United States Code Service, Title 38

This infobase is current through the Second Session of the 109th Congress

TITLE 38  VETERANS' BENEFITS

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Amendments:


Other provisions:


"(a) All offenses committed and all penalties and forfeitures incurred under any of the provisions of law amended or repealed by this Act or the Veterans' Benefits Act of 1957 may be prosecuted and punished in the same manner and with the same effect as if such Acts had not been enacted.

"(b) Forfeitures of benefits under laws administered by the Veterans' Administration occurring before January 1, 1959 shall continue to be effective."

Continuation of authority under Act July 3, 1930. Act Sept. 2, 1958, P. L. 85-857, § 4, 72 Stat. 1262, provides: "All functions, powers, and duties conferred upon and vested in the President and the Administrator by the Act of July 3, 1930 (46 Stat. 1016) and which were in effect on December 31, 1957, are continued in effect."

Cross references. Act Sept. 2, 1958, P. L. 85-857, § 5, 72 Stat. 1262, provides:
"(a) References in other laws to any provision of law replaced by title 38, United States Code, shall, where applicable, be deemed to refer also to the corresponding provision of title 38, United States Code.

"(b) References in title 38, United States Code to any provision of title 38, United States Code, shall, where applicable, be deemed to refer also to the prior corresponding provisions of law.

"(c) Amendments effective after August 18, 1958, made to any provision of law replaced by title 38, United States Code, shall, notwithstanding the repeal of such provision of section 14 of this Act, supersede the corresponding provisions of title 38, United States Code, to the extent that such amendments are inconsistent therewith."

**Continuing availability of appropriations.** Act Sept. 2, 1958, P. L. 85-857, § 6, 72 Stat. 1263, provides:

"(a) Amounts heretofore appropriated to carry out the purposes of any provision of law repealed by this Act, and available on December 31, 1958, shall be available to carry out the purposes of the corresponding provisions of title 38, United States Code.


**Outstanding rules, regulations, and orders.** Act Sept. 2, 1958, P. L. 85-857, § 7, 72 Stat. 1263, provides: "All rules, regulations, orders, permits, and other privileges issued or granted by the Administrator of Veterans' Affairs before December 31, 1958, and in effect on such date (or scheduled to take effect after such date) shall remain in full force and effect until modified, suspended, overruled, or otherwise changed by the Administrator."

**Publication.** Act Sept. 2, 1958, P. L. 85-857, § 8, 72 Stat. 1263, provides: "This Act shall be printed in slip-law form with a table of contents and a comprehensive index and tables furnished by the Committee on Veterans' Affairs of the House of Representatives; however, such table of contents, comprehensive index and tables shall not be printed in the United States Statutes at Large."

**Pending claims.** Act Sept. 2, 1958, P. L. 85-857, § 9, 72 Stat. 1263, provides: "A claim for benefits which is pending in the Veterans' Administration on January 1, 1959, or filed thereafter, shall be adjudicated under the laws in effect on December 31, 1958, with respect to the period before January 1, 1959, and except as provided in section 10 [note preceding 38 USCS § 101], under title 38, United States Code, thereafter."

**Persons receiving benefits on December 31, 1958.** Act Sept. 2, 1958, P. L. 85-857, § 10, 72 Stat. 1263, provides: "Any individual receiving benefits as a veteran, or as the widow, child, or parent of a veteran, under public laws administered by the Veterans' Administration on December 31, 1958, shall, as long as entitlement under such laws continues, receive benefits under the corresponding provisions of title 38, United States Code, thereafter, or benefits at the rate payable under such public laws, whichever will result in the greater benefit being paid to the individual. The provisions of this section shall apply to those claims within the purview of section 9 [note preceding 38 USCS § 101] in which it is determined that benefits are payable for December 31, 1958."


"(a) Any person who was receiving, or entitled to receive, emergency officers' retirement pay, or other privileges or benefits as a retired emergency officer of World War I, on December 31, 1958, under the laws in effect on that day, shall, except where there was fraud, clear and unmistakable error as to conclusion of fact or law, or misrepresentation of material facts, continue to receive, or be entitled to receive, emergency officers' retirement pay at the rate otherwise payable on December 31, 1958, and such other privileges and benefits, so long as the conditions warranting such pay, privileges, and benefits under those laws continue."
"(b) Any individual who, upon application therefor before May 25, 1929, would have been granted emergency officer's retirement pay based upon 30 per centum or more disability under the Act of May 24, 1928 (45 Stat. 735), and who would have been entitled to continue to receive such pay under section 10 of Public Numbered 2, Seventy-third Congress, or under section 1 of Public Numbered 743, Seventy-sixth Congress, and who upon being placed on the emergency officer's retired list would have been paid retired pay at a monthly rate lower than the monthly rate of disability compensation then payable, shall, upon application made therefor after the date of enactment of this subparagraph [enacted Oct. 24, 1962] to the Administrator of Veterans' Affairs, be placed upon the appropriate emergency officer's retired list, and thereafter shall be entitled to all rights, privileges, and benefits of retired emergency officers of World War I."


"(a) [Repealed by Act June 11, 1969, effective June 11, 1969, except as to indebtedness which may be due the Government as result of any benefits granted thereunder. Prior to repeal this subsec. read: 'The repeal of part VIII, and paragraphs 10 and 11 of part VII, of Veterans Regulation Numbered 1(a), sections 3 and 4 of Public Law 16, Seventy-eighth Congress, and section 1507 of the Servicemen's Readjustment Act of 1944, shall not apply in the case of any veteran (1) who enlisted or reenlisted in a regular component of the Armed Forces after October 6, 1945, and before October 7, 1946, or (2) whose discharge or dismissal is changed, corrected, or modified before February 1, 1965, pursuant to section 1552 or 1553 of title 10, United States Code, or by other corrective action by competent authority.']."

"(b) Nothing in this Act or any amendment or repeal made by it, shall affect any right, liability, penalty, authorization or requirement pertaining to World War adjusted compensation authorized or prescribed under the provisions of the World War Adjusted Compensation Act, or the Adjusted Compensation Payment Act, 1936, or any related Act, which was in effect on December 31, 1958.

"(c) [Repealed by Act June 24, 1965, effective July 1, 1966. Prior to repeal this subsec. read: 'Nothing in this Act, or any amendment or repeal made by it, shall deprive any person of benefits under the Musterling-Out Payment Act of 1944 to which he would have been entitled if this Act had not been enacted.']."

"(d) Nothing in this Act, or any amendment or repeal made by it, shall affect any right of any person based on a contract entered into before the effective date of this Act, or affect the manner in which such right could have been enforced or obtained but for this Act, or such amendment or repeal.

"(e) Chapter 37 of title 38, United States Code [38 USCS §§ 3701 et seq.], is a continuation and restatement of the provisions of title III of the Servicemen's Readjustment Act of 1944, and may be considered to be an amendment to such title III.".

Amendments:


1966. Act March 3, 1966, P. L. 89-358, §§ 4(c), 6(b), 80 Stat. 23, 27, substituted item 34 for item 33 which read: "33. Education of Korean Conflict Veterans . . . . . . 1601"; added item 36; and in item 41, substituted "Job Counseling and Employment Placement Service for Veterans" for "Unemployment Benefits for Veterans".


Act Dec. 31, 1974, P. L. 93-569, § 7(d), 88 Stat. 1866, substituted item 37 for one which read: "37. Home, Farm, and Business Loans . . . . .1801".

1976. Act Oct. 15, 1976, P. L. 94-502, Title III, § 309(b), Title IV, § 405, 90 Stat. 2391, 2397, added item 32 and substituted item 35 for one which read: "35. War Orphans' and Widows' Education Assistance . . . . . 1700".

Act Oct. 21, 1976, P. L. 94-581, Title II, § 203(a), 90 Stat. 2856, purported to amend item 17 by inserting "NURSING HOME," following "HOSPITAL"; however, the amendment was executed by inserting "Nursing Home," following "Hospital," in order to effectuate the probable intent of Congress.


Act Nov. 18, 1988, P. L. 100-687, Div A, Title III, § 301(b), 102 Stat. 4121, effective Sept. 1, 1989 as provided by § 401(a) or as provided by § 401(e) of such Act, which appear as 38 USCS § 4051 notes), added item 72.

Such Act further (Title I, § 103(c)(1), 102 Stat. 4107; effective Sept. 1, 1989, as provided by § 401(a) of such Act, which appears as 38 USCS § 4051 note), in item 51, substituted "Claims" for "Applications".


Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(2), 105 Stat. 239, revised this analysis by conforming the section numbers to those redesignated by § 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act May 7, 1991, P. L. 102-40, Title IV, § 403(f)(1), 105 Stat. 240, substituted "PART V. BOARDS, ADMINISTRATIONS, AND SERVICES" for "PART V. BOARDS and DEPARTMENTS"; substituted items 73 and 74 for items 73 and 75, which read: "73. Department of Medicine and Surgery . . . . .4101" and "75. Veterans' Canteen Service . . . . . . 4201"; and added item 78.

Act Aug. 6, 1991, P. L. 102-83, § 2(d)(1), 105 Stat. 402, substituted item 3 for one which read: "3. Veterans' Administration; Officers and Employees . . . . . 201"; and added items 5, 7, 9, and 77.

Section 5(b)(2) of such Act further revised the analysis of this Title by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


1994. Act Oct. 13, 1994, P. L. 103-353, § 2(b)(1), 108 Stat. 3169 (effective and applicable as provided by § 8 of such Act, which appears as 38 USCS § 4301 note), substituted item 43 for one which read: "43. Veteran's Reemployment Rights . . . . . 2021".

Act Nov. 2, 1994, P. L. 103-446, Title XII, § 1201(h)(1), 108 Stat. 4688, substituted item 42 for one which read: "42. Employment and Training of Disabled and Vietnam Era Veterans . . . . . 4211".

1996. Act Sept. 26, 1996, P. L. 104-204, Title IV, § 421(b)(2), 110 Stat. 2926 (effective as provided by § 422(c) of such Act, which appears as 38 USCS § 1151 note), added item 18.


Other provisions:

Effective date of Nov. 3, 1981 amendment; effective date of Administrator's authority to promulgate regulations. Act Nov. 3, 1981, P. L. 97-72, Title III, § 305, 95 Stat. 1060, which appears as 38 USCS § 3741 note, provided that the amendment made to this table by Title III of such Act is effective at the end of the 180-day period beginning on enactment on Nov. 3, 1981, except that the authority of the Administrator of Veterans' Affairs to promulgate regulations under 38 USCS §§ 3741 et seq. is effective on enactment on Nov. 3, 1981.

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this Title analysis, see § 5 of such Act, which appears as 10 USCS § 101 note.


"(a) References to replaced laws. A reference to a provision of title 38, United States Code, replaced by a provision of that title enacted by section 2 [38 USCS §§ 301 et seq., 501 et seq., 701 et seq., 901 et seq., 7701 et seq.] (including a reference in a regulation, order, or other law) shall be treated as referring to the corresponding provision enacted by this Act.

"(b) Savings provision for regulations. A regulation, rule, or order in effect under a provision of title 38, United States Code, replaced by a provision of that title enacted by section 2 [38
USCS §§ 301 et seq., 501 et seq., 701 et seq., 901 et seq., 7701 et seq.] shall continue in effect under the corresponding provision enacted by this Act until repealed, amended, or superseded.

"(c) General savings provision. An action taken or an offense committed under a provision of title 38, United States Code, replaced by a provision of that title enacted by section 2 [38 USCS §§ 301 et seq., 501 et seq., 701 et seq., 901 et seq., 7701 et seq.] shall be treated as having been taken or committed under the corresponding provision enacted by this Act."

PART I. GENERAL PROVISIONS

CHAPTER 1. GENERAL
CHAPTER 3. DEPARTMENT OF VETERANS AFFAIRS
CHAPTER 5. AUTHORITY AND DUTIES OF THE SECRETARY
CHAPTER 7. EMPLOYEES
CHAPTER 9. SECURITY AND LAW ENFORCEMENT ON PROPERTY UNDER THE JURISDICTION OF THE DEPARTMENT

Amendments:


Section 5(b)(2) of such Act further revised the analysis of this Part by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

CHAPTER 1. GENERAL

§ 101. Definitions
§ 102. Dependent parents
§ 103. Special provisions relating to marriages
§ 104. Approval of educational institutions
§ 105. Line of duty and misconduct
§ 106. Certain service deemed to be active service
§ 107. Certain service deemed not to be active service
§ 108. Seven-year absence presumption of death
§ 109. Benefits for discharged members of allied forces
§ 110. Preservation of disability ratings
§ 111. Payments or allowances for beneficiary travel
§ 112. Presidential memorial certificate program
§ 113. Treatment of certain programs under sequestration procedures
§ 114. Multiyear procurement
§ 115. Acquisition of real property
§ 116. Reports to Congress: cost information

Amendments:


§ 101. Definitions
Discussion and Analysis in the Veterans Benefits Manual

For the purposes of this title [38 USCS §§ 101 et seq.][1]--
(1) The terms "Secretary" and "Department" mean the Secretary of Veterans Affairs and the Department of Veterans Affairs, respectively.
(2) The term "veteran" means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.
(3) The term "surviving spouse" means (except for purposes of chapter 19 of this title [38 USCS §§ 1901 et seq.]) a person of the opposite sex who was the spouse of a veteran at the time of the veteran's death, and who lived with the veteran continuously from the date of marriage to the date of the veteran's death (except where there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse) and who has not remarried or (in cases not involving remarriage) has not since the death of the veteran, and after September 19, 1962, lived with another person and held himself or herself out openly to the public to be the spouse of such other person.
(4) (A) The term "child" means (except for purposes of chapter 19 of this title [38 USCS §§ 1901 et seq.]) (other than with respect to a child who is an insurable dependent under section 1665(10)(B) of such chapter [38 USCS § 1665(10)(B)] and section 8502(b) of this title [38 USCS § 8502(b)]) a person who is unmarried and--
(i) who is under the age of eighteen years;
(ii) who, before attaining the age of eighteen years, became permanently incapable of self-support; or
(iii) who, after attaining the age of eighteen years and until completion of education or training (but not after attaining the age of twenty-three years), is pursuing a course of instruction at an approved educational institution; and who is a legitimate child, a legally adopted child, a stepchild who is a member of a veteran's household or was a member at the time of the veteran's death, or an illegitimate child but, as to the alleged father, only if acknowledged in writing signed by him, or if he has been judicially ordered to contribute to the

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child's support or has been, before his death, judicially decreed to be the father of such child, or if he is otherwise shown by evidence satisfactory to the Secretary to be the father of such child. A person shall be deemed, as of the date of death of a veteran, to be the legally adopted child of such veteran if such person was at the time of the veterans' death living in the veterans' household and was legally adopted by the veteran's surviving spouse before August 26, 1961, or within two years after the veteran's death; however, this sentence shall not apply if at the time of the veteran's death, such person was receiving regular contributions toward the person's support from some individual other than the veteran or the veteran's spouse, or from any public or private welfare organization which furnishes services or assistance for children. A person with respect to whom an interlocutory decree of adoption has been issued by an appropriate adoption authority shall be recognized thereafter as a legally adopted child, unless and until that decree is rescinded, if the child remains in the custody of the adopting parent or parents during the interlocutory period. A person who has been placed for adoption under an agreement entered into by the adopting parent or parents with any agency authorized under law to so act shall be recognized thereafter as a legally adopted child, unless and until such agreement is terminated, if the child remains in the custody of the adopting parent or parents during the period of placement for adoption under such agreement. A person described in clause (ii) of the first sentence of this subparagraph who was a member of a veteran's household at the time the person became 18 years of age and who is adopted by the veteran shall be recognized as a legally adopted child of the veteran regardless of the age of such person at the time of adoption.

(B) For the purposes of subparagraph (A) of this paragraph, in the case of an adoption under the laws of any jurisdiction other than a State (as defined in section 101(20) of this title [para. (20) of this section] and including the Commonwealth of the Northern Mariana Islands)--

(i) a person residing outside any of the States shall not be considered to be a legally adopted child of a veteran during the lifetime of such veteran (including the purposes of this subparagraph a Commonwealth Army veteran or new Philippine Scout, as defined in section 3566 of this title [38 USCS § 3566] unless such person--

(I) was less than eighteen years of age at the time of adoption;
(II) is receiving one-half or more of such person's annual support from such veteran;
(III) is not in the custody of such person's natural parent, unless such natural parent is such veteran's spouse; and
(IV) is residing with such veteran (or in the case of divorce following adoption, with the divorced spouse who is also an adoptive or natural parent) except for periods during which such person is residing apart from such veteran (or such divorced spouse) for purposes of full-time attendance at an educational institution or during which such person or such veteran (or such divorced spouse) is confined in a hospital, nursing home, other health-care facility, or other institution; and
(ii) a person shall not be considered to have been a legally adopted child of a veteran as of the date of such veteran's death and thereafter unless--
   (I) at any time within the one-year period immediately preceding such veteran's death, such veteran was entitled to and was receiving a dependent's allowance or similar monetary benefit under this title for such person; or
   (II) for a period of at least one year prior to such veteran's death, such person met the requirements of clause (i) of this subparagraph.

(5) The term "parent" means (except for purposes of chapter 19 of this title [38 USCS §§ 1901 et seq.]) a father, a mother, a father through adoption, a mother through adoption, or an individual who for a period of not less than one year stood in the relationship of a parent to a veteran at any time before the veteran's entry into active military, naval, or air service or if two persons stood in the relationship of a father or a mother for one year or more, the person who last stood in the relationship of father or mother before the veteran's last entry into active military, naval, or air service.

(6) The term "Spanish-American War" (A) means the period beginning on April 21, 1898, and ending on July 4, 1902, (B) includes the Philippine Insurrection and the Boxer Rebellion, and (C) in the case of a veteran who served with the United States military forces engaged in hostilities in the Moro Province, means the period beginning on April 21, 1898, and ending on July 15, 1903.

(7) The term "World War I" (A) means the period beginning on April 6, 1917, and ending on November 11, 1918, and (B) in the case of a veteran who served with the United States military forces in Russia, means the period beginning on April 6, 1917, and ending on April 1, 1920.

(8) The term "World War II" means (except for purposes of chapters 31 and 37 of this title [38 USCS §§ 3100 et seq. and 3701 et seq.]) the period beginning on December 7, 1941, and ending on December 31, 1946.

(9) The term "Korean conflict" means the period beginning on June 27, 1950, and ending on January 31, 1955.

(10) The term "Armed Forces" means the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, including the reserve components thereof.

(11) The term "period of war" means the Spanish-American War, the Mexican border period, World War I, World War II, the Korean conflict, the Vietnam era, the Persian Gulf War, and the period beginning on the date of any future declaration of war by the Congress and ending on the date prescribed by Presidential proclamation or concurrent resolution of the Congress.

(12) The term "veteran of any war" means any veteran who served in the active military, naval, or air service during a period of war.

(13) The term "compensation" means a monthly payment made by the Secretary to a veteran because of service-connected disability, or to a surviving spouse, child, or parent of a veteran because of the service-connected death of the veteran occurring before January 1, 1957.

(14) The term "dependency and indemnity compensation" means a monthly payment made by the Secretary to a surviving spouse, child, or parent (A) because of a service-connected death occurring after December 31, 1956, or (B) pursuant to the
election of a surviving spouse, child, or parent, in the case of such a death occurring before January 1, 1957.

(15) The term "pension" means a monthly or other periodic payment made by the Secretary to a veteran because of service, age, or non-service-connected disability, or to a surviving spouse or child of a veteran because of the non-service-connected death of the veteran.

(16) The term "service-connected" means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service.

(17) The term "non-service-connected" means, with respect to disability or death, that such disability was not incurred or aggravated, or that the death did not result from a disability incurred or aggravated, in line of duty in the active military, naval, or air service.

(18) The term "discharge or release" includes (A) retirement from the active military, naval, or air service, and (B) the satisfactory completion of the period of active military, naval, or air service for which a person was obligated at the time of entry into such service in the case of a person who, due to enlistment or reenlistment, was not awarded a discharge or release from such period of service at the time of such completion thereof and who, at such time, would otherwise have been eligible for the award of a discharge or release under conditions other than dishonorable.

(19) The term "State home" means a home established by a State (other than a possession) for veterans disabled by age, disease, or otherwise who by reason of such disability are incapable of earning a living. Such term also includes such a home which furnishes nursing home care for veterans.

(20) The term "State" means each of the several States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico. For the purpose of section 2303 and chapters 34 and 35 of this title [38 USCS §§ 2303, 3451 et seq., and 3500 et seq.], such term also includes the Canal Zone.

(21) The term "active duty" means--

(A) full-time duty in the Armed Forces, other than active duty for training;

(B) full-time duty (other than for training purposes) as a commissioned officer of the Regular or Reserve Corps of the Public Health Service (i) on or after July 29, 1945, or (ii) before that date under circumstances affording entitlement to "full military benefits" or (iii) at any time, for the purposes of chapter 13 of this title [38 USCS §§ 1301 et seq.];

(C) full-time duty as a commissioned officer of the National Oceanic and Atmospheric Administration or its predecessor organization the Coast and Geodetic Survey (i) on or after July 29, 1945, or (ii) before that date (I) while on transfer to one of the Armed Forces, or (II) while, in time of war or national emergency declared by the President, assigned to duty on a project for one of the Armed Forces in an area determined by the Secretary of Defense to be of immediate military hazard, or (III) in the Philippine Islands on December 7, 1941, and continuously in such islands thereafter, or (iii) at any time, for the purposes of chapter 13 of this title [38 USCS §§ 1301 et seq.];

(D) service as a cadet at the United States Military, Air Force, or Coast Guard Academy, or as a midshipman at the United States Naval Academy; and
(E) authorized travel to or from such duty or service.

(22) The term "active duty for training" means--
(A) full-time duty in the Armed Forces performed by Reserves for training purposes;
(B) full-time duty for training purposes performed as a commissioned officer of the Reserve Corps of the Public Health Service (i) on or after July 29, 1945, or (ii) before that date under circumstances affording entitlement to "full military benefits", or (iii) at any time, for the purposes of chapter 13 of this title [38 USCS §§ 1301 et seq.];
(C) in the case of members of the National Guard or Air National Guard of any State, full-time duty under section 316, 502, 503, 504, or 505 of title 32 [32 USCS § 316, 502, 503, 504, or 505], or the prior corresponding provisions of law; and
(D) duty performed by a member of a Senior Reserve Officers' Training Corps program when ordered to such duty for the purpose of training or a practice cruise under chapter 103 of title 10 [10 USCS §§ 2101 et seq.] for a period of not less than four weeks and which must be completed by the member before the member is commissioned; and
(E) authorized travel to or from such duty.

The term does not include duty performed as a temporary member of the Coast Guard Reserve.

(23) The term "inactive duty training" means--
(A) duty (other than full-time duty) prescribed for Reserves (including commissioned officers of the Reserve Corps of the Public Health Service) by the Secretary concerned under section 206 of title 37 [37 USCS § 206] or any other provision of law;
(B) special additional duties authorized for Reserves (including commissioned officers of the Reserve Corps of the Public Health Service) by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned; and
(C) training (other than active duty for training) by a member of, or applicant for membership (as defined in section 8140(g) of title 5 [5 USCS § 8140(g)]) in, the Senior Reserve Officers' Training Corps prescribed under chapter 103 of title 10 [10 USCS §§ 2101 et seq.].

In the case of a member of the National Guard or Air National Guard of any State, such term means duty (other than full-time duty) under sections 316, 502, 503, 504, or 505 of title 32 [32 USCS §§ 316, 502, 503, 504, or 505], or the prior corresponding provisions of law. Such term does not include (i) work or study performed in connection with correspondence courses, (ii) attendance at an educational institution in an inactive status, or (iii) duty performed as a temporary member of the Coast Guard Reserve.

(24) The term "active military, naval, or air service" includes--
(A) active duty;
(B) any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty; and
(C) any period of inactive duty training during which the individual concerned was disabled or died--
   (i) from an injury incurred or aggravated in line of duty; or
   (ii) from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident occurring during such training.

(25) The term "Secretary concerned" means--
   (A) the Secretary of the Army, with respect to matters concerning the Army;
   (B) the Secretary of the Navy, with respect to matters concerning the Navy; or the Marine Corps;
   (C) the Secretary of the Air Force, with respect to matters concerning the Air Force;
   (D) the Secretary of Homeland Security, with respect to matters concerning the Coast Guard;
   (E) the Secretary of Health and Human Services, with respect to matters concerning the Public Health Service; and
   (F) the Secretary of Commerce, with respect to matters concerning the National Oceanic and Atmospheric Administration or its predecessor organization the Coast and Geodetic Survey.

(26) The term "Reserve" means a member of a reserve component of one of the Armed Forces.

(27) The term "reserve component" means, with respect to the Armed Forces--
   (A) the Army Reserve;
   (B) the Navy Reserve;
   (C) the Marine Corps Reserve;
   (D) the Air Force Reserve;
   (E) the Coast Guard Reserve;
   (F) the Army National Guard of the United States; and
   (G) the Air National Guard of the United States.

(28) The term "nursing home care" means the accommodation of convalescents or other persons who are not acutely ill and not in need of hospital care, but who require nursing care and related medical services, if such nursing care and medical services are prescribed by, or are performed under the general direction of, persons duly licensed to provide such care. Such term includes services furnished in skilled nursing care facilities, in intermediate care facilities, and in combined facilities. It does not include domiciliary care.

(29) The term "Vietnam era" means the following:
   (A) The period beginning on February 28, 1961, and ending on May 7, 1975, in the case of a veteran who served in the Republic of Vietnam during that period.
   (B) The period beginning on August 5, 1964, and ending on May 7, 1975, in all other cases.

(30) The term "Mexican border period" means the period beginning on May 9, 1916, and ending on April 5, 1917, in the case of a veteran who during such period served in Mexico, on the borders thereof, or in the waters adjacent thereto.

(31) The term "spouse" means a person of the opposite sex who is a wife or husband.

(32) The term "former prisoner of war" means a person who, while serving in the active military, naval or air service, was forcibly detained or interned in line of duty--
(A) by an enemy government or its agents, or a hostile force, during a period of war; or

(B) by a foreign government or its agents, or a hostile force, under circumstances which the Secretary finds to have been comparable to the circumstances under which persons have generally been forcibly detained or interned by enemy governments during periods of war.

(33) The term "Persian Gulf War" means the period beginning on August 2, 1990, and ending on the date thereafter prescribed by Presidential proclamation or by law.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XIX, § 2202, 71 Stat. 162:


Amendments:

1959. Act Aug. 25, 1959, in para. (4), in the concluding matter, inserted "A person shall be deemed, as of the date of death of a veteran, to be the legally adopted child of such veteran if such person was at the time of the veteran's death living in the veteran's household and was legally adopted by the veteran's surviving spouse within two years after the veteran's death or the date of enactment of this sentence; however, this sentence shall not apply if at the time of the veteran's death, such person was receiving regular contributions toward his support from some individual other than the veteran or his spouse, or from any public or private welfare organization which furnishes services or assistance for children."

1962. Act Sept. 19, 1962, in para. (3), substituted "and who has not remarried or (in cases not involving remarriage) has not since the death of the veteran, and after enactment of the 1962 amendment to this paragraph, lived with another man and held herself out openly to the public to be the wife of such other man" for "and who has not remarried (unless the purported remarriage is void)".

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Act Oct. 15, 1962, in para. (26), substituted "Reserve" for "Reserves" and "a member" for "members".

1964. Act Aug. 19, 1964, in para. (19), inserted "Such term also includes such a home which furnishes nursing home care for veterans of any war.”; and added para. (28).

1965. Act Oct. 31, 1965 (effective 12/1/65, as provided by § 9 of such Act, which appears as 38 USCS § 1114 note), in para. (4)(C), substituted "twenty-three years" for "twenty-one years".

1966. Act March 3, 1966, in para. (20), inserted "For the purpose of section 903 and chapters 34 and 35 of this title, such term also includes the Canal Zone.”.

1967. Act Aug. 31, 1967 (effective as provided by § 405 of such Act, which appears as a note to this section), substituted new para. (11) for one which read: "(11) The term ‘period of war’ means the Spanish-American War, World War I, World War II, the Korean conflict, and the period beginning on the date of any future declaration of war by the Congress and ending on a date prescribed by Presidential proclamation or concurrent resolution of the Congress.”; and added para. (29).


1970. Act May 21, 1970, in para. (4), concluding matter, inserted "A person with respect to whom an interlocutory decree of adoption has been issued by an appropriate adoption authority shall be recognized thereafter as a legally adopted child, unless and until that decree is rescinded: Provided, That the child remains in the custody of the adopting parent or parents during the interlocutory period.”.

Act Dec. 24, 1970 (effective 1/1/71, as provided by § 10(a) of such Act, which appears as 38 USCS § 1521 note), in para. (11), inserted "the Mexican border period.”; and added para. (30).

Act Dec. 31, 1970, in paras. (21)(C) and (25)(F), inserted "the National Oceanic and Atmospheric Administration or its predecessor organization".

1971. Act Dec. 15, 1971 (effective 1/1/72, as provided by § 6 of such Act, which appears as 38 USCS § 1521 note), purported to delete "for ninety days of more" from para. (30) of this section; however, the amendment was executed by deleting "for 90 days or more", which followed "period served", in order to effectuate the probable intent of Congress.

1972. Act Oct. 24, 1972, in para. (4), concluding matter, substituted "A person with respect to whom an interlocutory decree of adoption has been issued by an appropriate adoption authority shall be recognized thereafter as a legally adopted child, unless and until that decree is rescinded, if the child remains in the custody of the adopting parent or parents during the interlocutory period. A person who has been placed for adoption under an agreement entered into by the adopting parent or parents with any agency authorized under law to so act shall be recognized thereafter as a legally adopted child, unless and until such agreement is terminated, if the child remains in the custody of the adopting parent or parents during the period of placement for adoption under such agreement.” for "A person with respect to whom an interlocutory decree of adoption has been issued by an appropriate adoption authority shall be recognized thereafter as a legally adopted child, unless and until that decree is rescinded: Provided, That the child remains in the custody of the adopting parent or parents during the interlocutory period.”.

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 101 of such Act), in para. (3), substituted "surviving spouse" for "widow", substituted "person of the opposite sex" for "woman", substituted "spouse" for "wife" wherever appearing, substituted "the veteran's" for "his" wherever appearing, substituted "the veteran" for "him" following "who lived with", substituted "person" for "man" wherever appearing, and substituted "himself or herself" for "herself"; in para. (4), concluding matter, substituted "the person's support" and "the veteran's
1976. Act Sept. 21, 1976, in para. (19), deleted "of any war (including the Indian Wars)" following "for veterans" first time appearing, and deleted "of any war" following "for veterans" second time appearing.

1977. Act Oct. 8, 1977 (effective 10/8/77, as provided by § 5 of such Act, which appears as 38 USCS § 5303 note), substituted new para. (18) for one which read: "(18) The term 'discharge or release' includes retirement from the active military, naval, or air service.".

Act Nov. 23, 1977 (effective 11/23/77, as provided by § 501 of such Act, which appears as a note to this section), in para. (29), substituted "May 7, 1975" for "such date as shall thereafter be determined by Presidential proclamation or concurrent resolution of the Congress".

1978. Act Nov. 4, 1978, in para. (15), inserted "or other periodic"; for effective date of this amendment, see Other provisions note to this section.


1982. Act Oct. 12, 1982, in para. (4)(A), in the concluding matter, substituted "before August 26, 1961, or within two years after the veteran's death" for "within two years after the veteran's death or the date of enactment of this sentence"; and, in para. (25)(E), substituted "Health and Human Services" for "Health, Education, and Welfare".

Act Oct. 14, 1982 (effective as provided by § 113(d) of such Act, which appears as a note to this section), in para. (22), in subpar. (C), deleted "and" following "law;", redesignated former subpar. (D) as subpar. (E), and added subpara. (D).


1986. Act Oct. 28, 1986, in paras. (22)(C), (23), and (27)(F), inserted "Army", and in para. (31) deleted "and the term 'surviving spouse' means a person of the opposite sex who is a widow or widower" following "husband".

1988. Act May 20, 1988, in para. (28), deleted "skilled" preceding "nursing care", and substituted the sentence beginning "Such term includes . . . ." for one which read: "The term includes intensive care where the nursing service is under the supervision of a registered professional nurse."; and in para. (32)(B), deleted "during a period other than a period of war in which such person was held" following "or a hostile force,".

Act Sept. 29, 1988 (applicable only with respect to training performed after 9/30/88 as provided by § 633(e) of such Act, which appears as 10 USCS § 2109 note), in para. (22)(D), deleted "field" preceding "training" and inserted "for a period of not less than four weeks and which must be completed by the member before the member is commissioned"; in para. (23), in subpara. (A), deleted "and" following "law;", in subpara. (B), substituted "; and" for the concluding period, and added subpara. (C).

1989. Act Dec. 18, 1989, substituted para. (1) for one which read: "The term 'Administrator' means the Administrator of Veterans' Affairs.".


Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding this section).

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding this section), and substituted "Secretary" for "Administrator" and "Department" for "Veterans' Administration".

1994. Act Nov. 2, 1994 (effective 1/1/97 as provided by § 505(d) of such Act, which appears as a note to this section) substituted para. (1) for one which read: "The terms 'Secretary' and 'Administrator' mean the Secretary of Veterans Affairs, and the terms 'Department' and mean the Department of Veterans Affairs.".

1996. Act Oct. 9, 1996 substituted para. (29) for one which read: "(29) The term 'Vietnam era' means the period beginning August 5, 1964, and ending on May 7, 1975.".

2000. Act Nov. 1, 2000, substituted para. (24) for one which read: "(24) The term 'active military, naval, or air service' includes active duty, any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty, and any period of inactive duty training during which the individual concerned was disabled or died from an injury incurred or aggravated in line of duty.".

2001. Act June 5, 2001 (effective on the first day of the first month that begins more than 120 days after enactment, as provided by § 4(g) of such Act, which appears as a note to this section), in para. (4)(A), in the introductory matter, inserted "(other than with respect to a child who is an insurable dependent under section 1965(10)(B) of such chapter)".

2002. Act Nov. 25, 2002 (effective 3/1/2003 pursuant to § 1704(g) of such Act, which appears as 10 USCS § 101 note), purported to amend para. (25)(d) by substituting "of Homeland Security" for "of Transportation", wherever appearing; however, such amendment was executed to para. (25)(D) in order to effectuate the probable intent of Congress.


Short titles:

Act Aug. 29, 1959, P. L. 86-211, § 1, 73 Stat. 432, provides: "This Act may be cited as the 'Veterans' Pension Act of 1959'.". For full classification of such Act, consult USCS Tables volumes.

Act March 3, 1966, P. L. 89-358, § 1, 80 Stat. 12, provides: "This Act may be cited as the 'Veterans' Readjustment Benefits Act of 1966'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 7, 1966, P. L. 89-785, § 1, 80 Stat. 1368, provides: "This Act may be cited as the 'Veterans Hospitalization and Medical Services Modernization Amendments of 1966'.". For full classification of such Act, consult USCS Tables volumes.

Act Aug. 31, 1967, P. L. 90-77, § 1, 81 Stat. 178, provides: "This Act may be cited as the 'Veterans' Pension and Readjustment Assistance Act of 1967'.". For full classification of such Act, consult USCS Tables volumes.

Act March 26, 1970, P. L. 91-219, § 1, 84 Stat. 76, provides: "This Act may be cited as the 'Veterans Education and Training Amendments Act of 1970'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 23, 1970, P. L. 91-506, § 1, 84 Stat. 1108, provides: "This Act may be cited as the 'Veterans' Housing Act of 1970'.". For full classification of such Act, consult USCS Tables volumes.


Act June 30, 1972, P. L. 92-328, § 1, 86 Stat. 393, provides: "This Act may be cited as the 'Veterans' Compensation and Relief Act of 1972'.". For full classification of such Act, consult USCS Tables volumes.
Act Oct. 24, 1972, P. L. 92-540, § 1, 86 Stat. 1074, provides: "This Act may be cited as the 'Vietnam Era Veterans' Readjustment Assistance Act of 1972'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 24, 1972, P. L. 92-540, Title V, § 501, 86 Stat. 1094, provides: "This title may be cited as the 'Veterans' Employment and Readjustment Act of 1972'.". For full classification of such title, consult USCS Tables volumes.

Act Oct. 24, 1972, P. L. 92-541, § 1, 86 Stat. 1101, provides: "This Act [adding 38 USCS §§ 4121 et seq. (now repealed) and 8211 et seq.], may be cited as the 'Veterans' Administration Medical School Assistance and Health Manpower Training Act of 1972'.".


Act May 24, 1974, P. L. 93-289, § 1, 88 Stat. 165, provides: "This Act, may be cited as the 'Veterans' Insurance Act of 1974'.". For full classification of such Act, consult USCS Tables volumes.

Act May 31, 1974, P. L. 93-295, § 1, 88 Stat. 180, provides: "This Act may be cited as the 'Veterans Disability Compensation and Survivor Benefits Act of 1974'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 3, 1974, P. L. 93-508, § 1, 88 Stat. 1578, provides: "This Act may be cited as the 'Vietnam Era Veterans' Readjustment Assistance Act of 1974'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 21, 1974, P. L. 93-527, § 1, 88 Stat. 1702, provides: "This Act may be cited as the 'Veterans and Survivors Pension Adjustment Act of 1974'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 22, 1974, P. L. 93-538, § 1, 88 Stat. 1736, provides: "This Act may be cited as the 'Disabled Veterans' and Servicemen's Automobile and Adaptive Equipment Amendments of 1974'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 31, 1974, P. L. 93-569, § 1, 88 Stat. 1863, provides: "This Act may be cited as the 'Veterans Housing Act of 1974'.". For full classification of such Act, consult USCS Tables volumes.

Act Jan. 2, 1975, P. L. 93-602, Title II, § 201, 88 Stat. 1958, provides: "This title may be cited as the 'Veterans' Education and Rehabilitation Equalization Amendments Act of 1975'.". For full classification of such title, consult USCS Tables volumes.

Act Aug. 5, 1975, P. L. 94-71, § 1, 89 Stat. 395, provides: "This Act may be cited as the 'Veterans Disability Compensation and Survivor Benefits Act of 1975'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 22, 1975, P. L. 94-123, § 1, 89 Stat. 669, provides: "This Act may be cited as the 'Veterans' Administration Physician and Dentist Pay Comparability Act of 1975'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 23, 1975, P. L. 94-169, § 1, 89 Stat. 1013, provides: "This Act may be cited as the 'Veterans and Survivors Pension Interim Adjustment Act of 1975'.". For full clarification of such Act, consult USCS Tables volumes.

Act June 30, 1976, P. L. 94-324, § 1, 90 Stat. 720, provides: "This Act may be cited as the 'Veterans Housing Amendments Act of 1976'.". For full classification of such Act, consult USCS Tables volumes.
Act Sept. 30, 1976, P. L. 94-432, § 1, 90 Stat. 1369, provides: "This Act may be cited as the 'Veterans and Survivors Pension Adjustment Act of 1976'.". For full classification of such Act, consult USCS Tables volumes.

Act Sept. 30, 1976, P. L. 94-433, § 1, 90 Stat. 1374, provides: "This Act may be cited as the 'Veterans Disability Compensation and Survivor Benefits Act of 1976'.". For full classification of such Act, consult USCS Tables volumes.


Act Oct. 15, 1976, P. L. 94-502, Title IV, § 401, 90 Stat. 2392, provides: "This title may be cited as the 'Post-Vietnam Era Veterans' Educational Assistance Act of 1977'.". For full classification of such title, consult USCS Tables volumes.

Act Oct. 21, 1976, P. L. 94-581, § 1, 90 Stat. 2842, provides: "This Act may be cited as the 'Veterans Omnibus Health Care Act of 1976'.". For full classification of such Act, consult USCS Tables Volumes.

Act Oct. 21, 1976, P. L. 94-581, Title II, § 201, 90 Stat. 2855, provides: "This title may be cited as the 'Veterans Medical Technical and Conforming Amendments of 1976'.". For full classification of such title, consult USCS Tables volumes.

Act July 5, 1977, P. L. 95-62, § 1, 91 Stat. 262, provides: "This Act may be cited as the 'State Veterans' Home Assistance Improvement Act of 1977'.". For full classification of such Act, consult USCS Tables volumes.


Act Nov. 23, 1977, P. L. 95-201, § 1, 91 Stat. 1429, provides: "This Act may be cited as the 'Veterans' Administration Physician and Dentist Pay Comparability Amendments of 1977'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 23, 1977, P. L. 95-202, § 1, 91 Stat. 1433, provides: "This Act may be cited as the 'GI Bill Improvement Act of 1977'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 2, 1977, P. L. 95-204, § 1, 91 Stat. 1455, effective Jan. 1, 1978 as provided by § 302 of such Act, provides: "this Act be cited as the 'Veterans and Survivors Pension Adjustment Act of 1977'.". For full classification of such Act, consult USCS Tables volumes.


Act Oct. 18, 1978, P. L. 95-479, § 1(a), 92 Stat. 1560, effective Oct. 1, 1978, as provided by § 401(a) of such Act, provides: "This Act may be cited as the 'Veterans' Disability Compensation and Survivors' Benefits Act of 1978'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 26, 1978, P. L. 95-520, § 1, 92 Stat 1820, provides: "This Act may be cited as the 'Veterans' Administration Programs Extension Act of 1978'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 4, 1978, P. L. 95-588, § 1, 92 Stat. 2497, provides: "This Act may be cited as the 'Veterans' and Survivors' Pension Improvement Act of 1978'.". For full classification of such Act, consult USCS Tables volumes.

Act June 13, 1979, P. L. 96-22, § 1(a), 93 Stat. 47, provides: "This Act may be cited as the 'Veterans' Health Care Amendments of 1979'.". For full classification of such Act, consult USCS Tables volumes.
Act Nov. 28, 1979, P. L. 96-128, § 1, 93 Stat. 982, provides: "This Act may be cited as the 'Veterans' Disability Compensation and Survivors' Benefits Amendments of 1979'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 20, 1979, P. L. 96-151, § 1, 93 Stat. 1092, provides: "This Act may be cited as the 'Veterans Health Programs Extension and Improvement Act of 1979'.". For full classification of such Act, consult USCS Tables volumes.

Act Aug. 26, 1980, P. L. 96-330, § 1(a), 94 Stat. 1030, provides: "This Act may be cited as the 'Veterans' Administration Health-Care Amendments of 1980'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 7, 1980, P. L. 96-385, § 1(a), 94 Stat. 1528, provides: "This Act may be cited as the 'Veterans' Disability Compensation and Housing Benefits Amendments of 1980'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 17, 1980, P. L. 96-466, § 1(a), 94 Stat. 2171, provides: "This Act may be cited as the 'Veterans' Rehabilitation and Education Amendments of 1980'.". For full classification of such Act, consult USCS Tables volumes.


Act Nov. 3, 1981, P. L. 97-72, § 1, 95 Stat. 1047, provides: "This Act may be cited as the 'Veterans' Health Care, Training, and Small Business Loan Act of 1981'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 3, 1981, P. L. 97-72, Title III, § 301, 95 Stat. 1055, provides: "This title [38 USCS §§ 3741 et seq.; for full classification, consult USCS Tables volumes] may be cited as the 'Veterans' Small Business Loan Act of 1981'.".

Act May 4, 1982, P. L. 97-174, § 1, 96 Stat. 70, provides: "This Act may be cited as the 'Veterans' Administration and Department of Defense Health Resources Sharing and Emergency Operations Act'.". For full classification of such Act, consult USCS Tables volumes.

Act Sept. 8, 1982, P. L. 97-251, § 1(a), 96 Stat. 711 provides: "This Act may be cited as the 'Veterans' Administration Health-Care Programs Improvement and Extension Act of 1982'.". For full classification of such Act, consult USCS Tables volumes.


Act Nov. 21, 1983, P. L. 98-160, § 1(a), 97 Stat. 993, provides: "This Act may be cited as the 'Veterans' Health Care Amendments of 1983'. For full classification of such Act, consult USCS Tables volumes.

Act March 2, 1984, P. L. 98-223, § 1(a), 98 Stat. 37, provides: "This Act may be cited as the 'Veterans' Compensation and Program Improvements Amendments of 1984'. For full classification of such Act, consult USCS Tables volumes.


Act Oct. 19, 1984, P. L. 98-528, § 1(a), 98 Stat. 2686, provides: "This Act may be cited as the 'Veterans' Health Care Act of 1984'. For full classification of such Act, consult USCS Tables volumes.
Act Oct. 24, 1984, P. L. 98-542, § 1, 98 Stat. 2725, which appears as 38 USCS § 1154 note, provides that such Act may be cited as the "Veterans' Dioxin and Radiation Exposure Compensation Standards Act". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 24, 1984, P. L. 98-543, § 1(a), 98 Stat. 2735, provides: "This Act may be cited as the 'Veterans' Benefits Improvement Act of 1984'. For full classification of such Act, consult USCS Tables volumes.

Act Dec. 3, 1985, P. L. 99-166, § 1(a), 99 Stat. 941, provides: "This Act may be cited as the 'Veterans' Administration Health-Care Amendments of 1985'.". For full classification of such Act, consult USCS Tables volumes.

Act Jan. 13, 1986, P. L. 99-238, § 1, 99 Stat. 1765, provides: "This Act may be cited as the 'Veterans' Compensation Rate Increase and Job Training Amendments of 1985'.". For full classification of such Act, consult USCS Tables volumes.

Act April 7, 1986, P. L. 99-272, Title XIX, § 19001(a), 100 Stat. 372, provides: "This title may be cited as the 'Veterans' Health-Care Amendments of 1986'.". For full classification of such Title, consult USCS Tables volumes.


Act June 1, 1987, P. L. 100-48, § 1, 101 Stat. 331, provides: "This Act may be cited as the 'New GI Bill Continuation Act'.".

Act Dec. 21, 1987, P. L. 100-198, § 1, 101 Stat. 1315, provides: "This Act may be cited as the 'Veterans' Home Loan Program Improvements and Property Rehabilitation Act of 1987'.".

Act Dec. 31, 1987, P. L. 100-227, § 1(a), 101 Stat. 1552, provides: "This Act may be cited as the 'Veterans' Compensation Cost-of-Living Adjustment Act of 1987'.".

Act Feb. 29, 1988, P. L. 100-253, § 1, 102 Stat. 20, provides: "This Act may be cited as the 'Veterans' Home Loan Program Emergency Amendments of 1988'.".

Act May 20, 1988, P. L. 100-321, § 1, 102 Stat. 485, provides: "This Act may be cited as the 'Radiation-Exposed Veterans Compensation Act of 1988'.".

Act May 20, 1988, P. L. 100-322, § 1(a), 102 Stat. 487, provides: "This Act may be cited as the 'Veterans' Benefits and Services Act of 1988'.".

Act May 20, 1988, P. L. 100-323, § 1(a), 102 Stat. 556, effective on enactment as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note, provides: "This Act may be cited as the 'Veterans' Employment, Training, and Counseling Amendments of 1988'.".

Act Oct. 25, 1988, P. L. 100-527, 102 Stat. 2635, § 1, generally effective March 15, 1989, as provided by § 18 of such Act, which formerly appeared as 38 USCS § 201 note, provides: "This Act may be cited as the 'Department of Veterans Affairs Act'.".

Act Nov. 18, 1988, P. L. 100-687, Div A, § 1, 102 Stat. 4105, effective Sept. 1, 1989 as provided by § 401(a) of such Act, which appears as 38 USCS § 7251 note, provides: This division may be cited as the 'Veterans' Judicial Review Act'.".

Act Nov. 18, 1988, P. L. 100-687, Div B, § 1001(a), 102 Stat. 4122, provides: This division may be cited as the 'Veterans' Benefits Improvement Act of 1988'.".

Act Nov. 18, 1988, P. L. 100-689, § 1, 102 Stat. 4161, provides: "This Act may be cited as the 'Veterans' Benefits and Programs Improvement Act of 1988'.". For full classification of such Act, consult USCS Tables volumes.

Act Aug. 16, 1989, P. L. 101-94, § 1, 103 Stat. 617, provides: "This Act may be cited as the 'Court of Veterans Appeals Judges Retirement Act'.". For full classification of such Act, consult USCS Tables volumes.
Act Dec. 18, 1989, P. L. 101-237, § 1(a), 103 Stat. 2062, provides: "This Act may be cited as the 'Veterans' Benefits Amendments of 1989'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 18, 1989, P. L. 101-237, Title III, § 301, 103 Stat. 2069, provides: "This title may be cited as the 'Veterans Home Loan Indemnity and Restructuring Act of 1989'.". For full classification of such title, consult USCS Tables volumes.

Act Dec. 18, 1989, P. L. 101-237, Title IV, § 401, 103 Stat. 2078, provides: "This title may be cited as the 'Veterans Education and Employment Amendments of 1989'.". For full classification of such title, consult USCS Tables volumes.

Act Aug. 15, 1990, P. L. 101-366, § 1, 104 Stat. 430, provides: "This Act may be cited as the 'Department of Veterans Affairs Nurse Pay Act of 1990'.". For full classification of such Act, consult USCS Tables volumes.

Act Feb. 6, 1991, P. L. 102-3, § 1, 105 Stat. 7, provides: "This Act may be cited as the 'Veterans' Compensation Amendments of 1991'.". For full classification of such Act, consult USCS Tables volumes.

Act Feb. 6, 1991, P. L. 102-4, § 1, 105 Stat. 11, provides: "This Act may be cited as the 'Agent Orange Act of 1991'.". For full classification of such Act, consult USCS Tables volumes.


Act May 7, 1991, P. L. 102-40, § 1(a), 105 Stat. 187, provides: "This Act may be cited as the 'Department of Veterans Affairs Health-Care Personnel Act of 1991'.". For full classification of such Act, consult USCS Tables volumes.

Act May 7, 1991, P. L. 102-40, Title I, § 101, 105 Stat. 187, provides: "This title may be cited as the 'Department of Veterans Affairs Physician and Dentist Recruitment and Retention Act of 1991'.". For full classification of such Title, consult USCS Tables volumes.

Act May 7, 1991, P. L. 102-40, Title II, § 201, 105 Stat. 200, provides: "This title may be cited as the 'Department of Veterans Affairs Labor Relations Improvement Act of 1991'.". For full classification of such Title, consult USCS Tables volumes.

Act Aug. 6, 1991, P. L. 102-83, § 1(a), 105 Stat. 378, provides: "This Act may be cited as the 'Department of Veterans Affairs Codification Act'.". For full classification of such Act, consult USCS Tables volumes.


Act Nov. 12, 1991, P. L. 102-152, § 1(a), 105 Stat. 985, provides: "This Act may be cited as the 'Veterans' Compensation Rate Amendments of 1991'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 9, 1992, P. L. 102-405, § 1, 106 Stat. 1972, provides: "This Act may be cited as the 'Veterans' Medical Programs Amendments of 1992'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 28, 1992, P. L. 102-547, § 1, 106 Stat. 3633, provides: "This Act may be cited as the 'Veterans Home Loan Program Amendments of 1992'". For full classification of such Act, consult USCS Tables volumes.


Act Oct. 29, 1992, P. L. 102-568, Title I, § 101, 106 Stat. 4321, provides: "This title may be cited as the 'Dependency and Indemnity Compensation Reform Act of 1992'". For full classification of such Title, consult USCS Tables volumes.


Act Nov. 4, 1992, P. L. 102-585, § 1, 106 Stat. 4943, provides: "This Act may be cited as the 'Veterans Health Care Act of 1992'". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 4, 1992, P. L. 102-585, Title I, § 101, 106 Stat. 4944, provides: "This title may be cited as the 'Women Veterans Health Programs Act of 1992'". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 10, 1992, P. L. 102-590, § 1, 106 Stat. 5136, provides: "This Act may be cited as the 'Homeless Veterans Comprehensive Service Programs Act of 1992'". For full classification of such Act, consult USCS Tables volumes.

Act Aug. 10, 1993, P. L. 103-66, Title XII, § 12001, 107 Stat. 413, provides: "This title may be cited as the 'Veterans Reconciliation Act of 1993'". For full classification of such Title, consult USCS Tables volumes.

Act Nov. 11, 1993, P. L. 103-140, § 1, 107 Stat. 1485, provides: "This Act may be cited as the 'Veterans Compensation Rates Amendments of 1993'". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 2, 1994, P. L. 103-271, § 1, 108 Stat. 740, provides: "This Act may be cited as the 'Board of Veterans' Appeals Administrative Procedures Improvement Act of 1994'". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 13, 1994, P. L. 103-353, § 1, 108 Stat. 3149, provides: "This Act may be cited as the 'Uniformed Services Employment and Reemployment Rights Act of 1994'". This Act appears generally as 38 USCS §§ 4301 et seq.; for full classification, consult USCS Tables volumes.


Act Nov. 2, 1994, P. L. 103-446, § 1(a), 108 Stat. 4645, provides: "This Act may be cited as the 'Veterans' Benefits Improvements Act of 1994'". For full classification of such Act, consult USCS Tables volumes.


Act Nov. 2, 1994, P. L. 103-452, § 1, 108 Stat. 4783, provides: "This Act may be cited as the 'Veterans Health Programs Extension Act of 1994'". For full classification of such Act, consult USCS Tables volumes.

Act Feb. 10, 1996, P. L. 104-106, Div B, Title XXVIII, Subtitle B, § 2822(a), 110 Stat. 556, provides: "This section [adding 38 USCS § 3708, amending the chapter analysis preceding 38 USCS § 3701, and classified in part to 38 USCS § 3708 note] may be cited as the 'Military Housing Assistance Act of 1995'.".

Act Oct. 9, 1996, P. L. 104-262, § 1, 110 Stat. 3177, provides: "This Act may be cited as the 'Veterans' Health Care Eligibility Reform Act of 1996'.". For full classification of such Act, consult USCS Tables volumes.


Act Oct. 9, 1996, P. L. 104-275, § 1, 110 Stat. 3322, provides: "This Act may be cited as the 'Veterans' Benefits improvements Act of 1996'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 9, 1996, P. L. 104-275, Title IV, § 401, 110 Stat. 3337, provides: "This title may be cited as the 'Veterans' Insurance Reform Act of 1996'.". For full classification of such Title, consult USCS Tables volumes.

Act Oct. 5, 1997, P. L. 105-33, Title VIII, § 8001, 111 Stat. 663, provides: "This title may be cited as the 'Veterans Reconciliation Act of 1997'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 19, 1997, P. L. 105-98, § 1(a), 111 Stat. 2155, provides: "This Act may be cited as the 'Veterans' Compensation Rate Amendments of 1997'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 21, 1997, P. L. 105-114, § 1(a), 111 Stat. 2277, provides: "This Act may be cited as the 'Veterans' Benefits Act of 1997'.". For full classification of such Act, consult USCS Tables volumes.


Act Nov. 11, 1998, P. L. 105-368, § 1, 112 Stat. 3315, provides: "This Act may be cited as the 'Veterans Programs Enhancement Act of 1998'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 11, 1999, P. L. 106-368, § 1, 112 Stat. 3352, provides: "This title [38 USCS §§ 7671 et seq. generally; for full classification, consult USCS Tables volumes] may be cited as the 'Department of Veterans Affairs Health Care Personnel Incentive Act of 1998'.".

Act Nov. 30, 1999, P. L. 106-117, § 1(a), 113 Stat. 1545, provides: "This Act may be cited as the 'Veterans Millennium Health Care and Benefits Act'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 30, 1999, P. L. 106-117, Title V, Subtitle A, § 501(a), 113 Stat. 1573, provides: "This section [amending 38 USCS § 1318] may be cited as the 'John William Rolen Act'.".

Act Nov. 30, 1999, P. L. 106-117, Title X, § 1001, 113 Stat. 1587, provides: "This title may be cited as the 'Court of Appeals for Veterans Claims Amendments of 1999'.". For full classification of such Title, consult USCS Tables volumes.

Act Nov. 30, 1999, P. L. 106-118, § 1(a), 113 Stat. 1601, provides: "This Act [amending 38 USCS §§ 1114, 1115, 1162, 1311, 1313, and 1314, and appearing in part as notes to 38
USCS § 1114] may be cited as the 'Veterans' Compensation Cost-of-Living Adjustment Act of 1999'.

Act Nov. 1, 2000, P. L. 106-413, § 1, 114 Stat. 1798, provides: "This Act [38 USCS § 1114 notes] may be cited as the 'Veterans' Compensation Cost-of-Living Adjustment Act of 2000'."

Act Nov. 1, 2000, P. L. 106-419, § 1(a), 114 Stat. 1822, provides: "This Act may be cited as the 'Veterans Benefits and Health Care Improvement Act of 2000'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 9, 2000, P. L. 106-475, § 1, 114 Stat. 2096, provides: "This Act may be cited as the 'Veterans Claims Assistance Act of 2000'.". For full classification of such Act, consult USCS Tables volumes.

Act June 5, 2001, P. L. 107-14, § 1, 115 Stat. 25, provides: "This Act may be cited as the 'Veterans' Survivor Benefits Improvements Act of 2001'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 21, 2001, P. L. 107-94, § 1(a), 115 Stat. 900, provides: "This Act may be cited as the 'Veterans' Compensation Rate Amendments of 2001'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 21, 2001, P. L. 107-95, § 1(a), 115 Stat. 903, provides: "This Act may be cited as the 'Homeless Veterans Comprehensive Assistance Act of 2001'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 27, 2001, P. L. 107-103, § 1(a), 115 Stat. 976, provides: "This Act may be cited as the 'Veterans Education and Benefits Expansion Act of 2001'.". For full classification of such Act, consult USCS Tables volumes.

Act Jan. 23, 2002, P. L. 107-135, § 1(a), 115 Stat. 2446, provides: "This Act may be cited as the 'Department of Veterans Affairs Health Care Programs Enhancement Act of 2001'.". For full classification of such Act, consult USCS Tables volumes.


Act Nov. 7, 2002, P. L. 107-287, § 1, 116 Stat. 2024, provides: "This Act may be cited as the 'Department of Veterans Affairs Emergency Preparedness Act of 2002'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 7, 2002, P. L. 107-288, § 1(a), 116 Stat. 2033, provides: "This Act may be cited as the 'Jobs for Veterans Act'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 6, 2002, P. L. 107-330, § 1(a), 116 Stat. 2820, provides: "This Act may be cited as the 'Veterans Benefits Act of 2002'.". For full classification of such Act, consult USCS Tables volumes.


Act Dec. 6, 2003, P. L. 108-170, § 1(a), 117 Stat. 2042, provides: "This Act may be cited as the 'Veterans Health Care, Capital Asset, and Business Improvement Act of 2003'.". For full classification of such Act, consult USCS Tables volumes.


Act Nov. 30, 2004, P. L. 108-422, § 1(a), 118 Stat. 2379, provides: "This Act may be cited as the 'Veterans Health Programs Improvement Act of 2004'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 10, 2004, P. L. 108-454, § 1(a), 118 Stat. 3598, provides: "This Act may be cited as the 'Veterans Benefits Improvement Act of 2004'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 10, 2004, P. L. 108-454, Title I, § 101, 118 Stat. 3600, provides: "This title may be cited as the 'Veterans Earn and Learn Act of 2004'.". For full classification of such Title, consult USCS Tables volumes.


Act May 29, 2006, P. L. 109-228, § 1, 120 Stat. 387, provides: "This Act [enacting 18 USCS § 1387 and 38 USCS § 2413 and note, amending the chapter analyses preceding 18 USCS § 1381 and 38 USCS § 2400, and in part unclassified] may be cited as the 'Respect for Fallen Heroes Act'.".

Act June 15, 2006, P. L. 109-233, § 1(a), 120 Stat. 397, provides: "This Act may be cited as the 'Veterans' Housing Opportunity and Benefits Improvement Act of 2006'.". For full classification of such Act, consult USCS Tables volumes.

Other provisions:


"(a) Except as provided in subsections (b) and (c) of this section, this Act [amending this section, among other things; for full classification, consult USCS Tables volumes] shall become effective on the first day of the first calendar month which begins more than ten days after the date of enactment of this Act.

"(b) The amendments made by section 203 of this Act [amending 38 USCS §§ 1702, 1712(h)] shall become effective upon enactment.

"(c) The amendments made by title II of this Act relating to the payment of burial benefits in the case of veterans of the Vietnam era shall become effective on the date of enactment of this Act. If the burial allowance authorized by section 902 of title 38, United States Code, is payable solely by virtue of the enactment of this Act, the two-year period for filing applications, referred to in section 904 of such title 38, shall not end, with respect to an individual whose death occurred prior to the enactment of this Act, before the expiration of the two-year period which begins on the date of enactment of this Act, or, in any case involving the correction of a discharge after the date of enactment of this Act, before the expiration of two years from the date of such correction."


Tables volumes] shall become effective on the first day of the first month beginning 60 days after the date of enactment of this Act, except that the provisions of title I [amending 38 USCS §§ 3104, former 1677, 3482, 3485, 3492, former 1696, 3532, 3542, 3686, 3687, 3698] and section 304(a)(1)(A) [amending 38 USCS § 3684(b)] shall be effective retroactively to October 1, 1977, the provisions of sections 201 and 202 [enacting former 38 USCS §§ 1682A and 1738 and amending 38 USCS § 3698] shall become effective on January 1, 1978, the provisions of section 203 [amending 38 USCS §§ 3462, 3512] shall be effective retroactively to May 31, 1976, and the provisions of sections 301, 302(2) [302(b)], 304(a)(1)(B), 304(a)(2), 305(a)(3), 305(b)(2), 305(b)(3), 305(b)(4), 305(c), 306, 307, 308, 309, and 310 and of title IV [enacting former 38 USCS § 246 and notes to 38 USCS §§ 106, former 246, 3101, 3473, 3474, 5301 and amending 38 USCS §§ 101, former 210, former 1698, 3684, 3685, 3690, 4107, 4214] shall be effective upon enactment.

Effective date of Nov. 4, 1978 amendments. Act Nov. 4, 1978, P. L. 95-588, Title IV, § 401, 92 Stat. 2511, provides: "The amendments made by this Act to title 38, United States Code [amending this section, among other things; for full classification, consult USCS Tables volumes], shall become effective on January 1, 1979."

Terminal date respecting service during Vietnam era. Proc. No. 4373 of May 7, 1975, 40 Fed. Reg. 20257, provides:

"The Congress has provided that entitlement to certain veterans benefits be limited to persons serving in the Armed Forces during the period, beginning August 5, 1964, referred to as the Vietnam era. The President is authorized to determine the last day on which a person must have entered the active military, naval, or air service of the United States in order for such service to qualify as service during that period.


"NOW, THEREFORE, I, GERALD R. FORD, President of the United States of America, by virtue of the authority vested in me by Section 101(29) of Title 38 of the United States Code, do hereby proclaim, for the purposes of said Section 101(29), that May 7, 1975, is designated as the last day of the "Vietnam era.""

References to be considered made to sections or other provisions of title 38, USCS. Act Oct. 18, 1978, P. L. 95-479, § 1(b), 92 Stat. 1560 (effective 10/1/78, as provided by § 401(a) of such Act), provides: "Except as otherwise expressly provided, whenever in this Act [this note, among other things; for full classification, consult USCS Tables volumes] an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code."

Act Aug. 26, 1980, P. L. 96-330, § 1(b), 94 Stat. 1030, provides: "Except as otherwise expressly provided, whenever in this Act [adding this note, among other things; for full classification, consult USCS Tables volumes] an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code."

Act Oct. 17, 1980, P. L. 96-466, § 1(b), 94 Stat. 2171, provides: "Except as otherwise expressly provided, whenever in this Act [adding this note, among other things; for full classification, consult USCS Tables volumes] an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code."

Study of benefits payable to persons residing outside the United States. Act June 13, 1979, P. L. 96-22, Title IV, § 402, 93 Stat. 63, provides:
"(a) The Administrator of Veterans' Affairs, in consultation with the Secretary of State, shall carry out a comprehensive study of benefits payable under the provisions of title 38, United States Code, to persons who reside outside the fifty States and the District of Columbia. The Administrator shall include in such study--

"(1) an analysis of the issues involved in the payment of such benefits to persons who reside outside the fifty States and the District of Columbia, together with analyses of such aspects of the economy of each foreign country and each territory, possession, and Commonwealth of the United States in which a substantial number of persons receiving such benefits reside as are relevant to such issues (such as the rate of inflation, the standard of living, and health care, educational, housing, and burial costs);

"(2) an analysis of the issues involved in the payment of such benefits as the result of adoptions under laws other than the laws of any of the fifty States or the District of Columbia;

"(3) an analysis of the amounts and method of payment of benefits payable to persons entitled, by virtue of sections 107 and 1765 of such title [38 USCS §§ 107 and 3565], to benefits under chapters 11, 13, and 35 of such title [38 USCS §§ 1101 et seq., 1301 et seq., and 3500 et seq.];

"(4) estimates of the present and future costs of paying monetary benefits under such title to persons described in clauses (1) and (3);

"(5) an evaluation of the desirability of continuing to maintain the Veterans' Administration Regional Office in the Republic of the Philippines, taking into consideration (A) the current and expected future workloads of such office, (B) the estimated cost in fiscal years 1981 through 1985 of continuing to maintain such regional office, (C) the feasibility and desirability of transferring appropriate functions of such regional office to the United States Embassy in the Republic of the Philippines, and (D) a provisional plan, which the Administrator shall develop, for the closing of such office and so transferring such functions, together with cost estimates for fiscal years 1981 through 1985 for the implementation of such plan assuming that such office is closed before October 1, 1981; and

"(6) an evaluation of the effects of the amendments to such title made by section 401 of this Act [amending this section].

"(b) Not later than February 1, 1980, the Administrator shall report to the Congress and to the President on the results of such study together with the Administrator's recommendations for resolving the issues to be analyzed and evaluated in such study.

"(c) The Administrator shall (1) carry out the study required under subsection (a) of this section in conjunction with the study required under section 308(a) of the Veterans' and Survivors' Pension Improvement Act of 1978 (Public Law 95-588) [38 USCS § 1521 note], and (2) submit the reports of such studies as a combined report."

**Application and construction of Oct. 12, 1982 amendment.** For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

**Application of Oct. 14, 1982 amendment.** Act Oct. 14, 1982, P. L. 97-306, Title I, Part B, § 113(d), 96 Stat. 1433, as amended March 2, 1984, Title II, § 210, 98 Stat. 45, provides: "The amendments made by subsections (a) and (b) [amending this section and repealing 38 USCS § 403] and the provisions of subsection (c) [5 USCS § 8140 note]--

"(1) with respect to deaths and disabilities resulting from diseases or injuries incurred or aggravated after September 30, 1982, shall take effect as of October 1, 1982; and
"(2) with respect to deaths and disabilities resulting from diseases or injuries incurred or aggravated before October 1, 1982, shall take effect as of October 1, 1983."

Act April 7, 1986; references. Act April 6, 1986, P. L. 99-272, Title XIX, § 19001(b), 100 Stat. 372, provides: "Except as otherwise expressly provided, whenever in this title [for full classification, consult USCS Tables volumes] an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code."

Act May 20, 1988; definition of Administrator. Act May 20, 1988, P. L. 100-322, § 3, 102 Stat. 489, provides: "For purposes of this Act, the term 'Administrator' means the Administrator of Veterans' Affairs."

Act Nov. 18, 1988; definition of Administrator. Act Nov. 18, 1988, P. L. 100-687, Div B, § 1002, 102 Stat. 4122, provides: "For purposes of this division, the term 'Administrator' means the Administrator of Veterans' Affairs."

Redesignation of sections of Chapters 11 through 42. Act Aug. 6, 1991, P. L. 102-83, § 5(c), 105 Stat. 406, provides:

"(a) Redesignation of sections to conform to chapter numbers. Each section contained in any of chapters 11 through 23 [now 38 USCS §§ 1101 et seq. through 2301 et seq.] is redesignated by replacing the first digit of the section number with the number of the chapter containing that section. Each section contained in any of chapters 24 through 42 [now 38 USCS §§ 2400 et seq. through 4211 et seq.] is redesignated so that the first two digits of the section number of that section are the same as the chapter number of the chapter containing that section.

"(b) Tables of sections and chapters.(1) The tables of sections at the beginning of the chapters referred to in subsection (a) are revised so as to conform the section references in those tables to the redesignations made by that subsection.

"(2) The table of chapters before part I and the tables of chapters at the beginning of parts I, II, and III are revised so as to conform the section references in those tables to the redesignations made by subsection (a).

"(c) Cross-references.

(1) Each provision of title 38, United States Code, that contains a reference to a section redesignated by subsection (a) is amended so that the reference refers to the section as redesignated.

"(2) Any reference in a provision of law other than title 38, United States Code, to a section redesignated by subsection (a) shall be deemed to refer to the section as so redesignated.

"(d) Rule for execution. The redesignations made by subsection (a) and the amendments made by subsections (b) and (c) shall be executed after any other amendments made by this Act."

Effective date of Oct. 9, 1996 amendments. Act Oct. 9, 1996, P. L. 104-275, Title V, § 505(d), 110 Stat. 3342, provides: "The amendments made by this section [amending 38 USCS §§ 101(29), 1116(a)(1)-(4), and 1710(e)] shall take effect on January 1, 1997. No benefit may be paid or provided by reason of such amendments for any period before such date."

Act Nov. 30, 1999; definitions of Secretary and Department. Act Nov. 30, 1999, P. L. 106-117, § 3, 113 Stat. 1547, provides:

"For purposes of this Act [for full classification, consult USCS Tables volumes]--

"(1) the term 'Secretary' means the Secretary of Veterans Affairs; and
"(2) the term 'Department' means the Department of Veterans Affairs.".

Effective date of amendments made by § 4 of Act June 5, 2001; initial implementation.

Act June 5, 2001, P. L. 107-14, § 4(g), 115 Stat. 30, provides:

"(1) The amendments made by this section [amending 38 USCS §§ 101, 1965, 1967-1970] shall take effect on the first day of the first month that begins more than 120 days after the date of the enactment of this Act.

"(2) Each Secretary concerned, acting in consultation with the Secretary of Veterans Affairs, shall take such action as is necessary to ensure that during the period between the date of the enactment of this Act and the effective date determined under paragraph (1) each eligible member--

"(A) is furnished an explanation of the insurance benefits available for dependents under the amendments made by this section [amending 38 USCS §§ 101, 1965, 1967-1970]; and

"(B) is afforded an opportunity before such effective date to make elections that are authorized under those amendments to be made with respect to dependents.

"(3) For purposes of paragraph (2):

"(A) The term 'Secretary concerned' has the meaning given that term in section 101 of title 38, United States Code.

"(B) The term 'eligible member' means a member of the uniformed services described in subparagraph (A) or (C) of section 1967(a)(1) of title 38, United States Code, as amended by subsection (b)(1)."

Code of Federal Regulations

Office of Personnel Management-Affirmative employment programs, 5 CFR Part 720

Office of the Secretary of Defense-Discharge Review Board (DRB) procedures and standards, 32 CFR Part 70

Office of Postsecondary Education, Department of Education-Federal Perkins loan program, 34 CFR Part 674

Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Department of Veterans Affairs-Aid to States for establishment, expansion, and improvement of veterans' cemeteries, 38 CFR Part 39

Department of Veterans Affairs-Per diem for nursing home care of veterans in State homes, 38 CFR Part 51

Department of Veterans Affairs-Per diem for adult day health care of veterans in State homes, 38 CFR Part 52

Department of Veterans Affairs-Forms, 38 CFR Part 58

Department of Veterans Affairs-Grants to States for construction or acquisition of State homes, 38 CFR Part 59

Cross References

General military law, 10 USCS §§ 101, 261

This section is referred to in 5 USCS §§ 2108, 3501, 6303; 7 USCS § 1983; 8 USCS §§ 1612, 1613, 1622; 10 USCS §§ 1413, 1491, 2641; 15 USCS § 632; 26 USCS §§ 3121, 6334; 38 USCS §§ 2301, 3729, 3771, 4303, 5302, 8111A; 42 USCS §§ 410, 1477, 11448; 43 USCS § 1629g; 49 USCS § 47112; 50 USCS Appx § 591

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Research Guide

Am Jur:
3C Am Jur 2d, Aliens and Citizens § 2179
60A Am Jur 2d, Pensions and Retirement Funds §§ 1261, 1262
70A Am Jur 2d, Social Security and Medicare §§ 50, 55
77 Am Jur 2d, Veterans and Veterans' Laws §§ 1, 16, 35

Forms:
13 Am Jur Legal Forms 2d, Mortgages and Trust Deeds § 179:36

Annotations:
Tenant selection criteria under § 8 of Housing Act of 1937 (42 USCS § 1437f). 80 ALR Fed 470

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I. IN GENERAL

1. Generally
   No pensioner has legal vested right to his pension; pensions are bounties of government, which Congress has right to give, withhold, distribute, or recall at its discretion. Walton v Cotton (1857) 60 US 355, 19 How 355, 15 L Ed 658; United States v Teller (1883) 107 US 64, 17 Otto 64, 27 L Ed 352, 2 S Ct 39; Frisbie v United States (1895) 157 US 160, 39 L Ed 657, 15 S Ct 586; Estate of Lindquist (1944) 25 Cal 2d 697, 154 P2d 879, cert den (1945) 325 US 869, 89 L Ed 1988, 65 S Ct 1408 and cert den (1945) 325 US 869, 89 L Ed 1988, 65 S Ct 1410
   Under Article 1, § 8, of United States Constitution, giving Congress power "to raise and support armies," Congress has power to give bounties and pensions to those who engage in military service of United States. United States v Fairchilds (1867, WD Mich) 1 Abb 74, 25 F Cas 1035, No 15067

2. Nature of pension benefits
Pension is gratuity involving no claim of right, agreement of parties, or rights of third persons. Harrison v United States (1885) 20 Ct Cl 122

Pension benefits are granted as conditional, not absolute right, conferred upon widow and children of deceased. St. Louis, I. M. & S. R. Co. v Maddry (1893) 57 Ark 306, 21 SW 472

3. Construction of pension statutes

Pension statutes serving beneficial purpose are to be liberally construed. Walton v Cotton (1857) 60 US 355, 19 How 355, 15 L Ed 658; O'Dea v Cook (1917) 176 Cal 659, 169 ¶ 366

4. Relationship with other laws

Surviving widow of serviceman killed in collision with military vehicle while on 3-day pass may bring action against government under Federal Tort Claims Act (28 USCS §§ 2671 et seq.); widow's receipt of veterans benefits does not foreclose FTCA cause of action because serviceman received right to be off duty, he was driving civilian vehicle towards home off military reservation, he was not performing any military function, his activities were not "incident to service," and government should be liable like any "private person." Parker v United States (1980, CA5 Tex) 611 F.2d 1007, reh den (1980, CA5 Tex) 615 F.2d 919

Surviving spouse's action, under Federal Tort Claims Act, 28 USCS § 1346, for wrongful death of off-duty, on furlough, serviceman husband, who was killed on roadway within military reservation while proceeding to his off-base home, is not barred by survivor's receipt of veterans benefits. Parker v United States (1980, CA5 Tex) 611 F.2d 1007, reh den (1980, CA5 Tex) 615 F.2d 919

38 USCS § 101(24) should not be incorporated into Veterans' Reemployment Rights Act of 1974 (VRRA) to expand scope and application of VRRA: (1) even though courts construe veterans' statutes liberally, they cannot create rights out of whole cloth; (2) employer complies with VRRA when it rehires employee following his or her discharge from military service; and (3) VRRA does not purport to create additional reemployment rights after employee has been rehired and thereafter is granted disability leave, even if disability is related to his prior military service. Bowlds v GM Mfg. Div. of GMC (2005, CA7 Ind) 411 F.3d 808, 177 BNA LRRM 2529

38 USCS § 1151 does not redefine service-connected from how that term is defined in 38 USCS § 101(16); instead, it provides exception that grants compensation for some non-service-connected disabilities, treating those disabilities for some purposes as if they were service-connected. Alleman v Principi (2003, CA FC) 349 F.3d 1368


II. ELIGIBILITY FOR BENEFITS

5. Persons deemed veterans

Veteran who was dishonorably discharged from enlistment entered into prior to November 11, 1918, and who was honorably discharged from enlistment entered into between November 12, 1918 and July 2, 1921, is not honorably discharged World War veteran under regulations applicable to claims for reimbursement of burial expenses. 1938 ADVA 428

Veteran who served in United States naval forces in Russia prior to April 1, 1920 as member of landing parties co-operating with Army in suppressing rebellion is veteran of World War I for purpose of receiving benefits. 1939 ADVA 449

Claimant is not "a veteran of any war" where he refused to sign enlistment contract and to take Federal oath. 1941 ADVA 462

Person inducted into military service in July, 1941 and transferred to Enlisted Reserve Corps in October, 1941 under honorable conditions was not in active military or naval service on or after

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December 7, 1941 and is not "a veteran of any war" for purpose of payment of burial expenses. 1943 ADVA 522

Member of Coast Guard Auxiliary enrolled under 14 USCS § 756 as member of Temporary Reserve during World War II did not thereby attain status of veteran or become entitled to veterans' benefits, since 14 USCS § 893 provides that members of Coast Guard Auxiliary and temporary members of Coast Guard Reserve are entitled only to such rights, privileges and benefits as may be specifically granted them by law and 38 USCS § 101(2) does not specifically include service as temporary member of Coast Guard Reserve in definition of "Veteran" for purposes of entitlement to veterans' benefits. G-LGL Memo 16790, 5 Jul 79, CGLB, Jun 1980

6. Service requirements

In computing service under any law, other than one based on Civil War service, periods of agricultural, industrial, or indefinite furlough, time under arrest, in absence of acquittal, time for which soldier or sailor was determined to have forfeited pay by reason of absence without leave, and time spent in desertion or while undergoing sentence of court-martial are to be excluded; however, time lost through intemperate use of drugs or alcoholic liquor, or through disease or injury resulting from own misconduct are includable in such computation. 1946 ADVA 724

7. Active service

Serviceman injured while on agricultural furlough is not "in the military or naval service" and no compensation is payable for such injury. 1933 ADVA 114

In determining benefits, time spent at home awaiting orders are not to be used in computing length of service, and disabilities acquired during that time are not considered as being acquired in active service. 1936 ADVA 376

Decedent killed on day of enlistment while performing active duty without pay, is in active naval service, and dependents are entitled to death pension. 1943 ADVA 532

Reservist who was not accepted for active service and was rejected upon reporting for active duty is entitled to disability benefits only for injuries or diseases actually incurred during period of his enlistment in reserves and prior to his rejection. 1944 ADVA 608

National guardsman who was not finally accepted into federal service, who did not contract disease or injury resulting in death or disability in line of duty between date he reported and date of discharge, had no "active duty", was never in "active military, naval or air service" within definitions of 38 USCS § 101, and did not acquire status to qualify for benefits under Title 38, United States Code. 1963 ADVA 983

Soldier, killed in truck in which he was ordered to carry supplies, is engaged in activity "in the line of duty," entitling his widow to pension. (1931) 36 Op Atty Gen 439

Myocardial infarction sustained during mandatory physical fitness test by national guardsman on inactive duty training is not "injury" within meaning of 38 USCS § 101(24). VA GCO 1-81, 1990 VAOPGCPRC LEXIS 1662

Service by Air and National Guard member with Air Force NCO school under orders stating he was ordered to "active duty" qualifies individual under 38 USCS § 101(21). VA GCO 32-79

Thirty-month period from reenlistment until release from military control after Army determined that appellant, as he had claimed all along, had been validly discharged day before his reenlistment (and thus was not subject to court-martial jurisdiction on desertion charges) was not period of active military service; military's attempt to assert court-martial jurisdiction cannot impose military status where appellant consistently claimed civilian status and his position was ultimately vindicated. Maldonado v Brown (1993) 6 Vet App 48, app dismd (1994, CA FC) 1994 US App LEXIS 11299, vacated without op, recalled, app reinstated (1994, CA FC) 1994 US App LEXIS 16826, motion gr, app dismd without op (1994, CA FC) 43 F.3d 1485, reported in full (1994, CA FC) 1994 US App LEXIS 35418

Board decision denying eligibility for non-service-connected, needs-based pension benefits would be vacated and remanded since Board did not explain why regulation providing that "active
duty” includes authorized travel to and from such duty did not apply. Pacheco v West (1998) 12 Vet App 36

8. Reserve duty

Temporary members of Coast Guard Reserve are not within purview of laws governing Veterans’ Administration [now Department of Veterans Affairs] for pension, National Service Life Insurance or medical and hospital services as beneficiaries of Veterans’ Administration [now Department]. 1946 ADVA 700

Reservist’s active duty for slightly more than 180 days did not constitute active duty as defined by statute; therefore, reservist did not establish that he was "veteran," where his 6-month period had to include minimum 3 months’ active duty for training. Strachan v United States Postal Serv. (1994, MSPB) 64 MSPR 333

Determination by Army that reservist is performing active duty for training is controlling as to reservist’s eligibility under 38 USCS § 1818. VA GCO 16-79


9. Former prisoner of war

Board and CVA properly evaluated both type and degree of hardship suffered by veteran in prisoner camp of neutral government during World War II in determining that veteran did not met regulatory guidelines for status as former prisoner of war. Young v Gober (1997, CA FC) 121 F.3d 662

In denying veteran POW status, Board failed to provide adequate reasons to support its determination that hardships suffered during internment in Sweden were not comparable to hardships suffered by veterans interned as POWs by enemy nations or forces. Young v Brown (1993) 4 Vet App 106, subsequent app (1996) 9 Vet App 141, affd sub nom Young v Gober (1997, CA FC) 121 F.3d 662

Decision or finding of prisoner of war status is legal determination, hence subject to clearly erroneous standard of review. Young v Brown (1993) 4 Vet App 106, subsequent app (1996) 9 Vet App 141, affd sub nom Young v Gober (1997, CA FC) 121 F.3d 662

Appellant was not eligible for benefits as former prisoner of war where service department records did not reflect that appellant had been POW during service, dates of alleged POW status varied considerably in appellant's evidence, and although record showed that appellant signed oath of obedience to Imperial Japanese Forces, there was no showing that oath was exacted as condition of release from internment as POW. Manibog v Brown (1996) 8 Vet App 465

BVA had rational basis for denying appellant POW status where it found that his internment by Swedish government during 2 and 1/2 months was not sufficiently severe as to be comparable to detainment by enemy government; regulation regarding prisoner of war status provided BVA basis for evaluating POW status which focuses on kinds of hardships experienced by veteran during internment. Young v Brown (1996) 9 Vet App 141, affd sub nom Young v Gober (1997, CA FC) 121 F.3d 662

10. Nature of discharge

Federal court lacks jurisdiction to hear veteran's claim of improper denial of medical benefits where veterans' administrator [now Secretary of Veterans Affairs], through his own regulation, made decision "under" 38 USC § 101(2) that veteran's discharge because of homosexuality was dishonorable. Kiser v Johnson (1975, MD Pa) 404 F Supp 879

Applicant who fraudulently accepted commission actually intended for another is not honorably discharged veteran and not entitled to any benefits accruing to such veterans. 1931 ADVA 68
Veteran is entitled to pension based upon period of active service which terminated under honorable circumstances, notwithstanding extension of that enlistment which terminated with bad conduct discharge. 1934 ADVA 275

In determining entitlement to compensation or pension under laws administered by Veterans' Administration [now Department of Veterans Affairs] where discharge under honorable conditions is requisite to entitlement, question whether discharge was under honorable or other than honorable conditions is controlled by determination of military or naval authorities under departmental policy and practice in effect at time of discharge. 1943 ADVA 508

Veteran, convicted of assault to commit rape and later discharged for such conviction, is discharged under conditions other than dishonorable where veteran made no attempt to conceal such conviction and would have been subject to punishment for refusing to render military service. 1950 ADVA 853

Action of Board for Correction of Naval Records in changing status of discharge to honorable sets aside bars of 38 USCS § 101, and serviceman is eligible for veterans benefits, if otherwise entitled. 1962 ADVA 980

Board did not err in finding that veteran was discharged under dishonorable conditions, thus making surviving spouse ineligible for dependency and indemnity compensation benefits, where he requested discharge for good of service in lieu of court-martial on charge of wrongful possession of heroin. Rogers v Derwinski (1992) 2 Vet App 419

Remand was required to determine if veteran’s AWOL conduct leading to his discharge should be excused because of insanity for determining whether he met definition of veteran. Stringham v Principi (1992) 3 Vet App 560, appeal after remand sub nom Stringham v Brown (1995) 8 Vet App 445

Regulation providing that discharge is considered to have been issued under dishonorable conditions if given for willful and persistent misconduct is consistent with statute; if Congress had meant to make sentence of general court martial only event for precluding veteran status, it could easily have done so by stating it directly, and there is nothing in statute or overall statutory scheme encompassed by either title 38 or 10 which suggests that definition of “veteran” was to be entirely removed from rulemaking power of Secretary of Veterans Affairs and given over to unfettered discretion of general courts-martial panels. Camarena v Brown (1994) 6 Vet App 565, aff’d without op (1995, CA FC) 60 F.3d 843, reported in full (1995, CA FC) 1995 US App LEXIS 16683

Although claimant’s deceased husband’s first discharge to reenlist was honorable, she was still not entitled to benefits as surviving spouse since his subsequent discharge for absence without leave occurred during his initial three-year period such that it precluded satisfactory completion of initial service obligation and award of requisite discharge. Holmes v Brown (1997) 10 Vet App 38 (ovrd by D’Amico v West (2000, CA FC) 209 F.3d 1322)

III. ENTITLEMENT TO BENEFITS

11. Generally

Eligibility for benefits arising from marriage of veteran following sex-change operation depends upon treatment given marriage under state law, and where state considers marriage invalid as involving members of same sex, benefits are denied. VA GCO 1-80

Only service department records can establish if and when person was serving on active duty, active duty for training, or inactive duty training. Venturella v Gober (1997) 10 Vet App 340

12. Parent

Term “father” does not include father who did not assume legal and moral obligations of parent toward veteran, and such father is not entitled to pension upon showing of dependency. 1934 ADVA 284
Mere fact that child has been legally adopted by other persons does not take natural mother outside definition of mother and natural mother is entitled to benefits where she was person who last bore relation of mother. 1943 ADVA 541

Claimant is eligible as beneficiary where in loco parentis relationship to veteran existed for period of not less than 1 year at any time prior to entry into active service and relationship had its inception before serviceman attained his majority. 1945 ADVA 675

Veteran's younger sister was not proper claimant for burial expenses and other Veterans' Administration [now Department of Veterans Affairs] benefits since she failed to satisfy statute's requirements to be considered foster parent; veteran never referred to his sister as foster parent or guardian, sister never referred to herself as veteran's foster mother except on one occasion, veteran was 18 or 19 and sister 13 or 14 when their last parent died and thus she was not in position to rear veteran, and record did not reveal that veteran had disability that required parental guidance or supervision. Mayang v Brown (1995) 8 Vet App 260

13. Surviving spouse

Where veteran's disability was clearly not service-connected as defined by 38 USCS § 101(16) because it arose from veteran's treatment at Department of Veterans Affairs hospital and veteran was awarded compensation under 38 USCS § 1151, veteran's widow was not entitled to Service Disabled Veterans' Insurance under 38 USCS § 1922 because § 1922 benefits were not among those covered by § 1151. Alleman v Principi (2003, CA FC) 349 F.3d 1368

Widow of rejected draftee, who became ill prior to final examination for military service and who had requisite degree of disability, is entitled to death compensation. 1938 ADVA 425

Bar to death benefits set forth in 38 USCS § 101 is not applicable where unremarried widow was mentally incompetent during pertinent period of living with man and holding out as his wife. 1964 ADVA 985

All laws discontinue pension on widow's remarriage, and nothing can accrue after that event. (1828) 2 Op Atty Gen 95

Claimant may be recognized as surviving spouse, notwithstanding she had 2 children by another man while husband was missing in action and where he never learned of wife's infidelity prior to death as prisoner of war. VA GCO 3-80

Secretary was ordered to file brief on question whether regulation was in conflict with statute by not requiring that separation be caused by veteran's misconduct or procured by veteran. Gregory v Derwinski (1992) 2 Vet App 295

Soldier's pension rights pass to his widow and children only where he died from wound, injury, or disability on which the pension was granted. St. Louis, I. M. & S. R. Co. v Maddry (1893) 57 Ark 306, 21 SW 472

Board's failure to cite to law of any particular state or provide any reasons or bases for law chosen or not chosen in determining that appellant was not veteran's lawful spouse was clearly erroneous. Sanders v Brown (1993) 6 Vet App 17

Spouse who had remarried following veteran's death was not entitled to resumption of DIC benefits as surviving spouse of veteran upon divorce from second husband, since divorce proceedings did not begin before effective date of amendment eliminating benefits for remarried spouses. Owings v Brown (1995) 8 Vet App 17, affd, without op (1996, CA FC) 86 F.3d 1178, reported in full (1996, CA FC) 1996 US App LEXIS 11368

BVA decision denying appellant recognition as veteran's surviving spouse was not clearly and mistakenly erroneous in light of evidence that she did not live continuously with veteran from date of marriage until his death, and that after their separation she had two other children and therefore was not without fault as to continuation of separation. Berger v Brown (1997) 10 Vet App 166

Although claimant was legal spouse of veteran at time of veteran's death and was deemed to have lived with veteran continuously since their marriage, Board of Veterans' Appeals did not err in deciding claimant was not entitled to recognition as veteran's surviving spouse pursuant to 38
USCS § 101(3) since claimant held herself out to public as spouse of another until after veteran's death and, therefore, 38 USCS § 1311(e), which permits restoration of prior eligibility for dependency and indemnity compensation, is not applicable. Cacatian v West (1999) 12 Vet App 373, 1999 US App Vet Claims LEXIS 306

Board's decision to deny appellant entitlement to retroactive apportionment of pension benefits that had been paid to veteran is affirmed since appellant was not veteran's "spouse" under 38 USCS § 101(31) at any time during veteran's receipt of pension benefits where veteran and appellant were divorced two years prior to veteran's award of pension benefits. Marrero v Gober (2000) 14 Vet App 80, 2000 US App Vet Claims LEXIS 859, app dismd, motion gr (2001, CA FC) 5 Fed Appx 891, cert den (2001) 533 US 957, 150 L Ed 2d 764, 121 S Ct 2609, reh den (2001) 533 US 971, 150 L Ed 2d 799, 122 S Ct 14

14. Children

Word "children" as used in Pension Act of June 4, 1832, and July 4, 1836, embraces grandchildren of deceased pensioner, whether their parents died before or after his decease and entitled them, per stirpes, to distributive share of deceased parent. Walton v Cotton (1857) 60 US 355, 19 How 355, 15 L Ed 658

Marriage of mother after birth of child and acknowledgment of husband that he is father of child constitute prima facie proof that he is the father. United States v Skam (1837, CCD Dist Col) 5 Cranch CC 367, 27 F Cas 1122, No 16308

Daughter of Vietnam veteran who died of service-connected heart disability was entitled to award of Restored Entitlement Program for Survivors benefits from time of veteran's death since she met all applicable eligibility criteria at that time, rather than from time of her application filed now invalidated Veterans' Administration [now Department of Veterans Affairs] regulation. Skinner v Brown (1993) 4 Vet App 141, affd (1994, CA FC) 27 F.3d 1571, reh, en banc, den (1994, CA FC) 1994 US App LEXIS 28461

Neither of two children who lived with veteran's widow was "child" for purposes of entitlement to additional pension benefits where they were not biological children of veteran, and, although widow was their legal guardian, there was no evidence that they were living in veteran's household at time of his death or that veteran had legally adopted them. Burch v Brown (1994) 6 Vet App 512

15. Children over age of 18

Combination of training and employment in United States Cadet Nurse Corps as provided by Congress does not bring minor within contemplation of Veterans' Regulation No. 2(a) [predecessor to 38 USCS § 101], and such compensation may not be continued beyond minor's 18th birthday by reason thereof. 1843 ADVA 542

Pension is payable to child pursuing course of instruction, even though such child was never on pension rolls as minor and was over age of 18 years on date of veteran's death. 1934 ADVA 244

Child pursuing course of instruction at Government Indian School supported wholly by United States is not entitled to continuation of compensation after 18th birthday, where government already is providing substantial support. 1936 ADVA 367

Child who has been helpless from infancy and who has attained age of 18 years on date of her mother's marriage to veteran is not stepchild where, during infancy she had right to look upon veteran as parent and veteran had corresponding duty to give support. 1956 ADVA 672

Board did not err in denying additional compensation for disabled veteran's adult son where evidence established that son's mental disability rendering him incapable of self-employment was not established until 10 years after he turned 18. Bledsoe v Derwinski (1990) 1 Vet App 32

Income of college student's mother and stepfather were properly included in calculating student's entitlement to improved death pension benefits for his deceased father, Vietnam veteran; mother had custody for Veterans' Administration [now Department of Veterans Affairs]
purposes, hence stepfather did also in absence of any evidence parents were estranged. Kelly v Brown (1993) 4 Vet App 177

Finding that adult child of deceased veteran was not incapable of self-support at age 18 was improperly placed on fact that child graduated from high school some 5 years late; if anything, belated graduation supported petitioner's contention that she was incapable of self-support at 18. Dobson v Brown (1993) 4 Vet App 443

There is no legal basis for 70 year-old appellant to be paid dependency and indemnity compensation pursuant to 38 USCS § 1310(a) or 38 USCS § 1318, or to be paid accrued benefits under 38 USCS § 5121(a), since 38 USCS 101(4)(A) excludes from category of "child" anyone who is more than 23 years of age. Burris v Principi (2001) 15 Vet App 348, 2001 US App Vet Claims LEXIS 1498

Construing interpretative-rule exception in 5 USCS § 553(A) narrowly, March 2000 amendment to 38 C.F.R. § 3.57(a)(1)(iii) extends beyond merely clarifying or explaining existing law; instead, it makes new substantive law by excluding home-school programs wholesale from classification as part of category educational institution and, because amendment affects individual rights and obligations, it is substantive, legislative rule that is subject to notice-and-comment requirements of 5 USCS § 553(b) and (c). Theiss v Principi (2004) 18 Vet App 204, 2004 US App Vet Claims LEXIS 486

March 2000 amendment to 38 C.F.R. § 3.57(a)(1)(iii), which excluded home-school programs from definition of educational institution for purposes of 38 USCS §§ 101(4)(A)(iii) and 104, is invalid for failure to comply with notice-and-comment rulemaking procedures that 5 USCS § 553 requires of such substantive rule changes. Theiss v Principi (2004) 18 Vet App 204, 2004 US App Vet Claims LEXIS 486

16. - Adopted children

Adopted children of soldier are entitled to death benefits. 1934 ADVA 280

Individual adopted after 18th birthday by veteran is "child" within meaning of 38 USCS § 101 until 23 if attending approved educational institution. VA GCO 14-79

Issue of clear and unmistakable error was clearly before Board on appellant's claim that it reopen decision refusing to recognize validity of adoption of veteran's and appellant's children where appellant asserted validity under both Philippine and U.S. law and Board simply responded by not disputing validity under Philippine law but stating that it was not recognized for Veterans' Administration [now Department of Veterans Affairs] purposes. Mata v Principi (1992) 3 Vet App 558

17. - Stepchildren

Veteran's stepchild is entitled to status as dependent where veteran has supported stepchild since death of natural mother, has made stepchild beneficiary of life insurance, and has had stepchild in constructive custody. 1945 ADVA 626

Illegitimate child, conceived and born after mother's marriage to veteran, and living in veteran's household, meets definition of stepchild for purpose of death benefits. 1951 ADVA 870

Individual becoming stepchild after 18th birthday is "child" within meaning of 38 USCS § 101 until 23 if attending approved educational institution. VA GCO 14-79

Child of veteran's spouse may be recognized as veteran's stepchild where it physically resides in veteran's home during alternate visiting months and receives support all year from veteran. VA GCO 2-83

18. Sibling

Veteran's sibling, who did not claim that sibling acted as veteran's parent, was ineligible for dependency and indemnity compensation benefits under 38 USCS § 101, even though sibling was veteran's parents' next of kin, and parents never claimed their benefits. Valiao v Principi (2003) 17 Vet App 229, 2003 US App Vet Claims LEXIS 612
§ 102.  Dependent parents

(a) Dependency of a parent, which may arise before or after the death of a veteran, shall be determined in accordance with regulations prescribed by the Secretary.

(b) Dependency of a parent shall not be denied (1) solely because of remarriage, or (2) in any case in any State where the monthly income for a mother or father does not exceed minimum levels which the Secretary shall prescribe by regulation, giving due regard to the marital status of the mother or father and additional members of the family whom the mother or father is under a moral or legal obligation to support.

(c) For the purpose of this subsection in determining monthly income the Secretary shall not consider any payments under laws administered by the Secretary because of disability or death or payments of bonus or similar cash gratuity by any State based upon service in the Armed Forces.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:


1972. Act Oct. 24, 1972, substituted new section catchline for one which read: "Dependent parents and dependent husbands"; substituted new subsec. (b) for one which read: "(b) For the purposes of this title (except chapter 19), (1) the term 'wife' includes the husband of any female veteran if such husband is incapable of self-maintenance and is permanently incapable of self-support due to mental or physical disability; and (2) the term 'widow' includes the widower of any female veteran if such widower is incapable of self-maintenance and was permanently incapable of self-support due to physical or mental disability at the time of the veteran's death.".

1976. Act Sept. 30, 1976 (effective 9/30/76, as provided by § 405(a) of such Act, which appears as 38 USCS § 1521 note), substituted new subsec. (a)(2) for one which read: "Dependency of a parent shall not be denied (A) solely because of remarriage, or (B) in any case in any State where the monthly income for a mother or father, not living together, is not more than $105, or where the monthly income for a mother and father living together, is not more than $175, plus, in either case, $45, for each additional member of the family whom the father or mother is under a moral or legal obligation to support, as determined by the Administrator.".

1986. Act Oct. 28, 1986, in subsec. (a), deleted "(1)" following "(a)", redesignated para. (2) as subsec. (b), substituted "(1)" for "(A)" and "(2)" for "(B)", substituted "[(c)](C)" for "(3)" and deleted former subsec. (b) which read: "For the purposes of this title, (1) the term 'wife' includes the husband of any female veteran; and (2) the term 'widow' includes the widower of any female veteran.".

§ 103. Special provisions relating to marriages

(a) Whenever, in the consideration of any claim filed by a person as the widow or widower of a veteran for gratuitous death benefits under laws administered by the Secretary it is established by evidence satisfactory to the Secretary that such person, without knowledge of any legal impediment, entered into a marriage with such veteran which, but for a legal impediment, would have been valid, and thereafter cohabited with the veteran for one year or more immediately before the veteran's death, or for any period of time if a child was born of the purported marriage or was born to them before such marriage, the purported marriage shall be deemed to be a valid marriage, but only if no claim has been filed by a legal widow or widower of such veteran who is found to be entitled to such benefits. No duplicate payments shall be made by virtue of this subsection.

(b) Where a surviving spouse has been legally married to a veteran more than once, the date of original marriage will be used in determining whether the statutory requirement as to date of marriage has been met.

(c) In determining whether or not a person is or was the spouse of a veteran, their marriage shall be proven as valid for the purposes of all laws administered by the Secretary according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued.

(d) (1) The remarriage of the surviving spouse of a veteran shall not bar the furnishing of benefits to such person as the surviving spouse of the veteran if the remarriage is void, or has been annulled by a court with basic authority to render annulment decrees unless the Secretary determines that the annulment was secured through fraud by either party or collusion.

(2) (A) The remarriage of the surviving spouse of a veteran shall not bar the furnishing of benefits specified in paragraph (5) to such person as the surviving spouse of the veteran if the remarriage has been terminated by death or divorce unless the Secretary determines that the divorce was secured through fraud or collusion.

(B) The remarriage after age 57 of the surviving spouse of a veteran shall not bar the furnishing of benefits specified in paragraph (5) to such person as the surviving spouse of the veteran. Notwithstanding the previous sentence, the remarriage after age 55 of the surviving spouse of a veteran shall not bar the furnishing of benefits under section 1781 of this title [38 USCS § 1781] to such person as the surviving spouse of the veteran.

(3) If the surviving spouse of a veteran ceases living with another person and holding himself or herself out openly to the public as that person's spouse, the bar to granting
that person benefits as the surviving spouse of the veteran shall not apply in the case of the benefits specified in paragraph (5).

(4) The first month of eligibility for benefits for a surviving spouse by reason of paragraph (2)(A) or (3) shall be the month after--

(A) the month of the termination of such remarriage, in the case of a surviving spouse described in paragraph (2)(A); or

(B) the month of the cessation described in paragraph (3), in the case of a surviving spouse described in that paragraph.

(5) Paragraphs (2)(A) and (3) apply with respect to benefits under the following provisions of this title:

(A) Section 1311 [38 USCS § 1311], relating to dependency and indemnity compensation.

(B) Section 1781 [38 USCS § 1781], relating to medical care for survivors and dependents of certain veterans.

(C) Chapter 35, relating to educational assistance [38 USCS §§ 3500 et seq.].

(D) Chapter 37, relating to housing loans [38 USCS §§ 3701 et seq.].

(e) The marriage of a child of a veteran shall not bar recognition of such child as the child of the veteran for benefit purposes if the marriage is void, or has been annulled by a court with basic authority to render annulment decrees unless the Secretary determines that the annulment was secured through fraud by either party or collusion.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:

1962. Act Sept. 19, 1962, added subsecs. (d) and (e).

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in subsec. (a), substituted "cohabited with him for one year or more immediately before his death, or for any period of time if a child was born of the purported marriage or was born to them before such marriage," for "cohabitated with him for five or more years immediately before his death."

1970. Act Aug. 12, 1970 (effective 1/1/71, as provided by § 9 of such Act), in subsec. (d), redesignated existing matter as para. (1), added paras. (2) and (3).

1974. Act Dec. 21, 1974 (effective 1/1/75, as provided by § 10 of such Act), in subsec. (e), redesignated existing matter as para. (1), added para. (2).

1986. Act Oct. 28, 1986, in subsec. (a) substituted "person" for "woman", inserted "or widower" wherever appearing, substituted "such person" for "she", substituted "the veteran" for "him", substituted "the veteran's" for "his"; in subsec. (b), substituted "surviving spouse" for "widow"; in subsec. (c), substituted "person" for "woman" and "spouse" for "wife" respectively; and in subsec. (d), substituted "surviving spouse" for "widow" wherever appearing, "such person" for "her" wherever appearing, "that person's spouse" for "his wife", "that person" for "her", "person" for "man" and inserted "himself or".
(2) The remarriage of the surviving spouse of a veteran shall not bar the furnishing of benefits to such person as the widow of the veteran if the remarriage has been terminated by death or has been dissolved by a court with basic authority to render divorce decrees unless the Veterans' Administration determines that the divorce was secured through fraud by the surviving spouse or collusion.

(3) If a surviving spouse ceases living with another person and holding himself or herself out openly to the public as that person's spouse, the bar to granting that person benefits as the surviving spouse of the veteran shall not apply.

Such Act further, in subsec. (d), in para. (4), in the introductory matter, substituted "paragraph (2)(A) or (3)" for "this subsection", and, in subpara. (A), substituted "paragraph (2)(A)" for "paragraph (2)", and, in para. (5), in the introductory matter, substituted "Paragraphs (2)(A)" for "Paragraphs (2)".

Other provisions:

Exception from denial of benefits; effective date of award. Act Aug. 12, 1970, P. L. 91-376, § 5, 84 Stat. 789 (effective 1/1/71, as provided by § 9 of such Act), provides:

"(a) If a widow terminates a relationship or conduct which resulted in imposition of a prior restriction on payment of benefits, in the nature of inference or presumption of remarriage, or relating to open and notorious adulterous cohabitation or similar conduct, she shall not be denied any benefits by the Veterans' Administration, other than insurance, solely because of such prior relationship or conduct.

"(b) The effective date of an award of benefits resulting from enactment of subsection (a) of this section [this note] shall not be earlier than the date of receipt of application therefor, filed after termination of the particular relationship or conduct and after December 31, 1970.".

Application of 1990 amendments of subsecs. (d) and (e). Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle A, § 8004(b), 104 Stat. 1388-343, provides: "The amendments made by..."
subsection (a) [amending subsecs. (d) and (e) of this section] shall apply with respect to claims filed after October 31, 1990, and shall not operate to reduce or terminate benefits to any individual whose benefits were predicated on section 103(d)(2), 103(d)(3), or 103(e)(2) before the effective date of those amendments.

Act Aug. 14, 1991, P. L. 102-86, Title V, § 502, 105 Stat. 424, provides: "The amendments made by section 8004 of the Omnibus Budget Reconciliation Act of 1990 (Public Law 101-508) [amending subsecs. (d) and (e) of this section] shall not apply with respect to any individual who on October 31, 1990, was a surviving spouse or child within the meaning of title 38, United States Code, unless after that date that individual (1) marries, or (2) in the case of a surviving spouse, begins to live with another person while holding himself or herself out openly to the public as that person's spouse."


"(a) Exception. The amendments made by section 8004 of the Omnibus Budget Reconciliation Act of 1990 (105 Stat. 424 [104 Stat. 1388-343]) [amending subsecs. (d) and (e) of this section] shall not apply to any case in which a legal proceeding to terminate an existing marital relationship was commenced before November 1, 1990, by an individual described in subsection (b) if that proceeding directly resulted in the termination of such marriage.

"(b) Covered individuals. An individual referred to in subsection (a) is an individual who, but for the marital relationship referred to in subsection (a), would be considered to be the surviving spouse of a veteran."

Effective date of Nov. 30, 1999 amendments; limitation on payments made by reason of subsec. (d)(2) and (3). Act Nov. 30, 1999, P. L. 106-117, Title V, Subtitle A, § 502(c), (d), 113 Stat. 1574, provide:

"(c) Effective date. The amendments made by subsections (a) and (b) [amending 38 USCS §§ 103(d) and 1311] shall take effect on the first day of the first month beginning after the month in which this Act is enacted.

"(d) Limitation. No payment may be made to a person by reason of paragraphs (2) and (3) of section 103(d) of title 38, United States Code, as added by subsection (a), for any period before the effective date specified in subsection (c)."

Individuals remarrying before Dec. 6, 2002, after attainment of age 55; eligibility for medical care. Act Dec. 6, 2002, P. L. 107-330, Title I, § 101(b), 116 Stat. 2821; Dec. 16, 2003, P. L. 108-183, Title I, § 101(f), 117 Stat. 2653, provides: "In the case of an individual who but for having remarried would be eligible for medical care under section 1781 of title 38, United States Code, and whose remarriage was before the date of the enactment of this Act and after the individual had attained age 55, the individual shall be eligible for such medical care by reason of the amendments made by subsection (a) [amending subsec. (d)(2) of this section] only if an application for such medical care is received by the Secretary of Veterans Affairs before the end of the one-year period beginning on the date of the enactment of the Veterans Benefits Act of 2003 [enacted Dec. 16, 2003]."

Effective date of Dec. 6, 2002 amendments. Act Dec. 6, 2002, P. L. 107-330, Title I, § 101(c), 116 Stat. 2821, provides: "The amendments made by this section [amending subsec. (d)(2) of this section] shall take effect on the date that is 60 days after the date of the enactment of this Act."

Effective date of amendments made by § 101(a) and (b) of Act Dec. 16, 2003. Act Dec. 16, 2003, P. L. 108-183, Title I, § 101(c), 117 Stat. 2653, provides: "The amendments made by subsections (a) and (b) [amending 38 USCS §§ 103(d)(2)(B) and 1311] shall take effect on January 1, 2004."

Retroactive benefits prohibited. Act Dec. 16, 2003, P. L. 108-183, Title I, § 101(d), 117 Stat. 2653, provides: "No benefit may be paid to any person by reason of the amendments made
by subsections (a) and (b) [amending 38 USCS §§ 103(d)(2)(B) and 1311] for any period before the effective date specified in subsection (c) [note to this section]."

**Application for benefits.** Act Dec. 16, 2003, P. L. 108-183, Title I, § 101(e), 117 Stat. 2653, provides: "In the case of an individual who but for having remarried would be eligible for benefits under title 38, United States Code, by reason of the amendment made by subsection (a) [amending subsec. (d)(2)(B) of this section] and whose remarriage was before the date of the enactment of this Act and after the individual had attained age 57, the individual shall be eligible for such benefits by reason of such amendment only if the individual submits an application for such benefits to the Secretary of Veterans Affairs not later than the end of the one-year period beginning on the date of the enactment of this Act.".

**Code of Federal Regulations**

Department of Veterans Affairs-Adjudication, 38 CFR Part 3

**Cross References**

This section is referred to in 38 USCS § 5110

**Research Guide**

Am Jur:

24 Am Jur 2d, Divorce and Separation § 538

77 Am Jur 2d, Veterans and Veterans' Laws § 35

1. Legal impediments

2. Determination of validity of marriage

3. Common-law marriage

4. Divorce

5. Remarriage

1. Legal impediments

State laws rendering marriage invalid for consanguinity of parties are "legal impediment" under 38 USC § 103 which do not bar widow from collecting death benefits based upon otherwise valid marriage. 1961 ADVA 976

French requirement of civil ceremony is "legal impediment" to valid marriage of widow, originally married in religious ceremony, and under terms of 38 USCS § 103 does not in itself bar her from receiving benefits. 1962 ADVA 797

Claimant who alleged that she was surviving spouse of veteran, to whom she had been married and from whom she had been divorced some 35 years later, because veteran continued to cohabit with her until his death approximately one and one-half years later, was entitled to opportunity on remand to submit signed statement that she had no knowledge that marriage ceremony requirement in Puerto Rico was legal impediment to common law marriage she was asserting. Colon v Brown (1996) 9 Vet App 104

2. Determination of validity of marriage

Validity of marriage as affecting widowhood under National Service Life Insurance Act of 1940 is determined by law of place where parties resided at time of marriage or at time claim accrued; hence, claimant could not assert validity of marriage where Mexican divorce was not recognized by applicable law. United States v Snyder (1949, App DC) 85 US App DC 198, 177 F.2d 44

Wife, separated from veteran by New York decree, is subject to loss of her portion of his disability benefits where veteran has obtained valid Nevada divorce decree and was domiciled in granting state, notwithstanding that one of parties to decree was not resident of state wherein
decree was granted and notwithstanding that state wherein she resides would not, according to its own law, give effect to decree as granted. 1933 ADVA 169

Second wife of Indian in plural marriage valid according to tribal custom is not eligible for pension under governing Federal law since pension laws and other Federal laws do not contemplate plural marriages. 1944 ADVA 568

Comity need not apply to Mexican divorce, and Veterans' Administration [now Department of Veterans Affairs] need not recognize woman as wife resulting from subsequent marriage in Colorado, where woman originally failed to establish domicile in Mexico prior to obtaining divorce there. 1970 ADVA 991

Statute providing that marriage shall be proven valid according to law of place where parties resided at time of marriage does not violate free exercise of religion clause since it is neutral statute dealing with subject that state is free to regulate; there simply is no express or implied discrimination against any particular religious belief or sect, nor does statute target subtly or otherwise any religious conduct for distinctive treatment. Bierer v Brown (1994) 6 Vet App 563

Appellant did not present sufficient evidence that her marriage to veteran was valid under Philippine law where, although she submitted copy of signed marriage contract, she was still legally married to another at time and she knew that he was alive. Dedicatoria v Brown (1995) 8 Vet App 441, app dismd without op (1996, CA FC) 91 F.3d 170, reported in full (1996, CA FC) 1996 US App LEXIS 16478

For VA-benefits purposes, validity of marriage is determined according to law of place where parties resided at time of marriage, and because widow's first marriage was in Colorado, under Colorado law, Colo. Rev. Stat. § 14-10-111(1)(d), her first marriage, even if induced by fraud, was not invalid when it was entered into; it remained valid until it was declared invalid. Hopkins v Nicholson (2005) 19 Vet App 165, 2005 US App Vet Claims LEXIS 213

3. Common-law marriage

Woman who entered into common-law marriage with her first cousin although such marriage was prohibited by state law, is entitled to benefits, if she satisfies adjudicating authorities that she did not know of prohibition against such marriages. (1961) 42 Op Atty Gen 37

4. Divorce

Widow whose marriage has been dissolved by decree of divorce cannot claim pension right upon death of her ex-husband. (1863) 11 Op Atty Gen 1

Religious marriage ceremony is of no legal significance in determining surviving spouse's eligibility for death pension benefits if veteran and claimant were divorced at time of veteran's death. Frankel v Derwinski (1990) 1 Vet App 23

Former wife of deceased pensioner can bring suit to set aside alleged fraudulent divorce decree for purpose of determining who is entitled to his pension. Lawrence v Nelson (1901) 113 Iowa 277, 85 NW 84

Remand of widow's claim was required in light of recent legislation permitting reinstatement of DIC payments for remarried surviving spouses whose disqualifying marriages terminated by proceedings begun before November 1, 1990. Dowlen v Principi (1992) 3 Vet App 507

Claimant was not surviving spouse of veteran since divorce decree was issued nunc pro tunc effective on date that preceded date veteran was declared missing in action and date he was presumed dead. Koch v Brown (1993) 4 Vet App 568

Statute barring reinstatement of DIC benefits for veteran's child whose marriage has been dissolved by divorce, but not by annulment, does not violate equal protection; Congress's budgetary considerations, coupled with rationale that marriages terminated by divorce or death pose less of financial burden than marriages terminated by annulment, establish that statute is rationally related to legitimate governmental interests. Giancaterino v Brown (1995) 7 Vet App 555

5. Remarriage
Restoration of pension to widow removed from rolls for remarriage now found voidable must not precede date of decree of nullity; restoration to widow for void remarriage should not precede date of separation following discovery that marriage was void, rather than date of decree, if any. 1949 ADVA 824

Remarriage of widow estops her from claiming pension by virtue of death of her first husband although second marriage is later declared illegal. (1873) 14 Op Atty Gen 220

Woman who married and lived with man, supposing her husband to be dead, and who subsequently discovered he was alive, is precluded from claiming pension upon subsequent death of her husband in military service. United States v Hays (1884, CCD Mo) 20 F 710

Spouse who had remarried following veteran’s death was not entitled to resumption of DIC benefits as surviving spouse of veteran upon divorce from second husband, since divorce proceedings did not begin before effective date of amendment eliminating benefits for remarried spouses. Owings v Brown (1995) 8 Vet App 17, affd, without op (1996, CA FC) 86 F.3d 1178, reported in full (1996, CA FC) 1996 US App LEXIS 11368

§ 104. Approval of educational institutions

(a) For the purpose of determining whether or not benefits are payable under this title (except chapter 35 of this title [38 USCS §§ 3500 et seq.]) for a child over the age of eighteen years and under the age of twenty-three years who is attending a school, college, academy, seminary, technical institute, university, or other educational institution, the Secretary may approve or disapprove such educational institutions.

(b) The Secretary may not approve an educational institution under this section unless such institution has agreed to report to the Secretary the termination of attendance of any child. If any educational institution fails to report any such termination promptly, the approval of the Secretary shall be withdrawn.

Prior law and revision:

This section is based on 38 USC § 2104 (Act June 17, 1957, P. L. 85-56, Title I, § 104, 71 Stat. 90).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:


Cross References

This section is referred to in 38 USCS § 1314

Construing interpretative-rule exception in 5 USCS § 553(A) narrowly, March 2000 amendment to 38 C.F.R. § 3.57(a)(1)(iii) extends beyond merely clarifying or explaining existing law; instead, it makes new substantive law by excluding home-school programs wholesale from classification as part of category educational institution and, because amendment affects individual rights and obligations, it is substantive, legislative rule that is subject to

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notice-and-comment requirements of 5 USCS § 553(b) and (c). Theiss v Principi (2004) 18 Vet App 204, 2004 US App Vet Claims LEXIS 486

March 2000 amendment to 38 C.F.R. § 3.57(a)(1)(iii), which excluded home-school programs from definition of educational institution for purposes of 38 USCS §§ 101(4)(A)(iii) and 104, is invalid for failure to comply with notice-and-comment rulemaking procedures that 5 USCS § 553 requires of such substantive rule changes. Theiss v Principi (2004) 18 Vet App 204, 2004 US App Vet Claims LEXIS 486

§ 105. Line of duty and misconduct

(a) An injury or disease incurred during active military, naval, or air service will be deemed to have been incurred in line of duty and not the result of the veteran's own misconduct when the person on whose account benefits are claimed was, at the time the injury was suffered or disease contracted, in active military, naval, or air service, whether on active duty or on authorized leave, unless such injury or disease was a result of the person's own willful misconduct or abuse of alcohol or drugs. Venereal disease shall not be presumed to be due to willful misconduct if the person in service complies with the regulations of the appropriate service department requiring the person's to report and receive treatment for such disease.

(b) The requirement for line of duty will not be met if it appears that at the time the injury was suffered or disease contracted the person on whose account benefits are claimed (1) was avoiding duty by deserting the service or by absenting himself or herself without leave materially interfering with the performance of military duties; (2) was confined under sentence of court-martial involving an unremitted dishonorable discharge; or (3) was confined under sentence of a civil court for a felony (as determined under the laws of the jurisdiction where the person was convicted by such court).

(c) For the purposes of any provision relating to the extension of a delimiting period under any education-benefit or rehabilitation program administered by the Secretary, the disabling effects of chronic alcoholism shall not be considered to be the result of willful misconduct.

Prior law and revision:

This section is based on 38 USC § 2105 (Act June 17, 1957, P. L. 85-56, Title I, § 105, 71 Stat. 90).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XII, § 2202, 71 Stat. 162:


Amendments:

1986. Act Oct. 28, 1986, in subsec. (a) substituted "the person's" for "his" and "him" respectively; and in subsec. (b) substituted "service or by absenting himself or herself" for "service, or by absenting himself".


1990. Act Nov. 5, 1990 (applicable as provided by § 8052(b) of such Act, which appears as a note to this section), in subsec. (a), substituted "a result of the person's own willful
misconduct or abuse of alcohol or drugs” for “the result of the person's own willful misconduct”.

1991. Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration".

Other provisions:

Application of 1990 amendments. Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle E, § 8052(b), 104 Stat. 1388-351, provides: "The amendments made by subsection (a) [amending subsec. (a) of this section and 38 USCS §§ 1110 and 1131] shall take effect with respect to claims filed after October 31, 1990."

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References
This section is referred to in 50 USCS Appx § 593

Research Guide

Am Jur:
60A Am Jur 2d, Pensions and Retirement Funds § 1262
77 Am Jur 2d, Veterans and Veterans' Laws § 31

Annotations:
Who is "individual with handicaps" under Rehabilitation Act of 1973 (29 USCS §§ 701 et seq.).
97 ALR Fed 40

1. Generally
2. Confinement
3. -Parole
4. Willful misconduct
   5. -Alcoholism and intoxication

1. Generally

Application of Feres doctrine under which federal government is not liable for injuries arising out of or in course of activity incident to military service, to bar suit brought by Navy serviceman against doctors in naval hospital for negligent treatment of fractured leg is not affected by fact that serviceman was denied benefits under Veterans Benefits Act because injuries were sustained in motorcycle accident resulting from serviceman's consumption of alcohol, operation of motorcycle at excessive rate of speed, and the failure to negotiate a curve. Sidley v United States, Dep't of Navy (1988, CA6 Ohio) 861 F.2d 988

Because 38 USCS § 101(16) makes clear that "service-connected" means same thing as "incurred in line of duty," 38 USCS § 105(a) creates presumption of service connection, that is, that disability first manifested or aggravated during active duty is deemed to be service connected unless such injury or disease was result of person's own willful misconduct or abuse of alcohol or drugs. Shedden v Principi (2004, CA FC) 381 F.3d 1163

Death of officer is in line of duty for pension purposes since his disobedience of orders in deviating from specific flight route was not proximate or contributory cause of death. 1944 ADVA 554

Veteran injured while on pass and in private employment is barred from benefits only for willful misconduct since Congress deleted prohibiting language relating to private employment. 1946 ADVA 715

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2. Confinement

Unremitted bad conduct discharge given to veteran is not equivalent to unremitted dishonorable discharge; thus, veteran who died while confined under sentence of court-martial under circumstances not due to his own willful misconduct, is not barred from benefits otherwise payable. 1950 ADVA 861

3. -Parole

Amendments to Missing Persons Act (50 USCS Appx §§ 1001 et seq.) providing for pay and allowances for Philippine Scouts after parole by Japanese do not require change in Veterans' Administration [now Department of Veterans Affairs] policy that such scouts in parole status are not in active service for purpose of entitlement to benefits, notwithstanding such payment of pay and allowances by service department pursuant to terms of Missing Persons Act. 1961 ADVA 971

Veteran in parole status from September 1, 1942 through July 3, 1945 is not on active duty or on authorized leave and hence is not in active service within purview of 38 USCS § 105, during that period, notwithstanding that he received pay therefor under Missing Persons Act (50 USCS App §§ 1001 et seq.). 1961 ADVA 972

4. Willful misconduct

As "preponderance of evidence" establishing willful misconduct was sufficient to rebut presumption of service-connection for peacetime disabilities under 38 USCS § 105(a), and veteran's willful misconduct in repeatedly failing to obey lawful order was proved under that standard, his claim for disability benefits was properly denied. Thomas v Nicholson (2005, CA FC) 423 F.3d 1279

Where hearing officer (HO) found that veteran was not entitled to disability benefits due to his willful misconduct in disobeying sergeant's order to leave area, 38 C.F.R. § 3.103(2)(c) did not require HO to ask veteran how much time he had to respond to sergeant's orders; HO fulfilled his duty in evaluating record and evidence adequately established nature of veteran's conduct. Thomas v Nicholson (2005, CA FC) 423 F.3d 1279

Failure to report venereal disease that did not manifest itself before claimant's discharge and therefore that claimant could not have reported while in service is subject to presumption of willful misconduct, and such injury is not incurred in line of duty. 1946 ADVA 726

Board failed to correctly apply statutory presumption that injury occurred during active military service is incurred in line of duty since, although there was evidence that appellant's deceased husband may not have acted wisely on night he was killed, Board did not provide adequate reasons or basis for its finding that he engaged in conduct that satisfied its definition of willful misconduct. Smith v Derwinski (1992) 2 Vet App 241

BVA's finding that proximate cause of appellant's quadriplegia was driving car while impaired by alcohol and fatigue and that his actions constituted gross negligence and deliberate or intentional wrongdoing was not clearly erroneous where it was supported by record evidence. Yeoman v Brown (1997) 10 Vet App 378

5. -Alcoholism and intoxication

Chronic use of alcohol as beverage, whether out of compulsion or otherwise, is not willful misconduct. 1964 ADVA 988

Widow presented new and material evidence warranting reopening of claim for DIC benefits from servicemember's death which BVA had determined to result from his willful misconduct in driving automobile at unsafe speed while intoxicated; evidence included statement of servicemember's extreme fatigue on day of accident as result of demanding work schedule, newspaper article about effects of alcohol and lack of sleep, expert testimony disputing accuracy of deceased's blood alcohol level, and medical journal article which addressed link between sleep disorders and ethanol concentrations. Daniels v Brown (1996) 9 Vet App 348
BVA's finding that proximate cause of appellant's quadriplegia was driving car while impaired by alcohol and fatigue and that his actions constituted gross negligence or deliberate or intentional wrongdoing was not clearly erroneous where it was supported by record evidence. Yeoman v Brown (1997) 10 Vet App 378

Board did not err in finding that injuries veteran sustained in automobile accident were result of his willful misconduct since there was plausible basis in record to conclude that veteran was voluntarily intoxicated at time. Yeoman v Brown (1997) 10 Vet App 378


§ 106. Certain service deemed to be active service

Discussion and Analysis in the Veterans Benefits Manual

(a) (1) Service as a member of the Women's Army Auxiliary Corps for ninety days or more by any woman who before October 1, 1943, was honorably discharged for disability incurred or aggravated in line of duty which rendered her physically unfit to perform further service in the Women's Army Auxiliary Corps or the Women's Army Corps shall be considered active duty for the purposes of all laws administered by the Secretary.

(2) Any person entitled to compensation or pension by reason of this subsection and to employees' compensation based upon the same service under subchapter I of Chapter 81 of title 5 [5 USCS §§ 8101 et seq.] must elect which benefits she will receive.

(b) Any person--

(1) who has applied for enlistment or enrollment in the active military, naval, or air service and has been provisionally accepted and directed or ordered to report to a place for final acceptance into such service; or

(2) who has been selected or drafted for service in the Armed Forces and has reported pursuant to the call of the person's local draft board and before rejection; or

(3) who has been called into the Federal service as a member of the National Guard, but has not been enrolled for the Federal service; and

who has suffered an injury or contracted a disease in line of duty while en route to or from, or at, a place for final acceptance or entry upon active duty, will, for the purposes of chapters 11, 13, 19, 21, 31, and 39 of this title [38 USCS §§ 1101 et seq., 1301 et seq., 1901 et seq., 2101 et seq., 3100 et seq., and 3900 et seq.], and for purposes of determining service-connection of a disability under chapter 17 of this title [38 USCS §§ 1701 et seq.], be considered to have been on active duty and to have incurred such disability in the active military, naval, or air service.

(c) For the purposes of this title, an individual discharged or released from a period of active duty shall be deemed to have continued on active duty during the period of time immediately following the date of such discharge or release from such duty determined by the Secretary concerned to have been required for that individual to proceed to that individual's home by the most direct route, and in any event that individual shall be
deemed to have continued on active duty until midnight of the date of such discharge or release.

(d) (1) For the purposes of this title, any individual—
(A) who, when authorized or required by competent authority, assumes an obligation to perform active duty for training or inactive duty training; and
(B) who is disabled or dies from an injury or covered disease incurred while proceeding directly to or returning directly from such active duty for training or inactive duty training, as the case may be;
shall be deemed to have been on active duty for training or inactive duty training, as the case may be, at the time such injury or covered disease was incurred.
(2) In determining whether or not such individual was so authorized or required to perform such duty, and whether or not such individual was disabled or died from injury or covered disease so incurred, the Secretary shall take into account the hour on which such individual began so to proceed or to return; the hour on which such individual was scheduled to arrive for, or on which such individual ceased to perform, such duty; the method of travel employed; the itinerary; the manner in which the travel was performed; and the immediate cause of disability or death.
(3) Whenever any claim is filed alleging that the claimant is entitled to benefits by reason of this subsection, the burden of proof shall be on the claimant.
(4) For purposes of this subsection, the term "covered disease" means any of the following:
(A) Acute myocardial infarction.
(B) A cardiac arrest.
(C) A cerebrovascular accident.

(e) Each person who has incurred a disability as a result of an injury or disease described in subsection (b) shall be entitled to the same rights, privileges, and benefits under title 5 as a preference eligible described in section 2108(3)(C) of title 5 [5 USCS § 2108(3)(C)].

(f) Service as a member of the Alaska Territorial Guard during World War II of any individual who was honorably discharged therefrom under section 8147 of the Department of Defense Appropriations Act, 2001, shall be considered active duty for purposes of all laws administered by the Secretary.

Prior law and revision:
This section is based on 38 USC §§ 1101(2)(E), (6)(B), (12), 2124(b), 2311, 2332 (Acts Aug. 1, 1956, ch 837, Title I, § 102(2)(E), (6)(B), (12), 70 Stat. 858; June 17, 1957, P. L. 85-56, Title III, §§ 311, 332, Title XXI, § 2104(b), 71 Stat. 96, 100, 155).
This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

References in text:
"Section 8147 of the Department of Defense Appropriations Act, 2001", referred to in this section, is § 8147 of Act Aug. 9, 2000, P. L. 106-259, which added subsec. (f) of this section and appears in part as notes to this section.
Amendments:

1961. Act July 21, 1961 (applicable as provided by § 2 of such Act, which appears as a note to this section), substituted new subsec. (c) for one which read: "For the purposes of this title, whenever an individual is discharged or released after December 31, 1956, from a period of active duty he shall be deemed to continue on active duty during the period of time immediately following the date of such discharge or release from such duty determined by the Secretary concerned to be required for him to proceed to his home by the most direct route, and in any event, until midnight of the date of such discharge or release."


1982. Act Oct. 12, 1982, in subsec. (a)(2), substituted "subchapter I of chapter 81 of title 5" for "the Federal Employees' Compensation Act"; and, in subsec. (e), substituted "title 5 as a preference eligible described in section 2108(3)(C) of title 5" for "the Act of June 27, 1944 (58 Stat. 387-391), as a person described in section 2(1) of such Act.".

1986. Act Oct. 28, 1986, in subsec. (b)(2), substituted "the person's" for "his"; in subsec. (c), substituted "that individual" for "him" and "he" respectively, and substituted "that individual's" for "his"; in subsec. (d), in para. (2), deleted "by him" following "incurred", and in the concluding matter substituted "such individual" for "he" wherever appearing, and "the" for "his".

1991. Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" and "Secretary" for "Administrator".


Act Nov. 1, 2000, in subsec. (d), inserted the paragraph designator "(1)", redesignated former paras. (1) and (2) as subparas. (A) and (B), respectively, inserted the paragraph designators "(2)" and "(3)" and, in paras. (1) and (2) as so designated, inserted "or covered disease" following "injury" wherever appearing, and added para. (4).

Other provisions:


Women's Air Forces Service Pilots. Act Nov. 23, 1977, P. L. 95-202, Title IV, § 401, 91 Stat. 1449, effective 11/23/77, as provided in § 501 of such Act; as amended Oct. 17, 1980, P. L. 96-466, Title VIII, § 801(m)(3), 94 Stat. 2217, effective 10/1/80, as provided by § 802(h) of such Act; Sept. 24, 1983, P. L. 98-94, Title XII, Part D, § 1263(a), 97 Stat. 703, (applicable to all persons issued discharges under honorable conditions pursuant to this note, whether such discharges are awarded before, on, or after Sept. 24, 1983, as provided by § 1263(b) of such Act); Aug. 6, 1991, P. L. 102-83, § 6(b), 105 Stat. 407, provides:

"(a)(1) Notwithstanding any other provision of law, the service of any person as a member of the Women's Air Forces Service Pilots (a group of Federal civilian employees attached to the United States Army Air Force during World War II), or the service of any person in any other similarly situated group the members of which rendered service to the Armed Forces of the United States in a capacity considered civilian employment or contractual service at the time such service was rendered, shall be considered active duty for the purposes of all laws administered by the Secretary of Veterans Affairs if the Secretary of Defense, pursuant to regulations which the Secretary shall prescribe--

"(A) after a full review of the historical records and all other available evidence pertaining to the service of any such group, determines, on the basis of judicial and
other appropriate precedent, that the service of such group constituted active military service, and

"(B) in the case of any such group with respect to which such Secretary has made an affirmative determination that the service of such group constituted active military service, issues to each member of such group a discharge from such service under honorable conditions where the nature and duration of the service of such member so warrants.

Discharges issued pursuant to the provisions of the first sentence of this paragraph shall designate as the date of discharge that date, as determined by the Secretary of Defense, on which such service by the person concerned was terminated.

"(2) In making a determination under clause (A) of paragraph (1) of this subsection with respect to any group described in such paragraph, the Secretary of Defense may take into consideration the extent to which--

"(A) such group received military training and acquired a military capability or the service performed by such group was critical to the success of a military mission,

"(B) the members of such group were subject to military justice, discipline, and control;

"(C) the members of such group were permitted to resign,

"(D) the members of such group were susceptible to assignment for duty in a combat zone, and

"(E) the members of such group had reasonable expectations that their service would be considered to be active military service.

"(b)(1) No benefits shall be paid to any person for any period prior to the date of enactment of this title [enacted Nov. 23, 1977] as a result of the enactment of subsection (a) of this section.

"(2) The provisions of section 106(a)(2) of title 38, United States Code [subsec. (a)(2) of this section], relating to election of benefits, shall be applicable to persons made eligible for benefits, under laws administered by the Secretary of Veterans Affairs, as a result of implementation of the provisions of subsection (a) of this section.

"(c) Under regulations prescribed by the Secretary of Defense, any person who is issued a discharge under honorable conditions pursuant to the implementation of subsection (a) of this section [this note] may be awarded any campaign or service medal warranted by such person's service.".

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Service in Alaska Territorial Guard during World War II; discharge; prohibition on retroactive benefits. Act Aug. 9, 2000, P. L. 106-259, Title VIII, § 8147(b), (c), 114 Stat. 705, provides:

"(b) Discharge.(1) The Secretary of Defense shall issue to each individual who served as a member of the Alaska Territorial Guard during World War II a discharge from such service under honorable conditions if the Secretary determines that the nature and duration of the service of the individual so warrants.

"(2) A discharge under paragraph (1) shall designate the date of discharge. The date of discharge shall be the date, as determined by the Secretary, of the termination of service of the individual concerned as described in that paragraph.
“(c) Prohibition on retroactive benefits. No benefits shall be paid to any individual for any period before the date of the enactment of this Act by reason of the enactment of this section.”.

**Code of Federal Regulations**

Office of the Secretary of Defense-Active duty service for civilian or contractual groups, 32 CFR Part 47

Department of the Air Force-Determination of active military service and discharge for civilian or contractual groups, 32 CFR Part 881

**Cross References**

This section is referred to in 5 USCS § 2302; 38 USCS §§ 1302, 2302

**Research Guide**

**Am Jur:**

77 Am Jur 2d, Veterans and Veterans' Laws § 29

1. Aggravation of existing disability

2. Merchant seamen

3. Miscellaneous

1. Aggravation of existing disability

Lack of authority to rate "aggravation per se" by regulatory direction does not preclude payment of pension, provided that as result of treatment furnished or operation performed or any other intervening cause in line of duty during service in draft, veteran suffered injury or disease. 1934 ADVA 219

Pension is not payable to veteran for "aggravation per se" of a pre-existing disability, but is payable if aggravation is due to intervening factor "in line of duty." 1945 ADVA 659

2. Merchant seamen

Secretary of the Air Force made decision based on unpublished criteria, failed to apply criteria even-handedly, and failed to adequately support his determination that Merchant Marine seamen of World War II were not entitled to active military service recognition for their service. Schumacher v Aldridge (1987, DC Dist Col) 665 F Supp 41


3. Miscellaneous

G.I. Bill Improvement Act of 1977, Pub. L. No. 95-202, § 401, 91 Stat. 1433 (found at 38 USCS § 106 (note)), unlike 38 USCS § 101(8), is not part of title 38; thus, any analysis under § 101(8) can take place only after it has been determined that claimant has met criteria under Pub. L. No. 95-202, § 401 of being member of certified class who has been issued Department of Defense discharge reflecting service dates associated with that certified class and Department of Veterans Affairs (VA) is then applying title 38 provisions to determine eligibility for VA benefits under that title; that is, general definition contained in 38 USCS § 101(8) for recognized World War II period of December 7, 1941, to December 31, 1946, does not define eligibility dates for active-duty service in accordance with Pub. L. No. 95-202, § 401, but instead defines term World
§ 107. Certain service deemed not to be active service

(a) Service before July 1, 1946, in the organized military forces of the Government of the Commonwealth of the Philippines, while such forces were in the service of the Armed Forces of the United States pursuant to the military order of the President dated July 26, 1941, including among such military forces organized guerrilla forces under commanders appointed, designated, or subsequently recognized by the Commander in Chief, Southwest Pacific Area, or other competent authority in the Army of the United States, shall not be deemed to have been active military, naval, or air service for the purposes of any law of the United States conferring rights, privileges, or benefits upon any person by reason of the service of such person or the service of any other person in the Armed Forces, except benefits under--

(1) contracts of National Service Life Insurance entered into before February 18, 1946;

(2) chapter 10 of title 37 [37 USCS §§ 551 et seq.] and

(3) chapters 11, 13 (except section 1312(a)), 23, and 24 [38 USCS §§ 1101 et seq., 1301 et seq. (except section 1312(a) [38 USCS § 1312(a)]), 2301 et seq., and 2401 et seq.] (to the extent provided for in section 2402(8) [38 USCS § 2402(8)]) of this title.

Except as provided in subsection (c) or (d), payments under such chapters shall be made at a rate of $0.50 for each dollar authorized, and where annual income is a factor in entitlement to benefits, the dollar limitations in the law specifying such annual income shall apply at a rate of $0.50 for each dollar. Any payments made before February 18, 1946, to any such member under such laws conferring rights, benefits, or privileges shall not be deemed to have been invalid by reason of the circumstance that such member's service was not service in the Armed Forces or any component thereof within the meaning of any such law.

(b) Service in the Philippine Scouts under section 14 of the Armed Forces Voluntary Recruitment Act of 1945 shall not be deemed to have been active military, naval, or air service for the purposes of any of the laws administered by the Secretary except--
(1) with respect to contracts of National Service Life Insurance entered into (A) before May 27, 1946, (B) under section 620 or 621 of the National Service Life Insurance Act of 1940, or (C) under section 1922 of this title [38 USCS § 1922]; and
(2) chapters 11, 13 [38 USCS §§ 1101, 1301 et seq.] (except section 1312(a) [38 USCS § 1312(a)]), 23, and 24 [38 USCS §§ 2301 et seq. and 2400 et seq.] (to the extent provided for in section 2402(8) [38 USCS § 2402(8)]) of this title.

Except as provided in subsection (c) or (d), payments under such chapters shall be made at a rate of $0.50 for each dollar authorized, and where annual income is a factor in entitlement to benefits, the dollar limitations in the law specifying such annual income shall apply at a rate of $0.50 for each dollar.

(c) In the case of benefits under subchapters II and IV of chapter 11 of this title [38 USCS §§ 1110 et seq. and 1131 et seq.] and subchapter II of chapter 13 [38 USCS §§ 1310 et seq.] (except section 1312(a) [38 USCS § 1312(a)]) of this title paid by reason of service described in subsection (a) or (b) to an individual residing in the United States who is a citizen of, or an alien lawfully admitted for permanent residence in, the United States, the second sentence of the applicable subsection shall not apply.

(d) (1) With respect to benefits under chapter 23 of this title [38 USCS §§ 2301 et seq.], in the case of an individual described in paragraph (2), the second sentence of subsection (a) or (b), as otherwise applicable, shall not apply.
(2) Paragraph (1) applies to any individual whose service is described in subsection (a) and who dies after November 1, 2000, or whose service is described in subsection (b) and who dies after the date of the enactment of the Veterans Benefits Act of 2003 [enacted Dec. 16, 2003 ], if the individual, on the individual's date of death--
   (A) is a citizen of, or an alien lawfully admitted for permanent residence in, the United States;
   (B) is residing in the United States; and
   (C) either--
      (i) is receiving compensation under chapter 11 of this title [38 USCS §§ 1101 et seq.]; or
      (ii) if the individual's service had been deemed to be active military, naval, or air service, would have been paid pension under section 1521 of this title [38 USCS § 1521] without denial or discontinuance by reason of section 1522 of this title [38 USCS § 1522].

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat 162:

This section is also based on the following provisions, which were repealed by Act Aug. 10, 1956, ch 1041, § 53, 70A Stat. 641:

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References in text:

"Section 14 of the Armed Forces Voluntary Recruitment Act of 1945", referred to in subsec. (b), is Act Oct. 6, 1945, ch 393, § 14, 59 Stat. 543, which was classified to 10 USC § 637. Such section was omitted in the general revision of Title 10 by Act Aug. 10, 1956, ch 1041, 70A Stat. 1.

"Section 620 or 621 of the National Service Life Insurance Act of 1940", referred to in subsec. (b)(1), are Act Oct. 8, 1940, ch 757, Title VI, Part I, §§ 620, 621, added April 25, 1951, ch 39, Part II, § 10, 65 Stat. 36, which were classified to 38 USC 820, 821 prior to their repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1272. For similar provisions, see 38 USCS §§ 1922(a), 1923.

Explanatory notes:

The amendments made by § 1(a)(1) of Act Oct. 27, 2000, P. L. 106-377, are based on § 501(a)(1) of Title V of H.R. 5482 (114 Stat. 1441A-57), as introduced on Oct. 18, 2000, which was enacted into law by such § 1(a)(1).

Amendments:

1961. Act Sept. 21, 1961 (effective as of the first day of the first calendar month which begins after Sept. 21, 1961, as provided by § 3 of such Act, which appears as 38 USCS § 1312 note), in subsecs. (a)(3) and (b)(2), substituted "412(a)" for "412".

1966. Act Oct. 11, 1966 (effective as provided by § 2(b) of such Act, which appears as a note to this section), in subsecs. (a) and (b), in the concluding matter, substituted "Payments under such chapters shall be made at a rate in pesos as is equivalent to $0.50 for each dollar authorized, and where annual income is a factor in entitlement to benefits, the dollar limitations in the law specifying such annual income shall apply at a rate in Philippine pesos as is equivalent to $0.50 for each dollar." for "Payments under such chapters shall be made at the rate of one peso for each dollar otherwise authorized, and where annual income is a factor in entitlement to benefits, the dollar limitations in the law specifying such annual income shall apply at the rate of one Philippine peso for each dollar." and "Payments under such chapters shall be made at the rate of one peso for each dollar otherwise authorized, and where annual income is a factor in entitlement to benefits, the dollar limitations in the law specifying such annual income shall apply at the rate of one Philippine peso for each dollar.", respectively.


1986. Act Oct. 28, 1986, in the concluding matter of subsec. (a) substituted "such member's" for "his".

1991. Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "administered by the Secretary" for "administered by the Veterans' Administration".

1994. Act Nov. 2, 1994 (applicable with respect to payments made after 12/31/94, as provided by § 507(c) of such Act, which appears as a note to this section), in subsecs. (a) and (b), in the concluding matter, substituted "rate of" for "rate in pesos as is equivalent to" following "shall be made at a" and substituted "rate of" for "rate in Philippine pesos as is equivalent to" following "shall apply at a".

2000. Act Oct. 27, 2000 (effective and applicable as provided by § 501(a)(2) of H.R. 5482, as enacted into law by such Act, which appears as a note to this section), in subsec. (a), in the concluding matter, substituted "Except as provided in subsection (c), payments" for "Payments"; and added subsec. (c).

Act Nov. 1, 2000 (applicable as provided by § 113(b), which appears as a note to this section), purported to amend subsec. (a) by substituting "Except as provided in subsection (c),
payments" for "Payments"; however, because of a prior amendment, this amendment could not be executed.

Such Act further (applicable with respect to deaths occurring on or after 11/1/00, as provided by § 331(c) of such Act, which appears as a note to this section), in subsec. (a), substituted para. (3) for one which read: "(3) chapters 11, 13 (except section 1312(a)), and 23 of this title."

Such Act further (applicable as provided by § 332(b) of such Act, which appears as a note to this section), added subsection [(d)](c).

2001. Act June 5, 2001 (effective as of 11/1/00, as provided by § 8(a)(1) of such Act), in subsec. (a), inserted "or (d)"; redesignated subsec. [(d)](c) as subsec. (d), and, in such subsection as redesignated, substituted "With respect to benefits under chapter 23 of this title, in" for "In".


2003. Act Dec. 16, 2003 (applicable to benefits paid for months beginning after enactment, as provided by § 211(b) of such Act, which appears as a note to this section), in subsec. (b), in the concluding matter, substituted "Except as provided in subsection (c), payments" for "Payments"; and, in subsec. (c), inserted "and subchapter II of chapter 13 (except section 1312(a)) of this title", substituted "in subsection (a) or (b)" for "in subsection (a)", and substituted "of the applicable subsection" for "of subsection (a)".

Such Act further (applicable with respect to deaths occurring on or after enactment, as provided by § 212(c) of such Act, which appears as a note to this section), in subsec. (b), in para. (2), substituted "11," for "11 and", and inserted ", 23, and 24 (to the extent provided for in section 2402(8))", and, in the concluding matter, inserted "or (d)"; and, in subsec. (d), in para. (1), inserted "or (b), as otherwise applicable," and, in para. (2), in the introductory matter, inserted "or whose service is described in subsection (b) and who dies after the date of the enactment of the Veterans Benefits Act of 2003, a"

Other provisions:

Refund of erroneously deducted amounts. Act Oct. 11, 1966, P. L. 89-641, § 1, 80 Stat. 884, provides: "Notwithstanding the provisions of any other law or regulation, the Administrator of Veterans' Affairs is authorized, under such terms and conditions as he may prescribe, to refund amounts erroneously deducted for National Service Life Insurance premiums from the arrears in pay paid by the United States Government to members of the organized military forces of the Government of the Commonwealth of the Philippines, while such forces were in the service of the Armed Forces of the United States pursuant to the military order of the President dated July 26, 1941. Such refund may be made only upon receipt in the Veterans' Administration of an application therefor filed with the Government of the Commonwealth of the Philippines within two years after the date of enactment of this Act and accompanied by a certification of an appropriate official of that Government that such amounts were so erroneously deducted and have not heretofore been refunded. Such refunds shall be made from the National Service Life Insurance appropriation. In the event of the death of any such member refunds may be made only to the following individuals and in the order named--

"(1) to the widow or widower of such person, if living;

"(2) if no widow or widower, to the child or children of such person, if living, in equal shares; or

"(3) if no widow, widower, child, or children, to the parent or parents of such person, if living, in equal shares.
No refunds under this section shall be paid to the heirs or legal representatives as such of such member or of any beneficiary. If such member is deceased, and in the event no individual within the permitted class survives to receive the refund, no payment of such refund shall be made."

Effective date of amendments made by § 2 of Act Oct. 11, 1966. Act Oct. 11, 1966, P. L. 89-641, § 2(b), 80 Stat. 885, provides: "The amendments made by subsection (a) of this section [amending this section] shall take effect on the first day of the second calendar month which begins after the date of enactment of this Act.".

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Application of Nov. 2, 1994 amendments. Act Nov. 2, 1994, P. L. 103-446, Title V, § 507(c), 108 Stat. 4664, provides: "The amendments made by this section [amending this section and 38 USCS §§ 3532(d) and 3565(b)(1)] shall apply with respect to payments made after December 31, 1994.".

Effective date and application of Oct. 27, 2000 amendments. Act Oct. 27, 2000, P. L. 106-377, § 1(a)(1), 114 Stat. 1441 (enacting into law § 501(a)(2) of Title V of H.R. 5482 (114 Stat. 1441A-57), as introduced on Oct. 18, 2000), provides: "The amendments made by paragraph (1) [amending subsec. (a) and adding subsec. (c) of this section] shall take effect on the date of the enactment of this Act and shall apply to benefits paid for months beginning on or after that date.".

Application of amendments made by § 331 of Act Nov. 1, 2000. Act Nov. 1, 2000, P. L. 106-419, Title III, Subtitle D, § 331(c), 114 Stat. 1856, provides: "The amendments made by this section [amending 38 USCS §§ 107(a)(3) and 2402(8)] shall apply with respect to deaths occurring on or after the date of the enactment of this Act.".

Application of amendments made by § 332 of Act Nov. 1, 2000. Act Nov. 1, 2000, P. L. 106-419, Title III, Subtitle D, § 332(b), 114 Stat. 1856, provides: "No benefits shall accrue to any person for any period before the date of the enactment of this Act by reason of the amendments made by subsection (a) [amending this section].".

Effective date of June 5, 2001 amendments. Act June 5, 2001, P. L. 107-14, § 8(a)(1), 115 Stat. 34, provides that the amendments made by such section (amending this section) are effective as of November 1, 2000.

Applicability of amendments made by § 211 of Act Dec. 16, 2003. Act Dec. 16, 2003, P. L. 108-183, Title II, Subtitle B, § 211(b), 117 Stat. 2657, provides: "The amendments made by subsection (a) [amending subssecs. (b) and (c) of this section] shall apply to benefits paid for months beginning after the date of the enactment of this Act.".

Applicability of amendments made by § 212 of Act Dec. 16, 2003. Act Dec. 16, 2003, P. L. 108-183, Title II, Subtitle B, § 212(c), 117 Stat. 2658, provides: "The amendments made by this section [amending 38 USCS §§ 107(b) and (d) and 2402(8)] shall apply with respect to deaths occurring on or after the date of the enactment of this Act.".

Code of Federal Regulations
Department of Veterans Affairs-National Service life insurance, 38 CFR Part 8
Department of Veterans Affairs-National Cemeteries of the Department of Veterans Affairs, 38 CFR Part 38

Cross References
This section is referred to in 8 USCS §§ 1612, 1613, 1622; 38 USCS §§ 1734, 1925, 2402

Research Guide
1. Constitutionality

Action by veteran of Philippine military challenging constitutionality of statute was barred by prior class action, since he was member of class despite fact that he was not resident of California at time, where action raised same claims as class action, and plaintiff made no charge of inadequate representation by original class action plaintiffs nor pointed to significant intervening change in law that would warrant relitigation of claims. Besinga v United States (1989, CA9 Cal) 879 F.2d 626, 14 FR Serv 3d 897, op withdrawn, substituted op, remanded on other grounds (1991, CA9 Cal) 923 F.2d 133, 91 CDOS 228, 91 Daily Journal DAR 145, 18 FR Serv 3d 718

Earlier decision upholding constitutionality of statute could not be given res judicata effect since no notice was provided to absent class members allowing them to opt out of class. Besinga v United States (1991, CA9 Cal) 923 F.2d 133, 91 CDOS 228, 91 Daily Journal DAR 145, 18 FR Serv 3d 718

Provision that Commonwealth Army members called into service by President's 1941 order would not be deemed members of U.S. military for purposes of veterans benefit programs (38 USCS § 107(a)) did not violate equal protection component of due process clause as applied to such member who later became naturalized U.S. citizen; Congress had rational basis for treating Commonwealth Army members different from U.S. forces, including costs, fact that Philippine residents did not contribute to federal treasury, and practical administrative difficulties inherent in dispensing benefits directly to citizens of what was soon to become foreign state. Besinga v United States (1994, CA9 Cal) 14 F.3d 1356, 94 CDOS 385, 94 Daily Journal DAR 655, cert den (1994) 513 US 864, 130 L Ed 2d 115, 115 S Ct 180, reh den (1994) 513 US 1010, 130 L Ed 2d 437, 115 S Ct 534

38 USCS § 107(a), which limits veterans' benefits available to veterans of Philippine Army and their spouses, is not unconstitutional under rational basis test to extent it deprives Philippine Army veterans and their dependents of benefits administered by Veterans' Administration [now Department of Veterans Affairs] and requires that benefits that are available to said veterans and their dependents be paid at reduced rate because the distinction Congress drew between members of the Philippine Army and United States service members is rationally related to the statutes purpose. Quiban v Veterans Admin. (1991, App DC) 289 US App DC 62, 928 F.2d 1154, cert den (1994) 513 US 918, 130 L Ed 2d 210, 115 S Ct 297, reh den (1994) 513 US 1009, 130 L Ed 2d 436, 115 S Ct 533


38 USCS § 107 which restricts Filipino World War II veteran's pensions to one-half of those received by American veterans, and exclusion from other benefits is not unconstitutional. Filipino American Veterans & Dependents Asso. v United States (1974, ND Cal) 391 F Supp 1314, later proceeding Besinga v United States (1989, CA9 Cal) 879 F.2d 626, 14 FR Serv 3d 897, op withdrawn, substituted op, remanded on other grounds (1991, CA9 Cal) 923 F.2d 133, 91
Government's new evidence does not establish constitutionality of 38 USCS § 107(a) and warrant reconsideration of decision granting Philippine Army veteran's widow survivors' benefits based on her husband's non-service-connected death, where new evidence consists of post-enactment internal executive memoranda discussing "practical difficulties" of extending veterans' benefits in light of other pending legislative aid to Philippines and imminent Philippine independence, because such evidence does not alter previous conclusion that Congress, by singling out persons equally entitled to U.S. Army veteran status to be means by which goal of saving money was to be achieved, failed to insure that means were rationally related to purposes of veterans' benefits legislation. Quiban v United States Veterans Admin. (1989, DC Dist Col) 724 F Supp 993

Statute did not deny equal protection to veteran who served with Philippine Commonwealth Army during World War II, even if he later resided in and became citizen of U.S., since fact that estimated cost of extending full benefits to such veterans would be $2 billion annually was itself sufficient basis upon which Congress could rationally exclude Philippine veterans from pension benefits. Talon v Brown (1993, CA) 999 F.2d 514, reh den (1993, CA FC) 1993 US App LEXIS 20905 and cert den (1993) 510 US 1028, 126 L Ed 2d 601, 114 S Ct 643, reh den (1994) 510 US 1082, 127 L Ed 2d 96, 114 S Ct 906


Widow of veteran who served in New Philippine Scouts was not entitled to extraordinary writ ordering Secretary to pay her full value of her DIC benefits on grounds that 38 USCS § 107 was unconstitutional; claimant was free to challenge constitutionality of statute in district court, hence could not demonstrate absence of adequate alternative remedies. Dacoron v Brown (1993) 4 Vet App 115

38 USCS § 107(b) is constitutional, based on court's earlier holding that subsection (a) is constitution, which embraced holding of decision of District of Columbia Circuit holding both subsections constitutional. Rosalinas v Brown (1993) 5 Vet App 1

2. Relationship with other laws

Service in Philippine Army does not qualify social security claimant's son as one who "served in the active military or naval service" for purpose of obtaining Social Security benefits under 42 USCS § 417. Lagtapon v Secretary of Health, Education & Welfare (1973, App DC) 156 US App DC 363, 481 F.2d 538

Petitioner for naturalization who had been member of Philippine Commonwealth Army from May 1, 1945, to November 7, 1945, while such army was in service of armed forces of United States, is entitled to naturalization without usual period of residence despite provisions of Act Feb. 18, 1946 providing that service in military forces of commonwealth of Philippines should not be deemed service in armed forces of United States for purposes of any law conferring rights, privileges, or benefits upon any person by reason of such service. Petition of Munoz (1957, DC Cal) 156 F Supp 184

Based on 38 USCS § 107(a), which makes members of Philippine military statutorily ineligible for most benefits available to members of U.S. Armed Forces, members of Philippine military are not eligible for benefits provided by Section 654 of National Defense Authorization Act for Fiscal Year 1998 (Act Nov. 18, 1997, P.L. 105-85, 111 Stat. 1629 at 1804), which provides for payment of back quarters and subsistence allowances to World War II veterans who served as guerilla fighters in Philippines. Gonzales v United States (2000) 48 Fed Cl 176, affd (2001, CA FC) 275 F.3d 1340

3. Persons entitled to benefits
As Philippine Commonwealth Army was not deemed to have been active military service of United States under 38 USCS § 107(a), court was without power to issue mandamus compelling federal authorities to allow burial of petitioners’ father’s remains at Arlington National Cemetery. Realuyo v Metzler (2003, SD NY) 263 F Supp 2d 686

Any member of Commonwealth Army who was ordered into and served in Armed Forces of United States, or any person who served in such forces, is potentially entitled to benefits under applicable laws; such service being shown by record, or by certification of United States Armed Forces; also, it must be shown that at time injury (disease) or death occurred: (a) person was serving in Armed Forces of United States, or (b) that he was serving, albeit in irregular force, under commissioned officer of United States Army, Navy, or Marine Corps, or under commissioned officer of Commonwealth Army recognized by, and co-operating with United States forces; presumption of soundness attaches only to such persons where record shows examination at time of entrance into Armed Forces of United States; and any period of parole is not to be considered as active service in Armed Forces of United States for such purpose. 1947 ADVA 746

Board did not err in holding that members of Philippine Army and guerilla forces who served before 7/1/46 were ineligible for non-service connected veterans’ benefits. Bravo v Derwinski (1991) 1 Vet App 609

BVA did not commit either legal or factual error in holding that appellant’s act of service in organized military forces of Government of Commonwealth of Philippines from July 1943 to December 1946 was not qualifying service for purpose of establishing eligibility for non-service-connected pension. Solis v Derwinski (1991) 2 Vet App 6

Board did not err in denying death pension benefits to appellant since her deceased husband’s service in organized guerilla forces of Government of Commonwealth of Philippines before 1946 was not qualifying service. Fonseca v Derwinski (1992) 2 Vet App 54

Surviving spouse of veteran was not eligible for non-service connected death benefits since veteran’s service in organized military forces of Commonwealth of Philippines was not deemed active service for purpose of granting non-service connected benefits. Cacalda v Brown (1996) 9 Vet App 261

Based on 38 USCS § 107(a), which makes members of Philippine military statutorily ineligible for most benefits available to members of U.S. Armed Forces, members of Philippine military are not eligible for benefits provided by Section 654 of National Defense Authorization Act for Fiscal Year 1998 (Act Nov. 18, 1997, P.L. 105-85, 111 Stat. 1629 at 1804), which provides for payment of back quarters and subsistence allowances to World War II veterans who served as guerilla fighters in Philippines. Gonzales v United States (2000) 48 Fed Cl 176, aff’d (2001, CA FC) 275 F.3d 1340

4. -Philippine Scouts


United States Court of Veterans Claims properly concluded that individual’s service with Philippine Expeditionary Forces in Korea was not service in United States Armed Forces where 38 USCS § 107(a)(3) only recognized such service occurring before July 1, 1946 and individual’s service had occurred after 1946. Cayat v Nicholson (2005, CA FC) 429 F.3d 1331

Limiting provisions of former 38 USCS § 38 do not apply to service in Philippine Scouts since that force was not, and is not, part of “organized military forces of the Government of the Commonwealth of the Philippines” but is component part of Army of United States; provisions of statute limiting benefits available to Philippine Scouts apply only to enlistments entered into under former 10 USCS § 637. 1946 ADVA 721
Restrictions in legislation limiting benefits under laws administered by Veterans' Administration [now Department of Veterans Affairs] available to Philippine Scouts who are enlisted and serve pursuant to former 10 USCS § 637 are not applicable to officers commissioned in connection with administration of such Act. 1948 ADVA 778

Members of New Philippine Scouts may be eligible for service-connected compensation but are not eligible for nonservice-connected pensions. Laruan v Principi (1993) 4 Vet App 100

Service department's finding that appellant had been member of Philippine Army with no recognized guerilla service was binding on Veterans' Administration [now Department of Veterans Affairs] for purposes of established service in U.S. Armed Forces, Philippine Commonwealth Army, or Philippine guerrillas in service of U.S. Armed Forces. Fazon v Brown (1996) 9 Vet App 319

Widow of "New" Philippine Scouts veteran was not entitled to non-service-connected death pension since his service was not active military, naval, or air service for purposes of qualifying for Veterans' Administration [now Department of Veterans Affairs] benefits except for certain specified benefits. Manlincon v West (1999) 12 Vet App 238, 1999 US App Vet Claims LEXIS 15

5. Benefits payable

Pensions that may be paid are those payable under laws administered by Veterans' Administration [now Department of Veterans Affairs], on account of service-connected disability or death of persons who served in organized military forces of Government of Commonwealth of Philippines, while such forces were in service of Armed Forces of United States pursuant to military order of President dated July 26, 1941; no distinction is permissible among those falling within class of veterans affected by reason of citizenship, residence of theater of operations in which service was performed. 1946 ADVA 696

Benefits of legislation allowing Administrator [now Secretary] of Veterans' Affairs to provide automobile or other conveyance for certain veterans are not available to those persons whose service consisted of service in organized military forces of Commonwealth of Philippines and who were ordered into service of Armed Forces of United States pursuant to military order of President of United States dated July 26, 1941, even though such persons may have been entitled to benefits for loss or loss of use of one or both legs, at or above ankle, incurred in services in World War II. 1947 ADVA 749

6. Payment of benefits

Allowable pensions are payable in Philippine pesos at rate of one Philippine peso for every dollar authorized to be paid under laws providing for service-connected disability or death pensions or such payment may be made in American dollars, but, in latter case, only if each payment is made in amount which, according to rate of exchange prevailing at time of payment, will conform to requirement that payment be made at a rate of 1 Philippine peso for each dollar authorized. 1946 ADVA 696

Manner of payment is in no way conditioned upon place of residence of beneficiary. 1946 ADVA 696

Regarding those cases in which governing income limitations are expressed in pesos, annual income reported in dollars is to be converted to pesos at current rate of exchange. 1964 ADVA 986

§ 108. Seven-year absence presumption of death

(a) No State law providing for presumption of death shall be applicable to claims for benefits under laws administered by the Secretary.

(b) If evidence satisfactory to the Secretary is submitted establishing the continued and unexplained absence of any individual from that individual's home and family for seven or more years, and establishing that after diligent search no evidence of that individual's
existence after the date of disappearance has been found or received, the death of such individual as of the date of the expiration of such period shall be considered as sufficiently proved.

(c) Except in a suit brought pursuant to section 1984 of this title [38 USCS § 1984], the finding of death made by the Secretary shall be final and conclusive.

Prior law and revision:
This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Amendments:
1991. Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "administered by the Secretary" for "administered by the Veterans' Administration" and "Secretary" for "Administrator".

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:148

Am Jur:
44A Am Jur 2d, Insurance § 1891
77 Am Jur 2d, Veterans and Veterans' Laws § 157
1. Generally
2. Operation of presumption
3. Rebuttal of presumption
4. Miscellaneous

1. Generally

Suit to recover proceeds of policy may not be maintained as practical matter, prior to expiration of statutory seven-year period, cause of action to recover proceeds of policy accrues at time when, under 38 USCS § 108, beneficiary might successfully maintain her suit, and that is date from which six-year statute of limitations (which is, under predecessor to 38 USCS § 1984, applicable to suits on national service life insurance policies) should be computed; cause of action for proceeds of national service life insurance policy issued to one who disappeared and is claimed to have died in 1943, but whose death, if found to have occurred after 1943, might still be within coverage of his policy (since, if he was totally disabled at time of his disappearance, he would, under predecessor to 38 USCS § 1912, have been eligible for waiver of premiums), does not accrue until 1950, as of which time insured, having been continuously and unexplainedly absent for period of seven years, is, under predecessor to 38 USCS § 108, presumed dead. Peak v United States (1957) 353 US 43, 1 L Ed 2d 631, 77 S Ct 613

Decree presuming death because of unexplained absence is not bar to payment of benefits to dependent of incompetent veteran who has disappeared. 1939 ADVA 443
2. Operation of presumption

Presumption of death from absence is that death occurred at end of 7 year period, not at beginning of such period or during its continuance. United States v Robertson (1930, CA9 Or) 44 F.2d 317; United States v O'Brien (1931, CA4 Va) 51 F.2d 37; McCune v United States (1932, CA6 Ky) 56 F.2d 572

Presumption of death of insured from absence of seven years does not establish time of death. United States v Hayman (1932, CA5 Tex) 62 F.2d 118

Date of disappearance of individual during period of hostilities is date of individual's death where there is evidence that insured disappeared while actively participating in combat or under comparable conditions, that he was not accounted for as prisoner of war or as parolee or internee, that there was no subsequent official or other information as to his existence subsequent to his disappearance, that his family received no information as to his whereabouts subsequent to his disappearance, or after restoration of normal conditions, that since termination of hostilities and/or declaration of peace no intelligence has been received which would rebut inference of death arising from facts; however, when evidence is insufficient to indicate probability of death as of definite date, date of death is date 7 years after unexplained absence. 1953 ADVA 929

3. Rebuttal of presumption

Beneficiary is not precluded from introducing evidence, such as insured's frail health and disability and other relevant facts, from which jury might conclude that insured's presumed death occurred at earlier date, when policy was in force, since statute does not purport to create conclusive presumption that insured died at end of seven-year period. Peak v United States (1957) 353 US 43, 1 L Ed 2d 631, 77 S Ct 613

Although presumption is that insured died immediately upon expiration of period of seven years, evidence may be adduced to rebut that presumption and show the true date of death. United States v Willhite (1955, CA4 NC) 219 F.2d 343

Presumption of death of insured from evidence of his disappearance in 1919 and issuance of letters of administration thereon in 1929, is overcome by evidence that he enlisted under assumed name and that some time after his said disappearance, he resumed his real name and in 1923 became married and was seen alive and well in 1928; thus, evidence failed to establish death of insured. Swanson v United States (1933, DC NY) 3 F Supp 813

Appellant was not entitled to presume that first wife was dead, for purposes of having Veterans' Administration [now Department of Veterans Affairs] recognize second wife as spouse for Veterans' Administration [now Department of Veterans Affairs] benefits, since RO interviewed both appellant and first wife and found that it was veteran who abandoned first wife, not reverse; therefore, he could not presume she was dead at time he married second wife. Brillo v Brown (1994) 7 Vet App 102

4. Miscellaneous

Claim for proceeds of national service life insurance policy filed by beneficiary of insured who disappeared in 1943, and who, because continuously and unexplanationly absent since his disappearance, is, under predecessor to 38 USCS § 108, presumed dead as of 1950, should be considered as including lesser claim that, because of his total and permanent disability at time of his disappearance, insured was entitled to waiver of premiums provided for in predecessor to 38 USCS § 1912, where beneficiary alleges that insured was so disabled, and claim for insurance proceeds is made within one year subsequent to presumed date of insured's death and thus complies with requirement of § 1912 that premium waiver claims be made within one year of death. Peak v United States (1957) 353 US 43, 1 L Ed 2d 631, 77 S Ct 613

BVA's findings that veteran's third marriage was invalid under Philippine law was supported by record showing that he wed third wife only six years after his second wife became absent and he did not believe his second wife was dead at time he remarried; presumption of death was also not applicable since absence of second wife was not unexplained and there was no diligent search to ascertain her existence. Badua v Brown (1993) 5 Vet App 472
§ 109. Benefits for discharged members of allied forces

(a) (1) In consideration of reciprocal services extended to the United States, the Secretary, upon request of the proper officials of the government of any nation allied or associated with the United States in World War I (except any nation which was an enemy of the United States during World War II), or in World War II, may furnish to discharged members of the armed forces of such government, under agreements requiring reimbursement in cash of expenses so incurred, at such rates and under such regulations as the Secretary may prescribe, medical, surgical, and dental treatment, hospital care, transportation and traveling expenses, prosthetic appliances, education, training, or similar benefits authorized by the laws of such nation for its veterans, and services required in extending such benefits. Hospitalization in a Department facility shall not be afforded under this section, except in emergencies, unless there are available beds surplus to the needs of veterans of this country. The Secretary may also pay the court costs and other expenses incident to the proceedings taken for the commitment of such discharged members who are mentally incompetent to institutions for the care or treatment of the insane.

   (2) The Secretary, in carrying out the provisions of this subsection, may contract for necessary services in private, State, and other Government hospitals.

   (3) All amounts received by the Department as reimbursement for such services shall be credited to the current appropriation of the Department for which expenditures were made under this subsection.

(b) Persons who served in the active service in the armed forces of any government allied with the United States in World War II and who at time of entrance into such active service were citizens of the United States shall, by virtue of such service, and if otherwise qualified, be entitled to the benefits of chapters 31 and 37 of this title [38 USCS §§ 3100 et seq. and 3701 et seq.] in the same manner and to the same extent as veterans of World War II are entitled. No such benefit shall be extended to any person who is not a resident of the United States at the time of filing claim, or to any person who has applied for and received the same or any similar benefit from the government in whose armed forces he served.

(c) (1) Any person who served during World War I or World War II as a member of any armed force of the Government of Czechoslovakia or Poland and participated while so serving in armed conflict with an enemy of the United States and has been a citizen of the United States for at least ten years shall, by virtue of such service, and upon satisfactory evidence thereof, be entitled to hospital and domiciliary care and medical services within the United States under chapter 17 of this title [38 USCS §§ 1701 et seq.] to the same extent as if such service had been performed in the Armed Forces of the United States unless such person is entitled to, or would, upon application thereof, be entitled to, payment for equivalent care and services under a program established by the foreign government concerned for persons who served in its armed forces in World War I or World War II.

   (2) In order to assist the Secretary in making a determination of proper service eligibility under this subsection, each applicant for the benefits thereof shall furnish an authenticated certification from the French Ministry of Defense or the British War Office as to records in either such Office which clearly indicate military service of the
applicant in the Czechoslovakian or Polish armed forces and subsequent service in or with the armed forces of France or Great Britain during the period of World War I or World War II.

Prior law and revision:
This section is based on 38 USC 697f, 2127 (Acts June 22, 1944, ch 268, Title VI, Chapter XV, § 1506, as added Dec. 28, 1945, ch 588, § 10, 59 Stat. 631; June 17, 1957, P. L. 85-56, Title XXI, § 2107, 71 Stat. 157).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Amendments:
1986. Act Oct. 28, 1986, in subsec. (b) purported to substitute "such person" for "he"; however such amendment could not be executed inasmuch as "he" does not appear in such subsection.
1991. Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 34, 55, 138
1. Generally
2. Benefits available
3. Disqualifications
4. Payment of benefits to survivors
5. Service in particular forces

1. Generally
Question whether particular service is active military or naval service of any government allied with the United States in World War II is question of fact in individual case to be determined by either examination of record or report from proper agency of government of nation with which United States was allied in World War II. 1946 ADVA 698

Eligibility under statute providing like benefits for American veterans and certain veterans of allied armies is dependent upon service in active military or naval forces of government which declared war or maintained state of war against common enemies and was allied with United States in World War II, whether such country fought declared or de facto war; such service between September 16, 1940 and July 25, 1947 is basis for determining eligibility; during this time claimant's government must have been at war with common enemies, and any service performed at time when such government was at war with United States or its allies is excluded in determining eligibility. 1947 ADVA 770

2. Benefits available
Benefits provided for under Servicemen's Readjustment Act of 1944 (38 USCS §§ 3701 et seq.) are not same, nor are they similar to, "war service gratuity" and "re-establishment credit" apparently paid in cash to claimant by Canadian government under Canadian law. 1946 ADVA 717
3. Disqualifications

Citizen of United States, who is veteran of Royal Canadian Air Force, is not entitled to benefits otherwise available under Federal law where he is presently receiving benefits under Canadian law. 1946 ADVA 719

Veteran's discharge from Royal Canadian Air Force is merely change of status, and therefore veteran's discharge under dishonorable conditions from United States Armed Forces is bar to receipt of benefits on basis of his service in Royal Canadian Air Force. 1948 ADVA 782

4. Payment of benefits to survivors

Unremarried widow of person who served in military or naval forces of government allied with United States in World War II is not, by virtue of his service, eligible for benefits under statute providing such benefits on equal basis with American veterans or those otherwise entitled. 1950 ADVA 851

5. Service in particular forces

Veteran of Canadian Armed Forces receiving pension from Canadian Government and pursuing full-time institutional training under Federal law is entitled to vocational rehabilitation funds under statute providing same support for persons who served in active military or naval service of any government allied with United States in World War II as provided for persons who served in active military or naval service of United States. 1948 ADVA 790

Persons who served in irregular (guerrilla) forces of nations allied with United States in World War II are not within purview of statute providing like benefits for American veterans and certain veterans of other nations, and are not brought within its purview by legislation of foreign government retroactively conferring active duty status on such irregular service. 1949 ADVA 817

Appellant who was injured while he was 13-year old civilian citizen of Hungary following instructions of Russian Army officer, and who later moved to U.S. and became naturalized citizen, was not eligible for benefits under statute since he did not serve with allied government and was not U.S. citizen at time of injury. Selley v Brown (1994) 6 Vet App 196

§ 110. Preservation of disability ratings

A rating of total disability or permanent total disability which has been made for compensation, pension, or insurance purposes under laws administered by the Secretary, and which has been continuously in force for twenty or more years, shall not be reduced thereafter, except upon a showing that such rating was based on fraud. A disability which has been continuously rated at or above any evaluation for twenty or more years for compensation purposes under laws administered by the Secretary shall not thereafter be rated at less than such evaluation, except upon a showing that such rating was based on fraud. The mentioned period shall be computed from the date determined by the Secretary as the date on which the status commenced for rating purposes.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Former 38 USC § 746 (Act March 17, 1954, ch 100, 68 Stat. 29).

Amendments:
1962. Act Oct. 15, 1962 (effective as provided by § 7 of such Act, which appears as a note to this section), inserted "The mentioned period shall be computed from the date determined by the Administrator as the date on which the status commenced for rating purposes."

1964. Act Aug. 19, 1964, in the section catchline, deleted "total" following "Preservation of"; in the section, inserted "A disability which has been continuously rated at or above any percentage for twenty or more years for compensation purposes under laws administered by the Veterans' Administration shall not thereafter be rated at less than such percentage, except upon a showing that such rating was based on fraud.".

1969. Act June 23, 1969 (effective 8/19/64, as provided by § 1 of such Act), substituted "evaluation" for "percentage" wherever appearing.

1991. Act Aug 6, 1991, substituted "Secretary" for "Administrator" and "administered by the Secretary" for "administered by the Veterans' Administration".

Other provisions:

Effective date of amendments made by Act Oct. 15, 1962. Act Oct. 15, 1962, P. L. 87-825, § 7, 76 Stat. 950, provides: "This Act [amending this section and 38 USCS §§ 1115, 1159, 5110, 5112; adding 38 USCS § 5310; repealing 38 USC §§ 3004, 3011] shall take effect on the first day of the second calendar month which begins after the date of enactment of this Act, but no payments shall be made by reason of this Act for any period before such effective date. Payments for any period before such effective date shall be made under prior laws and regulations. The provisions of this Act with respect to reductions and discontinuances shall be applicable only where the event requiring such reduction or discontinuance occurs on or after such effective date. If such event occurred before such effective date, action shall be taken pursuant to the prior laws and regulations."

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 30
1. Generally
2. Relationship with other laws
3. Application
   4. Determination of fraud

1. Generally
   Twenty-year period under predecessor to 38 USCS § 110 begins to run from date on which rating decision of total disability or permanent total disability is signed by member of appropriate Veterans' Administration [now Department of Veterans Affairs] Rating Board. 1954 ADVA 942

2. Relationship with other laws
   Renouncement of compensation pursuant to 38 USCS § 5306 extinguishes entitlement and protection of disability rating under 38 USCS § 110. VA GCO 5-83

3. Application
   Rating of permanent and total disability reduced or discontinued prior to effective date of legislation insulating such rate is not protected thereby, unless it is established that reduction was in error and that permanent total disability actually continued to exist subsequent to effective date of such statute. 1954 ADVA 943

   Veteran rated as permanently and totally disabled whose award is suspended prior to expiration of 20-year period because of his disappearance is not considered to have had rating of permanent total disability continuously in force for 20 or more years under predecessor to 38 USCS § 110, and is not entitled to protection of such statute unless Veterans' Administration
subsequently finds such veteran was permanently and totally disabled continuously over said 20-year period. 1955 ADVA 954

Temporary total disability rating assigned more than 20 years ago does not qualify under 38 USCS § 110, since by law it was good for only one year. VA GCO 8-79

Barring fraud, rating of 100 percent based on individual unemployability is protected under § 110 where it has been in effect for more than 20 years even though veteran has, in fact, been employed most of that time. VA GCO 4-85

Veteran's rating for post-traumatic brain syndrome with healed fracture was for compensation purposes, hence under statute's plain meaning is protected. Salgado v Brown (1992) 4 Vet App 316

Appellant's 60 percent rating for service-connected Pott's disease is preserved by operation of law as having been in effect for at least 20 years under 38 USCS § 110. Colayong v West (1999) 12 Vet App 524, 1999 US App Vet Claims LEXIS 885

4. -Determination of fraud

Elements upon which adjudicator might conclude that rating was based on fraud are (1) knowledge of facts upon which payments are based, (2) knowledge of change in circumstances, (3) knowledge that change removes eligibility for some or all of compensation being paid (4) failure to advise agency of change with actual intention of receiving or obtaining payments or of obtaining increased payments, and (5) actual receipt or retention of payments or increased payments as consequence of intentional failure to disclose. VA GCO 4-85

§ 111. Payments or allowances for beneficiary travel

(a) Under regulations prescribed by the President pursuant to the provisions of this section, the Secretary may pay the actual necessary expense of travel (including lodging and subsistence), or in lieu thereof an allowance based upon mileage traveled, of any person to or from a Department facility or other place in connection with vocational rehabilitation, counseling required by the Secretary pursuant to chapter 34 or 35 of this title [38 USCS §§ 3451 et seq. or 3500 et seq.], or for the purpose of examination, treatment, or care. In addition to the mileage allowance authorized by this section, there may be allowed reimbursement for the actual cost of ferry fares, and bridge, road, and tunnel tolls.

(b) (1) Except as provided in subsection (c) of this section and notwithstanding (g)(2)(A) of this section or any other provision of law, if, with respect to any fiscal year, the Secretary exercises the authority under this section to make any payments, the Secretary shall make the payments provided for in this section to or for the following persons for travel during such fiscal year for examination, treatment, or care for which the person is eligible:

(A) A veteran or other person whose travel is in connection with treatment or care for a service-connected disability.
(B) A veteran with a service-connected disability rated at 30 percent or more.
(C) A veteran receiving pension under section 1521 of this title [38 USCS § 1521].
(D) A veteran (i) whose annual income (as determined under section 1503 of this title [38 USCS § 1503]) does not exceed the maximum annual rate of pension which would be payable to such veteran if such veteran were eligible for pension under section 1521 of this title [38 USCS § 1521], or (ii) who is determined,
under regulations prescribed by the Secretary, to be unable to defray the expenses of the travel for which payment under this section is claimed.

(E) Subject to paragraph (3) of this subsection, a veteran or other person whose travel to or from a Department facility is medically required to be performed by a special mode of travel and who is determined under such regulations to be unable to defray the expenses of the travel for which payment under this section is claimed.

(F) A veteran whose travel to a Department facility is incident to a scheduled compensation and pension examination.

(2) The Secretary may make payments provided for in this section to or for any person not covered by paragraph (1) of this subsection for travel by such person for examination, treatment, or care. Such payments shall be made in accordance with regulations which the Secretary shall prescribe.

(3) (A) Except as provided in subparagraph (B) of this paragraph, the Secretary shall not make payments under this section for travel performed by a special mode of travel unless (i) the travel by such mode is medically required and is authorized by the Secretary before the travel begins, or (ii) the travel by such mode is in connection with a medical emergency of such a nature that the delay incident to obtaining authorization from the Secretary to use that mode of travel would have been hazardous to the person's life or health.

(B) In the case of travel by a person to or from a Department facility by special mode of travel, the Secretary may provide payment under this section to the provider of the transportation by special mode before determining the eligibility of such person for such payment if the Secretary determines that providing such payment is in the best interest of furnishing care and services. Such a payment shall be made subject to subsequently recovering from such person the amount of the payment if such person is determined to have been ineligible for payment for such travel.

(c) (1) Except as otherwise provided in this subsection, the Secretary, in making a payment under this section to or for a person described in subparagraph (A), (B), (C), or (D) of subsection (b)(1) of this section for travel for examination, treatment, or care, shall deduct from the amount otherwise payable an amount equal to $3 for each one-way trip.

(2) In the case of a person who is determined by the Secretary to be a person who is required to make six or more one-way trips for needed examination, treatment, or care, during the remainder of the calendar month in which the determination is made or during any subsequent calendar month during the one-year period following the last day of the month in which the determination is made, the amount deducted by the Secretary pursuant to paragraph (1) of this subsection from payments for trips made to or from such facility during any such month shall not, except as provided in paragraph (5) of this subsection, exceed $18.

(3) No deduction shall be made pursuant to paragraph (1) of this subsection in the case of a person whose travel to or from a Department facility is performed by a special mode of travel for which payment under this section is authorized under subsection (b)(3) of this section.

(4) The Secretary may waive the deduction requirement of paragraph (1) of this subsection in the case of the travel of any veteran for whom the imposition of the
deduction would cause severe financial hardship. The Secretary shall prescribe in regulations the conditions under which a finding of severe financial hardship is warranted for purposes of this paragraph.

(5) Whenever the Secretary increases or decreases the rates of allowances or reimbursement to be paid under this section, the Secretary shall, effective on the date on which such increase or decrease takes effect, adjust proportionately the dollar amounts specified in paragraphs (1) and (2) of this subsection as such amounts may have been increased or decreased pursuant to this paragraph before such date.

(d) Payment of the following expenses or allowances in connection with vocational rehabilitation, counseling, or upon termination of examination, treatment, or care, may be made before the completion of travel:

(1) The mileage allowance authorized by subsection (a) of this section.
(2) Actual local travel expenses.
(3) The expense of hiring an automobile or ambulance, or the fee authorized for the services of a nonemployee attendant.

(e) When any person entitled to mileage under this section requires an attendant (other than an employee of the Department) in order to perform such travel, the attendant may be allowed expenses of travel upon the same basis as such person.

(f) The Secretary may provide for the purchase of printed reduced-fare requests for use by veterans and their authorized attendants when traveling at their own expense to or from any Department facility.

(g) (1) In carrying out the purposes of this section, the Secretary, in consultation with the Administrator of General Services, the Secretary of Transportation, the Comptroller General of the United States, and representatives of organizations of veterans, shall conduct periodic investigations of the actual cost of travel (including lodging and subsistence) to beneficiaries while traveling to or from a Department facility or other place pursuant to the provisions of this section, and the estimated cost of alternative modes of travel, including public transportation and the operation of privately owned vehicles. The Secretary shall conduct such investigations immediately following any alteration in the rates described in paragraph (3)(C) of this subsection, and, in any event, immediately following the enactment of this subsection [enacted Oct. 21, 1976] and not less often than annually thereafter, and based thereon, shall determine rates of allowances or reimbursement to be paid under this section.

(2) In no event shall payment be provided under this section--

(A) unless the person claiming reimbursement has been determined, pursuant to regulations which the Secretary shall prescribe, to be unable to defray the expenses of such travel (except with respect to a person receiving benefits for or in connection with a service-connected disability under this title, a veteran receiving or eligible to receive pension under section 1521 of this title [38 USCS § 1521], or a person whose annual income, determined in accordance with section 1503 of this title [38 USCS § 1503], does not exceed the maximum annual rate of pension which would be payable to such person if such person were eligible for pension under section 1521 of this title [38 USCS § 1521];
(B) to reimburse for the cost of travel by privately owned vehicle in any amount in excess of the cost of such travel by public transportation unless (i) public transportation is not reasonably accessible or would be medically inadvisable, or (ii) the cost of such travel is not greater than the cost of public transportation; and (C) in excess of the actual expense incurred by such person as certified in writing by such person.

(3) In conducting investigations and determining rates under this section, the Secretary shall review and analyze, among other factors, the following factors:

(A) (i) Depreciation of original vehicle costs;
(ii) gasoline and oil costs;
(iii) maintenance, accessories, parts, and tire costs;
(iv) insurance costs; and
(v) State and Federal taxes.
(B) The availability of and time required for public transportation.
(C) The per diem rates, mileage allowances, and expenses of travel authorized under sections 5702 and 5704 of title 5 [5 USCS §§ 5702 and 5704] for employees of the United States.

(4) Before determining rates or adjusting amounts under this section and not later than sixty days after any alteration in the rates described in paragraph (3)(C) of this subsection, the Secretary shall submit to the Committees on Veterans' Affairs of the House of Representatives and the Senate a report containing the rates and amounts the Secretary proposes to establish or continue with a full justification therefor in terms of each of the limitations and factors set forth in this section.

(h) The Secretary, in consultation and coordination with the Secretary of Transportation and appropriate representatives of veterans' service organizations, shall take all appropriate steps to facilitate the establishment and maintenance of a program under which such organizations, or individuals who are volunteering their services to the Department, would take responsibility for the transportation, without reimbursement from the Department, to Department facilities of veterans (primarily those residing in areas which are geographically accessible to such facilities) who seek services or benefits from the Department under chapter 17 [38 USCS §§ 1701 et seq.] or other provisions of this title.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:

1960. Act July 5, 1960, in subsec. (a), inserted "In addition to the mileage allowance authorized by this section, there may be allowed reimbursement for the actual cost of ferry fares, and bridge, road, and tunnel tolls.".
1966. Act March 3, 1966, in subsec. (a), substituted "34" for "33". Act June 18, 1966, substituted new subsec. (b) for one which read: "Mileage may be paid under this section in connection with vocational rehabilitation, counseling, or upon termination of examination, treatment, or care, before the completion of travel.".

1976. Act Oct. 21, 1976 (effective as provided by § 211 of such Act, which appears as a note to this section), in subsec. (a), inserted "pursuant to the provisions of this section"; added subsec. (e).

1979. Act Dec. 20, 1979 (effective as provided by § 206 of such Act, which appears as a note to this section), in subsec. (e)(2)(A), substituted "pursuant to regulations which the Administrator shall prescribe" for "based on an annual declaration and certification by such person" and substituted "a person receiving benefits for or in connection with a service-connected disability under this title, a veteran receiving or eligible to receive pension under section 521 of this title, or a person whose annual income, determined in accordance with section 503 of this title, does not exceed the maximum annual rate of pension which would be payable to such person if such person were eligible for pension under section 521 of this title", for "a veteran receiving benefits for or in connection with a service-connected disability under this title".

1982. Act Oct. 12, 1982, in subsec. (e)(4), substituted "and" for ",", and not later than sixty days after the effective date of this subsection, and thereafter".

1988. Act May 20, 1988 (effective with respect to travel performed after 6/30/88 as provided by § 108(g) of such Act, which appears as a note to this section) substituted the section heading for one which read: "§ 111. Travel expenses"; redesignated subsecs. (b)-(e) as subsecs. (d)-(g), respectively, and added new subsecs. (b) and (c).

Such Act further, in subsec. (d), as so redesignated, in para. (1), substituted "The" for "the" and "of this section." for "hereof;", in para. (2), substituted "Actual" for "actual" and the concluding period for the semicolon, and in para. (3), substituted "The" for "the"; in subsec. (g)(4), inserted "or adjusting amounts" and "and amounts"; and added subsec. (h).

1991. Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Department" for "Veterans' Administration", "Secretary" for "Administrator" (except in subsec. (g)(1) following "consultation with the"), and "Department facility" for "Veterans' Administration facility".


Other provisions:


Ex. Or. Nos. 10810, 11142, superseded. Ex. Or. No. 11142, formerly set out as a note to this section, was superseded by Ex. Or. No. 11302 of Sept. 6, 1966, 31 Fed. Reg. 11741, which appears as a note to this section. The order prescribed regulations governing allowances.


"By virtue of the authority vested in me by Section 111 of Title 38 of the United States Code, as amended by the Act of June 18, 1966 (Public Law 89-455), it is hereby ordered as follows:
"Section 1. The Administrator of Veterans' Affairs may authorize or approve the payment of the actual necessary expenses of travel, including lodging and subsistence, of any claimant or beneficiary of the Veterans' Administration traveling to or from a Veterans' Administration facility, or other place, in connection with vocational rehabilitation or counseling, or for the purpose of examination, treatment, or care.

"The Administrator may authorize or approve such payment to the claimant or beneficiary, or, in his discretion, to the person who or the organization which has actually paid the expenses of such travel, including lodging and subsistence.

"Sec. 2. The Administrator of Veterans' Affairs may authorize or approve in lieu of actual necessary expenses of travel, including lodging and subsistence, payment of an allowance in such amount per mile as the Administrator shall from time to time fix pursuant to 38 U.S.C. 111 as affected by this order, to any claimant or beneficiary of the Veterans' Administration traveling to or from a Veterans' Administration facility, or other place, in connection with vocational rehabilitation or counseling, or for the purpose of examination, treatment, or care. In addition to such mileage allowance, the Administrator may allow reimbursement for the actual cost of ferry fares, and bridge, road, and tunnel tolls. In his discretion, the Administrator may authorize or approve such payment and such reimbursement to the person who or the organization which has actually paid the expenses of such travel, including lodging and subsistence.

"Sec. 3. Whenever a claimant or beneficiary requires an attendant other than an employee of the Veterans' Administration for the performance of travel specified in Sections 1 and 2 hereof, the travel expenses of such attendant may be allowed in the same manner and to the same extent that travel expenses are allowed to such claimant or beneficiary.

"Sec. 4. Payment of the following expenses or allowances in connection with vocational rehabilitation, counseling, or upon termination of examination, treatment, or care, may be made before the completion of travel:

"a. The mileage allowance and fare and tolls authorized by Section 2 hereof.

"b. Actual local travel expenses.

"c. The expense of hiring an automobile or ambulance, or the fee authorized for services of a non-employee attendant.

"Sec. 5. The Administrator of Veterans' Affairs may prescribe such rules and regulations not inconsistent herewith as may be necessary to effectuate the provisions of this order.

"Sec. 6. Executive Order No. 11142 of February 12, 1964, is hereby superseded.".

Effective date of amendments made by Act Oct. 21, 1976. Act Oct. 21, 1976, P. L. 94-581, Title II, § 211, 90 Stat. 2866, provides: "Except as otherwise provided in this Act, the amendments made by this Act to title 38, United States Code [amending this section among other things; for full classification, consult USCS Tables volumes], shall take effect on October 1, 1976, or on the date of enactment [enacted Oct. 21, 1976], whichever is later."

Effective date of amendments made by Title II of Act Dec. 20, 1979. Act Dec. 20, 1979, P. L. 96-151, Title II, § 206, 93 Stat. 1094, provides: "Except as otherwise provided in section 205(b) [38 USCS § 1713 note], the amendments made by this title [amending this section, among other things; for full classification, consult USCS Tables volumes] shall take effect on January 1, 1980."

Availability of funds for beneficiary travel. Act Aug. 26, 1980, P. L. 96-330, Title IV, § 406, 94 Stat. 1052, provides: "No provision of law enacted after the date of the enactment of this Act which imposes any restriction or limitation on the availability of funds for the travel and transportation of officers and employees of the executive branch of the Government and their dependents, or on the transportation of things of such officers and employees and their dependents, shall be applicable to the travel of eligible veterans, dependents, or survivors, for which reimbursement is authorized under title 38, United States Code, pursuant to the terms
and conditions of section 111 of such title [this section], unless such provision is expressly made applicable to the travel of such veterans, dependents, or survivors.”.

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.


“(a)(1) If by January 1, 1984, the Administrator of Veterans' Affairs has not prescribed the regulations that the Administrator is required by subsection (e)(2)(A) of section 111 of title 38, United States Code [subsec. (e)(2)(A) of this section], to prescribe, payments for travel that occurs during the period beginning on such date and ending on the day on which the Administrator prescribes such regulations may not be made under such section to any person except--

“(A) a person receiving benefits under such title for or in connection with a service-connected disability;

“(B) a veteran receiving or eligible to receive pension under section 521 of such title [now 38 USCS § 1521]; or

“(C) a person whose travel to a Veterans' Administration facility was required to be performed by a special mode of transportation and such travel (i) was authorized by the Administrator before such travel, or (ii) was in connection with a medical emergency of such a nature that the delay incident to obtaining authorization under subclause (i) would have been hazardous to the person's life or health.

“(2) For the purpose of this subsection, the term 'service-connected' has the meaning given such term in section 101(16) of title 38, United States Code.

“(b) The Administrator of Veterans' Affairs shall review the making of payments under section 111 [this section] for the purpose of affecting management improvements and economies in the making of such payments. Not later than April 1, 1984, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report describing and explaining the results of such review and including any recommendation for legislative and administrative action that the Administrator considers appropriate.”.

Transition provision. Act May 20, 1988, P. L. 100-322, Title I, Part A, § 108(f), 102 Stat. 498, provides: "In determining for the purposes of subsection (b)(1) of section 111 of title 38, United States Code, as amended by subsection (a), whether during fiscal year 1988 the Administrator has exercised the authority under that section to make payments there shall be disregarded any exercise of authority under that section before the date of the enactment of this Act.”.

Effective date of Act May 20, 1988 amendments. Act May 20, 1988, P. L. 100-322, Title I, Part A, § 108(g), 102 Stat. 499, provides: "The amendments made by subsection (a) [amending subsecs. (b)-(g) of this section] shall take effect with respect to travel performed after June 30, 1988.”.

Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17

Department of Veterans Affairs-Board of Veterans' Appeals: Appeals regulations, 38 CFR Part 19

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References
Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 54, 69, 76

1. Medical examinations

Government must reimburse claimant for full amount expended by him in reporting for examination in his own conveyance, pursuant to request of Veterans' Administration [now Department of Veterans Affairs], where use thereof resulted in no increased cost to Government. 1932 ADVA 86

If advance authorization is not furnished, Administrator [now Secretary] is to authorize reimbursement of proper travel expense in connection with physical examination at government request. 1954 ADVA 947

When physical examination is directed for convenience and purposes of Government, transportation at Government expense is matter of right and not matter of discretion on part of authorizing official; if advance authorization is not furnished, Administrator [now Secretary] is to authorize reimbursement of proper expense in connection therewith. 1954 ADVA 947

2. Travel related expenses

Cost of necessary medical treatment incident to authorized travel to hospital is part and parcel of expense of such travel and is to be paid for as such. 1934 ADVA 276

§ 112. Presidential memorial certificate program

(a) At the request of the President the Secretary may conduct a program for honoring the memory of deceased veterans, discharged under honorable conditions, by preparing and sending to eligible recipients a certificate bearing the signature of the President and expressing the country's grateful recognition of the veteran's service in the Armed Forces. The award of a certificate to one eligible recipient will not preclude authorization of another certificate if a request is received from some other eligible recipient.

(b) For the purpose of this section an "eligible recipient" means the next of kin, a relative or friend upon request, or an authorized service representative acting on behalf of such relative or friend.

(c) A certificate may not be furnished under the program under subsection (a) on behalf of a deceased person described in section 2411(b) of this title [38 USCS § 2411(b)].

Amendments:


2002. Act Dec. 6, 2002 (applicable as provided by § 201(d) of such Act, which appears as note a note to this section), added subsec. (c).

Other provisions:

Applicability of Dec. 6, 2002 amendments. Act Dec. 6, 2002, P. L. 107-330, Title II, § 201(d), 116 Stat. 2823, provides: "The amendments made by this section [amending 38 USCS §§ 112, 2301, 2306] shall apply with respect to deaths occurring on or after the date of the enactment of this Act.".
§ 113. **Treatment of certain programs under sequestration procedures**

(a) The following programs shall be exempt from sequestration or reduction under part C of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 901 et seq.) or any other sequestration law and shall not be included in any report specifying reductions in Federal spending:

1. Benefits under chapter 21 of this title [38 USCS §§ 2101 et seq.], relating to specially adapted housing and mortgage-protection life insurance for certain veterans with service-connected disabilities.
2. Benefits under section 2307 of this title [38 USCS § 2307], relating to burial benefits for veterans who die as the result of a service-connected disability.
3. Benefits under chapter 39 of this title [38 USCS §§ 3901 et seq.], relating to automobiles and adaptive equipment for certain disabled veterans and members of the Armed Forces.
4. Assistance and services under chapter 31 of this title [38 USCS §§ 3100 et seq.], relating to training and rehabilitation for certain veterans with service-connected disabilities.
5. Benefits under chapter 35 of this title [38 USCS §§ 3500 et seq.], relating to educational assistance for survivors and dependents of certain veterans with service-connected disabilities.
6. Benefits under subchapters I, II, and III of chapter 37 of this title [38 USCS §§ 3701 et seq., 3710 et seq., and 3720 et seq.], relating to housing loans for certain veterans and for the spouses and surviving spouses of certain veterans.

(b) The following accounts of the Department shall be exempt from sequestration or reduction under part C of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 901 et seq.) or any other sequestration law and shall not be included in any report specifying reductions in Federal spending:

1. The following life insurance accounts:
   A. The National Service Life Insurance Fund authorized by section 1920 of this title [38 USCS § 1920].
   B. The Veterans' Canteen Service revolving fund authorized by section 1922 of this title [38 USCS § 1922].
   C. The Veterans Special Life Insurance Fund authorized by section 1923 of this title [38 USCS § 1923].
   D. The Veterans Reopened Insurance Fund authorized by section 1925 of this title [38 USCS § 1925].
   E. The United States Government Life Insurance Fund authorized by section 1955 of this title [38 USCS § 1955].
   F. The Veterans Insurance and Indemnity appropriation authorized by section 1919 of this title [38 USCS § 1919].

2. The following revolving fund accounts:
(A) The Department of Veterans' Affairs Special Therapeutic and Rehabilitation Activities Fund established by section 1718(c) of this title [38 USCS § 1718(c)].

(B) The Veterans' Canteen Service revolving fund authorized by section 7804 of this title [38 USCS § 7804].

(c) (1) A benefit under section 2301, 2302, 2303, 2306, 2308 of this title [38 USCS §§ 2301, 2302, 2303, 2306, 2308] that is subject to reduction under a sequestration order or sequestration law shall be paid in accordance with the rates determined under the sequestration order or law (if any) in effect on the date of the death of the veteran concerned.

(2) A benefit paid to, or on behalf of, an eligible veteran for pursuit of a program of education or training under chapter 30, 31, 34, 35, or 36 of this title [38 USCS §§ 3001 et seq., 3100 et seq., 3451 et seq., 3500 et seq., or 3670 et seq.] that is subject to a sequestration order or a sequestration law shall be paid in accordance with the rates determined under the sequestration order or law (if any) in effect during the period of education or training for which the benefit is paid.

(3) In implementation of a sequestration order or law with respect to each account from which a benefit described in paragraph (1) or (2) of this subsection is paid (including the making of determinations of the amounts by which such benefits are to be reduced), the total of the amounts (as estimated by the Secretary after consultation with the Director of the Congressional Budget Office) by which payments of such benefit will be reduced by reason of such paragraph after the last day of the period during which such order or law is in effect shall be deemed to be additional reductions in the payments of such benefit made, and in new budget authority for such payments, during such period.

(d) In computing the amount of new budget authority by which a budget account of the Department is to be reduced for a fiscal year under a report of the Director of the Office of Management and Budget and the Congressional Budget Office, or under an order of the President under part C of the Balanced Budget and Emergency Deficit Control Act of 1985 [2 USCS §§ 901 et seq.], the base from which the amount of the reduction for such account is determined shall be established without regard to any amount of new budget authority in such account (determined under section 251(a)(6) of such Act [2 USCS § 901(a)(6)]) for any of the programs listed in subsection (a) of this section.

(e) This section applies without regard to any other provision of law (whether enacted before, on, or after the date of the enactment of this section [enacted Oct. 28, 1986]) unless such Act expressly provides that it is enacted as a limitation to this section.

(f) For the purposes of this section:

(1) The term "sequestration" means a reduction in spending authority and loan guarantee commitments generally throughout the Government under the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 901 et seq.) or any other law.

(2) The term "sequestration law" means a law enacted with respect to a sequestration under the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 901 et seq.) or any other law (under the procedures specified in that Act or otherwise).
(3) The term "sequestration order" means an order of the President issued under part C of such Act.

Amendments:

1987. Act Dec. 21, 1987 (effective 11/19/87, as provided by § 12(b) of such Act), in subsec. (a), added para. (6); in subsec. (c)(2), substituted "31, 34, 35, or 36" for "34, or 36"; and deleted subsec. (e), which read:

"If a final order issued by the President pursuant to a law providing for the cancellation of loan guarantee commitments imposes a limitation on the total amount of loans that may be guaranteed under chapter 37 of this title in any fiscal year, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a monthly report (not later than the 10th day of each month during the remainder of such fiscal year following the issuance of such final order) providing the following information:

"(1) The total amount of the loans for which commitments of guarantees were made under such chapter during the preceding month.

"(2) The total amount of the loans for which commitments were made during the fiscal year through the end of such preceding month.

"(3) The Administrator's estimates as to the total amounts of the loans for which commitments would, in the absence of any limits on such commitments or guarantees, be made during (A) the month in which the report is required to be submitted, and (B) the succeeding months of the fiscal year."

Such Act further redesignated former subsecs. (f) and (g) as subsecs. (e) and (f).

1988. Act May 20, 1988, in subsec. (a), in paras. (4) and (5), deleted "(but only with respect to fiscal year 1987)" following "service-connected disabilities"; and in subsec. (d), substituted "a report of the Director of the Office of Management and Budget" for "a joint report of the Directors of the Office of Management and Budget and the Congressional Budget Office".

1991. Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Department" for "Veterans' Administration", "Department of Veterans Affairs" for "Veterans' Administration", and "Secretary" for "Administrator".

Other provisions:

Application of section. Act Oct. 28, 1986, P. L. 99-576, Title VI, § 601(b), 100 Stat. 3289, provides: "Section 113 of title 38, United States Code (as added by subsection (a)), shall apply with respect to a sequestration order issued, or a sequestration law enacted, for a fiscal year after fiscal year 1986."

Restoration of certain revolving funds. Act May 20, 1988, P. L. 100-322, Title IV, Part B, § 411(a), 102 Stat. 547, provides:

"(1) Notwithstanding section 601(b) of the Veterans' Benefits Improvement and Health-Care Authorization Act of 1986 (Public Law 99-576) [note to this section], section 113(b)(2) of title 38, United States Code, shall apply with respect to a sequestration order issued, or a sequestration law enacted, for any fiscal year after fiscal year 1985.

"(2) The Secretary of the Treasury shall take such action as is necessary to implement paragraph (1). Not later than 60 days after the date of the enactment of this Act, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the action taken by the Secretary pursuant to that paragraph.".

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§ 114. Multiyear procurement

(a) The Secretary may enter into a multiyear contract for the procurement of supplies or services if the Secretary makes each of the following determinations:

(1) Appropriations are available for obligations that are necessary for total payments that would be required during the fiscal year in which the contract is entered into, plus the estimated amount of any cancellation charge payable under the contract.

(2) The contract is in the best interest of the United States by reason of the effect that use of a multiyear, rather than one-year, contract would have in--

(A) reducing costs;

(B) achieving economies in contract administration or in any other Department activities;

(C) increasing quality of performance by or service from the contractors; or

(D) encouraging effective competition.

(3) During the proposed contract period--

(A) there will be a continuing or recurring need for the supplies or services being procured;

(B) there is not a substantial likelihood of substantial changes in the need for such supplies or services in terms of the total quantity of such supplies or services or of the rate of delivery of such supplies or services; and

(C) the specifications for the supplies or services are expected to be reasonably stable.

(4) The risks relating to the prospective contractor's ability to perform in accordance with the specifications and other terms of the contract are not excessive.

(5) The use of a multiyear contract will not inhibit small business concerns in competing for the contract.

(6) In the case of the procurement of a pharmaceutical item for which a patent has expired less than four years before the date on which the solicitation of offers is issued, there is no substantial likelihood that increased competition among potential contractors would occur during the term of the contract as the result of the availability of generic equivalents increasing during the term of the contract.

(b) (1) A multiyear contract authorized by this section shall contain--

(A) a provision that the obligation of the United States under the contract during any fiscal year which is included in the contract period and is subsequent to the fiscal year during which the contract is entered into is contingent on the availability of sufficient appropriations (as determined by the Secretary pursuant to paragraph (2)(A) of this subsection) if, at the time the contract is entered into, appropriations are not available to cover the total estimated payments that will be required during the full term of the contract; and

(B) notwithstanding section 1502(a) of title 31 [31 USCS § 1502(a)], a provision for the payment of reasonable cancellation charges to compensate the contractor for nonrecurring, unrecovered costs, if any, if the performance is cancelled pursuant to the provision required by subparagraph (A) of this paragraph.

(2) (A) If, during a fiscal year after the fiscal year during which a multiyear contract is entered into under this section, the Secretary determines that, in light of other funding needs involved in the operation of Department programs, the amount of
funds appropriated for such subsequent fiscal year is not sufficient for such contract, the Secretary shall cancel such contract pursuant to the provisions required by paragraph (1)(A) of this subsection.

(B) Cancellation charges under a multiyear contract shall be paid from the appropriated funds which were originally available for performance of the contract or the payment of cancellation costs unless such funds are not available in an amount sufficient to pay the entire amount of the cancellation charges payable under the contract. In a case in which such funds are not available in such amount, funds available for the procurement of supplies and services for use for the same purposes as the supplies or services procured through such contract shall be used to the extent necessary to pay such cost.

(c) Nothing in this section shall be construed so as to restrict the Secretary's exercise of the right to terminate for convenience a contract under any other provision of law which authorizes multiyear contracting.

(d) The Secretary shall prescribe regulations for the implementation of this section.

(e) For the purposes of this section:
(1) The term "appropriations" has the meaning given that term in section 1511 of title 31 [31 USCS § 1511].
(2) The term "multiyear contract" means a contract which by its terms is to remain in effect for a period which extends beyond the end of the fiscal year during which the contract is entered into but not beyond the end of the fourth fiscal year following such fiscal year. Such term does not include a contract for construction or for a lease of real property.
(3) The term "nonrecurring, unrecovered costs" means those costs reasonably incurred by the contractor in performing a multiyear contract which (as determined under regulations prescribed under subsection (d) of this section) are generally incurred on a one-time basis.

Amendments:
1989. Act Dec. 18, 1989, substituted the section catchline for one which read: "§ 114. Multiyear procurement for certain medical items"; in subsec. (a), in the introductory matter, deleted "for use in Veterans' Administration health-care facilities" following "services"; in subsec. (b)(2)(A), deleted "health-care" following "Administration" and in subsec. (e), deleted para. (2) which read: "The term 'cancel' or 'cancellation' refers to the termination of a contract by the Administrator as required under paragraph (2)(B)(i) of this subsection." and redesignated paras. (3) and (4) as paras. (2) and (3), respectively.

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§ 115. Acquisition of real property
For the purposes of sections 314, 315, 316, and 2406 of this title [38 USCS §§ 314, 315, 316, and 2406] and subchapter I of chapter 81 of this title [38 USCS §§ 8101 et seq.], the Secretary may acquire and use real property--

(1) before title to the property is approved under section 3111 of title 40 [40 USCS § 3111]; and

(2) even though the property will be held in other than a fee simple interest in a case in which the Secretary determines that the interest to be acquired is sufficient for the purposes of the intended use.

Amendments:


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§ 116. Reports to Congress: cost information

Whenever the Secretary submits to Congress, or any committee of Congress, a report that is required by law or by a joint explanatory statement of a committee of conference of the Congress, the Secretary shall include with the report--

(1) a statement of the cost of preparing the report; and

(2) a brief explanation of the methodology used in preparing that cost statement.

Other provisions:

Applicability of section. Act Nov. 1, 2000, P. L. 106-419, Title IV, § 403(d)(2), 114 Stat. 1864, provides: "Section 116 of title 38, United States Code, as added by paragraph (1) of this subsection, shall apply with respect to any report submitted by the Secretary of Veterans Affairs after the end of the 90-day period beginning on the date of the enactment of this Act."

CHAPTER 3. DEPARTMENT OF VETERANS AFFAIRS

[§ 201-203. Repealed]
[§ 210-224. Repealed]
[§ 230-236. Repealed]
[§ 240-246. Repealed]
§ 301. Department
§ 302. Seal
§ 303. Secretary of Veterans Affairs
§ 304. Deputy Secretary of Veterans Affairs
§ 305. Under Secretary for Health
§ 306. Under Secretary for Benefits
§ 307. Under Secretary for Memorial Affairs
§ 308. Assistant Secretaries; Deputy Assistant Secretaries
§ 309. Chief Financial Officer
§ 310. Chief Information Officer
§ 311. General Counsel
§ 312. Inspector General
§ 313. Availability of appropriations
§ 314. Central Office
§ 315. Regional offices
§ 316. Colocation of regional offices and medical centers
§ 317. Center for Minority Veterans
§ 318. Center for Women Veterans
§ 319. Office of Employment Discrimination Complaint Adjudication
§ 320. Department of Veterans Affairs-Department of Defense Joint Executive Committee

Amendments:


Act Nov. 7, 1966, P. L. 89-785, title III, § 303(c), 80 Stat. 1377, amended the analysis of this chapter by substituting item 233 for one which read: "233. Employees' apparel; school transportation; recreational equipment; visual exhibits; personal property."


1970. Act March 26, 1970, P. L. 91-219, Title II, § 214(b), 84 Stat. 85, amended the analysis of this chapter by adding the subchapter IV heading and items 240-244.


Act Aug. 2, 1973, P. L. 93-82, Title IV, § 402(b), 87 Stat. 196, amended the analysis of this chapter by substituting item 234 for one which read: "234. Telephone service for medical officers."


1979. Act June 13, 1979, P. L. 96-22, Title V, § 503(c)(2), 93 Stat. 65, amended the analysis of this chapter by substituting item 235 for one which read: "235. Benefits to employees at oversea offices who are United States citizens."


1982. Act Oct. 14, 1982, P. L. 97-3-6, Title II, § 201(b), 96 Stat. 1433, amended the analysis of this chapter by substituting the item relating to section 243 for one which read: "243. Veterans' representatives."

1983. Act Nov. 21, 1983, P. L. 98-160, Title III, § 301(b), 97 Stat. 1004, amended the analysis of this chapter by adding the item relating to section 222.


"CHAPTER 3. VETERANS' ADMINISTRATION; OFFICERS AND EMPLOYEES

"SUBCHAPTER I-VETERANS' ADMINISTRATION

"Section

"201. Veterans' Administration an independent agency.

"202. Seal of the Veterans' Administration.

"203. Availability of appropriations.

"SUBCHAPTER II-ADMINISTRATOR OF VETERANS' AFFAIRS

"210. Appointment and general authority of Administrator; Deputy Administrator.

"211. Decisions by Administrator; opinions of Attorney General.

"212. Delegation of authority and assignment of duties.

"213. Contracts and personal services.

"214. Reports to the Congress.
"215. Publication of laws relating to veterans.
"216. Assistance to certain rehabilitation activities.
"217. Studies of rehabilitation of disabled persons.
"218. Security and law enforcement on property under the jurisdiction of the Veterans' Administration.
"220. Coordination and promotion of other programs affecting veterans and their dependents.
"221. Advisory Committee on Former Prisoners of War.
"222. Advisory Committee on Women Veterans.
"223. Rulemaking: procedures and judicial review
"224. Administrative settlement of tort claims

"SUBCHAPTER III-VETERANS' ADMINISTRATION REGIONAL OFFICES; EMPLOYEES
"230. Central and regional offices.
"231. Placement of employees in military installations.
"233. Employees' apparel; school transportation; recreational equipment; visual exhibits; personal property; emergency transportation of employees.
"234. Telephone service for medical officers and facility directors.
"235. Benefits to employees at overseas offices who are United States citizens.
"236. Administrative settlement of tort claims arising in foreign countries.

"SUBCHAPTER IV-VETERANS OUTREACH SERVICES PROGRAM
"240. Purpose; definitions.
"241. Outreach services.
"242. Veterans assistance offices.
"243. Outstationing of counseling and outreach personnel.
"244. Utilization of other agencies.
"245. Report to Congress.
"246. Veterans' cost-of-instruction payments to institutions of higher learning.


1996. Act Feb. 10, 1996, P. L. 104-106, Div E, Title LVI, § 5608(b), 110 Stat. 702, amended the analysis of this chapter by substituting item 310 for one which read: "310. Chief Information Resources Officer.".


§ 201-203. Repealed

These sections (Act Sept. 2, 1958, P. L. 85-857, § 1, 72 Stat. 1114; Act Sept. 28, 1976, P. L. 94-424, § 2(a), 90 Stat. 1332; Sept. 13, 1982, P. L. 97-258, § 2(j), 96 Stat. 1062; Nov. 21, 1983, P. L. 98-160, Title VII, § 702(1), 97 Stat. 1009) were repealed by Act Aug. 6, 1991, P. L. 102-83, § 2(a), 105 Stat. 378. Section 201 provided for the establishment of the Veterans' Administration as an independent agency (for similar provisions, see 38 USCS § 301); § 202 provided for the seal of the Veterans' Administration (for similar provisions, see 38 USCS § 302); and § 203 provided for availability of appropriations (for similar provisions, see 38 USCS § 313).

§ 210-224. Repealed

§ 214 provided for annual reports by the Administrator to Congress (for similar provisions, see 38 USCS § 529); § 215 provided for the publication of laws relating to veterans (for similar provisions, see 38 USCS § 525); § 216 provided for assistance in certain rehabilitation activities (for similar provisions, see 38 USCS § 521); § 217 provided for studies relative to the rehabilitation of disabled persons (for similar provisions, see 38 USCS § 522); § 218 provided for security and law enforcement on property under the jurisdiction of the Veterans' Administration (for similar provisions, see 38 USCS §§ 901 et seq); § 219 provided for the evaluation and collection of data (for similar provisions, see 38 USCS § 527); § 220 provided for the coordination and promotion of other programs affecting veterans and their dependents (for similar provisions, see 38 USCS § 523); § 221 provided for the Advisory Committee on Former Prisoners of War (for similar provisions, see 38 USCS § 541); § 222 provided for the Advisory Committee on Women Veterans (for similar provisions, see 38 USCS § 542); § 223 provided for procedures for and judicial review of rulemaking (for similar provisions, see 38 USCS §§ 501, 502); § 224 provided for settlement by the Administrator of claims for money damages against the United States (for similar provisions, see 38 USCS § 515).


§ 230-236. Repealed


§ 240-246. Repealed

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§ 301. Department

(a) The Department of Veterans Affairs is an executive department of the United States.

(b) The purpose of the Department is to administer the laws providing benefits and other services to veterans and the dependents and the beneficiaries of veterans.

(c) The Department is composed of the following:
   (1) The Office of the Secretary.
   (2) The Veterans Health Administration.
   (3) The Veterans Benefits Administration.
   (4) The National Cemetery Administration.
   (5) The Board of Veterans' Appeals.
   (6) The Veterans' Canteen Service.
   (7) The Board of Contract Appeals.
   (8) Such other offices and agencies as are established or designated by law or by the President or the Secretary.
   (9) Any office, agency, or activity under the control or supervision of any element named in paragraphs (1) through (8).

Explanatory notes:

A prior § 301 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 1101.

Amendments:

Other provisions:


"Section 1. Short title.

"This Act [for full classification, consult USCS Tables volumes] may be cited as the 'Department of Veterans Affairs Act'."

"Sec. 2. Establishment of Veterans' Administration as an executive department.

"The Veterans' Administration is hereby redesignated as the Department of Veterans Affairs and shall be an executive department in the executive branch of the Government.

"Secs. 3-5. [Repealed]

"Sec. 6. Veterans Health Services and Research Administration.

"The establishment within the Veterans' Administration known as the Department of Medicine and Surgery is hereby redesignated as the Veterans Health Services and Research Administration of the Department of Veterans Affairs.

"Sec. 7. Veterans Benefits Administration.

"The establishment within the Veterans' Administration known as the Department of Veterans' Benefits is hereby redesignated as the Veterans Benefits Administration of the Department of Veterans Affairs.


"(a) [Repealed]

"(b) Continuation of service of General Counsel. The individual serving on the effective date of this Act [for full classification, consult USCS Tables volumes] as the General Counsel of the Veterans' Administration may act as the General Counsel of the Department of Veterans Affairs until a person is appointed under this Act to that office.


"(a) Redesignation. The Office of Inspector General of the Veterans' Administration, established in accordance with the Inspector General Act of 1978 [5 USCS Appx.], is hereby redesignated as the Office of Inspector General of the Department of Veterans Affairs.

"(b) [Repealed]

"Sec. 10. References.

"Reference in any other Federal law, Executive order, rule, regulation, or delegation of authority, or any document of or pertaining to the Veterans' Administration--

"(1) to the Administrator of Veterans' Affairs shall be deemed to refer to the Secretary of Veterans Affairs;

"(2) to the Veterans' Administration shall be deemed to refer to the Department of Veterans Affairs;

"(3) to the Deputy Administrator of Veterans' Affairs shall be deemed to refer to the Deputy Secretary of Veterans Affairs;

"(4) to the Chief Medical Director of the Veterans' Administration shall be deemed to refer to the Chief Medical Director of the Department of Veterans Affairs;
"(5) to the Department of Medicine and Surgery of the Veterans' Administration shall be deemed to refer to the Veterans Health Services and Research Administration of the Department of Veterans Affairs;

"(6) to the Chief Benefits Director of the Veterans' Administration shall be deemed to refer to the Chief Benefits Director of the Department of Veterans Affairs;

"(7) to the Department of Veterans' Benefits of the Veterans' Administration shall be deemed to refer to the Veterans Benefits Administration of the Department of Veterans Affairs;

"(8) to the Chief Memorial Affairs Director of the Veterans' Administration shall be deemed to refer to the Director of the National Cemetery System of the Department of Veterans Affairs; and

"(9) to the Department of Memorial Affairs of the Veterans' Administration shall be deemed to refer to the National Cemetery System of the Department of Veterans Affairs.

"Sec. 11. Savings provisions.

"(a) Continuing effect of legal documents. All orders, determinations, rules, regulations, permits, grants, contracts, certificates, licenses, and privileges--

"(1) which have been issued, made, granted, or allowed to become effective by the President, by the Administrator of Veterans' Affairs, or by a court of competent jurisdiction, in the performance of functions of the Administrator or the Veterans' Administration; and

"(2) which are in effect on the effective date of this Act [effective March 15, 1989];

shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the President, the Secretary, or other authorized official, by a court of competent jurisdiction, or by operation of law.

"(b) Proceedings not affected. The provisions of this Act [for full classification, consult USCS Tables volumes] shall not affect any proceedings or any application for any benefits, service, license, permit, certificate, or financial assistance pending before the Veterans' Administration at the time this Act takes effect [effective March 15, 1989], but such proceedings and applications shall be continued. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this Act had not been enacted, and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by a duly authorized official, by a court of competent jurisdiction, or by operation of law. Nothing in this subsection shall be deemed to prohibit the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this Act had not been enacted.

"(c) Suits not affected. The provisions of this Act [for full classification, consult USCS Tables volumes] shall not affect suits commenced before the effective date of this Act [effective March 15, 1989], and in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and with the same effect as if this Act had not been enacted.

"(d) Nonabatement of actions. No suit, action, or other proceeding commenced by or against the Veterans' Administration, or by or against any individual in the official capacity of such individual as an officer of the Veterans' Administration, shall abate by reason of the enactment of this Act [for full classification, consult USCS Tables volumes].

"(e) Property and resources. The contracts, liabilities, records, property, and other assets and interests of the Veterans' Administration shall, after the effective date of this Act [effective March 15, 1989], be considered to be the contracts, liabilities, records, property, and other assets and interests of the Department of Veterans Affairs.
"(f) Compensation for continued service. Any person--

"(1) who acts as Secretary of Deputy Secretary of the Department of Veterans Affairs under [former] section 3(e);

"(2) who continues to serve as Chief Medical Director or Chief Benefits Director of such department under [former] section 3(f) or (g), respectively;

"(3) who acts as the Director of the National Cemetery System under [former] section 3(h), or;

"(4) who acts as General Counsel of the Department of Veterans Affairs under section 8(b);

after the effective date of this Act [effective March 15, 1989] and before the first appointment of a person to such position after such date shall continue to be compensated for so serving or acting at the rate at which such person was compensated before the effective date of this Act [effective March 15, 1989].

"Sec. 12. [Repealed]


"After consultation with the appropriate committees of the Congress, the Secretary of Veterans Affairs shall prepare and submit to the Congress proposed legislation containing technical and conforming amendments to title 38, United States Code, and to other provisions of law, which reflect the changes made by this Act [for full classification, consult USCS Tables volumes]. Such legislation shall be submitted not later than 6 months after the date of enactment of this Act.

"Sec. 16. [Repealed]

"Sec. 18. Effective date.

"(a) In general. Except as provided in subsection (b), this Act [for full classification, consult USCS Tables volumes] shall take effect on March 15, 1989.

"(b) Appointment of Secretary. Notwithstanding any other provision of law or of this Act, the President may, any time after January 21, 1989, appoint an individual to serve as Secretary of the Department of Veterans Affairs."


"(a) Renaming. The establishment in the Department of Veterans Affairs known as the Veterans Health Services and Research Administration is hereby redesignated as the Veterans Health Administration.

"(b) References. Any reference to the Veterans Health Services and Research Administration (or to the Department of Medicine and Surgery of the Veterans' Administration) in any Federal law, Executive order, regulation, delegation of authority, or document of or pertaining to the Department of Veterans Affairs shall be deemed to refer to the Veterans Health Administration."

Franchise fund; central services. Act Sept. 26, 1996, P. L. 104-204, Title I, 110 Stat. 2880; Nov. 30, 2005, P. L. 109-114, Title II, § 208, 119 Stat. 2389, provides: "There is hereby established in the Treasury a Department of Veterans Affairs franchise fund, to be available without fiscal year limitation for expenses and equipment necessary for the maintenance and operation of such administrative services as the Secretary determines may be performed more advantageously as central services: Provided. That any inventories, equipment and other assets pertaining to the services to be provided by the franchise fund, either on hand or on order, less the related liabilities or unpaid obligations, and any appropriations made hereafter for the purpose of providing capital, shall be used to capitalize the franchise fund:
Provided further, That the franchise fund may be paid in advance from funds available to the Department and other Federal agencies for which such centralized services are performed, at rates which will return in full all expenses of operation, including accrued leave, depreciation of fund plant and equipment, amortization of automated data processing (ADP) software and systems (either acquired or donated), and an amount necessary to maintain a reasonable operating reserve, as determined by the Secretary: Provided further, That the franchise fund shall provide services on a competitive basis: Provided further, That an amount not to exceed four percent of the total annual income to such fund may be retained in the fund for fiscal year 1997 and each fiscal year thereafter, to remain available until expended, to be used for the acquisition of capital equipment and for the improvement and implementation of Departmental financial management, ADP, and other support systems: Provided further, That no later than thirty days after the end of each fiscal year amounts in excess of this reserve limitation shall be transferred to the Treasury.”.

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Federal Procedure:

29 Moore's Federal Practice (Matthew Bender 3d ed.), ch 704, Admiralty Pleading and Procedure § 704.10
4B Fed Proc L Ed, Banking and Financing § 8:1841

Am Jur:

35A Am Jur 2d, Federal Tort Claims Act § 21
60A Am Jur 2d, Pensions and Retirement Funds § 1267
77 Am Jur 2d, Veterans and Veterans' Laws § 3

§ 302. Seal

(a) The Secretary of Veterans Affairs shall cause a seal of office to be made for the Department of such device as the President shall approve. Judicial notice shall be taken of the seal.

(b) Copies of any public document, record, or paper belonging to or in the files of the Department, when authenticated by the seal and certified by the Secretary (or by an officer or employee of the Department to whom authority has been delegated in writing by the Secretary), shall be evidence equal with the original thereof.

Explanatory notes:


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Federal Procedure:

5 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 902, Self-Authentication § 902.06
6 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 1002, Requirement of Original § 1002.04
12 Fed Proc L Ed, Evidence § 33:66
12A Fed Proc L Ed, Evidence §§ 33:578, 594
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:1, 336
1. Admission or exclusion of records or documents

Report found in veterans' bureau files concerning condition of insured and purporting to have been made by physician in employ of government is admissible in behalf of beneficiary of insured, if properly identified. Runkle v United States (1930, CA10 Colo) 42 F.2d 804; United States v Cole (1930, CA6 Ohio) 45 F.2d 339; United States v Stamey (1931, CA9 Wash) 48 F.2d 150; McNally v United States (1931, CA8 Minn) 52 F.2d 440; United States v Blackburn (1931, CA9 Wash) 53 F.2d 19; Long v United States (1932, CA4 SC) 59 F.2d 602; United States v Buck (1934, CA5 Ala) 70 F.2d 1007; Cohan v United States (1935, CA7 Ill) 77 F.2d 140; Clark v United States (1931, DC Ky) 48 F.2d 291; Nichols v United States (1931, DC Ky) 48 F.2d 293; Humble v United States (1931, DC Ky) 49 F.2d 600

2. -Medical records

Veteran's hospital record, not properly authenticated, is properly excluded in war risk insurance action. United States v Chandler (1937, CA5 Ala) 87 F.2d 356

Report of medical examination of veteran made at veterans' hospital is admissible although one physician who participated in examination was present and testified at trial. Burak v United States (1939, CA9 Wash) 101 F.2d 137, cert den (1939) 308 US 595, 84 L Ed 498, 60 S Ct 126

In action on war risk insurance policy, certified copies, under seal of veterans' administration, of reports of government physicians made in usual and ordinary course of their examination are admissible as exception to hearsay rule. United States v Ware (1940, CA5 La) 110 F.2d 739

3. -Ratings

Rating made by central office board of appeals after death of insured, offered in behalf of beneficiary of insured, is properly excluded because it is not identified and it states no facts pertinent to inquiry. Runkle v United States (1930, CA10 Colo) 42 F.2d 804

4. -Other documents

Letter, from veterans' administration concerning tuberculosis of insured is admissible on behalf of insured's beneficiary since it is not disputed that insured had tuberculosis and statutory presumption connects it with service. United States v Huddleston (1936, CA7 Ill) 81 F.2d 593

Admission of report in veteran's file, not established as being within official documents excepted from hearsay rule, is improper. United States v Smart (1936, CA5 Ala) 87 F.2d 1

In action on war risk policy, certificate of director of veterans' administration concerning vocational training and pay claims and paid documents which reports were part of the records of veterans' administration, are admissible to show income which rendered it unnecessary for insured to try to work otherwise over long period. Walker v United States (1942, CA5 Miss) 130 F.2d 587
5. Objections to admission or exclusion of documents

Objection that report of government physician, among records of bureau [now Department of Veterans Affairs], was not properly identified cannot be made for first time in court of appeals. United States v Blackburn (1931, CA9 Wash) 53 F.2d 19

6. Improper admission or exclusion of documents

Error in excluding reports of physicians of veterans' bureau [now Department of Veterans Affairs] offered by insured is harmless where court should have directed verdict for government even if evidence had been received. Long v United States (1932, CA4 SC) 59 F.2d 602

§ 303. Secretary of Veterans Affairs

There is a Secretary of Veterans Affairs, who is the head of the Department and is appointed by the President, by and with the advice and consent of the Senate. The Secretary is responsible for the proper execution and administration of all laws administered by the Department and for the control, direction, and management of the Department.

Other provisions:


"(a) Information program. The Secretary of Veterans Affairs shall establish and carry out an information program relating to the acquired immune deficiency syndrome (hereinafter in this section referred to as 'AIDS'). The information program shall be for employees and consultants of the Department of Veterans Affairs, for other persons providing services in Department of Veterans Affairs facilities to beneficiaries of programs administered by the Department of Veterans Affairs, and for such beneficiaries.

"(b) Required elements of information program. In conducting the program under subsection (a), the Secretary shall--

"(1) develop, in consultation with the Surgeon General of the United States and the Director of the Centers for Disease Control and Prevention, publications and other materials containing information on AIDS, including information on the prevention of infection with the human immunodeficiency virus;

"(2) provide for periodic dissemination of publications (including the Surgeon General's Report on AIDS) and other materials containing such information;

"(3) make publications and other suitable materials containing such information readily available in Department of Veterans Affairs health-care facilities and such other Department of Veterans Affairs facilities as the Secretary considers appropriate; and

"(4) disseminate information (including the Surgeon General's Report on AIDS) on the risk of transmission of the human immunodeficiency virus, and information on preventing the transmission of such virus, to Department of Veterans Affairs substance abuse treatment personnel, to each person being furnished treatment by the Department of Veterans Affairs for drug abuse, and to each person receiving care of services from the Department of Veterans Affairs whom the Secretary believes to be at high risk for AIDS.

"(c) Training in AIDS prevention. The Secretary shall establish and carry out a program that provides for education, training, and other activities (including continuing education and infection control programs) regarding AIDS and the human immunodeficiency virus designed to improve the effectiveness and safety of all health-care personnel and all health-care
support personnel involved in the furnishing of care under programs administered by the Department of Veterans Affairs.”.

**Assignment of emergency preparedness functions.** For assignment of certain emergency preparedness functions to Secretary of Veterans Affairs, see Parts 1, 2, and 27 of Ex. Or. No 12656 of Nov. 18, 1988, 53 Fed. Reg. 47491, which appears as 42 USCS § 5195 note.


"(a) Budget information. In the documentation providing detailed information on the budgets for the Department of Veterans Affairs and the Department of Labor that the Secretary of Veterans Affairs and the Secretary of Labor, respectively, submit to the Congress in conjunction with the President's budget submission for each fiscal year pursuant to section 1105 of title 31, United States Code, the Secretary of Veterans Affairs and the Secretary of Labor shall identify, to the maximum extent feasible, the estimated amount in each of the appropriation requests for Department of Veterans Affairs accounts and Department of Labor accounts, respectively, that is to be obligated for the furnishing of each of the following services or benefits only to, or with respect to, veterans who performed active military, naval, or air service in combat with the enemy or in a theatre of combat operations during a period of war or other hostilities:

"(1) Employment services and other employment benefits under programs administered by the Secretary of Labor.

"(2) Compensation under chapter 11 of title 38, United States Code [38 USCS §§ 1101 et seq.].

"(3) Dependency and Indemnity Compensation under chapter 13 of such title [38 USCS §§ 1301 et seq.].

"(4) Pension under chapter 15 of such title [38 USCS §§ 1501 et seq.].

"(5) Inpatient hospital care under chapter 17 of such title [38 USCS §§ 1701 et seq.].

"(6) Outpatient medical care under chapter 17 of such title [38 USCS §§ 1701 et seq.].

"(7) Nursing home care under chapter 17 of such title [38 USCS §§ 1701 et seq.].

"(8) Domiciliary care under chapter 17 of such title [38 USCS §§ 1701 et seq.].

"(9) Readjustment counseling services under section 612A [now § 1712A] of such title.

"(10) Insurance under chapter 19 of such title [38 USCS §§ 1901 et seq.].

"(11) Specially adapted housing for disabled veterans under chapter 21 of such title [38 USCS §§ 2101 et seq.].

"(12) Burial benefits under chapter 23 of such title [38 USCS §§ 2301 et seq.].

"(13) Educational assistance under chapters 30, 32, and 34 of such title and chapter 106 of title 10, United States Code [38 USCS §§ 3001 et seq., 3201 et seq., and 3451 et seq. and 10 USCS §§ 2131 et seq.].

"(14) Vocational rehabilitation services under chapter 31 of title 38, United States Code [38 USCS §§ 3100 et seq.].

"(15) Survivors' and dependents' educational assistance under chapter 35 of such title [38 USCS §§ 3500 et seq.].
“(16) Home loan benefits under chapter 37 of such title [38 USCS §§ 3701 et seq.].

“(17) Automobiles and adaptive equipment under chapter 39 of such title [38 USCS §§ 3901 et seq.].

“(b) Report on feasibility. If the Secretary of Veterans Affairs or the Secretary of Labor determines that, with respect to any services or benefits referred to in subsection (a), it is not feasible to identify an estimated dollar amount to be obligated for furnishing such services or benefits only to veterans described in that subsection for any fiscal year, the Secretary of Veterans Affairs and the Secretary of Labor shall, with respect to an appropriation request for such fiscal year relating to such services or benefits, report to the Committees on Veterans’ Affairs of the Senate and the House of Representatives the reasons for the infeasibility. The report shall be submitted contemporaneously with the budget submission for such fiscal year. The report shall specify (1) the information, systems, equipment, or personnel that would be required in order for it to be feasible for the Secretary of Veterans Affairs or the Secretary of Labor to identify such amount, and (2) the actions to be taken in order to ensure that it will be feasible to make such an estimate in connection with the submission of the budget request for the next fiscal year.”.

National center on war-related illnesses and post-deployment health issues. Act Nov. 11, 1998, P. L. 105-368, Title I, § 103, 112 Stat. 3322, provides:

“(a) Assessment. The Secretary of Veterans Affairs shall seek to enter into an agreement with the National Academy of Sciences, or another appropriate independent organization, under which such entity shall assist in developing a plan for the establishment of a national center or national centers for the study of war-related illnesses and post-deployment health issues. The purposes of such a center may include--

“(1) carrying out and promoting research regarding the etiologies, diagnosis, treatment, and prevention of war-related illnesses and post-deployment health issues; and

“(2) promoting the development of appropriate health policies, including monitoring, medical recordkeeping, risk communication, and use of new technologies.

“(b) Recommendations and report. With respect to such a center, an agreement under this section shall provide for the Academy (or other entity) to--

“(1) make recommendations regarding: (A) design of an organizational structure or structures, operational scope, staffing and resource needs, establishment of appropriate databases, the advantages of single or multiple sites, mechanisms for implementing recommendations on policy, and relationship to academic or scientific entities; (B) the role or roles that relevant Federal departments and agencies should have in the establishment and operation of any such center or centers; and (C) such other matters as it considers appropriate; and

“(2) report to the Secretary, the Secretaries of Defense and Health and Human Services, and the Committees on Veterans’ Affairs of the Senate and House of Representatives, not later than 1 year after the date of the enactment of this Act, on its recommendations.

“(c) Report on establishment of National Center. Not later than 60 days after receiving the report under subsection (b), the Secretaries specified in subsection (b)(2) shall submit to the Committees on Veterans’ Affairs and Armed Services of the Senate and the Committees on Veterans’ Affairs and National Security of the House of Representatives a joint report on the findings and recommendations contained in that report. Such report may set forth an operational plan for carrying out any recommendation in that report to establish a national center or centers for the study of war-related illnesses. No action to carry out such plan may be taken after the submission of such report until the end of a 90-day period following the date of the submission.”.

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Remand by court of board decision confers on veteran or other claimant, as matter of law, right to compliance with remand orders and imposes upon Secretary of Veterans Affairs concomitant duty to ensure compliance with terms of remand, either personally or as head of department. Stegall v West (1998) 11 Vet App 268

If courts subjected agency processes used for determining amount of funding required for project to judicial scrutiny, courts would remove management authority from Congress’ delegee (agency head) and, thus, become de facto managers of agency, given such impermissible result, agency has virtually carte blanche right to decide amount of funding it will spend on given project. First Enter. v United States (2004) 61 Fed Cl 109

Claimant for veterans benefits was denied relief, where decision of Board of Veterans' Appeals that he did not suffer from service connected post-traumatic stress disorder was based upon preponderance of medical testimony, and was not clearly erroneous under 38 USCS § 7261(a)(4); Veterans Affairs had complied with its duty to assist claimant to extent necessary. Forcier v Nicholson (2006) 19 Vet App 414, 2006 US App Vet Claims LEXIS 25

§ 304. Deputy Secretary of Veterans Affairs

There is in the Department a Deputy Secretary of Veterans Affairs, who is appointed by the President, by and with the advice and consent of the Senate. The Deputy Secretary shall perform such functions as the Secretary shall prescribe. Unless the President designates another officer of the Government, the Deputy Secretary shall be Acting Secretary of Veterans Affairs during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary.

§ 305. Under Secretary for Health

(a) (1) There is in the Department an Under Secretary for Health, who is appointed by the President, by and with the advice and consent of the Senate.

   (2) The Under Secretary for Health shall be appointed without regard to political affiliation or activity and solely--

   (A) on the basis of demonstrated ability in the medical profession, in health-care administration and policy formulation, or in health-care fiscal management; and

   (B) on the basis of substantial experience in connection with the programs of the Veterans Health Administration or programs of similar content and scope.

(b) The Under Secretary for Health is the head of, and is directly responsible to the Secretary for the operation of, the Veterans Health Administration.

(c) The Under Secretary for Health shall be appointed for a period of four years, with reappointment permissible for successive like periods. If the President removes the Under Secretary for Health before the completion of the term for which the Under Secretary for
Health was appointed, the President shall communicate the reasons for the removal to Congress.

(d) (1) Whenever a vacancy in the position of Under Secretary for Health occurs or is anticipated, the Secretary shall establish a commission to recommend individuals to the President for appointment to the position.

(2) A commission established under this subsection shall be composed of the following members appointed by the Secretary:

(A) Three persons representing clinical care and medical research and education activities affected by the Veterans Health Administration.
(B) Two persons representing veterans served by the Veterans Health Administration.
(C) Two persons who have experience in the management of veterans health services and research programs, or programs of similar content and scope.
(D) The Deputy Secretary of Veterans Affairs.
(E) The Chairman of the Special Medical Advisory Group established under section 7312 of this title [38 USCS § 7312].
(F) One person who has held the position of Under Secretary for Health (including service as Chief Medical Director of the Department), if the Secretary determines that it is desirable for such person to be a member of the commission.

(3) A commission established under this subsection shall recommend at least three individuals for appointment to the position of Under Secretary for Health. The commission shall submit all recommendations to the Secretary. The Secretary shall forward the recommendations to the President with any comments the Secretary considers appropriate. Thereafter, the President may request the commission to recommend additional individuals for appointment.

(4) The Assistant Secretary or Deputy Assistant Secretary of Veterans Affairs who performs personnel management and labor relations functions shall serve as the executive secretary of a commission established under this subsection.

Amendments:


1992. Act Oct. 9, 1992, in the heading and in subsecs. (a), (b), (c), and (d), substituted "Under Secretary for Health" for "Chief Medical Director" wherever appearing.

1994. Act Nov. 2, 1994, in subsec. (a)(1), substituted "an Under Secretary" for "a Under Secretary"; and, in subsec. (d)(2)(F), substituted "Chief Medical Director of the Veterans’ Administration" for "Under Secretary for Health of the Veterans' Administration" and "commission" for "Commission".

2004. Act Nov. 30, 2004, in subsec. (a)(2), in the introductory matter, deleted "shall be a doctor of medicine and" following "for Health", and, in subpara. (A), substituted "or in health-care" for "and in health-care".

Other provisions:

Position of Chief Medical Director redesignated as Under Secretary for Health. Act Oct. 9, 1992, P. L. 102-405, Title III, § 302(a), 106 Stat. 1984, provides: "The position of Chief Medical Director of the Department of Veterans Affairs is hereby redesignated as Under Secretary for Health of the Department of Veterans Affairs."
References in other laws to Chief Medical Director or Chief Benefits Director. Act Oct. 9, 1992, P. L. 102-405, Title III, § 302(e), 106 Stat. 1985, provides: "Any reference in any Federal law, Executive order, rule, regulation, or delegation of authority, or any document of or pertaining to the Department of Veterans Affairs--

"(1) to the Chief Medical Director of the Department of Veterans Affairs shall be deemed to refer to the Under Secretary for Health of the Department of Veterans Affairs; and

"(2) to the Chief Benefits Director of the Department of Veterans Affairs shall be deemed to refer to the Under Secretary for Benefits of the Department of Veterans Affairs.".

Research Guide

Am Jur: 77 Am Jur 2d, Veterans and Veterans' Laws § 10

§ 306. Under Secretary for Benefits

(a) There is in the Department an Under Secretary for Benefits, who is appointed by the President, by and with the advice and consent of the Senate. The Under Secretary for Benefits shall be appointed without regard to political affiliation or activity and solely on the basis of demonstrated ability in--

(1) fiscal management; and

(2) the administration of programs within the Veterans Benefits Administration or programs of similar content and scope.

(b) The Under Secretary for Benefits is the head of, and is directly responsible to the Secretary for the operations of, the Veterans Benefits Administration.

(c) The Under Secretary for Benefits shall be appointed for a period of four years, with reappointment permissible for successive like periods. If the President removes the Under Secretary for Benefits before the completion of the term for which the Under Secretary for Benefits was appointed, the President shall communicate the reasons for the removal to Congress.

(d) (1) Whenever a vacancy in the position of Under Secretary for Benefits occurs or is anticipated, the Secretary shall establish a commission to recommend individuals to the President for appointment to the position.

(2) A commission established under this subsection shall be composed of the following members appointed by the Secretary:

(A) Three persons representing education and training, real estate, mortgage finance, and related industries, and survivor benefits activities affected by the Veterans Benefits Administration.

(B) Two persons representing veterans served by the Veterans Benefits Administration.

(C) Two persons who have experience in the management of veterans benefits programs or programs of similar content and scope.

(D) The Deputy Secretary of Veterans Affairs.

(E) The chairman of the Veterans' Advisory Committee on Education formed under section 3692 of this title [38 USCS § 3692].
(F) One person who has held the position of Under Secretary for Benefits (including service as Chief Benefits Director of the Department), if the Secretary determines that it is desirable for such person to be a member of the commission.

(3) A commission established under this subsection shall recommend at least three individuals for appointment to the position of Under Secretary for Benefits. The commission shall submit all recommendations to the Secretary. The Secretary shall forward the recommendations to the President with any comments the Secretary considers appropriate. Thereafter, the President may request the commission to recommend additional individuals for appointment.

(4) The Assistant Secretary or Deputy Assistant Secretary of Veterans Affairs who performs personnel management and labor relations functions shall serve as the executive secretary of a commission established under this subsection.

Amendments:


1992. Act Oct. 9, 1992, in the section heading and in subsecs. (a)-(c), and (d), substituted "Under Secretary for Benefits" for "Chief Benefits Director" wherever appearing.


Other provisions:

Position of Chief Benefits Director redesignated as Under Secretary for Benefits. Act Oct. 9, 1992, P. L. 102-405, Title III, § 302(b), 106 Stat. 1984, provides: "The position of Chief Benefits Director of the Department of Veterans Affairs is hereby redesignated as Under Secretary for Benefits of the Department of Veterans Affairs.".

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 10

§ 307. Under Secretary for Memorial Affairs

There is in the Department an Under Secretary for Memorial Affairs, who is appointed by the President, by and with the advice and consent of the Senate. The Under Secretary is the head of the National Cemetery Administration as established in section 2400 of this title [38 USCS § 2400] and shall perform such functions as may be assigned by the Secretary.

Amendments:

1998. Act Nov. 11, 1998 substituted the section heading for one which read: "§ 307. Director of the National Cemetery System" and, in the text, substituted "an Under Secretary for Memorial Affairs" for "a Director of the National Cemetery System" and substituted "The Under Secretary is the head of the National Cemetery Administration" for "The Director is the head of the National Cemetery System".

Research Guide
§ 308. Assistant Secretaries; Deputy Assistant Secretaries

(a) There shall be in the Department not more than seven Assistant Secretaries. Each Assistant Secretary shall be appointed by the President, by and with the advice and consent of the Senate.

(b) The Secretary shall assign to the Assistant Secretaries responsibility for the administration of such functions and duties as the Secretary considers appropriate, including the following functions:
   (1) Budgetary and financial functions.
   (2) Personnel management and labor relations functions.
   (3) Planning, studies, and evaluations.
   (4) Management, productivity, and logistic support functions.
   (5) Information management functions as required by section 3506 of title 44 [44 USCS § 3506].
   (6) Capital facilities and real property program functions.
   (7) Equal opportunity functions.
   (8) Functions regarding the investigation of complaints of employment discrimination within the Department.
   (9) Functions regarding intergovernmental, public, and consumer information and affairs.
   (10) Procurement functions.
   (11) Operations, preparedness, security, and law enforcement functions.

(c) Whenever the President nominates an individual for appointment as an Assistant Secretary, the President shall include in the communication to the Senate of the nomination a statement of the particular functions of the Department specified in subsection (b), and any other functions of the Department, the individual will exercise upon taking office.

(d) (1) There shall be in the Department such number of Deputy Assistant Secretaries, not exceeding 19, as the Secretary may determine. Each Deputy Assistant Secretary shall be appointed by the Secretary and shall perform such functions as the Secretary prescribes.
   (2) At least two-thirds of the number of positions established and filled under paragraph (1) shall be filled by individuals who have at least five years of continuous service in the Federal civil service in the executive branch immediately preceding their appointment as a Deputy Assistant Secretary. For purposes of determining such continuous service of an individual, there shall be excluded any service by such individual in a position--
      (A) of a confidential, policy-determining, policy-making, or policy-advocating character;
      (B) in which such individual served as a noncareer appointee in the Senior Executive Service, as such term is defined in section 3132(a)(7) of title 5 [5 USCS § 3132(a)(7)]; or
      (C) to which such individual was appointed by the President.
Amendments:

2002. Act Nov. 7, 2002, in subsec. (a), substituted "seven" for "six"; in subsec. (b), added para. (11); and, in subsec. (d)(1), substituted "19" for "18".

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 10

§ 309. Chief Financial Officer

The Secretary shall designate the Assistant Secretary whose functions include budgetary and financial functions as the Chief Financial Officer of the Department. The Chief Financial Officer shall advise the Secretary on financial management of the Department and shall exercise the authority and carry out the functions specified in section 902 of title 31 [31 USCS § 902].

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 10

§ 310. Chief Information Officer

(a) The Chief Information Officer for the Department is designated pursuant to section 3506(a)(2) of title 44 [44 USCS § 3506(a)(2)].

(b) The Chief Information Officer performs the duties provided for chief information officers of executive agencies under chapter 35 of title 44 [44 USCS §§ 3501 et seq.] and subtitle III of title 40 [40 USCS §§ 11101 et seq.].

Explanatory notes:


Amendments:

1996. Act Feb. 10, 1996 (effective 180 days after enactment, as provided by § 5701 of such Act) substituted this section for one which read:

"§ 310. Chief Information Resources Officer

"(a) The Secretary shall designate the Assistant Secretary whose functions include information management functions (as required by section 3506 of title 44) as the Chief Information Resources Officer of the Department.

"(b) The Chief Information Resources Officer shall advise the Secretary on information and management activities of the Department as required by section 3506 of title 44.

"(c) The Chief Information Resources Officer shall develop and maintain an information resources management system for the Department that provides for--

"(1) the conduct of, and accountability for, any acquisitions made pursuant to a delegation of authority under section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759);
“(2) the implementation of all applicable Governmentwide and Department information policies, principles, standards, and guidelines with respect to information collection, paperwork reduction, privacy and security of records, sharing and dissemination of information, acquisition and use of information technology, and other information resources management functions;

“(3) the periodic evaluation of and (as needed) the planning and implementation of improvements in the accuracy, completeness, and reliability of data and records contained within Department information systems; and

“(4) the development and annual revision of a five-year plan for meeting the Department's information technology needs.

“(d) The Chief Information Resources Officer shall report directly to the Secretary in carrying out the duties of the Chief Information Resources Officer under this section and under chapter 35 of title 44.”.

1997. Act Nov. 18, 1997 (applicable as provided by § 1073(i) of such Act, which appears as 10 USCS § 101 note), in subsec. (b), substituted "division E of the Clinger-Cohen Act of 1996 (40 U.S.C. 1401 et seq.)" for "the Information Technology Management Reform Act of 1996".


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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 10

§ 311. General Counsel

There is in the Department the Office of the General Counsel. There is at the head of the office a General Counsel, who is appointed by the President, by and with the advice and consent of the Senate. The General Counsel is the chief legal officer of the Department and provides legal assistance to the Secretary concerning the programs and policies of the Department.


Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 10

§ 312. Inspector General

(a) There is in the Department an Inspector General, who is appointed by the President, by and with the advice and consent of the Senate, as provided in the Inspector General Act of 1978 (5 U.S.C. App.). The Inspector General performs the functions, has the responsibilities, and exercises the powers specified in that Act.

(b) (1) The Secretary shall provide for not less than 40 full-time positions in the Office of Inspector General in addition to the number of such positions in that office on March 15, 1989.
(2) The President shall include in the budget transmitted to the Congress for each fiscal year pursuant to section 1105 of title 31 [31 USCS § 1105] an estimate of the amount for the Office of Inspector General that is sufficient to provide for a number of full-time positions in that office that is not less than the number of full-time positions in that office on March 15, 1989, plus 40.

Explanatory notes:
A prior § 312 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 1112.

Amendments:

§ 313. Availability of appropriations
(a) Funds appropriated to the Department may remain available until expended.

(b) Funds appropriated to the Department may not be used for a settlement of more than $1,000,000 on a construction contract unless--
   (1) the settlement is audited by an entity outside the Department for reasonableness and appropriateness of expenditures; and
   (2) the settlement is provided for specifically in an appropriation law.

Explanatory notes:
A prior § 313 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 1113.

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 10

§ 314. Central Office
The Central Office of the Department shall be in the District of Columbia.

Explanatory notes:
A prior § 314 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 1114.

Cross References
This section is referred to in 38 USCS § 115

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 3, 24

§ 315. Regional offices

(a) The Secretary may establish such regional offices and such other field offices within the United States, its Territories, Commonwealths, and possessions, as the Secretary considers necessary.

(b) The Secretary may maintain a regional office in the Republic of the Philippines until December 31, 2009.

Explanatory notes:
A prior § 315 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 1115.

Amendments:
1992. Act May 20, 1992 (effective as of September 30, 1991, as provided by § 1(b) of such Act, which appears as a note to this section), in subsec. (b), substituted "March 31, 1994" for "September 30, 1991".


Other provisions:

Ratification of maintenance of regional office in the Philippines between Oct. 1, 1991 and May 20, 1992. Act May 20, 1992, P. L. 102-291, § 1(c), 106 Stat. 176, provides: "Any action of the Secretary of Veterans Affairs in maintaining a Department of Veterans Affairs Regional Office in the Republic of the Philippines under section 315(b) of title 38, United States Code, during the period beginning on October 1, 1991, and ending on the date of the enactment of this Act is hereby ratified with respect to that period.".

Cross References
This section is referred to in 38 USCS § 115

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 3, 24
 Administrator's [now Secretary's] authority to establish regional offices does not give regional
director right to prosecute appeal under conditions not authorized by state statute regulating
when, and by whom, appeals may be prosecuted. In re Pariser's Estate (1930) 231 App Div 762,
245 NYS 694

§ 316. Colocation of regional offices and medical centers

(a) To provide for a more economical, efficient, and effective operation of such regional
offices, the Secretary shall provide for the colocation of at least three regional offices
with medical centers of the Department--
   (1) on real property under the jurisdiction of the Department of Veterans Affairs at
   such medical centers; or
   (2) on real property that is adjacent to such a medical center and is under the
   jurisdiction of the Department as a result of being conveyed to the United States for
   the purpose of such colocation.

(b) (1) In carrying out this section and notwithstanding any other provision of law, the
Secretary may lease, with or without compensation and for a period of not to exceed 35
years, to another party at not more than seven locations any of the real property described
in paragraph (1) or (2) of subsection (a).
   (2) Such real property shall be used as the site of a facility--
        (A) constructed and owned by the lessee of such real property; and
        (B) leased under subsection (c)(1) to the Department for such use and such other
        activities as the Secretary determines are appropriate.

(c) (1) The Secretary may enter into a lease for the use of any facility described in
subsection (b)(2) for not more than 35 years under such terms and conditions as may be
in the best interests of the Department.
   (2) Each agreement for such a lease shall provide--
        (A) that the obligation of the United States to make payments under the
agreement is subject to the availability of appropriations for that purpose; and
        (B) that the ownership of the facility shall vest in the United States at the end of
such lease.

(d) (1) The Secretary may sublease any space in such a facility to another party at a rate
not less than--
        (A) the rental rate paid by the Secretary for such space under subsection (c); plus
        (B) the amount the Secretary pays for the costs of administering such facility
        (including operation, maintenance, utility, and rehabilitation costs) which are
        attributable to such space.
   (2) In any such sublease, the Secretary shall include such terms relating to default and
nonperformance as the Secretary considers appropriate to protect the interests of the
United States.

(e) The Secretary shall use the receipts of any payment for the lease of real property
under subsection (b) for the payment of the lease of a facility under subsection (c).

(f) (1) Subject to paragraph (3)(A), the Secretary shall, not later than April 18, 1990,
issue an invitation for offers with respect to three colocations to be carried out under this
(g) The authority to enter into an agreement under this section shall expire on September 30, 1992.

**Explanatory notes:**

A prior § 316 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 1116.

**Cross References**

This section is referred to in 38 USCS §§ 115, 8103

**Research Guide**

**Am Jur:**

77 Am Jur 2d, Veterans and Veterans' Laws §§ 3, 24

**§ 317.** Center for Minority Veterans
(a) There is in the Department a Center for Minority Veterans. There is at the head of the Center a Director.

(b) The Director shall be a career or noncareer appointee in the Senior Executive Service. The Director shall be appointed for a term of six years.

(c) The Director reports directly to the Secretary or the Deputy Secretary concerning the activities of the Center.

(d) The Director shall perform the following functions with respect to veterans who are minorities:

1. Serve as principal adviser to the Secretary on the adoption and implementation of policies and programs affecting veterans who are minorities.
2. Make recommendations to the Secretary, the Under Secretary for Health, the Under Secretary for Benefits, and other Department officials for the establishment or improvement of programs in the Department for which veterans who are minorities are eligible.
3. Promote the use of benefits authorized by this title by veterans who are minorities and the conduct of outreach activities to veterans who are minorities, in conjunction with outreach activities carried out under chapter 77 of this title [38 USCS §§ 7701 et seq.].
4. Disseminate information and serve as a resource center for the exchange of information regarding innovative and successful programs which improve the services available to veterans who are minorities.
5. Conduct and sponsor appropriate social and demographic research on the needs of veterans who are minorities and the extent to which programs authorized under this title meet the needs of those veterans, without regard to any law concerning the collection of information from the public.
6. Analyze and evaluate complaints made by or on behalf of veterans who are minorities about the adequacy and timeliness of services provided by the Department and advise the appropriate official of the Department of the results of such analysis or evaluation.
7. Consult with, and provide assistance and information to, officials responsible for administering Federal, State, local, and private programs that assist veterans, to encourage those officials to adopt policies which promote the use of those programs by veterans who are minorities.
8. Advise the Secretary when laws or policies have the effect of discouraging the use of benefits by veterans who are minorities.
9. Publicize the results of medical research which are of particular significance to veterans who are minorities.
10. Advise the Secretary and other appropriate officials on the effectiveness of the Department's efforts to accomplish the goals of section 492B of the Public Health Service Act (42 U.S.C. 289a-2) with respect to the inclusion of minorities in clinical research and on particular health conditions affecting the health of members of minority groups which should be studied as part of the Department's medical research program and promote cooperation between the Department and other sponsors of medical research of potential benefit to veterans who are minorities.
(11) Provide support and administrative services to the Advisory Committee on Minority Veterans provided for under section 544 of this title [38 USCS § 544].
(12) Perform such other duties consistent with this section as the Secretary shall prescribe.

(e) The Secretary shall ensure that the Director is furnished sufficient resources to enable the Director to carry out the functions of the Center in a timely manner.

(f) The Secretary shall include in documents submitted to Congress by the Secretary in support of the President's budget for each fiscal year--
(1) detailed information on the budget for the Center;
(2) the Secretary's opinion as to whether the resources (including the number of employees) proposed in the budget for that fiscal year are adequate to enable the Center to carry out its statutory and regulatory duties; and
(3) a report on the activities and significant accomplishments of the Center during the preceding fiscal year.

(g) In this section--
(1) The term "veterans who are minorities" means veterans who are minority group members.
(2) The term "minority group member" has the meaning given such term in section 544(d) of this title [38 USCS § 544(d)].

Explanatory notes:

Amendments:
1996. Act Oct. 9, 1996, in subsec. (b), inserted "career or"; in subsec. (d), redesignated para. (10) as para. (12), and added new paras. (10) and (11); and added subsec. (g).

Cross References
Advisory Committee on Minority Veterans,  38 USCS § 544

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 11

§ 318.  Center for Women Veterans

(a) There is in the Department a Center for Women Veterans. There is at the head of the Center a Director.

(b) The Director shall be a career or noncareer appointee in the Senior Executive Service. The Director shall be appointed for a term of six years.

(c) The Director reports directly to the Secretary or the Deputy Secretary concerning the activities of the Center.
(d) The Director shall perform the following functions with respect to veterans who are women:

(1) Serve as principal adviser to the Secretary on the adoption and implementation of policies and programs affecting veterans who are women.
(2) Make recommendations to the Secretary, the Under Secretary for Health, the Under Secretary for Benefits, and other Department officials for the establishment or improvement of programs in the Department for which veterans who are women are eligible.
(3) Promote the use of benefits authorized by this title by veterans who are women and the conduct of outreach activities to veterans who are women, in conjunction with outreach activities carried out under chapter 77 of this title [38 USCS §§ 7701 et seq.].
(4) Disseminate information and serve as a resource center for the exchange of information regarding innovative and successful programs which improve the services available to veterans who are women.
(5) Conduct and sponsor appropriate social and demographic research on the needs of veterans who are women and the extent to which programs authorized under this title meet the needs of those veterans, without regard to any law concerning the collection of information from the public.
(6) Analyze and evaluate complaints made by or on behalf of veterans who are women about the adequacy and timeliness of services provided by the Department and advise the appropriate official of the Department of the results of such analysis or evaluation.
(7) Consult with, and provide assistance and information to, officials responsible for administering Federal, State, local, and private programs that assist veterans, to encourage those officials to adopt policies which promote the use of those programs by veterans who are women.
(8) Advise the Secretary when laws or policies have the effect of discouraging the use of benefits by veterans who are women.
(9) Publicize the results of medical research which are of particular significance to veterans who are women.
(10) Advise the Secretary and other appropriate officials on the effectiveness of the Department's efforts to accomplish the goals of section 492B of the Public Health Service Act (42 U.S.C. 289a-2) with respect to the inclusion of women in clinical research and on particular health conditions affecting women's health which should be studied as part of the Department's medical research program and promote cooperation between the Department and other sponsors of medical research of potential benefit to veterans who are women.
(11) Provide support and administrative services to the Advisory Committee on Women Veterans established under section 542 of this title [38 USCS § 542].
(12) Perform such other duties consistent with this section as the Secretary shall prescribe.

(e) The Secretary shall ensure that the Director is furnished sufficient resources to enable the Director to carry out the functions of the Center in a timely manner.
(f) The Secretary shall include in documents submitted to Congress by the Secretary in support of the President's budget for each fiscal year--

(1) detailed information on the budget for the Center;
(2) the Secretary's opinion as to whether the resources (including the number of employees) proposed in the budget for that fiscal year are adequate to enable the Center to comply with its statutory and regulatory duties; and
(3) a report on the activities and significant accomplishments of the Center during the preceding fiscal year.

Amendments:

1996. Act Oct. 9, 1996, in subsec. (b), inserted "career or"; and, in subsec. (d)(10), substituted "(42 U.S.C. 289a-2) with respect to the inclusion of women in clinical research and on" for "(relating to the inclusion of women and minorities in clinical research) and of".

Other provisions:

Assessment of use by women veterans of department health services. Act Oct. 9, 1996, P. L. 104-262, Title III, Subtitle B, § 323, 110 Stat. 3196, provides:

"(a) Reports to Under Secretary for Health. The Center for Women Veterans of the Department of Veterans Affairs (established under section 509 of Public Law 103-446 [adding this section and amending 38 USCS § 317]), in consultation with the Advisory Committee on Women Veterans, shall assess the use by women veterans of health services through the Department of Veterans Affairs, including counseling for sexual trauma and mental health services. The Center shall submit to the Under Secretary for Health of the Department of Veterans Affairs a report not later than April 1, 1997, and April 1 of each of the two following years, on--

"(1) the extent to which women veterans described in paragraphs (1) and (2) of section 1710(a) of title 38, United States Code, fail to seek, or face barriers in seeking, health services through the Department, and the reasons therefor; and

"(2) recommendations, if indicated, for encouraging greater use of such services, including (if appropriate) public service announcements and other outreach efforts.

"(b) Reports to Congressional Committees. Not later than July 1, 1997, and July 1 of each of the two following years, the Secretary of Veterans Affairs shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report containing--

"(1) the most recent report of the Center for Women Veterans under subsection (a);

"(2) the views of the Under Secretary for Health on such report's findings and recommendations; and

"(3) a description of the steps being taken by the Secretary to remedy any problems described in the report.".

Cross References

Advisory Committee on Women Veterans, 38 USCS § 542

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 12

§ 319. Office of Employment Discrimination Complaint Adjudication
(a) (1) There is in the Department an Office of Employment Discrimination Complaint Adjudication. There is at the head of the Office a Director.
   (2) The Director shall be a career appointee in the Senior Executive Service.
   (3) The Director reports directly to the Secretary or the Deputy Secretary concerning matters within the responsibility of the Office.

(b) (1) The Director is responsible for making the final agency decision within the Department on the merits of any employment discrimination complaint filed by an employee, or an applicant for employment, with the Department. The Director shall make such decisions in an impartial and objective manner.
   (2) No person may make any ex parte communication to the Director or to any employee of the Office with respect to a matter on which the Director has responsibility for making a final agency decision.

(c) Whenever the Director has reason to believe that there has been retaliation against an employee by reason of the employee asserting rights under an equal employment opportunity law, the Director shall report the suspected retaliatory action directly to the Secretary or Deputy Secretary, who shall take appropriate action thereon.

(d) (1) The Office shall employ a sufficient number of attorneys and other personnel as are necessary to carry out the functions of the Office. Attorneys shall be compensated at a level commensurate with attorneys employed by the Office of the General Counsel.
   (2) The Secretary shall ensure that the Director is furnished sufficient resources in addition to personnel under paragraph (1) to enable the Director to carry out the functions of the Office in a timely manner.
   (3) The Secretary shall ensure that any performance appraisal of the Director of the Office of Employment Discrimination Complaint Adjudication or of any employee of the Office does not take into consideration the record of the Director or employee in deciding cases for or against the Department.

Effective date of section:
Act Nov. 21, 1997, P. L. 105-114, Title I, § 102(c), 111 Stat. 2281, provides: "Section 319 of title 38, United States Code, as added by subsection (a), shall take effect 90 days after the date of enactment of this Act."

Other provisions:
Reports to Secretary of Veterans Affairs and to Congress. Act Nov. 21, 1997, P. L. 105-114, Title I, § 102(b), 111 Stat. 2281, provides: "The Director of the Office of Employment Discrimination Complaint Adjudication of the Department of Veterans Affairs (established by section 319 of title 38, United States Code, as added by subsection (a)) shall submit to the Secretary of Veterans Affairs and to Congress reports on the implementation and the operation of that office. The first such report shall be submitted not later than April 1, 1998, and subsequent reports shall be submitted not later than January 1, 1999, and January 1, 2000."

Cross References
This section is referred to in 38 USCS § 516

§ 320. Department of Veterans Affairs-Department of Defense Joint Executive Committee
(a) Joint Executive Committee.
(1) There is established an interagency committee to be known as the Department of Veterans Affairs-Department of Defense Joint Executive Committee (hereinafter in this section referred to as the "Committee").
(2) The Committee is composed of--
   (A) the Deputy Secretary of Veterans Affairs and such other officers and employees of the Department of Veterans Affairs as the Secretary of Veterans Affairs may designate; and
   (B) the Under Secretary of Defense for Personnel and Readiness and such other officers and employees of the Department of Defense as the Secretary of Defense may designate.

(b) Administrative matters.
(1) The Deputy Secretary of Veterans Affairs and the Under Secretary of Defense shall determine the size and structure of the Committee, as well as the administrative and procedural guidelines for the operation of the Committee.
(2) The two Departments shall supply appropriate staff and resources to provide administrative support and services. Support for such purposes shall be provided at a level sufficient for the efficient operation of the Committee, including a subordinate Health Executive Committee, a subordinate Benefits Executive Committee, and such other committees or working groups as considered necessary by the Deputy Secretary and Under Secretary.

(c) Recommendations.
(1) The Committee shall recommend to the Secretaries strategic direction for the joint coordination and sharing efforts between and within the two Departments under section 8111 of this title [38 USCS § 8111] and shall oversee implementation of those efforts.
(2) The Committee shall submit to the two Secretaries and to Congress an annual report containing such recommendations as the Committee considers appropriate.

(d) Functions. In order to enable the Committee to make recommendations in its annual report under subsection (c)(2), the Committee shall do the following:
(1) Review existing policies, procedures, and practices relating to the coordination and sharing of resources between the two Departments.
(2) Identify changes in policies, procedures, and practices that, in the judgment of the Committee, would promote mutually beneficial coordination, use, or exchange of use of services and resources of the two Departments, with the goal of improving the quality, efficiency and effectiveness of the delivery of benefits and services to veterans, service members, military retirees, and their families through an enhanced Department of Veterans Affairs and Department of Defense partnership.
(3) Identify and assess further opportunities for the coordination and collaboration between the Departments that, in the judgment of the Committee, would not adversely affect the range of services, the quality of care, or the established priorities for benefits provided by either Department.
(4) Review the plans of both Departments for the acquisition of additional resources, especially new facilities and major equipment and technology, in order to assess the
potential effect of such plans on further opportunities for the coordination and sharing of resources.

(5) Review the implementation of activities designed to promote the coordination and sharing of resources between the Departments.

**Effective date of section:**

This section took effect on enactment, pursuant to § 583(d)(2) of Act Nov. 24, 2003, P. L. 108-136, which appears as a note to this section.

**Other provisions:**

**Effective date of Nov. 24, 2003 amendments.** Act Nov. 24, 2003, P. L. 108-136, Div A, Title V, Subtitle H [I], § 583(d)(2), 117 Stat. 1490, provides: "If this Act is enacted on or after October 1, 2003, the amendments made by this section [adding 38 USCS § 320 and amending 38 USCS § 8111] shall take effect on the date of the enactment of this Act."


"(a) Program. The Secretary of Defense and the Secretary of Veterans Affairs may conduct a program to develop and evaluate integrated healing care practices for members of the Armed Forces and veterans. Any such program shall be carried out through the Department of Veterans Affairs-Department of Defense Joint Executive Committee established under section 320 of title 38, United States Code.

"(b) Source of DOD Funds. Amounts authorized to be appropriated by this Act [for full classification, consult USCS Tables volumes] for the Defense Health Program may be used for the program under subsection (a)."

### CHAPTER 5. AUTHORITY AND DUTIES OF THE SECRETARY

**SUBCHAPTER I. GENERAL AUTHORITIES**

**SUBCHAPTER II. SPECIFIED FUNCTIONS**

**SUBCHAPTER III. ADVISORY COMMITTEES**

**Amendments:**


**1994.** Act Nov. 2, 1994, P. L. 103-446, Title V, § 510(b), 108 Stat. 4670, amended the analysis of this chapter by adding item 544.


**1997.** Act Nov. 21, 1997, P. L. 105-114, Title I, § 101(a)(2), 111 Stat. 2279, amended the analysis of this chapter by adding item 516.

**1998.** Act Nov. 11, 1998, P. L. 105-368, Title IX, § 906(b), Title X, § 1001(a)(2), 112 Stat. 3362, 3363, amended the analysis of this chapter by adding items 530 and 531.
§ 501. Rules and regulations
§ 502. Judicial review of rules and regulations
§ 503. Administrative error; equitable relief
§ 505. Opinions of Attorney General
§ 510. Authority to reorganize offices
§ 511. Decisions of the Secretary; finality
§ 512. Delegation of authority; assignment of functions and duties
§ 513. Contracts and personal services
§ 515. Administrative settlement of tort claims
§ 516. Equal employment responsibilities

§ 501. Rules and regulations

(a) The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including--
   (1) regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws;
   (2) the forms of application by claimants under such laws;
   (3) the methods of making investigations and medical examinations; and
   (4) the manner and form of adjudications and awards.

(b) Any rule, regulation, guideline, or other published interpretation or order (and any amendment thereto) issued pursuant to the authority granted by this section or any other provision of this title shall contain citations to the particular section or sections of statutory law or other legal authority upon which such issuance is based. The citation to the authority shall appear immediately following each substantive provision of the issuance.

(c) In applying section 552(a)(1) of title 5 [5 USCS § 552(a)(1)] to the Department, the Secretary shall ensure that subparagraphs (C), (D), and (E) of that section are complied with, particularly with respect to opinions and interpretations of the General Counsel.

(d) The provisions of section 553 of title 5 [5 USCS § 553] shall apply, without regard to subsection (a)(2) of that section, to matters relating to loans, grants, or benefits under a law administered by the Secretary.

Explanatory notes:

Code of Federal Regulations
Department of Veterans Affairs-General provisions, 38 CFR Part 1
Department of Veterans Affairs-Delegations of authority, 38 CFR Part 2
Department of Veterans Affairs-Adjudication, 38 CFR Part 3
Department of Veterans Affairs-Veterans mortgage life insurance, 38 CFR Part 8a
Department of Veterans Affairs-Servicemen's Group Life Insurance and Veterans' Group Life Insurance, 38 CFR Part 9
Department of Veterans Affairs-Veterans Benefits Administration, fiduciary activities, 38 CFR Part 13
Department of Veterans Affairs-Legal services, General Counsel, and miscellaneous claims, 38 CFR Part 14
Department of Veterans Affairs-Medical, 38 CFR Part 17
Department of Veterans Affairs-Board of Veterans' Appeals: Appeals regulations, 38 CFR Part 19
Department of Veterans Affairs-Board of Veterans' Appeals: Rules of practice, 38 CFR Part 20
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Loan guaranty, 38 CFR Part 36
Department of Veterans Affairs-National Cemeteries of the Department of Veterans Affairs, 38 CFR Part 38
Department of Veterans Affairs-Aid to States for establishment, expansion, and improvement of veterans' cemeteries, 38 CFR Part 39
Department of Veterans Affairs-Audits of States, local governments, and non-profit organizations, 38 CFR Part 41
Department of Veterans Affairs-Uniform administrative requirements for grants and cooperative agreements to State and local governments, 38 CFR Part 43
Department of Veterans Affairs-Governmentwide debarment and suspension (nonprocurement) and governmentwide requirements for drug-free workplace (grants), 38 CFR Part 44
Department of Veterans Affairs-Policy regarding participation in National Practitioner Data Bank, 38 CFR Part 46
Department of Veterans Affairs-Policy regarding reporting health care professionals to State licensing boards, 38 CFR Part 47
Department of Veterans Affairs-Governmentwide requirements for drug-free workplace (financial assistance), 38 CFR Part 48
Department of Veterans Affairs-Per diem for nursing home care of veterans in State homes, 38 CFR Part 51
Department of Veterans Affairs-Per diem for adult day health care of veterans in State homes, 38 CFR Part 52
Department of Veterans Affairs-Forms, 38 CFR Part 58
Department of Veterans Affairs-Grants to States for construction or acquisition of State homes, 38 CFR Part 59
Department of Veterans Affairs-Fisher Houses and other temporary lodging, 38 CFR Part 60
Department of Veterans Affairs-VA Homeless Providers Grant and Per Diem Program, 38 CFR Part 61
Department of Veterans Affairs-Standards of ethical conduct and related responsibilities, 38 CFR Part 0
Department of Veterans Affairs-Veterans Affairs acquisition regulations system, 48 CFR Part 801
Department of Veterans Affairs-Definitions of words and terms, 48 CFR Part 802
Department of Veterans Affairs-Improper business practices and personal conflicts of interest, 48 CFR Part 803
Department of Veterans Affairs-Administrative matters, 48 CFR Part 804
Department of Veterans Affairs-Publicizing contract action, 48 CFR Part 805
Department of Veterans Affairs-Competition requirements, 48 CFR Part 806
Department of Veterans Affairs-Acquisition planning, 48 CFR Part 807
Department of Veterans Affairs-Required sources of supplies and services, 48 CFR Part 808
Department of Veterans Affairs-Describing agency needs, 48 CFR Part 811
Department of Veterans Affairs-Acquisition of commercial items, 48 CFR Part 812
Department of Veterans Affairs-Simplified acquisition procedures, 48 CFR Part 813
Department of Veterans Affairs-Sealed bidding, 48 CFR Part 814
Department of Veterans Affairs-Contracting by negotiation, 48 CFR Part 815
Department of Veterans Affairs-Types of contracts, 48 CFR Part 816
Department of Veterans Affairs-Special contracting methods, 48 CFR Part 817
Department of Veterans Affairs-Small business and small disadvantaged business concerns, 48 CFR Part 819
Department of Veterans Affairs-Application of labor laws to Government acquisitions, 48 CFR Part 822
Department of Veterans Affairs-Foreign acquisition, 48 CFR Part 825
Department of Veterans Affairs-Bonds and insurance, 48 CFR Part 828
Department of Veterans Affairs-Taxes, 48 CFR Part 829
Department of Veterans Affairs-Contract cost principles and procedures, 48 CFR Part 831
Department of Veterans Affairs-Contract financing, 48 CFR Part 832
Department of Veterans Affairs-Protests, disputes, appeals, 48 CFR Part 833
Department of Veterans Affairs-Construction and architect-engineer contracts, 48 CFR Part 836
Department of Veterans Affairs-Service contracting, 48 CFR Part 837
Department of Veterans Affairs-Contract administration, 48 CFR Part 842
Department of Veterans Affairs-Quality assurance, 48 CFR Part 846
Department of Veterans Affairs-Transportation, 48 CFR Part 847
Department of Veterans Affairs-Termination of contracts, 48 CFR Part 849
Department of Veterans Affairs-Forms, 48 CFR Part 853
Department of Veterans Affairs-Special procurement controls, 48 CFR Part 870
Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

Cross References
This section is referred to in 38 USCS § 1721

Research Guide
I. IN GENERAL

1. Generally

Regulations are intended to create uniform system for determining Veterans Administration's obligations, which system operates to displace inconsistent state law. United States v Shimer (1961) 367 US 374, 6 L Ed 2d 908, 81 S Ct 1554

Court of Appeals for Federal Circuit reviewed regulations promulgated by Department of Veterans Affairs pursuant to Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (codified in scattered sections of 38 USCS) and with exception of one regulation, 38 C.F.R. § 3.159(b)(1), which was inconsistent with VCAA, and therefore invalid, regulations regarding claims procedures under 38 C.F.R. §§ 3.156 and 1.159 were affirmed as regulations were not on their face arbitrary, capricious, and contrary to various statutory provisions. Paralyzed Veterans of Am. v Sec'y of Veterans Affairs (2003, CA FC) 345 F.3d 1334 (superseded by statute as stated in Detviler v Principi (2005, US) 2005 US App Vet Claims LEXIS 328)

38 USCS §§ 210(c) (now repealed) and 621 (now § 1721), authorizing Administrator [now Secretary] to prescribe rules and regulations, contemplated only rules and regulations implementing powers given Veterans' Administration [now Department of Veterans Affairs] by law. Texas Employers Ins. Asso. v United States (1975, ND Tex) 390 F Supp 142

2. Limitations upon rulemaking authority

No regulation can be promulgated to lessen obligation of government or to curtail benefits it contracts to pay. Lynch v United States (1934) 292 US 571, 78 L Ed 1434, 54 S Ct 840 (overlt in part as stated in Pro-Eco v Board of Comm'rs (1995, CA7 Ind) 57 F.3d 505, 26 ELR 20445)

Fact that 38 USCS § 5904(c) did not prohibit payments by disinterested fee payers did not mean that Department of Veterans Affairs (DVA) could not regulate payments by such fee payers; DVA was authorized to issue rules governing conduct of third-party fee payers where those rules were designed to prevent circumvention of statutory prohibition against attorney fee payments made by claimant or from funds intended for benefit of claimant. Carpenter v Sec'y of Veterans Affairs (2003, CA FC) 343 F.3d 1347

Regulations conferring rights inconsistent with import of statute cannot be given effect. Nordberg v United States (1931, DC Mont) 51 F.2d 271
Regulation adding longer suspension of statute of limitations than provided in statute, is invalid. Harrop v United States (1935, DC Neb) 10 F Supp 753

Although former 38 USCS § 210(c)(1) was broad grant of authority to Administrator [now Secretary] to promulgate necessary or appropriate rules and regulations to carry out laws administered by Veterans' Administration [now Department of Veterans Affairs], regulations had to be consistent with laws they sought to carry out and former 38 USCS § 210 contemplated that Administrator [now Secretary] would promulgate only those regulations which implemented powers given him by Congress, and he could not issue regulations on matters which had not been delegated to him; Administrator [now Secretary] could ask Congress to enact necessary legislation related to veterans' affairs, but he could not legislate himself. Wayne State University v Cleland (1977, ED Mich) 440 F Supp 811, affd in part and revd in part on other grounds (1978, CA6 Mich) 590 F.2d 627

General rulemaking authority in 38 USCS § 501 was basically indistinguishable from that found in 42 USCS § 405(a), which Supreme Court held did not contain any express authority allowing Commissioner of Social Security to engage in retroactive rulemaking; granting retroactive effect to 38 CFR § 3.22 would have taken away appellant's right to 38 USCS § 1318 adjudication under "hypothetically entitled to receive" theory, and thus, she was entitled to pursue her § 1318 dependency and indemnity compensation claim based on that theory. Rodríguez v Nicholson (2005) 19 Vet App 275, 2005 US App Vet Claims LEXIS 523


3. Relationship of regulations with state laws


Under predecessor to former 38 USCS § 210, which authorized Veterans' Administrator [now Secretary] to promulgate regulations, Administrator [now Secretary] was authorized to displace state law by adoption of regulations stating exclusive procedures regarding obligations of Veterans' Administration [now Department of Veterans Affairs] as guarantor of veterans' mortgages; hence, Veterans' Administrator [now Secretary] was authorized to adopt regulations displacing state statute which provided that mortgagee who purchases mortgaged property at foreclosure sale cannot recover deficiency judgment unless and until mortgagee obtains court determination of fair market value of property and credits that amount to unsatisfied liability, failing which debtor and guarantor are permanently discharged. United States v Shimer (1961) 367 US 374, 6 L Ed 2d 908, 81 S Ct 1554

Regulations promulgated by Veterans Administration [now Department of Veterans Affairs] pursuant to former 38 USCS § 210(c), providing for assignment of state workmen's compensation claim to Veterans Administration [now Department of Veterans Affairs], in compensation for treatment in hospital of veteran with compensable claim, prevailed over state law precluding assignment of workmen's compensation claims; Supremacy Clause of Constitution, Article VI, cl. 2 prevails. Texas Employers' Ins. Asso. v United States (1978, CA5 Tex) 569 F.2d 874, cert den (1978) 439 US 826, 58 L Ed 2d 119, 99 S Ct 98

Order of director [now Secretary] as to commissions of guardians was merely expressive of desire, and not positive prohibition which would limit power of state probate court. Keating v Hession (1930) 272 Mass 212, 172 NE 111

4. Force and effect of regulations

Regulations promulgated by Administrator [now Secretary] have force of law when not inconsistent with statute and when appropriate to carry out laws administered by Veterans Administration [now Department of Veterans Affairs]. Sawyer v United States (1926, CA2 NY) 10 F.2d 416

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Regulations, lawfully promulgated, have force and effect of law. Claffy v Forbes (1922, DC Wash) 280 F 233; Tomlinson v United States (1926, DC Mont) 18 F.2d 795; Anderson v Olivia State Bank (1932) 186 Minn 396, 243 NW 398, 83 ALR 1086 (ovrd in part by In re Hallbom's Estate (1933) 189 Minn 383, 249 NW 417)

5. Judicial notice

Courts will take judicial notice of rules and regulations. Boan v United States (1933, DC Idaho) 3 F Supp 219

II. PARTICULAR REGULATIONS

6. Definitions


7. Forms

Regulations requiring claimants to furnish statements in support of their claim, when requested, on forms provided by administration [now Department], were proper. Burgett v United States (1935, CA7 Ill) 80 F.2d 151, 104 ALR 167

8. Disability standards

It was not within power of director [now Secretary] to make regulation which provided that loss of one hand and one eye was to be deemed total permanent disability. Miller v United States (1935) 294 US 435, 79 L Ed 977, 55 S Ct 440, reh den (1935) 294 US 734, 79 L Ed 1262, 55 S Ct 635

9. Insurance

Regulation which provided that loss of hand and eye should be deemed total permanent disability under yearly renewable term insurance was invalid. Miller v United States (1935) 294 US 435, 79 L Ed 977, 55 S Ct 440, reh den (1935) 294 US 734, 79 L Ed 1262, 55 S Ct 635

Regulation requiring that changes of beneficiary must be attested and recorded with bureau [now Department] was valid. United States v Napoleon (1924, CA5 Fla) 296 F 811

Regulation requiring that insurance of one who, in writing, requested its discontinuance remain in force throughout grace period he would have had if he had not made request is valid. Baker v United States (1928, CA5 Tex) 24 F.2d 766

Reasonable regulations, adopted after certificate of war risk insurance has issued, form part of contract. Ross v United States (1931, CA5 Tex) 49 F.2d 541

10. Disability benefits

Word "continuously" meant reasonable regularity, and if insured was able to follow gainful occupation only spasmodically with frequent interruptions due to disability, he was entitled to recover, question of total and permanent disability being for jury. Ford v United States (1930, CA1 Mass) 44 F.2d 754

Word "continuously" as used in administrator's [now Secretary's] regulation meant reasonable regularity, and fact that insured worked for substantial period was not conclusive against him, and medical testimony as to permanent case of disability was not determinative of question, which was for jury if there was substantial evidence of disability. Carter v United States (1931, CA4 NC) 49 F.2d 221

Under insurance regulation which defines total disability as any impairment which renders it impossible for disabled person to follow continuously any substantially gainful occupation, word "continuously" should not be interpreted in its absolute sense, but reasonably and relatively interpreted, having in mind object which Congress intended. United States v Dougherty (1931, CA7 Ill) 54 F.2d 721; United States v Crain (1933, CA7 Ill) 63 F.2d 528
Regulation of director [now Secretary] providing that government would not be liable for
disability arising before policy was applied for could not be given effect in view of incontestability
statute subsequently enacted. Hicks v United States (1933, CA4 Va) 65 F.2d 517

Requirement in 38 C.F.R. § 3.304(f) (2002), of “credible supporting evidence” of claimed
in-service stressor is valid exercise by Secretary of Veterans Affairs of his 38 USCS § 501(a)(1)
authority to promulgate regulations as to “nature and extent of proof and evidence” necessary to
App 149, 2003 US App Vet Claims LEXIS 479

11. Death benefits

Manual for Adjudication Procedure for Death Benefits, which was validly promulgated
pursuant to former 38 USCS § 210(c), to execute policy of limiting assignments to close relatives
of insured decedent, was binding in dispute between persons claiming to be beneficiaries.
Alford v United States (1973, ND Ohio) 369 F Supp 1339

12. Educational benefits

Since Congress mandated 12 semester hour minimum for all undergraduate students who
seek to obtain full-time veterans' benefits, Veterans' Administration [now Department of Veterans
Affairs] was merely including Congressional mandate in its regulations by requiring 12 semester
hours and was not exceeding its statutory authority. Merged Area X (Education) v Cleland (1979,
CA8 Iowa) 604 F.2d 1075

13. Appeals

Provision that order of administrator [now Secretary] of November 13, 1931, fixing period of
limitation for appeals from decisions of insurance claims council, was to be given effect as of
November 1, 1931, had to be disregarded, because such order could not be given retroactive
effect. Lopez v United States (1936, CA4 NC) 82 F.2d 982

§ 502. Judicial review of rules and regulations

Discussion and Analysis in the Veterans Benefits Manual

An action of the Secretary to which section 552(a)(1) or 553 of title 5 [5 USCS §
552(a)(1) or 553] (or both) refers (other than an action relating to the adoption or revision
of the schedule of ratings for disabilities adopted under section 1155 of this title [38
USCS § 1155]) is subject to judicial review. Such review shall be in accordance with
chapter 7 of title 5 [5 USCS §§ 701 et seq.] and may be sought only in the United States
Court of Appeals for the Federal Circuit. However, if such review is sought in connection
with an appeal brought under the provisions of chapter 72 of this title [38 USCS §§ 7251
et seq.], the provisions of that chapter shall apply rather than the provisions of chapter 7
of title 5 [5 USCS §§ 701 et seq.].

Explanatory notes:

A prior § 502 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and
appears as 38 USCS § 1502.

Cross References

This section is referred to in 38 USCS § 511

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans’ Affairs § 79:308

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Am Jur:

37A Am Jur 2d, Freedom of Information Acts § 476
77 Am Jur 2d, Veterans and Veterans' Laws § 161

1. Generally

2. Jurisdiction found

3. Jurisdiction not found

1. Generally

In action for judicial review of rule or regulation under 38 USCS § 502, "issuance" must be defined as date rule becomes effective as opposed to date rule was published pursuant to Fed.Cir.R.47.12(a). Disabled Am. Veterans v Gober (2000, CA FC) 234 F.3d 682, reh den (2001, CA FC) 2001 US App LEXIS 1314 and cert den (2001) 532 US 973, 149 L Ed 2d 471, 121 S Ct 1605

   Court of Appeals for Federal Circuit reviewed regulations promulgated by Department of Veterans Affairs pursuant to Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (codified in scattered sections of 38 USCS) and with exception of one regulation, 38 C.F.R. § 3.159(b)(1), which was inconsistent with VCAA, and therefore invalid, regulations regarding claims procedures under 38 C.F.R. §§ 3.156 and 1.159 were affirmed as regulations were not on their face arbitrary, capricious, and contrary to various statutory provisions. Paralyzed Veterans of Am. v Sec'y of Veterans Affairs (2003, CA FC) 345 F.3d 1334 (superseded by statute as stated in Detviler v Principi (2005, US) 2005 US App Vet Claims LEXIS 328)

2. Jurisdiction found

   Court had jurisdiction pursuant to 38 USCS § 502 to review actions of Department of Veterans Affairs' repeal of regulation without advance notice and opportunity to comment. Paralyzed Veterans of Am. v West (1998, CA FC) 138 F.3d 1434

   Petitioners' challenge to statutory authority of Department of Veterans Affairs to issue interpretive rule at request of Board of Veterans' Appeals is reviewable by Court of Appeals for Federal Circuit under 38 USCS § 502 because it directly challenges agency action referred to in 5 USCS §§ 552(a)(1) and 553. Splane v West (2000, CA FC) 216 F.3d 1058

   Court had jurisdiction to hear petitioner's constitutional challenge to diagnostic code established by Department of Veterans Affairs at 38 C.F.R. § 4.114 (2001) because statute did not preclude constitutional challenges to regulations. Nyeholt v Sec'y of VA (2002, CA FC) 298 F.3d 1350, cert den (2003) 537 US 1109, 154 L Ed 2d 781, 123 S Ct 853

   Organization's challenge to 38 C.F.R. § 3.304(f) was ripe for review, because 38 USCS § 502 was example of Congress's preference for preenforcement review of agency rules. Nat'l Org. of Veterans' Advocates v Sec'y of Veterans Affairs (2003, CA FC) 330 F.3d 1345

3. Jurisdiction not found

   Ninth Circuit lacked jurisdiction to review Veterans Administration's [now Department of Veterans Affairs] regulations regarding service connection for residuals of radiation exposure since Veterans Administration [now Department of Veterans Affairs] rulemaking is subject to judicial review only in Federal Circuit. Chinnock v Turnage (1993, CA9 Cal) 995 F.2d 889, 93 CDOS 4174, 93 Daily Journal DAR 7169

   District court and court of appeals lacked jurisdiction of complaint relating to plaintiff's receipt of disability compensation under Veterans Administration [now Department of Veterans Affairs] regulation, since plaintiff attacked only regulation, not statute it implemented, and exclusive jurisdiction to review regulations is in Federal Circuit. Hall v United States Dep't Veterans' Affairs (1996, CA11 Fla) 85 F.3d 532, 9 FLW Fed C 1171 (criticized in Murrhee v Principi (2005, CD Ill) 364 F Supp 2d 782)
Statutory scheme of 5 USCS §§ 552, 553, and 38 USCS §§ 1155, 7252, consistently excluded from judicial review all content of ratings schedule, as well as actions of Secretary of Veterans Affairs in adopting or revising that content, and 38 USCS § 7261(a)(3)(C) only provides standards of review to be applied by U.S. Court of Appeals for Veterans Claims when reviewing decision from Board of Veterans' Appeals and, thus, under 38 USCS § 7252, such court lacked jurisdiction to review content of diagnostic codes as part of schedule of ratings for disabilities; accordingly, Court of Appeals for Federal Circuit reversed determination of U.S. Court of Appeals for Veterans Claims that 38 C.F.R. § 4.87a, Diagnostic Code 6260, was invalid as inconsistent with 38 USCS § 1110. Wanner v Principi (2004, CA FC) 370 F.3d 1124

38 USCS § 502 did not preclude district court from reviewing defendant's challenge to conviction under 38 C.F.R. § 1.218(b)(11), after bench trial before magistrate, on ground that regulation was overbroad or vague. United States v Fentress (2003, DC Md) 241 F Supp 2d 526, affd (2003, CA4 Md) 69 Fed Appx 643

Statute confers no jurisdiction on court over challenge to application of veterans' benefits statutes to facts of discharged veteran's disability compensation claim. Hilario v Secretary, Dep't of Veterans Affairs (1991, CA) 937 F.2d 586

§ 503. Administrative error; equitable relief

Explanatory notes:


Amendments:

2000. Act Nov. 1, 2000, in subsec. (c), added the sentence beginning "No report . . .".


Code of Federal Regulations

Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Research Guide

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Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:105, 360

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 17
Administrative grant of partial equitable relief by Secretary under statute does not fall within appellate jurisdiction of BVA since there is neither statute nor regulatory provision for review by Board of such awards. Darrow v Derwinski (1992) 2 Vet App 303


Court of Appeals for Veterans Claims may not award equitable relief, no matter how compelling facts; however, widow of veteran could raise her equitable claims with Secretary of Veterans Affairs pursuant to 38 USCS § 503(a). Bonner v Nicholson (2005) 19 Vet App 188, 2005 US App Vet Claims LEXIS 408

§ 505. Opinions of Attorney General
Discussion and Analysis in the Veterans Benefits Manual

The Secretary may require the opinion of the Attorney General on any question of law arising in the administration of the Department.

Explanatory notes:
A prior § 505 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 1505.

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Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 16

§ 510. Authority to reorganize offices
(a) Except to the extent inconsistent with law, the Secretary may--
(1) consolidate, eliminate, abolish, or redistribute the functions of the Administrations, offices, facilities, or activities in the Department;
(2) create new Administrations, offices, facilities, or activities in the Department; and
(3) fix the functions of any such Administration, office, facility, or activity and the duties and powers of their respective executive heads.

(b) The Secretary may not in any fiscal year implement an administrative reorganization described in subsection (c) unless the Secretary first submits to the appropriate committees of the Congress a report containing a detailed plan and justification for the administrative reorganization. No action to carry out such reorganization may be taken after the submission of such report until the end of a 45-day period following the date of the submission of the report, not less than 30 days of which shall be days during which Congress shall have been in continuous session. For purposes of the preceding sentence, continuity of a session of Congress is broken only by adjournment sine die, and there shall be excluded from the computation of any period of continuity of session any day
during which either House of Congress is not in session during an adjournment of more than three days to a day certain.

(c) An administrative reorganization described in this subsection is an administrative reorganization of a covered field office or facility that involves a reduction during any fiscal year in the number of full-time equivalent employees with permanent duty stations at such office or facility—

(1) by 15 percent or more; or
(2) by a percent which, when added to the percent reduction made in the number of such employees with permanent duty stations at such office or facility during the preceding fiscal year, is 25 percent or more.

(d) (1) Not less than 30 days before the date on which the implementation of any administrative reorganization described in paragraph (2) of a unit in the Central Office is to begin, the Secretary shall transmit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a notification regarding the reorganization.

(2) Paragraph (1) applies to an administrative reorganization of any unit of the Central Office that is the duty station for 30 or more employees if the reorganization involves a reduction in any fiscal year in the number of full-time equivalent employees with permanent duty stations in such unit by 50 percent or more.

(e) For purposes of this section, the term "administrative reorganization" does not include a consolidation or redistribution of functions at a covered field office or facility, or between components of the Veterans Benefits Administration and the Veterans Health Administration at a Department medical and regional office center, if after the consolidation or redistribution the same number of full-time equivalent employees continues to perform the affected functions at that field office, facility, or center.

(f) For purposes of this section:

(1) The term "covered field office or facility" means a Department office or facility outside the Central Office that is the permanent duty station for 25 or more employees or that is a free-standing outpatient clinic.

(2) The term "detailed plan and justification" means, with respect to an administrative reorganization, a written report that, at a minimum, includes the following:

(A) Specification of the number of employees by which each covered office or facility affected is to be reduced, the responsibilities of those employees, and the means by which the reduction is to be accomplished.

(B) Identification of any existing or planned office or facility at which the number of employees is to be increased and specification of the number and responsibilities of the additional employees at each such office or facility.

(C) A description of the changes in the functions carried out at any existing office or facility and the functions to be assigned to an office or facility not in existence on the date that the plan and justification are submitted pursuant to subsection (b).

(D) An explanation of the reasons for the determination that the reorganization is appropriate and advisable in terms of the statutory missions and long-term goals of the Department.

(E) A description of the effects that the reorganization may have on the provision of benefits and services to veterans and dependents of veterans (including the
provision of benefits and services through offices and facilities of the Department not directly affected by the reorganization).

(F) Estimates of the costs of the reorganization and of the cost impact of the reorganization, together with analyses supporting those estimates.

Explanatory notes:


Amendments:

1996. Act Oct. 9, 1996, in subsec. (b), substituted "a 45-day period following the date of the submission of the report, not less than 30 days of which shall be days during which Congress shall have been in continuous session" for "a 90-day period of continuous session of Congress following the date of the submission of the report" and substituted "any period of continuity of session" for "such 90-day period".

Other provisions:


"Section 210(b) of title 38, United States Code (as amended by subsection (a)) [now repealed; for similar provisions, see 38 USCS § 510], shall not apply to a reorganization of a unit of the Central Office of the Department of Veterans’ Affairs if the reorganization--

"(1) is necessary in order to carry out the provisions of or amendments made by this Act [for full classification of such Act, consult USCS Tables volumes]; and

"(2) is initiated within 6 months after the effective date of this Act.”.

Authorization of Secretary of Veterans Affairs to proceed with reorganization of regional field offices of Veterans Health Services and Research Administration. Act June 25, 1990, P. L. 101-312, 104 Stat. 271, provides:

"(a) The Secretary of Veterans Affairs may proceed with the administrative reorganization described in subsection (b) of this Act without regard to section 210(b) of title 38, United States Code [now repealed; for similar provisions, see 38 USCS § 510].

"(b) The administrative reorganization referred to in subsection (a) is the reorganization of the regional field offices of the Veterans Health Services and Research Administration of the Department of Veterans Affairs as that reorganization and related activity are described in (1) letters dated January 22, 1990, and the detailed plan and justification enclosed therewith, submitted by the Secretary to the Committees on Veterans’ Affairs of the Senate and the House of Representatives pursuant to such section 210(b) [now repealed; for similar provisions, see 38 USCS § 510], and (2) letters dated April 17, 1990, submitted in supplementation thereof by the Secretary to such Committees.”.

Authority of the Secretary of Veterans Affairs to carry out specified administrative reorganization. Act June 13, 1991, P. L. 102-54, § 12, 105 Stat. 273, provides:

"(a) Authority for administrative reorganization. The Secretary of Veterans Affairs may carry out the administrative reorganization described in subsection (b) without regard to section 210(b)(2) of title 38, United States Code [now repealed; for similar provisions, see 38 USCS § 510].

"(b) Specified reorganization. Subsection (a) applies to the organizational realignment of management responsibility for the Department of Veterans Affairs Data Processing Centers, together with the corresponding organizational realignment of associated Information...
Resources Management operational components and functions within the Department of Veterans Affairs central office, as such realignment was described in the detailed plan and justification submitted by the Secretary of Veterans Affairs in January 4, 1991, letters to the Chairmen of the Committees on Veterans' Affairs of the Senate and the House of Representatives.”.

**Code of Federal Regulations**

Department of Veterans Affairs-Board of Veterans' Appeals: Appeals regulations, 38 CFR Part 19

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

**Research Guide**

**Am Jur:**

77 Am Jur 2d, Veterans and Veterans' Laws § 16

§ 511. Decisions of the Secretary; finality

Discussion and Analysis in the Veterans Benefits Manual

(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(b) The second sentence of subsection (a) does not apply to--

(1) matters subject to section 502 of this title [38 USCS § 502];

(2) matters covered by sections 1975 and 1984 of this title [38 USCS §§ 1975 and 1984];

(3) matters arising under chapter 37 of this title [38 USCS §§ 3701 et seq.]; and

(4) matters covered by chapter 72 of this title [38 USCS §§ 7251 et seq.].

**Explanatory notes:**

A prior § 511 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 1511.

**Code of Federal Regulations**

Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Department of Veterans Affairs-Board of Veterans' Appeals: Appeals regulations, 38 CFR Part 19

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

**Cross References**

This section is referred to in 38 USCS §§ 5104, 7104

**Research Guide**

**Federal Procedure:**

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:10, 46, 284, 308, 309
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1. Generally

Action against administrator [now Secretary] of veterans affairs was properly dismissed for lack of jurisdiction, decisions of administrator [now Secretary] being final under statute. Magnus v United States (1956, CA7 Ill) 234 F.2d 673, cert den (1957) 352 US 1006, 1 L Ed 2d 551, 77 S Ct 569

Except with regard to life insurance programs, decision of Administrator [now Secretary] of any question of law or fact may not be reviewed by any official or court of United States by action in nature of mandamus or otherwise. Fermin v Army Board for Correction of Military Records (1963, CA9 Cal) 312 F.2d 552; Barefield v Byrd (1963, CA5 Miss) 320 F.2d 455, cert den (1964) 376 US 928, 11 L Ed 2d 624, 84 S Ct 675

By enactment of former 38 USCS § 211, Congress expressly deprives courts of jurisdiction to decide merits of claim. Fritz v Director of Veterans Administration (1970, CA9 Cal) 427 F.2d 154

Court had no jurisdiction to review Veterans' Administration [now Department of Veterans Affairs] decision accorded finality under former 28 USCS § 211, unless agency acted without statutory authority or veteran was denied constitutional right. Holley v United States (1972, SD Ohio) 352 F Supp 175, affd without op (1973, CA6 Ohio) 477 F.2d 600, cert den (1973) 414 US 1023, 38 L Ed 2d 314, 94 S Ct 446

Decisions of Veterans Administration [now Department of Veterans Affairs] were fully isolated from judicial review by former 38 USCS § 211, at least in absence of action so egregiously discriminatory and procedurally unfair as to require judicial re-examination of constitutionality of statute. Cieliczka v Johnson (1973, ED Mich) 363 F Supp 453

Petitioner did not show that decision by Department of Veterans Affairs (VA) General Counsel (GC) to terminate petitioner's accreditation under 38 USCS § 5904(b) was decision under law that affected provision of benefits by Secretary of Veterans Affairs to veterans or dependents or survivors of veterans under 38 USCS § 511(a); accordingly, it was not matter subject to review by Board of Veterans' Appeals, pursuant to 38 USCS § 7104(a), and was thus not matter over which court had jurisdiction under 38 USCS § 7252(a); therefore, veteran's petition for writ of mandamus ordering Secretary to provide statement of case was dismissed for lack of jurisdiction. Bates v Principi (2004) 17 Vet App 443, 2004 US App Vet Claims LEXIS 50, revd, remanded (2005, CA FC) 398 F.3d 1355

2. Constitutionality

Provision of former 38 USCS § 211 that decisions of Administrator [now Secretary] not be subject to review by courts was not unconstitutional. Milliken v Gleason (1964, CA1 RI) 332 F.2d 122, cert den (1965) 379 US 1002, 13 L Ed 2d 703, 85 S Ct 723

Preclusion of judicial review under former 38 USCS § 211(a) was not unconstitutional. Rosen v Walters (1983, CA9 Cal) 719 F.2d 1422

Finality provision of former 38 USCS § 211 did not deprive claimants of due process of law by judge and jury, since veterans' benefits were gratuities, to which recipients had no vested right. Rodulfa v United States (1972, App DC) 149 US App DC 154, 461 F.2d 1240, 18 ALR Fed 890, cert den (1972) 409 US 949, 34 L Ed 2d 220, 93 S Ct 270; Sager v Johnson (1972, DC Md) 342 F Supp 351

Provision of former 38 USCS § 211 as to conclusiveness of findings of director [now Secretary] was valid. Ex parte Rickell's Estate (1930) 158 Md 654, 149 A 446

Eighth Amendment challenge to 38 USCS § 511 must fail, where Seventh Circuit previously affirmed district court's summary dismissal of equal protection challenge to statute, because § 511(a), as construed "to allow substantial constitutional challenges to veterans' benefits statutes and regulations, as well as to procedures established by Veterans' Administration [now Department of Veterans Affairs] to administer them," is clearly constitutional and its subject matter is not close to kind of considerations that violate Eighth Amendment. Marozsan v United States (1994, ND Ind) 849 F Supp 617, affd, motion den (1996, CA7 Ind) 90 F.3d 1284, reh, en banc, den (1996, CA7 Ind) 1996 US App LEXIS 23455 and cert den (1997) 520 US 1109, 137 L Ed 2d 317, 117 S Ct 1117

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3. Purpose

Primary purposes of former 38 USCS § 211(a), were to insure that veterans' benefits claims would not burden courts and Veterans' Administration [now Department of Veterans Affairs] with expensive and time-consuming litigation, and to insure that technical and complex determinations and applications of Veterans' Administration [now Department of Veterans Affairs] policy connected with veterans' benefits decisions would be adequately and uniformly made. Johnson v Robison (1974) 415 US 361, 39 L Ed 2d 389, 94 S Ct 1160 (criticized in Hall v United States Dep't Veterans' Affairs (1996, CA11 Fla) 85 F.3d 532, 9 FLW Fed C 1171) and (superseded by statute as stated in Menendez v United States (1999, DC Puerto Rico) 67 F Supp 2d 42)

By providing judicial review of Secretary's decisions in Federal Circuit, Congress intended to obviate Supreme Court's reluctance to construe statute as barring judicial review of substantial statutory and constitutional claims, and such judicial review provisions amply evinced Congress' intent to include all issues, even constitutional ones, necessary to decision which affects benefits in this exclusive appellate review scheme; although district courts continue to have jurisdiction to hear facial challenges of legislation affecting veteran's benefits, other constitutional and statutory claims must be pursued within appellate mill Congress established in VJRA. Larrabee v Derwinski (1992, CA2 Conn) 968 F.2d 1497 (criticized in Hall v United States Dep't Veterans' Affairs (1996, CA11 Fla) 85 F.3d 532, 9 FLW Fed C 1171)

4. Relationship with other laws

State statute construed by state courts as authorizing award of child support from veteran's disability benefits which were his sole income does not conflict with former 38 USCS § 211 since Congress intended veterans' disability benefits to be used in part to support veteran's family, under Supremacy Clause of U.S. Constitution (Art VI, Cl 2), statute was not preempted by former § 211 which stated that Veterans' Administration [now Department of Veterans Affairs] decisions regarding benefits were to be final and not subject to judicial review where former § 211 was not intended to allow Veterans' Administration [now Department of Veterans Affairs] to make child support determinations contrary to determination of state courts. Rose v Rose (1987) 481 US 619, 95 L Ed 2d 599, 107 S Ct 2029

Under former 38 USCS § 211, judicial review of suit claiming that antidiscrimination provisions of 29 USCS § 794 of Rehabilitation Act of 1973 invalidated otherwise valid Veterans Administration's [now Department of Veterans Affairs] regulation purporting to deny extension of G. I. Bill educational benefits to certain alcoholics was not precluded, since text and legislative history of former § 211 provide no clear and convincing evidence of congressional intent to preclude such suits, notwithstanding that former § 211 generally bared judicial review of decisions, where, inter alia, 29 USCS § 794 was applicable to all federal agencies, enforcement of § 794 is not exclusive domain of agency, there is no challenge to agency's construction of any veterans' benefits statute, and judicial review of such suit would not undermine purposes of former § 211. Traynor v Turnage (1988) 485 US 535, 99 L Ed 2d 618, 108 S Ct 1372, 1 ADD 469, 2 AD Cas 214, 46 CCH EPD ¶ 37924 (superseded by statute as stated in Larrabee v Derwinski (1992, CA2 Conn) 968 F.2d 1497) and (superseded by statute as stated in Menendez v United States (1999, DC Puerto Rico) 67 F Supp 2d 42)

Servicemen's Indemnity Act of 1951 (65 Stat. 33) did not, by granting gratuitous indemnity, create contract right in serviceman, but rather made provision for pension for payment of which government had not consented to be sued, and decision of board of appeal was final and conclusive and not subject to review by any court of United States. Turner v United States (1956, CA8 Ark) 237 F.2d 700

Administrator [now Secretary] is not bound to follow provisions of Administrative Procedure Act [5 USCS §§ 1001 et seq. Barefield v Byrd (1963, CA5 Miss) 320 F.2d 455, cert den (1964) 376 US 928, 11 L Ed 2d 624, 84 S Ct 675

Statute takes precedence over general provision providing for judicial review of administrative action except so far as statutes preclude judicial review or agency action is committed to agency's discretion by law. Brewer v United States (1954, DC Tenn) 117 F Supp 842
Court of Federal Claims does not have jurisdiction to review denial of veterans' benefits, because 38 USCS § 511(a) precludes judicial review of veterans' benefits determinations in Court of Federal Claims, 38 USCS § 7252(a) provides that exclusive remedy for denial of veterans' benefits is to appeal to Court of Veterans Appeals, and jurisdiction for appeals from Court of Veterans Appeals lies exclusively in U.S. Court of Appeals for Federal Circuit (38 USCS § 7292). Davis v United States (1996) 36 Fed Cl 556

5. Retroactive application

Former 38 USCS § 211 was applicable even though appeal of Administrator's [now Secretary's] decision was perfected prior to date of enactment of former § 211. Van Horne v Hines (1941) 74 App DC 214, 122 F.2d 207, cert den (1941) 314 US 689, 86 L Ed 552, 62 S Ct 360, reh den (1942) 314 US 717, 86 L Ed 570, 62 S Ct 478

Inclusion in 1970 amendment to this statute of effective date October 17, 1940, evidenced unmistakable intent that statute be applied retroactively, and as so applied to bar recovery of fees by attorneys who successfully represented plaintiffs in actions to reinstate benefits prior to enactment of 1970 amendment; such bar did not violate attorneys' due process rights. Rodulfa v United States (1972, App DC) 149 US App DC 154, 461 F.2d 1240, 18 ALR Fed 890, cert den (1972) 409 US 949, 34 L Ed 2d 220, 93 S Ct 270

1970 amendment to former 38 USCS § 211(a), although retroactive to October 17, 1940, did not affect final, unappealable judgments. Daylo v Administrator of Veterans' Affairs (1974, App DC) 163 US App DC 251, 501 F.2d 811

1970 amendment to former 38 USCS § 211(a) pertained to all judgments to extent that they remained non-final at effective date of amendment; thus, dismissal in de Rodulfa was restricted to attorney's fees only, since Administrator [now Secretary] restricted appeal in that case to issue of attorney's fees. Dampitan v Administrator of Veterans Affairs (1974, App DC) 170 US App DC 115, 516 F.2d 708

6. Conclusiveness of prior state court determinations

State court judgment determining right to administration of estate of deceased holder of war risk policy is not subject to collateral attack in any other court. Cuff v United States (1933, CA9 Cal) 64 F.2d 624, cert den (1933) 290 US 676, 78 L Ed 583, 54 S Ct 96

Decision of state court as to rights of veteran under contract of war risk insurance was not res judicata binding on director of bureau [now Secretary] in his administration under federal statutes. Hines v Starnes (1928, Dist Col App) 58 App DC 219, 26 F.2d 997

7. Conclusiveness of prior federal court determinations

Judgment of Federal Court of Appeals as to disability of veteran was not binding on Administrator [now Secretary] in determining right to compensation. Kalasanckas v Hines (1930, Dist Col App) 59 App DC 217, 38 F.2d 389, cert den (1930) 282 US 837, 75 L Ed 744, 51 S Ct 29

Administrator [now Secretary] could review award of benefits based on finding of permanent disability and discontinue payment of such award when he no longer believes disability to exist, even though court originally directed payment of benefits. United States ex rel. Wilkinson v Hines (1934, Dist Col App) 64 App DC 5, 73 F.2d 514

II. MAINTENANCE OF PARTICULAR ACTIONS

A. In General

8. Generally

Beneficiary of life insurance granted under Servicemen's Indemnity Act, to whom veterans' administration [now Department of Veterans Affairs] had refused to pay proceeds upon death of insured soldier, could maintain action in federal district court for recovery thereof. Miller v United States (1954, DC Mo) 124 F Supp 203
Broad language of former 38 USCS § 211 required courts to decline judicial review and to dismiss action brought by patients at Veterans' Administration [now Department of Veterans Affairs] hospital for lack of subject matter jurisdiction as to all statutory claims, including those based upon §§ 504 and 505 of Rehabilitation Act of 1973 (29 USCS §§ 794 and 794a) and Developmental Disabilities Assistance and Bill of Rights Act (42 USCS §§ 600 et seq.). Falter v Veterans' Admin. (1980, DC NJ) 502 F Supp 1178

In suit by plaintiffs, on behalf of individuals who participated in activities associated with atomic weapons test detonations, against various past and present government officials, employees, and contractors alleging violation of constitutional rights by concealing medical records and other information necessary to obtain disability, medical, and other compensation, district court had subject matter jurisdiction and suit was not barred by 38 USCS § 511 because plaintiffs did not seek benefits determination under § 511, but raised issue of access to courts. Broudy v Mather (2004, DC Dist Col) 335 F Supp 2d 1

9. Damage actions

Civil damage action alleging that doctor caused defamatory psychiatric report to be placed in veteran's file, which was later used to deny him veteran's benefits, was barred by former 38 USCS § 211. Ross v United States (1972, CA9 Cal) 462 F.2d 618, cert den (1972) 409 US 984, 34 L Ed 2d 249, 93 S Ct 326, reh den (1973) 409 US 1118, 34 L Ed 2d 703, 93 S Ct 897

Privacy Act (5 USCS § 552) claim for damages based upon allegations that agency destroyed medical records pertinent to plaintiff's disability claim was barred by former 38 USCS § 211(a). Rosen v Walters (1983, CA9 Cal) 719 F.2d 1422

Veteran's state tort action brought against Veterans' Administration [now Department of Veterans Affairs] physician under Federal Tort Claims Act was properly dismissed by district court for lack of subject matter jurisdiction since it would have necessitated consideration of issues of law and fact involving decision to reduce veteran's benefits, which is review specifically precluded by 38 USCS § 511. Hicks v Small (1995, CA9 Nev) 69 F.3d 967, 95 CDOS 8232, 95 Daily Journal DAR 14206

Veteran's federal tort claim, alleging that negligent loss of his military medical records prevented his receipt of service-connected disability benefits, was precluded by former 38 USCS § 211(a), because former § 211(a) barred attempt through Federal Tort Claims Act (28 USCS §§ 1346 et seq.) to seek judicial review of decision to deny benefits. Quarles v United States (1990, DC Kan) 731 F Supp 428

Veteran cannot pursue his claim that Veterans' Administration [now Department of Veterans Affairs] doctor attempted and for period of time succeeded in reducing his benefits in retaliation for his complaints to his congressman regarding care received at Veterans' Administration [now Department of Veterans Affairs] medical center, because 38 USCS § 511 precludes federal District Court's exercise of jurisdiction over veteran's tort claim since to do so would involve judicial review of decision of Secretary of Department of Veterans Affairs regarding veteran's benefits. Hicks v Small (1993, DC Nev) 842 F Supp 407, affd (1995, CA9 Nev) 69 F.3d 967, 95 CDOS 8232, 95 Daily Journal DAR 14206

10. Mandamus actions

Mandamus would not lie to compel commissioner [now Secretary] to issue pension certificate, where he has decided that law did not entitle veteran to such certificate. United States ex rel. Dunlap v Black (1888) 128 US 40, 32 L Ed 354, 9 S Ct 12, 3 AFTR 2511

Except with regard to life insurance programs, decision of Administrator [now Secretary] of any question of law or fact could not be reviewed by any official or court of United States by action in nature of mandamus or otherwise. Fermin v Army Board for Correction of Military Records (1963, CA9 Cal) 312 F.2d 552; Barefield v Byrd (1963, CA5 Miss) 320 F.2d 455, cert den (1964) 376 US 928, 11 L Ed 2d 624, 84 S Ct 675

Mentally ill veteran's suit against Veterans' Administration [now Department of Veterans Affairs] is not moot where he sued on behalf of himself and all others similarly situated and
agency had not responded to mandamus issued upon it directing that veteran be provided psychological care. Taylor v United States (1974, ND Ill) 385 F Supp 1034

Award of compensation to veteran was discretionary with director [now Secretary], and if he did not exercise such power in arbitrary manner, mandamus would not issue to control his action. Hines v Welch (1928, Dist Col App) 57 App DC 371, 23 F.2d 979

Privileges conferred were subject to discretion of Administrator [now Secretary] to reconsider, set aside, or vacate either his own orders or those of his predecessors, and his action in that regard could not be controlled by mandamus. United States ex rel. Finley v Hines (1928, Dist Col App) 58 App DC 120, 25 F.2d 544

Mandamus would not control decisions of director [now Secretary] of bureau as to whether veteran had become permanently and totally disabled so as to be entitled to benefits of war risk insurance. Hines v Starnes (1928, Dist Col App) 58 App DC 219, 26 F.2d 997

Determination by Director [now Secretary] that retired enlisted man of regular Army was not entitled to pay of retired emergency officer, was not subject to review by mandamus. United States ex rel. Bowling v Hines (1931, Dist Col App) 60 App DC 180, 50 F.2d 330

B. Actions Raising Constitutional Issues

11. Constitutionality of statute

Prohibition of former 38 USCS § 211(a) against judicial review of decisions of the Administrator [now Secretary] did not deprive Federal District Court of jurisdiction of suit challenging constitutionality of the statutory scheme restricting educational benefits under the Veterans' Readjustment Benefits Act of 1966 (38 USCS §§ 3451 et seq. to veterans who served on active duty, thus denying benefits to conscientious objects who performed required alternative civilian service, since former § 211(a) did not bar judicial consideration of constitutional challenges to veterans' benefits legislation. Hernandez v Veterans' Administration (1974) 415 US 391, 39 L Ed 2d 412, 94 S Ct 1177

Provisions of former 38 USCS § 211(a) precluded judicial review of action of Administrator of Veterans Administration [now Department of Veterans Affairs], even when veteran alleged that Administrator [now Secretary] acted unconstitutionally and action was for damages, although judicial review would not be precluded if constitutional attack were directed to statutes underlying veterans' benefits program. Anderson v Veterans Admin. (1977, CA5 La) 559 F.2d 935

Prohibitions of former 38 USCS § 211 against review did not preclude review of claim that involved constitutional issue rather than mere challenge to administrator's [now Secretary] decision; thus, claim of class of student veterans which asserted that procedures used by agency to suspend and terminate class members' educational assistance payments violated procedural due process was reviewable under former § 211. Devine v Cleland (1980, CA9) 616 F.2d 1080

Former 38 USCS § 211(a) did not preclude judicial review of constitutional challenges to provisions of veterans' benefits legislation and regulations issued thereunder or of challenges to Administrator's [now Secretary] authority to promulgate regulations. Evergreen State College v Cleland (1980, CA9 Wash) 621 F.2d 1002

Although former 38 USCS § 211 prohibited review of decisions of Administrator [now Secretary] of Veterans Affairs on any questions of law or fact, and it was not intended to permit judicial review of determinations and interpretations of agency policies, there is no congressional statutory intent to preclude judicial cognizance of constitutional challenge to statute proscribing payment of benefits to veteran who asserts denial of "equal protection." Criminal Injuries Compensation Bd. v Gould (1975) 273 Md 486, 331 A2d 55 (superseded by statute as stated in McGee v Criminal Injuries Compensation Bd. (1984) 57 Md App 143, 469 A2d 470)

Although provisions of former 38 USCS § 211(a) limited jurisdiction of District Court over matters which involved approving of veteran's educational benefits, District Court was not precluded from inquiry into constitutionality of amendment to veteran's benefit legislation.

Former 38 USCS § 211 did not deprive court of jurisdiction to review plaintiff's claims, where subject matter of claims was agency's constitutional and statutory authority to enforce its retroactive billing regulations. American Federation of Government Employees v Nimmo (1982, ED Va) 536 F Supp 707, affd in part and vacated in part on other grounds (1983, CA4 Va) 711 F.2d 28

Court lacked jurisdiction to review final decision of Board of Veteran Appeals where disability claimant attempted to characterize her claim as constitutional challenge and alleged she was denied due process by not being allowed a hearing before Board, because claimant was represented by counsel at practically every critical stage of her proceedings and in fact was granted hearing. Dyer v Walters (1986, ED Mo) 646 F Supp 791

Veteran's suit against Veterans Administration [now Department of Veterans Affairs] alleging improper discontinuation of benefits was dismissed, because (1) veteran failed to exhaust administrative remedies by appealing decision to Board of Veterans Appeals, and (2) court was precluded by former 38 USCS § 211(a) from reviewing agency decision relating to benefits since veteran was really attacking application of statute rather than its constitutionality. Secretary of Labor v Turnage (1987, DC Puerto Rico) 657 F Supp 1033

Court would address veteran's constitutional arguments, even though substance of veteran's complaint was attempt to have court review questions of law and fact as applied to his particular reduction in disability percentage, because veteran proposed novel constitutional argument that beneficiary's right to due process was violated if Veterans Administration [now Department of Veterans Affairs] initiates constitutionally adequate process of reevaluation. Tietjen v United States Veteran's Admin. (1988, DC Ariz) 692 F Supp 1106, affd (1989, CA9 Ariz) 884 F.2d 514

12. Constitutionality of regulations

Former 38 USCS § 211(a) did not preclude criminal court's jurisdiction to review plaintiffs' challenge to Veterans' Administration [now Department of Veterans Affairs] guidelines under which plaintiffs, employees of agency, were billed for medical care provided by agency hospitals, where action is not aimed at review of denial of benefits, but rather at constitutional and statutory authority of agency to enforce its retroactive billing regulations. American Federation of Government Employees v Nimmo (1982, ED Va) 536 F Supp 707, affd in part and vacated in part on other grounds (1983, CA4 Va) 711 F.2d 28

Former section 211(a) did not bar review of quasi-legislative actions of Administrator [now Secretary]; thus, suits challenging authority to promulgate regulations were not barred by former § 211(a). Hartmann v United States (1985, ED NY) 615 F Supp 446

Court review of constitutionality of Veterans Administration [now Department of Veterans Affairs] regulation and its application to particular case was permissible under former 38 USCS § 211(a), where veteran and his wife challenged erratic pattern of dispositions which reduced veteran's disability rate without affording him a hearing; regulation allowing action affecting benefits against veteran who failed to report to medical examination was only constitutionally applied where veteran received hearing and opportunity to establish adequate reasons for noncompliance, and agency acted irresponsibly by reducing benefits of veteran for not attending medical exam when it was obvious from record that schizophrenic, paranoid veteran could not be forced to attend exam by sending letters to his wife. Zayas v Veterans Admin. (1987, DC Puerto Rico) 666 F Supp 361

13. Administrative determinations and practices

Provisions of former 38 USCS § 211(a) precluded judicial review of action of Administrator of Veterans Administration [now Department of Veterans Affairs], even when veteran alleged that Administrator [now Department of Veterans Affairs] acted unconstitutionally and action is for damages, although judicial review would not be precluded if constitutional attack were directed to statutes underlying veterans' benefits program. Anderson v Veterans Admin. (1977, CA5 La) 559 F.2d 935

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Bar to judicial reviewability imposed by former 38 USCS § 211(a) could not be overcome by alleging deprivation of property interest in form of benefits claimed. Durant v United States (1985, CA11 Fla) 749 F.2d 1554.

Federal District Court had subject matter jurisdiction to hear veteran's constitutional due process challenge to Veterans' Administration [now Department of Veterans Affairs] procedures in terminating veteran's educational benefits without appropriate notice while veteran was incarcerated, since constitutional procedural challenge was significantly different in substance and effect from challenges to Administrator's [now Secretary's] decisions regarding entitlement to veterans benefits which were not subject to federal court review under former 38 USCS § 211. Mathes v Hornbarger (1987, CA7 Ind) 821 F.2d 439.

Former 38 USCS § 211 did not bar judicial review of veteran's constitutional claim that arbitrary quota system employed by agency to grant disability benefits violated due process, since veteran's claims sought more than benefits, they seek review of procedures employed by administrator [now Secretary] to reach decisions. Marozsan v United States (1988, CA7 Ind) 852 F.2d 1469.

Veteran's suit alleging constitutional rights' violations by agency and seeking over $27 million in damages could not be construed as anything more than request for judicial review of agency's decision to deny him disability benefits in absence of specific allegation of any particular constitutional violation. Deloria v Veterans Admin. (1991, CA7 Wis) 927 F.2d 1009, reh den (1991, CA7 Wis) 1991 US App LEXIS 7836.

District Court lacked jurisdiction to pass on validity of Administrator's [now Secretary] 1952 determination terminating monthly disability compensation benefits in favor of World War II Veteran, and to pass on question of whether Administrator's [now Secretary] action was consistent with due process constitutional requirement, where record showed that veteran ignored invitation to present evidence at pretermination hearing and was granted four posttermination hearings on his claim for restoration of benefits. Langston v Johnson (1973, App DC) 156 US App DC 5, 478 F.2d 915.

Action was not maintainable against United States for declaratory judgment that veteran's induction into army constituted taking of his body and its earning power, his private property, for public use, for which he was entitled to just compensation to be determined by jury in view of injuries sustained in combat which rendered him totally unable to follow any gainful occupation. Commers v United States (1946, DC Mont) 66 F Supp 943, affd (1947, CA9 Mont) 159 F.2d 248, cert den (1947) 331 US 807, 91 L Ed 1828, 67 S Ct 1189.

Allegation of constitutional infirmity in particular administrative action was not sufficient basis for avoiding effect of former 38 USCS § 211 and permitting judicial review of decision of Veterans Administration [now Department of Veterans Affairs]. Cieliczka v Johnson (1973, ED Mich) 363 F Supp 453.

Former 38 USCS § 211(a) did not prohibit review by federal court of veteran's constitutional attack on Veterans' Administration's [now Department of Veterans Affairs'] refusal to provide pretermination hearing in connection with suspending veterans' pension benefits since veteran did not seek review of decision of Administrator [now Secretary] on question of law or fact under law providing benefits for veterans but rather seeks constitutional review of generally applicable procedural policy. Plato v Roudebush (1975, DC Md) 397 F Supp 1295.

Provisions of former 38 USCS § 211(a) did not preclude judicial review of constitutional questions arising from Administrator's [now Secretary] interpretation of limits of his authority in promulgating regulations; Congress could, consistent with Constitution, withdraw from judicial scrutiny administrative decisions which were "discretionary" or which involved "privileges" and not deprivations of liberty or property by extrajudicial action, but former 38 USCS § 211 should not be construed as attempt to insulate from judicial review decisions of Administrator [now Secretary].
Secretary) as to scope of his authority, as this would make Administrator [now Secretary] sole judge of lawfulness of regulations he had enacted, and call into question constitutionality of former 38 USCS § 211(a); provisions of former § 211(a) precluded court from taking jurisdiction of questions involving decision of Administrator [now Secretary] in interpretation of application of particular provision of statute to particular set of facts. Wayne State University v Cleland (1977, ED Mich) 440 F Supp 806

Claim that Veterans' Administration [now Department of Veterans Affairs] acted unreasonably in not processing Vietnam veteran's application for benefits in timely manner thereby denying veteran equal protection of law and depriving him of property without due process of law appeared to fit within exception to jurisdictional bar of former 38 USCS § 211(a). Arnolds v Veterans' Admin. (1981, ND Ill) 507 F Supp 128

Former 38 USCS § 211(a) did not bar judicial review of constitutional challenges to veterans' benefits legislation but it did bar courts from considering action by veteran alleging discriminatory practices in treatment of drug addicted patients at Veterans Administration [now Department of Veterans Affairs] Hospital, since plaintiff was challenging medical and rehabilitative decisions of administrators, not congressional act. Pettus v Veterans Admin. Hospital (1981, ED Pa) 517 F Supp 656, 33 BNA FEP Cas 903

Former section 211(a) barred suit to require Veterans Administration [now Department of Veterans Affairs] to provide diagnostic testing and correct treatment for filariasis in Vietnam veterans notwithstanding contention that World War II veterans received care for filariasis and that unequal treatment for Vietnam veterans violated their right to equal protection under Constitution. Hartmann v United States (1985, ED NY) 615 F Supp 446

III. REVIEWABILITY OF PARTICULAR DETERMINATIONS

A. Benefit Determinations

1. In General

14. Generally

Decisions of director [now Secretary] upon right to compensation were final and conclusive and not subject to judicial review, unless they were wholly unsupported by evidence, wholly dependent upon question of law, or clearly arbitrary or capricious. Silberschein v United States (1924) 266 US 221, 69 L Ed 256, 45 S Ct 69 (superseded by statute as stated in New York v Eadarso (1996, ED NY) 946 F Supp 240); Armstrong v United States (1926, CA8 Iowa) 16 F.2d 387; Smith v United States (1936, CA8 Ark) 83 F.2d 631

Decisions of veterans' administration [now Department of Veterans Affairs] upon questions concerning pensions, compensation allowances and special privileges, all of which are gratuities, were final and not subject to judicial review. United States v Robinson (1939, CA9 Cal) 103 F.2d 713

Former 38 USCS § 211(a) did not preclude District Court review of challenge to Administrator's [now Secretary] interpretation of his authority under 38 USCS § 3101(a) [now 38 USCS § 5301(a)], since litigation did not involve veterans' benefits claims. University of Maryland v Cleland (1980, CA4 Md) 621 F.2d 98

Complaint which sought benefits which had been claimed and denied failed to state valid claim for relief since applicant for benefits could not challenge disposition of his claim because administrator's [now Secretary] decisions of law or fact concerning administration of benefits were not subject to judicial review; one could not circumvent former 38 USCS § 211 by seeking damages on constitutional claim arising out of denial of benefits. Pappanikolaou v Administrator of Veterans Admin. (1985, CA2) 762 F.2d 8, cert den (1985) 474 US 851, 88 L Ed 2d 124, 106 S Ct 150

Veterans Judicial Review Act's statutory review process vests exclusive jurisdiction over veterans' benefits claims, including decisions of constitutional issues, with Court of Veterans

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District Court did not have jurisdiction to review decision of administrator [now Secretary], as it is final, since veteran benefits are mere gratuities and not matter of right; Congress did not intend any appeal from decision of administrator [now Secretary]. Slocumb v Gray (1949, App DC) 86 US App DC 5, 179 F.2d 31

Judicial review of use by Veterans' Administration [now Department of Veterans Affairs] of certain documents and methodologies to help determine claims of injury from exposure to radiation during military service was precluded by former 38 USCS § 211. Gott v Walters (1985, App DC) 244 US App DC 193, 756 F.2d 902, reh gr, en banc, vacated (1985, App DC) 253 US App DC 1, 791 F.2d 172

Even if veteran appeals only ultimate question of entitlement to benefits, 38 USCS § 511(a) and 38 USCS § 7104(a) authorize Board of Veterans' Appeals to make final decision on behalf of Secretary regarding whether new and material evidence has been presented by veteran; although regional office determined veteran had presented new and material evidence to warrant reopening of claim, Board did not err in ruling that veteran had failed to present new and material evidence, even though veteran only appealed regional office's determination that disability was not service connected. Jackson v Principi (2001, CA FC) 265 F.3d 1366

On petition for review of certain regulations promulgated by Secretary of United States Department of Veterans Affairs (Secretary) filed by veterans organizations, 38 C.F.R. § 19.9(a)(2), in conjunction with 38 C.F.R. § 20.1304, was invalid because it was inconsistent with requirement of 38 USCS § 7104(a) that all questions in matter which was subject to decision by Secretary under 38 USCS § 511(a) should be subject to one review on appeal to Secretary, 38 C.F.R. § 19.9(a)(2)(ii) was invalid because it was contrary to 38 USCS § 5103(b), which provided claimant one year to submit evidence, but remaining challenged provisions were not arbitrary, capricious, or contrary to law under 5 USCS § 706(2)(A) because 38 C.F.R. § 19.31 did not conflict with 38 C.F.R. § 3.103, 38 C.F.R. § 20.903 was not contrary to 38 USCS § 5103, and 38 C.F.R. § 20.1304's requirement for good cause and ninety-day response period does not conflict with 38 USCS § 5103's notice and time limitations. Disabled Am. Veterans v Sec'y of Veterans Affairs (2003, CA FC) 327 F.3d 1339

Federal District Courts, which possess only such jurisdiction as Congress may confer upon them by statute, were expressly precluded by former 38 USCS § 211(a), from reviewing factual or legal determinations made by Administrator [now Secretary] providing benefits for veterans, dependents or survivors; nonreview clause of former 38 USCS § 211(a) was intended to insure that veterans' benefits claims would not burden courts and Veterans' Administration [now Department of Veterans Affairs] with expensive and time-consuming litigation, and to insure that technical and complex determinations and application of Veterans' Administration policy connected with veterans' benefits decisions would be adequately and uniformly made. Wexler v Roudebush (1977, ED Pa) 443 F Supp 31

Claims against Veterans Administration [now Department of Veterans Affairs] were improperly removed to federal court because former 38 USCS § 211(a) provides that federal courts had no jurisdiction to hear challenges to benefits. Woodward v Turnage (1986, ED Mo) 646 F Supp 219

Court lacked jurisdiction to review Veteran's Administration [now Department of Veterans Affairs] decision regarding pro se plaintiff's effort to obtain benefits, because former 38 USCS § 211(a) specifically prohibited judicial review of benefit decisions. Bactong v United States Veterans Admin. (1987, DC Dist Col) 663 F Supp 10

Veterans' challenge to Veterans Administration [now Department of Veterans Affairs] implementation of Gramm-Rudman-Hollings federal deficit reduction directive was dismissed, because to extent plaintiffs (1) sought review of individual benefit reductions, or (2) attack on nonconstitutional grounds any "decisions of Veterans Administrator [now Secretary] on any question of law or fact," no jurisdiction existed for ordinary judicial review under former 38 USCS

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Court lacked subject matter jurisdiction over plaintiff veteran's claims under Federal Tort Claims Act, 28 USCS §§ 2671 et seq., and over alleged constitutional violations and other claims, that were based on defendant Department of Veterans' Affairs' alleged failure to inform veteran of diagnosis and to offer treatment, because claims amounted to request that court review adequacy of medical attention provided to veteran and, therefore, were barred by 38 USCS § 511. Thomas v Principi (2003, DC Dist Col) 265 F Supp 2d 35, aff'd in part and revd in part, remanded, request den (2005, App DC) 394 F.3d 970

15. Eligibility for benefits

Denial by veterans' administration [now Department of Veterans Affairs] of claim for gratuitous indemnity for son who died in active duty in service was final and federal district court must dismiss suit of mother for lack of jurisdiction, for there was no provision in Servicemen's Indemnity Act of 1951 authorizing suits against United States on claims for gratuitous indemnity. Cyrus v United States (1955, CA1 Mass) 226 F.2d 416

Since court lacked jurisdiction over determination of veteran's benefits, it could not be compelled to consider and render judgment on validity of claim or evidence pertaining thereto. Carter v Register (1963, CA8 ND) 316 F.2d 226


Veteran's argument that district court's refusal to apply claim preclusion to his action under Federal Tort Claims Act, 28 USCS § 2671 et seq., resulted in impermissible judicial review of Department of Veterans Affairs' disability determinations in violation of 38 USCS § 511 failed because veteran had not shown how adverse decision in FTCA could possibly have had any effect on benefits he had already been awarded, and without any diminution of his entitlement to disability benefits, there was no way in which decision on merits of veteran's FTCA claim amounted to judicial review of 38 USCS § 1151 proceedings. Littlejohn v United States (2003, CA9 Nev) 321 F.3d 915, cert den (2003) 540 US 985, 157 L Ed 2d 377, 124 S Ct 486

Because adjudicating claim that Department of Veteran's Affairs (VA) committed medical malpractice when it failed to inform veteran that VA doctor had diagnosed veteran with schizophrenia would not require district court to review question necessary to decision under law that affected provision of benefits, district court erred in dismissing complaint. Thomas v Principi (2005, App DC) 394 F.3d 970

Decision of Administrator [now Secretary] that deceased veteran was honorably discharged from United States Army at his own request upon ground of alienage and, therefore, was not entitled to adjusted service certificate or to loan on security of such certificate, was controlling against veteran's estate, upon validity and allowance of claim. United States v Gudewicz (1942, DC NY) 45 F Supp 787

Former 38 USCS § 211 precluded judicial review of claim alleging that Veterans' Administration [now Department of Veterans Affairs] wrongfully withheld veterans' benefits. Sager v Johnson (1972, DC Md) 342 F Supp 351

Federal court was without jurisdiction to hear veteran's claim of improper denial of medical benefits since Administrator [now Secretary], through his own regulation, made decision under 38 USC § 101(2) that veteran's discharge because of homosexuality was dishonorable. Kiser v Johnson (1975, MD Pa) 404 F Supp 879

Disabled veteran's action against Secretary of Veterans Affairs is dismissed, where veteran alleged that Department of Veterans Affairs (VA) violated his constitutional and statutory rights by
improperly setting his disability rating at 50 percent and refusing to revise that rating, because 38 USCS § 511 precludes the court from reviewing VA determinations of benefit awards or of disability ratings. Sugrue v Derwinski (1992, ED NY) 808 F Supp 946, affd (1994, CA2 NY) 26 F.3d 8, cert den (1995) 515 US 1102, 132 L Ed 2d 254, 115 S Ct 2245

Veteran's action seeking $10.4 billion from Department of Veterans Affairs (VA) for denial of his civil rights must fail, where veteran claims department has refused to provide him medical benefits to which he is entitled, because he is essentially seeking judicial review of VA determination regarding his eligibility for benefits, which is precluded by 38 USCS § 511(a). Marsh v Department of Veterans Affairs (1995, ND W Va) 921 F Supp 360, affd without op (1996, CA4 W Va) 77 F.3d 469, reported in full (1996, CA4 W Va) 1996 US App LEXIS 2188 and cert den (1996) 517 US 1226, 134 L Ed 2d 960, 116 S Ct 1861

Veteran seeking Veterans' Administration [now Department of Veterans Affairs] payment of his medical bills must fail, where state seeks to recover portion of his hospital bill from veteran, because review of Veterans' Administration [now Department of Veterans Affairs] determination not to award benefits to veteran is expressly precluded by 38 USCS § 511(a). New York v Eadarso (1996, ED NY) 946 F Supp 240

Board had jurisdiction to decide whether veteran was entitled to fee-basis medical care since implementing regulation regarding Board's jurisdiction specifically states that Board has jurisdiction to review eligibility for outpatient treatment. Meakin v West (1998) 11 Vet App 183

16. -Eligibility date

Decision of Administrator [now Secretary] became "final and conclusive" and district court lacked jurisdiction to review that decision, where based on "Difference of Opinion" under 38 C.F.R. 3.105(b), corrective action was taken in widow's claim for dependency and indemnity compensation benefits, previously and finally disallowed, but reopened by Administrator [now Secretary] who decided to allow benefits, effective as of later date under 38 USCS § 3010(a) [now 38 USCS § 5310(a)]. Sibonga v Administrator of Veterans Affairs (1972, App DC) 147 US App DC 370, 458 F.2d 789, cert den (1972) 409 US 952, 34 L Ed 2d 224, 93 S Ct 298, reh den (1972) 409 US 1068, 34 L Ed 2d 521, 93 S Ct 564

Action challenging determination of Administrator of Veterans Administration [now Secretary of Veterans Affairs] that aunt of deceased veteran, who stood in loco parentis to veteran, was not entitled to retroactive dependency and indemnity compensation for death of nephew, would be dismissed, notwithstanding complaint alleges violation of due process and conflict between statute and pertinent regulation, where denial of retroactive benefits was not based on challenged regulation but rather on findings as to factual time claim was filed, since former 38 USCS § 211 precludes court review of decisions of Administrator [now Secretary of Veterans Affairs] on questions of law or fact. Brooks v Cleland (1982, ED Mich) 531 F Supp 103

Air Force veteran's claim seeking retroactivity of service-incurred disability benefits was dismissed for lack of subject-matter jurisdiction, because veteran's challenge involved application of statutory provision and regulation to particular set of facts—technical matter within particular expertise of agency—which former 38 USCS § 211(a) precluded court from reviewing. Mozur v Turnage (1990, ED Pa) 729 F Supp 27, affd without op (1990, CA3 Pa) 908 F.2d 963

17. Termination of benefits

Action, seeking declaration that forfeiture was void, could not be maintained by veteran whose benefits had been forfeited for alleged fraud. Milliken v Gleason (1964, CA1 RI) 332 F.2d 122, cert den (1965) 379 US 1002, 13 L Ed 2d 703, 85 S Ct 723

Judicial review of Administrator's [now Secretary's] decision to terminate certain vocational training benefits, was barred by former 38 USC § 211(a), since benefits, which were made available by 38 USCS 610 [now 38 USCS § 1710], were such as Administrator [now Secretary] could "furnish within limits of Veterans Administration [now Department of Veterans Affairs] facilities" and were thus committed to agency discretion by law and by reason of 5 USCS 701(a)(2). Moore v Johnson (1978, CA9 Cal) 582 F.2d 1228
Judicial review of Administrator's [now Secretary] decision to relocate certain veterans receiving domiciliary care and to terminate certain vocational training benefits, was barred by former 38 USCS 211(a), since benefits, which were made available by 38 USCS 610 [now 38 USCS § 1710], were such as Administrator [now Secretary] could "furnish within limits of Veterans Administration [now Department of Veterans Affairs] facilities" and were thus committed to agency discretion by law and by reason of 5 USCS 701(a)(2). Moore v Johnson (1978, CA9 Cal) 582 F.2d 1228

Mere fact that government made conclusive discretion of the administrator [now Secretary's] in granting benefit did not carry with it conclusiveness in discretion in taking it away retroactively. Hines v United States (1939) 70 App DC 206, 105 F.2d 85

Forfeiture of previously awarded pension benefits was not decision on claim, but action initiated by Administrator [now Secretary] to which former 38 USCS § 211 did not apply; although award of benefits pursuant to claim did not give veteran vested right in benefits, after claim had been allowed and benefits had been awarded, there was no longer mere claim which Administrator [now Secretary] could unreviewably reject if he chose because veteran was beneficiary and Administrator's [now Secretary's] subsequent termination of his benefits was not immune from judicial scrutiny. Tracy v Gleason (1967, App DC) 126 US App DC 415, 379 F.2d 469 (superseded by statute as stated in Carter v Cleland (1980, App DC) 207 US App DC 6, 643 F.2d 1) and (superseded by statute as stated in Gott v Walters (1985, App DC) 244 US App DC 193, 756 F.2d 902) and (superseded by statute as stated in Marozsan v United States (1988, CA7 Ind) 852 F.2d 1469)

Federal District Court had no jurisdiction to review decision of veterans' administration [now Department of Veterans Affairs] that plaintiff was shown by evidence to be living as wife of third person, and had generally acquired reputation as such in community; accordingly, she could no longer be recognized as unmarried widow of deceased, former Philippine scout in United States army, and hence was not entitled to recover death compensation benefits as widow of deceased. Guzman v Gleason (1964, DC Dist Col) 234 F Supp 145

18. Recovery of payments

Predecessor to former 38 USCS § 211 did not preclude judicial review of evidentiary basis for government's claimed right to setoff overpayments of gratuitous benefits against national service life insurance dividends, since finality accorded Administrator's [now Secretary's] decisions by predecessor to former § 211 was limited to decisions denying claim for gratuitous benefits or declaring their forfeiture. Di Silvestro v United States (1968, CA2 NY) 405 F.2d 150

Administrator's [now Secretary's] determination of fraud upon which he acted retroactively to recover overpayments from veterans, was not a conclusive nature. Hines v United States (1939) 70 App DC 206, 105 F.2d 85

When agency took affirmative action against individual under former 38 USCS § 211, whether by bringing action to recover on asserted claim or by proceeding on its common-law right of set-off, validity of underlying basis of action became open to judicial scrutiny. De Magno v United States (1980, App DC) 205 US App DC 6, 636 F.2d 714

Whether or not pension payments or disability compensation erroneously received by veteran from veterans' administration [now Department of Veterans Affairs] should be set off against salary payments due him from it was matter for administrative settlement through consideration and decision by administrator of veterans' administration [now Secretary of Veterans Affairs] and not by courts. Egan v United States (1952) 123 Ct Cl 472, 112 F Supp 958

A debt asserted by the government was not a "claim for benefits" conferring on Administrator [now Secretary] final and conclusive jurisdiction under predecessor to former 38 USCS § 211. Hormel v United States (1954, DC NY) 123 F Supp 806

Provisions contained in former 38 USCS § 211 relating to finality of decisions of veterans' administration [now Department of Veterans Affairs] were applicable solely to cases in which claim was presented against government, but did not extend to affirmative claims made by
government to secure repayments. Gongora v United States (1960, DC Dist Col) 183 F Supp 872

In action by United States to recover educational assistance allowance paid to veteran who was allegedly not entitled to such money, court could decide whether veteran owed government notwithstanding provision of former 38 USCS § 211 purporting to deprive federal court of jurisdiction to review decision of Administrator [now Secretary] on veterans benefits. United States v Brandon (1984, WD NC) 584 F Supp 803

Former 38 USC § 211(a) did not preclude federal court from independently examining merits of controversy involving overpayment of veteran's benefits where Board of Veterans Appeals had already determined that debt was owed to government because of veteran's failure to report workers' compensation benefits. United States v Walls (1986, SD W Va) 633 F Supp 720

Decision of Administrator [now Secretary] of Veterans' Affairs that decedent had never served in United States army or navy, that issuance of his discharge from army was error, and that amounts paid to him were erroneous and unlawful was controlling with respect to government's claim for refund filed against decedent's estate in state court. In re Rosa's Estate (1939) 172 Misc 808, 16 NYS2d 285

Administrator's [now Secretary's] erroneous and excessive award to one beneficiary at expense of fellow-beneficiary under war risk insurance policies was not final and conclusive determination under predecessor to 38 USCS § 211, thus allowing court to award set-off in favor of fellow-beneficiary. Day v Bradshaw (1939) 174 Va 105, 5 SE2d 514

2. Insurance

19. Generally

Predecessor to former 38 USCS § 211, providing that decisions by the Administrator [now Secretary] of Veterans Affairs were final and conclusive on all questions of law and fact, did not relate to war risk insurance but concerned only pensions, compensation allowances and special privileges to veterans and their dependents. Lynch v United States (1934) 292 US 571, 78 L Ed 1434, 54 S Ct 840 (ovrd in part as stated in Pro-Eco v Board of Comm'rs (1995, CA7 Ind) 57 F.3d 505, 26 ELR 20445)

20. Beneficiaries

Because automatic free insurance provided by Servicemen's Indemnity Act of 1951 (65 Stat. 33) created contract of insurance, claim for proceeds of such insurance was exempt from provisions of this section and serviceman's widow could obtain judicial review of veterans' administration [now Department of Veterans Affairs] determination that soldier's mother was true beneficiary of his insurance. Wilkinson v United States (1957, CA2 NY) 242 F.2d 735, cert den (1957) 355 US 839, 2 L Ed 2d 51, 78 S Ct 52

21. Dividends

No-review clause did not preclude veteran from obtaining judicial review of Veterans' Administration [now Department of Veterans Affairs] decision that it had right to set off national service life insurance dividends against monies claimed to be due from veteran to United States as result of benefit payments made to veteran allegedly procured by fraud. Di Silvestro v United States (1968, CA2 NY) 405 F.2d 150

3. Other Particular Benefits

22. Pensions

Decisions of commissioner of pensions were not reviewable by United States Supreme Court. United States ex rel. Dunlap v Black (1888) 128 US 40, 32 L Ed 354, 9 S Ct 12, 3 AFTR 2511

Whatever may have been fact regarding deceased Civil War veteran's term of service insofar as pension claim was concerned, District Court was without jurisdiction to issue to Administrator [now Secretary] of Veterans Affairs order to pay it, since Congress had denied
judicial review of decisions of administrator [now Secretary] concerning claims for pensions. Snauffer v Stimson (1946, App DC) 81 US App DC 110, 155 F.2d 861

District Court had no jurisdiction to review decision of Administrator [now Secretary] of Veterans Affairs denying pension to widow of World War I veteran. Cook v Higley (1956, App DC) 99 US App DC 180, 238 F.2d 41

Matter of ascertaining, determining, and certifying who is lawfully entitled to gratuity authorized to be bestowed on account of military service was confided to certain executive officers, and nowhere to judiciary; no right to pension is fixed until those officers declared it so, and if they decide against the right, there was no appeal from that decision except to Congress. Daily's Case (1881) 17 Ct Cl 144

Action against United States to recover sum for sickness incurred by veteran while on duty in Army, if maintainable at all, was for pension, and it could not be maintained in Court of Claims. Killian v United States (1946) 105 Ct Cl 393, 63 F Supp 748

Court of Claims did not have jurisdiction of claim for emergency officer's retirement pay, since jurisdiction to determine such claim was restricted to Administrator [now Secretary] of Veterans Affairs. Peyton v United States (1951) 120 Ct Cl 722, 100 F Supp 823, cert den (1952) 343 US 909, 96 L Ed 1326, 72 S Ct 639

If plaintiff intended to sue defendants in their individual capacities for making him wait eight years before his pension benefits were reinstated and by delaying for another four years after reinstating his benefits before paying him back benefits for eight-year gap, he failed to state claim for which relief could be granted because comprehensive remedial structure of 38 USCS § 511 provided adequate remedy for constitutional violations and, thus, precluded Bivens claims. Murrhee v Principi (2005, CD Ill) 364 F Supp 2d 782

Plaintiff's action, challenging delay of his pension benefits was dismissed for lack of jurisdiction because, although district courts retained jurisdiction to review facial constitutional challenges to veterans' benefits statutes, 38 USCS § 511(a) effectively precluded district court review of veterans' benefits claims; further, plaintiff's complaint challenged agency's conduct and, therefore, claim could not be construed to raise facial constitutional challenge. Murrhee v Principi (2005, CD Ill) 364 F Supp 2d 782

Pensions are free gifts from government, and, where law provides that claims for pensions are to be finally determined by administrative officers, that is exclusive remedy. Corkum v Clark (1928) 263 Mass 378, 161 NE 912

23. Death benefits

Action against United States by natural mother of soldier to recover $10,000 payment under Servicemen's Indemnity Act, which amount had been awarded by veterans' administration [now Department of Veterans Affairs] to soldier's aunt and uncle as persons standing in relationship of parents, was properly dismissed either as claim seeking judgment for money or as effort to review correctness of administrator's [now Secretary] action under Administrative Procedure Act (5 USCS §§ 1001 et seq.). Ford v United States (1956, CA5 Ga) 230 F.2d 533

Decision that death of veteran was due to service-related disability was subject to judicial review where determination of whether veteran died from service-connected disability or died from another cause while receiving benefits for service-connected disability affected whether widow's award for economic loss due to medical negligence during heart surgery could be set-off or whether future death benefits owing to widow could be withheld until amount of future death benefits owed to widow exceeded amount received as economic loss from court. Greenwood v United States (1988, CA5 Tex) 858 F.2d 1056

Widow and child of armed service member who died while stationed in Germany might not be precluded from seeking intermediate relief if lawful, even though then they might well hope that corrected Army record might warrant reconsideration by Veterans Administration [now Department of Veterans Affairs] of service member's status and, in turn, their entitlement to benefits, notwithstanding that original purpose in initiating review of military record and bringing law suit was to qualify for veteran survivor's benefits, such purpose being contrary to bar against

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judicial review of Veteran Administration [now Department of Veterans Affairs] denial of benefits. Moore v Secretary of Army (1986, DC Conn) 627 F Supp 1538

Plaintiff's action, seeking reversal of Secretary of Veterans Affairs' determination that he is not due benefits as surviving spouse of veteran, is dismissed, because jurisdiction for this matter rests solely with Court of Veterans Appeals, so court lacks subject-matter jurisdiction. Pate v Department of Veterans Affairs (1995, MD Ala) 881 F Supp 553

Court lacked jurisdiction of Secretary's decision concerning survivor's benefits claim. Pena v Secretary, Dep't of Veterans Affairs (1991, CA) 944 F.2d 867

24. Disability payments

Director of Veterans' Bureau [now Secretary of Veterans Affairs] was not shown to have acted arbitrarily in discontinuing compensation of disabled veteran by facts that, after allowing compensation, he discontinued it, although veteran's physical condition had become worse, as result of same causes for which compensation was originally made; or that he allowed for temporary partial disability when undisputed evidence showed that veteran was temporarily totally disabled, where it was not alleged that evidence showed such disability to have resulted from injury caused in line of duty; or that veteran was suffering from disability shown by entries in Adjutant General's office not to have existed at time of his entering service, and there was no cause therefor other than veteran's military service, these being matters bearing upon soundness of director's [now Secretary's] determination upon matter properly submitted to his judgment. Silberschein v United States (1924) 266 US 221, 69 L Ed 256, 45 S Ct 69 (superseded by statute as stated in New York v Eadarso (1996, ED NY) 946 F Supp 240)

Decision of Director of Veterans' Bureau [now Secretary of Veterans Affairs] that applicant for reinstatement of lapsed insurance policy issued under War Risk Insurance Act of October 6, 1917 [40 Stat at L 398, chap 105], at time of making application was totally and permanently disabled, was not subject to review by courts. Meadows v United States (1930) 281 US 271, 74 L Ed 852, 50 S Ct 279, 73 ALR 310

Judicial review of denial of disability compensation claim was precluded by former 38 USCS § 211. Wickline v Brooks (1971, CA4 Va) 446 F.2d 1391, cert den (1972) 404 US 1061, 30 L Ed 2d 750, 92 S Ct 749, reh den (1972) 405 US 981, 31 L Ed 2d 257, 92 S Ct 1199

Veterans' Administration [now Department of Veterans Affairs] denial of claim for service-connected disability compensation was not subject to judicial review. Davis v United States (1971, CA5 Ga) 447 F.2d 959; Holley v United States (1972, SD Ohio) 352 F Supp 175, affd without op (1973, CA6 Ohio) 477 F.2d 600, cert den (1973) 414 US 1023, 38 L Ed 2d 314, 94 S Ct 446

Former 38 USCS § 211 did not deprive federal court of jurisdiction to hear veteran's claim that veteran was entitled to hearing prior to any future alteration or reduction of veteran's disability rating under Due Process Clause of U.S. Constitution, since veteran was not challenging decision of Veterans Administration [now Department of Veterans Affairs] program but presented question of law arising under federal constitution regarding constitutionality of Veterans Administration [now Department of Veterans Affairs] procedures. Winslow v Walters (1987, CA7 Wis) 815 F.2d 1114, 7 FR Serv 3d 967

Federal district court had no jurisdiction to review veteran's challenge of Veterans Administration [now Department of Veterans Affairs] decision to deny veteran benefits on ground that veteran's mental disorder was not to service connected, since court lacks authority under former § 211 to review administrative decisions. Higgins v Kelley (1987, CA8 Minn) 824 F.2d 690 (criticized in Czerkies v United States Dep't of Labor (1996, CA7 Ill) 73 F.3d 1435)

District Court erred in ordering set off of disabled veteran's tort judgment according to provisions of 38 USCS § 351 [now 38 USCS § 1151], where Veterans' Administration [now Department of Veterans Affairs] had determined that veteran's increased future disability benefits due to negligent medical treatment were covered by 38 USCS § 331 [now 38 USCS § 1131] which did not provide for cessation of future disability benefits, since former 38 USCS § 211 barred judicial review of Veterans' Administration [now Department of Veterans Affairs]
decision that veteran's future disability benefits were governed by 38 USCS § 331 [now 38 USCS § 1131], so that veteran's tort judgment was to be reduced by present value of veteran's expected future disability benefits in order to prevent double recovery. Cole v United States (1988, CA11 Ga) 861 F.2d 1261

Statute precluded judicial review of Administrator's [now Secretary] reduction of disability benefits, which challenged decision question of law or fact rather than constitutionality of Act of Congress. Tietjen v United States Veterans Admin. (1989, CA9 Ariz) 884 F.2d 514

Court lacked jurisdiction of veteran's action against Veterans' Administration [now Department of Veterans Affairs] disputing his disability rating since none of exceptions to finality of Secretary's decisions listed in 38 USCS § 511(b) applied; neither Privacy Act nor Freedom of Information Act could be used as rhetorical cover to attack Veterans' Administration [now Department of Veterans Affairs] benefits determinations. Sugrue v Derwinski (1994, CA2 NY) 26 F.3d 8, cert den (1995) 515 US 1102, 132 L Ed 2d 254, 115 S Ct 2245

Dismissal for lack of subject matter jurisdiction was appropriate where substance of plaintiff's complaint alleging conspiracy, fraud, misrepresentation, and so forth, against Veterans' Administration [now Department of Veterans Affairs] officials sought review of actions taken in connection with denial of plaintiff's claim for disability benefits. Weaver v United States (1996, CA10 Kan) 98 F.3d 518

Former section 211(a) barred granting of relief to veteran claiming that Veterans Administration [now Department of Veterans Affairs] and Board of Veterans Appeals wrongly passed on degree of his disability, and hence his entitlement, notwithstanding veteran's confusion and protest over Veterans Administration [now Department of Veterans Affairs] characterization of claim as "nervous condition," "generalized seizure disorder," and "cerebellar degeneration secondary to seizure disorder," rather than originally diagnosed idiopathic epilepsy. Slotnick v United States (1985) 8 Cl Ct 784

Administrator's [now Secretary's] decision to allow death compensation to widow of veteran presumed dead for only 2 year period following veteran's death was final under terms of former 38 USCS § 211, and was not subject to judicial review. De Capili v Administrator of Veterans Affairs (1970, DC Dist Col) 314 F Supp 805

Veterans' Administration [now Department of Veterans Affairs] decision that claimant's injuries were not service-connected and were not permanently disabling, was not subject to review. United States ex rel. Hester v Veterans Administration Center (1971, ED Pa) 330 F Supp 995, affd without op (1973, CA3 Pa) 478 F.2d 1399

Plain language of former § 211 unequivocally barred court review of decisions by Administrator of Veterans' Administration [now Secretary of Veterans Affairs], thus veteran's challenge to disability decision was dismissed for lack of subject matter jurisdiction. Marozsan v United States (1986, ND Ind) 635 F Supp 578, affd in part and revd in part on other grounds, remanded (1988, CA7 Ind) 852 F.2d 1469


Pro se claim of former serviceman "raped of his civil rights by system" is dismissed, where he alleges that he was denied 100% disability pay with proof of his military health record, because judicial review of denial of any veterans benefits is specifically precluded by 38 USCS § 511(a). Hunt v United States Air Force (1994, ED Pa) 848 F Supp 1190, 44 Soc Sec Rep Serv 361

Statute conferred no jurisdiction on court over challenge to application of veterans' benefits statutes to facts of discharged veteran's disability compensation claim. Hilario v Secretary, Dep't of Veterans Affairs (1991, CA) 937 F.2d 586

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25. Educational benefits

Prohibition of former 38 USCS § 211(a) against judicial review of decisions of Administrator [now Secretary] of Veterans Affairs on questions of law or fact under any law administered by Veterans' Administration [now Department of Veterans Affairs] providing for veterans' benefits did not deprive District Court of jurisdiction of suit challenging constitutionality of statutory scheme restricting educational benefits under 38 USCS §§ 1651-1697 [now 38 USCS §§ 3451-3493] to veterans who served on active duty, thus denying benefits to conscientious objectors who performed required alternative civilian service, since former § 211(a) did not bar judicial consideration of constitutional challenges to veterans' benefits legislation. Hernandez v Veterans' Administration (1974) 415 US 391, 39 L Ed 2d 412, 94 S Ct 1177

Former 38 USCS § 211 did not bar judicial review of veteran claim alleging that denial of extension of veteran educational benefits on ground of regulation defining veteran's alcoholism as willful misconduct was invalid as contrary to 29 USCS § 794. Traynor v Turnage (1988) 485 US 535, 99 L Ed 2d 618, 108 S Ct 1372, 1 ADD 469, 2 AD Cas 214, 46 CCH EPD ¶ 37924 (superseded by statute as stated in Larrabee v Derwinski (1992, CA2 Conn) 968 F.2d 1497) and (superseded by statute as stated in Menendez v United States (1999, DC Puerto Rico) 67 F Supp 2d 42)

Judicial review of whether Veterans Administration's treatment of certain forms of alcoholism as willful misconduct violated 29 USCS § 794 as handicap discrimination was not barred by former § 211, since, inter alia, preclusion of review depended at minimum that claim be resolved by actual decision of Administrator [now Secretary], and no decision concerning impact of Rehabilitation Act on veteran's education benefits extension application was made until after decision denying extension of benefits due to veteran's inability to partake of benefits during statutory period because of alcoholism; application of bar to judicial review under former § 211 was to be firmly and finally decided on date plaintiff commenced litigation so that District Court could issue judgment not later set aside by agency fiat. McKelvey v Turnage (1986, App DC) 253 US App DC 126, 792 F.2d 194, affd (1988) 485 US 535, 99 L Ed 2d 618, 108 S Ct 1372, 1 ADD 469, 2 AD Cas 214, 46 CCH EPD ¶ 37924 (superseded by statute as stated in Larrabee v Derwinski (1992, CA2 Conn) 968 F.2d 1497) and (superseded by statute as stated in Menendez v United States (1999, DC Puerto Rico) 67 F Supp 2d 42)

Judicial review of marine officer's claim for increased educational benefits as an active duty officer following decision of Administrator of Veterans Administration [now Department of Veterans Affairs] that under 38 USCS § 1682 [now 38 USCS § 3482] educational benefits for full time study should be pro-rated for part-time study of law by Marine officer, was barred by former § 211. Roberts v Walters (1986, CA) 792 F.2d 1109

B. Other Determinations

26. Award of indemnity

Federal district court was without jurisdiction to review award made by Administrator [now Secretary] of Veterans Affairs under Servicemen's Indemnity Act of 1951. United States v Houston (1954, CA6 Tenn) 216 F.2d 440

27. Character of military discharge

District Court erred in dismissing, under former 38 USCS § 211, former serviceman's suit seeking judicial review of Army Board of Military Correction's decision denying request to correct serviceman's military record to reflect service related disability, notwithstanding that any correction might affect Veteran's Administration [now Department of Veterans Affairs] decision that denied serviceman's claim for benefits for service related injuries, since there was no violation of former § 211 because an applicant's military record was changed through judicial review, where tasks performed by the Veteran's Administration [now Department of Veterans Affairs] and by boards of correction were distinctively different, and just because military record was changed through judicial review does not mean Veteran's Administration [now Department of Veterans Affairs] decision regarding benefits had to change. Fishel v American Sec. Life Ins. Co. (1988, CA5 Miss) 835 F.2d 613
Administrator's [now Secretary's] decision that, under 38 USCS § 101, veteran's discharge because of homosexuality was dishonorable, was accorded finality by former 38 USCS § 211, and was not subject to judicial review.  Kiser v Johnson (1975, MD Pa) 404 F Supp 879

28. Diagnosis of mental condition

Court of Claims was without jurisdiction to revise or correct Veterans' Administration [now Department of Veterans Affairs] diagnosis of veteran's mental condition where veteran alleged factual and procedural errors.  Cunningham v United States (1977) 212 Ct Cl 451, 549 F.2d 753, cert den (1980) 445 US 969, 64 L Ed 2d 246, 100 S Ct 1662

29. Determinations affecting third parties not recipients of benefits

   Judicial review of Veterans' Administration [now Department of Veterans Affairs] determinations against third parties who were not recipients of Veterans' Administration [now Department of Veterans Affairs] gratuities was not barred by former 38 USCS § 211(a).  Colorado v VA (1977, DC Colo) 430 F Supp 551, affd (1979, CA10 Colo) 602 F.2d 926, cert den (1980) 444 US 1014, 62 L Ed 2d 643, 100 S Ct 663

   General court review of fiduciary payee determinations by Secretary of Veterans Affairs under 38 USCS § 5502 is not barred by 38 USCS § 511; determination is collateral to actual claim for benefits, determination is not subject to alternative judicial review of benefit determinations under § 511(a), and no-court-review statutes are to be strictly construed. In re Guardianship & Conservatorship of Blunt (2005, DC ND) 358 F Supp 2d 882

30. Miscellaneous

   Veterans' claims for postservice injuries based on alleged failure of Veterans Administration [now Department of Veterans Affairs] to provide adequate medical treatment to veterans exposed to Agent Orange were not subject to judicial review.  In re "Agent Orange" Prod. Liab. Litig. (1987, CA2 NY) 818 F.2d 194

   Statute requiring Secretary to make decision under law that affects provision of benefits by Secretary to veteran applied to attorney's claim for fee under § 5904(d) erroneously paid to veteran; decision interpreted law affecting veteran's benefits.  Cox v West (1998, CA FC) 149 F.3d 1360

   Neither history of amendments to law, nor its changing position in U.S. Code through passage of series of consolidation statutes, alters fact that, as originally enacted, 38 USCS § 5904 was part of Public Law that affects provision of benefits, and therefore, is subject to review by Board of Veterans' Appeals and Court of Appeals for Veterans Claims under terms of 38 USCS § 511. Bates v Nicholson (2005, CA FC) 398 F.3d 1355

   Court of Appeals for Veterans Claims erred in concluding that it lacked jurisdiction to consider attorney's request for mandamus requiring Secretary of Veterans Affairs to issue statement of case so that he could appeal decision to terminate his accreditation to represent claimants before Department of Veterans Affairs to Board of Veterans' Appeals (BVA) as 38 USCS § 5904 was part of single statutory enactment that affected provision of benefits and as result, it was subject to review by BVA and Court of Appeals for Veterans Claims under terms of 38 USCS § 511. Bates v Nicholson (2005, CA FC) 398 F.3d 1355

   Former 38 USCS § 211(a) precluded judicial review of Veterans' Administration [now Department of Veterans Affairs] 1948 adjudicative action severing service connection for veteran's noncompensable back injury residuals growing out of fall while on active duty in 1944. Barry v United States (1981, DC SC) 527 F Supp 472

   Former 38 USCS § 211 did not preclude judicial review of decision by Board for Correction of Military Records denying veteran's application to correct records to reflect service-connection of disease.  Yagjian v Marsh (1983, DC NH) 571 F Supp 698

   Although appellant may challenge validity of underlying debt which affects entitlement to claimed benefits, where injury is only possibility of additional tax liability or some other
unspecified monetary burden, actual or threatened injury is too speculative to give court jurisdiction. Waterhouse v Principi (1992) 3 Vet App 473

Court of Appeals for Veterans Claims does not have jurisdiction under 38 USCS § 511(a) to review manner in which Secretary disburses special adaptive housing grant pursuant to 38 USCS § 2101(a) since manner in which funds are disbursed is committed solely to Secretary's discretion. Werden v West (2000) 13 Vet App 463, 2000 US App Vet Claims LEXIS 359

§ 512. Delegation of authority; assignment of functions and duties

(a) Except as otherwise provided by law, the Secretary may assign functions and duties, and delegate, or authorize successive redelegation of, authority to act and to render decisions, with respect to all laws administered by the Department, to such officers and employees as the Secretary may find necessary. Within the limitations of such delegations, redelegations, or assignments, all official acts and decisions of such officers and employees shall have the same force and effect as though performed or rendered by the Secretary.

(b) There shall be included on the technical and administrative staff of the Secretary such staff officers, experts, inspectors, and assistants (including legal assistants) as the Secretary may prescribe.

Explanatory notes:


Code of Federal Regulations

Department of Veterans Affairs-Delegations of authority, 38 CFR Part 2
Department of Veterans Affairs-Adjudication, 38 CFR Part 3
Department of Veterans Affairs-Legal services, General Counsel, and miscellaneous claims, 38 CFR Part 14
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-National Cemeteries of the Department of Veterans Affairs, 38 CFR Part 38

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 20
1. Generally
2. Particular delegations and assignments

1. Generally

Letter from director of insurance denying insured's claim is sufficient to constitute "disagreement" prerequisite to suit. Sullivan v United States (1941, CA6 Ky) 116 F.2d 576

2. Particular delegations and assignments

Since Secretary of Veterans Affairs may delegate authority to act with respect to all laws administered by Department of Veterans Affairs under 38 USCS § 512(a), Secretary may delegate to Board of Veterans' Appeals authority to request legal opinions from agency's general counsel. Splane v West (2000, CA FC) 216 F.3d 1058

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Regional adjudication officer is not authorized to sign letters which constitute disagreement
authorizing suit on policy in view of general order 387.   Anderson v United States (1932, DC Ky)
5 F Supp 269

Administrator [now Secretary] has authority to confer power on insurance claims council to
effect disagreement in cases where no appeal is taken to administrator [now Secretary], and
administrator may delegate to solicitor of veterans' administration [now Department of Veterans
Affairs] power to act on appeal.   (1931) 36 Op Atty Gen 456

§ 513. Contracts and personal services

The Secretary may, for purposes of all laws administered by the Department, accept
uncompensated services, and enter into contracts or agreements with private or public
agencies or persons (including contracts for services of translators without regard to any
other law), for such necessary services (including personal services) as the Secretary may
consider practicable. The Secretary may also enter into contracts or agreements with
private concerns or public agencies for the hiring of passenger motor vehicles or aircraft
for official travel whenever, in the Secretary's judgment, such arrangements are in the
interest of efficiency or economy.

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 22

I. IN GENERAL

1. Generally

II. GOVERNMENT CONTRACTS

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I. IN GENERAL

1. Generally
Person allegedly injured while voluntarily providing recreational supplies and services without compensation at veterans hospital is rendering personal services authorized by act of Congress as contemplated by Federal Employees' Compensation Act (5 USCS §§ 751 et seq.), and is therefore employee. McNicholas v United States (1964, ND Ill) 226 F Supp 965

II. GOVERNMENT CONTRACTS

A. Bids

2. Generally

There are limits to amount of study that bidder is required to undertake in discerning government's requirements prior to bidding, in that admonition in specifications that requirements of various drawings and specifications should be coordinated to avoid duplication cannot be stretched so far as to require bidder to seek out and correct all errors and discrepancies therein. George E. Jensen, Contractor, Inc. (1972, VACAB) 72-2 CCH BCA Dec ¶ 9680

Prudent bidder is not at liberty to ignore any information on contract documents. Wolverine Fire Protection Co. (1977, VACAB) 78-1 CCH BCA Dec. ¶ 12902

When contract drawings themselves purport to represent existing conditions in respect to particular feature, bidder has right to rely thereon notwithstanding provisions requiring that site inspection be made. Klefstad Engineering Co. & Blackhawk Heating & Plumbing Co. (1968, VA-CAB) 68-2 CCH BCA Dec ¶ 7254, affd 68-2 CCH BCA Dec ¶ 7396

3. Acceptance

In proper circumstances, Government may accept bid, once expired, which has subsequently been revived by bidder; however, where mistake in original bid is alleged, but original bid is affirmed, original bid as affirmed lapses before acceptance and request for extension is specifically denied by bidder. (1978) 57 Comp Gen 228

4. Protests

When bid protest is filed with apparent purpose of seeking General Accounting Office sanction for cancellation and resolicitation after other bids have been exposed, as evidenced when original bid is reinstated more than week after extension was specifically denied, bidder's behavior adversely affects integrity of competitive bid system such that interests of Government are not served by awarding contract to him. (1978) 57 Comp Gen 228

B. Terms of Contract

5. Generally

Government is entitled to specify what it wants in contract and to require strict conformance with contract even though offered substitute may be said to be superior; burden is on drafters of government contract to use such language, and in such manner, that it will convey what they intend and will not reasonably be understood as meaning something else. George E. Jensen, Contractor, Inc. (1972, VACAB) 72-2 CCH BCA Dec ¶ 9680

Although advised by Veterans' Administration [now Department of Veterans Affairs] officials during prebid inspection that windows in certain parts of building were not included in contract for cleaning of windows, government's requirement that such windows be cleaned does not constitute compensable extra, since contract expressly provides that any clarification of specifications must be requested in writing from contract authority and total number of windows done by contractor is within number contemplated by contract. A. A. A. Services, Inc. (1980, VACAB) 80-1 CCH BCA Dec ¶ 14249

6. Drawings

Contract requirement shown on drawings but not in specifications, and not in conflict with any specification requirement is, under Clause 2 of General Provisions of procurement contract, as effective as if it were shown in both specifications and drawings; standard contract language
providing that in case of difference between drawings and specifications, latter shall govern, is not for application unless only reasonable interpretation of contract as whole compels conclusion of inconsistency and conflict.  Wolverine Fire Protection Co. (1977, VACAB) 78-1 CCH BCA Dec ¶ 12902

7. Economic price adjustment clause

Where economic price adjustment clause allows reduction of price government is to pay on indefinite quantity contract, prompt payment discount is to be taken on adjusted price and not on original price where adjustment is made downward.  Sheidow Bronze Corp. (1978, VACAB) 78-1 CCH BCA Dec ¶ 13031

8. Change and suspension clauses

Relief rights under changes and suspension clauses of government contract are independent and separable; therefore, recovery under suspension clause may be allowed notwithstanding existence of agreement on recovery due under changes clauses.  Alrae Constr. Co. Inc. (1973, VACAB) 73-1 CCH BCA Dec ¶ 9872

Generally when change order involves performance of additional work, price adjustment is based upon cost of extra labor and materials.  Picoult (1978, VACAB) 78-1 CCH BCA Dec ¶ 13024

In absence of probative evidence in support of upward adjustment of allowance by contracting officer under change order, government contractor is entitled to no more than that sum.  Philp D. Tigue Contracting (1978, VACAB) 78-2 CCH BCA Dec. ¶ 13,549

9. Trade practices

Trade practice, even if shown, cannot override provisions of contract where there is no discrepancy or ambiguity between specifications and drawings.  Wolverine Fire Protection Co. (1977, VACAB) 78-1 CCH BCA Dec ¶ 12902

Contractor is entitled to equitable adjustment for cost of filling fuel tanks under contract for installation of boiler plant, where both government's and contractor's interpretations of requirements are reasonable, and trade practice favors contractor's interpretation.  Charles Constr. Co., Inc. (1979, VACAB) 80-1 CCH BCA Dec ¶ 14227

10. Miscellaneous

Much language of construction contracts is of such nature as to require analytical consideration and determination of interpretative conclusion that must accept one alternative and, consciously or unconsciously, reject other possible interpretations; where ambiguity involved is latent and not obvious, and contractor's interpretation of drawings is reasonable and there is nothing in contract provisions themselves, nor attendant circumstances, to put contractor on notice of such error as to require request for clarification during bidding period, ambiguity will be resolved in favor of contractor; if, on other hand, there is glaring and obvious error, of material consequence, which because of unmistakable conflict, discrepancy or omission must necessarily be recognized as such error, contractor has duty to request clarification before bidding.  Klefstad Engineering Co. & Blackhawk Heating & Plumbing Co. (1968, VACAB) 68-2 CCH BCA Dec ¶ 7396

Prior course of dealing between parties to ambulance service contract which, in effect, constitutes additional provision to contract, will be accepted by Board and enforced as provision of contract where conduct was based on reasonable interpretation of contract and government failed to indicate its intention to alter course of conduct when issuing invitation for bids.  Ambulance, Inc. (1980, VACAB) 80-2 CCH BCA Dec ¶ 14555

C. Claims

11. Burden of proof
Contractor has burden of proving its claim for costs, and failure of contractor to prove amount may lead to total rejection of claim for lack of proof or it may result in jury verdict; where entitlement is shown, but proof is not so positive as to permit absolute determination of precise excess costs, approximate and reasonable determination may be made on basis of facts and circumstances and best available evidence. Picoult (1978, VACAB) 78-1 CCH BCA Dec ¶ 13024

Although it is not necessary for contractor to establish its costs for changed work with accounting accuracy, there must exist some means by which reasonable amount may be computed; mere statements of fact by contractor do not constitute proof of claim; there must be documentary evidence. Philp D. Tigue Contracting (1978, VACAB) 78-2 CCH BCA Dec. ¶ 13,549

Contractor fails to meet burden of proof on claim for equitable adjustment where it makes general claims of government interference with contract performance. A. A. A. Services, Inc. (1980 VACAB) 80-2 CCH BCA Sept ¶ 14683

Contractor's claim for additional expenses caused by government change, where evidence consisted of contractor's wage reports which were not verified, under oath, by workers who signed them, and photocopies of material invoices which were partially illegible, fails to establish that costs were reasonable and attributable to accomplishment of extra work. United Baeton International (1979, BACAB) 79-2 CCH BCA Dec ¶ 14045

Although contractor is entitled to equitable adjustment for increased insurance costs associated with contract changes, neither contracting officer nor Board can order remedy without documentation of increased insurance costs actually incurred by contractor, and Board has no basis upon which to grant relief where contractor refused to substantiate costs in any manner other than government paid audit. Wilner Constr. Co. (1979, VA CAB) 79-2 CCH BCA Dec ¶ 14180

12. Government liability for particular claims

Government contracts contain warranty that satisfactory performance is possible, if specifications are followed, and Government is therefore liable for increase in costs to Government contractor by reason of drawing defects; there was timely notification of claim for additional compensation due to dimensional errors in drawings where contractor informed Government of errors in drawings, Government made corrections and forwarded them to contractor and contractor then tentatively estimated revised costs. J.W. Bateson Co. (1970, VACAB) 70-2 CCH BCA Dec ¶ 8541, affd 71-1 CCH BCA Dec ¶ 8704

Since government took too long to order change for which recovery was agreed and continued, uncertainty caused deferral of specific work and had delaying effect upon overall job progress, contractor is entitled to recover for time caused by delay. Alrae Constr. Co. Inc. (1973, VACAB) 73-1 CCH BCA Dec ¶ 9872

Presence of hard rock layer, removal of which requires blasting and use of heavy equipment not commonly required of small contractors, constitutes differing site condition entitling contractor to equitable adjustment, since site inspection did not reveal existence of such rock, most of which is below surface; total cost method of determining amount of adjustment is not proper where contractor has unresolved claims relating to same work, since costs of unresolved claims may be duplicated in claim for which adjustment is made. Bick-Com Corp. (1980, VACAB) 80-1 CCH BCA Dec ¶ 14285

Contractor is entitled to equitable adjustments for variable overhead office related expenses incurred because of governmental delay. Salt City Contractors (1980, VACAB) 80-2 CCH BCA Sept. ¶ 14713

Contractor is not entitled to compensation for overhead expenses claimed in settlement allowance, where allocation of overhead was by percentage of total contract method, including value of subcontracts in base, without evidence of causal relationship between variations in dollar value of subcontracts fluctuations in total overhead expenses. Starks Contracting Co. Inc. (1979, VA CAB) 79-2 CCH BCA Dec ¶ 14018
13. Release of claims

Absent any indication to contrary, release of all claims under government contract for installation of automatic fire sprinkler system at Veterans Administration [now Department of Veterans Affairs] hospital, without exception or reservation, signed by contractor at conclusion of contract is given its literal interpretation and is held to constitute accord and satisfaction as to disputed claim. Mid South Fire Protection, Inc. (1977, VACAB) 77-2 CCH BCA Dec ¶ 12776

D. Default

14. Generally

Contractor need not be given time to cure deficiencies under substantial performance doctrine where contractor's proposed corrections would also result in nonconformance with specifications, and where deficiencies are substantial. Reach Electronics, Inc. (1979, VACAB) 79-2 CCH BCA Dec ¶ 14048

15. Particular grounds for default termination

Government contract for taxicab service for patients at Veterans' Administration [now Department of Veterans Affairs] hospital is properly terminated for default due to intoxication of driver, driver operating with revoked license, and numerous complaints from hospital patients of unsatisfactory service. Maywood Cab Service, Inc. (1977, VACAB) 77-2 CCH BCA Dec ¶ 12751

Contractor's failure to supply surety bonds by date required in contract is sufficient justification for default termination of construction contract, and contractor's claim that contracting officer abused his discretion by imposing prohibitive bonding requirements must be rejected, since contractor never submitted any bonds or sureties for approval. United Baeton International (1979, VACAB) 80-1 CCH BCA Dec ¶ 14211

Termination of construction contract for default is proper, although termination occurred prior to start of construction, where contractor let substantial portion of performance period expire without starting construction, and without valid excuse for delay. Record Electric, Inc. (1979, VACAB) 80-1 CCH BCA Dec ¶ 14226

E. Appeal

16. Generally

Mere fact that contractor requests additional information upon which to base his appeal argument does not vitiate otherwise valid timely notice of intent to take appeal from contracting officer's final decision. Louis G. Redstone Associates, Inc. (1977, VACAB) 77-2 CCH BCA Dec ¶ 12811

17. Jurisdiction of board of contract appeals

Board of contract appeals lacks jurisdiction to decide claim that has not been presented to and decided by contracting officer; when however, contracting officer does settle claim, board is not restricted on appeal to consideration of only those issues of entitlement that were considered and relied upon by contracting officer in denying claim, where claim has been denied in its entirety and appeal has been taken from decision, since there is no jurisdictional limitation in disputes clause of contract to preclude board from considering and deciding general issue of entitlement to payment. J.W. Bateson Co., (1968, VACAB) 68-2 CCH BCA Dec ¶ 7279

When claim upon which appeal before Veterans Administration [now Department of Veterans Affairs] Contract Appeals Board has been released by contractor, Board has no jurisdiction under terms of contract to afford any relief to contractor. Mid South Fire Protection, Inc. (1977, VACAB) 77-2 CCH BCA Dec ¶ 12776

Contract appeals board lacks jurisdiction to give contractor right to pursue either new procedures or expanded remedies covered by 41 USCS §§ 601 et seq, where final decision of contracting officer has been issued and received by contractor over 3 months prior to date set as
time at which appeal provisions could be invoked on claims "pending" before contracting officer. Bick-Com Corp. (1979, VACAB) 79-2 CCH BCA Dec ¶ 13904

Jurisdiction of subject matter of dispute before Contract Appeals Board is measured by boundaries of claim to entitlement in action taken in final decision on that claim by contracting officer; where claim is denied in its entirety, points selected by officer for consideration and final decision are not jurisdictional measure on review. Stramese Constr. Corp. (1979, VACAB) 79-2 CCH BCA Dec ¶ 13940

§ 515. Administrative settlement of tort claims

(a) (1) Notwithstanding the limitations contained in section 2672 of title 28 [28 USCS § 2672], the Secretary may settle a claim for money damages against the United States cognizable under section 1346(b) or 2672 of title 28 [28 USCS § 1346(b) or 2672] or section 7316 of this title [38 USCS § 7316] to the extent the authority to do so is delegated to the Secretary by the Attorney General. Such delegation may not exceed the authority delegated by the Attorney General to United States attorneys to settle claims for money damages against the United States.

(2) For purposes of this subsection, the term "settle", with respect to a claim, means consider, ascertain, adjust, determine, and dispose of the claim, whether by full or partial allowance or by disallowance.

(b) The Secretary may pay tort claims, in the manner authorized in the first paragraph of section 2672 of title 28 [28 USCS § 2672], when such claims arise in foreign countries in connection with Department operations abroad. A claim may not be allowed under this subsection unless it is presented in writing to the Secretary within two years after the claim accrues.

Code of Federal Regulations

Department of Veterans Affairs-Delegations of authority, 38 CFR Part 2

Department of Veterans Affairs-Legal services, General Counsel, and miscellaneous claims, 38 CFR Part 14

Research Guide

Federal Procedure:
31 Fed Proc L Ed, Tort Claims Against the United States §§ 73:186, 188-191

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 21

§ 516. Equal employment responsibilities

(a) The Secretary shall provide that the employment discrimination complaint resolution system within the Department be established and administered so as to encourage timely and fair resolution of concerns and complaints. The Secretary shall take steps to ensure that the system is administered in an objective, fair, and effective manner and in a manner that is perceived by employees and other interested parties as being objective, fair, and effective.

(b) The Secretary shall provide--
(1) that employees responsible for counseling functions associated with employment
discrimination and for receiving, investigating, and processing complaints of
employment discrimination shall be supervised in those functions by, and report to,
an Assistant Secretary or a Deputy Assistant Secretary for complaint resolution
management; and
(2) that employees performing employment discrimination complaint resolution
functions at a facility of the Department shall not be subject to the authority, direction,
and control of the Director of the facility with respect to those functions.

(c) The Secretary shall ensure that all employees of the Department receive adequate
education and training for the purposes of this section and section 319 of this title [38
USCS § 319].

(d) The Secretary shall, when appropriate, impose disciplinary measures, as authorized by
law, in the case of employees of the Department who engage in unlawful employment
discrimination, including retaliation against an employee asserting rights under an equal
employment opportunity law.

(e) (1) (A) Not later than 45 days after the end of each calendar quarter, the Assistant
Secretary for Human Resources and Administration shall submit to the Committees on
Veterans' Affairs of the Senate and House of Representatives a report summarizing the
employment discrimination complaints filed against the individuals referred to in
paragraph (2) during such quarter.
(B) Subparagraph (A) shall apply in the case of complaints filed against
individuals on the basis of such individuals' personal conduct and shall not apply
in the case of complaints filed solely on the basis of such individuals' positions as
officials of the Department.

(2) Paragraph (1) applies to the following officers and employees of the Department:
(A) The Secretary.
(B) The Deputy Secretary of Veterans Affairs.
(C) The Under Secretary for Health and the Under Secretary for Benefits.
(D) Each Assistant Secretary of Veterans Affairs and each Deputy Assistant
Secretary of Veterans Affairs.
(E) The Director of the National Cemetery System [Under Secretary of Veterans
Affairs for Memorial Affairs].
(F) The General Counsel of the Department.
(G) The Chairman of the Board of Veterans' Appeals.
(H) The Chairman of the Board of Contract Appeals of the Department.
(I) The director and the chief of staff of each medical center of the Department.
(J) The director of each Veterans Integrated Services Network.
(K) The director of each regional office of the Department.
(L) Each program director of the Central Office of the Department.
(3) Each report under this subsection--
(A) may not disclose information which identifies the individuals filing, or the
individuals who are the subject of, the complaints concerned or the facilities at
which the discrimination identified in such complaints is alleged to have
occurred;
(B) shall summarize such complaints by type and by equal employment opportunity field office area in which filed; and
(C) shall include copies of such complaints, with the information described in subparagraph (A) redacted.

(4) Not later than April 1 each year, the Assistant Secretary shall submit to the committees referred to in paragraph (1)(A) a report on the complaints covered by paragraph (1) during the preceding year, including the number of such complaints filed during that year and the status and resolution of the investigation of such complaints.

(f) The Secretary shall ensure that an employee of the Department who seeks counseling relating to employment discrimination may elect to receive such counseling from an employee of the Department who carries out equal employment opportunity counseling functions on a full-time basis rather than from an employee of the Department who carries out such functions on a part-time basis.

(g) The number of employees of the Department whose duties include equal employment opportunity counseling functions as well as other, unrelated functions may not exceed 40 full-time equivalent employees. Any such employee may be assigned equal employment opportunity counseling functions only at Department facilities in remote geographic locations (as determined by the Secretary). The Secretary may waive the limitation in the preceding sentence in specific cases.

(h) The provisions of this section shall be implemented in a manner consistent with procedures applicable under regulations prescribed by the Equal Employment Opportunity Commission.

**Explanatory notes:**

"Under Secretary of Veterans Affairs for Memorial Affairs" has been inserted in brackets in subsec. (e)(2)(E) on the authority of § 403(d)(2) of Act Nov. 11, 1998, P. L. 105-368, which appears as 38 USCS § 2400 note, and provides that any reference in a law, map, regulation, document, paper, or other record of the United States to the Director of the National Cemetery System shall be deemed to be a reference to the Under Secretary of Veterans Affairs for Memorial Affairs.

**Effective date of section:**

Act Nov. 21, 1997, P. L. 105-114, Title I, § 101(c), 111 Stat. 2280, provides: "Section 516 of title 38, United States Code, as added by subsection (a), shall take effect 90 days after the date of enactment of this Act. Subsection (e) of that section shall take effect with respect to the first quarter of calendar year 1998."

**Amendments:**

2003. Act Dec. 6, 2003, in subsec. (e)(1)(A), substituted "45 days" for "30 days".

**Other provisions:**

**Reports to Congress.** Act Nov. 21, 1997, P. L. 105-114, Title I, § 1(b), 111 Stat. 2279, provides:

"(1) The Secretary of Veterans Affairs shall submit to Congress reports on the implementation and operation of the equal employment opportunity system within the Department of
Veterans Affairs. The first such report shall be submitted not later than April 1, 1998, and subsequent reports shall be submitted not later than January 1, 1999, and January 1, 2000.

"(2) The first report under paragraph (1) shall set forth the actions taken by the Secretary to implement section 516 of title 38, United States Code, as added by subsection (a), and other actions taken by the Secretary in relation to the equal employment opportunity system within the Department of Veterans Affairs.

"(3) The subsequent reports under paragraph (1) shall set forth, for each equal employment opportunity field office of the Department and for the Department as a whole, the following:

   "(A) Any information to supplement the information submitted in the report under paragraph (2) that the Secretary considers appropriate.

   "(B) The number of requests for counseling relating to employment discrimination received during the one-year period ending on the date of the report concerned.

   "(C) The number of employment discrimination complaints received during such period.

   "(D) The status of each complaint described in subparagraph (C), including whether or not the complaint was resolved and, if resolved, whether the employee concerned sought review of the resolution by the Equal Employment Opportunity Commission or by Federal court.

   "(E) The number of employment discrimination complaints that were settled during such period, including--

       "(i) the type of such complaints; and

       "(ii) the terms of settlement (including any settlement amount) of each such complaint.".

Assessment and review of Department of Veterans' Affairs Employment Discrimination Complaint Resolution System. Act Nov. 21, 1997, P. L. 105-114, Title I, § 103, 111 Stat. 2280, provides:

"(a) Agreement for assessment and review.(1) The Secretary of Veterans Affairs shall seek to enter into an agreement with a qualified private entity under which agreement the entity shall carry out the assessment described in subsection (b) and the review described in subsection (c).

   "(2) The Secretary shall include in the agreement provisions necessary to ensure that the entity carries out its responsibilities under the agreement (including the exercise of its judgments concerning the assessment and review) in a manner free of influence from any source, including the officials and employees of the Department of Veterans Affairs.

   "(3) The Secretary may not enter into the agreement until 15 days after the date on which the Secretary notifies the Committees on Veterans' Affairs of the Senate and House of Representatives of the entity with which the Secretary proposes to enter into the agreement.

"(b) Initial assessment of system.(1) Under the agreement under subsection (a), the entity shall conduct an assessment of the employment discrimination complaint resolution system administered within the Department of Veterans Affairs, including the extent to which the system meets the objectives set forth in section 516(a) of title 38, United States Code, as added by section 101. The assessment shall include a comprehensive description of the system as of the time of the assessment.

   "(2) Under the agreement, the entity shall submit the assessment to the committees referred to in subsection (a)(3) and to the Secretary not later than June 1, 1998.
"(c) Review of administration of system. (1) Under the agreement under subsection (a), the entity shall monitor and review the administration by the Secretary of the employment discrimination complaint resolution system administered within the Department.

"(2) Under the agreement, the entity shall submit to the committees referred to in subsection (a)(3) and to the Secretary a report on the results of the review under paragraph (1) not later than June 1, 1999. The report shall include an assessment of the administration of the system, including the extent to which the system meets the objectives referred to in subsection (b)(1), and the effectiveness of the following:

"(A) Programs to train and maintain a cadre of individuals who are competent to investigate claims relating to employment discrimination.

"(B) Programs to train and maintain a cadre of individuals who are competent to provide counseling to individuals who submit such claims.

"(C) Programs to provide education and training to Department employees regarding their rights and obligations under the equal employment opportunity laws.

"(D) Programs to oversee the administration of the system.

"(E) Programs to evaluate the effectiveness of the system in meeting its objectives.

"(F) Other programs, procedures, or activities of the Department relating to the equal employment opportunity laws, including any alternative dispute resolution procedures and informal dispute resolution and settlement procedures.

"(G) Any disciplinary measures imposed by the Secretary on employees determined to have violated the equal employment opportunity laws in preventing or deterring violations of such laws by other employees of the Department.".

Research Guide

Am Jur:

45A Am Jur 2d, Job Discrimination §§ 214-251

SUBCHAPTER II. SPECIFIED FUNCTIONS

§ 521. Assistance to certain rehabilitation activities
§ 522. Studies of rehabilitation of disabled persons
§ 523. Coordination and promotion of other programs affecting veterans and their dependents
§ 525. Publication of laws relating to veterans
§ 527. Evaluation and data collection
§ 529. Annual report to Congress
§ 530. Annual report on program and expenditures for domestic response to weapons of mass destruction
§ 531. Requirement relating to naming of Department property

§ 521. Assistance to certain rehabilitation activities

(a) The Secretary may assist any organization named in or approved under section 5902 of this title [38 USCS § 5902] in providing recreational activities which would further the rehabilitation of disabled veterans. Such assistance may be provided only if--

(1) the activities are available to disabled veterans on a national basis; and
(2) a significant percentage of the individuals participating in the activities are eligible for rehabilitative services under chapter 17 of this title [38 USCS §§ 1701 et seq.].

(b) The Secretary may accept from any appropriate source contributions of funds and of other assistance to support the Secretary's provision of assistance for such activities.

(c) (1) Subject to paragraph (2), the Secretary may authorize the use, for purposes approved by the Secretary in connection with the activity involved, of the seal and other official symbols of the Department and the name "Department of Veterans Affairs" by--

(A) any organization which provides an activity described in subsection (a) with assistance from the Secretary; and

(B) any individual or entity from which the Secretary accepts a significant contribution under subsection (b) or an offer of such a contribution.

(2) The use of such seal or name of any official symbol of the Department in an advertisement may be authorized by the Secretary under this subsection only if--

(A) the Secretary has approved the advertisement; and

(B) the advertisement contains a clear statement that no product, project, or commercial line of endeavor referred to in the advertisement is endorsed by the Department of Veterans Affairs.

Explanatory notes:

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 18

§ 522. Studies of rehabilitation of disabled persons

(a) The Secretary may conduct studies and investigations, and prepare reports, relative to the rehabilitation of disabled persons, the relative abilities, aptitudes, and capacities of the several groups of the variously handicapped, and how their potentialities can best be developed and their services best used in gainful and suitable employment including the rehabilitation programs of foreign nations.

(b) In carrying out this section, the Secretary (1) may cooperate with such public and private agencies as the Secretary considers advisable; and (2) may employ consultants who shall receive a reasonable per diem, as prescribed by the Secretary, for each day actually employed, plus necessary travel and other expenses.

Explanatory notes:

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 18

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§ 523. Coordination and promotion of other programs affecting veterans and their dependents

(a) The Secretary shall seek to achieve (1) the maximum feasible effectiveness, coordination, and interrelationship of services among all programs and activities affecting veterans and their dependents carried out by and under all other departments, agencies, and instrumentalities of the executive branch, and (2) the maximum feasible coordination of such programs with programs carried out under this title. The Secretary shall actively promote the effective implementation, enforcement, and application of all provisions of law and regulations providing for special consideration, emphasis, or preference for veterans.

(b) The Secretary shall seek to achieve the effective coordination of the provision, under laws administered by the Department, of benefits and services (and information about such benefits and services) with appropriate programs (and information about such programs) conducted by State and local governmental agencies and by private entities at the State and local level. In carrying out this subsection, the Secretary shall place special emphasis on veterans who are 65 years of age or older.

Explanatory notes:
A prior § 523 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 1523.

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans’ Laws § 16
Rejected applicant for Senior Storekeeper position at hospital has no viable cause of action based on hospital’s failure to give preference to his veteran status, even though applicant was Vietnam era veteran, because no direct cause of action exists under either 38 USCS § 523 or § 4212, and neither provision can be enforced through 42 USCS § 1983. Philippeaux v North Cent. Bronx Hosp. (1994, SD NY) 871 F Supp 640, 68 BNA FEP Cas 223, 150 BNA LRRM 2095

38 USCS § 523 does not provide any express cause of action, does not create implied cause of action, and does not create right that is enforceable through 42 USCS § 1983. Philippeaux v North Cent. Bronx Hosp. (1994, SD NY) 871 F Supp 640, 68 BNA FEP Cas 223, 150 BNA LRRM 2095

§ 525. Publication of laws relating to veterans

(a) The Secretary may compile and publish all Federal laws relating to veterans' relief, including laws administered by the Department as well as by other agencies of the Government. Such compilation and publication shall be in such form as the Secretary considers advisable for the purpose of making currently available in convenient form for the use of the Department and full-time representatives of the several service organizations an annotated, indexed, and cross-referenced statement of the laws providing veterans' relief.

(b) The Secretary may maintain such compilation on a current basis either by the publication, from time to time, of supplementary documents or by complete revision of the compilation.
(c) The distribution of the compilation to the representatives of the several service organizations shall be as determined by the Secretary.

Explanatory notes:

A prior § 525 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 1525.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans’ Laws § 19

§ 527. Evaluation and data collection

(a) The Secretary, pursuant to general standards which the Secretary shall prescribe in regulations, shall measure and evaluate on a continuing basis the effect of all programs authorized under this title, in order to determine their effectiveness in achieving stated goals in general, and in achieving such goals in relation to their cost, their effect on related programs, and their structure and mechanisms for delivery of services. Such information as the Secretary may consider necessary for purposes of such evaluations shall be made available to the Secretary, upon request, by all departments, agencies, and instrumentalities of the executive branch.

(b) In carrying out this section, the Secretary shall collect, collate, and analyze on a continuing basis full statistical data regarding participation (including the duration thereof), provision of services, categories of beneficiaries, planning and construction of facilities, acquisition of real property, proposed excessing of land, accretion and attrition of personnel, and categorized expenditures attributable thereto, under all programs carried out under this title.

(c) The Secretary shall make available to the public, and on a regular basis provide to the appropriate committees of the Congress, copies of all completed evaluative research studies and summaries of evaluations of program impact and effectiveness carried out, and tabulations and analyses of all data collected, under this section.

Other provisions:


"Sec. 701. Short title.
"This title may be cited as the ‘Persian Gulf War Veterans’ Health Status Act’.
"Sec. 702. Persian Gulf War Veterans Health Registry.
"(a) Establishment of Registry. The Secretary of Veterans Affairs shall establish and maintain a special record to be known as the ‘Persian Gulf War Veterans Health Registry’ (in this section referred to as the ‘Registry’).
“(b) Contents of Registry. Except as provided in subsection (c), the Registry shall include the following information:

“(1) A list containing the name of each individual who served as a member of the Armed Forces in the Persian Gulf theater of operations during the Persian Gulf War and who--

“(A) applies for care or services from the Department of Veterans Affairs under chapter 17 of title 38, United States Code [38 USCS §§ 1701 et seq.];

“(B) files a claim for compensation under chapter 11 of such title [38 USCS §§ 1101 et seq.] on the basis of any disability which may be associated with such service;

“(C) dies and is survived by a spouse, child, or parent who files a claim for dependency and indemnity compensation under chapter 13 of such title [38 USCS §§ 1301 et seq.] on the basis of such service;

“(D) requests from the Department a health examination under section 703; or

“(E) receives from the Department of Defense a health examination similar to the health examination referred to in subparagraph (D) and requests inclusion in the Registry.

“(2) Relevant medical data relating to the health status of, and other information that the Secretary considers relevant and appropriate with respect to, each individual described in paragraph (1) who--

“(A) grants to the Secretary permission to include such information in the Registry; or

“(B) at the time the individual is listed in the Registry, is deceased.

“(c) Individuals submitting claims or making requests before date of enactment. If in the case of an individual described in subsection (b)(1) the application, claim, or request referred to in such subsection was submitted, filed, or made, before the date of the enactment of this Act, the Secretary shall, to the extent feasible, include in the Registry such individual's name and the data and information, if any, described in subsection (b)(2) relating to the individual.

“(d) Department of Defense information. The Secretary of Defense shall furnish to the Secretary of Veterans Affairs such information maintained by the Department of Defense as the Secretary of Veterans Affairs considers necessary to establish and maintain the Registry.

“(e) Relation to Department of Defense Registry. The Secretary of Veterans Affairs, in consultation with the Secretary of Defense, shall ensure that information is collected and maintained in the Registry in a manner that permits effective and efficient cross-reference between the Registry and the registry established under section 734 of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (Public Law 102-190; 105 Stat. 1411; 10 U.S.C. 1074 note), as amended by section 704.

“(f) Ongoing outreach to individuals listed in Registry. The Secretary of Veterans Affairs shall, from time to time, notify individuals listed in the Registry of significant developments in research on the health consequences of military service in the Persian Gulf theater of operations during the Persian Gulf War.

*Sec. 703. Health examinations and counseling for veterans eligible for inclusion in certain health-related registries.*

“(a) In general. (1) The Secretary of Veterans Affairs--

“(A) shall, upon the request of a veteran described in subsection (b)(1), provide the veteran with a health examination (including any appropriate diagnostic tests) and consultation and counseling with respect to the results of the examination and the tests; and
"(B) may, upon the request of a veteran described in subsection (b)(2), provide the veteran with such an examination (including diagnostic tests) and such consultation and counseling.

"(2) The Secretary shall carry out appropriate outreach activities with respect to the provision of any health examinations (including any diagnostic tests) and consultation and counseling services under paragraph (1).

"(b) Covered veterans.(1) In accordance with subsection (a)(1)(A), the Secretary shall provide an examination (including diagnostic tests), consultation, and counseling under that subsection to any veteran who is eligible for listing or inclusion in the Persian Gulf War Veterans Health Registry established by section 702.

"(2) In accordance with subsection (a)(1)(B), the Secretary may provide an examination (including diagnostic tests), consultation, and counseling under that subsection to any veteran who is eligible for listing or inclusion in any other similar health-related registry administered by the Secretary.

"Sec. 704. Expansion of coverage of Persian Gulf Registry.

"(a) In general. Subsections (a) and (b) of section 734 of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (Public Law 102-190; 105 Stat. 1411; 10 U.S.C. 1074 note) are amended to read as follows:

" `(a) Establishment of Registry. The Secretary of Defense shall establish and maintain a special record (in this section referred to as the 'Registry') relating to the following members of the Armed Forces:

" `(1) Members who, as determined by the Secretary, were exposed to the fumes of burning oil in the Operation Desert Storm theater of operations during the Persian Gulf conflict.

" `(2) Any other members who served in the Operation Desert Storm theater of operations during the Persian Gulf conflict.

" `(b) Contents of Registry.(1) The Registry shall include--

" `(A) with respect to each class of members referred to in each of paragraphs (1) and (2) of subsection (a)--

" `(i) a list containing each such member's name and other relevant identifying information with respect to the member; and

" `(ii) to the extent that data are available and inclusion of the data is feasible, a description of the circumstances of the member's service during the Persian Gulf conflict, including the locations in the Operation Desert Storm theater of operations in which such service occurred and the atmospheric and other environmental circumstances in such locations at the time of such service; and

" `(B) with respect to the members referred to in subsection (a)(1), a description of the circumstances of each exposure of each such member to the fumes of burning oil as described in such subsection (a)(1), including the length of time of the exposure.

" `(2) The Secretary shall establish the Registry with the advice of an independent scientific organization.'

"(b) Conforming amendments.(1) Subsection (c)(1) of such section is amended by striking out 'subsection (a)' and inserting in lieu thereof 'subsection (a)(1)'.

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“(2) Subsection (d) of such section is amended by inserting 'pursuant to subsection (a)(1)' after 'Registry'.

"Sec. 705. Study by Office of Technology Assessment of Persian Gulf Registry and Persian Gulf War Veterans Health Registry.

"(a) Study. The Director of the Office of Technology Assessment shall, in a manner consistent with the Technology Assessment Act of 1972 (2 U.S.C. 472(d)), assess--

"(1) the potential utility of each of the Persian Gulf Registry and the Persian Gulf War Veterans Health Registry for scientific study and assessment of the intermediate and long-term health consequences of military service in the Persian Gulf theater of operations during the Persian Gulf War;

"(2) the extent to which each registry meets the requirements of the provisions of law under which the registry is established;

"(3) the extent to which data contained in each registry--

 "(A) are maintained in a manner that ensures permanent preservation and facilitates the effective, efficient retrieval of information that is potentially relevant to the scientific study of the intermediate and long-term health consequences of military service in the Persian Gulf theater of operations during the Persian Gulf War; and

 "(B) would be useful for scientific study regarding such health consequences;

 "(4) the adequacy of any plans to update each of the registries;

 "(5) the extent to which the Department of Defense or the Department of Veterans Affairs, as the case may be, is assembling and maintaining information on the Persian Gulf theater of operations (including information on troop locations and atmospheric and weather conditions) in a manner that facilitates the usefulness of, maintenance of, and retrieval of information from, the applicable registry; and

 "(6) the adequacy and compatibility of protocols for the health examinations and counseling provided under section 703 and health examinations provided by the Department of Defense to members of the Armed Forces for the purpose of assessing the health status of members of the Armed Forces who served in the Persian Gulf theater of operations during the Persian Gulf War.

"(b) Access to information. The Secretary of Veterans Affairs and the Secretary of Defense shall provide the Director with access to such records and information under the jurisdiction of each such secretary as the Director determines necessary to permit the Director to carry out the study required under this section.

"(c) Reports. The Director shall--

 "(1) not later than 270 days after the date of the enactment of this Act, submit to Congress a report on the results of the assessment carried out under this section of the Persian Gulf Registry and health-examination protocols; and

 "(2) not later than 15 months after such date, submit to Congress a report on the results of the assessment carried out under this section of the Persian Gulf War Veterans Health Registry.

"(d) Definitions. For the purposes of this section:

"(2) The term 'Persian Gulf War Veterans Health Registry' means the Persian Gulf War Veterans Health Registry established under section 702.

"Sec. 706. Agreement with national academy of sciences for review of health consequences of service during the Persian Gulf War.

"(a) Agreement.(1) The Secretary of Veterans Affairs and Secretary of Defense jointly shall seek to enter into an agreement with the National Academy of Sciences for the Medical Follow-Up Agency (MFUA) of the Institute of Medicine of the Academy to review existing scientific, medical, and other information on the health consequences of military service in the Persian Gulf theater of operations during the Persian Gulf War.

"(2) The agreement shall require MFUA to provide members of veterans organizations and members of the scientific community (including the Director of the Office of Technology Assessment) with the opportunity to comment on the method or methods MFUA proposes to use in conducting the review.

"(3) The agreement shall permit MFUA, in conducting the review, to examine and evaluate medical records of individuals who are included in the registries referred to in section 705(d) for purposes that MFUA considers appropriate, including the purpose of identifying illnesses of those individuals.

"(4) The Secretary of Veterans Affairs and the Secretary of Defense shall seek to enter into the agreement under this section not later than 180 days after the date of the enactment of this Act.

"(b) Report.(1) The agreement under this section shall require the National Academy of Sciences to submit to the committees and secretaries referred to in paragraph (2) a report on the results of the review carried out under the agreement. Such report shall contain the following:

"(A) An assessment of the effectiveness of actions taken by the Secretary of Veterans Affairs and the Secretary of Defense to collect and maintain information that is potentially useful for assessing the health consequences of the military service referred to in subsection (a).

"(B) Recommendations on means of improving the collection and maintenance of such information.

"(C) Recommendations on whether there is sound scientific basis for an epidemiological study or studies on the health consequences of such service, and if the recommendation is that there is sound scientific basis for such a study or studies, the nature of the study or studies.

"(2) The committees and secretaries referred to in paragraph (1) are the following:

"(A) The Committees on Veterans' Affairs of the Senate and House of Representatives.

"(B) The Committees on Armed Services of the Senate and House of Representatives.

"(C) The Secretary of Veterans Affairs.

"(D) The Secretary of Defense.

"(c) Funding.(1) The Secretary of Veterans Affairs and the Secretary of Defense shall make available up to a total of $500,000 in fiscal year 1993, from funds available to the Department of Veterans Affairs and the Department of Defense in that fiscal year, to carry out the review. Any amounts provided by the two departments shall be provided in equal amounts.
"(2) If the Secretary of Veterans Affairs and the Secretary of Defense enter into an agreement under subsection (a) with the National Academy of Sciences--

"(A) the Secretary of Veterans Affairs shall make available $250,000 in each of fiscal years 1994 through 2003, from amounts available to the Department of Veterans Affairs in each such fiscal year, to the National Academy of Sciences for the general purposes of conducting epidemiological research with respect to military and veterans populations; and

"(B) the Secretary of Defense shall make available $250,000 in each of fiscal years 1994 through 2003, from amounts available to the Department of Defense in each such fiscal year, to the National Academy of Sciences for the purposes of carrying out the research referred to in subparagraph (A).

"(d) Research review and development of medical education curriculum.(1) In order to further understand the health consequences of military service in the Persian Gulf theater of operations during the Persian Gulf War and of new research findings with implications for improving the provision of care for veterans of such service, the Secretary of Veterans Affairs and the Secretary of Defense shall seek to enter into an agreement with the National Academy of Sciences under which the Institute of Medicine of the Academy would--

"(A) develop a curriculum pertaining to the care and treatment of veterans of such service who have ill-defined or undiagnosed illnesses for use in the continuing medical education of both general and specialty physicians who provide care for such veterans; and

"(B) on an ongoing basis, periodically review and provide recommendations regarding the research plans and research strategies of the Departments relating to the health consequences of military service in the Persian Gulf theater of operations during the Persian Gulf War.

"(2) Recommendations to be provided under paragraph (1)(B) include any recommendations that the Academy considers appropriate for additional scientific studies (including studies related to treatment models) to resolve areas of continuing scientific uncertainty relating to the health consequences of any aspects of such military service. In making recommendations for additional studies, the Academy shall consider the available scientific data, the value and relevance of the information that could result from such studies, and the cost and feasibility of carrying out such studies.

"(3) Not later than 9 months after the Institute of Medicine provides the Secretaries the curriculum developed under paragraph (1)(A), the Secretaries shall provide for the conduct of continuing education programs using that curriculum. Those programs shall include instruction which seeks to emphasize use of appropriate protocols of diagnosis, referral, and treatment of such veterans.

"Sec. 707. Coordination of health-related government activities on the Persian Gulf War.

"(a) Designation of coordinating organization. The President shall designate, and may redesignate from time to time, the head of an appropriate department or agency of the Federal Government to coordinate all activities undertaken or funded by the Executive Branch of the Federal Government on the health consequences of military service in the Persian Gulf theater of operations during the Persian Gulf War.

"(b) Public advisory committee. Not later than January 1, 1999, the head of the department or agency designated under subsection (a) shall establish an advisory committee consisting of members of the general public, including Persian Gulf War veterans and representatives of such veterans, to provide advice to the head of that department or agency on proposed research studies, research plans, or research strategies relating to the health consequences of military service in the Southwest Asia theater of operations during the Persian Gulf War.
The department or agency head shall consult with such advisory committee on a regular basis.

"(c) Reports.(1) Not later than March 1 of each year, the head of the department or agency designated under subsection (a) shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on--

"(A) the status and results of all such research activities undertaken by the executive branch during the previous year; and

"(B) research priorities identified during that year.

"(2)(A) Not later than 120 days after submission of the epidemiological research study conducted by the Department of Veterans Affairs entitled "VA National Survey of Persian Gulf Veterans-Phase III", the head of the department or agency designated under subsection (a) shall submit to the congressional committees specified in paragraph (1) a report on the findings under that study and any other pertinent medical literature.

"(B) With respect to any findings of that study and any other pertinent medical literature which identify scientific evidence of a greater relative risk of illness or illnesses in family members of veterans who served in the Persian Gulf War theater of operations than in family members of veterans who did not so serve, the head of the department or agency designated under subsection (a) shall seek to ensure that appropriate research studies are designed to follow up on such findings.

"(d) Public availability of research findings. The head of the department or agency designated under subsection (a) shall ensure that the findings of all research conducted by or for the executive branch relating to the health consequences of military service in the Persian Gulf theater of operations during the Persian Gulf War (including information pertinent to improving provision of care for veterans of such service) are made available to the public through peer-reviewed medical journals, the World Wide Web, and other appropriate media.

"(e) Outreach. The head of the department or agency designated under subsection (a) shall ensure that the appropriate departments consult and coordinate in carrying out an ongoing program to provide information to those who served in the Southwest Asia theater of operations during the Persian Gulf War relating to: (1) the health risks, if any, resulting from any risk factors associated with such service; and (2) any services or benefits available with respect to such health risks.

"Sec. 708. Definition.

"For the purposes of this title, the term 'Persian Gulf War' has the meaning given such term in section 101(33) of title 38, United States Code.".

Code of Federal Regulations
Department of Veterans Affairs-General provisions, 38 CFR Part 1

Cross References
This section is referred to in 38 USCS § 5701

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 19

Secretary of Veterans Affairs did not abuse his discretion in deciding to abandon congressionally mandated epidemiological study of effects of exposure to dioxin-byproduct of Agent Orange and other herbicides-on Vietnam veterans, after concluding that scientifically valid study was impossible, and that conclusion was not reached arbitrarily or capriciously since, after
§ 529. Annual report to Congress

The Secretary shall submit annually, at the close of each fiscal year, a report in writing to Congress. Each such report shall--

(1) give an account of all moneys received and disbursed by the Department for such fiscal year;
(2) describe the work done during such fiscal year; and
(3) state the activities of the Department for such fiscal year.

Cross References
This section is referred to in 38 USCS §§ 541, 542, 544, 545, 1718, 1754, 3121, 3733, 3736, 7101, 7726, 7734

§ 530. Annual report on program and expenditures for domestic response to weapons of mass destruction

(a) The Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives an annual report, to be submitted each year at the time that the President submits the budget for the next fiscal year under section 1105 of title 31 [31 USCS § 1105], on the activities of the Department relating to preparation for, and participation in, a domestic medical response to an attack involving weapons of mass destruction.

(b) Each report under subsection (a) shall include the following:

(1) A statement of the amounts of funds and the level of personnel resources (stated in terms of full-time equivalent employees) expected to be used by the Department during the next fiscal year in preparation for a domestic medical response to an attack involving weapons of mass destruction, including the anticipated source of those funds and any anticipated shortfalls in funds or personnel resources to achieve the tasks assigned the Department by the President in connection with preparation for such a response.

(2) A detailed statement of the funds expended and personnel resources (stated in terms of full-time equivalent employees) used during the fiscal year preceding the fiscal year during which the report is submitted in preparation for a domestic medical response to an attack involving weapons of mass destruction or in response to such an attack, including identification of the source of those funds and a description of how those funds were expended.

(3) A detailed statement of the funds expended and expected to be expended, and the personnel resources (stated in terms of full-time equivalent employees) used and expected to be used, during the fiscal year during which the report is submitted in
preparation for a domestic medical response to an attack involving weapons of mass
destruction or in response to such an attack, including identification of the source of
funds expended and a description of how those funds were expended.

(c) This section shall expire on January 1, 2009.

§ 531. Requirement relating to naming of Department property

Except as expressly provided by law, a facility, structure, or real property of the
Department, and a major portion (such as a wing or floor) of any such facility, structure,
or real property, may be named only for the geographic area in which the facility,
structure, or real property is located.

Other provisions:

Application of section. Act Nov. 11, 1998, P. L. 105-368, Title X, § 1001(b), 112 Stat. 3363,
provides: "Section 531 of title 38, United States Code, as added by subsection (a)(1), shall
apply with respect to the assignment or designation of the name of a facility, structure, or real
property of the Department of Veterans Affairs (or of a major portion thereof) after the date of
the enactment of this Act."

SUBCHAPTER III. ADVISORY COMMITTEES

§ 541. Advisory Committee on Former Prisoners of War
§ 542. Advisory Committee on Women Veterans
§ 543. Advisory Committee on Prosthetics and Special-Disabilities Programs
§ 544. Advisory Committee on Minority Veterans
§ 545. Advisory Committee on the Readjustment of Veterans

§ 541. Advisory Committee on Former Prisoners of War

(a) (1) The Secretary shall establish an advisory committee to be known as the Advisory
Committee on Former Prisoners of War (hereinafter in this section referred to as the
"Committee").

(2) (A) The members of the Committee shall be appointed by the Secretary from the
general public and shall include--

(i) appropriate representatives of veterans who are former prisoners of war;
(ii) individuals who are recognized authorities in fields pertinent to disabilities
prevalent among former prisoners of war, including authorities in
epidemiology, mental health, nutrition, geriatrics, and internal medicine; and
(iii) appropriate representatives of disabled veterans.

(B) The Committee shall also include, as ex officio members, the Under Secretary
for Health and the Under Secretary for Benefits, or their designees.

(3) The Secretary shall determine the number, terms of service, and pay and
allowances of members of the Committee appointed by the Secretary, except that the
term of service of any such member may not exceed three years.

(b) The Secretary shall, on a regular basis, consult with and seek the advice of the
Committee with respect to the administration of benefits under this title for veterans who
are former prisoners of war and the needs of such veterans with respect to compensation,
health care, and rehabilitation.
(c) (1) Not later than July 1 of each odd-numbered year through 2009, the Committee shall submit to the Secretary a report on the programs and activities of the Department that pertain to veterans who are former prisoners of war. Each such report shall include--
(A) an assessment of the needs of such veterans with respect to compensation, health care, and rehabilitation;
(B) a review of the programs and activities of the Department designed to meet such needs; and
(C) such recommendations (including recommendations for administrative and legislative action) as the Committee considers to be appropriate.

(2) The Secretary shall, within 60 days after receiving each report under paragraph (1), submit to the Congress a copy of the report, together with any comments concerning the report that the Secretary considers appropriate.

(3) The Committee may also submit to the Secretary such other reports and recommendations as the Committee considers appropriate.

(4) The Secretary shall submit with each annual report submitted to the Congress pursuant to section 529 of this title [38 USCS § 529] a summary of all reports and recommendations of the Committee submitted to the Secretary since the previous annual report of the Secretary submitted to the Congress pursuant to that section.

Explanatory notes:
A prior § 541 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 1541.

Amendments:

Other provisions:
Termination of advisory committees. Act Oct. 6, 1972, P. L. 92-463, §§ 3(2), 14, 86 Stat. 770, 776, located at 5 USCS Appendix, provided that advisory committees in existence on Jan. 5, 1973, would terminate not later than the expiration of the two-year period following Jan. 5, 1973, unless, in the case of a committee established by the President or an officer of the Federal government, such committee is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law. Advisory committees established after Jan. 5, 1973, would terminate not later than two years after their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law.

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 19

§ 542. Advisory Committee on Women Veterans
(a) (1) The Secretary shall establish an advisory committee to be known as the Advisory Committee on Women Veterans (hereinafter in this section referred to as "the Committee").
   (2) (A) The Committee shall consist of members appointed by the Secretary from the general public, including--
      (i) representatives of women veterans;
      (ii) individuals who are recognized authorities in fields pertinent to the needs of women veterans, including the gender-specific health-care needs of women; and
      (iii) representatives of both female and male veterans with service-connected disabilities, including at least one female veteran with a service-connected disability and at least one male veteran with a service-connected disability.
   (B) The Committee shall include, as ex officio members--
      (i) the Secretary of Labor (or a representative of the Secretary of Labor designated by the Secretary after consultation with the Assistant Secretary of Labor for Veterans' Employment [Assistant Secretary of Labor for Veterans' Employment and Training]);
      (ii) the Secretary of Defense (or a representative of the Secretary of Defense designated by the Secretary of Defense after consultation with the Defense Advisory Committee on Women in the Services); and
      (iii) the Under Secretary for Health and the Under Secretary for Benefits, or their designees.
   (C) The Secretary may invite representatives of other departments and agencies of the United States to participate in the meetings and other activities of the Committee.
   (3) The Secretary shall determine the number, terms of service, and pay and allowances of members of the Committee appointed by the Secretary, except that a term of service of any such member may not exceed three years. The Secretary may reappoint any such member for additional terms of service.

(b) The Secretary shall, on a regular basis, consult with and seek the advice of the Committee with respect to the administration of benefits by the Department for women veterans, reports and studies pertaining to women veterans and the needs of women veterans with respect to compensation, health care, rehabilitation, outreach, and other benefits and programs administered by the Department, including the Center for Women Veterans.

(c) (1) Not later than July 1 of each even-numbered year through 2004, the Committee shall submit to the Secretary a report on the programs and activities of the Department that pertain to women veterans. Each such report shall include--
   (A) an assessment of the needs of women veterans with respect to compensation, health care, rehabilitation, outreach, and other benefits and programs administered by the Department;
   (B) a review of the programs and activities of the Department designed to meet such needs; and
   (C) such recommendations (including recommendations for administrative and legislative action) as the Committee considers appropriate.
(2) The Secretary shall, within 60 days after receiving each report under paragraph (1), submit to the Congress a copy of the report, together with any comments concerning the report that the Secretary considers appropriate.
(3) The Committee may also submit to the Secretary such other reports and recommendations as the Committee considers appropriate.
(4) The Secretary shall submit with each annual report submitted to the Congress pursuant to section 529 of this title [38 USCS § 529] a summary of all reports and recommendations of the Committee submitted to the Secretary since the previous annual report of the Secretary submitted pursuant to such section.

Explanatory notes:
The bracketed words "Assistant Secretary of Labor for Veterans' Employment and Training" have been inserted in subsec. (a)(2)(B)(i) on authority of § 2(b)(3) of Act Nov. 6, 1986, P. L. 99-619, which appears as 29 USCS § 553 note.

Amendments:
1992. Act Oct. 9, 1992, in subsec. (a)(2), in subpara. (B)(iii), substituted "Under Secretary for Health" for "Chief Medical Director" and "Under Secretary for Benefits" for "Chief Benefits Director".
1996. Act Oct. 9, 1996, in subsec. (b), inserted ", including the Center for Women Veterans".

Other provisions:
Termination of advisory committees. Act Oct. 6, 1972, P. L. 92-463, §§ 3(2), 14, 86 Stat. 770, 776, located at 5 USCS Appendix, provided that advisory committees in existence on Jan. 5, 1973, would terminate not later than the expiration of the two-year period following Jan. 5, 1973, unless, in the case of a committee established by the President or an officer of the Federal government, such committee is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law. Advisory committees established after Jan. 5, 1973, would terminate not later than two years after their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law.

Cross References
This section is referred to in 38 USCS § 318

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Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 19

§ 543. Advisory Committee on Prosthetics and Special-Disabilities Programs
(a) There is in the Department an advisory committee known as the Advisory Committee on Prosthetics and Special-Disabilities Programs (hereinafter in this section referred to as the "Committee").
(b) The objectives and scope of activities of the Committee shall relate to--
   (1) prosthetics and special-disabilities programs administered by the Secretary;
   (2) the coordination of programs of the Department for the development and testing of,
       and for information exchange regarding, prosthetic devices;
   (3) the coordination of Department and non-Department programs that involve the
       development and testing of prosthetic devices; and
   (4) the adequacy of funding for the prosthetics and special-disabilities programs of
       the Department.

(c) The Secretary shall, on a regular basis, consult with and seek the advice of the
Committee on the matters described in subsection (b).

(d) Not later than January 15 of 1993, 1994, and 1995, the Committee shall submit to the
Secretary and the Committees on Veterans' Affairs of the Senate and House of
Representatives a report on the effectiveness of the prosthetics and special-disabilities
programs administered by the Secretary during the preceding fiscal year. Not more than
60 days after the date on which any such report is received by the Secretary, the Secretary
shall submit a report to such committees commenting on the report of the Committee.

(e) As used in this section, the term "special-disabilities programs" includes all programs
administered by the Secretary for--
   (1) spinal-cord-injured veterans;
   (2) blind veterans;
   (3) veterans who have lost or lost the use of extremities;
   (4) hearing-impaired veterans; and
   (5) other veterans with serious incapacities in terms of daily life functions.

Explanatory notes:
A prior § 543 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and
appears as 38 USCS § 1543.

Other provisions:
770, 776, located at 5 USCS Appendix, provided that advisory committees in existence on
Jan. 5, 1973, would terminate not later than the expiration of the two-year period following
Jan. 5, 1973, unless, in the case of a committee established by the President or an officer of
the Federal government, such committee is renewed by appropriate action prior to the
expiration of such two-year period, or in the case of a committee established by the Congress,
its duration is otherwise provided by law. Advisory committees established after Jan. 5, 1973,
would terminate not later than two years after their establishment, unless, in the case of a
committee established by the President or an officer of the Federal Government, such
committee is renewed by appropriate action prior to the expiration of such two-year period, or
in the case of a committee established by the Congress, its duration is otherwise provided by
law.

Status and name of Committee. Act Oct. 9, 1992, P. L. 102-405, Title I, Part A, § 105(a),
106 Stat. 1775, provides: "The Federal advisory committee established by the Secretary and
known as the Prosthetics Service Advisory Committee shall after the date of the enactment of
this Act be known as the Advisory Committee on Prosthetics and Special-Disabilities
Programs and shall operate as though such committee had been established by law.
Notwithstanding any other provision of law, the Committee may, upon the enactment of this
Act, meet and act on any matter covered by subsection (b) of section 543 of title 38, United States Code, as added by subsection (b) of this section.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 18

§ 544. Advisory Committee on Minority Veterans

(a) (1) The Secretary shall establish an advisory committee to be known as the Advisory Committee on Minority Veterans (hereinafter in this section referred to as "the Committee").

(2) (A) The Committee shall consist of members appointed by the Secretary from the general public, including--
   (i) representatives of veterans who are minority group members;
   (ii) individuals who are recognized authorities in fields pertinent to the needs of veterans who are minority group members;
   (iii) veterans who are minority group members and who have experience in a military theater of operations; and
   (iv) veterans who are minority group members and who do not have such experience.

   (B) The Committee shall include, as ex officio members, the following:
      (i) The Secretary of Labor (or a representative of the Secretary of Labor designated by the Secretary after consultation with the Assistant Secretary of Labor for Veterans' Employment).
      (ii) The Secretary of Defense (or a representative of the Secretary of Defense designated by the Secretary of Defense).
      (iii) The Secretary of the Interior (or a representative of the Secretary of the Interior designated by the Secretary of the Interior).
      (iv) The Secretary of Commerce (or a representative of the Secretary of Commerce designated by the Secretary of Commerce).
      (v) The Secretary of Health and Human Services (or a representative of the Secretary of Health and Human Services designated by the Secretary of Health and Human Services).
      (vi) The Under Secretary for Health and the Under Secretary for Benefits, or their designees.

   (C) The Secretary may invite representatives of other departments and agencies of the United States to participate in the meetings and other activities of the Committee.

(3) The Secretary shall determine the number, terms of service, and pay and allowances of members of the Committee appointed by the Secretary, except that a term of service of any such member may not exceed three years. The Secretary may reappoint any such member for additional terms of service.

(4) The Committee shall meet as often as the Secretary considers necessary or appropriate, but not less often than twice each fiscal year.

(b) The Secretary shall, on a regular basis, consult with and seek the advice of the Committee with respect to the administration of benefits by the Department for veterans.
who are minority group members, reports and studies pertaining to such veterans and the
needs of such veterans with respect to compensation, health care, rehabilitation, outreach,
and other benefits and programs administered by the Department, including the Center
for Minority Veterans.

(c) (1) Not later than July 1 of each year, the Committee shall submit to the Secretary a
report on the programs and activities of the Department that pertain to veterans who are
minority group members. Each such report shall include--
(A) an assessment of the needs of veterans who are minority group members with
respect to compensation, health care, rehabilitation, outreach, and other benefits
and programs administered by the Department;
(B) a review of the programs and activities of the Department designed to meet
such needs; and
(C) such recommendations (including recommendations for administrative and
legislative action) as the Committee considers appropriate.
(2) The Secretary shall, within 60 days after receiving each report under paragraph (1),
submit to Congress a copy of the report, together with any comments concerning the
report that the Secretary considers appropriate.
(3) The Committee may also submit to the Secretary such other reports and
recommendations as the Committee considers appropriate.
(4) The Secretary shall submit with each annual report submitted to the Congress
pursuant to section 529 of this title [38 USCS § 529] a summary of all reports and
recommendations of the Committee submitted to the Secretary since the previous
annual report of the Secretary submitted pursuant to such section.

(d) In this section, the term "minority group member" means an individual who is--
(1) Asian American;
(2) Black;
(3) Hispanic;
(4) Native American (including American Indian, Alaskan Native, and Native
Hawaiian); or
(5) Pacific-Islander American.

(e) The Committee shall cease to exist December 31, 2009.

Explanatory notes:
L. 91-588, § 3(a), 84 Stat. 1583; Dec. 21, 1974, P. L. 93-527, § 5, 88 Stat. 1704; Dec. 23,
1975, P. L. 94-169, Title I, § 105, 89 Stat. 1017; Sept. 30, 1976, P. L. 94-432, Title II, § 205,
90 Stat. 1371; Dec. 2, 1977, P. L. 95-204, Title I, § 104, 91 Stat. 1457) was repealed by Act
Nov. 4, 1978, P. L. 95-588, Title I, § 112(a)(1), Title IV, § 401, 92 Stat. 2505, 2511, effective
Jan. 1, 1979. Such section provided for increase of monthly rate of pension payable to
certain surviving spouses.

Amendments:
1996. Act Oct. 9, 1996, in subsec. (b), inserted ", including the Center for Minority Veterans";
and, in subsec. (e), substituted "December 31, 1999" for "December 31, 1997".
(a) (1) There is in the Department the Advisory Committee on the Readjustment of Veterans (hereinafter in this section referred to as the "Committee").

(2) The Committee shall consist of not more than 18 members appointed by the Secretary from among individuals who--

(A) have demonstrated significant civic or professional achievement; and

(B) have experience with the provision of veterans benefits and services by the Department.

(3) The Secretary shall seek to ensure that members appointed to the Committee include individuals from a wide variety of geographic areas and ethnic backgrounds, individuals from veterans service organizations, individuals with combat experience, and women.

(4) The Secretary shall determine the terms of service and pay and allowances of the members of the Committee, except that a term of service may not exceed two years. The Secretary may reappoint any member for additional terms of service.

(b) (1) The Secretary shall, on a regular basis, consult with and seek the advice of the Committee with respect to the provision by the Department of benefits and services to veterans in order to assist veterans in the readjustment to civilian life.

(2) (A) In providing advice to the Secretary under this subsection, the Committee shall--

(i) assemble and review information relating to the needs of veterans in readjusting to civilian life;

(ii) provide information relating to the nature and character of psychological problems arising from service in the Armed Forces;

(iii) provide an on-going assessment of the effectiveness of the policies, organizational structures, and services of the Department in assisting veterans in readjusting to civilian life; and

(iv) provide on-going advice on the most appropriate means of responding to the readjustment needs of veterans in the future.

(B) In carrying out its duties under subparagraph (A), the Committee shall take into special account the needs of veterans who have served in a theater of combat operations.

(c) (1) Not later than March 31 of each year, the Committee shall submit to the Secretary a report on the programs and activities of the Department that relate to the readjustment of veterans to civilian life. Each such report shall include--
(A) an assessment of the needs of veterans with respect to readjustment to civilian life;
(B) a review of the programs and activities of the Department designed to meet such needs; and
(C) such recommendations (including recommendations for administrative and legislative action) as the Committee considers appropriate.

(2) Not later than 90 days after the receipt of a report under paragraph (1), the Secretary shall transmit to the Committees on Veterans' Affairs of the Senate and House of Representatives a copy of the report, together with any comments and recommendations concerning the report that the Secretary considers appropriate.

(3) The Committee may also submit to the Secretary such other reports and recommendations as the Committee considers appropriate.

(4) The Secretary shall submit with each annual report submitted to the Congress pursuant to section 529 of this title [38 USCS § 529] a summary of all reports and recommendations of the Committee submitted to the Secretary since the previous annual report of the Secretary submitted pursuant to that section.

(d) (1) Except as provided in paragraph (2), the provisions of the Federal Advisory Committee Act (5 U.S.C. App.) shall apply to the activities of the Committee under this section.

(2) Section 14 of such Act [5 USCS Appx.] shall not apply to the Committee.

Amendments:

Other provisions:
Original members. Act Oct. 9, 1996, P. L. 104-262, Title III, Subtitle C, § 333(b), 110 Stat. 3200, provides:
"(1) Notwithstanding subsection (a)(2) of section 545 of title 38, United States Code (as added by subsection (a)), the members of the Advisory Committee on the Readjustment of Vietnam and Other War Veterans on the date of the enactment of this Act shall be the original members of the advisory committee recognized under such section.

"(2) The original members shall so serve until the Secretary of Veterans Affairs carries out appointments under such subsection (a)(2). The Secretary of Veterans Affairs shall carry out such appointments as soon after such date as is practicable. The Secretary may make such appointments from among such original members."

"Sec. 701. Establishment of Commission.

"(a) Establishment. There is established a commission to be known as the Commission on Servicemembers and Veterans Transition Assistance (hereafter in this title referred to as the 'Commission').

"(b) Membership.(1) The Commission shall be composed of 12 members appointed from among private United States citizens with appropriate and diverse experiences, expertise, and historical perspectives on veterans, military, organizational, and management matters. The members shall be appointed as follows:
“(A) Four shall be appointed jointly by the chairman and ranking minority member of the Committee on Veterans’ Affairs of the House of Representatives.

“(B) Four shall be appointed jointly by the chairman and ranking minority member of the Committee on Veterans’ Affairs of the Senate.

“(C) Two shall be appointed jointly by the chairman and ranking minority member of the Committee on National Security of the House of Representatives.

“(D) Two shall be appointed jointly by the chairman and ranking minority member of the Committee on Armed Services of the Senate.

“(2)(A) One member of the Commission appointed under each of subparagraphs (A) and (B) of paragraph (1) shall be a representative of a veterans service organization.

“(B) To the maximum extent practicable, the individuals appointed under paragraph (1) as members of the Commission shall be veterans.

“(C) Not more than seven of the members of the Commission may be members of the same political party.

“(3) In addition to the members appointed under paragraph (1), the following shall be nonvoting members of the Commission:

“(A) The Under Secretary for Benefits of the Department of Veterans Affairs.


“(C) The Assistant Secretary of Labor for Veterans’ Employment and Training.

“(4) The appointments of members of the Commission shall, to the maximum extent practicable, be made after consultation with representatives of veterans service organizations.

“(5) The appointments of the members of the Commission shall be made not later than 45 days after the date of the enactment of this Act.

“(c) Period of appointment; vacancies. Members shall be appointed for the life of the Commission. Any vacancy in the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment.

“(d) Initial meeting. Not later than 30 days after the date on which all members of the Commission have been appointed under subsection (b)(1), the Commission shall hold its first meeting.

“(e) Quorum. A majority of the members of the Commission shall constitute a quorum, but a lesser number may hold hearings.

“(f) Chairman and vice chairman. The Commission shall select a chairman and vice chairman from among its members.

“(g) Meetings. The Commission shall meet at the call of the chairman of the Commission.

“(h) Panels. The Commission may establish panels composed of less than the full membership of the Commission for the purpose of carrying out the Commission's duties. The actions of such panels shall be subject to the review and control of the Commission. Any findings and determinations made by such a panel shall not be considered the findings and determinations of the Commission unless approved by the Commission.

“(i) Authority of individuals to act for Commission. Any member or agent of the Commission may, if authorized by the Commission, take any action which the Commission is authorized to take under this title.
Sec. 702. Duties of Commission.

(a) In general. The Commission shall--

(1) review the adequacy and effectiveness of veterans transition assistance and benefits programs in providing assistance to members of the Armed Forces in making the transition and adjustment to civilian life;

(2) review the allocation under law of responsibility for the administration of veterans transition assistance and benefits programs among the various departments and agencies of the Government and determine the feasibility and desirability of consolidating such administration;

(3) evaluate proposals for improving such programs, including proposals for alternative means of providing services delivered by such programs; and

(4) make recommendations to Congress regarding the need for improvements in such programs.

(b) Review of programs to assist members of the Armed Forces at separation.

(1) While carrying out the general duties specified in subsection (a), the members of the Commission appointed under subparagraphs (C) and (D) of section 701(b)(1) and the member specified in subparagraph (B) of section 701(b)(3) shall review primarily the programs intended to assist members of the Armed Forces at the time of their separation from service in the Armed Forces, including programs designed to assist families of such members.

(2) In carrying out the review, those members of the Commission shall determine the following:

(A) The adequacy of the programs referred to in paragraph (1) for their purposes.

(B) The adequacy of the support of the Armed Forces for such programs.

(C) The adequacy of funding levels for such programs.

(D) The effect, if any, of the existence of such programs on military readiness.

(E) The extent to which such programs provide members of the Armed Forces with job-search skills.

(F) The extent to which such programs prepare such members for employment in the private sector and in the public sector.

(G) The effectiveness of such programs in assisting such members in finding employment in the public sector upon their separation from service.

(H) The ways in which such programs could be improved.

(3) In carrying out the review, the Commission shall make use of previous studies which have been made of such programs.

(c) Review of programs to assist veterans.

(1) While carrying out the general duties specified in subsection (a), the members of the Commission appointed under subparagraphs (A) and (B) of section 701(b)(1) and the members specified in subparagraphs (A) and (C) of section 701(b)(3) shall review the following programs:

(A) Educational assistance programs.

(B) Job counseling, job training, and job placement services programs.

(C) Rehabilitation and training programs.
“(D) Housing loan programs.

“(E) Small business loan and small business assistance programs.

“(F) Employment and employment training programs for employment in the public sector and the private sector, including employer training programs and union apprenticeship programs.

“(G) Government personnel policies (including veterans' preference policies) and the enforcement of such policies.

“(H) Programs that prepare the families of members of the Armed Forces for their transition from military life to civilian life and facilitate that transition.

“(2) In carrying out the review, such members of the Commission shall determine the following:

“(A) The adequacy of the programs referred to in paragraph (1) for their purposes.

“(B) The adequacy of the support of the Department of Veterans Affairs for such programs.

“(C) The adequacy of funding levels for such programs.

“(D) The extent to which such programs provide veterans with job-search skills.

“(E) The extent to which such programs prepare veterans for employment in the private sector and in the public sector.

“(F) The effectiveness of such programs in assisting veterans in finding employment in the public sector upon their separation from service.

“(G) The ways in which such programs could be improved.

“(d) Reports. (1) Not later than 90 days after the date on which all members of the Commission have been appointed under section 701(b)(1), the Commission shall submit to the Committees on Veterans' Affairs and Armed Services of the Senate and the Committees on Veterans’ Affairs and National Security of the House of Representatives a report setting forth a plan for the work of the Commission. The Commission shall develop the plan in consultation with the Secretary of Defense, the Secretary of Veterans Affairs, the Secretary of Labor, and the heads of other appropriate departments and agencies of the Government.

“(2)(A) Not later than 18 months after the date of the first meeting of the Commission, the Commission shall submit to the committees referred to in paragraph (1), and to the Secretary of Defense, the Secretary of Veterans Affairs, and the Secretary of Labor, a report setting forth the activities, findings, and recommendations of the Commission, including any recommendations for legislative action and administrative action as the Commission considers appropriate.

“(B) Not later than 90 days after receiving the report referred to in subparagraph (A), the Secretary of Defense, the Secretary of Veterans Affairs, and the Secretary of Labor shall jointly transmit the report to Congress, together with the Secretaries’ comments on the report.


“(a) Hearings. The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers advisable to carry out the purposes of this title.
“(b) Information from Federal agencies. The Commission may secure directly from the Department of Defense, the Department of Veterans Affairs, and any other department or agency of the Government such information as the Commission considers necessary to carry out its duties under this title. Upon request of the chairman of the Commission, the head of such department or agency shall furnish such information expeditiously to the Commission.

“Sec. 704. Miscellaneous administrative provisions.

“(a) Postal services. The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Government.

“(b) Gifts. The Commission may accept, use, and dispose of gifts or donations of services or property.

“(c) Miscellaneous administrative support. The Secretary of Defense, the Secretary of Veterans Affairs, and the Secretary of Labor shall, upon the request of the chairman of the Commission, furnish the Commission, on a reimbursable basis, any administrative and support services as the Commission may require.

“Sec. 705. Commission personnel matters.

“(a) Compensation of members. Each member of the Commission may be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which such member is engaged in performing the duties of the Commission.

“(b) Travel and travel expenses. (1) Members and personnel of the Commission may travel on military aircraft, military vehicles, or other military conveyances when travel is necessary in the performance of a duty of the Commission except when the cost of commercial transportation is less expensive.

“(2) The members of the Commission may be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code [5 USCS §§ 5701 et seq.], while away from their homes or regular places of business in the performance of services for the Commission.

“(c) Staff. (1) The chairman of the Commission may, without regard to civil service laws and regulations, appoint and terminate an executive director and up to five additional staff members as may be necessary to enable the Commission to perform its duties. In appointing an individual as executive director, the chairman shall, to the maximum extent practicable, attempt to appoint an individual who is a veteran. The employment of an executive director shall be subject to confirmation by the Commission.

“(2) The chairman of the Commission may fix the compensation of the executive director and other personnel without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code [5 USCS §§ 5101 et seq., 5331 et seq.], relating to classification of positions and General Schedule pay rates, except that the rate of pay for the executive director and other staff members may not exceed the rate payable for level V of the Executive Schedule under section 5316 of such title.

“(d) Detail of Government employees. Upon request of the chairman of the Commission, the head of any department or agency of the Government may detail, on a nonreimbursable basis, any personnel of the department or agency to the Commission to assist the Commission in carrying out its duties.

“(e) Procurement of temporary and intermittent services. The chairman of the Commission may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, at rates for individuals which do not exceed the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of such title.

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“Sec. 706. Termination of Commission.
"The Commission shall terminate 90 days after the date on which it submits its report under section 702(d)(2).”.

"Sec. 707. Definitions.
"For the purposes of this title:

"(1) The term 'veterans transition assistance and benefits program' means any program of the Government the purpose of which is--

"(A) to assist, by rehabilitation or other means, members of the Armed Forces in readjusting or otherwise making the transition to civilian life upon their separation from service in the Armed Forces; or

"(B) to assist veterans in making the transition to civilian life.

"(2) The term 'Armed Forces' has the meaning given such term in section 101(10) of title 38, United States Code.

"(3) The term 'veteran' has the meaning given such term in section 101(2) of title 38, United States Code.

"(4) The term 'veterans service organization' means any organization covered by section 5902(a) of title 38, United States Code.

"Sec. 708. Funding.
"(a) In general. The Secretary of Defense shall, upon the request of the chairman of the Commission, make available to the Commission such amounts as the Commission may require to carry out its duties under this title. The Secretary shall make such amounts available from amounts appropriated for the Department of Defense, except that such amounts may not be from amounts appropriated for the transition assistance program (TAP), the Army career alumni program (ACAP), or any similar program.

"(b) Availability. Any sums made available to the Commission under subsection (a) shall remain available, without fiscal year limitation, until the termination of the Commission.”.

CHAPTER 7. EMPLOYEES

§ 701. Placement of employees in military installations
§ 703. Miscellaneous authorities respecting employees
§ 705. Telephone service for medical officers and facility directors
§ 707. Benefits for employees at overseas offices who are United States citizens
§ 709. Employment restrictions
§ 711. Grade reductions
[§ 712. Repealed]

Amendments:

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§ 701. Placement of employees in military installations

The Secretary may place employees of the Department in such Army, Navy, and Air Force installations as may be considered advisable for the purpose of adjudicating disability claims of, and giving aid and advice to, members of the Armed Forces who are about to be discharged or released from active military, naval, or air service.

Explanatory notes:


Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 13

§ 703. Miscellaneous authorities respecting employees

(a) The Secretary may furnish and launder such wearing apparel as may be prescribed for employees in the performance of their official duties.

(b) The Secretary may transport children of Department employees located at isolated stations to and from school in available Government-owned automotive equipment.

(c) The Secretary may provide recreational facilities, supplies, and equipment for the use of patients in hospitals and employees in isolated installations.

(d) The Secretary may provide for the preparation, shipment, installation, and display of exhibits, photographic displays, moving pictures, and other visual educational information and descriptive material. For the purposes of the preceding sentence, the Secretary may purchase or rent equipment.

(e) The Secretary may reimburse employees for the cost of repairing or replacing their personal property damaged or destroyed by patients or domiciliary members while such employees are engaged in the performance of their official duties.

(f) (1) The Secretary, upon determining that an emergency situation exists and that such action is necessary for the effective conduct of the affairs of the Department, may use Government-owned, or leased, vehicles to transport employees to and from their place of employment and the nearest adequate public transportation or, if such public transportation is either unavailable or not feasible to use, to and from their place of employment and their home.

(2) The Secretary shall establish reasonable rates to cover the cost of the service rendered under this subsection, and all proceeds collected therefrom shall be applied to the applicable appropriation.

Explanatory notes:

A prior § 703 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 1903.

Research Guide
Federal Procedure:
16 Fed Proc L Ed, Government Officers and Employees §§ 40:472, 476, 480

1. Generally
2. Recreation and amusement

1. Generally

Plaintiff, who was allegedly injured at Veterans Hospital while voluntarily providing recreational supplies and service, which administrator of veterans administration is authorized to provide, was rendering personal services authorized by Act of Congress as contemplated by Federal Employees' Compensation Act (5 USCS §§ 751 et seq.) and was therefore an employee under federal law within meaning of the Act (5 USCS § 790(b)(2)). McNicholas v United States (1964, ND Ill) 226 F Supp 965

2. Recreation and amusement

Officials at isolated stations are not to use station equipment such as buses, ambulances, etc., to transport employees, free of charge, from hospital to nearest settled community for purposes of recreation or amusement since Congress intended such recreational facilities, supplies and equipment to be located at hospital and to be considered as part of hospital reservation. 1931 ADVA 62

§ 705. Telephone service for medical officers and facility directors

The Secretary may pay for official telephone service and rental in the field whenever incurred in case of official telephones for directors of centers, hospitals, independent clinics, domiciliaries, and medical officers of the Department where such telephones are installed in private residences or private apartments or quarters, when authorized under regulations prescribed by the Secretary.

Explanatory notes:


§ 707. Benefits for employees at overseas offices who are United States citizens

(a) The Secretary may, under such rules and regulations as may be prescribed by the President or the President's designee, provide to personnel of the Department who are United States citizens and are assigned by the Secretary to the Department offices in the Republic of the Philippines allowances and benefits similar to those provided by the following provisions of law:

(1) Section 905 of the Foreign Service Act of 1980 [22 USCS § 4085] (relating to allowances to provide for the proper representation of the United States).
(2) Sections 901 (1), (2), (3), (4), (7), (8), (9), (11), and (12) of the Foreign Service Act of 1980 [22 USCS § 4081(1)-(4), (7)-(9), (11), (12)] (relating to travel expenses).
(3) Section 901(13) of the Foreign Service Act of 1980 [22 USCS § 4081(13)] (relating to transportation of automobiles).
(4) Section 903 of the Foreign Service Act of 1980 [22 USCS § 4083] (relating to the return of personnel to the United States on leave of absence).
(5) Section 904(d) of the Foreign Service Act of 1980 [22 USCS § 4084(d)] (relating to payments by the United States of expenses for treating illness or injury of officers or employees and dependents requiring hospitalization).

(6) Section 5724a(c) of title 5 [5 USCS § 5724a(c)] (relating to subsistence expenses for 60 days in connection with the return to the United States of the employee and such employee's immediate family).

(7) Section 5724a(d) of title 5 [5 USCS § 5724a(d)] (relating to the sale and purchase of the residence or settlement of an unexpired lease of the employee when transferred from one station to another station and both stations are in the United States, its territories or possessions, or the Commonwealth of Puerto Rico).

(b) The authority in subsection (a) supplements, but is not in lieu of, other allowances and benefits for overseas employees of the Department provided by title 5 and the Foreign Service Act of 1980 (22 U.S.C. 3901 et seq.).

Explanatory notes:


Amendments:

1996. Act Sept. 23, 1996 (effective 180 days after enactment, as provided by § 1725(a) of such Act, which appears as 5 USCS § 5722 note), in subsec. (a), in para. (6), substituted "Section 5724a(c)" for "Section 5724a(a)(3)" and, in para. (7), substituted "Section 5724a(d)" for "Section 5724a(a)(4)".

Other provisions:


"1-101. Payment of the additional compensation authorized by Section 8(a)(2) of the Defense Department Overseas Teachers Pay and Personnel Practices Act of 1959, as amended, shall be governed by the regulations contained in Executive Order No. 10000, as amended [5 USCS § 5941 note], which govern the payment of additional compensation in foreign areas (referred to as foreign post differential), subject to the provisions of Section 8(b) of that Act (20 U.S.C. 906(a)(2) and (b)).

"1-102. The following functions vested in the President are delegated to the Secretary of State:

"(a) That part of the functions in Section 7(a) of the Defense Department Overseas Teachers Pay and Personnel Practices Act which consists of the authority to prescribe regulations relating to quarters and quarters allowances (20 U.S.C. 905(a)).

"(b) The authority in Section 8(a)(1) of the Defense Department Overseas Teachers Pay and Personnel Practices Act to prescribe regulations relating to cost of living allowances (20 U.S.C. 906(a)(1)).

"(c) The following authority in [former] Section 235 of Title 38 of the United States Code to prescribe rules and regulations:

"(1) Section 235(2) [repealed; for similar provisions, see subsec. (a)(1) of this section], except as that section pertains to an allowance similar to that provided for in Section 901(6) of the Foreign Service Act of 1980 (22 U.S.C. 4081(6)).

"(2) Section 235(3) [repealed; for similar provisions, see subsec. (a)(3) of this section];
“(3) Section 235(5) [repealed; for similar provisions, see subsec.(a)(5) of this section];
“(4) Section 235(6) [repealed; for similar provisions, see subsec.(a)(6) of this section]; and
“(5) Section 235(7) [repealed; for similar provisions, see subsec.(a)(7) of this section].

"1-103. The following functions vested in the President by Section 235 of Title 38 of the United States Code [repealed; for similar provisions, see this section] are delegated to the Administrator of the Veterans Administration. The authority with respect to the allowances or benefits of paragraphs (1) and (4) of Section 235 [now repealed; for similar provisions, see subsecs. (a)(1)-(4) of this section] which are similar to the benefits and allowances provided in the sections of the Foreign Service Act of 1980 [22 USCS §§ 3901 et seq.] designated in those paragraphs."

"1-104. Executive Order No. 10853, as amended [unclassified], is revoked. The rules and regulations which were prescribed by the Secretary of State or the Administrator of the Veterans Administration pursuant to Executive Order No. 10853, as amended [unclassified], and which would be valid if issued pursuant to this Order, shall be deemed to have been issued under this Order."

§ 709. Employment restrictions

(a) (1) Notwithstanding section 3134(d) of title 5 [5 USCS § 3134(d)], the number of Senior Executive Service positions in the Department which are filled by noncareer appointees in any fiscal year may not at any time exceed 5 percent of the average number of senior executives employed in Senior Executive Service positions in the Department during the preceding fiscal year.

(2) For purposes of this subsection, the average number of senior executives employed in Senior Executive Service positions in the Department during a fiscal year shall be equal to 25 percent of the sum of the total number of senior executives employed in Senior Executive Service positions in the Department on the last day of each quarter of such fiscal year.

(b) The number of positions in the Department which may be excepted from the competitive service, on a temporary or permanent basis, because of their confidential or policy-determining character may not at any time exceed the equivalent of 15 positions.

(c) (1) Political affiliation or activity may not be taken into account in connection with the appointment of any person to any position in or to perform any service for the Department or in the assignment or advancement of any employee in the Department.

(2) Paragraph (1) shall not apply--

(A) to the appointment of any person by the President under this title, other than the appointment of the Under Secretary for Health, the Under Secretary for Benefits, and the Inspector General; or

(B) to the appointment of any person to (i) a Senior Executive Service position as a noncareer appointee, or (ii) a position that is excepted from the competitive service, on a temporary or permanent basis, because of the confidential or policy-determining character of the position.

Explanatory notes:

Amendments:

1992. Act Oct. 9, 1992, in subsec. (c)(2)(A), substituted "Under Secretary for Health" for "Chief Medical Director" and "Under Secretary for Benefits" for "Chief Benefits Director".

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 13

§ 711. Grade reductions

(a) The Secretary may not implement a grade reduction described in subsection (b) unless the Secretary first submits to the Committees on Veterans' Affairs of the Senate and House of Representatives a report containing a detailed plan for such reduction and a detailed justification for the plan. The report shall include a determination by the Secretary (together with data supporting such determination) that, in the personnel area concerned, the Department has a disproportionate number of employees at the salary grade or grades selected for reduction in comparison to the number of such employees at the salary levels involved who perform comparable functions in other departments and agencies of the Federal Government and in non-Federal entities. Any grade reduction described in such report may not take effect until the end of a period of 90 calendar days (not including any day on which either House of Congress is not in session) after the report is received by the committees.

(b) A grade reduction referred to in subsection (a) is a systematic reduction, for the purpose of reducing the average salary cost for Department employees described in subsection (c), in the number of such Department employees at a specific grade level.

(c) The employees referred to in subsection (b) are--

(1) health-care personnel who are determined by the Secretary to be providing either direct patient-care services or services incident to direct patient-care services;

(2) individuals who meet the definition of professional employee as set forth in section 7103(a)(15) of title 5 [5 USCS § 7103(a)(15)]; and

(3) individuals who are employed as computer specialists.

(d) Not later than the 45th day after the Secretary submits a report under subsection (a), the Comptroller General shall, upon request of either of such Committees, submit to such committees a report on the Secretary's compliance with such subsection. The Comptroller General shall include in the report the Comptroller General's opinion as to the accuracy of the Secretary's determination (and of the data supporting such determination) made under such subsection.

(e) In the case of Department employees not described in subsection (c), the Secretary may not in any fiscal year implement a systematic reduction for the purpose of reducing the average salary cost for such Department employees that will result in a reduction in the number of such Department employees at any specific grade level at a rate greater than the rate of the reductions systematically being made in the numbers of employees at such grade level in all other agencies and departments of the Federal Government combined.
Explanatory notes:

Amendments:
1996. Act Oct. 19, 1996 (effective on enactment, as provided by § 101(e) of such Act, which appears as 2 USCS § 130c note), in subsec. (d), inserted ", upon request of either of such Committees,"

[§ 712. Repealed]

CHAPTER 9. SECURITY AND LAW ENFORCEMENT ON PROPERTY UNDER THE JURISDICTION OF THE DEPARTMENT

§ 901. Authority to prescribe rules for conduct and penalties for violations
(a) (1) The Secretary shall prescribe regulations to provide for the maintenance of law and order and the protection of persons and property on Department property.
   (2) In this chapter, the term 'Department property' means land and buildings that are under the jurisdiction of the Department and are not under control of the Administrator of General Services.
(b) Regulations under subsection (a) shall include--
   (1) rules for conduct on Department property; and
   (2) the penalties, within the limits specified in subsection (c), for violations of such rules.
(c) Whoever violates any rule prescribed by regulation under subsection (b)(1) shall be fined in accordance with title 18 or imprisoned not more than six months, or both. The Secretary may prescribe by regulation a maximum fine less than that which would otherwise apply under the preceding sentence or a maximum term of imprisonment of a shorter period than that which would otherwise apply under the preceding sentence, or both. Any such regulation shall apply notwithstanding any provision of title 18 or any other law to the contrary.
(d) The rules prescribed under subsection (a), together with the penalties for violations of such rules, shall be posted conspicuously on property to which they apply.

(e) The Secretary shall consult with the Attorney General before prescribing regulations under this section.

Explanatory notes:
A prior § 901 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 2301.

Code of Federal Regulations
Department of Veterans Affairs-General provisions, 38 CFR Part 1

Cross References
This section is referred to in 38 USCS § 902

Research Guide
Federal Procedure:
29 Fed Proc L Ed, Public Lands and Property § 66:519

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 4

§ 902. Enforcement and arrest authority of Department police officers

(a) (1) Employees of the Department who are Department police officers shall, with respect to acts occurring on Department property, enforce--
   (A) Federal laws;
   (B) the rules prescribed under section 901 of this title [38 USCS § 901]; and
   (C) subject to paragraph (2), traffic and motor vehicle laws of a State or local government within the jurisdiction of which such Department property is located.

   (2) A law described in subparagraph (C) of paragraph (1) may be enforced under such subparagraph only as authorized by an express grant of authority under applicable State or local law. Any such enforcement shall be by the issuance of a citation for violation of such law.

   (3) Subject to regulations prescribed under subsection (b), a Department police officer may make arrests on Department property for a violation of a Federal law or any rule prescribed under section 901(a) of this title [38 USCS § 901(a)].

(b) The Secretary shall prescribe regulations with respect to Department police officers. Such regulations shall include--
   (1) policies with respect to the exercise by Department police officers of the enforcement and arrest authorities provided by this section;
   (2) the scope and duration of training that is required for Department police officers, with particular emphasis on dealing with situations involving patients; and
   (3) rules limiting the carrying and use of weapons by Department police officers.

(c) The Secretary shall consult with the Attorney General before prescribing regulations under paragraph (1) of subsection (b).
(d) Rates of basic pay for Department police officers may be increased by the Secretary under section 7455 of this title [38 USCS § 7455].

Explanatory notes:


Cross References

This section is referred to in 38 USCS § 7455

Research Guide

Federal Procedure:

29 Fed Proc L Ed, Public Lands and Property § 66:519

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 4

1. Generally

2. Tort liability

1. Generally

Warrantless search of veteran patient's personal effects stored at veteran's hospital under authority of 38 CFR 1.218 does not offend Fourth Amendment, even though probable cause is lacking. United States v Transou (1983, MD Tenn) 572 F Supp 295

2. Tort liability

Veterans Administration [now Department of Veterans Affairs] hospital security guards are police officers under former 38 USCS § 218 and are thus investigative or law enforcement officers within meaning of intentional tort exception of Federal Tort Claim Act, 28 USCS § 2680. Celestine v United States (1988, CA8 Mo) 841 F.2d 851

§ 903. Uniform allowance

(a) The Secretary may pay an allowance under this section for the purchase of uniforms to any Department police officer who is required to wear a prescribed uniform in the performance of official duties.

(b) The amount of the allowance that the Secretary may pay under this section--

(1) may be based on estimated average costs or actual costs;
(2) may vary by geographic regions; and
(3) except as provided in subsection (c), may not exceed $200 in a fiscal year for any police officer.

(c) The amount of an allowance under this section may be increased to an amount up to $400 for not more than one fiscal year in the case of any Department police officer. In the case of a person who is appointed as a Department police officer on or after January 1, 1990, an allowance in an amount established under this subsection shall be paid at the beginning of such person's employment as such an officer. In the case of any other Department police officer, an allowance in an amount established under this subsection shall be paid upon the request of the officer.
(d) A police officer who resigns as a police officer less than one year after receiving an allowance in an amount established under this section shall repay to the Department a pro rata share of the amount paid, based on the number of months the officer was actually employed as such an officer during the twelve-month period following the date on which such officer began such employment or the date on which the officer submitted a request for such an allowance, as the case may be.

(c) An allowance may not be paid to a Department police officer under this section and under section 5901 of title 5 [5 USCS § 5901] for the same fiscal year.

Explanatory notes:
A prior § 903 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 2303.

§ 904. Equipment and weapons
The Secretary shall furnish Department police officers with such weapons and related equipment as the Secretary determines to be necessary and appropriate.

Explanatory notes:
A prior § 904 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 2304.

§ 905. Use of facilities and services of other law enforcement agencies
With the permission of the head of the agency concerned, the Secretary may use the facilities and services of Federal, State, and local law enforcement agencies when it is economical and in the public interest to do so.

Explanatory notes:

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 4

PART II. GENERAL BENEFITS

CHAPTER 11. COMPENSATION FOR SERVICE-CONNECTED DISABILITY OR DEATH
CHAPTER 13. DEPENDENCY AND INDEMNITY COMPENSATION FOR SERVICE-CONNECTED DEATHS
CHAPTER 15. PENSION FOR NON-SERVICE-CONNECTED DISABILITY OR DEATH OR FOR SERVICE
CHAPTER 17. HOSPITAL, NURSING HOME, DOMICILIARY, AND MEDICAL CARE
CHAPTER 18. BENEFITS FOR CHILDREN OF VIETNAM VETERANS AND OTHER VETERANS
CHAPTER 19. INSURANCE
CHAPTER 20. BENEFITS FOR HOMELESS VETERANS
CHAPTER 21. SPECIALLY ADAPTED HOUSING FOR DISABLED VETERANS
CHAPTER 23. BURIAL BENEFITS
CHAPTER 24. NATIONAL CEMETERIES AND MEMORIALS

Amendments:


1976. Act Oct. 21, 1976, P. L. 94-581, Title II, § 203(a), 90 Stat. 2856, purported to amend item 17 by inserting "NURSING HOME," following "HOSPITAL"; however, the amendment was executed by inserting "Nursing Home," following "Hospital," in order to effectuate the probable intent of Congress.

1991. Act Aug. 6, 1991, P. L. 102-83, § 5(b)(2), 105 Stat. 406, revised the analysis of this part by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


Cross References

This part is referred to in 42 USCS § 3013

CHAPTER 11. COMPENSATION FOR SERVICE-CONNECTED DISABILITY OR DEATH

SUBCHAPTER I. GENERAL
SUBCHAPTER II. WARTIME DISABILITY COMPENSATION
SUBCHAPTER III. WARTIME DEATH COMPENSATION
SUBCHAPTER IV. PEACETIME DISABILITY COMPENSATION
SUBCHAPTER V. PEACETIME DEATH COMPENSATION
SUBCHAPTER VI. GENERAL COMPENSATION PROVISIONS

Explanatory notes:

The bracketed section numbers "1136", "1143", and "1156" have been inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

Amendments:


1986. Act Oct. 28, 1986, P. L. 99-576, Title I, § 109(a)(2), 100 Stat. 3253, amended the analysis of this chapter by substituting item 360 for one which read: "360. Special consideration for certain cases of blindness or bilateral kidney involvement or bilateral deafness".


Act Aug. 6, 1991, P. L. 102-83, § 5(b)(1), 105 Stat. 406, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


Act Nov. 11, 1998, P. L. 105-368, Title X, § 1005(a), 112 Stat. 3364, amended the analysis of this chapter by redesignating item 1103, as added by § 8031(a)(2) of Act Aug. 5, 1997, as item 1104.

Cross References
This chapter is referred to in 10 USCS §§ 1086, 1437, 1446, 1450; 26 USCS § 6103; 31 USCS § 3803; 38 USCS §§ 106, 107, 1310, 1315, 1712, 1822, 2101, 3102, 3485, 3501, 3901, 4213, 5125, 5303A, 5317; 42 USCS § 6862

SUBCHAPTER I. GENERAL

§ 1101. Definitions
§ 1102. Special provisions relating to surviving spouses
§ 1103. Special provisions relating to claims based upon effects of tobacco products
§ 1104. Cost-of-living adjustments

§ 1101. Definitions

For the purposes of this chapter [38 USCS §§ 1101 et seq.]--

(1) The term "veteran" includes a person who died in the active military, naval, or air service.

(2) The term "period of war" includes, in the case of any veteran--
   (A) any period of service performed by such veteran after November 11, 1918, and before July 2, 1921, if such veteran served in the active military, naval, or air service after April 5, 1917, and before November 12, 1918; and
   (B) any period of continuous service performed by such veteran after December 31, 1946, and before July 26, 1947, if such period began before January 1, 1947.

(3) The term "chronic disease" includes-
   Anemia, primary
   Arteriosclerosis
   Arthritis
   Atrophy, progressive muscular
   Brain hemorrhage
   Brain thrombosis
   Bronchiectasis
   Calculi of the kidney, bladder, or gall bladder
   Cardiovascular-renal disease, including hypertension
   Cirrhosis of the liver
   Coccidioidomycosis
   Diabetes mellitus
   Encephalitis lethargica residuals
   Endocarditis
   Endocrinopathies
   Epilepsies
   Hansen's disease
   Hodgkin's disease
Leukemia
Lupus erythematosus, systemic
Myasthenia gravis
Myelitis
Myocarditis
Nephritis
Organic diseases of the nervous system
Osteitis deformans (Paget's disease)
Osteomalacia
Palsy, bulbar
Paralysis agitans
Psychoses
Purpura idiopathic, hemorrhagic
Raynaud's disease
Sarcoidosis
Scleroderma
Sclerosis, amyotrophic lateral
Sclerosis, multiple
Syringomyelia
Thromboangiitis obliterans (Buerger's disease)
Tuberculosis, active
Tumors, malignant, or of the brain or spinal cord or peripheral nerves
Ulcers, peptic (gastric or duodenal)

and such other chronic diseases as the Secretary may add to this list.

(4) The term "tropical disease" includes-
Amebiasis
Blackwater fever
Cholera
Dracontiasis
Dysentery
Filiariasis
Hansen's disease
Leishmaniasis, including kala-azar
Loiasis
Malaria
Onchocerciasis
Oroya fever
Pinta
Plague
Schistosomiasis
Yaws
Yellow fever

and such other tropical diseases as the Secretary may add to this list.

Prior law and revision:
This section is based on 38 USC § 2301 (Act June 17, 1957, P. L. 85-56, Title III, Part A § 301, 71 Stat. 94).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Veterans' Regulation No. 1(a), Part I, para. l(c), 3rd and 4th provisos (as added Act June 24, 1948, ch 612, § 1, 62 Stat. 581).


Amendments:

1976. Act Sept. 30, 1976 (effective 10/1/1976, as provided by § 406 of such Act, which appears as a note to this section), in para. (2)(A), (B), substituted "such veteran" for "him" following "by"; in para. (3), substituted "Hansen's disease" for "Leprosy"; in para. (4), deleted "Leprosy" preceding "Loiasis" and inserted "Hansen's disease".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 301, as 38 USCS § 1101, and substituted "Secretary" for "Administrator".

Other provisions:

Study of claims for dependency and indemnity compensation. Act May 31, 1974, P. L. 93-295, Title II, Sec. 207, 88 Stat. 183, directed Administrator of Veterans' Affairs to make a detailed study of claims for dependency and indemnity compensation relating to veterans, as defined in 38 USCS § 101(2), who at time of death within six months prior to May 31, 1974, were receiving disability compensation from Veterans' Administration based upon a rating total and permanent in nature, and submit a report together with such comments and recommendations as Administrator deemed appropriate to Speaker of the House and President of the Senate not more than thirty days after Jan. 14, 1975.


"(a) The Administrator of Veterans' Affairs shall conduct a scientific study to determine if there is a causal relationship between the amputation of an extremity and the subsequent development of cardiovascular disorders.

"(b) The report of the study shall include (1) a comprehensive review and professional analysis of the literature covering other such studies conducted or underway of such relationship; and (2) an analysis of statistically valid samples of disability claims of veterans having service-connected extremity amputation matched by age, sex and war period with nonamputee veterans.

"(c) The report, together with such comments and recommendations as the Administrator deems appropriate, shall be submitted to the Speaker of the House and the President of the Senate not later than June 30, 1977.".
Study of health-care and compensation needs of former prisoners of war. Act Oct. 18, 1978, P. L. 95-479, Title III, § 305, 92 Stat 1565 (effective 10/1/78, as provided by § 401(a) of such Act), provides:

"(a) The Administrator of Veterans' Affairs, in consultation with the Secretary of Defense, shall carry out a comprehensive study of the disability compensation awarded to, and the health-care needs of, veterans who are former prisoners of war. The Administrator shall include in such study--

"(1) descriptions and analyses of the repatriation procedures, including physical examinations, for former prisoners of war and the adequacy of such procedures and the resultant medical records of former prisoners of war;

"(2) the types and severity of disabilities that are particularly prevalent among former prisoners of war in various theaters of operation at various times;

"(3) a description and analysis of procedures used with respect to former prisoners of war in determining eligibility for health-care benefits and in adjudicating claims for disability compensation, including an analysis of the current use of statutory and regulatory provisions specifically relating to former prisoners of war; and

"(4) a survey and analysis of the medical literature on the health-related problems of former prisoners of war.

"(b) The Administrator shall transmit to the Congress and to the President a report on the results of such study not later than February 1, 1980. Such report shall include recommendations for such administrative and legislative action as the Administrator considers may be necessary to assure that former prisoners of war receive compensation and health-care benefits for all disabilities which may reasonably be attributed to their internment.


"(a) Not later than ninety days after the date of the enactment of this Act [enacted Aug. 14, 1981] and at appropriate times thereafter, the Administrator shall, to the maximum extent feasible and in order to carry out the requirements of the veterans outreach services program under subchapter IV of chapter 3 of title 38, United States Code [38 USCS §§ 240 et seq., now repealed; for similar provisions, see 38 USCS §§ 7721 et seq.], seek out former prisoners of war and provide them with information regarding applicable changes in law, regulations, policies, guidelines, or other directives affecting the benefits and services to which former prisoners of war are entitled under such title by virtue of the amendments made by this Act [which, among other things, enacted this note].

"(b)(1) The Administrator shall, for not less than the three-year period beginning ninety days after the date of the enactment of this Act, maintain a centralized record showing all claims for benefits under chapter 11 of such title [38 USCS §§ 1101 et seq.] that are submitted by former prisoners of war and the disposition of such claims.

"(2) Not later than ninety days after the end of the three-year period described in paragraph (1), the Administrator shall, after consulting with and receiving the views of the Advisory Committee on Former Prisoners of War required to be established pursuant to section 221 of such title [38 USCS § 221, now repealed; for similar provisions, see 38 USCS § 541], submit a report on the results of the disposition of claims described in such paragraph, together with any comments or recommendations that the Administrator may have, to the appropriate committees of Congress. The Administrator may also submit to such committees interim reports on such results.
“(c) For the purposes of this section, the term ‘former prisoner of war’ has the meaning given such term in paragraph (32) of section 101 of title 38, United States Code (as added by section (a) of this Act) [38 USCS § 101(32)].”.

**Effective date of future increases.** Act March 2, 1984, P. L. 98-223, Title I, Part A, § 108, 98 Stat. 40 (effective 4/1/84, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), provides: “It is the sense of the Congress that any increase provided by law to take effect after fiscal year 1984 in the rates of disability compensation and dependency and indemnity compensation payable under chapters 11 and 13, respectively, of title 38, United States Code [38 USCS §§ 1101 et seq. and 1301 et seq.], shall take effect on December 1 of the fiscal year involved and that the budgets for any such fiscal year include amounts to achieve such purpose.”.


“(a) Policy regarding fiscal year 1991. The fiscal year 1991 cost-of-living adjustments in the rates of compensation payable under chapter 11 of title 38, United States Code [38 USCS §§ 1101 et seq.], and of the dependency and indemnity compensation payable under chapter 13 of such title [38 USCS §§ 1301 et seq.] will be no more than a 5.4 percent increase, with all increased monthly rates rounded down to the next lower dollar. The effective date for such adjustments will not be earlier than January 1, 1991.

“(b) Increase payable as of January 1992. The amount of compensation or dependency and indemnity compensation payable to any individual for the month of January 1992 who is entitled to such benefits as of January 1, 1992, shall be increased for such month by the amount equal to the amount of the monthly increase provided for that individual’s benefit level as of January 1, 1991, pursuant to the adjustments described in subsection (a).”.


“(a) Policy. The fiscal year 1994 cost-of-living adjustments in the rates of and limitations for compensation payable under chapter 11 of title 38, United States Code [38 USCS §§ 1101 et seq.], and of dependency and indemnity compensation payable under chapter 13 of such title [38 USCS §§ 1301 et seq.], except as provided in subsection (b) of this section, will be no more than a percentage equal to the percentage by which benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) are increased effective December 1, 1993, as a result of a determination under section 215(i) of such Act (42 U.S.C. 415(i)), with all increased monthly rates and limitations (other than increased rates or limitations equal to a whole dollar amount) rounded down to the next lower dollar.

“(b) Limitation on fiscal year 1994 cost-of-living adjustment for certain DIC recipients.(1) During fiscal year 1994, the amount of any increase in any of the rates of dependency and indemnity compensation in effect under section 1311(a)(3) of title 38, United States Code, will not exceed 50 percent of the new law increase, rounded down (if not an even dollar amount) to the next lower dollar.

“(2) For purposes of paragraph (1), the new law increase is the amount by which the rate of dependency and indemnity compensation provided for recipients under section 1311(a)(1) of such title is increased for fiscal year 1994.”.

**Policy regarding cost-of-living adjustment in compensation rates for fiscal year 1995.** Act Nov. 2, 1994, P. L. 103-446, Title I, § 111(b), 108 Stat. 4654, provides: “The fiscal year 1995 cost-of-living adjustments in the rates of and limitations for compensation payable under chapter 11 of title 38, United States Code [38 USCS §§ 1101 et seq.], and of dependency and indemnity compensation payable under chapter 13 of such title [38 USCS §§ 1301 et seq.] will be no more than a percentage equal to the percentage by which benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) are increased effective December 1, 1994, as a result of a determination under section 215(i) of such Act (42 U.S.C.
415(i)), with all increased monthly rates and limitations (other than increased rates or limitations equal to a whole dollar amount) rounded down to the next lower dollar.”.

**Treatment of certain income of Alaska Natives for purposes of needs-based benefits.**

Act Nov. 2, 1994, P. L. 103-446, Title V, § 506, 108 Stat. 4664, provides: "Any receipt by an individual from a Native Corporation under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) of cash, stock, land, or other interests referred to in subparagraphs (A) through (E) of section 29(c) of that Act (43 U.S.C. 1626(c)) (whether such receipt is attributable to the disposition of real property, profits from the operation of real property, or otherwise) shall not be countable as income for purposes of any law administered by the Secretary of Veterans Affairs.”.


"Sec. 1501. Establishment of commission.

"(a) Establishment of commission. There is hereby established a commission to be known as the Veterans’ Disability Benefits Commission (hereinafter in this title referred to as the 'commission').

"(b) Membership.(1) The commission shall be composed of 13 members, appointed as follows:

"(A) Two members appointed by the Speaker of the House of Representatives, at least one of whom shall be a veteran who was awarded a decoration specified in paragraph (2).

"(B) Two members appointed by the minority leader of the House of Representatives, at least one of whom shall be a veteran who was awarded a decoration specified in paragraph (2).

"(C) Two members appointed by the majority leader of the Senate, at least one of whom shall be a veteran who was awarded a decoration specified in paragraph (2).

"(D) Two members appointed by the minority leader of the Senate, at least one of whom shall be a veteran who was awarded a decoration specified in paragraph (2).

"(E) Five members appointed by the President, at least three of whom shall be veterans who were awarded a decoration specified in paragraph (2).

"(2) A decoration specified in this paragraph is any of the following:

"(A) The Medal of Honor.

"(B) The Distinguished Service Cross, the Navy Cross, or the Air Force Cross.

"(C) The Silver Star.

"(3) A vacancy in the Commission shall be filled in the manner in which the original appointment was made.

"(4) The appointment of members of the commission under this subsection shall be made not later than 60 days after the date of the enactment of this Act.

"(c) Period of appointment. Members of the commission shall be appointed for the life of the commission. A vacancy in the commission shall not affect its powers.

"(d) Initial meeting. The commission shall hold its first meeting not later than 30 days after the date on which a majority of the members of the commission have been appointed.
“(e) Meetings. The commission shall meet at the call of the chairman.

“(f) Quorum. A majority of the members of the commission shall constitute a quorum, but a lesser number may hold hearings.

“(g) Chairman. The President shall designate a member of the commission to be chairman of the commission.

“Sec. 1502. Duties of the commission.

“(a) Study. The commission shall carry out a study of the benefits under the laws of the United States that are provided to compensate and assist veterans and their survivors for disabilities and deaths attributable to military service.

“(b) Scope of study. In carrying out the study, the commission shall examine and make recommendations concerning the following:

“(1) The appropriateness of such benefits under the laws in effect on the date of the enactment of this Act.

“(2) The appropriateness of the level of such benefits.

“(3) The appropriate standard or standards for determining whether a disability or death of a veteran should be compensated.

“(c) Contents of study. The study to be carried out by the commission under this section shall be a comprehensive evaluation and assessment of the benefits provided under the laws of the United States to compensate veterans and their survivors for disability or death attributable to military service, together with any related issues that the commission determines are relevant to the purposes of the study. The study shall include an evaluation and assessment of the following:

“(1) The laws and regulations which determine eligibility for disability and death benefits, and other assistance for veterans and their survivors.

“(2) The rates of such compensation, including the appropriateness of a schedule for rating disabilities based on average impairment of earning capacity.

“(3) Comparable disability benefits provided to individuals by the Federal Government, State governments, and the private sector.

“(d) Consultation with Institute of Medicine. In carrying out the study under this section, the commission shall consult with the Institute of Medicine of the National Academy of Sciences with respect to the medical aspects of contemporary disability compensation policies.


“Not later than October 1, 2007, the commission shall submit to the President and Congress a report on the study. The report shall include the following:

“(1) The findings and conclusions of the commission, including its findings and conclusions with respect to the matters referred to in section 1502(c).

“(2) The recommendations of the commission for revising the benefits provided by the United States to veterans and their survivors for disability and death attributable to military service.

“(3) Other information and recommendations with respect to such benefits as the commission considers appropriate.

“Sec. 1504. Powers of the commission.
“(a) Hearings. The commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the commission considers advisable to carry out the purposes of this title.

“(b) Information from Federal agencies. In addition to the information referred to in section 1502(c), the commission may secure directly from any Federal department or agency such information as the commission considers necessary to carry out the provisions of this title. Upon request of the chairman of the commission, the head of such department or agency shall furnish such information to the commission.

“(c) Postal services. The commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal Government.

“(d) Gifts. The commission may accept, use, and dispose of gifts or donations of services or property.

“Sec. 1505. Personnel matters.

“(a) Compensation of members. Each member of the commission who is not an officer or employee of the United States shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the performance of the duties of the commission. All members of the commission who are officers or employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States.

“(b) Travel expenses. The members of the commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code [5 USCS §§ 5701 et seq.], while away from their homes or regular places of business in the performance of services for the commission.

“(c) Staff.(1) The chairman of the commission may, without regard to the civil service laws and regulations, appoint an executive director and such other personnel as may be necessary to enable the commission to perform its duties. The appointment of an executive director shall be subject to approval by the commission.

“(2) The chairman of the commission may fix the compensation of the executive director and other personnel without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code [5 USCS §§ 5101 et seq. and 5331 et seq.], relating to classification of positions and General Schedule pay rates, except that the rate of pay for the executive director and other personnel may not exceed the rate payable for level V of the Executive Schedule under section 5316 of such title.

“(d) Detail of government employees. Upon request of the chairman of the commission, the head of any Federal department or agency may detail, on a nonreimbursable basis, any personnel of that department or agency to the commission to assist it in carrying out its duties.

“(e) Procurement of temporary and intermittent services. The chairman of the commission may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, at rates for individuals which do not exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of such title.

“Sec. 1506. Termination of commission.

“The commission shall terminate 60 days after the date on which the commission submits its report under section 1503.
"Sec. 1507. Funding.

"(a) In general. The Secretary of Veterans Affairs shall, upon the request of the chairman of the commission, make available to the commission such amounts as the commission may require to carry out its duties under this title.

"(b) Availability. Any sums made available to the commission under subsection (a) shall remain available, without fiscal year limitation, until the termination of the commission."

**Code of Federal Regulations**

Department of Veterans Affairs-Medical, 38 CFR Part 17

**Cross References**

Definitions generally, 38 USCS § 101

This section is referred to in 5 USCS §§ 3501, 5532, 6303, 8332, 8411; 8 USCS §§ 1612, 1613, 1622; 50 USCS § 2082

**Research Guide**

**Am Jur:**

3C Am Jur 2d, Aliens and Citizens § 2179

60A Am Jur 2d, Pensions and Retirement Funds §§ 1261, 1262

77 Am Jur 2d, Veterans and Veterans' Laws §§ 68, 148, 153

**Law Review Articles:**

Benefits for Conscientious Objectors. 19 Catholic Lawyer 62, Winter 1973

1. Prior service

2. Relationship of benefits to other compensation

1. Prior service

Veteran is entitled to such benefits as are otherwise payable where he enlisted in Navy prior to November 11, 1918, was placed on inactive duty subsequent to November 11, 1918, and thereafter recalled to active service prior to July 2, 1921, and re-enlisted for purposes of awarding compensation. 1937 ADVA 406

Service between April 6, 1917 and November 11, 1918 is not prior service for purposes of pension or compensation, where veteran was discharged during such period by reason of alienage. 1937 ADVA 408

2. Relationship of benefits to other compensation

Since statutory provisions concerning service-connected disability set forth at 38 USCS §§ 301 et seq. [now 38 USCS §§ 1101 et seq.] do not by their terms preclude receipt of Veterans' Administration disability compensation by veteran who is earning salary, finding of total disability by Veterans' Administration does not ipso facto establish person's unavailability for work so as to preclude award of compensatory damages following wrongful termination from federal employment. Cunningham v United States (1977) 212 Ct Cl 451, 549 F.2d 753, cert den (1980) 445 US 969, 64 L Ed 2d 246, 100 S Ct 1662

Disability compensation awarded veteran under 38 USCS §§ 301 et seq. [now 38 USCS §§ 1101 et seq.] does not constitute benefit for loss of time from employment and thus is not subject to being offset under private insurance company's disability insurance policy which provides for lessening of payments to extent that other disability income benefits are payable to insured. Gibson v Connecticut General Life Ins. Co. (1978) 145 Ga App 799, 245 SE2d 49

Veterans' claims under Chapter 11 do not survive their deaths; Chapter 11 makes no provision for survivors, rather Chapter 13 provides for award of DIC survivors' benefits, and 38

§ 1102. Special provisions relating to surviving spouses

(a) No compensation shall be paid to the surviving spouse of a veteran under this chapter [38 USCS §§ 1101 et seq.] unless such surviving spouse was married to such veteran--

(1) before the expiration of fifteen years after the termination of the period of service in which the injury or disease causing the death of the veteran was incurred or aggravated; or

(2) for one year or more; or

(3) for any period of time if a child was born of the marriage, or was born to them before the marriage.

(b) Subsection (a) shall not be applicable to any surviving spouse who, with respect to date of marriage, could have qualified as a surviving spouse for death compensation under any law administered by the Secretary in effect on December 31, 1957.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Veterans' Regulations No. 10, para. V, No. 10(b), para. I.

Amendments:


1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in subsec. (a), substituted paras. (2) and (3) for ones which read:

"(2) for five or more years; or

(3) for any period of time if a child was born of the marriage."

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in the section catchline, substituted "surviving spouses" for "widows"; in subsec. (a), introductory matter, substituted "surviving spouse of a veteran under this chapter unless such surviving spouse was married to such veteran" for "widow of a veteran under this chapter unless she was married to him"; in subsec. (b), substituted "surviving spouse" for "widow" wherever appearing.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 302, as 38 USCS § 1102, and substituted "administered by the Secretary" for "administered by the Veterans' Administration".

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Cross References

Special provisions relating to marriage, 38 USCS § 103

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 35

Annotations:

Effect of divorce, remarriage, or annulment, on widow's pension or bonus rights or social security benefits. 85 ALR2d 242

§ 1103. Special provisions relating to claims based upon effects of tobacco products

Discussion and Analysis in the Veterans Benefits Manual

(a) Notwithstanding any other provision of law, a veteran's disability or death shall not be considered to have resulted from personal injury suffered or disease contracted in the line of duty in the active military, naval, or air service for purposes of this title on the basis that it resulted from injury or disease attributable to the use of tobacco products by the veteran during the veteran's service.

(b) Nothing in subsection (a) shall be construed as precluding the establishment of service connection for disability or death from a disease or injury which is otherwise shown to have been incurred or aggravated in active military, naval, or air service or which became manifest to the requisite degree of disability during any applicable presumptive period specified in section 1112 or 1116 of this title [38 USCS § 1112 or 1116].

Amendments:


Other provisions:

Applicability of section. Act June 9, 1998, P. L. 105-178, Title VIII, Subtitle B, § 8202(b), as added July 22, 1998, P. L. 105-206, Title IX, § 9014(a), 112 Stat. 866, provides: "Section 1103 of title 38, United States Code, as added by subsection (a), shall apply with respect to claims received by the Secretary of Veterans Affairs after the date of the enactment of this Act.".

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 36

38 USCS § 1103(a) applies to surviving spouse's dependency and indemnity compensation claim, even if veteran had previously established service connection for disability because 38 USCS § 1310(a) explicitly refers to Chapter 11 of Title 38 of U.S. Code, which includes 38 USCS § 1103(a), and as result, 38 USCS § 1310(a) incorporates 38 USCS § 1103(a)'s service connection preclusion; 38 USCS § 1103(a) does not apply to veterans themselves who have established service connection for their disabilities prior to enactment date of § 1103(a), June 9,
1998, even if disability was attributable to tobacco use during veterans' military service. Stoll v Nicholson (2005, CA FC) 401 F.3d 1375

Wife could not rely on her deceased husband's prior service connection status to save dependency and indemnity compensation claim where 38 USCS § 1310(a) incorporated 38 USCS § 1103(a)'s service connection preclusion, § 1103(a) only applied to living veterans, and there was no dispute that her husband's chronic obstructive pulmonary disease was attributable to his in-service tobacco use. Stoll v Nicholson (2005, CA FC) 401 F.3d 1375

Plain language of 38 USCS § 1103 expresses congressional intent to no longer award service connection for veteran's death that results from service connected disease that was "capable of being attributed" to use of tobacco products during veteran's service; therefore, although smoking-related heart disease that caused veteran's death had been deemed to be "service-connected" while veteran was alive, veteran's widow was not entitled to dependency and indemnity compensation benefits under 38 USCS § 1310(a), due to enactment of 38 USCS § 1103, and 38 C.F.R. § 3.300. Kane v Principi (2003) 17 Vet App 97, 2003 US App Vet Claims LEXIS 385

Since Veterans Claims Assistance Act of 2000 (VCAA), P. L. 106-475, 114 Stat. 2096 (2000), has no effect on appeal that is limited to interpretation of law, it had no effect on widow's appeal from Board of Veterans' Appeals' denial of widow's claim for dependency and indemnity compensation benefits, since proper interpretation of 38 USCS § 1103 was dispositive of appeal. Kane v Principi (2003) 17 Vet App 97, 2003 US App Vet Claims LEXIS 385

§ 1104. Cost-of-living adjustments

(a) In the computation of cost-of-living adjustments for fiscal years 1998 through 2013 in the rates of, and dollar limitations applicable to, compensation payable under this chapter [38 USCS §§ 1101 et seq.], such adjustments shall be made by a uniform percentage that is no more than the percentage equal to the social security increase for that fiscal year, with all increased monthly rates and limitations (other than increased rates or limitations equal to a whole dollar amount) rounded down to the next lower whole dollar amount.

(b) For purposes of this section, the term "social security increase" means the percentage by which benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) are increased for any fiscal year as a result of a determination under section 215(i) of such Act (42 U.S.C. 415(i)).

Amendments:
1998. Act Nov. 11, 1998 redesignated this section, enacted as 38 USCS § 1103, as 38 USCS § 1104.

SUBCHAPTER II. WARTIME DISABILITY COMPENSATION

§ 1110. Basic entitlement
§ 1111. Presumption of sound condition
§ 1112. Presumptions relating to certain diseases and disabilities
§ 1113. Presumptions rebuttable
§ 1114. Rates of wartime disability compensation
§ 1115. Additional compensation for dependents
§ 1116. Presumptions of service connection for diseases associated with exposure to certain herbicide agents; presumption of exposure for veterans who served in the Republic of Vietnam

§ 1117. Compensation for disabilities occurring in Persian Gulf War veterans

§ 1118. Presumptions of service connection for illnesses associated with service in the Persian Gulf during the Persian Gulf War

Cross References
This subchapter is referred to in 26 USCS § 6334; 38 USCS §§ 107, 1157, 1734

§ 1110. Basic entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter [38 USCS §§ 1110 et seq.], but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

Prior law and revision:
This section is based on 38 USC § 2310 (Act June 17, 1957, P. L. 85-56, Title III, Part B, § 310, 71 Stat. 96).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Explanatory notes:
Although this section was amended by Act June 9, 1998, P. L. 105-178, Title VIII, Subtitle B, § 8202, 112 Stat. 492, such § 8202 was subsequently amended by Act July 22, 1998, P. L. 105-206, Title IX, § 9014(a), 112 Stat. 865, and, as amended, it did not affect this section.

Amendments:
1990. Act Nov. 5, 1990 (applicable as provided by § 8052(b) of such Act, which appears as 38 USCS § 105 note) substituted "a result of the veteran's own willful misconduct or abuse of alcohol or drugs" for "the result of the veteran's own willful misconduct".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 310, as 38 USCS § 1110.

Cross References
This section is referred to in 38 USCS §§ 1111, 1112, 1114, 1116, 1118

Research Guide

Am Jur:

60A Am Jur 2d, Pensions and Retirement Funds § 1262
77 Am Jur 2d, Veterans and Veterans' Laws §§ 30, 31, 155, 156

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Law Review Articles:

Wellen. Armed Forces Disability Benefits—a Lawyer’s View. 27 Judge Advocate General Journal 485, Spring 1974

1. Generally
2. Active service
3. Disease or disability
4. Willful misconduct
5. Alcohol or drug abuse
6. Concurring causes
7. Particular disability determinations
   8. -Mental disabilities
9. Consolidation of awards
10. Miscellaneous

1. Generally

Bivens type action involving former servicemen’s claim against federal officials, both civil and military, for injuries suffered before or after his discharge from military service arising from surreptitious administration of LSD to servicemen while participating in military volunteer program purportedly designed to develop and test military equipment and protective clothing for use during chemical warfare was not available. Stanley v United States (1986, CA11 Fla) 786 F.2d 1490, reh den, en banc (1986, CA11 Fla) 794 F.2d 687 and revd, in part, vacated, in part, remanded (1987) 483 US 669, 97 L Ed 2d 550, 107 S Ct 3054 and cert den (1987) 483 US 1020, 97 L Ed 2d 761, 107 S Ct 3262

Compensation under 38 USCS §§ 1101 et seq. is normally reserved for veterans with service-connected disabilities; however, 38 USCS § 1151 provides compensation for veterans who are disabled as result of Department of Veterans Affairs medical or surgical treatment. Kilpatrick v Principi (2003, CA FC) 327 F.3d 1375

Injured veteran has valid tort claim against military where it committed intentional act, and then negligently failed to protect him, after he returned to civilian status, from dire consequences which flowed from original wrongdoing; later negligence is separate wrong; new action or omission occurred after civilian status was attained, and perpetrators of this wrong must be held accountable for their conduct. Thornwell v United States (1979, DC Dist Col) 471 F Supp 344, 59 ALR Fed 299

Insofar as 38 USCS §§ 310 et seq. [now 38 USCS §§ 1110 et seq.], may apply in action by veterans and members of their families for relief for injuries allegedly sustained from use by military of defoliant in Vietnam, it furnishes limited monthly benefits which may not fully compensate plaintiffs for serious injuries alleged in complaint, or provide compensation to veterans’ spouses or their children who are alleged to have suffered genetic damage, and makes §§ 310 et seq. [now 38 USCS §§ 1110 et seq.], insufficient guardian of rights at stake in instant litigation. In re “Agent Orange” Product Liability Litigation (1979, ED NY) 506 F Supp 737, revd on other grounds (1980, CA2 NY) 635 F.2d 987, cert den (1981) 454 US 1128, 71 L Ed 2d 116, 102 S Ct 980

Veteran is not entitled to some sort of benefit simply because he had a disease or injury while on active service; Congress specifically limits entitlement for service-connected disease or injury to cases where disability results. Brammer v Derwinski (1992) 3 Vet App 223

2. Active service
Veteran was entitled to presumption under 38 USCS § 105(a) that injury occurring during active duty was service-connected for purposes of disability compensation, but denial of presumption in determining lack of service connection for veteran's claimed mental disorder was harmless error in view of alternative and unchallenged finding that veteran failed to show any psychiatric disorder occurring in active service. Shedden v Principi (2004, CA FC) 381 F.3d 1163

Disabilities acquired by Navy officers while at home awaiting orders are not acquired in active service. 1936 ADVA 376

Time which Navy officers spent at home awaiting orders is not to be used in computing length of service for purposes of awarding disability benefits. 1936 ADVA 376

Service between April 6, 1917 and November 11, 1918 is not prior service for purposes of pension or compensation where veteran was discharged during such period by reason of alienage. 1937 ADVA 408

Veteran, was entitled to benefits otherwise payable where he enlisted in Navy prior to November 11, 1918, was placed on inactive duty subsequent to November 11, 1918, was recalled to active service prior to July 2, 1921, and re-enlisted for purposes of awarding compensation. 1937 ADVA 406

Presumption of soundness under former 38 USCS § 311 (redesignated 38 USCS § 1111) did not attach where appellant was not "veteran" under former 38 USCS § 310 (redesignated 38 USCS § 1110) at time of Veterans' Affairs regional office adjudication of his claim in 1976 because his service was active duty for training and he had not established service-connected disability in order to achieve veteran status. Hines v Principi (2004) 18 Vet App 227, 2004 US App Vet Claims LEXIS 526

3. Disease or disability

Reasonable basis existed for excluding "refractive error of eye" from construction of terms "injury" and "disease" in 38 USCS §§ 1110 and 1131 when presbyopia was due to developmental problems associated with aging rather than due to trauma that was incurred during military service and, therefore, interpretation adopted by Secretary of Veterans Affairs in 38 C.F.R. 3.303(c), which prohibited compensation for refractive error of eye and, in particular, for presbyopia, was not arbitrary, capricious, or manifestly contrary to statutes, and represented permissible construction of statutes. Terry v Principi (2003, CA FC) 340 F.3d 1378, reh den (2003, CA FC) 2003 US App LEXIS 24133 and cert den (2004) 541 US 904, 158 L Ed 2d 246, 124 S Ct 1606

"Disability" as used in statute refers to impairment of earning capacity, and such definition mandates that any additional impairment of earning capacity resulting from already service-connected condition, regardless of whether additional impairment is itself separate disease or injury caused by service-connected condition, shall be compensated. Allen v Brown (1995) 7 Vet App 439

Service-connection may be granted for diseases but not defects of congenital, developmental, or familial origin; service-connection is deemed to exist with respect to retinitis pigmentosa and polycystic renal disease if evidence establishes that such familial conditions were incurred or aggravated during service within meaning of Veterans Administration law and regulations. VA GCO 1-85

Term "disease" in 38 USCS §§ 310 and 331 [now 38 USCS §§ 1110 and 1131] and term "defects" in 38 CFR § 3.303(c) (providing that congenital or developmental defects are not diseases) are mutually exclusive; "defect" is defined as structural or inherent abnormalities or conditions which are more or less stationary in nature, while "disease" has been variously defined as morbid condition of body or of some organ or part, illness, or sickness. VA GCO 1-85

Although congenital or developmental defects may not be service-connected because they are not diseases or injuries under law, many such defects can be subject to superimposed disease or injury, and if during individual's military service superimposed disease or injury does occur, service-connection may be warranted for resultant disability. VA GCO 1-85
Decision by Board of Veterans Appeals that applied more stringent standard for disability rating under pre-1999 Disability Code, which required that tinnitus be "persistent" as opposed to post-1999 Disability Code, which required condition to be "recurring," was arbitrary and capricious and matter was remanded for reassessment and for assessment of effective date before June 1999 based upon pre-1999 Disability Code. Smith v Principi (2003) 17 Vet App 168, 2003 US App Vet Claims LEXIS 426, revd, remanded (2004, CA FC) 108 Fed Appx 628

Where: (1) record of veteran's discharge examination noted that veteran's physical condition was normal in all respects except that veteran had tachycardia, and (2) veteran's doctors did not relate veteran's claimed disabilities to his period of service, Board of Veterans' Appeals properly denied veteran's claims for service connection for urinary tract infection, poor vision, hearing-loss disability, gastrointestinal disorder, asthma, bronchitis, emphysema, and hypertension; medical evidence was necessary to establish etiology of disabilities and veteran's statements were insufficient to demonstrate in-service incurrence of disabilities. Duenas v Principi (2004) 18 Vet App 512, 2004 US App Vet Claims LEXIS 798

Where veteran argued that exclusion of periodontal disease as compensable disability under 38 C.F.R. § 3.381(a) conflicted with 38 USC § 1110 which required compensation for disabilities, under 38 USCS § 7252(b), Court of Veterans Appeals lacked jurisdiction to review regulatory determination that periodontal disease was eligible for treatment benefits but was not compensable disability. Byrd v Nicholson (2005) 19 Vet App 388, 2005 US App Vet Claims LEXIS 802

4. Willful misconduct

Widow's appeal of non-final order of remand of her claim for veteran's survivor benefits to Board of Veterans' Appeals, for reconsideration in light of Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000), was dismissed where there was no substantial risk that factual determination that veteran was disabled and died due to willful misconduct would not survive entry of final order. Myore v Principi (2003, CA FC) 323 F.3d 1347

Organic diseases and disabilities which are secondary result of chronic use of alcohol as beverage, whether out of compulsion or otherwise, are not willful misconduct. 1964 ADVA 988

In denying widow's claim for DIC on grounds that veteran's death was not service-connected, Board erred as matter of law in concluding that veteran's alcoholism was result of willful misconduct for which service connection could not be granted, since statutory amendment by which disabilities secondary to alcoholism are barred by "willful misconduct" did not apply to claim filed before October 31, 1990. Gabrielson v Brown (1994) 7 Vet App 36

5. Alcohol or drug abuse

38 USCS § 1110 does not preclude veteran from receiving compensation for alcohol or drug-related disabilities arising secondarily from service-connected disability or from using alcohol or drug-related disabilities as evidence of increased severity of service-connected disability. Allen v Principi (2001, CA FC) 237 F.3d 1368, CCH Bankr L Rptr ¶ 78584, reh, en banc, den (2001, CA FC) 268 F.3d 1340

Organic diseases and disabilities which are secondary result of chronic use of alcohol as beverage, whether out of compulsion or otherwise, are not willful misconduct. 1964 ADVA 988

Statute prohibiting compensation for disabilities which result from alcohol or substance abuse does not bar award for service connection for disability due to abuse of alcohol or drugs. Barela v West (1998) 11 Vet App 280 (ovrld in part by Allen v Principi (2001, CA FC) 237 F.3d 1368, CCH Bankr L Rptr ¶ 78584)

6. Concurring causes

Pension obtained for partial paralysis claimed to have resulted from disease and sickness contracted in Army cannot be held fraudulent by showing that paralysis was direct, immediate result of blow or accident, if prior physical condition caused by ill health and exposure in Army may fairly be regarded as concurring cause of paralysis. Lalone v United States (1896) 164 US 255, 41 L Ed 425, 17 S Ct 74
Veteran was not entitled to presumption of service connection for malaria where he lived and continued to live in tropical climate where malaria is endemic. Tenio v Derwinski (1992) 3 Vet App 47


7. Particular disability determinations

Rating board effectively granted service connection for veterans' ischemic heart disease in 1986 when it considered symptoms of that disease and increased veteran's rating from 10 to 30 percent, hence board erred in denying service connection for consequences of that disease, including arteriosclerotic, cardiovascular and peripheral vascular disease and resulting above-knee amputation. Baughman v Derwinski (1991) 1 Vet App 563

Failure of rating board in 1953 to assign disability of at least moderate degree to muscle group was clear and unmistakable error, warranting retroactive effect of 30 percent disability rating where gunshot wound sustained by veteran in 1950 resulted in injuries to 2 separate and distinct muscle groups. Myler v Derwinski (1991) 1 Vet App 571

BVA's denial of increased rating for residuals of multiple shell-fragment wounds was supported by medical evidence that residuals of veteran's wound were small, well-healed scars with no retained shrapnel fragments or demonstrable muscle damage. Shy v Derwinski (1992) 2 Vet App 647

Ninety percent disability rating which was in effect for 10 years preceding veteran's death was not erroneous, but in fact was highest percentage rating that could have been awarded. Hrvatin v Principi (1992) 3 Vet App 426

Denial of service-connection for polycythemia rubra as result of exposure to ionizing radiation was made in full accordance with applicable laws and regulations; disease was not one presumed to result from radiation, is not "radiogenic disease" entitled to extended presumption period, and veteran developed it some two decades after service. Ennis v Principi (1993) 4 Vet App 50, vacated, stay den, reconsideration gr, motion den (1993, Vet App) 1993 US Vet App LEXIS 138 and op replaced, on reconsideration (1993) 4 Vet App 523

Veteran's claim for frostbite residuals was properly denied, despite undisputedly harsh conditions of his confinement as POW, where veteran failed to produce any evidence, medical or otherwise, that tended to show present disability arising from frozen feet, and service medical records showed no complaints of or treatment for frostbite. Burger v Brown (1993) 5 Vet App 340

Where veteran's ulcer condition preexisted service, and veteran had suffered marked increase in symptoms associated with his ulcer, applying law in existence in 1955, Department of Veterans Affairs regional office was required to have made "specific finding" of natural progression of condition; absent such finding, it was error to conclude that presumption of aggravation had been rebutted. Joyce v Nicholson (2005) 19 Vet App 36, 2005 US App Vet Claims LEXIS 97

Evidence, e.g., veteran's statements during his initial examination that he had experienced intermittent epigastria pain and vomiting, supported conclusion of Board of Veterans' Appeals that veteran's ulcer had preexisted service. Joyce v Nicholson (2005) 19 Vet App 36, 2005 US App Vet Claims LEXIS 97

8. Mental disabilities

Secretary of Veterans Affairs permissibly interpreted statute to require current symptomatology at time claim is filed in order for veteran to be entitled to compensation for disability such as post-traumatic stress disorder; many of statutes governing benefit provisions
only allow benefits for disability existing on or after date of application, and if Congress had been concerned with awarding compensation to any applicant who had disability, it would not have so restricted effective date of payments to period of time after application has been filed, and other statutes limit compensation to disabled veterans to those who have service-connected disability at time of application. Gilpin v West (1998, CA FC) 155 F.3d 1353, reh, en banc, den (1998, CA FC) 1998 US App LEXIS 29450 and cert den (1999) 526 US 1144, 143 L Ed 2d 1031, 119 S Ct 2019

Board erred in denying service-connection for psychiatric disorder where physicians' expert opinions linking veteran's current psychiatric disorders to his military service stood unrebutted and were supported by record evidence. Chisem v Brown (1993) 4 Vet App 169

Denial of service connection for psychosis was not erroneous where no evidence establishing that claimant currently had claimed disability accompanied claim for service connection. Degmetich v Brown (1995) 8 Vet App 208, affd (1997, CA FC) 104 F.3d 1328

Appellant was not entitled to disability compensation at wartime rate for service-connected psychiatric disability since there was no record evidence other than appellant's own testimony to suggest that his psychiatric disability was incurred during wartime. Ford v Gober (1997) 10 Vet App 531

Vietnam veteran who sought increased rating for panic disorder provided medical evidence of some significance that would support disability rating in excess of 10 percent, yet BVA's decision lacked any meaningful discussion of such evidence and there was no indication that Board gave any consideration to veteran's post-hearing letter concerning nature and frequency of his panic attacks. Fisher v Derwinski (1992) 2 Vet App 406, vacated, in part, on reconsideration, remanded (1992) 3 Vet App 121


9. Consolidation of awards

Benefits payable upon service-connected disabilities from World War I and World War II were entitled to be consolidated and paid as one award. 1946 ADVA 723

10. Miscellaneous

Veteran's claim for compensation under 38 USCS § 1110 was extinguished by his death, notwithstanding CVA's procedural rules expressly allowing substitution; issue of substitution is separate from standing, allowing derivative actions to proceed after death of veteran-claimant would render 38 USCS § 5112 express termination of payment of disability compensation virtually meaningless, and Congress established in 38 USCS § 5121 singular exception to this rule in form of wholly separate procedure for designated survivors to recover limited amounts of disability benefits due and unpaid at veteran's death. Richard ex rel. Richard v West (1998, CA FC) 161 F.3d 719 (criticized in Terry v Principi (2004, CA FC) 367 F.3d 1291)

Statutory scheme of 5 USCS §§ 552, 553, and 38 USCS §§ 1155, 7252, consistently excluded from judicial review all content of ratings schedule, as well as actions of Secretary of Veterans Affairs in adopting or revising that content, and 38 USCS § 7261(a)(3)(C) only provides standards of review to be applied by U.S. Court of Appeals for Veterans Claims when reviewing decision from Board of Veterans' Appeals and, thus, under 38 USCS § 7252, such court lacked jurisdiction to review content of diagnostic codes as part of schedule of ratings for disabilities; accordingly, Court of Appeals for Federal Circuit reversed determination of U.S. Court of Appeals for Veterans Claims that 38 C.F.R. § 4.87a, Diagnostic Code 6260, was invalid as inconsistent with 38 USCS § 1110. Wanner v Principi (2004, CA FC) 370 F.3d 1124
Regulatory provision, to extent it would provide disability compensation for temporary exacerbations of preexisting conditions, is inconsistent with statutory scheme for disability benefits. Jensen v Brown (1993) 4 Vet App 304

Inconsistent statement on VA Form 21-6782 could not contradict non-service-connected rating decision, since clerical error cannot be relied upon to invoke estoppel against U.S. for money payments. Lozano v Derwinski (1991) 1 Vet App 184

§ 1111. Presumption of sound condition

For the purposes of section 1110 of this title [38 USCS § 1110], every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.

Prior law and revision:
This section is based on 38 USC § 2312 (Act June 17, 1957, P. L. 85-56, Title III, Part B, § 312, 71 Stat. 96).
This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:
Veterans’ Regulation No. 1(a), Part I, para. I(b) (as amended Act July 13, 1943, ch 233, § 9(b), 57 Stat. 556).

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 311, as 38 USCS § 1111, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Cross References
This section is referred to in 38 USCS § 1137

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:149

Am Jur:
60A Am Jur 2d, Pensions and Retirement Funds § 1262
77 Am Jur 2d, Veterans and Veterans' Laws § 155

Law Review Articles:
Wellen. Armed Forces Disability Benefits-a Lawyer's View. 27 Judge Advocate General Journal 485, Spring 1974

1. Generally
2. Rebuttal of presumption

1. Generally
It was reasonable for Department of Veterans Affairs (VA) to conclude that presumption of soundness in 38 USCS § 1111 was always rebutted by medical evidence with respect to
refractive error of eye and that therefore refractive error of eye could be reasonably excluded from terms "injury" and "disease"; therefore, VA's interpretation of 38 C.F.R. § 3.303(c) as prohibiting compensation for refractive error of eye and, in particular, for presbyopia, was not contrary to 38 USCS § 1111. Terry v Principi (2003, CA FC) 340 F.3d 1378, reh den (2003, CA FC) 2003 US App LEXIS 24133 and cert den (2004) 541 US 904, 158 L Ed 2d 246, 124 S Ct 1606

Although there was new regulatory interpretation of 38 USCS § 1111 after Board of Veterans' Appeals decision that there was no clear and unmistakable error (CUE) in denial of service connection, Board's decision was final and veteran had no recourse for appeal through CUE claim; rather, 38 C.F.R. § 20.1403(e) clearly proscribed veteran's claim. Jordan v Nicholson (2005, CA FC) 401 F.3d 1296

Presumption of soundness is not applicable in determining entitlement to service pension for nonservice-connected disabilities. 1944 ADVA 558

Unless record shows examination at time of entrance into armed forces of United States, persons who served with so-called recognized guerrilla forces in Philippines subsequent to December 7, 1941 are not entitled to presumption of soundness. 1947 ADVA 746

Term "defect" in section necessarily means defect that amounts to or arises from disease or injury, and only service-connected "disability resulting from personal injury suffered or disease contracted" is entitled to compensation under 38 USCS § 1110; it would be anomalous in extreme to expand "disabilities" to include non-disease and non-injury entities such as congenital defects, and then allow their existence to be rebutted only by evidence of disease or injury when congenital defect is neither disease or injury. Winn v Brown (1996) 8 Vet App 510, app dismd (1997, CA FC) 110 F.3d 56


On review of 1983 decision of Board of Veterans' Appeals (Board), Board was bound to apply regulations as they existed in 1983, and new interpretations of 38 USCS § 1111 (former 38 USCS § 311) and 38 USCS § 1153 (former 38 USCS § 353), interpretations to which Secretary of Veterans Affairs also agreed, that apparently conflicted with those regulations could not be basis for clear and unmistakable error for 1983 decision. Jordan v Principi (2003) 17 Vet App 261, 2003 US App Vet Claims LEXIS 721, affd (2005, CA FC) 401 F.3d 1296, reh den, reh, en banc, den (2005, CA FC) 2005 US App LEXIS 10618

Presumption of soundness under former 38 USCS § 311 (redesignated 38 USCS § 1111) did not attach where appellant was not "veteran" under former 38 USCS § 310 (redesignated 38 USCS § 1110) at time of Veterans' Affairs regional office adjudication of his claim in 1976 because his service was active duty for training and he had not established service-connected disability in order to achieve veteran status. Hines v Principi (2004) 18 Vet App 227, 2004 US App Vet Claims LEXIS 526

2. Rebuttal of presumption

Appellant's argument that presumption of soundness cannot be rebutted by medical professional's after-the-fact opinion regarding probable onset of disease or condition is not supported by 38 USCS § 1111, which only requires that evidence, whatever it may be, must clearly and unmistakably lead to conclusion that injury or disease existed before veteran entered service. Harris v West (2000, CA FC) 203 F.3d 1347, cert den (2000) 530 US 1276, 147 L Ed 2d 1008, 120 S Ct 2745

Correct standard for rebutting presumption of soundness under 38 USCS § 1111 requires government to show by clear and unmistakable evidence that (1) veteran's disability existed prior
to service and (2) that pre-existing disability was not aggravated during service. Wagner v Principi (2004, CA FC) 370 F.3d 1089

Lower court's decision affirming Board of Veterans' Appeals (BVA) denial of veteran's claim for disability benefits based on alleged aggravation of knee disorder during service was vacated and remanded for further consideration where lower court and BVA had applied incorrect legal standard in determining if presumption of soundness had been rebutted. Wagner v Principi (2004, CA FC) 370 F.3d 1089

Veteran's argument that 1945 rating decision did not rebut presumptions of sound condition and aggravation failed, where rating board had found that veteran's eye condition was clearly shown by service records and examination conducted subsequent to discharge to be of congenital or developmental origin, that it was due to defect in form and structure of eye, held to be of congenital or developmental origin, and that there was no evidence of superimposed disability during service which could have caused or aggravated condition; fact that rating board did not specifically advert to presumptions of soundness and aggravation, and did not specifically recite applicable standard of proof for rebutting those presumptions, did not require holding that rating board's decision constituted clear and unmistakable error as matter of law. Natali v Principi (2004, CA FC) 375 F.3d 1375, reh den (2004, CA FC) 2004 US App LEXIS 21062

Court of Appeals for Veterans' Claims did not err in its interpretation of 38 USCS § 1111 because presumption that service entrants were in sound condition was rebuttable even if face of entrance examination affirmatively indicating that condition in question was tested and found not to exist upon entry into service. Kent v Principi (2004, CA FC) 389 F.3d 1380

Board erred in concluding that presumption of soundness had been rebutted where totality of evidence it relied upon was examining Army physician's notes about what veteran allegedly said to him when seeking treatment for problem concerning other eye; if on remand BVA seeks to rely on physician's statement it must do so after analysis of and in context of all evidence of record, e.g., BVA did not deal with veteran's sworn testimony that it had misinterpreted his response to question by Army physician and that conclusion about pre-service eye injury reflected misunderstanding between what he had said and what he had meant in prior medical examinations. Parker v Derwinski (1991) 1 Vet App 522

Presumption of soundness was effectively rebutted, despite failure of claimant's induction x-ray examination to detect presence of ulcer, by references in service hospital records to ulcer as "chronic" and "old". Bagby v Derwinski (1991) 1 Vet App 225

Since veteran's keratoconus was first diagnosed while in service, burden was on government to rebut presumption of sound condition upon induction by showing with clear and unmistakable evidence that condition existed prior to service and, if it makes this showing, that condition was not aggravated in service. Kinnaman v Principi (1993) 4 Vet App 20

Tentative diagnosis of early keratoconus shortly after veteran's induction, coupled with fact that earlier examinations did not conduct detailed ophthalmologic examinations did not constitute clear and unmistakable evidence to rebut veteran's claim of service-connection for bilateral keratoconus. Kinnaman v Principi (1993) 4 Vet App 20

Board's conclusion that appellant's psychiatric condition existed prior to service did not rebut presumption of soundness since only evidence supporting it was reports not supported by any contemporaneous clinical evidence or recorded history in record, but constituted bare conclusion by medical professional; without factual predicate, this is insufficient to rebut statutory presumption of soundness. Miller v West (1998) 11 Vet App 345

Appellant did not rebut presumption of soundness and aggravation so as to establish viable claim for service connection for retinitis pigmentosa, since he was diagnosed with condition two years after his entrance examination and at that time reported that he had 8-year history of poor night vision that had worsened in preceding year and Veterans' Administration [now Department of Veterans Affairs] physician opined that worsening of condition was normal progression. Harris v West (1998) 11 Vet App 456, reh, en banc, den (1998, Vet App) 1998 US Vet App LEXIS 1611 and affd (2000, CA FC) 203 F.3d 1347, cert den (2000) 530 US 1276, 147 L Ed 2d 1008, 120 S Ct 2745

Evidence, e.g., veteran's statements during his initial examination that he had experienced intermittent epigastria pain and vomiting, supported conclusion of Board of Veterans' Appeals that veteran's ulcer had preexisted service. Joyce v Nicholson (2005) 19 Vet App 36, 2005 US App Vet Claims LEXIS 97

§ 1112. Presumptions relating to certain diseases and disabilities

(a) For the purposes of section 1110 of this title [38 USCS § 1110], and subject to the provisions of section 1113 of this title [38 USCS § 1113], in the case of any veteran who served for ninety days or more during a period of war--

(1) a chronic disease becoming manifest to a degree of 10 percent or more within one year from the date of separation from such service;

(2) a tropical disease, and the resultant disorders or disease originating because of therapy, administered in connection with such diseases, or as a preventative thereof, becoming manifest to a degree of 10 percent or more within one year from the date of separation from such service, or at a time when standard or accepted treatises indicate that the incubation period thereof commenced during such service;

(3) active tuberculous disease developing a 10 percent degree of disability or more within three years from the date of separation from such service;

(4) multiple sclerosis developing a 10 percent degree of disability or more within seven years from the date of separation from such service;

(5) Hansen's disease developing a 10 percent degree of disability or more within three years from the date of separation from such service;

shall be considered to have been incurred in or aggravated by such service, notwithstanding there is no record of evidence of such disease during the period of service.

(b) (1) For the purposes of section 1110 of this title [38 USCS § 1110] and subject to the provisions of section 1113 of this title [38 USCS § 1113], in the case of a veteran who is a former prisoner of war--

(A) a disease specified in paragraph (2) which became manifest to a degree of 10 percent or more after active military, naval, or air service shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of such disease during the period of service; and

(B) if the veteran was detained or interned as a prisoner of war for not less than thirty days, a disease specified in paragraph (3) which became manifest to a degree of 10 percent or more after active military, naval, or air service shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of such disease during the period of service.

(2) The diseases specified in this paragraph are the following:

(A) Psychosis.

(B) Any of the anxiety states.

(C) Dysthymic disorder (or depressive neurosis).
(D) Organic residuals of frostbite, if the Secretary determines that the veteran was detained or interned in climatic conditions consistent with the occurrence of frostbite.

(E) Post-traumatic osteoarthritis.

(3) The diseases specified in this paragraph are the following:
   (A) Avitaminosis.
   (B) Beriberi (including beriberi heart disease).
   (C) Chronic dysentery.
   (D) Helminthiasis.
   (E) Malnutrition (including optic atrophy associated with malnutrition).
   (F) Pellagra.
   (G) Any other nutritional deficiency.
   (H) Cirrhosis of the liver.
   (I) Peripheral neuropathy except where directly related to infectious causes.
   (J) Irritable bowel syndrome.
   (K) Peptic ulcer disease.
   (L) Atherosclerotic heart disease or hypertensive vascular disease (including hypertensive heart disease) and their complications (including myocardial infarction, congestive heart failure and arrhythmia).
   (M) Stroke and its complications.

(c) (1) For the purposes of section 1110 of this title [38 USCS § 1110], and subject to the provisions of section 1113 of this title [38 USCS § 1113], a disease specified in paragraph (2) of this subsection becoming manifest in a radiation-exposed veteran shall be considered to have been incurred in or aggravated during active military, naval, or air service, notwithstanding that there is no record of evidence of such disease during a period of such service.

(2) The diseases referred to in paragraph (1) of this subsection are the following:
   (A) Leukemia (other than chronic lymphocytic leukemia).
   (B) Cancer of the thyroid.
   (C) Cancer of the breast.
   (D) Cancer of the pharynx.
   (E) Cancer of the esophagus.
   (F) Cancer of the stomach.
   (G) Cancer of the small intestine.
   (H) Cancer of the pancreas.
   (I) Multiple myeloma.
   (J) Lymphomas (except Hodgkin's disease).
   (K) Cancer of the bile ducts.
   (L) Cancer of the gall bladder.
   (M) Primary liver cancer (except if cirrhosis or hepatitis B is indicated).
   (N) Cancer of the salivary gland.
   (O) Cancer of the urinary tract.
   (P) Bronchiolo-alveolar carcinoma.
   (Q) Cancer of the bone.
   (R) Cancer of the brain.
   (S) Cancer of the colon.
(T) Cancer of the lung.
(U) Cancer of the ovary.

(3) For the purposes of this subsection:
   (A) The term "radiation-exposed veteran" means (i) a veteran who, while serving on active duty, participated in a radiation-risk activity, or (ii) an individual who, while a member of a reserve component of the Armed Forces, participated in a radiation-risk activity during a period of active duty for training or inactive duty training.
   (B) The term "radiation-risk activity" means any of the following:
      (i) Onsite participation in a test involving the atmospheric detonation of a nuclear device (without regard to whether the nation conducting the test was the United States or another nation).
      (ii) The occupation of Hiroshima or Nagasaki, Japan, by United States forces during the period beginning on August 6, 1945, and ending on July 1, 1946.
      (iii) Internment as prisoner of war in Japan (or service on active duty in Japan immediately following such internment) during World War II which (as determined by the Secretary) resulted in an opportunity for exposure to ionizing radiation comparable to that of veterans described in clause (ii) of this subparagraph.
      (iv) Service in a capacity which, if performed as an employee of the Department of Energy, would qualify the individual for inclusion as a member of the Special Exposure Cohort under section 3621(14) of the Energy Employees Occupational Illness Compensation Program Act of 2000 (42 U.S.C. 7384l(14)).

(4) A radiation-exposed veteran who receives a payment under the provisions of the Radiation Exposure Compensation Act of 1990 (42 U.S.C. 2210 note) shall not be deprived, by reason of the receipt of that payment, of receipt of compensation to which that veteran is entitled by reason of paragraph (1), but there shall be deducted from payment of such compensation the amount of the payment under that Act.

Prior law and revision:
This section is based on 38 USC § 2313 (Act June 17, 1957, P. L. 85-56, Title III, Part B, § 313, 71 Stat. 97).
This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Amendments:
1962. Act Sept. 7, 1962 (effective as provided by § 4 of such Act, which appears as a note to this section), in para. (4), substituted "seven years" for "three years".
1970. Act Aug. 12, 1970, in the section heading, inserted "and disabilities"; designated existing matter as subsec. (a); and added subssecs. (b) and (c).
1981. Act Aug. 14, 1981 (effective 10/1/81, as provided by § 4(b) of such Act, which appears as a note to this section), deleted subsec. (b) which read: "(b) For the purposes of subsection (c) of this section, any veteran who, while serving in the active military, naval, or air service, was held as a prisoner of war for not less than six months by the Imperial Japanese Government or the German Government during World War II, by the Government of North Korea during the Korean conflict, or by the Government of North Korea, the Government of North Vietnam or the Viet Cong forces during the Vietnam era, or by their respective agents, shall be deemed to have suffered from dietary deficiencies, forced labor, or inhumane treatment in violation of the terms of the Geneva Conventions of July 27, 1929, and August 12, 1949."; redesignated subsec. (c) as subsec. (b); and substituted a new subsec. (b) for subsec. (b) as redesignated, which read:

"(b) For the purposes of section 310 of this title and subject to the provisions of section 313 of this title, in the case of any veteran who, while serving in the active military, naval, or air service and while held as a prisoner of war by an enemy government, or its agents during World War II, the Korean conflict, or the Vietnam era, suffered from dietary deficiencies, forced labor, or inhumane treatment (in violation of the terms of the Geneva Conventions of July 27, 1929, and August 12, 1949), the disease of--

"(1) Avitaminosis, Beriberi (including beriberi heart disease), Chronic dysentery, Helminthiasis, Malnutrition (including optic atrophy associated with malnutrition), Pellagra, or Any other nutritional deficiency, which became manifest to a degree of 10 per centum or more after such service; or

"(2) Psychosis which became manifest to a degree of 10 per centum or more within two years from the date of separation from such service;

shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of such disease during the period of service."

1984. Act March 2, 1984 (effective 10/1/83, as provided by § 114 of such Act, which appears as a note to this section), in subsec. (b), in para. (8), deleted "or" following the concluding comma, in para. (9), added "or", and added para. (10).

Such Act further (effective 4/1/84, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note) substituted "percent" for "per centum" wherever appearing.

1986. Act Oct. 28, 1986, (effective 10/1/86, as provided by § 108(b) if such Act), in subsec. (b), in para. (9), deleted "or" following "states.", and added paras. (11) and (12).

1988. Act May 20, 1988, P. L. 100-321 (effective 5/1/88, as provided by § 2(b) of such Act, which appears as a note to this section) added subsec. (c).

Act May 20, 1988, P. L. 100-322, in subsec. (b), in para. (11), deleted "or" following "frostbite.", and added paras. (13)-(15).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 312, as 38 USCS § 1112, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

Act Aug. 14, 1991, in subsec. (c), in para. (1), substituted "active military, naval, or air service" for "the veteran's service on active duty", and substituted "during a period" for "during the period".

Such Act further, in subsec. (c), in para. (4)(A), added "(i)"", ", or" and cl. (ii).

Such Act further (applicable as provided by § 104(b) of such Act, which appears as a note to this section), in subsec. (c), in para. (3), deleted ", except that such period shall be the 30 year period beginning on that date in the case of leukemia (other than chronic lymphocytic leukemia)" following "radiation-risk activity".
1992. Act Oct. 30, 1992 (effective 10/1/92, as provided by § 2(b) of such Act), in subsec. (c), in para. (1), deleted "to a degree of 10 percent or more within the presumption period (as specified in paragraph (3) of this subsection)" following "veteran", in para. (2), added subparas. (N) and (O), deleted para. (3), which read: "The presumption period for purposes of paragraph (1) of this subsection is the 40-year period beginning on the last date on which the veteran participated in a radiation-risk activity.", and redesignated para. (4) as new para. (3).

1994. Act Nov. 2, 1994, in subsec. (c)(3)(B)(i), inserted "(without regard to whether the nation conducting the test was the United States or another nation)".


2003. Act Dec. 16, 2003, substituted subsec. (b) for one which read:

"(b) For the purposes of section 1110 of this title and subject to the provisions of section 1113 of this title, in the case of a veteran who is a former prisoner of war and who was detained or interned for not less than thirty days, the disease of--

"(1) avitaminosis,

"(2) beriberi (including beriberi heart disease),

"(3) chronic dysentery,

"(4) helminthiasis,

"(5) malnutrition (including optic atrophy associated with malnutrition),

"(6) pellagra,

"(7) any other nutritional deficiency,

"(8) psychosis,

"(9) any of the anxiety states,

"(10) dysthymic disorder (or depressive neurosis),

"(11) organic residuals of frostbite, if the Secretary determines that the veteran was interned in climatic conditions consistent with the occurrence of frostbite,

"(12) post-traumatic osteoarthritis,

"(13) peripheral neuropathy except where directly related to infectious causes,

"(14) irritable bowel syndrome, or

"(15) peptic ulcer disease, which became manifest to a degree of 10 percent or more after active military, naval, or air service shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of such disease during the period of service.".

2004. Act Dec. 10, 2004 (effective 3/26/2002, as provided by § 306(c) of such Act, which appears as a note to this section), in subsec. (c), in para. (2), added subparas. (Q)-(U), and, in para. (3)(B), added cl. (iv).

Such Act further (effective with respect to compensation payments for months beginning after 3/26/2002, as provided by § 302(c) of such Act, which appears as a note to this section), in subsec. (c), added para. (4).

Other provisions:

Effective date of Sept. 7, 1962 amendments. Act Sept. 7, 1962, P. L. 87-645, § 4, 76 Stat. 442, provides: "This Act [amending this section and 38 USCS §§ 1114, 5503, and adding note to 38 USCS § 1114] shall take effect on the first day of the first calendar month which begins after the date of enactment of this Act but no payments shall be made by reason of this Act for any period before such effective date. The increased rate of compensation payable to any veteran entitled thereto on such first day shall be further increased, for such month only, in an amount equal to three times the monthly increase provided for such veteran by the amendments made by this Act."


Effective date of amendments made by § 302 of Dec. 10, 2004. Act Dec. 10, 2004, P. L. 108-454, Title III, § 302(c), 118 Stat. 3610, provides: "Paragraph (4) of section 1112(c) of title 38, United States Code, as added by subsection (a), shall take effect with respect to compensation payments for months beginning after March 26, 2002. Subsection (c) of section 1310 of such title, as added by subsection (b), shall take effect with respect to dependency and indemnity compensation payments for months beginning after March 26, 2002."


Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Cross References
This section is referred to in 38 USCS §§ 1103, 1113, 1137, 1710; 42 USCS § 7385j

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:140, 142, 145, 147

Am Jur:
60A Am Jur 2d, Pensions and Retirement Funds § 1262
77 Am Jur 2d, Veterans and Veterans' Laws § 56

Law Review Articles:
Wellen. Armed Forces Disability Benefits-a Lawyer's View. 27 Judge Advocate General Journal 485, Spring 1974
1. Time of service
2. Degree of disability

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3. Time of manifestation of disease or disability

4. Radiation claims

5. Miscellaneous

1. Time of service

Veteran in service on April 6, 1917 and discharged thereafter without serving 90 days during World War is not thereby barred from benefits if he had 90 days continuous service. 1934 ADVA 247

Veteran who served in Hiroshima shortly after atomic bomb was dropped there was entitled to reconsideration of service-connected disability for cancer of urinary tract pursuant to Veterans' Radiation Exposure Act of 1992. Farris v Principi (1993) 4 Vet App 6


Veteran’s 93 total days of service did not qualify him for presumptive service connection since it did not include 90 days of continuous active service. Lorenzano v Brown (1993) 4 Vet App 446

Ninety-day duty requirement for presumption of service connection is not irrational; appellant's brief lacked any developed or well-supported argument against 90-day requirement, and conclusory statement that regulation could just as easily be read to state 60-day presumption does not show why 90-day requirement is irrational. Robinson v Brown (1996) 9 Vet App 398, app dismd (1997, CA FC) 111 F.3d 142, reported in full (1997, CA FC) 1997 US App LEXIS 7697

2. Degree of disability

Showing that chronic disease became manifest to degree of 10 percent or more within one year from date of discharge from enlistment entered into prior to November 11, 1918, is necessary to entitle claimant to disability benefits. 1934 ADVA 236

Physician’s statement that veteran was his patient 40 years earlier and suffered from occasional attacks of hypertensive and cardiovascular disease for which he treated veteran was insufficient to establish service connection. Oris v Derwinski (1992) 2 Vet App 95

Board’s conclusion that veteran’s low back disorder did not warrant more than 10 percent disabling rating was not clearly erroneous in light of record viewed in its entirety. Moore v Derwinski (1992) 2 Vet App 209

Board erred in denying claim for right thoracic outlet syndrome, not chronic disease subject to presumption of service connection, without considering whether there was continuity of symptomatology after discharge from service. Rhodes v Brown (1993) 4 Vet App 124

Board’s error in not applying former POW presumptions, hence denying surviving spouse’s application for DIC benefits, was not clear and unmistakable error since application would not assist appellant in proving that veteran was totally disabled due to psychiatric disorder for at least ten years prior to his death: presumption is intended only to assist in proving service connection, not as means of increasing disability rating once service connection is established. Allin v Brown (1994) 6 Vet App 207

Claim for increased disability rating is new claim and, in light of amendments to rating schedule pertaining to mental disorders which became effective after veteran filed his appeal, case would be remanded to application of amendments more favorable to claimant than earlier provisions. Baker v West (1998) 11 Vet App 163

3. Time of manifestation of disease or disability

Board did not clearly err in denying veteran's presumptive service connection claim for acquired psychiatric disorder since evidence did not demonstrate that it was manifested by March 1977 and thus within one year after his discharge; veteran's testimony that he had received hospital care for psychiatric condition prior to that time was inconsistent with his previous
assertions that his maladies were related only to his back and his alcoholism, medical evidence
dating from that time at most suggested only possibility that he had been treated for psychiatric
disorder, and there was no other medical evidence referring to psychiatric disorder until 1982,
well beyond presumptive service connection period. Madden v Gober (1997, CA FC) 125 F.3d
1477, cert den (1998) 523 US 1046, 140 L Ed 2d 511, 118 S Ct 1361

Portion of opinion by general counsel for Department of Veterans Affairs concluding that 38
USCS § 1112(a) does not establish presumption of aggravation for chronic disease that existed
before entry into service interprets statute in manner that is not in accordance with law and is
vacated since phrase "or aggravated by" indicates Congress intended to include preexisting
conditions in presumption of in-service occurrence. Splane v West (2000, CA FC) 216 F.3d 1058

Board's finding that service member's schizophrenia was not present within one year after
separation from service was clearly erroneous where evidence was unanimous in supporting that
there were symptoms of psychosis within one year after separation from service. Caldwell v
Derwinski (1991) 1 Vet App 466

Physician's report that he diagnosed veteran with rheumatoid arthritis within year following his
discharge established well-grounded claim of presumptive service-connection. Emperador v
Derwinski (1991) 2 Vet App 343

Board did not err in denying service connection for chronic acquired psychiatric disorder
where it properly found that first evidence of chronic psychiatric disorder occurred over 10 years
after separation from the service and that in-service psychological problems were attributable to
adjustment reaction of adolescence, personality disorder, and alcohol and drug abuse, not to

Veteran was not entitled to benefit of 40-year presumption of service connection for any of his
cancerous disorders since two-cancer of larynx and of urinary bladder-were not on list-and
40-year presumptive period expired before he was diagnosed with lymphomatic cancer.
Stegman v Derwinski (1992) 3 Vet App 228

Given diagnosis of fibromyalgia in service, there was no plausible basis in record for BVA's
finding that veteran's myofascial pain syndrome was not manifested in service. Hoag v Brown
(1993) 4 Vet App 209

New and material evidence is not required to reopen claim of former POW for disease which
is presumptively service connected under 38 USCS § 1112(b); all that is required is that former
POW submit well-grounded claim. Roncevich v Brown (1994) 7 Vet App 192

4. Radiation claims

VA's interpretation that list of radiogenic diseases is exclusive, i.e., that veteran can only
establish service connection on direct basis based on radiation exposure if disability is
enumerated in list, is not reasonable. Combee v Brown (1994, CA FC) 34 F.3d 1039, reh den
Ramey v Gober (1997, CA FC) 120 F.3d 1239)

Proper standard for BVA's adjudication of claims for entitlement to service-connected
disability compensation based on exposure to ionizing radiation is not "no reasonable possibility"
standard, but one under generally applicable regulations giving due consideration to all evidence

Veteran was entitled to readjudication of claim for service-connected bladder cancer in light
of Congress' enacting Veterans' Radiation Exposure Act during pendency of appeal. Farris v
Principi (1993) 4 Vet App 6

Board's finding that veteran's eye disorder was not radiogenic disease enumerated in either
38 USCS § 1112 or regulations was not clearly erroneous, and its conclusion that disorder may
not be related to active service on basis of exposure to ionizing radiation was correct. Nix v
BVA's denial of service connection for polycythemia rubra vera, based on exposure to ionizing radiation, fully accorded with applicable laws and regulations.  Ennis v Brown (1993) 4 Vet App 523

Colon cancer is not one of specified diseases to which presumption of service connection for disease resulting from exposure to ionizing radiation applies, and in absence of any medical evidence suggesting that veteran's colon cancer, first manifested more than 40 years after exposure, was related to service, plausible basis existed for denying service connection.  Papa v Brown (1993) 5 Vet App 327

Veteran's exposure to radiation during course of his laboratory work as chemist at Manhattan Project did not constitute radiation-risk activity as defined by statute, hence statutory presumption of service connection was not applicable to veteran's lymphoma.  Lasovick v Brown (1994) 6 Vet App 141

Provision of Department's adjudication manual that claimant's assertion of radiation-risk activity may be substantiated, for presumptive service-connection services, only through official Defense Nuclear Agency documentation is substantive rule because it necessarily limits administrative action and was invalid since it was not adopted subject to notice and public comment procedures. Earle v Brown (1994) 6 Vet App 558

Board's finding that death of veteran, who had served in Nagasaki shortly after atomic bomb had been dropped there, was due to colon cancer was not clearly erroneous where medical evidence indicated that carcinoma in veteran's liver was result of metastasis from colon cancer, not primary source of cancer, or at least another source unrelated. Ramey v Brown (1996) 9 Vet App 40, affd sub nom Ramey v Gober (1997, CA FC) 120 F.3d 1239, cert den (1998) 522 US 1151, 140 L Ed 2d 181, 118 S Ct 1171

World War II veteran was not entitled to presumption of service connection for cancers of bladder, left kidney, prostate and right lung since such cancers were not included in 15 listed and veteran admitted to not participating in radiation risk activity as defined by statute. Rucker v Brown (1997) 10 Vet App 67

Intent of statute as to radiation risk activity is to grant presumption to those veterans who somehow participated in seizure or control of Hiroshima and Nagasaki at time when U.S. forces were assigned to occupy those cities, and although Congress chose expansive definition of veterans who qualified for presumption, it is clear that statute does not apply presumption based merely upon veteran's leisure presence in those cities; accordingly, appellant whose duties did not require him to participate in occupation, but who visited both cities exclusively while on weekend leave, was not entitled to presumptive service connection for his cancers. McGuire v West (1998) 11 Vet App 274

In denying widow's claim of service connection for veteran's death from rectal cancer from veteran's one day of service at Nagasaki in November 1945, Board failed to address all of factors specified in regulation § 3.311(e), and because medical evidence before Board did not address all those factors, Board was required to remand claim for medical opinion to be obtained that would be adequate for requisite analysis. Hilkert v West (1998) 11 Vet App 284, substituted op (1999) 12 Vet App 145, afffd (2000, CA FC) 232 F.3d 908

Any medical nexus between veteran's fatal lung cancer and in-service exposure to ionizing radiation was speculative at best where three physicians found that it was extremely unlikely that lung cancer was caused by veteran's level of radiation exposure and that contrary opinion of appellant's physician lacked scientific validity; adenocarcinoma of lungs is not one of fifteen cancers subject to presumption of service connection for exposure to ionizing radiation under 38 USCS § 1112 and there was plausible basis in record for Board to discount opinion of appellant's physician. Davis v West (1999) 13 Vet App 178, 1999 US App Vet Claims LEXIS 1287, remanded (2001) 15 Vet App 163, 2001 US App Vet Claims LEXIS 1008

5. Miscellaneous

Veteran's assertion of presumption does not act as collateral estoppel against assertion of contrary position in proceedings to obtain insurance benefits if Administrator [now Secretary]
decides to pay veteran's claim so that assertion is never presented in adversary hearing.

Steamfitters Local 343 (1996, CA9 Cal) 94 F.3d 597, 61 Cal Comp Cas 833, 96 CDOS 6439, 96
Daily Journal DAR 10597, 71 BNA FEP Cas 1057, 153 BNA LRRM 2111, 69 CCH EPD ¶ 44460)

§ 1113. Presumptions rebuttable

(a) Where there is affirmative evidence to the contrary, or evidence to establish that an
intercurrent injury or disease which is a recognized cause of any of the diseases or
disabilities within the purview of section 1112, 1116, 1117, or 1118 of this title [38
USCS § 1112, 1116, 1117, or 1118], has been suffered between the date of separation
from service and the onset of any such diseases or disabilities, or the disability is due to
the veteran's own willful misconduct, service-connection pursuant to section 1112, 1116,
or 1118 of this title [38 USCS § 1112, 1116, or 1118], or payments of compensation
pursuant to section 1117 of this title [38 USCS § 1117], will not be in order.

(b) Nothing in section 1112, 1116, 1117, or 1118 of this title [38 USCS § 1112, 1116,
1117, or 1118], subsection (a) of this section, or section 5 of Public Law 98-542 (38
U.S.C. 1154 note) shall be construed to prevent the granting of service-connection for
any disease or disorder otherwise shown by sound judgment to have been incurred in or
aggravated by active military, naval, or air service.

Prior law and revision:
This section is based on 38 USC § 2314, (Act June 17, 1957, P. L. 85-56, Title III, Part B, §
314, 71 Stat. 97).
This section is also based on the following provisions, which were repealed by Act June 17,
1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:
Veterans' Regulation No. 1(a), Part I, para. l(c) (as amended June 24, 1948, ch 612, § 1, 62

Amendments:
1991. Act Feb. 6, 1991, in subsecs. (a) and (b), inserted "or 316".
Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 313, as 38 USCS § 1113,
and amended the references in this section to reflect the redesignations made by § 5(a) of
such Act (see Table III preceding 38 USCS § 101).
1994. Act Nov. 2, 1994, in subsec. (a), substituted "section 1112, 1116, 1117, or 1118" for
"section 1112 or 1116", inserted ", or payments of compensation pursuant to section 1117 of
this title," and inserted "or disabilities" in two places; and, in subsec. (b), substituted "section
1112, 1116, 1117, or 1118" for "section 1112 or 1116".
Such Act further (applicable with respect to applications for benefits that are submitted after
the date of enactment, as provided by § 501(b)(2) of such Act, which appears as a note to
this section), in subsec. (b), substituted "title," for "title or" and inserted " or section 5 of Public
Law 98-542 (38 U.S.C. 1154 note)".
1998. Act Oct. 21, 1998, in subsec. (a), substituted "1117, or 1118" for "or 1117" and
substituted ", 1116, or 1118" for "or 1116"; and, in subsec. (b), substituted "1117, or 1118" for
"or 1117".

Other provisions:
Application of Nov. 2, 1994 amendments. Act Nov. 2, 1994, P. L. 103-446, Title V, § 501(b)(2), 108 Stat. 4663, provides: "The amendments made by paragraph (1) [amending subsec. (b)] shall apply with respect to applications for veterans benefits that are submitted to the Secretary of Veterans Affairs after the date of the enactment of this Act.".

Cross References
This section is referred to in 38 USCS §§ 1112, 1116, 1118, 1137

Research Guide
Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:140, 143, 147

Am Jur:
60A Am Jur 2d, Pensions and Retirement Funds § 1262

Law Review Articles:
Wellen. Armed Forces Disability Benefits-a Lawyer's View. 27 Judge Advocate General Journal 485, Spring 1974

1. Generally

2. Prisoners of war

1. Generally
Presumption of service-connection of appellant's right foot condition was not rebutted by evidence that residuals of right foot fracture preexisted service where there was no evidence that degenerative joint disease preexisted appellant's service. Lichtenfels v Derwinski (1991) 1 Vet App 484

2. Prisoners of war
BVA erred in denying service connection for former POW's suffering from residuals of frostbite since there was no affirmative evidence to the contrary to rebut the presumption of service connection. Borella v Derwinski (1992) 3 Vet App 52

Unless there is affirmative evidence to contrary, veteran who has been POW and manifests helminthiasis to degree of 10 percent or more shall be considered service connected for disorder, and claim for entitlement to service connection for POW presumptive diseases does not require any new and material evidence to reopen; claim must merely be well grounded, which it was in instant case since veteran had diagnosis of intestinal parasites. Pena v Brown (1993) 5 Vet App 279

§ 1114. Rates of wartime disability compensation

For the purposes of section 1110 of this title [38 USCS § 1110]-

(a) if and while the disability is rated 10 percent the monthly compensation shall be $112;
(b) if and while the disability is rated 20 percent the monthly compensation shall be $218;
(c) if and while the disability is rated 30 percent the monthly compensation shall be $337;
(d) if and while the disability is rated 40 percent the monthly compensation shall be $485;
(e) if and while the disability is rated 50 percent the monthly compensation shall be $690;
(f) if and while the disability is rated 60 percent the monthly compensation shall be $873;

(g) if and while the disability is rated 70 percent the monthly compensation shall be $1,099;

(h) if and while the disability is rated 80 percent the monthly compensation shall be $1,277;

(i) if and while the disability is rated 90 percent the monthly compensation shall be $1,436;

(j) if and while the disability is rated as total the monthly compensation shall be $2,393;

(k) if the veteran, as the result of service-connected disability, has suffered the anatomical loss or loss of use of one or more creative organs, or one foot, or one hand, or both buttocks, or blindness of one eye, having only light perception, has suffered complete organic aphony with constant inability to communicate by speech, or deafness of both ears, having absence of air and bone conduction, or, in the case of a woman veteran, has suffered the anatomical loss of 25 percent or more of tissue from a single breast or both breasts in combination (including loss by mastectomy or partial mastectomy) or has received radiation treatment of breast tissue, the rate of compensation therefor shall be $87 per month for each such loss or loss of use independent of any other compensation provided in subsections (a) through (j) or subsection (s) of this section but in no event to exceed $2,977 per month; and in the event the veteran has suffered one or more of the disabilities heretofore specified in this subsection, in addition to the requirement for any of the rates specified in subsections (l) through (n) of this section, the rate of compensation shall be increased by $87 per month for each such loss or loss of use, but in no event to exceed $4,176 per month;

(l) if the veteran, as the result of service-connected disability, has suffered the anatomical loss or loss of use of both feet, or of one hand and one foot, or is blind in both eyes, with 5/200 visual acuity or less, or is permanently bedridden or with such significant disabilities as to be in need of regular aid and attendance, the monthly compensation shall be $2,977;

(m) if the veteran, as the result of service-connected disability, has suffered the anatomical loss or loss of use of both hands, or of both legs at a level, or with complications, preventing natural knee action with prostheses in place, or of one arm and one leg at levels, or with complications, preventing natural elbow and knee action with prostheses in place, or has suffered blindness in both eyes having only light perception, or has suffered blindness in both eyes, rendering such veteran so significantly disabled as to be in need of regular aid and attendance, the monthly compensation shall be $3,284;

(n) if the veteran, as the result of service-connected disability, has suffered the anatomical loss or loss of use of both arms at levels, or with complications, preventing natural elbow action with prostheses in place, has suffered the anatomical loss of both legs so near the hip as to prevent the use of prosthetic appliances, or has suffered the anatomical loss of one arm and one leg so near the shoulder and hip as to prevent the use of prosthetic
appliances, or has suffered the anatomical loss of both eyes, or has suffered blindness without light perception in both eyes, the monthly compensation shall be $3,737;

(o) if the veteran, as the result of service-connected disability, has suffered disability under conditions which would entitle such veteran to two or more of the rates provided in one or more subsections (l) through (n) of this section, no condition being considered twice in the determination, or if the veteran has suffered bilateral deafness (and the hearing impairment in either one or both ears is service connected) rated at 60 percent or more disabling and the veteran has also suffered service-connected total blindness with 5/200 visual acuity or less, or if the veteran has suffered service-connected total deafness in one ear or bilateral deafness (and the hearing impairment in either one or both ears is service connected) rated at 40 percent or more disabling and the veteran has also suffered service-connected blindness having only light perception or less, or if the veteran has suffered the anatomical loss of both arms so near the shoulder as to prevent the use of prosthetic appliances, the monthly compensation shall be $4,176;

(p) in the event the veteran's service-connected disabilities exceed the requirements for any of the rates prescribed in this section, the Secretary may allow the next higher rate or an intermediate rate, but in no event in excess of $4,176. In the event the veteran has suffered service-connected blindness with 5/200 visual acuity or less and (1) has also suffered bilateral deafness (and the hearing impairment in either one or both ears is service connected) rated at no less than 30 percent disabling, the Secretary shall allow the next higher rate, or (2) has also suffered service-connected total deafness in one ear or service-connected anatomical loss or loss of use of one hand or one foot, the Secretary shall allow the next intermediate rate, but in no event in excess of $4,176. In the event the veteran has suffered service-connected blindness, having only light perception or less, and has also suffered bilateral deafness (and the hearing impairment in either one or both ears is service connected) rated at 10 or 20 percent disabling, the Secretary shall allow the next intermediate rate, but in no event in excess of $4,176. In the event the veteran has suffered the anatomical loss or loss of use, or a combination of anatomical loss and loss of use, of three extremities, the Secretary shall allow the next higher rate or intermediate rate, but in no event in excess of $4,176. Any intermediate rate under this subsection shall be established at the arithmetic mean, rounded down to the nearest dollar, between the two rates concerned;

(q) [Repealed]

(r) Subject to section 5503(c) of this title [38 USCS § 5503(c)], if any veteran, otherwise entitled to compensation authorized under subsection (o) of this section, at the maximum rate authorized under subsection (p) of this section, or at the intermediate rate authorized between the rates authorized under subsections (n) and (o) of this section and at the rate authorized under subsection (k) of this section, is in need of regular aid and attendance, then, in addition to such compensation--

(1) the veteran shall be paid a monthly aid and attendance allowance at the rate of $1,792; or
(2) if the veteran, in addition to such need for regular aid and attendance, is in need of a higher level of care, such veteran shall be paid a monthly aid and attendance allowance at the rate of $2,669, in lieu of the allowance authorized in clause (1) of
this subsection, if the Secretary finds that the veteran, in the absence of the provision of such care, would require hospitalization, nursing home care, or other residential institutional care.

For the purposes of clause (2) of this subsection, need for a higher level of care shall be considered to be need for personal health-care services provided on a daily basis in the veteran's home by a person who is licensed to provide such services or who provides such services under the regular supervision of a licensed health-care professional. The existence of the need for such care shall be determined by a physician employed by the Department or, in areas where no such physician is available, by a physician carrying out such function under contract or fee arrangement based on an examination by such physician. For the purposes of section 1134 of this title [38 USCS § 1134], such allowance shall be considered as additional compensation payable for disability.

(s) If the veteran has a service-connected disability rated as total, and (1) has additional service-connected disability or disabilities independently ratable at 60 percent or more, or, (2) by reason of such veteran's service-connected disability or disabilities, is permanently housebound, then the monthly compensation shall be $2,678. For the purpose of this subsection, the requirement of "permanently housebound" will be considered to have been met when the veteran is substantially confined to such veteran's house (ward or clinical areas, if institutionalized) or immediate premises due to a service-connected disability or disabilities which it is reasonably certain will remain throughout such veteran's lifetime.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:

1958. Act Aug. 27, 1958 (effective 1/1/59, as provided by § 2 of such Act), added subsec. (r).

1960. Act July 14, 1960 (effective on and after the first day of the second calendar month following enactment, as provided by § 2 of such Act, which appears as a note to this section) added subsec. (s).

1962. Act Sept. 7, 1962 (effective as provided by § 4 of such Act, which appears as 38 USCS § 1112 note), in subsec. (a), substituted "$20" for "$19"; in subsec. (b), substituted "$38" for "$36"; in subsec. (c), substituted "$58" for "$55"; in subsec. (d), substituted "$77" for "$73"; in subsec. (e), substituted "$107" for "$100"; in subsec. (f), substituted "$128" for "$120"; in subsec. (g), substituted "$149" for "$140"; in subsec. (h), substituted "$170" for "$160"; in subsec. (i), substituted "$191" for "$179"; in subsec. (j), substituted "$250" for "$225"; in
subsec. (k), substituted "$525" for "$450"; in subsec. (l), substituted "$340" for "$309"; in subsec. (m), substituted "$390" for "$359"; in subsec. (n), substituted "$440" for "$401"; in subsecs. (o) and (p), substituted "$525" for "$450"; in subsec. (r), substituted "$200" for "$150" and substituted "subject to the limitations of section 3203(f) of this title." for "for all periods during which he is not hospitalized at Government expense"; and in subsec. (s), substituted "$290" for "$265".

1963. Act May 15, 1963, P. L. 88-20 (effective as provided by § 2 of such Act, which appears as a note to this section), in subsec. (k), inserted "or deafness of both ears, having absence of air and bone conduction," wherever appearing.

Act May 15, 1963, P. L. 88-22 (effective as provided by § 2 of such Act, which appears as a note to this section), in subsec. (k), inserted "or has suffered complete organic aphonia with constant inability to communicate by speech," wherever appearing.

1965. Act Oct. 31, 1965 (effective as provided by § 9 of such Act, which appears as a note to this section), in subsec. (a), substituted "$21" for "$20"; in subsec. (b), substituted "$40" for "$38"; in subsec. (c), substituted "$60" for "$58"; in subsec. (d), substituted "$82" for "$77"; in subsec. (e), substituted "$113" for "$107"; in subsec. (f), substituted "$136" for "$128"; in subsec. (g), substituted "$161" for "$149"; in subsec. (h), substituted "$186" for "$170"; in subsec. (i), substituted "$209" for "$191"; in subsec. (j), substituted "$300" for "$250"; in subsec. (k), substituted "$600" for "$525"; in subsec. (l), substituted "$400" for "$340"; in subsec. (m), substituted "$450" for "$390"; in subsec. (n), substituted "$525" for "$440"; in subsec. (o), substituted "$600" for "$525" and "if the veteran has suffered bilateral deafness (and the hearing impairment in either one or both ears is service connected) rated at 60 per centum or more disabling and the veteran has also suffered service-connected total blindness with 5/200 visual acuity or less," for "has suffered total deafness"; in subsec. (p) substituted "$600". In the event the veteran has suffered service-connected blindness with 5/200 visual acuity or less and (1) has also suffered bilateral deafness (and the hearing impairment in either one or both ears is service connected) rated at no less than 40 per centum disabling, the Administrator shall allow the next higher rate, or (2) has also suffered service-connected total deafness in one ear, the Administrator shall allow the next intermediate rate, but in no event in excess of $600;" for "$525; and"; in subsec. (r), substituted "$250" for "$200"; and in subsec. (s), substituted "$350" for "$290".

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), substituted subsec. (k) for one which read: "if the veteran, as the result of service-connected disability, has suffered the anatomical loss or loss of use of a creative organ, or one foot, or one hand, or both buttocks, or blindness of one eye, having only light perception, or has suffered complete organic aphonia with constant inability to communicate by speech, or deafness of both ears, having absence of air and bone conduction, the rate of compensation therefor shall be $47 per month independent of any other compensation provided in subsections (a) through (j) of this section; and in the event of anatomical loss or loss of use of a creative organ, or one foot, or one hand, or both buttocks, or blindness of one eye, having only light perception, or has suffered complete organic aphonia with constant inability to communicate by speech, or deafness of both ears, having absence of air and bone conduction, in addition to the requirement for any of the rates specified in subsections (l) through (n) of this section, the rate of compensation shall be increased by $47 per month for each such loss or loss of use, but in no event to exceed $600 per month;".

1968. Act Aug. 19, 1968 (effective as provided by § 2 of such Act, which appears as a note to this section), in subsec. (a), substituted "$23" for "$21"; in subsec. (b), substituted "$43" for "$40"; in subsec. (c), substituted "$65" for "$60"; in subsec. (d), substituted "$89" for "$82"; in subsec. (e), substituted "$122" for "$113"; in subsec. (f), substituted "$147" for "$136"; in subsec. (g), substituted "$174" for "$161"; in subsec. (h), substituted "$201" for "$186"; in subsec. (i), substituted "$226" for "$209"; in subsec. (j), substituted "$400" for "$300"; in subsec. (k), substituted "$700" for "$600" and substituted "$500" for "$400"; in subsec. (l),
substituted "$500" for "$400"; in subsec. (m), substituted "$550" for "$450"; in subsecs. (o) and (p), substituted "$700" for "$600" wherever appearing; in subsec. (r), substituted "$300" for "$250"; and in subsec. (s), substituted "$450" for "$350".

Such Act further (applicable as provided by § 4(b) of such Act, which appears as a note to this section), repealed subsec. (q), which read: "if the veteran is shown to have had a service-connected disability resulting from an active tuberculous disease, which disease in the judgment of the Administrator has reached a condition of complete arrest, the monthly compensation shall be not less than $67.".

1970. Act Aug. 12, 1970 (effective as provided by § 9 of such Act, which appears as a note to this section), in subsec. (a), substituted "$25" for "$23"; in subsec. (b), substituted "$46" for "$43"; in subsec. (c), substituted "$70" for "$65"; in subsec. (d), substituted "$96" for "$89"; in subsec. (e), substituted "$135" for "$122"; in subsec. (f), substituted "$163" for "$147"; in subsec. (g), substituted "$193" for "$174"; in subsec. (h), substituted "$223" for "$201"; in subsec. (i), substituted "$250" for "$226"; in subsec. (j), substituted "$450" for "$400"; in subsec. (k), substituted "$560" for "$500" and substituted "$784" for "$700"; in subsec. (l), substituted "$560" for "$500"; in subsec. (m), substituted "$616" for "$550"; in subsec. (n), substituted "$700" for "$625"; in subsecs. (o) and (p), substituted "$784" for "$700" wherever appearing; in subsec. (r), substituted "$336" for "$300"; and in subsec. (s), substituted "$504" for "$450".

1972. Act June 30, 1972 (effective on the first day of the second calendar month which begins after the date of enactment, as provided by § 301 of such Act, which appears as a note to this section), in subsec. (a), substituted "$28" for "$25"; in subsec. (b), substituted "$51" for "$46"; in subsec. (c), substituted "$77" for "$70"; in subsec. (d), substituted "$106" for "$96"; in subsec. (e), substituted "$149" for "$135"; in subsec. (f), substituted "$179" for "$163"; in subsec. (g), substituted "$212" for "$193"; in subsec. (h), substituted "$245" for "$223"; in subsec. (i), substituted "$275" for "$250"; in subsec. (j), substituted "$495" for "$450"; in subsec. (k), substituted "$616" for "$560" and substituted "$862" for "$784"; in subsec. substituted "$616" for "$560"; in subsec. (m), substituted "$678" for "$616"; in subsec. (n), substituted "$770" for "$700"; in subsecs. (o) and (p), substituted "$862" for "$784" wherever appearing; in subsec. (r), substituted "$370" for "$336"; and in subsec. (s), substituted "$554" for "$504".

1974. Act May 31, 1974 (effective as provided by § 401 of such Act, which appears as a note to this section), in subsec. (a), substituted "$32" for "$28"; in subsec. (b), substituted "$59" for "$51"; in subsec. (c), substituted "$89" for "$77"; in subsec. (d), substituted "$122" for "$106"; in subsec. (e), substituted "$171" for "$149"; in subsec. (f), substituted "$211" for "$179"; in subsec. (g), substituted "$250" for "$212"; in subsec. (h), substituted "$289" for "$245"; in subsec. (i), substituted "$325" for "$275"; in subsec. (j), substituted "$584" for "$495"; in subsec. (k), substituted "$52" for "$47" wherever appearing, substituted "$727" for "$616," and substituted "$1,017" for "$862"; in subsec. (l), substituted "$727" for "$616"; in subsec. (m), substituted "$800" for "$678"; in subsec. (n), substituted "$909" for "$770"; in subsecs. (o) and (p), substituted "$1,017" for "$862" wherever appearing; in subsec. (r), substituted "$437" for "$370"; and in subsec. (s), substituted "$654" for "$554".

1975. Act Aug. 5, 1975 (effective 8/1/1975, as provided by § 301 of such Act, which appears as a note to this section), in subsec. (a), substituted "$35" for "$32"; in subsec. (b), substituted "$65" for "$59"; in subsec. (c), substituted "$98" for "$89"; in subsec. (d), substituted "$134" for "$122"; in subsec. (e), substituted "$188" for "$171"; in subsec. (f), substituted "$236" for "$211"; in subsec. (g), substituted "$280" for "$250"; in subsec. (h), substituted "$324" for "$289"; in subsec. (i), substituted "$364" for "$325"; in subsec. (j), substituted "$655" for "$584"; in subsec. (k), substituted "$814" for "$727" and substituted "$1,139" for "$1,017"; in subsec. (l), substituted "$814" for "$727"; in subsec. (m), substituted "$896" for "$800"; in subsec. (n), substituted "$1,018" for "$909"; in subsecs. (o) nd (p),
substituted "$1,139" for "$1,017" wherever appearing; in subsec. (r), substituted "$489" for "$437"; and in subsec. (s), substituted "$732" for "$654".

1976.  Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in subsec. (a), substituted "$38" for "$35"; in subsec. (b), substituted "$70" for "$65"; in subsec. (c), substituted "$106" for "$98"; in subsec. (d), substituted "$145" for "$134"; in subsec. (e), substituted "$203" for "$188"; in subsec. (f), substituted "$255" for "$236"; in subsec. (g), substituted "$302" for "$280"; in subsec. (h), substituted "$350" for "$324"; in subsec. (i), substituted "$393" for "$364"; in subsec. (j), substituted "$707" for "$655"; in subsec. (k), substituted "$56" for "$52" wherever appearing, substituted "$879" for "$814", and substituted "$1,231" for "$1,139"; in subsec. (l), substituted "$791" for "$814"; in subsec. (m), substituted "$968" for "$896" and substituted "such veteran" for "him"; in subsec. (n), substituted "$1,099" for "$1,018"; in subsec. (o), substituted "$1,231" for "$1,139", deleted "in combination with total blindness with 5/200 visual acuity or less," following "total deafness" and substituted "such veteran" for "him"; in subsec. (p), substituted "$1,231" for "$1,139" wherever appearing and deleted ", in his discretion," following "Administrator", first time appearing; in subsec. (r), substituted "$528" for "$489", substituted "3203(e)" for "3203(f)" and substituted "such veteran" for "he"; in subsec. (s), substituted "$791" for "$732" and substituted "such veteran's" for "his" wherever appearing.

1977.  Act Oct. 3, 1977 (effective 10/1/1977 as provided by § 501 of such Act, which appears as a note to this section), in subsec. (a), substituted "$41" for "$38"; in subsec. (b), substituted "$75" for "$70"; in subsec. (c), substituted "$113" for "$106"; in subsec. (d), substituted "$155" for "$145"; in subsec. (e), substituted "$216" for "$203"; in subsec. (f), substituted "$272" for "$255"; in subsec. (g), substituted "$322" for "$302"; in subsec. (h), substituted "$373" for "$350"; in subsec. (i), substituted "$419" for "$393"; in subsec. (j), substituted "$754" for "$707"; in subsec. (k), substituted "$937" for "$879" and substituted "$1,312" for "$1,231"; in subsec. (l), substituted "$937" for "$879"; in subsec. (m), substituted "$1,032" for "$968"; in subsec. (n), substituted "$1,172" for "$1,099"; in subsec. (o) and (p), substituted "$1,312" for "$1,231" wherever appearing: in subsec. (r), substituted "$563" for "$528"; and in subsec. (s), substituted "$843" for "$791".

1978.  Act Oct. 18, 1978 (effective as provided by § 401 of such Act, which appears as a note to this section), in subsec. (a), substituted "$44" for "$41"; in subsec. (b), substituted "$80" for "$75"; in subsec. (c), substituted "$121" for "$113"; in subsec. (d), substituted "$166" for "$155"; in subsec. (e), substituted "$232" for "$216"; in subsec. (f), substituted "$292" for "$272"; in subsec. (g), substituted "$346" for "$322"; in subsec. (h), substituted "$400" for "$373"; in subsec. (i), substituted "$450" for "$419"; in subsec. (j), substituted "$809" for "$754"; in subsec. (k), substituted "$1,005" for "$937" and substituted "$1,408" for "$1,312"; in subsec. (l), substituted "$1,005" for "$937"; in subsec. (m), substituted "$1,107" for "$1,032"; in subsec. (n), substituted "$1,258" for "$1,172"; in subsec. (o), substituted "$1,408" for "$1,312"; in subsec. (p), substituted "$1,408" for "$1,312" wherever appearing and inserted ". In the event the veteran has suffered the anatomical loss or loss of use, or a combination of anatomical loss and loss of use, of three extremities, the Administrator shall allow the next higher rate or intermediate rate, but in no event in excess of $1,408"; in subsec. (r), substituted:

"Subject to section 3203(e) of this title, if any veteran, otherwise entitled to the compensation authorized under subsection (o) of this section or at the maximum rate authorized under subsection (p) of this section, is in need of regular aid and attendance, then, in addition to such compensation under subsection (o) or (p) of this section--

"(1) the veteran shall be paid a monthly aid and attendance allowance at the rate of $604; or

"(2) if the veteran, in addition to such need for regular aid and attendance, is in need of a higher level of care, such veteran shall be paid a monthly aid and attendance allowance at the rate of $900, in lieu of the allowance authorized in clause (1) of this subsection, if

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the Administrator finds that the veteran, in the absence of the provision of such care, would require hospitalization, nursing home care, or other residential institutional care.

For the purposes of clause (2) of this subsection, need for a higher level of care shall be considered to be need for personal health-care services provided on a daily basis in the veteran's home by a person who is licensed to provide such services or who provides such services under the regular supervision of a licensed health-care professional. The existence of the need for such care shall be determined by a physician employed by the Veterans' Administration or, in areas where no such physician is available, by a physician carrying out such function under contract or fee arrangement based on an examination by such physician."

for "if any veteran, otherwise entitled to the compensation authorized under subsection (o) of this section, or the maximum rate authorized under subsection (p) of this section, is in need of regular aid and attendance, such veteran shall be paid in addition to such compensation, a monthly aid and attendance allowance at the rate of $563 per month subject to the limitations of section 3203(e) of this title."; in subsec. (s), substituted "$905" for "$843"; and added subsec. (t).

1979. Act Nov. 28, 1979 (effective as provided by § 601 of such Act, which appears as a note to this section), in subsec. (a), substituted "$48" for "$44"; in subsec. (b), substituted "$88" for "$80"; in subsec. (c), substituted "$133" for "$121"; in subsec. (d), substituted "$182" for "$166"; in subsec. (e), substituted "$255" for "$232"; in subsec. (f), substituted "$321" for "$292"; in subsec. (g), substituted "$380" for "$346"; in subsec. (h), substituted "$440" for "$400"; in subsec. (i), substituted "$495" for "$450"; in subsec. (j), substituted "$889" for "$809"; in subsec. (k), substituted "$62" for "$56" wherever appearing, substituted "$1,104" for "$1,005", and substituted "$1,547" for "$1,408"; in subsec. (l), substituted "$1,104" for "$1,005"; in subsec. (m), substituted "$1,217" for "$1,107"; in subsec. (n), substituted "$1,383" for "$1,258"; in subsec. (o), substituted "$1,547" for "$1,408"; in subsec. (p), substituted "$1,547" for "$1,408" wherever appearing and inserted ". Any intermediate rate under this subsection shall be established at the arithmetic mean, rounded to the nearest dollar, between the two rates concerned"; in subsec. (r)(1), substituted "$664" for "$604"; in subsec. (r)(2), substituted "$989" for "$900"; in subsec. (s), substituted "$995" for "$905"; and in subsec. (t)(1), substituted "$192" for "$175".

1980. Act Oct. 7, 1980 (effective as provided by § 601 of such Act, which appears as a note to this section), in subsec. (a), substituted "$54" for "$48"; in subsec. (b), substituted "$99" for "$88"; in subsec. (c), substituted "$150" for "$133"; in subsec. (d), substituted "$206" for "$182"; in subsec. (e), substituted "$291" for "$255"; in subsec. (f), substituted "$367" for "$321"; in subsec. (g), substituted "$434" for "$380"; in subsec. (h), substituted "$503" for "$440"; in subsec. (i), substituted "$566" for "$495"; in subsec. (j), substituted "$1,016" for "$889"; in subsec. (k), substituted "$1,262" for "$1,104" and substituted "$1,768" for "$1,547"; in subsec. (l), substituted "$1,262" for "$1,104"; in subsec. (m), substituted "$1,391" for "$1,217"; in subsec. (n), substituted "$1,581" for "$1,383"; in subsec. (o) and (p), substituted "$1,768" for "$1,547" wherever appearing; in subsec. (r)(1), substituted "$759" for "$664"; in subsec. (r)(2), substituted "$1,130" for "$989"; in subsec. (s), substituted "$1,137" for "$995"; and in subsec. (t)(1), substituted "$219" for "$192".

1981. Act Oct. 17, 1981 (effective 10/1/81, as provided by § 701(a) of such Act, which appears as a note to this section), in subsec. (a), substituted "$58" for "$54"; in subsec. (b), substituted "$107" for "$99"; in subsec. (c), substituted "$162" for "$150"; in subsec. (d), substituted "$232" for "$206"; in subsec. (e), substituted "$328" for "$291"; in subsec. (f), substituted "$413" for "$367"; in subsec. (g), substituted "$521" for "$434"; in subsec. (h), substituted "$604" for "$503"; in subsec. (i), substituted "$679" for "$566"; in subsec. (j), substituted "$1,130" for "$1,016"; in subsec. (k), substituted "$1,403" and "$1,966" for "$1,262" and "$1,768"; in subsec. (l), deleted "both hands, or" preceding "both feet" and substituted "$1,403" for "$1,262"; in subsec. (m), substituted "both hands, or of both legs at a level, or with complications, preventing normal knee action with prostheses in place, or of one
arm and one leg at levels, or with complications, preventing natural elbow and knee action with prostheses" for "two extremities at a level, or with complications, preventing natural elbow or knee action with prosthesis" and substituted $1,547" for "$1,391"; in subsec. (n), substituted "or loss of use of both arms at levels, or with complications, preventing natural elbow action with prostheses in place, has suffered the anatomical loss of both legs so near the hip as to prevent the use of prosthetic appliances, or has suffered the anatomical loss of one arm and one leg so near the shoulder and hip as to prevent the use of prosthetic appliances," for "of two extremities so near the shoulder or hip as to prevent the use of a prosthetic appliance", and substituted "$1,758" for "$1,581"; in subsec. (o), inserted "or if the veteran has suffered the anatomical loss of both arms so near the shoulder as to prevent the use of prosthetic appliances," and substituted "$1,966" for "$1,768"; in subsec. (p), substituted "$1,966" for "$1,768", wherever appearing; in subsec. (q), in para. (1), substituted "$844" for "$759", and in para. (2), substituted "$1,257" for "$1,130"; in subsec. (s), substituted "$1,264" for "$1,137"; and in subsec. (t)(1), substituted "$244" for "$219".

1982. Act Sept. 8, 1982 (effective 10/1/82, as provided by § 404(c) of such Act, which appears as a note to this section), in subsec. (p), inserted "down" following "rounded".

Act Oct. 14, 1982, § 101(a) (effective 10/1/82, as provided by § 108 of such Act, which appears as a note to this section), in subsec. (a), substituted "$62" for "$58"; in subsec. (b), substituted "$114" for "$107"; in subsec. (c), substituted "$173" for "$162"; in subsec. (d), substituted "$249" for "$232"; in subsec. (e), substituted "$352" for "$328"; in subsec. (f), substituted "$443" for "$413"; in subsec. (g), substituted "$559" for "$521"; in subsec. (h), substituted "$648" for "$604"; in subsec. (i), substituted "$729" for "$679"; in subsec. (j), substituted "$1,213" for "$1,130"; in subsec. (k), substituted "$1,506" for "$1,403" and substituted "$2,111" for "$1,966"; in subsec. (l), substituted "$1,506" for "$1,403"; in subsec. (m), substituted "$1,661" for "$1,547"; in subsec. (n), substituted "$1,888" for "$1,758"; in subsec. (o), substituted "$2,111" for "$1,966"; in subsec. (p), substituted "$2,111" for "$1,966", wherever appearing; in subsec. (q), in para. (1), substituted "$906" for "$844" and, in para. (2), substituted "$1,350" for "$1,257"; in subsec. (s), substituted "$1,357" for "$1,264"; and, in subsec. (t), substituted "$262" for "$244".

Such Act further (effective 10/1/82, as provided by § 111(c) of such Act, which appears as a note to this section), in subsec. (o), inserted "or has suffered blindness without light perception in both eyes,"; and in subsec. (p), inserted "or service-connected anatomical loss or loss of use of one hand or one foot".

1984. Act March 2, 1984 (effective 10/1/83, as provided by § 114 of such Act, which appears as 38 USCS § 1112 note), in subsec. (o), inserted "or if the veteran has suffered service-connected total deafness in one ear or bilateral deafness (and the hearing impairment in either one or both ears is service connected) rated at 40 percent or more disabling and the veteran has also suffered service-connected blindness having only light perception or less,"; and, in subsec. (p), in para. (1), substituted "30" for "40", and, in para. (2), inserted the sentence beginning "In the event the veteran has suffered service-connected blindness . . .".

Such Act further (effective 4/1/84, as provided by § 107 of such Act, which appears as a note to this section) substituted "percent" for "per centum" wherever it appears; in subsec. (a), substituted "$64" for "$62"; in subsec. (b), substituted "$118" for "$114"; in subsec. (c), substituted "$179" for "$173"; in subsec. (d), substituted "$258" for "$249"; in subsec. (e), substituted "$364" for "$352"; in subsec. (f), substituted "$459" for "$443"; in subsec. (g), substituted "$579" for "$559"; in subsec. (h), substituted "$671" for "$648"; in subsec. (i), substituted "$755" for "$729"; in subsec. (j), substituted "$1,255" for "$1,213"; in subsec. (k), substituted "$1,559" for "$1,506" and substituted "$2,185" for "$2,111"; in subsec. (l), substituted "$1,559" for "$1,506"; in subsec. (m), substituted "$1,719" for "$1,661"; in subsec. (n), substituted "$1,954" for "$1,888"; in subsec. (o), substituted "$2,185" for "$2,111"; in subsec. (p), substituted "$2,185" for "$2,111" wherever appearing; in subsec. (r), substituted
Act Oct. 24, 1984 (effective 12/1/84, as provided by § 107 of such Act, which appears as a note to this section), in subsec. (a), substituted "$66" for "$64"; in subsec. (b), substituted "$122" for "$118"; in subsec. (c), substituted "$185" for "$179"; in subsec. (d), substituted "$266" for "$258"; in subsec. (e), substituted "$376" for "$364"; in subsec. (f), substituted "$474" for "$459"; in subsec. (g), substituted "$598" for "$579"; in subsec. (h), substituted "$692" for "$671"; in subsec. (i), substituted "$779" for "$755"; in subsec. (j), substituted "$1,295" for "$1,255"; in subsec. (k), substituted "$1,609" for "$1,559" and "$2,255" for "$2,185"; in subsec. (l), substituted "$1,609" for "$1,559"; in subsec. (m), substituted "$1,774" for "$1,719"; in subsec. (n), substituted "$1,609" for "$1,559" and "$2,255" for "$2,185" wherever it appears; in subsec. (r), substituted "$968" for "$938" and substituted "$1,442" for "$1,397"; in subsec. (s), substituted "$1,449" for "$1,404"; and in subsec. (t), substituted "$280" for "$271".

1986. Act Jan. 13, 1986 (effective 12/1/85, as provided by § 107 of such Act, which appears as a note to this section), in subsec. (a), substituted "$68" for "$66"; in subsec. (b), substituted "$126" for "$122"; in subsec. (c), substituted "$191" for "$185"; in subsec. (d), substituted "$274" for "$258"; in subsec. (e), substituted "$388" for "$376"; in subsec. (f), substituted "$489" for "$474"; in subsec. (g), substituted "$617" for "$598"; in subsec. (h), substituted "$713" for "$692"; in subsec. (i), substituted "$803" for "$779"; in subsec. (j), substituted "$1,335" for "$1,295"; in subsec. (k), substituted "$1,659" for "$1,609" and substituted "$2,325" for "$2,255"; in subsec. (l), substituted "$1,609" for "$1,609"; in subsec. (m), substituted "$1,829" for "$1,774"; in subsec. (n), substituted "$2,080" for "$2,017"; in subsecs. (o) and (p), substituted "$2,325" for "$2,255" wherever appearing; in subsec. (r), in para. (1) substituted "$998" for "$968", and in para. (2), substituted "$1,487" for "$1,442"; in subsec. (s), substituted "$1,494" for "$1,449"; and in subsec. (t)(1), substituted "$289" for "$280".

Act Oct. 28, 1986 (effective upon enactment on 10/28/86, as provided by § 109(c) of such Act, which appears as 38 USCS § 1160 note), deleted subsec. (t), which read:

"(t)(1) If the veteran (A) is entitled to receive compensation at any rate provided for under subsection (a) through (i) of this section and compensation under subsection (k) of this section, (B) has suffered the loss or loss of use of an extremity as a result of a service-connected disability ratable at 40 percent or more, and (C) has suffered the loss or loss of use of the paired extremity as a result of a non-service-connected disability, not the result of the veteran's own willful misconduct, that would be rated, if service-connected, at 40 percent or more, the monthly rate of compensation payable to such veteran shall be increased by $289.

"(2) If a veteran described in paragraph (1) of this subsection receives any money or property of value pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of any cause of action for damages for the non-service-connected disability described in such paragraph, the increase in the rate of compensation otherwise payable under this subsection shall not be paid for any month following a month in which any such money or property is received until such time as the total of the amount of such increase that would otherwise have been payable equals the total of the amount of any such money received and the fair market value of any such property received."

Act Oct. 28, 1986, (effective 12/1/86, as provided by § 107 of such Act, which appears as a note to this section), in subsec. (a) substituted "$69" for "$68"; in subsec. (b) substituted "$128" for "$126"; in subsec. (c) substituted "$194" for "$191"; in subsec. (d) substituted "$278" for "$274"; in subsec. (e) substituted "$394" for "$388"; in subsec. (f) substituted "$496" for "$489"; in subsec. (g) substituted "$626" for "$617"; in subsec. (h) substituted "$724" for "$713"; in subsec. (i) substituted "$815" for "$803"; in subsec. (j) substituted "$1,355" for "$1,335"; in subsec. (k) substituted "$63", "$1,684", and "$2,360" for "$62";
"$1,659", and "$2,325" respectively; in subsec. (l), substituted "$1,684" for "$1,659"; in subsec. (m) substituted "$1,856" for "$1,829"; in subsec. (n) substituted "$2,111" for "$2,080"; in subsecs. (o) and (p) substituted "$2,360" for "$2,325" wherever appearing; in subsec. (r) substituted "$1,509" for "$1,013" and in subsec. (s) substituted "$1,516" for "$1,494".

1987. Act Dec. 31, 1987 (as provided by § 107 of such Act, which appears as a note to this section), in subsec. (a), substituted "$71" for "$69"; in subsec. (b), substituted "$133" for "$128"; in subsec. (c), substituted "$202" for "$194"; in subsec. (d), substituted "$269" for "$278"; in subsec. (e), substituted "$410" for "$394"; in subsec. (f), substituted "$516" for "$496"; in subsec. (g), substituted "$652" for "$626"; in subsec. (h), substituted "$754" for "$724"; in subsec. (i), substituted "$849" for "$815"; in subsec. (j), substituted "$1,411" for "$1,355"; in subsec. (k) substituted "$1,754" and "$2,459" for "$1,684" and "$2,360" respectively; in subsec. (l), substituted "$1,754" for "$1,684"; in subsec. (m), substituted "$1,933" for "$1,856"; in subsec. (n), substituted "$2,199" for "$2,111"; in subsec. (o) and (p), substituted "$2,459" for "$2,360"; in subsec. (r), substituted "$1,055" and "$1,572" for "$1,013" and "$1,509" respectively; and in subsec. (s), substituted "$1,579" for "$1,516".

1988. Act Nov. 18, 1988 (as provided by § 1106 of such Act, which appears as a note to this section) substituted the following: in subsec. (a), "$73" for "$71"; in subsec. (b), "$138" for "$133"; in subsec. (c), "$210" for "$202"; in subsec. (d), "$300" for "$289"; in subsec. (e), "$426" for "$410"; in subsec. (f), "$537" for "$516"; in subsec. (g) "$678" for "$652"; in subsec. (h), "$784" for "$754"; in subsec. (i), "$883" for "$849"; in subsec. (j), "$1,468" for "$1,411"; in subsec. (k), "$1,825" and "$2,559" for "$1,754" and "$2,459" respectively; in subsec. (l), "$1,825" for "$1,754"; in subsec. (m), "$2,012" for "$1,933"; in subsec. (n), "$2,289" for "$2,199"; in subsecs. (o) and (p), "$2,559" for "$2,459"; in subsec. (r), "$1,098" and "$1,636" for "$1,055" and "$1,572", respectively; and in subsec. (s), "$1,643" for "$1,579".

1989. Act Dec. 18, 1989 (as provided by § 106 of such Act, which appears as a note to this section), in subsec. (a), substituted "$76" for "$73"; in subsec. (b), substituted "$144" for "$138"; in subsec. (c), substituted "$220" for "$210"; in subsec. (d), substituted "$300" for "$289"; in subsec. (e), substituted "$426" for "$410"; in subsec. (f), substituted "$537" for "$516"; in subsec. (g) "$678" for "$652"; in subsec. (h), "$784" for "$754"; in subsec. (i), "$883" for "$849"; in subsec. (j), "$1,468" for "$1,411"; in subsec. (k), "$1,825" and "$2,559" for "$1,754" and "$2,459" respectively; in subsec. (l), "$1,825" for "$1,754"; in subsec. (m), "$2,012" for "$1,933"; in subsec. (n), "$2,289" for "$2,199"; in subsecs. (o) and (p), "$2,559" for "$2,459"; in subsec. (r), "$1,098" and "$1,636" for "$1,055" and "$1,572", respectively; and in subsec. (s), "$1,643" for "$1,579".

1991. Act Feb. 6, 1991 (as provided by § 7 of such Act, which appears as a note to this section), in subsec. (a), substituted "$80" for "$76"; in subsec. (b), substituted "$144" for "$138"; in subsec. (c), substituted "$220" for "$210"; in subsec. (d), substituted "$300" for "$289"; in subsec. (e), substituted "$426" for "$410"; in subsec. (f), substituted "$537" for "$516"; in subsec. (g) "$678" for "$652"; in subsec. (h), "$784" for "$754"; in subsec. (i), "$883" for "$849"; in subsec. (j), "$1,468" for "$1,411"; in subsec. (k), "$1,825" and "$2,559" for "$1,754" and "$2,459" respectively; in subsec. (l), substituted "$1,911" and "$2,679" for "$1,825" and "$2,559" respectively; in subsec. (m), substituted "$1,911" for "$1,825"; in subsec. (n), substituted "$2,107" for "$2,012"; in subsec. (o), substituted "$2,397" for "$2,289"; in subsec. (p), substituted "$2,679" for "$2,559" wherever appearing; in subsec. (r), substituted "$1,150" for "$1,098", and in para. (1), substituted "$1,579" for "$1,516".

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Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 314, as 38 USCS § 1114, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".

Act Nov. 12, 1991 (effective 12/1/91 as provided by § 7 of such Act, which appears as a note to this section), in subsec. (a), substituted "$83" for "$80"; in subsec. (b), substituted "$157" for "$151"; in subsec. (c), substituted "$240" for "$231"; in subsec. (d), substituted "$342" for "$330"; in subsec. (e), substituted "$487" for "$470"; in subsec. (f) substituted "$614" for "$592"; in subsec. (g), substituted "$776" for "$748"; in subsec. (h), substituted "$897" for "$865"; in subsec. (i), substituted "$1,010" for "$974"; in subsec. (j), substituted "$1,680" for "$1,620"; in subsec. (k), substituted "$68" for "$66" in two places and substituted "$2,089" and "$2,927" for "$2,014" and "$2,823", respectively; in subsec. (l), substituted "$2,089" for "$2,014"; in subsec. (m), substituted "$302" for "$2,220"; in subsec. (n), substituted "$2,619" for "$2,526"; in subsecs. (o) and (p), substituted "$2,927" for "$2,823"; in subsec. (r), substituted "$1,257" and "$1,872" for "$1,212" for "$1,805", respectively; and, in subsec. (s), substituted "$1,879" for "$1,812".

1993. Act Aug. 13, 1993, in subsec. (a), substituted "$85" for "$83"; in subsec. (b), substituted "$162" for "$157"; in subsec. (c), substituted "$247" for "$240"; in subsec. (d), substituted "$352" for "$342"; in subsec. (e), substituted "$502" for "$487"; in subsec. (f), substituted "$632" for "$614"; in subsec. (g), substituted "$799" for "$776"; in subsec. (h), substituted "$924" for "$897"; in subsec. (i), substituted "$1,040" for "$1,010"; in subsec. (j), substituted "$1,730" for "$1,680"; in subsec. (k), substituted "$70" for "$68", substituted "$2,152" for "$2,089", and substituted "$3,015" for "$2,927" in subsec. (l), substituted "$2,152" for "$2,089"; in subsec. (m), substituted "$3,371" for "$3,015"; in subsec. (n), substituted "$698" for "$2,619"; in subsecs. (o) and (p), substituted "$3,015" for "$2,927", wherever appearing; in subsec. (r), substituted "$1,295" for "$1,257" and substituted "$1,928" for "$1,872"; and, in subsec. (s), substituted "$1,935" for "$1,879".

Act Nov. 11, 1993 (effective 12/1/93, as provided by § 7 of such Act, which appears as a note to this section), in subsec. (a), substituted "$87" for "$85"; in subsec. (b), substituted "$166" for "$162"; in subsec. (c), substituted "$253" for "$247"; in subsec. (d), substituted "$361" for "$352"; in subsec. (e), substituted "$515" for "$502"; in subsec. (f), substituted "$648" for "$632"; in subsec. (g), substituted "$819" for "$799"; in subsec. (h), substituted "$948" for "$924"; in subsec. (i), substituted "$1,067" for "$1,040"; in subsec. (j), substituted "$1,774" for "$1,730"; in subsec. (k), substituted "$2,207" for "$2,152" and "$3,093" for "$3,015"; in subsec. (l), substituted "$2,207" for "$2,152"; in subsec. (m), substituted "$2,432" for "$2,371"; in subsec. (n), substituted "$2,768" for "$2,698"; in subsecs. (o) and (p), substituted "$3,093" for "$3,015", wherever appearing; in subsec. (r), substituted "$1,328" for "$1,295" and "$1,978" for "$1,928"; and, in subsec. (s), substituted "$1,985" for "$1,935".

1997. Act Nov. 19, 1997 (effective 12/1/97, as provided by § 7 of such Act, which appears as a note to this section), in subsec. (a), substituted "$95" for "$87"; in subsec. (b), substituted "$182" for "$166"; in subsec. (c), substituted "$279" for "$253"; in subsec. (d), substituted "$399" for "$361"; in subsec. (e), substituted "$569" for "$515"; in subsec. (f), substituted "$717" for "$648"; in subsec. (g), substituted "$905" for "$819"; in subsec. (h), substituted "$1,049" for "$948"; in subsec. (i), substituted "$1,181" for "$1,067"; in subsec. (j), substituted "$1,964" for "$1,774"; in subsec. (k), substituted "$75" for "$70" in two places, substituted "$2,443" for "$2,207", and substituted "$3,426" for "$3,093" in subsec. (l), substituted "$2,443" for "$2,207"; in subsec. (m), substituted "$2,694" for "$2,432"; in subsec. (n), substituted "$3,066" for "$2,768"; in subsecs. (o) and (p), substituted "$3,426" for "$3,093" wherever appearing; in subsec. (r), in para. (1), substituted "$1,471" for "$1,328"
and, in para. (2), substituted "$2,190" for "$1,978"; and, in subsec. (s), substituted "$2,199" for "$1,985".

1999. Act Nov. 30, 1999 (effective 12/1/99, as provided by § 7 of such Act, which appears as a note to this section), in subsec. (a), substituted "$98" for "$95"; in subsec. (b), substituted "$188" for "$182"; in subsec. (c), substituted "$288" for "$279"; in subsec. (d), substituted "$413" for "$399"; in subsec. (e), substituted "$589" for "$569"; in subsec. (f), substituted "$743" for "$717"; in subsec. (g), substituted "$937" for "$905"; in subsec. (h), substituted "$1,087" for "$1,049"; in subsec. (i), substituted "$1,224" for "$1,181"; in subsec. (j), substituted "$2,036" for "$1,964"; in subsec. (k), substituted "$76" for "$75" in two places, substituted "$2,533" for "$2,443", and substituted "$3,553" for "$3,426"; in subsec. (l), substituted "$2,533" for "$2,443"; in subsec. (m), substituted "$2,794" for "$2,694"; in subsec. (n), substituted "$3,179" for "$3,066"; in subsecs. (o) and (p), substituted "$3,553" for "$3,426" wherever appearing; in subsec. (r), in para. (1), substituted "$1,525" for "$1,471" and, in para. (2), "$2,271" for "$2,190"; and, in subsec. (s), substituted "$2,280" for "$2,199".

2000. Act Nov. 1, 2000, in subsec. (k), substituted "has suffered" for "or has suffered" following "light perception," and inserted "or, in the case of a woman veteran, has suffered the anatomical loss of one or both breasts (including loss by mastectomy)."

2001. Act Dec. 21, 2001 (effective 12/1/2001, as provided by § 7 of such Act, which appears as a note to this section), in subsec. (a), substituted "$103" for "$98"; in subsec. (b), substituted "$199" for "$188"; in subsec. (c), substituted "$306" for "$288"; in subsec. (d), substituted "$439" for "$413"; in subsec. (e), substituted "$625" for "$589"; in subsec. (f), substituted "$790" for "$743"; in subsec. (g), substituted "$995" for "$937"; in subsec. (h), substituted "$1,155" for "$1,087"; in subsec. (i), substituted "$1,299" for "$1,224"; in subsec. (j), substituted "$2,163" for "$2,036"; in subsec. (k), substituted "$80" for "$76" in two places, substituted "$2,691" for "$2,443", and substituted "$3,775" for "$3,553"; in subsec. (l), substituted "$2,691" for "$2,533"; in subsec. (m), substituted "$2,969" for "$2,794"; in subsec. (n), substituted "$3,378" for "$3,179"; in subsecs. (o) and (p), substituted "$3,775" for "$3,553" wherever appearing; in subsec. (r), in para. (1), substituted "$1,621" for "$1,525", and, in para. (2), substituted "$2,413" for "$2,271"; and, in subsec. (s), substituted "$2,422" for "$2,280".

Act Dec. 27, 2001, in subsec. (r), in the introductory matter, substituted "section 5503(c)" for "section 5503(e)".

2002. Act Dec. 6, 2002, in subsec. (a), substituted "$104" for "$103"; in subsec. (b), substituted "$201" for "$199"; in subsec. (c), substituted "$310" for "$306"; in subsec. (d), substituted "$445" for "$439"; in subsec. (e), substituted "$633" for "$625"; in subsec. (f), substituted "$801" for "$790"; in subsec. (g), substituted "$1,008" for "$995"; in subsec. (h), substituted "$1,171" for "$1,155"; in subsec. (i), substituted "$1,317" for "$1,299"; in subsec. (j), substituted "$2,193" for "$2,163"; in subsec. (k), substituted "25 percent or more of tissue from a single breast or both breasts in combination (including loss by mastectomy or partial mastectomy) or has received radiation treatment of breast tissue" for "one or both breasts (including loss by mastectomy)"; substituted "$81" for "$80" in two places, substituted "$2,728" for "$2,691", and substituted "$3,827" for "$3,775"; in subsec. (l), substituted "$2,728" for "$2,691"; in subsec. (m), substituted "$3,010" for "$2,969"; in subsec. (n), substituted "$3,425" for "$3,378"; in subsecs. (o) and (p), substituted "$3,827" for "$3,775" wherever appearing; in subsec. (r), substituted "$1,643" for "$1,621" and substituted "$2,446" for "$2,413"; and, in subsec. (s), substituted "$2,455" for "$2,422".

2004. Act Dec. 10, 2004, in subsec. (a), substituted "$106" for "$104"; in subsec. (b), substituted "$205" for "$201"; in subsec. (c), substituted "$316" for "$310"; in subsec. (d), substituted "$454" for "$445"; in subsec. (e), substituted "$646" for "$633"; in subsec. (f), substituted "$817" for "$801"; in subsec. (g), substituted "$1,029" for "$1,008"; in subsec. (h), substituted "$1,195" for "$1,171"; in subsec. (i), substituted "$1,344" for "$1,317"; in subsec. (j), substituted "$2,239" for "$2,193"; in subsec. (k), substituted "$82" for "$81" in two places, substituted "$2,785" for "$2,728", and substituted "$3,907" for "$3,827"; in subsec. (l),
substituted "$2,785" for "$2,728"; in subsec. (m), substituted "$3,073" for "$3,010"; in subsec. (n), substituted "$3,496" for "$3,425"; in subsecs. (o) and (p), substituted "$3,907" for "$3,827" wherever appearing; in subsec. (r), substituted "$1,677" for "$1,643" and substituted "$2,497" for "$2,446"; and, in subsec. (s), substituted "$2,506" for "$2,455".

2005. Act Nov. 22, 2005 (effective 12/1/2005, as provided by § 2(f) of such Act, which appears as a note to this section), in subsec. (a), substituted "$112" for "$106"; in subsec. (b), substituted "$218" for "$205"; in subsec. (c), substituted "$337" for "$316"; in subsec. (d), substituted "$485" for "$454"; in subsec. (e), substituted "$690" for "$646"; in subsec. (f), substituted "$873" for "$817"; in subsec. (g), substituted "$1,099" for "$1,029"; in subsec. (h), substituted "$1,277" for "$1,195"; in subsec. (i), substituted "$1,436" for "$1,344"; in subsec. (j), substituted "$2,393" for "$2,239"; in subsec. (k), substituted "$87" for "$82" in two places, substituted "$2,977" for "$2,785", and substituted "$4,176" for "$3,907"; in subsec. (l), substituted "$2,977" for "$2,785"; in subsec. (m), substituted "$3,284" for "$3,073"; in subsec. (n), substituted "$3,737" for "$3,496"; in subsecs. (o) and (p), substituted "$4,176" for "$3,907" wherever appearing; in subsec. (r), substituted "$1,792" for "$1,677" and substituted "$2,669" for "$2,497"; and, in subsec. (s), substituted "$2,678" for "$2,506".

2006. Act June 15, 2006, in subsec. (l), substituted "with such significant disabilities" for "so helpless"; and, in subsec. (m), substituted "so significantly disabled" for "so helpless".

Other provisions:

Effective date of July 14, 1960 amendment. Act July 14, 1960, P. L. 86-663, § 2, 74 Stat. 528, provides: "This Act [amending this section] shall be effective on and after the first day of the second calendar month following the date of its enactment."


Effective date of Nov. 1, 1965 amendments. Act Nov. 1, 1965, P. L. 89-311, § 9, 79 Stat. 1157, provides: "The amendments made by the first section and sections 2, 3, and 4 of this Act [amending this section, among other things; for full classification, consult USCS Tables volumes] shall take effect on the first day of the second calendar month following the date of enactment of this Act."


Application of repeal of subsec. (q). Act Aug. 19, 1968, P. L. 90-493, § 4(b), 82 Stat. 809, provides that the repeal of subsec. (q) by Act Aug. 19, 1968, should not apply in the case of a veteran who, on Aug. 19, 1968, was receiving or entitled to receive compensation for tuberculosis which in the judgment of the Administrator had reached a condition of complete arrest.

Effective date of June 30, 1972 amendments. Act June 30, 1972, P. L. 92-328, Title III, § 301(a), 86 Stat. 398, provides: "Sections 101 through 107 of this Act [amending this section and 38 USCS §§ 1115, 1536, 5121, 5502, 5503 and enacting 38 USCS § 1162 and notes to this section and 38 USCS § 5503] shall take effect on the first day of the second calendar month which begins after the date of enactment.".

Effective dates of May 31, 1974 amendments. Act May 31, 1974, P. L. 93-295, Title IV, § 401, 88 Stat. 184, provides: "The provisions of this Act [amending this section and 38 USCS §§ 1115, 1122, 1137, 1142, 1311, 1313, 1314, repealing 38 USCS § 343; enacting notes to this section and 38 USCS § 1101] shall become effective on May 1, 1974, except that title III [amending 38 USCS §§ 3501, 5502] shall become effective on the first day of the second calendar month following enactment.".

Effective date of Aug. 5, 1975 amendments. Act Aug. 5, 1975, P. L. 94-71, Title III, § 301, 89 Stat. 398, provides: "The provisions of this Act [amending this section and 38 USCS §§ 1115, 1162, 1311, 1313, 1314, 5110; adding notes to this section and 38 USCS § 1311] shall become effective August 1, 1975.".

Effective date of Oct. 3, 1977 amendments. Act Oct. 3, 1977, P. L. 95-117, Title V, § 501, 91 Stat. 1066, provides: "Except as otherwise provided in this Act, the amendments made by this Act to title 38, United States Code [amending this section and 38 USCS §§ 1115, 1162, 1311, 1313, 1314, 2101 and adding this note and 38 USCS § 101 note], shall become effective on October 1, 1977.".


"(a) Except as provided in subsection (b), the amendments made by this Act [amending this section, among other things; for full classification, consult USCS Tables volumes] shall take effect on October 1, 1978.

"(b) The amendment made by section 302 [amending 38 USCS § 1562] shall take effect on January 1, 1979."

Effective dates of Nov. 28, 1979 amendments. Act Nov. 28, 1979, P. L. 96-128, Title VI, § 601, 93 Stat. 987, provides:

"(a)(1) Except as provided in paragraph (2) of this subsection, the amendments made by titles I and II [amending this section and 38 USCS §§ 1115, 1162, 1311, 1313, and 1314] and the provisions of section 101(b) [note this section] shall take effect as of October 1, 1979.

"(2) With respect to the amendment made by clause (1) of section 101(a) [amending this section], that portion of the amendment amending subsection (k) of section 314 [new section 1114] to increase certain monthly rates of compensation shall take effect as of September 1, 1980, and that portion of the amendment amending such subsection to increase certain maximum monthly amounts of compensation shall take effect as of October 1, 1979.

"(b) The amendments made by titles III, IV, and V [for full classification, consult USCS Tables volumes] shall take effect on the date of the enactment of this Act.".


"(a) The amendments made by titles I and II [amending this section and 38 USCS §§ 1115, 1162, 1311, 1313, 1314] shall apply only to payments for months beginning after September 30, 1980.

"(b) The amendments made by title III and by sections 402, 501, 503, and 506 [amending 30 USCS § 121 and 38 USCS 230, 2101, 2102, 2104, 2105, 3710, 3711, 3712, 5304, 5503] shall take effect on October 1, 1980.

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"(c) The amendments made by section 502 [amending 38 USCS § 2306] shall apply only with respect to individuals who die after September 30, 1980.

"(d) The amendments made by sections 401, 504, 505, and 507 [amending 38 USCS §§ 3703, 3710, 3711, 3712; adding 38 USCS §§ 5313, 5705] shall take effect on the date of the enactment of this Act.

"(e) The amendments made by section 508 [amending 38 USCS §§ 4107, 4109] shall take effect as of August 26, 1980."


"(1) Except as otherwise provided in this subsection, the amendments made by titles IV, V, and VI [for full classification of such Titles, consult USCS Tables volumes] shall take effect on the date of the enactment of this Act.


"(3) The amendments made by section 504 [amending 38 USCS § 3726] shall take effect as of October 17, 1980.

"(4) The amendments made by section 601(b)(1) [amending 38 USCS § 8110(a)(4)] shall take effect as of October 1, 1981.

"(5) The amendments made by section 602 [amending 38 USCS § 5503(a)] shall take effect on the date of the enactment of this Act and shall apply with respect to veterans admitted to a Veterans' Administration hospital or nursing home on or after such date.

"(6) The amendments made by section 603 [amending 38 USCS §§ 2306(b), 2403(a)] shall apply with respect to veterans dying before, on, or after the date of the enactment of this Act."

**Effective date of amendments made by § 404 of Act Sept. 8, 1982.** Act Sept. 8, 1982, P. L. 97-253, Title IV, § 404(c), 96 Stat. 803, provides: "The amendments made by this section [amending subsec. (p) of this section and 38 USCS § 1115(2)] shall take effect on October 1, 1982."

**Repeal of Jan. 1983 prospective amendments.** Act Sept. 8, 1982, P. L. 97-253, Title IV, § 405(b), 96 Stat. 803, which amended this section effective Jan. 1, 1983, as provided by § 405(c) of such Act, was repealed by Act Oct. 14, 1982, P. L. 97-306, Title I, Part A, § 107, 96 Stat. 1431, effective Oct. 1, 1982, as provided by § 108 of such Act, which appears as a note to this section.

**Provisions relating to 1983 compensation cost-of-living increase repealed.** Act Sept. 8, 1982, P. L. 97-253, Title IV, § 405(a), 96 Stat. 803, formerly classified as a note to this section, was repealed by Act Oct. 14, 1982, P. L. 97-306, Title I, Part A, § 107, 96 Stat. 1431, effective Oct. 1, 1982, as provided by § 108 of such Act, which appears as a note to this section. Such section provided that the adjustments made by Act Sept. 8, 1982, which were to be effective Jan. 1, 1983, were made with the intent of being superseded by increased, and rounded down and realigned rates provided for in later legislation, which was to be effective Oct. 1, 1982.


Effective date and application of Oct. 28, 1986 amendments. Act Oct. 28, 1986, P. L. 99-576, Title I, § 107, 100 Stat. 3252, provides: "The amendments made by sections 101 through 106 [amending this section and 38 USCS §§ 1115, 1162, 1311, 1313, 1314] shall take effect on December 1, 1986, except that such amendments shall not take effect unless benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) are increased effective December 1, 1986, as a result of a determination under section 215(i) of such Act (42 U.S.C. 415(i))."


Effective date of Title XI of Act Nov. 18, 1988. Act Nov. 18, 1988, P. L. 100-687, Div B, Title XI, § 1106, 102 Stat. 4125, provides: "The amendments made by this title [amending this section and 38 USCS §§ 1115, 1162, 1311, 1313, 1314] shall take effect on December 1, 1988."


Effective date for rate increases. Act Feb. 6, 1991, P. L. 102-3, § 7, 105 Stat. 10, provides: "Section 2(b) [note to this section] and the amendments made by this Act [amending this section and 38 USCS §§ 1115, 1162, 1311, 1313, 1314] shall take effect as of January 1, 1991."


"Sec. 2. Increase in rates of disability compensation and dependency and indemnity compensation.

"(a) Rate adjustment. The Secretary of Veterans Affairs shall, effective on December 1, 2004, increase the dollar amounts in effect for the payment of disability compensation and dependency and indemnity compensation by the Secretary, as specified in subsection (b).

"(b) Amounts to be increased. The dollar amounts to be increased pursuant to subsection (a) are the following:

"(1) Compensation. Each of the dollar amounts in effect under section 1114 of title 38, United States Code.

"(2) Additional compensation for dependents. Each of the dollar amounts in effect under sections 1115(1) of such title.

"(3) Clothing allowance. The dollar amount in effect under section 1162 of such title.

"(4) New DIC rates. The dollar amounts in effect under paragraphs (1) and (2) of section 1311(a) of such title.

"(5) Old DIC rates. Each of the dollar amounts in effect under section 1311(a)(3) of such title.

"(6) Additional DIC for surviving spouses with minor children. The dollar amount in effect under section 1311(b) of such title.

"(7) Additional DIC for disability. The dollar amounts in effect under sections 1311(c) and 1311(d) of such title.

"(8) DIC for dependent children. The dollar amounts in effect under sections 1313(a) and 1314 of such title.

"(c) Determination of increase. (1) The increase under subsection (a) shall be made in the dollar amounts specified in subsection (b) as in effect on November 30, 2004.

"(2) Except as provided in paragraph (3), each such amount shall be increased by the same percentage as the percentage by which benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) are increased effective December 1, 2004, as a result of a determination under section 215(i) of such Act (42 U.S.C. 415(i)).

"(3) Each dollar amount increased pursuant to paragraph (2) shall, if not a whole dollar amount, be rounded down to the next lower whole dollar amount.

* * * * *

"Sec. 3. Publication of adjusted rates.

"At the same time as the matters specified in section 215(i)(2)(D) of the Social Security Act (42 U.S.C. 415(i)(2)(D)) are required to be published by reason of a determination made under section 215(i) of such Act [42 USC § 415(i)] during fiscal year 2005, the Secretary of Veterans Affairs shall publish in the Federal Register the amounts specified in subsection (b) of section 2, as increased pursuant to that section.".

Special rule for persons receiving disability compensation on December 1, 1958. Act Nov. 22, 2005, P. L. 109-111, § 2(g), 119 Stat. 2364, provides: "The Secretary may adjust administratively, consistent with the increases made under subsection (a) [amending this section], the rates of disability compensation payable to persons within the purview of section 10 of Public Law 85-857 (72 Stat. 1263) [note preceding 38 USCS § 101] who are not in receipt of compensation payable pursuant to chapter 11 of title 38, United States Code [38 USCS §§ 1101 et seq.].


Code of Federal Regulations

Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Cross References

This section is referred to in 38 USCS §§ 1115, 1134, 1717, 3108, 5313, 5503

Research Guide

Am Jur:

60A Am Jur 2d, Pensions and Retirement Funds § 1263

Law Review Articles:

Wellen. Armed Forces Disability Benefits-a Lawyer's View. 27 Judge Advocate General Journal 485, Spring 1974
1. Generally

While promulgated under exercise of discretion given to Secretary of Veterans Affairs in 38 USCS § 1114(p), 38 C.F.R. § 3.350(f)(3) (1972) itself contained no discretionary language; rather, it stated that veteran's additional injuries would afford entitlement to higher special monthly compensation rate and, to extent that Court of Appeals for Veterans Claims concluded that Secretary retained discretion not to award next higher rate to veteran despite wording of 38 C.F.R. § 3.350(f)(3), its decision was contrary to law. Augustine v Principi (2003, CA FC) 343 F.3d 1334

Determination of "loss of use" regarding a particular benefit is controlling respecting eligibility irrespective of whether such loss is functional or organic in origin, and assertion that prognosis for reversal is virtually nil from medical standpoint meets requirements of permanence applicable to entitlement to benefits. 1974 ADVA 994

2. Receipt of in kind benefits

Pension of veteran who comes within phrase "or is so helpless as to be in need of regular aid and attendance", is being maintained by Government in institution and is thus being furnished with benefits in kind, is to be reduced to rate provided for total disability while so maintained. 1933 ADVA 201

3. Recovery of damages in civil action

In action against hospital brought by veteran who became paraplegic due to accident while under psychiatric supervision at hospital for service-related injury, modification of judgment by reducing damage award for pain and suffering because of increase in disability benefits received by veteran pursuant to 38 USCS § 314 [now 38 USCS § 1114] was improper, since there was no statutory authority permitting § 314 [now § 1114] benefits to set off pain and suffering awards, and increase in § 314 [now § 1114] benefits received by plaintiff were not equivalent to pain and suffering damages to justify setoff, but were intended to compensate veteran for lost earning capacity, thus original damage award to be reinstated. Ulrich v Veterans Admin. Hospital (1988, CA2 NY) 853 F.2d 1078

4. Practice and procedure

Where veteran was entitled to larger disability benefit due to clear and unmistakable error made in 1969 because his disability was incorrectly classified under 38 USCS § 1114(m) when proper classification was under 38 USCS § 1114(n), while veteran was awarded difference in payments, and these payments incorporated cost-of-living adjustments (COLAs) that had been authorized and in effect for each month for which he received payment, veteran was not entitled to interest on difference because government's sovereign immunity prevented award of interest. Sandstrom v Principi (2004, CA FC) 358 F.3d 1376

Board did not err in denying veteran earlier effective date for Special Monthly Compensation rating where, at time contested ratings were made, those decisions were not clearly and unmistakably erroneous. Moreira v Principi (1992) 3 Vet App 522

Board incorrectly applied regulatory standard for determining special monthly compensation for veteran's loss of use of both feet; relevant inquiry is not whether amputation was warranted but whether appellant had effective function remaining other than that which would be equally well served by amputation with use of suitable prosthetic appliance. Tucker v West (1998) 11 Vet App 369

Board's decision denying veteran entitlement to special monthly compensation pursuant to 38 USCS § 1114(l) is affirmed even though there is substantial evidence both for and against veteran's claim since Board found that preponderance of evidence was against finding that
veteran required aid and attendance solely on account of his service-connected mental condition, Board supported its conclusion with an adequate statement of its reasoning of why it found certain medical opinions more probative than others, and there is plausible basis in record for Board's decision. Prejean v West (2000) 13 Vet App 444, 2000 US App Vet Claims LEXIS 344

§ 1115. Additional compensation for dependents

Any veteran entitled to compensation at the rates provided in section 1114 of this title [38 USCS § 1114], and whose disability is rated not less than 30 percent, shall be entitled to additional compensation for dependents in the following monthly amounts:

(1) If and while rated totally disabled and--
   (A) has a spouse but no child, $135;
   (B) has a spouse and one or more children, $233 plus $68 for each child in excess of one;
   (C) has no spouse but one or more children, $91 plus $68 for each child in excess of one;
   (D) has a parent dependent upon such veteran for support, then, in addition to the above amounts, $109 for each parent so dependent;
   (E) notwithstanding the other provisions of this paragraph, the monthly payable amount on account of a spouse who is (i) a patient in a nursing home or (ii) blind, or so nearly blind or significantly disabled as to need or require the regular aid and attendance of another person, shall be $257 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section; and
   (F) notwithstanding the other provisions of this paragraph the monthly amount payable on account of each child who has attained the age of eighteen years and who is pursuing a course of instruction at an approved educational institution shall be $215 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section.

(2) If and while rated partially disabled, but not less than 30 percent, in an amount having the same ratio to the amount specified in paragraph (1) of this section as the degree of disability bears to total disability. The amounts payable under this paragraph, if not a multiple of $1, shall be rounded down to the nearest dollar.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:

1960. Act June 8, 1960 (effective as provided by § 2 of such Act, which appears as a note to this section), in subsec. (a)(1)(D), (G), inserted "(plus $12 for each living child in excess of three)".

1965. Act Aug. 26, 1965 (effective 10/1/67, as provided by § 2 of such Act, which appears as a note to this section), deleted "(a)" preceding "Any" and deleted subsec. (b), which read:
"(b) The additional compensation for a dependent or dependents provided by this section shall not be payable to any veteran during any period he is in receipt of an increased rate of subsistence allowance or education and training allowance on account of a dependent or dependents under any other law administered by the Veterans' Administration.

"The veteran may elect to receive whichever is the greater.".

Act Oct. 31, 1965 (effective on the first day of the second calendar month following 10/31/1965, as provided by § 9 of such Act, which appears as 38 USCS § 1114 note), in para. (1)(A), substituted "$25" for "$23"; in para. (1)(B), substituted "$43" for "$39"; in para. (1)(C), substituted "$55" for "$50"; in para. (1)(D), substituted "$68" for "$62" and substituted "$13" for "$12"; in para. (1)(E), substituted "$17" for "$15"; in para. (1)(F), substituted "$30" for "$27"; in para. (1)(G), substituted "$43" for "$39", and substituted "$13" for "$12", and deleted "and" following "three"); in para. (1)(H), substituted "$21" for "$19" and substituted "; and" for a concluding period; and added para. (1)(I).

1970. Act Aug. 12, 1970 (effective 7/1/70, as provided by § 9 of such Act, which appears as 38 USCS § 1114 note), in para. (1)(A), substituted "$28" for "$25"; in para. (1)(B), substituted "$48" for "$43"; in para. (1)(C), substituted "$61" for "$55"; in para. (1)(D), substituted "$75" for "$68" and substituted "$14" for "$13"; in para. (1)(E), substituted "$19" for "$17"; in para. (1)(F), substituted "$33" for "$30"; in para. (1)(G), substituted "$48" for "$43" and substituted "$14" for "$13"; in para. (1)(H), substituted "$23" for "$21"; and in para. (1)(I), substituted "$44" for "$40".

1972. Act June 30, 1972 (effective 8/1/72, as provided by § 301(a) of such Act, which appears as 38 USCS § 1114 note), in para. (1)(A), substituted "$31" for "$28"; in para. (1)(B), substituted "$53" for "$48"; in para. (1)(C), substituted "$67" for "$61"; in para. (1)(D), substituted "$83" for "$75" and substituted "$15" for "$14"; in para. (1)(E), substituted "$21" for "$19"; in para. (1)(F), substituted "$36" for "$33"; in para. (1)(G), substituted "$53" for "$48" and substituted "$15" for "$14"; in para. (1)(H), substituted "$23" for "$21"; and in para. (1)(I), substituted "$48" for "$44".

1974. Act May 31, 1974 (effective 5/1/74, as provided by § 401 of such Act, which appears as 38 USCS § 1114 note), in para. (1)(A), substituted "$36" for "$31"; in para. (1)(B), substituted "$61" for "$53"; in para. (1)(C), substituted "$77" for "$67"; in para. (1)(D), substituted "$95" for "$83" and substituted "$17" for "$15"; in para. (1)(E), substituted "$24" for "$21"; in para. (1)(F), substituted "$41" for "$36"; in para. (1)(G), substituted "$61" for "$53" and substituted "$17" for "$15"; in para. (1)(H), substituted "$29" for "$25"; and in para. (1)(I), substituted "$55" for "$48".

1975. Act Aug. 5, 1975 (effective 8/1/75, as provided by § 301 of such Act, which appears as 38 USCS § 1114 note), in para. (1)(A), substituted "$40" for "$36"; in para. (1)(B), substituted "$61" for "$67"; in para. (1)(C), substituted "$85" for "$77"; in para. (1)(D), substituted "$105" for "$95" and substituted "$19" for "$17"; in para. (1)(E), substituted "$26" for "$24"; in para. (1)(F), substituted "$45" for "$41"; in para. (1)(G), substituted "$61" for "$67" and substituted "$19" for "$17"; in para. (1)(H), substituted "$32" for "$29"; and in para. (1)(I), substituted "$61" for "$55".

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1114 note), in para. (1)(A)-(G), substituted "spouse" for "wife"; in para. (1)(A), substituted "$43" for "$40"; in para. (1)(B), substituted "$72" for "$67"; in para. (1)(C), substituted "$92" for "$85"; in para. (1)(D), substituted "$113" for "$105" and substituted "$21" for "$19"; in para. (1)(E), substituted "$28" for "$26"; in para. (1)(F), substituted "$49" for "$45"; in para. (1)(G), substituted "$72" for "$67" and substituted "$21" for "$19"; in para. (1)(H), substituted "parent dependent upon such veteran" for "mother or father, either or both dependent upon him"; substituted "$35" for "$32", and deleted "and" following "so dependent"); redesignated para. (1)(I) as para. (1)(J); in para. (1)(J), as redesignated, substituted "$66" for "$61"; added new para. (1)(I); and in para. (2), deleted "his" following "degree of".
1977. Act Oct. 3, 1977 (effective 10/1/77, as provided by § 501 of such Act, which appears as 38 USCS § 1114 note), in para. (1)(A), substituted "$46" for "$43"; in para. (1)(B), substituted "$77" for "$72"; in para. (1)(C), substituted "$98" for "$92"; in para. (1)(D), substituted "$120" for "$113" and substituted "$22" for "$21"; in para. (1)(E), substituted "$30" for "$28"; in para. (1)(F), substituted "$52" for "$49"; in para. (1)(G), substituted "$77" for "$72" and substituted "$22" for "$21"; in para. (1)(H), substituted "$37" for "$35"; in para. (1)(I), substituted "$83" for "$78"; and in para. (1)(J), substituted "$70" for "$66".

1978. Act Oct. 18, 1978 (effective 10/1/78, as provided by § 401(a) of such Act, which appears as 38 USCS § 1114 note), in the preliminary matter, substituted "30 per centum" for "50 per centum"; in para. (1)(A), substituted "$49" for "$46"; in para. (1)(B), substituted "$83" for "$77"; in para. (1)(C), substituted "$110" for "$98"; in para. (1)(D), substituted "$137" for "$120" and substituted "$27" for "$22"; in para. (1)(E), substituted "$34" for "$30"; in para. (1)(F), substituted "$61" for "$52"; in para. (1)(G), substituted "$88" for "$77" and substituted "$27" for "$22"; in para. (1)(H), substituted "$40" for "$37"; in para. (1)(I), substituted "$89" for "$83"; in para. (1)(J), substituted "$75" for "$70"; and in para. (2), substituted "30 per centum" for "50 per centum".

1979. Act Nov. 28, 1979 (effective 10/1/79, as provided by § 601(a)(1) of such Act, which appears as 38 USCS § 1114 note), in para. (1)(A), substituted "$54" for "$49"; in para. (1)(B), substituted "$91" for "$83"; in para. (1)(C), substituted "$121" for "$110"; in para. (1)(D), substituted "$151" for "$137" and substituted "$30" for "$27"; in para. (1)(E), substituted "$37" for "$34"; in para. (1)(F), substituted "$67" for "$61"; in para. (1)(G), substituted "$97" for "$88" and substituted "$30" for "$27"; in para. (1)(H), substituted "$44" for "$40"; in para. (1)(I), substituted "paragraph" for "subsection" following "provisions of this", substituted "(i)" for "(1)", substituted "or (ii)" for "or (2)", substituted "$98" for "$89", and substituted "paragraph (2) of this section" for "paragraph (2) of this subsection"; in para. (1)(J), substituted "paragraph" for "subsection" following "provisions of this", substituted "$82" for "$75"; and substituted "paragraph (2) of this section" for "paragraph (2) of this subsection"; in para. (2), inserted "of this section".

1980. Act Oct. 7, 1980 (applicable as provided by § 601(a) of such Act, which appears as 38 USCS § 1114 note), in para. (1)(A), substituted "$62" for "$54"; in para. (1)(B), substituted "$104" for "$91"; in para. (1)(C), substituted "$138" for "$121"; in para. (1)(D), substituted "$173" for "$151" and substituted "$34" for "$30"; in para. (1)(E), substituted "$42" for "$37"; in para. (1)(F), substituted "$77" for "$67"; in para. (1)(G), substituted "$111" for "$97" and substituted "$34" for "$30"; in para. (1)(H), substituted "$50" for "$44"; in para. (1)(I), substituted "$122" for "$98"; and in para. (1)(J), substituted "$94" for "$82".

1981. Act Oct. 17, 1981 (effective 10/1/81, as provided by § 701(a) of such Act, which appears as 38 USCS § 1114 note), in subsec. (1), in cl. (A), substituted "$69" for "$62", in cl. (B), substituted "$116" for "$104", in cl. (C), substituted "$153" for "$138", in cl. (D), substituted "$192" and "$38" for "$173" and "$34", in cl. (E), substituted "$47" for "$42", in cl. (F), substituted "$86" for "$77", in cl. (G), substituted "$123" and "$38" for "$111" and "$34", in cl. (H), substituted "$56" for "$50", in cl. (I), "$125" for "$112", and in cl. (J), substituted "$105" for "$94".

1982. Act Sept. 8, 1982 (effective 10/1/82, as provided by § 404(c) of such Act, which appears as 38 USCS § 1114 note), in para. (2), substituted the sentence beginning "The amounts payable . . ." for "The amounts payable under this paragraph shall be adjusted upward or downward to the nearest dollar, counting fifty cents and over as a whole dollar."

Act Oct. 14, 1982 (effective 10/1/82 as provided by § 108 of such Act, which appears as 38 USCS § 1114 note), in para. (1), substituted subparas. (A)-(C) for former subparas. (A)-(G), which read:

"(A) has a spouse but no child living, $69;"

"(B) has a spouse and one child living, $116;"

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“(C) has a spouse and two children living, $153;

“(D) has a spouse and three or more children living, $192 (plus $38 for each living child in excess of three);

“(E) has no spouse but one child living, $47;

“(F) has no spouse but two children living, $86;

“(G) has no spouse but three or more children living, $123 (plus $38 for each child in excess of three),”

redesignated former subparas. (H)-(J) as subparas. (D)-(F), respectively, and, in subpara. (D) as redesignated, substituted “$60” for “$56”, in subpara. (E) as redesignated, substituted “$134” for “$125”, and, in subpara. (F) as redesignated, substituted “$112” for “$105”.

1984. Act March 2, 1984 (effective 4/1/84, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note) substituted “percent” for “per centum” wherever it appears; and, in para. (1), in subpara. (A), substituted “$77” for “$74”, in subpara. (B), substituted “$128” for “$124” and substituted “$41” for “$40”, in subpara. (C), substituted “$52” for “$50” and substituted “$41” for “$40”, in subpara. (D), substituted “$62” for “$60”, in subpara. (E), substituted “$139” for “$134”, and, in subpara. (F), substituted “$116” for “$112”.

Act Oct. 24, 1984 (effective 12/1/84, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), in para. (1), in subpara. (A), substituted “$79” for “$77”; in subpara. (B), substituted “$132” for “$124” and substituted “$42” for “$41”; in subpara. (C), substituted “$54” for “$52” and substituted “$42” for “$41”; in subpara. (D), substituted “$64” for “$62”; in subpara. (E), substituted “$143” for “$139”; and in subpara. (F), substituted “$120” for “$116”.

1986. Act Jan. 13, 1986 (effective 12/1/85, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), in para. (1), in subpara. (A), substituted “$81” for “$79”, in subpara. (B), substituted “$136” for “$124” and substituted “$43” for “$42”; in subpara. (C), substituted “$56” for “$54” and substituted “$43” for “$42”; in subpara. (D), substituted “$66” for “$64”; in subpara. (E), substituted “$147” for “$143”; and in subpara. (F), substituted “$124” for “$120”.

Act Oct. 28, 1986 (effective 12/1/86, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), in para. (1), in subpara. (A), substituted “$82” for “$81”, in subpara. (B), substituted “$138” and “$44” for “$136” and “$43” respectively, in subpara. (C) substituted “$57” and “$44” for “$56” and “$43” respectively, in subpara. (D) substituted “$67” for “$66”, in subpara. (E) substituted “$149” for “$147”, and in subpara. (F) substituted “$126” for “$124”.

1987. Act Dec. 31, 1987 (effective 12/1/87, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), in para. (1), in cl. (A), substituted “$85” for “$82”, in cl. (B), substituted “$143” and “$45” for “$138” and “$43” respectively, in cl. (C), substituted “$59” and “$45” for “$57” and “$44”; respectively, in cl. (D), substituted “$69” for “$67”; in cl. (E), substituted “$155” for “$149”, and in cl. (F), substituted “$131” for “$126”.

1988. Act Nov. 18, 1988 (effective 12/1/88 as provided by § 1106 of such Act, which appears as 38 USCS § 1114 note), in para. (1), substituted the following: in subpara. (A), “$86” for “$85”; in subpara. (B), “$148” and “$46” for “$143” and “$45” respectively; in subpara. (C), “$61” and “$46” for “$59” and “$45”; respectively; in subpara. (D), “$71” for “$69”; in subpara. (E), “$161” for “$155”; and in subpara. (F), “$136” for “$131”.

1989. Act Dec. 18, 1989 (effective 12/1/89, as provided by § 106 of such Act, which appears as 38 USCS § 1114 note), in para. (1), in subpara. (A), substituted “$92” for “$88”; in subpara. (B), substituted “$155” and “$48” for “$148” and “$46” respectively, in subpara. (C), substituted “$64” and “$48” for “$61” and “$46” respectively, in subpara. (D), substituted “$74” for “$71”; in subpara. (E), substituted “$169” for “$161”; and in subpara. (F), substituted “$142” for “$136”.
1991. Act Feb. 6, 1991 (effective 1/1/91, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in para. (1), in subpara. (A), substituted "$96" for "$92", in subpara. (B), substituted "$163" and "$50" for "$155" and "$48", respectively, in subpara. (C), substituted "$67" and "$50" for "$64" and "$48", respectively, in subpara. (D), substituted "$77" for "$74", in subpara. (E), substituted "$178" for "$169" and in subpara. (F), substituted "$149" for "$142".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 315, as 38 USCS § 1115, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Act Nov. 12, 1991 (effective 12/1/91 as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in para. (1), in subpara. (A), substituted "$100" for "$96", in subpara. (B), substituted "$169" and "$52" for "$163" and "$50", respectively, in subpara. (C), substituted "$69" and "$52" for "$67" and "$50", respectively, in subpara. (D), substituted "$80" for "$77", in subpara. (E), substituted "$185" for "$178", and, in subpara. (F), substituted "$155" for "$149".

1993. Act Aug. 13, 1993, in para. (1), in subpara. (A), substituted "$103" for "$100", in subpara. (B), substituted "$174" for "$169" and "$54" for "$52", in subpara. (C), substituted "$71" for "$69" and "$54" for "$52", in subpara. (D), substituted "$82" for "$80", in subpara. (E), substituted "$191" for "$185", and, in subpara. (F), substituted "$160" for "$155".

Act Nov. 11, 1993 (effective 12/1/93, as provided by § 7 of such Act, which appears as a note to this section), in para. (1), in subpara. (A), substituted "$105" for "$103", in subpara. (B), substituted "$178" for "$174" and "$55" for "$54", in subpara. (C), substituted "$72" for "$71" and "$55" for "$54", in subpara. (D), substituted "$84" for "$82", in subpara. (E), substituted "$195" for "$191" and, in subpara. (F), substituted "$164" for "$160".

1997. Act Nov. 19, 1997 (effective 12/1/97, as provided by § 7 of such Act, which appears as a note to this section), in para. (1), in subpara. (A), substituted "$114" for "$105", in subpara. (B), substituted "$195" for "$195" and substituted "$60" for "$55", in subpara. (C), substituted "$78" for "$72" and substituted "$60" for "$55", in subpara. (D), substituted "$92" for "$84", in subpara. (E), substituted "$215" for "$195", and, in subpara. (F), substituted "$180" for "$164".

1999. Act Nov. 30, 1999 (effective 12/1/99, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in para. (1), in subpara. (A), substituted "$117" for "$114", in subpara. (B), substituted "$201" for "$195" and substituted "$61" for "$60", in subpara. (C), substituted "$80" for "$78" and substituted "$61" for "$60", in subpara. (D), substituted "$95" for "$92", in subpara. (E), substituted "$222" for "$215", and, in subpara. (F), substituted "$186" for "$180".

2001. Act Dec. 21, 2001 (effective 12/1/2001, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in para. (1), in subpara. (A), substituted "$124" for "$117", in subpara. (B), substituted "$213" for "$201" and substituted "$64" for "$61", in subpara. (C), substituted "$84" for "$80" and substituted "$64" for "$61", in subpara. (D), substituted "$100" for "$95", in subpara. (E), substituted "$234" for "$222", and, in subpara. (F), substituted "$196" for "$186".

2002. Act Dec. 6, 2002, in para. (1), in subpara. (A), substituted "$125" for "$124", in subpara. (B), substituted "$215" for "$213", in subpara. (C), substituted "$85" for "$84", in subpara. (D), substituted "$101" for "$100", in subpara. (E), substituted "$237" for "$234", and, in subpara. (F), substituted "$198" for "$196".

2004. Act Dec. 10, 2004, in para. (1), in subpara. (A), substituted "$127" for "$125", in subpara. (B), substituted "$219" for "$215" and substituted "$65" for "$64", in subpara. (C), substituted "$86" for "$85" and substituted "$65" for "$64", in subpara. (D), substituted "$103" for "$101", in subpara. (E), substituted "$241" for "$237", and, in subpara. (F), substituted "$202" for "$198".
2005. Act Nov. 22, 2005 (effective 12/1/2005, as provided by § 2(f) of such Act, which appears as 38 USCS § 1114 note), in para. (1), in subpara. (A), substituted "$135" for "$127", in subpara. (B), substituted "$233" for "$219" and substituted "$68" for "$65", in subpara. (C), substituted "$91" for "$86" and substituted "$68" for "$65", in subpara. (D), substituted "$109" for "$103", in subpara. (E), substituted "$257" for "$241", and, in subpara. (F), substituted "$215" for "$202".

2006. Act June 15, 2006, in para. (1)(E)(ii), substituted "blind, or so nearly blind or significantly disabled as to" for "helpless or blind, or so nearly helpless or blind as to".

Other provisions:

Effective date of June 8, 1960 amendments. Act June 8, 1960, P. L. 86-499, § 2, 74 Stat. 165, provides: "The amendments made by this Act [amending this section] shall take effect on the first day of the second calendar month which begins after the date of enactment of this Act.".

Savings provision. Act Aug. 26, 1965, P. L. 89-137, § 1(c), 79 Stat. 576, provides: "Any veteran-trainee receiving subsistence allowance on the date of the enactment of this Act while pursuing a course of vocational rehabilitation authorized by [former] chapter 31 of title 38, United States Code, shall not have such allowance reduced by reason of the amendments contained in such Act [amending this section and former 38 USCS § 1504].".


Code of Federal Regulations

Department of Veterans Affairs-Schedule for rating disabilities, 38 CFR Part 4

Cross References

This section is referred to in 38 USCS § 1135

Research Guide

Am Jur:

60A Am Jur 2d, Pensions and Retirement Funds § 1263

Law Review Articles:

Wellen. Armed Forces Disability Benefits-a Lawyer's View. 27 Judge Advocate General Journal 485, Spring 1974
Denial of widow's claim for accrued disability benefits under 38 USCS § 1115 was affirmed because such benefits were provided solely to veteran and any claim pursuant to that statute was extinguished by veteran's death. Sharp v Nicholson (2005, CA FC) 403 F.3d 1324

Since there is no clear indication in statute or Public Law amending it that Congress intended to create duty to notify potential beneficiaries of change in law from 30 to 50 per centum, no such duty was created by law. Gold v Brown (1995) 7 Vet App 315

Board's decision that veteran's spouse did not have legal standing to apply for entitlement to additional compensation to veteran based on spouse's need for regular aid and attendance under 38 USCS § 1115(1)(E)(ii) is affirmed where spouse has not demonstrated that she has standing to submit Notice of Disagreement or substantive appeal. Veterans' Administration [now Department of Veterans Affairs] divested spouse of her capacity as legal guardian for veteran and designated veteran's mother as legal guardian, and spouse has no personal stake in outcome of controversy since benefit would flow to veteran and not to her. Redding v West (2000) 13 Vet App 512, 2000 US App Vet Claims LEXIS 466

Widow of veteran had no standing under 38 USCS § 1115 because any retroactive benefits under that section belonged to veteran, not to widow, and veteran's claim was extinguished by his death; widow thus had no property interest in any such benefits. Sharp v Principi (2004) 17 Vet App 431, 2004 US App Vet Claims LEXIS 14, affd in part and vacated in part, remanded (2005, CA FC) 403 F.3d 1324

§ 1116. Presumptions of service connection for diseases associated with exposure to certain herbicide agents; presumption of exposure for veterans who served in the Republic of Vietnam

(a) (1) For the purposes of section 1110 of this title [38 USCS § 1110], and subject to section 1113 of this title [38 USCS § 1113]--

(A) a disease specified in paragraph (2) of this subsection becoming manifest as specified in that paragraph in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975; and

(B) each additional disease (if any) that (i) the Secretary determines in regulations prescribed under this section warrants a presumption of service-connection by reason of having positive association with exposure to an herbicide agent, and (ii) becomes manifest within the period (if any) prescribed in such regulations in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, and while so serving was exposed to that herbicide agent, shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of evidence of such disease during the period of such service.

(2) The diseases referred to in paragraph (1)(A) of this subsection are the following:

(A) Non-Hodgkin's lymphoma becoming manifest to a degree of disability of 10 percent or more.

(B) Each soft-tissue sarcoma becoming manifest to a degree of disability of 10 percent or more other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma.

(C) Chloracne or another acneform disease consistent with chloracne becoming manifest to a degree of disability of 10 percent or more within one year after the last date on which the veteran performed active military, naval, or air service in
the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.
(D) Hodgkin's disease becoming manifest to a degree of disability of 10 percent or more.
(E) Porphyria cutanea tarda becoming manifest to a degree of disability of 10 percent or more within a year after the last date on which the veteran performed active military, naval, or air service in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.
(F) Respiratory cancers (cancer of the lung, bronchus, larynx, or trachea) becoming manifest to a degree of disability of 10 percent or more.
(G) Multiple myeloma becoming manifest to a degree of disability of 10 percent or more.
(H) Diabetes Mellitus (Type 2).
(3) For purposes of this section, the term "herbicide agent" means a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.

(b) (1) Whenever the Secretary determines, on the basis of sound medical and scientific evidence, that a positive association exists between (A) the exposure of humans to an herbicide agent, and (B) the occurrence of a disease in humans, the Secretary shall prescribe regulations providing that a presumption of service connection is warranted for that disease for the purposes of this section.
(2) In making determinations for the purpose of this subsection, the Secretary shall take into account (A) reports received by the Secretary from the National Academy of Sciences under section 3 of the Agent Orange Act of 1991 [note to this section], and (B) all other sound medical and scientific information and analyses available to the Secretary. In evaluating any study for the purpose of making such determinations, the Secretary shall take into consideration whether the results are statistically significant, are capable of replication, and withstand peer review.
(3) An association between the occurrence of a disease in humans and exposure to an herbicide agent shall be considered to be positive for the purposes of this section if the credible evidence for the association is equal to or outweighs the credible evidence against the association.

(c) (1) (A) Not later than 60 days after the date on which the Secretary receives a report from the National Academy of Sciences under section 3 of the Agent Orange Act of 1991 [note to this section], the Secretary shall determine whether a presumption of service connection is warranted for each disease covered by the report. If the Secretary determines that such a presumption is warranted, the Secretary, not later than 60 days after making the determination, shall issue proposed regulations setting forth the Secretary's determination.
(B) If the Secretary determines that a presumption of service connection is not warranted, the Secretary, not later than 60 days after making the determination, shall publish in the Federal Register a notice of that determination. The notice shall include an explanation of the scientific basis for that determination. If the disease already is included in regulations providing for a presumption of service connection, the Secretary shall issue regulations providing that such presumption is not warranted.

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connection, the Secretary, not later than 60 days after publication of the notice of a determination that the presumption is not warranted, shall issue proposed regulations removing the presumption for the disease.

(2) Not later than 90 days after the date on which the Secretary issues any proposed regulations under this subsection, the Secretary shall issue final regulations. Such regulations shall be effective on the date of issuance.

(d) Whenever a disease is removed from regulations prescribed under this section--
(1) a veteran who was awarded compensation for such disease on the basis of the presumption provided in subsection (a) before the effective date of the removal shall continue to be entitled to receive compensation on that basis; and
(2) a survivor of a veteran who was awarded dependency and indemnity compensation for the death of a veteran resulting from such disease on the basis of such presumption shall continue to be entitled to receive dependency and indemnity compensation on such basis.

(e) Subsections (b) through (d) shall cease to be effective on September 30, 2015.

(f) For purposes of establishing service connection for a disability or death resulting from exposure to a herbicide agent, including a presumption of service-connection under this section, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent containing dioxin or 2,4-dichlorophenoxyacetic acid, and may be presumed to have been exposed during such service to any other chemical compound in an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 316, as 38 USCS § 1116, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


1996. Act Oct. 9, 1996 (effective 1/1/97 as provided by § 505(d) of such Act, which appears as a note to this section), in subsec. (a), in paras. (1)(B) and (3), substituted "during the period beginning on January 9, 1962, and ending on May 7, 1975," for "during the Vietnam era".

Such Act further (effective as above), in paras. (1)(A), (2)(C), (E), (F), and (4), substituted "during the period beginning on January 9, 1962, and ending on May 7, 1975" for "during the Vietnam era".


2001. Act Dec. 27, 2001 (effective 1/1/2002 as provided by § 201(a)(1)(B) of such Act, which appears as a note to this section), in subsec. (a)(2)(F), deleted "within 30 years after the last date on which the veteran performed active military, naval, or air service in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975" following "or more".

Such Act further substituted the heading for one which read: "§ 1116. Presumptions of service connection for diseases associated with exposure to certain herbicide agents"; in
subsec. (a), in para. (2), added subpara. (H), redesignated para. (3) as subsec. (f), and redesignated para. (4) as new para. (3); in subsec. (e), substituted "on September 30, 2015" for "10 years after the first day of the fiscal year in which the National Academy of Sciences transmits to the Secretary the first report under section 3 of the Agent Orange Act of 1991"; and, in para. (f) as redesignated, substituted "For purposes of establishing service connection for a disability or death resulting from exposure to a herbicide agent, including a presumption of service-connection under this section, a veteran" for "For the purposes of this subsection, a veteran", and deleted "and has a disease referred to in paragraph (1)(B) of this subsection following "1975;".

Other provisions:


"(a) Requirement for epidemiological study. (1)(A) Except as provided in paragraph (2), the Administrator of Veterans' Affairs shall provide for the conduct of an epidemiological study of any long-term adverse health effects (particularly gender-specific health effects) which have been experienced by women who served in the Armed Forces of the United States in the Republic of Vietnam during the Vietnam era and which may have resulted from traumatic experiences during such service, from exposure during such service to phenoxy herbicides (including the herbicide known as Agent Orange), to other herbicides, chemicals, or medications that may have deleterious health effects, or to environmental hazards, or from any other experience or exposure during such service.

"(B) The Administrator may include in the study conducted under this paragraph an evaluation of the means of detecting and treating long-term adverse health effects (particularly gender-specific health effects) found through the study.

"(2)(A) If the Administrator, in consultation with the Director of the Office of Technology Assessment, determines that it is not feasible to conduct a scientifically valid study of an aspect of the matters described in paragraph (1) --

"(i) the Administrator shall promptly submit to the appropriate committees of the Congress a notice of that determination and the reasons for the determination; and

"(ii) the Director, not later than 60 days after the date on which such notice is submitted to the committees, shall submit to such committees a report evaluating and commenting on such determination.

"(B) The Administrator is not required to study any aspect of the matters described in paragraph (1) with respect to which a determination is made and a notice is submitted pursuant to subparagraph (A)(i).

"(C) If the Administrator submits to the Congress notice of a determination made pursuant to subparagraph (A) that it is not scientifically feasible to conduct the study described in paragraph (1)(A), this section (effective as of the date of such notice) shall cease to have effect as if repealed by law.

"(3) The Administrator shall provide for the study to be conducted through contracts or other agreements with private or public agencies or persons."
“(b) Approval of protocol. (1) The study required by subsection (a) shall be conducted in accordance with a protocol approved by the Director of the Office of Technology Assessment.

“(2) Not later than July 1, 1986, the Administrator shall publish a request for proposals for the design of the protocol to be used in conducting the study under this section.

“(3) In considering any proposed protocol for use or approval under this subsection, the Administrator and the Director shall take into consideration--

“(A) the protocol approved under section 307(a)(2)(A)(i) of the Veterans Health Programs Extension and Improvement Act of 1979 (Public Law 96-151; 38 U.S.C. 219 note) [now a note to this section]; and

“(B) the experience under the study being conducted pursuant to that protocol.

“(c) OTA reports. (1) Concurrent with the approval or disapproval of any protocol under subsection (b)(1), the Director shall submit to the appropriate committees of the Congress a report--

“(A) explaining the reasons for the Director's approval or disapproval of the protocol, as the case may be; and

“(B) containing the Director's conclusions regarding the scientific validity and objectivity of the protocol.

“(2) If the Director has not approved a protocol under subsection (b)(1) by the last day of the 180-day period beginning on the date of the enactment of this Act, the Director--

“(A) shall, on such day, submit to the appropriate committees of the Congress a report describing the reasons why the Director has not approved such a protocol; and

“(B) shall, each 60 days thereafter until such a protocol is approved, submit to such committees an updated report on the report required by clause (A).

“(d) OTA monitoring of compliance. (1) In order to ensure compliance with the protocol approved under subsection (b)(1), the Director shall monitor the conduct of the study under subsection (a).

“(2)(A) The Director shall submit to the appropriate committees of the Congress, at each of the times specified in subparagraph (B), a report on the Director's monitoring of the conduct of the study pursuant to paragraph (1).

“(B) A report shall be submitted under subparagraph (A)--

“(i) before the end of the 6-month period beginning on the date on which the Director approves the protocol referred to in paragraph (1);

“(ii) before the end of the 12-month period beginning on such date; and

“(iii) annually thereafter until the study is completed or terminated.

“(e) Duration of study. The study conducted pursuant to subsection (a) shall be continued for as long after the date on which the first report is submitted under subsection (f)(1) as the Administrator determines that there is a reasonable possibility of developing, through such study, significant new information on the health effects described in subsection (a)(1).

“(f) Reports. (1) Not later than 24 months after the date of the approval of the protocol pursuant to subsection (b)(1) and annually thereafter, the Administrator shall submit to the appropriate committees of the Congress a report containing--
“(A) a description of the results obtained, before the date of such report, under the study conducted pursuant to subsection (a); and

“(B) any administrative actions or recommended legislation, or both, and any additional comments which the Administrator considers appropriate in light of such results.

“(2) Not later than 90 days after the date on which each report required by paragraph (1) is submitted, the Administrator shall publish in the Federal Register, for public review and comment, a description of any action that the Administrator plans or proposes to take with respect to programs administered by the Veterans' Administration based on--

“(A) the results described in such report;

“(B) the comments and recommendations received on that report; and

“(C) any other available pertinent information. Each such description shall include a justification or rationale for the planned or proposed action.

“(g) Definitions. For the purposes of this section:

“(1) The term ‘gender-specific health effects' includes--

“(A) effects on female reproductive capacity and reproductive organs;

“(B) effects on reproductive outcomes;

“(C) effects on female-specific organs and tissues; and

“(D) other effects unique to the physiology of females.

“(2) The term 'Vietnam era' has the meaning given such term in section 101(29) of title 38, United States Code.”.


“(a) Purpose. The purpose of this section is to provide for the National Academy of Sciences, an independent nonprofit scientific organization with appropriate expertise which is not part of the Federal Government, to review and evaluate the available scientific evidence regarding associations between diseases and exposure to dioxin and other chemical compounds in herbicides.

“(b) Agreement. The Secretary shall seek to enter into an agreement with the National Academy of Sciences for the Academy to perform the services covered by this section. The Secretary shall seek to enter into such agreement not later than two months after the date of the enactment of the Veterans' Benefits Programs Improvement Act of 1991.

“(c) Review of scientific evidence. Under an agreement between the Secretary and the National Academy of Sciences under this section, the Academy shall review and summarize the scientific evidence, and assess the strength thereof, concerning the association between exposure to an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the Vietnam era and each disease suspected to be associated with such exposure.

“(d) Scientific determinations concerning diseases.(1) For each disease reviewed, the Academy shall determine (to the extent that available scientific data permit meaningful determinations)--
“(A) whether a statistical association with herbicide exposure exists, taking into account the strength of the scientific evidence and the appropriateness of the statistical and epidemiological methods used to detect the association;

“(B) the increased risk of the disease among those exposed to herbicides during service in the Republic of Vietnam during the Vietnam era; and

“(C) whether there exists a plausible biological mechanism or other evidence of a causal relationship between herbicide exposure and the disease.

“(2) The Academy shall include in its reports under subsection (g) a full discussion of the scientific evidence and reasoning that led to its conclusions under this subsection.

“(e) Recommendations for additional scientific studies. The Academy shall make any recommendations it has for additional scientific studies to resolve areas of continuing scientific uncertainty relating to herbicide exposure. In making recommendations for further study, the Academy shall consider the scientific information that is currently available, the value and relevance of the information that could result from additional studies, and the cost and feasibility of carrying out such additional studies.

“(f) Subsequent reviews. An agreement under subsection (b) shall require the National Academy of Sciences--

“(1) to conduct as comprehensive a review as is practicable of the evidence referred to in subsection (c) that became available since the last review of such evidence under this section; and

“(2) to make its determinations and estimates on the basis of the results of such review and all other reviews conducted for the purposes of this section.

“(g) Reports.(1) The agreement between the Secretary and the National Academy of Sciences shall require the Academy to transmit to the Secretary and the Committees on Veterans’ Affairs of the Senate and House of Representatives periodic written reports regarding the Academy’s activities under the agreement. Such reports shall be submitted at least once every two years (as measured from the date of the first report).

“(2) The first report under this subsection shall be transmitted not later than the end of the 18-month period beginning on the date of the enactment of this Act. That report shall include (A) the determinations and discussion referred to in subsection (d), (B) any recommendations of the Academy under subsection (e), and (C) the recommendation of the Academy as to whether the provisions of each of sections 6 through 9 [notes to this section] should be implemented by the Secretary. In making its recommendation with respect to each such section, the Academy shall consider the scientific information that is currently available, the value and relevance of the information that could result from implementing that section, and the cost and feasibility of implementing that section. If the Academy recommends that the provisions of section 6 [note to this section] should be implemented, the Academy shall also recommend the means by which clinical data referred to in that section could be maintained in the most scientifically useful way.

“(h) Limitation on authority. The authority to enter into agreements under this section shall be effective for a fiscal year to the extent that appropriations are available.

“(i) Sunset. This section shall cease to be effective on October 1, 2014.

“(j) Alternative contract scientific organization. If the Secretary is unable within the time period prescribed in subsection (b) to enter into an agreement with the National Academy of Sciences for the purposes of this section on terms acceptable to the Secretary, the Secretary shall seek to enter into an agreement for the purposes of this section with another appropriate scientific organization that is not part of the Government and operates as a not-for-profit entity and that has expertise and objectivity comparable to that of the National
Academy of Sciences. If the Secretary enters into such an agreement with another organization, then any reference in this section and in section 316 [now section 1116] of title 38, United States Code (as added by section 2), to the National Academy of Sciences shall be treated as a reference to the other organization.

"(k) Liability Insurance.(1) The Secretary may provide liability insurance for the National Academy of Sciences or any other contract scientific organization to cover any claim for money damages for injury, loss of property, personal injury, or death caused by any negligent or wrongful act or omission of any person referred to in paragraph (2) in carrying out any of the following responsibilities of the Academy or such other organization, as the case may be, under an agreement entered into with the Secretary pursuant to this section:

"(A) The review, summarization, and assessment of scientific evidence referred to in subsection (c).

"(B) The making of any determination, on the basis of such review and assessment, regarding the matters set out in clauses (A) through (C) of subsection (d)(1), and the preparation of the discussion referred to in subsection (d)(2).

"(C) The making of any recommendation for additional scientific study under subsection (e).

"(D) The conduct of any subsequent review referred to in subsection (f) and the making of any determination or estimate referred to in such subsection.

"(E) The preparation of the reports referred to in subsection (g).

"(2) A person referred to in paragraph (1) is--

"(A) an employee of the National Academy of Sciences or other contract scientific organization referred to in paragraph (1); or

"(B) any individual appointed by the President of the Academy or the head of such other contract scientific organization, as the case may be, to carry out any of the responsibilities referred to in such paragraph.

"(3) The cost of the liability insurance referred to in paragraph (1) shall be made from funds available to carry out this section.

"(4) The Secretary shall reimburse the Academy or person referred to in paragraph (2) for the cost of any judgments (if any) and reasonable attorney's fees and incidental expenses, not compensated by the liability insurance referred to in paragraph (1) or by any other insurance maintained by the Academy, incurred by the Academy or person referred to in paragraph (2), in connection with any legal or administrative proceedings arising out of or in connection with the work to be performed under the agreement referred to in paragraph (1). Reimbursement of the cost of such judgments, attorney's fees, and incidental expenses shall be paid from funds appropriated for such reimbursement or appropriated to carry out this section, but in no event shall any such reimbursement be made from funds authorized pursuant to section 1304 of title 31, United States Code."

Results of examinations and treatment of veterans for disabilities related to exposure to certain herbicides or to service in Vietnam. Act Feb. 6, 1991, P. L. 102-4, § 6, 105 Stat. 15, effective as provided by subsec. (e) of this note, provides:

"(a) In general. Subject to subsections (d) and (e), the Secretary of Veterans Affairs shall compile and analyze, on a continuing basis, all clinical data that (1) is obtained by the Department of Veterans Affairs in connection with examinations and treatment furnished to veterans by the Department after November 3, 1981, by reason of eligibility provided in section 610(e)(1)(A) [now section 1710(e)(1)(A)] of title 38, United States Code, and (2) is
likely to be scientifically useful in determining the association, if any, between the disabilities of veterans referred to in such section and exposure to dioxin or any other toxic substance referred to in such section or between such disabilities and active military, naval, or air service in the Republic of Vietnam during the Vietnam era.

"(b) Annual report. The Secretary shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives an annual report containing--

"(1) the information compiled in accordance with subsection (a);

"(2) the Secretary's analysis of such information;

"(3) a discussion of the types and incidences of disabilities identified by the Department of Veterans Affairs in the case of veterans referred to in subsection (a);

"(4) the Secretary's explanation for the incidence of such disabilities;

"(5) other explanations for the incidence of such disabilities considered reasonable by the Secretary; and

"(6) the Secretary's views on the scientific validity of drawing conclusions from the incidence of such disabilities, as evidenced by the data compiled under subsection (a), about any association between such disabilities and exposure to dioxin or any other toxic substance referred to in section 610(e) (1)(A) [now section 1710(e)(1)(A)] of title 38, United States Code, or between such disabilities and active military, naval, or air service, in the Republic of Vietnam during the Vietnam era.

"(c) First report. The first report under subsection (b) shall be submitted not later than one year after the effective date of this section.

"(d) Funding. The authority of the Secretary to carry out this section is effective in any fiscal year only to the extent or in the amount specifically provided in statutory language in appropriations Acts.

"(e) Effective date. (1) This section shall take effect at the end of the 90-day period beginning on the date on which the first report of the National Academy of Sciences under section 3(g) [note to this section] is received by the Secretary, except that this section shall not take effect if the Secretary, after receiving that report and before the end of that 90-day period--

"(A) determines that it is not feasible or cost-effective to carry out this section or that carrying out this section would not make a material contribution to the body of scientific knowledge concerning the health effects in humans of herbicide exposure; and

"(B) notifies the Committees on Veterans' Affairs of the Senate and House of Representatives of the Secretary's determination and the reasons therefor.

"(2) In making a determination under this subsection, the Secretary shall give great weight to the views and recommendations of the Academy expressed in that report with respect to the implementation of this section.”.

Tissue archiving system. Act Feb. 6, 1991, P. L. 102-4, § 7, 105 Stat. 16, effective as provided by subsec. (f) of this note, provides:

"(a) Establishment of system. Subject to subsections (e) and (f), for the purpose of facilitating future scientific research on the effects of exposure of veterans to dioxin and other toxic agents in herbicides used in support of United States and allied military operations in the Republic of Vietnam during the Vietnam era, the Secretary of Veterans Affairs shall establish and maintain a system for the collection and storage of voluntarily contributed samples of blood and tissue of veterans who performed active military, naval, or air service in the Republic of Vietnam during the Vietnam era.
“(b) Security of specimens. The Secretary shall ensure that the tissue is collected and stored under physically secure conditions and that the tissue is maintained in a condition that is useful for research referred to in subsection (a).

“(c) Authorized use of specimens. The Secretary may make blood and tissue available from the system for research referred to in subsection (a). The Secretary shall carry out this section in a manner consistent with the privacy rights and interests of the blood and tissue donors.

“(d) Limitations on acceptance of samples. The Secretary may prescribe such limitations on the acceptance and storage of blood and tissue samples as the Secretary considers appropriate consistent with the purpose specified in subsection (a).

“(e) Funding. The authority of the Secretary to carry out this section is effective in any fiscal year only to the extent or in the amount specifically provided in statutory language in appropriations Acts.

“(f) Effective date. (1) This section shall take effect at the end of the 90-day period beginning on the date on which the first report of the National Academy of Sciences under section 3(g) [note to this section] is received by the Secretary, except that this section shall not take effect if the Secretary, after receiving that report and before the end of that 90-day period--

"(A) determines that it is not feasible or cost-effective to carry out this section or that carrying out this section would not make a material contribution to the body of scientific knowledge concerning the health effects in humans of herbicide exposure; and

“(B) notifies the Committees on Veterans’ Affairs of the Senate and House of Representatives of the Secretary's determination and the reasons therefor.

"(2) In making a determination under this subsection, the Secretary shall give great weight to the views and recommendations of the Academy expressed in that report with respect to the implementation of this section.”.

Scientific research feasibility studies program. Act Feb. 6, 1991, P. L. 102-4, § 8, 105 Stat. 17, effective as provided by subsec. (f) of this note, provides:

“(a) Establishment of program. Subject to subsections (e) and (f), the Secretary of Veterans Affairs shall establish a program to provide for the conduct of studies of the feasibility of conducting additional scientific research on--

“(1) health hazards resulting from exposure to dioxin;

“(2) health hazards resulting from exposure to other toxic agents in herbicides used in support of United States and allied military operations in the Republic of Vietnam during the Vietnam era; and

“(3) health hazards resulting from active military, naval, or air service in the Republic of Vietnam during the Vietnam era.

“(b) Program requirements. (1) Under the program established pursuant to subsection (a), the Secretary shall, pursuant to criteria prescribed pursuant to paragraph (2), award contracts or furnish financial assistance to non-Government entities for the conduct of studies referred to in subsection (a).

“(2) The Secretary shall prescribe criteria for (A) the selection of entities to be awarded contracts or to receive financial assistance under the program, and (B) the approval of studies to be conducted under such contracts or with such financial assistance.

“(c) Report. The Secretary shall promptly report the results of studies conducted under the program to the Committees on Veterans’ Affairs of the Senate and the House of Representatives.
“(d) Consultation with the National Academy of Sciences. (1) To the extent provided under any agreement entered into by the Secretary and the National Academy of Sciences under this Act—

“(A) the Secretary shall consult with the Academy regarding the establishment and administration of the program under subsection (a); and

“(B) the Academy shall review the studies conducted under contracts awarded pursuant to the program and the studies conducted with financial assistance furnished pursuant to the program.

“(2) The agreement shall require the Academy to submit to the Secretary and the Committees on Veterans' Affairs of the Senate and the House of Representatives any recommendations that the Academy considers appropriate regarding any studies reviewed under the agreement.

“(e) Funding. The authority of the Secretary to carry out this section is effective in any fiscal year only to the extent or in the amount specifically provided in statutory language in appropriations Acts.

“(f) Effective date. (1) This section shall take effect at the end of the 90-day period beginning on the date on which the first report of the National Academy of Sciences under section 3(g) [note to this section] is received by the Secretary, except that this section shall not take effect if the Secretary, after receiving that report and before the end of that 90-day period—

“(A) determines that it is not feasible or cost-effective to carry out this section or that carrying out this section would not make a material contribution to the body of scientific knowledge concerning the health effects in humans of herbicide exposure; and

“(B) notifies the Committees on Veterans' Affairs of the Senate and House of Representatives of the Secretary's determination and the reasons therefor.

“(2) In making a determination under this subsection, the Secretary shall give great weight to the views and recommendations of the Academy expressed in that report with respect to the implementation of this section.”.

**Blood testing of certain Vietnam-era veterans.** Act Feb. 6, 1991, P. L. 102-4, § 9, 105 Stat. 18, effective as provided by subsec. (e) of this note, provides:

“(a) Blood testing. Subject to subsections (d) and (e), in the case of a veteran described in section 610(e)(1)(A) [now section 1710(e)(1)(A)] of title 38, United States Code, who—

“(1) has applied for medical care from the Department of Veterans Affairs; or

“(2) has filed a claim for, or is in receipt of disability compensation under chapter 11 of title 38, United States Code [38 USCS §§ 1101 et seq.]

the Secretary of Veterans Affairs shall, upon the veteran's request, obtain a sufficient amount of blood serum from the veteran to enable the Secretary to conduct a test of the serum to ascertain the level of 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD) which may be present in the veteran's body.

“(b) Notification of test results. Upon completion of such test, the Secretary shall notify the veteran of the test results and provide the veteran a complete explanation as to what, if anything, the results of the test indicate regarding the likelihood of the veteran's exposure to TCDD while serving in the Republic of Vietnam.

“(c) Incorporation in system. The Secretary shall maintain the veteran's blood sample and the results of the test as part of the system required by section 7 [note to this section].
“(d) Funding. The authority of the Secretary to carry out this section is effective in any fiscal year only to the extent or in the amount specifically provided in statutory language in appropriations Acts, but such amount shall not exceed $4,000,000 in any fiscal year.

“(e) Effective date. (1) This section shall take effect at the end of the 90-day period beginning on the date on which the first report of the National Academy of Sciences under section 3(g) [note to this section] is received by the Secretary, except that this section shall not take effect if the Secretary, after receiving that report and before the end of that 90-day period--

"(A) determines that it is not feasible or cost-effective to carry out this section or that carrying out this section would not make a material contribution to the body of scientific knowledge concerning the health effects in humans of herbicide exposure; and

"(B) notifies the Committees on Veterans' Affairs of the Senate and House of Representatives of the Secretary's determination and the reasons therefor.

"(2) In making a determination under this subsection, the Secretary shall give great weight to the views and recommendations of the Academy expressed in that report with respect to the implementation of this section.”.


Study and report on effects of exposure to herbicide agents containing dioxin; rulemaking; limits. Act Dec. 27, 2001, P. L. 107-103, Title II, § 201(a)(2)-(4), 115 Stat. 987, provides:

"(2) The Secretary of Veterans Affairs shall enter into a contract with the National Academy of Sciences, not later than six months after the date of the enactment of this Act, for the performance of a study to include a review of all available scientific literature on the effects of exposure to an herbicide agent containing dioxin on the development of respiratory cancers in humans and whether it is possible to identify a period of time after exposure to herbicides after which a presumption of service-connection for such exposure would not be warranted. Under the contract, the National Academy of Sciences shall submit a report to the Secretary setting forth its conclusions. The report shall be submitted not later than 18 months after the contract is entered into.

"(3) For a period of six months beginning on the date of the receipt of the report of the National Academy of Sciences under paragraph (2), the Secretary may, if warranted by clear scientific evidence presented in the National Academy of Sciences report, initiate a rulemaking under which the Secretary would specify a limit on the number of years after a claimant's departure from Vietnam after which respiratory cancers would not be presumed to have been associated with the claimant's exposure to herbicides while serving in Vietnam. Any such limit under such a rule may not take effect until 120 days have passed after the publication of a final rule to impose such a limit.

"(4)(A) Subject to subparagraphs (B) and (C), if the Secretary imposes such a limit under paragraph (3), that limit shall be effective only as to claims filed on or after the effective date of that limit.

"(B) In the case of any veteran whose disability or death due to respiratory cancer is found by the Secretary to be service-connected under section 1116(a)(2)(F) of title 38, United States Code, as amended by paragraph (1), such disability or death shall remain service-connected for purposes of all provisions of law under such title notwithstanding the imposition, if any, of a time limit by the Secretary by rulemaking authorized under paragraph (3).
“(C) Subparagraph (B) does not apply in a case in which--

"(i) the original award of compensation or service connection was based on fraud; or

"(ii) it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge.”.

Cross References

This section is referred to in 38 USCS §§ 1103, 1113

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:143, 147

Am Jur:

60A Am Jur 2d, Pensions and Retirement Funds § 1262

Forms:

16 Fed Procedural Forms L Ed, Veterans and Veterans' Laws § 68:12

Secretary's determination not to create presumption that prostate cancer, liver cancer, and nose cancer are connected to exposure to herbicides in Vietnam, was reasonable in light of Academy's conclusion that there was yet no convincing evidence of, or mechanistic basis for, carcinogenicity of any of herbicides used in Vietnam. LeFevre v Secretary, Dep't of Veteran's Affairs (1995, CA FC) 66 F.3d 1191, reh den (1995, CA FC) 1995 US App LEXIS 29853 and cert den (1996) 517 US 1188, 134 L Ed 2d 778, 116 S Ct 1674

Section 2 of Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (1991), establishes presumption of service connection, by reason of exposure to dioxin, for diseases that are to be identified in later-promulgated regulations. Williams v Principi (2002, CA FC) 310 F.3d 1374


National Academy of Sciences and Institute of Medicine (Academies) was entitled to dismissal of action filed by veteran of Vietnam War seeking declaratory judgment reflecting that Academies failed to adequately review scientific evidence concerning association between herbicide Agent Orange exposure and illnesses among Vietnam veterans; there was no plausible contention in pleadings that Academies did not adhere to provisions of Agent Orange Act, 38 USCS § 1116, in reviewing scientific evidence and offering recommendations for further study and such lawsuits would significantly imperil and inhibit free and effective scientific inquiry and research that was protected under U.S. Const. amend. I. McMillan v Togus Reg'l Office, Dep't of VA (2003, ED NY) 294 F Supp 2d 305, affd (2005, CA2 NY) 120 Fed Appx 849

Statute concerning service connection for conditions caused by exposure to Agent Orange precludes granting of service connection for birth defects and deaths of appellant's three children secondary to appellant's exposure to Agent Orange, because children are not veterans. Martin v Brown (1995) 8 Vet App 138

Veteran's medical records and death certificate rebutted service connection for veteran's cause of death, even though he died, in part, from lung cancer, since records indicated that first diagnosis was for stomach cancer, that additional cancers developed as result of metastasizing, and that veteran's lung cancer was due to or consequence of veteran's stomach cancer. Darby v Brown (1997) 10 Vet App 243, motion gr sub nom Darby v Gober (1997, Vet App) 1997 US Vet
§ 1117. Compensation for disabilities occurring in Persian Gulf War veterans

(a) (1) The Secretary may pay compensation under this subchapter [38 USCS §§ 1110 et seq.] to a Persian Gulf veteran with a qualifying chronic disability that became manifest--
   (A) during service on active duty in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War; or
   (B) to a degree of 10 percent or more during the presumptive period prescribed under subsection (b).
   (2) For purposes of this subsection, the term "qualifying chronic disability" means a chronic disability resulting from any of the following (or any combination of any of the following):
      (A) An undiagnosed illness.
      (B) A medically unexplained chronic multisymptom illness (such as chronic fatigue syndrome, fibromyalgia, and irritable bowel syndrome) that is defined by a cluster of signs or symptoms.
      (C) Any diagnosed illness that the Secretary determines in regulations prescribed under subsection (d) warrants a presumption of service-connection.

(b) The Secretary shall prescribe by regulation the period of time following service in the Southwest Asia theater of operations during the Persian Gulf War that the Secretary determines is appropriate for presumption of service connection for purposes of this section. The Secretary's determination of such period of time shall be made following a review of any available credible medical or scientific evidence and the historical treatment afforded disabilities for which manifestation periods have been established and shall take into account other pertinent circumstances regarding the experiences of veterans of the Persian Gulf War.

(c) (1) Whenever the Secretary determines under section 1118(c) of this title [38 USCS § 1118(c)] that a presumption of service connection previously established under this section is no longer warranted--
      (A) a veteran who was awarded compensation under this section on the basis of the presumption shall continue to be entitled to receive compensation under this section on that basis; and
      (B) a survivor of a veteran who was awarded dependency and indemnity compensation for the death of a veteran resulting from the disease on the basis of the presumption before that date shall continue to be entitled to receive dependency and indemnity compensation on that basis.
   (2) This subsection shall cease to be effective on September 30, 2011.

(d) (1) The Secretary shall prescribe regulations to carry out this section.
   (2) Those regulations shall include the following:
      (A) A description of the period and geographical area or areas of military service in connection with which compensation under this section may be paid.
      (B) A description of the illnesses for which compensation under this section may be paid.
(C) A description of any relevant medical characteristic (such as a latency period) associated with each such illness.

(e) A disability for which compensation under this subchapter [38 USCS §§ 1110 et seq.] is payable shall be considered to be service connected for purposes of all other laws of the United States.

(f) For purposes of this section, the term "Persian Gulf veteran" means a veteran who served on active duty in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War.

(g) For purposes of this section, signs or symptoms that may be a manifestation of an undiagnosed illness or a chronic multisymptom illness include the following:

1. Fatigue.
2. Unexplained rashes or other dermatological signs or symptoms.
3. Headache.
5. Joint pain.
7. Neuropsychological signs or symptoms.
8. Signs or symptoms involving the upper or lower respiratory system.
9. Sleep disturbances.
10. Gastrointestinal signs or symptoms.
11. Cardiovascular signs or symptoms.
12. Abnormal weight loss.

(h) (1) If the Secretary determines with respect to a medical research project sponsored by the Department that it is necessary for the conduct of the project that Persian Gulf veterans in receipt of compensation under this section or section 1118 of this title [38 USCS § 1118] participate in the project without the possibility of loss of service connection under either such section, the Secretary shall provide that service connection granted under either such section for disability of a veteran who participated in the research project may not be terminated. Except as provided in paragraph (2), notwithstanding any other provision of law any grant of service-connection protected under this subsection shall remain service-connected for purposes of all provisions of law under this title.

2. Paragraph (1) does not apply in a case in which--
   (A) the original award of compensation or service connection was based on fraud; or
   (B) it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge.

(3) The Secretary shall publish in the Federal Register a list of medical research projects sponsored by the Department for which service connection granted under this section or section 1118 of this title [38 USCS § 1118] may not be terminated pursuant to paragraph (1).

Amendments:

2001. Act Dec. 27, 2001 (effective 3/1/2002, as provided by § 202(c) of such Act, which appears as a note to this section), substituted subsec. (a) for one which read:

"(a) The Secretary may pay compensation under this subchapter to any Persian Gulf veteran suffering from a chronic disability resulting from an undiagnosed illness (or combination of undiagnosed illnesses) that--

(1) became manifest during service on active duty in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War; or

(2) became manifest to a degree of 10 percent or more within the presumptive period prescribed under subsection (b)."

in subsec. (c)(1), in the introductory matter, deleted "for an undiagnosed illness (or combination of undiagnosed illnesses)" following "connection", and, in subpara. (A), deleted "for such illness (or combination of illnesses)" following "this section"; and added subsec. (g).

Such Act further, in subsec. (c)(2), substituted "on September 20, 2011" for "10 years after the first day of the fiscal year in which the National Academy of Sciences submits to the Secretary the first report under section 1603 of the Persian Gulf War Veterans Act of 1998".

Such Act further (applicable as provided by § 203(b) of such Act, which appears as a note to this section), added subsec. (h).


Other provisions:

Persian Gulf War Veterans' Benefits Act; congressional findings. Act Nov. 2, 1994, P. L. 103-446, Title I, § 102, 108 Stat. 4647, provides:

"The Congress makes the following findings:

(1) During the Persian Gulf War, members of the Armed Forces were exposed to numerous potentially toxic substances, including fumes and smoke from military operations, oil well fires, diesel exhaust, paints, pesticides, depleted uranium, infectious agents, investigational drugs and vaccines, and indigenous diseases, and were also given multiple immunizations. It is not known whether these servicemembers were exposed to chemical or biological warfare agents. However, threats of enemy use of chemical and biological warfare heightened the psychological stress associated with the military operation.

(2) Significant numbers of veterans of the Persian Gulf War are suffering from illnesses, or are exhibiting symptoms of illness, that cannot now be diagnosed or clearly defined. As a result, many of these conditions or illnesses are not considered to be service connected under current law for purposes of benefits administered by the Department of Veterans Affairs.

(3) The National Institutes of Health Technology Assessment Workshop on the Persian Gulf Experience and Health, held in April 1994, concluded that the complex biological, chemical, physical, and psychological environment of the Southwest Asia theater of operations produced complex adverse health effects in Persian Gulf War veterans and that no single disease entity or syndrome is apparent. Rather, it may be that the illnesses suffered by those veterans result from multiple illnesses with overlapping symptoms and causes that have yet to be defined.

(4) That workshop concluded that the information concerning the range and intensity of exposure to toxic substances by military personnel in the Southwest Asia theater of
operations is very limited and that such information was collected only after a considerable delay.

"(5) In response to concerns regarding the health-care needs of Persian Gulf War veterans, particularly those who suffer from illnesses or conditions for which no diagnosis has been made, the Congress, in Public Law 102-585 [for full classification, consult USCS Tables volumes], directed the establishment of a Persian Gulf War Veterans Health Registry, authorized health examinations for veterans of the Persian Gulf War, and provided for the National Academy of Sciences to conduct a comprehensive review and assessment of information regarding the health consequences of military service in the Persian Gulf theater of operations and to develop recommendations on avenues for research regarding such health consequences. In Public Law 103-210 [for full classification, consult USCS Tables volumes], the Congress authorized the Department of Veterans Affairs to provide health care services on a priority basis to Persian Gulf War veterans. The Congress also provided in Public Law 103-160 (the National Defense Authorization Act for Fiscal Year 1994 [for full classification, consult USCS Tables volumes]) for the establishment of a specialized environmental medical facility for the conduct of research into the possible health effects of exposure to low levels of hazardous chemicals, especially among Persian Gulf veterans, and for research into the possible health effects of battlefield exposure in such veterans to depleted uranium.

"(6) In response to concerns about the lack of objective research on Gulf War illnesses, Congress included research provisions in the National Defense Authorization Act for Fiscal Year 1995 [Act Oct. 5, 1994, P. L. 103-337; for full classification, consult USCS tables volumes], which was passed by the House and Senate in September 1994. This legislation requires the Secretary of Defense to provide research grants to non-Federal researchers to support three types of studies of the Gulf War syndrome. The first type of study will be an epidemiological study or studies of the incidence, prevalence, and nature of the illness and symptoms and the risk factors associated with symptoms or illnesses. This will include illnesses among spouses and birth defects and illnesses among offspring born before and after the Gulf War. The second group of studies shall be conducted to determine the health consequences of the use of pyridostigmine bromide as a pretreatment antidote enhancer during the Persian Gulf War, alone or in combination with exposure to pesticides, environmental toxins, and other hazardous substances. The final group of studies shall include clinical research and other studies on the causes, possible transmission, and treatment of Gulf War syndrome, and will include studies of veterans and their spouses and children.

"(7) Further research and studies must be undertaken to determine the underlying causes of the illnesses suffered by Persian Gulf War veterans and, pending the outcome of such research, veterans who are seriously ill as the result of such illnesses should be given the benefit of the doubt and be provided compensation benefits to offset the impairment in earnings capacities they may be experiencing.


"The purposes of this title [for full classification, consult USCS Tables volumes] are--

"(1) to provide compensation to Persian Gulf War veterans who suffer disabilities resulting from illnesses that cannot now be diagnosed or defined, and for which other causes cannot be identified;

"(2) to require the Secretary of Veterans Affairs to develop at the earliest possible date case assessment strategies and definitions or diagnoses of such illnesses;
“(3) to promote greater outreach to Persian Gulf War veterans and their families to inform them of ongoing research activities, as well as the services and benefits to which they are currently entitled; and

“(4) to ensure that research activities and accompanying surveys of Persian Gulf War veterans are appropriately funded and undertaken by the Department of Veterans Affairs.”.


“(a) Uniform medical evaluation protocol.(1) The Secretary of Veterans Affairs shall develop and implement a uniform and comprehensive medical evaluation protocol that will ensure appropriate medical assessment, diagnosis, and treatment of Persian Gulf War veterans who are suffering from illnesses the origins of which are (as of the date of the enactment of this Act) unknown and that may be attributable to service in the Southwest Asia theater of operations during the Persian Gulf War. The protocol shall include an evaluation of complaints relating to illnesses involving the reproductive system.

“(2) If such a protocol is not implemented before the end of the 120-day period beginning on the date of the enactment of this Act, the Secretary shall, before the end of such period, submit to the Committees on Veterans’ Affairs of the Senate and House of Representatives a report as to why such a protocol has not yet been developed.

“(3)(A) The Secretary shall ensure that the evaluation under the protocol developed under this section is available at all Department medical centers that have the capability of providing the medical assessment, diagnosis, and treatment required under the protocol.

“(B) The Secretary may enter into contracts with non-Department medical facilities for the provision of the evaluation under the protocol.

“(C) In the case of a veteran whose residence is distant from a medical center described in subparagraph (A), the Secretary may provide the evaluation through a Department medical center described in that subparagraph and, in such a case, may provide the veteran the travel and incidental expenses therefor pursuant to the provisions of section 111 of title 38, United States Code.

“(4)(A) If the Secretary is unable to diagnose the symptoms or illness of a veteran provided an evaluation, or if the symptoms or illness of a veteran do not respond to treatment provided by the Secretary, the Secretary may use the authority in section 1703 of title 38, United States Code, in order to provide for the veteran to receive diagnostic tests or treatment at a non-Department medical facility that may have the capability of diagnosing or treating the symptoms or illness of the veteran. The Secretary may provide the veteran the travel and incidental expenses therefor pursuant to the provisions of section 111 of title 38, United States Code.

“(B) The Secretary shall request from each non-Department medical facility that examines or treats a veteran under this paragraph such information relating to the diagnosis or treatment as the Secretary considers appropriate.

“(5) In each year after the implementation of the protocol, the Secretary shall enter into an agreement with the National Academy of Sciences under which agreement appropriate experts shall review the adequacy of the protocol and its implementation by the Department of Veterans Affairs.

“(b) Relationship to other comprehensive clinical evaluation protocols. The Secretary, in consultation with the Secretary of Defense, shall ensure that the information collected through the protocol described in this section is collected and maintained in a manner that
permits the effective and efficient cross-reference of that information with information collected and maintained through the comprehensive clinical protocols of the Department of Defense for Persian Gulf War veterans.

"(c) Case definitions and diagnoses. The Secretary shall develop case definitions or diagnoses for illnesses associated with the service described in subsection (a)(1). The Secretary shall develop such definitions or diagnoses at the earliest possible date."


"(a) In general. The Secretary of Veterans Affairs shall implement a comprehensive outreach program to inform Persian Gulf War veterans and their families of the medical care and other benefits that may be provided by the Department of Veterans Affairs and the Department of Defense arising from service in the Persian Gulf War.

"(b) Newsletter.(1) The outreach program shall include a newsletter which shall be updated and distributed at least semi-annually and shall be distributed to the veterans listed on the Persian Gulf War Veterans Health Registry. The newsletter shall include summaries of the status and findings of Government sponsored research on illnesses of Persian Gulf War veterans and their families, as well as on benefits available to such individuals through the Department of Veterans Affairs. The newsletter shall be prepared in consultation with veterans service organizations.

"(2) The requirement under this subsection for the distribution of the newsletter shall terminate on December 31, 2003.

"(c) Toll-free number. The outreach program shall include establishment of a toll-free telephone number to provide Persian Gulf War veterans and their families information on the Persian Gulf War Veterans Health Registry, health care and other benefits provided by the Department of Veterans Affairs, and such other information as the Secretary considers appropriate. Such toll-free telephone number shall be established not later than 90 days after the date of the enactment of this Act."

**Report on payment of compensation.** Act Nov. 2, 1994, P. L. 103-446, Title I, § 106(c), 108 Stat. 4651, provides: "Not later than 60 days after the date of the enactment of this Act, the Secretary of Veterans Affairs shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report stating whether or not the Secretary intends to pay compensation as provided in section 1117 of title 38, United States Code, as added by subsection (a)."

**Publication of proposed regulations.** Act Nov. 2, 1994, P. L. 103-446, Title I, § 106(d), 108 Stat. 4651, provides: "If the Secretary states in the report under subsection (c) that the Secretary intends to pay compensation as provided in section 1117 of title 38, United States Code, as added by subsection (a), the Secretary shall, not later than 30 days after the date on which such report is submitted, publish in the Federal Register proposed regulations under subsections (b) and (c) of that section."


"(a) Evaluation program. Subject to subsection (c), the Secretary of Veterans Affairs shall conduct a program to evaluate the health status of spouses and children of Persian Gulf War veterans. Under the program, the Secretary shall provide for the conduct of diagnostic testing and appropriate medical examinations of any individual--

"(1) who is the spouse or child of a veteran who--
"(A) is listed in the Persian Gulf War Veterans Registry established under section 702 of Public Law 102-585 [38 USCS § 527 note]; and

"(B) is suffering from an illness or disorder;

"(2) who is apparently suffering from, or may have suffered from, an illness or disorder (including a birth defect, miscarriage, or stillbirth) which cannot be disassociated from the veteran's service in the Southwest Asia theater of operations; and

"(3) who, in the case of a spouse, has granted the Secretary permission to include in the Registry relevant medical data (including a medical history and the results of diagnostic testing and medical examinations) and such other information as the Secretary considers relevant and appropriate with respect to such individual.

"(b) Duration of program. The program shall be carried out during the period beginning on November 1, 1994, and ending on December 31, 2003.

"(c) Funding limitation. The amount spent for the program under subsection (a) may not exceed $2,000,000.

"(d) Contracting. The Secretary may provide for the conduct of testing and examinations under subsection (a) through appropriate contract arrangements, including fee arrangements described in section 1703 of title 38, United States Code.

"(e) Standard protocols and guidelines. The Secretary shall seek to ensure uniform development of medical data through the development of standard protocols and guidelines for such testing and examinations. If such protocols and guidelines have not been adopted before the end of the 120-day period beginning on the date of the enactment of this Act, the Secretary shall, before the end of such period, submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report as to why such protocols and guidelines have not yet been developed.

"(f) Entry of results in registry. The results of diagnostic tests, medical histories, and medical examinations conducted under subsection (a) shall be entered into the Persian Gulf War Veterans Health Registry.

"(g) Outreach. The Secretary shall conduct such outreach activities as the Secretary determines necessary for the purposes of the program. In conducting such outreach activities, the Secretary shall advise that medical treatment is not available under the program.

"(h) Use outside department of standard protocols and guidelines. The Secretary shall--

"(1) make the standard protocols and guidelines developed under this section available to any entity which requests a copy of such protocols and guidelines; and

"(2) enter into the registry the results of any examination of the spouse or child of a veteran who served in the Persian Gulf theater which a licensed physician certifies was conducted using those standard protocols and guidelines.

"(i) Report to Congress. Not later than July 31, 1999, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on activities with respect to the program, including the provision of services under subsection (d).

"(j) Definitions. For purposes of this section, the terms 'child' and 'spouse' have the meanings given those terms in paragraphs (4) and (31), respectively, of section 101 of title 38, United States Code."

"(a) In general. The Secretary of Veterans Affairs may carry out a survey of Persian Gulf
veterans to gather information on the incidence and nature of health problems occurring in
Persian Gulf veterans and their families.

"(b) Coordination with Department of Defense. Any survey under subsection (a) shall be
carried out in coordination with the Secretary of Defense.

"(c) Persian Gulf veteran. For purposes of this section, a Persian Gulf veteran is an individual
who served on active duty in the Armed Forces in the Southwest Asia theater of operations
during the Persian Gulf War as defined in section 101(33) of title 38, United States Code.".

Authorization of epidemiological studies. Act Nov. 2, 1994, P. L. 103-446, Title I, § 110,
108 Stat. 4654, provides:

"(a) Study of health consequences of Persian Gulf service. If the National Academy of
Sciences includes in the report required by section 706(b) of the Veterans Health Care Act of
1992 (Public Law 102-585) [38 USCS § 527 note] a finding that there is a sound basis for an
epidemiological study or studies on the health consequences of service in the Persian Gulf
theater of operations during the Persian Gulf War and recommends the conduct of such a
study or studies, the Secretary of Veterans Affairs is authorized to carry out such study.

"(b) Oversight.(1) The Secretary shall seek to enter into an agreement with the Medical
Follow-Up Agency (MFUA) of the Institute of Medicine of the National Academy of Sciences
for (A) the review of proposals to conduct the research referred to in subsection (a), (B)
oversight of such research, and (C) review of the research findings.

"(2) If the Secretary is unable to enter into an agreement under paragraph (1) with the
entity specified in that paragraph, the Secretary shall enter into an agreement described
in that paragraph with another appropriate scientific organization which does not have a
connection to the Department of Veterans Affairs. In such a case, the Secretary shall
submit to the Committees on Veterans' Affairs of the Senate and House of
Representatives, at least 90 days before the date on which the agreement is entered into,
otice in writing identifying the organization with which the Secretary intends to enter into
the agreement.

"(c) Access to data. The Secretary shall enter into agreements with the Secretary of Defense
and the Secretary of Health and Human Services to make available for the purposes of any
study described in subsection (a) all data that the Secretary, in consultation with the National
Academy of Sciences and the contractor for the study, considers relevant to the study.

"(d) Authorization. There are authorized to be appropriated to the Department such sums as
are necessary for the conduct of studies described in subsection (a).".

formerly appeared as a note to this section, was revoked by Ex. Or. No. 13138 of Sept. 30,
1999, 64 Fed. Reg. 53879, which appears as 5 USCS Appx § 14 note. The revoked Order
provided for a Presidential Advisory Committee on Gulf War Veterans' Illnesses.

9, 1996, P. L. 104-262, Title III, Subtitle D, § 352(b), 110 Stat. 3211, provides: "Any
diagnostic testing and medical examinations undertaken by the Secretary of Veterans Affairs
for the purpose of the study required by subsection (a) of such section [§ 107(a) of Act Nov. 2,
1994, P. L. 103-446, which appears as a note to this section] during the period beginning on
October 1, 1996, and ending on the date of the enactment of this Act is hereby ratified.".

Extension of Presidential Advisory Committee on Gulf War Veterans' Illnesses. Ex. Or.
No. 13034 of Jan. 30, 1997, 62 F.R. 5137, provides:

"By the authority vested in me as President by the Constitution and the laws of the United
States of America, it is hereby ordered as follows:
"Section 1. Extension. The Presidential Advisory Committee on Gulf War Veterans' Illnesses (the 'Committee'), established pursuant to Executive Order 12961 of May 26, 1995 [note to this section], is hereby extended for the purposes set forth herein. All provisions of that order relating to membership and administration shall remain in effect. All Committee appointments, as well as the President's designation of a Chairperson, shall remain in effect. The limitations set forth in section 2(c)-(e) and section 4(a) of Executive Order 12961 [note to this section] shall also remain in effect. The Committee shall remain subject to the Federal Advisory Committee Act, as amended, 5 U.S.C. App. 2.

"Sec. 2. Functions. (a) The Committee shall report to the President through the Secretary of Defense, the Secretary of Veterans Affairs, and the Secretary of Health and Human Services.

"(b) The Committee shall have two principal roles:

"(1) Oversight of the ongoing investigation being conducted by the Department of Defense with the assistance, as appropriate, of other executive departments and agencies into possible chemical or biological warfare agent exposures during the Gulf War; and

"(2) Evaluation of the Federal Government's plan for and progress towards the implementation of the Committee's recommendations contained in its Final Report submitted on December 31, 1996.

"(c) The Committee shall provide advice and recommendations related to its oversight and evaluation responsibilities.

"(d) The Committee may also provide additional advice and recommendations prompted by any new developments related to its original functions as set forth in section 2(b) of Executive Order 12961 [note to this section].

"(e) The Committee shall submit by letter a status report by April 30, 1997, and a final supplemental report by October 31, 1997, unless otherwise directed by the President.

"Sec. 3. General Provisions. (a) The Committee shall terminate 30 days after submitting its final supplemental report.

"(b) This order is intended only to improve the internal management of the executive branch and it is not intended to create any right, benefit or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person."


"(a) Purpose. The purpose of this section is to provide for the National Academy of Sciences, an independent nonprofit scientific organization with appropriate expertise, to review and evaluate the available scientific evidence regarding associations between illnesses and exposure to toxic agents, environmental or wartime hazards, or preventive medicines or vaccines associated with Gulf War service.

"(b) Agreement. The Secretary of Veterans Affairs shall seek to enter into an agreement with the National Academy of Sciences for the Academy to perform the activities covered by this section. The Secretary shall seek to enter into the agreement not later than two months after the date of enactment of this Act.

"(c) Identification of agents and illnesses.(1) Under the agreement under subsection (b), the National Academy of Sciences shall--

"(A) identify the biological, chemical, or other toxic agents, environmental or wartime hazards, or preventive medicines or vaccines to which members of the Armed Forces
who served in the Southwest Asia theater of operations during the Persian Gulf War may have been exposed by reason of such service; and

"(B) identify the illnesses (including diagnosed illnesses and undiagnosed illnesses) that are manifest in such members.

"(2) In identifying illnesses under paragraph (1)(B), the Academy shall review and summarize the relevant scientific evidence regarding illnesses among the members described in paragraph (1)(A) and among other appropriate populations of individuals, including mortality, symptoms, and adverse reproductive health outcomes among such members and individuals.

"(d) Initial consideration of specific agents.(1) In identifying under subsection (c) the agents, hazards, or preventive medicines or vaccines to which members of the Armed Forces may have been exposed for purposes of the first report under subsection (i), the National Academy of Sciences shall consider, within the first six months after the date of enactment of this Act, the following:

"(A) The following organophosphorous pesticides:

"(i) Chlorpyrifos.

"(ii) Diazinon.

"(iii) Dichlorvos.

"(iv) Malathion.

"(B) The following carbamate pesticides:

"(i) Proxpur.

"(ii) Carbaryl.

"(iii) Methomyl.

"(C) The carbamate pyridostigmine bromide used as nerve agent prophylaxis.

"(D) The following chlorinated hydrocarbon and other pesticides and repellents:

"(i) Lindane.

"(ii) Pyrethrins.

"(iii) Permethrins.

"(iv) Rodenticides (bait).

"(v) Repellent (DEET).

"(E) The following low-level nerve agents and precursor compounds at exposure levels below those which produce immediately apparent incapacitating symptoms:

"(i) Sarin.

"(ii) Tabun.

"(F) The following synthetic chemical compounds:

"(i) Mustard agents at levels below those which cause immediate blistering.

"(ii) Volatile organic compounds.
"(iii) Hydrazine.

"(iv) Red fuming nitric acid.

"(v) Solvents.

"(vi) Uranium.

"(G) The following ionizing radiation:

"(i) Depleted uranium.

"(ii) Microwave radiation.

"(iii) Radio frequency radiation.

"(H) The following environmental particulates and pollutants:

"(i) Hydrogen sulfide.

"(ii) Oil fire byproducts.

"(iii) Diesel heater fumes.

"(iv) Sand micro-particles.

"(I) Diseases endemic to the region (including the following):

"(i) Leishmaniasis.

"(ii) Sandfly fever.

"(iii) Pathogenic escherechia coli.

"(iv) Shigellosis.


"(2) The consideration of agents, hazards, and medicines and vaccines under paragraph (1) shall not preclude the Academy from identifying other agents, hazards, or medicines or vaccines to which members of the Armed Forces may have been exposed for purposes of any report under subsection (i).

"(3) Not later than six months after the date of enactment of this Act, the Academy shall submit to the designated congressional committees a report specifying the agents, hazards, and medicines and vaccines considered under paragraph (1).

"(e) Determinations of associations between agents and illnesses.(1) For each agent, hazard, or medicine or vaccine and illness identified under subsection (c), the National Academy of Sciences shall determine, to the extent that available scientific data permit meaningful determinations--

"(A) whether a statistical association exists between exposure to the agent, hazard, or medicine or vaccine and the illness, taking into account the strength of the scientific evidence and the appropriateness of the scientific methodology used to detect the association;

"(B) the increased risk of the illness among human or animal populations exposed to the agent, hazard, or medicine or vaccine; and
“(C) whether a plausible biological mechanism or other evidence of a causal relationship exists between exposure to the agent, hazard, or medicine or vaccine and the illness.

“(2) The Academy shall include in its reports under subsection (i) a full discussion of the scientific evidence and reasoning that led to its conclusions under this subsection.

“(f) Review of potential treatment models for certain illnesses. Under the agreement under subsection (b), the National Academy of Sciences shall separately review, for each chronic undiagnosed illness identified under subsection (c)(1)(B) and for any other chronic illness that the Academy determines to warrant such review, the available scientific data in order to identify empirically valid models of treatment for such illnesses which employ successful treatment modalities for populations with similar symptoms.

“(g) Recommendations for additional scientific studies. (1) Under the agreement under subsection (b), the National Academy of Sciences shall make any recommendations that it considers appropriate for additional scientific studies (including studies relating to treatment models) to resolve areas of continuing scientific uncertainty relating to the health consequences of exposure to toxic agents, environmental or wartime hazards, or preventive medicines or vaccines associated with Gulf War service.

“(2) In making recommendations for additional studies, the Academy shall consider the available scientific data, the value and relevance of the information that could result from such studies, and the cost and feasibility of carrying out such studies.

“(h) Subsequent reviews. (1) Under the agreement under subsection (b), the National Academy of Sciences shall conduct on a periodic and ongoing basis additional reviews of the evidence and data relating to its activities under this section.

“(2) As part of each review under this subsection, the Academy shall--

“(A) conduct as comprehensive a review as is practicable of the evidence referred to in subsection (c) and the data referred to in subsections (e), (f), and (g) that became available since the last review of such evidence and data under this section; and

“(B) make determinations under the subsections referred to in subparagraph (A) on the basis of the results of such review and all other reviews previously conducted for purposes of this section.

“(i) Reports. (1) Under the agreement under subsection (b), the National Academy of Sciences shall submit to the committees and officials referred to in paragraph (5) periodic written reports regarding the Academy's activities under the agreement.

“(2) The first report under paragraph (1) shall be submitted not later than 18 months after the date of enactment of this Act. That report shall include--

“(A) the determinations and discussion referred to in subsection (e);

“(B) the results of the review of models of treatment under subsection (f); and

“(C) any recommendations of the Academy under subsection (g).

“(3) Reports shall be submitted under this subsection at least once every two years, as measured from the date of the report under paragraph (2).

“(4) In any report under this subsection (other than the report under paragraph (2)), the Academy may specify an absence of meaningful developments in the scientific or medical community with respect to the activities of the Academy under this section during the 2-year period ending on the date of such report.

“(5) Reports under this subsection shall be submitted to the following:
"(A) The designated congressional committees.

"(B) The Secretary of Veterans Affairs.

"(C) The Secretary of Defense.

"(j) Sunset. This section shall cease to be effective on October 1, 2010.

"(k) Alternative contract scientific organization.(1) If the Secretary is unable within the time period set forth in subsection (b) to enter into an agreement with the National Academy of Sciences for the purposes of this section on terms acceptable to the Secretary, the Secretary shall seek to enter into an agreement for purposes of this section with another appropriate scientific organization that is not part of the Government, operates as a not-for-profit entity, and has expertise and objectivity comparable to that of the National Academy of Sciences.

"(2) If the Secretary enters into an agreement with another organization under this subsection, any reference in this section and section 1118 of title 38, United States Code (as added by section 1602(a)), to the National Academy of Sciences shall be treated as a reference to such other organization.".

Repeal of inconsistent provisions of law with respect to evaluation of health consequences of Persian Gulf War service. Act Oct. 21, 1998, P. L. 105-277, Div C, Title XVI, § 1604, 112 Stat. 2681-748, provides: "In the event of the enactment, before, on, or after the date of the enactment of this Act, of section 101 of the Veterans Programs Enhancement Act of 1998 [§ 101 of Act Nov. 11, 1998, P. L. 105-368 (note to this section)], or any similar provision of law enacted during the second session of the 105th Congress requiring an agreement with the National Academy of Sciences regarding an evaluation of health consequences of service in Southwest Asia during the Persian Gulf War, such section 101 (or other provision of law) shall be treated as if never enacted, and shall have no force or effect.".


"In this title [adding 38 USCS § 1118, amending 38 USCS §§ 1113, 1117, and the chapter analysis preceding § 1101, and appearing in part as notes to this section]:

"(1) The term 'toxic agent, environmental or wartime hazard, or preventive medicine or vaccine associated with Gulf War service' means a biological, chemical, or other toxic agent, environmental or wartime hazard, or preventive medicine or vaccine that is known or presumed to be associated with service in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War, whether such association arises as a result of single, repeated, or sustained exposure and whether such association arises through exposure singularly or in combination.

"(2) The term 'designated congressional committees' means the following:

"(A) The Committees on Veterans' Affairs and Armed Services of the Senate.

"(B) The Committees on Veterans' Affairs and National Security of the House of Representatives.

"(3) The term 'Persian Gulf War' has the meaning given that term in section 101(33) of title 38, United States Code.".

Agreement with National Academy of Sciences regarding evaluation of health consequences of service in Southwest Asia during the Persian Gulf War [Caution: See § 1604 of Division C of Act Oct. 21, 1998, P. L. 105-277 (note to this section), for provision that this section shall be treated as if never enacted, and shall have no force or effect.]. Act Nov. 11, 1998, P. L. 105-368, Title I, § 101, 112 Stat. 3317, provides:
"(a) Purpose. The purpose of this section is to provide for the National Academy of Sciences, an independent nonprofit scientific organization with appropriate expertise which is not a part of the Federal Government, to review and evaluate the available scientific evidence regarding associations between illness and service in the Persian Gulf War.

"(b) Agreement.(1) The Secretary of Veterans Affairs shall seek to enter into an agreement with the National Academy of Sciences for the Academy to perform the activities covered by this section. The Secretary shall seek to enter into the agreement not later than 2 months after the date of the enactment of this Act.

"(2)(A) If the Secretary is unable within the time period set forth in paragraph (1) to enter into an agreement with the Academy for the purposes of this section on terms acceptable to the Secretary, the Secretary shall seek to enter into an agreement for purposes of this section with another appropriate scientific organization that is not part of the Federal Government, operates as a not-for-profit entity, and has expertise and objectivity comparable to that of the Academy.

"(B) If the Secretary enters into an agreement with another organization under this paragraph, any reference in this section to the National Academy of Sciences shall be treated as a reference to such other organization.

"(c) Review of scientific evidence.(1) Under the agreement under subsection (b), the National Academy of Sciences shall conduct a comprehensive review and evaluation of the available scientific and medical information regarding the health status of Gulf War veterans and the health consequences of exposures to risk factors during service in the Persian Gulf War. In conducting such review and evaluation, the Academy shall--

"(A) identify the biological, chemical, or other toxic agents, environmental or wartime hazards, or preventive medicines or vaccines (including the agents specified in subsection (d)(1)) to which members of the Armed Forces who served in the Southwest Asia theater of operations during the Persian Gulf War may have been exposed by reason of such service;

"(B) identify the illnesses associated with the agents, hazards, or medicines or vaccines identified under subparagraph (A); and

"(C) identify the illnesses (including diagnosed illnesses and undiagnosed illnesses) for which there is scientific evidence of a higher prevalence among populations of Gulf War veterans when compared with other appropriate populations of individuals.

"(2) In identifying illnesses under subparagraphs (B) and (C) of paragraph (1), the Academy shall review and summarize the relevant scientific evidence regarding illnesses, including symptoms, adverse reproductive health outcomes, and mortality, among the members described in paragraph (1)(A) and among other appropriate populations of individuals.

"(3) In conducting the review and evaluation under paragraph (1), the Academy shall, for each illness identified under subparagraph (B) or (C) of that paragraph, assess the latency period, if any, between service or exposure to any potential risk factor (including an agent, hazard, or medicine or vaccine identified under subparagraph (A) of that paragraph) and the manifestation of such illness.

"(d) Specified agents.(1) In identifying under subsection (c)(1)(A) the agents, hazards, or preventive medicines or vaccines to which members of the Armed Forces may have been exposed, the National Academy of Sciences shall consider the following:

"(A) The following organophosphorous pesticides:

"(i) Chlorpyrifos.
(ii) Diazinon.
(iii) Dichlorvos.
(iv) Malathion.

(B) The following carbamate pesticides:
(i) Proxpur.
(ii) Carbaryl.
(iii) Methomyl.

(C) The carbamate pyridostigmine bromide used as nerve agent prophylaxis.

(D) The following chlorinated hydrocarbons and other pesticides and repellents:
(i) Lindane.
(ii) Pyrethrins.
(iii) Permethrins.
(iv) Rodenticides (bait).
(v) Repellent (DEET).

(E) The following low-level nerve agents and precursor compounds at exposure levels below those which produce immediately apparent incapacitating symptoms:
(i) Sarin.
(ii) Tabun.

(F) The following synthetic chemical compounds:
(i) Mustard agents at levels below those which cause immediate blistering.
(ii) Volatile organic compounds.
(iii) Hydrazine.
(iv) Red fuming nitric acid.
(v) Solvents.

(G) The following sources of radiation:
(i) Depleted uranium.
(ii) Microwave radiation.
(iii) Radio frequency radiation.

(H) The following environmental particulates and pollutants:
(i) Hydrogen sulfide.
(ii) Oil fire byproducts.
(iii) Diesel heater fumes.
"(iv) Sand micro-particles.

"(I) Diseases endemic to the region (including the following):

"(i) Leishmaniasis.

"(ii) Sandfly fever.

"(iii) Pathogenic escherichia coli.

"(iv) Shigellosis.

"(J) Time compressed administration of multiple live, 'attenuated', and toxoid vaccines.

"(2) The consideration of agents, hazards, and medicines and vaccines under paragraph (1) shall not preclude the Academy from identifying other agents, hazards, or medicines or vaccines to which members of the Armed Forces may have been exposed for purposes of any report under subsection (h).

"(3) Not later than 6 months after entry into the agreement under subsection (b), the Academy shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report specifying the agents, hazards, and medicines and vaccines considered under paragraph (1).

"(e) Scientific determinations concerning illnesses. (1) For each illness identified under subparagraph (B) or (C) of subsection (c)(1), the National Academy of Sciences shall determine (to the extent available scientific evidence permits) whether there is scientific evidence of an association of that illness with Gulf War service or exposure during Gulf War service to one or more agents, hazards, or medicines or vaccines. In making those determinations, the Academy shall consider--

"(A) the strength of scientific evidence, the replicability of results, the statistical significance of results, and the appropriateness of the scientific methods used to detect the association;

"(B) in any case where there is evidence of an apparent association, whether there is reasonable confidence that that apparent association is not due to chance, bias, or confounding;

"(C) the increased risk of the illness among human or animal populations exposed to the agents, hazards, or medicines or vaccines;

"(D) whether a plausible biological mechanism or other evidence of a causal relationship exists between exposure to the agents, hazards, or medicines or vaccines and the illnesses;

"(E) in any case where information about exposure levels is available, whether the evidence indicates that the levels of exposure of the studied populations were of the same magnitude as the estimated likely exposures of Gulf War veterans; and

"(F) whether there is an increased risk of illness among Gulf War veterans in comparison with appropriate peer groups.

"(2) The Academy shall include in its reports under subsection (h) a full discussion of the scientific evidence and reasoning that led to its conclusions under this subsection.

"(f) Recommendations for additional scientific studies. (1) Under the agreement under subsection (b), the National Academy of Sciences shall make any recommendations that it considers appropriate for additional scientific studies (including studies relating to treatment
models) to resolve areas of continuing scientific uncertainty relating to the health consequences of service in the Persian Gulf War or exposure to toxic agents, environmental or wartime hazards, or preventive medicines or vaccines associated with Gulf War service.

"(2) In making recommendations for additional studies, the Academy shall consider the available scientific data, the value and relevance of the information that could result from such studies, and the cost and feasibility of carrying out such studies.

"(g) Subsequent reviews.(1) Under the agreement under subsection (b), the National Academy of Sciences shall conduct on a periodic and ongoing basis additional reviews of the evidence and data relating to its activities under this section.

"(2) As part of each review under this subsection, the Academy shall--

"(A) conduct as comprehensive a review as is practicable of the information referred to in subsection (c), the evidence referred to in subsection (e), and the data referred to in subsection (f) that became available since the last review of such information, evidence, and data under this section; and

"(B) make determinations under the subsections referred to in subparagraph (A) on the basis of the results of such review and all other reviews previously conducted for purposes of this section.

"(h) Reports by Academy.(1) Under the agreement under subsection (b), the National Academy of Sciences shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives and the Secretary of Veterans Affairs periodic written reports regarding the Academy's activities under the agreement.

"(2) The first report under paragraph (1) shall be submitted not later than 2 years after entry into the agreement under subsection (b). That report shall include--

"(A) the determinations and discussion referred to in subsection (e); and

"(B) any recommendations of the Academy under subsection (f).

"(3) Reports shall be submitted under this subsection at least once every 2 years, as measured from the date of the report under paragraph (2).

"(4) In any report under this subsection (other than the report under paragraph (2)), the Academy may specify an absence of meaningful developments in the scientific or medical community with respect to the activities of the Academy under this section during the 2-year period ending on the date of such report.

"(i) Reports by Secretary.(1) The Secretary shall review each report from the Academy under subsection (h). As part of such review, the Secretary shall seek comments on, and evaluation of, the Academy's report from the heads of other affected departments and agencies of the United States.

"(2) Based upon a review under paragraph (1), the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on the available scientific and medical information regarding the health consequences of Persian Gulf War service and of exposures to risk factors during service in the Persian Gulf War. The Secretary shall include in the report the Secretary's recommendations as to whether there is sufficient evidence to warrant a presumption of service-connection for the occurrence of a specified condition in Gulf War veterans. In determining whether to make such a recommendation, the Secretary shall consider the matters specified in subparagraphs (A) through (F) of subsection (e)(1).

"(3) The report under this subsection shall be submitted not later than 120 days after the date on which the Secretary receives the report from the Academy.
“(j) Sunset. This section shall cease to be effective 11 years after the last day of the fiscal year in which the National Academy of Sciences enters into an agreement with the Secretary under subsection (b).

“(k) Definition. In this section, the term 'toxic agent, environmental or wartime hazard, or preventive medicine or vaccine associated with Gulf War service' means a biological, chemical, or other toxic agent, environmental or wartime hazard, or preventive medicine or vaccine that is known or presumed to be associated with service in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War, whether such association arises as a result of single, repeated, or sustained exposure and whether such association arises through exposure singularly or in combination.”.


“(a) Assessment by National Academy of Sciences. Not later than April 1, 1999, the Secretary of Veterans Affairs shall enter into a contract with the National Academy of Sciences to review the available scientific data in order to--

“(1) assess whether a methodology could be used by the Department of Veterans Affairs for determining the efficacy of treatments furnished to, and health outcomes (including functional status) of, Persian Gulf War veterans who have been treated for illnesses which may be associated with their service in the Persian Gulf War; and

“(2) identify, to the extent feasible, with respect to each undiagnosed illness prevalent among such veterans and for any other chronic illness that the Academy determines to warrant such review, empirically valid models of treatment for such illness which employ successful treatment modalities for populations with similar symptoms.

“(b) Action on report.(1) After receiving the final report of the National Academy of Sciences under subsection (a), the Secretary shall, if a reasonable and scientifically feasible methodology is identified by the Academy, develop an appropriate mechanism to monitor and study the effectiveness of treatments furnished to, and health outcomes of, Persian Gulf War veterans who suffer from diagnosed and undiagnosed illnesses which may be associated with their service in the Persian Gulf War.

“(2) The Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the implementation of paragraph (1).

“(3) The Secretary shall carry out paragraphs (1) and (2) not later than 180 days after receiving the final report of the National Academy of Sciences under subsection (a).”.

Effective date of amendments made by § 202(a) and (b) of Act Dec. 27, 2001. Act Dec. 27, 2001, P. L. 107-103, Title II, § 202(c), provides: "The amendments made by subsections (a) and (b) [amending 38 USCS §§ 1117 and 1118] shall take effect on March 1, 2002."

Application of amendment made by § 203 of Act Dec. 27, 2001. Act Dec. 27, 2001, P. L. 107-103, Title II, § 203(b), provides: "The authority provided by subsection (h) of section 1117 of title 38, United States Code, as added by subsection (a), may be used by the Secretary of Veterans Affairs with respect to any medical research project of the Department of Veterans Affairs, whether commenced before, on, or after the date of the enactment of this Act.”.

Cross References

This section is referred to in 38 USCS § 1113

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:144, 147
In order to establish well-grounded claim for compensation under 38 USCS § 1117(a), claimant need only present some evidence that he or she is Persian Gulf veteran, that he or she exhibits objective indications of chronic disability, that sign or symptoms became manifest during active service in Southwest Asia theater of operations during Persian Gulf War, and that such symptomatology, by history, physical examination, and laboratory tests, cannot be attributed to any known clinical diagnosis; to extent veteran argues that claim for right wrist condition is entitled to benefits of § 1117 presumption, claim must be rejected as legally insufficient since veteran's symptoms were diagnosed as cubital tunnel syndrome. Neumann v West (2000) 14 Vet App 12, 2000 US App Vet Claims LEXIS 717, motions ruled upon, remanded (2001, CA FC) 5 Fed Appx 881 and op replaced on other grounds, remanded (2001) 14 Vet App 304, 2001 US App Vet Claims LEXIS 360

Where veteran sought presumptive service connection for variety of undiagnosed conditions allegedly incurred during Persian Gulf War, but claim was denied based on finding that veteran's subjective complaints were insufficient to establish illness connected to service in Persian Gulf War, denial of claim was erroneous since veteran was not required to present objective medical evidence of symptoms nor to establish link between symptoms and veteran's service in Persian Gulf War. Gutierrez v Principi (2004) 19 Vet App 1, 2004 US App Vet Claims LEXIS 834

Where veteran complained of joint and muscle pain, fatigue, dizziness, loss of vision, memory loss, and loss of concentration, allegedly incurred during Persian Gulf War, testimony of veteran's spouse, father, and friend concerning symptoms and veteran's general decline in health was competent evidence supporting veteran's claim for presumptive service connection since symptoms were capable of lay observation. Gutierrez v Principi (2004) 19 Vet App 1, 2004 US App Vet Claims LEXIS 834

§ 1118. Presumptions of service connection for illnesses associated with service in the Persian Gulf during the Persian Gulf War

(a) (1) For purposes of section 1110 of this title [38 USCS § 1110], and subject to section 1113 of this title [38 USCS § 1113], each illness, if any, described in paragraph (2) shall be considered to have been incurred in or aggravated by service referred to in that paragraph, notwithstanding that there is no record of evidence of such illness during the period of such service.

(2) An illness referred to in paragraph (1) is any diagnosed or undiagnosed illness that--

(A) the Secretary determines in regulations prescribed under this section to warrant a presumption of service connection by reason of having a positive association with exposure to a biological, chemical, or other toxic agent, environmental or wartime hazard, or preventive medicine or vaccine known or presumed to be associated with service in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War; and

(B) becomes manifest within the period, if any, prescribed in such regulations in a veteran who served on active duty in that theater of operations during that war and by reason of such service was exposed to such agent, hazard, or medicine or vaccine.

(3) For purposes of this subsection, a veteran who served on active duty in the Southwest Asia theater of operations during the Persian Gulf War and has an illness described in paragraph (2) shall be presumed to have been exposed by reason of such service to the agent, hazard, or medicine or vaccine associated with the illness in the regulations prescribed under this section unless there is conclusive evidence to

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establish that the veteran was not exposed to the agent, hazard, or medicine or vaccine by reason of such service.

(4) For purposes of this section, signs or symptoms that may be a manifestation of an undiagnosed illness include the signs and symptoms listed in section 1117(g) of this title [38 USCS § 1117(g)].

(b) (1) (A) Whenever the Secretary makes a determination described in subparagraph (B), the Secretary shall prescribe regulations providing that a presumption of service connection is warranted for the illness covered by that determination for purposes of this section.

(B) A determination referred to in subparagraph (A) is a determination based on sound medical and scientific evidence that a positive association exists between--

(i) the exposure of humans or animals to a biological, chemical, or other toxic agent, environmental or wartime hazard, or preventive medicine or vaccine known or presumed to be associated with service in the Southwest Asia theater of operations during the Persian Gulf War; and

(ii) the occurrence of a diagnosed or undiagnosed illness in humans or animals.

(2) (A) In making determinations for purposes of paragraph (1), the Secretary shall take into account--

(i) the reports submitted to the Secretary by the National Academy of Sciences under section 1603 of the Persian Gulf War Veterans Act of 1998 [38 USCS § 1117 note]; and

(ii) all other sound medical and scientific information and analyses available to the Secretary.

(B) In evaluating any report, information, or analysis for purposes of making such determinations, the Secretary shall take into consideration whether the results are statistically significant, are capable of replication, and withstand peer review.

(3) An association between the occurrence of an illness in humans or animals and exposure to an agent, hazard, or medicine or vaccine shall be considered to be positive for purposes of this subsection if the credible evidence for the association is equal to or outweighs the credible evidence against the association.

c) (1) Not later than 60 days after the date on which the Secretary receives a report from the National Academy of Sciences under section 1603 of the Persian Gulf War Veterans Act of 1998 [38 USCS § 1117 note], the Secretary shall determine whether or not a presumption of service connection is warranted for each illness, if any, covered by the report.

(2) If the Secretary determines under this subsection that a presumption of service connection is warranted, the Secretary shall, not later than 60 days after making the determination, issue proposed regulations setting forth the Secretary's determination.

(3) (A) If the Secretary determines under this subsection that a presumption of service connection is not warranted, the Secretary shall, not later than 60 days after making the determination, publish in the Federal Register a notice of the determination. The notice shall include an explanation of the scientific basis for the determination.

(B) If an illness already presumed to be service connected under this section is subject to a determination under subparagraph (A), the Secretary shall, not later
than 60 days after publication of the notice under that subparagraph, issue proposed regulations removing the presumption of service connection for the illness.

(4) Not later than 90 days after the date on which the Secretary issues any proposed regulations under this subsection, the Secretary shall issue final regulations. Such regulations shall be effective on the date of issuance.

(d) Whenever the presumption of service connection for an illness under this section is removed under subsection (c)--

(1) a veteran who was awarded compensation for the illness on the basis of the presumption before the effective date of the removal of the presumption shall continue to be entitled to receive compensation on that basis; and

(2) a survivor of a veteran who was awarded dependency and indemnity compensation for the death of a veteran resulting from the illness on the basis of the presumption before that date shall continue to be entitled to receive dependency and indemnity compensation on that basis.

(e) Subsections (b) through (d) shall cease to be effective on September 30, 2011.

Amendments:

2001. Act Dec. 27, 2001 (effective 3/1/2002, as provided by § 202(c) of such Act, which appears as 38 USCS § 1117 note), in subsec. (a), added para. (4).

Such Act further, in subsec. (e), substituted "on September 30, 2011" for "10 years after the first day of the fiscal year in which the National Academy of Sciences submits to the Secretary the first report under section 1603 of the Persian Gulf War Veterans Act of 1998".

Cross References

This section is referred to in 38 USCS §§ 1113, 1117

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:144, 147

SUBCHAPTER III. WARTIME DEATH COMPENSATION

§ 1121. Basic entitlement
§ 1122. Rates of wartime death compensation

Cross References

This subchapter is referred to in 26 USCS § 6334

§ 1121. Basic entitlement

The surviving spouse, child or children, and dependent parent or parents of any veteran who died before January 1, 1957 as the result of injury or disease incurred in or aggravated by active military, naval, or air service, in line of duty, during a period of war, shall be entitled to receive compensation at the monthly rates specified in section 1122 of this title [38 USCS § 1122].
Prior law and revision:
This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:
Veterans; Regulation No. 1(a), Part I, para. IV (as amended Aug. 1, 1956, ch 837, Title V, § 501(s)(1), 70 Stat. 885).

Amendments:
1971. Act Dec. 15, 1971 (effective 1/1/72, as provided by § 10 of such Act, which appears as 38 USCS § 1311), deleted "(or after April 30, 1957, under the circumstances described in section 417(a) of this title)" following "January 1, 1957".
1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), substituted "spouse" for "widow".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 321, as 38 USCS § 1121, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Cross References
This section is referred to in 38 USCS § 5313

Research Guide
Am Jur:
60A Am Jur 2d, Pensions and Retirement Funds § 1264

Annotations:
Effect of divorce, remarriage, or annulment, on widow's pension or bonus rights or social security benefits. 85 ALR2d 242
1. Surviving spouse
2. Children
3. Dependent parents
4. Claims against benefits
5. Judicial review

1. Surviving spouse
Widow is not entitled to death pension where she has already received payment under special act of Congress providing one-time payment of $5,000 in full settlement of all claims. 1944 ADVA 584

2. Children
Widow is entitled to file claim prior to birth of posthumous child, setting forth that child is expected in near future, and such filing is to be accepted as claim for such child upon proof that child was born alive. 1938 ADVA 432
Surviving minor child of Spanish-American War veteran is precluded from receiving increase in basic rate of pension on account of death of sister, since it appears her death was due to his felonious act. 1941 ADVA 468

3. Dependent parents
Natural mother of veteran is not entitled to pension so long as stepmother is being paid pension under prior law on account of death of veteran. 1934 ADVA 250

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Payment of increased death compensation to parents of 2 or more deceased veterans is not barred because dependent parent marries parent of another World War veteran. 1939 ADVA 442

Both mother and father have right to pension, and right of one is not contingent upon, or secondary to, other; father is entitled to elect to receive benefits under one act, and mother benefits under other. 1943 ADVA 511

4. Claims against benefits

Claims of state hospital against proceeds received by incompetent parent of veteran are properly allowed. Cruce v Arkansas State Hospital (1966) 241 Ark 680, 409 SW2d 342

5. Judicial review

Federal District Court has no jurisdiction to review decision of veterans' administration [now Department of Veterans Affairs] that widow was shown by evidence to have been living as wife of third person, and had generally acquired reputation as such in community; accordingly, she can no longer be recognized as unmarried widow of deceased, a former Philippine scout in United States army, and hence is not entitled to recover death compensation benefits as widow of deceased. Guzman v Gleason (1964, DC Dist Col) 234 F Supp 145

§ 1122. Rates of wartime death compensation

The monthly rates of death compensation shall be as follows:

(a) The monthly rates of death compensation shall be as follows:

  1. Surviving spouse but no child, $87;
  2. Surviving spouse with one child, $121 (with $29 for each additional child);
  3. No surviving spouse but one child, $67;
  4. No surviving spouse but two children, $94 (equally divided);
  5. No surviving spouse but three children, $122 (equally divided) (with $23 for each additional child, total amount to be equally divided);
  6. Dependent parent, $75;
  7. Both dependent parents, $40 each.

(b) The monthly rate of death compensation payable to a surviving spouse or dependent parent under subsection (a) of this section shall be increased by $79 if the payee is (1) a patient in a nursing home or (2) blind, or so nearly blind or significantly disabled as to need or require the regular aid and attendance of another person.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:

1969. Act Oct. 27, 1969 (effective 12/1/69, as provided by § 8 of such Act, which appears as 38 USCS § 1302 note), designated existing matter as subsec. (a); added subsec. (b).
1970. Act Dec. 24, 1970 (effective 1/1/71, as provided by § 10(a) of such Act, which appears as 38 USCS § 1521 note), in subsec. (b), substituted "$55" for "$50".

1971. Act Dec. 15, 1971 (effective 1/1/72, as provided by § 10 of such Act, which appears as 38 USCS § 1311 note), substituted new subsec. (b) for one which read: "The monthly rate of death compensation payable to a widow under subsection (a) of this section shall be increased by $55 if she is (1) a patient in a nursing home or (2) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person.".

1974. Act May 31, 1974 (effective 5/1/74, as provided by § 401 of such Act, which appears as 38 USCS § 1114 note), substituted new subsec. (b) for one which read: "The monthly rate of death compensation payable to a widow or dependent parent under subsection (a) of this section shall be increased by $55 if the payee is (1) a patient in a nursing home or (2) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attention of another person.".

1975. Act Dec. 23, 1975 (effective 9/30/1976, as provided by § 202 of such Act), in subsec. (b), substituted "$69" for "$64".

1976. Act Sept. 30, 1976, P. L. 94-432 (effective 1/1/77, as provided by § 405(b) of such Act, which appears as 38 USCS § 1521 note), in subsec. (b), substituted "$74" for "$69".

Act Sept. 30, 1976, P. L. 94-433 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in subsec. (a), in paras. (1) and (2), substituted "Surviving spouse" for "Widow", in paras. (3)-(5), substituted "surviving spouse" for "widow", in para. (6), substituted "parent" for "mother or father", in para. (7), substituted "Both dependent parents" for "Dependent mother and father"; in subsec. (b), substituted "surviving spouse" for "widow".

1977. Act Dec. 2, 1977 (effective 1/1/1978, as provided by § 302 of such Act, which appears as a note to this section), in subsec. (b), substituted "$79" for "$74".


2006. Act June 15, 2006, in subsec. (b)(2), substituted "blind, or so nearly blind or significantly disabled as to" for "helpless or blind, or so nearly helpless or blind as to".

Other provisions:


Cross References

This section is referred to in 38 USCS §§ 1121, 1142

Research Guide

Am Jur:

60A Am Jur 2d, Pensions and Retirement Funds § 1264

1. Death of claimant

2. Withdrawal of claim

1. Death of claimant

When widow survives veteran but dies before decision is made in her favor, awards are to be made as if there were no surviving widow. 1943 ADVA 524

2. Withdrawal of claim
Stepfather is entitled to withdraw claim that has not been favorably considered, and such withdrawal entitles mother to be considered as only person who has established right to benefit.

1940 ADVA 458

SUBCHAPTER IV. PEACETIME DISABILITY COMPENSATION

§ 1131. Basic entitlement
§ 1132. Presumption of sound condition
§ 1133. Presumptions relating to certain diseases
§ 1134. Rates of peacetime disability compensation
§ 1135. Additional compensation for dependents
§ 1136. Repealed
§ 1137. Wartime presumptions for certain veterans

Cross References
This subchapter is referred to in 26 USCS § 6334; 38 USCS §§ 107, 1734

§ 1131. Basic entitlement
xxviii Discussion and Analysis in the Veterans Benefits Manual

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter [38 USCS §§ 1131 et seq.], but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:
Veterans' Regulation No. 1(a), Part II, para. I(a) (as amended Act June 23, 1937, ch 376, 50 Stat. 305).

Explanatory notes:
Although this section was amended by Act June 9, 1998, P. L. 105-178, Title VIII, Subtitle B, § 8202, 112 Stat. 492, such § 8202 was subsequently amended by Act July 22, 1998, P. L. 105-206, Title IX, § 9014(a), 112 Stat. 865, and, as amended, it did not affect this section.

Amendments:
1990. Act Nov. 5, 1990 (applicable as provided by § 8052(b) of such Act, which appears as 38 USCS § 105 note) substituted "a result of the veteran's own willful misconduct or abuse of alcohol or drugs" for "the result of the veteran's own willful misconduct".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 331, as 38 USCS § 1131.

Cross References
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1. Generally
   Secretary's interpretation of 38 USCS § 1131 to require presently existing disability at time veteran applied for benefits cannot be considered arbitrary as statute is silent on matter of when disabled veteran must be disabled and Secretary’s interpretation is supportable when viewed in context with other statutes. Degmetich v Brown (1997, CA FC) 104 F.3d 1328

   Regular Naval Reserve Officers Training Corps student who became physically disqualified while on summer training cruise was not eligible for disability compensation. VA GCO 7-75

2. Relationship with other remedies
   Former soldier exposed by military order to nuclear radiation does not have cause of action against government and individual defendants, since his exclusive remedy for injury in course of activity incident to military service is compensation under Veterans' Benefits Act (38 USCS §§ 301 et seq. [now 38 USCS §§ 1101 et seq.]). Jaffee v United States (1981, CA3 NJ) 663 F.2d 1226, cert den (1982) 456 US 972, 72 L Ed 2d 845, 102 S Ct 2234

3. State law remedies
   Navy enlisted man's personal injury claim under state tort law against operator of nuclear reactor which also designed and manufactured deck which collapsed while serviceman was standing on it pursuant to contract with federal government was not preempted by VBA; if serviceman were successful and contractor sought indemnification from government, policies underlying Act might be implicated but, if so, preemption would operate against contractor's claim and not against serviceman's. Chapman v Westinghouse Electric Corp. (1990, CA9 Idaho) 911 F.2d 267, 36 CCF ¶ 75931

4. Compensability of diseases
   Reasonable basis existed for excluding "refractive error of eye" from construction of terms "injury" and "disease" in 38 USCS §§ 1110 and 1131 when presbyopia was due to developmental problems associated with aging rather than due to trauma that was incurred during military service and, therefore, interpretation adopted by Secretary of Veterans Affairs in 38 C.F.R. 3.303(c), which prohibited compensation for refractive error of eye and, in particular, for presbyopia, was not arbitrary, capricious, or manifestly contrary to statutes, and represented permissible construction of statutes. Terry v Principi (2003, CA FC) 340 F.3d 1378, reh den (2003,

Service-connection may be granted for diseases but not defects of congenital, developmental, or familial origin; service-connection is deemed to exist with respect to retinitis pigmentosa and polycystic renal disease if evidence establishes that such familial conditions were incurred or aggravated during service within meaning of Veterans Administration law and regulations. VA GCO 1-85

Term "disease" in 38 USCS §§ 310 and 331 [now 38 USCS §§ 1110 and 1131] and term "defects" in 38 CFR § 3.303(c) (providing that congenital or developmental defects are not diseases) are mutually exclusive; "defect" is defined as structural or inherent abnormalities or conditions which are more or less stationary in nature, while "disease" has been variously defined as morbid condition of body or of some organ or part, illness, or sickness. VA GCO 1-85

Although congenital or developmental defects may not be service-connected because they are not diseases or injuries under law, many such defects can be subject to superimposed disease or injury, and if during individual's military service superimposed disease or injury does occur, service-connection may be warranted for resultant disability. VA GCO 1-85


5. Particular benefit determinations

Board's conclusion that veteran's Tourette's Syndrome was not present during service was clearly erroneous where all evidence of record indicated that it was incurred in service. Hanson v Derwinski (1991) 1 Vet App 512

Enlistment examination noting cystitis chronic with history of dematuria dysuria and frequency for year prior to enlistment constituted more than sufficient factual basis for Board's decision denying service connection for chronic interstitial cystitis. Sanders v Derwinski (1990) 1 Vet App 88

Denial of claim for service connection for hypertension was proper where there was total lack of evidence of any hypertension existing since service. Rabideau v Derwinski (1992) 2 Vet App 141

6. -Hearing loss

Board did not err in denying service connection for veteran's hearing loss where it was first documented more than quarter of century after veteran's service-connected injury. Bankowski v Derwinski (1990) 1 Vet App 36

Assuming veteran's hearing loss arose during his inactive duty training with Air National Guard under 38 USCS § 1131, claim is not compensable even though departmental examination record found no evidence of ear disease since veteran has not submitted plausible evidence of hearing loss incurred during inactive duty for training given episodic nature of veteran's service, and there is no competent evidence to suggest nexus between presumed exposure to jet-aircraft noise and hearing loss. McManaway v West (1999) 13 Vet App 60, 1999 US App Vet Claims LEXIS 1035, vacated on other grounds, remanded (2001, CA FC) 4 Fed Appx 821 and op withdrawn on other grounds, remanded (2001) 14 Vet App 275, 2001 US App Vet Claims LEXIS 126

7. -Mental conditions

Secretary permissibly required presently existing disability at time claim was filed in order for veteran to be entitled to compensation under 38 USCS § 1131, hence even if veteran suffered from psychiatric problems within one year of his discharge, his claim for service connection was properly denied since there was no evidence that he suffered from psychosis at time he applied for benefits. Degmetich v Brown (1997, CA FC) 104 F.3d 1328
Veteran failed to establish that onset of his schizophrenia occurred within one-year presumptive period following service; letters from German physicians related history of symptoms, but were too inconclusive regarding degree of disability to support assertion that schizophrenia was at least 10 percent disabling. Stadin v Brown (1995) 8 Vet App 280

8. Judicial review

District Court erred in ordering set off of disabled veteran's tort judgment according to provisions of 38 USCS § 351 [now 38 USCS § 1151] where Veterans Administration [now Department of Veterans Affairs] had determined that veteran's increased future disability benefits due to negligent medical treatment were covered by 38 USCS § 331 [now 38 USCS § 1131] which does not provide for cessation of future disability benefits, since 38 USCS § 211 [now 38 USCS § 511] bars judicial review of Veterans Administration [now Department of Veterans Affairs] decision that veteran's future disability benefits are governed by 38 USCS § 331 [now 38 USCS § 1131]. Cole v United States (1988, CA11 Ga) 861 F.2d 1261

Veteran was entitled to presumption under 38 USCS § 105(a) that injury occurring during active duty was service-connected for purposes of disability compensation, but denial of presumption in determining lack of service connection for veteran's claimed mental disorder was harmless error in view of alternative and unchallenged finding that veteran failed to show any psychiatric disorder occurring in active service. Shedden v Principi (2004, CA FC) 381 F.3d 1163

§ 1132. Presumption of sound condition

For the purposes of section 1131 of this title [38 USCS § 1131], every person employed in the active military, naval, or air service for six months or more shall be taken to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance and enrollment, or where evidence or medical judgment is such as to warrant a finding that the disease or injury existed before acceptance and enrollment.

Prior law and revision:
This section is based on 38 USC § 2333 (Act June 17, 1957, P. L. 85-56, Title III, Part D, § 333, 71 Stat. 100).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:
Veterans' Regulation No. 1(a), Part II, para. I(b).

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 332, as 38 USCS § 1132, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Cross References
This section is referred to in 38 USCS § 1137

Research Guide

Am Jur:
60A Am Jur 2d, Pensions and Retirement Funds § 1262

Law Review Articles:
§ 1133. Presumptions relating to certain diseases

(a) For the purposes of section 1131 of this title [38 USCS § 1131], and subject to the provisions of subsections (b) and (c) of this section, any veteran who served for six months or more and contracts a tropical disease or a resultant disorder or disease originating because of therapy administered in connection with a tropical disease, or as a preventative thereof, shall be deemed to have incurred such disability in the active military, naval, or air service when it is shown to exist within one year after separation from active service, or at a time when standard and accepted treatises indicate that the incubation period thereof commenced during active service.

(b) Service-connection shall not be granted pursuant to subsection (a), in any case where the disease or disorder is shown by clear and unmistakable evidence to have had its inception before or after active military, naval, or air service.

(c) Nothing in this section shall be construed to prevent the granting of service-connection for any disease or disorder otherwise shown by sound judgment to have been incurred in or aggravated by active military, naval, or air service.

Prior law and revision:

This section is based on 38 USC § 2334 (Act June 17, 1957, P. L. 85-56, Title III, Part D, § 334, 71 Stat. 100).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 333, as 38 USCS § 1133, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Cross References

This section is referred to in 38 USCS § 1137

Research Guide

Law Review Articles:

Wellen. Armed Forces Disability Benefits-a Lawyer’s View. 27 Judge Advocate General Journal 485, Spring 1974

§ 1134. Rates of peacetime disability compensation
For the purposes of section 1131 of this title [38 USCS § 1131], the compensation payable for the disability shall be that specified in section 1114 of this title [38 USCS § 1114].

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:
Veterans' Regulation No. 1(a), Part II, para. II (as amended July 2, 1948, ch 804, 62 Stat. 1219).

Amendments:
1972. Act June 30, 1972 (effective 7/1/1973, as provided by § 301(b) of such Act, which appears as a note to this section), substituted "that specified in section 314 of this title." for "equal to 80 per centum of the compensation payable for such disability under section 314 of this title, adjusted upward or downward to the nearest dollar, counting fifty cents and over as a whole dollar.".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 334, as 38 USCS § 1134, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:

Cross References
This section is referred to in 38 USCS §§ 1114, 1135, 1717

Research Guide
Am Jur:
60A Am Jur 2d, Pensions and Retirement Funds § 1263
77 Am Jur 2d, Veterans and Veterans' Laws § 69

Law Review Articles:
Wellen. Armed Forces Disability Benefits-a Lawyer's View. 27 Judge Advocate Journal 485, Spring 1974

Neither pension, compensation, nor retirement pay of veteran suffering from Hansen's Disease is subject to reduction while veteran is undergoing course of treatment for such disease in Government institution. 1951 ADVA 865

§ 1135. Additional compensation for dependents

Any veteran entitled to compensation at the rates provided in section 1134 of this title [38 USCS § 1134], and whose disability is rated not less than 30 percent, shall be entitled to

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additional monthly compensation for dependents as provided in section 1115 of this title [38 USCS § 1115].

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Amendments:
1972. Act June 30, 1972 (effective 7/1/73, as provided by § 301(b) of such Act, which appears as 38 USCS § 1114), substituted "as provided in section 315 of this title." for "equal to 80 per centum of the additional compensation for dependents provided in section 315 of this title, and subject to the limitations thereof. The amounts payable under this section shall be adjusted upward or downward to the nearest dollar, counting fifty cents and over as a whole dollar.".

1984. Act Oct. 24, 1984 (effective 10/1/78, as provided by § 112(b) of such Act, which appears as a note to this section), substituted "30 percent" for "50 per centum".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 335, as 38 USCS § 1135, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:

Research Guide

Am Jur:
60A Am Jur 2d, Pensions and Retirement Funds § 1263

Law Review Articles:
Wellen. Armed Forces Disability Benefits--a Lawyer's View. 27 Judge Advocate Journal 485, Spring 1974

[§ 1136] [§ 336. Repealed]
The bracketed section number "1136" has been inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

This section (Act Sept. 2, 1958, P. L. 85-857, § 1, 72 Stat. 1123) was repealed by Act June 30, 1972, P. L. 92-328, Title I, § 108(c), 86 Stat. 396, effective July 1, 1973, as provided by § 301(b) of such Act. It provided for considerations under which wartime rates were payable.

§ 1137. Wartime presumptions for certain veterans
xxxii Discussion and Analysis in the Veterans Benefits Manual

For the purposes of this subchapter [38 USCS §§ 1131 et seq.] and subchapter V of this chapter [38 USCS §§ 1141 et seq.] and notwithstanding the provisions of sections 1132
and 1133 of this subchapter [38 USCS §§ 1132 and 1133], the provisions of sections 1111, 1112, and 1113 of this chapter [38 USCS §§ 1111, 1112, and 1113] shall be applicable in the case of any veteran who served in the active military, naval, or air service after December 31, 1946.

Amendments:

1974. Act May 31, 1974 (effective 5/1/74, as provided by § 401 of such Act, which appears as 38 USCS § 1114 note), substituted "December 31, 1946" for "January 31, 1955".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 337, as 38 USCS § 1137, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:140, 149

SUBCHAPTER V. PEACETIME DEATH COMPENSATION

§ 1141. Basic entitlement

§ 1142. Rates of peacetime death compensation

[§ 1143] [§ 343. Repealed]

Cross References

This subchapter is referred to in 26 USCS § 6334; 38 USCS § 1337

§ 1141. Basic entitlement

The surviving spouse, child or children, and dependent parent or parents of any veteran who died before January 1, 1957, as the result of injury or disease incurred in or aggravated by active military, naval, or air service, in line of duty, during other than a period of war, shall be entitled to receive compensation as hereinafter provided in this subchapter [38 USCS §§ 1141 et seq.].

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Veterans' Regulation No. 1(a), Part II, para. III; No. 1(g), para. II (as amended Acts July 1, 1948, ch 788, § 3, 62 Stat. 1213; Aug. 1, 1956, ch 837, Title V, § 501(s)(1), 70 Stat. 885).

Amendments:

1971. Act Dec. 15, 1971 (effective 1/1/72, as provided by § 10 of such Act, which appears as 38 USCS § 1311 note), deleted "(or after April 30, 1957, under the circumstances described in section 417(a) of this title)" following "January 1, 1957".

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), substituted "spouse" for "widow".

Cross References

This section is referred to in 38 USCS §§ 1142, 5313

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans’ Laws § 69

Annotations:

Effect of divorce, remarriage, or annulment, on widow’s pension or bonus rights or social security benefits. 85 ALR2d 242

1. Children

2. Dependent parents

1. Children

Widow is entitled to file claim prior to birth of posthumous child, setting forth that child is expected in near future, and such filing is to be accepted as claim for such child upon proof that child was born alive. 1938 ADVA 432

Surviving minor child of Spanish-American War veteran was precluded from receiving increase in basic rate of pension on account of death of sister, since it appeared her death was due to his felonious act. 1941 ADVA 468

2. Dependent parents

Payment of increased death compensation provided to parents of 2 or more deceased veterans is not barred where such dependent parent marries parent of another World War veteran. 1939 ADVA 442

Father is entitled to elect to receive benefits under one act, and mother benefits under other; both mother and father have right to pension, and right to one is not contingent upon, or secondary to, other; but since father is considered dependent parent for purpose for determining amount of pension, mother is not entitled to payment on basis of sole surviving parent. 1943 ADVA 511

§ 1142. Rates of peacetime death compensation

For the purpose of section 1141 of this title [38 USCS § 1141], the monthly rates of death compensation shall be those specified in section 1122 of this title [38 USCS § 1122].

Prior law and revision:

This section is based on 38 USC § 2342 (Act June 17, 1957, P. L. 85-56, Title III, Part E, § 342, 71 Stat. 101).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Veterans’ Regulation No. 1(a), Part II, para. III (as amended Act July 1, 1948, ch 788, § 3, 62 Stat. 1213).

Amendments:

1974. Act May 31, 1974 (effective 5/1/74, as provided by § 401 of such Act, which appears as 38 USCS § 1114 note), substituted "those specified in section 322 of this title" for "equal to 80 per centum of the rates prescribed by section 322 of this title, adjusted upward or downward to the nearest dollar, counting fifty cents and over as a whole dollar".

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1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 442, as 38 USCS § 1142, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

[§ 1143] [§ 343. Repealed]

The bracketed section number "1143" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

This section (Act Sept. 2, 1958, P. L. 85-857, § 1, 72 Stat. 1124) was repealed by Act May 31, 1974, P. L. 93-295, Title II, § 206(b), 88 Stat. 183, effective May 1, 1974 as provided by § 401 of such Act. It provided for conditions under which wartime rates were payable.

SUBCHAPTER VI. GENERAL COMPENSATION PROVISIONS

§ 1151. Benefits for persons disabled by treatment or vocational rehabilitation
§ 1152. Persons heretofore having a compensable status
§ 1153. Aggravation
§ 1154. Consideration to be accorded time, place, and circumstances of service
§ 1155. Authority for schedule for rating disabilities
§ 1156] [§ 356. Repealed]
§ 1157. Combination of certain ratings
§ 1158. Disappearance
§ 1159. Protection of service connection
§ 1160. Special consideration for certain cases of loss of paired organs or extremities
§ 1161. Payment of disability compensation in disability severance cases
§ 1162. Clothing allowance
§ 1163. Trial work periods and vocational rehabilitation for certain veterans with total disability ratings

Cross References

This subchapter is referred to in 26 USCS § 6334

§ 1151. Benefits for persons disabled by treatment or vocational rehabilitation

(a) Compensation under this chapter [38 USCS §§ 1101 et seq.] and dependency and indemnity compensation under chapter 13 of this title [38 USCS §§ 1301 et seq.] shall be awarded for a qualifying additional disability or a qualifying death of a veteran in the same manner as if such additional disability or death were service-connected. For purposes of this section, a disability or death is a qualifying additional disability or qualifying death if the disability or death was not the result of the veteran's willful misconduct and--

(1) the disability or death was caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by the Secretary, either by a Department employee or in a Department facility as defined in section 1701(3)(A) of this title [38 USCS § 1701(3)(A)], and the proximate cause of the disability or death was--
(A) carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the Department in furnishing the hospital care, medical or surgical treatment, or examination; or
(B) an event not reasonably foreseeable; or

(2) the disability or death was proximately caused (A) by the provision of training and rehabilitation services by the Secretary (including by a service-provider used by the Secretary for such purpose under section 3115 of this title [38 USCS § 3115]) as part of an approved rehabilitation program under chapter 31 of this title [38 USCS §§ 3100 et seq.], or (B) by participation in a program (known as a "compensated work therapy program") under section 1718 of this title [38 USCS § 1718].

(b) (1) Where an individual is on or after December 1, 1962 awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 [28 USCS § 1346(b)], or on or after December 1, 1962 enters into a settlement or compromise under section 2672 or 2677 of title 28 [28 USCS § 2672 or 2677], by reason of a disability or death treated pursuant to this section as if it were service-connected, then (except as otherwise provided in paragraph (2)) no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability or death becomes final until the aggregate amount of benefits which would be paid but for this subsection equals the total amount included in such judgment, settlement, or compromise.

(2) In the case of a judgment, settlement, or compromise covered by paragraph (1) that becomes final on or after the date of the enactment of this paragraph [enacted Dec. 10, 2004] and that includes an amount that is specifically designated for a purpose for which benefits are provided under chapter 21 or 39 of this title [38 USCS §§ 2101 et seq. or 3901 et seq.] (hereinafter in this paragraph referred to as the "offset amount"), if such judgment, settlement, or compromise becomes final before the date of the award of benefits under chapter 21 or 39 [38 USCS §§ 2101 et seq. or 3901 et seq.] for the purpose for which the offset amount was specifically designated-
(A) the amount of such award shall be reduced by the offset amount; and
(B) if the offset amount is greater than the amount of such award, the excess amount received pursuant to the judgment, settlement or compromise, shall be offset against benefits otherwise payable under this chapter.

(c) A qualifying additional disability under this section shall be treated in the same manner as if it were a service-connected disability for purposes of the following provisions of this title:
(1) Chapter 21 [38 USCS §§ 2101 et seq.], relating to specially adapted housing.
(2) Chapter 39 [38 USCS §§ 3901 et seq.], relating to automobiles and adaptive equipment.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162.

Amendments:

1962. Act Oct. 15, 1962 (effective as provided by § 7 of such Act, which appears as 38 USCS § 110 note), deleted "; except that no benefits shall be awarded unless application be made therefor within two years after such injury or aggravation was suffered, or such death occurred" following "service-connected", and inserted "Where an individual is hereafter awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28, United States Code, or hereafter enters into a settlement or compromise under section 2672 or 2677 of title 28, United States Code, by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.".


1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), deleted "him" following "title, awarded" and substituted "such veteran's" for "his".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 351, as 38 USCS § 1151, and substituted "administered by the Secretary" for "administered by the Veterans' Administration".

1996. Act Sept. 26, 1996 (effective 10/1/97 unless legislation is enacted providing for an earlier date, as provided by § 422(c) of such Act, which appears as a note to this section) substituted subsec. (a) for the former first sentence, which read: "Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Secretary or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected."; and designated the second sentence as subsec. (b) and, in such subsection as so designated, deleted ", aggravation," following "disability" in two places and substituted "subsection" for "sentence".

2000. Act Nov. 1, 2000, in subsec. (a)(2), inserted "(A)" and ", or (B) by participation in a program (known as a 'compensated work therapy program') under section 1718 of this title".

2004. Act Dec. 10, 2004, in subsec. (b), designated the existing provisions as para. (1), inserted "except as otherwise provided in paragraph (2))", and added para. (2).

Such Act further (applicable as provided by § 304(b) of such Act, which appears as a note to this section), added subsec. (c).

Other provisions:

Effective date and applicability of Sept. 26, 1996 amendments. Act Sept. 26, 1996, P. L. 104-204, Title IV, § 422(b), (c), 110 Stat. 2927, provides:

"(b)(1) The amendments made by subsection (a) [amending this section] shall take effect on October 1, 1996. [But see subsec. (c) below, which provides that notwithstanding this paragraph, § 422 (amending this section) shall not take effect until October 1, 1997, unless
legislation other than Act Sept. 26, 1996, P. L. 104-204, is enacted to provide for an earlier effective date.]

“(2) Section 1151 of title 38, United States Code (as amended by subsection (a)), shall govern all administrative and judicial determinations of eligibility for benefits under such section that are made with respect to claims filed on or after the effective date set forth in paragraph (1), including those based on original applications and applications seeking to reopen, revise, reconsider, or otherwise readjudicate on any basis claims for benefits under such section 1151 or any provision of law that is a predecessor of such section.

“(c) Notwithstanding subsection (b)(1), section 421(d) [38 USCS § 1801 note], or any other provision of this Act, section 421 [adding 38 USCS §§ 1801 et seq., amending the tables of chapters preceding 38 USCS §§ 101 and 1101, and amending 38 USCS § 5312] and this section [amending this section] shall not take effect until October 1, 1997, unless legislation other than this Act is enacted to provide for an earlier effective date.”.

Application of subsec. (c). Act Dec. 10, 2004, P. L. 108-454, Title III, § 304(b), 118 Stat. 3611, provides: "Subsection (c) of section 1151 of title 38, United States Code, as added by subsection (a), shall apply with respect to eligibility for benefits and services provided by the Secretary of Veterans Affairs on or after the date of the enactment of this Act.”.

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References
This section is referred to in 38 USCS §§ 1710, 5110, 5313

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 55

Law Review Articles:
Wellen. Armed Forces Disability Benefits-a Lawyer's View. 27 Judge Advocate Journal 485, Spring 1974

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I. IN GENERAL

1. Generally

Veteran injured while receiving treatment for disability originally held as service connected is entitled to disability compensation though finding of service connection for original disability is subsequently severed. 1934 ADVA 20

Claim under prior 38 USCS § 1151 based upon incident as to which there has previously been settlement under Federal Tort Claims Act must be well grounded and claim is not per se well grounded as result of settlement. Jones v West (1999) 12 Vet App 460, 1999 US App Vet Claims LEXIS 612

2. Relationship with other laws and remedies

Although veteran of army air force injured his left knee while on active service, and seven years after his discharge from service operation was negligently performed on injured knee at Veterans’ Administration [now Department of Veterans Affairs] hospital, he is not required to seek relief under Compensation Act (5 USCS § 751 et seq.) but can recover from United States under Tort Claims Act (28 USCS §§ 1346(b), 2671 et seq.) for injury to his leg as result of negligent operation. Brown v United States (1954, CA2 NY) 209 F.2d 463, affd (1954) 348 US 110, 99 L Ed 139, 75 S Ct 141

Veterans’ Benefit Act (38 USCS §§ 301 et seq. [now 38 USCS §§ 1101 et seq.]) does not preclude serviceman's recovery against government under Swine Flu Act (42 USCS § 247). Brown v United States (1983, CA9 Or) 715 F.2d 463

Because procedures established for 38 USCS § 1151 claims provided government with neither tools nor opportunity to fully litigate negligence and causation questions in veteran's case, and because there were differences in burdens of proof for proceedings under Federal Tort Claims Act (FTCA), 28 USCS § 2671 et seq., and Department of Veterans Affairs' disability system, application of issue preclusion in veteran's FTCA action was inappropriate. Littlejohn v United States (2003, CA9 Nev) 321 F.3d 915, cert den (2003) 540 US 985, 157 L Ed 2d 377, 124 S Ct 486

Veteran’s argument that liability under Federal Tort Claims Act (FTCA), 28 USCS § 2671 et seq., was established by Department of Veterans Affairs’ (VA) Rating Decisions under traditional claim preclusion principles failed because VA could not assert its FTCA causation defense in disability benefit proceedings, and because claim preclusion was incompatible with separate statutory purposes underlying § 1151 veterans’ disability and FTCA statutory schemes. Littlejohn v United States (2003, CA9 Nev) 321 F.3d 915, cert den (2003) 540 US 985, 157 L Ed 2d 377, 124 S Ct 486


Order of United States Court of Appeals for Veterans Claims directing that specially adapted housing benefits be awarded to veteran was affirmed, because 38 USCS § 2101(a) merely required that (1) veteran be entitled to compensation under 38 USCS §§ 1101 et seq., and (2) compensation be be that which was awarded for permanent and total service-connected disability; those requirements were met in this case. Kilpatrick v Principi (2003, CA FC) 327 F.3d 1375

Where veteran’s disability was clearly not service-connected as defined by 38 USCS § 101(16) because it arose from veteran's treatment at Department of Veterans Affairs hospital and veteran was awarded compensation under 38 USCS § 1151, veteran's widow was not entitled to Service Disabled Veterans’ Insurance under 38 USCS § 1922 because § 1922 benefits were not among those covered by § 1151. Alleman v Principi (2003, CA FC) 349 F.3d 1368

38 USCS § 1151 does not redefine service-connected from how that term is defined in 38 USCS § 101(16); instead, it provides exception that grants compensation for some
non-service-connected disabilities, treating those disabilities for some purposes as if they were
service-connected. Alleman v Principi (2003, CA FC) 349 F.3d 1368

On its face, 38 USCS § 1151 only grants compensation under Chapter 11 and Chapter 13 of
Title 38, and not Service Disabled Veterans’ Insurance benefits of 38 USCS § 1922. Alleman v
Principi (2003, CA FC) 349 F.3d 1368

Nurse injured in veterans’ hospital while undergoing treatment is restricted to recovering
compensation and cannot sue government for damages. Pettis v United States (1952, DC Cal)
108 F Supp 500

Federal Tort Claims Act (28 USCS § 2671) is applicable to claims for injuries otherwise
compensable as if service-connected, if injury or death is due to negligence or other tortious act,
and judgment under such act does not preclude compensation payments; but in settling such
claims, Veterans’ Administration [now Department of Veterans Affairs] is to take into
consideration any payments previously made for such injuries, and any award under Federal Tort
Claims Act precludes further payments. 1955 ADVA 953

Veteran receiving compensation under 38 USCS § 1151 is not eligible for Service Disabled
Veterans’ Insurance benefits under 38 USCS § 1922. Alleman v Principi (2002) 16 Vet App 253,
2002 US App Vet Claims LEXIS 605, affd (2003, CA FC) 349 F.3d 1368

3. Rate of compensation

Veteran who suffered additional disabilities as result of surgery for war-connected injuries is
eligible for benefits for such additional disabilities at 100 percent of rates provided therefor.
1934 ADVA 294

Veteran is entitled to payment of additional allowance for anatomical loss or loss of use of
one hand, one foot, or one eye, and is entitled to higher rate of payment where dates of service
meet statutory definition of wartime service. 1936 ADVA 388

4. Regulations

Regulation requiring veteran to prove he has suffered disability as result of negligent
treatment or accident occurring during treatment is invalid implementation of statute since statute
does not require veteran to prove that Veterans’ Administration [now Department of Veterans
Affairs] treatment was faulty or that accident occurred during treatment. Gardner v Brown (1993,
CA FC) 5 F.3d 1456, affd (1994) 513 US 115, 130 L Ed 2d 462, 115 S Ct 552, 94 CDOS 9401, 94
Daily Journal DAR 17388, 8 FLW Fed S 500

Regulation requiring either accident or fault on part of agency for veteran to receive
compensation for increased disability for any aggravation of injury resulting from treatment at
agency facility was contrary to statute by including element of fault. Gardner v Derwinski (1991)
Ct 552, 94 CDOS 9401, 94 Daily Journal DAR 17388, 8 FLW Fed S 500

Decision holding invalid regulation requiring either accident or fault on Veterans’
Administration [now Department of Veterans Affairs] part for veteran to receive compensation for
increased disability for any aggravation of injury resulting from treatment at VA facility was
precedential one that must be applied by BVA in first instance, hence case in which regulation
was applied would be remanded. Werner v Derwinski (1992) 3 Vet App 37

II. ENTITLEMENT TO BENEFITS

A. In General

5. Persons entitled to compensation

Veteran of Women’s Army Auxiliary Corps, properly hospitalized under Veterans’
Administration [now Department of Veterans Affairs] care and suffering injury or aggravation of
injury while under such care, is eligible for benefits as if such injuries were service-connected.
1949 ADVA 805
One admitted to Veterans' Administration [now Department of Veterans Affairs] facility without legal eligibility is not within definition of term "veteran" and is not entitled to compensation for disability incurred from injury, or aggravation of existing injury, while in receipt of hospitalization to which no legal entitlement existed. 1950 ADVA 856

6. Circumstances creating right to compensation

Phrase “as a result of hospitalization,” as used in former 38 USCS § 1151 (amended 1996), did not require that veteran's injuries have been caused by actions of Department of Veterans Affairs; in order to recover under § 1151, word "result" only implied causal connection, not fault, although injury could not result from veteran's own willful misconduct. Jackson v Nicholson (2005, CA FC) 433 F.3d 822

Word "injury" includes contagious disease contracted while undergoing treatment, and payment for otherwise unauthorized medical services in treating disease is proper as if expense were incurred for service-connected disability. 1946 ADVA 716

Phrase "in pursuit of course of vocational rehabilitation" in 38 USCS § 1151 contextually refers to vocational rehabilitation program defined in chapter 31 of title 38, and if veteran is injured as result of pursuit of such course or program and before veteran is declared rehabilitated, veteran has basic eligibility under § 1151 to file claim for Veterans' Administration [now Department of Veterans Affairs] compensation. Cottle v Principi (2001) 14 Vet App 329, 2001 US App Vet Claims LEXIS 536

Board's finding that veteran developed symptoms consistent with diagnosis of possible non-A non-B hepatitis secondary to blood transfusions during surgery was not specific factual finding necessary to determine entitlement to benefits under statute. Davis v Derwinski (1992) 2 Vet App 276

Veteran's death while in Veterans' Administration [now Department of Veterans Affairs] hospital was not shown to be service-connected for purposes of awarding DIC benefits to widow where death certificate listed cause of death as cardio-pulmonary arrest due to hepatic renal syndrome and renal cell carcinoma with liver metastasis and, at time of his death, veteran was not service-connected for any disability. Cariaga v Brown (1993) 5 Vet App 397

Adjudicative decision by Veterans' Administration [now Department of Veterans Affairs] that veteran was not eligible for further physical therapy following knee surgery because veteran's income level disqualified him cannot constitute Veterans' Administration [now Department of Veterans Affairs] medical care under 38 USCS § 1151 and veteran has failed to furnish well-grounded claim because he failed to submit any evidence between Veterans' Administration [now Department of Veterans Affairs] medical care and any additional disability. Jimison v West (1999) 13 Vet App 75, 1999 US App Vet Claims LEXIS 1063

B. Injuries Incurred Under Particular Circumstances

7. During training

World War II veteran is not entitled to payment of benefits for injury or aggravation suffered as result of training taken under Veterans Administration [now Department of Veterans Affairs] auspices, or for payments for injury resulting from hospital or medical, including surgical, treatment furnished by school or training institution as incident of education or training. 1946 ADVA 710

Claimant who suffered injury while in training, which disability was not result of his own willful misconduct, is eligible for benefits if it is determined that injury resulted from pursuit of course of vocational rehabilitation and that additional disability has resulted therefrom. 1949 ADVA 803

8. During examination

Although action brought under Federal Tort Claims Act (28 USCS §§ 1346(b), 2671 et seq.) was dismissed for want of jurisdiction because veteran alleged that he suffered injury as result of examination by doctor, employee of the veterans' administration [now Department of Veterans Affairs], for purpose of obtaining information to be used in considering veteran's appeal from
reduced rate of compensation for service-incurred injuries, veteran is not without remedy since World War Veterans’ Act of 1924 [predecessor to 38 USCS § 1151] provides for compensation to veterans injured undergoing examination for benefits. Perucki v United States (1948, DC Pa) 80 F Supp 959

Veteran, who was struck by motorized wheelchair while awaiting scheduled examination, suffered injury coincidental to examination rather than one resulting from his having submitted to examination. Sweitzer v Brown (1993) 5 Vet App 503

Where veteran was injured when ceiling grate fell on his knee while he was undergoing medical examination in VA clinic, veteran was properly denied compensation under 38 USCS § 1151 because injury was coincidental to examination and was not caused by it. Loving v Nicholson (2005) 19 Vet App 96, 2005 US App Vet Claims LEXIS 131

9. During transportation

Transportation authorized by Veterans’ Administration is not part of hospitalization for purpose of disability benefits. 1948 ADVA 802

Patient who is hospitalized is in such status during time of transport from one Veterans’ Administration [now Department of Veterans Affairs] hospital to another, whether by agency vehicle and employee or by independent contractor; but injury occurring during such transport is compensable by Veterans Administration [now Department of Veterans Affairs] only if negligence of its agent is proximate or concurring cause. 1954 ADVA 945

10. During care at nursing home

Benefits are not payable to veteran under 38 USCS § 351 [now 38 USCS § 1151 et seq.] where injuries were sustained during care at nursing home authorized by Veterans Administration [now Department of Veterans Affairs] since statutory definition of "nursing home care" in § 101 does not meet requirements of § 351 [now § 1151] for "hospitalization" or "medical or surgical treatment." 1970 ADVA 992

Veteran’s claim for injuries as result of fall after getting out of wheelchair and walking down hall at Veterans’ Administration [now Department of Veterans Affairs] Medical Center is not well grounded under prior 38 USCS § 1151 as there is no medical evidence to relate claimed conditions to VA treatment. Jones v West (1999) 12 Vet App 460, 1999 US App Vet Claims LEXIS 612

III. PRACTICE AND PROCEDURE

11. Generally

Veteran’s disability claim under 38 USCS § 1151 does not survive veteran's death and Court of Appeals for Veterans Claims properly dismissed claim when veteran died during pendency of appeal. Seymour v Principi (2001, CA FC) 245 F.3d 1377

Court of Appeals for Federal Circuit had no jurisdiction to consider veteran's claim that Court of Appeals for Veterans Claims should have remanded his case to Board of Veterans' Appeals to consider informed consent form as evidence in veteran's claim for benefits under 38 USCS § 1151(a) due to injuries sustained following surgery performed by Department of Veterans Affairs surgeons; to decide issue, Federal Circuit would have been required to review Veterans Court's application of law, i.e., 38 USCS § 7104(d)(1), to facts and failure to consider consent form, and 38 USCS § 7292(d)(2) precluded Federal Circuit's review of factual determinations and applications of law to facts where no constitutional issues were involved. Cook v Principi (2003, CA FC) 353 F.3d 937

Veteran’s challenge to denial of service connection for conditions stemming from surgery is dismissed for lack of subject-matter jurisdiction, where he simply claims that Veterans’ Administration [now Department of Veterans Affairs] denied him equal protection by failing (1) to grant him relief under 38 USCS § 1151, and (2) properly to apply 38 CFR § 3.358(c)(3), because it is clear that veteran does not challenge validity of § 1151 on its face and judicial review is either
barred or channeled to Court of Veterans' Appeals and Federal Circuit. McCulley v United States Dep't of Veterans Affairs (1994, ED Wis) 851 F Supp 1271

Decision holding invalid regulation requiring either accident or fault on Veterans' Administration [now Department of Veterans Affairs] part for veteran to receive compensation for increased disability for any aggravation of injury resulting from treatment at VA facility was precedential one that must be applied by BVA in first instance, hence case in which regulation was applied would be remanded. Werner v Derwinski (1992) 3 Vet App 37

Although veteran had proper claim for compensation for depression as secondary to award of compensation for impotence, Court of Appeals for Veterans Claims lacked jurisdiction to review claim where issue was neither raised before, nor adjudicated by, Veterans' Administration. Anderson v Principi (2004) 18 Vet App 371, 2004 US App Vet Claims LEXIS 579

38 USCS § 1151(a)(1)(B) requires that finding be made regarding whether event in question was reasonably foreseeable only if and when it is first determined, under § 1151(a)(1), that additional disability at issue was caused by VA hospital care, medical or surgical treatment, or examination; where Board of Veterans' Appeals determined that claimant's disability was not caused by VA hospital care, medical or surgical treatment, or examination, but rather was caused by falling ceiling grate at VA clinic, Board was not required to make finding as to whether falling grate was reasonably foreseeable. Loving v Nicholson (2005) 19 Vet App 96, 2005 US App Vet Claims LEXIS 131

12. Filing of claims

38 USCS § 351 [now 38 USCS § 1151] does not require second claim to be filed after death of claimant. Devany v United States (1966, CA2 NY) 366 F.2d 807 (criticized in Seymour v Principi (2001, CA FC) 245 F.3d 1377)

Veteran's mere reference to similar case in his notice of disagreement was not enough for VA to have inferred that veteran raised claim under 38 USCS § 1151 where reference occurred in another context and record contained no indication that veteran believed he currently had condition caused by VA medical treatment. King v Nicholson (2006) 19 Vet App 406, 2006 US App Vet Claims LEXIS 2

13. Burden of proof

Monetary benefits are not payable as result of veteran's death unless it is shown that death proximately resulted from accident, carelessness, negligence, lack of proper skill, error in judgment, or malpractice on part of person or persons charged with duty respecting his hospitalization or treatment. 1934 ADVA 255

14. Setoffs


District Court erred in ordering set off of disabled veteran's tort judgment according to provisions of 38 USCS § 351 [now 38 USCS § 1151], where Veterans' Administration [now Department of Veterans Affairs] had determined that veteran's increased future disability benefits due to negligent medical treatment were covered by 38 USCS § 331 [now 38 USCS § 1131] which does not provide for cessation of future disability benefits, since 38 USCS § 211 [now 38 USCS § 511] bars judicial review of Veterans' Administration [now Department of Veterans Affairs] decision that veteran's future disability benefits are governed by 38 USCS § 331 [now 38 USCS § 1131], so that veteran's tort judgment is to be reduced by present value of veteran's expected future disability benefits in order to prevent double recovery. Cole v United States (1988, CA11 Ga) 861 F.2d 1261
Veteran who is awarded both benefits under 38 USCS § 1151 and damages under FTCA for same Veterans' Administration [now Department of Veterans Affairs] hospital injuries must have his § 1151 benefits set off against entire amount of FTCA damages, not just against lost earnings portion of award. Morgan v United States (1992, CA2 NY) 968 F.2d 200

Despite rule that government does not have to pay twice for same injury, successful plaintiff in medical malpractice action against Veterans' Administration [now Department of Veterans Affairs] hospital was entitled to compensation for future medical treatment even though such treatment would be available without charge from Veterans Administration [now Department of Veterans Affairs], where amount of future VA benefits was too speculative to be deducted from recovery, and to do so would unduly restrict plaintiff's future choice of medical care; by terms of statute, benefits awarded to plaintiff under 38 USCS § 351 [now 38 USCS § 1151] must be set off, and future benefits withheld in amount of damages awarded. Powers v United States (1984, DC Conn) 589 F Supp 1084

All damages under 38 USCS § 351 [now 38 USCS § 1151] paid to plaintiff, who was negligently treated at Veterans Administration [now Department of Veterans Affairs] hospital, before date of plaintiff's judgment's are setoff against court award, and all further § 351 [now § 1151] benefits must be curtailed until such time as sum of benefits reaches amount of court damages. Powers v United States (1984, DC Conn) 589 F Supp 1084

Veterans Administration [now Department of Veterans Affairs] may not only withhold from widow accrued benefits which veteran was entitled to receive up to time of death, but also any DIC payable to her in her own right until aggregate of such withholding equals full amount of settlement paid to widow under Federal Tort Claims Act (28 USCS § 2672). VA GCO 1-75

Offsetting relief with part of FTCA settlement attributable to widow in her individual capacity was proper where widow acted as both representative of deceased husband's estate and for estate beneficiaries, of whom she was one, when entering settlement. Neal v Derwinski (1992) 2 Vet App 296

Veterans' Administration [now Department of Veterans Affairs] did not reduce amount of widow's retroactive DIC entitlement, but rather subtracted from it sum of money that she already received as death pension benefits, nor did district court's judgment, in widow's Federal Tort Claims Act, which included consideration of death pension benefits she had received, constitute wrongful second recoupment of that amount, thus Board did not err in determining that widow was not entitled to additional payment of DIC for period before district court's judgment. Gantt v Principi (2002) 16 Vet App 89, 2002 US App Vet Claims LEXIS 297

§ 1152. Persons heretofore having a compensable status

The death and disability benefits of this chapter [38 USCS §§ 1101 et seq.] shall, notwithstanding the service requirements thereof, be granted to persons heretofore recognized by law as having a compensable status, including persons whose claims are based on war or peacetime service rendered before April 21, 1898.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Veterans' Regulation No. 10, para. III.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 352, as 38 USCS § 1152.
Research Guide

Law Review Articles:

Wellen. Armed Forces Disability Benefits-a Lawyer's View. 27 Judge Advocate General Journal 485, Spring 1974

§ 1153. Aggravation

A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

Prior law and revision:

This section is based on 38 USC § 2353 (Act June 17, 1957, P. L. 85-56, Title III, Part F, § 353, 71 Stat. 102).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Veterans' Regulation No. 1(a), Part I, para. I(d).

Amendments:


Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 156

Law Review Articles:


1. Generally

2. Regulations

3. Determinations

4. Particular injuries or diseases

1. Generally

Since veteran's visual acuity decreased during service, Board had obligation to apply presumption of aggravation or explain why presumption should not be applied. Browder v Derwinski (1991) 1 Vet App 204, appeal after remand, remanded (1993) 5 Vet App 268

On review of 1983 decision of Board of Veterans' Appeals (Board), Board was bound to apply regulations as they existed in 1983, and new interpretations of 38 USCS § 1111 (former 38 USCS § 311) and 38 USCS § 1153 (former 38 USCS § 353), interpretations to which Secretary of Veterans Affairs also agreed, that apparently conflicted with those regulations could not be basis for clear and unmistakable error for 1983 decision. Jordan v Principi (2003) 17 Vet App 261, 2003 US App Vet Claims LEXIS 721, affd (2005, CA FC) 401 F.3d 1296, reh den, reh, en banc, den (2005, CA FC) 2005 US App LEXIS 10618

2. Regulations
Regulation providing that symptomatic manifestations of preexisting disease or injury will establish aggravation of disability does not impose conclusive or irrebuttable presumption of service-connection based on aggravation in conflict with 38 USCS § 1153 which it implements, since statute is silent about method or level of proof necessary to establish increase in severity, rather those matters are taken up by 38 USCS § 1154 which gives Secretary authority to set out regulations to create rules of evidence directed at nature and level of proof required to establish service-connection, one method is aggravation, and regulation followed that statute's mandate in creating evidentiary presumption in favor of combat veteran, but presumption may be rebutted. Jensen v Brown (1994, CA FC) 19 F.3d 1413

Secretary of Veterans Affairs was reasonable in excluding presbyopia in 38 C.F.R. § 3.303(c) because medical evidence showed that increase in presbyopia was always due to natural progress of disease and, as veteran had not provided any contrary evidence suggesting that presbyopia could be caused by or aggravated by events associated with military service other than aging, Secretary's interpretation of terms "injury" and "disease" was not contrary to 38 USCS § 1153. Terry v Principi (2003, CA FC) 340 F.3d 1378, reh den (2003, CA FC) 2003 US App LEXIS 24133 and cert den (2004) 541 US 904, 158 L Ed 2d 246, 124 S Ct 1606

Regulatory provision, to extent it would provide disability compensation for temporary exacerbations of preexisting conditions, is inconsistent with statutory scheme for disability benefits. Jensen v Brown (1993) 4 Vet App 304

3. Determinations

Evidence of temporary flare-ups symptomatic of underlying preexisting condition, alone, is not sufficient for non-combat veteran to show increased disability under 38 USCS § 1153 unless underlying condition is worsened. Davis v Principi (2002, CA FC) 276 F.3d 1341

Court of Appeals for Veterans Claims properly remanded denial of benefits to Board of Veterans' Appeals after finding that board incorrectly determined that evidence in case met "clear and unmistakable" standard for rebutting presumption of in-service aggravation of disability; board had applied incorrect standard and remand was necessary to determine whether evidence generally acceptable as competent showed that any increase in disability was due to natural progress of condition. Stevens v Principi (2002, CA FC) 289 F.3d 814

Veteran's argument that 1945 rating decision did not rebut presumptions of sound condition and aggravation failed, where rating board had found that veteran's eye condition was clearly shown by service records and examination conducted subsequent to discharge to be of congenital or developmental origin, that it was due to defect in form and structure of eye, held to be of congenital or developmental origin, and that there was no evidence of superimposed disability during service which could have caused or aggravated condition; fact that rating board did not specifically advert to presumptions of soundness and aggravation, and did not specifically recite applicable standard of proof for rebutting those presumptions, did not require holding that rating board's decision constituted clear and unmistakable error as matter of law. Natali v Principi (2004, CA FC) 375 F.3d 1375, reh den (2004, CA FC) 2004 US App LEXIS 21062

Where veteran's ulcer condition preexisted service, and veteran had suffered marked increase in symptoms associated with his ulcer, applying law in existence in 1955, Department of Veterans Affairs regional office was required to have made "specific finding" of natural progression of condition; absent such finding, it was error to conclude that presumption of aggravation had been rebutted. Joyce v Nicholson (2005) 19 Vet App 36, 2005 US App Vet Claims LEXIS 97

Evidence, e.g., veteran's statements during his initial examination that he had experienced intermittent epigastria pain and vomiting, supported conclusion of Board of Veterans' Appeals that veteran's ulcer had preexisted service. Joyce v Nicholson (2005) 19 Vet App 36, 2005 US App Vet Claims LEXIS 97

4. Particular injuries or diseases
Where records show that veteran's foot disorder increased in severity during service inclusive of time of discharge, Board erred in denying veteran's reopened claim for service connection for flat feet. Townsend v Derwinski (1991) 1 Vet App 408

Board's denial of service connection for aggravation of right knee disability was not erroneous since its factual finding that there was no increase in severity of knee injury during service was plausible in light of entire record. Hunt v Derwinski (1991) 1 Vet App 292

Service-connection was mandated where there was no evidence that natural progression of veteran's traumatic cataract was glaucoma which in turn led to enucleation of his right eye. Akins v Derwinski (1991) 1 Vet App 228

Appellant was not entitled to service connection for aggravation of preexisting knee condition since there was no evidence to show that appellant experienced persistent worsening of knee condition in service, and in fact evidence showed that knee condition actually improved in service. Beverly v Brown (1996) 9 Vet App 402

Rating decision determining that appellant's psychosis existed prior to service and was not aggravated by service did not constitute clear and unmistakable error since appellant did not allege that correct facts as known at time were not before adjudicator or that statutory and regulatory provisions extant at time were incorrectly applied. Daniels v Gober (1997) 10 Vet App 474, dismd without op sub nom Daniels v West (1998, CA FC) 155 F.3d 572, reported in full (1998, CA FC) 1998 US App LEXIS 17306

§ 1154. Consideration to be accorded time, place, and circumstances of service

(a) The Secretary shall include in the regulations pertaining to service-connection of disabilities (1) additional provisions in effect requiring that in each case where a veteran is seeking service-connection for any disability due consideration shall be given to the places, types, and circumstances of such veteran's service as shown by such veteran's service record, the official history of each organization in which such veteran served, such veteran's medical records, and all pertinent medical and lay evidence, and (2) the provisions required by section 5 of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act (Public Law 98-542; 98 Stat. 2727) [note to this section].

(b) In the case of any veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service-connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary. The reasons for granting or denying service-connection in each case shall be recorded in full.

Prior law and revision:

This section is based on 38 USC § 2354 (Act June 17, 1957, P. L. 85-56, Title III, Part F, § 354, 71 Stat. 102).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Amendments:

1976. Act Sept. 30, 1976 (effective, 10/1/76 as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in subsec. (a), substituted "such veteran's" and "such veteran" for "his" and "he", respectively, wherever appearing.

1984. Act Oct. 24, 1984, in subsec. (a), substituted "(1)" for a comma and added: "and (2) the provisions required by section 5 of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 354, as 38 USCS § 1154, and substituted "Secretary" for "Administrator".

Other provisions:


"Short Title

"Section 1. This Act may be cited as the 'Veterans' Dioxin and Radiation Exposure Compensation Standards Act'.

"Findings

"Sec. 2. The Congress makes the following findings:

"(1) Veterans who served in the Republic of Vietnam during the Vietnam era and veterans who participated in atmospheric nuclear tests or the American occupation of Hiroshima or Nagasaki, Japan, are deeply concerned about possible long-term health effects of exposure to herbicides containing dioxin or to ionizing radiation.

"(2) There is scientific and medical uncertainty regarding such long-term adverse health effects.

"(3) In section 102 of Public Law 97-22 [probably a reference to § 102 of P.L. 97-72, which amended 38 USCS §§ 1710, 1712], the Congress responded to that uncertainty by authorizing priority medical care at Veterans' Administration facilities for any disability of a veteran who may have been so exposed (even though there is insufficient medical evidence linking such disability with such exposure) unless the disability is found to have resulted from a cause other than the exposure.

"(4) The Congress has further responded to that medical and scientific uncertainty by requiring, in section 307 of Public Law 96-151 [38 USCS § 527 note] and section 601 of Public Law 98-160 [38 USCS § 527 note], the conduct of thorough epidemiological studies of the health effects experienced by veterans in connection with exposure both to
herbicides containing dioxin and (if not determined to be scientifically infeasible) to radiation, and by requiring in Public Law 97-414 [21 USCS § 301 note, among other things; for full classification, consult USCS Tables volumes], the development of radioepidemiological tables setting forth the probabilities of causation between various cancers and exposure to radiation.

"(5) There is some evidence that most types of leukemia, malignancies of the thyroid, female breast, lung, bone, liver, and skin, and polycythemia vera are associated with exposure to certain levels of ionizing radiation.

"(6) As of the date of the enactment of this Act, there are sixty-six federally sponsored research projects being conducted relating to herbicides containing dioxin, at a cost to the Federal Government in excess of $130,000,000 and, as of 1981, federally sponsored research projects relating to ionizing radiation were costing the Federal Government more than $115,000,000.

"(7) The initial results of one project—an epidemiological study, conducted by the United States Air Force School of Aerospace Medicine, of the health status of the 'Ranch Hand' veterans who carried out the loading and aerial spraying of herbicides containing dioxin in Vietnam and in the process came into direct skin contact with such herbicides in their most concentrated liquid form—were released on February 24, 1984, and contained the conclusion 'that there is insufficient evidence to support a cause and effect relationship between herbicide exposure and adverse health in the Ranch Hand group at this time'.

"(8) The 'film badges' which were originally issued to members of the Armed Forces in connection with the atmospheric nuclear test program have previously constituted a primary source of dose information for veterans (and survivors of veterans) filing claims for Veterans' Administration disability compensation or dependency and indemnity compensation in connection with exposure to radiation.

"(9) These film badges often provide an incomplete measure of radiation exposure, since they were not capable of recording inhaled, ingested, or neutron doses (although the Defense Nuclear Agency currently has the capability to reconstruct individual estimates of such doses), were not issued to most of the participants in nuclear tests, often provided questionable readings because they were shielded during the detonation, and were worn for only limited periods during and after each nuclear detonation.

"(10) Standards governing the reporting of dose estimates in connection with radiation-related claims for Veterans' Administration disability compensation vary among the several branches of the Armed Forces, and no uniform minimum standards exist.

"(11) The Veterans' Administration has not promulgated permanent regulations setting forth specific guidelines, standards, and criteria for the adjudication of claims for Veterans' Administration disability compensation based on exposure to herbicides containing dioxin or to ionizing radiation.

"(12) Such claims (especially those involving health effects with long latency periods) present adjudicatory issues which are significantly different from issues generally presented in claims based upon the usual types of injuries incurred in military service.

"(13) It has always been the policy of the Veterans' Administration and is the policy of the United States, with respect to individual claims for service connection of diseases and disabilities, that when, after consideration of all evidence and material of record, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of a claim, the benefit of the doubt in resolving each such issue shall be given to the claimant.

*Purpose
"Sec. 3. The purpose of this Act is to ensure that Veterans' Administration disability compensation is provided to veterans who were exposed to ionizing radiation in connection with atmospheric nuclear tests or in connection with the American occupation of Hiroshima or Nagasaki, Japan, for all disabilities arising after that service that are connected, based on sound scientific and medical evidence, to such service (and that Veterans' Administration dependency and indemnity compensation is provided to survivors of those veterans for all deaths resulting from such disabilities).

"Requirement in Title 38, United States Code, Relating to Regulations

"Sec. 4. [Section 4 of this Act amends subsecs. (a)(1), (2) of this section; see the 1984 Amendments notes to this section.]

"Requirement for and Content of Regulations

"Sec. 5. (a) In carrying out the responsibilities of the Administrator of Veterans' Affairs under section 354(a)(2) [now section 1154(a)(2)] of title 38, United States Code, and in order to promote consistency in claims processing and decisions, the Administrator shall prescribe regulations to--

"(1) establish guidelines and (where appropriate) standards and criteria for the resolution of claims for benefits under laws administered by the Veterans' Administration where the criteria for eligibility for a benefit include a requirement that a death or disability be service connected and the claim of service connection is based on a veteran's exposure during service in connection with such veteran's participation in atmospheric nuclear tests or with the American occupation of Hiroshima or Nagasaki, Japan, prior to July 1, 1946, to ionizing radiation from the detonation of a nuclear device; and

"(2) ensure that, with respect to those claims, the policy of the United States described in section 2(13) is carried out.

"(b)(1)(A) The guidelines required to be established in regulations prescribed under this section shall include guidelines governing the evaluation of the findings of scientific studies relating to the possible increased risk of adverse health effects of exposure to ionizing radiation. Those guidelines shall require that, in the evaluation of those studies, the Administrator shall take into account whether the results are statistically significant, are capable of replication, and withstand peer review.

"(B) The evaluations described in subparagraph (A) shall be made by the Administrator of Veterans' Affairs after receiving the advice of the Scientific Council of the Veterans' Advisory Committee on Environmental Hazards (established under section 6). Those evaluations shall be published in the notice section of the Federal Register.

"(C) The standards and criteria required to be established in regulations prescribed under this section shall include provisions governing the use in the adjudication of individual claims of the Administrator's evaluations made under subparagraph (B).

"(2)(A)(i) In prescribing regulations under this section, the Administrator (after receiving the advice of the Advisory Committee and of the Scientific Council of the Veterans' Advisory Committee on Environmental Hazards regarding the diseases described in subparagraph (B)) shall make determinations, based on sound medical and scientific evidence, with respect to each disease described in subparagraph (B) as to whether service connection shall, subject to division (ii) of this subparagraph, be granted in the adjudication of individual cases. In making determinations regarding such diseases, the Administrator shall give due regard to the need to maintain the policy of the United States with respect to the resolution of contested issues as set forth in section 2(13). The Administrator shall set forth in such regulations such determinations, with any specification (relating to exposure or other relevant matter) of limitations on the
circumstances under which service connection shall be granted, and shall implement such determinations in accordance with such regulations.

"(ii) If the Administrator makes a determination, pursuant to this subparagraph, that service connection shall be granted in the case of a disease described in subparagraph (B), the Administrator shall specify in such regulations that, in the adjudication of individual cases, service connection shall not be granted where there is sufficient affirmative evidence to the contrary or evidence to establish that an intercurrent injury or disease which is a recognized cause of the described disease has been suffered between the date of separation from service and the onset of such disease or that the disability is due to the veteran's own willful misconduct.

"(iii) With regard to each disease described in subparagraph (B), the Administrator shall include in the regulations prescribed under this section provisions specifying the factors to be considered in adjudicating issues relating to whether or not service connection should be granted in individual cases and the circumstances governing the granting of service connection for such disease.

"(B) The diseases referred to in subparagraph (A) are those specified in section 2(5) and any other disease with respect to which the Administrator finds (after receiving and considering the advice of the Scientific Council established under section 6(d)(2)) that there is sound scientific or medical evidence indicating a connection to exposure to ionizing radiation, in the case of a veteran who was exposed to ionizing radiation in connection with such veteran's participation in an atmospheric nuclear test or with the American occupation of Hiroshima or Nagasaki, Japan, before July 1, 1946.

"(3) The regulations prescribed under this section shall include--

"(A) specification of the maximum period of time after exposure to such ionizing radiation for the development of those diseases; and

"(B) a requirement that a claimant filing a claim based upon a veteran's exposure to ionizing radiation from the detonation of a nuclear device may not be required to produce evidence substantiating the veteran's exposure during active military, naval, or air service if the information in the veteran's service records and other records of the Department of Defense is not inconsistent with the claim that the veteran was present where and when the claimed exposure occurred.

"(c)(1) The Administrator of Veterans' Affairs shall develop the regulations required by this section (and any amendment to those regulations) through a public review and comment process in accordance with the provisions of section 553 of title 5, United States Code. That process may include consideration by the Administrator of the recommendations of the Veterans' Advisory Committee on Environmental Hazards and the Scientific Council thereof (established under section 6) with respect to the proposed regulations, and that process shall include consideration by the Administrator of the recommendations of the Committee and the Council with respect to the final regulations and proposed and final amendments to such regulations. The period for public review and comment shall be completed not later than ninety days after the proposed regulations or proposed amendments are published in the Federal Register.

"(2)(A) Not later than one hundred and eighty days after the date of the enactment of this Act, the Administrator shall develop and publish in the Federal Register a proposed version of the regulations required to be prescribed by this section.

"(B) Not later than three hundred days after the date of the enactment of this Act, the Administrator shall publish in the Federal Register the final regulations (together with
explanations of the bases for the guidelines, standards, and criteria contained therein) required to be prescribed by this section.

"Advisory Committee on Environmental Hazards

"Sec. 6. (a) The advisory committee referred to in subsections (b) and (c) of section 5, to be known as the Veterans' Advisory Committee on Environmental Hazards (hereinafter in this section referred to as the "Committee") shall consist of nine members appointed by the Administrator of Veterans' Affairs after requesting and considering recommendations from veteran organizations, including--

"(1) six individuals (of whom none may be members of the Armed Forces on active duty or employees of the Veterans' Administration or the Department of Defense and not more than three may be employees of other Federal departments or agencies), appointed, after requesting and considering the recommendations of the heads of Federal entities with particular expertise in biomedical and environmental science, including--

"(A) three individuals who are recognized medical or scientific authorities in fields pertinent to understanding the health effects of exposure to ionizing radiation; and

"(B) three individuals who are recognized medical or scientific authorities in fields, such as epidemiology and other scientific disciplines, pertinent to determining and assessing the health effects of exposure to ionizing radiation in exposed populations; and

(C) [Redesignated]

"(2) three individuals from the general public, including at least one disabled veteran, having a demonstrated interest in and experience relating to veterans' concerns regarding exposure to ionizing radiation.

"(b) The Committee shall include, as ex officio, nonvoting members, the Chief Medical Director [Under Secretary for Health] and the Chief Benefits Director [Under Secretary for Benefits] of the Veterans' Administration, or their designees.

"(c) The Committee shall submit to the Administrator any recommendations it considers appropriate for administrative or legislative action.

"(d)(1) The six members of the Committee described in subsection (a)(1) shall, in addition to serving as members of the Committee, constitute a Scientific Council of the Committee (hereinafter in this section referred to as the 'Council').

"(2) The Council shall have responsibility for evaluating scientific studies relating to possible adverse health effects of exposure to ionizing radiation.

"(3) The Council shall make findings and evaluations regarding pertinent scientific studies and shall submit to the Committee, the Administrator, and the Committees on Veterans' Affairs of the Senate and House of Representatives directly periodic reports on such findings and evaluations.

"(e) The Administrator shall designate one of the members to chair the Committee and another member to chair the Council.

"(f) The Administrator shall determine the terms of service and pay and allowances of members of the Committee, except that a term of service of any member may not exceed three years. The Administrator may reappoint any member for additional terms of service.

"(g) The Administrator shall provide administrative support services and fiscal support for the Committee.

"Nuclear Radiation Matters Involving Other Agencies
"Sec. 7. (a) In connection with the duties of the Director of the Defense Nuclear Agency, as Department of Defense Executive Agent for the Nuclear Test Personnel Review Program, relating to the preparation of radiation dose estimates with regard to claims for Veterans' Administration disability compensation and dependency and indemnity compensation under chapters 11 and 13, respectively, of title 38, United States Code [38 USCS §§ 1101 et seq. and 1301 et seq.]--

"(1) the Secretary of Defense shall prescribe guidelines (and any amendment to those guidelines) through a public review and comment process in accordance with the provisions of section 553 of title 5, United States Code--

"(A) specifying the minimum standards governing the preparation of radiation dose estimates in connection with claims for such compensation,

"(B) making such standards uniformly applicable to the several branches of the Armed Forces, and

"(C) requiring that each such estimate furnished to the Veterans' Administration and to any veteran or survivor include information regarding all material aspects of the radiation environment to which the veteran was exposed and which form the basis of the claim, including inhaled, ingested, and neutron doses; and

"(2) the Secretary of Health and Human Services, through the Director of the National Institutes of Health, shall--

"(A) conduct a review of the reliability and accuracy of scientific and technical devices and techniques (such as 'whole body counters') which may be useful in determining previous radiation exposure;

"(B) submit to the Administrator of Veterans' Affairs and the Committees on Veterans' Affairs of the House of Representatives and the Senate, not later than July 1, 1985, a report regarding the results of such review, including information concerning the availability of such devices and techniques, the categories of exposed individuals as to whom use of such devices and techniques may be appropriate, and the reliability and accuracy of dose estimates which may be derived from such devices and techniques; and

"(C) enter into an interagency agreement with the Administrator of Veterans' Affairs for the purpose of assisting the Administrator in identifying agencies or other entities capable of furnishing services involving the use of such devices and techniques.

"(b) The Administrator of Veterans' Affairs, in resolving material differences between a radiation dose estimate, from a credible source, submitted by a veteran or survivor and a radiation dose estimate prepared and transmitted by the Director of the Defense Nuclear Agency, shall provide for the preparation of a radiation dose estimate by an independent expert, who shall be selected by the Director of the National Institutes of Health and who shall not be affiliated with the Defense Nuclear Agency, and the Administrator shall provide for the consideration of such independent estimate in connection with the adjudication of the claim for Veterans' Administration compensation.

*Amendments to Regulations

"Sec. 8. [Section 8 of this Act amends Act Dec. 20, 1979, P. L. 96-151, Title III, § 307(b)(3), 93 Stat. 1097, which appears as 38 USCS § 527 note.]

"Interim Benefits for Disability or Death in Certain Cases

"Sec. 9. (a)(1) In the case of a veteran--
"(A) who served in the active military, naval, or air service in the Republic of Vietnam during the Vietnam era; and

"(B) who has a disease described in subsection (b) that became manifest within one year after the date of the veteran's most recent departure from the Republic of Vietnam during that service,

the Administrator shall (except as provided in subsection (c)) pay a monthly disability benefit to the veteran in accordance with this section.

"(2) If a veteran described in paragraph (1) dies from the disease, the Administrator shall pay a monthly death benefit to the survivors of the veteran in accordance with this section.

"(b) The diseases referred to in subsection (a) are chloracne and porphyria cutanea tarda.

"(c) Benefits may not be paid under this section with respect to a disease occurring in a veteran--

"(1) where there is affirmative evidence that the disease was not incurred by the veteran during service in the Republic of Vietnam during the Vietnam era;

"(2) where there is affirmative evidence to establish that an intercurrent injury or disease which is a recognized cause of the disease was suffered by the veteran between the date of the veteran's most recent departure from the Republic of Vietnam during active military, naval, or air service and the onset of the disease; or

"(3) if the Administrator determines, based on evidence in the veteran's service records and other records of the Department of Defense, that the veteran was not exposed to dioxin during active military, naval, or air service in the Republic of Vietnam during the Vietnam era.

"(d)(1) A disability benefit payable to a veteran under this section for a disease described in subsection (b) shall be paid at the rate at which compensation would be payable under chapter 11 of title 38, United States Code [38 USCS §§ 1101 et seq.], to that veteran for the disability resulting from that disease if the disability were determined to be service-connected.

"(2) A death benefit payable under this section to the survivors of a veteran shall be paid to such survivors based upon the eligibility requirements (other than the requirement that death be the result of a service-connected or compensable disability) and at the rates that are applicable to dependency and indemnity compensation under chapter 13 of that title [38 USCS §§ 1301 et seq.].

"(e) A benefit may not be paid under this section with respect to a disease or the death of a veteran for any month for which compensation is payable to that veteran for that disease under chapter 11 of title 38, United States Code [38 USCS §§ 1101 et seq.], or for which dependency and indemnity compensation is payable for that death under chapter 13 of such title [38 USCS §§ 1301 et seq.].

"(f) A disease establishing eligibility for a disability or death benefit under this section shall be treated for purposes of all other laws of the United States (other than chapters 11 and 13 of title 38, United States Code) [38 USCS §§ 1101 et seq., 1301 et seq.] as if such disease were service connected. The receipt of a disability benefit under this section shall be treated for purposes of all other laws of the United States as if such benefit were compensation under chapter 11 of such title [38 USCS §§ 1101 et seq.], and the receipt of a death benefit under this section shall be treated for purposes of all other laws of the United States as if such benefit were dependency and indemnity compensation under chapter 13 of title 38, United States Code [38 USCS §§ 1301 et seq.].

"(g) For the purposes of this section:
"(1) The term 'Administrator' means the Administrator of Veterans' Affairs.

"(2) The term 'Vietnam era' means the period beginning on August 5, 1964, and ending on May 7, 1975.

"(3) The term 'veteran' has the meaning given that term in paragraph (2) of section 101 of title 38, United States Code, and includes a person who died in the active military, naval, or air service.

"(4) The terms 'service-connected' and 'active military, naval, or air service' have the meanings given those terms in paragraphs (16) and (24), respectively, of section 101 of title 38, United States Code.

"(h)(1) This section takes effect as of October 1, 1984. No benefit may be paid under this section for a period before that date.

"(2) No benefit may be paid under this section for a period after September 30, 1986.

"Identification of activities involving exposure before January 1, 1970.

Sec. 10. (a) In general.(1) In order to determine whether activities (other than the tests or occupation activities referred to in section 5(a)(1)(B)) resulted in the exposure of veterans to ionizing radiation during the service of such veterans that occurred before January 1, 1970, and whether adverse health effects have been observed or may have resulted from such exposure in a significant number of such veterans, the Advisory Committee established under section 6 shall--

"(A) review all available scientific studies and other relevant information relating to the exposure of such veterans to ionizing radiation during such service;

"(B) identify any activity during which significant numbers of veterans received exposure; and

"(C) on the basis of such review, submit to the Secretary of Veterans Affairs a report containing the recommendation of the Advisory Committee on the feasibility and appropriateness for the purpose of the determination under this paragraph of any additional investigation with respect to any activity of such veterans during such service.

"(2) Upon the request of the Advisory Committee, the Secretary of Veterans Affairs (after seeking such assistance from the Secretary of Defense as is necessary and appropriate) shall make available to the Advisory Committee records and other information relating to the service referred to in paragraph (1) that may assist the Advisory Committee in carrying out the review and recommendation referred to in that paragraph.

"(3) The Advisory Committee shall submit to the Secretary of Veterans Affairs the report referred to in paragraph (1)(C) not later than August 1, 1993.

"(b) Investigation plan and report.(1) Upon receipt of the report referred to in subparagraph (C) of subsection (a)(1), the Secretary of Veterans Affairs shall--

"(A) identify which of the activities referred to in that subparagraph, if any, that the Secretary intends to investigate more fully for the purpose of making the determination referred to in that subsection; and

"(B) prepare a plan (including a deadline for the plan) to carry out that investigation and make that determination.

"(2) Not later than December 1, 1993, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report containing--
"(A) a list of the activities identified by the Secretary pursuant to paragraph (1)(A) and the basis of such identification;

"(B) a copy of the report of the Advisory Committee referred to in subsection (a)(1)(C); and

"(C) the plan referred to in paragraph (1)(B)."


"(a) Establishment of registry. The Secretary of Veterans Affairs shall establish and maintain a special record to be known as the 'Ionizing Radiation Registry' (hereinafter in this section referred to as the 'Registry').

"(b) Content of registry. Except as provided in subsection (c), the Registry shall include the following information:

"(1) A list containing the name of each veteran who was exposed to ionizing radiation under the conditions described in section 610(e)(1)(B) [now section 1710(e)(1)(B)] of title 38, United States Code, and who--

"(A) applies for hospital or nursing home care from the Department of Veterans Affairs under chapter 17 of such title [38 USCS §§ 1701 et seq.];

"(B) files a claim for compensation under chapter 11 of such title [38 USCS §§ 1101 et seq.] on the basis of a disability which may be associated with the exposure to ionizing radiation; or

"(C) dies and is survived by a spouse, child, or parent who files a claim for dependency and indemnity compensation under chapter 13 of such title [38 USCS §§ 1301 et seq.] on the basis of the exposure of such veteran to ionizing radiation.

"(2) Medical data relating to each veteran listed in the Registry, including--

"(A) the veteran's medical history, latest health status recorded by the Department of Veterans Affairs, physical examinations, and clinical findings; and

"(B) a statement describing birth defects, if any, in the natural children of the veteran.

"(3) Data on claims for the compensation referred to in paragraph (1), including decisions and determinations of the Department of Veterans Affairs relating to such claims.

"(4) An estimate of the dose of radiation to which each veteran listed in the Registry was exposed under the conditions described in section 610(e)(1)(B) [now section 1710(e)(1)(B)] of such title.

"(c) Veterans submitting claims before date of enactment. If in the case of a veteran described in subsection (b)(1) the application or claim referred to in such subsection was submitted or filed before Oct. 28, 1986, the Secretary shall include in the Registry, to the extent feasible, such veteran's name and the data and information described in subsection (b) relating to the veteran.

"(d) Consolidation of existing information.(1) For the purpose of establishing and maintaining the Registry, the Secretary of Veterans Affairs shall compile and consolidate--

"(A) relevant information maintained by the Veterans Benefits Administration and the Veterans Health Administration of the Department of Veterans Affairs;

"(B) relevant information maintained by the Defense Nuclear Agency of the Department of Defense; and
"(C) any relevant information maintained by any other element of the Department of Veterans Affairs or the Department of Defense.

"(2) With respect to a veteran whose name is included in the Registry and for whom the information in the Registry is not complete, the Secretary of Veterans Affairs shall include information described in paragraph (1) with respect to that veteran (A) to the extent that such information is reasonably available in records of the Department of Veterans Affairs or Department of Defense, or (B) if such information is submitted by the veteran after October 28, 1986.

"(e) Department of defense information. The Secretary of Defense shall furnish to the Secretary of Veterans Affairs such information maintained by the Department of Defense as the Secretary of Veterans Affairs considers necessary to establish and maintain the Registry.

"(f) Definition. For the purpose of this section, the term 'veteran' has the meaning given that term in section 101(2) of title 38, United States Code, and includes a person who died in the active military, naval, or air service.

"(g) Effective date. The Registry shall be established not later than 180 days after the date of the enactment of this Act.

References to positions of Chief Medical Director and Chief Benefits Director.  Act Oct. 9, 1992, P. L. 102-405, Title III, § 302(e), 106 Stat. 1985, which appears as 38 USCS § 305 note, provides that any reference to the Chief Medical Director or the Chief Benefits Director of the Department of Veterans Affairs in any Federal law, Executive order, rule, regulation, or delegation of authority, or any document of or pertaining to the Department of Veterans Affairs shall be deemed to refer to the Under Secretary for Health and the Under Secretary for Benefits, respectively, of such Department.


"(a) Review by National Academy of Sciences. Not later than 30 days after the date of the enactment of this Act, the Secretary of Defense shall enter into a contract with the National Academy of Sciences to carry out periodic reviews of the program of the Defense Threat Reduction Agency of the Department of Defense known as the 'dose reconstruction program'.

"(b) Review activities. The periodic reviews of the dose reconstruction program under the contract under subsection (a) shall consist of the periodic selection of random samples of doses reconstructed by the Defense Threat Reduction Agency in order to determine--

"(1) whether or not the reconstruction of the sampled doses is accurate;

"(2) whether or not the reconstructed dosage number is accurately reported;

"(3) whether or not the assumptions made regarding radiation exposure based upon the sampled doses are credible; and

"(4) whether or not the data from nuclear tests used by the Defense Threat Reduction Agency as part of the reconstruction of the sampled doses is accurate.

"(c) Duration of review. The periodic reviews under the contract under subsection (a) shall occur over a period of 24 months.

"(d) Report.(1) Not later than 60 days after the conclusion of the period referred to in subsection (c), the National Academy of Sciences shall submit to Congress a report on its activities under the contract under this section.

"(2) The report shall include the following:

"(A) A detailed description of the activities of the National Academy of Sciences under the contract.
"(B) Any recommendations that the National Academy of Sciences considers appropriate regarding a permanent system of review of the dose reconstruction program of the Defense Threat Reduction Agency."


"(a) Review of mission, procedures, and administration.(1) The Secretary of Veterans Affairs and the Secretary of Defense shall jointly conduct a review of the mission, procedures, and administration of the Radiation Dose Reconstruction Program of the Department of Defense.

"(2) In conducting the review under paragraph (1), the Secretaries shall--

"(A) determine whether any additional actions are required to ensure that the quality assurance and quality control mechanisms of the Radiation Dose Reconstruction Program are adequate and sufficient for purposes of the program; and

"(B) determine the actions that are required to ensure that the mechanisms of the Radiation Dose Reconstruction Program for communication and interaction with veterans are adequate and sufficient for purposes of the program, including mechanisms to permit veterans to review the assumptions utilized in their dose reconstructions.

"(3) Not later than 90 days after the date of the enactment of this Act, the Secretaries shall jointly submit to Congress a report on the review under paragraph (1). The report shall set forth--

"(A) the results of the review;

"(B) a plan for any actions determined to be required under paragraph (2); and

"(C) such other recommendations for the improvement of the mission, procedures, and administration of the Radiation Dose Reconstruction Program as the Secretaries jointly consider appropriate.

"(b) On-going review and oversight. The Secretaries shall jointly take appropriate actions to ensure the on-going independent review and oversight of the Radiation Dose Reconstruction Program, including the establishment of the advisory board required by subsection (c).

"(c) Advisory board.(1) In taking actions under subsection (b), the Secretaries shall jointly appoint an advisory board to provide review and oversight of the Radiation Dose Reconstruction Program.

"(2) The advisory board under paragraph (1) shall be composed of the following:

"(A) At least one expert in historical dose reconstruction of the type conducted under the Radiation Dose Reconstruction Program.

"(B) At least one expert in radiation health matters.

"(C) At least one expert in risk communications matters.

"(D) A representative of the Department of Veterans Affairs.


"(F) At least three veterans, including at least one veteran who is a member of an atomic veterans group.

"(3) The advisory board under paragraph (1) shall--
"(A) conduct periodic, random audits of dose reconstructions under the Radiation Dose Reconstruction Program and of decisions by the Department of Veterans Affairs on claims for service connection of radiogenic diseases;

"(B) assist the Department of Veterans Affairs and the Defense Threat Reduction Agency in communicating to veterans information on the mission, procedures, and evidentiary requirements of the Radiation Dose Reconstruction Program; and

"(C) carry out such other activities with respect to the review and oversight of the Radiation Dose Reconstruction Program as the Secretaries shall jointly specify.

"(4) The advisory board under paragraph (1) may make such recommendations on modifications in the mission or procedures of the Radiation Dose Reconstruction Program as the advisory board considers appropriate as a result of the audits conducted under paragraph (3)(A)."

Code of Federal Regulations
Office of the Secretary of Defense—Guidance for the determination and reporting of nuclear radiation dose for DoD participants in the atmospheric nuclear test program (1945-1962), 32 CFR Part 218

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:139

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 153, 154

1. Generally
2. Construction
3. Regulations
4. Evidence
   5. -Radiation claims
   6. -Post-traumatic stress disorder
   7. -Hearing and ear injuries
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   9. -Miscellaneous disabilities

1. Generally
Since § 5 of Veterans' Dioxin and Radiation Exposure Compensation Standards Act (Dioxin Act), Pub. L. No. 98-542, 98 Stat. 2725 (1984) did not establish service connection for lung cancer in veterans exposed to dioxin during service, it did not establish present entitlement to dependency and indemnity compensation benefits for widow whose husband had died of lung cancer several years before Dioxin Act was effective. Williams v Principi (2002, CA FC) 310 F.3d 1374


Two conditions must exist before 38 USCS § 354(b) [now 38 USCS § 1154(b)] apply: 1) veteran must have been engaged in combat with enemy and 2) injury (in this case "stressors" triggering PTSD) must have been consistent with circumstances, conditions, or hardships of such combat service. Wood v Derwinski (1991) 1 Vet App 406

38 USCS § 1154(b) does not obviate requirement that appellant submit evidence of current disability and service to well ground claim and to succeed on merits of claim. Kessel v West
2. Construction

Court of Appeals for Veterans Claims misinterpreted 38 USCS § 1154(b) by holding that it does not apply to any illness incurred during combat when there is record documenting at least one in-service illness. Dambach v Gober (2000, CA FC) 223 F.3d 1376, on remand, motion den, remanded (2001) 14 Vet App 307, 2001 US App Vet Claims LEXIS 363, app dismd, mand den (2001, CA FC) 17 Fed Appx 959

Court of Appeals for Veterans Claims correctly interpreted 38 USCS § 1154(b) as permitting consideration of veteran's entire medical history, including lengthy period of absence of complaint directed to condition in issue, despite veteran's contention presumption of service-connected aggravation of pre-existing condition can only be overcome by positive medical evidence of non-aggravation. Maxson v Gober (2000, CA FC) 230 F.3d 1330


3. Regulations

Regulation providing that symptomatic manifestations of preexisting disease or injury will establish aggravation of disability does not impose conclusive or irrebuttable presumption of service-connection based on aggravation in conflict with 38 USCS § 1153 which it implements, since statute is silent about method or level of proof necessary to establish increase in severity, rather those matters are taken up by 38 USCS § 1154 which gives Secretary authority to set out regulations to create rules of evidence directed at nature and level of proof required to establish service-connection, one method is aggravation, and regulation followed that statute's mandate in creating evidentiary presumption in favor of combat veteran, but presumption may be rebutted. Jensen v Brown (1994, CA FC) 19 F.3d 1413

38 C.F.R. § 3.304(f), which requires "credible supporting evidence" of occurrence of stressor in non-combat-related claims for service connection of post-traumatic stress disorder (PTSD), is not arbitrary, capricious, or contrary to law; § 3.304(f) does not conflict with 38 USCS §§ 1154(a) and 5107(b), because regulation does not alter Department of Veterans Affairs' obligation to review all evidence of record when determining service connection, nor does it preclude consideration of lay evidence. Nat'l Org. of Veterans' Advocates v Sec'y of Veterans Affairs (2003, CA FC) 330 F.3d 1345

Requirements for class certification were satisfied by members of class challenging Veterans' Administration [now Department of Veterans Affairs] implementation of Veteran's Dioxin and Radiation Exposure Compensation Standards Act of 1984, 38 USCS § 354 [now 38 USCS § 1154] note, by regulation that permits recovery only for one particular skin disease as being compensable as service-related injury connected to exposure to Dioxin, where class members consist of all current or former service members or their next of kin, who are eligible to apply, who will become eligible to apply, who have an existing claim pending before agency for service-connected disabilities or death arising from exposure during service to herbicides containing Dioxin, or who have had a claim denied by agency for such disability or deaths because of exposure to herbicides containing Dioxin. Nehmer v United States Veterans Admin. (1987, ND Cal) 118 FRD 113

Regulation which denies service connection to all medical problems allegedly caused by dioxin except chloracne is invalidated and all benefit denials made under regulation are voided, because administrator [now Secretary] misinterpreted Dioxin Act (38 USCS § 354 [now 38 USCS § 1154] note, by imposing impermissibly demanding cause and effect test for granting service
connection for various diseases, and refused to give veterans benefit of doubt in meeting demanding standard. Nehmer v United States Veterans Admin. (1989, ND Cal) 712 F Supp 1404

Veteran's reopened disability claim for lung cancer allegedly resulting from exposure to nuclear tests should have been given de novo review in light of statute's implementing regulations setting forth list of requirements and steps agency must follow to determine if veteran's disability, based on radiation exposure, is service-connected. Sawyer v Derwinski (1991) 1 Vet App 130 (ovrld in part by Douglas v Derwinski (1992) 2 Vet App 435)

4. Evidence

If veteran produces credible evidence that would allow reasonable factfinder to conclude that alleged injury or disease was incurred in or aggravated by veteran's combat service, veteran has produced satisfactory evidence to satisfy first requirement of 38 USCS § 1154(b); it is only at third step of analysis, if agency seeks to rebut presumption of service connection, that evidence contrary to veteran's claim of service connection comes into play. Collette v Brown (1996, CA FC) 82 F.3d 389, on remand, remanded (1996, Vet App) 1996 US Vet App LEXIS 464

Board erred in concluding that without service medical records, which had been destroyed in fire, to verify that veteran received treatment or a diagnosis while in service, Board had no choice but to deny him benefits; service connection can also be shown through lay evidence. Smith v Derwinski (1992) 2 Vet App 147, appeal after remand, remanded (1996) 9 Vet App 363, reported at (1996) 10 Vet App 44

Given veteran's Purple Heart, Board was obligated either to accept veteran's lay evidence of service incurrence or explain why 38 USCS § 1154 did not apply or why veteran's version of events was not consistent with circumstances of his service. Shaw v Principi (1992) 3 Vet App 365

Effect of statute, whether or not it is labeled as due to "presumption," is that when in case of combat veteran three 38 USCS § 1154(b) elements are satisfied, its relaxation of adjudication evidentiary requirements dictates that veteran's "lay or other evidence" be accepted as sufficient proof of service incurrence or aggravation unless there is "clear and convincing" evidence that disease or injury was not incurred or aggravated in service or during applicable presumption period; this reading comports most logically and clearly with statute's words, which do not include word "presumption." Caluza v Brown (1995) 7 Vet App 498, affd without op (1996, CA FC) 78 F.3d 604, reported in full (1996, CA FC) 1996 US App LEXIS 2635 and reh den (1996, CA FC) 1996 US App LEXIS 11269

Even if Board did not comply with three-step process for evaluating service-connection claims under 38 USCS § 1154 and instead leapt directly to step three without determining whether veteran had submitted lay or other evidence consistent with conditions, circumstances, and hardships of his service, there was clear and convincing evidence of nonincurrence during service to rebut steps one and two, so error was harmless. Velez v West (1998) 11 Vet App 148, app dismd (1998, CA FC) 178 F.3d 1308, vacated on other grounds (1998, CA FC) 185 F.3d 878 and app dismd (1999, CA FC) 215 F.3d 1344

Combat veteran who has successfully established in-service occurrence or aggravation of injury pursuant to lighter evidentiary burden imposed on combat veterans must still submit sufficient evidence of causal nexus between that in-service event and his or her current disability in order to meet initial burden of submitting well-grounded claim. Wade v West (1998) 11 Vet App 302

Board of Veterans' Appeals erred by failing to provide adequate statement of reasons or bases for its conclusion that in its May 1981 decision Department of Veterans' Affairs regional office (RO) considered veteran's combat service; specifically, Board relied solely on RO's mention of veteran's Purple Heart award as evidence that it so considered, without evaluating whether or not RO had adequately considered, as 38 USCS § 354(b) then mandated (and as 38 USCS § 1154(b) presently mandated) that it must, whether there was satisfactory lay or other evidence of service incurrence or aggravation notwithstanding fact that there was no official record of such incurrence or aggravation in such service. Huston v Principi (2003) 17 Vet App 195, 2003 US App
5. -Radiation claims

Veterans' Dioxin and Radiation Exposure Compensation Standards Act does not remove veteran's right to pursue direct service connection with proof of actual direct causation; therefor, veteran who sought to show connection between his exposure to radiation during service in armed forces and his neutropenia and leucopenia should have been given opportunity to prove actual causation. Combee v Brown (1994, CA FC) 34 F.3d 1039, reh den (1994, CA FC) 1994 US App LEXIS 31577 and remanded (1994) 7 Vet App 193 and (criticized in Ramey v Gober (1997, CA FC) 120 F.3d 1239)

Veterans' Dioxin and Radiation Exposure Compensation Standards Act does not create presumption of service connection for radiation-exposed veterans who contract radiogenic diseases, nor does it direct DVA to create any such presumption by regulation, rather statute leaves to agency task of determining whether to grant service connection. Ramey v Gober (1997, CA FC) 120 F.3d 1239, cert den (1998) 522 US 1151, 140 L Ed 2d 181, 118 S Ct 1171

6. -Post-traumatic stress disorder

BVA's denial of service connection for PTSD would be affirmed where it discussed each claimed stressor and pointed out contradictions between veteran's various claims and information provided by U.S. Army and Joint Services Environmental Support Group. Wilson v Derwinski (1992) 2 Vet App 614, app dismd without op (1993, CA) 996 F.2d 1236

In denying service connection for PTSD, Board neither set forth standard for what constitutes requisite stressor nor applied standard to record evidence, hence decision would be vacated and remanded. Maynard v Brown (1993) 4 Vet App 341

In adjudicating Korean War veteran's claim for service connection for PTSD, BVA erred in rejecting possibility that any of alleged stressors were combat-related on ground that appellant's aircraft carrier was engaged in combat only brief period and in failing to determine which events, if any, occurred during combat. West v Brown (1994) 7 Vet App 70

Board did not err in denying service-connection for post-traumatic stress disorder since, although appellant served in Vietnam, he was assigned as stock and accounting specialist, he did not receive any of recognized military citations which recognize combat, and none of submitted evidence indicated that appellant was engaged in combat at any time. Fossie v West (1998) 12 Vet App 1, app dismd (2000, CA FC) 250 F.3d 760, reported in full (2000, CA FC) 2000 US App LEXIS 15216

Board of Veterans' Appeals erred to extent that its determination that veteran had not engaged in combat was based on sole criterion of veteran's not having received fire from enemy, which was not required under 38 USCS § 1154(b)'s phrase "engaged in combat with enemy" as interpreted by VA General Counsel opinion; evidence showed that veteran's unit had been

7. -Hearing and ear injuries

Board erred in specifically relying upon lack of official record that was contemporaneous with alleged trauma as to veteran's claimed ear injury and completely disregarding veteran's own lay evidence and other evidence of record in determining entitlement to service connection. Smith v Derwinski (1992) 2 Vet App 137

Board erred in relying on absence of any entry in veteran's service medical record indicating that he had ever been treated during service for complaints associated with hearing difficulties to discount his testimony of service incurrence and in failing to rely on clear and convincing evidence to contrary. Peters v Brown (1994) 6 Vet App 540

8. -Frostbite

Appellant was entitled to service connection for frostbite injury, even in absence of official recording of occurrence of injury, based on appellant's statements and existing medical records since condition was consistent with circumstances of engagement and combat with enemy. Horvath v Derwinski (1992) 2 Vet App 240

World War II veteran's uncontradicted assertion of having experienced frozen feet in combat was consistent with circumstances of his service and therefore satisfactory evidence that it occurred in service. Russo v Brown (1996) 9 Vet App 46

9. -Miscellaneous disabilities

BVA was required to consider and discuss testimony of veteran who had engaged in combat as to jaw dislocation in service 20 years earlier, and other lay evidence, and its was not permissible to BVA to reject lay evidence of service incurrence of TMJ syndrome simply because it was not substantiated by contemporaneous medical evidence. Antonian v Brown (1993) 4 Vet App 179

Board erred in rejecting veteran's claim of service connection for headaches since testimony that his headaches started about five minutes after he was hit by shell fragment was consistent with circumstances surrounding his in-service shell fragment wound. Franko v Brown (1993) 4 Vet App 502

Clear and convincing evidence exists to rebut veteran's claim of aggravation of preexisting condition of partial colectomy under 38 USCS § 1154(b) despite numerous pre-1944 entries regarding veteran's symptomatology where evidence of record reveals that from 1944 to 1989, there is no record of any complaint or treatment involving veteran's colon condition. Maxson v West (1999) 12 Vet App 453, 1999 US App Vet Claims LEXIS 602, affd (2000, CA FC) 230 F.3d 1330

§ 1155. Authority for schedule for rating disabilities

The Secretary shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations. The schedule shall be constructed so as to provide ten grades of disability and no more, upon which payments of compensation shall be based, namely, 10 percent, 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, 80 percent, 90 percent, and total, 100 percent. The Secretary shall from time to time readjust this schedule of ratings in accordance with experience. However, in no event shall such a readjustment in the rating schedule cause a veteran's disability rating in effect on the
effective date of the readjustment to be reduced unless an improvement in the veteran's disability is shown to have occurred.

Prior law and revision:
This section is based on 38 USC § 2355 (Act June 17, 1957, P. L. 85-56, Title III, Part F, § 355, 71 Stat. 103).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:
Veterans' Regulation No. 3(a), para. I.

Amendments:
1984. Act March 2, 1984 (effective 4/1/84, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), substituted "percent" for "per centum" wherever it appears.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 355, as 38 USCS § 1155, and substituted "Secretary" for "Administrator".

Act Aug. 14, 1991 (applicable as provided by § 103(b) of such Act, which appears as a note to this section), added the sentence beginning "However, in no event . . .".

Other provisions:

Code of Federal Regulations
Department of Veterans Affairs-Schedule for rating disabilities, 38 CFR Part 4

Cross References
This section is referred to in 38 USCS §§ 502, 7252, 7292

Research Guide
Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:401, 414

Am Jur:
60A Am Jur 2d, Pensions and Retirement Funds § 1263
77 Am Jur 2d, Veterans and Veterans' Laws §§ 167, 175

1. Generally
2. Increased valuation or rating
3. Miscellaneous

1. Generally
Disability compensation rating by Veterans Administration [now Department of Veterans Affairs] is not determinative of issues involved in disability retirement determination by military, although Veterans Administration [now Department of Veterans Affairs] ratings are proper evidence to be waived by military, since Veterans Administration [now Department of Veterans Affairs] ratings are based upon average impairment of earning capacity in civilian life while military's determination is directed to question of whether individual is unfit to perform duties of his office, grade, rank or rating. Bennett v United States (1973) 200 Ct Cl 635
Although both military and Department of Veterans Affairs (VA) utilize Veterans Administration Schedule of Rating Disabilities, two entities utilize rating systems for different purposes; thus, VA rating decision may be relevant to consideration of appropriate disability rating by military, but it is not binding on military. Champagne v United States (1996) 35 Fed Cl 198, affd (1998, CA FC) 136 F.3d 1300


2. Increased valuation or rating

Decision of Court of Appeals for Veterans Claims was affirmed because its interpretation of 38 C.F.R. § 4.130, general rating formula for mental disorders promulgated by Department of Veterans' Affairs pursuant to 38 USCS § 1155, that symptoms listed in Diagnostic and Statistical Manual of Mental Disorders, 4th edition, (DSM-IV), do not replace, but rather supplement, criteria listed in general rating formula as basis for rating post-traumatic stress disorder (PTSD) claims was correct as matter of law; under regulation, while Board of Veterans Appeals is not restricted to considering only those symptoms listed in general rating formula and may consider those identified in DSM-IV, criteria listed in general rating formula are rating formula adopted by Secretary in rating PTSD claims. Sellers v Principi (2004, CA FC) 372 F.3d 1318

Protection afforded to 1925 schedule rating by former 38 USC § 737 ceases to apply whenever there is increased valuation under 1945 rating schedule, with continuing or running award (not temporary or limited by its terms), irrespective whether increase results from change in condition, or from some other cause, such as change in tests or treatment. 1961 ADVA 977

BVA failed to provide adequate reasons or bases for rejecting medical testimony that veteran was incapable of work in rejecting his claim that his disability rating be increased from 60 to 100 percent, where there was evidence that veteran's back disease was progressive in nature and there was no explanation why Board found more recent diagnoses less persuasive than earlier ones. Simon v Derwinski (1992) 2 Vet App 621

Issue of rating higher than 50 percent for PTSD was inextricably intertwined with remanded issue of unemployability in that all disability ratings are primarily predicated on impairment in gainful employment, hence was not ripe for review. Herlehy v Brown (1993) 4 Vet App 122

Board's denial of veteran's claim for rating increase was legally erroneous since, in failing to assign 100 percent rating for veteran's active disease, Board did not grant veteran benefit of law most favorable to him because it did not base its analogous rating of his lymphadenopathy on amended rating schedule. Green v West (1998) 11 Vet App 472

Court reversed Board of Veteran's Appeals' decision that bilateral tinnitus could not qualify for two 10 percent ratings, one for each ear, and remanded matter for expeditious re-adjudication as to whether veteran had bilateral tinnitus and, if so, for assignment of rating that was consistent with opinion. Smith v Nicholson (2005) 19 Vet App 63, 2005 US App Vet Claims LEXIS 143

3. Miscellaneous

Statutory scheme of 5 USCS §§ 552, 553, and 38 USCS §§ 1155, 7252, consistently excluded from judicial review all content of ratings schedule, as well as actions of Secretary of Veterans Affairs in adopting or revising that content, and 38 USCS § 7261(a)(3)(C) only provides standards of review to be applied by U.S. Court of Appeals for Veterans Claims when reviewing decision from Board of Veterans' Appeals and, thus, under 38 USCS § 7252, such court lacked jurisdiction to review content of diagnostic codes as part of schedule of ratings for disabilities; accordingly, Court of Appeals for Federal Circuit reversed determination of U.S. Court of Appeals for Veterans Claims that 38 C.F.R. § 4.87a, Diagnostic Code 6260, was invalid as inconsistent with 38 USCS § 1110. Wanner v Principi (2004, CA FC) 370 F.3d 1124

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Federal Tort Claims Act did not bar plaintiff from recovering, in addition to benefits that plaintiff received from proceedings under 38 USCS § 1155, damages for spouse's death as result of hospital's negligence. Aldridge v United States (2003, WD Tenn) 282 F Supp 2d 802


When service connection for claimant's disability is established but nature of medical evidence permits reasonable arguments for rating disability under two or more possible diagnostic codes, BVA must weigh evidence and make informed choice as to which diagnostic code provides most appropriate method for rating veteran's disability. Brady v Brown (1993) 4 Vet App 203


§ 1156. Repealed]

The bracketed section number “1156” was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.


§ 1157. Combination of certain ratings

The Secretary shall provide for the combination of ratings and pay compensation at the rates prescribed in subchapter II of this chapter [38 USCS §§ 1110 et seq.] to those veterans who served during a period of war and during any other time, who have suffered disability in line of duty in each period of service.

Prior law and revision:

This section is based on 38 USC § 2357 (Act June 17, 1957, P. L. 85-56, Title III, Part F, § 357, 71 Stat. 103).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Veterans' Regulation No. 1(a), Part IV, para. I.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 357, as 38 USCS § 1157, and substituted "Secretary" for "Administrator".

Board properly applied combined rating formula to arrive at 40 percent combined rating for veteran, and since there was no plausible basis upon which veteran's individual ratings could be combined to give rating in excess of that, he failed to submit well-grounded claim for relief. Tumaning v Brown (1993) 4 Vet App 160

§ 1158. Disappearance

Where a veteran receiving compensation under this chapter [38 USCS §§ 1101 et seq.] disappears, the Secretary may pay the compensation otherwise payable to the veteran to such veteran's spouse, children, and parents. Payments made to such spouse, child, or
parent under the preceding sentence shall not exceed the amounts payable to each if the veteran had died from service-connected disability.

Prior law and revision:

This section is based on 38 USC § 2358 (Act June 17, 1957, P. L. 85-56, Title III, Part F, § 358, 71 Stat. 103).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Veterans' Regulation No. 1(a), Part VI; No. 1(g), para. III.

Amendments:

1959. Act Sept. 1, 1959, substituted "a veteran" for "an incompetent veteran".

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), substituted "such veteran's spouse" and "such spouse" for "his wife" and "a wife", respectively.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 358, as 38 USCS § 1158, and substituted "Secretary" for "Administrator".

1. Generally

2. Right to benefits when veteran not receiving compensation

1. Generally

Court decree presuming death of veteran because of unexplained absence is not bar to payment of benefits to veteran's dependents by reason of his disappearance. 1939 ADVA 443

2. Right to benefits when veteran not receiving compensation

Dependents of veteran who disappeared are entitled to benefits since disability from which veteran was suffering at time of disappearance was rated as directly service connected, and even though veteran was not receiving compensation at the time of disappearance. 1935 ADVA 316

Wife in her capacity as legal guardian of her missing incompetent husband is not entitled to elect to receive compensation in lieu of naval retirement pay in absence of court order authorizing such election, and payment of compensation to wife and minor child of veteran is authorized, without regard to fact that there has been no election between retirement pay and compensation. 1947 ADVA 763

§ 1159. Protection of service connection

Service connection for any disability or death granted under this title which has been in force for ten or more years shall not be severed on or after January 1, 1962, except upon a showing that the original grant of service connection was based on fraud or it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge. The mentioned period shall be computed from the date determined by the Secretary as the date on which the status commenced for rating purposes.

Amendments:

1962. Act Oct. 15, 1962 (effective as provided by § 7 of such Act, which appears as 38 USCS § 110 note), inserted "The mentioned period shall be computed from the date determined by the Administrator as the date on which the status commenced for rating purposes.".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 359, as 38 USCS § 1159, and substituted "Secretary" for "Administrator".

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 30

Forms:
24A Am Jur Pl & Pr Forms (Rev ed), Veterans and Veterans' Laws § 36

Finding of service connection for claimant's spouse's diabetes mellitus is protected by 38 USCS § 359 [now 38 USCS § 1159] for purposes of dependency and indemnity compensation. VA GCO 8-83

§ 1160. Special consideration for certain cases of loss of paired organs or extremities

Discussion and Analysis in the Veterans Benefits Manual

(a) Where a veteran has suffered--
   (1) blindness in one eye as a result of service-connected disability and blindness in the other eye as a result of non-service-connected disability not the result of the veteran's own willful misconduct;
   (2) the loss or loss of use of one kidney as a result of service-connected disability and involvement of the other kidney as a result of non-service-connected disability not the result of the veteran's own willful misconduct;
   (3) deafness compensable to a degree of 10 percent or more in one ear as a result of service-connected disability and deafness in the other ear as the result of non-service-connected disability not the result of the veteran's own willful misconduct;
   (4) the loss or loss of use of one hand or one foot as a result of service-connected disability and the loss or loss of use of the other hand or foot as a result of non-service-connected disability not the result of the veteran's own willful misconduct; or
   (5) permanent service-connected disability of one lung, rated 50 percent or more disabling, in combination with a non-service-connected disability of the other lung that is not the result of the veteran's own willful misconduct,

the Secretary shall assign and pay to the veteran the applicable rate of compensation under this chapter [38 USCS §§ 1101 et seq.] as if the combination of disabilities were the result of service-connected disability.

(b) If a veteran described in subsection (a) of this section receives any money or property of value pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of, any cause of action for damages for the non-service-connected disability described in such subsection, the increase in the rate of compensation otherwise payable under this section shall not be paid for any month following a month in which any such money or property is received until such time as the total of the amount of such increase that would otherwise have been payable equals the total of the amount of any such money received and the fair market value of any such property received.
Amendments:

1965. Act Oct. 31, 1965 (effective 12/1/65, as provided by § 9 of such Act, which appears as 38 USCS § 1114 note), in the section heading, inserted "or bilateral deafness"; and, in the text, inserted "or (3) has suffered total deafness in one ear as a result of service-connected disability and has suffered total deafness in the other ear as the result of non-service-connected disability not the result of his own willful misconduct," and inserted "or such total deafness in both ears".

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note) substituted "such veteran's" for "his" wherever appearing.

1983. Act Nov. 21, 1983, substituted "(1) has suffered" for "has suffered (1)".

1986. Act Oct. 28, 1986 (effective upon enactment on 10/28/86, as provided by § 109(c) of such Act, which appears as a note to this section), substituted this section for one which read:

"§ 360. Special consideration for certain cases of blindness or bilateral kidney involvement or bilateral deafness

"Where any veteran (1) has suffered blindness in one eye as a result of service-connected disability and has suffered blindness in the other eye as a result of non-service-connected disability not the result of such veteran's own willful misconduct, or (2) has suffered the loss or loss of use of one kidney as a result of service-connected disability, and has suffered severe involvement of the other kidney such as to cause total disability, as a result of non-service-connected disability not the result of such veteran's own willful misconduct, or (3) has suffered total deafness in one ear as a result of service-connected disability and has suffered total deafness in the other ear as the result of non-service-connected disability not the result of such veteran's own willful misconduct, the Administrator shall assign and pay to the veteran concerned the applicable rate of compensation under this chapter as if such veteran's blindness in both eyes or such bilateral kidney involvement or such total deafness in both ears were the result of service-connected disability.".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 360, as 38 USCS § 1160, and substituted "Secretary" for "Administrator".

2002. Act Dec. 6, 2002, in subsec. (a)(3), substituted "deafness compensable to a degree of 10 percent or more" for "total deafness", and substituted "deafness" for "total deafness" preceding "in the other ear".

Other provisions:


"(1) Except as provided in paragraph (2), the amendments made by this section [amending this section, chapter analysis, and 38 USCS § 1114(t)] shall take effect on the date of the enactment of this Act.

"(2) In the case of an award of compensation for a disability described in clause (1), (2), (3), or (5) of subsection (a) of section 360 [now section 1160] of title 38, United States Code, as amended by subsection (a) of this section, subsection (b) of such section shall apply only to awards of compensation made on or after the date of the enactment of this Act.".

Code of Federal Regulations

Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Decision of Court of Appeals for Veterans Claims denying veteran's claim for compensable rating evaluation for service-connected left-ear hearing loss was affirmed, since 38 USCS § 1160(a)(3), at that time, precluded any consideration of less than total, non-service-connected
right-ear hearing loss for purposes of evaluating service-connected hearing loss in left ear. Boyer v West (2000, CA FC) 210 F.3d 1351

Disability arising from appellant's non-service-connected hearing loss did not have to be part of rating provided for disability attributable to appellant's service-connected hearing loss, since 38 USCS § 1160, at that time, authorized compensation only for total deafness in both ears, which was not case here, and 38 USCS § 1155 authorized only schedule of ratings to reflect reductions in earning capacity. Boyer v West (1999) 12 Vet App 142

Court could not say that Secretary's interpretation of statute was wrong or frustrated its purpose since record evidence did not show that appellant was totally deaf in both ears, as required by statute at that time; thus, it was not erroneous for Board not to consider appellant's right-ear hearing loss when rating his left-ear hearing loss and holding that hearing loss was not compensable. Boyer v West (1998) 11 Vet App 477

§ 1161. Payment of disability compensation in disability severance cases

The deduction of disability severance pay from disability compensation, as required by section 1212(c) of title 10 [10 USCS § 1212(c)], shall be made at a monthly rate not in excess of the rate of compensation to which the former member would be entitled based on the degree of such former member's disability as determined on the initial Department rating.

Amendments:

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), substituted "such former member's" for "his".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 361, as 38 USCS § 1161, and substituted "Department" for "Veterans' Administration".

§ 1162. Clothing allowance

The Secretary under regulations which the Secretary shall prescribe, shall pay a clothing allowance of $641 per year to each veteran who--

(1) because of a service-connected disability, wears or uses a prosthetic or orthopedic appliance (including a wheelchair) which the Secretary determines tends to wear out or tear the clothing of the veteran; or

(2) uses medication which (A) a physician has prescribed for a skin condition which is due to a service-connected disability, and (B) the Secretary determines causes irrepairable damage to the veteran's outergarments.

Effective date of section:

Act June 30, 1972, P. L. 92-328, Title III, § 301(a), 86 Stat. 398, provided that this section took effect on the first day of the second calendar month beginning after enactment.

Amendments:

1975. Act Aug. 5, 1975 (effective 8/1/75, as provided by § 301 of such Act, which appears as 38 USCS § 1114 note), substituted "$175" for "$150".

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), substituted "$190" for "$175" and substituted "the Administrator" for "he" preceding "shall prescribe".

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1977. Act Oct. 3, 1977 (effective 10/1/77, as provided by § 501 of such Act, which appears as 38 USCS § 1114 note), substituted "$203" for "$190".

1978. Act Oct. 18, 1978 (effective 10/1/78, as provided by § 401(a) of such Act, which appears as 38 USCS § 1114 note), substituted "$218" for "$203".

1979. Act Nov. 28, 1979 (effective 10/1/79, as provided by § 601(a)(1) of such Act, which appears as 38 USCS § 1114 note), substituted "$240" for "$218".

1980. Act Oct. 7, 1980 (applicable as provided by § 601(b) of such Act, which appears as 38 USCS § 1114 note), substituted "$274" for "$240".

1981. Act Oct. 17, 1981 (effective 10/1/81, as provided by § 701(a) of such Act, which appears as 38 USCS § 1114 note), substituted "$305" for "$274".

1982. Act Oct. 14, 1982 (effective 10/1/82 as provided by § 108 of such Act, which appears as 38 USCS § 1114 note) substituted "$327" for "$305".

1984. Act March 2, 1984 (effective 4/1/84, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note) substituted "$338" for "$327".

Act Oct. 24, 1984 (effective 12/1/84, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note) substituted "$349" for "$338".

1986. Act Jan. 13, 1986 (effective 12/1/85, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), substituted "$360" for "$349".

Act Oct. 28, 1986 (effective 12/1/86, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), substituted "$365" for "$360".

1987. Act Dec. 31, 1987 (effective 12/1/87, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note) substituted "$380" for "$365".

1988. Act Nov. 18, 1988 (effective 12/1/88 as provided by § 1106 of such Act, which appears as 38 USCS § 1114 note) substituted "$395" for "$380".

1989. Act Dec. 18, 1989 (effective 12/1/89, as provided by § 106 of such Act, which appears as 38 USCS § 1114 note), substituted "$414" for "$395".

Such Act further substituted "Secretary" for "Administrator" following "The" and following "regulations which the" and substituted "who-" and paras. (1) and (2) for "who because of disability which is compensable under the provisions of this chapter, wears or uses a prosthetic or orthopedic appliance or appliances (including a wheelchair) which the Administrator determines tends to wear out or tear the clothing of such veteran.

1991. Act Feb. 6, 1991 (effective 1/1/91, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in the introductory matter, substituted "$436" for "$414".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 362, as 38 USCS § 1162.

Act Nov. 12, 1991 (effective 12/1/91 as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in the introductory matter, substituted "$452" for "$436".


Act Nov. 11, 1993 (effective 12/1/93, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in the introductory matter, substituted "$478" for "$466".

1997. Act Nov. 19, 1997, (effective 12/1/97, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in the introductory matter, substituted "$528" for "$478".

1999. Act Nov. 30, 1999 (effective 12/1/99, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in the introductory matter, substituted "$546" for "$528".

2001. Act Dec. 21, 2001 (effective 12/1/2001, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in the introductory matter, substituted "$580" for "$546".
2005. Act Nov. 22, 2005 (effective 12/1/2005, as provided by § 2(f) of such Act, which appears as 38 USCS § 1114 note), in the introductory matter, substituted "$641" for "$600".

Other provisions:


Cross References
This section is referred to in 38 USCS § 5313A

Although appellant veteran did not receive notice required by Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096, 2096-97, benefit for damage to underwear was not permitted by law, 38 USCS § 1162, and because veteran had actual knowledge of what was required to receive clothing allowance and because she was not legally entitled to clothing allowance based on facts as averred by her, any notice error was nonprejudicial. Short Bear v Nicholson (2005) 19 Vet App 341, 2005 US App Vet Claims LEXIS 585

§ 1163. Trial work periods and vocational rehabilitation for certain veterans with total disability ratings

(a) (1) The disability rating of a qualified veteran who begins to engage in a substantially gainful occupation after January 31, 1985, may not be reduced on the basis of the veteran having secured and followed a substantially gainful occupation unless the veteran maintains such an occupation for a period of 12 consecutive months.

(2) For purposes of this section, the term "qualified veteran" means a veteran who has a service-connected disability, or service-connected disabilities, not rated as total but who has been awarded a rating of total disability by reason of inability to secure or follow a substantially gainful occupation as a result of such disability or disabilities.

(b) The Secretary shall make counseling services described in section 3104(a)(2) of this title [38 USCS § 3104(a)(2)] and placement and postplacement services described in section 3104(a)(5) of this title [38 USCS § 3104(a)(5)] available to each qualified veteran.
(whether or not the veteran is participating in a vocational rehabilitation program under chapter 31 of this title [38 USCS §§ 3100 et seq.]).

(c) (1) In the case of each award after January 31, 1985, of a rating of total disability described in subsection (a)(2) of this section to a veteran, the Secretary shall provide to the veteran, at the time that notice of the award is provided to the veteran, a statement providing--

(A) notice of the provisions of this section;
(B) information explaining the purposes and availability of and eligibility for, and the procedures for pursuing, a vocational rehabilitation program under chapter 31 of this title [38 USCS §§ 3100 et seq.]; and
(C) a summary description of the scope of services and assistance available under that chapter [38 USCS §§ 3100 et seq.].

(2) After providing the notice required under paragraph (1) of this subsection, the Secretary shall offer the veteran the opportunity for an evaluation under section 3106(a) of this title [38 USCS § 3106(a)].

Amendments:

1988. Act Nov. 18, 1988, in subsec. (a)(2)(B), substituted "January 31, 1992" for "January 31, 1989"; in subsec. (c), in para. (1), substituted "In" for "(A) Except as provided in paragraph (4) of this subsection, in", redesignated former cls. (i)-(iii) as subparas. (A)-(C), respectively, deleted subpara. (B) which read: "After providing the notice required under subparagraph (A) of this paragraph to a veteran, the Administrator shall arrange as promptly as is practical for the veteran to be provided an evaluation in order to make a determination as to whether the achievement of a vocational goal by the veteran is reasonably feasible. Such evaluation shall include a personal interview of the veteran by a Veterans' Administration employee who is trained in vocational counseling. The Administrator shall provide the veteran with reasonable notice of the schedule for the evaluation.", and substituted para. (2) for former paras. (2)-(4), which read:

"(2) If the veteran fails, for reasons other than those beyond the veteran's control, to participate in an evaluation under paragraph (1)(B) of this subsection in the manner required by the Administrator in order to make the determination described in that paragraph, the Administrator shall reduce the veteran's disability rating to the rating that would be applicable to the veteran but for the determination of the veteran's inability to secure or follow a substantially gainful occupation. Any such reduction shall remain in effect for the duration of such failure.

"(3)(A) If, after completion of an evaluation under paragraph (1)(B) of this subsection, the Administrator determines that achievement of a vocational goal by the veteran is reasonably feasible, the Administrator shall formulate an individualized written plan of vocational rehabilitation for the veteran under chapter 31 of this title.

"(B) If the Administrator determines that the veteran has failed to pursue (or to continue to pursue) the vocational rehabilitation program described in such plan, the Administrator shall provide the veteran with notice that, if the veteran fails, for reasons other than those beyond the veteran's control, to initiate or resume pursuit of such program within 60 days after the Administrator provided such notice (or such longer period as the Administrator determines is the shortest period within which it is reasonably feasible for the veteran to initiate or resume pursuit), the Administrator will provide for the results of the evaluation to be considered in the next scheduled review of the veteran's eligibility for a rating of total disability based on inability to secure or follow a substantially gainful occupation. Unless the veteran initiates or resumes such
pursuit within such 60 days (or such longer period, if applicable), the Administrator shall provide for such results to be so considered.

"(4) This subsection does not apply with respect to a veteran as to whom the Administrator determines that an evaluation of vocational rehabilitation potential or achievement of a vocational goal is not reasonably feasible.".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 363, as 38 USCS § 1163, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

1992. Act May 20, 1992 (effective as of January 31, 1992, as provided by § 2(d) of such Act, which appears as a note to this section), in subsec. (a)(2)(B), substituted "December 31, 1992" for "January 31, 1992".

Act Oct. 29, 1992, substituted the section heading for one which read: "§ 1163. Temporary program for trial work periods and vocational rehabilitation for certain veterans with total disability ratings"; in subsec. (a), in para. (1), substituted for "after January 31, 1985," for "during the program period", substituted para. (2) for one which read:

"(2) For purposes of this section:

"(A) The term 'qualified veteran' means a veteran who has a service-connected disability, or service-connected disabilities, not rated as total but who has been awarded a rating of total disability by reason of inability to secure or follow a substantially gainful occupation as a result of such disability or disabilities.

"(B) The term 'program period' means the period beginning on February 1, 1985, and ending on December 31, 1992.";

in subsec. (b), substituted "The Secretary" for "During the program period, the Secretary"; and, in subsec. (c), in para. (1), substituted "after January 31, 1985, of a rating of total disability described in subsection (a)(2)" for "during the program period of a rating of total disability described in subsection (a)(2)(A)".

Other provisions:


"(b)(1) Not later than April 1, 1985, the Administrator of Veterans' Affairs shall provide to each veteran described in paragraph (2) a statement providing--

"(A) information explaining the provisions of section 363(b) [now section 1163(b)] of title 38, United States Code [subsec. (b) of this section] (as added by subsection (a)(1));

"(B) information explaining the purposes and availability of and eligibility for, and the procedures for pursuing, a vocational rehabilitation program under chapter 31 of such title [38 USCS §§ 3100 et seq.]; and

"(C) a summary description of the scope of services and assistance available under that chapter [38 USCS §§ 3100 et seq.].

"(2)(A) A veteran to whom a statement is to be provided under paragraph (1) is a veteran who has a service-connected disability, or service-connected disabilities, not rated as total but who, as of January 31, 1985, has been awarded a rating of total disability by reason of a determination of inability to secure or follow a substantially gainful occupation as a result of such disability or disabilities.
"(B) Notice under paragraph (1) need not be provided to a veteran who has a rating of total disability described in subparagraph (A) which is protected by the first sentence of section 110 of title 38, United States Code.

"(c) Not later than April 15, 1988, the Administrator of Veterans' Affairs shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the results of the implementation of section 363 [now section 1163] of title 38, United States Code (as added by subsection (a)(1)), during the three-year period beginning on February 1, 1985. The report shall include--

"(1) information regarding

"(A) the number of veterans with a disability rating of total based on inability to secure or follow a substantially gainful occupation who during such period followed a substantially gainful occupation for a period of twelve consecutive months and the work experience of those veterans and their disability ratings after completing such twelve-month period and (if known) the number of veterans with such a rating who during the period covered by the report followed a substantially gainful occupation but did not maintain employment in it for a period of twelve consecutive months,

"(B) the number of veterans who during the period covered by the report were provided with evaluations under subsection (c)(1)(B) of such section,

"(C) the number of veterans provided such evaluations for whom a plan of vocational rehabilitation was formulated pursuant to such subsection,

"(D) the number of veterans for whom such a plan was formulated who elected, and who did not elect, to pursue a vocational rehabilitation program,

"(E) the extent to which those veterans who elected to pursue such a program completed the program, and

"(F) the subsequent work experience and disability ratings of the veterans who were provided such evaluations;

"(2) a tabulation of the reasons given by such veterans for not electing to pursue such a program by those who did not elect to pursue such a program; and

"(3) the Administrator's assessment of the value (including the cost-effectiveness) and effect of such implementation and any recommendations of the Administrator for administrative and legislative action based on such results and assessment."

Effective date of amendments made by Act May 20, 1992. Act May 20, 1992, P. L. 102-291, § 2(d), 106 Stat. 178, provides: "The amendments made by subsections (a) through (c) [amending subsec. (a)(2)(B) of this section and 38 USCS §§ 1524(a)(4) and 1525(b)(2)] shall take effect as of January 31, 1992."

Ratification of certain actions of the Secretary of Veterans Affairs between February 1, 1992 and May 20, 1992. Act May 20, 1992, P. L. 102-291, § 2(e), 106 Stat. 178, provides: "The following actions of the Secretary of Veterans Affairs during the period beginning on February 1, 1992, and ending on the date of the enactment of this Act are hereby ratified with respect to that period:

"(1) A failure to reduce the disability rating of a veteran who began to engage in a substantially gainful occupation during that period.

"(2) The provision of a vocational training program (including related evaluations and other related services) to a veteran under section 1524 of title 38, United States Code, and the making of related determinations under that section.
“(3) The provision of health care and services to a veteran pursuant to section 1525 of title 38, United States Code.”.

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

CHAPTER 13. DEPENDENCY AND INDEMNITY COMPENSATION FOR SERVICE-CONNECTED DEATHS

SUBCHAPTER I. GENERAL

SUBCHAPTER II. DEPENDENCY AND INDEMNITY COMPENSATION

SUBCHAPTER III. CERTIFICATIONS

Amendments:

1969. Act Oct. 27, 1969, P. L. 91-96, § 6, 83 Stat. 145 (effective 12/1/69, as provided by § 8 of such Act), substituted new item 402 for one which read: "402. Computation of basic pay.", and substituted new item 421 for one which read: "421. Certifications with respect to basic pay.”.

1976. Act Sept. 30, 1976, P. L. 94-433, Title IV, § 405(6), (8), 90 Stat. 1379 (effective 10/1/76, as provided by § 406 of such Act), substituted new item 404 for one which read: "404. Special provisions relating to widows.", and substituted new item 411 for one which read: "411. Dependency and indemnity compensation to a widow.”.


1991. Act Aug. 6, 1991, P. L. 102-83, §§ 4(b)(3)(B), 5(b)(1), 105 Stat. 405, 406, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted item 1323, as redesignated, for one which read: "Certifications by Administrator.”.


Other provisions:

Uniformed Services, promotion of members in missing status; effective date. Act April 27, 1973, P. L. 93-26, § 2, 87 Stat. 26, located at 37 USCS § 552 note, provided that for purposes of this chapter, the amendment of 37 USCS § 552 by Act April 27, 1973, relating to promotion while in a missing status notwithstanding determination of death before making promotion, is effective Nov. 24, 1971.

Cross References

This chapter is referred to in 10 USCS §§ 1431, 1446; 26 USCS § 6334; 31 USCS § 3803; 38 USCS §§ 101, 106, 107, 1151, 4213, 5105, 5310, 5313

SUBCHAPTER I. GENERAL

§ 1301. Definitions
§ 1302. Determination of pay grade

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§ 1303. Cost-of-living adjustments
§ 1304. Special provisions relating to surviving spouses

§ 1301. Definitions

As used in this chapter [38 USCS §§ 1301 et seq.]--

The term "veteran" includes a person who died in the active military, naval, or air service.

Prior law and revision:
This section is based on 38 USC § 1101(10)(A) (Act Aug. 1, 1956, ch 837, Title I, § 102(10)(A), 70 Stat. 860).

Amendments:
1969. Act June 11, 1969, substituted "sections 201, 202, 203, 204, 205, or 207 of title 37" for "sections 232(a), 232(e), or 308 of title 37".
Act Oct. 27, 1969 (effective 12/1/69, as provided by § 8 of such Act, which appears as 38 USCS § 1302 note), deleted para. (1) which read "(1) The term 'basic pay' means the monthly pay prescribed by sections 201, 202, 203, 204, 205, or 207 of title 37, as may be appropriate, for a member of a uniformed service on active duty." and deleted the para. designator "(2)" preceding "The term 'veteran'".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 401, as 38 USCS § 1301.

Cross References
This section is referred to in 8 USCS §§ 1612, 1613, 1622

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:102
33 Fed Proc L Ed, Veterans and Veterans' Affairs § 79:15

Am Jur:
3C Am Jur 2d, Aliens and Citizens § 2179
60A Am Jur 2d, Pensions and Retirement Funds § 1261
77 Am Jur 2d, Veterans and Veterans' Laws § 148

Forms:
15 Fed Procedural Forms L Ed, Social Security and Medicare §§ 60:37, 41, 42
16B Am Jur Legal Forms 2d, Social Security and Medicare §§ 235:16, 18, 19

Law Review Articles:
Benefits for Conscientious Objectors. 19 Catholic Lawyer 62, Winter 1973

§ 1302. Determination of pay grade

(a) With respect to a veteran who died in the active military, naval, or air service, such veteran's pay grade shall be determined as of the date of such veteran's death or as of the date of a promotion after death while in a missing status.
(b) With respect to a veteran who did not die in the active military, naval, or air service, such veteran's pay grade shall be determined as of--

(1) the time of such veteran's last discharge or release from active duty under conditions other than dishonorable; or

(2) the time of such veteran's discharge or release from any period of active duty for training or inactive duty training, if such veteran's death results from service-connected disability incurred during such period and if such veteran was not thereafter discharged or released under conditions other than dishonorable from active duty.

(c) The pay grade of any veteran described in section 106(b) of this title shall be that to which such veteran would have been assigned upon final acceptance or entry upon active duty.

(d) If a veteran has satisfactorily served on active duty for a period of six months or more in a pay grade higher than that specified in subsection (a) or (b) and any subsequent discharge or release from active duty was under conditions other than dishonorable, the higher pay grade shall be used if it will result in greater monthly payments to such veteran's surviving spouse under this chapter [38 USCS §§ 1301 et seq.]. The determination as to whether an individual has served satisfactorily for the required period in a higher pay grade shall be made by the Secretary of the department in which such higher pay grade was held.

(e) The pay grade of any person not otherwise described in this section, but who had a compensable status on the date of such person's death under laws administered by the Secretary, shall be determined by the head of the department under which such person performed the services by which such person obtained such status (taking into consideration such person's duties and responsibilities) and certified to the Secretary. For the purposes of this chapter [38 USCS §§ 1301 et seq.], such person shall be deemed to have been on active duty while performing such services.

Prior law and revision:

This section is based on 38 USC § 1101(11)(A)-(C), (E) (Act Aug. 1, 1956, ch 837, Title I, § 102(11)(A)-(C), (E), 70 Stat. 860).

Amendments:


1966. Act Oct. 4, 1966 (effective as provided by § 2 of such Act, which appears as a note to this section), in subsec. (d), substituted "any subsequent discharge or release from active duty was under conditions other than dishonorable" for "was so serving in such rank within one hundred and twenty days before death in the active military, naval, or air service or before last discharge or release from active duty under conditions other than dishonorable".

1969. Act Oct. 27, 1969 (effective as provided by § 8 of such Act, which appears as a note to this section), substituted new catchline and section for ones which read:

"§ 402. Computation of basic pay

"(a) With respect to a veteran who died in the active military, naval, or air service, his basic pay shall be that prescribed on January 1, 1957, or on the date of his death (whichever is the later date) for a member of a uniformed service on active duty of the same rank and years of service as that of the deceased veteran at the time of his death.
"(b) With respect to a veteran who did not die in the active military, naval, or air service, his basic pay shall be that prescribed on January 1, 1957, or on the date of his death (whichever is the later date) for a member of a uniformed service on active duty of the same rank and years of service as that of the deceased veteran--

"(1) at the time of his last discharge or release from active duty under conditions other than dishonorable; or

"(2) at the time of his discharge or release from any period of active duty for training or inactive duty training, if his death results from service-connected disability incurred during such period and if he was not thereafter discharged or released under conditions other than dishonorable from active duty.

"(c)(1) The basic pay of any veteran described in section 106(b) of this title shall be that to which he would have been entitled upon final acceptance or entry upon active duty.

"(2) The basic pay of any person not otherwise described in this section, but who had a compensable status on the date of his death under laws administered by the Veterans' Administration, shall be determined by the head of the department under which such person performed the services by which he obtained such status (taking into consideration his duties, responsibilities, and years of service) and certified to the Administrator. For the purposes of this chapter, such person shall be deemed to have been on active duty while performing such services.

"(d) If a veteran has satisfactorily served on active duty for a period of six months or more in a rank higher than that specified in subsection (a) or (b) and any subsequent discharge or release from active duty was under conditions other than dishonorable, his basic pay shall be determined by using the appropriate rank specified in those subsections or by substituting such higher rank for the rank specified in those subsections, whichever will result in a greater amount. The determination as to whether an individual has served satisfactorily for the required period in a higher rank shall be made by the Secretary of the Department in which such higher rank was held.

1971. Act Nov. 24, 1971 (effective as provided by § 3 of such Act, which appears as a note to this section), in subsec. (a), inserted "or as of the date of a promotion after death while in a missing status".

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in subsecs. (a) and (b), substituted "such veteran's" for "his" wherever appearing; in subsec. (b)(2), substituted "such veteran" for "he"; in subsec. (c), substituted "such veteran" for "he"; in subsec. (d), substituted "such veteran's surviving spouse" for "his widow"; in subsec. (e), substituted "such person's" for "his" wherever appearing; and "such person" for "he" preceding "obtained such status".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 402, as 38 USCS § 1302, and substituted "administered by the Secretary" for "administered by the Veterans' Administration" and "Secretary" for "Administrator".

Other provisions:

Effective date of amendment made by Act Oct. 4, 1966. Act Oct. 4, 1966, P. L. 89-622, § 2, 80 Stat. 873, provides: "The amendment made by this Act [amending this section] shall take effect on the first day of the second calendar month after the date of enactment of this Act.".

Effective dates of amendments made by Act Nov. 24, 1971. Act Nov. 24, 1971, P. L. 92-169, § 3, 85 Stat. 489, provides: "For the purposes of chapter 13 of title 38, United States Code [38 USCS §§ 1301 et seq.], this Act [amending this section and 37 USCS § 522(a)] becomes effective upon the date of enactment. For all other purposes this Act becomes effective as of February 28, 1961."

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Cross References
This section is referred to in 38 USCS § 1311

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:102

§ 1303. Cost-of-living adjustments

(a) In the computation of cost-of-living adjustments for fiscal years 1998 through 2013 in the rates of dependency and indemnity compensation payable under this chapter, such adjustments (except as provided in subsection (b)) shall be made by a uniform percentage that is no more than the percentage equal to the social security increase for that fiscal year, with all increased monthly rates (other than increased rates equal to a whole dollar amount) rounded down to the next lower whole dollar amount.

(b) For purposes of this section, the term "social security increase" means the percentage by which benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) are increased for any fiscal year as a result of a determination under section 215(i) of such Act (42 U.S.C. 415(i)).

Amendments:

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:102

§ 1304. Special provisions relating to surviving spouses

No dependency and indemnity compensation shall be paid to the surviving spouse of a veteran dying after December 31, 1956, unless such surviving spouse was married to such veteran--

(1) before the expiration of fifteen years after the termination of the period of service in which the injury or disease causing the death of the veteran was incurred or aggravated; or
(2) for one year or more; or

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(3) for any period of time if a child was born of the marriage, or was born to them before the marriage.

Prior law and revision:
This section is based on 38 USC § 1101(8) (Act Aug. 1, 1956, ch 837, Title I, § 102(8), 70 Stat. 860).

Amendments:
1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), substituted new paras. (2), (3) for ones which read: "(2) for five or more years; or "(3) for any period of time if a child was born of the marriage.".
1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in the section catchline, substituted "surviving spouses" for "widows"; in the introductory matter, substituted "surviving spouse", "such surviving spouse" and "such veteran" for "widow", "she", and "him", respectively.
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 404, as 38 USCS § 1304.

Cross References
This section is referred to in 8 USCS §§ 1612, 1613, 1622

Research Guide
Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:102

Am Jur:
3C Am Jur 2d, Aliens and Citizens §§ 2177, 2179, 2195
60A Am Jur 2d, Pensions and Retirement Funds § 1265

SUBCHAPTER II. DEPENDENCY AND INDEMNITY COMPENSATION

§ 1310. Deaths entitling survivors to dependency and indemnity compensation
§ 1311. Dependency and indemnity compensation to a surviving spouse
§ 1312. Benefits in certain cases of in-service or service-connected deaths
§ 1313. Dependency and indemnity compensation to children
§ 1314. Supplemental dependency and indemnity compensation to children
§ 1315. Dependency and indemnity compensation to parents
§ 1316. Dependency and indemnity compensation in cases of prior deaths
§ 1317. Restriction on payments under this chapter
§ 1318. Benefits for survivors of certain veterans rated totally disabled at time of death

§ 1310. Deaths entitling survivors to dependency and indemnity compensation
(a) When any veteran dies after December 31, 1956, from a service-connected or compensable disability, the Secretary shall pay dependency and indemnity compensation to such veteran's surviving spouse, children, and parents. The standards and criteria for
determining whether or not a disability is service-connected shall be those applicable under chapter 11 of this title [38 USCS §§ 1101 et seq.].

(b) Dependency and indemnity compensation shall not be paid to the surviving spouse, children, or parents of any veteran dying after December 31, 1956, unless such veteran (1) was discharged or released under conditions other than dishonorable from the period of active military, naval, or air service in which the disability causing such veteran's death was incurred or aggravated, or (2) died while in the active military, naval, or air service.

(c) A person who receives a payment under the provisions of the Radiation Exposure Compensation Act of 1990 (42 U.S.C. 2210 note) shall not be deprived, by reason of the receipt of that payment, of receipt of dependency and indemnity compensation to which that person is otherwise entitled, but there shall be deducted from payment of such dependency and indemnity compensation the amount of the payment under that Act.

Prior law and revision:
This section is based on 38 USC §§ 1111, 1119(c) (Act Aug. 1, 1956, ch 837, Title II, §§ 201, 209(c), 70 Stat. 862, 867).

Amendments:
1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in subsec. (a), substituted "such veteran's surviving spouse" for "his widow"; in subsec. (b), substituted "surviving spouse", "such veteran", and "such veteran's" for "widow", "he", and "his", respectively.

1978. Act Oct. 18, 1978 (effective 10/1/78, as provided by § 401(a) of such Act, which appears as 38 USCS § 1114 note), redesignated subsec. (b) as subsec. (c); added new subsec. (b).

1982. Act Oct. 14, 1982, (effective 10/1/82 as provided by § 112(b)(1) of such Act, which appears as a note to this section), in subsec. (b)(1), inserted "or entitled to receive".

1988. Act Nov. 18, 1988 deleted subsec. (b) which read:

"(1) Notwithstanding the provisions of subsection (a) of this section, when any veteran dies, not as the result of the veteran's own willful misconduct, if the veteran was in receipt of or entitled to receive (or but for the receipt of retired or retirement pay was entitled to receive) compensation at the time of death for a service-connected disability that either (A) was continuously rated totally disabling for a period of ten or more years immediately preceding death, or (B) if so rated for a lesser period, was so rated continuously for a period of not less than five years from the date of such veteran's discharge or other release from active duty, the Administrator shall pay benefits under this chapter to the veteran's surviving spouse, if such surviving spouse was married to such veteran for not less than two years immediately preceding such veteran's death, and to such veteran's children, in the same manner as if the veteran's death were service connected.

"(2) If a surviving spouse or a child receives any money or property of value pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of, any cause of action for damages for the death of a veteran described in paragraph (1) of this subsection, benefits under this chapter payable to such surviving spouse or child by virtue of this subsection shall not be paid for any month following a month in which any such money or property is received until such time as the total amount of such benefits that would otherwise have been payable equals the total of the amount of the money received and the fair market value of the property received.

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"(3) For purposes of sections 1448(d) and 1450(c) of title 10, eligibility for benefits under this chapter by virtue of this subsection shall be deemed eligibility for dependency and indemnity compensation under section 411(a) of this title."

Such Act further redesignated former subsec. (c) as subsec. (b).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 410, as 38 USCS § 1310, and substituted "Secretary" for "Administrator".

2004. Act Dec. 10, 2004 (effective with respect to dependency and indemnity compensation payments for months beginning after 3/26/2002, as provided by § 302(c) of such Act, which appears as 38 USCS § 1112 note), added subsec. (c).

Other provisions:

Study of dependency and indemnity compensation claims. Act May 31, 1974, P. L. 93-295, Title II, § 207, 88 Stat. 183, required the Administrator to make a study of claims for dependency and indemnity compensation relating to veterans who, at time of death within six months of May 31, 1974, were receiving disability compensation, and to report to the Speaker and the President of the Senate no more than 30 days after the beginning of the 94th Congress.

Act Aug. 5, 1975, P. L. 94-71, Title II, § 204, 89 Stat. 397, authorized the Administrator of Veterans' Affairs to make a study of claims for dependency and indemnity compensation relating to veterans who at the time of death during the period Sept. 1, 1975 to March 1, 1976 were receiving disability compensation based upon a total and permanent disability and required the report to be submitted to the Speaker of the House and the President of the Senate no later than Oct. 1, 1976.

Study of dependency and indemnity compensation program. Act Sept. 30, 1976, P. L. 94-433, Title II, § 204, 90 Stat. 1376, authorized the Administrator of Veterans' Affairs to study the dependency and indemnity compensation program authorized by this chapter in order to evaluate the benefits provided by the program and to determine whether, or to what extent, benefits should be based on the military pay grade of the person upon whose death entitlement is predicated, and required the Administrator to submit a report, containing the results of the study together with the Administrator's recommendations for improvement of the program, to Congress and the President not later than Oct. 1, 1977.


"(b)(1) The amendment made by subsection (a) [amending this section] shall take effect on October 1, 1982.

"(2)(A) As soon as practicable after September 30, 1982, the Administrator of Veterans' Affairs shall pay an amount determined under subparagraph (B) to each person who would have been entitled to a payment under chapter 13 of title 38, United States Code [38 USCS §§ 1301 et seq.], for any part of the period beginning on October 1, 1978, and ending on September 30, 1982, if the amendment made by subsection (a) [amending this section] had taken effect on October 1, 1978.

"(B) The amount of any payment to a person under subparagraph (A) is the amount equal to the total of all payments under chapter 13 of title 38, United States Code [38 USCS §§ 1301 et seq.], that would have been made to that person for the period described in such subparagraph if the amendment made by subsection (a) [amending this section] had taken effect on October 1, 1978."

GAO report relating to the provision of benefits to survivors of veterans and members of the armed forces. Act Oct. 29, 1992, P. L. 102-568, Title I, § 104, 106 Stat. 4322, provides:
“(a) In general. The Comptroller General of the United States shall submit to the Committees on Veterans’ Affairs of the Senate and House of Representatives a report with respect to the most appropriate combination of financial, health-care, educational, and other survivor benefits to meet the needs of survivors of veterans.

“(b) Contents of report. The report shall include the following:

"(1) A review and compilation of data on current and proposed survivor benefits programs that will permit an assessment of the adequacy of such benefits programs, including information on--

"(A) in the case of each current and proposed alternative survivor benefits program--

"(i) each benefit provided;

"(ii) the survivors entitled to the benefit;

"(iii) the extent to which survivors are entitled to similar benefits under the program; and

"(iv) the costs of providing such benefits under the program;

"(B) the extent to which current and anticipated benefits under current survivor benefits programs meet the current and anticipated financial, health-care, educational, and other needs of survivors; and

"(C) the differences, if any, in the survivor benefits provided under current and proposed survivor benefits programs to survivors of various categories of veterans and members of the Armed Forces (including survivors of veterans having service-connected disabilities, veterans without such disabilities, members of the Armed Forces who die during service in the Armed Forces, members of the Armed Forces retired under any provision of law other than chapter 61 of title 10, United States Code [10 USCS §§ 1201 et seq.], and members of the Armed Forces retired under chapter 61 of title 10, United States Code [10 USCS §§ 1201 et seq.] (relating to retirement or separation for physical disability)).

"(2) A review and compilation of existing studies on the adequacy of survivor benefits provided under current and proposed survivor benefits programs to meet the financial, health-care, educational, and other needs of survivors.

"(3) A comprehensive assessment and evaluation of the adequacy of current and proposed survivor benefits programs, including data and methods for an assessment and evaluation of--

"(A) the feasibility and desirability of limiting the period of entitlement of survivors to survivor benefits;

"(B) the feasibility and desirability of modifying the provision of monetary benefits to survivors by--

"(i) revising the term of payment of any such benefits;

"(ii) replacing the periodic payment of such benefits with a lump sum payment;

"(iii) providing such benefits through insurance or other premium-based payment mechanisms; or

"(iv) carrying out any other revision or modification proposed before the date of the enactment of this Act by the Secretary of Veterans Affairs, the Secretary of Defense, the Secretary of Health and Human Services, or organizations

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recognized by the Secretary of Veterans Affairs under section 5902(a)(1) of title 38, United States Code;

"(C) the feasibility and desirability of modifying the provision of health-care benefits to survivors;

"(D) the feasibility and desirability of modifying the provision of benefits to children survivors; and

"(E) the feasibility and desirability of consolidating, expanding, or otherwise modifying any program relating to the provision of survivor benefits.

"(4) The recommendations of the Comptroller General (including a proposal for legislation) on the most appropriate combination of survivor benefits to meet the current and anticipated financial, health-care, educational, and other needs of survivors.

"(c) Submission of report. The Comptroller General shall submit the report not later than April 1, 1994.

"(d) Definitions. In this section:

"(1) The term 'survivor', in the case of a veteran or member of the Armed Forces who dies, means the surviving spouse or surviving dependent child of the veteran or member.

"(2) The term 'survivor benefit' means any monetary, health-care, educational, or other benefit paid, payable, or otherwise provided to survivors of veterans and survivors of members of the Armed Forces under the following:

"(A) Laws administered by the Secretary of Veterans Affairs.

"(B) Laws administered by the Secretary of Defense.

"(C) The Social Security Act (42 U.S.C. 301 et seq.).

"(3) The term 'veteran' has the meaning given such term in section 101(2) of title 38, United States Code.".

Research Guide

Am Jur:

60A Am Jur 2d, Pensions and Retirement Funds § 1265
77 Am Jur 2d, Veterans and Veterans' Laws § 35

1. Generally
   2. Conduct of beneficiary
   3. Cause of death determinations
   4. Miscellaneous

1. Generally

Widow's appeal of non-final order of remand of her claim for veteran's survivor benefits to Board of Veterans' Appeals, for reconsideration in light of Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000), was dismissed where there was no substantial risk that factual determination that veteran's disability and death were not service-connected would not survive entry of final order. Myore v Principi (2003, CA FC) 323 F.3d 1347

Eligibility for survivors benefits under 38 USCS § 410(b)(1) [now 38 USCS § 1310(b)(1)] is controlled by Veterans' Administration [now Department of Veterans Affairs] not findings regarding disability rather than service department's ratings of total disability. VA GCO 3-83
Board erred in failing to apply benefit-of-doubt doctrine to surviving spouse’s claim for DIC benefits where there was substantial evidence in her favor. Garcia v Principi (1992) 3 Vet App 382

2. Conduct of beneficiary

Widow of service member was not entitled to renew her eligibility for survivor benefit plan annuities after waiving her statutory entitlement to dependency indemnity compensation benefits while also continuing to receive benefits of Federal Tort Claims Act settlement since there is no statutory provision entitling individual such as plaintiff who voluntarily albeit mistakenly renounces her entitlement to dependency indemnity compensation benefits following receipt of FTCA settlement to have survivor benefit plan annuity restored. Kesler v United States (1992) 25 Cl Ct 189

Surviving minor child of Spanish-American War veteran is precluded from receiving increase in basic rate of pension on account of death of sister, where it appears her death was due to his felonious act. 1941 ADVA 468

3. Cause of death determinations

DIC claim following veteran's death from respiratory failure due to chronic obstructive pulmonary disease complicated by nosebleed was properly denied where veteran had made no complaints of any lung condition while in service. Gartman v Derwinski (1992) 3 Vet App 225

Denial of DIC benefits had plausible basis where cause of veteran's death was terminal stage of prostrate cancer, non-service connected condition, and Board determined that Veterans' Administration [now Department of Veterans Affairs] treatment when veteran was hospitalized did not cause or hasten veteran's death. Monts v Brown (1993) 4 Vet App 379

Surviving spouse failed to present well-ground claim of service connection for cause of veteran's death where 1937 death certificate listed only coronary sclerosis as principal cause of death and anemia as contributory cause of death, and did not mention veteran's service-connected PTB and bronchitis or provide any other information regarding causation, and physician's letter written 15 years after veteran's death stating that veteran's death was aggravated by service-connected disability also stated that physician had no evidence that veteran had service-connected disability or was receiving compensation from Veterans' Administration [now Department of Veterans Affairs], nor did it refer to any specific disability. Hanna v Brown (1994) 6 Vet App 507, app dismd without op (1995, CA FC) 56 F.3d 82, reported in full (1995, CA FC) 1995 US App LEXIS 10749, reh, en banc, den (1995, CA FC) 1995 US App LEXIS 16626


Board's determination that veteran's death was not service connected for purpose of dependency and indemnity compensation claim under 38 USCS § 1310 was not clearly erroneous even though physician who prepared death certificate stated that total sum of veteran's injuries sustained while being in service contributed to veteran's death where medical opinion obtained by regional office stated that it was not likely any of veteran's service-connected disabilities contributed substantially or materially to veteran's death. Sachs v Gober (2000) 14 Vet App 175, 2000 US App Vet Claims LEXIS 742, mod, remanded, app dismd (2001) 14 Vet App 298, 2001 US App Vet Claims LEXIS 164

4. Miscellaneous

38 USCS § 1103(a) applies to surviving spouse's dependency and indemnity compensation claim, even if veteran had previously established service connection for disability because 38 USCS § 1310(a) explicitly refers to Chapter 11 of Title 38 of U.S. Code, which includes 38 USCS
§ 1103(a), and as result, 38 USCS § 1310(a) incorporates 38 USCS § 1103(a)'s service connection preclusion. Stoll v Nicholson (2005, CA FC) 401 F.3d 1375

Wife could not rely on her deceased husband's prior service connection status to save dependency and indemnity compensation claim where 38 USCS § 1310(a) incorporated 38 USCS § 1103(a)'s service connection preclusion, § 1103(a) only applied to living veterans, and there was no dispute that her husband's chronic obstructive pulmonary disease was attributable to his in-service tobacco use. Stoll v Nicholson (2005, CA FC) 401 F.3d 1375

Widow of deceased veteran was not entitled to have deceased veteran's claims for increased disability ratings reopened since she presented no new evidence and only asserted evidence which was previously submitted; survivor's accrued-benefits claims asserting veteran's disorder was service-connected necessarily incorporates any previous adjudications of service-connection claims of veteran and requires new and material evidence before accrued benefits claim may be considered, just as if veteran himself had been asking to have claim reopened. Wright v Brown (1996) 9 Vet App 300

Veterans' Administration [now Department of Veterans Affairs] failed to follow its own regulations governing termination of benefits when it terminated DIC benefits to deceased veteran's dependent children; record revealed that earlier notification to both children's custodians, despite adjudicative decision that veteran's death was not service connected, constituted final and binding agency decision which was not subject to revision except when it is clearly and unmistakably erroneous, requiring notice to recipients and burden on government. Wilson v West (1998) 11 Vet App 383

There is no legal basis for 70 year-old appellant to be paid dependency and indemnity compensation pursuant to 38 USCS § 1310(a) or 38 USCS § 1318, or to be paid accrued benefits under 38 USCS § 5121(a), since 38 USCS 101(4)(A) excludes from category of "child" anyone who is more than 23 years of age. Burris v Principi (2001) 15 Vet App 348, 2001 US App Vet Claims LEXIS 1498

Plain language of 38 USCS § 1103 expresses congressional intent to no longer award service connection for veteran's death that results from service connected disease that was "capable of being attributed" to use of tobacco products during veteran's service; therefore, although smoking-related heart disease that caused veteran's death had been deemed to be "service-connected" while veteran was alive, veteran's widow was not entitled to dependency and indemnity compensation benefits under 38 USCS § 1310(a), due to enactment of 38 USCS § 1103, and 38 C.F.R. § 3.300. Kane v Principi (2003) 17 Vet App 97, 2003 US App Vet Claims LEXIS 385

Plaintiff widow, survivor of military veteran, was granted tax refund relief for funds withheld from her Survivor Benefit Plan receipts for period of time for which she was retroactively entitled to Dependency and Indemnity Compensation benefits, which were nontaxable under 38 USCS § 5301. Ebert v United States (2005) 66 Fed Cl 287, 2005-2 USTC ¶ 50495, 96 AFTR 2d 5163

§ 1311. Dependency and indemnity compensation to a surviving spouse

(a) (1) Dependency and indemnity compensation shall be paid to a surviving spouse at the monthly rate of $1,033.

(2) The rate under paragraph (1) shall be increased by $221 in the case of the death of a veteran who at the time of death was in receipt of or was entitled to receive (or but for the receipt of retired pay or retirement pay was entitled to receive) compensation for a service-connected disability that was rated totally disabling for a continuous period of at least eight years immediately preceding death. In determining the period of a veteran's disability for purposes of the preceding sentence, only periods in which the veteran was married to the surviving spouse shall be considered.
(3) In the case of dependency and indemnity compensation paid to a surviving spouse that is predicated on the death of a veteran before January 1, 1993, the monthly rate of such compensation shall be the amount based on the pay grade of such veteran, as set forth in the following table, if the amount is greater than the total amount determined with respect to that veteran under paragraphs (1) and (2):

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
<th>Monthly rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-1</td>
<td>$1,033</td>
<td>W-4.......... $1,236</td>
</tr>
<tr>
<td>E-2</td>
<td>1,033</td>
<td>O-1.......... 1,092</td>
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<tr>
<td>E-3</td>
<td>1,033</td>
<td>O-2.......... 1,128</td>
</tr>
<tr>
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<td>1,033</td>
<td>O-3.......... 1,207</td>
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</tr>
<tr>
<td>W-3</td>
<td>1,169</td>
<td></td>
</tr>
</tbody>
</table>

n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 1302 of this title, the surviving spouse's rate shall be $1,271.

n2 If the veteran served as Chairman or Vice-Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the Coast Guard, at the applicable time designated by section 1302 of this title, the surviving spouse's rate shall be $2,365.

(b) If there is a surviving spouse with one or more children below the age of eighteen of a deceased veteran, the dependency and indemnity compensation paid monthly to the surviving spouse shall be increased by $257 for each such child.

(c) The monthly rate of dependency and indemnity compensation payable to a surviving spouse shall be increased by $257 if the spouse is (1) a patient in a nursing home or (2) blind, or so nearly blind or significantly disabled as to need or require the regular aid and attendance of another person.

(d) The monthly rate of dependency and indemnity compensation payable to a surviving spouse shall be increased by $122 if the surviving spouse is, by reason of disability, permanently housebound but does not qualify for the aid and attendance allowance under subsection (c) of this section. For the purposes of this subsection, the requirement of "permanently housebound" will be considered to have been met when the surviving spouse is substantially confined to such surviving spouse's home (ward or clinical areas, if institutionalized) or immediate premises by reason of a disability or disabilities which it is reasonably certain will remain throughout such surviving spouse's lifetime.
(e) In the case of an individual who is eligible for dependency and indemnity compensation under this section by reason of section 103(d)(2)(B) of this title [38 USCS § 103(d)(2)(B)] who is also eligible for benefits under another provision of law by reason of such individual's status as the surviving spouse of a veteran, then, notwithstanding any other provision of law (other than section 5304(b)(3) of this title [38 USCS § 5304(b)(3)]), no reduction in benefits under such other provision of law shall be made by reason of such individual's eligibility for benefits under this section.

[(f)](e) (1) Subject to paragraphs (2) and (3), if there is a surviving spouse with one or more children below the age of 18, the dependency and indemnity compensation paid monthly to the surviving spouse shall be increased by $250, regardless of the number of such children.

(2) Dependency and indemnity compensation shall be increased under this subsection only for months occurring during the two-year period beginning on the date on which entitlement to dependency and indemnity compensation commenced.

(3) The increase in dependency and indemnity compensation of a surviving spouse under this subsection shall cease beginning with the first month commencing after the month in which all children of the surviving spouse have attained the age of 18.

(4) Dependency and indemnity compensation under this subsection is in addition to any other dependency and indemnity compensation payable under this chapter.

Prior law and revision:
This section is based on 38 USC § 1112 (Act Aug. 1, 1956, ch 837, Title II, § 202, 70 Stat. 862).

Explanatory notes:
The subsection designator "(f)" has been inserted in brackets in order to maintain alphabetical continuity.

Amendments:
1961. Act Sept. 21, 1961 (effective 10/1/61, as provided by § 3 of such Act, which appears as 38 USCS § 1312 note), in subsec. (d)(1), substituted "412(a)" for "412".

1963. Act May 15, 1963 (effective as provided by § 5 of such Act, which appears as a note to this section), in subsec. (b), concluding matter, substituted "$28" for "$25".

Act Oct. 5, 1963 (effective as provided by § 2 of such Act, which appears as a note to this section), in subsec. (a), substituted "$120" for "$112".


Act Oct. 27, 1969 (effective 12/1/69, as provided by § 8 of such Act, which appears as 38 USCS § 1302 note), substituted this section for one which read:

"(a) Dependency and indemnity compensation shall be paid to a widow at a monthly rate equal to $120 plus 12 per centum of the basic pay of her deceased husband.

"(b) If there is a widow and two or more children below the age of eighteen of a deceased veteran, and--

"(1) the total of the monthly benefits to which such widow and children are (or would be, upon the filing of an application) entitled on the basis of such deceased veteran's status under the laws referred to in subsection (d);
is less than

"(2) the amount described in subsection (e);

then the dependency and indemnity compensation paid monthly to the widow shall be increased by $28 for each such child in excess of one; however, the total of increases under this subsection shall not exceed the difference between the amounts referred to in subparagraphs (1) and (2) of this subsection.

"(c) If the amount determined under subsection (a), after increase (if any) under subsection (b), involves a fraction of a dollar, the amount payable shall be increased by the Administrator to the next higher dollar.

"(d) The laws referred to in subsection (b)(1) are--

"(1) section 412(a) of this title;

"(2) section 402 of title 42 (including the reduction provisions of subsection (a) of section 403 of title 42, but without regard to the deduction provisions of section 403); and

"(3) section 228e of title 45 (including the reduction provisions of section 228c-1(h) and 228e(h) of title 45).

"(e) The amount referred to in subsection (b)(2) is an amount equal to the total of the monthly benefits to which a widow and two children of a deceased fully and currently insured individual would be entitled under section 402 of title 42 (after reduction under subsection (a) of section 403 of title 42 but without regard to deduction provisions of section 403) if such deceased individual's average monthly wage had been $160.

"(f) The amount referred to in subsection (b)(1) shall be determined by the Secretary of Health, Education, and Welfare, or the Railroad Retirement Board, as the case may be, and shall be certified to the Administrator upon his request.

1970. Act Dec. 24, 1970 (effective 1/1/71, as provided by § 10(a) of such Act, which appears as 38 USCS § 1521 note), in subsec. (c), substituted "$55" for "$50".

1971. Act Dec. 15, 1971 (effective as provided by § 10 of such Act, which appears as a note to this section), substituted new section for one which read:

"(a) Dependency and indemnity compensation shall be paid to a widow, based on the pay grade of her deceased husband, at monthly rates set forth in the following table:

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-1</td>
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<td>W-4</td>
<td>$ 238</td>
</tr>
<tr>
<td>E-2</td>
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</tr>
<tr>
<td>E-3</td>
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<td>218</td>
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<tr>
<td>E-4</td>
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</tr>
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<td>E-5</td>
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<td>247</td>
</tr>
<tr>
<td>E-6</td>
<td>197</td>
<td>O-5</td>
<td>272</td>
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<td>O-8</td>
<td>363</td>
</tr>
<tr>
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</tr>
<tr>
<td>W-2</td>
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<td>O-10</td>
<td>n2 426</td>
</tr>
<tr>
<td>W-3</td>
<td>226</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, or sergeant major of the Marine Corps, at the applicable time designated by sec. 402 of this title, the widow's rate shall be $ 245.

"n2 If the veteran served as Chairman of the Joint Chiefs of Staff,
Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, at the applicable time designated by sec. 402 of this title, the widow's rate shall be $457."

"(b) If there is a widow with one or more children below the age of eighteen of a deceased veteran, the dependency and indemnity compensation paid monthly to the widow shall be increased by $20 for each such child.

"(c) The monthly rate of dependency and indemnity compensation payable to a widow shall be increased by $55 if she is (1) a patient in a nursing home or (2) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person.".

1972. Act Oct. 2, 1972, in subsec. (a), in footnote 1 of the table, deleted "or" following "Air Force," and inserted "or master chief petty officer of the Coast Guard, ".

1974. Act May 31, 1974 (effective 5/1/74, as provided by § 401 of such Act, which appears as 38 USCS § 1114 note), substituted new section for one which read:

"(a) Dependency and indemnity compensation shall be paid to a widow, based on the pay grade of her deceased husband, at monthly rates set forth in the following table:

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-1</td>
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<td>206</td>
<td>O-3</td>
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<tr>
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<td>272</td>
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<tr>
<td>E-6</td>
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<tr>
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<td>241</td>
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<td>n2 469</td>
</tr>
<tr>
<td>W-3</td>
<td>249</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

"n1 If the veteran served as sergeant major of the Army, senior enlisted adviser of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 402 of this title, the widow's rate shall be $270.

"n2 If the veteran served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, at the applicable time designated by section 402 of this title, the widow's rate shall be $503."

"(b) If there is a widow with one or more children below the age of eighteen of a deceased veteran, the dependency and indemnity compensation paid monthly to the widow shall be increased by $22 for each such child.

"(c) The monthly rate of dependency and indemnity compensation payable to a widow shall be increased by $55 if she is (1) a patient in a nursing home or (2) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person.".

1975. Act Aug. 5, 1975 (effective 8/1/75, as provided by § 301 of such Act, which appears as 38 USCS § 1114 note), substituted new section for one which read:

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“(a) Dependency and indemnity compensation shall be paid to a widow, based on the pay grade of her deceased husband, at monthly rates set forth in the following table:

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
<th>Pay grade</th>
<th>Monthly rate</th>
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</thead>
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<td>E-1</td>
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<td>E-3</td>
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<td>281</td>
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<tr>
<td>E-4</td>
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<td>O-3</td>
<td>301</td>
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</tr>
<tr>
<td>W-3</td>
<td>291</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by sec. 402 of this title, the widow’s rate shall be $316.

"n2 If the veteran served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, at the applicable time designated by sec. 402 of this title, the widow's rate shall be $589.".

“(b) If there is a widow with one or more children below the age of eighteen of a deceased veteran, the dependency and indemnity compensation paid monthly to the widow shall be increased by $26 for each such child.

“(c) The monthly rate of dependency and indemnity compensation payable to the widow shall be increased by $64 if she is (1) a patient in a nursing home or (2) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person.".

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), substituted new catchline and section for ones which read:

"§ 411. Dependency and indemnity compensation to a widow

“(a) Dependency and indemnity compensation shall be paid to a widow, based on the pay grade of her deceased husband, at monthly rates set forth in the following table:

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
<tbody>
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<tr>
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<td>337</td>
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<tr>
<td>E-5</td>
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<td>O-4</td>
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<td>O-9</td>
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</tr>
</tbody>
</table>

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"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by sec. 402 of this title, the surviving spouse's rate shall be $ 382.

"n2 If the veteran served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, at the applicable time designated by sec. 402 of this title, the surviving spouse's rate shall be $ 712.".

"(b) If there is a widow with one or more children below the age of eighteen of a deceased veteran, the dependency and indemnity compensation paid monthly to the widow shall be increased by $29 for each such child.

"(c) The monthly rate of dependency and indemnity compensation payable to a widow shall be increased by $72 if she is (1) a patient in a nursing home or (2) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person."

1977. Act Oct. 3, 1977 (effective 10/1/77 as provided by § 501 of such Act, which appears as 38 USCS § 1114 note), substituted new section for one which read:

"(a) Dependency and indemnity compensation shall be paid to a surviving spouse, based on the pay grade of the person upon whose death entitlement is predicated, at monthly rates set forth in the following table:

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
<tbody>
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<td>E-1</td>
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<tr>
<td>E-3</td>
<td>275</td>
<td>O-2</td>
<td>340</td>
</tr>
<tr>
<td>E-4</td>
<td>292</td>
<td>O-3</td>
<td>364</td>
</tr>
<tr>
<td>E-5</td>
<td>300</td>
<td>O-4</td>
<td>384</td>
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<td>307</td>
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<td>423</td>
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<td>476</td>
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<td>E-8</td>
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</tr>
<tr>
<td>W-3</td>
<td>352</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

"n1 If the veteran served as sergeant major Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by sec. 402 of this title, the surviving spouse's rate shall be $ 382.

"n2 If the veteran served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, at the applicable time designated by sec. 402 of this title, the surviving spouse's rate shall be $ 712.".
"(b) If there is a surviving spouse with one or more children below the age of eighteen of a deceased veteran, the dependency and indemnity compensation paid monthly to the surviving spouse shall be increased by $31 for each such child.

"(c) The monthly rate of dependency and indemnity compensation payable to a surviving spouse shall be increased by $78 if the spouse is (1) a patient in a nursing home or (2) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person."

1978. Act Oct. 18, 1978 (effective 10/1/78, as provided by § 401(a) of such Act, which appears as 38 USCS § 1114 note), substituted new subsec. (a) for one which read:

"(a) Dependency and indemnity compensation shall be paid to a surviving spouse, based on the pay grade of the person upon whose death entitlement is predicated, at monthly rates set forth in the following table:

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
<th>Pay grade</th>
<th>Monthly rate</th>
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</thead>
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<td>388</td>
</tr>
<tr>
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</tr>
<tr>
<td>W-3</td>
<td>375</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by Sec. 402 of this title, the surviving spouse's rate shall be $407.

"n2 If the veteran served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, at the applicable time designated by Sec. 402 of this title, the surviving spouse's rate shall be $759."

in subsec. (b), substituted "$35" for "$33"; in subsec. (c), substituted "$89" for "$83"; and added subsec. (d).

1979. Act Nov. 28, 1979 (effective 10/1/79, as provided by § 601(a)(1) of such Act, which appears as 38 USCS § 1114 note), substituted new subsec. (a) for one which read:

"(a) Dependency and indemnity compensation shall be paid to a surviving spouse, based on the pay grade of the person upon whose death entitlement is predicated, at monthly rates set forth in the following table:

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
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<td>O-5</td>
<td>484</td>
</tr>
</tbody>
</table>

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"n1 If the veteran served as sergeant, major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $437.

"n2 If the veteran served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force or Commandant of the Marine Corps, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $814.

in subsec. (b), substituted "$38" for "$35"; in subsec. (c), substituted "$98" for "$89"; and, in subsec. (d), substituted "$49" for "$45".

1980. Act Oct. 7, 1980 (applicable as provided by § 601(a) of such Act, which appears as 38 USCS § 1114 note), substituted new subsec. (a) for one which read:

"(a) Dependency and indemnity compensation shall be paid to a surviving spouse, based on the pay grade of the person upon whose death entitlement is predicated, at monthly rates set forth in the following table:

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
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</tr>
<tr>
<td>W-3</td>
<td>442</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $480.

"n2 If the veteran served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $895."; in subsec. (b), substituted "$43" for "$38"; in subsec. (c), substituted "$112" for "$98"; in subsec. (d), substituted "$56" for "$49".
1981. Act Oct. 17, 1981 (effective 10/1/81, as provided by § 701(a) of such Act, which appears as 38 USCS § 1114 note), substituted subsec. (a) for one which read:

"(a) Dependency and indemnity compensation shall be paid to a surviving spouse, based on the pay grade of the person upon whose death entitlement is predicated, at monthly rates set forth in the following table:

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-1</td>
<td>$ 373</td>
<td>W-4</td>
<td>$ 535</td>
</tr>
<tr>
<td>E-2</td>
<td>385</td>
<td>O-1</td>
<td>472</td>
</tr>
<tr>
<td>E-3</td>
<td>394</td>
<td>O-2</td>
<td>487</td>
</tr>
<tr>
<td>E-4</td>
<td>419</td>
<td>O-3</td>
<td>522</td>
</tr>
<tr>
<td>E-5</td>
<td>431</td>
<td>O-4</td>
<td>551</td>
</tr>
<tr>
<td>E-6</td>
<td>441</td>
<td>O-5</td>
<td>608</td>
</tr>
<tr>
<td>E-7</td>
<td>462</td>
<td>O-6</td>
<td>684</td>
</tr>
<tr>
<td>E-8</td>
<td>487</td>
<td>O-7</td>
<td>741</td>
</tr>
<tr>
<td>E-9</td>
<td>$510</td>
<td>O-8</td>
<td>812</td>
</tr>
<tr>
<td>W-1</td>
<td>472</td>
<td>O-9</td>
<td>872</td>
</tr>
<tr>
<td>W-2</td>
<td>491</td>
<td>O-10</td>
<td>n2 954</td>
</tr>
<tr>
<td>W-3</td>
<td>505</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $ 549.

"n2 If the veteran served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $ 1,023."

Such Act further, in subsec. (b), substituted "$48" for "$43"; in subsec. (c), substituted "$125" for "$112"; and in subsec. (d), substituted "$62" for "$56".

1982. Act Oct. 14, 1982 (effective 10/1/82 as provided by § 108 of such Act, which appears as 38 USCS § 1114 note), substituted subsec. (a) for one which read:

"(a) Dependency and indemnity compensation shall be paid to a surviving spouse, based on the pay grade of the person upon whose death entitlement is predicated, at monthly rates set forth in the following table:

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-1</td>
<td>$ 415</td>
<td>W-4</td>
<td>$ 595</td>
</tr>
<tr>
<td>E-2</td>
<td>428</td>
<td>O-1</td>
<td>525</td>
</tr>
<tr>
<td>E-3</td>
<td>438</td>
<td>O-2</td>
<td>542</td>
</tr>
<tr>
<td>E-4</td>
<td>466</td>
<td>O-3</td>
<td>580</td>
</tr>
<tr>
<td>E-5</td>
<td>479</td>
<td>O-4</td>
<td>613</td>
</tr>
<tr>
<td>E-6</td>
<td>490</td>
<td>O-5</td>
<td>676</td>
</tr>
<tr>
<td>E-7</td>
<td>514</td>
<td>O-6</td>
<td>761</td>
</tr>
<tr>
<td>E-8</td>
<td>542</td>
<td>O-7</td>
<td>824</td>
</tr>
<tr>
<td>E-9</td>
<td>n1 567</td>
<td>O-8</td>
<td>903</td>
</tr>
<tr>
<td>W-1</td>
<td>525</td>
<td>O-9</td>
<td>970</td>
</tr>
<tr>
<td>W-2</td>
<td>546</td>
<td>O-10</td>
<td>n2 1,061</td>
</tr>
<tr>
<td>W-3</td>
<td>562</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $610.

"n2 If the veteran served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $1,138."

Such Act further, in subsec. (b), substituted "$51" for "$48"; in subsec. (c), substituted "$134" for "$125"; and, in subsec. (d), substituted "$66" for "$62".

1984. Act March 2, 1984 (effective 4/1/84, as provided by § 107 of such Act, which appears as 38 USCS § 1314 note) substituted subsec. (a) for one which read:

"(a) Dependency and indemnity compensation shall be paid to a surviving spouse, based on the pay grade of the person upon whose death entitlement is predicated, at monthly rates set forth in the following table:

<table>
<thead>
<tr>
<th>Monthly Pay grade rate</th>
<th>Monthly Pay grade rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-1 ................ $ 445</td>
<td>W-4 ................ $ 639</td>
</tr>
<tr>
<td>E-2 ................ 459</td>
<td>O-1 ................ 563</td>
</tr>
<tr>
<td>E-3 ................ 470</td>
<td>O-2 ................ 582</td>
</tr>
<tr>
<td>E-4 ................ 500</td>
<td>O-3 ................ 622</td>
</tr>
<tr>
<td>E-5 ................ 514</td>
<td>O-4 ................ 658</td>
</tr>
<tr>
<td>E-6 ................ 526</td>
<td>O-5 ................ 726</td>
</tr>
<tr>
<td>E-7 ................ 552</td>
<td>O-6 ................ 817</td>
</tr>
<tr>
<td>E-8 ................ 582</td>
<td>O-7 ................ 884</td>
</tr>
<tr>
<td>E-9 ................ n1 608</td>
<td>O-8 ................ 969</td>
</tr>
<tr>
<td>W-1 ................ 563</td>
<td>O-9 ................ 1,041</td>
</tr>
<tr>
<td>W-2 ................ 586</td>
<td>O-10 ................ n2 1,139</td>
</tr>
<tr>
<td>W-3 ................ 603</td>
<td></td>
</tr>
</tbody>
</table>

"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $655.

"n2 If the veteran served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $1,222."

Such Act further, in subsec. (b), substituted "$53" for "$51"; in subsec. (c), substituted "$139" for "$134"; and, in subsec. (d), substituted "$68" for "$66".

Act Oct. 24, 1984 (effective 12/1/84, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note) substituted subsec. (a) for one which read: "Dependency and indemnity compensation shall be paid to a surviving spouse, based on the pay grade of the person upon whose death entitlement is predicated, at monthly rates set forth in the following table:

<table>
<thead>
<tr>
<th>Monthly Pay grade rate</th>
<th>Monthly Pay grade rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-1 ................ $ 461</td>
<td>W-4 ................ $ 661</td>
</tr>
<tr>
<td>E-2 ................ 475</td>
<td>O-1 ................ 583</td>
</tr>
</tbody>
</table>

© 2006 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.
"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $700.

"n2 If the veteran served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $1,305."

Such Act further, in subsec. (b), substituted "$57" for "$55"; in subsec. (c), substituted "$147" for "$143"; and in subsec. (d), substituted "$72" for "$70".

1986. Act Oct. 28, 1986 (effective 12/1/86, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted the table for one which read:
<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-1</td>
<td>$ 491</td>
</tr>
<tr>
<td>E-2</td>
<td>505</td>
</tr>
<tr>
<td>E-3</td>
<td>518</td>
</tr>
<tr>
<td>E-4</td>
<td>552</td>
</tr>
<tr>
<td>E-5</td>
<td>566</td>
</tr>
<tr>
<td>E-6</td>
<td>578</td>
</tr>
<tr>
<td>E-7</td>
<td>607</td>
</tr>
<tr>
<td>E-8</td>
<td>640</td>
</tr>
<tr>
<td>E-9</td>
<td>n1 669</td>
</tr>
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<td>W-1</td>
<td>621</td>
</tr>
<tr>
<td>W-2</td>
<td>645</td>
</tr>
<tr>
<td>W-3</td>
<td>664</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>W-4</td>
<td>$ 703</td>
</tr>
<tr>
<td>O-1</td>
<td>621</td>
</tr>
<tr>
<td>O-2</td>
<td>640</td>
</tr>
<tr>
<td>O-3</td>
<td>686</td>
</tr>
<tr>
<td>O-4</td>
<td>725</td>
</tr>
<tr>
<td>O-5</td>
<td>799</td>
</tr>
<tr>
<td>O-6</td>
<td>900</td>
</tr>
<tr>
<td>O-7</td>
<td>973</td>
</tr>
<tr>
<td>O-8</td>
<td>1,067</td>
</tr>
<tr>
<td>O-9</td>
<td>1,145</td>
</tr>
<tr>
<td>O-10</td>
<td>n2 1,255</td>
</tr>
<tr>
<td>W-2</td>
<td>1,274</td>
</tr>
</tbody>
</table>

"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $ 722.

"n2 If the veteran served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $ 1,345."

Such Act further, in subsec. (b) substituted "$58" for "$57"; in subsec. (b) substituted "$58" for "$57"; in subsec. (c) substituted "$149" for "$147"; and in subsec. (d) substituted "$73" for "$72".

1987. Act Dec. 4, 1987, in subsec. (a), in footnote 2, inserted "or Vice Chairman".
Commandant of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $1,365."

Such Act further in subsec. (b), substituted "$60" for "$58"; in subsec. (c), substituted "$155" for "$149"; and in subsec. (d), substituted "$76" for "$73".

1988. Act Nov. 18, 1988 (effective 12/1/88 as provided by § 1106 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted the table and corresponding footnotes for ones which read:

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-1</td>
<td>$ 518</td>
<td>W-4</td>
<td>$ 743</td>
</tr>
<tr>
<td>E-2</td>
<td>534</td>
<td>0-1</td>
<td>656</td>
</tr>
<tr>
<td>E-3</td>
<td>548</td>
<td>0-2</td>
<td>677</td>
</tr>
<tr>
<td>E-4</td>
<td>583</td>
<td>0-3</td>
<td>725</td>
</tr>
<tr>
<td>E-5</td>
<td>598</td>
<td>0-4</td>
<td>766</td>
</tr>
<tr>
<td>E-6</td>
<td>611</td>
<td>0-5</td>
<td>845</td>
</tr>
<tr>
<td>E-7</td>
<td>641</td>
<td>0-6</td>
<td>952</td>
</tr>
<tr>
<td>E-8</td>
<td>677</td>
<td>0-7</td>
<td>1,029</td>
</tr>
<tr>
<td>E-9</td>
<td>n1 707</td>
<td>0-8</td>
<td>1,128</td>
</tr>
<tr>
<td>W-1</td>
<td>656</td>
<td>0-9</td>
<td>1,210</td>
</tr>
<tr>
<td>W-2</td>
<td>682</td>
<td>0-10</td>
<td>n2 1,327</td>
</tr>
<tr>
<td>W-3</td>
<td>702</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $763.

"n2 If the veteran served as Chairman or Vice Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $1,422.".

Such Act further (effective as above) made the following substitutions: in subsec. (b), "$62" for "$60"; in subsec. (c), "$161" for "$155"; and, in subsec. (d), "$79" for "$76".

1989. Act Dec. 18, 1989 (effective 12/1/89, as provided by § 106 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted the table for one which read:

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-1</td>
<td>$ 539</td>
<td>W-4</td>
<td>$ 773</td>
</tr>
<tr>
<td>E-2</td>
<td>555</td>
<td>0-1</td>
<td>682</td>
</tr>
<tr>
<td>E-3</td>
<td>570</td>
<td>0-2</td>
<td>704</td>
</tr>
<tr>
<td>E-4</td>
<td>606</td>
<td>0-3</td>
<td>754</td>
</tr>
<tr>
<td>E-5</td>
<td>622</td>
<td>0-4</td>
<td>797</td>
</tr>
<tr>
<td>E-6</td>
<td>636</td>
<td>0-5</td>
<td>879</td>
</tr>
<tr>
<td>E-7</td>
<td>667</td>
<td>0-6</td>
<td>991</td>
</tr>
<tr>
<td>E-8</td>
<td>704</td>
<td>0-7</td>
<td>1,071</td>
</tr>
<tr>
<td>E-9</td>
<td>n1 735</td>
<td>0-8</td>
<td>1,174</td>
</tr>
<tr>
<td>W-1</td>
<td>682</td>
<td>0-9</td>
<td>1,259</td>
</tr>
<tr>
<td>W-2</td>
<td>701</td>
<td>0-10</td>
<td>n2 1,381</td>
</tr>
<tr>
<td>W-3</td>
<td>730</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of
the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $794.

"n2 If the veteran served as Chairman or Vice-Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $1,480."

Such Act further (effective as above), in subsec. (b), substituted "$65" for "$62"; in subsec. (c), substituted "$169" for "$161"; and in subsec. (d), substituted "$83" for "$79".

1991. Act Feb. 6, 1991 (effective 1/1/91, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted the table for one which read:

<table>
<thead>
<tr>
<th>Monthly Pay grade</th>
<th>Monthly Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-1 ...............</td>
<td>$ 564</td>
<td>W-4 ...........</td>
</tr>
<tr>
<td>E-2 ...............</td>
<td>581</td>
<td>O-1 ............</td>
</tr>
<tr>
<td>E-3 ...............</td>
<td>597</td>
<td>O-2 ............</td>
</tr>
<tr>
<td>E-4 ...............</td>
<td>634</td>
<td>O-3 ............</td>
</tr>
<tr>
<td>E-5 ...............</td>
<td>651</td>
<td>O-4 ............</td>
</tr>
<tr>
<td>E-6 ...............</td>
<td>666</td>
<td>O-5 ............</td>
</tr>
<tr>
<td>E-7 ...............</td>
<td>698</td>
<td>O-6 ............</td>
</tr>
<tr>
<td>E-8 ...............</td>
<td>737</td>
<td>O-7 ............</td>
</tr>
<tr>
<td>E-9 ...............</td>
<td>n1 770</td>
<td>O-8 ............</td>
</tr>
<tr>
<td>W-1 ...............</td>
<td>714</td>
<td>O-9 ............</td>
</tr>
<tr>
<td>W-2 ...............</td>
<td>742</td>
<td>O-10 ...........</td>
</tr>
<tr>
<td>W-3 ...............</td>
<td>764</td>
<td></td>
</tr>
</tbody>
</table>

"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $831.

"n2 If the veteran served as Chairman or Vice-Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $1,550."

Such Act further (effective as above), in subsec. (b), substituted "$68" for "$65"; in subsec. (c), substituted "$178" for "$169"; and in subsec. (d), substituted "$87" for "$83".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 411, as 38 USCS § 1311, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Act Nov. 12, 1991 (effective 12/1/91 as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted the table for one which read:

<table>
<thead>
<tr>
<th>Monthly Pay grade</th>
<th>Monthly Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-1 ...............</td>
<td>$ 594</td>
<td>W-4 ...........</td>
</tr>
<tr>
<td>E-2 ...............</td>
<td>612</td>
<td>O-1 ............</td>
</tr>
<tr>
<td>E-3 ...............</td>
<td>629</td>
<td>O-2 ............</td>
</tr>
<tr>
<td>E-4 ...............</td>
<td>668</td>
<td>O-3 ............</td>
</tr>
<tr>
<td>E-5 ...............</td>
<td>686</td>
<td>O-4 ............</td>
</tr>
<tr>
<td>E-6 ...............</td>
<td>701</td>
<td>O-5 ............</td>
</tr>
<tr>
<td>E-7 ...............</td>
<td>735</td>
<td>O-6 ............</td>
</tr>
<tr>
<td>E-8 ...............</td>
<td>776</td>
<td>O-7 ............</td>
</tr>
</tbody>
</table>
If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 1302 of this title, the surviving spouse's rate shall be $875.

If the veteran served as Chairman or Vice Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the Coast Guard, at the applicable time designated by section 1302 of this title, the surviving spouse's rate shall be $1,693.

---

<table>
<thead>
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<th>Monthly rate</th>
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<tr>
<td>W-3</td>
<td>835</td>
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<td></td>
</tr>
</tbody>
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If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 1302 of this title, the surviving spouse's rate shall be $907.

If the veteran served as Chairman or Vice Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the Coast Guard, at the applicable time designated by section 1302 of this title, the surviving spouse's rate shall be $1,693.

---

Such Act further, in subsec. (c), substituted "$191" for "$185"; and, in subsec. (d), substituted "$93" for "$90".

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Act Nov. 11, 1993 (effective 12/1/93, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted "$769" for "$750", in para. (2), substituted "$169" for "$165" and, in para. (3), substituted the table for one which read:

<table>
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<th>Monthly Pay grade rate</th>
</tr>
</thead>
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<td>E-8 829</td>
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<td>O-10 n2 1,627</td>
</tr>
<tr>
<td>W-3 860</td>
<td></td>
</tr>
</tbody>
</table>

"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $934.

"n2 If the veteran served as Chairman or Vice Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $1,744.");

1997. Act Nov. 19, 1997, (effective 12/1/97, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted "$850" for "$769", in para. (2), substituted "$185" for "$169" and, in para. (3), substituted the table for one which read:

<table>
<thead>
<tr>
<th>Monthly Pay grade rate</th>
<th>Monthly Pay grade rate</th>
</tr>
</thead>
<tbody>
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<td>O-3 $897</td>
</tr>
<tr>
<td>E-8 838</td>
<td>O-4 948</td>
</tr>
<tr>
<td>E-9 n1 875</td>
<td>O-5 1,044</td>
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<td>W-4 920</td>
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<td>O-10 n2 1,636</td>
</tr>
<tr>
<td>O-2 838</td>
<td></td>
</tr>
</tbody>
</table>

"n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 1302 of this title, the surviving spouse's rate shall be $943.

"n2 If the veteran served as Chairman or Vice Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or...
in subsec. (b), substituted "$215 for each such child." for "$100 for each such child during fiscal year 1993, $150 for each such child during fiscal year 1994, and $200 for each such child thereafter.;" in subsec. (c), substituted "$215" for "$195"; and, in subsec. (d), substituted "$104" for "$95".

1998. Act June 9, 1998 (applicable as provided by § 8207(b) of such Act, which appears as a note to this section) added subsec. (e).

1999. Act Nov. 30, 1999 (effective 12/1/99, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted "$881" for "$850", in para. (2), substituted "$191" for "$185", in para. (3), substituted the table for one which read:

<table>
<thead>
<tr>
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<th>Pay grade</th>
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<tr>
<td>W-3.....</td>
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<td></td>
</tr>
</tbody>
</table>

n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $ 1,044.

n2 If the veteran served as Chairman or Vice Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $ 1,941.";

in subsecs. (b) and (c), substituted "$222" for "$215"; and, in subsec. (d), substituted "$107" for "$104".

Act Nov. 30, 1999 (effective 12/1/99 pursuant to § 502(c) of such Act, which appears as 38 USCS § 103 note), deleted subsec. (e), which read:

"(e)(1) The remarriage of the surviving spouse of a veteran shall not bar the furnishing of dependency and indemnity compensation to such person as the surviving spouse of the veteran if the remarriage is terminated by death, divorce, or annulment unless the Secretary determines that the divorce or annulment was secured through fraud or collusion.

"(2) If the surviving spouse of a veteran ceases living with another person and holding himself or herself out openly to the public as that person's spouse, the bar to granting that person dependency and indemnity compensation as the surviving spouse of the veteran shall not apply.

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“(3) The first month of eligibility for payment of dependency and indemnity compensation to a surviving spouse by reason of this subsection shall be the later of the month after--

“(A) the month of the termination of such remarriage, in the case of a surviving spouse described in paragraph (1); or

“(B) the month of the cessation described in paragraph (2), in the case of a surviving spouse described in that paragraph.”.

2001. Act Dec. 21, 2001 (effective 12/1/2001, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted "$935" for "$881", in para. (2), substituted "$202" for "$191" and, in para. (3), substituted the table for one which read:

<table>
<thead>
<tr>
<th>Monthly Pay grade</th>
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<th>Monthly rate</th>
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</thead>
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<tr>
<td>E-3 .............</td>
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</tr>
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</tr>
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<td>0-5 ..........</td>
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<td>E-7 .............</td>
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</tr>
<tr>
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</tr>
<tr>
<td>W-3 .............</td>
<td>997</td>
<td></td>
</tr>
</tbody>
</table>

n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 1302 of this title, the surviving spouse's rate shall be $1,082.

n2 If the veteran served as Chairman or Vice-Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the Coast Guard, at the applicable time designated by section 1302 of this title, the surviving spouse's rate shall be $2,013.”;

in subsecs. (b) and (c), substituted "$234" for "$222"; and, in subsec. (d), substituted "$112" for "$107".

2002. Act Dec. 6, 2002 in subsec. (a), in para. (1), substituted "$948" for "$935", in para. (2), substituted "$204" for "$202" and, in para. (3), substituted the table for one which read:

<table>
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<tr>
<th>Monthly Pay grade</th>
<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
<tbody>
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<td>935</td>
<td>0-1 ..........</td>
</tr>
<tr>
<td>E-3 .............</td>
<td>935</td>
<td>0-2 ..........</td>
</tr>
<tr>
<td>E-4 .............</td>
<td>935</td>
<td>0-3 ..........</td>
</tr>
<tr>
<td>E-5 .............</td>
<td>935</td>
<td>0-4 ..........</td>
</tr>
<tr>
<td>E-6 .............</td>
<td>935</td>
<td>0-5 ..........</td>
</tr>
<tr>
<td>E-7 .............</td>
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</tr>
<tr>
<td>W-3 .............</td>
<td>1,058</td>
<td></td>
</tr>
</tbody>
</table>
n1 If the veteran served as Sergeant Major of the Army, Senior
Enlisted Advisor of the Navy, Chief Master Sergeant of the Air Force,
Sergeant Major of the Marine Corps, or Master Chief Petty Officer of the
Coast Guard, at the applicable time designated by section 1302 of this
title, the surviving spouse's rate shall be $1,149.

n2 If the veteran served as Chairman or Vice Chairman of the Joint Chiefs
of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief
of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the
Coast Guard, at the applicable time designated by section 1302 of this
title, the surviving spouse's rate shall be $2,139.

in subsecs. (b) and (c), substituted "$237" for "$234"; and, in subsec. (d), substituted "$113"
for "$112".

2003. Act Dec. 16, 2003 (effective 1/1/2004, as provided by § 101(c) of such Act, which
appears as 38 USCS § 103 note), added subsec. (e).

substituted "$208" for "$204" and, in para. (3), substituted the table for one which read:

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<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
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<tr>
<td>W-3...........</td>
<td>1,072</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

n1 If the veteran served as sergeant major of the Army, senior enlisted
advisor of the Navy, chief master sergeant of the Air Force, sergeant major
of the Marine Corps, or master chief petty officer of the Coast Guard, at
the applicable time designated by section 1302 of this title, the surviving
spouse's rate shall be $1,165.

n2 If the veteran served as Chairman or Vice-Chairman of the Joint Chiefs
of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief
of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the
Coast Guard, at the applicable time designated by section 1302 of this
title, the surviving spouse's rate shall be $2,168.

in subsecs. (b) and (c), substituted "$241" for "$237"; and, in subsec. (d), substituted "$115"
for "$113".

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Such Act further (effective with respect to payments for the first month beginning after enactment, as provided by § 301(b) of such Act, which appears as a note to this section), added subsec. (f).

2005. Act Nov. 22, 2005 (effective 12/1/2005, as provided by § 2(f) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted "$1,033" for "$967", in para. (2), substituted "$221" for "$208" and, in para. (3), substituted the table for one which read:

<table>
<thead>
<tr>
<th>Pay grade</th>
<th>Monthly rate</th>
<th>Pay grade</th>
<th>Monthly rate</th>
</tr>
</thead>
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</tr>
<tr>
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<td>1,094</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

n1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 1302 of this title, the surviving spouse's rate shall be $1,189.

n2 If the veteran served as Chairman or Vice-Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the Coast Guard, at the applicable time designated by section 1302 of this title, the surviving spouse's rate shall be $2,213; in subsecs. (b) and (c), substituted "$257" for "$241"; and, in subsec. (d), substituted "$122" for "$115".

2006. Act June 15, 2006, in subsec. (c)(2), substituted "blind, or so nearly blind or significantly disabled as to" for "helpless or blind, or so nearly helpless or blind as to".

Other provisions:


Effective date of the Uniformed Services Pay Act of 1963 [effective Oct. 1, 1963], or on January 1, 1964, whichever first occurs.


Payment for implementation of revisions. Act Oct. 29, 1992, P. L. 102-568, Title I, § 102(d), 106 Stat. 4322, provides: "The costs of implementing, during fiscal years 1993 and 1994, any revisions in the payment of dependency and indemnity compensation to surviving spouses under section 1311 of title 38, United States Code, that result from the amendments made by subsections (a) and (b) [amending subsecs. (a) and (b) of this section] shall be paid from amounts available to the Department of Veterans Affairs for the payment of compensation and pension."


Application of subsec. (e). Act June 9, 1998, P. L. 105-178, Title VIII, Subtitle B, § 8207(b), 112 Stat. 495, provides: "No payment may be made by reason of section 1311(e) of title 38, United States Code, as added by subsection (a), for any month before October 1998."


Effective date of subsec. [(f)](e). Act Dec. 10, 2004, P. L. 108-454, Title III, § 301(b), 118 Stat. 3610, provides: "Subsection (e) of section 1311 of title 38, United States Code, as added by subsection (a), shall take effect with respect to payments for the first month beginning after the date of the enactment of this Act."

Cross References
This section is referred to in 10 USCS §§ 1059, 1450, 1451, 1457; 38 USCS §§ 103, 1318, 5110

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Annotations:
Effect of divorce, remarriage, or annulment, on widow's pension or bonus rights or social security benefits. 85 ALR2d 242

1. Generally
2. Relationship with other laws
3. Determinations

4. Termination

1. Generally

Receipt of Bureau of Employees' compensation benefits does not terminate widow's basic eligibility for dependency and indemnity compensation, though such eligibility may be terminated by death or remarriage. 1961 ADVA 974

2. Relationship with other laws

Claimant was not surviving spouse of veteran for purposes of receiving benefits where, although she and veteran had been married and divorced and subsequently cohabited, they never remarried before veteran's death and Tennessee, where they were domiciled, does not recognize common law marriages. Harden v Derwinski (1992) 3 Vet App 39, app dismd (1992, CA) 979 F.2d 215, reported in full (1992, CA FC) 1992 US App LEXIS 36778

Whether veteran was entitled to receive total disability rating for his cirrhosis for eight continuous years prior to time of his death, so that his widow would be entitled to enhanced DIC, required remand for establishment of effective date and assignment of disability; because both 38 USCS § 1311(a)(2) and 38 USCS § 1318(b) are located in Chapter 13 and deal with DIC, phrase "in receipt of or entitled to receive" must have same meaning in both sections. Hix v West (1999) 12 Vet App 138, affd sub nom Hix v Gober (2000, CA FC) 225 F.3d 1377

Board of Veterans Appeals did not err in its determination that appellant attorney was not entitled to direct payment by Department of Veterans Affairs of 20 percent of veteran’s son’s past due dependency and indemnity compensation (DIC) benefits pursuant to his fee agreement with veteran’s widow because, although attorney’s successful representation of veteran’s widow had result of qualifying intervenor for DIC benefits, those benefits for her helpless-adult son under 38 USCS § 1314 were separate and distinct from veteran’s widow’s DIC benefits under 38 USCS § 1311. Hanlin v Nicholson (2005) 19 Vet App 350, 2005 US App Vet Claims LEXIS 616

3. Determinations

38 USCS § 1311(a)(2) requires retrospective determination of extent and duration of disability of deceased veteran upon entirety of record, including any new evidence presented by surviving spouse. Hix v Gober (2000, CA FC) 225 F.3d 1377

Board did not err in denying claim of surviving spouse of veteran for aid and assistance since claimant presented only her own statement to show that she met requirements, yet Board had her physician’s opinion that she was neither housebound nor in need of aid and assistance. Smith v Derwinski (1992) 3 Vet App 78

Although claimant was legal spouse of veteran at time of veteran's death and was deemed to have lived with veteran continuously since their marriage, Board of Veterans’ Appeals did not err in deciding claimant was not entitled to recognition as veteran’s surviving spouse pursuant to 38 USCS § 101(3) since claimant held herself out to public as spouse of another until after veteran’s death and, therefore, 38 USCS § 1311(e), which permits restoration of prior eligibility for dependency and indemnity compensation, is not applicable. Cacatian v West (1999) 12 Vet App 373, 1999 US App Vet Claims LEXIS 306

4. Termination

Award of veteran’s indemnity made in favor of widow is not lawfully terminated upon her remarriage, for purpose of giving effect to his intent that his mother become beneficiary in event his widow remarried. 1959 ADVA 968

Receipt of Bureau of Employees’ compensation benefits does not terminate widow's basic eligibility for dependency and indemnity compensation, though such eligibility may be terminated by death or remarriage. 1961 ADVA 974

§ 1312. Benefits in certain cases of in-service or service-connected deaths
(a) In the case of any veteran--
   (1) who dies after December 31, 1956, and is not a fully and currently insured individual (as defined in section 214 of the Social Security Act (42 U.S.C. 414) at the time of such veteran's death; and
   (2) whose death occurs--
      (A) while on active duty, active duty for training, or inactive duty training; or
      (B) as the result of a service-connected disability incurred after September 15, 1940; and
   (3) who leaves one or more survivors who are not entitled for any month to monthly benefits under section 202 of the Social Security Act (42 U.S.C. 402) on the basis of such veteran's wages and self-employment income but who would, upon application therefor, be entitled to such benefits if such veteran had been fully and currently insured at the time of such veteran's death;

   the Secretary shall pay for such monthly benefits under this section to each such survivor in an amount equal to the amount of the benefits which would have been paid for such month to such survivor under Title II of the Social Security Act (42 U.S.C. 401 et seq.), if such veteran had been both fully and currently insured at the time of his death and if such survivor had filed application therefor on the same date on which application for benefits under this section is filed with the Secretary.

(b) In any case where the amount of dependency and indemnity compensation payable under this chapter [38 USCS §§ 1301 et seq.] to a surviving spouse who has children is less than the amount of pension which would be payable to (1) such surviving spouse, or (2) such children if the surviving spouse were not entitled, under chapter 15 of this title [38 USCS §§ 1501 et seq.] had the death occurred under circumstances authorizing payment of death pension, the Secretary shall pay dependency and indemnity compensation to such surviving spouse in an amount equal to such amount of pension.

Prior law and revision:

This section is based on 38 USC § 1103(a) (Act Aug. 1, 1956, ch 837, Title IV, § 405(a), 70 Stat. 874).

Amendments:

1961. Act Sept. 21, 1961 (effective as provided by § 3 of such Act, which appears as a note to this section), designated existing matter as subsec. (a); added subsec. (b).

1966. Act June 22, 1966, substituted new subsec. (b) for one which read: "In any case where the amount of dependency and indemnity compensation payable under this chapter is less than the amount of pension which would be payable under chapter 15 of this title had the death occurred under circumstances authorizing payment of death pension, the Administrator shall pay dependency and indemnity compensation in an amount equal to such amount of pension."

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in subsec. (a), substituted "such veteran's" for "his" wherever appearing; in subsec. (a)(3), substituted "such veteran" for "he"; in subsec. (b), substituted "surviving spouse" for "widow" wherever appearing.


Other provisions:

Filing of application for benefits. Act Sept. 21, 1961, P. L. 87-268, § 2, 75 Stat. 566, provides: "Increased benefits provided by this Act [amending this section and 38 USCS §§ 107, 1311, 1315, 1322, and 1503 and adding this note] shall be payable from the effective date of the Act [see effective date note this section] in the case of any person receiving dependency and indemnity compensation on such date only if application therefor is filed in the Veterans' Administration within one year from such date and evidence of entitlement is of record or received within one year from the date of request therefor.".

Effective date of amendments made by Act Sept. 21, 1961. Act Sept. 31, 1961, P. L. 87-268, § 3, 75 Stat. 566, provides: "The amendments made by this Act [amending this section and 38 USCS §§ 107, 1311, 1315, 1322, 1503 and adding notes to this section] shall take effect as of the first day of the first calendar month which begins after the date of its enactment.".

Cross References

This section is referred to in 38 USCS §§ 107, 1315, 1322

§ 1313. Dependency and indemnity compensation to children

(a) Whenever there is no surviving spouse of a deceased veteran entitled to dependency and indemnity compensation, dependency and indemnity compensation shall be paid in equal shares to the children of the deceased veteran at the following monthly rates:

(1) one child, $438;
(2) two children, $629;
(3) three children, $819; and
(4) more than three children, $819, plus $157 for each child in excess of three.

(b) If dependency and indemnity compensation has been awarded under this section to a veteran's child or children and the entitlement to dependency and indemnity compensation under this section of an additional child of that veteran who is over the age of eighteen years and who had previously been entitled to dependency and indemnity compensation under this section before becoming eighteen years of age is later reestablished effective retroactively upon determination that such child is pursuing a course of instruction at an approved educational institution, the amount payable retroactively to the additional child is the amount equal to the difference between the total of the increased award payable under this section to the children of the deceased veteran for the retroactive period and the prior total award for such purpose for that period.

Prior law and revision:

This section is based on 38 USC § 1113 (Act Aug. 1, 1956, ch 837, Title II, § 203, 70 Stat. 863).
Amendments:

1963. Act May 15, 1963 (effective 7/1/63, as provided by § 5 of such Act, which appears as 38 USCS § 1315 note), in para. (1), substituted "$77" for "$70"; in para. (2), substituted "$110" for "$100"; in para. (3), substituted "$143" for "$130"; in para. (4), substituted "$143" for "$130" and substituted "$28" for "$25".

1966. Act Nov. 2, 1966 (effective 1/1/67, as provided by § 7(a) of such Act, which appears as 38 USCS § 1315 note), in para. (1), substituted "$80" for "$77"; in para. (2), substituted "$115" for "$110"; in para. (3), substituted "$149" for "$143"; and in para. (4), substituted "$149" for "$143" and substituted "$29" for "$28".

1970. Act May 21, 1970 (effective as provided by § 4 of such Act, which appears as a note to this section), in para. (1), substituted "$88" for "$80"; in para. (2), substituted "$127" for "$115"; in para. (3), substituted "$164" for "$149"; and in para. (4), substituted "$164" for "$149" and substituted "$32" for "$29".

1971. Act Dec. 15, 1971 (effective 1/1/72, as provided by § 10 of such Act, which appears as 38 USCS § 1311 note), in para. (1), substituted "$92" for "$88"; in para. (2), substituted "$133" for "$127"; in para. (3), substituted "$172" for "$164"; and in para. (4), substituted "$172" for "$164" and substituted "$34" for "$32".

1974. Act May 31, 1974 (effective 5/1/74, as provided by § 401 of such Act, which appears as 38 USCS § 1114 note), in para. (1), substituted "$108" for "$92"; in para. (2), substituted "$156" for "$133"; in para. (3), substituted "$201" for "$172"; and in para. (4), substituted "$201" for "$172" and substituted "$40" for "$34".

1975. Act Aug. 5, 1975 (effective 8/1/75, as provided by § 301 of such Act, which appears as 38 USCS § 1114 note), in para. (1), substituted "$121" for "$108"; in para. (2), substituted "$175" for "$156"; in para. (3), substituted "$225" for "$201"; and in para. (4), substituted "$225" for "$201" and substituted "$45" for "$40".

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in the preliminary matter, substituted "surviving spouse" for "widow", in para. (1), substituted "$131" for "$121"; in para. (2), substituted "$189" for "$175"; in para. (3), substituted "$243" for "$225"; and in para. (4), substituted "$243" for "$225" and substituted "$49" for "$45".

1977. Act Oct. 3, 1977 (effective 10/1/77, as provided by § 501 of such Act, which appears as 38 USCS § 1114 note), in para. (1), substituted "$140" for "$131"; in para. (2), substituted "$201" for "$189"; in para. (3), substituted "$259" for "$243"; and in para. (4), substituted "$259" for "$243" and substituted "$52" for "$49".

1978. Oct. 18, 1978 (effective 1/1/79, as provided by § 401(a) of such Act, which appears as 38 USCS § 1114 note), in para. (1), substituted "$150" for "$140"; in para. (2), substituted "$216" for "$201"; in para. (3), substituted "$278" for "$259"; and in para. (4), substituted "$278" for "$259" and substituted "$56" for "$52".

1979. Act Nov. 28, 1979 (effective 10/1/79, as provided by § 601(a)(1) of such Act, which appears as 38 USCS § 1114 note), in para. (1), substituted "$165" for "$150"; in para. (2), substituted "$237" for "$216"; in para. (3), substituted "$306" for "$278"; and in para. (4), substituted "$306" for "$278" and substituted "$62" for "$56".

1980. Act Oct. 7, 1980 (applicable as provided by § 601(a) of such Act, which appears as 38 USCS § 1114 note), in para. (1), substituted "$189" for "$165"; in para. (2), substituted "$271" for "$237"; in para. (3), substituted "$350" for "$306"; and in para. (4), substituted "$350" for "$306" and substituted "$71" for "$62".

1981. Act Oct. 17, 1981 (effective 10/1/81, as provided by § 701(a) of such Act, which appears as 38 USCS § 1114 note), designated existing provisions as subsec. (a), and in cl. (1) thereof, substituted "$210" for "$189"; in cl. (2) thereof, substituted "$301" for "$271"; in cl.
thereof, substituted "$389" for "$350", and in cl. (4) thereof, substituted "$389" and "$79" for "$350" and "$71"; and added subsec. (b).

1982. Act Oct. 14, 1982 (effective 10/1/82 as provided by § 108 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted "$225" for "$210", in para. (2), substituted "$323" for "$301", in para. (3), substituted "$417" for "$389", and in para. (4), substituted "$417" and "$84" for "$389" and "$79", respectively.

1984. Act March 2, 1984 (effective 4/1/84, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted "$233" for "$225", in para. (2), substituted "$334" for "$323", in para. (3), substituted "$432" for "$417", and, in para. (4), substituted "$432" for "$417" and "$87" for "$84".

Act Oct. 24, 1984 (effective 12/1/84, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted "$240" for "$233"; in para. (2), substituted "$345" for "$334"; in para. (3), substituted "$446" for "$432"; and in para. (4), substituted "$446" for "$432" and "$90" for "$87".

1986. Act Jan. 13, 1986 (effective 12/1/85, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted "$251" for "$240", in para. (2), substituted "$356" for "$345"; in para. (3), substituted "$460" for "$446" and, in para. (4), substituted "$460" for "$446" and substituted "$93" for "$90". Although the Act directed that these amendments be executed to paras. (1)-(4), they were executed to paras. (1)-(4) of subsec. (a) in order to effectuate the probable intent of Congress.

Act Oct. 28, 1986, (effective 12/1/86, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted "$251" for "$240", in para. (2), substituted "$361" for "$356", in para. (3), substituted "$467" for "$460", and in para. (4), substituted "$467" and "$94" for "$460" and "$93" respectively.

Such Act further amended the directory language of Act Oct. 24, 1984, (effective as if included in such Act), by directing that the 1984 Act's amendments be executed to subsec. (a) of this section.

1987. Act Dec. 31, 1987 (effective 12/1/87, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in cl. (1), substituted "$261" for "$251", in cl. (2), substituted "$376" for "$361"; in cl. (3), substituted "$486" for "$467", and in cl. (4), substituted "$486" and "$97" for "$467" and "$94", respectively.

1988. Act Nov. 18, 1988 (effective 12/1/88 as provided by § 1106 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted the following: in para. (1), "$271" for "$261"; in para. (2), "$391" for "$376"; in para. (3), "$505" for "$486", and in para. (4), "$505" and "$100" for "$486" and "$97" respectively.

1989. Act Dec. 18, 1989 (effective 12/1/89, as provided by § 106 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted "$284" for "$271", in para. (2), substituted "$409" for "$391", in para. (3), substituted "$529" for "$505", and in para. (4), substituted "$529" and "$105" for "$505" and "$100", respectively.

1991. Act Feb. 6, 1991 (effective 1/1/91, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted "$299" for "$284", in para. (2), substituted "$431" for "$409", in para. (3), substituted "$557" for "$529", and in para. (4), substituted "$557" and "$110" for "$529" and "$105", respectively.

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 413, as 38 USCS § 1313.

Act Nov. 12, 1991 (effective 12/1/91 as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted "$310" for "$299", in para. (2), substituted "$447" for "$431", in para. (3), substituted "$578" for "$557" and, in para. (4), substituted "$578" and "$114" for "$557" and "$110", respectively.
<table>
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<tr>
<th>Year</th>
<th>Act Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>Act Nov. 19, 1997</td>
<td>(effective 12/1/97, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted &quot;$361&quot; for &quot;$327&quot;, in para. (2), substituted &quot;$520&quot; for &quot;$471&quot;, in para. (3), substituted &quot;$675&quot; for &quot;$610&quot; and, in para. (4), substituted &quot;$675&quot; for &quot;$610&quot; and substituted &quot;$132&quot; for &quot;$120&quot;.</td>
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<td>1999</td>
<td>Act Nov. 30, 1999</td>
<td>(effective 12/1/99, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted &quot;$361&quot; for &quot;$327&quot;, in para. (2), substituted &quot;$538&quot; for &quot;$520&quot;, in para. (3), substituted &quot;$699&quot; for &quot;$675&quot;, and, in para. (4), substituted &quot;$699&quot; for &quot;$675&quot; and substituted &quot;$136&quot; for &quot;$132&quot;.</td>
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<td>2001</td>
<td>Act Dec. 21, 2001</td>
<td>(effective 12/1/2001, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted &quot;$397&quot; for &quot;$373&quot;, in para. (2), substituted &quot;$571&quot; for &quot;$538&quot;, in para. (3), substituted &quot;$742&quot; for &quot;$699&quot;, and, in para. (4), substituted &quot;$742&quot; for &quot;$699&quot; and substituted &quot;$143&quot; for &quot;$136&quot;.</td>
</tr>
<tr>
<td>2002</td>
<td>Act Dec. 6, 2002</td>
<td>in subsec. (a), in para. (1), substituted &quot;$402&quot; for &quot;$397&quot;, in para. (2), substituted &quot;$578&quot; for &quot;$571&quot;, in para. (3), substituted &quot;$752&quot; for &quot;$742&quot;, and, in para. (4), substituted &quot;$752&quot; for &quot;$742&quot; and substituted &quot;$145&quot; for &quot;$143&quot;.</td>
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<tr>
<td>2005</td>
<td>Act Nov. 22, 2005</td>
<td>(effective 12/1/2005, as provided by § 2(f) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in para. (1), substituted &quot;$438&quot; for &quot;$410&quot;, in para. (2), substituted &quot;$629&quot; for &quot;$590&quot;, in para. (3), substituted &quot;$819&quot; for &quot;$767&quot;, and, in para. (4), substituted &quot;$819&quot; for &quot;$767&quot; and substituted &quot;$157&quot; for &quot;$148&quot;.</td>
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</table>

Other provisions:

**Effective date of May 21, 1970 amendments.** Act May 21, 1970, P. L. 91-262, § 4, 84 Stat. 256, provides: "The amendments made by sections 2 and 3 of this Act [amending 38 USCS §§ 1313 and 1314] shall become effective on the first day of the second calendar month following the month in which this Act is enacted."


**Disability compensation and dependency and indemnity compensation rate increases, effective Dec. 1, 1995.** For increases in disability compensation and dependency and


Cross References
This section is referred to in 10 USCS § 1049

Research Guide
Am Jur:
60A Am Jur 2d, Pensions and Retirement Funds § 1265

§ 1314. Supplemental dependency and indemnity compensation to children

Discussion and Analysis in the Veterans Benefits Manual

(a) In the case of a child entitled to dependency and indemnity compensation who has attained the age of eighteen and who, while under such age, became permanently incapable of self-support, the dependency and indemnity compensation paid monthly to such child shall be increased by $257.

(b) If dependency and indemnity compensation is payable monthly to a person as a "surviving spouse" and there is a child (of such person's deceased spouse) who has attained the age of eighteen and who, while under such age, became permanently incapable of self-support, dependency and indemnity compensation shall be paid monthly to each such child, concurrently with the payment of dependency and indemnity compensation to the surviving spouse, in the amount of $438.

(c) If dependency and indemnity compensation is payable monthly to a person as a "surviving spouse" and there is a child (of such person's deceased spouse) who has attained the age of eighteen and who, while under the age of twenty-three, is pursuing a course of instruction at an educational institution approved under section 104 of this title [38 USCS § 104], dependency and indemnity compensation shall be paid monthly to each such child, concurrently with the payment of dependency and indemnity compensation to the surviving spouse, in the amount of $218.

Prior law and revision:
This section is based on 38 USC § 1114 (Act Aug. 1, 1956, ch 837, Title II, § 204, 70 Stat. 863).

Amendments:
1963. Act May 15, 1963 (effective 7/1/63, as provided by § 5 of such Act, which appears as 38 USCS § 1311 note), in subsec. (a), substituted "$28" for "$25"; in subsec. (b), substituted "$77" for "$70"; in subsec. (c), substituted "$39" for "$35".

1965. Act Oct. 31, 1965 (effective 12/1/65, as provided by § 9 of such Act, which appears as 38 USCS § 1114 note), in subsec. (c), substituted "twenty-three" for "twenty-one".

1966. Act Nov. 2, 1966 (effective 1/1/67, as provided by § 7(a) of such Act, which appears as 38 USCS § 1315 note), in subsec. (a), substituted "$29" for "$28"; in subsec. (b), substituted "$80" for "$77"; and in subsec. (c), substituted "$41" for "$39".
1970. Act May 21, 1970 (effective 7/1/70, as provided by § 4 of such Act, which appears as 38 USCS § 1313 note), in subsec. (a), substituted "$32" for "$29"; in subsec. (b), substituted "$88" for "$80"; and in subsec. (c), substituted "$45" for "$41".

1971. Act Dec. 15, 1971 (effective 1/1/72, as provided by § 10 of such Act, which appears as 38 USCS § 1311 note), in subsec. (a), substituted "$55" for "$32"; in subsec. (b), substituted "$92" for "$88"; and in subsec. (c), substituted "$47" for "$45".

1974. Act May 31, 1974 (effective 5/1/74, as provided by § 401 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$64" for "$55"; in subsec. (b), substituted "$108" for "$92"; and in subsec. (c), substituted "$62" for "$55".

1975. Act Aug. 5, 1975 (effective 8/1/75, as provided in § 301 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$72" for "$64"; in subsec. (b), substituted "$121" for "$108"; and in subsec. (c), substituted "$62" for "$55".

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in subsec. (a), substituted "such child" for "him" and substituted "$78" for "$72"; in subsec. (b), substituted "person" for "woman", substituted "surviving spouse" for "widow" wherever appearing, substituted "such person's deceased spouse" for "her deceased husband" and substituted "$131" for "$121"; and in subsec. (c), substituted "person" for "woman", substituted "surviving spouse" for "widow" wherever appearing, substituted "such person's deceased spouse" for "her deceased husband" and substituted "$67" for "$62".

1977. Act Oct. 3, 1977 (effective 10/1/77, as provided by § 501 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$83" for "$78"; in subsec. (b), substituted "$140" for "$131"; and in subsec. (c), substituted "$71" for "$67".

1978. Act Oct. 18, 1978 (effective 1/1/78, as provided by § 401(a) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$89" for "$83"; in subsec. (b), substituted "$150" for "$140"; and in subsec. (c), substituted "$76" for "$71".

1979. Act Nov. 28, 1979 (effective 1/1/79, as provided by § 601(a)(1) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$98" for "$89"; in subsec. (b), substituted "$165" for "$150"; and in subsec. (c), substituted "$84" for "$76".

1980. Act Oct. 7, 1980 (applicable as provided by § 601(a) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$112" for "$98"; in subsec. (b), substituted "$189" for "$165"; and in subsec. (c), substituted "$96" for "$84".

1981. Act Oct. 17, 1981 (effective 10/1/81, as provided by § 701(a) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$125" for "$112"; in subsec. (b), substituted "$210" for "$189"; and in subsec. (c), substituted "$107" for "$96".

1982. Act Oct. 14, 1982 (effective 10/1/82, as provided by § 108 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$134" for "$125"; in subsec. (b), substituted "$225" for "$210"; and in subsec. (c), substituted "$114" for "$107".

1984. Act Oct. 24, 1984 (effective 4/1/84, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$139" for "$134"; in subsec. (b), substituted "$233" for "$225"; and in subsec. (c), substituted "$118" for "$114".

Act Oct. 24, 1984 (effective 12/1/84, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$143" for "$139"; in subsec. (b), substituted "$240" for "$233"; and in subsec. (c), substituted "$122" for "$118".

1986. Act Jan. 13, 1986 (effective 12/1/85, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$147" for "$143"; in subsec. (b), substituted "$247" for "$240"; and in subsec. (c), substituted "$126" for "$122".
Act Oct. 28, 1986 (effective 12/1/86, as provided by § 107 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$149" for "$147"; in subsec. (b), substituted "$251" for "$247"; and in subsec. (c), substituted "$128" for "$126".

1987. Act Dec. 31, 1987 (effective 12/1/87, as provided by § 107 of such Act, which appears as a note to this section), in subsec. (a), substituted "$155" for "$149"; in subsec. (b), substituted "$261" for "$251"; and in subsec. (c), substituted "$133" for "$128".

1988. Act Nov. 18, 1988 (effective 12/1/88, as provided by § 1106 of such Act, which appears as 38 USCS § 1114 note) substituted the following: in subsec. (a), "$161" for "$155"; in subsec. (b), "$271" for "$261"; and in subsec. (c), "$138" for "$133".

1989. Act Dec. 18, 1989 (effective 12/1/89, as provided by § 1106 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$169" for "$161"; in subsec. (b), substituted "$284" for "$271"; and in subsec. (c), substituted "$144" for "$138".

1991. Act Feb. 6, 1991 (effective 1/1/91, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$178" for "$169"; in subsec. (b), substituted "$284" for "$271"; and in subsec. (c), substituted "$151" for "$144".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 414, as 38 USCS § 1314.

Act Nov. 12, 1991 (effective 12/1/91 as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$185" for "$178"; in subsec. (b), substituted "$299" for "$284"; and in subsec. (c), substituted "$151" for "$144".


Act Nov. 11, 1993 (effective 12/1/93, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$195" for "$191"; in subsec. (b), substituted "$327" for "$319"; and, in subsec. (c), substituted "$166" for "$162".

1997. Act Nov. 19, 1997 (effective 12/1/97, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$215" for "$195"; in subsec. (b), substituted "$361" for "$327"; and, in subsec. (c), substituted "$182" for "$166".

1999. Act Nov. 30, 1999 (effective 12/1/99, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$222" for "$215"; in subsec. (b), substituted "$373" for "$361"; and, in subsec. (c), substituted "$188" for "$182".

2001. Act Dec. 21, 2000 (effective 12/1/2001, as provided by § 7 of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$234" for "$222"; in subsec. (b), substituted "$397" for "$373"; and, in subsec. (c), substituted "$199" for "$188".

2002. Act Dec. 6, 2002, in subsec. (a), substituted "$237" for "$234"; in subsec. (b), substituted "$402" for "$397"; and, in subsec. (c), substituted "$201" for "$199".


2005. Act Nov. 22, 2005 (effective 12/1/2005, as provided by § 2(f) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$257" for "$241"; in subsec. (b), substituted "$438" for "$410"; and, in subsec. (c), substituted "$218" for "$205".

Other provisions:


Disability compensation and dependency and indemnity compensation rate increases, effective Dec. 1, 1992. For increases in disability compensation and dependency and


Cross References
This section is referred to in 7 USCS § 2012

Dependency and indemnity compensation benefit is payable to school child under 38 USCS § 414 [now 38 USCS 1314], if child is otherwise eligible, notwithstanding continuing receipt of Bureau of Employees' Compensation benefits by widow. 1961 ADVA 974

Board of Veterans' Appeals did not err in concluding claim for recognition as child of veteran on basis of permanent incapacity for self-support before reaching age of 18 years pursuant to 38 USCS § 1314 was not well-grounded under 38 USCS § 5107(a) since claim involves issues of medical causation requiring submission of medical evidence to establish claimant's condition of permanent incapacity is plausible or well-grounded and claimant did not present such evidence; although medical examination reports note treatment for skin conditions, allergic rhinitis, bronchitis, scoliosis, and existence of systolic murmur, and claimant's mother submitted letter reporting claimant had been provided with home teacher due to illness with headaches, record neither contains medical evidence describing claimant's illness nor nature and extent of claimed disability. Cumby v West (1999) 12 Vet App 363, 1999 US App Vet Claims LEXIS 252

Board of Veterans Appeals did not err in its determination that appellant attorney was not entitled to direct payment by Department of Veterans Affairs of 20 percent of veteran's son's past-due dependency and indemnity compensation (DIC) benefits pursuant to his fee agreement with veteran's widow because, although attorney's successful representation of veteran's widow had result of qualifying intervenor for DIC benefits, those benefits for her helpless-adult son under 38 USCS § 1314 were separate and distinct from veteran's widow's DIC benefits under 38 USCS § 1311. Hanlin v Nicholson (2005) 19 Vet App 350, 2005 US App Vet Claims LEXIS 616

§ 1315. Dependency and indemnity compensation to parents

(a) (1) Except as provided in paragraph (2), dependency and indemnity compensation shall be paid monthly to parents of a deceased veteran in the amounts prescribed by this section.

(2) Under regulations prescribed by the Secretary, benefits under this section may be paid less frequently than monthly if the amount of the annual benefit is less than 4 percent of the maximum annual rate payable under this section.

(b) (1) Except as provided in paragraph (4) of this subsection, if there is only one parent, the monthly rate of dependency and indemnity compensation paid to such parent shall be $163, as increased from time to time under section 5312(b)(1) of this title [38 USCS § 5312(b)(1)] and reduced by an amount, based upon the amount of such parent's annual income, determined in accordance with regulations which the Secretary shall prescribe under section 5312(b)(2) of this title [38 USCS § 5312(b)(2)].
(2) In no case may the amount of dependency and indemnity compensation payable to any parent under this subsection be less than $5 monthly.

(3) In no case may dependency and indemnity compensation be paid under paragraph (1) of this subsection to any parent if the annual income of such parent exceeds $4,038, as increased from time to time under section 5312 of this title [38 USCS § 5312].

(4) If there is only one parent and such parent has remarried and is living with such parent's spouse, dependency and indemnity compensation shall be paid to such parent under either paragraph (1) of this subsection or under the formula in subsection (d), whichever will result in the greater amount of such compensation being paid to such parent. In such a case of remarriage the total combined annual income of the parent and such parent's spouse shall be counted in determining the monthly rate of dependency and indemnity compensation under the appropriate formula.

(c) (1) Except as provided in subsection (d) of this section, if there are two parents, but they are not living together, the monthly rate of dependency and indemnity compensation paid to each such parent shall be $115, as increased from time to time under section 5312(b)(1) of this title [38 USCS § 5312(b)(1)] and reduced by an amount, based upon the amount of such parent's annual income, determined in accordance with regulations which the Secretary shall prescribe under section 5312(b)(2) of this title [38 USCS § 5312(b)(2)].

(2) In no case may the amount of dependency and indemnity compensation payable to any parent under this subsection be less than $5 monthly.

(3) In no case may dependency and indemnity compensation be paid under paragraph (1) of this subsection to any parent if the annual income of such parent exceeds $4,038, as increased from time to time under section 5312 of this title [38 USCS § 5312].

(d) (1) If there are two parents who are living together, or if a parent has remarried and is living with such parent's spouse, the monthly rate of dependency and indemnity compensation paid to such parent shall be $109, as increased from time to time under section 5312(b)(1) of this title [38 USCS § 5312(b)(1)] and reduced by an amount, based upon the amount of the combined annual income of the parents or the parent and the parent's spouse, determined in accordance with regulations which the Secretary shall prescribe under section 5312(b)(2) of this title [38 USCS § 5312(b)(2)].

(2) In no case may the amount of dependency and indemnity compensation payable to any parent under this subsection be less than $5 monthly.

(3) In no case may dependency and indemnity compensation be paid under this subsection to a parent if the total combined annual income of the parent and such parent's spouse exceeds $5,430, as increased from time to time under section 5312 of this title [38 USCS § 5312].

(e) The Secretary may require as a condition of granting or continuing dependency and indemnity compensation to a parent that such parent, other than one who has attained seventy-two years of age and has been paid dependency and indemnity compensation during two consecutive calendar years, file for a calendar year with the Secretary (on the form prescribed by the Secretary) a report showing the total income which such parent expects to receive in that year and the total income which such parent received in
the preceding year. The parent or parents shall notify the Secretary whenever there is a material change in annual income.

(f) (1) In determining income under this section, all payments of any kind or from any source shall be included, except--

(A) payments of the six-months' death gratuity;
(B) donations from public or private relief or welfare organizations;
(C) payments under this chapter [38 USCS §§ 1301 et seq.] (except section 1312(a) [38 USCS § 1312(a)]) and chapters 11 and 15 of this title [38 USCS §§ 1101 et seq. and 1501 et seq.] and under the first sentence of section 9(b) of the Veterans' Pension Act of 1959;
(D) lump-sum death payments under title II of the Social Security Act (42 U.S.C. 401 et seq.);
(E) payments of bonus or similar cash gratuity by any State based upon service in the Armed Forces;
(F) payments under policies of servicemembers' group life insurance, United States Government life insurance or national service life insurance, and payments of servicemen's indemnity;
(G) 10 percent of the amount of payments to an individual under public or private retirement, endowment, or similar plans or programs;
(H) amounts equal to amounts paid by a parent of a deceased veteran for--

(i) a deceased spouse's just debts,
(ii) the expenses of the spouse's last illness to the extent such expenses are not reimbursed under chapter 51 of this title [38 USCS §§ 5100 et seq.], and
(iii) the expenses of the spouse's burial to the extent that such expenses are not reimbursed under chapter 23 or chapter 51 of this title [38 USCS §§ 2301 et seq. or 5100 et seq.];
(I) reimbursements of any kind for any casualty loss (as defined in regulations which the Secretary shall prescribe), but the amount excluded under this clause may not exceed the greater of the fair market value or the reasonable replacement value of the property involved at the time immediately preceding the loss;
(J) amounts equal to amounts paid by a parent of a deceased veteran for--

(i) the expenses of the veteran's last illness, and
(ii) the expenses of such veteran's burial to the extent that such expenses are not reimbursed under chapter 23 of this title [38 USCS §§ 2301 et seq.];
(K) profit realized from the disposition of real or personal property other than in the course of a business;
(L) payments received for discharge of jury duty or obligatory civic duties;
(M) payments of annuities elected under subchapter I of chapter 73 of title 10 [10 USCS §§ 1431 et seq.].

(2) Where a fraction of a dollar is involved, annual income shall be fixed at the next lower dollar.

(3) The Secretary may provide by regulation for the exclusion from income under this section of amounts paid by a parent for unusual medical expenses.

(g) The monthly rate of dependency and indemnity compensation payable to a parent shall be increased by $85, as increased from time to time under section 5312 of this title.
[38 USCS § 5312], if such parent is (1) a patient in a nursing home or (2) blind, or so nearly blind or significantly disabled as to need or require the regular aid and attendance of another person.

Prior law and revision:

References in text:
"Section 9(b) of the Veterans' Pension Act of 1959", referred to in this section, is § 9(b) of Act Aug. 29, 1959, P. L. 86-211, which formerly appeared as a note to 38 USCS § 1521, and was repealed by § 306(b)(1) of Act Nov. 4, 1978, P. L. 95-588.

Amendments:
1961. Act Sept. 21, 1961 (effective 10/1/61, as provided by § 3 of such Act, which appears as 38 USCS § 1312 note), in subsec. (g)(1)(C), substituted "412(a)" for "412".

1963. Act May 15, 1963 (effective 7/1/63, as provided by § 5 of such Act, which appears as 38 USCS § 1311 note), in subsec. (b), in the table, substituted "$83" for "$75", substituted "$66" for "$60", substituted "$50" for "$45", substituted "$33" for "$30", and substituted "$17" for "$15"; in subsecs. (c) and (d), in the tables, substituted "$55" for "$50", substituted "$44" for "$40", substituted "$33" for "$30", substituted "$22" for "$20", and substituted "$11" for "$10".

1966. Act Nov. 2, 1966 (effective as provided by § 7 of such Act, which appears as a note to this section), substituted new subsec. (b) for one which read: "(b) Except as provided in subsection (d), if there is only one parent, dependency and indemnity compensation shall be paid to him at a monthly rate equal to the amount under column II of the following table opposite his total annual income as shown in column I:

<table>
<thead>
<tr>
<th>Total annual income</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>$750</td>
<td>$83.</td>
</tr>
<tr>
<td>$750</td>
<td>$66.</td>
</tr>
<tr>
<td>$1,000</td>
<td>$50.</td>
</tr>
<tr>
<td>$1,250</td>
<td>$33.</td>
</tr>
<tr>
<td>$1,500</td>
<td>$17.</td>
</tr>
<tr>
<td>$1,750</td>
<td>No amount payable.&quot;;</td>
</tr>
</tbody>
</table>

in subsec. (c), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Total annual income</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>$750</td>
<td>$55.</td>
</tr>
<tr>
<td>$1,000</td>
<td>$44.</td>
</tr>
</tbody>
</table>
$1,000                       $1,250             $33.
$1,250                       $1,500             $22.
$1,500                       $1,750             $11.
$1,750                       ______             No amount payable.

in subsec. (d), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Total combined annual income</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>More</td>
<td>Equal to or less than--</td>
</tr>
<tr>
<td>$1,000</td>
<td>$55.</td>
</tr>
<tr>
<td>$1,000</td>
<td>$1,350</td>
</tr>
<tr>
<td>$1,350</td>
<td>$1,700</td>
</tr>
<tr>
<td>$1,700</td>
<td>$2,050</td>
</tr>
<tr>
<td>$2,050</td>
<td>$2,400</td>
</tr>
<tr>
<td>$2,400</td>
<td>______</td>
</tr>
</tbody>
</table>

1968. Act March 28, 1968 (effective 1/1/69, as provided by § 6(a) of such Act, which appears as 38 USCS § 1521), in subsec. (b)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Total annual income</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>More</td>
<td>Equal to or less than--</td>
</tr>
<tr>
<td>$800</td>
<td>$87.</td>
</tr>
<tr>
<td>$800</td>
<td>$1,100</td>
</tr>
<tr>
<td>$1,100</td>
<td>$1,300</td>
</tr>
<tr>
<td>$1,300</td>
<td>$1,500</td>
</tr>
<tr>
<td>$1,500</td>
<td>$1,800</td>
</tr>
<tr>
<td>$1,800</td>
<td>______</td>
</tr>
</tbody>
</table>

in subsec. (c), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Total annual income</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>More</td>
<td>Equal to or less than--</td>
</tr>
<tr>
<td>$800</td>
<td>$58.</td>
</tr>
<tr>
<td>1,100</td>
<td>46.</td>
</tr>
<tr>
<td>1,300</td>
<td>35.</td>
</tr>
<tr>
<td>1,500</td>
<td>23.</td>
</tr>
<tr>
<td>1,800</td>
<td>12.</td>
</tr>
<tr>
<td>1,800</td>
<td>______</td>
</tr>
</tbody>
</table>

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and in subsec. (d), substituted new table for one which read:

<table>
<thead>
<tr>
<th>&quot;Column I&quot;</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total combined annual income</strong></td>
<td></td>
</tr>
<tr>
<td><strong>More than--</strong></td>
<td><strong>Equal to or but less than--</strong></td>
</tr>
<tr>
<td>$1,000</td>
<td>$1,000 $58</td>
</tr>
<tr>
<td>1,500</td>
<td>1,500 46</td>
</tr>
<tr>
<td>2,000</td>
<td>2,000 35</td>
</tr>
<tr>
<td>2,500</td>
<td>2,500 23</td>
</tr>
<tr>
<td>3,000</td>
<td>3,000 12</td>
</tr>
<tr>
<td><strong>$1,000</strong></td>
<td>$58</td>
</tr>
<tr>
<td><strong>$1,500</strong></td>
<td>46</td>
</tr>
<tr>
<td><strong>2,000</strong></td>
<td>35</td>
</tr>
<tr>
<td><strong>2,500</strong></td>
<td>23</td>
</tr>
<tr>
<td><strong>3,000</strong></td>
<td>12</td>
</tr>
</tbody>
</table>

**1970.** Act Dec. 24, 1970 (effective 1/1/71, as provided by § 10(a) of such Act, which appears as 38 USCS § 1521 note), in subsec. (b)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>&quot;Column I&quot;</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total annual income</strong></td>
<td></td>
</tr>
<tr>
<td><strong>More than--</strong></td>
<td><strong>Equal to or but less than--</strong></td>
</tr>
<tr>
<td>$800</td>
<td>$800 $87</td>
</tr>
<tr>
<td>900</td>
<td>900 81</td>
</tr>
<tr>
<td>1,000</td>
<td>1,000 75</td>
</tr>
<tr>
<td>1,000</td>
<td>1,100 69</td>
</tr>
<tr>
<td>1,100</td>
<td>1,200 62</td>
</tr>
<tr>
<td>1,200</td>
<td>1,300 54</td>
</tr>
<tr>
<td>1,300</td>
<td>1,400 46</td>
</tr>
<tr>
<td>1,400</td>
<td>1,500 38</td>
</tr>
<tr>
<td>1,500</td>
<td>1,600 31</td>
</tr>
<tr>
<td>1,600</td>
<td>1,700 25</td>
</tr>
<tr>
<td>1,700</td>
<td>1,800 18</td>
</tr>
<tr>
<td>1,800</td>
<td>1,900 12</td>
</tr>
<tr>
<td>1,900</td>
<td>2,000 10&quot;;</td>
</tr>
</tbody>
</table>

in subsec. (c), substituted new table for one which read:

<table>
<thead>
<tr>
<th>&quot;Column I&quot;</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total annual income</strong></td>
<td></td>
</tr>
<tr>
<td><strong>More than--</strong></td>
<td><strong>Equal to or but less than--</strong></td>
</tr>
<tr>
<td>$800</td>
<td>$800 $58</td>
</tr>
<tr>
<td>900</td>
<td>900 54</td>
</tr>
<tr>
<td>1,000</td>
<td>1,000 50</td>
</tr>
<tr>
<td>1,000</td>
<td>1,100 46</td>
</tr>
<tr>
<td>1,100</td>
<td>1,200 41</td>
</tr>
<tr>
<td>1,200</td>
<td>1,300 35</td>
</tr>
</tbody>
</table>
in subsec. (d), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Total combined annual income</th>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>More</td>
<td>Equal to or less than--</td>
<td></td>
</tr>
<tr>
<td>$1,000</td>
<td>$1,000</td>
<td>$58</td>
</tr>
<tr>
<td>1,100</td>
<td>1,200</td>
<td>54</td>
</tr>
<tr>
<td>1,200</td>
<td>1,300</td>
<td>52</td>
</tr>
<tr>
<td>1,300</td>
<td>1,400</td>
<td>49</td>
</tr>
<tr>
<td>1,400</td>
<td>1,500</td>
<td>46</td>
</tr>
<tr>
<td>1,500</td>
<td>1,600</td>
<td>44</td>
</tr>
<tr>
<td>1,600</td>
<td>1,700</td>
<td>42</td>
</tr>
<tr>
<td>1,700</td>
<td>1,800</td>
<td>40</td>
</tr>
<tr>
<td>1,800</td>
<td>1,900</td>
<td>38</td>
</tr>
<tr>
<td>1,900</td>
<td>2,000</td>
<td>35</td>
</tr>
<tr>
<td>2,000</td>
<td>2,100</td>
<td>33</td>
</tr>
<tr>
<td>2,100</td>
<td>2,200</td>
<td>31</td>
</tr>
<tr>
<td>2,200</td>
<td>2,300</td>
<td>29</td>
</tr>
<tr>
<td>2,300</td>
<td>2,400</td>
<td>26</td>
</tr>
<tr>
<td>2,400</td>
<td>2,500</td>
<td>23</td>
</tr>
<tr>
<td>2,500</td>
<td>2,600</td>
<td>21</td>
</tr>
<tr>
<td>2,600</td>
<td>2,700</td>
<td>19</td>
</tr>
<tr>
<td>2,700</td>
<td>2,800</td>
<td>17</td>
</tr>
<tr>
<td>2,800</td>
<td>2,900</td>
<td>15</td>
</tr>
<tr>
<td>2,900</td>
<td>3,000</td>
<td>12</td>
</tr>
<tr>
<td>3,000</td>
<td>3,100</td>
<td>11</td>
</tr>
<tr>
<td>3,100</td>
<td>3,200</td>
<td>10&quot;</td>
</tr>
</tbody>
</table>
"(2) If there is only one parent, and he has remarried and is living with his spouse, dependency and indemnity compensation shall be paid to him under either the table in subsection (b)(1) or the table in subsection (d), whichever is the greater. In such a case of remarriage the total combined annual income of the parent and his spouse shall be counted in determining the monthly rate of dependency and indemnity compensation under the appropriate table.

"(c) Except as provided in subsection (d), if there are two parents, but they are not living together, dependency and indemnity compensation shall be paid to each at a monthly rate equal to the amount under column II of the following table opposite the total annual income of each as shown in column I:

<table>
<thead>
<tr>
<th>Total annual income</th>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>More than--</td>
<td>$800</td>
<td>$66</td>
</tr>
<tr>
<td>but less than--</td>
<td>900</td>
<td>64</td>
</tr>
<tr>
<td>1,000</td>
<td>1,100</td>
<td>58</td>
</tr>
<tr>
<td>1,100</td>
<td>1,200</td>
<td>54</td>
</tr>
<tr>
<td>1,200</td>
<td>1,300</td>
<td>50</td>
</tr>
<tr>
<td>1,300</td>
<td>1,400</td>
<td>46</td>
</tr>
<tr>
<td>1,400</td>
<td>1,500</td>
<td>41</td>
</tr>
<tr>
<td>1,500</td>
<td>1,600</td>
<td>35</td>
</tr>
<tr>
<td>1,600</td>
<td>1,700</td>
<td>29</td>
</tr>
<tr>
<td>1,700</td>
<td>1,800</td>
<td>23</td>
</tr>
<tr>
<td>1,800</td>
<td>1,900</td>
<td>20</td>
</tr>
<tr>
<td>1,900</td>
<td>2,000</td>
<td>16</td>
</tr>
<tr>
<td>2,000</td>
<td>2,100</td>
<td>14</td>
</tr>
</tbody>
</table>
"(d) If there are two parents who are living together, or if a parent has remarried and is living with his spouse, dependency and indemnity compensation shall be paid to each such parent at a monthly rate equal to the amount under column II of the following table opposite the total combined annual income of the parents, or of the parent and his, spouse, as the case may be, as shown in column I:

<table>
<thead>
<tr>
<th>Total combined annual income</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>More than-- but less than--</td>
<td></td>
</tr>
<tr>
<td>$1,000</td>
<td>$64</td>
</tr>
<tr>
<td>1,100</td>
<td>62</td>
</tr>
<tr>
<td>1,200</td>
<td>60</td>
</tr>
<tr>
<td>1,300</td>
<td>58</td>
</tr>
<tr>
<td>1,400</td>
<td>56</td>
</tr>
<tr>
<td>1,500</td>
<td>54</td>
</tr>
<tr>
<td>1,600</td>
<td>52</td>
</tr>
<tr>
<td>1,700</td>
<td>49</td>
</tr>
<tr>
<td>1,800</td>
<td>46</td>
</tr>
<tr>
<td>1,900</td>
<td>44</td>
</tr>
<tr>
<td>2,000</td>
<td>42</td>
</tr>
<tr>
<td>2,100</td>
<td>40</td>
</tr>
<tr>
<td>2,200</td>
<td>38</td>
</tr>
<tr>
<td>2,300</td>
<td>35</td>
</tr>
<tr>
<td>2,400</td>
<td>33</td>
</tr>
<tr>
<td>2,500</td>
<td>31</td>
</tr>
<tr>
<td>2,600</td>
<td>29</td>
</tr>
<tr>
<td>2,700</td>
<td>27</td>
</tr>
<tr>
<td>2,800</td>
<td>25</td>
</tr>
<tr>
<td>2,900</td>
<td>23</td>
</tr>
<tr>
<td>3,000</td>
<td>21</td>
</tr>
<tr>
<td>3,100</td>
<td>19</td>
</tr>
<tr>
<td>3,200</td>
<td>17</td>
</tr>
<tr>
<td>3,300</td>
<td>14</td>
</tr>
<tr>
<td>3,400</td>
<td>12</td>
</tr>
<tr>
<td>3,500</td>
<td>10&quot;;</td>
</tr>
</tbody>
</table>

in subsec. (g), redesignated para. (2) as para. (3), added a new para. (2); and added subsec. (h).

1972. Act Sept. 21, 1972, substituted new subsec. (g)(1)(M), for one which read: "payments of annuities elected under chapter 73 of title 10."

1973. Act Dec. 6, 1973 (effective 1/1/74, as provided by § 8 of such Act, which appears as 38 USCS § 1521 note), substituted new subsecs. (b)-(d) for ones which read:

"(b)(1) Except as provided in paragraph (2) of this subsection, if there is only one parent, dependency and indemnity compensation shall be paid to him according to the following formula: If annual income is $800 or less the monthly rate of dependency and indemnity compensation shall be $100. For each $1 of annual income in excess of $800 up to and including $1,200, the monthly rate shall be reduced 3 cents; for each $1 of annual income in
excess of $1,200 up to and including $1,600, the monthly rate shall be reduced 4 cents; for each $1 of annual income in excess of $1,600 up to and including $1,900, the monthly rate shall be reduced 5 cents; for each $1 of annual income in excess of $1,900 up to and including $2,100, the monthly rate shall be reduced 6 cents; and for each $1 of annual income in excess of $2,100 up to and including $2,600, the monthly rate shall be reduced 7 cents. No dependency and indemnity compensation shall be paid if annual income exceeds $2,600.

"(2) If there is only one parent and he has remarried and is living with his spouse, dependency and indemnity compensation shall be paid to him under either the formula of paragraph (1) of this subsection or under the formula in subsection (d), whichever is the greater. In such a case of remarriage the total combined annual income of the parent and his spouse shall be counted in determining the monthly rate of dependency and indemnity compensation under the appropriate formula.

"(c) Except as provided in subsection (d), if there are two parents, but they are not living together, dependency and indemnity compensation shall be paid to each according to the following formula: If the annual income of each parent is $800 or less, the monthly rate of dependency and indemnity payable to each shall be $70. For each $1 of annual income in excess of $800 up to and including $1,100, the monthly rate shall be reduced 2 cents; for each $1 of annual income in excess of $1,100 up to and including $1,700, the monthly rate shall be reduced 3 cents; and for each $1 of annual income in excess of $1,700 up to and including $2,600, the monthly rate shall be reduced 4 cents. No dependency and indemnity compensation shall be paid to a parent whose annual income exceeds $2,600.

"(d) If there are two parents who are living together, or if a parent has remarried and is living with his spouse, dependency and indemnity compensation shall be paid to each such parent according to the following formula: If the total combined annual income is $1,000 or less, the monthly rate of dependency and indemnity compensation payable to each parent shall be $67. For each $1 of annual income in excess of $1,000 up to and including $1,300, the monthly rate shall be reduced 1 cent; for each $1 of annual income in excess of $1,300 up to and including $3,400, the monthly rate shall be reduced 2 cents; and for each $1 of annual income in excess of $3,400 up to and including $3,800, the monthly rate shall be reduced 3 cents. No dependency and indemnity compensation shall be paid to either parent if the total combined annual income exceeds $3,800."

1974. Act Dec. 21, 1974 (effective 1/1/75, as provided by § 10 of such Act, which appears as 38 USCS § 1521), substituted new subsecs. (b)-(d) for ones which read:

"(b)(1) Except as provided in paragraph (2) of this subsection, if there is only one parent, dependency and indemnity compensation shall be paid to him according to the following formula: If annual income is $800 or less, the monthly rate of dependency and indemnity compensation shall be $110. For each $1 of annual income in excess of $800 up to and including $1,100, the monthly rate shall be reduced 3 cents; for each $1 of annual income in excess of $1,100 up to and including $1,500, the monthly rate shall be reduced 4 cents; for each $1 of annual income in excess of $1,500 up to and including $1,700, the monthly rate shall be reduced 5 cents; for each $1 of annual income in excess of $1,700 up to and including $2,000, the monthly rate shall be reduced 6 cents; for each $1 of annual income in excess of $2,000 up to and including $2,300, the monthly rate shall be reduced 7 cents; and for each $1 of annual income in excess of $2,300 up to and including $2,600, the monthly rate shall be reduced 8 cents. No dependency and indemnity compensation shall be paid if annual income exceeds $2,600.

"(2) If there is only one parent and he has remarried and is living with his spouse, dependency and indemnity compensation shall be paid to him under either the formula of paragraph (1) of this subsection or under the formula in subsection (d), whichever is the greater. In such a case of remarriage the total combined annual income of the parent and
his spouse shall be counted in determining the monthly rate of dependency and indemnity compensation under the appropriate formula.

“(c) Except as provided in subsection (d), if there are two parents, but they are not living together, dependency and indemnity compensation shall be paid to each according to the following formula: If the annual income of each parent is $800 or less, the monthly rate of dependency and indemnity payable to each shall be $77. For each $1 of annual income in excess of $800 up to and including $1,100, the monthly rate shall be reduced 2 cents; for each $1 of annual income in excess of $1,100 up to and including $1,400, the monthly rate shall be reduced 3 cents; for each $1 of annual income in excess of $1,400 up to and including $2,300, the monthly rate shall be reduced 4 cents; and for each $1 of annual income in excess of $2,300 up to and including $2,600, the monthly rate shall be reduced 5 cents.

"No dependency and indemnity compensation shall be paid to a parent whose annual income exceeds $2,600.

"(d) If there are two parents who are living together, or if a parent has remarried and is living with his spouse, dependency and indemnity compensation shall be paid to each such parent according to the following formula: If the total combined annual income is $1,000 or less, the monthly rate of dependency and indemnity compensation payable to each parent shall be $74. For each $1 of annual income in excess of $1,000 up to and including $1,200, the monthly rate shall be reduced 1 cent; for each $1 of annual income in excess of $1,200 up to and including $2,900, the monthly rate shall be reduced 2 cents; and for each $1 of annual income in excess of $2,900 up to and including $3,800, the monthly rate shall be reduced 3 cents. No dependency and indemnity compensation shall be paid to either parent if the total combined annual income exceeds $3,800."); and in subsec. (h), substituted "$64" for "$55".

1975. Act Dec. 23, 1975 (effective 1/1/1976 as provided by § 302 of such Act), redesignated subsec. (b)(2) as subsec. (b)(4); substituted subsec. (b)(1)-(3) for subsec. (b)(1) which read:

"(b)(1) Except as provided in paragraph (2) of this subsection, if there is only one parent, dependency and indemnity compensation shall be paid to him according to the following formula: If annual income is $800 or less, the monthly rate of dependency and indemnity compensation shall be $123. For each $1 of annual income in excess of $800 up to and including $1,000, the monthly rate shall be reduced 3 cents; for each $1 of annual income in excess of $1,000 up to and including $1,300, the monthly rate shall be reduced 4 cents; for each $1 of annual income in excess of $1,300 up to and including $1,600, the monthly rate shall be reduced 5 cents; for each $1 of annual income in excess of $1,600 up to and including $1,800, the monthly rate shall be reduced 6 cents; for each $1 of annual income in excess of $1,800 up to and including $2,000, the monthly rate shall be reduced 7 cents; and for each $1 annual income in excess of $2,000 up to and including $3,000, the monthly rate shall be reduced 8 cents; but in no event shall the monthly rate of dependency and indemnity compensation be less than $4. No dependency and indemnity compensation shall be paid if annual income exceeds $3,000."; in subsec. (b)(4), as redesignated, substituted "such parent" for "he" preceding "has remarried", substituted "such parent's" for "his" wherever appearing, and substituted "such parent" for "him" following "paid to"; substituted new subsecs. (c) and (d) for ones which read:

"(c) Except as provided in subsection (d), if there are two parents, but they are not living together, dependency and indemnity compensation shall be paid to each according to the following formula: If the annual income of each parent is $800 or less, the monthly rate of dependency and indemnity payable to each shall be $86. For each $1 of annual income in excess of $800 up to and including $1,100, the monthly rate shall be reduced 2 cents; for each $1 of annual income in excess of $1,100 up to and including $1,400, the monthly rate shall be reduced 3 cents; for each $1 of annual income in excess of $1,400 up to and including $2,300, the monthly rate shall be reduced 4 cents; and for each $1 of annual income in excess of $2,300 up to and including $2,600, the monthly rate shall be reduced 5 cents; but in no event shall the monthly rate of dependency and indemnity compensation be..."
less than $4. No dependency and indemnity compensation shall be paid to a parent whose annual income exceeds $3,000.

"(d) If there are two parents who are living together, or if a parent has remarried and is living with his spouse, dependency and indemnity compensation shall be paid to each such parent according to the following formula: If the total combined annual income is $1,000 or less, the monthly rate of dependency and indemnity compensation payable to each parent shall be $83. For each $1 of annual income in excess of $1,000 up to and including $1,100, the monthly rate shall be reduced 1 cent; for each $1 of annual income in excess of $1,100 up to and including $2,500, the monthly rate shall be reduced 2 cents; for each $1 of annual income in excess of $2,500 up to and including $3,500, the monthly rate shall be reduced 3 cents; and for each $1 of annual income in excess of $3,500 up to and including $4,200, the monthly rate shall be reduced 4 cents; but in no event shall the monthly rate of dependency and indemnity compensation be less than $4. No dependency and indemnity compensation shall be paid to either parent if the total combined annual income exceeds $4,200."; in subsec. (e), substituted "the Administrator" for "him" following "each year with" and "form prescribed by"; in subsec. (f) substituted "the Administrator" for "he" preceding "shall deduct"; in subsec. (g)(1)(J)(ii), substituted "such veteran's" for "his"; and in subsec. (h), substituted "$69" for "$64".

1976. Act Sept. 30, 1976 (effective 1/1/77, as provided by § 405(b) of such Act, which appears as 38 USCS § 1521 note), in subsec. (b)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>For each $1 of annual income</th>
<th>$0.00</th>
<th>.03</th>
<th>.04</th>
<th>.05</th>
<th>.06</th>
<th>.08</th>
</tr>
</thead>
<tbody>
<tr>
<td>Which is more</td>
<td>0</td>
<td>$800</td>
<td>1,000</td>
<td>1,200</td>
<td>1,500</td>
<td>1,700</td>
</tr>
<tr>
<td>But not more than</td>
<td>$800</td>
<td>$800</td>
<td>1,000</td>
<td>1,200</td>
<td>1,500</td>
<td>1,700</td>
</tr>
</tbody>
</table>

in subsec. (b)(3), substituted "$3,540" for "$3,300"; in subsec. (c)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>For each $1 of annual income of such parent</th>
<th>$0.00</th>
<th>.02</th>
<th>.04</th>
<th>.05</th>
<th>.06</th>
</tr>
</thead>
<tbody>
<tr>
<td>Which is more</td>
<td>0</td>
<td>$800</td>
<td>1,100</td>
<td>1,600</td>
<td>2,400</td>
</tr>
<tr>
<td>But not more than</td>
<td>$800</td>
<td>$800</td>
<td>1,100</td>
<td>1,600</td>
<td>2,400</td>
</tr>
</tbody>
</table>

in subsec. (c)(3), substituted "$3,540" for "$3,300"; in subsec. (d)(1), substituted new table for one which read:
The monthly rate of dependency and indemnity compensation shall be $142 reduced by-- For each $1 of annual income

<table>
<thead>
<tr>
<th>reduced by</th>
<th>$0.00</th>
<th>.02</th>
<th>.03</th>
<th>.04</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0</td>
<td>$1,000</td>
<td>2,300</td>
<td>3,300</td>
</tr>
<tr>
<td></td>
<td>$1,000</td>
<td>3,300</td>
<td>4,500</td>
<td></td>
</tr>
</tbody>
</table>

in subsec. (d)(3), substituted "$4,760" for "$4,500"; and in subsec. (h), substituted "$74" for "$69".

1977. Act Dec. 2, 1977 (effective 1/1/78, as provided by § 302 of such Act, which appears as 38 USCS § 1122), in subsec. (b)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>reduced by</th>
<th>$0.00</th>
<th>.02</th>
<th>.03</th>
<th>.04</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0</td>
<td>$800</td>
<td>1,000</td>
<td>1,200</td>
</tr>
<tr>
<td></td>
<td>$800</td>
<td>1,000</td>
<td>1,400</td>
<td>1,600</td>
</tr>
<tr>
<td></td>
<td>1,000</td>
<td>1,400</td>
<td>2,300</td>
<td>3,540</td>
</tr>
</tbody>
</table>

in subsec. (b)(3), substituted "$3,770" for "$3,540"; in subsec. (c)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>reduced by</th>
<th>$0.00</th>
<th>.02</th>
<th>.03</th>
<th>.04</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0</td>
<td>$800</td>
<td>1,100</td>
<td>1,300</td>
</tr>
<tr>
<td></td>
<td>$800</td>
<td>1,100</td>
<td>1,300</td>
<td>2,300</td>
</tr>
<tr>
<td></td>
<td>1,100</td>
<td>1,300</td>
<td>2,300</td>
<td>3,540</td>
</tr>
</tbody>
</table>

in subsec. (c)(3), substituted "$3,770" for "$3,540"; in subsec. (d)(1), substituted the table for one which read:

<table>
<thead>
<tr>
<th>reduced by</th>
<th>$0.00</th>
<th>.02</th>
<th>.03</th>
<th>.04</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0</td>
<td>$800</td>
<td>1,100</td>
<td>1,300</td>
</tr>
<tr>
<td></td>
<td>$800</td>
<td>1,100</td>
<td>1,300</td>
<td>2,300</td>
</tr>
<tr>
<td></td>
<td>1,100</td>
<td>1,300</td>
<td>2,300</td>
<td>3,540</td>
</tr>
</tbody>
</table>

in subsec. (c)(3), substituted "$3,770" for "$3,540"; in subsec. (d)(1), substituted the table for one which read:
dependency compensation shall be $96 reduced by-- Which is more But not more
$0.00 0 $1,000
.02 $1,000 2,100
.03 2,100 3,100
.04 3,100 3,800
.05 3,800 4,760"

in subsec. (d)(3), substituted "$5,070" for "$4,760"; and in subsec. (b), substituted "$79" for "$74".

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as 38 USCS § 101 note), substituted new subsec. (b)(1) for one which read:

"(b)(1) Except as provided in paragraph (4) of this subsection, if there is only one parent, dependency and indemnity compensation shall be paid to the parent according to the following formula:

"The monthly rate of dependency and indemnity compensation shall be $152 reduced by-- For each $1 of annual income
$0.00 0 $800
.03 $800 1,000
.05 1,000 1,200
.06 1,200 1,500
.08 1,500 3,770"

in subsec. (b)(3), substituted "$4,038, as increased from time to time under section 3112 of this title" for "$3,770"; in subsec. (b)(4), substituted "paragraph (1) of this subsection or under subsection (d) of this section, whichever will result in the greater amount of such compensation being paid to such parent" for "the formula of paragraph (1) of this subsection or under the formula in subsection (d), whichever is the greater"; substituted new subsec. (c)(1) for one which read:

"(c)(1) Except as provided in subsection (d) of this section, if there are two parents, but they are not living together, dependency and indemnity compensation shall be paid to each parent according to the following formula:

"The monthly rate of dependency and indemnity compensation shall be $107 reduced by-- For each $1 of annual income
$0.00 0 $800
.02 $800 1,100
.05 1,100 2,000
.06 2,000 3,770"
in subsec. (c)(3), substituted "$4,038, as increased from time to time under section 3112 of this title" for "$3,770"; substituted new subsec. (d)(1) for one which read:

"(d)(1) If there are two parents who are living together, or if a parent has remarried and is living with such parent's spouse, dependency and indemnity compensation shall be paid to each such parent according to the following formula:

<table>
<thead>
<tr>
<th>The monthly rate of dependency and indemnity compensation shall be $102 reduced by--</th>
<th>For each $1 of the total combined annual income which is more than--</th>
<th>But not more than--</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$0.00</td>
<td>0</td>
<td>$1,000</td>
</tr>
<tr>
<td>.02</td>
<td>$1,000</td>
<td>2,000</td>
</tr>
<tr>
<td>.03</td>
<td>2,000</td>
<td>2,900</td>
</tr>
<tr>
<td>.04</td>
<td>2,900</td>
<td>3,600</td>
</tr>
<tr>
<td>.05</td>
<td>3,600</td>
<td>5,070</td>
</tr>
</tbody>
</table>

in subsec. (d)(3), substituted "$5,430, as increased from time to time under section 3112 of this title" for "$5,070"; and in subsec. (h), substituted "$85, as increased from time to time under section 3112 of this title," for "$79".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(f)(1) of such Act, which appears as 38 USCS § 5314 note), deleted subsec. (f) which read: If the Administrator ascertains that there have been overpayments to a parent under this section, the Administrator shall deduct such overpayments (unless waived) from any future payments made to such parent under this section."


1988. Act Nov. 18. 1988, in subsec. (f)(1), substituted cl. (I) for one which read: "proceeds of the fire insurance policies;"

1991. Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 415, as 38 USCS § 1315, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

Act Aug. 14, 1991 substituted subsec. (a) for one which read: "(a) Dependency and indemnity compensation shall be paid monthly to parents of a deceased veteran in the amounts prescribed by this section."

1994. Act July 1, 1994, in subsec. (e), substituted "may" for "shall", substituted "for a calendar year" for "each year", substituted "notify the Secretary" for "file with the Secretary a revised report", and deleted "the estimated" following "a material change in".


2006. Act June 1, 2006, in subsec. (g)(2), substituted "blind, or so nearly blind or significantly disabled as to" for "helpless or blind, or so nearly helpless or blind as to".

Other provisions:

"(a) Except section 6 [38 USCS § 1976 note] and as otherwise provided in subsection (b) of this section, this Act [amending this section, and 38 USCS §§ 1313, 1314, 5112] shall take effect on the first day of the second calendar month following the date of enactment of this Act [enacted Nov. 2, 1966].

"(b) Section 2 of this Act [amending subsec. (g)(1) of this section] shall take effect on January 1, 1967, but paragraph (G) of section 1315(g)(1), title 38, United States Code, as added by such section 2 [subsec. (g)(1)(G) of this section], shall not apply to any parent receiving dependency and indemnity compensation on December 31, 1966, or subsequently determined entitled to that benefit for said day, until his contributions to the described plans or programs have been recouped."


Cross References
This section is referred to in 26 USCS § 6103; 38 USCS §§ 1316, 5306, 5312, 5317; 42 USCS § 8624

Research Guide
Am Jur:
60A Am Jur 2d, Pensions and Retirement Funds § 1265

Dependent parent who marries parent of another World War veteran is entitled to payment of increased death compensation provided for parents of 2 or more veterans. 1939 ADVA 442

§ 1316. Dependency and indemnity compensation in cases of prior deaths

(a) (1) Any person who is eligible as a surviving spouse or child for death compensation by reason of a death occurring before January 1, 1957, may receive dependency and indemnity compensation upon application therefor.

(2) Any person who is eligible as a parent, or, but for such person's annual income, would be eligible as a parent, for death compensation by reason of a death occurring before January 1, 1957, may receive dependency and indemnity compensation upon application therefor; however, the annual income limitations established by section 1315 of this title [38 USCS § 1315] shall apply to each such parent.

(b) (1) Whenever the surviving spouse of a veteran has been granted dependency and indemnity compensation by reason of this section, payments to such surviving spouse and to the children of the veteran shall thereafter be made under this chapter [38 USCS §§ 1301 et seq.], and shall not thereafter be made to them by reason of the death of the veteran under (A) other provisions of law administered by the Secretary providing for the
payment of compensation or pension, or (B) subchapter I of chapter 81 of title 5 [5 USCS §§ 8101 et seq.].

(2) Whenever the child or parent of any veteran is granted dependency and indemnity compensation, payments shall not thereafter be made to such child or parent by reason of the death of the veteran under (A) other provisions of law administered by the Secretary providing for the payment of compensation or pension, or (B) subchapter I of chapter 81 of title 5 [5 USCS §§ 8101 et seq.].

(c) If children of a deceased individual are receiving death compensation, and all such children have not applied for dependency and indemnity compensation, (1) paid to each child who has applied therefor shall not exceed the amounts which would be paid if the application had been made by, or on behalf of, all such children, and (2) benefits paid under other provisions of law administered by the Secretary providing for the payment of compensation or pension, or under subchapter I of chapter 81 of title 5 [5 USCS §§ 8101 et seq.], to each child who has not so applied therefor shall not exceed the amounts which would be paid to such child if no such application had been made.

(d) If there are two parents of a deceased individual eligible for benefits by reason of subsection (a), and an application for dependency and indemnity compensation is not made by both parents, (1) dependency and indemnity compensation paid to the parent who applies therefor shall not exceed the amounts which would be paid to such parent if both parents had so applied, and (2) benefits paid under other provisions of law administered by the Secretary providing for the payment of compensation, or under subchapter I of chapter 81 of title 5 [5 USCS §§ 8101 et seq.], to the parent who has not so applied therefor shall not exceed the amounts which would be paid to such parent if no such application had been made.

(e) (1) Except as provided in paragraphs (3) and (4), no person who, on January 1, 1957, was a principal or contingent beneficiary of any payments under the Servicemen's Indemnity Act of 1951 may receive any such payments based upon the death giving rise to such payments after such person has been granted dependency and indemnity compensation based upon that death. No principal or contingent beneficiary who has assigned such beneficiary's interest in payments under the Servicemen's Indemnity Act of 1951 after June 28, 1956, may receive any payments under this chapter [38 USCS §§ 1301 et seq.] based upon the death giving rise to such payments until the portion of the indemnity so assigned is no longer payable to any person.

(2) Where a beneficiary is barred from the receipt of payments under the Servicemen's Indemnity Act of 1951 by virtue of the first sentence of paragraph (1), no payments of the portion of indemnity in which such beneficiary had an interest shall be made to any other beneficiary.

(3) In the case of a child who has applied for dependency and indemnity compensation pursuant to this section or prior corresponding provisions of law, and who is or becomes a beneficiary under the Servicemen's Indemnity Act of 1951 by reason of the death giving rise to such child's eligibility for dependency and indemnity compensation, the Secretary shall determine and pay to such child for each month, or part thereof, payments under this chapter [38 USCS §§ 1301 et seq.] or under such Act, whichever payment the Secretary determines to be the greater amount.
(4) Notwithstanding paragraph (2), where a child receives dependency and indemnity compensation under this chapter [38 USCS §§ 1301 et seq.], and thereafter dies, the portions of servicemen's indemnity in which such child had an interest may be paid (subject to paragraph (3)) to another child of the person by reason of whose death such servicemen's indemnity was payable.

Prior law and revision:
This section is based on 38 USC § 1116 (Act Aug. 1, 1956, ch 837, Title II § 206, 70 Stat. 865).

References in text:

Amendments:
1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in subsec. (a)(1), substituted "surviving spouse" for "widow"; in subsec. (a)(2), substituted "such person" for "his"; in subsec. (b)(1), substituted "surviving spouse" for "widow" and "such surviving spouse" for "her"; in subsec. (c), substituted "such child" for "him"; in subsec. (d), substituted "such parent" for "him"; in subsec. (e), in para. (1), substituted "such person" for "he" and "such beneficiary's" for "his"; and in para. (3), substituted "such child's" for "his" and "the Administrator" for "he" preceding "determines".

1982. Act Oct. 12, 1982, in subssecs. (b), (c), and (d), substituted "subchapter I of chapter 81 of title 5" for "the Federal Employees' Compensation Act" each place it appears.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 416, as 38 USCS § 1316, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing; and, in subsec. (e)(3), substituted "Secretary" for "Administrator".

§ 1317. Restriction on payments under this chapter

(a) Except as provided in subsection (b), no person eligible for dependency and indemnity compensation by reason of any death occurring after December 31, 1956, shall be eligible by reason of such death for any payments under (1) provisions of law administered by the Secretary providing for the payment of death compensation or death pension, or (2) subchapter I of chapter 81 of title 5 [5 USCS §§ 8101 et seq.].

(b) A surviving spouse who is eligible for dependency and indemnity compensation may elect to receive death pension instead of such compensation.

Prior law and revision:
This section is based on 38 USC §§ 823 note, 1118 (Act Aug. 1, 1956, ch 837, Title II, § 208, Title V, § 501(a)(3)(B), 70 Stat. 866, 880).

Amendments:
1970. Act June 25, 1970 (applicable and effective as provided by §§ 13(c), 14(a) of such Act, which appear as notes to this section), in subsec. (a), inserted "(1)", substituted ", or (2) the total amount paid to the widow, children, or parents of such veteran under any such policy is
equal to or exceeds the face value of the policy and such amount paid when added to any amounts paid as death compensation is equal to or less than the total amount which would have been payable in dependency and indemnity compensation following the death of such veteran if such widow, children, or parents had been eligible for such compensation upon the death of such veteran. Any person receiving death compensation at the time he becomes eligible for dependency and indemnity compensation pursuant to clause (2) of the preceding sentence shall continue to receive such death compensation unless he makes application to the Administrator to be paid dependency and indemnity compensation. An election by such person to receive dependency and indemnity compensation shall be final.

1971. Act Dec. 15, 1971 (effective 1/1/72, as provided by § 10 of such Act, which appears as 38 USCS § 1311 note), deleted subsec. (a), which read: "(a) No dependency and indemnity compensation shall be paid to the widow, children, or parents of any veteran dying after April 30, 1957, having in effect at the time of death a policy of United States Government life insurance or National Service Life Insurance under waiver of premiums under section 724 of this title, unless (1) waiver of premiums on such policy was granted pursuant to the first proviso of section 622(a) of the National Service Life Insurance Act of 1940, and the death occurs before the veteran's return to military jurisdiction or within one hundred and twenty days thereafter, or (2) the total amount paid to the widow, children, or parents of such veteran under any such policy is equal to or exceeds the face value of the policy and such amount paid when added to any amounts paid as death compensation is equal to or less than the total amount which would have been payable in dependency and indemnity compensation following the death of such veteran if such widow, children, or parents had been eligible for such compensation upon the death of such veteran. Any person receiving death compensation at the time he becomes eligible for dependency and indemnity compensation pursuant to clause (2) of the preceding sentence shall continue to receive such death compensation unless he makes application to the Administrator to be paid dependency and indemnity compensation. An election by such person to receive dependency and indemnity compensation shall be final.

Other provisions:

Application of amendment made by § 13(a) of Act June 25, 1970. Act June 25, 1970, P. L. 91-291, § 13(c), 84 Stat. 332, provides: "No dependency and indemnity compensation shall be payable to any person by virtue of the amendments made by subsection (a) of this section [amending subsec. (a) of this section by adding clause (2)] for any person prior to the effect date of this Act."

Dependency and indemnity compensation; eligibility. Act Dec. 15, 1971, P. L. 92-197, § 8, 85 Stat. 662, provides: "Any person who before January 1, 1972, was not eligible for dependency and indemnity compensation under such title by reason of the provisions of the prior section 417(a) of title 38, United States Code, may elect, in such manner as the Administrator of Veterans' Affairs shall prescribe, to receive dependency and indemnity compensation, and an election so made shall be final. A person receiving, or entitled to receive, death compensation on December 31, 1971, shall continue to receive death compensation, if otherwise eligible, in the absence of an election to receive dependency and indemnity compensation.".

Research Guide

Am Jur:

60A Am Jur 2d, Pensions and Retirement Funds § 1265

§ 1318. Benefits for survivors of certain veterans rated totally disabled at time of death

1Discussion and Analysis in the Veterans Benefits Manual

(a) The Secretary shall pay benefits under this chapter [38 USCS §§ 1301 et seq.] to the surviving spouse and to the children of a deceased veteran described in subsection (b) of this section in the same manner as if the veteran's death were service connected.

(b) A deceased veteran referred to in subsection (a) of this section is a veteran who dies, not as the result of the veteran's own willful misconduct, and who was in receipt of or entitled to receive (or but for the receipt of retired or retirement pay was entitled to receive) compensation at the time of death for a service-connected disability rated totally disabling if:

(1) the disability was continuously rated totally disabling for a period of 10 or more years immediately preceding death;

(2) the disability was continuously rated totally disabling for a period of not less than five years from the date of such veteran's discharge or other release from active duty; or

(3) the veteran was a former prisoner of war who died after September 30, 1999, and the disability was continuously rated totally disabling for a period of not less than one year immediately preceding death.

(c) Benefits may not be paid under this chapter [38 USCS §§ 1301 et seq.] by reason of this section to a surviving spouse of a veteran unless--

(1) the surviving spouse was married to the veteran for one year or more immediately preceding the veteran's death; or

(2) a child was born of the marriage or was born to them before the marriage.

(d) If a surviving spouse or a child receives any money or property of value pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of, any cause of action for damages for the death of a veteran described in subsection (a) of this section benefits under this chapter [38 USCS §§ 1301 et seq.] payable to such surviving spouse or child by virtue of this section shall not be paid for any month following a month in which any such money or property is received until such time as the total
amount of such benefits that would otherwise have been payable equals the total of the amount of the money received and the fair market value of the property received.

(e) For purposes of sections 1448(d) and 1450(c) of title 10 [10 USCS §§ 1448(d) and 1450(c)], eligibility for benefits under this chapter [38 USCS §§ 1301 et seq.] by virtue of this section shall be deemed eligibility for dependency and indemnity compensation under section 1311(a) of this title [38 USCS § 1311(a)].

Amendments:

1989. Act Dec. 18, 1989, in subsec. (c)(1), substituted "one year" for "two years".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 418, as 38 USCS § 1318, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

1999. Act Nov. 30, 1999, in subsec. (b), in the introductory matter, substituted "rated totally disabling if-" for "that either-", in para. (1), inserted "the disability" and deleted "or" after "death;", in para. (2), substituted "the disability was continuously rated totally disabling" for "if so rated for a lesser period, was so rated continuously" and substituted ``; or" for a concluding period, and added para. (3).

2000. Act Nov. 1, 2000, in subsec. (b)(3), substituted "not less than" for "not later than".

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3

1. Generally
2. Duration requirement
3. Evidence
4. Prior rating decisions
5. Damages actions
6. Miscellaneous

1. Generally

There is no legal basis for 70 year-old appellant to be paid dependency and indemnity compensation pursuant to 38 USCS § 1310(a) or 38 USCS § 1318, or to be paid accrued benefits under 38 USCS § 5121(a), since 38 USCS 101(4)(A) excludes from category of "child" anyone who is more than 23 years of age. Burris v Principi (2001) 15 Vet App 348, 2001 US App Vet Claims LEXIS 1498

2. Duration requirement

Language of statute and implementing regulations permit award of DIC benefits where deceased veteran's total disability status could be established on basis of clear and unmistakable error in prior rating action which had caused veteran to fall short of meeting duration requirements. Damrel v Brown (1994) 6 Vet App 242

Veteran's widow was not entitled to benefits pursuant to 38 USCS § 1318 because veteran was not rated 100 percent disabled due to his schizophrenia upon his discharge from service; 100 percent rating did not occur until 13 months after he was discharged from service. Ruiz v Gober (1997) 10 Vet App 352

3. Evidence

Board's error in not applying former POW presumptions, hence denying surviving spouse's application for DIC benefits, was not clear and unmistakable error since application would not

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assist appellant in proving that veteran was totally disabled due to psychiatric disorder for at least ten years prior to his death: presumption is intended only to assist in proving service connection, not as means of increasing disability rating once service connection is established. Allin v Brown (1994) 6 Vet App 207

Widow was not entitled to DIC payments without presenting new and material evidence since statute and its implementing regulations were in effect at time RO first decided appellant's DIC claim, hence no new substantive right was created after her claim was first decided. Green v Brown (1997) 10 Vet App 111

Widow presented well-grounded claim for DIC because she presented evidence that veteran was injured in service in 1944 and that he was rated 100 percent disabled thereafter, albeit by service department, and that he remained so rated until his death in 1992. Wingo v West (1998) 11 Vet App 307

Widow's claim for dependency and indemnity compensation would be remanded to determine whether veteran, based upon evidence in his claims file or in Veterans' Administration [now Department of Veterans Affairs] custody prior to his death, would have been entitled to receive total disability rating for ten years immediately preceding his death. Weaver v West (1999) 12 Vet App 229, op withdrawn on other grounds, motion den, app dismd (1999, US) 1999 US App Vet Claims LEXIS 423

4. Prior rating decisions

Law of case doctrine precluded review of widow's claim of clear and unmistakable error in RO's rating for deceased veteran's service-connected disabilities since court had already determined that Board did not err in finding no clear and unmistakable error in RO's decision. Allin v Brown (1997) 10 Vet App 55

Decision denying spouse's entitlement to compensation under 38 USCS § 1318(b)(1) because veteran was not rated totally disabled for minimum period of 10 years prior to death is affirmed where Board supported its finding pursuant to 38 USCS § 7104(d)(1) that evidence presented by veteran's treating physician, though new and material, does not show that there was clear and unmistakable error in previous rating decisions since physician began treating veteran within 10-year period prior to veteran's death. McNaron v Brown (1997) 10 Vet App 61, affd without op sub nom McNaron v Gober (1997, CA FC) 121 F.3d 728, reported in full (1997, CA FC) 1997 US App LEXIS 22480

Where prior final Veterans' Administration [now Department of Veterans Affairs] determination had denied veteran total disability rating, so that veteran had not been rated totally disabled for 10 continuous years prior to his or her death, survivor under 38 USCS § 1318(b) must demonstrate clear and unmistakable error in prior Veterans' Administration [now Department of Veterans Affairs] determination in order to establish eligibility under § 1318(b)(1). Marso v West (1999) 13 Vet App 260, 1999 US App Vet Claims LEXIS 1392, remanded on other grounds (2001, CA FC) 17 Fed Appx 994, on remand, remanded (2002) 15 Vet App 406, 2002 US App Vet Claims LEXIS 21

To raise clear and unmistakable error theory in dependency and indemnity compensation claim under 38 USCS § 1318(b)(1), claimant must provide date or approximate date of decision sought to be attacked collaterally, or otherwise provide sufficient detail so as to identify clearly prior decision, and must indicate how, based on evidence of record and law at time of decision, veteran would have been entitled to have prevailed so as to have been receiving total disability rating for ten years immediately preceding veteran's death; to raise hypothetical "entitled to receive" theory, claimant must, prior to Board decision, set forth how, based on evidence in veteran's claims file, or under Veterans' Administration [now Department of Veterans Affairs] control, at time of veteran's death and law then applicable, veteran would have been entitled to total disability rating for ten years immediately preceding veteran's death. Cole v West (1999) 13 Vet App 268, 1999 US App Vet Claims LEXIS 1391

5. Damages actions
Veteran’s widow’s benefits under 38 USCS § 1318 will not be suspended, where widow did not prevail on any wrongful death claim, because suspension of § 1318 benefits is warranted only if award of damages is "based upon . . . any cause of action for damages for death of veteran" and damages award here is not linked to death of veteran. Parkins v United States (1993, DC Conn) 842 F Supp 617

38 USCS § 1318(d) does not distinguish between economic and noneconomic damages and surviving spouse's dependency and indemnity compensation benefits will be offset by amount of settlement under Federal Tort Claims Act for wrongful death of veteran despite contention that dependency and indemnity compensation payments are intended to compensate only for economic losses and that majority of settlement was for noneconomic losses. Bryan v West (2000) 13 Vet App 482, 2000 US App Vet Claims LEXIS 362

6. Miscellaneous

Veteran’s widow was not entitled to benefits pursuant to 38 USCS § 1318 because veteran was not rated 100 percent disabled due to his schizophrenia upon his discharge from service; 100 percent rating did not occur until 13 months after he was discharged from service. Ruiz v Gober (1997) 10 Vet App 352

Widow of World War II veteran was entitled to adjudication of her 38 USCS § 1318 DIC claim under law and regulation in effect when she brought that claim since it was more favorable to adjudication of claim and Secretary in changing regulation did not make new regulation retroactive; hence, widow was entitled to adjudication of her claim as though it were claim brought by veteran prior to his death and without regard to BVA decision made during veteran's lifetime regarding his claim of total disability based on individual unemployability. Carpenter v Gober (1998) 11 Vet App 140

"Hypothetically entitled to receive" theory constituted substantive right at time that appellant's claim was pending before Department of Veterans Affairs (VA) in that Green/Carpenter/Wingo were in effect on day before new regulation was promulgated and were binding on VA in its adjudication process; to apply amended 38 CFR § 3.22 to her claim would thus have taken away substantive right that existed at time regulation was promulgated, and accordingly, VA's application of amended § 3.22 to her case had "retroactive effect." Rodriguez v Nicholson (2005) 19 Vet App 275, 2005 US App Vet Claims LEXIS 523

It would have been fundamentally unfair to claimant to apply Cole pleading requirement when Secretary of Veterans Affairs had provided her no notice of evidence needed to substantiate "hypothetically . . . entitled to receive" basis for her 38 USCS § 1318 dependency and indemnity compensation claim; hence, her failure to meet Cole specificity requirement for pleading "hypothetically entitled to receive" § 1318 claim was not dispositive of appeal. Rodriguez v Nicholson (2005) 19 Vet App 275, 2005 US App Vet Claims LEXIS 523

§ 1321. Certifications with respect to pay grade
§ 1322. Certifications with respect to social security entitlement
§ 1323. Certifications with respect to circumstances of death

SUBCHAPTER III. CERTIFICATIONS

The Secretary concerned shall, at the request of the Secretary, certify to the Secretary the pay grade of deceased persons with respect to whose deaths applications for benefits are filed under this chapter [38 USCS §§ 1301 et seq.]. The certification of the Secretary concerned shall be binding upon the Secretary.

Prior law and revision:
This section is based on 38 USC § 1101(11)(D), (F) (Act Aug. 1, 1956, ch 837, Title I, § 102(11)(D), (F), 70 Stat. 861).

Amendments:

1969. Act Oct. 27, 1969 (effective 12/1/69, as provided by § 8 of such Act, which appears as 38 USCS § 1302 note), substituted new catchline and section for ones which read:

"§ 421. Certifications with respect to basic pay

"(a) The Secretary concerned shall, at the request of the Administrator, certify to him the basic pay, considering rank or grade and cumulative years of service for pay purposes, of deceased persons with respect to whose deaths applications for benefits are filed under this chapter. The certification of the Secretary concerned shall be binding upon the Administrator.

"(b) Whenever basic pay (as defined in section 401 of this title) is increased or decreased, basic pay determined pursuant to this chapter shall increase or decrease accordingly.".

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), substituted "the Administrator" for "him" following "certify to".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 421, as 38 USCS § 1321, and substituted "Secretary" for "Administrator".

§ 1322. Certifications with respect to social security entitlement

(a) Determinations required by section 1312(a) of this title [38 USCS § 1312(a)] (other than a determination required by section 1312(a)(2) of this title [38 USCS § 1312(a)(2)]) as to whether any survivor described in section 1312(a)(3) of this title [38 USCS § 1312(a)(3)] of a deceased individual would be entitled to benefits under section 202 of the Social Security Act (42 U.S.C. 402) for any month and as to the amount of the benefits which would be paid for such month, if the deceased veteran had been a fully and currently insured individual at the time of such veteran's death, shall be made by the Commissioner of Social Security, and shall be certified by the Commissioner to the Secretary upon request of the Secretary.

(b) The Secretary shall pay to the Commissioner of Social Security an amount equal to the costs which will be incurred in making determinations and certifications under subsection (a). Such payments shall be made with respect to the costs incurred during such period (but not shorter than a calendar quarter) as the Secretary and the Commissioner, with the amount of such payments to be made on the basis of estimates made by the Commissioner after consultation with the Secretary. The amount payable for any period shall be increased or reduced to compensate for any underpayment or overpayment, as the case may be, of the costs incurred in any preceding period.

(c) Except with respect to determinations made under subsection (a) of this section, the Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section and section 1312(a) of this title [38 USCS § 1312(a)].

Prior law and revision:

This section is based on 38 USC § 1103(b)-(d) (Act Aug. 1, 1956, ch 837, Title IV, § 405(b)-(d), 70 Stat. 875).

Amendments:
§ 1323. Certifications with respect to circumstances of death

Whenever the Secretary determines on the basis of a claim for benefits filed with the Secretary that a death occurred under the circumstances referred to in section 1476(a) of title 10 [10 USCS § 1476(a)], the Secretary shall certify that fact to the Secretary concerned. In all other cases, the Secretary shall make the determination referred to in such section at the request of the Secretary concerned.

Prior law and revision:

This section is based on 38 USC § 1133(b) (Act Aug. 1, 1956, ch 837, Title III, § 303(b), 70 Stat. 868).

Amendments:

1961. Act Sept. 21, 1961 (effective 10/1/61, as provided by § 3 of such Act, which appears as 38 USCS § 1312 note), in subsec. (a), substituted "412(a)" for "412", substituted "412(a)(2)" for "412(2)" and substituted "412(a)(3)" for "412(3)"; and in subsec. (c), substituted "412(a)" for "412".

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in subsec. (a), substituted "such veteran's" for "his" and "such Secretary" for "him".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 422, as 38 USCS § 1322, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101); in subsec. (a), substituted "Secretary of Veterans Affairs" for "Administrator"; in subsec. (b), substituted "The Secretary shall pay to the Secretary of Health and Human Services" for "Upon the basis of estimates made by the Secretary of Health and Human Services after consultation with the Administrator, the Administrator shall pay to the Secretary", and "as the two Secretaries may prescribe, with the amount of such payments to be made on the basis of estimates made by the Secretary of Health and Human Services after consultation with the Secretary" for "as the Secretary and the Administrator may prescribe"; and, in subsec. (c), substituted "Secretary" for "Administrator".

2003. Act Dec. 16, 2003, in subsec. (a), substituted "Commissioner of Social Security, and shall be certified by the Commissioner to the Secretary upon request of the Secretary." for "Secretary of Health and Human Services, and shall be certified by such Secretary to the Secretary of Veterans Affairs upon request of the Secretary of Veterans Affairs."; and, in subsec. (b), substituted "Commissioner of Social Security" for "Secretary of Health and Human Services", substituted "the Secretary and the Commissioner" for "the two Secretaries", and substituted "made by the Commissioner" for "made by the Secretary of Health and Human Services".
CHAPTER 15.  PENSION FOR NON-SERVICE-CONNECTED
DISABILITY OR DEATH OR FOR SERVICE

SUBCHAPTER I. GENERAL
SUBCHAPTER II. VETERANS' PENSIONS
SUBCHAPTER III. PENSIONS TO SURVIVING SPOUSES AND CHILDREN
SUBCHAPTER IV. ARMY, NAVY, AIR FORCE, AND COAST GUARD MEDAL
OF HONOR ROLL

Explanatory notes:
The bracketed section numbers "1510", "1531", "1544", and "1545" have been inserted to
preserve numerical continuity following the section number redesignations made by Act Aug.
Although Act July 25, 1963, substituted "Army, Navy, Air Force, and Coast Guard." for "Army,
Navy, and Air Force" in the heading to Subchapter IV, "Army, Navy, Air Force, and Coast
Guard" was substituted for "Army, Navy, and Air Force" as the probable intent of Congress.

Amendments:
1959. Act Aug. 29, 1959, P. L. 86-211, § 7(a), 73 Stat. 436 (effective 7/1/60, as provided by §
10 of such Act), substituted item 503 for one which read: "503. Items not considered in
determining income."; added item 506; substituted item 522 for one which read: "522. Income
limitations."; substituted items 541-543 for items 541-545 which read: "541. Widows of World
War I veterans."; "542. Children of World War I veterans. "543. Widows of World War II or
Korean conflict veterans."; "544. Children of World War II or Korean conflict veterans."; "545.
Income limitations.".

of such Act), substituted new item 561 for one which read: "561. Certificate entitling holder
to pension.".

substituted "Army, Navy, Air Force, and Coast Guard." for "Army, Navy, and Air Force", see
Explanatory note.


(effect 10/1/67, as provided by § 405(a) of such Act), substituted new item 521 for one
which read: "521. Veterans of World War I, World War II, or the Korean conflict."; in the
analysis of Subchapter III, substituted "World War I, World War II, the Korean conflict, and the
Vietnam era" for "World War I, World War II and the Korean Conflict", substituted new item
541 for one which read: "541. Widows of World War I, World War II, or Korean conflict
veterans."; substituted new item 542 for one which read: "542. Children of World War I, World
War II, or Korean conflict veterans."; added "Widows of Veterans of All Periods of War", and
added item 544.

1970. Act Dec. 24, 1970, P. L. 91-588, § 9(h), 84 Stat. 1585 (effective 1/1/72, as provided by
§ 10(a) of such Act), in item 521, inserted "the Mexican border period,"; in the part heading
preceding item 541 and in items 541 and 542, inserted "Mexican border period, ".

provided by § 101 of such Act), deleted item 510 which read: "510. Confederate forces
veterans."; in Subchapter III heading, substituted "Surviving Spouses" for "Widows"; deleted
item 531 which read: "531. Widows of Mexican War veterans."; in item 541, substituted
"Surviving spouses" for "Widows"; in the part heading preceding item 544, substituted
"Surviving Spouses" for "Widows".
Act Dec. 23, 1975, P. L. 94-169, Title I, § 106(24), (30), (38), 89 Stat. 1018 (effective 1/1/76, as provided by § 106 of such Act), in items 532, 534, and 536, substituted "Surviving spouses" for "Widows".

1978. Act Nov. 4, 1978, P. L. 95-588, Title I, §§ 104(b), 106(b), 109(b), 110(b), 112(b), 92 Stat. 2499, 2502, 2504, 2505 (effective 1/1/79, as provided by § 401 of such Act), added item 508; substituted new item 521 for one which read: "521. Veterans of the Mexican border period, World War I, World War II, Korean conflict, or the Vietnam era."); substituted new item 541 for one which read: "541. Surviving spouses of Mexican border period, World War I, World War II, Korean conflict, or Vietnam era veterans."); substituted new item 542 for one which read: "542. Children of Mexican border period, World War I, World War II, Korean conflict, or Vietnam era veterans."); deleted the part heading preceding item 544 and item 544 which read: "Surviving Spouses of Veterans of All Periods of War" and "544. Aid and attendance allowance.".

1982. Act Oct. 12, 1982, P. L. 97-295, § 4(14), 96 Stat. 1305 (applicable as provided by § 5 of such Act, which appears as 38 USCS § 101 note), amended the analysis of this chapter by substituting the item relating to section 560 for one which read: "560. Medal of honor roll; persons eligible.".


1986. Oct. 28, 1986, P. L. 99-576, Title VII, § 703(b)(3), 100 Stat. 3303 (effective 10/24/84, as provided by § 703(c) of such Act which appears as 38 USCS § 1313 note), amended the analysis of this chapter by inserting "program of" in item 524.


Act Aug. 6, 1991, P. L. 102-83, § 5(b)(1), 105 Stat. 406, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


Cross References
This chapter is referred to in 26 USCS § 6103; 31 USCS § 3803; 38 USCS §§ 1312, 1315, 1717, 1718, 5125, 5304, 5310, 5317; 42 USCS § 6862

SUBCHAPTER I. GENERAL

§ 1501. Definitions
§ 1502. Determinations with respect to disability
§ 1503. Determinations with respect to annual income
§ 1504. Persons heretofore having a pensionable status
§ 1505. Payment of pension during confinement in penal institutions
§ 1506. Resource reports and overpayment adjustments
§ 1507. Disappearance
§ 1508. Frequency of payment of pension benefits

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§ 1501. Definitions

For the purposes of this chapter [38 USCS §§ 1501 et seq.]-

(1) The term "Indian Wars" means the campaigns, engagements, and expeditions of the United States military forces against Indian tribes or nations, service in which has been recognized heretofore as pensionable service.

(2) The term "World War I" includes, in the case of any veteran, any period of service performed by such veteran after November 11, 1918, and before July 2, 1921, if such veteran served in the active military, naval, or air service after April 5, 1917, and before November 12, 1918.

(3) The term "Civil War veteran" includes a person who served in the military or naval forces of the Confederate States of America during the Civil War, and the term "active military or naval service" includes active service in those forces.

(4) The term "period of war" means the Mexican border period, World War I, World War II, the Korean conflict, the Vietnam era, the Persian Gulf War, and the period beginning on the date of any future declaration of war by the Congress and ending on the date prescribed by Presidential proclamation or concurrent resolution of the Congress.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Explanatory notes:

A prior § 1501 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3101.

Amendments:

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), in para. (2), substituted "such veteran" for "him" preceding "after November 11, 1918".

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as 38 USCS § 101 note), added para. (4).


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 501, as 38 USCS § 1501.

Other provisions:

Elderly veterans and widows. Act Dec. 21, 1974, P. L. 93-527, § 8, 88 Stat. 1705 (effective 1/1/75, as provided by § 10 of such Act), provides:

"(a) The Administrator of Veterans' Affairs shall carry out an original study of the needs and problems of veterans and their widows seventy-two years of age or older. The study shall include (1) a profile of the current income characteristics of such veterans and their widows, describing the proportion and amount of income from all sources and the average necessary
for all necessities such as rent, food, medical care, and other items; (2) an evaluation of the adequacy of the present veterans pension system to meet the needs of such veterans and widows; and (3) actuarial information concerning the present expected mortality rates of such veterans and their widows.

"(b) The Administrator shall report to the Congress and the President not later than one hundred and eighty days after the convening of the first session of the Ninety-fourth Congress the results of the study carried out under this section together with any recommendations for legislative or administrative action to improve the present program of pension benefits for such veterans and widows."

Pension program for nonservice-connected disability or death; report. Act Sept. 30, 1976, P. L. 94-432, Title IV, § 404, 90 Stat. 1372, provides:

"(a) The Congress finds and declares that the pension program for nonservice-connected disability or death, authorized in chapter 15 of title 38, United States Code [38 USCS §§ 1501 et seq.], and administered by the Veterans' Administration--

"(1) does not provide sufficient assistance to meet the needs of some eligible veterans and survivors;

"(2) has developed some inconsistencies, inequities, and anomalies which prevent it from operating in the most efficient and equitable manner; and

"(3) subjects many pensioners annually to reductions in their pensions.

The Congress further finds and declares that it lacks sufficient long range information as to actual and anticipated financial characteristics of potential pensioners (and their families) upon which to estimate costs of existing alternative pension programs.

"(b) No later than October 1, 1977, the Administrator of Veterans' Affairs shall submit a report to Congress and the President. The report shall contain the findings and recommendations of a comprehensive investigation, analysis, and evaluation of existing and alternative nonservice-connected pension programs, and shall include, but not be limited to, the following:

"(1) Income characteristics of veterans and survivors currently in receipt of nonservice-connected pension.

"(2) Actual and anticipated long-term financial characteristics of pensioners including those veterans and survivors (and their families) who may be potentially eligible for benefits under the nonservice-connected pension program during the next 25 years.

"(3) Identification and analysis of existing inequities, anomalies, and inconsistencies contained in the current nonservice-connected pension program.

"(4) Current and proposed income exclusions.

"(5) Particular problems and needs of catastrophically disabled nonservice-connected pensioners.

"(6) Alternative proposals which--

"(A) assure a level of income for eligible veterans at or above the national minimum standard of need;

"(B) treat similarly circumstanced pensioners alike; and

"(C) provide the greatest amount of assistance to those with the greatest amount of need.
“(c) On the basis of the investigation, analysis, and evaluation required to be made in subsection (b), the report shall identify alternative courses of legislative or administrative action (including proposed legislation) and long-range cost estimates therefor which, in the judgment of the Administrator, would result in a more equitable nonservice-connected pension program.”.

**Code of Federal Regulations**

Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18

Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a

Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

**Research Guide**

**Federal Procedure:**

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:309

**Am Jur:**

60A Am Jur 2d, Pensions and Retirement Funds § 1262

77 Am Jur 2d, Veterans and Veterans' Laws § 153

**Law Review Articles:**

Benefits for conscientious objectors. 19 Catholic Lawyer 62, Winter 1973

**§ 1502. Determinations with respect to disability**

Discussion and Analysis in the Veterans Benefits Manual

(a) For the purposes of this chapter [38 USCS §§ 1501 et seq.], a person shall be considered to be permanently and totally disabled if such person is any of the following:

1. A patient in a nursing home for long-term care because of disability.
2. Disabled, as determined by the Commissioner of Social Security for purposes of any benefits administered by the Commissioner.
3. Unemployable as a result of disability reasonably certain to continue throughout the life of the person.
4. Suffering from--
   (A) any disability which is sufficient to render it impossible for the average person to follow a substantially gainful occupation, but only if it is reasonably certain that such disability will continue throughout the life of the person; or
   (B) any disease or disorder determined by the Secretary to be of such a nature or extent as to justify a determination that persons suffering therefrom are permanently and totally disabled.

(b) For the purposes of this chapter [38 USCS §§ 1501 et seq.], a person shall be considered to be in need of a regular aid and attendance if such person is (1) a patient in a nursing home or (2) blind, or so nearly blind or significantly disabled as to need or require the regular aid and attendance of another person.
(c) For the purposes of this chapter [38 USCS §§ 1501 et seq.], the requirement of "permanently housebound" will be considered to have been met when the veteran is substantially confined to such veteran's house (ward or clinical areas, if institutionalized) or immediate premises due to a disability or disabilities which it is reasonably certain will remain throughout such veteran's lifetime.

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Explanatory notes:

Amendments:
1964. Act Oct. 13, 1964 (effective 1/1/65, as provided by § 11(a) of such Act, which appears as 38 USCS § 1503 note), added subsec. (c).

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in subsec. (a), preliminary matter, inserted "sixty-five years of age or older or"; in subsec. (b), inserted "(1) a patient in a nursing home or (2)".

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), in subsec. (a), preliminary matter and subsec. (b), substituted "such person" for "he"; in subsec. (c), substituted "such veteran's" for "his".

1976. Act Sept. 30, 1976 (effective 1/1/77, as provided by § 405(b) of such Act, which appears as 38 USCS § 1521 note), in subsec. (a), preliminary matter, inserted "or became unemployable after age 65,"

1990. Act Nov. 5, 1990 (applicable as provided by § 8002(b) of such Act, which appears as a note to this section), in subsec. (a), substituted the introductory matter for matter which read: "For the purposes of this chapter, a person shall be considered to be permanently and totally disabled if such person is sixty-five years of age or older or became unemployable after age 65, or suffering from--".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 502, as 38 USCS § 1502, and substituted "Secretary" for "Administrator".

2001. Act Dec. 27, 2001 (effective as of 9/17/2001, as provided by § 206(b) of such Act, which appears as a note to this section), in subsec. (a), in the introductory matter, substituted "such person is any of the following:" and paras. (1)-(4) for "such a person is unemployable as a result of disability reasonably certain to continue throughout the life of the disabled person, or is suffering from--

"(1) any disability which is sufficient to render it impossible for the average person to follow a substantially gainful occupation, but only if it is reasonably certain that such disability will continue throughout the life of the disabled person; or

"(2) any disease or disorder determined by the Secretary to be of such nature or extent as to justify a determination that persons suffering therefrom are permanently and totally disabled."
2006. Act June 26, 2006, in subsec. (b)(2), substituted "blind, or so nearly blind or significantly disabled as to" for "helpless or blind, or so nearly helpless or blind as to".

Other provisions:

Applicability of Nov. 5, 1990 amendment. Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle A, § 8002(b), 104 Stat. 1388-342, provides: "The amendment made by subsection (a) [amending subsec. (a) of this section] shall apply with respect to claims filed after October 31, 1990."

Effective date of Dec. 27, 2001 amendment. Act Dec. 27, 2001, P. L. 107-103, Title II, § 206(b), 115 Stat. 991, provides: "The amendment made by subsection (a) [amending subsec. (a) of this section] shall take effect as of September 17, 2001."

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:309

Law Review Articles:

1. Generally
2. Regular aid and attendance
3. Blindness

1. Generally

Words "total disability" in pension laws have technical significance which cannot be disregarded, and courts have no power to increase amount fixed by statute in such cases. Burnett v United States (1885) 116 US 158, 29 L Ed 586, 6 S Ct 327

Secretary has statutory authority to prescribe regulations establishing criteria for determining Veterans' Administration [now Department of Veterans Affairs] pension eligibility based on combination of subjective and objective standards; provisions of 38 USCS § 1502 which provide for determinations based upon objective criteria for certain disabilities to be conclusively presumed to be permanently and totally disabling for pension purposes do not supplant general authority in 38 USCS § 1521, which provides for payment of pension to individual veteran determined to be permanently and totally disabled based upon subjective factors applicable to that veteran. Talley v Derwinski (1992) 2 Vet App 282

Board did not enunciate which standard of 38 USCS § 1502 was being applied to evaluation of veteran's claim for non-service connected disability, did not consider all of veteran's disabilities in its evaluation, and neglected to consider veteran under "average person" test. Brown v Derwinski (1992) 2 Vet App 444

2. Regular aid and attendance

Aid and attendance benefits may be treated as income for purposes of determining extent of Medicaid allowances an eligible veteran or veteran's survivor can receive under home and community-based Medicaid waiver program. Lamore v Ives (1992, CA1 Me) 977 F.2d 713, 39 Soc Sec Rep Serv 153

In evaluating disability, need for regular aid and attendance must be permanent need in order to qualify for higher rate of pension; but term "regular aid and attendance of another person" does not require that individual attention be devoted by such attendant to exclusion of all others. 1953 ADVA 927

3. Blindness
Functional blindness, as distinguished from blindness or near blindness due to organic conditions, if permanent, as determined by medical principles and evidence, meets statutory requirements. 1953 ADVA 927

§ 1503. Determinations with respect to annual income

(a) In determining annual income under this chapter [38 USCS §§ 1501 et seq.], all payments of any kind or from any source (including salary, retirement or annuity payments, or similar income, which has been waived, irrespective of whether the waiver was made pursuant to statute, contract, or otherwise) shall be included except--
   (1) donations from public or private relief or welfare organizations;
   (2) payments under this chapter [38 USCS §§ 1501 et seq.];
   (3) amounts equal to amounts paid by a spouse of a veteran for the expense of such veteran's last illness, and by a surviving spouse or child of a deceased veteran for--
      (A) such veteran's just debts,
      (B) the expenses of such veteran's last illness, and
      (C) the expenses of such veteran's burial to the extent such expenses are not reimbursed under chapter 23 of this title [38 USCS §§ 2301 et seq.];
   (4) amounts equal to amounts paid--
      (A) by a veteran for the last illness and burial of such veteran's deceased spouse or child, or
      (B) by the spouse of a living veteran or the surviving spouse of a deceased veteran for the last illness and burial of a child of such veteran;
   (5) reimbursements of any kind for any casualty loss (as defined in regulations which the Secretary shall prescribe), but the amount excluded under this clause may not exceed the greater of the fair market value or reasonable replacement value of the property involved at the time immediately preceding the loss;
   (6) profit realized from the disposition of real or personal property other than in the course of a business;
   (7) amounts in joint accounts in banks and similar institutions acquired by reason of death of other joint owner;
   (8) amounts equal to amounts paid by a veteran, veterans' spouse, or surviving spouse or by or on behalf of a veteran's child for unreimbursed medical expenses, to the extent that such amounts exceed 5 percent of the maximum annual rate of pension (including any amount of increased pension payable on account of family members but not including any amount of pension payable because a person is in need of regular aid and attendance or because a person is permanently housebound) payable to such veteran, surviving spouse, or child;
   (9) in the case of a veteran or surviving spouse pursuing a course of education or vocational rehabilitation or training, amounts equal to amounts paid by such veteran or surviving spouse for such course of education or vocational rehabilitation or training, including (A) amounts paid for tuition, fees, books, and materials, and (B) in the case of such a veteran or surviving spouse in need of regular aid and attendance, unreimbursed amounts paid for unusual transportation expenses in connection with the pursuit of such course of education or vocational rehabilitation or training, to the extent that such amounts exceed the reasonable expenses which would have been
incurred by a nondisabled person using an appropriate means of transportation (public transportation, if reasonably available); (10) in the case of a child, any current-work income received during the year, to the extent that the total amount of such income does not exceed an amount equal to the sum of--

(A) the lowest amount of gross income for which an income tax return is required under section 6012(a) of the Internal Revenue Code of 1986 [26 USCS § 6012(a)], to be filed by an individual who is not married (as determined under section 7703 of such Code [26 USCS § 7703]), is not a surviving spouse (as defined in section 2(a) of such Code [26 USCS § 2(a)]), and is not a head of household (as defined in section 2(b) of such Code [26 USCS § 2(b)]); and

(B) if the child is pursuing a course of postsecondary education or vocational rehabilitation or training, the amount paid by such child for such course of education or vocational rehabilitation or training, including the amount paid for tuition, fees, books, and materials; and

(11) lump-sum proceeds of any life insurance policy on a veteran, for purposes of pension under subchapter III of this chapter [38 USCS §§ 1531 et seq.].

(b) Where a fraction of a dollar is involved, annual income shall be fixed at the next lower dollar.

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Uncodified section (Act June 29, 1936, ch 867, Title IV, § 403, 49 Stat. 2034).

This section is also based on the following provisions, which were repealed by Act Aug. 10, 1956, ch 1041, § 53, 70A Stat. 641:


References in text:

Explanatory notes:

Amendments:
"(1) payments under laws administered by the Veterans' Administration because of disability or death;

"(2) payments of mustering-out pay;

"(3) payments of the six months' death gratuity;

"(4) annuities under chapter 73 of title 10;

"(5) payments of adjusted compensation; and

"(6) payments of bonus or similar cash gratuity by any State based on service in the Armed Forces.".

1961. Act Sept. 21, 1961 (effective as of the first day of the calendar month which begins after enactment, as provided by § 3 of such Act, which appears as 38 USCS § 1312 note), in para. (3), substituted "412(a)" for "412".

1964. Act Oct. 13, 1964 (applicable and effective as provided by § 11 of such Act, which appears as a note to this section), in para. (6), inserted "10 per centum of the amount of" and deleted "equal to his contributions therefor following "programs"; added paras. (9)-(13).

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in para. (7), introductory matter, inserted "a wife of a veteran for the expenses of his last illness, and by"; in para. (9), inserted "(A)" and added "or (B) by a widow or a wife of a veteran for the last illness and burial of a child of such veteran".

1970. Act Dec. 24, 1970 (effective 1/1/71, as provided by § 10(a) of such Act, which appears as 38 USCS § 1521 note), in para. (4), inserted "servicemen's group life insurance"; in para. (13) substituted a semicolon for a concluding period; and added paras. (14)-(17).

1971. Act Dec. 15, 1971 (effective 1/1/72, as provided by § 6 of such Act, which appears as 38 USCS § 1521 note), designated existing matter as subsec. (a); added subsecs. (b), (c).

1972. Act Sept. 21, 1972, substituted new subsec. (a)(17) for one which read: "(17) payments of annuities elected under chapter 73 of title 10.".

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by §§ 101, 106 of such Act), in subsec. (a)(7), in the introductory matter, substituted "spouse", "such veteran's" and "surviving spouse" for "wife", "his", and "widow", respectively, in subpars. (A)-(C), substituted "such veteran's" for "his"; in subsec. (a)(9)(A), substituted "such veteran's" for "his"; in subsec. (a)(9)(B), substituted "surviving spouse" and "spouse" for "widow" and "wife", respectively; in subsec. (a)(14), substituted "such veteran's surviving spouse" for "his widow"; in subsec. (a)(16), substituted "such employee's" for "his" and inserted "and"; in subsec. (c), substituted "surviving spouse" for "widow".

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as 38 USCS § 101 note), in subsec. (a), deleted para. (1) which read: "(1) payments of the six-months' death gratuity"; redesignated paras. (2) and (3) as paras. (1) and (2), respectively, in para. (2), as redesignated, deleted ", and chapters 11 and 13 (except section 412(a)) of this title" following "under this chapter", deleted paras. (4)-(6) which read:

"(4) payments under policies of servicemen's group life insurance, United States Government life insurance or National Service Life Insurance, and payments of servicemen's indemnity;

"(5) lump sum death payments under subchapter II of chapter 7 of title 42;
"(6) 10 per centum of the amount of payments to an individual under public or private retirement, annuity, endowment, or similar plans or programs;",
redesignated para. (7) as para. (3), added new para. (4), redesignated para. (8) as para. (5), deleted para. (9) which read:

"(9) amounts equal to amounts paid (A) by a veteran for the last illness and burial of such veteran's deceased spouse or child or (B) by a surviving spouse or a spouse of a veteran for the last illness and burial of a child of such veteran;",
redesignated para. (10) as para. (6), deleted paras. (11)-(14) which read:

"(11) payments received for discharge of jury duty or obligatory civic duties;

"(12) payments of educational assistance allowance or special training allowance under chapter 35 of this title;

"(13) payments of bonus or similar cash gratuity by any State based on service in the Armed Forces;

"(14) amounts equal to prepayments on an indebtedness secured by a mortgage, or similar type security instrument, on real property (which was prior to death the principal residence of a veteran and spouse) made by the veteran or such veteran's surviving spouse, after the death of the spouse, during the year of death and the succeeding year, if said indebtedness was in existence at the time of death;",
redesignated para. (15) as para. (7), deleted paras. (16) and (17) which read:

"(16) payments received by a retired employee from such employee's former employer as reimbursement for monthly premiums for supplementary medical insurance benefits for the aged provided by part B of title XVIII of the Social Security Act, as amended; and

"(17) payments of annuities elected under subchapter I of chapter 73 of title 10."

added new paras. (8), (9) and (10); deleted subsec. (c), which read: "(c) The Administrator may provided by regulation for the exclusion from income under this chapter of amounts paid by a veteran, surviving spouse, or child for unusual medical expenses.".


1988. Act Nov. 18, 1988 substituted subsec. (a)(5) for one which read: "proceeds of fire insurance policies.".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 503, as 38 USCS § 1503, and substituted "Secretary" for "Administrator".


Other provisions:


"(a) Except as otherwise provided herein, this Act [amending 38 USCS §§ 1502, 1503, 1506, 1521, 1541, 1542, 1712, and 5304, and appearing in part as 38 USCS § 1521 note] shall take effect on January 1, 1965.

"(b) The amendment to paragraph (6) of section 503 [now § 1503], title 38, United States Code, shall not apply to any individual receiving pension on December 31, 1964, under
chapter 15 of said title [38 USCS §§ 1501 et seq.], or subsequently determined entitled to such pension for said day, until his contributions have been recouped under the provision of that paragraph in effect on December 31, 1964."

Cross References
This section is referred to in 38 USCS §§ 111, 1710, 1710B, 1722A

Research Guide
Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:309
1. Generally
2. Contributions
3. Medical expenses
4. Military retirement pay
5. Waiver
6. Miscellaneous

1. Generally
Person is not entitled to receive one pension under provisions of special act of Congress and another, at same time, under general pension laws. United States v Teller (1883) 107 US 64, 17 Otto 64, 27 L Ed 352, 2 S Ct 39

2. Contributions
Under old or new veterans pension laws, person is entitled to recoup his contributions to Social Security made as result of employment engaged in after commencement of payment of Social Security benefits to him only when there is recomputation by Social Security Administration resulting in higher Social Security benefits. 1962 ADVA 981

Payment received as result of pensioner's withdrawal of contributions to retirement fund are to be considered as income in year received for purposes of improved pension program, regardless of whether interest is included or payment is received in lump sum or in installments. VA GCO 1-82

3. Medical expenses
Certain pension funds paid by Veterans Administration (VA) [now Department of Veterans Affairs] are reimbursement of medical expenses for purpose of state medical care program under 38 USCS § 1503(a)(8) and not mere adjustment to non-VA income as suggested by state and Department of Health and Human Services (HHS), because state may not include in countable income medical reimbursements received under independent federal program; HHS's interpretation is not given customary defense because it turns almost completely on interpretation of Veterans' Administration [now Department of Veterans Affairs] statutes and regulations. Mitson v Coler (1987, SD Fla) 674 F Supp 851

4. Military retirement pay
Congress never intended that 38 USCS § 1503 apply to military retirement pay, which veteran is required to waive under other sections of Title 38, USCS. Peed v Cleland (1981, DC Md) 516 F Supp 469

5. Waiver
Withdrawal of Social Security application after finding of entitlement for purpose of maintaining eligibility for other unreduced Social Security benefit does not constitute waiver under 38 USCS § 1503(a). VA GCO 3-81

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6. Miscellaneous

In case arising under Federal Tort Claims Act, 28 USCS §§ 1346(b) and 2671 et seq., in which veteran was awarded damages for medical malpractice from Department of Veterans Affairs (VA), fact that VA was liable to veteran had very little to do with his right to income-based benefits; while veteran's pension rate would be affected by increase in his annual income, that in itself did not entitle him to damages for loss of benefits. Davis v United States (2004, CA7 Ill) 375 F.3d 590

Lump-sum accrued benefits to which veteran was entitled at his death were excludable from annual income countable for death pension purposes since accrued benefit is derivative in nature and thus paid "under" Chapter 15; at minimum, accrued benefit is paid "under both section 5121 and Chapter 15, and that is sufficient to meet 38 USCS § 1503(a)(2) exclusion. Martin v Brown (1994) 7 Vet App 196

Mineral lease royalties must be considered proceeds of sale of property and are properly excludable from income for pension purposes; but such payments are relevant to evaluation of corpus of claimant’s estate for purposes of net worth limitation under 38 USCS §§ 1522(a) and 1543; and bonus payments and delay rentals received in connection with mineral lease must be considered income of lessor for pension purposes. VA GCO 3-85

§ 1504. Persons heretofore having a pensionable status

The pension benefits of subchapters II and III of this chapter [38 USCS §§ 1510 et seq. and 1531 et seq.] shall, notwithstanding the service requirements of such subchapters, be granted to persons heretofore recognized by law as having a pensionable status.

Prior law and revision:

This section is based on 38 USC § 2404 (Act June 17, 1957, P. L. 85-56, Title IV, Part A, § 404, 71 Stat. 104).

Explanatory notes:


Amendments:


Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:309

1. Women
2. Surviving spouses

1. Women

Women citizens of United States, recognized as having pensionable status by former 38 USC § 471, are entitled to receive benefits. 1935 ADVA 156

Woman citizen employed as reconstruction aid in United States Army prior to November 11, 1918, but who did not embark for service overseas until after November 11, 1918, is entitled to benefits. 1935 ADVA 156-A

2. Surviving spouses

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Contract surgeon served in active military service during Philippine Insurrection, was wounded in such service, and died as result thereof; therefore, his widow is entitled to pension. 1934 ADVA 237

§ 1505. Payment of pension during confinement in penal institutions

(a) No pension under public or private laws administered by the Secretary shall be paid to or for an individual who has been imprisoned in a Federal, State, or local penal institution as a result of conviction of a felony or misdemeanor for any part of the period beginning sixty-one days after such individual's imprisonment begins and ending when such individual's imprisonment ends.

(b) Where any veteran is disqualified for pension for any period solely by reason of subsection (a) of this section, the Secretary may apportion and pay to such veteran's spouse or children the pension which such veteran would receive for that period but for this section.

(c) Where any surviving spouse or child of a veteran is disqualified for pension for any period solely by reason of subsection (a) of this section, the Secretary may (1) if the surviving spouse is so disqualified, pay to the child, or children, the pension which would be payable if there were no such surviving spouse or (2) if a child is so disqualified, pay to the surviving spouse or other children, as applicable, the pension which would be payable if there were no such child.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Explanatory notes:


Amendments:

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), in subsec. (a), substituted "such individual's" for "his" wherever appearing; in subsec. (b), substituted "such veteran's spouse" for "his wife"; in subsec. (c), substituted "surviving spouse" for "widow" wherever appearing.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 505, as 38 USCS § 1505, and substituted "administered by the Secretary" for "administered by the Veterans' Administration" and "Secretary" for "Administrator".

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:309

Provision denying pension benefits to incarcerated veteran is rationally related to legitimate government goals of preventing duplication of subsistence payments and of contraband
§ 1506. Resource reports and overpayment adjustments

As a condition of granting or continuing pension under section 1521, 1541, or 1542 of this title [38 USCS § 1521, 1541, or 1542], the Secretary—

(1) may require from any person who is an applicant for or a recipient of pension such information, proofs, and evidence as the Secretary determines to be necessary in order to determine the annual income and the value of the corpus of the estate of such person, and of any spouse or child for whom the person is receiving or is to receive increased pension (such a child is hereinafter in this subsection referred to as a "dependent child"), and, in the case of a child applying for or in receipt of pension under section 1542 of this title [38 USCS § 1542], hereinafter in this subsection referred to as a "surviving child"), of any person with whom such child is residing who is legally responsible for such child's support;

(2) may require that any such applicant or recipient file for a calendar year with the Department (on such form as may be prescribed for such purpose by the Secretary) a report showing—

(A) the annual income which such applicant or recipient (and any such spouse or dependent child) received during the preceding year, the corpus of the estate of such applicant or recipient (and of any such spouse or dependent child) at the end of such year, and in the case of a surviving child, the income and corpus of the estate of any person with whom such child is residing who is legally responsible for such child's support;

(B) such applicant's or recipient's estimate for the then current year of the annual income such applicant or recipient (and any such spouse or dependent child) expects to receive and of any expected increase in the value of the corpus of the estate of such applicant or recipient (and for any such spouse or dependent child); and

(C) in the case of a surviving child, an estimate for the then current year of the annual income of any person with whom such child is residing who is legally responsible for such child's support and of any expected increase in the value of the corpus of the estate of such person;

(3) shall require that any such applicant or recipient promptly notify the Secretary whenever there is a material change in the annual income of such applicant or recipient (or of any such spouse or dependent child) or a material change in the value of the corpus of the estate of such applicant or recipient (or of any such spouse or dependent child), and in the case of a surviving child, a material change in the annual income or value of the corpus of the estate of any person with whom such child is residing who is legally responsible for such child's support; and

(4) shall require that any such applicant or recipient applying for or in receipt of increased pension on account of a person who is a spouse or child of such applicant or recipient promptly notify the Secretary if such person ceases to meet the applicable definition of spouse or child.
Explanatory notes:

A prior § 1506 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3106.

Amendments:

1964. Act Oct. 13, 1964 (effective 1/1/65, as provided by § 11(a) of such Act, which appears as 38 USCS § 1503 note), in subsec. (a)(2), inserted ``other than a child,``.

1970. Act Dec. 24, 1970 (effective 1/1/1972, as provided by § 10(b) of such Act, which appears as 38 USCS § 1521 note), in subsec. (a)(2), substituted "child or a person who has attained seventy-two years of age and has been paid pension thereunder during two consecutive years,`` for "child;``.

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), in subsec. (a)(1), substituted "the Administrator" for "he"; in subsec. (a)(2), substituted "the Administrator" for "his" and substituted "such person" and "such person's" for "he" and "his", respectively, wherever appearing; in subsec. (a)(3), substituted "such person's" for "his" wherever appearing.

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as 38 USCS § 5314 note)), substituted new subsec. (a) for one which read:

"(a) As a condition of granting or continuing pension under sections 521, 541, or 542 of this title, the Administrator--

"(1) may require from any person applying for, or in receipt of, pension thereunder such information, proofs, or evidence as the Administrator desires in order to determine the annual income and the corpus of the estate of such person;

"(2) shall require that any such person, other than a child or a person who has attained seventy-two years of age and has been paid pension thereunder during two consecutive calendar years, file each year with the Veterans' Administration (on the form prescribed by the Administrator) a report showing the total income which such person received during the preceding year, the corpus of such person's estate at the end of that year, and such person's estimate for the then current year of the total income such person expects to receive and of any expected increase in the corpus of such person's estate; and

"(3) shall require that any such person promptly file a revised report whenever there is a material change in such person's estimated annual income or a material change in such person's estimate of the corpus of such person's estate.".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(f)(1) of such Act, which appears as 38 USCS § 5314 note), redesignated subsec. (a) as the entire section; and deleted subsec. (b) which read: "If there is an overpayment of pension under section 521, 541, or 542 of this title, the amount thereof shall be deducted (unless waived) from any future payments made thereunder to the person concerned.".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 506, as 38 USCS § 1506, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".

1994. Act July 1, 1994, in para. (2), in the introductory matter, substituted "may" for "shall" and substituted "for a calendar year" for "each year"; and, in para. (3), substituted "notify the Secretary" for "file a revised report", deleted "estimated" following "a material change in the" wherever appearing, and deleted "such applicant's or recipient's estimate of" following "or a material change in".

Other provisions:
Effective date of Act Aug. 29, 1959. Act Aug. 29, 1959, P. L. 86-211, § 10, 73 Stat. 436, provides: "This Act [adding this section, among other things; for full classification of this Act, consult USCS Tables volumes] shall take effect on July 1, 1960.".

Cross References

This section is referred to in 38 USCS § 1507

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:309

§ 1507. Disappearance

Where a veteran receiving pension under subchapter II of this chapter [38 USCS §§ 1510 et seq.] disappears, the Secretary may pay the pension otherwise payable to such veteran's spouse and children. In applying the provisions of this section, the Secretary may presume, without reports pursuant to section 1506(a) of this title [38 USCS § 1506(a)], that the status of the veteran at the time of disappearance, with respect to permanent and total disability, income, and net worth, continues unchanged. Payments made to a spouse or child under this section shall not exceed the amount to which each would be entitled if the veteran died of a non-service-connected disability.

Explanatory notes:

A prior § 1507 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3107.

Amendments:

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), deleted ", in his discretion," preceding "may pay"; substituted "such veteran's spouse" for "his wife"; and substituted "spouse" for "wife".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 507, as 38 USCS § 1507, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:309

§ 1508. Frequency of payment of pension benefits

(a) Except as provided under subsection (b) of this section, benefits under sections 1521, 1541, and 1542 of this title [38 USCS §§ 1521, 1541, and 1542] shall be paid monthly.

(b) Under regulations which the Secretary shall prescribe, benefits under sections 1521, 1541, and 1542 of this title [38 USCS §§ 1521, 1541, and 1542] may be paid less frequently than monthly if the amount of the annual benefit is less than 4 percent of the maximum annual rate payable to a veteran under section 1521(b) of this title [38 USCS § 1521(b)].
Explanatory notes:

A prior § 1508 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3108.

Effective date of section:

Act Nov. 4, 1978, P. L. 95-588, Title IV, § 401, 92 Stat. 2511, provided that this section is effective on Jan. 1, 1979.

Amendments:


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 508, as 38 USCS § 1508, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Secretary" for "Administrator" wherever appearing.

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:309

SUBCHAPTER II. VETERANS' PENSIONS

SERVICE PENSION

NON-SERVICE-CONNECTED DISABILITY PENSION

Cross References

This subchapter is referred to in 38 USCS §§ 1504, 1507

SERVICE PENSION

§ 1511. Indian War veterans
§ 1512. Spanish-American War veterans
§ 1513. Veterans 65 years of age and older

The bracketed section number "1510" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

This section (Act Sept. 2, 1958, P. L. 85-857, § 1, 72 Stat. 1135) was repealed by Act Dec. 23, 1975, P. L. 94-169, Title I, § 101(2)(F), 89 Stat. 1014, effective Jan. 1, 1976, as provided by § 101 of Act Dec. 23, 1975. This section provided pensions for persons who served in military or naval forces of the Confederate States of America.

§ 1511. Indian War veterans

(a) The Secretary shall pay to each veteran of the Indian Wars who meets the service requirements of this section a pension at the following monthly rate:
   (1) $101.59; or
   (2) $135.45 if the veteran is in need of regular aid and attendance.
(b) A veteran meets the service requirements of this section if such veteran served in one of the Indian Wars--
   (1) for thirty days or more; or
   (2) for the duration of such Indian War;

in any military organization, whether or not such service was the result of regular muster into the service of the United States, if such service was under the authority or by the approval of the United States or any State.

(c) (1) Any veteran eligible for pension under this section shall, if such veteran so elects, be paid pension at the rates prescribed by section 1521 of this title [38 USCS § 1521], and under the conditions (other than the service requirements) applicable to pension paid under that section to veterans of World War I. If pension is paid pursuant to such an election, the election shall be irrevocable, except as provided in paragraph (2).
   
   (2) The Secretary shall pay each month to each veteran of the Indian Wars who is receiving, or entitled to receive, pension based on a need of regular aid and attendance, whichever amount is greater (A) that provided by paragraph (2) of subsection (a) of this section, or (B) that which is payable to the veteran under section 1521 of this title [38 USCS § 1521] if such veteran has elected, or would be payable if such veteran were to elect, to receive pension under such section pursuant to paragraph (1) of this subsection. Each change in the amount of pension payment required by this paragraph shall be effective as of the first day of the month during which the facts of the particular case warrant such change, and shall be made without specific application therefor.

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Explanatory notes:
A prior § 1511 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3111.

Amendments:

1960. Act July 14, 1960 (effective as provided by § 3 of such Act, which appears as a note to this section), added subsec. (c).

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in subsec. (c), designated existing matter as para. (1), in para. (1), as so designated, inserted ", except as provided in paragraph (2)", and added para. (2).

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), in subsec. (b), introductory matter and subsec. (c), substituted "such veteran" for "he" wherever appearing.
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 511, as 38 USCS § 1511, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

Other provisions:
Effective date of amendments made by Act July 14, 1960. Act July 14, 1960, P. L. 86-670, § 3, 74 Stat. 545, provides: "This Act [amending this section and 38 USCS § 1512] shall take effect on the first day of the second calendar month which begins after the date of enactment of this Act."

Cross References
This section is referred to in 38 USCS §§ 1534, 1535

§ 1512. Spanish-American War veterans

(a) (1) The Secretary shall pay to each veteran of the Spanish-American War who meets the service requirements of this subsection a pension at the following monthly rate:
   (A) $101.59; or
   (B) $135.45 if the veteran is in need of regular aid and attendance.
(2) A veteran meets the service requirements of this section if such veteran served in the active military or naval service--
   (A) for ninety days or more during the Spanish-American War;
   (B) during the Spanish-American War and was discharged or released from such service for a service-connected disability; or
   (C) for a period of ninety consecutive days or more and such period began or ended during the Spanish-American War.
(3) (A) Any veteran eligible for pension under this subsection shall, if such veteran so elects, be paid pension at the rates prescribed by section 1521 of this title [38 USCS § 1521] (except the rate provided under subsection (g) of such section), and under the conditions (other than the service requirements) applicable to pension paid under that section to veterans of a period of war. If pension is paid pursuant to such an election, the election shall be irrevocable.
   (B) The Secretary shall pay each month to each Spanish-American War veteran who is receiving, or entitled to receive, pension based on a need of regular aid and attendance, whichever amount is greater (i) that provided by subparagraph (B) of subsection (a)(1) of this section, or (ii) that which is payable to the veteran under section 1521 of this title [38 USCS § 1521], as in effect on December 31, 1978, under regulations which the Secretary shall prescribe. Each change in the amount of pension payment required by this subparagraph shall be effective as of the first day of the month during which the facts of the particular case warrant such change, and shall be made without specific application therefor.

(b) (1) The Secretary shall pay to each veteran of the Spanish-American War who does not meet the service requirements of subsection (a), but who meets the service requirements of this subsection, a pension at the following monthly rate:
   (A) $67.73; or
   (B) $88.04 if the veteran is in need of regular aid and attendance.
(2) A veteran meets the service requirements of this subsection if such veteran served in the active military or naval service--

(A) for seventy days or more during the Spanish-American War; or

(B) for a period of seventy consecutive days or more and such period began or ended during the Spanish-American War.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Explanatory notes:

A prior § 1512 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3112.

Amendments:

1960. Act July 14, 1960 (effective on the first day of the second calendar month which begins after July 14, 1960, as provided by § 3 of such Act, which appears as 38 USCS § 1511 note), added subsec. (a)(3).

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in subsec. (a)(3), redesignated existing matter as subpara. (A), in subpara. (A), as so redesignated, inserted ", except as provided in subparagraph (B)", added subpara. (B).

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), in subsecs. (a)(2), preliminary matter, (a)(3) and (b)(2), preliminary matter, substituted "such veteran" for "he" wherever appearing.

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as 38 USCS § 101 note), in subsec. (a)(3)(A), inserted "(except the rate provided under subsection (g) of such section)", substituted "a period of war" for "World War I" and deleted ", except as provided in subparagraph (B)" following "irrevocable"; in subsec. (a)(3)(B), substituted ", as in effect on December 31, 1978, under regulations which the Administrator shall prescribe." for "if such veteran has elected, or would be payable if such veteran were to elect, to receive pension under such section pursuant to subparagraph (A) of this paragraph.".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 512, as 38 USCS § 1512, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

Cross References

This section is referred to in 38 USCS §§ 1536, 1537

1. Generally
2. Presumptions
3. Prior misconduct
4. Computation of service
5. Reduction of benefits
1. Generally
Person who served less than 90 days during war with Spain, Philippine Insurrection or Boxer Rebellion is entitled to pension since he was discharged for disease or injury existing prior to entrance into service but which was aggravated by service in line of duty. 1937 ADVA 393

2. Presumptions
Presumption of soundness is not applicable in determining entitlement of Spanish-American War veteran to service pension for nonservice-connected disabilities. 1944 ADVA 558

3. Prior misconduct
Veteran, who was in desertion from prior peacetime service at date of his enlistment in Spanish-American War service, is not thereby barred from receipt of pension. 1935 ADVA 348

4. Computation of service
Time covered by furloughs and leaves of absence granted under General Order No. 130, Adjutant General's Office, 1898, is to be deducted in calculating period of pensionable service during Spanish-American War. 1933 ADVA 131

5. Reduction of benefits
Benefits for veteran, who comes within phrase "or is so helpless as to be in need of regular aid and attendance," who is being maintained by Government in institution and is thus being furnished with those benefits in kind, are to be reduced to rate provided for total disability while so maintained. 1933 ADVA 201

Neither pension, compensation, nor retirement pay of veteran suffering from Hansen's Disease is subject to reduction while he is undergoing course of treatment for such disease in Government institution. 1951 ADVA 865

§ 1513. Veterans 65 years of age and older

(a) The Secretary shall pay to each veteran of a period of war who is 65 years of age or older and who meets the service requirements of section 1521 of this title [38 USCS § 1521] (as prescribed in subsection (j) of that section) pension at the rates prescribed by section 1521 of this title [38 USCS § 1521] and under the conditions (other than the permanent and total disability requirement) applicable to pension paid under that section.

(b) If a veteran is eligible for pension under both this section and section 1521 of this title [38 USCS § 1521], pension shall be paid to the veteran only under section 1521 of this title [38 USCS § 1521].

Effective date of section:
This section took effect on Sept. 17, 2001, pursuant to § 207(c) of Act Dec. 27, 2001, P. L. 107-103, which appears as a note to this section.

Amendments:

Other provisions:
Effective date of Dec. 27, 2001 amendments. Act Dec. 27, 2001, P. L. 107-103, Title II, § 207(c), 115 Stat. 991, provides: "The amendments made by this section [adding this section and amending 38 USCS §§ 1521(f)(1), 1522(a), and the chapter analysis preceding 38 USCS § 1501] shall take effect as of September 17, 2001."
NON-SERVICE-CONNECTED DISABILITY PENSION

§ 1521. Veterans of a period of war
§ 1522. Net worth limitation
§ 1523. Combination of ratings
§ 1524. Vocational training for certain pension recipients
§ 1525. Protection of health-care eligibility

§ 1521. Veterans of a period of war

(a) The Secretary shall pay to each veteran of a period of war who meets the service requirements of this section (as prescribed in subsection (j) of this section) and who is permanently and totally disabled from non-service-connected disability not the result of the veteran's willful misconduct, pension at the rate prescribed by this section, as increased from time to time under section 5312 of this title [38 USCS § 5312].

(b) If the veteran is unmarried (or married but not living with or reasonably contributing to the support of such veteran's spouse) and there is no child of the veteran in the custody of the veteran or to whose support the veteran is reasonably contributing, and unless the veteran is entitled to pension at the rate provided by subsection (d)(1) or (e) of this section, pension shall be paid to the veteran at the annual rate of $3,550, reduced by the amount of the veteran's annual income.

(c) If the veteran is married and living with or reasonably contributing to the support of such veteran's spouse, or if there is a child of the veteran in the custody of the veteran or to whose support the veteran is reasonably contributing, pension shall be paid to the veteran at the annual rate of $4,651, unless the veteran is entitled to pension at the rate provided by subsection (d)(2), (e), or (f) of this section. If the veteran has two or more such family members, such annual rate shall be increased by $600 for each such family member in excess of one. The rate payable shall be reduced by the amount of the veteran's annual income and, subject to subsection (h)(1) of this section, the amount of annual income of such family members.

(d) (1) If the veteran is in need of regular aid and attendance, the annual rate of pension payable to the veteran under subsection (b) of this section shall be $5,680, reduced by the amount of the veteran's annual income.

(2) If the veteran is in need of regular aid and attendance, the annual rate of pension payable to the veteran under subsection (c) of this section shall be $6,781. If such veteran has two or more family members, as described in subsection (c) of this section, the annual rate of pension shall be increased by $600 for each such family member in excess of one. The rate payable shall be reduced by the amount of the veteran's annual income and, subject to subsection (h)(1) of this section, the amount of annual income of such family members.

(e) If the veteran has a disability rated as permanent and total and (1) has additional disability or disabilities independently ratable at 60 per centum or more, or (2) by reason of a disability or disabilities, is permanently housebound but does not qualify for pension at the aid and attendance rate provided by subsection (d) of this section, the annual rate of pension payable to the veteran under subsection (b) of this section shall be $4,340 and the
annual rate of pension payable to the veteran under subsection (c) of this section shall be $5,441. If such veteran has two or more family members, as described in subsection (c) of this section, the annual rate of pension shall be increased by $600 for each such family member in excess of one. The rate payable shall be reduced by the amount of the veteran's annual income and, subject to subsection (h)(1) of this section, the annual income of such family members.

(f) (1) If two veterans are married to one another and each meets the disability and service requirements prescribed in subsections (a) and (j), respectively, of this section, or the age and service requirements prescribed in section 1513 of this title [38 USCS § 1513], the annual rate of pension payable to such veterans shall be a combined annual rate of $4,651.

(2) If either such veteran is in need of regular aid and attendance, the annual rate provided by paragraph (1) of this subsection shall be $6,781. If both such veterans are in need of regular aid and attendance, such rate shall be $8,911.

(3) If either such veteran would be entitled (if not married to a veteran) to pension at the rate provided by subsection (e) of this section, the annual rate provided by paragraph (1) of this subsection shall be $5,441. If both such veterans would be entitled (if not married to one another) to such rate, such rate shall be $6,231.

(4) If one such veteran is in need of regular aid and attendance and the other would be entitled (if not married to a veteran) to the rate provided for under subsection (e) of this section, the annual rate provided by paragraph (1) of this subsection shall be $7,571.

(5) The annual rate provided by paragraph (1), (2), (3), or (4) of this subsection, as appropriate, shall (A) be increased by $600 for each child of such veterans (or of either such veteran) who is in the custody of either or both such veterans or to whose support either such veteran is, or both such veterans are, reasonably contributing, and (B) be reduced by the amount of the annual income of both such veterans and, subject to subsection (h)(1) of this section, the annual income of each such child.

(g) The annual rate of pension payable under subsection (b), (c), (d), (e), or (f) of this section to any veteran who is a veteran of a period of war shall be increased by $800 if veterans of such period of war were not provided educational benefits or home loan benefits similar to those provided to veterans of later periods of war under chapters 34 and 37, respectively, of this title [38 USCS §§ 3451 et seq. and 3701 et seq.] or under prior corresponding provisions of law.

(h) For the purposes of this section:

(1) In determining the annual income of a veteran, if there is a child of the veteran who is in the custody of the veteran or to whose support the veteran is reasonably contributing, that portion of the annual income of the child that is reasonably available to or for the veteran shall be considered to be income of the veteran, unless in the judgment of the Secretary to do so would work a hardship on the veteran.

(2) A veteran shall be considered as living with a spouse, even though they reside apart, unless they are estranged.
(i) If the veteran is entitled under this section to pension on the basis of such veteran's own service and is also entitled to pension on the basis of any other person's service, the Secretary shall pay such veteran only the greater benefit.

(j) A veteran meets the service requirements of this section if such veteran served in the active military, naval, or air service--

(1) for ninety days or more during a period of war;
(2) during a period of war and was discharged or released from such service for a service-connected disability;
(3) for a period of ninety consecutive days or more and such period began or ended during a period of war; or
(4) for an aggregate of ninety days or more in two or more separate periods of service during more than one period of war.

Prior law and revision:
This section is based on 38 USC § 2421 (Act June 17, 1957, P. L. 85-56, Title IV, Part B, Subpart II, § 421, 71 Stat 105).
This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Explanatory notes:
A prior § 1521 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3121.

Amendments:
1959. Act Aug. 29, 1959 (effective 7/1/60, as provided by § 10 of such Act, which appears as 38 USCS § 1506 note), in subsec. (a), substituted "pension at the rate prescribed by this section." for "a pension at the following monthly rate:

"(1) $66.15; or

"(2) $78.75 if (A) the veteran is sixty-five years of age or older, or (B) the veteran has been rated as permanently and totally disabled for a continuous period of ten years and he has been in receipt of pension throughout such period; or

"(3) $135.45 if the veteran is in need of regular aid and attendance."
redesignated subsec. (b) as subsec. (f), and added subsecs. (b)-(e).

1961. Act July 21, 1961 (effective as provided by § 2 of such Act, which appears as a note to this section), in subsec. (f), in para. (2), deleted "or" following "disability;"
substituted "; or" for a concluding period, and added para. (4).

1964. Act Oct. 13, 1964 (effective 1/1/65, as provided by § 11(a) of such Act, which appears as 38 USCS § 1503 note), in subsec. (b), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual income</td>
<td></td>
</tr>
<tr>
<td>More than--</td>
<td>but</td>
</tr>
<tr>
<td>------------</td>
<td>-----</td>
</tr>
<tr>
<td>$600</td>
<td></td>
</tr>
<tr>
<td>1,200</td>
<td></td>
</tr>
<tr>
<td>$85</td>
<td>70</td>
</tr>
<tr>
<td>40&quot;</td>
<td></td>
</tr>
</tbody>
</table>

in subsec. (c), substituted new table for one which read:

<table>
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<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual income</td>
<td>One dependent</td>
<td>Two dependents</td>
<td>Three or more dependents</td>
</tr>
<tr>
<td>More than--</td>
<td>but</td>
<td>Equal to or less than--</td>
<td></td>
</tr>
<tr>
<td>$1,000</td>
<td>$90</td>
<td>$95</td>
<td>$100</td>
</tr>
<tr>
<td>$1,000</td>
<td>2,000</td>
<td>75</td>
<td>75</td>
</tr>
<tr>
<td>2,000</td>
<td>3,000</td>
<td>45</td>
<td>45</td>
</tr>
</tbody>
</table>

in subsec. (d), substituted "$100" for "$70"; redesignated subsecs. (e) and (f) as subsecs. (f) and (g), respectively; added new subsec. (e); in subsec. (f)(1), as redesignated, substituted "in excess of whichever is the greater, $1,200 or the total earned income of the spouse," for "except $1,200 of such income".

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), substituted new section catchline for one which read: "§ 521. Veterans of World War I, World War II, or the Korean conflict"; substituted new subsec. (a) for one which read: "The Administrator shall pay to each veteran of World War I, World War II, or the Korean conflict, who meets the service requirements of this section, and who is permanently and totally disabled from non-service-connected disability not the result of the veteran's willful misconduct or vicious habits, pension at the rate prescribed by this section."; in subsec. (b), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual income</td>
<td></td>
</tr>
<tr>
<td>More than--</td>
<td>but</td>
</tr>
<tr>
<td>$600</td>
<td>$600</td>
</tr>
<tr>
<td>1,200</td>
<td>1,200</td>
</tr>
<tr>
<td>1,800</td>
<td>1,800</td>
</tr>
</tbody>
</table>

in subsec. (c), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Column I&quot;</td>
<td>&quot;Column II&quot;</td>
</tr>
</tbody>
</table>
in subsec. (c), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual income</td>
<td>One dependent</td>
<td>Two dependents</td>
<td>Three or more dependents</td>
</tr>
<tr>
<td>More than--but less than--</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$1,000</td>
<td>$1,000</td>
<td>$105</td>
<td>$105</td>
</tr>
<tr>
<td>$1,000</td>
<td>2,000</td>
<td>80</td>
<td>80</td>
</tr>
<tr>
<td>2,000</td>
<td>3,000</td>
<td>48</td>
<td>48</td>
</tr>
</tbody>
</table>

in subsec. (e), substituted "$40" for "$35"; substituted new subsec. (g) for one which read:

"A veteran meets the service requirements of this section if he served in the active military, naval, or air service--

"(1) for ninety days or more during either World War I, World War II, or the Korean conflict;

"(2) during World War I, World War II, or the Korean conflict, and was discharged or released from such service for a service-connected disability;

"(3) for a period of ninety consecutive days or more and such period ended during World War I, or began or ended during World War II or the Korean conflict; or

"(4) for an aggregate of ninety days or more in two or more separate periods of service during more than one period of war.".

1968. Act March 28, 1968 (effective as provided by § 6 of such Act, which appears as a note to his section), in subsec. (b), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual income</td>
<td>Equal to or less than--</td>
</tr>
<tr>
<td>More than--but less than--</td>
<td></td>
</tr>
<tr>
<td>$600</td>
<td>$600</td>
</tr>
<tr>
<td>1,200</td>
<td>1,200</td>
</tr>
</tbody>
</table>

in subsec. (c), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Column I</td>
<td>Column II</td>
<td>Column III</td>
<td>Column IV</td>
</tr>
<tr>
<td>----------</td>
<td>-----------</td>
<td>------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Annual income</td>
<td>One dependent</td>
<td>Two dependents</td>
<td>Three or more dependents</td>
</tr>
<tr>
<td>More than--but less than--</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$1,000</td>
<td>$1,000</td>
<td>$105</td>
<td>$105</td>
</tr>
<tr>
<td>$1,000</td>
<td>2,000</td>
<td>80</td>
<td>80</td>
</tr>
<tr>
<td>2,000</td>
<td>3,000</td>
<td>48</td>
<td>48</td>
</tr>
<tr>
<td>Annual income</td>
<td>More than--but less than--</td>
<td>One dependent</td>
<td>Two dependents</td>
</tr>
<tr>
<td>---------------</td>
<td>----------------------------</td>
<td>---------------</td>
<td>----------------</td>
</tr>
<tr>
<td>$1,000</td>
<td>$1,000</td>
<td>$109</td>
<td>$114</td>
</tr>
<tr>
<td>$2,000</td>
<td>$2,000</td>
<td>84</td>
<td>84</td>
</tr>
</tbody>
</table>

1970. Act Dec. 24, 1970 (effective as provided by § 10 of such Act, which appears as a note to this section), in the section catchline, inserted "the Mexican border period,"; in subsec. (a), inserted "the Mexican border period,"; in subsec. (b), substituted new table for one which read:

<table>
<thead>
<tr>
<th>&quot;Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>$300</td>
<td>$110</td>
</tr>
<tr>
<td>$400</td>
<td>$107</td>
</tr>
<tr>
<td>$500</td>
<td>$106</td>
</tr>
<tr>
<td>$600</td>
<td>$104</td>
</tr>
<tr>
<td>$700</td>
<td>$102</td>
</tr>
<tr>
<td>$800</td>
<td>$100</td>
</tr>
<tr>
<td>$900</td>
<td>$98</td>
</tr>
<tr>
<td>$900</td>
<td>$98</td>
</tr>
<tr>
<td>$1,000</td>
<td>$84</td>
</tr>
<tr>
<td>$1,100</td>
<td>$84</td>
</tr>
<tr>
<td>$1,200</td>
<td>$79</td>
</tr>
<tr>
<td>$1,300</td>
<td>$75</td>
</tr>
<tr>
<td>$1,400</td>
<td>$69</td>
</tr>
<tr>
<td>$1,500</td>
<td>$63</td>
</tr>
<tr>
<td>$1,600</td>
<td>$57</td>
</tr>
<tr>
<td>$1,700</td>
<td>$51</td>
</tr>
<tr>
<td>$1,800</td>
<td>$45</td>
</tr>
<tr>
<td>$1,900</td>
<td>$37</td>
</tr>
<tr>
<td>$2,000</td>
<td>$29</td>
</tr>
</tbody>
</table>

in subsec. (c), substituted new table for one which read:

<table>
<thead>
<tr>
<th>&quot;Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>$500</td>
<td>$120</td>
<td>$125</td>
<td>$130</td>
</tr>
<tr>
<td>$600</td>
<td>$118</td>
<td>$123</td>
<td>$128</td>
</tr>
<tr>
<td>$700</td>
<td>$114</td>
<td>$119</td>
<td>$124</td>
</tr>
</tbody>
</table>
in subsec. (d), substituted "$110" for "$100"; in subsec. (e), substituted "$44" for "$40"; in
subsec. (g)(1), (2), inserted "the Mexican border period."

1971. Act Dec. 15, 1971 (effective 1/1/1972 as provided by § 6 of such Act, which appears as
a note to this section), substituted new subsec. (b) for one which read:

"(b) If the veteran is unmarried (or married but not living with and not reasonably contributing
to the support of his spouse) and has no child, pension shall be paid at the monthly rate set
forth in column II of the following table opposite the veteran's annual income as shown in
column I:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual income</td>
<td></td>
</tr>
<tr>
<td>More than-- but Equal to or less than--</td>
<td></td>
</tr>
<tr>
<td>$800</td>
<td>$96</td>
</tr>
<tr>
<td>900</td>
<td>94</td>
</tr>
<tr>
<td>1,000</td>
<td>91</td>
</tr>
<tr>
<td>1,100</td>
<td>87</td>
</tr>
<tr>
<td>1,200</td>
<td>81</td>
</tr>
<tr>
<td>1,300</td>
<td>75</td>
</tr>
<tr>
<td>1,400</td>
<td>69</td>
</tr>
<tr>
<td>1,500</td>
<td>62</td>
</tr>
<tr>
<td>1,600</td>
<td>54</td>
</tr>
<tr>
<td>1,700</td>
<td>46</td>
</tr>
<tr>
<td>1,800</td>
<td>38</td>
</tr>
<tr>
<td>1,900</td>
<td>31</td>
</tr>
<tr>
<td>2,000</td>
<td>25</td>
</tr>
<tr>
<td>2,100</td>
<td>18</td>
</tr>
<tr>
<td>2,200</td>
<td>12</td>
</tr>
</tbody>
</table>
substituted new subsec. (c) for one which read:

"(c) If the veteran is married and living with or reasonably contributing to the support of his spouse, or has a child or children, pension shall be paid at the monthly rate set forth in columns II, III, or IV of the following table opposite the veteran's annual income as shown in column I:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total annual income</td>
<td></td>
</tr>
<tr>
<td>More than--</td>
<td>Equal to or less than--</td>
</tr>
</tbody>
</table>

- $800 900 $66
- 900 1,000 61
- 1,000 1,100 58
- 1,100 1,200 54
- 1,200 1,300 50
- 1,300 1,400 46
- 1,400 1,500 41
- 1,500 1,600 35
- 1,600 1,700 29
- 1,700 1,800 23
- 1,800 1,900 20
- 1,900 2,000 16
- 2,000 2,100 14
- 2,100 2,200 12
- 2,200 2,300 10"

and in subsec. (g)(3), inserted "the Mexican border period or".

1973. Act Dec. 6, 1973 (effective 1/1/1974 as provided by § 8 of such Act, which appears as a note to this section), substituted new subsec. (b) for one which read:

"(b) If the veteran is unmarried (or married but not living with and not reasonably contributing to the support of his spouse) and has no child, pension shall be paid according to the following formula: If annual income is $300 or less, the monthly rate of pension shall be $130. For each $1 of annual income in excess of $300 up to and including $1,000, the monthly rate shall be reduced 3 cents; for each $1 of annual income in excess of $1,000 up to and including $1,500, the monthly rate shall be reduced 4 cents; for each $1 of annual income in excess of $1,500 up to and including $1,800, the monthly rate shall be reduced 5 cents; for each $1 of annual income in excess of $1,800 up to and including $2,200, the monthly rate shall be reduced 6 cents; and for each $1 of annual income in excess of $2,200 up to and including $2,600, the monthly rate shall be reduced 7 cents. No pension shall be paid if annual income exceeds $2,600."; and substituted new subsec. (c) for one which read: "(c) If the veteran is married and living with or reasonably contributing to the support of his spouse, or has a child or children, pension shall be paid according to the following formula: If annual income is $500 or less, the monthly rate of pension shall be $140 for a veteran and one dependent, $145 for a veteran and two dependents, and $150 for three or more dependents. For each $1 of annual income in excess of $500 up to and including $900, the particular monthly rate shall be reduced 2 cents; for each $1 of annual income in excess of $900 up to and including $3,200, the monthly rate shall be reduced 3 cents; and for each $1 annual
income in excess of $3,200 up to and including $3,800, the monthly rate shall be reduced 5 cents. No pension shall be paid if annual income exceeds $3,800.".

1974. Act Dec. 21, 1974 (effective 1/1/1975 as provided by § 10 of such Act, which appears as a note to this section), substituted new subsec. (b) for one which read: "(b) If the veteran is unmarried (or married but not living with and not reasonably contributing to the support of his spouse) and has no child, pension shall be paid according to the following formula: If annual income is $300 or less, the monthly rate of pension shall be $143. For each $1 of annual income in excess of $300 up to and including $800, the monthly rate shall be reduced 3 cents; for each $1 of annual income in excess of $800 up to and including $1,300, the monthly rate shall be reduced 4 cents; for each $1 of annual income in excess of $1,300 up to and including $1,600, the monthly rate shall be reduced 5 cents; for each $1 of annual income in excess of $1,600 up to and including $2,200, the monthly rate shall be reduced 6 cents; for each $1 of annual income in excess of $2,200 up to and including $2,500, the monthly rate shall be reduced 7 cents; and for each $1 of annual income in excess of $2,500 up to and including $2,600, the monthly rate shall be reduced 8 cents. No pension shall be paid if annual income exceeds $2,600."; substituted new subsec. (c) for one which read: "(c) If the veteran is married and living with or reasonably contributing to the support of his spouse, or has a child or children, pension shall be paid according to the following formula: If annual income is $500 or less, the monthly rate of pension shall be $154 for a veteran and one dependent, $159 for a veteran and two dependents, and $164 for three or more dependents. For each $1 of annual income in excess of $500 up to and including $800, the monthly rate shall be reduced 2 cents; for each $1 of annual income in excess of $800 up to and including $2,600, the monthly rate shall be reduced 3 cents; for each $1 of annual income in excess of $2,600 up to and including $3,200, the monthly rate shall be reduced 4 cents; for each $1 of annual income in excess of $3,200 up to and including $3,700, the monthly rate shall be reduced 5 cents; and for each $1 of annual income in excess of $3,700 up to and including $3,800, the monthly rate shall be reduced 6 cents. No pension shall be paid if annual income exceeds $3,800."; and in subsec. (d), substituted "$123" for "$110"; in subsec. (e), substituted "$49" for "$44".

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by §§ 102, as amended, and 106 of such Act), substituted new subsec. (b) for one which read: "(b) If the veteran is unmarried (or married but not living with and not reasonably contributing to the support of his spouse) and has no child, pension shall be paid according to the following formula: If annual income is $300 or less, the monthly rate of pension shall be $160. For each $1 of annual income in excess of $300 up to and including $500, the monthly rate shall be reduced 3 cents; for each $1 of annual income in excess of $500 up to and including $900, the monthly rate shall be reduced 4 cents; for each $1 of annual income in excess of $900 up to and including $1,500, the monthly rate shall be reduced 5 cents; for each $1 of annual income in excess of $1,500 up to and including $1,900, the monthly rate shall be reduced 6 cents; for each $1 of annual income in excess of $1,900 up to and including $2,300, the monthly rate shall be reduced 7 cents; and for each $1 of annual income in excess of $2,300 up to and including $3,000, the monthly rate shall be reduced 8 cents; but in no event shall the monthly rate of pension be less than $5. No pension shall be paid if annual income exceeds $3,000."; substituted new subsec. (c) for one which read: "(c) If the veteran is married and living with or reasonably contributing to the support of his spouse, or has a child or children, pension shall be paid according to the following formula: If annual income is $500 or less, the monthly rate of pension shall be $172 for a veteran and one dependent, $177 for a veteran and two dependents, and $182 for three or more dependents. For each $1 of annual income in excess of $500 up to and including $700, the monthly rate shall be reduced 2 cents; for each $1 of annual income in excess of $700 up to and including $1,800, the monthly rate shall be reduced 3 cents; for each $1 of annual income in excess of $1,800 up to and including $3,000, the monthly rate shall be reduced 4 cents; for each $1 of annual income in excess of $3,000 up to and including $3,500, the monthly rate shall be reduced 5 cents; for each $1 of annual income in excess of $3,500 up to and including $3,800, the monthly rate shall be reduced 6 cents; for each $1 of annual income in excess of $3,800 up to and including
$4,000, the monthly rate shall be reduced 7 cents; and for each $1 of annual income in excess of $4,000 up to and including $4,200, the monthly rate shall be reduced 8 cents. No pension shall be paid if annual income exceeds $4,200."; in subsec. (d), substituted "such veteran" for "him" and substituted "$133" for "$123"; in subsec. (e), substituted "such veteran's"; "such veteran" and "$53" for "his", "him" and "$49", respectively; and in subsec. (g), preliminary matter, substituted "such veteran" for "he".

1976. Act Sept. 30, 1976 (effective as provided by § 405 of such Act, which appears as a note to this section), in subsec. (b)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>&quot;The monthly rate of pension shall be $173 reduced by--&quot;</th>
<th>For each $1 of annual income Which is more than--</th>
<th>But not more than--</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0.00</td>
<td>0</td>
<td>$300</td>
</tr>
<tr>
<td>.03</td>
<td>$300</td>
<td>500</td>
</tr>
<tr>
<td>.04</td>
<td>500</td>
<td>700</td>
</tr>
<tr>
<td>.05</td>
<td>700</td>
<td>1,200</td>
</tr>
<tr>
<td>.06</td>
<td>1,200</td>
<td>1,700</td>
</tr>
<tr>
<td>.07</td>
<td>1,700</td>
<td>2,000</td>
</tr>
<tr>
<td>.08</td>
<td>2,000</td>
<td>3,300&quot;</td>
</tr>
</tbody>
</table>

in subsec. (b)(3), substituted "$3,540" for "$3,300"; in subsec. (c)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>&quot;The monthly rate of pension for a veteran shall be--&quot;</th>
<th>For each $1 of annual income Which is more than--</th>
<th>But not more than--</th>
</tr>
</thead>
<tbody>
<tr>
<td>$186 if such veteran has one such dependent; $191 if such veteran has two such dependents; and $196 if such veteran has three or more such dependents; reduced by--</td>
<td>Which is more than--</td>
<td>But not more than--</td>
</tr>
<tr>
<td>$0.00</td>
<td>0</td>
<td>$500</td>
</tr>
<tr>
<td>.02</td>
<td>$500</td>
<td>700</td>
</tr>
<tr>
<td>.03</td>
<td>700</td>
<td>1,300</td>
</tr>
<tr>
<td>.04</td>
<td>1,300</td>
<td>2,800</td>
</tr>
<tr>
<td>.05</td>
<td>2,800</td>
<td>3,200</td>
</tr>
<tr>
<td>.06</td>
<td>3,200</td>
<td>3,800</td>
</tr>
<tr>
<td>.08</td>
<td>3,800</td>
<td>4,500&quot;</td>
</tr>
</tbody>
</table>

in subsec. (c)(3), substituted "$4,760" for "$4,500"; substituted new subsec. (d) for one which read: "(d) If the veteran is in need of regular aid and attendance, the monthly rate payable to such veteran under subsection (b) or (c) shall be increased by $133."; in subsec. (e), substituted "$57" for "$53"; added subsec. (h).
1977. Act Dec. 2, 1977 (effective 1/1/78, as provided by § 302 of such Act, which appears as 38 USCS § 1122 note), in subsec. (b)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>The monthly rate of pension shall be $185 reduced by--</th>
<th>For each $1 of annual income</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0.00</td>
<td>$300</td>
</tr>
<tr>
<td>.03</td>
<td>500</td>
</tr>
<tr>
<td>.04</td>
<td>700</td>
</tr>
<tr>
<td>.05</td>
<td>900</td>
</tr>
<tr>
<td>.06</td>
<td>1,500</td>
</tr>
<tr>
<td>.07</td>
<td>1,800</td>
</tr>
<tr>
<td>.08</td>
<td>3,540</td>
</tr>
</tbody>
</table>

in subsec. (b)(3), substituted "$3,770" for "$3,540"; in subsec. (c)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>The monthly rate of pension for a veteran shall be--</th>
<th>For each $1 of annual income</th>
</tr>
</thead>
<tbody>
<tr>
<td>$199 if he or she has one dependent; $204 if he or she has two dependents; and $209 if he or she has three or more dependents; reduced by--</td>
<td>Which is more than-- But not more than--</td>
</tr>
<tr>
<td>$0.00</td>
<td>0</td>
</tr>
<tr>
<td>.02</td>
<td>$500</td>
</tr>
<tr>
<td>.03</td>
<td>700</td>
</tr>
<tr>
<td>.04</td>
<td>1,100</td>
</tr>
<tr>
<td>.05</td>
<td>2,400</td>
</tr>
<tr>
<td>.06</td>
<td>3,100</td>
</tr>
<tr>
<td>.07</td>
<td>3,500</td>
</tr>
<tr>
<td>.08</td>
<td>3,700</td>
</tr>
</tbody>
</table>

in subsec. (c)(3), substituted "$5,070" for "$4,760"; in subsec. (d)(1), and (d)(2), concluding matter, substituted "$165" for "$155"; in subsec. (e), substituted "$61" for "$57".

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as 38 USCS § 101 note), substituted new catchline and section for ones which read: "§ 521. Veterans of the Mexican border period, World War I, World War II, the Korean conflict, or the Vietnam era

"(a) The Administrator shall pay to each veteran of the Mexican border period, World War I, World War II, the Korean conflict, or the Vietnam era, who meets the service requirements of this section, and who is permanently and totally disabled from non-service-connected
disability not the result of the veteran’s willful misconduct or vicious habits, pension at the rate prescribed by this section.

"(b)(1) If the veteran is unmarried (or married but not living with and not reasonably contributing to the support of such veteran’s spouse) and has no child, pension shall be paid to the veteran according to the following formula:

<table>
<thead>
<tr>
<th>The monthly rate of pension shall be</th>
<th>For each $1 of annual income</th>
</tr>
</thead>
<tbody>
<tr>
<td>$197 reduced by--</td>
<td>Which is more than--</td>
</tr>
<tr>
<td>$0.00</td>
<td>$300</td>
</tr>
<tr>
<td>.03</td>
<td>500</td>
</tr>
<tr>
<td>.04</td>
<td>700</td>
</tr>
<tr>
<td>.05</td>
<td>900</td>
</tr>
<tr>
<td>.06</td>
<td>1,100</td>
</tr>
<tr>
<td>.07</td>
<td>1,700</td>
</tr>
<tr>
<td>.08</td>
<td>3,770</td>
</tr>
</tbody>
</table>

"(2) In no case may the amount of pension payable to any veteran under this subsection be less than $5 monthly.

"(3) In no case may pension be paid under this subsection to any veteran if the annual income of such veteran exceeds $3,770.

"(c)(1) If the veteran is married and living with or reasonably contributing to the support of such veteran’s spouse, or has a child or children, pension shall be paid to the veteran according to the following formula:

<table>
<thead>
<tr>
<th>The monthly rate of pension for a veteran shall be--</th>
<th>For each $1 of annual income</th>
</tr>
</thead>
<tbody>
<tr>
<td>$212 if he or she has one dependent; $217 if he or she has two dependents; and $222 if he or she has three or more dependents; reduced by--</td>
<td>Which is more than--</td>
</tr>
<tr>
<td>$0.00</td>
<td>$500</td>
</tr>
<tr>
<td>.02</td>
<td>700</td>
</tr>
<tr>
<td>.03</td>
<td>1,000</td>
</tr>
<tr>
<td>.04</td>
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"(2) In no case may the amount of pension payable to any veteran under this subsection be less than $5 monthly.

"(3) In no case may pension be paid under this subsection to any veteran if the annual income of such veteran exceeds $5,070.

"(d)(1) If the veteran is in need of regular aid and attendance, the monthly rate payable to such veteran under subsection (b) or (c) shall be increased by $165.

"(2) In any case in which--

"(A) any veteran is denied pension under subsection (b) or (c) of this section solely for the reason that his annual income exceeds the maximum income limitation set forth in such subsection, or

"(B) payment of pension to any veteran under such subsection (b) or (c) is discontinued for such reason, and such veteran is in need of aid and attendance, such veteran shall be entitled to a monthly rate of $165 reduced by 16.6 per centum for each $100, or portion thereof, by which the veteran's annual income exceeds the applicable maximum annual income limitation; but no monthly rate shall be payable under this paragraph if the veteran's annual income exceeds such limitation by more than $500.

"(e) If the veteran has a disability rated as permanent and total, and (1) has additional disability or disabilities independently ratable at 60 per centum or more, or, (2) by reason of such veteran's disability or disabilities, is permanently housebound but does not qualify for the aid and attendance rate under subsection (d) of this section, the monthly rate payable to such veteran under subsection (b) or (c) shall be increased by $61.

"(f) For the purposes of this section--

"(1) in determining annual income, where a veteran is living with his spouse, all income of the spouse which is reasonably available to or for the veteran in excess of whichever is the greater, $1,200 or the total earned income of the spouse, shall be considered as the income of the veteran, unless in the judgment of the Administrator to do so would work a hardship upon the veteran;

"(2) a veteran shall be considered as living with a spouse, even though they reside apart, unless they are estranged.

"(g) A veteran meets the service requirements of this section if such veteran served in the active military, naval, or air service--

"(1) for ninety days or more during either the Mexican border period, World War I, World War II, the Korean conflict, or the Vietnam era;

"(2) during the Mexican border period, World War I, World War II, the Korean conflict, or the Vietnam era, and was discharged or released from such service for a service-connected disability;

"(3) for a period of ninety consecutive days or more and such period ended during the Mexican border period or World War I, or began or ended during World War II, the Korean conflict, or the Vietnam era; or

"(4) for an aggregate of ninety days or more in two or more separate periods of service during more than one period of war.

"(h) The rate of pension payable to any veteran receiving benefits under subsections (b), (c), (d), and (e) of this section shall be increased by 25 per centum beginning on the first day of the month during which the veteran attains age 78.".
1991. Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 521, as 38 USCS § 1521 and substituted "Secretary" for "Administrator".

2001. Act Dec. 27, 2001 (effective as of 9/17/2001, as provided by § 207(c) of such Act, which appears as 38 USCS § 1513 note), in subsec. (f)(1), inserted "or the age and service requirements prescribed in section 1513 of this title, ".

Other provisions:

Savings provisions. Act Aug. 29, 1959, P. L. 86-211, § 9, 73 Stat. 436, formerly classified as a note to this section, was repealed by Act Nov. 4, 1978, P. L. 95-588, Title III, § 306(b)(1), 92 Stat. 2509, effective Jan. 1, 1979, as provided by § 306(b)(1) of such Act. For effect of this repeal on existing rights, see note to this section containing Act Nov. 4, 1978, § 306. Prior to repeal, § 9 read as follows:

"(a) Any claim for pension which is pending in the Veterans' Administration on June 30, 1960, or any claim for death pension filed thereafter within one year from the date of death of a veteran which occurred prior to July 1, 1960, shall be adjudicated under title 38, United States Code, in effect on June 30, 1960, with respect to the period before July 1, 1960, and except as provided in subsection (c), under such title, as amended by this Act, thereafter.

"(b) Nothing in this Act shall affect the eligibility of any person receiving pension under title 38, United States Code, on June 30, 1960, for pension under all applicable provisions of that title in effect on that date for such period or periods thereafter with respect to which he can qualify under such provisions. This subsection shall not apply in any case for any period after pension is granted, pursuant to application, under title 38, United States Code, as amended by this Act.

"(c) Subsection (b) shall apply to those claims within the purview of subsection (a) in which it is determined that pension is payable for June 30, 1960.".

Payments for period prior to eligibility denied. Act July 21, 1961, P. L. 87-101, § 2, 75 Stat. 219, provides: "Pension shall not be paid for any period prior to the effective date of this Act to any person whose eligibility for pension is established solely by virtue of this Act [amending this section].".

Retirement income exclusion. Act Oct. 13, 1964, P. L. 88-664, § 10 78 Stat. 1096, provides: "In computing the income of persons whose pension eligibility is subject to the first sentence of section 9(b) of the Veterans Pension Act of 1959 [see note to this section], there shall be excluded 10 per centum of the amount of payments received under public or private retirement, annuity, endowment, or similar plans or programs.".

Aid and attendance allowance for widows of veterans of all periods of war. Act Aug. 31, 1967, P. L. 90-77, Title I, § 108(c), 81 Stat. 180, provides: "If any widow is entitled to pension under the first sentence of section 9(b) of the Veterans' Pension Act of 1959 [see note to this section] and is in need of regular aid and attendance, the monthly rate of pension payable to her shall be increased by $50.".


"The Administrator of Veterans' Affairs shall pay to a veteran who is entitled to pension under the first sentence of section 9(b) of the Veterans' Pension Act of 1959 [see note to this section] and who--

"(1) has, in addition to a disability rated as permanent and total, additional disability or disabilities independently ratable at 60 per centum or more, or
"(2) by reason of his disability or disabilities, is permanently housebound but does not qualify for pension based on need of regular aid and attendance, in lieu of the pension otherwise payable to him, a pension at the monthly rate of $100."

**Pension, dependency, and indemnity compensation; relation to the Social Security Amendments of 1967.** Act March 28, 1968, P. L. 90-275, § 3, 82 Stat. 67 (for effective date, see note this section), provides:

"(a) If the monthly rate of pension or dependency and indemnity compensation payable to a person under title 38, United States Code [this title], would be less, solely as a result of an increase in monthly insurance benefits provided by the Social Security Amendments of 1967 [Act Jan. 2, 1968, P. L. 90-248, 81 Stat. 821], than the monthly rate payable for the month immediately preceding the effective date of this Act [see note this section], the Administrator of Veterans' Affairs shall pay the person as follows:

"(1) for the balance of calendar year 1968 and during calendar year 1969, at the prior monthly rate;

"(2) during the calendar year 1970, at the rate for the next $100 annual income limitation higher than the maximum annual income limitation corresponding to the prior monthly rate; and

"(3) during each successive calendar year, at the rate for the next $100 annual income limitation higher than the one applied for the preceding year, until the rate corresponding to actual countable income is reached.

"(b) Subsection (a) shall not apply for any period during which annual income of such person, exclusive of an increase in monthly insurance benefits provided by the Social Security Amendments of 1967 [Act Jan. 2, 1968, P. L. 90-248, 81 Stat. 821], exceeds the amount of annual income upon which was based the pension or dependency and indemnity compensation payable to the person immediately prior to receipt of the increase."


**Effective dates of March 28, 1968 amendments.** Act March 28, 1968, P. L. 90-275, § 6, 82 Stat. 68, provides:

"(a) The first section and sections 2 and 4 of this Act [amending this section and 38 USCS §§ 1315, 1541 and adding note to this section] shall take effect on January 1, 1969.

"(b) Sections 3 and 5 of this Act [amending 38 USCS § 5112 and adding note to this section] shall take effect on the first day of the first calendar month following the month of initial payment of increases in monthly insurance benefits provided by the Social Security Amendments of 1967 [Act Jan. 2, 1968, P. L. 90-248, 81 Stat. 821]."


"(a) Sections 1, 2(a), (b), and (c), 3, 4, 5, 6, 7, 8, and 9 [amending this section, among other things; for full classification, consult USCS Tables volumes] shall take effect on January 1, 1971.

"(b) Sections 2(d) and 6 [amending 38 USCS §§ 1315, 1506] shall take effect on January 1, 1972.". In view of the similarity of subject matter covered by amendments made by sections
2(d) and 6 or Act Dec. 24, 1970, the effective date for the amendment made by section 6 was probably intended by Congress to be Jan. 1, 1972, as called for in § 10(b) of Act Dec. 24, 1970, rather than Jan. 1, 1971, as called for in § 10(a).


**Effective date of Dec. 6, 1973 amendments.** Act Dec. 6, 1973, P. L. 93-177, § 8, 87 Stat. 697, provides: "This Act [amending this section and 38 USCS §§ 1315, 1541, 1542, 5110, 5503 and adding 38 USCS § 5110 note] shall take effect on January 1, 1974."

**Effective date of Dec. 21, 1974 amendments.** Act Dec. 21, 1974, P. L. 93-527, § 10, 88 Stat. 1705, provides: "This Act [amending this section and 38 USCS §§ 103, 1315, 1541, 1542, 5110 and adding notes to this section and 38 USCS § 1501] shall take effect on January 1, 1975."


"(a) The provisions of this Act [amending 38 USCS § 102 and notes to this section and 38 USCS § 1541; adding 38 USCS §§ 5106 and 1501 note], other than titles II and III and section 401, shall take effect on the date of the enactment of this Act.

"(b) Titles II and III and section 401 of this Act [amending this section and 38 USCS §§ 1122, 1315, 1502, 1541, 1542, 1544, and note to this section] shall take effect January 1, 1977."

**Savings provisions for persons entitled to pension as of Dec. 31, 1978.** Act Nov. 4, 1978, P. L. 95-588, Title III, § 306, 92 Stat. 2508 (effective 1/1/79, as provided in § 401 of such Act); Aug. 6, 1991, P. L. 102-83, § 6(c), 105 Stat. 407, provides:

"(a)(1)(A) Except as provided in subparagraph (B), any person who as of December 31, 1978, is entitled to receive pension under section 521, 541, or 542 [now 1521, 1541, or 1542] of title 38, United States Code, may elect to receive pension under such section as in effect after such date, subject to the terms and conditions in effect with respect to the receipt of such pension. Any such election shall be made in such form and manner as the Secretary of Veterans Affairs (hereinafter in this section referred to as the 'Secretary') may prescribe. If pension is paid pursuant to such an election, the election shall be irrevocable.

"(B) Any veteran eligible to make an election under subparagraph (A) who is married to another veteran who is also eligible to make such an election may not make such an election unless both such veterans make such an election.

"(2) Any person eligible to make an election under paragraph (1) who does not make such an election shall continue to receive pension at the monthly rate being paid to such person on December 31, 1978, subject to all provisions of law applicable to basic eligibility for and payment of pension under section 521, 541, or 542 [now 1521, 1541, or 1542], as appropriate, of title 38, United States Code, as in effect on December 31, 1978, except that--

"(A) pension may not be paid to such person if such person's annual income (determined in accordance with section 503 [now section 1503] of title 38, United States Code, as in effect on December 31, 1978) exceeds $4,038, in the case of a veteran or surviving spouse without dependents, $5,430, in the case of a veteran or surviving spouse with one or more dependents, or $3,299, in the case of a child; and

"(B) the amount prescribed in subsection (f)(1) of section 521 [now section 1521] of such title (as in effect on December 31, 1978) shall be $1,285; as each such amount is increased from time to time under paragraph (3)."
“(3) Whenever there is an increase under section 3112 [now section 5312] of title 38, United States Code (as added by section 304 of this Act), in the maximum annual rates of pension under sections 521, 541, and 542 [now 1521, 1541, and 1542] of such title, as in effect after December 31, 1978, the Secretary shall, effective on the date of such increase under such section 3112 [now section 5312], increase--

"(A) the annual income limitations in effect under paragraph (2); and

"(B) the amount of income of a veteran's spouse excluded from the annual income of such veteran under section 521(f)(1) [now section 1521(f)(1)] of such title, as in effect on December 31, 1978; by the same percentage as the percentage by which such maximum annual rates under such sections 521, 541, and 542 [now 1521, 1541, and 1542] are increased.

"(b)(1) Effective January 1, 1979, section 9 of the Veterans' Pension Act of 1959 (Public Law 86-211) [see note this section] is repealed.

"(2)(A) Except as provided in subparagraph (B), any person who as of December 31, 1978, is entitled to receive pension under section 9(b) of the Veterans' Pension Act of 1959 [see note this section] may elect to receive pension under section 521, 541, or 542 [now 1521, 1541, or 1542] of title 38, United States Code, as in effect after such date, subject to the terms and conditions in effect with respect to the receipt of such pension. Any such election shall be made in such form and manner as the Secretary may prescribe. If pension is paid pursuant to such an election, the election shall be irrevocable.

"(B) Any veteran eligible to make an election under subparagraph (A) who is married to another veteran who is also eligible to make such an election may not make such an election unless both such veterans make such an election.

"(3) Any person eligible to make an election under paragraph (2) who does not make such an election shall continue to receive pension at the monthly rate being paid to such person on December 31, 1978, subject to all provisions of law applicable to basic eligibility for and payment of pension under section 9(b) of the Veterans' Pension Act of 1959, as in effect on December 31, 1978 [see note this section], except that pension may not be paid to such person if such person's annual income (determined in accordance with the applicable provisions of law, as in effect on December 31, 1978) exceeds $3,534, in the case of a veteran or surviving spouse without dependents or in the case of a child, or $5,098, in the case of a veteran or surviving spouse with one or more dependents, as each such amount is increased from time to time under paragraph (4).

"(4) Whenever there is an increase under section 3112 [now section 5312] of title 38, United States Code (as added by section 304 of this Act), in the maximum annual rates of pension under sections 521, 541, and 542 [now 1521, 1541, and 1542] of such title, as in effect after December 31, 1978, the Secretary shall, effective on the date of such increase under such section 3112 [now section 5312] increase the annual income limitations in effect under paragraph (3) by the same percentage as the percentage by which the maximum annual rates under such sections 521, 542, and 543 [now 1521, 1542 and 1543] are increased.

"(c) Any case in which--

"(1) a claim for pension is pending in the Veterans' Administration on December 31, 1978;

"(2) a claim for pension is filed by a veteran after December 31, 1978, and within one year after the date on which such veteran became totally and permanently disabled, if such veteran became totally and permanently disabled before January 1, 1979; or
“(3) a claim for pension is filed by a surviving spouse or by a child after December 31, 1978, and within one year after the date of death of the veteran through whose relationship such claim is made, if the death of such veteran occurred before January 1, 1979; shall be adjudicated under title 38, United States Code, as in effect on December 31, 1978. Any benefits determined to be payable as the result of the adjudication of such a claim shall be subject to the provisions of subsection (a).

“(d) In any case in which any person who as of December 31, 1978, is entitled to receive pension under section 521, 541, or 542 [now 1521, 1541, or 1542] of title 38, United States Code, or under section 9(b) of the Veterans’ Pension Act of 1959 [see note this section], elects (in accordance with subsection (a)(1) or (b)(2), as appropriate) before October 1, 1979, to receive pension under such section as in effect after December 31, 1978, the Administrator of Veterans’ Affairs shall pay to such person an amount equal to the amount by which the amount of pension benefits such person would have received had such election been made on January 1, 1979, exceeds the amount of pension benefits actually paid to such person for the period beginning on January 1, 1979, and ending on the date preceding the date of such election.

“(e) Whenever there is an increase under subsections (a)(3) and (b)(4) in the annual income limitations with respect to persons being paid pension under subsections (a)(2) and (b)(3), the Secretary shall publish such annual income limitations, as increased pursuant to such subsections, in Federal Register at the same time as the material required by section 215(i)(2)(D) of the Social Security Act [42 USCS § 415(i)(2)(D)] is published by reason of a determination under section 215(i) of such Act [42 USCS § 415(i)].

Study of pension benefits paid to persons overseas. Act Nov. 4, 1978, P. L. 95-588, Title III, § 308, 92 Stat. 2510, provides:

“(a) The Administrator of Veterans’ Affairs, in consultation with the Secretary of State, shall carry out a comprehensive study of the income characteristics of veterans of a period of war (as defined in section 101(11) of title 38, United States Code) and their survivors who are residing outside the fifty States and the District of Columbia, including those who are receiving pension benefits under chapter 15 of title 38, United States Code [38 USCS §§ 1501 et seq.], or under section 9(b) of the Veterans’ Pension Act of 1959 [see note this section], as in effect on the date of the enactment of this Act. The Administrator shall include in such study (1) an analysis of the issues involved in the payment of non-service-connected pension benefits to such persons, (2) analyses of such aspects of the economy of each foreign country and each territory, possession, and commonwealth of the United States in which a substantial number of such persons reside as are relevant to such issues, such as the rate of inflation, the standard of living, and subsistence levels in such foreign country or such territory, possession, or commonwealth, and (3) estimates of the present and future costs of the payment of pension benefits to such persons.

“(b) The Administrator of Veterans’ Affairs shall transmit a report to the Congress and to the President, not later than February 1, 1980, on the results of such study, together with the Administrator's recommendations as to the desirability of modifying the Veterans' Administration non-service-connected pension program for veterans of a period of war (as defined in section 101(11) of title 38, United States Code) and their survivors who are residing outside the fifty States and the District of Columbia.”.


“(a) Not later than twenty-eight months after the date of the enactment of this Act [enacted Oct. 24, 1984], the Administrator of Veterans’ Affairs shall submit to the Committees on Veterans’ Affairs of the Senate and House of Representatives a report containing a statistical tabulation of the results of the medical examinations conducted under subsection (b)(1)(A) and the determinations made under subsection (b)(1)(B).

“(b)(1) The Administrator--
"(A) shall provide for the selection of a sampling of the class of pension recipients described in paragraph (3) to undergo, and each recipient in such sampling shall undergo, a medical examination of the kind provided a veteran under 65 years of age who is applying for pension under section 521 [now section 1521] of title 38, United States Code [this section]; and

"(B) shall determine what, if any, percentage rating would be applicable to the recipient under the schedule of ratings adopted pursuant to section 355 [now section 1155] of such title.

"(2) The sampling of pension recipients selected under paragraph (1)(A) shall be selected in a manner that is statistically valid for the purpose of estimating the disability ratings of all recipients in the class described in paragraph (3).

"(3) The class of pension recipients referred to in paragraphs (1) and (2) are those individuals who, during the two-year period beginning on the date of the enactment of this Act [enacted Oct. 24, 1984], are awarded pension under section 521 [now section 1521] of title 38, United States Code by reason of being considered, under section 502(a) [now section 1502(a)] of such title, to be permanently and totally disabled by reason of being 65 years of age or older or becoming unemployable after age 65."


"Effective October 1, 1998, the maximum annual rates of pension in effect as of September 30, 1998, under the following provisions of chapter 15 of title 38, United States Code, are increased by $600:

"(1) Subsections (d)(1), (d)(2), (f)(2), and (f)(4) of section 1521.

"(2) Section 1536(d)(2)."

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Cross References
This section is referred to in 38 USCS §§ 107, 111, 1506, 1508, 1511, 1512, 1522, 1523, 1541, 1542, 1710, 1710B, 1712, 1722, 1722A, 5123, 5304, 5312, 5503; 42 USCS § 8624

Research Guide
Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:19

Am Jur:
60A Am Jur 2d, Pensions and Retirement Funds § 1266
77 Am Jur 2d, Veterans and Veterans' Laws § 55

Law Review Articles:

I. IN GENERAL

1. Service requirements
2. Willful misconduct
3. Miscellaneous
II. COMPENSATION

4. Computation
   5. -Exclusions from income
   6. -Deductions for improper payments
   7. Persons in need of regular aid and attendance
   8. Persons deemed permanently and totally disabled
   9. Miscellaneous

I. IN GENERAL

1. Service requirements
   
   Time spent at home by Navy veterans awaiting orders is not to be used in computing length
   of service, and disabilities acquired during that interval are not acquired in active service. 1936
   ADVA 376

   Veteran who was in civilian jail during last months of service including days subsequently
   defined as wartime is not considered to have had wartime service where he was never returned
   to military control or acquitted. VA GCO 4-83

   Veteran's service during 1980 Iran hostage situation did not constitute service during time of
   war, and thus, he was not eligible for non-service-connected pension benefits. Mason v Principi

   Veteran who served in Army, who did not serve in Republic of Vietnam, but who spent his
   entire military service in continental U.S., was not entitled to service-connected pension because
   he did not meet statutory requirements for award of non-service-connected pension relating to
   Claims LEXIS 579

2. Willful misconduct

   Organic diseases and disabilities which are secondary result of chronic use of alcohol as
   beverage, whether out of compulsion or otherwise, are not result of willful misconduct. 1964
   ADVA 988

3. Miscellaneous

   Board was not estopped to deny benefits to veteran who served during recognized period of
   war for fewer than 90 days by officer's announcing to veteran and other members of group that
   they would be eligible for veterans' benefits on same terms as if they had served full enlistment.
   Thompson v Derwinski (1991) 1 Vet App 610

   Board failed to provide adequate reasons for its denial of non-service-connected pension
   under 38 USCS § 1521; it apparently considered regulations pertaining to permanent and total
   disability rating without first evaluating veteran's conditions under schedule of ratings, and last
   evaluation of veteran's non-service-connected disabilities was made by RO 4 years earlier and
   Board did not mention its results, nor did Board discuss whether veteran was entitled to Veterans'
   Administration [now Department of Veterans Affairs] pension on extra-schedular basis, or explain
   why it found that his disabilities did not prevent him from working. Grantham v Brown (1995) 8 Vet
   App 228, revd, in part, dismd, in part, remanded (1997, CA FC) 114 F.3d 1156, on remand,

II. COMPENSATION

4. Computation

   Disclosure of disabled veteran's social security benefits to Veterans' Administration [now
   Department of Veterans Affairs] is lawful in view of fact Veterans' Administration [now Department
   of Veterans Affairs] is obligated by statute to take payments into account in its determination
   of benefits under 38 USCS § 521 [now 38 USCS § 1521]. Jaffess v Secretary, HEW (1975, SD
   NY) 393 F Supp 626
Veteran's receipt of lump sum, nonservice-connected pension could be considered income received during year for purposes of calculating whether he exceeded annual income limitation, even though payments were for service rendered over 34-year period. Hermogenes v Brown (1996) 9 Vet App 75, dismd without op (1997, CA FC) 106 F.3d 427, reported in full (1997, CA FC) 1997 US App LEXIS 2418

Veterans' Administration [now Department of Veterans Affairs] did not have duty to review amounts available to veteran under both old and new pension and "automatically" deem his improved pension election effective on date his benefits under improved pension program exceeded those under old program since pensioner was required to file election in order to enter improved pension program; and Veterans' Administration [now Department of Veterans Affairs] fulfilled its duties when, after having received one election request, it notified appellant that election would not be advantageous to him at that time and informed him that he must notify Veterans' Administration [now Department of Veterans Affairs] if he wished further action to be taken on election. Lewis v Brown (1995) 8 Vet App 287

Disabled veteran's claim for pension benefits was properly denied where Board correctly determined that veteran's income exceeded maximum allowed by law for pension purposes. Johnson v Principi (1992) 3 Vet App 534

5. -Exclusions from income

Ten percent exclusion from income provided by 38 USCS § 503 [now 38 USCS § 1503] for new law pension cases is applicable to payments for permanent and total disability and for death under workmen's compensation and employer's liability laws. 1966 ADVA 989

Lump-sum accrued benefits to which veteran was entitled at his death were excludable from annual income countable for death pension purposes since accrued benefit is derivative in nature and thus paid "under" Chapter 15; at minimum, accrued benefit is paid "under both 38 USCS § 5121 and Chapter 15, and that is sufficient to meet 38 USCS § 1503(a)(2) exclusion. Martin v Brown (1994) 7 Vet App 196

6. -Deductions for improper payments

Government is entitled to deduct amount of improperly paid pension from amount due guard officer on retirement pay, even though right was not asserted by government until just prior to judgment. Price v United States (1952) 121 Ct Cl 681, 104 F Supp 99, cert den (1953) 344 US 911, 97 L Ed 703, 73 S Ct 333

7. Persons in need of regular aid and attendance

Pension of veteran, who comes within phrase "or is so helpless as to be in need of regular aid and attendance", who is being maintained by Government in institution and who is thus being furnished with those benefits in kind, is to be reduced to rate provided for total disability while so maintained. 1933 ADVA 201

Neither pension, compensation, nor retirement pay of veteran suffering from Hansen's Disease is subject to reduction while veteran is undergoing course of treatment for such disease in Government institution. 1951 ADVA 865

BVA's determination that veterans did not qualify for aid and attendance was plausible, hence would be affirmed, where examining physician noted that veteran was able to care for his physical needs although his ability to leave home on a daily or weekly basis was variable, as opposed to neighbor's testimony that veteran was physically incapable of taking care of his own needs and that she shopped and ran errands daily for him. Kulick v Derwinski (1992) 2 Vet App 640

BVA's conclusion that veteran was not qualified to receive special monthly pension, based on need for regular aid and attendance or housebound status, was plausible and thus not clearly erroneous, where appellant's back condition was rated at 40 percent disability and there was no record evidence to indicate condition which could be basis for 100 percent rating. Turco v Brown (1996) 9 Vet App 222
8. Persons deemed permanently and totally disabled

Health and Human Services Secretary's interpretation, as stated in SSR 82-31, that Veterans' Administration [now Department of Veterans Affairs] benefits paid to veteran for support of dependent living with veteran will be treated as unearned income to dependent for purposes of determining dependent's eligibility for and amount of Supplemental Security Income benefits, was reasonable and entitled to deference, even if it represented change in policy and interpretation; change was made in response to circuit court rulings that prior interpretation was invalid, and within regulation Secretary provided sufficient reasons for change. Fair v Shalala (1994, CA11 Fla) 37 F.3d 1466, 45 Soc Sec Rep Serv 726, 8 FLW Fed C 811

Veteran rated permanently and totally disabled and paid pension for 10-year period, who was found not to be permanently and totally disabled for limited period of time, is not entitled to higher rate when he again merits rating of permanent and total disability. 1944 ADVA 602

Secretary has statutory authority to prescribe regulations establishing criteria for determining Veterans' Administration [now Department of Veterans Affairs] pension eligibility based on combination of subjective and objective standards; provisions of 38 USCS § 1502 which provide for determinations based upon objective criteria for certain disabilities to be conclusively presumed to be permanently and totally disabling for pension purposes do not supplant general authority in 38 USCS § 1521, which provides for payment of pension to individual veteran determined to be permanently and totally disabled based upon subjective factors applicable to that veteran. Talley v Derwinski (1992) 2 Vet App 282

9. Miscellaneous

Where Secretary of Interior decides that veteran comes within meaning of law granting pensions to those persons who require regular aid and attendance, and commissioner [now Secretary] accepts that decision and notes pension as he understands law to be, court can not interfere to establish different rate. United States ex rel. Miller v Raum (1890) 135 US 200, 34 L Ed 105, 10 S Ct 820

In case arising under Federal Tort Claims Act, 28 USCS §§ 1346(b) and 2671 et seq., in which veteran was awarded damages for medical malpractice from Department of Veterans Affairs (VA), fact that VA was liable to veteran had very little to do with his right to income-based benefits; while veteran's pension rate would be affected by increase in his annual income, that in itself did not entitle him to damages for loss of benefits. Davis v United States (2004, CA7 Ill) 375 F.3d 590

Veteran who filed new application for pension after renouncing prior payments is not entitled to 10 year monthly rate of pension; such rate is legally payable only after expiration of 10 years from date of reopening (assuming permanent and total disability rating is continuous for period), or after veteran reaches age of 65 years. 1951 ADVA 867

Board of Veterans' Appeals' decision to deny veteran additional non-service-connected pension benefits for dependents under 38 USCS § 1521(c) for his 18-year-old son, who was attending state-approved home school, was vacated where Board relied in part on 2000 amendment to 38 C.F.R. § 3.57(a)(1)(iii), which was substantive change in law because it established criteria for entitlement to benefits for children who were over 18 but Secretary of Veterans Affairs had not complied with notice-and-comment requirements of 5 USCS § 553 when adopting amendment. Theiss v Principi (2004) 18 Vet App 204, 2004 US App Vet Claims LEXIS 486

§ 1522. Net worth limitation

(a) The Secretary shall deny or discontinue the payment of pension to a veteran under section 1513 or 1521 of this title [38 USCS § 1513 or 1521] when the corpus of the estate of the veteran or, if the veteran has a spouse, the corpus of the estates of the veteran and of the veteran's spouse is such that under all the circumstances, including consideration of
the annual income of the veteran, the veteran's spouse, and the veteran's children, it is reasonable that some part of the corpus of such estates be consumed for the veteran's maintenance.

(b) The Secretary shall deny or discontinue the payment of increased pension under subsection (c), (d), (e), or (f) of section 1521 of this title [38 USCS § 1521] on account of a child when the corpus of such child's estate is such that under all the circumstances, including consideration of the veteran's and spouse's income, and the income of the veteran's children, it is reasonable that some part of the corpus of such child's estate be consumed for the child's maintenance. During the period such denial or discontinuance remains in effect, such child shall not be considered as the veteran's child for purposes of this chapter [38 USCS §§ 1501 et seq.].

Prior law and revision:
This section is based on 38 USC § 2422 (Act June 17, 1957, P. L. 85-56, Title IV, Part B, Subpart II, § 422, 71 Stat. 106).
This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:
Veterans' Regulation No. 1(a), Part III, para. II(a)-(c) (as amended Act May 23, 1952, ch 324, § 1, 66 Stat. 91).

Amendments:
1959. Act Aug. 29, 1959 (effective 7/1/60, as provided by § 10 of such Act, which appears as 38 USCS § 1521 note), substituted this section for one which read:
"§ 522. Income limitations
"(a) No pension shall be paid under section 521 of this title to any unmarried veteran whose annual income exceeds $1,400, or to any married veteran or any veteran with children whose annual income exceeds $2,700.
"(b) As a condition of granting or continuing pension under section 521 of this title, the Administrator may require from any veteran applying for, or in receipt of, pension under such sections such information, proofs, or evidence as he desires in order to determine the annual income of such veteran.".

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as 38 USCS § 101 note), substituted the text of this section for text which read: "The Administrator shall deny or discontinue payment of pension under section 521 of this title when the corpus of the veteran's estate is such that under all the circumstances, including consideration of the veteran's income, it is reasonable that some part of the corpus be consumed for the veteran's maintenance."

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 522, as 38 USCS § 1522, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

2001. Act Dec. 27, 2001 (effective as of 9/17/2001, as provided by § 207(c) of such Act, which appears as 38 USCS § 1513 note), in subsec. (a), inserted "1513 or".

Cross References
This section is referred to in 38 USCS §§ 107, 1722

Research Guide
Am Jur:

60A Am Jur 2d, Pensions and Retirement Funds § 1266

In case arising under Federal Tort Claims Act, 28 USCS §§ 1346(b) and 2671 et seq., in which veteran was awarded damages for medical malpractice from Department of Veterans Affairs (VA), fact that VA was liable to veteran had very little to do with his right to income-based benefits; while veteran's pension rate would be affected by increase in his annual income, that in itself did not entitle him to damages for loss of benefits. Davis v United States (2004, CA7 Ill) 375 F.3d 590

Mineral lease royalties must be considered proceeds of sale of property and are properly excludable from income for pension purposes; but such payments are relevant to evaluation of corpus of claimant's estate for purposes of net worth limitation under 38 USCS §§ 522(a) and 543 [now 38 USCS §§ 1522(a) and 543]; and bonus payments and delay rentals received in connection with mineral lease must be considered income of lessor for pension purposes. VA GCO 3-85

Veteran's wife's workers' compensation settlement was properly attributed as income to him in year received, precluding payment of pension benefits. Cutler v Derwinski (1992) 2 Vet App 336

§ 1523. Combination of ratings

(a) The Secretary shall provide that, for the purpose of determining whether or not a veteran is permanently and totally disabled, ratings for service-connected disabilities may be combined with ratings for non-service-connected disabilities.

(b) Where a veteran, by virtue of subsection (a), is found to be entitled to a pension under section 1521 of this title [38 USCS § 1521], and is entitled to compensation for a service-connected disability, the Secretary shall pay such veteran the greater benefit.

Prior law and revision:

This section is based on 38 USC § 2423 (Act June 17, 1957, P. L. 85-56, Title IV, Part B, Subpart II, § 423, 71 Stat. 106).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Veterans' Regulation No. 1(a), Part IV.

Amendments:

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), in subsec. (b), substituted "such veteran" for "him".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 523, as 38 USCS § 1523, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

Code of Federal Regulations

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

§ 1524. Vocational training for certain pension recipients

Discussion and Analysis in the Veterans Benefits Manual

(a) (1) In the case of a veteran under age 45 who is awarded a pension during the program period, the Secretary shall, based on information on file with the Department of Veterans
Affairs, make a preliminary finding whether such veteran, with the assistance of a vocational training program under this section, has a good potential for achieving employment. If such potential is found to exist, the Secretary shall solicit from the veteran an application for vocational training under this section. If the veteran thereafter applies for such training, the Secretary shall provide the veteran with an evaluation, which may include a personal interview, to determine whether the achievement of a vocational goal is reasonably feasible.

(2) If a veteran who is 45 years of age or older and is awarded pension during the program period, or a veteran who was awarded pension before the beginning of the program period, applies for vocational training under this section and the Secretary makes a preliminary finding on the basis of information in the application that, with the assistance of a vocational training program under subsection (b) of this section, the veteran has a good potential for achieving employment, the Secretary shall provide the veteran with an evaluation in order to determine whether the achievement of a vocational goal by the veteran is reasonably feasible. Any such evaluation shall include a personal interview by a Department employee trained in vocational counseling.

(3) For the purposes of this section, the term "program period" means the period beginning on February 1, 1985, and ending on December 31, 1995.

(b) (1) If the Secretary, based upon an evaluation under subsection (a) of this section, determines that the achievement of a vocational goal by a veteran is reasonably feasible, the veteran shall be offered and may elect to pursue a vocational training program under this subsection. If the veteran elects to pursue such a program, the program shall be designed in consultation with the veteran in order to meet the veteran's individual needs and shall be set forth in an individualized written plan of vocational rehabilitation of the kind described in section 3107 of this title [38 USCS § 3107].

(2) (A) Subject to subparagraph (B) of this paragraph, a vocational training program under this subsection shall consist of vocationally oriented services and assistance of the kind provided under chapter 31 of this title [38 USCS §§ 3100 et seq.] and such other services and assistance of the kind provided under that chapter [38 USCS §§ 3100 et seq.] as are necessary to enable the veteran to prepare for and participate in vocational training or employment.

(B) A vocational training program under this subsection--

(i) may not exceed 24 months unless, based on a determination by the Secretary that an extension is necessary in order for the veteran to achieve a vocational goal identified (before the end of the first 24 months of such program) in the written plan formulated for the veteran, the Secretary grants an extension for a period not to exceed 24 months;

(ii) may not include the provision of any loan or subsistence allowance or any automobile adaptive equipment of the kind provided under chapter 39 of this title [38 USCS §§ 3901 et seq.]; and

(iii) may include a program of education at an institution of higher learning (as defined in sections 3452(b) and 3452(f), respectively, of this title [38 USCS §§ 3452(b) and 3452(f)]) only in a case in which the Secretary determines that the program involved is predominantly vocational in content.
(3) When a veteran completes a vocational training program under this subsection, the Secretary may provide the veteran with counseling of the kind described in section 3104(a)(2) of this title [38 USCS § 3104(a)(2)], placement and postplacement services of the kind described in section 3104(a)(5) of this title [38 USCS § 3104(a)(5)], and training of the kind described in section 3104(a)(6) of this title [38 USCS § 3104(a)(6)] during a period not to exceed 18 months beginning on the date of such completion.

(4) A veteran may not bring pursuit of a vocational training program under this subsection after the later of (A) December 31, 1995, or (B) the end of a reasonable period of time, as determined by the Secretary, following either the evaluation of the veteran under subsection (a) of this section or the award of pension to the veteran as described in subsection (a)(2) of this section. Any determination by the Secretary of such a reasonable period of time shall be made pursuant to regulations which the Secretary shall prescribe.

(c) In the case of a veteran who has been determined to have a permanent and total non-service-connected disability and who, not later than one year after the date the veteran's eligibility for counseling under subsection (b)(3) of this section expires, secures employment within the scope of a vocational goal identified in the veteran's individualized written plan of vocational rehabilitation (or in a related field which requires reasonably developed skills and the use of some or all of the training or services furnished the veteran under such plan), the evaluation of the veteran as having a permanent and total disability may not be terminated by reason of the veteran's capacity to engage in such employment until the veteran first maintains such employment for a period of not less than 12 consecutive months.

(d) A veteran who pursues a vocational training program under subsection (b) of this section shall have the benefit of the provisions of subsection (a) of section 1525 of this title [38 USCS § 1525] beginning at such time as the veteran's entitlement to pension is terminated by reason of income from work or training (as defined in subsection (b)(1) of that section) without regard to the date on which the veteran's entitlement to pension is terminated.

(e) Payments by the Secretary for education, training, and other services and assistance under subsection (b) of this section (other than the services of Department employees) shall be made from the Department appropriations account from which payments for pension are made.

Amendments:

1986. Act Oct. 28, 1986 (effective 10/24/84, as provided by § 703(c) of such Act, which appears as 38 USCS § 1313 note), in subsec. (a)(2) substituted "subsection (b)" for "subsection (d)"; in subsec. (b)(4) substituted "subsection (a)" for "subsection (a)(1)"; in subsec. (c) substituted "A veteran" for "Notwithstanding subsection (c) of section 525 of this title, a veteran", and substituted "subsection (b)(1)" for "subsection (b)" following "as defined in".


1988. Act Nov. 18, 1988, in subsec. (a), in para. (2), substituted "is awarded pension during the program period, or a veteran who was awarded pension before the beginning of the program period," for "who is awarded pension during the program period", and in para. (4),

1989. Act Dec. 18, 1989, in subsec. (a), in paras. (1) and (2), substituted "45" for "50"; redesignated subsecs. (c) and (d) as subsecs. (d) and (e), respectively; and added subsec. (c).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 524, as 38 USCS § 1524, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".

1992. Act May 20, 1992 (effective as of January 31, 1992, as provided by § 2(d) of such Act, which appears as 38 USCS § 1163 note), in subsec. (a)(4), substituted "December 31, 1992" for "January 31, 1992".

1992. Act Oct. 29, 1992 (effective 1/31/1992, as provided by § 2(d) of such Act, which appears as 38 USCS § 1163 note), substituted the section heading for one which read: "§ 1524. Temporary program of vocational training for certain new pension recipients"; in subsec. (a), substituted para. (1) for one which read: "(1) Subject to paragraph (3) of this subsection, in the case of a veteran under the age of 45 who is awarded pension during the program period, the Secretary shall determine whether the achievement of a vocational goal by the veteran is reasonably feasible. Any such determination shall be made only after evaluation of the veteran's potential for rehabilitation, and any such evaluation shall include a personal interview of the veteran by a Department employee who is trained in vocational counseling. If the veteran fails, for reasons other than those beyond the veteran's control, to participate in the evaluation in the manner required by the Secretary in order to make such determination, the Secretary shall suspend the veteran's pension for the duration of such failure.", deleted para. (3) which read: "(3) Not more than 3,500 veterans may be given evaluations under this subsection during any 12-month period beginning on February 1 of a year.", redesignated para. (4) as new para. (3) and, in such paragraph as redesignated, substituted "December 31, 1995" for "December 31, 1992"; and, in subsec. (b), in para. (4), substituted "December 31, 1995" for "January 31, 1992".

1994. Act Nov. 2, 1994, in subsec. (a)(2), substituted "If" for "Subject to paragraph (3) of this subsection, if".

Other provisions:

Report to Veterans' Affairs Committees on results of implementation of 38 USCS §§ 1524 and 1525. Act Oct. 24, 1984, P. L. 98-543, Title III, § 301(b), 98 Stat. 2746, provides:

"(b) Not later than April 15, 1988, the Administrator of Veterans' Affairs shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the results of the implementation of sections 524 and 525 [now 1524 and 1525] of title 38, United States Code (as added by subsection (a)(1)), during the period beginning on February 1, 1985, and ending on January 31, 1988. The report shall include--

"(1) information regarding--

"(A) the number of veterans who during the period covered by the report were provided with evaluations under paragraphs (1) and (2) of subsection (a) of such section 524 [now section 1524],

"(B) the number of such veterans for whom a vocational goal was determined to be feasible,

"(C) the number of such veterans who elected, and who did not elect, to pursue a vocational training program under subsection (b) of that section,
"(D) the extent to which those veterans who elected to pursue such a program completed the program,

"(E) the subsequent work and pension-eligibility experience of the veterans who were provided with such evaluations, shown according to their participation in and completion of vocational training programs, and

"(F) the number of veterans who received the benefit of such section 525 [now section 1525];

"(2) a tabulation of the reasons given by such veterans for not electing to pursue such a program by those for whom a vocational goal was determined to be reasonably feasible but who did not elect to pursue such program; and

"(3) the Administrator's assessment of the value (including the cost-effectiveness) and effect of such implementation and any recommendations of the Administrator for administrative and legislative action based on such results and assessments."

Ratification of certain actions of the Secretary of Veterans Affairs between February 1, 1992 and May 20, 1992. For provisions regarding ratification of certain actions by the Secretary of Veterans Affairs during the period beginning on February 1, 1992 and ending on May 20, 1992, see § 2(e) of Act May 20, 1992, P. L. 102-291, which appears as 38 USCS § 1163 note.

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3
Department of Veterans Affairs-Medical, 38 CFR Part 17
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References
This section is referred to in 38 USCS § 3697

§ 1525. Protection of health-care eligibility

(a) In the case of a veteran whose entitlement to pension is terminated after January 31, 1985, by reason of income from work or training, the veteran shall retain for a period of three years beginning on the date of such termination all eligibility for care and services under such chapter that the veteran would have had if the veteran's entitlement to pension had not been terminated. Care and services for which such a veteran retains eligibility include, when applicable, drugs and medicines under section 1712(d) of this title [38 USCS § 1712(d)].

(b) For purposes of this section, the term "terminated by reason of income from work or training" means terminated as a result of the veteran's receipt of earnings from activity performed for remuneration or with gain, but only if the veteran's annual income from sources other than such earnings would, taken alone, not result in the termination of the veteran's pension.

References in text:
The reference to "such chapter" in subsec. (a) is apparently a reference to Chapter 17 of Title 38, which appears as 38 USCS §§ 1701 et seq.

Amendments:
1986. Act April 7, 1986 (applicable as provided by § 19011(f) of such Act, which appears as 38 USCS § 1313 note), in subsec. (a), substituted "clauses (5) and (6) of section 612(i)" for "section 612(i)(5) of this title".

Act Oct. 28, 1986 (effective 10/24/84, as provided by § 703(c) of such Act, which appears as 38 USCS § 1313 note), in subsec. (a) deleted "under section 521 of this title" following "pension".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 525, as 38 USCS § 1525, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1992. Act May 20, 1992 (effective as of January 31, 1992, as provided by § 2(d) of such Act, which appears as 38 USCS § 1163 note), in subsec. (b)(2), substituted "December 31, 1992" for "January 31, 1992".

1992. Act Oct. 29, 1992, substituted the section heading for one which read: "§ 1525. Temporary protection of health-care eligibility"; in subsec. (a), substituted "after January 31, 1985," for "during the program period"; and substituted subsec. (b) for one which read:

"(b) For the purposes of this section:

"(1) The term 'terminated by reason of income from work or training' means terminated as a result of the veteran's receipt of earnings from activity performed for remuneration or gain, but only if the veteran's annual income from sources other than such earnings would, taken alone, not result in the termination of the veteran's pension.

"(2) The term 'program period' means the period beginning on February 1, 1985, and ending on December 31, 1992."

1996. Act Oct. 9, 1996, in subsec. (a), substituted "section 1712(d) of this title." for "section 1712(h) of this title and special priority with respect to such care and services under clauses (5) and (6) of section 1712(i)(5), (6)."; and, in subsec. (b), substituted "remuneration" for "renumeration".

Other provisions:

Ratification of certain actions of the Secretary of Veterans Affairs between February 1, 1992 and May 20, 1992. For provisions regarding ratification of certain actions by the Secretary of Veterans Affairs during the period beginning on February 1, 1992 and ending on May 20, 1992, see § 2(e) of Act May 20, 1992, P. L. 102-291, which appears as 38 USCS § 1163 note.

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
This section is referred to in 38 USCS § 1524

SUBCHAPTER III. PENSIONS TO SURVIVING SPOUSES AND CHILDREN

WARS BEFORE WORLD WAR I
OTHER PERIODS OF WAR
[SURVIVING SPOUSES OF VETERANS OF ALL PERIODS OF WAR-REPEALED]

Amendments:
§ 1532. Surviving spouses of Civil War veterans

(a) The Secretary shall pay to the surviving spouse of each Civil War veteran who met the service requirements of this section a pension at the following monthly rate:
   (1) $40.64 if such surviving spouse is below seventy years of age; or
   (2) $70 if such surviving spouse is seventy years of age or older.

(b) If there is a child of the veteran, the rate of pension paid to the surviving spouse under subsection (a) shall be increased by $8.13 per month for each such child.

(c) A veteran met the service requirements of this section if such veteran served for ninety days or more in the active military or naval service during the Civil War, as heretofore defined under public laws administered by the Veterans' Administration, or if such veteran was discharged or released from such service upon a surgeon's certificate of disability.

(d) No pension shall be paid to a surviving spouse of a veteran under this section unless such surviving spouse was married to such veteran--
   (1) before June 27, 1905; or
   (2) for one year or more; or
   (3) for any period of time if a child was born of the marriage, or was born to them before the marriage.

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in subsec. (a)(2), substituted "$70" for "$65"; in subsec. (d), substituted new paras. (2) and (3) for ones which read:

"(2) for five or more years; or

"(3) for any period of time if a child was born of the marriage.".

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), in the section catchline, substituted "Surviving spouses" for "Widows"; in subsec. (a), in the introductory matter, substituted " surviving spouse" for "widow", in paras. (1) and (2), substituted " such surviving spouse" for "she", in the concluding matter, substituted "such surviving spouse", "spouse", and "such veteran's" for "she", "wife", and "his" respectively; in subsec. (b), substituted " surviving spouse" for "widow"; in subsec. (c), substituted " such veteran" for "he" wherever appearing; in subsec. (d), introductory matter, substituted " surviving spouse", "such surviving spouse", and "such veteran" for "widow", "she", and "him", respectively.

1991. Act June 13, 1991, in subsec. (a), in para. (2), substituted the concluding period for a semicolon, and deleted the concluding matter, which read: "unless such surviving spouse was the spouse of the veteran during such veteran's service in the Civil War, in which case the monthly rate shall be $75.".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 532, as 38 USCS § 1532, and substituted "Secretary" for "Administrator" wherever appearing.

Such Act further, in subsec. (c), substituted "administered by the Secretary" for "administered by the Veterans' Administration".

1994. Act Nov. 2, 1994, in subsec. (c), substituted "Veterans' Administration" for "Secretary".

Cross References

This section is referred to in 38 USCS § 1533

Research Guide

Annotations:

Effect of divorce, remarriage, or annulment, on widow's pension or bonus rights or social security benefits. 85 ALR2d 242

Although soldier enlisted in United States infantry on January 24, 1863, deserted June 2, 1865, re-enlisted under assumed name, made good the time lost, and was discharged April 24, 1870, he was not honorably discharged from Civil War service. (1920) 32 Op Atty Gen 345

§ 1533. Children of Civil War veterans

Whenever there is no surviving spouse entitled to pension under section 1532 of this title [38 USCS § 1532], the Secretary shall pay to the children of each Civil War veteran who met the service requirements of section 1532 of this title [38 USCS § 1532] a pension at
the monthly rate of $73.13 for one child, plus $8.13 for each additional child, with the total amount equally divided.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), substituted “surviving spouse” for “widow”.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 533, as 38 USCS § 1533, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted “Secretary” for “Administrator”.

§ 1534. Surviving spouses of Indian War veterans

(a) The Secretary shall pay to the surviving spouse of each Indian War veteran who met the service requirements of section 1511 of this title [38 USCS § 1511] a pension at the following monthly rate:

(1) $40.64 if such surviving spouse is below seventy years of age; or
(2) $70 if such surviving spouse is seventy years of age or older.

(b) If there is a child of the veteran, the rate of pension paid to the surviving spouse under subsection (a) shall be increased by $8.13 per month for each such child.

(c) No pension shall be paid to a surviving spouse of a veteran under this section unless such surviving spouse was married to such veteran--

(1) before March 4, 1917; or
(2) for one year or more; or
(3) for any period of time if a child was born of the marriage, or was born to them before the marriage.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:
1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, 38 USCS § 101 note), in subsec. (a)(2), substituted "$70" for "$65"; in subsec. (c), substituted new paras. (2) and (3) for ones which read:

"(2) for five or more years; or

"(3) for any period of time if a child was born of the marriage.", respectively.

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), in the section catchline, substituted "Surviving spouses" for "Widows"; in subsec. (a), in the introductory matter, substituted "surviving spouse" for "widow", in paras. (1) and (2), substituted "such surviving spouse" for "she", in the concluding matter, substituted "such surviving spouse", "spouse", and "such veteran's" for "she", "wife", and "his", respectively; in subsec. (b), substituted "surviving spouse" for "widow"; in subsec. (c), introductory matter, substituted "surviving spouse", "such surviving spouse", and "such veteran" for "widow", "she", and "him", respectively.

1991. Act June 13, 1991, in subsec. (a), in para. (2), substituted a concluding period for a semicolon, and deleted the concluding matter, which read: "unless such surviving spouse was the spouse of the veteran during such veteran's service in one of the Indian Wars, in which case the monthly rate shall be $75."

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 534, as 38 USCS § 1534, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

Cross References
This section is referred to in 38 USCS § 1535

Research Guide
Annotations:
Effect of divorce, remarriage, or annulment, on widow's pension or bonus rights or social security benefits. 85 ALR2d 242
Woman who was married to Indian scout in accordance with Indian Tribal Law and who was polygamous wife is not widow of veteran for pension purposes; pension laws and other Federal laws do not contemplate plural marriages. 1944 ADVA 568

§ 1535. Children of Indian War veterans

Whenever there is no surviving spouse entitled to pension under section 1534 of this title [38 USCS § 1534], the Secretary shall pay to the children of each Indian War veteran who met the service requirements of section 1511 of this title [38 USCS § 1511] a pension at the monthly rate of $73.13 for one child, plus $8.13 for each additional child, with the total amount equally divided.

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Amendments:
§ 1536. Surviving spouses of Spanish-American War Veterans

(a) The Secretary shall pay to the surviving spouse of each Spanish-American War veteran who met the service requirements of section 1512(a) of this title [38 USCS § 1512(a)] a pension at the monthly rate of $70, unless such surviving spouse was the spouse of the veteran during such veteran's service in the Spanish-American War, in which case the monthly rate shall be $75.

(b) If there is a child of the veteran, the rate of pension paid to the surviving spouse under subsection (a) shall be increased by $8.13 per month for each such child.

(c) No pension shall be paid to a surviving spouse of a veteran under this section unless such surviving spouse was married to such veteran--

(1) before January 1, 1938; or
(2) for one year or more; or
(3) for any period of time if a child was born of the marriage, or was born to them before the marriage.

(d) (1) Any surviving spouse eligible for pension under this section shall, if such surviving spouse so elects, be paid pension at the rates prescribed by section 1541 of this title [38 USCS § 1541], and under the conditions (other than the service requirements) applicable to pension paid under that section to surviving spouses of veterans of a period of war. If pension is paid pursuant to such an election, the election shall be irrevocable.

(2) The Secretary shall pay each month to the surviving spouse of each Spanish-American War veteran who is receiving, or entitled to receive, pension based on a need of regular aid and attendance, whichever amount is greater (A) that which is payable to such surviving spouse under subsections (a) and (b) of this section as increased by section 544 of this title [38 USCS § 544], as in effect on December 31, 1978; or (B) that which is payable under section 1541 of this title [38 USCS § 1541], as in effect on December 31, 1978, as increased by such section 544, as in effect on such date, to a surviving spouse of a World War I veteran with the same annual income and corpus of estate. Each change in the amount of pension required by this paragraph shall be effective as of the first day of the month during which the facts of the particular case warrant such change, and shall be made without specific application therefor.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

References in text:
The references to "section 544 of this title as in effect on December 31, 1978" and to "such section 544, as in effect on such date" in subsec. (d)(2) are references to Act Aug. 31, 1967, P. L. 90-77, Title I, § 108(a), 81 Stat. 180, as amended, which appeared as 38 USCS § 544 prior to repeal by Act Nov. 4, 1978, P. L. 95-588, Title I, § 112(a)(1), 92 Stat. 2505, effective Jan. 1, 1979. It provided for aid and attendance allowance.


Amendments:
1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in subsec. (a), substituted "$70" for "$65"; in subsec. (c), substituted new paras. (2) and (3) for ones which read:

"(2) for five or more years; or

"(3) for any period of time if a child was born of the marriage.", respectively.

1972. Act June 30, 1972 (effective 8/1/72, as provided by § 301(a) of such Act, which appears as 38 USCS § 1114 note), added subsec. (d).

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), in the section catchline, substituted "Surviving spouses" for "Widows"; in subsec. (a), substituted "surviving spouse", "such surviving spouse", "spouse", and "such veteran's" for "widow", "she", "wife", and "his", respectively; in subsec. (b), substituted "surviving spouse" for "widow"; in subsec. (c), introductory matter, substituted "surviving spouse", "such surviving spouse", and "such veteran" for "widow", "she", and "him", respectively; in subsec. (d)(1), substituted "surviving spouse", "such surviving spouse", and "surviving spouses" for "widow", "she", and "widows", respectively; in subsec. (d)(2), substituted "surviving spouse" for "widow" wherever appearing and substituted "such surviving spouse" for "her".

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as 38 USCS § 101 note), in subsec. (d)(1), substituted "a period of war" for "World War I" and deleted "; except as provided in paragraph (2)" following "irrevocable"; in subsec. (d)(2), inserted ", as in effect on December 31, 1978" wherever appearing and inserted ", as in effect on such date".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 536, as 38 USCS § 1536, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

Other provisions:
Increase in aid and attendance rates for veterans eligible for pension. Act June 9, 1998, P. L. 105-178, Title VIII, Subtitle B, § 8206, 112 Stat. 494, which appears as 38 USCS § 1521 note, provides that, effective October 1, 1998, the maximum annual rates of pension in effect as of September 30, 1998 under subsec. (d)(2) of this section are increased by $600.

Cross References
This section is referred to in 38 USCS § 1537

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Annotations:
Effect of divorce, remarriage, or annulment, on widow's pension or bonus rights or social security benefits. 85 ALR2d 242

§ 1537. Children of Spanish-American War veterans

Whenever there is no surviving spouse entitled to pension under section 1536 of this title [38 USCS § 1536], the Secretary shall pay to the children of each Spanish-American War veteran who met the service requirements of section 1512(a) of this title [38 USCS § 1512(a)] a pension at the monthly rate of $73.13 for one child, plus $8.13 for each additional child, with the total amount equally divided.

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Amendments:
1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), substituted "surviving spouse" for "widow".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 537, as 38 USCS § 1537, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

OTHER PERIODS OF WAR
§ 1541. Surviving spouses of veterans of a period of war
§ 1542. Children of veterans of a period of war
§ 1543. Net worth limitation

Amendments:

§ 1541. Surviving spouses of veterans of a period of war

(a) The Secretary shall pay to the surviving spouse of each veteran of a period of war who met the service requirements prescribed in section 1521(j) of this title [38 USCS § 1521(j)], or who at the time of death was receiving (or entitled to receive) compensation or retirement pay for a service-connected disability, pension at the rate prescribed by this section, as increased from time to time under section 5312 of this title [38 USCS § 5312].
(b) If no child of the veteran is in the custody of the surviving spouse, pension shall be paid to the surviving spouse at the annual rate of $2,379, reduced by the amount of the surviving spouse's annual income.

(c) If there is a child of the veteran in the custody of the surviving spouse, pension shall be paid to the surviving spouse at the annual rate of $3,116. If the surviving spouse has custody of two or more such children, the annual pension rate shall be increased by $600 for each such child in excess of one. In each case, the rate payable shall be reduced by the amount of the surviving spouse's annual income and, subject to subsection (g) of this section, the annual income of each such child.

(d) (1) If a surviving spouse who is entitled to pension under subsection (b) of this section is in need of regular aid and attendance, the annual rate of pension payable to such surviving spouse shall be $3,806, reduced by the amount of the surviving spouse's annual income.

(2) If a surviving spouse who is entitled to pension under subsection (c) of this section is in need of regular aid and attendance, the annual rate of pension payable to the surviving spouse shall be $4,543. If there are two or more children of the veteran in such surviving spouse's custody, the annual rate of pension shall be increased by $600 for each such child in excess of one. The rate payable shall be reduced by the amount of the surviving spouse's annual income and, subject to subsection (g) of this section, the annual income of each such child.

(e) (1) If the surviving spouse is permanently housebound but does not qualify for pension at the aid and attendance rate provided by subsection (d) of this section, the annual rate of pension payable to such surviving spouse under subsection (b) of this section shall be $2,908 and the annual rate of pension payable to such surviving spouse under subsection (c) of this section shall be $3,645. If there are two or more children of the veteran in such surviving spouse's custody, the annual rate of pension shall be increased by $600 for each such child in excess of one. The rate payable shall be reduced by the amount of the surviving spouse's annual income and, subject to subsection (g) of this section, the income of any child of the veteran for whom the surviving spouse is receiving increased pension.

(2) For purposes of paragraph (1) of this subsection, the requirement of "permanently housebound" shall be met when the surviving spouse is substantially confined to such surviving spouse's house (ward or clinical areas, if institutionalized) or immediate premises by reason of a disability or disabilities reasonably certain to remain throughout such surviving spouse's lifetime.

(f) No pension shall be paid under this section to a surviving spouse of a veteran unless the spouse was married to the veteran—


(2) for one year or more; or
(3) for any period of time if a child was born of the marriage, or was born to them before the marriage.

(g) In determining the annual income of a surviving spouse for the purposes of this section, if there is a child of the veteran in the custody of the surviving spouse, that portion of the annual income of the child that is reasonably available to or for the surviving spouse shall be considered to be income of the surviving spouse, unless in the judgment of the Secretary to do so would work a hardship on the surviving spouse.

(h) As used in this section and section 1542 of this title [38 USCS § 1542], the term "veteran" includes a person who has completed at least two years of honorable active military, naval, or air service, as certified by the Secretary concerned, but whose death in such service was not in line of duty.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:

1959. Act Aug. 29, 1959 (effective 7/1/60, as provided by § 10 of such Act, which appears as 38 USCS § 1521 note), substituted new catchline and section for ones which read:

"§ 541. Widows of World War I veterans

"(a) The Administrator shall pay to the widow of each veteran of World War I who met the service requirements of section 521, of this title, or who at the time of his death was receiving (or entitled to receive) compensation or retirement pay based upon a service-connected disability, a pension at the following monthly rate:

"(1) Widow, no child, $50.40;

"(2) Widow, one child, $63, with $7.56 for each additional child.

"(b) No pension shall be paid to a widow of a veteran under this section unless she was married to him--

"(1) before December 14, 1944; or

"(2) for five or more years; or

"(3) for any period of time if a child was born of the marriage.".

1964. Act Oct. 13, 1964 (effective 1/1/65, as provided by § 11 of such Act, which appears as 38 USCS § 1503 note), in subsec. (b), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual income</td>
<td></td>
</tr>
</tbody>
</table>
in subsec. (c), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual income</td>
<td></td>
</tr>
<tr>
<td>More than--</td>
<td>Equal to or less than--</td>
</tr>
<tr>
<td>$1,000</td>
<td>$75</td>
</tr>
<tr>
<td>2,000</td>
<td>60</td>
</tr>
<tr>
<td>3,000</td>
<td>40</td>
</tr>
</tbody>
</table>

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), substituted new section catchline for one which read: "§ 541. Widows of World War I, World War II, or Korean conflict veterans"; substituted new subsec. (a) for one which read: "(a) The Administrator shall pay to the widow of each veteran of World War I, World War II, or the Korean conflict who met the service requirements of section 521 of this title, or who at the time of his death was receiving (or entitled to receive) compensation or retirement pay for a service-connected disability, pension at the rate prescribed by this section."; in subsec. (b), substituted new table for one which read:

in subsec. (d), substituted "$16" for "$15"; in subsec. (e), substituted new paras. (1)-(3) for ones which read:

"(1) before (A) December 14, 1944, in the case of a widow of a World War I veteran, or (B) January 1, 1957, in the case of a widow of a World War II veteran, or (C) February 1, 1965, in the case of a widow of a Korean conflict veteran; or

"(2) for five or more years; or

"(3) for any period of time if a child was born of the marriage.".

1968. Act March 28, 1968 (effective 1/1/69, as provided by § 6(a) of such Act, which appears as 38 USCS § 1521 note), in subsecs. (b) and (c), substituted new tables for ones which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual income</td>
<td></td>
</tr>
<tr>
<td>More than--</td>
<td>Equal to or less than--</td>
</tr>
<tr>
<td>$600</td>
<td>$70</td>
</tr>
<tr>
<td>$600</td>
<td>51</td>
</tr>
<tr>
<td>1,800</td>
<td>29</td>
</tr>
</tbody>
</table>

and
1970. Act Dec. 24, 1970 (effective 1/1/71, as provided by § 10(a) of such Act, which appears as 38 USCS § 1521 note), in the section catchline, inserted "Mexican border period,"; in subsec. (a), inserted "the Mexican border period,"; in subsec. (b), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Annual income</th>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>$300</td>
<td>$300</td>
<td>$74</td>
</tr>
<tr>
<td>400</td>
<td>400</td>
<td>73</td>
</tr>
<tr>
<td>500</td>
<td>500</td>
<td>72</td>
</tr>
<tr>
<td>600</td>
<td>600</td>
<td>70</td>
</tr>
<tr>
<td>700</td>
<td>700</td>
<td>67</td>
</tr>
<tr>
<td>800</td>
<td>800</td>
<td>64</td>
</tr>
<tr>
<td>900</td>
<td>900</td>
<td>61</td>
</tr>
<tr>
<td>1,000</td>
<td>1,000</td>
<td>58</td>
</tr>
<tr>
<td>1,100</td>
<td>1,100</td>
<td>55</td>
</tr>
<tr>
<td>1,200</td>
<td>1,200</td>
<td>51</td>
</tr>
<tr>
<td>1,300</td>
<td>1,300</td>
<td>48</td>
</tr>
<tr>
<td>1,400</td>
<td>1,400</td>
<td>45</td>
</tr>
<tr>
<td>1,500</td>
<td>1,500</td>
<td>41</td>
</tr>
<tr>
<td>1,600</td>
<td>1,600</td>
<td>37</td>
</tr>
<tr>
<td>1,700</td>
<td>1,700</td>
<td>33</td>
</tr>
<tr>
<td>1,800</td>
<td>1,800</td>
<td>29</td>
</tr>
<tr>
<td>1,900</td>
<td>1,900</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>2,000</td>
<td>17&quot;</td>
</tr>
</tbody>
</table>

in subsec. (c), substituted a new table for one which read:

<table>
<thead>
<tr>
<th>Annual income</th>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>$600</td>
<td>$600</td>
<td>$90</td>
</tr>
<tr>
<td>700</td>
<td>700</td>
<td>89</td>
</tr>
<tr>
<td>800</td>
<td>800</td>
<td>88</td>
</tr>
<tr>
<td>900</td>
<td>900</td>
<td>87</td>
</tr>
</tbody>
</table>
in subsec. (e)(1), inserted "Mexican border period or".

1971. Act Dec. 15, 1971 (effective 1/1/72, as provided by § 6 of such Act, which appears as 38 USCS § 1521 note), substituted new subsecs (b) and (c) for ones which read:

"(b) If there is no child, pension shall be paid at the monthly rate set forth in column II of the following table opposite the widow's annual income as shown in column I:

<table>
<thead>
<tr>
<th>Annual income</th>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>More than $300</td>
<td>$300</td>
<td>$81</td>
</tr>
<tr>
<td>$300</td>
<td>400</td>
<td>80</td>
</tr>
<tr>
<td>400</td>
<td>500</td>
<td>79</td>
</tr>
<tr>
<td>500</td>
<td>600</td>
<td>78</td>
</tr>
<tr>
<td>600</td>
<td>700</td>
<td>76</td>
</tr>
<tr>
<td>700</td>
<td>800</td>
<td>73</td>
</tr>
<tr>
<td>800</td>
<td>900</td>
<td>70</td>
</tr>
<tr>
<td>900</td>
<td>1,000</td>
<td>67</td>
</tr>
<tr>
<td>1,000</td>
<td>1,100</td>
<td>64</td>
</tr>
<tr>
<td>1,100</td>
<td>1,200</td>
<td>61</td>
</tr>
<tr>
<td>1,200</td>
<td>1,300</td>
<td>58</td>
</tr>
<tr>
<td>1,300</td>
<td>1,400</td>
<td>55</td>
</tr>
<tr>
<td>1,400</td>
<td>1,500</td>
<td>51</td>
</tr>
<tr>
<td>1,500</td>
<td>1,600</td>
<td>48</td>
</tr>
<tr>
<td>1,600</td>
<td>1,700</td>
<td>45</td>
</tr>
<tr>
<td>1,700</td>
<td>1,800</td>
<td>41</td>
</tr>
<tr>
<td>1,800</td>
<td>1,900</td>
<td>37</td>
</tr>
<tr>
<td>1,900</td>
<td>2,000</td>
<td>33</td>
</tr>
</tbody>
</table>
"(c) If there is a widow and one child, pension shall be paid at the monthly rate set forth in column II of the following table opposite the widow's annual income as shown in column I:

<table>
<thead>
<tr>
<th>Annual income</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>$600</td>
<td>$99</td>
</tr>
<tr>
<td>$700</td>
<td>98</td>
</tr>
<tr>
<td>$800</td>
<td>97</td>
</tr>
<tr>
<td>$900</td>
<td>96</td>
</tr>
<tr>
<td>$1,000</td>
<td>95</td>
</tr>
<tr>
<td>$1,100</td>
<td>94</td>
</tr>
<tr>
<td>$1,200</td>
<td>94</td>
</tr>
<tr>
<td>$1,300</td>
<td>92</td>
</tr>
<tr>
<td>$1,400</td>
<td>90</td>
</tr>
<tr>
<td>$1,500</td>
<td>88</td>
</tr>
<tr>
<td>$1,600</td>
<td>86</td>
</tr>
<tr>
<td>$1,700</td>
<td>84</td>
</tr>
<tr>
<td>$1,800</td>
<td>82</td>
</tr>
<tr>
<td>$1,900</td>
<td>80</td>
</tr>
<tr>
<td>$2,000</td>
<td>78</td>
</tr>
<tr>
<td>$2,100</td>
<td>76</td>
</tr>
<tr>
<td>$2,200</td>
<td>74</td>
</tr>
<tr>
<td>$2,300</td>
<td>72</td>
</tr>
<tr>
<td>$2,400</td>
<td>70</td>
</tr>
<tr>
<td>$2,500</td>
<td>68</td>
</tr>
<tr>
<td>$2,600</td>
<td>66</td>
</tr>
<tr>
<td>$2,700</td>
<td>64</td>
</tr>
<tr>
<td>$2,800</td>
<td>62</td>
</tr>
<tr>
<td>$2,900</td>
<td>60</td>
</tr>
<tr>
<td>$3,000</td>
<td>58</td>
</tr>
<tr>
<td>$3,100</td>
<td>56</td>
</tr>
<tr>
<td>$3,200</td>
<td>54</td>
</tr>
<tr>
<td>$3,300</td>
<td>52</td>
</tr>
<tr>
<td>$3,400</td>
<td>50</td>
</tr>
</tbody>
</table>

in subsec. (d), substituted "$17" for "$16".

1973. Act Dec. 6, 1973 (effective 1/1/74, as provided by § 8 of such Act, which appears as 38 USCS § 1521), substituted new subsecs. (b) and (c) for ones which read:

"(b) If there is no child, pension shall be paid according to the following formula: If annual income is $300 or less, the monthly rate of pension shall be $87. For each $1 of annual income in excess of $300 up to and including $600, the monthly rate shall be reduced 1 cent: for each $1 of annual income in excess of $600 up to and including $1,900, the monthly rate shall be reduced 3 cents; and for each $1 of annual income in excess of $1,900 up to and
including $2,600, the monthly rate shall be reduced 4 cents. No pension shall be paid if annual income exceeds $2,600.

"(c) If there is a widow and one child, pension shall be paid according to the following formula: If annual income is $600 or less, the monthly rate of pension shall be $104. For each $1 of annual income in excess of $600 up to and including $1,400, the monthly rate shall be reduced 1 cent; for each $1 of annual income in excess of $1,400 up to and including $2,700, the monthly rate shall be reduced 2 cents; and for each $1 of annual income in excess of $2,700 up to and including $3,800, the monthly rate shall be reduced 3 cents. Whenever the monthly rate payable to the widow under the foregoing formula is less than the amount which would be payable to the child under title 542 of this title if the widow were not entitled, the widow will be paid at the child's rate. No pension shall be paid if the annual income exceeds $3,800.";

in subsec. (d), substituted "18" for "17".

1974. Act Dec. 21, 1974 (effective 1/1/75, as provided by § 10 of such Act, which appears as 38 USCS § 1521), substituted new subsecs. (b) and (c) for ones which read:

"(b) If there is no child, pension shall be paid according to the following formula: If annual income is $300 or less, the monthly rate of pension shall be $96. For each $1 of annual income in excess of $300 up to and including $600, the monthly rate shall be reduced 1 cent; for each $1 of annual income in excess of $600 up to and including $1,400, the monthly rate shall be reduced 3 cents; for each $1 of annual income in excess of $1,400, up to and including $2,600, the monthly rate shall be reduced 4 cents. No pension shall be paid if annual income exceeds $2,600.

"(c) If there is a widow and one child, pension shall be paid according to the following formula: If annual income is $700 or less, the monthly rate of pension shall be $114. For each $1 of annual income in excess of $700 up to and including $1,100, the monthly rate shall be reduced 1 cent; for each $1 of annual income in excess of $1,100 up to and including $2,500, the monthly rate shall be reduced 2 cents; for each $1 of annual income in excess of $2,500 up to and including $3,400, the monthly rate shall be reduced 3 cents; and for each $1 of annual income in excess of $3,400 up to and including $3,800, the monthly rate shall be reduced 4 cents. Whenever the monthly rate payable to the widow under the foregoing formula is less than the amount which would be payable to the child under section 542 of this title if the widow were not entitled, the widow will be paid at the child's rate. No pension shall be paid if the annual income exceeds $3,800.";

in subsec. (d), substituted "$20" for "$18"; and added subsec. (f).

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by §§ 101, 103, as amended, and 106 of such Act), in the section catchline, substituted "Surviving spouses" for "Widows"; in subsec. (a), substituted "surviving spouse" for "widow" and deleted "his" preceding "death"; substituted new subsecs. (b) and (c) for ones which read:

"(b) If there is no child, pension shall be paid according to the following formula: If annual income is $300 or less, the monthly rate of pension shall be $108. For each $1 of annual income in excess of $300 up to and including $600, the monthly rate shall be reduced 1 cent; for each $1 of annual income in excess of $600 up to and including $900, the monthly rate shall be reduced 3 cents; for each $1 of annual income in excess of $900 up to and including $2,100, the monthly rate shall be reduced 4 cents; and for each $1 of annual income in excess of $2,100 up to and including $3,000, the monthly rate shall be reduced 5 cents; but in no event shall the monthly rate of pension be less than $5. No pension shall be paid if annual income exceeds $3,000.

"(c) If there is a widow and one child, pension shall be paid according to the following formula: If annual income is $700 or less, the monthly rate of pension shall be $128. For each $1 of annual income in excess of $700 up to and including $1,100, the monthly rate shall be reduced 1 cent; for each $1 of annual income in excess of $1,100 up to and including $2,100, the monthly rate shall be reduced 2 cents; for each $1 of annual income in excess of $2,100
up to and including $3,000, the monthly rate shall be reduced 3 cents; and for each $1 of annual income in excess of $3,000 up to and including $4,200, the monthly rate shall be reduced 4 cents. Whenever the monthly rate payable to the widow under the foregoing formula is less than the amount which would be payable to the child under section 542 of this title if the widow were not entitled, the widow will be paid at the child's rate. No pension shall be paid if the annual income exceeds $4,200.

in subsec. (d), substituted "surviving spouse" for "widow" and substituted "$22" for "$20"; in subsec. (e), substituted new introductory matter for matter which read: "No pension shall be paid to a widow of a veteran under this section unless she was married to him-"; in para. (1)(A)-(C), substituted "surviving spouse" for "widow", substituted new para. (1)(D) for one which read: "(D) before the expiration of ten years following termination of the Vietnam era in the case of a widow of a Vietnam era veteran; or"

1976. Act Sept. 30, 1976 (effective 1/1/77, as provided by § 405(b) of such Act, which appears as 38 USCS § 1521 note), in subsec. (b)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>$117 reduced by--</th>
<th>For each $1 of annual income Which is more than--</th>
<th>But not more than--</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0.00</td>
<td>0</td>
<td>$300</td>
</tr>
<tr>
<td>.01</td>
<td>$300</td>
<td>600</td>
</tr>
<tr>
<td>.03</td>
<td>600</td>
<td>900</td>
</tr>
<tr>
<td>.04</td>
<td>900</td>
<td>1,500</td>
</tr>
<tr>
<td>.05</td>
<td>1,500</td>
<td>2,700</td>
</tr>
<tr>
<td>.06</td>
<td>2,700</td>
<td>3,300&quot;;</td>
</tr>
</tbody>
</table>

in subsec. (b)(3), substituted "$3,540" for "$3,300"; in subsec. (c)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>$139 reduced by--</th>
<th>For each $1 of annual income Which is more than--</th>
<th>But not more than--</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0.00</td>
<td>0</td>
<td>$700</td>
</tr>
<tr>
<td>.01</td>
<td>$700</td>
<td>1,100</td>
</tr>
<tr>
<td>.02</td>
<td>1,100</td>
<td>1,800</td>
</tr>
<tr>
<td>.03</td>
<td>1,800</td>
<td>2,700</td>
</tr>
<tr>
<td>.04</td>
<td>2,700</td>
<td>3,500</td>
</tr>
<tr>
<td>.05</td>
<td>3,500</td>
<td>4,500&quot;;</td>
</tr>
</tbody>
</table>

in subsec. (c)(2), substituted "$4,760" for "$4,500"; and in subsec. (d), substituted "$24" for "$22".

1977. Act Dec. 2, 1977 (effective 1/1/78, as provided by § 302 of such Act, which appears as 38 USCS § 1122 note), in subsec. (b)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>$125 reduced by--</th>
<th>For each $1 of annual income Which is more than--</th>
<th>But not more than--</th>
</tr>
</thead>
</table>
in subsec. (b)(3), substituted "$3,770" for "$3,540"; in subsec. (c)(1), substituted new table for one which read:

"The monthly rate of pension shall be
For each $1 of annual income
$149 reduced by-- Which is more than-- But not more than--

<table>
<thead>
<tr>
<th>$0.00</th>
<th>0</th>
<th>$700</th>
</tr>
</thead>
<tbody>
<tr>
<td>.01</td>
<td>$700</td>
<td>1,100</td>
</tr>
<tr>
<td>.02</td>
<td>1,100</td>
<td>1,700</td>
</tr>
<tr>
<td>.03</td>
<td>1,700</td>
<td>2,500</td>
</tr>
<tr>
<td>.04</td>
<td>2,500</td>
<td>3,300</td>
</tr>
<tr>
<td>.05</td>
<td>3,300</td>
<td>4,760</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

in subsec. (c)(2), substituted "$5,070" for "$4,760"; and in subsec. (d), substituted "$26" for "$24".

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as 38 USCS § 101 note), substituted new catchline and section for ones which read:

"§ 541. Surviving spouses of Mexican border period, World War I, World War II, Korean conflict, or Vietnam era veterans

(a) The Administrator shall pay to the surviving spouse of each veteran of the Mexican border period, World War I, World War II, the Korean conflict, or the Vietnam era who met the service requirements of section 521 of this title, or who at the time of such veteran's death was receiving (or entitled to receive) compensation or retirement pay for a service-connected disability, pension at the rate prescribed by this section.

(b)(1) If there is no child, pension shall be paid to the surviving spouse according to the following formula:

"The monthly rate of pension shall be
For each $1 of annual income
$133 reduced by-- Which is more than-- But not more than--

<table>
<thead>
<tr>
<th>$0.00</th>
<th>0</th>
<th>$300</th>
</tr>
</thead>
<tbody>
<tr>
<td>.01</td>
<td>$300</td>
<td>600</td>
</tr>
<tr>
<td>.03</td>
<td>600</td>
<td>900</td>
</tr>
<tr>
<td>.04</td>
<td>900</td>
<td>1,100</td>
</tr>
<tr>
<td>.05</td>
<td>1,100</td>
<td>1,800</td>
</tr>
<tr>
<td>.06</td>
<td>1,800</td>
<td>2,800</td>
</tr>
<tr>
<td>.07</td>
<td>2,800</td>
<td>3,770</td>
</tr>
</tbody>
</table>

"(2) In no case may the amount of pension payable to any surviving spouse under this subsection be less than $5 monthly.

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"(3) In no case may pension be paid under this subsection to any surviving spouse if the annual income of such surviving spouse exceeds $3,770.

"(c)(1) If there is a surviving spouse and one child, pension shall be paid to the surviving spouse according to the following formula:

<table>
<thead>
<tr>
<th>The monthly rate of pension shall be reduced by-</th>
<th>For each $1 of annual income which is more than</th>
<th>But not more than</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0.00</td>
<td>0</td>
<td>$700</td>
</tr>
<tr>
<td>.01</td>
<td>$700</td>
<td>1,100</td>
</tr>
<tr>
<td>.02</td>
<td>1,100</td>
<td>1,600</td>
</tr>
<tr>
<td>.03</td>
<td>1,600</td>
<td>2,400</td>
</tr>
<tr>
<td>.04</td>
<td>2,400</td>
<td>2,900</td>
</tr>
<tr>
<td>.05</td>
<td>2,900</td>
<td>5,070</td>
</tr>
</tbody>
</table>

"(2) In no case may pension be paid under this subsection to any surviving spouse if the annual income of such surviving spouse exceeds $5,070.

"(3) Whenever the monthly rate payable to any surviving spouse under paragraph (1) of this subsection is less than the amount which would be payable for one child under section 542 of this title if the surviving spouse were not entitled, the surviving spouse shall be paid at the child's rate.

"(d) If there is a surviving spouse and more than one child, the monthly rate payable under subsection (c) shall be increased by $26 for each additional child.

"(e) No pension shall be paid to a surviving spouse of a veteran under this section unless the spouse was married to the veteran--

"(1) before (A) December 14, 1944, in the case of a surviving spouse of a Mexican border period or World War I veteran, or (B) January 1, 1957, in the case of a surviving spouse of a World War II veteran, or (C) February 1, 1965, in the case of a surviving spouse of a Korean conflict veteran, or (D) May 8, 1985, in the case of a surviving spouse of a Vietnam era veteran; or

"(2) for one year or more; or

"(3) for any period of time if a child was born of the marriage, or was born to them before the marriage.

"(f) As used in this section and section 542 of this title, the term 'veteran' includes a person who has completed at least two years of honorable active military, naval, or air service, as certified by the Secretary concerned, but whose death in such service was not in line of duty.

January 1, 2001, in the case of a surviving spouse of a veteran of the Persian Gulf War".

Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 541, as 38 USCS § 1541, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator" wherever appearing.
Other provisions:


Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Cross References
This section is referred to in 38 USCS §§ 1506, 1508, 1536, 1542, 1543, 5123, 5304, 5312; 42 USCS § 8624

Research Guide
Am Jur:
60A Am Jur 2d, Pensions and Retirement Funds § 1266

Annotations:
Effect of divorce, remarriage, or annulment, on widow's pension or bonus rights or social security benefits. 85 ALR2d 242

Law Review Articles:

I. IN GENERAL
1. Generally
2. Income
3. Compensation for death resulting from peacetime service
4. Support agreements
5. Remarriage
6. Withdrawal of claim

II. DETERMINATIONS
7. Validity of marriage
8. Eligibility determinations
9. Judicial review

I. IN GENERAL

1. Generally

Phrase "receiving or entitled to receive compensation," includes persons whose entitlement to receive monetary disability benefits is suspended solely by virtue of their presence in military or naval service. 1940 ADVA 454

2. Income

$5,000 lump-sum payment widow received from life insurance company is "annual income" within meaning of former 38 USC § 503, and widow is entitled to death benefits from first day of calendar year following that in which she received lump-sum payment. 1940 ADVA 454

Income of widow is measured on calendar year basis for purposes of income limit found in former 38 USC § 503, and her income does not exceed limit even if sum of installments received in particular month, or series of months, would exceed limits. 1940 ADVA 460
Cost of maintenance provided for in widow's contract of employment is part of her salary, and therefore is income for benefits eligibility purposes. 1941 ADVA 471

Proceeds of allowances paid to widow as dependent of veteran of Armed Forces are income for purposes of death benefits eligibility. 1943 ADVA 521

Sum of $3,231.57, received by surviving spouse as fire insurance on account of destruction by fire of her business property is not income, but merely serves as partial restoration of capital asset. 1944 ADVA 569

Annual income for compensation purposes does not include surviving spouse's income while veteran was living; and if her income from date she became surviving spouse to end of calendar year is proportionately less than $2,500, she is entitled to compensation. 1944 ADVA 609

Retirement deductions for Civil Service retirement annuity are income, but annuity payments are not subject to taxation prior to veteran's recoupment of entire amount of consideration paid into plan from salary. 1946 ADVA 688

Plain meaning of statutes requires that minimum income widow provision of Survivor Benefit Plan be included as annual income and that appropriate deductions be made. Johnson v Brown (1996) 9 Vet App 369

3. Compensation for death resulting from peacetime service

Death compensation is payable to widow under former 38 USC § 503, where death of veteran is due to or result of his peacetime service. 1938 ADVA 433

Widow of veteran who met service requirements for World War II service is not entitled to death pension where service-connected disability for which veteran was receiving compensation at date of death was incurred in period of peacetime service. 1958 ADVA 961

4. Support agreements

Mother entitled to pension loses such right upon entering into contract with third person for her support during life. United States v Purdy (1889, DC Ohio) 38 F 902

5. Remarriage

Widow of soldier of Revolution who has remarried after his death is entitled to pension given by Act July 7, 1838 [predecessor of 38 USCS § 1541], even during period of her second coverture, if she was a widow when she made application. Poucher's Case (1865) 1 Ct Cl 207

Widow is entitled to death benefits only if proper claim is filed by her before her remarriage, and in such cases remarriage terminates right to payment as of day before remarriage. 1936 ADVA 372

Where woman remarried, believing her husband to be dead, her continued cohabitation with other party after she learned that her husband was alive, disqualifies her from claiming pension upon death of husband. United States v Hays (1884, CCD Mo) 20 F 710

6. Withdrawal of claim

Though widow is not entitled to waive her right to benefits, withdrawal of her claim for benefits places her case in status that existed prior to favorable consideration of her application; that is, as though no claim for benefits had been filed. 1938 ADVA 431

II. DETERMINATIONS

7. Validity of marriage

Validity of marriage as affecting widowhood is determined by law of place where parties resided at time of marriage or at time claim accrued; hence, claimant cannot assert validity of marriage since Mexican divorce is not recognized by applicable law. United States v Snyder (1949, App DC) 85 US App DC 198, 177 F.2d 44

8. Eligibility determinations
Death benefit is payable, where veteran at time of death was receiving compensation for service-connected disability, disabling to degree of 30 percent or more, and where disabilities that resulted in death were also due to same disease. 1936 ADVA 385

Widow of rejected draftee, who is shown to be included within that class of persons which has been heretofore recognized by statute as having pensionable status, is entitled to death compensation under former 38 USCS § 503. 1938 ADVA 425

Since widow and child meet definition found in former 38 USC § 505a for persons of their relationship, veteran is survived by "widow with a child." 1940 ADVA 459

Death benefits are not payable where deceased veteran had been receiving disability compensation based upon service connection erroneously granted, based upon report from War Department pertaining to another veteran of same name. 1942 ADVA 500

Award is designated for surviving widow with children under former 38 USC 503-505a, subject to apportionment since children were out of widow's custody during all relevant time, even though widow died before decision in her favor was made on claim. 1943 ADVA 524

Dependents of veteran who died in active service during World War II, who are ineligible for death benefits because of cause of his death, are not entitled to use another service-connected disability present at date of death, which he had incurred in same period of service, as basis for benefits. 1944 ADVA 605

Widow of rejected draftee who served less than 90 days but was discharged for disability incurred in line of duty is entitled to death compensation. 1948 ADVA 774

Since veteran was killed after his release from active duty, and such release was under conditions other than dishonorable, pension is payable to widow under former 38 USCS § 507. 1949 ADVA 823

9. Judicial review

District court has no jurisdiction to review decision of Administrator of Veterans Affairs [now Secretary] denying pension to one claiming to be widow of World War I veteran. Cook v Higley (1956, App DC) 99 US App DC 180, 238 F.2d 41

§ 1542. Children of veterans of a period of war

The Secretary shall pay to each child (1) who is the child of a deceased veteran of a period of war who met the service requirements prescribed in section 1521(j) of this title [38 USCS § 1521(j)], or who at the time of death was receiving (or entitled to receive) compensation or retirement pay for a service-connected disability, and (2) who is not in the custody of a surviving spouse eligible for pension under section 1541 of this title [38 USCS § 1541], pension at the annual rate of $600, as increased from time to time under section 5312 of this title [38 USCS § 5312] and reduced by the amount of such child's annual income; or, if such child is residing with a person who is legally responsible for such child's support, at an annual rate equal to the amount by which the appropriate annual rate provided under section 1541(c) of this title [38 USCS § 1541(c)] exceeds the sum of the annual income of such child and such person, but in no event may such annual rate of pension exceed the amount by which $600, as increased from time to time under section 5312 of this title [38 USCS § 5312], exceeds the annual income of such child. The appropriate annual rate under such section 1541(c) [38 USCS § 1541(c)] for the purposes of the preceding sentence shall be determined in accordance with regulations which the Secretary shall prescribe.

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:

1959. Act Aug 29, 1959 (effective 7/1/60, as provided by § 10 of such Act, which appears as 38 USCS § 1521 note), substituted new catchline and section for ones which read:

"§ 542. Children of World War I veterans

"(a) Whenever there is no widow entitled to pension under section 541 of this title, the Administrator shall pay to the children of each veteran of World War I who met the service requirements of section 521 of this title, or who at the time of his death was receiving (or entitled to receive) compensation or retirement pay based upon a service-connected disability, a pension at the following monthly rate:

"(1) One child, $27.30;

"(2) Two children, $40.95; and

"(3) Three children, $54.60, with $7.56 for each additional child.

"(b) Pension prescribed by this section shall be paid to eligible children in equal shares.".

1964. Act Oct. 13, 1964 (effective 1/1/65, as provided by § 11 of such Act, which appears as 38 USCS § 1503 note), in subsec. (a), substituted "$38" for "$35".

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in the section catchline, substituted "Korean conflict, or Vietnam era" for "or Korean conflict"; in subsec. (a), substituted "the Korean conflict, or the Vietnam era" for "or the Korean conflict", substituted "$40" for "$38", and substituted "$16" for "$15".

1970. Act Dec. 24, 1970 (effective 1/1/71, as provided by § 10(a) of such Act, which appears as 38 USCS § 1521 note), in the section catchline, inserted "Mexican border period,"; in subsec. (a), inserted "the Mexican border period,"; in subsec. (c), substituted "$2,000" for "$1,800".

1971. Act Dec. 15, 1971 (effective 1/1/72, as provided by § 6 of such Act, which appears as 38 USCS § 1521 note), in subsec. (a), substituted "$42" and "$17" for "$40" and "$16", respectively.

1973. Act Dec. 6, 1973 (effective 1/1/74, as provided by § 8 of such Act, which appears as 38 USCS § 1521 note), in subsec. (a), substituted "44" and "18" for "42" and "17", respectively.

1974. Act Dec. 21, 1974 (effective 1/1/75, as provided by § 10 of such Act, which appears as 38 USCS § 1521 note), in subsec. (a), substituted "$49", and "$20" for "$44" and "$18", respectively; in subsec. (c), substituted "$2,400" for "$2,000".

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by §§ 101 and 104, as amended, of such Act), in subsec. (a), substituted "surviving spouse" for "widow", deleted "his" preceding "death", and substituted "$53" and "$22" for "$49" and "$20", respectively; in subsec. (c), substituted "$2,700" for "$2,400".

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1976. Act Sept. 30, 1976 (effective 1/1/77, as provided by § 405(b) of such Act, which appears as 38 USCS § 1521 note), in subsec. (a), substituted "$57" and "$24" for "$53" and "$22", respectively; in subsec. (c), substituted "$2,890" for "$2,700".

1977. Act Dec. 2, 1977 (effective 1/1/78, as provided by § 302 of such Act, which appears as 38 USCS § 1122 note), in subsec. (a), substituted "$61" and "$26" for "$57" and "$24", respectively; in subsec. (c), substituted "$3,080" for "$2,890".

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as 38 USCS § 101 note), substituted new catchline and section for ones which read:

"§ 542. Children of Mexican border period, World War I, World War II, Korean conflict, or Vietnam era veterans

"(a) Whenever there is no surviving spouse entitled to pension under section 541 of this title, the Administrator shall pay to the child or children of each veteran of the Mexican border period, World War I, World War II, the Korean conflict, or the Vietnam era who met the service requirements of section 521 of this title, or who at the time of death was receiving (or entitled to receive) compensation or retirement pay for a service-connected disability, pension at the monthly rate of $61 for one child, and $26 for each additional child.

"(b) Pension prescribed by this section shall be paid to eligible children in equal shares.

"(c) No pension shall be paid under this section to a child whose annual income, excluding earned income, exceeds $3,080.

1991. Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 542, as 38 USCS § 1542, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator" wherever appearing.

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Cross References
This section is referred to in 38 USCS §§ 1506, 1508, 1541, 1543, 5123, 5312; 42 USCS § 8624

Research Guide
Am Jur:

60A Am Jur 2d, Pensions and Retirement Funds § 1266
1. Generally
2. Compensation for death due to peacetime service
3. Compensation of multiple dependents

1. Generally
Phrase "receiving or entitled to receive compensation," found in former 38 USCS § 503, includes persons whose entitlement to receive monetary disability benefits is suspended solely by virtue of their presence in military or naval service. 1940 ADVA 453

2. Compensation for death due to peacetime service
Death benefits are payable under former 38 USC § 503, where death of veteran is due to or result of his peacetime service. 1938 ADVA 433
3. Compensation of multiple dependents

When one of several dependents having equal entitlement is barred from benefits under former § 503, payment to others is to be made at rates and in same manner as though there were no other dependents. 1942 ADVA 493

§ 1543. Net worth limitation

(a) (1) The Secretary shall deny or discontinue payment of pension to a surviving spouse under section 1541 of this title [38 USCS § 1541] when the corpus of the estate of the surviving spouse is such that under all the circumstances, including consideration of the income of the surviving spouse and the income of any child from whom the surviving spouse is receiving increased pension, it is reasonable that some part of the corpus of such estate be consumed for the surviving spouse's maintenance.

(2) The Secretary shall deny or discontinue the payment of increased pension under subsection (c), (d), or (e) of section 1541 of this title [38 USCS § 1541] on account of a child when the corpus of such child's estate is such that under all the circumstances, including consideration of the income of the surviving spouse and such child and the income of any other child for whom the surviving spouse is receiving increased pension, it is reasonable that some part of the corpus of the child's estate be consumed for the child's maintenance. During the period such denial or discontinuance remains in effect, such child shall not be considered as the surviving spouse's child for purposes of this chapter [38 USCS §§ 1501 et seq.].

(b) The Secretary shall deny or discontinue payment of pension to a child under section 1542 of this title [38 USCS § 1542] when the corpus of the estate of the child is such that under all the circumstances, including consideration of the income of the child, the income of any person with whom such child is residing who is legally responsible for such child's support, and the corpus of the estate of such person, it is reasonable that some part of the corpus of such estates be consumed for the child's maintenance.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Veterans; Regulation No. 10, para, V (as amended Act July 13, 1943, ch 233, § 6, 57 Stat. 555).

Amendments:

1959. Act Aug. 29, 1959 (effective 7/1/60, as provided by § 10 of such Act, which appears as 38 USCS § 1521 note), substituted new catchline and section for ones which read:

"§ 543. Widows of World War II or Korean conflict veterans

"(a) The Administrator shall pay to the widow of each veteran of World War II or of the Korean conflict--
“(1) who met the service requirements of section 521 of this title, and at the time of his
death had a service-connected disability for which compensation would have been
payable if 10 per centum or more in degree disabling; or

“(2) who, at the time of his death, was receiving (or entitled to receive) compensation or
retirement pay based upon a service-connected disability;

a pension at the rate prescribed by section 541 of this title for the widow of a veteran of World
War I.

“(b) No pension shall be paid to a widow of a veteran under this section unless she was
married to him--

“(1) before January 1, 1957, in the case of a widow of a veteran of World War II, or before
February 1, 1965, in the case of a widow of a veteran of the Korean conflict; or

“(2) for five or more years; or

“(3) for any period of time if a child was born of the marriage.”.

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 101 of such Act), substituted
"surviving spouse" for "widow".

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as
38 USCS § 101 note), substituted new section for one which read: "The Administrator shall
deny or discontinue payment of pension under sections 541 or 542 of this title to a surviving
spouse or child when the corpus of the estate of the survivor concerned is such that under all
the circumstances, including consideration of income, it is reasonable that some part of the

corpus be consumed for the survivor's maintenance."

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 543, as 38 USCS §
1543, amended the references in this section to reflect the redesignations made by § 5(a) of
such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for
"Administrator" wherever appearing.

Research Guide

Am Jur:

60A Am Jur 2d, Pensions and Retirement Funds § 1266

Mineral lease royalties must be considered proceeds of sale of property and are properly
excludable from income for pension purposes; but such payments are relevant to evaluation of
corpus of claimant's estate for purposes of net worth limitation under 38 USCS §§ 522(a) and
543 [now 38 USCS §§ 1522(a) and 1543], and bonus payments and delay rentals received in
connection with mineral lease must be considered income of lessor for pension purposes. VA
GCO 3-85

[SURVIVING SPOUSES OF VETERANS OF ALL PERIODS OF
WAR-REPEALED]

[§ 1544]  [§ 544. Repealed]
[§ 1545]  [§ 545. Superseded]

This part heading (Added Act Aug. 31, 1967, P. L. 90-77, Title I, § 108(a), 81 Stat. 180; Dec.
23, 1975, P. L. 94-169, Title I, § 101(2)(l), 89 Stat. 1014) was repealed by Act Nov. 4, 1978,
P. L. 95-588, Title I, § 112(a)(2), 92 Stat. 2505, effective Jan. 1, 1979, as provided by § 401
of Act Nov. 4, 1978.

[§ 1544]  [§ 544. Repealed]
SUBCHAPTER IV. ARMY, NAVY, AIR FORCE, AND COAST GUARD MEDAL OF HONOR ROLL

§ 1560. Medal of Honor Roll; persons eligible
§ 1561. Certificate
§ 1562. Special provisions relating to pension

Explanatory notes:
Although Act July 25, 1963, substituted "ARMY, NAVY, AIR FORCE, AND COAST GUARD." for "ARMY, NAVY, AND AIR FORCE", "ARMY, NAVY, AIR FORCE, AND COAST GUARD" has been substituted for "ARMY, NAVY, AND AIR FORCE" as the probable intent of Congress.

Amendments:

§ 1560. Medal of Honor Roll; persons eligible

(a) There shall be in the Department of the Army, the Department of the Navy, the Department of the Air Force, and the Department of Homeland Security, respectively, a roll designated as the "Army, Navy, Air Force, and Coast Guard Medal of Honor Roll".

(b) Upon written application to the Secretary concerned, that Secretary shall enter and record on such roll the name of each surviving person who has served on active duty in
the armed forces of the United States, and who has been awarded a medal of honor for
distinguishing such person conspicuously by gallantry and intrepidity at the risk of such
person's life, above and beyond the call of duty while so serving.

(c) Applications for entry on such roll shall be made in the form and under regulations
prescribed by the Secretary concerned, and shall indicate whether or not the applicant
desires to receive the special pension provided by section 1562 of this title [38 USCS §
1562]. Proper blanks and instructions shall be furnished by the Secretary concerned,
without charge upon the request of any person claiming the benefits of this subchapter
[38 USCS §§ 1560 et seq.].

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), in subsec. (b), substituted "such person" and "such person's" for "himself" and "his", respectively.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 560, as 38 USCS § 1560, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and, in subsec. (b), substituted "that Secretary" for "the Secretary".

2002. Act Nov. 25, 2002 (effective 3/1/2003 pursuant to § 1704(g) of such Act, which appears as 10 USCS § 101 note), in subsec. (a), substituted "of Homeland Security" for "of Transportation", wherever appearing.

Other provisions:

Effective date and application of Aug. 14, 1961 amendments. Act Aug. 14, 1961, P. L. 87-138, § 4, 75 Stat. 339, provides: "The amendments made by this Act [amending 38 USCS §§ 1560, 1561, and 1562] shall take effect on the first day of the first month which begins after the date of the enactment of this Act, except that the amendments made by subsection (b) of the first section [amending subsec. (c) of this section] and by section 2 [amending 38 USCS § 1561] shall not apply with respect to any application under section 560 [now section 1560] of title 38, United States Code, made before such first day by any person who fulfilled the qualifications prescribed by subsection (b) of such section at the time such application was made."

Cross References

This section is referred to in 38 USCS §§ 1561, 1562

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Am Jur:

60A Am Jur 2d, Pensions and Retirement Funds § 1266

§ 1561. Certificate

(a) The Secretary concerned shall determine whether or not each applicant is entitled to have such person's name entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor Roll. If the official award of the Medal of Honor to the Applicant, or the official notice to such person thereof, shows that the Medal of Honor was awarded to the applicant for an act described in section 1560 of this title [38 USCS § 1560], such award or notice shall be sufficient to entitle the applicant to have such person's name entered on such roll without further investigation; otherwise all official correspondence, orders, reports, recommendations, requests, and other evidence on file in any public office or department shall be considered.

(b) Each person whose name is entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor Roll shall be furnished a certificate of service and of the act of heroism, gallantry, bravery, or intrepidity for which the Medal of Honor was awarded, of enrollment on such roll, and, if such person has indicated such person's desire to receive the special pension provided by section 1562 of this title [38 USCS § 1562], of such person's right to such special pension.

(c) The Secretary concerned shall deliver to the Secretary a certified copy of each certificate issued under subsection (b) in which the right of the person named in the
certificate to the special pension provided by section 1562 of this title [38 USCS § 1562] is set forth. Such copy shall authorize the Secretary to pay such special pension to the person named in the certificate.

**Prior law and revision:**

This section is based on 38 USC § 2461 (Act June 17, 1957, P. L. 85-56, Title IV, Part D, § 461, 71 Stat. 110).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


This section is also based on the following provisions, which were repealed by Act Aug. 10, 1956, ch 1041, § 53, 70A Stat. 641:


**Amendments:**

1961. Act Aug. 14, 1961 (effective as provided by § 4 of such Act, which appears as 38 USCS § 1560 note), substituted new catchline and section for ones which read:

"§ 561. Certificate entitling holder to pension

"(a) The Secretary concerned shall determine whether or not each applicant is entitled to the benefits of this subchapter. If the official award of the Medal of Honor to the applicant, or the official notice to him thereof, shows that the Medal of Honor was awarded to the applicant for an act described in section 560 of this title, such award or notice shall be sufficient to entitle the applicant to special pension under this subchapter without further investigation; otherwise all official correspondence, orders, reports, recommendations, requests, and other evidence on file in any public office or department shall be considered.

"(b) Each person whose name is entered on the Army, Navy, and Air Force Medal of Honor roll shall be furnished a certificate of service and of the act of heroism, gallantry, bravery, or intrepidity for which the medal of honor was awarded, of enrollment on such roll, and of his right to special pension.

"(c) The Secretary concerned shall deliver to the Administrator a certified copy of each certificate which he issues under this subchapter. Such copy shall authorize the Administrator to pay to the person named in the certificate the special pension provided for in this subchapter."

1963. Act July 25, 1963, in subsecs. (a) and (b), substituted "Army, Navy, Air Force, and Coast Guard" for "Army, Navy, and Air Force".

1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act, in subsec. (a), substituted "such person's" for "his" wherever appearing and substituted "such person" for "him"; in subsec. (b), substituted "such person" for "he" and substituted "such person's" for "his" wherever appearing; in subsec. (c), deleted "by him" following "issued".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 561, as 38 USCS § 1561, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

**Cross References**

This section is referred to in 38 USCS § 1562

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§ 1562. Special provisions relating to pension

(a) The Secretary shall pay monthly to each person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll, and a copy of whose certificate has been delivered to the Secretary under subsection (c) of section 1561 of this title [38 USCS § 1561], a special pension at the rate of $1,000, as adjusted from time to time under subsection (e), beginning as of the date of application therefor under section 1560 of this title [38 USCS § 1560].

(b) The receipt of special pension shall not deprive any person of any other pension or other benefit, right, or privilege to which such person is or may hereafter be entitled under any existing or subsequent law. Special pension shall be paid in addition to all other payments under laws of the United States.

(c) Special pension shall not be subject to any attachment, execution, levy, tax lien, or detention under any process whatever.

(d) If any person has been awarded more than one medal of honor, such person shall not receive more than one special pension.

(e) Effective as of December 1 each year, the Secretary shall increase the amount of monthly special pension payable under subsection (a) as of November 30 of such year by the same percentage as the percentage by which benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) are increased effective December 1 of such year as a result of a determination under section 215(i) of that Act (42 U.S.C. 415(i)).

(f) (1) The Secretary shall pay, in a lump sum, to each person who is in receipt of special pension payable under this section an amount equal to the total amount of special pension that the person would have received during the period beginning on the first day of the first month beginning after the date of the act for which the person was awarded the Medal of Honor and ending on the last day of the month preceding the month in which the person's special pension in fact commenced.

(2) For each month of a period referred to in paragraph (1), the amount of special pension payable to a person shall be determined using the rate of special pension that was in effect for such month, and shall be payable only if the person would have been entitled to payment of special pension for such month under laws for eligibility for special pension (with the exception of the eligibility law requiring a person to have been awarded a Medal of Honor) in effect at the beginning of such month.

Prior law and revision:

This section is based on 38 USC § 2462 (Act June 17, 1957, P. L. 85-56, Title IV, Part D, § 462, 71 Stat. 110).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Uncodified section (Act May 3, 1922, ch 177, § 1, 42 Stat. 505).

This section is also based on the following provisions, which were repealed by Act Aug. 10, 1956, ch 1041, § 53, 70A Stat. 641:


Amendments:

1961. Act Aug. 14, 1961 (effective 9/1/61, as provided by § 4 of such Act), in subsec. (a), inserted ", and a copy of whose certificate has been delivered to him under subsection (c) of section 561 of this title," and substituted "$100" for "$10".


1975. Act Dec. 23, 1975 (effective 1/1/76, as provided by § 106 of such Act), in subsec. (a), substituted "the Administrator" for "him" following "delivered to"; and in subsecs. (b) and (d), substituted "such person" for "he".

1978. Act Oct. 18, 1978 (effective 1/1/79, as provided by § 401(b) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$200" for "$100".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 562, as 38 USCS § 1562, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

1993. Act Nov. 30, 1993 (applicable with respect to months beginning after the date of enactment, as provided by § 1(b) of such Act), in subsec. (a), substituted "$400" for "$200".

1998. Act Nov. 11, 1998 (effective on 12/1/98, pursuant to § 301(b) of such Act, which appears as a note to this section), in subsec. (a), substituted "$600" for "$400".

2002. Act Dec. 6, 2002 (effective 9/1/2003, as provided by § 304(d) of such Act, which appears as a note to this section), in subsec. (a), substituted "$1,000, as adjusted from time to time under subsection (e)" for "$600"; and added subsec. (e).

Such Act further added subsec. (f).

Other provisions:

Effective date of Nov. 11, 1998 amendment. Act Nov. 11, 1998, P. L. 105-368, Title III, § 301(b), 112 Stat. 3332, provides: "The amendment made by subsection (a) [amending subsec. (a) of this section] shall take effect on the first day of the first month beginning on or after the date of the enactment of this Act."

Effective date of amendments made by § 304(a) and (b) of Act Dec. 6, 2002. Act Dec. 6, 2002, P. L. 107-330, Title III, § 304(d), 116 Stat. 2826, provides:

"(1) Except as provided in paragraph (2), the amendments made by subsections (a) and (b) [amending subsec. (a) and adding subsec. (e) of this section] shall take effect on September 1, 2003. No payment may be made pursuant to subsection (f) of section 1562 of title 38, United States Code, as added by subsection (c) of this section, before October 1, 2003.

"(2) The Secretary of Veterans Affairs shall not make any adjustment under subsection (e) of section 1562 of title 38, United States Code, as added by subsection (b) of this section, in 2003."

Cross References

This section is referred to in 26 USCS §§ 136, 6334; 38 USCS §§ 1560, 1561
CHAPTER 17. HOSPITAL, NURSING HOME,
DOMICILIARY, AND MEDICAL CARE

Amendments:


Act Aug. 2, 1973, P. L. 93-82, Title I, §§ 103(c), 106, (b), 109(b), 87 Stat. 182, 184, 187, amended the analysis of this chapter by substituting item 613 for one which read: "613. Fitting and training in use of prosthetic appliances.", substituting item 614 for one which read: "614. Seeing-eye dogs.", substituting items 626-628 for former items 626 and 627, which read: "626. Reimbursement for loss of personal effects by fire." and "627. Persons eligible under prior law.", and adding the subchapter VI heading and items 651-654.


1981. Act Nov. 3, 1981, P. L. 97-72, Title I, §§ 106(a)(2), 107(c)(2), (d)(1), 95 Stat. 1051, amended the analysis of this chapter by adding item 629, substituting the Subchapter IV heading for one which read: "SUBCHAPTER IV-HOSPITAL AND MEDICAL CARE FOR COMMONWEALTH OF THE PHILIPPINES ARMY VETERANS", and substituting item 632 for one which read: "632. Contracts and grants to provide hospital care, medical services and nursing home care".


1985. Act Dec. 3, 1985, P. L. 99-166, Title I, §§ 1011(b)(2), 107(b), 99 Stat. 943, 946, amended the analysis of this chapter by adding item 612B; and deleting "; pilot program" following "disabilities" in item 620A.

1986. Act April 7, 1986, P. L. 99-272, Title XIX, Subtitle A, §§ 19011(c)(2), 19012(b)(2), 100 Stat. 378, 382, amended the analysis of this chapter by adding item 603, and substituting item 622 for one which read: "622. Evidence of inability to defray necessary expenses".


Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle B, § 8012(a)(2), 104 Stat. 1388-345, amended the analysis of this chapter by adding item 622A.
1991. Act Aug. 6, 1991, P. L. 102-83, § 5(b)(1), 105 Stat. 406, revised the analysis of this chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Section 4(a)(5) of such Act further amended item 1703 by substituting "non-Department" for "non-Veterans' Administration".

1992. Act Nov. 4, 1992, P. L. 102-585, Title I, § 102(a)(2), Title V, Subtitle B, §§ 512(b), 514(b), 106 Stat. 4946, 4958, amended the analysis of this chapter by adding items 1704 and 1720D, and deleting items relating to Subchapter VII, which read:

"Subchapter VII. Preventive Health-Care Services Pilot Program"

"1761. Purpose."

"1762. Definition."

"1763. Preventive health-care services."

"1764. Reports.".


1996. Act Oct. 9, 1996, P. L. 104-262, Title I, §§ 101(c)(2)(B), 104(a)(2), 110 Stat. 3179, 3184, amended the analysis of this chapter by adding items 1705 and 1706 and by substituting item 1712 for one which read: "1712. Eligibility for outpatient services.".


Act Aug. 5, 1997, P. L. 105-33, Title VIII, Subtitle B, § 8021(a)(2), 111 Stat. 667, amended the analysis of this chapter by adding item 1729A.

Act Nov. 21, 1997, P. L. 105-114, Title II, §§ 202(d), 206(b)(3), 111 Stat. 2287, 2289, amended the analysis of this chapter by substituting item 1720A for one which read "1720A. Treatment and rehabilitation for alcohol or drug dependence or abuse disabilities.", substituting item 1720C for one which read: "1720C. Noninstitutional alternatives to nursing home care: pilot program.", and adding the Subchapter VII heading and items 1771-1774.

1998. Act Nov. 11, 1998, P. L. 105-368, Title IX, § 901(b), 112 Stat. 3360, amended the analysis of this chapter by adding item 1720E.


2001. Act Dec. 21, 2001, P. L. 107-95, § 5(g)(1), 115 Stat. 918, amended the analysis of this chapter by deleting the Subchapter VII heading and items 1771-1774, which read:

"SUBCHAPTER VII. TREATMENT AND REHABILITATION FOR SERIOUSLY MENTALLY ILL AND HOMELESS VETERANS"

"1771. General treatment."

"1772. Therapeutic housing."

"1773. Additional services at certain locations."

"1774. Coordination with other agencies and organizations.".

Restriction on use of funds for assisted suicide, euthanasia, or mercy killing.


Cross References

This chapter is referred to in 31 USCS § 3803; 38 USCS §§ 106, 111, 3104, 3115, 3485, 3903, 5315, 5503, 7333, 8110, 8153; 42 USCS § 2651 Third party tort liability to United States for hospital and medical care, except for treatment of veterans under this chapter, 42 USCS §§ 2651 et seq

SUBCHAPTER I. GENERAL

§ 1701. Definitions

§ 1702. Presumption relating to psychosis

§ 1703. Contracts for hospital care and medical services in non-Department facilities

§ 1704. Preventive health services: annual report

§ 1705. Management of health care: patient enrollment system

§ 1706. Management of health care: other requirements

§ 1707. Limitations

§ 1708. Temporary lodging

§ 1701. Definitions

For the purposes of this chapter [38 USCS §§ 1701 et seq.]--

(1) The term "disability" means a disease, injury, or other physical or mental defect.

(2) The term "veteran of any war" includes any veteran awarded the Medal of Honor.

(3) The term "facilities of the Department" means--

(A) facilities over which the Secretary has direct jurisdiction;

(B) Government facilities for which the Secretary contracts; and

(C) public or private facilities at which the Secretary provides recreational activities for patients receiving care under section 1710 of this title [38 USCS § 1710].

(4) The term "non-Department facilities" means facilities other than facilities of the Department.

(5) The term "hospital care" includes--

(A) (i) medical services rendered in the course of the hospitalization of any veteran, and (ii) transportation and incidental expenses pursuant to the provisions of section 111 of this title [38 USCS § 111];
(B) such mental health services, consultation, professional counseling, and training for the members of the immediate family or legal guardian of a veteran, or the individual in whose household such veteran certifies an intention to live, as may be essential to the effective treatment and rehabilitation of a veteran or dependent or survivor of a veteran receiving care under the last sentence of section 1781(b) of this title [38 USCS § 1781(b)] and
(C) (i) medical services rendered in the course of the hospitalization of a dependent or survivor of a veteran receiving care under the last sentence of section 1781(b) of this title [38 USCS § 1781(b)], and (ii) travel and incidental expenses for such dependent or survivor under the terms and conditions set forth in section 111 of this title [38 USCS § 111].

(6) The term "medical services" includes, in addition to medical examination, treatment, and rehabilitative services, the following:
   (A) Surgical services.
   (B) Dental services and appliances as described in sections 1710 and 1712 of this title [38 USCS §§ 1710 and 1712].
   (C) Optometric and podiatric services.
   (D) Preventive health services.
   (E) In the case of a person otherwise receiving care or services under this chapter [38 USCS §§ 1701 et seq.],--
      (i) wheelchairs, artificial limbs, trusses, and similar appliances;
      (ii) special clothing made necessary by the wearing of prosthetic appliances; and
      (iii) such other supplies or services as the Secretary determines to be reasonable and necessary.
   (F) Travel and incidental expenses pursuant to section 111 of this title [38 USCS § 111].

(7) The term "domiciliary care" includes necessary medical services and travel and incidental expenses pursuant to the provisions of section 111 of this title [38 USCS § 111].

(8) The term "rehabilitative services" means such professional, counseling, and guidance services and treatment programs as are necessary to restore, to the maximum extent possible, the physical, mental, and psychological functioning of an ill or disabled person.

(9) The term "preventive health services" means
   (A) periodic medical and dental examinations:
   (B) patient health education (including nutrition education);
   (C) maintenance of drug use profiles, patient drug monitoring, and drug utilization education;
   (D) mental health preventive services:
   (E) substance abuse preventive measures;
   (F) immunizations against infectious disease;
   (G) prevention of musculoskeletal deformity or other gradually developing disabilities of a metabolic or degenerative nature;
   (H) genetic counseling concerning inheritance of genetically determined diseases;
   (I) routine vision testing and eye care services;
(J) periodic reexamination of members of likely target populations (high-risk groups) for selected diseases and for functional decline of sensory organs, together with attendant appropriate remedial intervention; and
(K) such other health-care services as the Secretary may determine to be necessary to provide effective and economical preventive health care.

(10) (A) During the period beginning on November 30, 1999, and ending on December 31, 2008, the term "medical services" includes noninstitutional extended care services.
(B) For the purposes of subparagraph (A), the term "noninstitutional extended care services" means such alternatives to institutional extended care which the Secretary may furnish (i) directly, (ii) by contract, or (iii) (through provision of case management) by another provider or payor.

Prior law and revision:
This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:
Veterans' Regulation No. 10, para. XIX, No. 10(b), para. IV.

Explanatory notes:
A prior § 1701 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3501.

Amendments:
Act July 12, 1960, in para. (6), inserted "(except under the conditions described in section 612(f)(1))"
1968. Act Oct. 21, 1968, in para. (4)(C), substituted new clause (iii) for one which read: "(iii) for veterans of any war in a Territory, Commonwealth, or possession of the United States,"
1973. Act Aug. 2, 1973 (effective as provided by § 501 of such Act, which appears as a note to this section), substituted para. (4)(C) for one which read: "(C) private facilities for which the Administrator contracts in order to provide hospital care (i) in emergency cases for persons suffering from service-connected disabilities or from disabilities for which such persons were discharged or released from the active military, naval, or air service; (ii) for women veterans of any war; or (iii) for veterans of any war in a State, Territory, Commonwealth, or possession of the United States not contiguous to the forty-eight contiguous States, except that the annually determined average hospital patient load per thousand veteran population hospitalized at Veterans' Administration expense in Government and private facilities in each such noncontiguous State may not exceed the average patient load per thousand veteran population hospitalized by the Veterans' Administration within the forty-eight contiguous States; but authority under this clause (iii) shall expire on December 31, 1978."; substituted para. (5) for one which read: "(5) The term 'hospital care' includes medical services rendered in the course of hospitalization and transportation and incidental expenses for veterans who are in need of treatment for a service-connected disability or are unable to defray the expense of transportation."; in para. (6), inserted "such home health services as the Administrator determines to be necessary or appropriate for the effective and economical

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treatment of a disability of a veteran or a dependent or survivor of a veteran receiving care under the last sentence of section 613(b) of this title*.

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in para. (4)(A), deleted "and exclusive" following "direct"; in para. (4)(C), inserted "when facilities described in clause (A) of (B) of this paragraph are not capable of furnishing economical care because of geographical inaccessibility or of furnishing the care or services required", deleted clause (i) which read: "(i) hospital care or medical services for persons suffering from service-connected disabilities or from disabilities for which such persons were discharged or released from the active military, naval, or air service;", redesignated clauses (ii) and (iii) as clauses (iv) and (v), respectively, added clauses (i)-(iii), in clause (v), as redesignated, substituted "subclause (v)" for "clause (iii)"; in para. (5)(A)(ii), substituted "pursuant to the provisions of section 111 of this title" for "for any veteran who is in need of treatment for a service-connected disability or is unable to defray the expense of transportation"; in para. (5)(B), substituted "for the members of the immediate family or legal guardian of a veteran, or the individual in whose household such veteran certifies an intention to live, as may be essential to the effective treatment and rehabilitation of a veteran or dependent or survivor of a veteran receiving care under the last sentence of section 613(b) of this title; and" for "(including (i) necessary expenses for transportation if unable to defray such expenses; or (ii) necessary expenses of transportation and subsistence in the case of a veteran who is receiving care for a service-connected disability, or in the case of a dependent or survivor of a veteran receiving care under the last sentence of section 613(b) of this title, under the terms and conditions set forth in section 111 of this title) of the members of the immediate family (including legal guardians) of a veteran or such a dependent or survivor of a veteran, or, in the case of a veteran or such dependent or survivor of a veteran who has no immediate family members (or legal guardian), the person in whose household such veteran, or such a dependent or survivor certifies his intention to live, as may be necessary or appropriate to the effective treatment and rehabilitation of a veteran or such a dependent or a survivor of a veteran; and"; substituted paras. (6) and (7) for ones which read:

"(6) The term 'medical services' includes, in addition to medical examination and treatment, such home health services as the Administrator determines to be necessary or appropriate for the effective and economical treatment of a disability of a veteran or a dependent or survivor of a veteran receiving care under the last sentence of section 613(b) of this title optometrists' services, dental and surgical services, and (except under the conditions described in section 612(f)(1)) dental appliances, wheelchairs, artificial limbs, trusses, and similar appliances, special clothing made necessary by the wearing of prosthetic appliances, and such other supplies as the Administrator determines to be reasonable and necessary." and

"(7) The term 'domiciliary care' includes transportation and incidental expenses for veterans who are unable to defray the expense of transportation."; and added para. (8).

1978. Act Oct. 26, 1978, substituted para. (4)(C)(v) for one which read: "(v) hospital care for veterans in a State, territory, Commonwealth, or possession of the United States not contiguous to the forty-eight contiguous States, except that the annually determined average hospital patient load per thousand veteran population hospitalized at Veterans' Administration expense in Government and private facilities in each such noncontiguous State may not exceed the average patient load per thousand veteran population hospitalized by the Veterans' Administration within the forty-eight contiguous States; but authority under this subclause (v) shall expire on December 31, 1978.".

1979. Act June 13, 1979, § 201(a) (effective 10/1/1979, as provided by § 107 of such Act, which appears as a note to this section), in para. (4), in subpara. (C)(ii), inserted "or of a veteran described in section 612(g) of this title if the Administrator has determined, based on an examination by a physician employed by the Veterans' Administration (or, in areas where
no such physician is available, by a physician carrying out such function under a contract or fee arrangement), that the medical condition of such veteran precludes appropriate treatment in facilities described in clauses (A) and (B) of this paragraph”, in subpara. (C)(iv), deleted “or” following “war;”, in subpara. (C)(v), substituted “; or” for a concluding period, added subpara. (C)(vi), and added concluding matter. Act June 13, 1979, § 102(c), in para. (4)(C)(ii), inserted “of the first sentence, or in the third sentence;”, in para. (6)(A)(i), substituted “described in sections 610 and 612” for “authorized in section 612(b), (d), and (e)”.

Act Dec. 20, 1979 (effective 1/1/80, as provided by § 206 of such Act, which appears as 38 USCS § 111 note), in para. (4)(C)(iii), substituted "medical services in" for "hospital care in" and inserted "until such time as the veteran can be safely transferred to any such facility"; in para. (5)(A)(ii), substituted "travel" for "transportation"; substituted new para. (5)(C)(ii) for one which read: "transportation and incidental expenses for such dependent or survivor of a veteran who is in need of treatment for any injury, disease, or disability and is unable to defray the expense of transportation"; in para. (6)(B), concluding matter, substituted "travel and incidental expenses" for "necessary expenses of travel and subsistence".


Act Dec. 3, 1985, in para. (4)(C)(v), substituted "with respect to the Commonwealth of Puerto Rico shall expire on September 30, 1988" for "(except with respect to Alaska and Hawaii) shall expire on October 31, 1985", and deleted "and to the Virgin Islands" preceding "of the restrictions".

1986. Act April 7, 1986, in para. (4), in subpara. (A), inserted "and", in subpara. (B), substituted a period for "; and", and deleted subpara. (C) and the concluding matter which read: "(C) private facilities for which the Administrator contracts when facilities described in clause (A) or (B) of this paragraph are not capable of furnishing economical care because of geographical inaccessibility or of furnishing the care or services required in order to provide (i) hospital care or medical services to a veteran for the treatment of a service-connected disability or a disability for which a veteran was discharged or released from the active military, naval, or air service; (ii) Medical services for the treatment of any disability of a veteran described in clause (1)(B) or (2) of the first sentence, or in the third sentence, of section 612(f) of this title or of a veteran described in section 612(g) of this title if the Administrator has determined, based on an examination by a physician employed by the Veterans' Administration (or, in areas where no such physician is available, by a physician carrying out such function under a contract or fee arrangement), that the medical condition of such veteran precludes appropriate treatment in facilities described in clauses (A) and (B) of this paragraph; (iii) hospital care or medical services for the treatment of medical emergencies which pose a serious threat to the life or health of a veteran receiving medical services in a facility described in clause (A) or (B) of this paragraph until such time as the veteran can be safely transferred to any such facility; (iv) hospital care for women veterans; (v) hospital care, or medical services that will obviate the need for hospital admission, for veterans in a State not contiguous to the forty-eight contiguous States, except that the annually determined hospital patient load and incidence of the provision of medical services to veterans hospitalized or treated at the expense of the Veterans' Administration in Government and private facilities in each such noncontiguous State shall be consistent with the patient load or incidence of the provision of medical services for veterans hospitalized or
treated by the Veterans' Administration within the forty-eight contiguous States, but the authority of the Administrator under this subclause with respect to the Commonwealth of Puerto Rico shall expire on September 30, 1988 and until such date the Administrator may, if necessary to prevent hardship, waive the applicability to the Commonwealth of Puerto Rico of the restrictions in this subclause with respect to hospital patient loads and incidence of provision of medical services; or (vi) diagnostic services necessary for determination of eligibility for, or of the appropriate course of treatment in connection with, the provision of medical services at independent Veterans' Administration outpatient clinics to obviate the need for hospital admission. "In the case of any veteran for whom the Administrator contracts to provide treatment in a private facility pursuant to the provisions of this paragraph, the Administrator shall periodically review the necessity for continuing such contractual arrangement pursuant to such provision."

Such Act further (applicable to hospital care, nursing home care, and medical services furnished on or after 7/1/1986, as provided by § 19011(f) of such Act, which appears as 38 USCS § 1710 note), in para. (6), in subpara. (A)(i), substituted "section 612(f)(1)(A)(i)" for "section 612(f)(1)(A)"; and in subpara. (B)(ii), substituted "section 612(f)(1)(A)(ii)" for "section 612(f)(1)(B)"

Such Act further added para. (9).

Act Oct. 28, 1986, substituted para. (6)(B) for one which read:

"(B) such consultation, professional counseling, training, and mental health services as are necessary in connection with the treatment--

"(i) of the service-connected disability of a veteran pursuant to section 612(a) of this title, and

"(ii) in the discretion of the Administrator, of the nonservice-connected disability of a veteran eligible for treatment under section 612(f)(1)(A)(ii) of this title [38 USCS § 612(f)(1)(A)(ii)] where such services were initiated during the veteran's hospitalization and the provision of such services on an outpatient basis is essential to permit the discharge of the veteran from the hospital,

for the members of the immediate family or legal guardian of a veteran, or the individual in whose household such veteran certifies an intention to live, as may be essential to the effective treatment and rehabilitation of the veteran (including, under the terms and conditions set forth in section 111 of this title, necessary expenses of travel and subsistence of such family member or individual in the case of a veteran who is receiving care for a service-connected disability, or in the case of dependent or survivor of a veteran receiving care under the last sentence of section 613(b) of this title). For the purposes of this paragraph, a dependent or survivor of a veteran receiving care under the last sentence of section 613(b) of this title shall be eligible for the same medical services as a veteran.".


Act Aug. 6, 1991, as amended by Act Nov. 2, 1994 (effective as of 8/6/91, and as if included in the enactment of Public Law 102-83, as provided by § 1202(b) of such Act), redesignated this section, formerly 38 USCS § 601, as 38 USCS § 1701, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding
38 USCS § 101); in para. (3), in the introductory matter, substituted “facilities of the Department” for "Veterans' Administration facilities"; in para (4), substituted "non-Department" for "non-Veterans' administration" and "Department" for "Veterans' Administration"; in para (6), in subpara (A)(i), substituted "Secretary" for "Administrator", in subpara (B), in cl. (i)(II), substituted "Secretary" for "Administrator", and, in cl. (ii), in subpara (II) and the concluding matter, substituted "Secretary" for "Administrator".

1992. Act Nov. 4, 1992, in para. (6), in subpara. (A)(i), substituted "preventive health services," for "preventive health-care services as defined in section 1762 of this title,"; transferred the text of 38 USCS § 1762 to this section and designated such text as para. (9); in para. (9), as so designated, redesignated paras. (1)-(11) as subparas. (A)-(K), respectively.


1996. Act Oct. 9, 1996, in para. (6), in subpara. (A)(i), deleted "(in the case of a person otherwise receiving care or services under this chapter)" following "podiatric services," and deleted "(except under the conditions described in section 1712(a)(5)(A) of this title)," following "services, and", inserted "(in the case of a person otherwise receiving care or services under this chapter)", and inserted "except that the Secretary may not furnish sensori-neural aids other than in accordance with guidelines which the Secretary shall prescribe," and, in subpara. (B)(i), in subcl. (I), substituted "paragraph (1) or (2) of section 1710(a)" for "section 1712(a)" and, in subcl. (II), substituted "paragraph (1), (2), or (3) of section 1710(a) for "section 1712(a)(5)(B)".

1999. Act Nov. 30, 1999 (effective on enactment as provided by § 101(h)(1) of such Act, which appears as 38 USCS § 1710B note), added para. (10).

2002. Act Jan. 23, 2002, in para (5), in subparas. (B) and (C)(i), substituted "1781(b)" for "1713(b);" and, in para. (6), in the introductory matter, substituted "services, the following:" for "services-," and substituted subparas (A)-(F) for former subparas. (A) and (B) and concluding matter, which read:

"(A)(i) surgical services, dental services and appliances as described in sections 1710 and 1712 of this title, optometric and podiatric services, preventive health-care services, and (in the case of a person otherwise receiving care or services under this chapter) wheelchairs, artificial limbs, trusses, and similar appliances, special clothing made necessary by the wearing of prosthetic appliances, and such other supplies or services as the Secretary determines to be reasonable and necessary, except that the Secretary may not furnish sensori-neural aids other than in accordance with guidelines which the Secretary shall prescribe, and (ii) travel and incidental expenses pursuant to the provisions of section 111 of this title; and

"(B)(i) such consultation, professional counseling, training, and mental health services as are necessary in connection with the treatment--

"(I) of the service-connected disability of a veteran pursuant to paragraph (1) or (2) of section 1710(a) of this title, and

"(II) in the discretion of the Secretary, of the non-service-connected disability of a veteran eligible for treatment under paragraph (1), (2) or (3) of section 1710(a) of this title where such services were initiated during the veteran's hospitalization and the provision of such services on an outpatient basis is essential to permit the discharge of the veteran from the hospital,

for the members of the immediate family or legal guardian of a veteran, or the individual in whose household such veteran certifies an intention to live, as may be essential to the effective treatment and rehabilitation of the veteran (including, under the terms and conditions set forth in section 111 of this title, travel and incidental expenses of such family member or individual in the case of a veteran
who is receiving care for a service-connected disability, or in the case of a
dependent or survivor of a veteran receiving care under the last sentence of
section 1713(b) of this title); and

"(ii) in the case of an individual who was a recipient of services under subclause
(i) of this clause at the time of--

"(I) the unexpected death of the veteran; or

"(II) the death of the veteran while the veteran was participating in a hospice
program (or a similar program) conducted by the Secretary,
such counseling services, for a limited period, as the Secretary determines to be
reasonable and necessary to assist such individual with the emotional and
psychological stress accompanying the veteran's death.

For the purposes of this paragraph, a dependent or survivor of a veteran receiving care
under the last sentence of section 1713(b) of this title shall be eligible for the same
medical services as a veteran.".

Act Dec. 6, 2002, in para. (10)(A), substituted "November 30, 1999," for "the date of the
enactment of the Veterans Millennium Health Care and Benefits Act".

2003. Act Dec. 6, 2003, in para. (8), deleted "(other than those types of vocational
rehabilitation services provided under chapter 31 of this title)" following "treatment programs".

Such Act further purported to amend para. (10)(A) by substituting "November 30, 1999, and
ending on December 31, 2008," for "the date of the enactment of the Veterans Millennium
Health Care and Benefits Act and ending on December 31, 2003;"; however, the substitution
was made for "November 30, 1999, and ending on December 31, 2003," in order to
effectuate the probable intent of Congress.

Other provisions:

87 Stat. 196, provides: "The provisions of this Act [amending this section, among other things;
for full classification, consult USCS Tables volumes] shall become effective the first day of
the first calendar month following the date of enactment, except that sections 105 and 106
[amending 38 USCS § 1726, enacting 38 USCS § 1728] shall be effective on January 1,
1971; section 107 [enacting 38 USCS §§ 1731, 1732, 1733 note] shall be effective July 1,
1973; and section 203 [amending former 38 USCS § 4107] shall become effective beginning
the first pay period following thirty days after the date of enactment of this Act.".

Hospital care and medical services furnished by Veterans' Administration in Puerto
Rico and Virgin Islands; report to President and Congress. Act Oct. 26, 1978, P. L.
provides:

"(a) Not later than February 1, 1981, the Administrator of Veterans' Affairs shall submit a
report to the Congress and to the President on the furnishing by the Veterans' Administration
of hospital care and medical services in the Commonwealth of Puerto Rico and in the Virgin
Islands. The Administrator shall include in such report--

"(1) a comprehensive assessment of the health-care needs of veterans in the
Commonwealth of Puerto Rico and in the Virgin Islands;

"(2) a detailed report on the hospital care and medical services furnished or to be
furnished to such veterans during fiscal years 1975 through 1981, with information in
such report shown with respect to the number of veterans treated or to be treated, the
facilities at which such care and services are furnished or to be furnished, and the extent
to which such care and services are furnished or are to be furnished for the treatment of
veterans for service-connected disabilities of any degree and of veterans with service-connected disabilities rated at 50 per centum or more; and

"(3) recommendations as to how the health-care needs of such veterans can best be addressed within the existing authority of the Administrator of Veterans' Affairs and what additional authority, if any, is necessary and desirable to meet such needs.

"(b) In making recommendations under subsection (a)(3), the Administrator shall take into consideration--

"(1) the state of the economy in the Commonwealth of Puerto Rico and in the Virgin Islands;

"(2) alternative sources of health-care services that would be available to veterans in the Commonwealth of Puerto Rico and in the Virgin Islands if the health-care services furnished by the Veterans' Administration for non-service-connected disabilities were substantially reduced;

"(3) the desirability of equitable distribution of Veterans' Administration health-care resources; and

"(4) the higher priority established by law for the care and treatment of service-connected disabilities."


Gender-specific health care services. Act Nov. 21, 1983, P. L. 98-160, Title III, § 302, 97 Stat. 1004; Aug. 6, 1991, P. L. 102-83, § 6(f), 105 Stat. 407, provides: "The Secretary of Veterans Affairs shall ensure that each health-care facility under the direct jurisdiction of the Secretary is able, through services made available either by individuals appointed to positions in the Veterans Health Administration or under contracts or other agreements made under section 4117 [now repealed], 5011 [now 8111], or 5053 [now 8153] of title 38, United States Code, to provide appropriate care, in a timely fashion, for any gender-specific disability (as defined in section 601(1) of such title [para. (1) of this section]) of a woman veteran eligible for such care under chapter 17 or chapter 31 of such title [38 USCS §§ 1701 et seq. or 3101 et seq.]."

Ratification of certain contracts and waivers. Act Oct. 19, 1984, P. L. 98-528, Title I, § 103(b), 98 Stat. 2688, provides: "Any action by the Administrator of Veterans' Affairs in entering into a contract applicable to the period beginning on October 1, 1984, and ending on the date of the enactment of this Act [enacted Oct. 19, 1984] for the provision of care described in subclause (v) of section 601(4)(C) of title 38, United States Code [subsec. (4)(C)(v) of this section], and any waiver described in that subclause made by the Administrator that is applicable to that period, is hereby ratified with respect to that period."

Repeal of previous requirements as to additional reports to Congressional committees. Act June 13, 1979, P. L. 96-22, Title II, § 201(b), 93 Stat. 54, which formerly appeared as a note to this section, was repealed by Act May 20, 1988, P. L. 100-322, Title I, Part B, § 112(b), 102 Stat. 499. Such section provided for additional reports to Congressional committees.

Study of alternative organizational structures for provision of health care services to veterans; report. Act Nov. 2, 1994, P. L. 103-446, Title XI, § 1104, 108 Stat. 4682, provides:

"(a) Requirement. The Secretary of Veterans Affairs shall enter into an agreement with an appropriate non-Federal entity under which the entity shall carry out a study of the feasibility and advisability of alternative organizational structures, such as the establishment of a
wholly-owned Government corporation or a Government-sponsored enterprise, for the effective provision of health care services to veterans.

"(b) Submission of report. The Secretary shall submit to the Committees on Veterans’ Affairs of the Senate and House of Representatives a report on the study required under subsection (a). The report shall be submitted not later than one year after the date of the enactment of this Act.

"(c) Authorization of funds. There is hereby authorized to be appropriated for the Department of Veterans Affairs the sum of $1,000,000 for the purposes of carrying out the study required under subsection (a)."

Effective date and application of Nov. 2, 1994 amendments. Act Nov. 2, 1994, P. L. 103-446, Title XII, § 1202(b), 108 Stat. 4689, provides that the amendments made by such section [amending paragraph (2)(E) of § 4(a) of Public Law, 102-83, which is classified to this section, and paragraph 4 of such section of such Act by adding subparagraph (E), relating to 38 USCS §§ 7314(b)(1) and 7315(b)(2)] shall be effective as of August 6, 1991, and as if included in the enactment of Public Law 102-83.

Guidelines required by Oct. 9, 1996 amendments of para. (6)(A)(i). Act Oct. 9, 1996, P. L. 104-262, Title I, § 103(b), 110 Stat. 3182, provides: "Not later than 30 days after the date of the enactment of this Act, the Secretary of Veterans Affairs shall prescribe the guidelines required by the amendments made by subsection (a) [amending para. (6)(A)(i) of this section] and shall furnish a copy of those guidelines to the Committees on Veterans’ Affairs of the Senate and House of Representatives.".

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
This section is referred to in 38 USCS §§ 1151, 1710B, 1712A, 2303, 7318, 7362, 8111, 8111A, 8152

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Federal Procedure:
29 Fed Proc L Ed, Public Lands and Property § 66:724

Am Jur:
70C Am Jur 2d, Social Security and Medicare § 2332
77 Am Jur 2d, Veterans and Veterans' Laws §§ 53, 54

1. Disability
2. Medical services

1. Disability
Veterans' Administration [now Department of Veterans Affairs] regulation denying medical benefits for pregnancy and childbirth to financially needy veterans unless complicated by some pathological condition is valid, being based on reasonable interpretation that pregnancy and parturition uncomplicated by pathological condition does not constitute "disability" within meaning of 38 USCS §§ 601(1), 610(a)(1)(B) [now 38 USCS §§ 1701(1), 1710(a)(1)(B)], and rationally furthering purpose of providing medical care to veterans consistent with efficient use of its resources. Kirkhuff v Nimmo (1982, App DC) 221 US App DC 203, 683 F.2d 544

2. Medical services
38 USCS § 601(6) [now 38 USCS § 1701(6)] allows for modification of utility systems in veteran's home when such modifications are essential to home dialysis treatment and where
failure to make treatment available in home would result in readmission to hospital. VA GCO 26-75, reissued VAOPGC PREC LEXIS 1201

§ 1702. Presumption relating to psychosis

Discussion and Analysis in the Veterans Benefits Manual

For the purposes of this chapter [38 USCS §§ 1701 et seq.], any veteran of World War II, the Korean conflict, the Vietnam era, or the Persian Gulf War who developed an active psychosis (1) within two years after discharge or release from the active military, naval, or air service, and (2) before July 26, 1949, in the case of a veteran of World War II, before February 1, 1957, in the case of a veteran of the Korean conflict, before May 8, 1977, in the case of a Vietnam era veteran, or before the end of the two-year period beginning on the last day of the Persian Gulf War, in the case of a veteran of the Persian Gulf War, shall be deemed to have incurred such disability in the active military, naval, or air service.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Note to Veterans’ Regulation No. 6(A) (Act Oct. 30, 1951, ch 638, 65 Stat. 694).

Amendments:

1967. Act Aug. 31, 1967 (effective 8/31/67, as provided by § 405(b) of such Act, which appears as 38 USCS § 101 note), substituted new section for one which read: “For the purposes of this chapter, any veteran of World War II or of the Korean conflict who developed an active psychosis (1) within two years after his discharge or release from the active military, naval, or air service, and (2) before July 26, 1949, in the case of a veteran of World War II, or February 1, 1957, in the case of a veteran of the Korean conflict, shall be deemed to have incurred such disability in the active military, naval, or air service.”.

1982. Act Oct. 12, 1982 substituted “before February 1, 1957, in the case of a veteran of the Korean conflict, or before May 8, 1977,” for “or February 1, 1957, in the case of a veteran of the Korean conflict, or before the expiration of two years following termination of the Vietnam era”.


1991. Act April 6, 1991 substituted “the Vietnam era, or the Persian Gulf War” for “or the Vietnam era”, deleted “or” before “May 8, 1977”, and inserted “or before the end of the two-year period beginning on the last day of the Persian Gulf War, in the case of a veteran of the Persian Gulf War,“.

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 602, as 38 USCS § 1702.

Other provisions:

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

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Am Jur:

70C Am Jur 2d, Social Security and Medicare § 2332

Phrase "shall be deemed to have incurred such disability in such active service" as used in predecessor to 38 USCS § 1702 provided conclusive presumption of service-connection in cases of active psychoses developing within 2 years from date of separation from active service in World War II. 1951 ADVA 891

§ 1703. Contracts for hospital care and medical services in non-Department facilities

Discussion and Analysis in the Veterans Benefits Manual

(a) When Department facilities are not capable of furnishing economical hospital care or medical services because of geographical inaccessibility or are not capable of furnishing the care or services required, the Secretary, as authorized in section 1710 of this title [38 USCS § 1710], may contract with non-Department facilities in order to furnish any of the following:

(1) Hospital care or medical services to a veteran for the treatment of--
   (A) a service-connected disability;
   (B) a disability for which a veteran was discharged or released from the active military, naval, or air service; or
   (C) a disability of a veteran who has a total disability permanent in nature from a service-connected disability.

(2) Medical services for the treatment of any disability of--
   (A) a veteran described in section 1710(a)(1)(B) of this title [38 USCS § 1710(a)(1)(B)];
   (B) a veteran who (i) has been furnished hospital care, nursing home care, domiciliary care, or medical services, and (ii) requires medical services to complete treatment incident to such care or services; or
   (C) a veteran described in section 1710(a)(2)(E) of this title [38 USCS § 1710(a)(2)(E)], or a veteran who is in receipt of increased pension, or additional compensation or allowances based on the need of regular aid and attendance or by reason of being permanently housebound (or who, but for the receipt of retired pay, would be in receipt of such pension, compensation, or allowance), if the Secretary has determined, based on an examination by a physician employed by the Department (or, in areas where no such physician is available, by a physician carrying out such function under a contract or fee arrangement), that the medical condition of such veteran precludes appropriate treatment in Department facilities.

(3) Hospital care or medical services for the treatment of medical emergencies which pose a serious threat to the life or health of a veteran receiving medical services in a Department facility or nursing home care under section 1720 of this title [38 USCS § 1720] until such time following the furnishing of care in the non-Department facility as the veteran can be safely transferred to a Department facility.

(4) Hospital care for women veterans.

(5) Hospital care, or medical services that will obviate the need for hospital admission, for veterans in a State (other than the Commonwealth of Puerto Rico) not contiguous to the contiguous States, except that the annually determined hospital patient load and incidence of the furnishing of medical services to veterans hospitalized or treated at the expense of the Department in Government and non-Department facilities in each
such noncontiguous State shall be consistent with the patient load or incidence of the furnishing of medical services for veterans hospitalized or treated by the Department within the 48 contiguous States and the Commonwealth of Puerto Rico.

(6) Diagnostic services necessary for determination of eligibility for, or of the appropriate course of treatment in connection with, furnishing medical services at independent Department out-patient clinics to obviate the need for hospital admission.

(7) Outpatient dental services and treatment, and related dental appliances, for a veteran described in section 1712(a)(1)(F) of this title [38 USCS § 1712(a)(1)(F)].

(8) Diagnostic services (on an inpatient or outpatient basis) for observation or examination of a person to determine eligibility for a benefit or service under laws administered by the Secretary.

(b) In the case of any veteran for whom the Secretary contracts to furnish care or services in a non-Department facility pursuant to a provision of subsection (a) of this section, the Secretary shall periodically review the necessity for continuing such contractual arrangement pursuant to such provision.

(c) The Secretary shall include in the budget documents which the Secretary submits to Congress for any fiscal year a detailed report on the furnishing of contract care and services during the most recently completed fiscal year under this section, sections 1712A, 1720, 1720A, 1724, and 1732 of this title [38 USCS §§ 1712A, 1720, 1720A, 1724, and 1732], and section 115 of the Veterans' Benefits and Services Act of 1988 (Public Law 100-322; 102 Stat. 501).

(d) (1) The Secretary shall conduct a program of recovery audits for fee basis contracts and other medical services contracts for the care of veterans under this section, and for beneficiaries under sections 1781, 1782, and 1783 of this title [38 USCS §§ 1781, 1782, and 1783], with respect to overpayments resulting from processing or billing errors or fraudulent charges in payments for non-Department care and services. The program shall be conducted by contract.

(2) Amounts collected, by setoff or otherwise, as the result of an audit under the program conducted under this subsection shall be available, without fiscal year limitation, for the purposes for which funds are currently available to the Secretary for medical care and for payment to a contractor of a percentage of the amount collected as a result of an audit carried out by the contractor.

(3) The Secretary shall allocate all amounts collected under this subsection with respect to a designated geographic service area of the Veterans Health Administration, net of payments to the contractor, to that region.

(4) The authority of the Secretary under this subsection terminates on September 30, 2008.

References in text:


Amendments:
1985. Act Dec. 3, 1985, P. L. 99-176, Title I, § 102(b)(1), as amended by Act April 7, 1986, P. L. 99-272, Title XIX, Subtitle A, § 19012(c)(5)(A) (effective 10/1/1988, as provided by § 102(b)(1) of such Act, as amended), in subsec. (a)(5), inserted "(other than the Commonwealth of Puerto Rico)" following "in a State" and substituted "contiguous States and the Commonwealth of Puerto Rico" for "contiguous States, but the authority of the Administrator under this paragraph with respect to the Commonwealth of Puerto Rico shall expire on September 30, 1988, and until such date the Administrator may, if necessary to prevent hardship, waive the applicability to the Commonwealth of Puerto Rico of the restrictions in this paragraph with respect to hospital patient loads and the incidence of the furnishing of medical services.".

1988. Act May 20, 1988, in subsec. (a), in the introductory matter, substituted "furnish any of the following: " for "furnish-", in para. (1), in the introductory matter, substituted "Hospital" for "hospital", and in subpara. (B), substituted the concluding period for a semicolon, in para. (2), in the introductory matter, substituted "Medical" for "medical", in subpara. (C), substituted the concluding period for a semicolon, in para. (3), substituted "Hospital" for "hospital", inserted "or nursing home care under section 620 of this title", and substituted the concluding period for a semicolon, in paras. (4) and (5), substituted "Hospital" for "hospital" and concluding periods for semicolons, in para. (6), substituted "Diagnostic" for "diagnostic", and the concluding period for "; or", in para. (7), substituted "Outpatient" for "outpatient", and added para. (8); and added subsec. (c).

Such Act further (applicable as provided by § 101(i) of such Act, which appears as a note to this section), in subsec. (a)(2), in subpara. (B), substituted "section 612(a)(4) of this title, for a purpose described in section 612(a)(5) of this title" for "section 612(f)(1)(A)(ii) of this title" and in subpara. (C), substituted "section 612(a)(3) (other than a veteran who is a former prisoner of war)" for "section 612(g)".

Act Nov. 18, 1988 (applicable as provided by § 1503(b) of such Act, which appears as a note to this section), in subsec. (a)(2)(B), substituted "paragraph (2), (3), or (4) of section 612(a)" for "612(a)(4)" and "612(a)(5)(B)" for "612(a)(5)".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 603, as 38 USCS § 1703, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "non-Department" for "non-Veterans' Administration", "administered by the Secretary" for "administered by the Veterans' Administration", "Department" for "Veterans' Administration", and "Secretary" for "Administrator".

1992. Act Nov. 4, 1992, in subsec. (a)(1), in subpara. (A), deleted "or" following the concluding semicolon, in subpara. (B), substituted "; or" for a concluding period, and added subpara. (C).

1996. Act Oct. 9, 1996, in subsec. (a), in the introductory matter, deleted "or 1712" following "1710", in para. (2), in subpara. (A), substituted "1710(a)(1)(B)" for "1712(a)(1)(B)", substituted subpara. (B) for one which read: "(B) a veteran described in paragraph (2), (3), or (4) of section 1712(a) of this title, for a purpose described in section 1712(a)(5)(B) of this title; or", in subpara. (C), substituted "section 1710(a)(2)(E) of this title, or a veteran who is in receipt of increased pension, or additional compensation or allowances based on the need of regular aid and attendance or by reason of being permanently housebound (or who, but for the receipt of retired pay, would be in receipt of such pension, compensation, or allowance)," for "section 1712(a)(3) (other than a veteran who is a former prisoner of war) of this title" and, in para. (7), substituted "1712(a)(1)(F)" for "1712(b)(1)(F)".

2005. Act May 11, 2005, in subsec. (d)(2), substituted "shall be available, without fiscal year limitation, for the purposes" for "shall be available for the purposes".

Other provisions:


"(2) During fiscal year 1986, the obligations incurred for Puerto Rico contract care may not exceed 85 percent of the obligations incurred for such care for fiscal year 1985.

"(3) During fiscal year 1987, the obligations incurred for Puerto Rico contract care may not exceed 50 percent of the obligations incurred for such care for fiscal year 1985.

"(4) During fiscal year 1988, the obligations incurred for Puerto Rico contract care may not exceed 25 percent of the obligations incurred for such care for fiscal year 1985.

"(5) For the purpose of this subsection, the term 'obligations incurred for Puerto Rico contract care' means the total obligations incurred during a fiscal year for medical services for veterans residing in the Commonwealth of Puerto Rico under the Administrator's authority to contract for hospital care or medical services under clause (v) of section 603(a)(5) of title 38, United States Code [subsec. (a)(5) of this section], in the Commonwealth of Puerto Rico."

Application of May 20, 1988 amendments. Act May 20, 1988, P. L. 100-322, Title I, Part A, § 101(i), 102 Stat. 492, provides: "The amendments made by this section [amending this section and 38 USCS §§ 1712, 1717 and items preceding § 1701, and adding this note and 38 USCS § 1712 note] shall apply with respect to the furnishing of medical services to veterans who apply for such services after June 30, 1988.".

Application of Nov. 18, 1988 amendments. Act Nov. 18, 1988, P. L. 100-687, Div B, Title XV, § 1503(b), 102 Stat. 4134, provides: "The amendments made by subsection (a)(1) [amending subsec. (a)(2)(B) of this section] shall apply with respect to the furnishing of medical services by contract to veterans who apply to the Veterans' Administration for medical services after June 30, 1988.".

Ratification of medical services contracts. Act Nov. 18, 1988, P. L. 100-687, Div B, Title XV, § 1503(c), 102 Stat. 4134, provides: "Any action of the Administrator in contracting with facilities other than Veterans' Administration facilities for the furnishing of medical services (as defined in section 601(6) [now section 1701(6)] of title 38, United States Code), for the purpose described in section 612(a)(5)(B) [now section 1712(a)(5)(B)] of such title, to an individual described in paragraph (2) or (3) of section 612 [now section 1712] of title 38, United States Code, who applied to the Veterans' Administration for such services during the period beginning on July 1, 1988, and ending on the date of enactment of this Act is hereby ratified.".

Cross References
This section is referred to in 38 USCS §§ 1712, 1712A, 2303; 42 USCS § 1395cc

Research Guide

Am Jur:

70C Am Jur 2d, Social Security and Medicare § 2332

77 Am Jur 2d, Veterans and Veterans' Laws §§ 59, 66

Widow was not entitled to reimbursement of cost of unauthorized private hospitalization and nursing home care for her husband, even though he was diverted to private hospital by VA [now Department of Veterans Affairs] physician, since he was not treated for service-connected disabilities and therefore not eligible for contracted hospital services at non-VA facility and he did not meet all three eligibility criteria for reimbursement under 38 USCS § 1728. Malone v Gober (1997) 10 Vet App 539
Board had jurisdiction to decide whether veteran was entitled to fee-basis medical care since implementing regulation regarding Board’s jurisdiction specifically states that Board has jurisdiction to review eligibility for outpatient treatment. Meakin v West (1998) 11 Vet App 183

Veteran who was referred from Veterans Affairs clinic to private hospital emergency room was eligible to receive payment of medical expenses incurred during hospitalization at private hospital because actions of Department of Veterans Affairs at time of transfer of veteran from Veterans Affairs clinic to private hospital constituted prior, individual authorization for admission of veteran to hospital pursuant to 38 USCS § 1703. Cantu v Principi (2004) 18 Vet App 92, 2004 US App Vet Claims LEXIS 304

§ 1704. Preventive health services: annual report

Not later than October 31 each year, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on preventive health services. Each such report shall include the following:

1. A description of the programs and activities of the Department with respect to preventive health services during the preceding fiscal year, including a description of the following:
   (A) The programs conducted by the Department—
      (i) to educate veterans with respect to health promotion and disease prevention; and
      (ii) to provide veterans with preventive health screenings and other clinical services, with such description setting forth the types of resources used by the Department to conduct such screenings and services and the number of veterans reached by such screenings and services.
   (B) The means by which the Secretary addressed the specific preventive health services needs of particular groups of veterans (including veterans with service-connected disabilities, elderly veterans, low-income veterans, women veterans, institutionalized veterans, and veterans who are at risk for mental illness).
   (C) The manner in which the provision of such services was coordinated with the activities of the Medical and Prosthetic Research Service of the Department and the National Center for Preventive Health.
   (D) The manner in which the provision of such services was integrated into training programs of the Department, including initial and continuing medical training of medical students, residents, and Department staff.
   (E) The manner in which the Department participated in cooperative preventive health efforts with other governmental and private entities (including State and local health promotion offices and not-for-profit organizations).
   (F) The specific research carried out by the Department with respect to the long-term relationships among screening activities, treatment, and morbidity and mortality outcomes.
   (G) The cost effectiveness of such programs and activities, including an explanation of the means by which the costs and benefits (including the quality of life of veterans who participate in such programs and activities) of such programs and activities are measured.
(2) A specific description of research activities on preventive health services carried out during that period using employees, funds, equipment, office space, or other support services of the Department, with such description setting forth--
   (A) the source of funds for those activities;
   (B) the articles or publications (including the authors of the articles and publications) in which those activities are described;
   (C) the Federal, State, or local governmental entity or private entity, if any, with which such activities were carried out; and
   (D) the clinical, research, or staff education projects for which funding applications were submitted (including the source of the funds applied for) and upon which a decision is pending or was denied.

(3) An accounting of the expenditure of funds during that period by the National Center for Preventive Health under section 7318 of this title [38 USCS § 7318].

Research Guide

Am Jur:

70C Am Jur 2d, Social Security and Medicare § 2332
77 Am Jur 2d, Veterans and Veterans' Laws § 53

§ 1705. Management of health care: patient enrollment system

(a) In managing the provision of hospital care and medical services under section 1710(a) of this title [38 USCS § 1710(a)], the Secretary, in accordance with regulations the Secretary shall prescribe, shall establish and operate a system of annual patient enrollment. The Secretary shall manage the enrollment of veterans in accordance with the following priorities, in the order listed:
   (1) Veterans with service-connected disabilities rated 50 percent or greater.
   (2) Veterans with service-connected disabilities rated 30 percent or 40 percent.
   (3) Veterans who are former prisoners of war or who were awarded the Purple Heart, veterans with service-connected disabilities rated 10 percent or 20 percent, and veterans described in subparagraphs (B) and (C) of section 1710(a)(2) of this title [38 USCS § 1710(a)(2)].
   (4) Veterans who are in receipt of increased pension based on a need of regular aid and attendance or by reason of being permanently housebound and other veterans who are catastrophically disabled.
   (5) Veterans not covered by paragraphs (1) through (4) who are unable to defray the expenses of necessary care as determined under section 1722(a) of this title [38 USCS § 1722(a)].
   (6) All other veterans eligible for hospital care, medical services, and nursing home care under section 1710(a)(2) of this title [38 USCS § 1710(a)(2)].
   (7) Veterans described in section 1710(a)(3) of this title [38 USCS § 1710(a)(3)] who are eligible for treatment as a low-income family under section 3(b) of the United States Housing Act of 1937 (42 U.S.C. 1437a(b)) for the area in which such veterans reside, regardless of whether such veterans are treated as single person families under paragraph (3)(A) of such section 3(b) or as families under paragraph (3)(B) of such section 3(b).
(8) Veterans described in section 1710(a)(3) of this title [38 USCS § 1710(a)(3)] who are not covered by paragraph (7).

(b) In the design of an enrollment system under subsection (a), the Secretary--
(1) shall ensure that the system will be managed in a manner to ensure that the provision of care to enrollees is timely and acceptable in quality;
(2) may establish additional priorities within each priority group specified in subsection (a), as the Secretary determines necessary; and
(3) may provide for exceptions to the specified priorities where dictated by compelling medical reasons.

(c) (1) The Secretary may not provide hospital care or medical services to a veteran under paragraph (2) or (3) of section 1710(a) of this title [38 USCS § 1710(a)] unless the veteran enrolls in the system of patient enrollment established by the Secretary under subsection (a).

(2) The Secretary shall provide hospital care and medical services under section 1710(a)(1) of this title [38 USCS § 1710(a)(1)], and under subparagraph (B) of section 1710(a)(2) of this title [38 USCS § 1710(a)(2)], for the 12-month period following such veteran's discharge or release from service, to any veteran referred to in such sections for a disability specified in the applicable subparagraph of such section, notwithstanding the failure of the veteran to enroll in the system of patient enrollment referred to in subsection (a) of this section.

Amendments:

1999. Act Nov. 30, 1999, in subsec. (a)(3), inserted "or who were awarded the Purple Heart".

2002. Act Jan. 23, 2002 (effective 10/1/2002, as provided by § 202(c) of such Act, which appears as a note to this section), in subsec. (a), substituted paras. (7) and (8) for former para. (7), which read: "(7) Veterans described in section 1710(a)(3) of this title.". Act Dec. 6, 2002, in subsec. (c)(1), substituted "The Secretary" for "Effective on October 1, 1998, the Secretary".

Other provisions:


"(a) Assessment systems. The Secretary of Veterans Affairs shall establish information systems to assess the experience of the Department of Veterans Affairs in implementing sections 101, 103, and 104, including the amendments made by those sections [for full classification, consult USCS Tables volumes], during fiscal year 1997. The Secretary shall establish those information systems in time to include assessments under such systems in the report required under subsection (b).

"(b) Report. Not later than March 1, 1998, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report reflecting the experience of the Department during fiscal year 1997 on--

"(1) the effect of implementation of, and provision and management of care under, sections 101, 103, and 104 (including the amendments made by those sections [for full classification, consult USCS Tables volumes]) on demand for health care services from the Department of Veterans Affairs by veterans described in paragraphs (1), (2), and (3) of section 1710(a) of title 38, United States Code, as amended by section 101;"
"(2) any differing patterns of demand on the part of such veterans relating to such factors as relative distance from Department facilities and prior experience, or lack of experience, as recipients of care from the Department;

"(3) the extent to which the Department has met such demand for care; and

"(4) changes in health-care delivery patterns in Department facilities and the fiscal impact of such changes.

"(c) Matters to be included. The report under subsection (b) shall include detailed information with respect to fiscal year 1997 regarding the following:

"(1) The number of veterans enrolled for care at each Department medical facility and, of such veterans, the number enrolled at each such facility who had not received care from the Department during the preceding three fiscal years.

"(2) With respect to the veterans who had not received care from the Department during the three preceding fiscal years, the total cost of providing care to such veterans, shown in total and separately (A) by level of care, and (B) by reference to whether care was furnished in Department facilities or under contract arrangements.

"(3) With respect to the number of veterans described in paragraphs (1), (2), and (3) of section 1710(a) of title 38, United States Code, as amended by section 101, who applied for health care from the Department during fiscal year 1997--

"(A) the number who applied for care (shown in total and separately by facility);

"(B) the number who were denied enrollment (shown in total and separately by facility); and

"(C) the number who were denied care which was considered to be medically necessary but not of an emergency nature (shown in total and separately by facility).

"(4) The numbers and characteristics of, and the type and extent of health care furnished to, veterans enrolled for care (shown in total and separately by facility).

"(5) The numbers and characteristics of, and the type and extent of health care furnished to, veterans not enrolled for care (shown separately by reference to each class of eligibility, both in total and separately by facility).

"(6) The specific fiscal impact (shown in total and by geographic health-care delivery areas) of changes in delivery patterns instituted under the amendments made by this title."

**Effective date of Jan. 23, 2002 amendments.** Act Jan. 23, 2002, P. L. 107-135, Title II, § 202(c), 115 Stat. 2457, provides: "The amendments made by this section [amending 38 USCS §§ 1705(a) and 1710(f)] shall take effect on October 1, 2002."

**Cross References**
This section is referred to in 10 USCS § 1076c; 38 USCS §§ 1718, 1720, 1725, 2062

**Research Guide**
Am Jur:
70C Am Jur 2d, Social Security and Medicare § 2332
77 Am Jur 2d, Veterans and Veterans' Laws § 69

§ 1706. Management of health care: other requirements
(a) In managing the provision of hospital care and medical services under section 1710(a) of this title [38 USCS § 1710(a)], the Secretary shall, to the extent feasible, design, establish and manage health care programs in such a manner as to promote cost-effective delivery of health care services in the most clinically appropriate setting.

(b) (1) In managing the provision of hospital care and medical services under such section, the Secretary shall ensure that the Department (and each geographic service area of the Veterans Health Administration) maintains its capacity to provide for the specialized treatment and rehabilitative needs of disabled veterans (including veterans with spinal cord dysfunction, blindness, amputations, and mental illness) within distinct programs or facilities of the Department that are dedicated to the specialized needs of those veterans in a manner that (A) affords those veterans reasonable access to care and services for those specialized needs, and (B) ensures that overall capacity of the Department (and each geographic service area of the Veterans Health Administration) to provide such services is not reduced below the capacity of the Department, nationwide, to provide those services, as of October 9, 1996. The Secretary shall carry out this paragraph in consultation with the Advisory Committee on Prosthetics and Special Disabilities Programs and the Committee on Care of Severely Chronically Mentally Ill Veterans.

(2) For purposes of paragraph (1), the capacity of the Department (and each geographic service area of the Veterans Health Administration) to provide for the specialized treatment and rehabilitative needs of disabled veterans (including veterans with spinal cord dysfunction, traumatic brain injury, blindness, prosthetics and sensory aids, and mental illness) within distinct programs or facilities shall be measured for seriously mentally ill veterans as follows (with all such data to be provided by geographic service area and totaled nationally):

(A) For mental health intensive community-based care, the number of discrete intensive care teams constituted to provide such intensive services to seriously mentally ill veterans and the number of veterans provided such care.

(B) For opioid substitution programs, the number of patients treated annually and the amounts expended.

(C) For dual-diagnosis patients, the number treated annually and the amounts expended.

(D) For substance-use disorder programs--

(i) the number of beds (whether hospital, nursing home, or other designated beds) employed and the average bed occupancy of such beds;

(ii) the percentage of unique patients admitted directly to outpatient care during the fiscal year who had two or more additional visits to specialized outpatient care within 30 days of their first visit, with a comparison from 1996 until the date of the report;

(iii) the percentage of unique inpatients with substance-use disorder diagnoses treated during the fiscal year who had one or more specialized clinic visits within three days of their index discharge, with a comparison from 1996 until the date of the report;

(iv) the percentage of unique outpatients seen in a facility or geographic service area during the fiscal year who had one or more specialized clinic visits, with a comparison from 1996 until the date of the report; and
(v) the rate of recidivism of patients at each specialized clinic in each geographic service area of the Veterans Health Administration.

(E) For mental health programs, the number and type of staff that are available at each facility to provide specialized mental health treatment, including satellite clinics, outpatient programs, and community-based outpatient clinics, with a comparison from 1996 to the date of the report.

(F) The number of such clinics providing mental health care, the number and type of mental health staff at each such clinic, and the type of mental health programs at each such clinic.

(G) The total amounts expended for mental health during the fiscal year.

(3) For purposes of paragraph (1), the capacity of the Department (and each geographic service area of the Veterans Health Administration) to provide for the specialized treatment and rehabilitative needs of disabled veterans within distinct programs or facilities shall be measured for veterans with spinal cord dysfunction, traumatic brain injury, blindness, or prosthetics and sensory aids as follows (with all such data to be provided by geographic service area and totaled nationally):

(A) For spinal cord injury and dysfunction specialized centers and for blind rehabilitation specialized centers, the number of staffed beds and the number of full-time equivalent employees assigned to provide care at such centers.

(B) For prosthetics and sensory aids, the annual amount expended.

(C) For traumatic brain injury, the number of patients treated annually and the amounts expended.

(4) In carrying out paragraph (1), the Secretary may not use patient outcome data as a substitute for, or the equivalent of, compliance with the requirement under that paragraph for maintenance of capacity.

(5) (A) Not later than April 1 of each year through 2004, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the Secretary's compliance, by facility and by service-network, with the requirements of this subsection. Each such report shall include information on recidivism rates associated with substance-use disorder treatment.

(B) In preparing each report under subparagraph (A), the Secretary shall use standardized data and data definitions.

(C) Each report under subparagraph (A) shall be audited by the Inspector General of the Department, who shall submit to Congress a certification as to the accuracy of each such report.

(6) (A) To ensure compliance with paragraph (1), the Under Secretary for Health shall prescribe objective standards of job performance for employees in positions described in subparagraph (B) with respect to the job performance of those employees in carrying out the requirements of paragraph (1). Those job performance standards shall include measures of workload, allocation of resources, and quality-of-care indicators.

(B) Positions described in this subparagraph are positions in the Veterans Health Administration that have responsibility for allocating and managing resources applicable to the requirements of paragraph (1).

(C) The Under Secretary shall develop the job performance standards under subparagraph (A) in consultation with the Advisory Committee on Prosthetics and
Special Disabilities Programs and the Committee on Care of Severely Chronically Mentally Ill Veterans.

(c) The Secretary shall ensure that each primary care health care facility of the Department develops and carries out a plan to provide mental health services, either through referral or direct provision of services, to veterans who require such services.

Amendments:


2002. Act Jan. 23, 2002, in subsec. (b), in para. (1), inserted "(and each geographic service area of the Veterans Health Administration)" in two places, redesignated paras. (2) and (3) as paras. (5) and (6), respectively, inserted new paras. (2)-(4), and, in para. (5) as redesignated, designated the existing text as subpara. (A) and, in such subparagraph as so designated, substituted "April 1 of each year through 2004" for "April 1, 1999, April 1, 2000, and April 1, 2001", and added the sentence beginning "Each such report shall include . . . .", and added suparas. (B) and (C).

Other provisions:

Deadline for prescribing standards. Act Nov. 11, 1998, P. L. 105-368, Title IX, § 903(b), 112 Stat. 3361, provides: "The standards of job performance required by paragraph (3) of section 1706(b) of title 38, United States Code, as added by subsection (a), shall be prescribed not later than January 1, 1999.".

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Am Jur:

70C Am Jur 2d, Social Security and Medicare § 2332

§ 1707. Limitations

(a) Funds appropriated to carry out this chapter [38 USCS §§ 1701 et seq.] may not be used for purposes that are inconsistent with the Assisted Suicide Funding Restriction Act of 1997 (42 U.S.C. 14401 et seq.).

(b) The Secretary may furnish sensori-neural aids only in accordance with guidelines prescribed by the Secretary.

References in text:

The "Assisted Suicide Funding Restriction Act of 1997", referred to in this section, is Act April 30, 1997, P. L. 105-12, which appears generally as 42 USCS §§ 14401 et seq. For full classification of such Act, consult USCS Tables volumes.

Effective date of section:

This section took effect upon enactment, pursuant to § 11 of Act April 30, 1997, P. L. 105-12, which appears as 42 USCS § 14401 note.

Amendments:
2002. Act Jan. 23, 2002, substituted the section heading for one which read: "§ 1707. Restriction on use of funds for assisted suicide, euthanasia, or mercy killing"; designated the existing provisions as subsec. (a); and added subsec. (b).

Act Dec. 6, 2002, in subsec. (a), inserted "(42 U.S.C. 14401 et seq.)".

Other provisions:

Applicability of section. For applicability of this section, see § 11 of Act April 30, 1997, P. L. 105-12, which appears as 42 USCS § 14401 note.

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Am Jur:

70C Am Jur 2d, Social Security and Medicare § 2332

§ 1708.  Temporary lodging

Discussion and Analysis in the Veterans Benefits Manual

(a) The Secretary may furnish persons described in subsection (b) with temporary lodging in a Fisher house or other appropriate facility in connection with the examination, treatment, or care of a veteran under this chapter [38 USCS §§ 1701 et seq.] or, as provided for under subsection (e)(5), in connection with benefits administered under this title.

(b) Persons to whom the Secretary may provide lodging under subsection (a) are the following:

(1) A veteran who must travel a significant distance to receive care or services under this title.

(2) A member of the family of a veteran and others who accompany a veteran and provide the equivalent of familial support for such veteran.

(c) In this section, the term "Fisher house" means a housing facility that--

(1) is located at, or in proximity to, a Department medical facility;

(2) is available for residential use on a temporary basis by patients of that facility and others described in subsection (b)(2); and

(3) is constructed by, and donated to the Secretary by, the Zachary and Elizabeth M. Fisher Armed Services Foundation.

(d) The Secretary may establish charges for providing lodging under this section. The proceeds from such charges shall be credited to the medical care account and shall be available until expended for the purposes of providing such lodging.

(e) The Secretary shall prescribe regulations to carry out this section. Such regulations shall include provisions--

(1) limiting the duration of lodging provided under this section;

(2) establishing standards and criteria under which charges are established for such lodging under subsection (d);

(3) establishing criteria for persons considered to be accompanying a veteran under subsection (b)(2);

(4) establishing criteria for the use of the premises of temporary lodging facilities under this section; and
(5) establishing any other limitations, conditions, and priorities that the Secretary considers appropriate with respect to lodging under this section.

**Code of Federal Regulations**

Department of Veterans Affairs-Fisher Houses and other temporary lodging, 38 CFR Part 60

**Research Guide**

**Am Jur:**

70C Am Jur 2d, Social Security and Medicare § 2332

**SUBCHAPTER II. HOSPITAL, NURSING HOME, OR DOMICILIARY CARE AND MEDICAL TREATMENT**

§ 1710. Eligibility for hospital, nursing home, and domiciliary care

§ 1710A. Required nursing home care

§ 1710B. Extended care services

§ 1711. Care during examinations and in emergencies

§ 1712. Dental care; drugs and medicines for certain disabled veterans; vaccines

§ 1712A. Eligibility for readjustment counseling and related mental health services

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§ 1714. Fitting and training in use of prosthetic appliances; guide dogs; service dogs

§ 1715. Tobacco for hospitalized veterans

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§ 1717. Home health services; invalid lifts and other devices

§ 1718. Therapeutic and rehabilitative activities

§ 1719. Repair or replacement of certain prosthetic and other appliances

§ 1720. Transfers for nursing home care; adult day health care

§ 1720A. Treatment and rehabilitative services for persons with drug or alcohol dependency

§ 1720B. Respite care

§ 1720C. Noninstitutional alternatives to nursing home care

§ 1720D. Counseling and treatment for sexual trauma

§ 1720E. Nasopharyngeal radium irradiation

**Amendments:**

1976. Act Oct. 21, 1976, P. L. 94-581, Title II, § 202(c), 90 Stat. 2855 (effective 10/21/76, as provided by § 211 of such Act), inserted ", NURSING HOME,".

§ 1710. **Eligibility for hospital, nursing home, and domiciliary care**

(a) (1) The Secretary (subject to paragraph (4)) shall furnish hospital care and medical services which the Secretary determines to be needed--

(A) to any veteran for a service-connected disability; and

(B) to any veteran who has a service-connected disability rated at 50 percent or more.

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(2) The Secretary (subject to paragraph (4)) shall furnish hospital care and medical services, and may furnish nursing home care, which the Secretary determines to be needed to any veteran--

(A) who has a compensable service-connected disability rated less than 50 percent or, with respect to nursing home care during any period during which the provisions of section 1710A(a) of this title [38 USCS § 1710A(a)] are in effect, a compensable service-connected disability rated less than 70 percent;
(B) whose discharge or release from active military, naval, or air service was for a disability that was incurred or aggravated in the line of duty;
(C) who is in receipt of, or who, but for a suspension pursuant to section 1151 of this title [38 USCS § 1151] (or both a suspension and the receipt of retired pay), would be entitled to disability compensation, but only to the extent that such veteran's continuing eligibility for such care is provided for in the judgment or settlement provided for in such section;
(D) who is a former prisoner of war or who was awarded the Purple Heart;
(E) who is a veteran of the Mexican border period or of World War I;
(F) who was exposed to a toxic substance, radiation, or other conditions, as provided in subsection (e); or
(G) who is unable to defray the expenses of necessary care as determined under section 1722(a) of this title [38 USCS § 1722(a)].

(3) In the case of a veteran who is not described in paragraphs (1) and (2), the Secretary may, to the extent resources and facilities are available and subject to the provisions of subsections (f) and (g), furnish hospital care, medical services, and nursing home care which the Secretary determines to be needed.

(4) The requirement in paragraphs (1) and (2) that the Secretary furnish hospital care and medical services, the requirement in section 1710A(a) of this title [38 USCS § 1710A(a)] that the Secretary provide nursing home care, and the requirement in section 1710B of this title [38 USCS § 1710B] that the Secretary provide a program of extended care services shall be effective in any fiscal year only to the extent and in the amount provided in advance in appropriations Acts for such purposes.

(5) During any period during which the provisions of section 1710A(a) of this title [38 USCS § 1710A(a)] are not in effect, the Secretary may furnish nursing home care which the Secretary determines is needed to any veteran described in paragraph (1), with the priority for such care on the same basis as if provided under that paragraph.

(b) (1) The Secretary may furnish to a veteran described in paragraph (2) of this subsection such domiciliary care as the Secretary determines is needed for the purpose of furnishing of medical services to the veteran.

(2) This subsection applies in the case of the following veterans:

(A) Any veteran whose annual income (as determined under section 1503 of this title [38 USCS § 1503]) does not exceed the maximum annual rate of pension that would be applicable to the veteran if the veteran were eligible for pension under section 1521(d) of this title [38 USCS § 1521(d)].
(B) Any veteran who the Secretary determines has no adequate means of support.

(c) While any veteran is receiving hospital care or nursing home care in any Department facility, the Secretary may, within the limits of Department facilities, furnish medical
services to correct or treat any non-service-connected disability of such veteran, in addition to treatment incident to the disability for which such veteran is hospitalized, if the veteran is willing, and the Secretary finds such services to be reasonably necessary to protect the health of such veteran. The Secretary may furnish dental services and treatment, and related dental appliances, under this subsection for a non-service-connected dental condition or disability of a veteran only (1) to the extent that the Secretary determines that the dental facilities of the Department to be used to furnish such services, treatment, or appliances are not needed to furnish services, treatment, or appliances for dental conditions or disabilities described in section 1712(a) of this title [38 USCS § 1712(a)], or (2) if (A) such non-service-connected dental condition or disability is associated with or aggravating a disability for which such veteran is receiving hospital care, or (B) a compelling medical reason or a dental emergency requires furnishing dental services, treatment, or appliances (excluding the furnishing of such services, treatment, or appliances of a routine nature) to such veteran during the period of hospitalization under this section.

(d) In no case may nursing home care be furnished in a hospital not under the direct jurisdiction of the Secretary except as provided in section 1720 of this title.

(e) (1) (A) A Vietnam-era herbicide-exposed veteran is eligible (subject to paragraph (2)) for hospital care, medical services, and nursing home care under subsection (a)(2)(F) for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

(B) A radiation-exposed veteran is eligible for hospital care, medical services, and nursing home care under subsection (a)(2)(F) for any disease suffered by the veteran that is--

(i) a disease listed in section 1112(c)(2) of this title [38 USCS § 1112(c)(2)]; or

(ii) any other disease for which the Secretary, based on the advice of the Advisory Committee on Environmental Hazards, determines that there is credible evidence of a positive association between occurrence of the disease in humans and exposure to ionizing radiation.

(C) Subject to paragraphs (2) and (3) of this subsection, a veteran who served in the Southwest Asia theater of operations during the Persian Gulf War is eligible for hospital care, medical services, and nursing home care under subsection (a)(2)(F) for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such service.

(D) Subject to paragraphs (2) and (3), a veteran who served on active duty in a theater of combat operations (as determined by the Secretary in consultation with the Secretary of Defense) during a period of war after the Persian Gulf War, or in combat against a hostile force during a period of hostilities (as defined in section 1712A(a)(2)(B) of this title [38 USCS § 1712A(a)(2)(B)]) after November 11, 1998, is eligible for hospital care, medical services, and nursing home care under subsection (a)(2)(F) for any illness, notwithstanding that there is insufficient medical evidence to conclude that such condition is attributable to such service.

(E) Subject to paragraphs (2) and (3), a veteran who participated in a test conducted by the Department of Defense Deseret Test Center as part of a program...
for chemical and biological warfare testing from 1962 through 1973 (including
the program designated as "Project Shipboard Hazard and Defense (SHAD)" and
related land-based tests) is eligible for hospital care, medical services, and nursing
home care under subsection (a)(2)(F) for any illness, notwithstanding that there is
insufficient medical evidence to conclude that such illness is attributable to such
testing.

(2) (A) In the case of a veteran described in paragraph (1)(A), hospital care, medical
services, and nursing home care may not be provided under subsection (a)(2)(F) with
respect to--

(i) a disability that is found, in accordance with guidelines issued by the Under
Secretary for Health, to have resulted from a cause other than an exposure
described in paragraph (4)(A)(ii); or

(ii) a disease for which the National Academy of Sciences, in a report issued
in accordance with section 3 of the Agent Orange Act of 1991 [38 USCS §
1116 note], has determined that there is limited or suggestive evidence of the
lack of a positive association between occurrence of the disease in humans
and exposure to a herbicide agent.

(B) In the case of a veteran described in subparagraph (C), (D), or (E) of
paragraph (1), hospital care, medical services, and nursing home care may not be
provided under subsection (a)(2)(F) with respect to a disability that is found, in
accordance with guidelines issued by the Under Secretary for Health, to have
resulted from a cause other than the service or testing described in such
paragraph.

(3) Hospital care, medical services, and nursing home care may not be provided under
or by virtue of subsection (a)(2)(F)--

(A) in the case of care for a veteran described in paragraph (1)(A), after
December 31, 2002;

(B) in the case of care for a veteran described in paragraph (1)(C), after December
31, 2002;

(C) in the case of care for a veteran described in paragraph (1)(D), after a period
of 2 years beginning on the date of the veteran's discharge or release from active
military, naval, or air service; and

(D) in the case of care for a veteran described in paragraph (1)(E), after December
31, 2005.

(4) For purposes of this subsection--

(A) The term "Vietnam-era herbicide-exposed veteran" means a veteran (i) who
served on active duty in the Republic of Vietnam during the period beginning
on January 9, 1962, and ending on May 7, 1975, and (ii) who the Secretary finds
may have been exposed during such service to dioxin or was exposed during such
service to a toxic substance found in a herbicide or defoliant used for military
purposes during such period.

(B) The term "radiation-exposed veteran" has the meaning given that term in
section 1112(c)(3) of this title [38 USCS § 1112(c)(3)].

(5) When the Secretary first provides care for veterans using the authority provided in
paragraph (1)(D), the Secretary shall establish a system for collection and analysis of
information on the general health status and health care utilization patterns of
veterans receiving care under that paragraph. Not later than 18 months after first providing care under such authority, the Secretary shall submit to Congress a report on the experience under that authority. The Secretary shall include in the report any recommendations of the Secretary for extension of that authority.

(f) (1) The Secretary may not furnish hospital care or nursing home care under this section to a veteran who is eligible for such care under subsection (a)(3) of this section unless the veteran agrees to pay to the United States the applicable amount determined under paragraph (2) or (4) of this subsection.

(2) A veteran who is furnished hospital care or nursing home care under this section and who is required under paragraph (1) of this subsection to agree to pay an amount to the United States in order to be furnished such care shall be liable to the United States for an amount equal to--

(A) the lesser of-

(i) the cost of furnishing such care, as determined by the Secretary; or
(ii) the amount determined under paragraph (3) of this subsection; and

(B) before September 30, 2007, an amount equal to $10 for every day the veteran receives hospital care and $5 for every day the veteran receives nursing home care.

(3) (A) In the case of hospital care furnished during any 365-day period, the amount referred to in paragraph (2)(A)(ii) of this subsection is--

(i) the amount of the inpatient Medicare deductible, plus
(ii) one-half of such amount for each 90 days of care (or fraction thereof) after the first 90 days of such care during such 365-day period.

(B) In the case of nursing home care furnished during any 365-day period, the amount referred to in paragraph (2)(A)(ii) of this subsection is the amount of the inpatient Medicare deductible for each 90 days of such care (or fraction thereof) during such 365-day period.

(C) (i) Except as provided in clause (ii) of this subparagraph, in the case of a veteran who is admitted for nursing home care under this section after being furnished, during the preceding 365-day period, hospital care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of hospital care in connection with such payment, the veteran shall not incur any liability under paragraph (2) of this subsection with respect to such nursing home care until--

(I) the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or
(II) the end of the 365-day period applicable to the hospital care for which payment was made, whichever occurs first.

(ii) In the case of a veteran who is admitted for nursing home care under this section after being furnished, during any 365-day period, hospital care for which the veteran has paid an amount under subparagraph (A)(ii) of this paragraph and who has not been furnished 90 days of hospital care in connection with such payment, the amount of the liability of the veteran under paragraph (2) of this subsection with respect to the number of days of such nursing home care which, when added to the number of days of such hospital care furnished in the preceding 365-day period, equals or exceeds 90 days.
care, is 90 or less, is the difference between the inpatient Medicare deductible and the amount paid under such subparagraph until--

(I) the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or

(II) the end of the 365-day period applicable to the hospital care for which payment was made, whichever occurs first.

(D) In the case of a veteran who is admitted for hospital care under this section after having been furnished, during the preceding 365-day period, nursing home care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of nursing home care in connection with such payment, the veteran shall not incur any liability under paragraph (2) of this subsection with respect to such hospital care until--

(i) the veteran has been furnished, beginning with the first day of such nursing home care furnished in connection with such payment, a total of 90 days of nursing home care and hospital care; or

(ii) the end of the 365-day period applicable to the nursing home care for which payment was made,

whichever occurs first.

(E) A veteran may not be required to make a payment under this subsection for hospital care or nursing home care furnished under this section during any 90-day period in which the veteran is furnished medical services under paragraph (3) of subsection (a) to the extent that such payment would cause the total amount paid by the veteran under this subsection for hospital care and nursing home care furnished during that period and under subsection (g) for medical services furnished during that period to exceed the amount of the inpatient Medicare deductible in effect on the first day of such period.

(F) A veteran may not be required to make a payment under this subsection or subsection (g) for any days of care in excess of 360 days of care during any 365-calendar-day period.

(4) In the case of a veteran covered by this subsection who is also described by section 1705(a)(7) of this title [38 USCS § 1705(a)(7)], the amount for which the veteran shall be liable to the United States for hospital care under this subsection shall be an amount equal to 20 percent of the total amount for which the veteran would otherwise be liable for such care under subparagraphs (2)(B) and (3)(A) but for this paragraph.

(5) For the purposes of this subsection, the term "inpatient Medicare deductible" means the amount of the inpatient hospital deductible in effect under section 1813(b) of the Social Security Act (42 U.S.C. 1395e(b)) on the first day of the 365-day period applicable under paragraph (3) of this subsection.

(g) (1) The Secretary may not furnish medical services under subsection (a) of this section (including home health services under section 1717 of this title [38 USCS § 1717]) to a veteran who is eligible for hospital care under this chapter [38 USCS §§ 1701 et seq.] by reason of subsection (a)(3) of this section unless the veteran agrees to pay to the
United States in the case of each outpatient visit the applicable amount or amounts established by the Secretary by regulation.

(2) A veteran who is furnished medical services under subsection (a) of this section and who is required under paragraph (1) of this subsection to agree to pay an amount to the United States in order to be furnished such services shall be liable to the United States, in the case of each visit in which such services are furnished to the veteran, for an amount which the Secretary shall establish by regulation.

(3) This subsection does not apply with respect to home health services under section 1717 of this title [38 USCS § 1717] to the extent that such services are for improvements and structural alterations.

(h) Nothing in this section requires the Secretary to furnish care to a veteran to whom another agency of Federal, State, or local government has a duty under law to provide care in an institution of such government.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Veterans' Regulation No. 6(a), para. I, No. 6(b); para. I, No. 6(c), para. I and notes (as amended Acts March 24, 1943, ch 22, § 3, 57 Stat. 45; June 22, 1944, ch 268, Title IV, § 401, 58 Stat. 290).

Explanatory notes:


Amendments:

1962. Act Aug. 14, 1962, substituted new subsec. (a)(1) for one which read: "(1) a veteran of any war for a service-connected disability incurred or aggravated during a period of war, or for any other disability if such veteran is unable to defray the expenses of necessary hospital care;".


1973. Act Aug. 2, 1973 (effective the first day of the first calendar month following 8/2/1973, as provided by § 501 of such Act, which appears as 38 USCS § 1701 note), in subsec. (a), in the introductory matter, inserted "or nursing home care", substituted new para. (1)(B) for one which read: "a veteran of any war or of service after January 31, 1955, for a non-service-connected disability if he is unable to defray the expenses of necessary hospital care;", substituted new subsec. (c) for one which read: "While any veteran is receiving hospital care in any Veterans' Administration facility, the Administrator may, within the limits of Veterans' Administration facilities, furnish medical services to correct or treat any non-service-connected disability of such veteran, in addition to treatment incident to the
disability for which he is hospitalized, if the veteran is willing, and the Administrator
determines that the furnishing of such medical services (1) would be in the interest of the
veteran, (2) would not prolong the hospitalization of such veteran, and (3) would not interfere
with the furnishing of medical services to other veterans under authority other than this
subsection.; and added subsec. (d).

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears
as 38 USCS § 111 note), in the section catchline, inserted ", nursing home,"; in subsec. (a), in
the introductory matter, substituted "the Administrator" for "he" preceding "determines", in
para. (1)(B), inserted "or nursing home" and substituted "such veteran" for "he"; in subsec.
(b)(1), substituted "such person" for "he"; in subsec. (b)(2), deleted ", of any war or of service
after January 31, 1955," preceding "a veteran", deleted a comma following "of domiciliary
care", and substituted "such veteran" for "he"; in subsec. (c), substituted "such veteran" for
"he" preceding "is hospitalized"; in subsec. (d), deleted "and exclusive" following "the direct".

1979. Act June 13, 1979 (effective 10/1/79, as provided by § 107 of such Act, which appears
as 38 USCS § 1701 note), in subsec. (c), inserted "The Administrator may furnish dental
services and treatment, and related dental appliances, under this subsection for a
non-service-connected dental condition or disability of a veteran only (1) to the extent that the
Administrator determines that the dental facilities of the Veterans' Administration to be used
to furnish such services, treatment, or appliances are not needed to furnish services,
treatment, or appliances for dental conditions or disabilities described in section 612(b) of this
title, or (2) if (A) such non-service-connected dental condition or disability is associated with
or aggravating a disability for which such veteran is receiving hospital care, or (B) a
compelling medical reason or a dental emergency requires furnishing dental services,
treatment, or appliances (excluding the furnishing of such services, treatment, or appliances
of a routine nature) to such veteran during the period of hospitalization under this section.".

1981. Act Aug. 14, 1981 (effective 10/1/81, as provided by § 5(d) of such Act) in subsec. (a),
in para. (3), deleted "and" following "compensation;", redesignated former para. (4) as para.
(5), and added a new para. (4).

Act Nov. 3, 1981, in subsec. (a), in para. (4) deleted "and" following "war;", redesignated former para. (5) as para. (6), and inserted para. (5); and added subsec. (e).

1983. Act Nov. 21, 1983, in subsec. (a)(3), inserted "(A)" and inserted ", or (B) who, but for a
suspension pursuant to section 351 of this title (or both such a suspension and the receipt of
retired pay), would be entitled to disability compensation, but only to the extent that such
person's continuing eligibility for such care is provided for in the judgment or settlement
described in such section".

the end of the one-year period beginning on the date the Administrator submits to the
appropriate committees of Congress the first report required by section 307(b)(2) of the
Veterans Health Programs Extension and Improvement Act of 1979 (Public Law 96-151; 93
Stat. 1098.".

1986. Act April 7, 1986 substituted subsec. (a) for one which read:

"(a) The Administrator, within the limits of Veterans' Administration facilities, may furnish
hospital care or nursing home care which the Administrator determines is needed to--

"(1)(A) any veteran for a service-connected disability; or

"(B) any veteran for a non-service-connected disability if such veteran is unable to
defray the expenses of necessary hospital or nursing home care;

"(2) a veteran whose discharge or release from the active military, naval, or air service
was for a disability incurred or aggravated in line of duty;"
“(3) a person (A) who is in receipt of, or but for the receipt or retirement pay would be entitled to, disability compensation;

“(4) a veteran who is a former prisoner of war, or (B) who, but for a suspension pursuant to section 351 of this title (or both such a suspension and the receipt of retired pay), would be entitled to disability compensation, but only to the extent that such person’s continuing eligibility for such care is provided for in the judgment or settlement described in such section;

“(5) a veteran who meets the conditions of subsection (e) of this section; and

“(6) any veteran for a non-service-connected disability if such veteran is sixty-five years of age or older.”.

Such Act further in subsec. (e), in para. (1), in subpara. (A), in the concluding matter, and in subpara. (B), substituted "is eligible for hospital care and nursing home care under subsection (a)(1)(G)" for "may be furnished hospital care or nursing home care under subsection (a)(5)"; and in paras. (2) and (3), substituted "subsection (a)(1)(G)" for "subsection (a)(5)", respectively; and added subsecs. (f) and (g).

Act Oct. 28, 1986 (effective 4/7/86, as provided by § 237(c) of such Act, which appears as a note to this section), in subsec. (a)(1)(C) inserted "who is in receipt of, or"; and added subsec. (f)(3)(F).

1988. Act May 20, 1988 substituted subsec. (b) for one which read:

"(b) The Administrator, within the limits of Veterans’ Administration facilities, may furnish domiciliary care to--

"(1) a veteran who was discharged or released from the active military, naval, or air service for a disability incurred or aggravated in line of duty, or a person who is in receipt of disability compensation, when such person is suffering from a permanent disability or tuberculosis or neuropsychiatric ailment and is incapacitated from earning a living and has no adequate means of support; and

"(2) a veteran who is in need of domiciliary care if such veteran is unable to defray the expenses of necessary domiciliary care."


1990. Act Nov. 5, 1990 (applicable as provided by § 8013(d) of such Act, which appears as a note to this section), in subsec. (a), in para. (1)(I), substituted "622(a)" for "622(a)(1)", and substituted para. (2) for one which read:

"(A) To the extent that resources and facilities are available, the Secretary may furnish hospital care and nursing home care which the Secretary determines is needed to a veteran for a non-service-connected disability if the veteran has an income level described in section 1722(a)(2) of this title.

"(B) In the case of a veteran who is not described in paragraph (1) of this subsection or in subparagraph (A) of this paragraph, the Secretary may furnish hospital care and nursing home care which the Secretary determines is needed to the veteran for a non-service-connected disability--

"(i) to the extent that resources and facilities are otherwise available; and

"(ii) subject to the provisions of subsection (f) of this section."

in subsec. (f), substituted paras. (1) and (2) for ones which read:
“(1) The Secretary may not furnish hospital care or nursing home care under this section to a veteran who is eligible for such care by reason of subsection (a)(2)(B) of this section unless the veteran agrees to pay to the United States the applicable amount determined under paragraph (2) of this subsection.

“(2) A veteran who is furnished hospital care or nursing home care under this section and who is required under paragraph (1) of this subsection to agree to pay an amount to the United States in order to be furnished such care shall be liable to the United States for an amount equal to the lesser of--

“(A) the cost of furnishing such care, as determined by the Secretary; and

“(B) the amount determined under paragraph (3) of this subsection."

and, in para. (3), in subpara. (A), in the introductory matter, and in subpara. (B), substituted "(2)(A)(ii)" for "(2)(B)".


Act June 13, 1991, in subsec. (a)(1)(H), substituted "the Mexican border period", for "the Spanish-American War, the Mexican border period,".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 610, as 38 USCS § 1710, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".


1993. Act Dec. 20, 1993 (effective 8/2/90 as provided by § 1(c) of such Act, which appears as a note to this section) in subsec. (a)(1)(G), substituted "; radiation, or environmental hazard" for "or radiation"; and, in subsec. (e), in para. (1), added subpara. (C), in para. (2), substituted "subparagraph (A), (B), or (C)" for "subparagraph (A) or (B)"; and, in para. (3), inserted ", or, in the case of care for a veteran described in paragraph (1)(C), after December 31, 1994".

Such Act further, in subsec. (e)(3), substituted "June 30, 1994" for "December 31, 1993".


Act Oct. 9, 1996, P. L. 104-262, substituted subsec. (a) for one which read:

“(a)(1) The Secretary shall furnish hospital care, and may furnish nursing home care, which the Secretary determines is needed--

“(A) to any veteran for a service-connected disability;

“(B) to a veteran whose discharge or release from the active military, naval, or air service was for a disability incurred or aggravated in line of duty, for any disability;

“(C) to a veteran who is in receipt of, or who, but for a suspension pursuant to section 1151 of this title (or both such a suspension and the receipt of retired pay), would be entitled to disability compensation, but only to the extent that such veteran's
continuing eligibility for such care is provided for in the judgment or settlement described in such section, for any disability;

"(D) to a veteran who has a service-connected disability rated at 50 percent or more, for any disability;

"(E) to any other veteran who has a service-connected disability, for any disability;

"(F) to a veteran who is a former prisoner of war, for any disability;

"(G) to a veteran exposed to a toxic substance, radiation, or environmental hazard, as provided in subsection (e) of this section;

"(H) to a veteran of the Mexican border period or World War I, for any disability; and

"(I) to a veteran for a non-service-connected disability, if the veteran is unable to defray the expenses of necessary care as determined under section 1722(a) of this title.

"(2) In the case of a veteran who is not described in paragraph (1) of this subsection, the Secretary may, to the extent resources and facilities are available, furnish hospital care and nursing home care to a veteran which the Secretary determines is needed for a non-service-connected disability, subject to the provisions of subsection (f) of this section.

"(3) In addition to furnishing hospital care and nursing home care described in paragraphs (1) and (2) of this subsection through Department facilities, the Secretary may furnish such hospital care in accordance with section 1703 of this title and may furnish such nursing home care as authorized under section 1720 of this title.";

in subsec. (c), substituted "section 1712(a)" for "section 1712(b)"; in subsec. (e), in para. (1), substituted subparas. (A) and (B) for ones which read:

"(A) Subject to paragraphs (2) and (3) of this subsection, a veteran--

"(i) who served on active duty in the Republic of Vietnam during the Vietnam era, and

"(ii) who the Secretary finds may have been exposed during such service to dioxin or was exposed during such service to a toxic substance found in a herbicide or defoliant used in connection with military purposes during such era,

is eligible for hospital care and nursing home care under subsection (a)(1)(G) of this section for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

"(B) Subject to paragraphs (2) and (3) of this subsection, a veteran who the Secretary finds was exposed while serving on active duty to ionizing radiation from the detonation of a nuclear device in connection with such veteran's participation in the test of such a device or with the American occupation of Hiroshima and Nagasaki, Japan, during the period beginning on September 11, 1945, and ending on July 1, 1946, is eligible for hospital care and nursing home care under subsection (a)(1)(G) of this section for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.".

and, in subpara. (C), substituted "hospital care, medical services, and nursing home care under subsection (a)(2)(F)" for "hospital care and nursing home care under subsection (a)(1)(G) of this section", and substituted paras. (2)-(4) for former paras. (2) and (3), which read:

"(2) Hospital and nursing home care may not be provided under subsection (a)(1)(G) of this section with respect to a disability that is found, in accordance with guidelines issued
by the Under Secretary for Health, to have resulted from a cause other than an exposure described in subparagraph (A), (B), or (C) of paragraph (1) of this subsection.

“(3) Hospital and nursing home care and medical services may not be provided under or by virtue of subsection (a)(1)(G) of this section after December 31, 1996.”;

in subsec. (f), in para. (1), substituted “subsection (a)(3)” for “subsection (a)(2)” and, in para. (3), in subpara. (E), substituted “paragraph (3) of subsection (a)” for “section 1712(a) of this title” and substituted “subsection (g)” for “section 1712(f) of this title”, and, in subpara. (F), substituted “subsection (g)” for “section 1712(f) of this title”, redesignated subsec. (g) as subsec. (h); redesignated 10 USCS § 1712(f) as subsec. (g) of this section and, in such subsection, substituted “subsection (a)(3) of this section” for “section 1710(a)(2) of this title”.

Act Oct. 9, 1996, P. L. 104-275 (effective 1/1/97 as provided by § 505(d) of such Act, which appears as 38 USCS § 101 note), in subsec. (e)(4)(A), in cl. (i), substituted “during the period beginning on January 9, 1962, and ending on May 7, 1975,” for “during the Vietnam era,” and, in cl. (ii), substituted “such period” for “such era”.


Such Act further (effective 10/1/97, as provided by § 8023(g) of such Act, which appears as 38 USCS § 712 note), in subsec. (f), deleted para. (4), which read: “(4) Amounts collected or received on behalf of the United States under this subsection shall be deposited in the Treasury as miscellaneous receipts.”, and redesignated para. (5) as para. (4); and, in subsec. (g), deleted para. (4), which read: “(4) Amounts collected or received by the Department under this subsection shall be deposited in the Treasury as miscellaneous receipts.”.

Act Nov. 21, 1997, in subsec. (a)(2), in subpara. (B), deleted “compensable preceding “disability” and, in subpara. (F), substituted “other conditions” for “environmental hazard”; and, in subsec. (e), in para. (1)(C), substituted “served” for “the Secretary finds may have been exposed while serving”, deleted “to a toxic substance or environmental hazard” following “Persian Gulf War”, and substituted “service” for “exposure” and, in para. (2) (B), substituted “the service” for “an exposure”.


1999. Act Nov. 30. 1999 (effective on enactment as provided by § 101(h)(1) of such Act, which appears as 38 USCS § 1710B note), in subsec. (a), in para. (1), in the introductory matter, deleted “, and may furnish nursing home care,” after “medical services”, in para. (2)(A), inserted “or, with respect to nursing home care during any period during which the provisions of section 1710A(a) of this title are in effect, a compensable service-connected disability rated less than 70 percent”, in para. (4), inserted “, and the requirement in section 1710B of this title that the Secretary provide a program of extended care services,”, and added para. (5).

Such Act further, in subsec. (a)(2)(D), inserted “or who was awarded the Purple Heart”.

Such Act further (applicable as provided by § 201(c) of such Act, which appears as a note to this section), in subsec. (g), in para. (1), substituted “in the case of each outpatient visit the applicable amount or amounts established by the Secretary by regulation” for “the amount determined under paragraph (2) of this subsection” and, in para. (2), substituted “which the Secretary shall establish by regulation.” for “equal to 20 percent of the estimated average cost (during the calendar year in which the services are furnished) of an outpatient visit in a Department facility. Such estimated average cost shall be determined by the Secretary.”.
2000. Act Nov. 1, 2000, in subsec. (a)(4), inserted "the requirement in section 1710A(a) of this title that the Secretary provide nursing home care," and deleted a comma following "extended care services".


Such Act further (effective 10/1/2002, as provided by § 202(c) of such Act, which appears as 38 USCS § 1705 note), in subsec. (f), in para. (1), inserted "or (4)", redesignated para. (4) as para. (5), and inserted a new para. (4).

Act Dec. 6, 2002, in subsec. (e)(1)(D), substituted "November 11, 1998" for "the date of the enactment of this subparagraph".

2003. Act Dec. 6, 2003, in subsec. (e), in para. (1), added subpara. (E), in para. (2)(B), substituted "subparagraph (C), (D), or (E) of paragraph (1)" for "paragraph (1)(C) or (1)(D)" and substituted "service or testing described in such paragraph" for "service described in that paragraph", and, in para. (3), in subpara. (B), deleted "and" following the concluding semicolon, in subpara. (C), substituted "; and" for a concluding period, and added subpara. (D).

Other provisions:


"(a) Establishment of pilot program.(1) The Administrator of Veterans' Affairs shall conduct a pilot program to evaluate the therapeutic benefits and the cost-effectiveness of furnishing certain chiropractic services to veterans eligible for medical services under chapter 17 of title 38, United States Code [38 USCS §§ 1701 et seq.]. Such a veteran is eligible to receive chiropractic services under the pilot program if the veteran was furnished hospital care or medical services by the Veterans' Administration for a neuromusculoskeletal condition of the spine within the 12-month period immediately preceding the commencement of the furnishing of such chiropractic services.

"(2) The pilot program shall consist of not less than one demonstration project in each of five geographic regions of the United States designated by the Administrator for the purpose of this section.

"(3) The pilot program shall be carried out during the period beginning on January 1, 1986, and ending on December 31, 1988.

"(b) Consultation and coordination. In developing the pilot program, the Administrator shall consult with the Secretary of Defense regarding the demonstration projects carried out by the Secretary under section 632(b) of the Department of Defense Authorization Act, 1985 (10 U.S.C. 1092 note). In designing, conducting, and evaluating the pilot program, the Administrator shall obtain advice and recommendations from recognized medical or scientific authorities in the treatment of neuromusculoskeletal conditions of the spine. The Administrator shall ensure that there is adequate participation by chiropractors in the design and evaluation of the demonstration projects, including participation by representatives from chiropractic colleges recognized by an approved accrediting organization.

"(c) Payment for chiropractic services under the pilot program.(1)(A) The Administrator shall pay the reasonable charge for chiropractic services furnished to eligible veterans under the pilot program.

"(B) The Administrator may not pay for such services to the extent that the veteran is entitled to such services (or reimbursement for the expenses of such services) under--
“(i) an insurance policy or contract;

“(ii) a medical or hospital service agreement or membership or subscription contract; or

“(iii) a similar arrangement for the purpose of providing, paying for, or reimbursing expenses for such services.

“(2) The Administrator--

“(A) shall reimburse the veteran for such reasonable charges if the veteran has paid for such services; or

“(B) in lieu of reimbursing a veteran for a charge for chiropractic services under subparagraph (A), may pay the reasonable charge for such chiropractic services directly to the chiropractor who furnished the services.

“(3) The amount paid for chiropractic services under this subsection may not exceed the amount for such services prescribed under the schedule of reasonable charges established under subsection (d).

“(4) Chiropractic services may be provided in private facilities or chiropractic colleges approved in guidelines issued by the Administrator.

“(5) Reimbursement of veterans and payments to chiropractors under this subsection shall be carried out under regulations which the Administrator shall prescribe.

“(d) Schedule of reasonable charges. The Administrator shall establish a schedule of reasonable charges for chiropractic services furnished under the pilot program. Such schedule shall--

“(1) be consistent with the reasonable charges allowed under section 1842 of the Social Security Act (42 U.S.C. 1395u); and

“(2) be established in consultation with--

“(A) appropriate public and nonprofit private organizations; and

“(B) other Federal departments and agencies that provide reimbursement for chiropractic services.

“(e) Program cap. The amount spent in any calendar year for chiropractic services under the pilot program may not exceed $2,000,000.

“(f) Report. Not later than April 1, 1989, the Administrator shall submit to the Committees on Veterans’ Affairs of the Senate and House of Representatives a report on the implementation, operation, and results of the pilot program. The report shall include--

“(1) the number of requests made by eligible veterans for reimbursement or payment for chiropractic services under this section and the number of such veterans who made such requests;

“(2) the number of such reimbursements and payments made and the number of veterans to (or for whom) such reimbursements and payments were made; and

“(3) the total amount spent for such reimbursements and payments.

“(g) Definitions. For the purposes of this section:

“(1) The term 'chiropractic services' means the manual manipulation of the spine performed by a chiropractor to correct a subluxation of the spine. Such term does not
include physical examinations, laboratory tests, radiologic services, and any other tests or services determined by the Administrator to be excluded.

"(2) The term 'chiropractor' means an individual who is licensed as such by the State in which the individual performs chiropractic services and who meets the uniform minimum standards promulgated for chiropractors under section 1861(r)(5) of the Social Security Act (42 U.S.C. 1395x(r)(5))."


"(1) The Administrator of Veterans' Affairs shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report for each fiscal year through fiscal year 1992 concerning the implementation of the amendments made by this section [amending this section, among other things; for full classification, consult USCS Tables volumes].

"(2) Each report under paragraph (1) shall provide detailed information with respect to the fiscal year for which it is submitted regarding--

"(A) the number of veterans who received health care from the Veterans' Administration during the fiscal year concerned (shown in total and separately for hospital care, nursing home care, outpatient care, and domiciliary care);

"(B) with respect to veterans who applied for health care from the Veterans' Administration during such fiscal year but did not receive such care--

"(i) the number of such veterans (shown in total and separately for hospital care, nursing home care, outpatient care, and domiciliary care); and

"(ii) the primary reasons why such care was not furnished;

"(C) the guidelines and processes for--

"(i) implementation of the income-threshold criteria for Veterans' Administration health-care eligibility established by paragraph (1)(I) [subsec. (a)(1)(I)] and subparagraphs (A) and (B) of paragraph (2) of section 610(a) of title 38, United States Code [subsec. (a)(2)(A), (B) of this section] (as added by subsection (a), paragraph (4) of section 612(f) [now section 1712(f)] of such title (as added by subsection (b)), and section 622 [now section 1722] of such title (as amended by subsection (c)); and

"(ii) the collection of payments required by section 610(f) of such title [subsec. (f) of this section] (as added by subsection (a)(2)) and by section 612(f)(4) [now section 1712(f)(4)] of such title (as added by subsection (b)(2));

"(D) the numbers and characteristics of, and the type and extent of health care furnished by the Veterans' Administration to, veterans eligible for such care by reason of any such authorities, including--

"(i) with respect to those eligible by reason of each such authority, the numbers who applied for and were furnished such care, the type and extent of such care that they were furnished, and their incomes and family sizes; and

"(ii) with respect to veterans eligible by reason of section 610(a)(2)(B) [now section 1710(a)(2)(B)] of such title [subsec. (a)(2)(B) of this section], the average and total payments made by such veterans for such care (shown in total and separately for hospital care, nursing home care, and out-patient care); and
“(E) the numbers of, and the type and extent of health care furnished by the Veterans’ Administration to, veterans eligible for such care by reason of each clause of section 610(a)(1) of such title [subsec. (a)(1) of this section] (shown in total and separately for veterans with service-connected disabilities for each percentile disability rating).

"The report for fiscal year 1986 shall include information relating only to care furnished on or after July 1, 1986.

"(3) Each report under this subsection shall be submitted not later than the February 1 following the end of the fiscal year for which it is required.”.

Application of April 7, 1986 amendments. Act April 7, 1986, P. L. 99-272, Title XIX, Subtitle A, § 19011(f), 100 Stat. 380, provides:

“(1) Except as provided in paragraph (2), the amendments made by this section [amending this section, among other things; for full classification, consult USCS Tables volumes] shall apply to hospital care, nursing home care, and medical services furnished on or after July 1, 1986.

“(2) (A) The provisions of sections 610 and 622 of title 38, United States Code [now this section and 38 USCS § 1722], as in effect on the day before the date of the enactment of this Act, shall apply with respect to hospital and nursing home care furnished on or after July 1, 1986, to veterans furnished such care or services on June 30, 1986, but only to the extent that such care is furnished with respect to the same episode of care for which it was furnished on June 30, 1986, as determined by the Administrator pursuant to regulations which the Administrator shall prescribe.

“(B) During the months of July and August 1986, the Administrator may, in order to continue a course of treatment begun before July 1, 1986, furnish medical services to a veteran on an ambulatory or outpatient basis without regard to the amendments made by this section [amending this section among other things; for full classification; consult USCS Tables volumes].

“(C) For the purposes of this paragraph, the term 'episode of care' means a period of consecutive days--

"(i) beginning with the first day on which a veteran is furnished hospital or nursing home care; and

"(ii) ending on the day of the veteran's discharge from the hospital or nursing home facility, as the case may be.”.


May 20, 1988 amendment; savings provision. Act May 20, 1988, P. L. 100-322, Title I, Part A, § 102(c), 102 Stat. 493, provides: "The amendment made by subsection (a) [amending subsec. (b) of this section] shall not limit or restrict the eligibility for domiciliary care of a veteran who was a patient or a resident in a State home facility or a Veterans' Administration domiciliary facility during the period beginning on January 1, 1987, and ending on April 1, 1988.”.

Application of Nov. 5, 1990 amendments. Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle B, § 8013(d), 104 Stat. 1388-347, provides: "The amendments made by this section [amending this section and 38 USCS §§ 1712 and 1722] shall apply with respect to hospital care and medical services received after October 31, 1990, or the date of the enactment of this Act, whichever is later.”.

Postponement of expiration of Nov. 5, 1990 amendments. Act Sept. 30, 1991, P. L. 102-109, § 111, 105 Stat. 553, provides: "Notwithstanding any other provision of this joint resolution or any other law, the amendments made by sections 8012 and 8013 of the Omnibus Budget Reconciliation Act of 1990 (Public Law 101-508) [amending 38 USCS §§ 1710, 1712, and 1722 and adding 38 USCS § 1722A] shall remain in effect through the period covered by this joint resolution [making continuing appropriations for fiscal year 1992]."

Extension of Nov. 5, 1990 amendments. Act Oct. 28, 1991, P. L. 102-145, § 111, 105 Stat. 970, provides: "Notwithstanding any other provision of this joint resolution or any other law, the amendments made by sections 8012 and 8013 of the Omnibus Budget Reconciliation Act of 1990 (Public Law 101-508) [amending 38 USCS §§ 1710, 1712, and 1722 and adding 38 USCS § 1722A] shall remain in effect through the period covered by this joint resolution [fiscal year 1992].".

Health care services for women. Act Nov. 4, 1992, P. L. 102-585, Title I, § 106, 106 Stat. 4847, provides:

"(a) General authority. In furnishing hospital care and medical services under chapter 17 of title 38, United States Code [38 USCS §§ 1701 et seq.], the Secretary of Veterans Affairs may provide to women the following health care services:

"(1) Papanicolaou tests (pap smears).

"(2) Breast examinations and mammography.

"(3) General reproductive health care, including the management of menopause, but not including under this section infertility services, abortions, or pregnancy care (including prenatal and delivery care), except for such care relating to a pregnancy that is complicated or in which the risks of complication are increased by a service-connected condition.

"(b) Responsibilities of directors of facilities. The Secretary shall ensure that directors of medical facilities of the Department identify and assess opportunities under the authority provided in title II of this Act [38 USCS § 8111 note] to (1) expand the availability of, and access to, health care services for women veterans under sections 1710 and 1712 of title 38, United States Code, and (2) provide counseling, care, and services authorized by this title.".


"(a) In general. Not later than January 1 of 1993 and each year thereafter through 1998, the Secretary of Veterans Affairs shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the provision of health care services and the conduct of research carried out by, or under the jurisdiction of, the Secretary relating to women veterans.

"(b) Contents. The report under subsection (a) shall include the following information with respect to the most recent fiscal year before the date of the report:

"(1) The number of women veterans who have received services described in section 106 of this Act [note to this section] in facilities under the jurisdiction of the Secretary (or the Secretary of Defense), shown by reference to the Department facility which provided (or, in the case of Department of Defense facilities, arranged) those services;
“(2) A description of (A) the services provided at each such facility (including information on the number of inpatient stays and the number of outpatient visits through which such services were provided), and (B) the extent to which each such facility relies on contractual arrangements under section 1703 or 8153 of title 38, United States Code, to furnish care to women veterans in facilities which are not under the jurisdiction of the Secretary where the provision of such care is not furnished in a medical emergency.

“(3) The steps taken by each such facility to expand the provision of services at such facility (or under arrangements with a Department of Defense facility) to women veterans.

“(4) A description (as of October 1 of the year preceding the year in which the report is submitted) of the status of any research relating to women veterans being carried out by or under the jurisdiction of the Secretary, including research under section 109 of this Act [38 USCS § 7303 note].

“(5) A description of the actions taken by the Secretary to foster and encourage the expansion of such research.”.

Coordination of services. Act Nov. 4, 1992, P. L. 102-585, Title I, § 108, 106 Stat. 4848, provides:

“The Secretary of Veterans Affairs shall ensure that an official in each regional office of the Veterans Health Administration shall serve as a coordinator of women's services. The responsibilities of such official shall include the following:

“(1) Conducting periodic assessments of the needs for services of women veterans within such region.

“(2) Planning to meet such needs.

“(3) Assisting in carrying out the purposes of section 106(b) of this title [note to this section].

“(4) Coordinating the training of women veterans coordinators who are assigned to Department facilities in the region under the jurisdiction of such regional coordinator.

“(5) Providing appropriate technical support and guidance to Department facilities in that region with respect to outreach activities to women veterans.”.


“(a) Study. (1) The Secretary, subject to subsection (d), shall conduct a study to determine the needs of veterans who are women for health-care services. The study shall be based on an appropriate sample of veterans who are women.

“(2) Before carrying out the study, the Secretary shall request the advice of the Advisory Committee on Women Veterans on the conduct of the study.

“(3) In carrying out the study, the Secretary shall include in the sample veterans who are women and members of the Armed Forces serving on active duty who are women. If it is feasible to do so within the amounts available for the conduct of the study, the Secretary shall ensure that the sample referred to in paragraph (1) constitutes a representative sampling (as determined by the Secretary) of the ages, the ethnic, social and economic backgrounds, the enlisted and officer grades, and the branches of service of all veterans who are women.

“(b) Reports. The Secretary shall submit to the Committees on Veterans Affairs of the Senate and House of Representatives reports relating to the study as follows:
“(1) Not later than 9 months after the date of the enactment of this Act, an interim report describing (A) the information and advice obtained by the Secretary from the Advisory Committee on Women Veterans, and (B) the status of the study.

“(2) Not later than December 31, 1995, a final report describing the results of the study.

“(c) Authorization of appropriations. There is authorized to be appropriated to the general operating expenses account of the Department of Veterans Affairs $2,000,000 to carry out the purposes of this section. Amounts appropriated pursuant to this authorization of appropriations shall be available for obligation until expended without fiscal year limitation.

“(d) Limitation. No funds may be used to conduct the study described in subsection (a) unless expressly provided for in an appropriation Act.”.

**Demonstration project to evaluate installation of telephones for patient use at Department health-care facilities.** Act Nov. 4, 1992, P. L. 102-585, Title V, Subtitle C, § 525, 106 Stat. 4960, provides:

“(a) Demonstration project. The Secretary of Veterans Affairs shall carry out a demonstration project to evaluate--

“(1) the feasibility and desirability of (A) providing telephone service in patient rooms in Department of Veterans Affairs health-care facilities which do not currently provide such service, and (B) the use of telephones by the patients of such health-care facilities; and

“(2) the relative feasibility and cost-effectiveness of a variety of options for providing such service.

“(b) Project activities.(1) In carrying out the demonstration project under this section, the Secretary shall, at an appropriate number (as determined by the Secretary) of health care facilities, provide patients reasonable access to telephone service in patients' rooms to the extent feasible, and subject to paragraph (2).

“(2) The Secretary shall ensure that patients who use such telephones bear financial responsibility for the cost of any long-distance telephone calls made during such use.

“(c) Project evaluation. In carrying out the evaluation under subsection (a), the Secretary shall determine--

“(1) the cost of the installation, use, and maintenance of such telephones, including--

“(A) the amount of any savings which accrue to the facility by reason of such installation and use (including the amount of any savings that may result from any decrease in the amount of assistance in using telephones that the staff of the facility would otherwise provide to patients); and

“(B) any costs that result from providing special telephones or other special equipment to facilitate the use of telephones by disabled veterans; and

“(2) the effect of the use of such telephones on the therapeutic course of veterans who receive care at the facility; and

“(3) the relative feasibility and cost effectiveness of a range of options for providing access to telephone service, including--

“(A) the expenditure of appropriated funds;

“(B) the receipt of donated funds, equipment, and services; and

“(C) the procuring of equipment and services by the Veterans Canteen Service.
"(d) Report. Not later than September 30, 1994, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on the demonstration project. The report shall contain the following:

"(1) The determinations of the Secretary under subsection (c).

"(2) An assessment by the Secretary of the feasibility and desirability of providing telephones for patients in other health-care facilities of the Department.

"(3) The experience of the Secretary in using, and an assessment by the Secretary of the feasibility and cost effectiveness of, alternative arrangements to the expenditure of appropriated funds for securing telephone service for patients in health-care facilities of the Department.

"(4) Any additional information and recommendations with respect to the provision and use of patient telephones at Department health-care facilities as the Secretary considers appropriate."

Effective date of amendments made by § 1(a), (b) of Act Dec. 20, 1993. Act Dec. 20, 1993, P. L. 103-210, § 1(c)(1), 107 Stat. 2497, provides: "The amendments made by subsections (a) and (b) [amending this section and 38 USCS § 1712] shall take effect as of August 2, 1990."

Reimbursement of veterans for prior care. Act Dec. 20, 1993, P. L. 103-210, § 1(c)(2), 107 Stat. 2497, provides: "The Secretary of Veterans Affairs shall, upon request, reimburse any veteran who paid the United States an amount under section 1710(f) or 1712(f) of title 38, United States Code, as the case may be, for hospital care, nursing home care, or outpatient services furnished by the Secretary to the veteran before the date of the enactment of this Act on the basis of a finding that the veteran may have been exposed to a toxic substance or environmental hazard during the Persian Gulf War. The amount of the reimbursement shall be the amount that was paid by the veteran for such care or services under such section 1710(f) or 1712(f)."

Ratification of actions during period of lapsed authority. Act Nov. 2, 1994, P. L. 103-452, Title I, § 105, 108 Stat. 4787, provides: "Any action of the Secretary of Veterans Affairs under section 1710(e) of title 38, United States Code, during the period beginning on July 1, 1994, and ending on the date of the enactment of this Act is hereby ratified."

Ratification of actions taken during period of expired authority. Act Feb. 13, 1996, P. L. 104-110, Title I, § 103, 110 Stat. 769, provides: "Any action taken by the Secretary of Veterans Affairs before the date of the enactment of this Act under a provision of law amended by this title [for full classification, consult USCS Tables volumes] that was taken during the period beginning on the date on which the authority of the Secretary under that provision of law expired and ending on the date of the enactment of this Act shall be considered to have the same force and effect as if the amendment to that provision of law made by this title [for full classification, consult USCS Tables volumes] had been in effect at the time of that action."

Oct. 9, 1996 amendment of 38 USCS §§ 1710(e) and 1712(a); savings provisions. Act Oct. 9, 1996, P. L. 104-262, Title I, § 102(b), 110 Stat. 3182, provides: "The provisions of sections 1710(e) and 1712(a) of title 38, United States Code, as in effect on the day before the date of the enactment of this Act, shall continue to apply on and after such date with respect to the furnishing of hospital care, nursing home care, and medical services for any veteran who was furnished such care or services before such date of enactment on the basis of presumed exposure to a substance or radiation under the authority of those provisions, but only for treatment for a disability for which such care or services were furnished before such date."

"(a) Identification of deficiencies. The Secretary of Veterans Affairs shall conduct a survey of each medical center under the jurisdiction of the Secretary to identify deficiencies relating to patient privacy afforded to women patients in the clinical areas at each such center which may interfere with appropriate treatment of such patients.

"(b) Correction of deficiencies. The Secretary shall ensure that plans and, where appropriate, interim steps to correct the deficiencies identified in the survey conducted under subsection (a) are developed and are incorporated into the Department's construction planning processes and, in cases in which it is cost-effective to do so, are given a high priority.

"(c) Reports to Congress. The Secretary shall compile an annual inventory, by medical center, of deficiencies identified under subsection (a) and of plans and, where appropriate, interim steps, to correct such deficiencies. The Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives, not later than October 1, 1997, and not later than October 1 each year thereafter through 1999 a report on such deficiencies. The Secretary shall include in such report the inventory compiled by the Secretary, the proposed corrective plans, and the status of such plans."


"(a) Study required. The Secretary of Veterans Affairs shall conduct a research study to determine the desirability of the Secretary furnishing hospice care to terminally ill veterans and to evaluate the most cost-effective and efficient way to do so. The Secretary shall carry out the study using resources and personnel of the Department.

"(b) Conduct of study. In carrying out the study required by subsection (a), the Secretary shall--

"(1) evaluate the programs, and the program models, through which the Secretary furnishes hospice care services within or through facilities of the Department of Veterans Affairs and the programs and program models through which non-Department facilities provide such services;

"(2) assess the satisfaction of patients, and family members of patients, in each of the program models covered by paragraph (1);

"(3) compare the costs (or range of costs) of providing care through each of the program models covered by paragraph (1); and

"(4) identify any barriers to providing, procuring, or coordinating hospice services through any of the program models covered by paragraph (1).

"(c) Program models. For purposes of subsection (b)(1), the Secretary shall evaluate a variety of types of models for delivery of hospice care, including the following:

"(1) Direct furnishing of full hospice care by the Secretary.

"(2) Direct furnishing of some hospice services by the Secretary.

"(3) Contracting by the Secretary for the furnishing of hospice care, with a commitment that the Secretary will provide any further required hospital care for the patient.

"(4) Contracting for all required care to be furnished outside the Department.

"(5) Referral of the patient for hospice care without a contract.

"(d) Report. Not later than April 1, 1998, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the research study. The report shall set forth the Secretary's findings and recommendations. The Secretary shall include in the report information on the extent to which the Secretary advises veterans
concerning their eligibility for hospice care and information on the number of veterans (as of the time of the report) who are in each model of hospice care described in subsection (c) and the average cost per patient of hospice care for each such model.

Effective date of Aug. 5, 1997 amendments. Act Aug. 5, 1997, P. L. 105-33, Title VIII, Subtitle B, § 8023(g), 111 Stat. 668, provides:

"(1) Except as provided in paragraph (2), this section [enacting 38 USCS § 1729A, amending 38 USCS §§ 712, 1710, 1722A, and 1729, and appearing in part as 38 USCS §§ 1729 and 1729A notes] and the amendments made by this section shall take effect on October 1, 1997.

"(2) The amendments made by subsection (d) [amending 38 USCS § 1729] shall take effect on the date of the enactment of this Act."

Demonstration projects for treatment of Persian Gulf illness. Act Nov. 21, 1997, P. L. 105-114, Title II, § 209(b), 111 Stat. 2290, provides:

"(1) The Secretary of Veterans Affairs shall carry out a program of demonstration projects to test new approaches to treating, and improving the satisfaction with such treatment of, Persian Gulf veterans who suffer from undiagnosed and ill-defined disabilities. The program shall be established not later than July 1, 1998, and shall be carried out at up to 10 geographically dispersed medical centers of the Department of Veterans Affairs.

"(2) At least one of each of the following models shall be used at no less than two of the demonstration projects:

"(A) A specialized clinic which serves Persian Gulf veterans.

"(B) Multidisciplinary treatment aimed at managing symptoms.

"(C) Use of case managers.

"(3) A demonstration project under this subsection may be undertaken in conjunction with another funding entity, including agreements under section 8111 of title 38, United States Code.

"(4) The Secretary shall make available from appropriated funds (which have been retained for contingent funding) $5,000,000 to carry out the demonstration projects.

"(5) The Secretary may not approve a medical center as a location for a demonstration project under this subsection unless a peer review panel has determined that the proposal submitted by that medical center is among those proposals that have met the highest competitive standards of clinical merit and the Secretary has determined that the facility has the ability to--

"(A) attract the participation of clinicians of outstanding caliber and innovation to the project; and

"(B) effectively evaluate the activities of the project.

"(6) In determining which medical centers to select as locations for demonstration projects under this subsection, the Secretary shall give special priority to medical centers that have demonstrated a capability to compete successfully for extramural funding support for research into the effectiveness and cost-effectiveness of the care provided under the demonstration project."

Implementation report. Act Nov. 11, 1998, P. L. 105-368, Title I, § 102(b), 112 Stat. 3322, provides: "Not later than October 1, 1999, the Secretary of Veterans Affairs shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the Secretary's plan for establishing and operating the system for collection and analysis of information required by paragraph (5) of section 1710(e) of title 38, United States Code, as added by subsection (a)(4)."
Applicability of amendments made by § 201(b) of Act Nov. 30, 1999. Act Nov. 30, 1999, P. L. 106-117, Title II, § 201(c), as added Nov. 1, 2000, P. L. 106-419, Title II, Subtitle C, § 224(c), 114 Stat. 1846, provides: "The amendments made by subsection (b) [amending subsec. (g) of this section] shall apply with respect to medical services furnished under section 1710(a) of title 38, United States Code, on or after the effective date of the regulations prescribed by the Secretary of Veterans Affairs to establish the amounts required to be established under paragraphs (1) and (2) of section 1710(g) of that title, as amended by subsection (b)."


"(a) Establishment of program. Not later than 120 days after the date of the enactment of this Act, the Under Secretary for Health of the Department of Veterans Affairs, after consultation with chiropractors, shall establish a policy for the Veterans Health Administration regarding the role of chiropractic treatment in the care of veterans under chapter 17 of title 38, United States Code [38 USCS §§ 1701 et seq.].

"(b) Definitions. For purposes of this section:

"(1) The term 'chiropractic treatment' means the manual manipulation of the spine performed by a chiropractor for the treatment of such musculo-skeletal conditions as the Secretary considers appropriate.

"(2) The term 'chiropractor' means an individual who--

"(A) is licensed to practice chiropractic in the State in which the individual performs chiropractic services; and

"(B) holds the degree of doctor of chiropractic from a chiropractic college accredited by the Council on Chiropractic Education."

Ratification of actions taken between Nov. 30, 1999, and Nov. 1, 2000, under subsec. (g). Act Nov. 1, 2000, P. L. 106-419, Title II, Subtitle C, § 224(d), 114 Stat. 1846, provides: "Any action taken by the Secretary of Veterans Affairs under section 1710(g) of title 38, United States Code, during the period beginning on November 30, 1999, and ending on the date of the enactment of this Act is hereby ratified."


"(a) Requirement for program. Subject to the provisions of this section, the Secretary of Veterans Affairs shall carry out a program to provide chiropractic care and services to veterans through Department of Veterans Affairs medical centers and clinics.

"(b) Eligible veterans. Veterans eligible to receive chiropractic care and services under the program are veterans who are enrolled in the system of patient enrollment under section 1705 of title 38, United States Code.

"(c) Location of program. The program shall be carried out at sites designated by the Secretary for purposes of the program. The Secretary shall designate at least one site for such program in each geographic service area of the Veterans Health Administration. The sites so designated shall be medical centers and clinics located in urban areas and in rural areas.

"(d) Care and services available. The chiropractic care and services available under the program shall include a variety of chiropractic care and services for neuro-musculoskeletal conditions, including subluxation complex.

"(e) Other administrative matters.(1) The Secretary shall carry out the program through personal service contracts and by appointment of licensed chiropractors in Department medical centers and clinics.

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“(2) As part of the program, the Secretary shall provide training and materials relating to chiropractic care and services to Department health care providers assigned to primary care teams for the purpose of familiarizing such providers with the benefits of chiropractic care and services.

“(f) Regulations. The Secretary shall prescribe regulations to carry out this section.

“(g) Chiropractic advisory committee.(1) The Secretary shall establish an advisory committee to provide direct assistance and advice to the Secretary in the development and implementation of the chiropractic health program.

“(2) The membership of the advisory committee shall include members of the chiropractic care profession and such other members as the Secretary considers appropriate.

“(3) Matters on which the advisory committee shall assist and advise the Secretary shall include the following:

“(A) Protocols governing referral to chiropractors.

“(B) Protocols governing direct access to chiropractic care.

“(C) Protocols governing scope of practice of chiropractic practitioners.

“(D) Definition of services to be provided.

“(E) Such other matters the Secretary determines to be appropriate.

“(4) The advisory committee shall cease to exist on December 31, 2004.”.

**Personal emergency response system for veterans with service-connected disabilities.**


“(a) Evaluation and study. The Secretary of Veterans Affairs shall carry out an evaluation and study of the feasibility and desirability of providing a personal emergency response system to veterans who have service-connected disabilities. The evaluation and study shall be commenced not later than 60 days after the date of the enactment of this Act.

“(b) Report. Not later than 180 days after the date of the enactment of this Act, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the evaluation and study under subsection (a). The Secretary shall include in the report the Secretary's findings resulting from the evaluation and study and the Secretary's conclusion as to whether the Department of Veterans Affairs should provide a personal emergency response system to veterans with service-connected disabilities.

“(c) Authority to provide system. If the Secretary concludes in the report under subsection (b) that a personal emergency response system should be provided by the Department of Veterans Affairs to veterans with service-connected disabilities--

“(1) the Secretary may provide such a system, without charge, to any veteran with a service-connected disability who is enrolled under section 1705 of title 38, United States Code, and who submits an application for such a system under subsection (d); and

“(2) the Secretary may contract with one or more vendors to furnish such a system.

“(d) Application. A personal emergency response system may be provided to a veteran under subsection (c)(1) only upon the submission by the veteran of an application for the system. Any such application shall be in such form and manner as the Secretary may require.

“(e) Definition. For purposes of this section, the term 'personal emergency response system' means a device--
“(1) that can be activated by an individual who is experiencing a medical emergency to notify appropriate emergency medical personnel that the individual is experiencing a medical emergency; and

“(2) that provides the individual's location through a Global Positioning System indicator.”.

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17
Department of Veterans Affairs-Per diem for nursing home care of veterans in State homes, 38 CFR Part 51
Department of Veterans Affairs-Forms, 38 CFR Part 58
Department of Veterans Affairs-Grants to States for construction or acquisition of State homes, 38 CFR Part 59

Cross References
Right in United States to recover from tortiously liable third person, 42 USCS § 2651
This section is referred to in 10 USCS § 1074e; 26 USCS § 6103; 38 USCS §§ 1701, 1703, 1705, 1706, 1710A, 1710B, 1712, 1712A, 1717, 1720B, 1720C, 1722, 1729A, 1771, 1772, 2032, 2062, 2303, 5317, 8111A

Research Guide
Federal Procedure:
29 Fed Proc L Ed, Public Lands and Property § 66:724

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 25, 55, 56, 60, 63, 65, 66

Forms:
16A Fed Procedural Forms L Ed, Veterans and Veterans' Laws § 68:42

I. IN GENERAL

II. ELIGIBILITY FOR BENEFITS

III. REIMBURSEMENT OF GOVERNMENT

I. IN GENERAL

1. Generally

To extent that veterans believe that Administrator of Veterans Administration [now Secretary of Veterans Affairs] is required to furnish domiciliary care and vocational training benefits to them
at specific facilities in certain cities, their expectations depart from duties imposed on Administrator [now Secretary] by 38 USCS § 610 [now 38 USCS § 1710] and, so far as their complaint reveals, are merely "unilateral expectations" and as such, are not property interests entitled to due process protection. Moore v Johnson (1978, CA9 Cal) 582 F.2d 1228

2. False statements as to financial ability

Veteran who in his application for free hospitalization in veterans' administration hospital falsely states his financial ability to pay for hospitalization violates predecessor to 18 USCS § 289, the False Claims Act. United States v Alperstein (1960, SD Fla) 183 F Supp 548, aff'd (1961, CA5 Fl) 291 F.2d 455

3. Damage actions against government

Veteran who received compensation for injuries sustained while undergoing treatment at veterans' hospital for non-service-connected illness is not entitled to sue government for damages. O'Neil v United States (1953, App DC) 92 US App DC 96, 202 F.2d 366

4. Regulations

Veterans Administration [now Department of Veterans Affairs] has no authority to promulgate regulations depriving veterans of right to hospitalization and treatment, or conditioning enjoyment of such right. United States v St. Paul Mercury Indem. Co. (1956, CA8 Neb) 238 F.2d 594

Regulations promulgated by Veterans Administration [now Department of Veterans Affairs] under 38 USCS §§ 210(c) [now repealed; for similar provisions, see 38 USCS § 501], 621, [now 1721], for assignment of workmen's compensation claim to Veterans Administration [now Department of Veterans Affairs] for treatment furnished pursuant to 38 USCS § 610 [now 38 USCS § 1710], for veteran who has compensable claim, prevails over state provision precluding assignment of workmen's compensation claims; Supremacy Clause of Constitution, Art. VI, cl. 2 prevails. Texas Employers' Ins. Asso. v United States (1978, CA5 Tex) 569 F.2d 874, cert den (1978) 439 US 826, 58 L Ed 2d 119, 99 S Ct 98

Veterans' Administration [now Department of Veterans Affairs] regulation denying medical benefits for pregnancy and childbirth to financially needy veterans unless complicated by some pathological condition is valid, being based on reasonable interpretation that pregnancy and parturition uncomplicated by pathological condition does not constitute "disability" within meaning of 38 USCS §§ 601(1), 610(a)(1)(B) [now 38 USCS §§ 1701(1), 1710(a)(1)(B)], and rationally furthering purpose of providing medical care to veterans consistent with efficient use of its resources. Kirkhoff v Nimmo (1982, App DC) 221 US App DC 203, 683 F.2d 544

Administrator [now Secretary] of Veterans Affairs has authority to promulgate regulation (38 CFR § 17.48) allowing Veterans' Administration [now Department of Veterans Affairs] to procure assignment of patient's rights to reimbursement from employer or workmen's compensation carrier as condition of providing services at Veterans' Administration [now Department of Veterans Affairs] hospital. United States v Kirkland (1975, ED Tenn) 405 F Supp 1024

II. ELIGIBILITY FOR BENEFITS

5. Generally

Naval hospitals are primarily for medical care of navy and marine corps personnel on active duty, and other members of uniformed services on active duty, as provided by 10 USCS §§ 1074(a), 6201; thus, "honorary discharged veterans", who are only entitled to hospitalization and medical care from Veterans' Administration [now Department of Veterans Affairs] under provisions of 38 USCS §§ 610 et seq. [now 38 USCS §§ 1710 et seq.], and who brought action seeking to restrain Secretary of Defense from discontinuing operations of naval hospital are not entitled to use hospital and fail to show irreparable harm which would result from scheduled closing. Disabled American Veterans Dept., Inc. v United States (1973, ED NY) 365 F Supp 1190

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Since purpose of Veterans Administration [now Department of Veterans Affairs] regulation is to grant same benefits to rejected draftees as to which same class of persons of World War I are entitled, such persons are entitled to domiciliary or hospital care, including medical treatment, for injuries or diseases incurred in line of duty, when in need of hospital treatment for such injuries or diseases. 1945 ADVA 648

Widow was not entitled to reimbursement of cost of unauthorized private hospitalization and nursing home care for her husband, even though he was diverted to private hospital by Veterans Administration [now Department of Veterans Affairs] physician, since he was not treated for service-connected disabilities and therefore not eligible for contracted hospital services at non-VA facility and he did not meet all three eligibility criteria for reimbursement under 38 USCS § 1728. Malone v Gober (1997) 10 Vet App 539

6. Preferences
Preference may be given to veterans with 90 or more days of service. (1934) 37 Op Atty Gen 551

7. Aliens
Neutral nondeclarant alien, honorably discharged from military service at his own request subsequent to November 11, 1918, is eligible for domiciliary or hospital care in Government institution. 1937 ADVA 392

8. Emergency treatment
Expenses for emergency medical treatment and hospitalization through nongovernmental facilities are payable where veteran became ill in transit to approved program of vocational rehabilitation, was furnished transportation and ordered to report to such program. 1945 ADVA 628

Expenses for emergency medical treatment and hospitalization through nongovernmental facilities are payable where veteran, granted vocational rehabilitation by Veterans' Administration [now Department of Veterans Affairs], is furnished transportation in order to report and becomes ill en route. 1945 ADVA 628

Term "medical and hospital treatment," as used in existing legislation pertaining to veterans, includes medical or hospital treatment furnished in osteopathic hospital; thus, veteran is eligible for subsequent payment by Veterans' Administration [now Department of Veterans Affairs], although he was taken in emergency into osteopathic hospital for treatment of service-connected disability without prior authorization by Veterans' Administration [now Department of Veterans Affairs]. 1946 ADVA 694

Veteran who was referred from Veterans Affairs clinic to private hospital emergency room was eligible to receive payment of medical expenses incurred during hospitalization at private hospital because all evidence supported finding that veteran's medical condition posed threat to his health. Cantu v Principi (2004) 18 Vet App 92, 2004 US App Vet Claims LEXIS 304

9. Appeal and review
Regulation of Veterans Administration [now Department of Veterans Affairs] which denies hospital benefits to veterans in custody of State Department of Corrections is not finally conclusive as a matter of law and is reviewable by federal court where inmate is in need of psychological treatment and incompetent to stand trial. Taylor v United States (1974, ND Ill) 385 F Supp 1034

In rejecting veteran's claim for reimbursement for his private hospitalization bills incurred when Veterans Administration [now Department of Veterans Affairs] doctor advised him to go to nearest private hospital for treatment, Board improperly concluded that it had no jurisdiction of reimbursement for medical expenses based on prior authorization; assuming that BVA has no jurisdiction over medical determinations, only basis for BVA to deny jurisdiction would be if it were to find that Secretary determined that appellant did not need hospital care. Similes v Brown (1994) 6 Vet App 555
III. REIMBURSEMENT OF GOVERNMENT

10. Generally

Veterans' Administration [now Department of Veterans Affairs] billing program for recovering costs of medical care provided by hospitals to veterans, employees of agency, who were ineligible for such care does not violate equal protection clause of Fifth Amendment since agency has right to place higher standard on its own employees and program may represent first step in larger program to recover costs from all ineligible veterans. American Federation of Government Employees v Nimmo (1982, ED Va) 536 F Supp 707, affd in part and vacated in part on other grounds (1983, CA4 Va) 711 F.2d 28

There is no authority vested in state court to grant application of state attorney general to require committee of incompetent veteran to pay money to state hospital out of such veteran's estate for hospitalization of veteran. In re Murphy's Committee (1929) 227 App Div 839, 237 NYS 448

11. By other governmental agencies

Administrator [now Secretary] is authorized to furnish injured workman with hospital and medical care at veterans' hospital and to make reasonable charge for such service and to have his claim for such service allowed by state industrial commission to same extent as any other private hospital or physician. Higley v Schlessman (1956, Okla) 292 P2d 411

12. By employer and insurance carriers

Government, assignee, is entitled to recover, for services rendered to veterans under 38 USCS § 610 [now 38 USCS § 1710], against veterans' employer under Longshoremen's and Harborworkers' Compensation Act [33 USCS §§ 901 et seq., provisions of Veterans Benefits Act [38 USCS §§ 101 et seq.] fulfill Congressional purpose of providing free hospital services to veterans who have suffered nonservice-connected disabilities and who are unable to pay for hospital care, but to include veterans legally entitled to provisions of hospital care by third parties would be inconsistent with Congress' exclusion of veterans who would otherwise be able to defray expense of hospital care and nothing in such Act indicates that Congress intended to relieve employer of statutory responsibility for providing medical treatment to his injured employees. United States v Bender Welding & Machine Co. (1977, CA5) 558 F.2d 761

Government, as assignee of veteran to whom services were rendered under 38 USCS § 610 [now 38 USCS § 1710], is entitled to recover against veteran's employer under state workmen's compensation act for such services rendered to veteran; Veterans' Benefits Act [38 USCS §§ 101 et seq.] was intended to authorize free hospital care for nonservice-connected injuries only to those veterans unable to defray necessary medical costs and was not intended to relieve employer of statutory duty of compensating injured employee for expenses incurred in treatment of job-related injury. Texas Employers' Ins. Asso. v United States (1977, CA5 Tex) 558 F.2d 766

United States is entitled to recover from veteran's employer for hospital and medical services rendered veteran, which services employer is under statutory duty to furnish. Stafford v Pabco Products, Inc. (1958) 53 NJ Super 300, 147 A2d 286

Administrator [now Secretary] of Veterans Affairs is entitled to recover from employer and its insurance carrier costs of treating at veterans hospital injuries of indigent veteran which resulted from industrial accident in course of employment. Marshall v Rebert's Poultry Ranch & Egg Sales (1966) 268 NC 223, 150 SE2d 423

13. By veteran's insurer

Veteran who qualified for and received hospitalization without charge, did not "actually incur" any expenses for his hospitalization, and veterans' administration [now Department of Veterans Affairs] cannot recover costs of his hospitalization from insurer under poliomyelitis expense policy, assigned by veteran to veterans' administration [now Department of Veterans Affairs], which
provides that insurer will pay veteran "for expenses actually incurred" if he is stricken by poliomyelitis. United States v St. Paul Mercury Indem. Co. (1956, CA8 Neb) 238 F.2d 594

Insurance company providing health insurance is not liable to Government, as assignee of rights, under policy, for costs of free medical services provided needy veteran by Veterans' Administration [now Department of Veterans Affairs], where policy conditions payment of benefits upon insured first incurring expense, since veteran could not assign to Government right to reimbursement which he does not have, in absence of incurred costs. United States v Metropolitan Life Ins. Co. (1982, CA9 Ariz) 683 F.2d 1250

§ 1710A. Required nursing home care

(a) The Secretary (subject to section 1710(a)(4) of this title [38 USCS § 1710(a)(4)]) shall provide nursing home care which the Secretary determines is needed (1) to any veteran in need of such care for a service-connected disability, and (2) to any veteran who is in need of such care and who has a service-connected disability rated at 70 percent or more.

(b) (1) The Secretary shall ensure that a veteran described in subsection (a) who continues to need nursing home care is not, after placement in a Department nursing home, transferred from the facility without the consent of the veteran, or, in the event the veteran cannot provide informed consent, the representative of the veteran.

(2) Nothing in subsection (a) may be construed as authorizing or requiring that a veteran who is receiving nursing home care in a Department nursing home on the date of the enactment of this section [enacted Nov. 30, 1999] be displaced, transferred, or discharged from the facility.

(c) The provisions of subsection (a) shall terminate on December 31, 2008.

Effective date of section:

This section took effect on November 30, 1999, pursuant to § 101(h)(1) of Act Nov. 30, 1999, P. L. 106-117, which appears as 38 USCS § 1710B note.

Amendments:

2000. Act Nov. 1, 2000, in subsec. (a), inserted "(subject to section 1710(a)(4) of this title)".


Other provisions:


"Not later than January 1, 2003, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the operation of this section (including the amendments made by this section [adding 38 USCS §§ 1710A and 1710B, and amending 38 USCS §§ 1701, 1710, 1720, 1720B, 1741, and the chapter analysis preceding § 1701]). The Secretary shall include in the report--"

"(1) the Secretary's assessment of the experience of the Department under the provisions of this section;

"(2) the costs incurred by the Department under the provisions of this section and a comparison of those costs with the Secretary's estimate of the costs that would have
been incurred by the Secretary for extended care services if this section had not been enacted; and

“(3) the Secretary's recommendations, with respect to the provisions of section 1710A(a) of title 38, United States Code, as added by subsection (a), and with respect to the provisions of section 1701(10) of such title, as added by subsection (b), as to--

"(A) whether those provisions should be extended or made permanent; and

"(B) what modifications, if any, should be made to those provisions.”.

Cross References
This section is referred to in 38 USCS § 1710

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 55

§ 1710B.   Extended care services

for Discussion and Analysis in the Veterans Benefits Manual

(a) The Secretary (subject to section 1710(a)(4) of this title [38 USCS § 1710(a)(4)] and subsection (c) of this section) shall operate and maintain a program to provide extended care services to eligible veterans in accordance with this section. Such services shall include the following:

1. Geriatric evaluation.
2. Nursing home care (A) in facilities operated by the Secretary, and (B) in community-based facilities through contracts under section 1720 of this title [38 USCS § 1720].
3. Domiciliary services under section 1710(b) of this title [38 USCS § 1710(b)].
4. Adult day health care under section 1720(f) of this title [38 USCS § 1720(f)].
5. Such other noninstitutional alternatives to nursing home care as the Secretary may furnish as medical services under section 1701(10) of this title [38 USCS § 1701(10)].
6. Respite care under section 1720B of this title [38 USCS § 1720B].

(b) The Secretary shall ensure that the staffing and level of extended care services provided by the Secretary nationally in facilities of the Department during any fiscal year is not less than the staffing and level of such services provided nationally in facilities of the Department during fiscal year 1998.

(c) (1) Except as provided in paragraph (2), the Secretary may not furnish extended care services for a non-service-connected disability other than in the case of a veteran who has a compensable service-connected disability unless the veteran agrees to pay to the United States a copayment (determined in accordance with subsection (d)) for any period of such services in a year after the first 21 days of such services provided that veteran in that year.

(2) Paragraph (1) shall not apply--
A to a veteran whose annual income (determined under section 1503 of this title [38 USCS § 1503]) is less than the amount in effect under section 1521(b) of this title [38 USCS § 1521(b)];
(B) to a veteran being furnished hospice care under this section; or
(C) with respect to an episode of extended care services that a veteran is being
furnished by the Department on November 30, 1999.

(d) (1) A veteran who is furnished extended care services under this chapter [38 USCS §§ 1701 et seq.] and who is required under subsection (c) to pay an amount to the United States in order to be furnished such services shall be liable to the United States for that amount.

(2) In implementing subsection (c), the Secretary shall develop a methodology for establishing the amount of the copayment for which a veteran described in subsection (c) is liable. That methodology shall provide for--

(A) establishing a maximum monthly copayment (based on all income and assets of the veteran and the spouse of such veteran);
(B) protecting the spouse of a veteran from financial hardship by not counting all of the income and assets of the veteran and spouse (in the case of a spouse who resides in the community) as available for determining the copayment obligation; and
(C) allowing the veteran to retain a monthly personal allowance.

(e) (1) There is established in the Treasury of the United States a revolving fund known as the Department of Veterans Affairs Extended Care Fund (hereinafter in this section referred to as the "fund"). Amounts in the fund shall be available, without fiscal year limitation and without further appropriation, exclusively for the purpose of providing extended care services under subsection (a).

(2) All amounts received by the Department under this section shall be deposited in or credited to the fund.

Effective date of section:

This section took effect on Nov. 30, 1999, except that subsec. (c) takes effect on the effective date of regulations prescribed by the Secretary of Veterans Affairs under subsections (c) and (d), pursuant to § 101(h)(1) of Act Nov. 30, 1999, P. L. 106-117, which appears as a note to this section.

Amendments:


Act Dec. 27, 2001, in subsec. (c)(2)(B), inserted "on" preceding "November".

2004. Act Nov. 30, 2004, in subsec. (c)(2), in subpara. (A), deleted "or" following the concluding semicolon, redesignated subpara. (B) as subpara. (C), and inserted new subpara. (B).

Other provisions:


"(1) Except as provided in paragraph (2), the amendments made by this section [adding 38 USCS §§ 1710A and 1710B, and amending 38 USCS §§ 1701, 1710, 1720, 1720B, 1741, and the chapter analysis preceding § 1701] shall take effect on the date of the enactment of this Act.

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"(2) Subsection (c) of section 1710B of title 38, United States Code (as added by subsection (b)), shall take effect on the effective date of regulations prescribed by the Secretary of Veterans Affairs under subsections (c) and (d) of such section. The Secretary shall publish the effective date of such regulations in the Federal Register.

"(3) The provisions of section 1710(f) of title 38, United States Code, shall not apply to any day of nursing home care on or after the effective date of regulations under paragraph (2)."


"(a) Pilot programs. The Secretary shall carry out three pilot programs for the purpose of determining the effectiveness of different models of all-inclusive care-delivery in reducing the use of hospital and nursing home care by frail, elderly veterans.

"(b) Locations of pilot programs. In selecting locations in which the pilot programs will be carried out, the Secretary may not select more than one location in any given health care region of the Veterans Health Administration.

"(c) Scope of services under pilot programs. Each of the pilot programs under this section shall be designed to provide participating veterans with integrated, comprehensive services which include the following:

"(1) Adult-day health care services on an eight-hour per day, five-day per week basis.

"(2) Medical services (including primary care, preventive services, and nursing home care, as needed).

"(3) Coordination of needed services.

"(4) Transportation services.

"(5) Home care services.

"(6) Respite care.

"(d) Program requirements. In carrying out the pilot programs under this section, the Secretary shall--

"(1) employ the use of interdisciplinary care-management teams to provide the required array of services;

"(2) determine the appropriate number of patients to be enrolled in each program and the criteria for enrollment; and

"(3) ensure that funding for each program is based on the complex care category under the resource allocation system (known as the Veterans Equitable Resource Allocation system) established pursuant to section 429 of Public Law 104-204 (110 Stat. 2929) [unclassified].

"(e) Design of pilot programs. To the maximum extent feasible, the Secretary shall use the following three models in designing the three pilot programs under this section:

"(1) Under one of the pilot programs, the Secretary shall provide services directly through facilities and personnel of the Department.

"(2) Under one of the pilot programs, the Secretary shall provide services through a combination of--

"(A) services provided under contract with appropriate public and private entities; and
"(B) services provided through facilities and personnel of the Department.

"(3) Under one of the pilot programs, the Secretary shall arrange for the provision of services through a combination of--

"(A) services provided through cooperative arrangements with appropriate public and private entities; and

"(B) services provided through facilities and personnel of the Department.

"(f) In-kind assistance. In providing for the furnishing of services under a contract in carrying out the pilot program described in subsection (e)(2), the Secretary may, subject to reimbursement, provide in-kind assistance (through the services of Department employees and the sharing of other Department resources) to a facility furnishing care to veterans. Such reimbursement may be made by reduction in the charges to the Secretary under such contract.

"(g) Limitation. In providing for the furnishing of services in carrying out a pilot program described in subsection (e)(2) or (e)(3), the Secretary shall make payment for services only to the extent that payment for such services is not otherwise covered (notwithstanding any provision of title XVIII or XIX of the Social Security Act [42 USCS §§ 1395 et seq. or 1396 et seq.]) by another government or nongovernment entity or program.

"(h) Duration of programs. (1) The authority of the Secretary to provide services under a pilot program under this section shall cease on the date that is three years after the date of the commencement of that pilot program.

"(2) In the case of a veteran who is participating in a pilot program under this section as of the end of the three-year period applicable to that pilot program under paragraph (1), the Secretary may continue to provide to that veteran any of the services that could be provided under the pilot program. The authority to provide services to any veteran under the preceding sentence applies during the period beginning on the date specified in paragraph (1) with respect to that pilot program and ending on December 31, 2005.

"(i) Report. (1) Not later than nine months after the completion of all of the pilot programs under this section, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on those programs.

"(2) The report shall include the following:

"(A) A description of the implementation and operation of each such program.

"(B) An analysis comparing use of institutional care and use of other services among enrollees in each of the pilot programs with the experience of comparable patients who are not enrolled in one of the pilot programs.

"(C) An assessment of the satisfaction of participating veterans with each of those programs.

"(D) An assessment of the health status of participating veterans in each of those programs and of the ability of those veterans to function independently.

"(E) An analysis of the costs and benefits under each of those programs."


"(a) Program authority. The Secretary may carry out a pilot program for the purpose of determining the feasibility and practicability of enabling eligible veterans to secure needed assisted living services as an alternative to nursing home care.
“(b) Locations of pilot program. (1) The pilot program shall be carried out in a designated health care region of the Department selected by the Secretary for purposes of this section.

“(2)(A) In addition to the health care region of the Department selected for the pilot program under paragraph (1), the Secretary may also carry out the pilot program in not more than one additional designated health care region of the Department selected by the Secretary for purposes of this section.

“(B) Notwithstanding subsection (f), the authority of the Secretary to provide services under the pilot program in a health care region of the Department selected under subparagraph (A) shall cease on the date that is three years after the commencement of the provision of services under the pilot program in the health care region.

“(c) Scope of program. In carrying out the pilot program, the Secretary may enter into contracts with appropriate facilities for the provision for a period of up to six months of assisted living services on behalf of eligible veterans in the region where the program is carried out.

“(d) Eligible veterans. A veteran is an eligible veteran for purposes of this section if the veteran--

“(1) is eligible for placement assistance by the Secretary under section 1730(a) of title 38, United States Code;

“(2) is unable to manage routine activities of daily living without supervision and assistance; and

“(3) could reasonably be expected to receive ongoing services after the end of the contract period under another government program or through other means.

“(e) Report. (1) Not later than 90 days before the end of the pilot program under this section, the Secretary shall submit to the Committees on Veterans’ Affairs of the Senate and the House of Representatives a report on the program.

“(2) The report under paragraph (1) shall include the following:

“(A) A description of the implementation and operation of the program.

“(B) An analysis comparing use of institutional care among participants in the program with the experience of comparable patients who are not enrolled in the program.

“(C) A comparison of assisted living services provided by the Department through the pilot program with domiciliary care provided by the Department.

“(D) The Secretary’s recommendations, if any, regarding an extension of the program.

“(f) Duration. The authority of the Secretary to provide services under the pilot program shall cease on the date that is three years after the date of the commencement of the pilot program.

“(g) Definition. For purposes of this section, the term 'assisted living services' means services in a facility that provides room and board and personal care for and supervision of residents as necessary for the health, safety, and welfare of residents.

“(h) Standards. The Secretary may not enter into a contract with a facility under this section unless the facility meets the standards established in regulations prescribed under section 1730 of title 38, United States Code.”.
Effective date of § 411(c) and (d) of Act November 30, 2004; certification of compliance with subsec. (b); annual update. Act Nov. 30, 2004, P. L. 108-422, Title IV, Subtitle B, § 411(f), (g), 118 Stat. 2390, provides:

"(f) Contingent effectiveness. Subsection (d) [38 USCS § 8118 note] and the amendments made by subsection (c) [repealing 38 USCS § 8116 and amending the chapter analysis preceding 38 USCS § 8101] shall take effect at the end of the 30-day period beginning on the date on which the Secretary of Veterans Affairs certifies to Congress that the Secretary is in compliance with subsection (b) of section 1710B of title 38, United States Code.

"(g) Annual update. Following a certification under subsection (f), the Secretary shall submit to Congress an annual update on that certification."

Cross References
This section is referred to in 38 USCS §§ 1710, 1741

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 55, 61

§ 1711. Care during examinations and in emergencies

(a) The Secretary may furnish hospital care incident to physical examinations where such examinations are necessary in carrying out the provisions of other laws administered by the Secretary.

(b) [Deleted]

(c) (1) The Secretary may contract with any organization named in, or approved by the Secretary under, section 5902 of this title [38 USCS § 5902] to provide for the furnishing by the Secretary, on a reimbursable basis (as prescribed by the Secretary), of emergency medical services to individuals attending any national convention of such organization, except that reimbursement shall not be required for services furnished under this subsection to the extent that the individual receiving such services would otherwise be eligible under this chapter [38 USCS §§ 1701 et seq.] for medical services.

(2) The authority of the Secretary to enter into contracts under this subsection shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Explanatory notes:
Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in the section catchline, substituted "Care" for "Hospitalization"; in subsec. (a), substituted "the Administrator" for "him" following "by"; in subsec. (b), inserted "or medical services", substituted "the Administrator" for "he" following "but", and substituted "the Administrator" for "him" following "by".


Act Nov. 28, 1979 (effective 11/28/79, as provided by § 601(b) of such Act, which appears as 38 USCS § 1114 note), in subsec. (c)(1), substituted "named in, or approved by the Administrator under," for "recognized by the Administrator for the purposes of".

1991. Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 611, as 38 USCS § 1711, and substituted "Secretary" for "Administrator".

2002. Act Jan. 23, 2002, deleted subsec. (b) which read: "(b) The Secretary may furnish hospital care or medical services as a humanitarian service in emergency cases, but the Secretary shall charge for such care at rates prescribed by the Secretary.".

Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References

This section is referred to in 38 USCS §§ 1712A, 1729, 1729A, 2303, 8111

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 65

§ 1712. Dental care; drugs and medicines for certain disabled veterans; vaccines

(a) (1) Outpatient dental services and treatment, and related dental appliances, shall be furnished under this section only for a dental condition or disability--

(A) which is service-connected and compensable in degree;

(B) which is service-connected, but not compensable in degree, but only if--

(i) the dental condition or disability is shown to have been in existence at time of the veteran's discharge or release from active military, naval, or air service;

(ii) the veteran had served on active duty for a period of not less than 180 days or, in the case of a veteran who served on active duty during the Persian Gulf War, 90 days immediately before such discharge or release;

(iii) application for treatment is made within 90 days after such discharge or release, except that (I) in the case of a veteran who reentered active military, naval, or air service within ninety days after the date of such veteran's prior discharge or release from such service, application may be made within 90 days from the date of such veteran's subsequent discharge or release from such service, and (II) if a disqualifying discharge or release has been corrected.
by competent authority, application may be made within 90 days after the date of correction; and
(iv) the veteran's certificate of discharge or release from active duty does not bear a certification that the veteran was provided, within the 90-day period immediately before the date of such discharge or release, a complete dental examination (including dental X-rays) and all appropriate dental services and treatment indicated by the examination to be needed;
(C) which is a service-connected dental condition or disability due to combat wounds or other service trauma, or of a former prisoner of war;
(D) which is associated with and is aggravating a disability resulting from some other disease or injury which was incurred in or aggravated by active military, naval, or air service;
(E) which is a non-service-connected condition or disability of a veteran for which treatment was begun while such veteran was receiving hospital care under this chapter [38 USCS §§ 1701 et seq.] and such services and treatment are reasonably necessary to complete such treatment;
(F) from which a veteran who is a former prisoner of war is suffering;
(G) from which a veteran who has a service-connected disability rated as total is suffering; or
(H) the treatment of which is medically necessary (i) in preparation for hospital admission, or (ii) for a veteran otherwise receiving care or services under this chapter [38 USCS §§ 1701 et seq.].
(2) The Secretary concerned shall at the time a member of the Armed Forces is discharged or released from a period of active military, naval, or air service of not less than 180 days or, in the case of a veteran who served on active duty during the Persian Gulf War, 90 days provide to such member a written explanation of the provisions of clause (B) of paragraph (1) of this subsection and enter in the service records of the member a statement signed by the member acknowledging receipt of such explanation (or, if the member refuses to sign such statement, a certification from an officer designated for such purpose by the Secretary concerned that the member was provided such explanation).
(3) The total amount which the Secretary may expend for furnishing, during any twelve-month period, outpatient dental services, treatment, or related dental appliances to a veteran under this section through private facilities for which the Secretary has contracted under clause (1), (2), or (5) of section 1703(a) of this title [38 USCS § 1703(a)], may not exceed $1,000 unless the Secretary determines, prior to the furnishing of such services, treatment, or appliances and based on an examination of the veteran by a dentist employed by the Department (or, in an area where no such dentist is available, by a dentist conducting such examination under a contract or fee arrangement), that the furnishing of such services, treatment, or appliances at such cost is reasonably necessary.
(4) (A) Except as provided in subparagraph (B) of this paragraph, in any year in which the President's Budget for the fiscal year beginning October 1 of such year includes an amount for expenditures for contract dental care under the provisions of this subsection and section 1703 of this title [38 USCS § 1703] during such fiscal year in excess of the level of expenditures made for such purpose during fiscal year
1978, the Secretary shall, not later than February 15 of such year, submit a report to the appropriate committees of the Congress justifying the requested level of expenditures for contract dental care and explaining why the application of the criteria prescribed in section 1703 of this title [38 USCS § 1703] for contracting with private facilities and in the second sentence of section 1710(c) of this title [38 USCS § 1710(c)] for furnishing incidental dental care to hospitalized veterans will not preclude the need for expenditures for contract dental care in excess of the fiscal year 1978 level of expenditures for such purpose. In any case in which the amount included in the President's Budget for any fiscal year for expenditures for contract dental care under such provisions is not in excess of the level of expenditures made for such purpose during fiscal year 1978 and the Secretary determines after the date of submission of such budget and before the end of such fiscal year that the level of expenditures for such contract dental care during such fiscal year will exceed the fiscal year 1978 level of expenditures, the Secretary shall submit a report to the appropriate committees of the Congress containing both a justification (with respect to the projected level of expenditures for such fiscal year) and an explanation as required in the preceding sentence in the case of a report submitted pursuant to such sentence. Any report submitted pursuant to this paragraph shall include a comment by the Secretary on the effect of the application of the criteria prescribed in the second sentence of section 1710(c) of this title [38 USCS § 1710(c)] for furnishing incidental dental care to hospitalized veterans.

(B) A report under subparagraph (A) of this paragraph with respect to a fiscal year is not required if, in the documents submitted by the Secretary to the Congress in justification for the amounts included for Department programs in the President's Budget, the Secretary specifies with respect to contract dental care described in such subparagraph--

(i) the actual level of expenditures for such care in the fiscal year preceding the fiscal year in which such Budget is submitted;
(ii) a current estimate of the level of expenditures for such care in the fiscal year in which such Budget is submitted; and
(iii) the amount included in such Budget for such care.

(b) Dental services and related appliances for a dental condition or disability described in paragraph (1)(B) of subsection (a) shall be furnished on a one-time completion basis, unless the services rendered on a one-time completion basis are found unacceptable within the limitations of good professional standards, in which event such additional services may be afforded as are required to complete professionally acceptable treatment.

(c) Dental appliances, wheelchairs, artificial limbs, trusses, special clothing, and similar appliances to be furnished by the Secretary under this section may be procured by the Secretary either by purchase or by manufacture, whichever the Secretary determines may be advantageous and reasonably necessary.

(d) The Secretary shall furnish to each veteran who is receiving additional compensation or allowance under chapter 11 of this title [38 USCS §§ 1101 et seq.], or increased pension as a veteran of a period of war, by reason of being permanently housebound or in need of regular aid and attendance, such drugs and medicines as may be ordered on prescription of a duly licensed physician as specific therapy in the treatment of any illness
or injury suffered by such veteran. The Secretary shall continue to furnish such drugs and medicines so ordered to any such veteran in need of regular aid and attendance whose pension payments have been discontinued solely because such veteran's annual income is greater than the applicable maximum annual income limitation, but only so long as such veteran's annual income does not exceed such maximum annual income limitation by more than $1,000.

(c) In order to assist the Secretary of Health and Human Services in carrying out national immunization programs under other provisions of law, the Secretary may authorize the administration of immunizations to eligible veterans who voluntarily request such immunizations in connection with the provision of care for a disability under this chapter [38 USCS §§ 1701 et seq.] in any Department health care facility. Any such immunization shall be made using vaccine furnished by the Secretary of Health and Human Services at no cost to the Department. For such purpose, notwithstanding any other provision of law, the Secretary may provide such vaccine to the Department at no cost. Section 7316 of this title [38 USCS § 7316] shall apply to claims alleging negligence or malpractice on the part of Department personnel granted immunity under such section.

Prior law and revision:
This section is based on 38 USCS § 2512 (Act June 17, 1957, P. L. 85-56, Title V, Part B, § 512, 71 Stat. 112).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:
Veterans; Regulations No. 7(a), para. I. No. 7(a), para. II (as added Act June 16, 1955, ch 152, § 1(a), 69 Stat. 161).

Explanatory notes:
A prior § 1712 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3512.

Amendments:
1961. Act Oct. 4, 1961, in subsecs. (b)(5) and (e), inserted "or Indian wars".
1962. Act Aug. 14, 1962, substituted new subsec. (a) for one which read: "Except as provided in subsection (b), the Administrator, within the limits of Veterans' Administration facilities, may furnish such medical services for a service-connected disability as he finds to be reasonably necessary to a veteran of any war, to a veteran discharged or released from the active military, naval, or air service for a disability incurred or aggravated in line of duty, or to a person who is in receipt of, or but for the receipt of retirement pay would be entitled to, disability compensation. Veterans eligible under this subsection by reason of discharge or release for disability incurred or aggravated in line of duty may also be furnished medical services for that disability, even though it is not a service-connected disability for the purposes of this chapter."
1964. Act Aug. 14, 1964, in subsec. (b)(2), substituted ", except that if a disqualifying discharge or release has been corrected by competent authority application may be made
within one year after the date of correction or the date of enactment of this exception, whichever is later;“ for a semicolon.

Act Aug. 19, 1964, added subsec. (g).

Act Oct. 13, 1964 (effective 1/1/65, as provided by § 11(a) of such Act, which appears as 38 USCS § 1503 note), added subsec. (h).

1967. Act Aug. 31, 1967 (effective 8/31/67, as provided by § 405(b) of such Act, which appears as 38 USCS § 101 note), substituted new subsec. (h) for one which read: "Any veteran who as a veteran of World War I, World War II, or the Korean conflict is receiving increased pension under section 521(d) of this title based on need of regular aid and attendance may be furnished drugs or medicines ordered on prescription of a duly licensed physician as specific therapy in the treatment of an illness or injury suffered by the veteran.”.


1970. Act Oct. 22, 1970, substituted subsec. (g) for one which read:

"(g) Where any veteran is in receipt of pension under chapter 15 of this title based on the need of regular aid and attendance or of an aid and attendance allowance received under section 314 or 334 of this title, or who, but for the receipt of retired pay, would be in receipt of such pension or such an allowance, and--

"(1) has received care for not less than one year under paragraph (2) of subsection (f) of this section; and

"(2) is suffering from (A) cardiovascular-renal disease, including hypertension, (B) endocrinopathies, (C) diabetes mellitus, (D) cancer, (E) a neuropsychiatric disorder, or (F) tuberculosis;

then the Administrator may furnish the veteran such further care as is reasonably necessary for such disease or disorder.”;

and, in subsec. (h), inserted "permanently housebound or".

Act Dec. 24, 1970 (effective 1/1/71, as provided by § 10(a) of such Act, which appears as 38 USCS § 1521 note), in subsec. (h), inserted “the Mexican border period,” and inserted “The Administrator shall continue to furnish such drugs and medicines so ordered to any such veteran in need of regular aid and attendance whose pension payments have been discontinued solely because his annual income is greater than the applicable maximum annual income limitation, but only so long as his annual income does not exceed such maximum annual income limitation by more than $500.”.

1973. Act Aug. 2, 1973 (effective 9/1/73, as provided by § 501 of such Act, which appears as 38 USCS § 1701 note), substituted new subsec. (f) for one which read:

"(f) The Administrator may also furnish medical services for a nonservice-connected disability under the following circumstances:

"(1) Where such care is reasonably necessary in preparation for admission of a veteran who has been determined to need hospital care and who has been scheduled for admission.

"(2) Where a veteran has been granted hospital care, and outpatient care is reasonably necessary to complete treatment incident to such hospital care.

"(3) where a veteran of any war has a total disability permanent in nature resulting from a service-connected disability.”.

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), substituted “the Administrator” for “he” preceding “finds to be reasonably necessary” and inserted “The Administrator may also furnish to any
such veteran such home health services as the Administrator finds to be necessary or appropriate for the effective and economical treatment of such disability (including only such improvements and structural alterations the cost of which does not exceed $2,500 (or reimbursement up to such amount) as are necessary to assure the continuation of treatment for such disability or to provide access to the home or to essential lavatory and sanitary facilities.);

in subsec. (b), in para. (4), deleted "or" following "air service."

redesignated para. (5) as para. (6), added new para. (5).

in subsec. (d), substituted "the Administrator" for "him" following "procured by" and substituted "the Administrator" for "he" preceding "determines";

in subsec. (e), substituted "Indians Wars" for "Indian wars";

in subsec. (f), in the introductory matter, substituted "," within the limits of Veterans' Administration facilities, may furnish" for "may also furnish";

in para. (1)(A), inserted "(to the extent that facilities are available)",

in para. (1)(B), substituted "furnished" for "granted" and inserted ",(for a period not in excess of twelve months after discharge from in-hospital treatment, except where the Administrator finds that a longer period is required by virtue of the disability being treated)," in para. (2), substituted "50" for "80", and inserted "The Administrator may also furnish to any such veteran such home health services as the Administrator determines to be necessary or appropriate for the effective and economical treatment of a disability of a veteran (including only such improvements and structural alterations the cost of which does not exceed $600 (or reimbursement up to such amount) as are necessary to assure the continuation of treatment or provide access to the home or to essential lavatory and sanitary facilities).";

in subsec. (g), inserted ", within the limits of Veterans' Administration facilities," and substituted "the Administrator" for "he" preceding "finds";

in subsec. (h), substituted "such veteran's" for "his" wherever appearing; and added subsecs. (i) and (j).

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as 38 USCS § 101 note), in subsec. (h), substituted "$1,000" for "$500".

1979. Act June 13, 1979, § 102(b) (effective 10/1/79, as provided by § 107 of such Act, which appears as 38 USCS § 1701 note), in subsec. (b), in para. (5), deleted "or" following "treatment;", in para. (6), substituted the concluding semicolon for a period, added paras. (7) and (8), and added the concluding matter; in subsec. (f), concluding matter, inserted "The Administrator may also furnish outpatient dental services and treatment, and related appliances, to any veteran described in subsection (b)(7) of this section.".

Act June 13, 1979, § 101, in subsec. (i)(3), inserted "(including any veteran being examined to determine the existence or rating of a service-connected disability)".

Act Dec. 20, 1979 (effective 1/1/80, as provided by § 206 of such Act, which appears as 38 USCS § 111 note), in subsec. (b), concluding matter, inserted "The total amount which the Administrator may expend for furnishing, during any twelve-month period, outpatient dental services, treatment, or related dental appliances to a veteran under this section through private facilities for which the Administrator has contracted under clause (i), (ii), or (v) of section 601(4)(C) of this title may not exceed $500 unless the Administrator determines, prior to the furnishing of such services, treatment, or appliances and based on an examination of the veteran by a dentist employed by the Veterans' Administration (or, in an area where no such dentist is available, by a dentist conducting such examination under a contract or fee arrangement), that the furnishing of such services, treatment, or appliances at such cost is reasonably necessary.";

in subsec. (g), substituted "In the case of any veteran who is a veteran of the Mexican border period or of World War I or who" for "Where any veteran" and inserted "The Administrator may also furnish to any such veteran home health services under the terms and conditions set forth in subsection (f) of this section.".

1981. Act Aug. 13, 1981 (effective as provided by § 2002(b)(1) of such Act, which appears as a note to this section), in subsec. (b), in para. (2), substituted "(B) if the veteran had served not less than 180 days of active military, naval, or air service immediately before such discharge or release, (C)" for "(B) and (C)" and inserted ", and (D) if the veteran's certificate of discharge or release from active duty does not bear a certification that the veteran was provided, within the 90-day period immediately before the date of such discharge or release,
a complete dental examination (including dental X-rays) and all appropriate dental services and treatment indicated by the examination to be needed", in the concluding matter, inserted the sentence beginning "The Secretary concerned . . .".

Such Act further (applicable as provided by § 2002(b)(2) of such Act, which appears as a note to this section), in subsec. (b)(2)(C), substituted "within 90 days" for "within one year" in two places.

Act Aug. 14, 1981, in subsec. (b), substituted para. (7) for one which read: "from which any veteran of World War I, World War II, the Korean conflict, or the Vietnam era who was held as a prisoner of war for a period of not less than six months is suffering; or".

Such Act further (effective 10/1/81 as provided by § 5(d) of such Act, which appears as 38 USCS § 1710 note), in subsec. (f), in para. (1), deleted "and" following "being treated", in para. (2), substituted "; and" for a concluding period, and added para. (3); in subsec. (i), redesignated para. (4) as para. (5), and added a new para. (4).

Act Nov. 3, 1981, in subsec. (b), designated the introductory matter as para. (1), redesignated former para. (1) as subpara. (A), and substituted subpara. (B) for former para. (2), which read: "which is service-connected, but not compensable in degree, but only (A) if it is shown to have been in existence at time of discharge or release from active military, naval, or air service, (B) if the veteran had served not less than 180 days of active military, naval, or air service immediately before such discharge or release, (C) if application for treatment is made within 90 days after such discharge or release, except that if a disqualifying discharge or release has been corrected by competent authority application may be made within 90 days after the date of correction or the date of enactment of this exception, whichever is later, and (D) if the veteran's certificate of discharge or release from active duty does not bear a certification that the veteran was provided, within the 90-day period immediately before the date of such discharge or release, a complete dental examination (including dental X-rays) and all appropriate dental services and treatment indicated by the examination to be needed;";
redesignated former paras. (3)-(8) as subparas. (A)-(H), designated formerly undesignated concluding matter as paras. (2)-(4), in para. (2) as so designated, substituted "clause (b) of paragraph (1)" for "clause (2)"; and, in para. (4), as so designated, substituted "pursuant to this paragraph" for "pursuant to this subsection"; in subsec. (c), substituted "paragraph (1)(B)" for "clause (2)"; in subsec. (f), substituted "clause (G) of subsection (b)(1)" for "subsection (b)(7)"; and in subsec. (i), substituted para. (4) for one which read: "To any veteran who is a former prisoner of war.".

1982. Act Oct. 12, 1982, in subsec. (a), inserted "of this section", and inserted a closing parenthesis following "facilities"; in subsec. (f)(2), substituted "percent" for "per centum"; in subsec. (h), inserted "of this title"; in subsec. (i), substituted "The" for "Not later than ninety days after the effective date of this subsection, The"; and, in subsec. (j), substituted "Health and Human Services" for "Health, Education, and Welfare".

1985. Act Dec. 3, 1985, in subsec. (f)(1), substituted "if" for "where" following "(A)", substituted "if" for "where" following "(B)"; inserted ", nursing home care, or domiciliary care", deleted "hospital" preceding "care (for" and substituted "such" for "in-hospital" preceding "treatment".

1986. Act April 7, 1986 (applicable to hospital care, nursing home care, and medical services furnished on or after 7/1/1986, as provided by § 19011(f) of such Act, which appears as 38 USCS § 1710 note), substituted subsec. (a) for one which read: "Except as provided in subsection (b) of this section, the Administrator, within the limits of Veterans' Administration facilities, may furnish such medical services as the Administrator finds to be reasonably necessary to any veteran for a service-connected disability. The Administrator may also furnish to any such veteran such home health services as the Administrator finds to be necessary or appropriate for the effective and economical treatment of such disability (including only such improvements and structural alterations the cost of which does not exceed $2,500 (or reimbursement up to such amount) as are necessary to assure the continuation of treatment of such disability or to provide access to the home or to essential
lavatory and sanitary facilities). In the case of any veteran discharged or released from the active military, naval, or air service for a disability incurred or aggravated in line of duty, such services may be so furnished for that disability, whether or not service connected for the purposes of this chapter.”; substituted subsec. (g) for one which read: “In the case of any veteran who is a veteran of the Mexican border period or of World War I or who is in receipt of increased pension or additional compensation or allowance based on the need of regular aid and attendance or by reason of being permanently housebound, or who, but for the receipt of retired pay, would be in receipt of such pension, compensation, or allowance, the Administrator, within the limits of Veterans’ Administration facilities, may furnish the veteran such medical services as the Administrator finds to be reasonably necessary. The Administrator may also furnish to any such veteran home health services under the terms and conditions set forth in subsection (f) of this section.”; and in subsec. (i), added para. (6).

Such Act further, in subsec. (b), in para. (3), substituted “clause (1), (2), or (5) of section 603(a)” for “clause (i), (ii), or (v) of section 601(4)(C)”, and in para. (4), substituted “section 603” for “section 601(4)(C)” each place it appears; in subsec. (f), designated the introductory matter as para. (1), and in para. (1) as so designated, substituted “Except as provided in paragraph (4) of this subsection, the Administrator may” for “The Administrator, within the limits of Veterans’ Administration facilities, may”, redesignated former para. (1) as subpara. (A), and in subpara. (A) as so redesignated, redesignated former cls. (A) and (B) as cls. (i) and (ii) respectively, and in cl. (ii) as so redesignated, added “and” following the concluding semicolon, deleted former para. (2) which read: “to any veteran who has a service-connected disability rated at 50 percent or more; and”, redesignated former para. (3) as subpara. (B), designated the former concluding matter as para. (2), and in para. (2) as so redesignated, substituted “As part of medical services furnished to a veteran under paragraph (1) of this subsection, the Administrator may furnish to the veteran” for “The Administrator may also furnish to any such veteran”, deleted the sentence which read: “The Administrator may also furnish outpatient dental services and treatment, and related appliances, to any veteran described in clause (G) of subsection (b)(1).” following “sanitary facilities.”, and added paras. (3) and (4).

Act Oct. 28, 1986, in subsecs. (a)(2) and (f)(2), substituted “Subject to subsection (k) of this section, as” for “As”; and added subsec. (k); in subsec. (b)(4), substituted “(A) Except as provided in subparagraph (B) of this paragraph, in” for “In” and added subpara. (B); in subsec. (j), substituted “under” for “pursuant to”, “who voluntarily request” for “(voluntarily requesting” and deleted the parenthesis following “immunization”, substituted “facility. Any such immunization shall be made using” for “facility, utilizing”, substituted “Administration. For such purpose, notwithstanding any other provision of law, the Secretary may provide” for “Administration, and for such purpose, notwithstanding any other provision of law, the Secretary is authorized to provide”; and substituted “cost. Section” for “cost and the provisions of section”.

Such Act further (effective 4/7/86, as provided by § 237(c) of such Act, which appears as 38 USCS § 1710 note), in subsec. (f)(4), redesignated subparas. (D)-(F) as (E)-(G) respectively and added a new subpara. (D).

1988. Act May 20, 1988 (applicable with respect to the furnishing of medical services to veterans applying for services after 6/30/88, as provided by § 102(i) of such Act, which appears as 38 USCS § 1703 note), substituted the section heading for one which read:

“§ 612. Eligibility for medical treatment”; in subsec. (a), in para. (1), in the introductory matter, substituted “shall furnish on an ambulatory or outpatient basis” for “may furnish”, in subpara. (A), deleted “and” following the concluding semicolon, in subpara. (B), substituted “; and” for the concluding period, and added subpara. (C), deleted para. (2), which read: “Subject to subsection (K) of this section, as part of medical services furnished to a veteran under paragraph (1) of this subsection, the Administrator may furnish to the veteran such home health services as the Administrator finds to be necessary or appropriate for the effective and economical treatment of such disability (including only such improvements and structural
alterations the cost of which does not exceed $2,500 (or reimbursement up to such amount) as are necessary to assure the continuation of treatment of such disability or to provide access to the home or to essential lavatory and sanitary facilities.

Such Act further (applicable as above), in subsec. (b)(1)(F), substituted "90 days" for "six months".

Such Act further (applicable as above), in subsec. (b), in para. (1), in subpara. (B), in cl. (i), substituted "at the time of the veteran's" for "at time of", in cl. (ii), substituted "180 days" for "one hundred and eighty days", in cl. (iii), substituted "90 days" for "ninety days" wherever appearing, and, in cl. (iv), substituted "90-day" for "ninety-day", deleted former subpara. (F), which read: "from which a veteran of the Spanish-American War or Indian wars is suffering;"., and redesignated former subparas. (G) and (H) as subparas. (F) and (G), and, in para. (4)(A), substituted "subsection (a) of this section (other than paragraphs (3)(B) and (3)(C) of that subsection)" for "subsections (a) and (f) of this section".

Such Act further (applicable as above), deleted subsec. (e), which read: "Any disability of a veteran of the Spanish-American War or Indian Wars, upon application for the benefits of this section or outpatient medical services under section 624 of this title, shall be considered for the purposes thereof to be a service-connected disability incurred or aggravated in a period of war.

Such Act further (applicable as above), in subsec. (f), deleted paras. (1)-(3), which read:

"(1) Except as provided in paragraph (4) of this subsection, the Administrator may furnish medical services for any disability on an outpatient or ambulatory basis--

(A) to any veteran eligible for hospital care under section 610 of this title (i) if such services are reasonably necessary in preparation for, or (to the extent that facilities are available) to obviate the need of, hospital admission, or (ii) if such a veteran has been furnished hospital care, nursing home care, or domiciliary care and such medical services are reasonably necessary to complete treatment incident to such care (for a period not in excess of twelve months after discharge from such treatment, except where the Administrator finds that a longer period is required by virtue of the disability being treated); and

"(B) to any veteran who is a former prisoner of war.

"(2) Subject to subsection (k) of this section, as part of medical services furnished to a veteran under paragraph (1) of this subsection, the Administrator may furnish to the veteran such home health services as the Administrator determines to be necessary or appropriate for the effective and economical treatment of a disability of a veteran (including only such improvements and structural alterations the cost of which does not exceed $600 (or reimbursement up to such amount) as are necessary to assure the continuation of treatment or provide access to the home or to essential lavatory and sanitary facilities).

"(3) In addition to furnishing medical services under this subsection through Veterans' Administration facilities, the Administrator may furnish such services in accordance with section 603 of this title."

Such Act further (applicable as above), in subsec. (f), redesignated para. (4), subpara. (A) as para. (1), and in para. (1) as redesignated, substituted "under subsection (a) of this section (including home health services under section 617 of this title)" for "under this subsection (including home health services under paragraph (2) of this subsection)" and substituted "paragraph (2) of this subsection" for "subparagraph (B) of this paragraph", redesignated former para. (4), subpara. (B) as para. (2), and in para. (2) as redesignated, substituted "subsection (a) of this section and who is required under paragraph (1) of this subsection" for "this subsection and who is required under subparagraph (A) of this paragraph", redesignated
former subpara. (4)(C) as para. (3) and in para. (3) as redesignated, substituted "this subsection" for "this paragraph" and "furnished under subsection (a) of this section" for "furnished under this subsection" preceding "for services" and "for medical services", redesignated former para. (4) subparas. (D) and (E) as paras. (4) and (5) and in para. (5) as redesignated, substituted "under section 617 of this title" for "under this subsection", redesignated former subparas. (F) and (G) as paras. (6) and (7), and in paras. (6) and (7) as redesignated, substituted "this subsection" for "this paragraph".

Such Act further (applicable as above) deleted subsec. (g), which read:

"(1) The Administrator may furnish medical services which the Administrator determines are needed to a veteran--

"(A) who is a veteran of the Mexican border period or of World War I; or

"(B) who is in receipt of increased pension or additional compensation or allowances based on the need of regular aid and attendance or by reason of being permanently housebound (or who, but for the receipt of retired pay, would be in receipt of such pension, compensation, or allowance).

"(2) As part of medical services furnished to a veteran under paragraph (1) of this subsection, the Administrator may furnish to the veteran home health services under the terms and conditions set forth in subsection (f) of this section.

"(3) In addition to furnishing medical services under this subsection through Veterans' Administration facilities, the Administrator may furnish such services in accordance with section 603 of this title".

Such Act further (applicable as above), in subsec. (i), substituted paras. (1)-(5) for former paras. (1)-(6), which read:

"(1) To any veteran for a service-connected disability.

"(2) To any veteran described in subsection (f)(2) of this section.

"(3) To any veteran with a disability rated as service-connected (including any veteran being examined to determine the existence or rating of a service-connected disability).

"(4) To any veteran (A) who is a former prisoner of war, or (B) who is eligible for care under section 610(a)(5) of this title.

"(5) To any veteran being furnished medical services under subsection (g) of this section.

"(6) To any veteran who is in receipt of pension under section 521 of this title.".

Such Act further (applicable as above) redesignated former subsec. (k) as para. (3) of 38 USCS § 1717(a).

1990. Act Nov. 5, 1990 (applicable as provided by § 8013(d) of such Act, which appears as a note to 38 USCS § 1712), in subsec. (f), in para. (1), substituted "610(a)(2)" for "610(a)(2)(B)"; redesignated paras. (5) and (7) as paras. (3) and (4), respectively, and deleted paras. (3) and (4), which read:

"(3) A veteran may not be required to make a payment under this subsection for services furnished under subsection (a) of this section during any 90-day period to the extent that such payment would cause the total amount paid by the veteran under this subsection for medical services furnished during that period and under section 1710(f) of this title for hospital and nursing home care furnished during that period to exceed the amount of the inpatient Medicare deductible in effect on the first day of such 90-day period.
“(4) A veteran may not be required to make a payment under this subsection if such payment would result in the veteran paying, under this subsection and section 1710(f) of this title, a total amount greater than four times the amount of the inpatient Medicare deductible for care or services, or any combination thereof, furnished under this chapter during any 365-calendar-day period.”,

and deleted para. (6), which read: “(6) For the purposes of this subsection, the term ‘inpatient Medicare deductible’ means the amount of the inpatient hospital deductible in effect under section 1813(b) of the Social Security Act (42 U.S.C. 1395e(b)).”.

1991. Act April 6, 1991, in subsec. (b), in paras. (1)(B)(ii) and (2), inserted “or, in the case of a veteran who served on active duty during the Persian Gulf War, 90 days”; and, in subsec. (h), substituted “a period of war” for “the Mexican border period, World War I, World War II, the Korean conflict, or the Vietnam era”.

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 612, as 38 USCS § 1712, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and, in subsec. (j), substituted “Secretary of Health and Human Services” for “Secretary” in the sentences beginning “Any such immunizations . . .” and “For such purposes . . .”.

Such Act further substituted “Department” for “Veterans’ Administration” and “Secretary” for “Administrator”.

Act Aug. 14, 1991, in subsec. (b), in para. (1), in subpara. (F), deleted “or” following “suffering;”, in subpara. (G), substituted “; or” for a concluding period, and added subpara. (H).

Such Act further, in subsec. (b), in para. (3), substituted “$1,000” for “$500”.

1992. Act Nov. 4, 1992, in subsec. (i)(2), substituted “, (B)” for “or (B)” and inserted “, or (C) who is eligible for counseling under section 1720D of this title, for the purposes of such counseling”.

1993. Act Dec. 20, 1993 (effective 8/2/90 as provided by § 1(c) of such Act, which appears as a 38 USCS § 1710 note), in subsec. (a), in para. (1), in subpara. (B), deleted “and” after the concluding semicolon, in subpara. (C), substituted “; and” for the concluding period, and added subpara. (D), and added para. (7).


Act Nov. 2, 1994, P. L. 103-452, in subsec. (a)(1)(D), substituted “December 31, 1995” for “December 31, 1994”; and, in subsec. (i), in para. (1), inserted “(A)” and “, or (B) who is eligible for counseling and care and services under section 1720D of this title, for the purposes of such counseling and care and services”, and in para. (2), substituted “or (B)” for “, (B)” and deleted “, or (C) who is eligible for counseling under section 1720D of this title, for the purposes of such counseling” following “severity of a service-connected disability”.


Act Oct. 9, 1996 substituted the section heading for one which read: “Eligibility for outpatient services”; deleted subsec. (a), which read:

“(a) Except as provided in subsection (b) of this section, the Secretary shall furnish on an ambulatory or outpatient basis such medical services as the Secretary determines are needed--

“(A) to any veteran for a service-connected disability (including a disability that was incurred or aggravated in line of duty and for which the veteran was discharged or released from the active military, naval, or air service);
"(B) for any disability of a veteran who has a service-connected disability rated at 50 percent or more;

"(C) to any veteran for a disability for which the veteran is in receipt of compensation under section 1151 of this title or for which the veteran would be entitled to compensation under that section but for a suspension pursuant to that section (but in the case of such a suspension, such medical services may be furnished only to the extent that such person's continuing eligibility for medical services is provided for in the judgment or settlement described in that section); and

"(D) during the period before December 31, 1996, for any disability in the case of a veteran who served on active duty in the Southwest Asia theater of operations during the Persian Gulf War and who the Secretary finds may have been exposed to a toxic substance or environmental hazard during such service, notwithstanding that there is insufficient medical evidence to conclude that the disability may be associated with such exposure.

"(2) The Secretary shall furnish on an ambulatory or outpatient basis medical services for a purpose described in paragraph (5) of this subsection--

"(A) to any veteran who has a service-connected disability rated at 30 percent or 40 percent; and

"(B) to any veteran who is eligible for hospital care under section 1710(a) of this title and whose annual income (as determined under section 1503 of this title) does not exceed the maximum annual rate of pension that would be applicable to the veteran if the veteran were eligible for pension under section 1521(d) of this title.

"(3) The Secretary may furnish on an ambulatory or outpatient basis medical services which the Secretary determines are needed--

"(A) to any veteran who is a former prisoner of war;

"(B) to any veteran of the Mexican border period or of World War I; and

"(C) to any veteran who is in receipt of increased pension or additional compensation or allowances based on the need of regular aid and attendance or by reason of being permanently housebound (or who, but for the receipt of retired pay, would be in receipt of such pension, compensation, or allowance).

"(4) Subject to subsection (f) of this section, the Secretary may furnish on an ambulatory or outpatient basis medical services for a purpose described in paragraph (5) of this subsection to any veteran who is eligible for hospital care under section 1710 of this title and who is not otherwise eligible for such services under this subsection.

"(5)(A) Medical services for a purpose described in this paragraph are medical services reasonably necessary in preparation for hospital admission or to obviate the need of hospital admission. In the case of a veteran described in paragraph (4) of this subsection, services to obviate the need of hospital admission may be furnished only to the extent that facilities are available.

"(B) In the case of a veteran who has been furnished hospital care, nursing home care, or domiciliary care, medical services for a purpose described in this paragraph include medical services reasonably necessary to complete treatment incident to such care. Such medical services may not be provided for a period in excess of 12 months after discharge from such care. However, the Secretary may authorize a longer period in any case if the Secretary finds that a longer period is required by reason of the disability being treated.
“(6) In addition to furnishing medical services under this subsection through Department facilities, the Secretary may furnish such services in accordance with section 1703 of this title.

“(7) Medical services may not be furnished under paragraph (1)(D) with respect to a disability that is found, in accordance with guidelines issued by the Under Secretary for Health, to have resulted from a cause other than an exposure described in that paragraph.”;

transferred subsec. (f) to 10 USCS § 1710(g); deleted subsec. (i), which read:

“(i) The Secretary shall prescribe regulations to ensure that special priority in furnishing medical services under this section and any other outpatient care with funds appropriated for the medical care of veterans shall be accorded in the following order, unless compelling medical reasons require that such care be provided more expeditiously:

“(1) To a veteran (A) who is entitled to such services under paragraph (1) or (2) of subsection (a) of this section, or (B) who is eligible for counseling and care and services under section 1720D of this title, for the purposes of such counseling and care and services.

“(2) To a veteran (A) who has a service-connected disability rated at less than 30-percent disabling, or (B) who is being examined to determine the existence or severity of a service-connected disability.

“(3) To a veteran (A) who is a former prisoner of war, or (B) who is eligible for hospital care under section 1710(e) of this title.

“(4) To a veteran eligible for medical services under subsection (a)(3)(B) or (a)(3)(C) of this section.

“(5) To a veteran not covered by paragraphs (1) through (4) of this subsection who is unable to defray the expenses of necessary care as determined under section 1722(a)(3) of this title.”;

redesignated subssecs. (b), (c), (d), (h), and (j) as subssecs. (a), (b), (c), (d), and (e), respectively; and, in subsec. (b) as redesignated, substituted "subsection (a)" for "subsection (b) of this section".

2000. Act Nov. 1, 2000, in subsec. (a)(4)(A), substituted "this subsection" for "subsection (a) of this section (other than paragraphs (3)(B) and (3)(C) of that subsection)".

2003. Act Dec. 6, 2003, in subsec. (a)(1)(F), deleted "and who was detained or interned for a period of not less than 90 days" following "prisoner of war".

Other provisions:

Notification of individuals eligible for new or expanded care and services; copies to congressional committees. Act Oct. 21, 1976, P. L. 94-581, Title I, § 117(b), 90 Stat. 2855, provides: "Not later than ninety days after the effective date of this Act [effective Oct. 21, 1976], the Administrator shall take all appropriate steps to ensure that, to the maximum extent feasible, each individual eligible for new or expanded care and services as a result of the amendments made by this Act [amending this section, among other things; for full classification, consult USCS Tables volumes] is personally notified, in a clear and simple manner, about such new or expanded eligibility and the way to secure such care and services, and shall send copies of all such notification forms to the appropriate committees of the House of Representatives and the Senate, along with a description of how such forms were distributed.”.

Affairs shall submit a report to the Committees on Veterans' Affairs of the Senate and House of Representatives, not later than October 1, 1979, on the needs of veterans who are totally blind from service-connected causes for home modifications the cost of which exceed the amount allowable for such purposes under section 612(a) [now section 1712(a)] of title 38, United States Code, and on the reasons why such veterans have not applied for home health services under such section 612(a) [now section 1712(a)].


"(1) The amendments made by clauses (1)(A), (1)(C), and (2) of subsection (a) [amending subsec. (b) of this section] shall take effect on October 1, 1981.

"(2) The amendment made by clause (1)(B) of subsection (a) [amending subsec. (b)(2)(C) of this section] shall apply only to veterans discharged or released from active military, naval, or air service after September 30, 1981."


"(1) Section 612(b)(1)(B)(iii)(I) [now § 1712(b)(1)(B)(iii)(I)] of title 38, United States Code, shall apply only to veterans discharged or released from active military, naval, or air service after August 12, 1981.

"(2) A veteran who before August 13, 1981--

"(A) was discharged or released from active military, naval, or air service,

"(B) reentered such service within one year after the date of such discharge or release, and

"(C) was discharged or released from such subsequent service,

may be provided dental services and treatment in the same manner as provided for in section 612(b) [now § 1712(b)] of title 38, United States Code, if the veteran is otherwise eligible for such services and treatment and if application for such services and treatment is or was made within one year from the date of such subsequent discharge or release."

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Application of April 7, 1986 amendments. For provisions as to the application of Act April 7, 1986 amendments of subsecs. (a), (f), (g), and (i) of this section, see Act April 7, 1986, P. L. 99-272, Title XIX, Subtitle A, § 19011(f), 100 Stat. 380 of such Act, which appears as 38 USCS § 1710 note.


"(a) Report requirement. The Administrator shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the Administrator's current use of authority--

"(1) to contract for care and treatment, and for rehabilitative services, for chronically mentally ill veterans through--

"(A) halfway houses;

"(B) therapeutic communities;

"(C) psychiatric residential treatment centers;
"(D) other community-based treatment facilities; and

"(2) to furnish home health services to such veterans in such veterans' homes or in other settings in which they reside (as provided for in section 612 [now § 1712] of title 38, United States Code, as amended by section 202).

"(b) Definition. For purposes of subsection (a), the term 'chronically mentally ill veterans' means veterans who are eligible for health care from the Veterans' Administration and who are suffering from chronic mental illness disabilities.

"(c) Deadline for submission. The report under subsection (a) shall be submitted not later than December 15, 1987.".

**Spanish-American War veterans as compensable for dental services.** Act May 20, 1988, P. L. 100-322, Title I, Part A, § 101(g)(2), 102 Stat. 492, applicable with respect to the furnishing of medical services to veterans applying for services after June 30, 1988, as provided by § 102(i) of such Act, which appears as 38 USCS § 1703 note, provides: "Any disability of a veteran of the Spanish-American War, upon application for outpatient medical services under section 612 [this section] or 624 [now section 1724] of title 38, United States Code, shall be considered for the purposes thereof to be a service-connected disability and, for the purposes of section 612(b) of such title [subsec. (b) of this section], to be compensable in degree.".

**Pilot program of mobile health-care clinics.** Act May 20, 1988, P. L. 100-322, Title I, Part B, § 113, 102 Stat. 499, provides:

"(a) Program.(1) In order to evaluate the desirability of using mobile health-care clinics to increase the access to Veterans' Administration health-care services of veterans who reside in isolated rural areas, the Administrator may conduct a pilot program under which eligible veterans residing in areas which are at least 100 miles from the nearest Veterans' Administration health-care facility are furnished health-care services at a location convenient to their residences by Veterans' Administration employees furnishing such services through the use of appropriately equipped mobile health-care clinics. The pilot program shall be conducted for a period of not less than 24 months.

"(2) The pilot program authorized by paragraph (1) shall be carried out using at least two mobile health-care clinics in each of the following geographic areas of the United States: the Northeast, the Midwest, the South, and the West.

"(b) Funding. There is authorized to be appropriated $5,000,000 for each of fiscal years 1989 and 1990 in order to carry out this section. No funds may be used for the pilot program unless specifically appropriated for that purpose.

"(c) Evaluation. In carrying out the pilot program, the Administrator shall evaluate the efficacy and cost-effectiveness of furnishing care to eligible veterans through the use of mobile health-care clinics.

"(d) Reports. Not later than 20 months after the first health-care service under the pilot program is furnished, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives an interim report on the implementation, operation, and results of the first 17 months' experience under the pilot program. Not later than 27 months after the beginning of the pilot program, the Administrator shall submit to such committees a final such report. Each such report shall include the following:

"(1) Information on the health-care services that were furnished under such pilot program and a detailed specification of the costs of furnishing such services.

"(2) Information describing the veterans who were furnished services under the pilot program, including a detailed description with respect to service connection, age, prior access to and use of Veterans' Administration care and services, and the financial need of such veterans.
“(3) The preliminary or final results of the Administrator’s evaluation.

“(4) Any plans for administrative action, and any recommendations for legislation, that the Administrator considers appropriate to include in the report.”.

**Modification of report on care furnished to veterans having chronic mental illness disabilities.** Act May 20, 1988, P. L. 100-322, Title I, Part B, § 114, 102 Stat. 500, provides:

“(a) Report on institutional care furnished mentally ill veterans. The report required by section 235 of the Veterans’ Benefits Improvement and Health Care Authorization Act of 1986 (Public Law 99-576; 100 Stat. 3266) [note to this section] shall, to the extent feasible, include (1) information on the number of veterans being treated by the Veterans’ Administration for mental illness disabilities who were furnished hospital, domiciliary, or nursing home care by the Administrator during each of fiscal years 1986, 1987, and 1988, shown by type of care furnished and the duration of such care, and (2) the Administrator’s analysis of any change in the numbers of veterans being furnished any type of such care during such fiscal years, with particular emphasis on the effect of the implementation by the Veterans’ Administration of a resource allocation methodology.

“(b) Deadline for submission of report. Notwithstanding the date specified in subsection (c) of such section [note to this section], the report required by such section [note to this section] shall be submitted not later than December 15, 1988.”.


**Termination of community-based residential care for homeless, chronically mentally ill veterans.** Act Oct. 6, 1989, P. L. 101-110, § 1(b), 103 Stat. 682 (effective Oct. 1, 1989, as provided by § 3(a) of such Act, which appears as 38 USCS § 8133 note), provides:

“Notwithstanding the provisions of subsection (d) of section 115 of the Veterans Benefits and Services Act of 1988 (Public Law 100-322) [subsec. (d) of a note to this section], the authority for the pilot program authorized by such section shall expire on November 30, 1989.”. [As to the ratification of any actions of the Secretary of Veterans Affairs relating to the carrying out of certain provisions, see the Other provisions note following 38 USCS § 1720B.]

**Ratification.** For provisions as to ratification of actions taken by the Secretary of Veterans Affairs in carrying out P. L. 100-322, § 115, 102 Stat. 501 (which appears as a note to this section), see § 604 of Act Dec. 18, 1989, P. L. 101-237, Title VI, 103 Stat. 2097, which appears as 38 USCS § 1720B note.


1388-346 shall remain in effect through the period covered by this joint resolution (making continuing appropriations for fiscal year 1992).


Oct. 9, 1996 amendment of 38 USCS §§ 1710(e) and 1712(a); savings provisions. Act Oct. 9, 1996, P. L. 104-262, Title I, § 102(b), 110 Stat. 3182, which appears as 38 USCS § 1710 note, provides that the provisions of 38 USCS §§ 1710(e) and 1712(a), as in effect on the day before the date of the enactment of such Act, shall continue to apply on and after such date with respect to the furnishing of hospital care, nursing home care, and medical services for any veteran who was furnished such care or services before such date of enactment on the basis of presumed exposure to a substance or radiation under the authority of those provisions, but only for treatment for a disability for which such care or services were furnished before such date.

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17
Department of Veterans Affairs-Uniform administrative requirements for grants and cooperative agreements to State and local governments, 38 CFR Part 43

Cross References
This section is referred to in 26 USCS § 6103; 38 USCS §§ 1525, 1701, 1703, 1710, 2062

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 65-67

Forms:
16A Fed Procedural Forms L Ed, Veterans and Veterans' Laws § 68:42
1. Generally
2. Determinations
3. Drugs
4. Dental care

1. Generally
Any person qualifying as veteran within applicable law, who is suffering from disease or injury incurred in or aggravated during service and not resulting from misconduct, is eligible for treatment of such condition. 1933 ADVA 129

Members of Women's Army Auxiliary Corps, Women's Reserve of Navy and Marine Corps, and Women's Reserve of Coast Guard, qualifying under applicable law, are entitled to outpatient treatment, even though receiving monetary benefits from Employees' Compensation Commission; Veterans' Administration [now Department of Veterans Affairs] claims and rating boards make eligibility findings independent of recommendations by United States Employees' Compensation Commission. 1943 ADVA 531

Persons, who meet regulation requirements of discharge prior to November 12, 1918, with disability incurred in line of duty and not resulting from misconduct, are entitled to outpatient treatment for injuries or diseases incurred in line of duty, and for any condition which would be appropriate from medical standpoint to treat as adjunct thereto. 1945 ADVA 648

2. Determinations

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Service department finding that disability was incurred in line of duty, entitling veteran to domiciliary or hospital care, also determines line of duty status of particular condition requiring medical treatment, even though Veterans' Administration [now Department of Veterans Affairs] found disability not incurred in line of duty for pension purposes. 1934 ADVA 232

Finding of service department that disability, for which soldier or sailor was discharged, was incurred in line of duty is to be accepted for purpose of determining eligibility of peacetime veterans for medical and hospital treatment; since War Department reported veteran was discharged for disability incurred in line of duty, he is eligible to receive prosthetic appliances, notwithstanding that Veterans’ Administration [now Department of Veterans Affairs] has determined that his disability was incurred not in line of duty for pension purposes. 1936 ADVA 369

Members of Women's Army Auxiliary Corps, Women's Reserve of Navy and Marine Corps, and Women's Reserve of Coast Guard, qualifying under applicable law, are entitled to outpatient treatment, even though receiving monetary benefits from Employees' Compensation Commission; Veterans' Administration [now Department of Veterans Affairs] claims and rating boards make eligibility findings independent of recommendations by United States Employees' Compensation Commission. 1943 ADVA 531

If BVA determines that appellant has compensable dental disability, then claim for outpatient dental treatment must be allowed. Grovhoug v Brown (1994) 7 Vet App 209

Where veteran argued that exclusion of periodontal disease as compensable disability under 38 C.F.R. § 3.381(a) conflicted with 38 USCS § 1110 which required compensation for disabilities, under 38 USCS § 7252(b), Court of Veterans Appeals lacked jurisdiction to review regulatory determination that periodontal disease was eligible for treatment benefits but was not compensable disability. Byrd v Nicholson (2005) 19 Vet App 388, 2005 US App Vet Claims LEXIS 802

3. Drugs

Veterans' Administration [now Department of Veterans Affairs] may furnish very unusual or expensive drugs and medicines to eligible veteran in state home provided there is no duplication of medical services required to be provided by home. VA GCO 14-74, reissued 1991 VAOPGCPREC LEXIS 1195

38 USCS § 1712(d) is exclusive legal authority for providing veteran with drugs prescribed by private physician where Veterans Administration [now Department of Veterans Affairs] has no involvement in veteran's treatment. VA GCO 11-83, reissued 1991 VAOPGCPREC LEXIS 1183

4. Dental care

Given that Air Force Secretary's failure to comply with notification provisions of statute resulted in veteran's delayed Veterans' Administration [now Department of Veterans Affairs] dental examination more than 6 months after discharge, veteran's claim for outpatient dental treatment must be disallowed if on remand Board concludes that veteran has noncompensable service-connected dental disability. Mays v Brown (1993) 5 Vet App 302

If BVA determines that appellant has compensable dental disability, then claim for outpatient dental treatment must be allowed. Grovhoug v Brown (1994) 7 Vet App 209

§ 1712A. Eligibility for readjustment counseling and related mental health services

(a) (1) (A) Upon the request of any veteran referred to in subparagraph (B), the Secretary shall furnish counseling to the veteran to assist the veteran in readjusting to civilian life. Such counseling may include a general mental and psychological assessment of the veteran to ascertain whether such veteran has mental or psychological problems associated with readjustment to civilian life.

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(B) Subparagraph (A) applies to the following veterans:

(i) Any veteran who served on active duty--
   (I) in a theater of combat operations (as determined by the Secretary in consultation with the Secretary of Defense) during the Vietnam era; or
   (II) after May 7, 1975, in an area at a time during which hostilities occurred in that area.

(ii) Any veteran (other than a veteran covered by clause (i)) who served on active duty during the Vietnam era who seeks or is furnished such counseling before January 1, 2004.

(2) (A) Upon the request of any veteran (other than a veteran covered by paragraph (1)) who served in the active military, naval, or air service in a theater of combat operations (as so determined) during a period of war, or in any other area during a period in which hostilities (as defined in subparagraph (B)) occurred in such area, the Secretary may furnish counseling to the veteran to assist the veteran in readjusting to civilian life.

(B) For the purposes of subparagraph (A), the term "hostilities" means an armed conflict in which the members of the Armed Forces are subjected to danger comparable to the danger to which members of the Armed Forces have been subjected in combat with enemy armed forces during a period of war, as determined by the Secretary in consultation with the Secretary of Defense.

(b) (1) If, on the basis of the assessment furnished under subsection (a) of this section, a physician or psychologist employed by the Department (or, in areas where no such physician or psychologist is available, a physician or psychologist carrying out such function under a contract or fee arrangement with the Secretary) determines that the provision of mental health services to such veteran is necessary to facilitate the successful readjustment of the veteran to civilian life, such veteran shall, within the limits of Department facilities, be furnished such services on an outpatient basis. For the purposes of furnishing such mental health services, the counseling furnished under subsection (a) of this section shall be considered to have been furnished by the Department as a part of hospital care. Any hospital care and other medical services considered necessary on the basis of the assessment furnished under subsection (a) of this section shall be furnished only in accordance with the eligibility criteria otherwise set forth in this chapter [38 USCS §§ 1701 et seq.] (including the eligibility criteria set forth in section 1784 of this title [38 USCS § 1784]).

(2) Mental health services furnished under paragraph (1) of this subsection may, if determined to be essential to the effective treatment and readjustment of the veteran, include such consultation, counseling, training, services, and expenses as are described in sections 1782 and 1783 of this title [38 USCS §§ 1782 and 1783].

(c) [Repealed]

(d) The Under Secretary for Health may provide for such training of professional, paraprofessional, and lay personnel as is necessary to carry out this section effectively, and, in carrying out this section, may utilize the services of paraprofessionals, individuals who are volunteers working without compensation, and individuals who are veteran-students (as described in section 3485 of this title [38 USCS § 3485]) in initial intake and screening activities.
(e) (1) In furnishing counseling and related mental health services under subsections (a) and (b) of this section, the Secretary shall have available the same authority to enter into contracts with private facilities that is available to the Secretary (under sections 1703(a)(2) and 1710(a)(1)(B) of this title [38 USCS §§ 1703(a)(2) and 1710(a)(1)(B)]) in furnishing medical services to veterans suffering from total service-connected disabilities.

(2) Before furnishing counseling or related mental health services described in subsections (a) and (b) of this section through a contract facility, as authorized by this subsection, the Secretary shall approve (in accordance with criteria which the Secretary shall prescribe by regulation) the quality and effectiveness of the program operated by such facility for the purpose for which the counseling or services are to be furnished.

(3) The authority of the Secretary to enter into contracts under this subsection shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.

(f) The Secretary, in cooperation with the Secretary of Defense, shall take such action as the Secretary considers appropriate to notify veterans who may be eligible for assistance under this section of such potential eligibility.

(g) (1) (A) Except as provided in subparagraph (C) of this paragraph, the Secretary may close or relocate a center in existence on January 1, 1988, only as described in the national plan required by paragraph (3) of this subsection (or in a revision to such plan under paragraph (4) of this subsection in which the closure or relocation of that center is proposed).

(B) A closure or relocation of a center which is proposed in such national plan may be carried out only after the end of the 120-day period beginning on the date on which the national plan is submitted. A closure or relocation of a center not proposed in such plan may be carried out only after the end of the 60-day period beginning on the date the Secretary submits a revision to such plan in which the closure or relocation of that center is proposed.

(C) The Secretary may relocate a center in existence on January 1, 1988, without regard to the national plan (including any revision to such plan) if such relocation is to a new location away from a Department general health-care facility when such relocation is necessitated by circumstances beyond the control of the Department. Such a relocation may be carried out only after the end of the 30-day period beginning on the date on which the Secretary notifies the Committees on Veterans' Affairs of the Senate and the House of Representatives of the proposed relocation, of the circumstances making it necessary, and of the reason for the selection of the new site for the center.

(2) (A) Not later than April 1, 1988, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the Secretary's evaluation of the effectiveness in helping to meet the readjustment needs of veterans who served on active duty during the Vietnam era of the readjustment counseling and mental health services provided pursuant to this section (and of outreach efforts with respect to such counseling and services). Such report shall give particular attention, in light of the results of the study required by section 102 of the Veterans' Health Care Amendments of 1983 (Public Law 98-160), to the provision of
such counseling and services to veterans with post-traumatic stress disorder and to the diagnosis and treatment of such disorder.

(B) The report required by subparagraph (A) of this paragraph shall include--
(i) the opinion of the Secretary with respect to (I) the extent to which the readjustment needs of veterans who served on active duty during the Vietnam era remain unmet, and (II) the extent to which the provision of readjustment counseling services under this section in centers is needed to meet such needs; and
(ii) in light of the opinion submitted pursuant to clause (i) of this subparagraph, such recommendations for amendments to this subsection and for other legislative and administrative action as the Secretary considers appropriate.

(3) (A) The Secretary, after considering the recommendations of the Under Secretary for Health, shall submit to such committees a report setting forth a national plan for all centers in existence on January 1, 1988. Such national plan shall set forth the Secretary's proposals as to each such center for a period (to be determined by the Secretary) of not less than 12 months beginning on the date of the submission of the report. The plan shall include, as to each center, whether the Secretary proposes to relocate the center to a general Department facility, relocate the center to a new location away from a general Department facility, expand the center in the same location, or close the center. The plan shall also set forth any proposal of the Secretary to open additional centers.

(B) The plan shall include the Secretary's evaluation as to how, in light of each of the criteria described in subparagraph (C) of this paragraph, the proposal set forth in the plan for each center covered by the plan would ensure the continued availability and effective furnishing of readjustment counseling services to eligible veterans needing such services in the geographic area served by that center.

(C) The Secretary shall make the evaluation described in subparagraph (B) of this paragraph with respect to any center in light of the following:
(i) The distribution of Vietnam-era veterans in the geographic area served by the center and the relationships between the location of such center and the general Department facility and such distribution.
(ii) The distance between the center and the general Department facility.
(iii) The availability of other entities (such as State, local, or private outreach facilities) which provide assistance to Vietnam-era veterans in the area served by the center.
(iv) The availability of transportation to, and parking at, the center and the general Department facility.
(v) The availability, cost, and suitability of the space at the general Department facility.
(vi) The overall cost impact of the proposed closure or relocation, including a comparison of the recurring nonpersonnel costs of providing readjustment counseling to the same estimated number of veterans at the center and the general Department facility.
(vii) The workload trends over the two previous fiscal years, and projected over the next fiscal year (or longer), at the center.
(viii) Such other factors as the Secretary determines to be relevant to making the evaluation described in subparagraph (B) of this paragraph.

(D) For the purposes of this paragraph, the term "general Department facility" means a Department facility which is not a center and at which readjustment counseling would be furnished in a particular geographic area upon the closure or relocation of a center.

(4) After submitting the plan required by paragraph (3) of this subsection, the Secretary may submit to the committees a revision to such plan in order to modify the proposal set forth in the plan as to any center. Any such revision shall include, with respect to each center addressed in the revision, a description of the Secretary's evaluation of the matters specified in paragraphs (3)(B) and (3)(C) of this subsection.

(5) For purposes of determining a period of time under paragraph (1)(B) of this subsection, if the national plan (or a revision to the national plan) is submitted to the committees during the 121-day period beginning 60 days before and ending 60 days after the final day of a session of the Congress, it shall be deemed to have been submitted on the sixty-first day after the final day of such session.

(h) [Repealed]

(i) For the purposes of this section:

(1) The term "center" means a facility (including a Resource Center designated under subsection (h)(3)(A) of this section) which is operated by the Department for the provision of services under this section and which (A) is situated apart from Department general health-care facilities, or (B) was so situated but has been relocated to a Department general health-care facility.

(2) The term "Department general health-care facility" means a health-care facility which is operated by the Department for the furnishing of health-care services under this chapter [38 USCS §§ 1701 et seq.], not limited to services provided through the program established under this section.

References in text:


Effective date of section:

Act June 13, 1979, P. L. 96-22, Title I, § 107, 93 Stat. 53, provided that this section shall be effective on October 1, 1979.

Amendments:

1979. Act Nov. 28, 1979 (effective 11/28/79, as provided by § 601(b) of such Act, which appears as 38 USCS § 1114 note), in subsec. (d), deleted a comma following "this title".

1981. Act Nov. 3, 1981 (effective 10/1/81, as provided by § 104(a)(2) of such Act), in subsec. (a), substituted "or by September 30, 1984" for "or two years after the effective date of this section".

Such Act further added subsec. (g).

1983. Act Nov. 21, 1983, in subsec. (a), deleted "if such veteran requests such counseling within two years after the date of such veteran's discharge or release from active duty or by September 30, 1984, whichever is later" following "life"; in subsec. (g), in the introductory
matter, substituted "September 30, 1988" for "September 30, 1984", in para. (1) substituted "October 1, 1988" for "October 1, 1984", substituted para. (2) for one which read "Not later than April 1, 1984, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the plans made and actions taken to carry out this subsection.", and added para (3).

1985. Act Dec. 3, 1985, in subsec. (g)(1)(B), purported to substitute "who request such counseling" for "who requested counseling before such date"; however, to conform to the probable intent of Congress, such amendment was executed to substitute "who request such counseling" for "who requested such counseling before such date".

Such Act further added subsec. (h).

1986. Act April 7, 1986 (applicable to hospital care, nursing home care, and medical services furnished on or after 7/1/1986, as provided by § 19011(f) of such Act, which appears as 38 USCS § 1710 note), in subsec. (b)(1), substituted "paragraph (1)(A)(ii)" for "clause (1)(B)".

Such Act further, in subsec. (e)(1), substituted "612(a)(1)(B)" for "612(f)(2)", and "603(a)(2)" for "601(4)(C)(ii)".

Act Oct. 28, 1986, in subsec. (b)(3)(A)(i), substituted "December 3, 1985" for "the date of enactment of this section"; in subsec. (g), in para. (1), substituted "the 24-month period ending on September 30, 1989" for "the twelve-month period ending on September 30, 1989", in subpara. (A), substituted "orderly transition, by October 1, 1988" for "orderly, gradual transition by October 1, 1989", in para. (2)(A), inserted "(Public Law 98-160) (or, if the study is not then completed, whatever information from it is then available)", in para. (3), inserted the sentence beginning "Such report shall be . . . ", and added para. (4).

1988. Act May 20, 1988, in subsec. (g), substituted para. (1) for one which read:

"(1) During the 24-month period ending on September 30, 1989, the Administrator shall take appropriate steps to ensure--

"(A) the orderly, gradual transition by October 1, 1989, of that part of the program established under this section for the provision of readjustment counseling services by Veterans' Administration personnel from a program providing such services primarily through centers located in facilities situated apart from the health-care facilities operated by the Veterans' Administration for the provision of other health-care services under other provisions of this chapter to a program providing readjustment counseling services primarily through such health-care facilities; and

"(B) the continued availability after such date of readjustment counseling and related mental health services under this section to veterans eligible for the provision of such counseling and services who request such counseling.

Such Act further, in subsec. (g), in para. (2), in subpara. (A), substituted "April 1, 1988" for "April 1, 1987", and deleted "(or, if the study is not then completed, whatever information from it is then available)" following "(Public Law 98-160)", in subpara. (B), in cl. (i), substituted "centers" for "a program providing such services through facilities situated apart from Veterans' Administration health-care facilities", in cl. (ii), deleted "paragraph (1) of" following "for amendments to", and substituted paras. (3)-(5) for paras. (3) and (4), which read:

"(3) Not later than July 1, 1987, the Administrator shall submit to such committees a report containing a description of the plans made and timetable for carrying out paragraph (1) of this subsection. Such report shall be prepared taking into consideration the results of the study referred to in paragraph (2)(A) of this subsection (or, if the study is not then completed, whatever information from it is then available).

"(4) Not later than February 1, 1989, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the experience under as much of the transition as was carried out pursuant to paragraph (1) of this
subsection before September 30, 1988, including such recommendations for legislative and administrative action as the Administrator considers appropriate in light of such experience."

Such Act further, in subsec. (h), in para. (3)(B), substituted "'Resource Centers' " for "'Centers' ", and in paras. (4) and (5), substituted "Resource Center" for "Center"; and added subsec. (i).

Act Nov. 18, 1988, in subsec. (g)(1), in subpara. (A), substituted "Except as provided in subparagraph (C) of this paragraph, the" for "The"; and added subpara. (C).


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 612A, as 38 USCS § 1712A, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and repealed subsec. (h), which read:

"(h)(1) During the period beginning on January 1, 1986, and ending on September 30, 1988, the Administrator shall conduct a pilot program to provide and coordinate the provision of services described in paragraph (2) of this subsection. The pilot program shall be carried out in order to evaluate the effectiveness, feasibility, and desirability of providing veterans eligible for readjustment counseling under this section with additional services through facilities furnishing such counseling.

"(2) The services referred to in paragraph (1) of this subsection are--

"(A) counseling with respect to, and assistance in applying for, all benefits and services under laws administered by the Veterans' Administration for which veterans participating in the pilot program may be eligible;

"(B) employment counseling, training, placement, and related services described in sections 2003 and 2003A of this title or provided under any other law administered by the Secretary of Labor;

"(C) initial intake and referral services with respect to disabilities related to alcohol or drug dependence or abuse and follow-up services for veterans who have received treatment for such disabilities; and

"(D) assistance in coordinating the provision of benefits and services to veterans participating in the pilot program with respect to such veterans' receipt of --

"(i) services provided under the pilot program; and

"(ii) other benefits and services provided under laws administered by the Veterans' Administration, the Secretary of Labor, or any other Federal agency or official.

"(3)(A) In order to carry out the pilot program, the Administrator shall--

"(i) designate as sites for demonstration projects 10 facilities which on December 3, 1985, are providing readjustment counseling under this section; and

"(ii) assign such staff and other resources to such facilities as are necessary to enable such facilities to provide the services referred to in subparagraphs (A) and (C) of paragraph (2) of this subsection.
“(B) Facilities designated under subparagraph (A) of this paragraph shall be known as Vietnam Veteran Resource Centers (hereinafter in this subsection referred to as ‘Resource Centers’).

“(4) The Administrator--

“(A) shall be responsible for coordinating the assignment and use of employees, on full- or part-time bases, as appropriate, in each Resource Center; and

“(B) shall, in carrying out that responsibility, make maximum feasible use of the Veterans' Administration employees who are providing services at each facility on the date it is designated as a Resource Center under this subsection.

“(5) The Secretary of Labor shall provide for the assignment to each Resource Center, on full- or part-time bases, as the Secretary considers appropriate, of disabled veterans' outreach specialists appointed under section 2003A of this title or employees on the staffs of local employment service offices who are assigned to perform services under section 2004 of this title.

“(A) shall be responsible for coordinating the assignment and use of employees, on full- or part-time bases, as appropriate, in each Center;

“(6) Not later than April 1, 1987, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the experience under the pilot program during its first 15 months of operation. The report shall include--

“(A) the Administrator's assessment of--

"(i) the effectiveness of the pilot program in providing and coordinating the provision of the services described in paragraph (2) of this subsection and counseling and services furnished under subsections (a) and (b) of this section; and

"(ii) the appropriateness of the use of the personnel assigned to the program;

“(B) a description of any administrative action that the Administrator plans to take generally to increase the coordination of the provision of such services to veterans eligible for readjustment counseling services under this section;

“(C) any recommendation that the Administrator considers appropriate; and

“(D) a comparison of such assessment, plans, and recommendations with the evaluation of and the recommendations relating to the readjustment counseling program included in the report required by subsection (g)(2) of this section.

“(7) Not later than January 1, 1989, the Administrator shall submit to such Committees a final report on the pilot program. The report shall include--

“(A) updates of all information provided in the report submitted pursuant to paragraph (6) of this subsection; and

“(B) the Administrator's final assessment of the pilot program based on 33 months of operation."

Such Act further substituted "Department" for "Veterans' Administration", "Secretary" for "Administrator", and "Secretary's" for "Administrator's".

1992. Act Oct. 9, 1992, in subsecs. (d) and (g)(3)(A), substituted "Under Secretary for Health" for "Chief Medical Director".

1996. Act Oct. 9, 1996 substituted subsec. (a) for one which read:
“(a)(1) Upon the request of any veteran who served on active duty during the Vietnam era, the Secretary shall, within the limits of Department facilities, furnish counseling to such veteran to assist such veteran in readjusting to civilian life. Such counseling shall include a general mental and psychological assessment to ascertain whether such veteran has mental or psychological problems associated with readjustment to civilian life.

“(2)(A) The Secretary shall furnish counseling as described in paragraph (1), upon request, to any veteran who served on active duty after May 7, 1975, in an area at a time during which hostilities occurred in such area.

“(B) For the purposes of subparagraph (A) of this paragraph, the term 'hostilities' means an armed conflict in which members of the Armed Forces are subjected to danger comparable to the danger to which members of the Armed Forces have been subjected in combat with enemy armed forces during a period of war, as determined by the Secretary in consultation with the Secretary of Defense.”;

in subsec. (b)(1), deleted "under the conditions specified in section 1712(a)(5)(B) of this title" following "outpatient basis"; in subsec. (e)(1), substituted "sections 1703(a)(2) and 1710(a)(1)(B)" for "sections 1712(a)(1)(B) and 1703(a)(2)"; and repealed subsec. (c), which read:

“(c) Upon receipt of a request for counseling under this section from any individual who has been discharged or released from active military, naval, or air service but who is not eligible for such counseling, the Secretary shall--

“(1) provide referral services to assist such individual, to the maximum extent practicable, in obtaining mental health care and services from sources outside the Department; and

“(2) if pertinent, advise such individual of such individual's rights to apply to the appropriate military, naval, or air service and the Department for review of such individual's discharge or release from such service.”.


Other provisions:

Eligibility assistance in case of declaration of war. Act June 13, 1979, P. L. 96-22, Title I, § 103(b), 93 Stat. 50 (effective 10/1/79, as provided by § 107 of such Act); Aug. 6, 1991, P. L. 102-83, § 6(d), 105 Stat. 407, provides: "In the event of a declaration of war by the Congress after June 13, 1979, the Secretary of Veterans' Affairs, not later than six months after the date of such declaration, shall determine and recommend to the Congress whether eligibility for the readjustment counseling and related mental health services provided for in section 612A [now § 1712A] of title 38, United States Code (as added by subsection (a) of this section) should be extended to the veterans of such war.”.


“(a)(1) The Administrator of Veterans' Affairs shall provide for the conduct of a comprehensive study of the prevalence and incidence in the population of Vietnam veterans of post-traumatic stress disorder and other psychological problems in readjusting to civilian life (hereinafter in this section collectively referred to as 'post-war psychological problems') and of the effects of post-war psychological problems on such veterans, with particular attention to veterans who have service-connected disabilities and with specific reference to women veterans.
“(2) The study required by this subsection--

“(A) shall be designed to yield information regarding any statistical correlations--

“(i) between post-war psychological problems and physical disabilities (by type of disability) in the population of Vietnam veterans;

“(ii) between post-war psychological problems and alcohol and drug abuse in such population;

“(iii) between veterans in such population having post-war psychological problems and being members of minority groups; and

“(iv) between post-war psychological problems in such population and the incarceration of such veterans in penal institutions;

“(B) shall include an evaluation of the long-term effects of post-war psychological problems among Vietnam veterans on the families of such veterans (and on persons in other primary social relationships with such veterans); and

“(C) shall include a survey of the extent to which Vietnam veterans with post-war psychological problems use care furnished by the Veterans’ Administration.

“(b) Not later than October 1, 1986, the Administrator shall submit to the Committees on Veterans’ Affairs of the Senate and House of Representatives a report on the results of the study required by subsection (a). Such report shall contain--

“(1) a description of the results of the study;

“(2) information regarding the capability of the Veterans’ Administration to provide treatment to the number of veterans estimated in such study to be suffering from post-war psychological problems;

“(3) descriptions of the policies and procedures of the Veterans’ Administration with respect to providing disability compensation for post-war psychological problems;

“(4) a description of the activities of the Administrator in attempting to coordinate Veterans’ Administration health-care and compensation programs with respect to post-traumatic stress disorder; and

“(5) such recommendations for administrative and legislative action as the Administrator considers appropriate in light of the results of the study.

“(c) For the purpose of this section [this note]:

“(1) The terms ‘veteran’, ‘service-connected’, and ‘active duty’ have the meanings provided in sections 101(2), (16), and (21), respectively, of title 38, United States Code.

“(2) The term ‘Vietnam veteran’ means a veteran who served on active duty in the Republic of Vietnam or elsewhere in the Vietnam theater of operations during the Vietnam era (as defined in section 101(29) of such title).

“(d) In order to promote the participation in the study required by subsection (a) of a number of study subjects sufficient to yield scientifically valid results from such study, the Administrator shall pay an appropriate stipend to each individual participating in the study as a subject. In determining the amount of such stipend, the Administrator shall take into account--

“(1) the amount of time that the individual is expected to devote to participation in the study,
“(2) the extent to which the individual’s normal routine is disrupted as a result of such participation,

“(3) any travel by the individual in connection with such participation, and

“(4) such other factors as the Administrator considers appropriate.”.


“(a)(1) The Under Secretary for Health of the Department of Veterans Affairs may designate special programs within the Veterans Health Administration for the diagnosis and treatment of post-traumatic-stress disorder (hereinafter in this section referred to as ‘PTSD’).

“(2) The Under Secretary for Health shall direct (A) that (in addition to providing diagnostic and treatment services for PTSD) Department programs designated under paragraph (1) (hereinafter in this section referred to as ‘designated PTSD programs’) carry out activities to promote the education and training of health-care personnel (including health-care personnel not working for the Department or the Federal Government) in the causes, diagnosis, and treatment of PTSD, and (B) that (when appropriate) the provision of treatment services under such program be coordinated with the provision of readjustment counseling services under section 1712A of title 38, United States Code.

“(b)(1) The Under Secretary for Health shall establish in the Veterans Health Administration a Special Committee on Post-Traumatic-Stress Disorder (hereinafter in this section referred to as the ‘Special Committee’). The Under Secretary for Health shall appoint qualified employees of the Veterans Health Administration to serve on the Special Committee.

“(2) The Special Committee shall assess, and carry out a continuing assessment of, the capacity of the Department to provide diagnostic and treatment services for PTSD to veterans eligible for health care furnished by the Department.

“(3) The Special Committee shall also advise the Under Secretary for Health regarding the development of policies, the provision of guidance, and the coordination of services for the diagnosis and treatment of PTSD (A) in designated PTSD programs, (B) in inpatient psychiatric programs and outpatient mental health programs other than designated PTSD programs, and (C) in readjustment counseling programs of the Department.

“(4) The Special Committee shall also make recommendations to the Under Secretary for Health for guidance with respect to PTSD regarding--

“(A) appropriate diagnostic and treatment methods;

“(B) referral for and coordination of followup care;

“(C) the evaluation of PTSD treatment programs;

“(D) the conduct of research concerning such diagnosis and treatment (taking into account the provisions of subsection (c));

“(E) special programs of education and training for employees of the Veterans Health Administration and the Veterans Benefits Administration (also taking into account such provisions);

“(F) the appropriate allocation of resources for all such activities; and
"(G) any specific steps that should be taken to improve such diagnosis and treatment and to correct any deficiencies in the operations of designated PTSD programs.

"(c) The Under Secretary for Health shall establish and operate in the Veterans Health Administration a National Center on Post-Traumatic-Stress Disorder. The National Center (1) shall carry out and promote the training of health care and related personnel in, and research into, the causes and diagnosis of PTSD and the treatment of veterans for PTSD, and (2) shall serve as a resource center for, and promote and seek to coordinate the exchange of information regarding, all research and training activities carried out by the Department, and by other Federal and non-Federal entities, with respect to PTSD.

"(d) The Under Secretary for Health shall regularly compile and publish the results of research that has been conducted relating to PTSD.

"(e)(1) Not later than March 1, 2000, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the implementation of this section. The report shall include the following:

"(A) A list of the members of the Special Committee.

"(B) A list of all designated PTSD programs and other programs providing treatment for PTSD, together with a description of the resources that have been allocated for the development and operation of each such program, a description of the education and training that has been provided for Department health-care personnel in such programs and elsewhere within the Department in the diagnosis and treatment of PTSD, and specification of the funding that has been allocated to each such program and elsewhere within the Department to support research relating to PTSD.

"(C) The assessment of the Under Secretary for Health of the Department, after consultation with the Special Committee, regarding the capability of the Department to meet the needs for inpatient and outpatient PTSD diagnosis and treatment (both through designated PTSD programs and otherwise) of veterans who served in the Republic of Vietnam during the Vietnam era, former prisoners of war, and other veterans eligible for health care from the Department and the efficacy of the treatment so provided, as well as a description of the results of any evaluations that have been made of PTSD treatment programs.

"(D) The plans of the Special Committee for further assessments of the capability of the Department to diagnose and treat veterans with PTSD.

"(E) The recommendations made by the Special Committee to the Under Secretary for Health and the views of the Under Secretary for Health on such recommendations.

"(F) A summary of the results of research conducted by the Department relating to PTSD.

"(G) A description of the steps taken, plans made (and a timetable for their execution), and resources to be applied to implement subsections (b) and (c).

"(H) The assessment of the Administrator of the capacity of the Department to meet in all geographic areas of the United States the needs described in subparagraph (C) and any plans and timetable for increasing that capacity (including the costs of such action).

"(2) Not later than May 1 of each year through 2008, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report containing information updating the reports submitted under this subsection since the
enactment of the Veterans Millennium Health Care and Benefits Act [enacted Nov. 30, 1999]."

Application of April 7, 1986 amendments. For provisions as to the amendments of subsecs. (b)(1) and (e)(1) of this section by § 19011 of Act April 7, 1986, see Act April 7, 1986, P. L. 99-272, Title XIX, Subtitle A, § 19011(f), 100 Stat. 380, of such Act, which appears as 38 USCS § 1710 note.

Prohibition of delegation of duties. Act May 20, 1988, P. L. 100-322, Title I, Part A, § 107(f), 102 Stat. 496, provides: "The Chief Medical Director [Under Secretary for Benefits] of the Veterans' Administration may not delegate the function of making recommendations under section 612A(g)(3)(A) [now § 1712A(g)(3)(A)] of title 38, United States Code, as amended by subsection (c)."

Authorization for relocation of certain facilities. Act Nov. 18, 1988, P. L. 100-687, Div B, Title XV, § 1501(b), 102 Stat. 4132, provides: "The requirements of section 612A(g)(1) [now § 1712A(g)(1)] of title 38, United States Code, shall not apply with respect to the relocation of 17 Veterans' Administration Readjustment Counseling Service Vet Centers from their locations away from general Veterans' Administration health-care facilities to other such locations, as described in letters dated July 25, 1988, from the Chief Medical Director [Under Secretary for Benefits] of the Veteran's Administration to the Chairmen of the Committees on Veterans' Affairs of the Senate and the House of Representatives."


"(1) Not later than February 1, 1990, and not later than February 1, 1991, the Special Committee on Post-Traumatic Stress Disorder (hereinafter in this subsection referred to as the 'Special Committee') established pursuant to section 110(b)(1) of the Veterans' Health Care Act of 1984 (Public Law 98-528; 98 Stat. 2691) [note to this section] shall submit concurrently to the Secretary of Veterans Affairs and the Committees on Veterans' Affairs of the Senate and House of Representatives (hereinafter in this subsection referred to as the 'Committees') a report containing information updating the reports submitted by the Secretary under section 110(e) of such Act [note to this section], together with any additional information the Special Committee considers appropriate regarding the overall efforts of the Department of Veterans Affairs to meet the needs of veterans with post-traumatic stress disorder and other psychological problems in readjusting to civilian life."

"(2) Not later than 60 days after receiving the report under paragraph (1), the Secretary shall submit to the Committees any comments concerning the report that the Secretary considers appropriate."


"(a) Requirement. Subject to the availability of funds appropriated pursuant to the authorization in subsection (g), the Secretary shall conduct a program to furnish to the persons referred to in subsection (b) the marriage and family counseling services referred to in subsection (c). The authority to conduct the program shall expire on September 30, 1994.

"(b) Persons eligible for counseling. The persons eligible to receive marriage and family counseling services under the program are--

"(1) veterans who were awarded a campaign medal for active-duty service during the Persian Gulf War and the spouses and children of such veterans; and

"(2) veterans who are or were members of the reserve components who were called or ordered to active duty during the Persian Gulf War and the spouses and children of such members.
“(c) Counseling services. Under the program, the Secretary may provide marriage and family counseling that the Secretary determines, based on an assessment by a mental-health professional employed by the Department and designated by the Secretary (or, in an area where no such professional is available, a mental-health professional designated by the Secretary and performing services under a contract or fee arrangement with the Secretary), is necessary for the amelioration of psychological, marital, or familial difficulties that result from the active duty service referred to in subsection (b)(1) or (2).

“(d) Manner of furnishing services.(1) Marriage and family counseling services shall be furnished under the program--

“(A) by personnel of the Department of Veterans Affairs who are qualified to provide such counseling services;

“(B) by appropriately certified marriage and family counselors employed by the Department; and

“(C) by qualified mental health professionals pursuant to contracts with the Department, when Department facilities are not capable of furnishing economical medical services because of geographical inaccessibility or are not capable of furnishing the services required.

“(2) The Secretary shall establish the qualifications required of personnel under subparagraphs (A) and (C) of paragraph (1) and shall prescribe the training, experience, and certification required of appropriately certified marriage and family counselors under subparagraph (B) of such paragraph.

“(3) The Secretary may employ licensed or certified marriage and family counselors to provide counseling under paragraph (1)(B) and may classify the positions in which they are employed at levels determined appropriate by the Secretary, taking into consideration the training, experience, and licensure or certification required of such counselors.

“(e) Contract counseling services.(1) Subject to paragraphs (2) and (4), a mental health professional referred to in subsection (d)(1)(C) may furnish marriage and family counseling services to a person under the program as follows:

“(A) For a period of not more than 15 days beginning on the date of the commencement of the furnishing of such services to the person.

“(B) For a 90-day period beginning on such date if--

“(i) the mental health professional submits to the Secretary a treatment plan with respect to the person not later than 15 days after such date; and

“(ii) the treatment plan and the assessment made under subsection (c) are approved by an appropriate mental health professional of the Department designated for that purpose by the Chief Medical Director.

“(C) For an additional 90-day period beginning on the date of the expiration of the 90-day period referred to in subparagraph (B) (or any subsequent 90-day period) if--

“(i) not more than 30 days before the expiration of the 90-day period referred to in subparagraph (B) (or any subsequent 90-day period), the mental health professional submits to the Secretary a revised treatment plan containing a justification of the need of the person for additional counseling services; and

“(ii) the plan is approved in accordance with the provisions of subparagraph (B)(ii).
"(2)(A) A mental health professional referred to in paragraph (1) who assesses the need of any person for services for the purposes of subsection (c) may not furnish counseling services to that person.

"(B) The Secretary may waive the prohibition referred to in subparagraph (A) for locations (as determined by the Secretary) in which the Secretary is unable to obtain the assessment referred to in that subparagraph from a mental health professional other than the mental health professional with whom the Secretary enters into contracts under subsection (d)(1)(C) for the furnishing of counseling services.

"(3) The Secretary shall reimburse mental health professionals for the reasonable cost (as determined by the Secretary) of furnishing counseling services under paragraph (1). In the event of the disapproval of a treatment plan of a person submitted by a mental health professional under paragraph (1)(B)(i), the Secretary shall reimburse the mental health professional for the reasonable cost (as so determined) of furnishing counseling services to the person for the period beginning on the date of the commencement of such services and ending on the date of the disapproval.

"(4) The Secretary may authorize the furnishing of counseling in an individual case for a period shorter than the 90-day period specified in subparagraph (B) or (C) of paragraph (1) and, upon further consideration, extend the shorter period to the full 90 days.

"(5)(A) For the purposes of this subsection, the term 'treatment plan', with respect to a person entitled to counseling services under the program, must include--

"(i) an assessment by the mental health professional submitting the plan of the counseling needs of the person described in the plan on the date of the submittal of the plan; and

"(ii) a description of the counseling services to be furnished to the person by the mental health professional during the 90-day period covered by the plan, including the number of counseling sessions proposed as part of such services.

"(B) The Secretary shall prescribe an appropriate form for the treatment plan.

"(f) Cost recovery. For the purposes of section 1729 of title 38, United States Code, marriage and family counseling services furnished under the program shall be deemed to be care and services furnished by the Department under chapter 17 of such title, and the United States shall be entitled to recover or collect the reasonable cost of such services in accordance with that section.

"(g) Authorization of appropriations. There is authorized to be appropriated $10,000,000 for each of fiscal years 1993 and 1994 to carry out this section.

"(h) Report. Not later than July 1, 1994, the Secretary shall submit to Congress a report on the program conducted pursuant to this section. The report shall contain information regarding the persons furnished counseling services under the program, including--

"(1) the number of such persons, stated as a total number and separately for each eligibility status referred to in subsection (b);

"(2) the age and gender of such persons;

"(3) the manner in which such persons were furnished such services under the program; and

"(4) the number of counseling sessions furnished to such persons.

"(i) Definitions. For the purposes of this section, the terms 'veteran', 'child', 'active duty', 'reserve component', 'spouse', and 'Persian Gulf War' have the meanings given such terms...
in paragraphs 101(2), (4), (21), (27), (31), and (33) of section 101 of title 38, United States Code, respectively.”.

**Updates of reports under section 110(c) of Public Law 98-528.** Act Oct. 9, 1992, P. L. 102-405, Title I, Part B, § 122(b), 106 Stat. 1981, provides:

"(1) Not later than October 1, 1992, and October 1, 1993, the Special Committee on Post-Traumatic-Stress Disorder established pursuant to section 110(b)(1) of the Veterans' Health Care Act of 1984 (38 U.S.C. 1712A note) shall concurrently submit to the Secretary and the Committees on Veterans' Affairs of the Senate and House of Representatives a report containing information updating the reports submitted to the Secretary under section 110(e) of the Veterans' Health Care Act of 1984 [38 USCS § 1712A note], together with any additional information the Special Committee considers appropriate regarding the overall efforts of the Department of Veterans Affairs to meet the needs of veterans with post-traumatic stress disorder and other psychological problems in readjusting to civilian life.

"(2) Not later than 90 days after receiving each of the reports under paragraph (1), the Secretary shall submit to the committees any comments concerning the report that the Secretary considers appropriate.”.


"(a) Plan. The Secretary shall develop a plan--

"(1) to ensure, to the maximum extent practicable, that veterans suffering from post-traumatic stress disorder related to active duty are provided appropriate treatment and rehabilitative services for that condition in a timely manner;

"(2) to expand and improve the services available for veterans suffering from post-traumatic stress disorder related to active duty;

"(3) to eliminate waiting lists for inpatient treatment and other modes of treatment for post-traumatic stress disorder;

"(4) to enhance outreach activities carried out to inform combat-area veterans of the availability of treatment for post-traumatic stress disorder; and

"(5) to ensure, to the extent practicable, that there are Department post-traumatic stress disorder treatment units in locations that are readily accessible to veterans residing in rural areas of the United States.

"(b) Considerations. In developing the plan referred to in subsection (a), the Secretary shall consider--

"(1) the numbers of veterans suffering from post-traumatic stress disorder related to active duty, as indicated by relevant studies, scientific and clinical reports, and other pertinent information;

"(2) the numbers of veterans who would likely seek post-traumatic stress disorder treatment from the Department if waiting times for treatment were eliminated and outreach activities to combat-area veterans with post-traumatic stress disorder were enhanced;

"(3) the current and projected capacity of the Department to provide appropriate treatment and rehabilitative services for post-traumatic stress disorder;

"(4) the level and geographic accessibility of inpatient and outpatient care available through the Department for veterans suffering from post-traumatic stress disorder across the United States;
"(5) the desirability of providing that inpatient and outpatient post-traumatic stress disorder care be furnished in facilities of the Department that are physically independent of general psychiatric wards of the medical facilities of the Department;

"(6) the treatment needs of veterans suffering from post-traumatic stress disorder who are women, of such veterans who are ethnic minorities (including Native Americans, Native Hawaiians, Asian-Pacific Islanders, and Native Alaskans), and of such veterans who suffer from substance abuse problems in addition to post-traumatic stress disorder; and

"(7) the recommendations of the Special Committee on Post-Traumatic-Stress Disorder with respect to (A) specialized inpatient and outpatient programs of the Department for the treatment of post-traumatic stress disorder, and (B) with respect to the establishment of educational programs that are designed for each of the various levels of education, training, and experience of the various mental health professionals involved in the treatment of veterans suffering from post-traumatic stress disorder.

"(c) Report. Not later than six months after the date of the enactment of this Act, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the plan developed pursuant to subsection (a). The report shall include specific information relating to the consideration given to the matters described in subsection (b).

"(d) Definitions. For the purposes of this section:

"(1) The term 'active duty' has the meaning given that term in section 101(21) of title 38, United States Code.

"(2) The term 'veteran' has the meaning given that term in section 101(2) of such title.

"(3) The term 'combat-area veteran' means a veteran who served on active duty in an area at a time during which hostilities (as defined in section 1712A(a)(2)(B) of such title) occurred in such area."


"(a) Improvement to specialized mental health services. The Secretary, in furtherance of the responsibilities of the Secretary under section 1706(b) of title 38, United States Code, shall carry out a program to expand and improve the provision of specialized mental health services to veterans. The Secretary shall establish the program in consultation with the Committee on Care of Severely Chronically Mentally Ill Veterans established pursuant to section 7321 of title 38, United States Code.

"(b) Covered programs. For purposes of this section, the term 'specialized mental health services' includes programs relating to--

"(1) the treatment of post-traumatic stress disorder; and

"(2) substance use disorders.

"(c) Funding. (1) In carrying out the program described in subsection (a), the Secretary shall identify, from funds available to the Department for medical care, an amount of not less than $25,000,000 in each of fiscal years 2004, 2005, and 2006 to be available to carry out the program and to be allocated to facilities of the Department pursuant to subsection (d).

"(2) In identifying available amounts pursuant to paragraph (1), the Secretary shall ensure that, after the allocation of those funds under subsection (d), the total expenditure for programs relating to (A) the treatment of post-traumatic stress disorder, and (B) substance use disorders is not less than $25,000,000 in excess of the baseline amount.
"(3)(A) For purposes of paragraph (2), the baseline amount is the amount of the total expenditures on such programs for the most recent fiscal year for which final expenditure amounts are known, adjusted to reflect any subsequent increase in applicable costs to deliver such services in the Veterans Health Administration, as determined by the Committee on Care of Severely Chronically Mentally Ill Veterans.

"(B) For purposes of this paragraph, in fiscal years 2004, 2005, and 2006, the fiscal year used to determine the baseline amount shall be fiscal year 2003.

"(d) Allocation of funds to Department facilities.(1) In each of fiscal years 2004, 2005, and 2006, the Secretary shall allocate funds identified pursuant to subsection (c)(1) to individual medical facilities of the Department as the Secretary determines appropriate based upon proposals submitted by those facilities for the use of those funds for improvements to specialized mental health services.

"(2) In allocating funds to facilities in a fiscal year under paragraph (1), the Secretary shall ensure that--

"(A) not less than $10,000,000 is allocated by direct grants to programs that are identified by the Mental Health Strategic Health Care Group and the Committee on Care of Severely Chronically Mentally Ill Veterans;

"(B) not less than $5,000,000 is allocated for programs on post-traumatic stress disorder; and

"(C) not less than $5,000,000 is allocated for programs on substance use disorder.

"(3) The Secretary shall provide that the funds to be allocated under this section during each of fiscal years 2004, 2005, and 2006 are funds for a special purpose program for which funds are not allocated through the Veterans Equitable Resource Allocation system.

"(e) Report. Not later than 12 months after the date of the enactment of this Act, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report describing the implementation of this section. The Secretary shall include in the report information on the allocation of funds to facilities of the Department under the program and a description of the improvements made with those funds to specialized mental health services for veterans.".


"(a) Study on post-traumatic stress disorder. Not later than 10 months after the date of the enactment of this Act, the Secretary of Veterans Affairs shall enter into a contract with an appropriate entity to carry out a study on post-traumatic stress disorder.

"(b) Follow-up study. The contract under subsection (a) shall provide for a follow-up study to the study conducted in accordance with section 102 of the Veterans Health Care Amendments of 1983 (Public Law 98-160) [note to this section]. Such follow-up study shall use the data base and sample of the previous study.

"(c) Information to be included. The study conducted pursuant to this section shall be designed to yield information on--

"(1) the long-term course of post-traumatic stress disorder;

"(2) any long-term medical consequences of post-traumatic stress disorder;

"(3) whether particular subgroups of veterans are at greater risk of chronic or more severe problems with such disorder; and

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“(4) the services used by veterans who have post-traumatic stress disorder and the effect of those services on the course of the disorder.

“(d) Report. The Secretary shall submit to the Committees on Veterans’ Affairs of the Senate and House of Representatives a report on the results of the study under this section. The report shall be submitted no later than October 1, 2004.”.

**Code of Federal Regulations**

Department of Veterans Affairs-Medical, 38 CFR Part 17

**Cross References**

This section is referred to in 29 USCS § 2913; 38 USCS §§ 1703, 1710, 4102A, 4103, 4103A, 4104, 4214, 7306

**Research Guide**

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws §§ 56, 65, 99

§ 1712B. Counseling for former prisoners of war

The Secretary may establish a program under which, upon the request of a veteran who is a former prisoner of war, the Secretary, within the limits of Department facilities, furnishes counseling to such veteran to assist such veteran in overcoming the psychological effects of the veteran's detention or internment as a prisoner of war.

**Amendments:**

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 612B, as 38 USCS § 1712B, and substituted “Department” for “Veterans' Administration” and “Secretary” for “Administrator”.

**Research Guide**

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 65

§ 1713. Transferred

This section, relating to medical care for survivors and dependents of certain veterans, was transferred to Subchapter VIII of this chapter, and redesignated 38 USCS § 1781.

A prior § 1713, relating to applications for educational assistance submitted by a parent or guardian of a person for whom the assistance is sought, was transferred to Subchapter II of Chapter 35 and redesignated 38 USCS § 3513.

§ 1714. Fitting and training in use of prosthetic appliances; guide dogs; service dogs

(a) Any veteran who is entitled to a prosthetic appliance shall be furnished such fitting and training, including institutional training, in the use of such appliance as may be necessary, whether in a Department facility or other training institution, or by out-patient treatment, including such service under contract, and including travel and incidental expenses (under the terms and conditions set forth in section 111 of this title [38 USCS § 111]) to and from such veteran's home to such hospital or training institution.

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(b) The Secretary may provide guide dogs trained for the aid of the blind to veterans who are enrolled under section 1705 of this title [38 USCS § 1705]. The Secretary may also provide such veterans with mechanical or electronic equipment for aiding them in overcoming the disability of blindness.

(c) The Secretary may, in accordance with the priority specified in section 1705 of this title [38 USCS § 1705], provide--

(1) service dogs trained for the aid of the hearing impaired to veterans who are hearing impaired and are enrolled under section 1705 of this title [38 USCS § 1705]; and

(2) service dogs trained for the aid of persons with spinal cord injury or dysfunction or other chronic impairment that substantially limits mobility to veterans with such injury, dysfunction, or impairment who are enrolled under section 1705 of this title [38 USCS § 1705].

(d) In the case of a veteran provided a dog under subsection (b) or (c), the Secretary may pay travel and incidental expenses for that veteran under the terms and conditions set forth in section 111 of this title [38 USCS § 111] to and from the veteran's home for expenses incurred in becoming adjusted to the dog.

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Explanatory notes:
A prior § 1714 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3514.

Amendments:
1973. Act Aug. 2, 1973 (effective 9/1/73, as provided by § 501 of such Act), substituted new catchline and section for ones which read:

"§ 614. Seeing-eye dogs

"The Administrator may provide seeing-eye or guide dogs trained for the aid of the blind to veterans who are entitled to disability compensation, and he may pay all necessary travel expenses to and from their homes and incurred in becoming adjusted to such seeing-eye or guide dogs. The Administrator may also provide such veterans with mechanical or electronic equipment for aiding them in overcoming the handicap of blindness."

1976. Act Oct. 20, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), substituted "such veteran" for "his"; in subsec. (b), deleted "he" following "compensation, and".

1979. Act Dec. 20, 1979 (effective 1/1/80, as provided by § 206 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), substituted "travel and incidental expenses (under the terms and conditions set forth in section 111 of this title)" for "necessary travel expenses"; in subsec. (b), substituted "travel and incidental expenses (under the terms and conditions set forth in section 111 of this title)" for "all necessary travel expenses".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 614, as 38 USCS § 1714, and substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".

2002. Act Jan. 23, 2002, substituted the section heading for one which read: "§ 1714. Fitting and training in use of prosthetic appliances; seeing-eye dogs"; in subsec. (b), deleted "seeing-eye or" following "may provide", substituted "who are enrolled under section 1705 of this title" for "who are entitled to disability compensation", deleted ", and may pay travel and incidental expenses (under the terms and conditions set forth in section 111 of this title) to and from their homes and incurred in becoming adjusted to such seeing-eye or guide dogs" before ". The Secretary may also", and substituted "disability" for "handicap"; and added subsecs. (c) and (d).

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 69

I. PROSTHETIC APPLIANCES

1. Generally
2. Training
3. Travel expenses
4. Miscellaneous

II. GUIDE AND SERVICE DOGS; EQUIPMENT

5. Generally
6. Travel expenses
7. Care and replacement of dogs
8. Repair and replacement of equipment

I. PROSTHETIC APPLIANCES

1. Generally
Since War Department reported veteran was discharged for disability incurred in line of duty, he is eligible to receive prosthetic appliances, notwithstanding that Veterans' Administration [now Department of Veterans Affairs] has determined that his disability was incurred not in line of duty for pension purposes. 1936 ADVA 369

2. Training
Manufacturer of prosthetic appliances is "training institution," if such manufacturer furnishes training in use of prosthetic appliances of same standard as that furnished by Veterans Administration [now Department of Veterans Affairs] facility or similar training institution. 1946 ADVA 706

3. Travel expenses
Wording "and including necessary travel expenses to and from their homes to such hospital or training institution," found in predecessor to 38 USCS § 1714, applies equally to services incident to fitting and taking of measurements as well as training in use of prosthetic appliance. 1946 ADVA 706

4. Miscellaneous
Automobiles are not supplied as prosthetic or other appliance. 1946 ADVA 702

II. GUIDE AND SERVICE DOGS; EQUIPMENT

5. Generally
Veterans' Administration [now Department of Veterans Affairs] is authorized to limit invitations for bids to persons or firms known to possess necessary equipment and requisite degree of skill in furnishing seeing-eye or guide dogs and rendering services incident to aiding veterans' adjustment to them, also, cost of transportation, meals and lodgings are elements relevant to amount of bids, along with distance which is practicable for blind veterans to travel. 1944 ADVA 581

Person receiving retirement pay, who is eligible for disability compensation but does not receive such compensation, is entitled to benefits of predecessor to 38 USCS § 1714 providing for seeing-eye dog if he waives equivalent amount of retirement pay. 1951 ADVA 868

Under 38 USCS § 614 [now 38 USCS § 1714], blind veteran is entitled to any mechanical or electronic equipment which will aid him to overcome handicap of blindness; while intended use must be to aid in overcoming handicap of blindness, no distinction is to be drawn between physical or economic handicap in determining need for such equipment. 1963 ADVA 984

6. Travel expenses
Furnishing necessary meals and lodging to veterans in connection with obtaining and becoming adjusted to seeing-eye or guide dogs and in traveling to and from home for that purpose is proper, and contracts for furnishing dogs may provide for furnishing such meals and lodgings. 1944 ADVA 581

7. Care and replacement of dogs
Veterans are entitled to replacement of seeing-eye or guide dogs lost without their negligence; also, expenses in medical care and treatment for seeing-eye or guide dogs necessary to prolong their lives and obviate making frequent replacements are payable by Government; but dogs become property of veterans and veterans are responsible for feeding them, and procuring their license tags; they are also liable for any damage inflicted by dogs. 1944 ADVA 581

8. Repair and replacement of equipment
Veterans are entitled to repairs to and replacements of electronic equipment furnished to them under same conditions and to same extent as is now done in case of other types of appliances. 1944 ADVA 581

§ 1715. Tobacco for hospitalized veterans
The Secretary may furnish tobacco to veterans receiving hospital or domiciliary care.

Prior law and revision:
This section is based on 38 USC § 2515 (Act June 17, 1957, P. L. 85-56, Title V, Part B, § 515, 71 Stat. 113).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:
Veterans' Regulation No. 6(a), para. IX (as added Act April 3, 1948, ch 170, § 2, 62 Stat. 160).

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 615, as 38 USCS § 1715, and substituted "Secretary" for "Administrator".

Other provisions:
Use of tobacco products in Department facilities. Act Nov. 4, 1992, P. L. 102-585, Title V, Subtitle C, § 526, 106 Stat. 4961, provides:
“(a) In general. The Secretary of Veterans Affairs shall take appropriate actions to ensure that, consistent with medical requirements and limitations, each facility of the Department described in subsection (b)--

"(1) establishes and maintains--

"(A) a suitable indoor area in which patients or residents may smoke and which is ventilated in a manner that, to the maximum extent feasible, prevents smoke from entering other areas of the facility; or

"(B) an area in a building that--

"(i) is detached from the facility;

"(ii) is accessible to patients or residents of the facility; and

"(iii) has appropriate heating and air conditioning; and

"(2) provides access to an area established and maintained under paragraph (1), consistent with medical requirements and limitations, for patients or residents of the facility who are receiving care or services and who desire to smoke tobacco products.

"(b) Covered facilities. A Department facility referred to in subsection (a) is any Department of Veterans Affairs medical center, nursing home, or domiciliary care facility.

"(c) Reports.(1) Not later than 180 days after the date of the enactment of this Act, the Comptroller General shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the feasibility of the establishment and maintenance of areas for smoking in Department facilities under this section. The report shall include information on--

"(A) the cost of, and a proposed schedule for, the establishment of such an area at each Department facility covered by this section;

"(B) the extent to which the ventilating system of each facility is adequate to ensure that use of the area for smoking does not result in health problems for other patients or residents of the facility; and

"(C) the effect of the establishment and maintenance of an area for smoking in each facility on the accreditation score issued for the facility by the Joint Commission on the Accreditation of Health Organizations.

"(2) Not later than 120 days after the effective date of this section [see subsec. (d) of this note], the Secretary shall submit to the committees referred to in paragraph (1) a report on the implementation of this section. The report shall include a description of the actions taken at each covered facility to ensure compliance with this section.

"(d) Effective date. The requirement to establish and maintain areas for smoking under subsection (a) shall take effect 60 days after the date on which the Comptroller General submits to the committees referred to in subsection (c)(1) that report required under that subsection.".

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 53

§ 1716. Hospital care by other agencies of the United States
When so specified in an appropriation or other Act, the Secretary may make allotments and transfers to the Departments of Health and Human Services (Public Health Service), the Army, Navy, Air Force, or Interior, for disbursement by them under the various headings of their appropriations, of such amounts as are necessary for the care and treatment of veterans entitled to hospitalization from the Department under this chapter [38 USCS §§ 1701 et seq.]. The amounts to be charged the Department for care and treatment of veterans in hospitals shall be calculated on the basis of a per diem rate approved by the Office of Management and Budget.

Prior law and revision:

This section is based on 38 USC § 697(b) & note (Act June 23, 1944, ch 268, Title VI, Chapter XV, § 1500(b), as added April 3, 1948, ch 170, § 5, 62 Stat. 160).

Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), substituted "Office of Management and Budget" for "Bureau of the Budget".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 616, as 38 USCS § 1716, and substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".

Other provisions:

Application and construction of the Oct. 12, 1982, amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans’ Laws § 59

§ 1717. Home health services; invalid lifts and other devices

(a) (1) As part of medical services furnished to a veteran under section 1710(a) of this title [38 USCS § 1710(a)], the Secretary may furnish such home health services as the Secretary finds to be necessary or appropriate for the effective and economical treatment of the veteran.

(2) Improvements and structural alterations may be furnished as part of such home health services only as necessary to assure the continuation of treatment for the veteran's disability or to provide access to the home or to essential lavatory and sanitary facilities. The cost of such improvements and structural alterations (or the amount of reimbursement therefor) under this subsection may not exceed--

(A) $4,100 in the case of medical services furnished under section 1710(a)(1) of this title [38 USCS § 1710(a)(1)], or for a disability described in section 1710(a)(2)(C) of this title [38 USCS § 1710(a)(2)(C)]; or

(B) $1,200 in the case of medical services furnished under any other provision of section 1710(a) of this title [38 USCS § 1710(a)].
(3) The Secretary may furnish home health services to a veteran in any setting in which the veteran is residing. The Secretary may not furnish such services in such a manner as to relieve any other person or entity of a contractual obligation to furnish services to the veteran. When home health services are furnished in a setting other than the veteran's home, such services may not include any structural improvement or alteration.

(b) The Secretary may furnish an invalid lift, or any type of therapeutic or rehabilitative device, as well as other medical equipment and supplies (excluding medicines), if medically indicated, to any veteran who is receiving (1) compensation under section 1114(l)-(p) of this title [38 USCS § 1114(l)-(p)] (or the comparable rates provided pursuant to section 1134 of this title [38 USCS § 1134]), or (2) pension under chapter 15 of this title [38 USCS §§ 1501 et seq.] by reason of being in need of regular aid and attendance.

(c) The Secretary may furnish devices for assisting in overcoming the handicap of deafness (including telecaptioning television decoders) to any veteran who is profoundly deaf and is entitled to compensation on account of hearing impairment.

**Effective date of section:**
Act Aug. 29, 1959, P. L. 86-211, § 10, 73 Stat. 436, provided that this section is effective on July 1, 1960.

**Amendments:**
1964. Act Aug. 19, 1964, substituted a new section heading for one which read: "Invalid lifts for pensioners"; designated existing matter as subsec. (a); added subsec. (b).

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in subsec. (b), substituted "to any veteran in receipt of pension under chapter 15 of this title based on need of regular aid and attendance." for "to any veteran who is eligible to receive an invalid lift under subsection (a) of this section, or who would be so eligible, but for the fact that he has such a lift.".

1968. Act Aug. 19, 1968, substituted this section for one which read:
"§ 617. Invalid lifts and other devices for pensioners

"(a) The Administrator may furnish an invalid lift, if medically indicated, to any veteran in receipt of pension under chapter 15 of this title based on the need of regular aid and attendance.

"(b) The Administrator may furnish any type of therapeutic or rehabilitative device, as well as other medical equipment and supplies (excluding medicines), if medically indicated, to any veteran in receipt of pension under chapter 15 of this title based on need of regular aid and attendance."

1982. Act Oct. 12, 1982 substituted "section 314(l)-(p) of this title (or the comparable rates provided pursuant to section 334 of this title); for "subsections 314(l)-(p) for the comparable rates provided pursuant to section 334) of this title".

1984. Act Oct. 19, 1984 designated the existing provisions as subsec. (a); and added subsec. (b).

1988. Act May 20, 1988 (applicable with respect to the furnishing of medical services to veterans applying for services after 6/30/88, as provided by § 102(i) of such Act, which appears as 38 USCS § 1703 note) substituted this section heading for one which read: "§ 617. Invalid lifts and other devices", redesignated former subsecs. (a) and (b) as subsecs. (b)
and (c); added new subsec. (a), and in subsec. (a) as so added, added former 38 USCS § 612(k) as para. (3).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 617, as 38 USCS § 1717, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

1992. Act Oct. 9, 1992 (applicable as provided by § 101(b) and (c) of such Act, which appear as notes to this section), in subsec. (a)(2), in subpara. (A), substituted "$4,100" for "$2,500" and, in subpara. (B), substituted "$1,200" for "$600".

1996. Act Oct. 9, 1996, in subsec. (a), in para. (1), substituted "section 1710(a)" for "section 1712(a)" and, in para. (2), in subpara. (A), substituted "section 1710(a)(1) of this title, or for a disability described in section 1710(a)(2)(C) of this title" for "paragraph (1) of section 1712(a) of this title" and, in subpara. (B), substituted "section 1710(a)(2)" for "section 1712".

1997. Act Nov. 21, 1997, in subsec. (a), in para. (1), substituted "veteran" for "veteran's disability" following "treatment of the" and, in para. (2)(B), substituted "section 1710(a)" for "section 1710(a)(2)".

Other provisions:

Applicability and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.


"(b) Effective date. The amendments made by subsection (a) [amending subsec. (a)(2) of this section] shall apply with respect to a veteran who first applies for benefits under section 1717(a)(2) of title 38, United States Code, after December 31, 1989.

"(c) Applicability. A veteran who exhausts such veteran's eligibility for benefits under section 1717(a)(2) of title 38, United States Code, before January 1, 1990, is not entitled to additional benefits under such section by reason of the amendments made by subsection (a) [amending subsec. (a)(2) of this section]."

Cross References

This section is referred to in 38 USCS §§ 1712, 2104

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws §§ 63, 69

Veteran was not entitled to reimbursement for cost of home wheelchair ramp where he failed to obtain prior approval for it; veteran admitted knowledge that such approval was required.

Paris v Brown (1993) 6 Vet App 75

§ 1718. Therapeutic and rehabilitative activities

(a) In providing rehabilitative services under this chapter [38 USCS §§ 1701 et seq.], the Secretary, upon the recommendation of the Under Secretary for Health, may use the services of patients and members in Department health care facilities for therapeutic and rehabilitative purposes. Such patients and members shall not under these circumstances be held or considered as employees of the United States for any purpose. The Secretary shall prescribe the conditions for the utilization of such services.
(b) (1) In furnishing rehabilitative services under this chapter [38 USCS §§ 1701 et seq.],
the Secretary, upon the recommendation of the Under Secretary for Health, may enter
into a contract or other arrangement with any appropriate source (whether or not an
element of the Department of Veterans Affairs or of any other Federal entity) to provide
for therapeutic work for patients and members in Department health care facilities.

(2) Notwithstanding any other provision of law, the Secretary may also furnish
rehabilitative services under this subsection through contractual arrangements with
nonprofit entities to provide for such therapeutic work for such patients. The
Secretary shall establish appropriate fiscal, accounting, management, recordkeeping,
and reporting requirements with respect to the activities of any such non-profit entity
in connection with such contractual arrangements.

(c) (1) There is hereby established in the Treasury of the United States a revolving fund
known as the Department of Veterans Affairs Special Therapeutic and Rehabilitation
Activities Fund (hereinafter in this section referred to as the "fund") for the purpose of
furnishing rehabilitative services authorized in subsection (b) or (d). Such amounts of the
fund as the Secretary may determine to be necessary to establish and maintain operating
accounts for the various rehabilitative services activities may be deposited in checking
accounts in other depositaries selected or established by the Secretary.

(2) All funds received by the Department under contractual arrangements made under
subsection (b) or (d), or by nonprofit entities described in subsection (b)(2), shall be
deposited in or credited to the fund, and the Department shall distribute out of the
fund moneys to participants at rates not less than the wage rates specified in the Fair
Labor Standards Act (29 U.S.C. 201 et seq.) and regulations prescribed thereunder for
work of similar character.

(3) The Under Secretary for Health shall prepare, for inclusion in the annual report
submitted to Congress under section 529 of this title [38 USCS § 529], a description
of the scope and achievements of activities carried out under this section (including
pertinent data regarding productivity and rates of distribution) during the prior twelve
months and an estimate of the needs of the program of therapeutic and rehabilitation
activities to be carried out under this section for the ensuing fiscal year.

(d) In providing to a veteran rehabilitative services under this chapter [38 USCS §§ 1701
et seq.], the Secretary may furnish the veteran with the following:

(1) Work skills training and development services.

(2) Employment support services.

(3) Job development and placement services.

(e) In providing rehabilitative services under this chapter [38 USCS §§ 1701 et seq.], the
Secretary shall take appropriate action to make it possible for the patient to take
maximum advantage of any benefits to which such patient is entitled under chapter 31, 34,
or 35 of this title [38 USCS §§ 3100 et seq., 3451 et seq., or 3500 et seq.], and, if the
patient is still receiving treatment of a prolonged nature under this chapter, the provision
of rehabilitative services under this chapter shall be continued during, and coordinated
with, the pursuit of education and training under such chapter 31, 34, or 35 [38 USCS §§
3100 et seq., 3451 et seq., or 3500 et seq.].
(f) The Secretary shall prescribe regulations to ensure that the priorities set forth in section 1705 of this title [38 USCS § 1705] shall be applied, insofar as practicable, to participation in therapeutic and rehabilitation activities carried out under this section.

(g) (1) The Secretary may not consider any of the matters stated in paragraph (2) as a basis for the denial or discontinuance of a rating of total disability for purposes of compensation or pension based on the veteran's inability to secure or follow a substantially gainful occupation as a result of disability.

   (2) Paragraph (1) applies to the following:
      
      (A) A veteran's participation in an activity carried out under this section.
      
      (B) A veteran's receipt of a distribution as a result of participation in an activity carried out under this section.
      
      (C) A veteran's participation in a program of rehabilitative services that (i) is provided as part of the veteran's care furnished by a State home and (ii) is approved by the Secretary as conforming appropriately to standards for activities carried out under this section.
      
      (D) A veteran's receipt of payment as a result of participation in a program described in subparagraph (C).

(3) A distribution of funds made under this section and a payment made to a veteran under a program of rehabilitative services described in paragraph (2)(C) shall be considered for the purposes of chapter 15 of this title [38 USCS §§ 1501 et seq.] to be a donation from a public or private relief or welfare organization.

Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), substituted "(a) In providing rehabilitative services under this chapter, the" for "The"; in subsec. (a), as so designated, substituted "health care facilities" for "hospitals and domiciliaries"; and added subsecs. (b)-(e).


1986. Act Oct. 28, 1986, in subsec. (a), substituted "may use" for "may utilize", "purposes. Such" for "purposes, at nominal remuneration, and such" and "use" for "utilization"; in subsec. (b)(1) deleted "for remuneration" following "therapeutic work"; in subsec. (c), in para. (2), substituted "distribute" for "pay", in para. (3), substituted "rates of distribution" for "and wage rates"; in subsec. (f), designated the existing matter as para. (1) and substituted "a distribution" for "remuneration", and added para. (2).

1991. Act June 13, 1991, in subsec. (b)(1), substituted "a contract or other arrangement with any appropriate source (whether or not an element of the Department of Veterans Affairs or of any other Federal entity)" for "contractual arrangements with private industry or other sources outside the Veterans' Administration"; and, in subsec. (c), in para. (1), substituted "furnishing rehabilitative services authorized in" for "carrying out the provisions of", and, in para. (3), inserted "and" after "productivity".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 618, as 38 USCS § 1718, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101); and, in subsec. (c)(3), substituted "section 529" for "section 214".

Such Act further substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".

1992. Act Oct. 9, 1992, in subsecs. (a), (b)(1), and (c)(3), substituted "Under Secretary for Health" for "Chief Medical Director".

Act Nov. 4, 1992 substituted subsec. (f) for one which read:
"(f)(1) Neither a veteran's participation in an activity carried out under this section nor a veteran's receipt of a distribution as a result of such participation may be considered as a basis for the denial or discontinuance of a rating of total disability for purposes of compensation or pension based on the veteran's inability to secure or follow a substantially gainful occupation as a result of disability.

"(2) A distribution of funds made under this section shall be considered for purposes of chapter 15 of this title to be a donation from a public or private relief or welfare organization.".


1996. Act Oct. 9, 1996, in subsec. (e), substituted "section 1705" for "section 1712(i)".

2003. Act Dec. 6, 2003, in subsec. (c), in para. (1), substituted "subsection (b) or (d)" for "subsection (b) of this section", and, in para. (2), substituted "subsection (b) or (d)" for "subsection (b) of this section" and substituted "subsection (b)(2)" for "paragraph (2) of such subsection"; redesignated subsecs. (d)-(f) as subsecs. (e)-(g), respectively; and inserted new subsec. (d).

Other provisions:


"(1) The Secretary of Veterans Affairs may settle claims made by the Department of Veterans Affairs against any private nonprofit corporation organized under the laws of any State, for the use of facilities and personnel of the Department in work projects as a part of a therapeutic or rehabilitation program for patients and members in health care facilities of the Department, and to execute a binding release of all claims by the United States against any such corporation, in such amounts, and upon such terms and conditions as the Secretary considers appropriate.

"(2) For the purposes of this subsection, notwithstanding section 484 of title 31, or any other provision of law, the Secretary may utilize any funds received under any settlement made pursuant to paragraph (1) of this subsection for any purpose agreed upon by the Secretary and such corporation."


Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Cross References
This section is referred to in 38 USCS §§ 113, 1151, 1771, 2031, 2063

Research Guide

Am Jur:
1. Generally

Outpatient as well as inpatients may be considered within scope of 38 USCS § 618 [now 38 USCS § 1718] for participation in incentive therapy program. VA GCO 20-75

2. Direct payment to veterans

Language of 38 USCS § 618 [now 38 USCS § 1718] and purposes set forth in its legislative history indicate that payments to veterans, as part of provision for utilization of services of patients and members in hospitals and domiciliaries, are to be made directly to patients, when medically indicated, and that, in such event, guardian of incompetent patient or member has no right to demand these payments, irrespective of any provision of guardianship laws of state in which guardian was appointed. 1962 ADVA 982

§ 1719. Repair or replacement of certain prosthetic and other appliances

The Secretary may repair or replace any artificial limb, truss, brace, hearing aid, spectacles, or similar appliance (not including dental appliances) reasonably necessary to a veteran and belonging to such veteran which was damaged or destroyed by a fall or other accident caused by a service-connected disability for which such veteran is in receipt of, or but for the receipt of retirement pay would be entitled to, disability compensation.

Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), substituted "such veteran" for "him".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 619, as 38 USCS § 1719 and substituted "Secretary" for "Administrator".

Other provisions:

Application of section. Act Oct. 23, 1962, P. L. 87-850, § 2, 76 Stat. 1126, provides: "The amendment made by this Act [adding this section] shall apply only with respect to the repair or replacement of artificial limbs, trusses, braces, hearing aids, spectacles, and similar devices damaged or destroyed after the date of enactment of this Act."

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 69

§ 1720. Transfers for nursing home care; adult day health care

(a) (1) Subject to subsection (b) of this section, the Secretary may transfer to a non-Department nursing home, for care at the expense of the United States--

(A) a veteran--

(i) who has been furnished care by the Secretary in a facility under the direct jurisdiction of the Secretary; and

(ii) who the Secretary determines--
(I) requires a protracted period of nursing home care which can be furnished in the non-Department nursing home; and
(II) in the case of a veteran who has been furnished hospital care in a facility under the direct jurisdiction of the Secretary, has received maximum benefits from such care; and

(B) a member of the Armed Forces--
(i) who has been furnished care in a hospital of the Armed Forces;
(ii) who the Secretary concerned determines has received maximum benefits from such care but requires a protracted period of nursing home care; and
(iii) who upon discharge from the Armed Forces will become a veteran.

(2) The Secretary may transfer a person to a nursing home under this subsection only if the Secretary determines that the cost to the United States of the care of such person in the nursing home will not exceed--

(A) the amount equal to 45 percent of the cost of care furnished by the Department in a general hospital under the direct jurisdiction of the Secretary (as such cost may be determined annually by the Secretary); or
(B) the amount equal to 50 percent of such cost, if such higher amount is determined to be necessary by the Secretary (upon the recommendation of the Under Secretary for Health) to provide adequate care.

(3) Nursing home care may not be furnished under this subsection at the expense of the United States for more than six months in the aggregate in connection with any one transfer except--

(A) in the case of a veteran--
(i) who is transferred to a non-Department nursing home from a hospital under the direct jurisdiction of the Secretary; and
(ii) whose hospitalization was primarily for a service-connected disability;
(B) in a case in which the nursing home care is required for a service-connected disability; or
(C) in a case in which, in the judgment of the Secretary, a longer period of nursing home care is warranted.

(4) A veteran who is furnished care by the Secretary in a hospital or domiciliary facility in Alaska or Hawaii may be furnished nursing home care at the expense of the United States under this subsection even if such hospital or domiciliary facility is not under the direct jurisdiction of the Secretary.

(b) No veteran may be transferred or admitted to any institution for nursing home care under this section, unless such institution is determined by the Secretary to meet such standards as the Secretary may prescribe. The standards prescribed and any report of inspection of institutions furnishing care to veterans under this section made by or for the Secretary shall, to the extent possible, be made available to all Federal, State, and local agencies charged with the responsibility of licensing or otherwise regulating or inspecting such institutions.

(c) (1) (A) In furnishing nursing home care, adult day health care, or other extended care services under this section, the Secretary may enter into agreements for furnishing such care or services with--
(i) in the case of the medicare program, a provider of services that has entered into a provider agreement under section 1866(a) of the Social Security Act (42 U.S.C. 1395cc(a)); and

(ii) in the case of the medicaid program, a provider participating under a State plan under title XIX of such Act (42 U.S.C. 1396 et seq.).

(B) In entering into an agreement under subparagraph (A) with a provider of services described in clause (i) of that subparagraph or a provider described in clause (ii) of that subparagraph, the Secretary may use the procedures available for entering into provider agreements under section 1866(a) of the Social Security Act [42 USCS § 1395cc(a)].

(2) In applying the provisions of section 2(b)(1) of the Service Contract Act of 1965 (41 U.S.C. 351(b)(1)) with respect to any contract entered into under this section to provide nursing home care of veterans, the payment of wages not less than those specified in section 6(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(b)) shall be deemed to constitute compliance with such provisions.

(d) (1) Subject to subsection (b) of this section, the Secretary may authorize for any veteran requiring nursing home care for a service-connected disability direct admission for such care at the expense of the United States to any non-Department nursing home. The Secretary may also authorize a direct admission to such a nursing home for nursing home care for any veteran who has been discharged from a hospital under the direct jurisdiction of the Secretary and who is currently receiving medical services as part of home health services from the Department.

(2) Direct admission authorized by paragraph (1) of this subsection may be authorized upon determination of need therefor--

(A) by a physician employed by the Department; or

(B) in areas where no such physician is available, by a physician carrying out such function under contract or fee arrangement, based on an examination by such physician.

(3) The amount which may be paid for such care and the length of care available under this subsection shall be the same as authorized under subsection (a) of this section.

(e) (1) The cost of intermediate care for purposes of payment by the United States pursuant to subsection (a)(2)(B) of this section shall be determined by the Secretary except that the rate of reimbursement shall be commensurately less than that provided for nursing home care.

(2) For the purposes of this section, the term "non-Department nursing home" means a public or private institution not under the direct jurisdiction of the Secretary which furnishes nursing home care.

(f) (1) (A) The Secretary may furnish adult day health care services to a veteran enrolled under section 1705(a) of this title [38 USCS § 1705(a)] who would otherwise require nursing home care.

(B) The Secretary may provide in-kind assistance (through the services of Department employees and the sharing of other Department resources) to a facility furnishing care to veterans under subparagraph (A) of this paragraph. Any such in-kind assistance shall be provided under a contract or agreement between
the Secretary and the facility concerned. The Secretary may provide such assistance only for use solely in the furnishing of adult day health care and only if, under such contract or agreement, the Department receives reimbursement for the full cost of such assistance, including the cost of services and supplies and normal depreciation and amortization of equipment. Such reimbursement may be made by reduction in the charges to the United States or by payment to the United States. Any funds received through such reimbursement shall be credited to funds allotted to the Department facility that provided the assistance.

(2) The Secretary may conduct, at facilities over which the Secretary has direct jurisdiction, programs for the furnishing of adult day health care to veterans who are eligible for such care under paragraph (1) of this subsection, except that necessary travel and incidental expenses (or transportation in lieu thereof) may be furnished under such a program only under the terms and conditions set forth in section 111 of this title [38 USCS § 111]. The furnishing of care under any such program shall be subject to the limitations that are applicable to the duration of adult day health care furnished under paragraph (1) of this subsection.

Explanatory notes:
A prior § 1720 was transferred by to 38 USCS § 3520.

Amendments:
Act Oct. 21, 1968, in subsec. (a), in the concluding matter, inserted "Any veteran who is furnished care by the Administrator in a hospital in Alaska or Hawaii may be furnished nursing home care under the provisions of this section even if such hospital is not under the direct and exclusive jurisdiction of the Administrator."; and added subsec. (c).
1969. Act Oct. 30, 1969, in subsec. (a), in the concluding matter, substituted "except (A) in the case of the veteran whose hospitalization was primarily for a service-connected disability, or (B) where in the judgment of the Administrator a longer period is warranted in the case of any other veteran" for "except where in the judgment of the Administrator a longer period is warranted in the case of any veteran".
1973. Act Aug. 2, 1973 (effective 9/1/73, as provided by § 501 of such Act, which appears as 38 USCS § 1701 note), in subsec. (a), redesignated paras. (1) and (2) as clauses (i) and (ii), respectively, substituted
"(a) Subject to subsection (b) of this section, the Administrator may transfer--

"(1) any veteran who has been furnished care by the Administrator in a hospital under the direct and exclusive jurisdiction of the Administrator, and

"(2) any person (A) who has been furnished care in any hospital of any of the Armed Forces, (B) who the appropriate Secretary concerned has determined has received maximum hospital benefits but requires a protracted period of nursing home care, and (C) who upon discharge therefrom will become a veteran
to any public or private institution not under the jurisdiction of the Administrator which furnishes nursing home care, for care at the expense of the United States, only if the Administrator determines that:-"

for "(a) Subject to subsection (b) of this section, the Administrator may transfer any veteran, who has been furnished care by the Administrator in a hospital under the direct and exclusive jurisdiction of the Administrator, to any public or private institution not under the jurisdiction of the Administrator which furnishes nursing home care, for care at the expense of the United
States, if the Administrator determines that-“, in the concluding matter, substituted “(I)” and “(II)” for “(A)” and “(B)”, respectively; in subsec. (b), inserted "or admitted" and inserted "The standards prescribed and any report of inspection of institutions furnishing care to veterans under this section made by or for the Administrator shall, to the extent possible, be made available to all Federal, State, and local agencies charged with the responsibility of licensing or otherwise regulating or inspecting such institutions.”; and added subsec. (d).

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), in the introductory matter, inserted "and except as provided in subsection (e)”, in para. (1), deleted "and exclusive" following "direct", in clause (ii), substituted "45 per centum" for "40 per centum", substituted "annually" for "from time to time", and inserted “, or not to exceed 50 per centum of such cost where determined necessary by the Administrator, upon recommendation of the Chief Medical Director, to provide adequate care", in the concluding matter, deleted "and exclusive" following "the direct"; in subsec. (b), substituted "the Administrator" for "he" preceding "may prescribe"; added subsec. (e).


1983. Act Nov. 21, 1983, substituted the section catchline for one which read: "Transfers for nursing home care”; and added subsec. (f).

1985. Act Dec. 3, 1985 substituted subsec. (a) for one which read:

"(a) Subject to subsection (b) and except as provided in subsection (e) of this section, the Administrator may transfer--

"(1) any veteran who has been furnished care by the Administrator in a hospital under the direct jurisdiction of the Administrator, and

"(2) any person (A) who has been furnished care in any hospital of any of the Armed Forces, (B) who the appropriate Secretary concerned has determined has received maximum hospital benefits but requires a protracted period of nursing home care, and (C) who upon discharge therefrom will become a veteran to any public or private institution not under the jurisdiction of the Administrator which furnishes nursing home care, for care at the expense of the United States, only if the Administrator determines that--

"(i) such veteran has received maximum benefits from such care in such hospital, but will require a protracted period of nursing home care which can be furnished in such institution, and

"(ii) the cost of such nursing home care in such institution will not exceed 45 percent of the cost of care furnished by the Veterans' Administration in a general hospital under the direct and exclusive jurisdiction of the Administrator, as such cost may be determined annually by the Administrator, or not to exceed 50 percent of such cost where determined necessary by the Administrator, upon recommendation of the Chief Medical Director, to provide adequate care.

Nursing home care may not be furnished pursuant to this section at the expense of the United States for more than six months in the aggregate in connection with any one transfer, except (I) in the case of the veteran whose hospitalization was primarily for a service-connected disability, or (II) where in the judgment of the Administrator a longer period is warranted in the case of any other veteran. Any veteran who is furnished care by the Administrator in a hospital in Alaska or Hawaii may be furnished nursing home care under the provisions of this section even if such hospital is not under the direct jurisdiction of the Administrator.”.

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Such Act further, in subsec. (d), designated the first sentence as para. (1), and, in para. (1) as so designated, substituted "to any non-Veterans' Administration nursing home" for "to any public or private institution not under the jurisdiction of the Administrator which furnishes nursing home care" and inserted the sentence beginning "The Administrator may also . . .", substituted para. (2) for "Such admission may be authorized upon determination of need therefor by a physician employed by the Veterans' Administration or, in areas where no such physician is available, carrying out such function under contract or fee arrangement based on an examination by such physician.", and designated the sentence beginning "The amount which may be paid . . ." as para. (3); and, in subsec. (e), designated the existing provisions as para. (1) and, in para. (1) as so designated, substituted "subsection (a)(2)(B)" for "subsection (a)(ii)", and added para. (2).

1986. Act April 7, 1986 (applicable to hospital care, nursing home care, and medical services furnished on or after 7/1/1986, as provided by § 19011(f) of such Act, which appears as 38 USCS § 1710 note), in subsec. (f)(1)(A), substituted "612(a)(1)(B)" for "612(f)(2)".

1988. Act May 20, 1988, in subsec. (e), deleted the sentence which read: "For the purposes of this section, the term 'nursing home care' includes intermediate care, as determined by the Administrator in accordance with regulations which the Administrator shall prescribe." following the para. (1) designator, and deleted "(as defined in section 101(28) of this title)" following "nursing home care"; and, in subsec. (f)(3), substituted "September 30, 1991" for "September 30, 1988".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 620, as 38 USCS § 1720, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101); substituted "non-Department" for "non-Veterans' Administration", "Department" for "Veterans' Administration", and "Secretary" for "Administrator"; and, in subpara. (f)(1)(B), in the sentence beginning "Any such . . .", substituted "Secretary" for "Veterans' Administration".


1996. Act Oct. 9, 1996, in subsec. (f), in para. (1)(A), substituted "paragraph (1), (2), or (3) of section 1710(a)" for "section 1712(a)(1)(B)"; and, deleted para. (3), which read: "(3) Adult day health care may not be furnished under this section after September 30, 1991."


1999. Act Nov. 30, 1999 (effective on enactment as provided by § 101(h)(1), which appears as 38 USCS § 1710B note), in subsec. (f)(1), substituted subpara. (A), for one which read:

"(A) The Secretary is authorized to furnish adult day health care as provided for in this subsection. For the purpose only of authorizing the furnishing of such care and specifying the terms and conditions under which it may be furnished to veterans needing such care--

"(i) references to 'nursing home care' in subsections (a) through (d) of this section shall be deemed to be references to 'adult day health care'; and

"(ii) a veteran who is eligible for medical services under paragraph (1), (2), or (3) of section 1710(a) of this title shall be deemed to be a veteran described in subsection (a)(1) of this section."

2003. Act Dec. 6, 2003, in subsec. (c), designated the existing provisions as para. (1), and inserted para. (1); and, in subsec. (f)(1)(B), inserted "or agreement" in two places.

Other provisions:
Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Repeal of adult day health care study. Act Nov. 21, 1983, P. L. 98-160, Title I, § 103(b), (c), 97 Stat. 996, which formerly appeared as a note to this section, was repealed by Act May 20, 1988, P. L. 100-322, Title I, Part B, § 111(d), 102 Stat. 499.

Study requirement. Act May 20, 1988, P. L. 100-322, Title I, Part B, § 111(b), (c), 102 Stat. 499, provides:

"(b) Study requirement. The Administrator shall conduct a study of--

"(1) the medical efficacy and the cost-effectiveness of furnishing adult day health care under section 620(f) [now § 1720(f)] of title 38, United States Code, as an alternative to nursing home care; and

"(2) the comparative advantages and disadvantages of providing such care through facilities that are not under the direct jurisdiction of the Administrator and through facilities that are under the direct jurisdiction of the Administrator.

"(c) Reports. (1) The Administrator shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives--

"(A) an interim report on the study under subsection (b) not later than February 1, 1988; and

"(B) a final report on such study not later than February 1, 1991.

"(2) Each such report shall include--

"(A) the results of the study under subsection (b) through September 30 of the year preceding the deadline under paragraph (1) for submission of the report: and

"(B) any other recommendation that the Administrator considers appropriate for legislative or administrative action with respect to the furnishing of adult day health care under section 620(f) [now § 1720(f)] of title 38, United States Code.

Cross References
This section is referred to in 38 USCS §§ 1703, 1710B, 1724, 1741, 1742, 2303, 8105, 8134; 42 USCS § 300dd-21

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Am Jur: 77 Am Jur 2d, Veterans and Veterans' Laws § 60

Whether injury or aggravation of injury was received as result of medical or surgical treatment during period of nursing home care pursuant to 38 USCS § 620 [now 38 USCS § 1720], and is within purview of § 351 [now § 1151], is question of fact for determination by adjudicating agency; agreement entered into with nursing home for performance of services under § 620 [now § 1720] creates independent contractor relationship for purposes of § 351 [now § 1151] so that nursing home agents or employees are not agents or employees of Veterans Administration [now Department of Veterans Affairs]; injury or aggravation of injury sustained by veteran while receiving nursing home care under § 620 [now § 1720] is not received as result of hospitalization for purposes of § 351 [now § 1151]. 1970 ADVA 992

§ 1720A. Treatment and rehabilitative services for persons with drug or alcohol dependency
(a) The Secretary, in consultation with the Secretary of Labor and the Director of the Office of Personnel Management, may take appropriate steps to (1) urge all Federal agencies and appropriate private and public firms, organizations, agencies, and persons to provide appropriate employment and training opportunities for veterans who have been provided treatment and rehabilitative services under this title for alcohol or drug dependence or abuse disabilities and have been determined by competent medical authority to be sufficiently rehabilitated to be employable, and (2) provide all possible assistance to the Secretary of Labor in placing such veterans in such opportunities.

(b) Upon receipt of an application for treatment and rehabilitative services under this title for an alcohol or drug dependence or abuse disability from any individual who has been discharged or released from active military, naval, or air service but who is not eligible for such treatment and services, the Secretary shall--

(1) provide referral services to assist such individual, to the maximum extent practicable, in obtaining treatment and rehabilitative services from sources outside the Department; and

(2) if pertinent, advise such individual of such individual's rights to apply to the appropriate military, naval, or air service and the Department for review of such individual's discharge or release from such service.

(c) (1) Any person serving in the active military, naval, or air service who is determined by the Secretary concerned to have an alcohol or drug dependence or abuse disability may be transferred to any facility in order for the Secretary to furnish care or treatment and rehabilitative services for such disability. Care and services provided to a member so transferred shall be provided as if such member were a veteran. Any transfer of any such member for such care and services shall be made pursuant to such terms as may be agreed upon by the Secretary concerned and the Secretary, subject to the provisions of sections 1535 and 1536 of title 31 [31 USCS §§ 1535 and 1536].

(2) No person serving in the active military, naval, or air service may be transferred pursuant to an agreement made under paragraph (1) of this subsection unless such person requests such transfer in writing for a specified period of time. No such person transferred pursuant to such a request may be furnished such care and services by the Secretary beyond the period of time specified in such request unless such person requests in writing an extension for a further specified period of time and such request is approved by the Secretary.

(d) (1) The Secretary shall ensure that each medical center of the Department develops and carries out a plan to provide treatment for substance use disorders, either through referral or direct provision of services, to veterans who require such treatment.

(2) Each plan under paragraph (1) shall make available clinically proven substance abuse treatment methods, including opioid substitution therapy, to veterans with respect to whom a qualified medical professional has determined such treatment methods to be appropriate.

Effective date of section:
Act June 13, 1979, P. L. 96-22, Title I, § 107, 93 Stat. 53, provided that this section shall be effective on October 1, 1979.

Amendments:

1979. Act Nov. 28, 1979 (effective 11/28/79, as provided by § 601(b) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a)(1), substituted "for" for "of" following "treatment facilities"; in subsec. (d)(2), deleted commma following "in such request".


1985. Act Sept. 30, 1985, in subsec. (e), substituted "October 31, 1985" for "the last day of the fifth fiscal year following the fiscal year in which the pilot program authorized by such subsection is initiated".

Act Dec. 3, 1985, in the section heading, deleted "; pilot program" following "disabilities"; in subsec. (a)(1), deleted "may conduct a pilot program under which the Administrator" following "chapter" and deleted "Such pilot program shall be planned, designed, and conducted by the Chief Medical Director, with the approval of the Administrator, so as to demonstrate any medical advantages and cost effectiveness that may result from furnishing such care and services to veterans with such disabilities in contract facilities as authorized by this section, rather than in facilities over which the Administrator has direct jurisdiction." following "or abuse disabilities."; in subsec. (e), substituted "September 30, 1988" for "October 31, 1985"; and substituted subsec. (f) for one which read: "Not later than March 31, 1984, the Administrator shall report to the Committees on Veterans' Affairs of the Senate and House of Representatives on the findings and recommendations of the Administrator pertaining to the operation through September 30, 1983, of the pilot program authorized by this section.".

1988. Act Nov. 18, 1988, P. L. 100-689, in subsec. (e), substituted "September 30, 1991" for "September 30, 1988"; and substituted subsec. (f) for one which read:

"(f)(1) The Administrator shall monitor the performance of each contract facility furnishing care and services under the program carried out under subsection (a) of this section.

"(2) The Administrator shall use the results of such monitoring to determine--

"(A) with respect to the program, the medical advantages and cost-effectiveness that result from furnishing such care and services; and

"(B) with respect to such contract facilities generally, the level of success under the program, considering--

"(i) the rate of successful rehabilitation for veterans furnished care and services under the program;

"(ii) the rate of readmission to contract facilities under the program or to Veterans' Administration health-care facilities by such veterans for care or services for disabilities referred to in subsection (a) of this section;

"(iii) whether the care and services furnished under the program obviated the need of such veterans for hospitalization for such disabilities;

"(iv) the average duration of the care and services furnished such veterans under the program;

"(v) the ability of the program to aid in the transition of such veterans back into their communities; and
“(vi) any other factor that the Administrator considers appropriate.

“(3) The Administrator shall maintain records of--

“(A) the total cost for the care and services furnished by each contract facility under the program;

“(B) the average cost per veteran for the care and services furnished under the program; and

“(C) the appropriateness of such costs, by comparison to--

“(i) the average charges for the same types of care and services furnished generally by other comparable halfway houses, therapeutic communities, psychiatric residential treatment centers, and other community-based treatment facilities; and

“(ii) the historical costs for such care and services for the period of time that the program carried out under subsection (a) of this section was a pilot program, taking into account economic inflation.

“(4) Not later than February 1, 1988, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the experience under the program carried out under this section during fiscal years 1984 through 1987. The report shall include--

“(A) a description of the care and services furnished;

“(B) the matters referred to in paragraphs (1), (2), and (3) of this subsection; and

“(C) the Administrator's findings, assessment, and recommendations regarding program under this section.”.
“(2) Before furnishing such care and services to any veteran through a contract facility as authorized by paragraph (1) of this subsection, the Secretary shall approve (in accordance with criteria which the Secretary shall prescribe by regulation) the quality and effectiveness of the program operated by such facility for the purpose for which such veteran is to be furnished such care and services.”;

deleted subsecs. (e)-(g), which read:

“(e) The Secretary may not furnish care and treatment and rehabilitative services under subsection (a) of this section after December 31, 1997.

“(f)(1) During the period beginning on December 1, 1988, and ending on October 1, 1997, the Secretary shall conduct an ongoing clinical evaluation in order to determine the long-term results of drug and alcohol abuse treatment furnished to veterans in contract residential treatment facilities under this section.

“(2) The evaluation shall include an assessment of the following:

“(A) The long-term results of treatment referred to in paragraph (1) of this subsection on drug and alcohol use by veterans who may have received such treatment.

“(B) The need for hospitalization of such veterans for drug and alcohol abuse after completion of the residential treatment.

“(C) The employment status and income of such veterans.

“(D) The extent of any criminal activity of such veterans.

“(E) Whether certain models and methods of residential treatment for drug and alcohol abuse are more successful for veterans with specific abuses, specific levels of resources available to them, and specific needs than are other models and methods.

“(3) To the extent feasible, the Secretary shall select for consideration in the evaluation veterans whose treatment for drug and alcohol abuse in contract residential treatment facilities under such section represents a variety of models and methods of residential drug and alcohol abuse treatment.

“(4) The Secretary shall submit to the Committees on Veterans’ Affairs of the Senate and House of Representatives the following reports on the evaluation under this subsection:

“(A) Not later than February 1, 1993, an interim report containing information obtained during the first four years of the evaluation and any conclusions that the Secretary has drawn on the basis of that information.

“(B) Not later than March 31, 1998, a final report containing information obtained during the evaluation and the determinations and conclusions of the Secretary based on that information.

“(g) The authority of the Secretary to enter into contracts under this section shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.”;

and redesignated subsecs. (b), (c), and (d) as subsecs. (a), (b), and (c), respectively.

1999. Act Nov. 30, 1999, in subsec. (c), in para. (1), substituted "may be transferred" for "may not be transferred" and deleted "unless such transfer is during the last thirty days of such member's enlistment or tour of duty" following "such disability" and, in para. (2), deleted "during the last thirty days of such person's enlistment period or tour of duty" following "for a specified period of time".
2000. Act Nov. 1, 2000, in subsec. (c)(1), substituted “for such disability. Care and services provided to a member so transferred” for “for such disability, in which case such care and services provided to such member”.


Other provisions:

Ratification of actions of Administrator between Oct. 1, 1988 and Nov. 1, 1988. Act Nov. 18, 1988, P. L. 100-689, Title V, § 502(a)(2), 102 Stat. 4179, provides: "Any action by the Administrator of Veterans' Affairs in providing, during the period beginning on October 1, 1988, and ending on the date of the enactment of this Act, for care and treatment and rehabilitative services under section 620A [now § 1720A] of title 38, United States Code, is hereby ratified with respect to that period.".

Evaluation of the Veterans' Administration inpatient and outpatient drug and alcohol treatment programs. Act Nov. 18, 1988, P. L. 100-690, Title II, Subtitle F, § 2501, 102 Stat. 4232, provides: "The Administrator of Veterans' Affairs shall conduct an evaluation of inpatient and outpatient drug and alcohol treatment programs operated by the Veterans' Administration. The evaluation shall include a determination of the medical advantages and cost-effectiveness of such programs, taking into consideration rates of readmission and the rate of successful rehabilitation. There are authorized to be appropriated for the purpose of the conduct of such evaluation $1,000,000 for fiscal year 1989 and such sums as may be necessary for each of the fiscal years 1990 and 1991.".


"(a) Loan program. The Secretary of Veterans Affairs may make loans in accordance with this section to assist in the provision of transitional housing exclusively to veterans who are in (or who recently have been in) a program for the treatment of substance abuse.

"(b) Loan recipients. A loan under this section may only be made to a nonprofit organization under selection criteria promulgated by the Secretary and only to assist that organization in leasing housing units for use as a group residence for the purposes described in subsection (a). The amount of such a loan that is used with respect to any single residential unit may not exceed $4,500. In making loans under this subsection, the Secretary shall, except to the extent that the Secretary determines that it is infeasible to do so, ensure that--

"(1) each loan is repaid within two years after the date on which the loan is made;

"(2) each loan is repaid through monthly installments and that a reasonable penalty is assessed for each failure to pay an installment by the date specified in the loan agreement involved; and

"(3) each loan is made only to a nonprofit private entity which agrees that, in the operation of each residence established with the assistance of the loan--

"(A) the use of alcohol or any illegal drug in the residence will be prohibited;

"(B) any resident who violates the prohibition in subclause (A) of this clause will be expelled from the residence;

"(C) the costs of maintaining the residence, including fees for rent and utilities, will be paid by the residents;

"(D) the residents will, through a majority vote of the residents, otherwise establish policies governing the conditions of residence, including the manner in which applications for residence are approved; and

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“(E) the residence will be operated solely as a residence for not less than six
veterans.

“(c) Funding. Loans under this section shall be made from the special account of the General
Post Fund of the Department of Veterans Affairs established for purposes of this section. The
amount of such loans outstanding at any time may not exceed $100,000. Amounts received
as payment of principal and interest on such loans shall be deposited in that account. The
operation of the loan program under this section shall be separately accounted for, and shall
be separately stated in the documents accompanying the President's budget for each fiscal
year.

“(d) Terms and conditions. Loans under this section shall be made on such terms and
conditions, including interest, as the Secretary prescribes.

“(e) Report. After the end of the 15-month period beginning on the date the first loan is
extended under this section, the Secretary shall issue a report on the Department's
experience under the section. The report shall include the following information:

“(1) The default rate on loans extended under this section.

“(2) The manner in which loan payments are collected.

“(3) The number of facilities at which loans have been extended.

“(4) The adequacy of the amount of funds in the special account referred to in subsection
(c).”.

Ratification of actions during period of expired authority. For provision that any action
taken by the Secretary of Veterans Affairs before Feb. 13, 1996, under a provision of law
amended by Title I of Act Feb. 13, 1996, P. L. 104-110, during the period beginning on the
date on which authority of Secretary under such provision of law expired and ending on Feb.
13, 1996, is considered to have the same force and effect as if such amendment had been in
effect at the time of such action, see § 103 of Act Feb. 13, 1996, P. L. 104-110, which
appears as 38 USCS § 1710 note.

202(a), 110 Stat. 770, provides:

“The Secretary of Veterans Affairs shall submit to Congress, not later than March 1, 1997, a
report on the advantages and disadvantages of consolidating into one program the following
three programs:

“(1) The alcohol and drug abuse contract care program under section 1720A of title 38,
United States Code.

“(2) The program to provide community-based residential care to homeless chronically
mentally ill veterans under section 115 of the Veterans' Benefits and Services Act of 1988

“(3) The demonstration program under section 7 of Public Law 102-54 (38 U.S.C. 1718
note).”.

Cross References
This section is referred to in 29 USCS § 1721; 38 USCS § 1703

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 70
§ 1720B. Respite care

(a) The Secretary may furnish respite care services to a veteran who is enrolled to receive care under section 1710 of this title [38 USCS § 1710].

(b) For the purpose of this section, the term "respite care services" means care and services which--
(1) are of limited duration;
(2) are furnished on an intermittent basis to a veteran who is suffering from a chronic illness and who resides primarily at home; and
(3) are furnished for the purpose of helping the veteran to continue residing primarily at home.

(c) In furnishing respite care services, the Secretary may enter into contract arrangements.

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 620B, as 38 USCS § 1720B, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".
1992. Act Nov. 4, 1992 deleted subsec. (c) which read: "(c) The authority provided by this section terminates on September 30, 1992.".
1999. Act Nov. 30, 1999 (effective on enactment as provided by § 101(h)(1) of such Act, which appears as 38 USCS § 1710B note), in subsec. (a), substituted "enrolled" for "eligible"; in subsec. (b), in the introductory matter, substituted "the term 'respite care services' means care and services" for "the term 'respite care' means hospital or nursing home care", in para. (1), substituted "are" for "is", in para. (2), substituted "are" for "is" and deleted "in a Department facility" after "furnished" and, in para. (3), substituted "are" for "is"; and added subsec. (c).

Other provisions:
"(b) If the Administrator of Veterans' Affairs furnishes respite care under section 620B [now § 1720B] of title 38, United States Code (as added by subsection (a))--

"(1) the Administrator shall conduct an evaluation of the health efficacy and cost-effectiveness of furnishing such care; and

"(2) not later than February 1, 1989, shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report containing--

"(A) the results of such evaluation; and

"(B) any plan for administrative action, and any recommendation for legislation, that the Administrator considers appropriate to include in the report.".

Termination of authority for respite care. Act Oct. 6, 1989, P. L. 101-110, § 1(a), 103 Stat. 682 (effective Oct. 1, 1989, as provided by § 3(a) of such Act, which appears as 38 USCS § 5033 note), provides: "Notwithstanding the provisions of subsection (c) of section 620B [now § 1720B] of title 38, United States Code, the authority provided by such section shall terminate on November 30, 1989.".
Ratification of actions of Secretary between Oct. 1, 1989 and Oct. 6, 1989. Act Oct. 6, 1989, P. L. 101-110, § 3(b), 103 Stat. 682 (effective Oct. 1, 1989, as provided by § 3(a) of such Act, which appears as 38 USCS § 8133 note), provides: "Any actions of the Secretary of Veterans Affairs in carrying out the provisions of section 620B [now § 1720B] of title 38, United States Code, section 115 of the Veterans Benefits and Services Act of 1988 [38 USCS § 1712 note], section 618 of the Treasury, Postal Service and General Government Appropriations Act, 1989 [5 USCS § 6302 note], or section 1829 of such title, by contract or otherwise, during the period beginning on October 1, 1989, and ending on the date of the enactment of this Act are hereby ratified.".

Ratification of actions of Secretary between Dec. 1, 1989 and Dec. 18, 1989. Act Dec. 18, 1989, P. L. 101-237, Title VI, § 604, 103 Stat. 2097, provides: "Any actions of the Secretary of Veterans Affairs in carrying out the provisions of section 620B of title 38, United States Code, section 115 of the Veterans Benefits and Services Act of 1988 [38 USCS § 1712], section 618 of the Treasury, Postal Service and General Government Appropriations Act, 1989 [5 USCS § 6302 note], or section 1829 of such title [38 USCS § 3729], by contract or otherwise, during the period beginning on December 1, 1989, and ending on the date of the enactment of this Act are hereby ratified.".

Cross References
This section is referred to in 38 USCS § 1710B

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77 Am Jur 2d, Veterans and Veterans' Laws § 65

§ 1720C. Noninstitutional alternatives to nursing home care

(a) The Secretary may furnish medical, rehabilitative, and health-related services in noninstitutional settings for veterans who are eligible under this chapter [38 USCS §§ 1701 et seq.] for, and are in need of, nursing home care. The Secretary shall give priority for participation in such program to veterans who-

(1) are in receipt of, or are in need of, nursing home care primarily for the treatment of a service-connected disability; or

(2) have a service-connected disability rated at 50 percent or more.

(b) (1) Under the program conducted pursuant to subsection (a), the Secretary shall (A) furnish appropriate health-related services solely through contracts with appropriate public and private agencies that provide such services, and (B) designate Department health-care employees to furnish care management services to veteran furnished services under the program.

(2) For the purposes of paragraph (1), the term "case management services" includes the coordination and facilitation of all services furnished to a veteran by the Department of Veterans Affairs, either directly or through contract, including assessment of needs, planning, referral (including referral for services to be furnished by the Department, either directly or through a contract, or by an entity other than the Department), monitoring, reassessment, and followup.

(c) The Secretary may provide in-kind assistance (through the services of Department of Veterans Affairs employees and the sharing of other Department resources) to a facility furnishing services to veterans under subsection (b)(1)(A). Any such in-kind assistance
shall be provided under a contract between the Department and the facility concerned. The Secretary may provide such assistance only for use solely in the furnishing of appropriate services under this section and only if, under such contract, the Department receives reimbursement for the full cost of such assistance (including the cost of services and supplies and normal depreciation and amortization of equipment). Such reimbursement may be made by reduction in the charges to the United States or by payment to the United States. Any funds received through such reimbursement shall be credited to funds allotted to the Department facility that provided the assistance.

(d) The total cost of providing services or in-kind assistance in the case of any veteran for any fiscal year under the program may not exceed 65 percent of the cost that would have been incurred by the Department during that fiscal year if the veteran had been furnished, instead, nursing home care under section 1710 of this title [38 USCS § 1710] during that fiscal year.

(e) The authority of the Secretary to enter into contracts under this section shall be effective for any fiscal year only to the extent that appropriations are available.

Explanatory notes:

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 620C, as 38 USCS § 1720C, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1994. Act Nov. 2, 1994 (effective as of 10/1/94, as provided by § 103(c)(1) of such Act), in subsec. (a), in the introductory matter, substituted "During the period through September 30, 1995," for "During the four-year period beginning on October 1, 1990."

Such Act further, in subsec. (a), in the introductory matter, substituted "care. The Secretary shall give priority for participation in such program to veterans who-" for "care and who--".


1997. Act Nov. 21, 1997, substituted the section heading for one which read: "1720C. Noninstitutional alternatives to nursing home care: pilot program"; in subsection (a), substituted "The Secretary may furnish" for "During the period through December 31, 1997, the Secretary may conduct a pilot program for the furnishing of"; in subsec. (b)(1), deleted "pilot" following "under the"; and, in subsec. (d), deleted "pilot" preceding "program".

Other provisions:
Report. Act Aug. 15, 1990, P. L. 101-366, Title II, § 201(b), 104 Stat. 438; Nov. 2, 1994, P. L. 103-452, Title I, § 103(g), 108 Stat. 4787, provides: "Not later than February 1, 1995, the Secretary of Veterans Affairs shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report setting forth the Secretary's evaluation, findings, and conclusions regarding the conduct, through September 30, 1993, of the pilot program required by section 620C [now § 1720C] of title 38, United States Code (as added by subsection (a)), and the results of the furnishing of care under such pilot program for the participating veterans. The report shall include a description of the conduct of the pilot program (including a description of the veterans furnished services and of the services furnished under the pilot program), and any plans for administrative action, and any
recommendations for legislation, that the Secretary considers appropriate to include in the report.”.

Effective date of Nov. 2, 1994 amendment. Act Nov. 2, 1994, P. L. 103-452, Title I, § 103(c)(1), 108 Stat. 4786, provided that the amendment made by such paragraph [amending subsec. (a) of this section] was effective as of Oct. 1, 1994.

Ratification of actions during period of expired authority. For provision that any action taken by the Secretary of Veterans Affairs before Feb. 13, 1996, under a provision of law amended by Title I of Act Feb. 13, 1996, P. L. 104-110, during the period beginning on the date on which authority of Secretary under such provision of law expired and ending on Feb. 13, 1996, is considered to have the same force and effect as if such amendment had been in effect at the time of such action, see § 103 of Act Feb. 13, 1996, P. L. 104-110, which appears as 38 USCS § 1710 note.

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§ 1720D. Counseling and treatment for sexual trauma

Discussion and Analysis in the Veterans Benefits Manual

(a) (1) The Secretary shall operate a program under which the Secretary provides counseling and appropriate care and services to veterans who the Secretary determines require such counseling and care and services to overcome psychological trauma, which in the judgment of a mental health professional employed by the Department, resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty or active duty for training.

(2) In furnishing counseling to a veteran under this subsection, the Secretary may provide such counseling pursuant to a contract with a qualified mental health professional if (A) in the judgment of a mental health professional employed by the Department, the receipt of counseling by that veteran in facilities of the Department would be clinically inadvisable, or (B) Department facilities are not capable of furnishing such counseling to that veteran economically because of geographical inaccessibility.

(b) (1) The Secretary shall give priority to the establishment and operation of the program to provide counseling and care and services under subsection (a). In the case of a veteran eligible for counseling and care and services under subsection (a), the Secretary shall ensure that the veteran is furnished counseling and care and services under this section in a way that is coordinated with the furnishing of such care and services under this chapter [38 USCS §§ 1701 et seq.].

(2) In establishing a program to provide counseling under subsection (a), the Secretary shall--

(A) provide for appropriate training of mental health professionals and such other health care personnel as the Secretary determines necessary to carry out the program effectively;

(B) seek to ensure that such counseling is furnished in a setting that is therapeutically appropriate, taking into account the circumstances that resulted in the need for such counseling; and
(C) provide referral services to assist veterans who are not eligible for services under this chapter [38 USCS §§ 1701 et seq.] to obtain those from sources outside the Department.

c) The Secretary shall provide information on the counseling and treatment available to veterans under this section. Efforts by the Secretary to provide such information--

(1) shall include availability of a toll-free telephone number (commonly referred to as an 800 number);
(2) shall ensure that information about the counseling and treatment available to veterans under this section--

(A) is revised and updated as appropriate;
(B) is made available and visibly posted at appropriate facilities of the Department; and
(C) is made available through appropriate public information services; and
(3) shall include coordination with the Secretary of Defense seeking to ensure that individuals who are being separated from active military, naval, or air service are provided appropriate information about programs, requirements, and procedures for applying for counseling and treatment under this section.

d) In this section, the term "sexual harassment" means repeated, unsolicited verbal or physical contact of a sexual nature which is threatening in character.

Amendments:

1994. Act Nov. 2, 1994 substituted the section heading for one which read: "§ 1720D. Counseling to women veterans for sexual trauma".

Such Act further, in subsec. (a), in para. (1), substituted "December 31, 1998," for "December 31, 1995," and deleted "woman" preceding "veteran who", substituted para. (2) for one which read: "(2) To be eligible to receive counseling under this subsection, a veteran must seek such counseling from the Secretary within two years after the date of the veteran's discharge or release from active military, naval, or air service.", and, in para. (3), substituted "December 31, 1998," for "December 31, 1994,"; deleted subsec. (b), which read: "(b) In providing services to a veteran under subsection (a), the period for which counseling is provided may not exceed one year from the date of the commencement of the furnishing of such counseling to the veteran. However, the Secretary may authorize a longer period in any case if, in the judgment of the Secretary, a longer period of counseling is required.", and redesignated subsecs. (c)-(e) as subsecs. (b)-(d), respectively; in subsec. (b) as so redesignated, substituted para. (1) for one which read: "(1) The Secretary shall give priority to the establishment and operation of the program to provide counseling under subsection (a). In the case of a veteran eligible for such counseling who requires other care or services under this chapter for trauma described in subsection (a)(1), the Secretary shall ensure that the veteran is furnished counseling under this section in a way that is coordinated with the furnishing of such other care and services under this chapter.", and, in para. (2)(C), deleted "women" preceding "veterans"; and, in subsec. (c) as so redesignated, in the introductory matter, deleted "women" preceding "veterans", substituted para. (1) for one which read: "(1) may include establishment of an information system involving the use of a toll-free telephone number (commonly referred to as an 800 number), and", and, in para. (2), substituted "individuals" for "women".


1999. Act Nov. 30, 1999, in subsec. (a), in para. (1), substituted "December 31, 2004" for "December 31, 2001" and substituted "shall operate a program under which the Secretary
provides counseling and appropriate care and services to veterans who the Secretary determines require such counseling and care and services" for "may provide counseling to a veteran who the Secretary determines requires such counseling", deleted para. (2), which read: "(2) During the period referred to in paragraph (1), the Secretary may provide appropriate care and services to a veteran for an injury, illness, or other psychological condition that the Secretary determines to be the result of a physical assault, battery, or harassment referred to in that paragraph.", redesignated para. (3) as para. (2) and, in such paragraph as so redesignated, substituted "December 31, 2004" for "December 31, 2001"; and, in subsec. (c), in the introductory matter, inserted "and treatment", in para. (1), deleted "and" after the concluding period, in para. (2), inserted "and treatment", redesignated para. (2) as para. (3), and inserted a new para. (2).

2004. Act Nov. 30, 2004, in subsec. (a), in para. (1), substituted "The Secretary" for "During the period through December 31, 2004, the Secretary", and inserted "or active duty for training", and, in para. (2), deleted ", during the period through December 31, 2004," following "the Secretary may".

Other provisions:


Commencement of provision of information on services. Act Nov. 4, 1992, P. L. 102-585, Title I, § 104, 106 Stat. 4946, provides: "Not later than 90 days after the date of the enactment of this Act, the Secretary of Veterans Affairs shall commence the provision of information on the counseling relating to sexual trauma that is available to women veterans under section 1720D of title 38, United States Code (as added by section 102) in accordance with the provisions of subsection (d) of that section."

Report on implementation of sexual trauma counseling program. Act Nov. 4, 1992, P. L. 102-585, Title I, § 105, 106 Stat. 4946, provides:

"Not later than March 31, 1994, the Secretary of Veterans Affairs shall submit to the Committees on Veterans’ Affairs of the Senate and House of Representatives a comprehensive report on the Secretary’s actions under section 1720D of title 38, United States Code (as added by section 102), and on the use made of the authority provided under that section. The report shall include the following:

"(1) The numbers of veterans who have received counseling under such section, shown by reference to the facility that provided that counseling and including the use made of the contract authority under such section.

"(2) The number of veterans who received care or services under chapter 17 of title 38, United States Code [38 USCS §§ 1701 et seq.], under the circumstances described in subsection (c)(1) of such section and the numbers referred to sources outside the Department, shown by reference to the facility that provided those services or made those referrals.

"(3) A listing and description of the specific training programs which the Secretary has instituted to ensure that the counseling program established under such section is carried out effectively.

"(4) A description of the specific efforts taken by the Secretary to ensure that the counseling furnished by the Secretary under such section is furnished in settings that are therapeutically appropriate, taking into account the circumstances that resulted in the need for such counseling.".
Telephone assistance service. Act Nov. 2, 1994, P. L. 103-452, Title I, § 101(g)(2)-(5), 108 Stat. 4785, provides:

"(2) In providing information on counseling available to veterans as required under section 1720D(c)(1) of title 38, United States Code (as amended by paragraph (1)), the Secretary of Veterans Affairs shall ensure that the Department of Veterans Affairs personnel who provide assistance under such section are trained in the provision to persons who have experienced sexual trauma of information about the care and services relating to sexual trauma that are available to veterans in the communities in which such veterans reside, including care and services available under programs of the Department (including the care and services available under section 1720D of such title) and from non-Department agencies or organizations.

"(3) The telephone assistance service shall be operated in a manner that protects the confidentiality of persons who place calls to the system.

"(4) The Secretary shall ensure that information about the availability of the telephone assistance service is visibly posted in Department medical facilities and is advertised through public service announcements, pamphlets, and other means.

"(5) Not later than 18 months after the date of the enactment of this Act, the Secretary shall submit to Congress a report on the operation of the telephone assistance service required under section 1720D(c)(1) of title 38, United States Code (as amended by paragraph (1)). The report shall set forth the following:

"(A) The number of persons who sought information during the period covered by the report through a toll-free telephone number regarding services available to veterans relating to sexual trauma, with a separate display of the number of such persons arrayed by State (as such term is defined in section 101(20) of title 38, United States Code).

"(B) A description of the training provided to the personnel who provide such assistance.

"(C) The recommendations and plans of the Secretary for the improvement of the service."

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§ 1720E. Nasopharyngeal radium irradiation

(a) The Secretary may provide any veteran a medical examination, and hospital care, medical services, and nursing home care, which the Secretary determines is needed for the treatment of any cancer of the head or neck which the Secretary finds may be associated with the veteran's receipt of nasopharyngeal radium irradiation treatments in active military, naval, or air service.

(b) The Secretary shall provide care and services to a veteran under subsection (a) only on the basis of evidence in the service records of the veteran which document nasopharyngeal radium irradiation treatment in service, except that, notwithstanding the absence of such documentation, the Secretary may provide such care to a veteran who--

(1) served as an aviator in the active military, naval, or air service before the end of the Korean conflict; or

(2) underwent submarine training in active naval service before January 1, 1965.
§ 1721. Power to make rules and regulations
§ 1722. Determination of inability to defray necessary expenses; income thresholds
§ 1722A. Copayment for medications
§ 1723. Furnishing of clothing
§ 1724. Hospital care, medical services and nursing home care abroad
§ 1725. Reimbursement for emergency treatment
§ 1726. Reimbursement for loss of personal effects by natural disaster
§ 1727. Persons eligible under prior law
§ 1728. Reimbursement of certain medical expenses
§ 1729. Recovery of the United States of the cost of certain care and services
§ 1729A. Department of Veterans Affairs Medical Care Collections Fund
[§ 1729B. Repealed]
§ 1730. Community residential care

Amendments:

1976. Act Oct. 21, 1976, P. L. 94-581, Title II, §(effective 10/21/76, as provided by § 211 of such Act), inserted "AND NURSING HOME".

§ 1721. Power to make rules and regulations

Rules and regulations prescribed under section 501(a) of this title [38 USCS § 501(a)] shall include rules and regulations to promote good conduct on the part of persons who are receiving hospital, nursing home, and domiciliary care and medical services in Department facilities. The Secretary may prescribe in rules and regulations under such section limitations in connection with the furnishing of such care and services during a period of national emergency (other than a period of war or an emergency described in section 8111A of this title [38 USCS § 8111A]).

Prior law and revision:

This section is based on 38 USC § 2521 (Act June 17, 1957, P. L. 85-56, Title V, Part C, § 521, 71 Stat. 113).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Veterans' Regulation No. 6(a), para. V.

Explanatory notes:

A prior § 1721 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3521.

Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in para. (1), inserted ", nursing home," and substituted "the
Administrator” for "he"; in para. (2), inserted "nursing home,"; and in para. (3), inserted "nursing home," and substituted "the Administrator" for "he".

1988. Act May 20, 1988 substituted this section for one which read:

"The Administrator shall prescribe--

"(1) such rules and procedure governing the furnishing of hospital, nursing home, and domiciliary care as the Administrator may deem proper and necessary;

"(2) limitations in connection with the furnishing of hospital, nursing home, and domiciliary care; and

"(3) such rules and regulations as the Administrator deems necessary in order to promote good conduct on the part of persons who are receiving hospital, nursing home, or domiciliary care in Veterans' Administration facilities."

1991. Act May 7, 1991, amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 621, as 38 USCS § 1721, and substituted "section 501(a)" for "section 210(c)(1)", "Department" for "Veterans' Administration", and "Secretary" for "Administrator".

Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17

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Federal Procedure:
29 Fed Proc L Ed, Public Lands and Property § 66:724

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 53
1. Generally
2. Assignment of claims
3. Forfeiture of benefits

1. Generally
38 USCS §§ 210(c) [now repealed; for similar provisions, see 38 USCS § 501] and 621 [now 38 USCS § 1721], authorizing Administrator to prescribe rules and regulations, contemplate only rules and regulations implementing powers given Veterans' Administration [now Department of Veterans Affairs] by law. Texas Employers Ins. Asso. v United States (1975, ND Tex) 390 F Supp 142

2. Assignment of claims
Regulations promulgated by Veterans Administration [now Department of Veterans Affairs] under 38 USCS §§ 210(c) [now repealed; for similar provisions, see 38 USCS § 501], 621 [now 38 USCS § 1721], providing for assignment of workmen's compensation claim to Veterans Administration for treatment furnished pursuant to 38 USCS § 610 [now 38 USCS § 1710], for veteran who has compensable claim, prevails over state provision precluding assignment of workmen's compensation claims; Supremacy Clause of Constitution, Art. VI, cl. 2 prevails. Texas Employers' Ins. Asso. v United States (1978, CA5 Tex) 569 F.2d 874, cert den (1978) 439 US 826, 58 L Ed 2d 119, 99 S Ct 98

3. Forfeiture of benefits
Forfeiture of compensation for which Administrator [now Secretary] may provide in order to promote good conduct does not include pension or emergency officers' retirement pay of hospitalized patient who breaches hospital discipline. 1931 ADVA 75

Benefits being paid to veterans are not subject to forfeiture because of violation of hospital rules and regulations. 1934 ADVA 258

§ 1722. Determination of inability to defray necessary expenses; income thresholds

Discussion and Analysis in the Veterans Benefits Manual

(a) For the purposes of section 1710(a)(2)(G) of this title [38 USCS § 1710(a)(2)(G)], a veteran shall be considered to be unable to defray the expenses of necessary care if--
   (1) the veteran is eligible to receive medical assistance under a State plan approved under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.);
   (2) the veteran is in receipt of pension under section 1521 of this title [38 USCS § 1521]; or
   (3) the veteran's attributable income is not greater than the amount set forth in subsection (b).

(b) (1) For purposes of subsection (a)(3), the income threshold for the calendar year beginning on January 1, 1990, is--
   (A) $17,240 in the case of a veteran with no dependents; and
   (B) $20,688 in the case of a veteran with one dependent, plus $1,150 for each additional dependent.

   (2) For a calendar year beginning after December 31, 1990, the amounts in effect for purposes of this subsection shall be the amounts in effect for the preceding calendar year as adjusted under subsection (c) of this section.

(c) Effective on January 1 of each year, the amounts in effect under subsection (b) of this section shall be increased by the percentage by which the maximum rates of pension were increased under section 5312(a) of this title [38 USCS § 5312(a)] during the preceding calendar year.

(d) (1) Notwithstanding the attributable income of a veteran, the Secretary may refuse to make a determination described in paragraph (2) of this subsection if the corpus of the estate of the veteran is such that under all the circumstances it is reasonable that some part of the corpus of the estate of the veteran be consumed for the veteran's maintenance.
   (2) A determination described in this paragraph is a determination that for purposes of subsection (a)(3) of this section a veteran's attributable income is not greater than the amount determined under subsection (b) of this section.
   (3) For the purposes of paragraph (1) of this subsection, the corpus of the estate of a veteran shall be determined in the same manner as the manner in which determinations are made of the corpus of the estates of persons under section 1522 of this title [38 USCS § 1522].

(e) (1) In order to avoid a hardship to a veteran described in paragraph (2) of this subsection, the Secretary may deem the veteran to have an attributable income during the previous year not greater than the amount determined under subsection (b) of this section.
(2) A veteran is described in this paragraph for the purposes of subsection (a) of this section if--
   (A) the veteran has an attributable income greater than the amount determined under subsection (b) of this section; and
   (B) the current projections of such veteran's income for the current year are that the veteran's income for such year will be substantially below the amount determined under subsection (b).

(f) For purposes of this section:
   (1) The term "attributable income" means the income of a veteran for the previous year determined in the same manner as the manner in which a determination is made of the total amount of income by which the rate of pension for such veteran under section 1521 of this title [38 USCS § 1521] would be reduced if such veteran were eligible for pension under that section.
   (2) The term "corpus of the estate of the veteran" includes the corpus of the estates of the veteran's spouse and dependent children, if any.
   (3) The term "previous year" means the calendar year preceding the year in which the veteran applies for care or services under section 1710(a) of this title [38 USCS § 1710(a)].

(g) For the purposes of section 1724(c) of this title [38 USCS § 1724(c)], the fact that a veteran is--
   (1) eligible to receive medical assistance under a State plan approved under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.);
   (2) a veteran with a service-connected disability; or
   (3) in receipt of pension under any law administered by the Secretary,

shall be accepted as sufficient evidence of such veteran's inability to defray necessary expenses.

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Explanatory notes:
A prior § 1722 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3522.

Amendments:
1966. Act Sept. 30, 1966, deleted "and" following "610(b)(2)," and inserted ", and section 632(b)".
1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note) in subsec. (a), substituted "610(a)(1)(B)" and "632(a)(2)" for
"610(a)(1)" and "632(b)", respectively; and in subsec. (b), substituted "such veteran's" for "his".

1980. Act Aug. 26, 1980, substituted this section for one which read:

"§ 622. Statement under oath

"(a) For the purposes of section 610(a)(1)(B), section 610(b)(2), section 624(c), and section 632(a)(2) of this title, the statement under oath of an applicant on such form as may be prescribed by the Administrator shall be accepted as sufficient evidence of inability to defray necessary expenses.

"(b) Notwithstanding the provisions of subsection (a) of this section, the receipt of pension under any law administered by the Veterans' Administration shall constitute sufficient evidence of inability to defray necessary expenses, and any veteran in receipt of such pension shall be exempt from making any statement under oath regarding such veteran's inability to defray necessary expenses."

1986. Act April 7, 1986 substituted this section for one which read:

"§ 622. Evidence of inability to defray necessary expenses

"For the purposes of sections 610(a)(1)(B), 610(b)(2), 624(c), and 632(a)(2) of this title, the fact that an individual is--

"(1) eligible to receive medical assistance under a State plan approved under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.);

"(2) a veteran with a service-connected disability; or

"(3) in receipt of pension under any law administered by the Veterans' Administration;

shall be accepted as sufficient evidence of such individual's inability to defray necessary expenses.".

1988. Act May 20, 1988, in subsec. (g), in the introductory matter, substituted "section 624(c)" for "sections 610(b)(2) and 624(c)". substantially below such threshold.".

1990. Act Nov. 5, 1990 (applicable as provided by § 8013(d) of such Act, which appears as a note to 38 USCS § 1710), in subsec. (a), deleted "(1) preceding "For the purposes of section 610(a)(1)(I)", redesignated subparas. (A)-(C) as paras. (1)-(3), respectively, in para. (3) as redesignated, substituted "amount set forth in subsection (b)" for "Category A threshold", and deleted para. (2) which read: "(2) For the purposes of section 1710(a)(2)(A) of this title, a veteran's income level is described in this paragraph if the veteran's attributable income is not greater than the Category B threshold."; and substituted subsec. (b) for one which read:

"(b) For the purposes of this section:

"(1) The Category A threshold--

"(A) for the calendar year beginning on January 1, 1986, is--

"(i) $15,000 in the case of a veteran with no dependents; and

"(ii) $18,000 in the case of a veteran with one dependent, plus $1,000 for each additional dependent; and

"(B) for a calendar year beginning after December 31, 1986, is the amount in effect for purposes of this paragraph for the preceding calendar year as adjusted under subsection (c) of this subsection.

"(2) The Category B threshold--

"(A) for the calendar year beginning on January 1, 1986, is--
“(i) $20,000 in the case of a veteran with no dependents; and

“(ii) $25,000 in the case of a veteran with one dependent, plus $1,000 for each additional dependent; and

“(B) for a calendar year beginning after December 31, 1986, is the amount in effect for purposes of this paragraph for the preceding calendar year as adjusted under subsection (c) of this subsection.”.

Such Act further, in subsec. (c), deleted "paragraphs (1) and (2) of" preceding "subsection (b)"; and, in subsec. (d), substituted para. (2) for one which read:

“(2) A determination described in this paragraph is a determination--

“(A) that for the purposes of subsection (a)(1)(C) of this section a veteran's attributable income is not greater than the Category A threshold; or

“(B) that for the purposes of subsection (a)(2) of this section a veteran's attributable income is not greater than the Category B threshold.”.

Such Act further, in subsec. (e), in para. (1), substituted "the amount determined under subsection (b) of this section" for "the Category A threshold or the Category B threshold, as appropriate", and substituted para. (2) for one which read:

“(2)(A) A veteran is described in this paragraph for the purposes of subsection (a)(1) of this section if--

“(i) the veteran has an attributable income greater than the Category A threshold; and

“(ii) the current projections of such veteran's income for the current year are that the veteran's income for such year will be substantially below such threshold.

“(B) A veteran is described in this paragraph for the purposes of subsection (a)(2) of this section if--

“(i) the veteran has an attributable income greater than the Category B threshold; and

“(ii) the current projections of such veteran's income for the current year are that the veteran's income for such year will be substantially below such threshold.”.

1991. Act May 7, 1991, amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 622, as 38 USCS § 1722, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "administered by the Secretary" for "administered by the Veterans' Administration" and "Secretary" for "Administrator".


Other provisions:

Effective date of initial increase under subsec. (c). Act April 7, 1986, P. L. 99-272, Title XIX, Subtitle A, § 19011(c)(3), 100 Stat. 378, provides: "The first increase under subsection (c) of section 622 [now § 1722] of title 38, United States Code, as added by paragraph (1), shall take effect on January 1, 1987.".
Application of section. For provisions as to the application of this section, see Act April 7, 1986, P. L. 99-272, Title XIX, Subtitle A, § 19011(f), 100 Stat. 380, which appears as 38 USCS § 1710 note.


Cross References

This section is referred to in 38 USCS §§ 1705, 1710

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 55

Forms:
16A Fed Procedural Forms L Ed, Veterans and Veterans' Laws § 68:42

1. Generally
2. Constitutionality

1. Generally
Veterans Administration [now Department of Veterans Affairs] may not recover cost of care provided to veterans for nonservice-connected disabilities when veterans receiving care have been deemed "unable to defray" pursuant to 38 USCS § 622 [now 38 USCS § 1722]. VAG GCO 10-83

2. Constitutionality
Statute classifying veterans by their income and requiring co-payment does not violate due process since classification has rational relationship to providing, from limited funds, benefits to needy veterans. Levy v Brown (1993) 6 Vet App 23

§ 1722A. Copayment for medications

Discussion and Analysis in the Veterans Benefits Manual

(a) (1) Subject to paragraph (2), the Secretary shall require a veteran to pay the United States $2 for each 30-day supply of medication furnished such veteran under this chapter on an outpatient basis for the treatment of a non-service-connected disability or condition. If the amount supplied is less than a 30-day supply, the amount of the charge may not be reduced.

(2) The Secretary may not require a veteran to pay an amount in excess of the cost to the Secretary for medication described in paragraph (1).

(3) Paragraph (1) does not apply--
(A) to a veteran with a service-connected disability rated 50 percent or more;
(B) to a veteran who is a former prisoner of war; or
(C) to a veteran whose annual income (as determined under section 1503 of this title [38 USCS § 1503]) does not exceed the maximum annual rate of pension
which would be payable to such veteran if such veteran were eligible for pension under section 1521 of this title [38 USCS § 1521].

(b) The Secretary, pursuant to regulations which the Secretary shall prescribe, may--
(1) increase the copayment amount in effect under subsection (a); and
(2) establish a maximum monthly and a maximum annual pharmaceutical copayment amount under subsection (a) for veterans who have multiple outpatient prescriptions.

(c) Amounts collected under this section shall be deposited in the Department of Veterans Affairs Medical Care Collections Fund.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 622A, as 38 USCS § 1722A.


1992. Act Oct. 29, 1992 (effective with respect to medication furnished after the date of enactment, as provided by § 605(b) of such Act), in subsec. (a), in para. (1), deleted "(other than a veteran with a service-connected disability rated 50 percent or more" following "a veteran", and added para. (3).

Such Act further, in subsec. (c), inserted "Notwithstanding the preceding sentence, the provisions of subsection (a) shall be in effect through September 30, 1997."


1997. Act Aug. 5, 1997 (effective 10/1/97, as provided by § 8023(g) of such Act, which appears as 38 USCS § 712 note), in subsec. (b), substituted "Department of Veterans Affairs Medical Care Collections Fund" for "Department of Veterans Affairs Medical-Care Cost Recovery Fund".

Such Act further, in subsec. (c), substituted "September, 2002" for "September 30, 1998".

1999. Act Nov. 30, 1999, redesignated subsecs. (b) and (c) as subsecs. (c) and (d), respectively; added a new subsec. (b); and, in subsec. (c) as redesignated, substituted "subsection (a)" for "this section", and added the sentence beginning "Amounts collected through . . . .".

2003. Act Feb. 20, 2003, in subsec. (c), substituted "under this section" for "under subsection (a)"; and deleted "Amounts collected through use of the authority under subsection (b) shall be deposited in the Department of Veterans Affairs Health Services Improvement Fund." following "Fund.", and deleted subsec. (d), which read: "(d) The provisions of subsection (a) expire on September 30, 2002."

Act Dec. 6, 2003, in subsec. (a)(3), in subpara. (A), deleted "or" following the concluding semicolon, redesignated subpara. (B) as subpara. (C), and inserted new subpara. (B).

Other provisions:

Application of section. Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle B, § 8012(b), 104 Stat. 1388-345, provides: "The amendments made by subsection (a) [adding this section and amending the chapter analysis preceding 38 USCS § 1701] shall take effect with respect to medication furnished to a veteran after October 31, 1990, or the date of the enactment of this Act, whichever is later."


**Cross References**
This section is referred to in 38 USCS §§ 1729A, 1729B

**Research Guide**

**Am Jur:**
77 Am Jur 2d, Veterans and Veterans' Laws § 67

**§ 1723. Furnishing of clothing**

The Secretary shall not furnish clothing to persons who are in Department facilities, except (1) where the furnishing of such clothing to indigent persons is necessary to protect health or sanitation, and (2) where the Secretary furnishes veterans with special clothing made necessary by the wearing of prosthetic appliances.

**Prior law and revision:**
This section is based on 38 USC § 2532 (Act June 17, 1957, P. L. 85-56, Title V, Part C, § 523, 71 Stat. 113).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:
Veterans' Regulation No. 6(a) para. II.

**Explanatory notes:**

**Amendments:**
1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act), substituted "the Administrator" for "he" following "(2) where".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 623, as 38 USCS § 1723, and substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".

**Research Guide**

**Am Jur:**
77 Am Jur 2d, Veterans and Veterans' Laws § 65

Expense of cleaning and pressing clothing of neuropsychiatric or any other patients validly hospitalized is payable if such service is necessary part of hospital treatment and patient is financially unable to pay; Administration [now Department] is not to bear expense of cleaning and repairing clothing if patient has available funds of his own on deposit at facility. 1933 ADVA 164

**§ 1724. Hospital care, medical services and nursing home care abroad**
Discussion and Analysis in the Veterans Benefits Manual

(a) Except as provided in subsections (b) and (c), the Secretary shall not furnish hospital or domiciliary care or medical services outside any State.

(b) (1) The Secretary may furnish hospital care and medical services outside a State to a veteran who is otherwise eligible to receive hospital care and medical services if the Secretary determines that such care and services are needed for the treatment of a service-connected disability of the veteran or as part of a rehabilitation program under chapter 31 of this title [38 USCS §§ 3100 et seq.].

(2) Care and services for a service-connected disability of a veteran who is not a citizen of the United States may be furnished under this subsection only--
   (A) if the veteran is in the Republic of the Philippines or in Canada; or
   (B) if the Secretary determines, as a matter of discretion and pursuant to regulations which the Secretary shall prescribe, that it is appropriate and feasible to furnish such care and services.

(c) Within the limits of those facilities of the Veterans Memorial Medical Center at Manila, Republic of the Philippines, for which the Secretary may contract, the Secretary may furnish necessary hospital care to a veteran for any non-service-connected disability if such veteran is unable to defray the expenses of necessary hospital care. The Secretary may enter into contracts to carry out this section.

(d) The Secretary may furnish nursing home care, on the same terms and conditions set forth in section 1720(a) of this title [38 USCS § 1720(a)], to any veteran who has been furnished hospital care in the Philippines pursuant to this section, but who requires a protracted period of nursing home care.

(e) Within the limits of an outpatient clinic in the Republic of the Philippines that is under the direct jurisdiction of the Secretary, the Secretary may furnish a veteran who has a service-connected disability with such medical services as the Secretary determines to be needed.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Veterans' Regulation No. 6(a), para. IV (as amended Act Oct. 17, 1940, ch 893, § 4, 54 Stat. 1195).

Explanatory notes:

The amendment made by § 1(a)(1) of Act Oct. 27, 2000, P. L. 106-377, is based on § 501(c) of Title V of H.R. 5482 (114 Stat. 1441A-58), as introduced on Oct. 18, 2000, which was enacted into law by such § 1(a)(1).

A prior § 1724 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3524.

Amendments:
1959. Act Aug. 11, 1959, substituted subsec. (b) for one which read:

"(b) The Administrator may furnish necessary hospital care and medical services for any service-connected disability--

"(1) if incurred during a period of war, to any veteran who is a citizen of the United States temporarily sojourning or residing abroad except in the Republic of the Philippines; or

"(2) whenever incurred, to any otherwise eligible veteran in the Republic of the Philippines."

1960. Act July 12, 1960, in subsec. (a), substituted "any state" for "the continental limits of the United States, or a Territory, Commonwealth, or possession of the United States".


1973. Act Aug. 2, 1973 (effective 9/1/73, as provided by § 501 of such Act, which appears as 38 USCS § 1701 note), substituted new section catchline for one which read: "§ 624. Hospital care and medical services abroad"; added subsec. (d).

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (c), substituted "the Administrator" for "he" preceding "may furnish" and deleted "of any war" following "a veteran".

1978. Act Oct. 26, 1978, in subsec. (c), substituted "Veterans Memorial Medical Center" for "Veterans Memorial Hospital".

1981. Act Nov. 3, 1981, in subsec. (d), deleted "and at the same rate as specified in section 632(a)(4) of this title" preceding "to any veteran".

1982. Act Oct. 12, 1982 purported to amend the heading of this section by substituting "Hospital care, medical services, and nursing home care abroad" for "Hospital care and medical services abroad"; however, Act Aug. 2, 1973, P. L. 93-82, Title I, § 108, 87 Stat. 186 (see the 1973 Amendments note to this section) had previously amended the heading of this section; thus, the heading of this section was substituted for one which read: "Hospital care, medical services and nursing home care abroad" to conform to the probable intent of Congress.

1988. Act May 20, 1988 substituted subsec. (b) for one which read: "(b) The Administrator may furnish necessary hospital care and medical services to any otherwise eligible veteran for any service-connected disability if the veteran (1) is a citizen of the United States sojourning or residing abroad, or (2) is in the Republic of the Philippines.".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 624, as 38 USCS § 1724, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".


Other provisions:

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Cross References

This section is referred to in 38 USCS §§ 1703, 1722, 1732

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 53

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§ 1725. Reimbursement for emergency treatment

(a) General authority.
   (1) Subject to subsections (c) and (d), the Secretary may reimburse a veteran described in subsection (b) for the reasonable value of emergency treatment furnished the veteran in a non-Department facility.
   (2) In any case in which reimbursement is authorized under subsection (a)(1), the Secretary, in the Secretary's discretion, may, in lieu of reimbursing the veteran, make payment of the reasonable value of the furnished emergency treatment directly--
      (A) to a hospital or other health care provider that furnished the treatment; or
      (B) to the person or organization that paid for such treatment on behalf of the veteran.

(b) Eligibility.
   (1) A veteran referred to in subsection (a)(1) is an individual who is an active Department health-care participant who is personally liable for emergency treatment furnished the veteran in a non-Department facility.
   (2) A veteran is an active Department health-care participant if--
      (A) the veteran is enrolled in the health care system established under section 1705(a) of this title [38 USCS § 1705(a)]; and
      (B) the veteran received care under this chapter [38 USCS §§ 1701 et seq.] within the 24-month period preceding the furnishing of such emergency treatment.
   (3) A veteran is personally liable for emergency treatment furnished the veteran in a non-Department facility if the veteran--
      (A) is financially liable to the provider of emergency treatment for that treatment;
      (B) has no entitlement to care or services under a health-plan contract (determined, in the case of a health-plan contract as defined in subsection (f)(2)(B) or (f)(2)(C), without regard to any requirement or limitation relating to eligibility for care or services from any department or agency of the United States);
      (C) has no other contractual or legal recourse against a third party that would, in whole or in part, extinguish such liability to the provider; and
      (D) is not eligible for reimbursement for medical care or services under section 1728 of this title [38 USCS § 1728].

(c) Limitations on reimbursement.
   (1) The Secretary, in accordance with regulations prescribed by the Secretary, shall--
      (A) establish the maximum amount payable under subsection (a);
      (B) delineate the circumstances under which such payments may be made, to include such requirements on requesting reimbursement as the Secretary shall establish; and
      (C) provide that in no event may a payment under that subsection include any amount for which the veteran is not personally liable.
   (2) Subject to paragraph (1), the Secretary may provide reimbursement under this section only after the veteran or the provider of emergency treatment has exhausted without success all claims and remedies reasonably available to the veteran or provider against a third party for payment of such treatment.
(3) Payment by the Secretary under this section on behalf of a veteran to a provider of emergency treatment shall, unless rejected and refunded by the provider within 30 days of receipt, extinguish any liability on the part of the veteran for that treatment. Neither the absence of a contract or agreement between the Secretary and the provider nor any provision of a contract, agreement, or assignment to the contrary shall operate to modify, limit, or negate the requirement in the preceding sentence.

(d) Independent right of recovery.

(1) In accordance with regulations prescribed by the Secretary, the United States shall have the independent right to recover any amount paid under this section when, and to the extent that, a third party subsequently makes a payment for the same emergency treatment.

(2) Any amount paid by the United States to the veteran (or the veteran's personal representative, successor, dependents, or survivors) or to any other person or organization paying for such treatment shall constitute a lien in favor of the United States against any recovery the payee subsequently receives from a third party for the same treatment.

(3) Any amount paid by the United States to the provider that furnished the veteran's emergency treatment shall constitute a lien against any subsequent amount the provider receives from a third party for the same emergency treatment for which the United States made payment.

(4) The veteran (or the veteran's personal representative, successor, dependents, or survivors) shall ensure that the Secretary is promptly notified of any payment received from any third party for emergency treatment furnished to the veteran. The veteran (or the veteran's personal representative, successor, dependents, or survivors) shall immediately forward all documents relating to such payment, cooperate with the Secretary in the investigation of such payment, and assist the Secretary in enforcing the United States right to recover any payment made under subsection (c)(3).

(e) Waiver. The Secretary, in the Secretary's discretion, may waive recovery of a payment made to a veteran under this section that is otherwise required by subsection (d)(1) when the Secretary determines that such waiver would be in the best interest of the United States, as defined by regulations prescribed by the Secretary.

(f) Definitions. For purposes of this section:

(1) The term "emergency treatment" means medical care or services furnished, in the judgment of the Secretary--

(A) when Department or other Federal facilities are not feasibly available and an attempt to use them beforehand would not be reasonable;

(B) when such care or services are rendered in a medical emergency of such nature that a prudent layperson reasonably expects that delay in seeking immediate medical attention would be hazardous to life or health; and

(C) until such time as the veteran can be transferred safely to a Department facility or other Federal facility.

(2) The term "health-plan contract" includes any of the following:

(A) An insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or similar arrangement under which health services for individuals are provided or the expenses of such services are paid.
(B) An insurance program described in section 1811 of the Social Security Act (42 U.S.C. 1395c) or established by section 1831 of that Act (42 U.S.C. 1395j).
(C) A State plan for medical assistance approved under title XIX of such Act (42 U.S.C. 1396 et seq.).
(D) A workers' compensation law or plan described in section 1729(a)(2)(A) of this title [38 USCS § 1729(a)(2)(A)].
(E) A law of a State or political subdivision described in section 1729(a)(2)(B) of this title [38 USCS § 1729(a)(2)(B)].

(3) The term "third party" means any of the following:

(A) A Federal entity.
(B) A State or political subdivision of a State.
(C) An employer or an employer's insurance carrier.
(D) An automobile accident reparations insurance carrier.
(E) A person or entity obligated to provide, or to pay the expenses of, health services under a health-plan contract.

Explanatory notes:

Effective date of section:
This section takes effect 180 days after enactment of Act Nov. 30, 1999, P. L. 106-117, pursuant to § 111(c) of such Act, which appears as a note to this section.

Other provisions:
Effective date of Nov. 30, 1999 amendments. Act Nov. 30, 1999, P. L. 106-117, Title I, Subtitle B, § 111(c), 113 Stat. 1556, provides: "The amendments made by this section [adding this section and amending 38 USCS § 1729A and the chapter analysis preceding 38 USCS § 1701] shall take effect 180 days after the date of the enactment of this Act."

Implementation reports. Act Nov. 30, 1999, P. L. 106-117, Title I, Subtitle B, § 111(d), 113 Stat. 1556, provides: "The Secretary shall include with the budget justification materials submitted to Congress in support of the Department of Veterans Affairs budget for fiscal year 2002 and for fiscal year 2003 a report on the implementation of section 1725 of title 38, United States Code, as added by subsection (a). Each such report shall include information on the experience of the Department under that section and the costs incurred, and expected to be incurred, under that section."

Cross References
This section is referred to in 38 USCS § 1729A

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 59

§ 1726. Reimbursement for loss of personal effects by natural disaster
The Secretary shall, under regulations which the Secretary shall prescribe, reimburse veterans in Department hospitals and domiciliaries for any loss of personal effects
sustained by fire, earthquake, or other natural disaster while such effects were stored in designated locations in Department hospitals or domiciliaries.

Prior law and revision:
This section is based on 38 USC § 2526 (Act June 17, 1957, P. L. 85-56, Title V, Part C, § 526, 71 Stat 114).
This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Explanatory notes:
A prior § 1726 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3526.

Amendments:
1973. Act Aug. 2, 1973 (effective 1/1/71, as provided by § 501 of such Act, which appears as 38 USCS § 1701 note), substituted new section catchline for one which read: "§ 626. Reimbursement for loss of personal effects by fire"; and substituted "fire, earthquake, or other natural disaster" for "fire".
1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), substituted "the Administrator" for "he" preceding "shall prescribe".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 626, as 38 USCS § 1726, and substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".

§ 1727. Persons eligible under prior law

Persons who have a status which would, under the laws in effect on December 31, 1957, entitle them to the medical services, hospital and domiciliary care, and other benefits, provided for in this chapter [38 USCS §§ 1701 et seq.], but who do not meet the service requirements contained in this chapter, shall be entitled to such benefits notwithstanding failure to meet such service requirements.

Prior law and revision:

Amendments:
1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), substituted "1957" for "1958".

Research Guide
Am Jur: 77 Am Jur 2d, Veterans and Veterans' Laws § 55
    Care at contract nursing home under Veterans' Administration [now Department of Veterans Affairs] auspices constitutes care by Veterans' Administration within meaning of 38 USCS § 627
[now 38 USCS § 1727], allowing readmission to VA hospital without regard to current eligibility criteria. VA GCO 8-76, reissued 1991 VAOPGCPREC LEXIS 1202

§ 1728. Reimbursement of certain medical expenses

Discussion and Analysis in the Veterans Benefits Manual

(a) The Secretary may, under such regulations as the Secretary shall prescribe, reimburse veterans entitled to hospital care or medical services under this chapter [38 USCS §§ 1701 et seq.] for the reasonable value of such care or services (including travel and incidental expenses under the terms and conditions set forth in section 111 of this title [38 USCS § 111]), for which such veterans have made payment, from sources other than the Department, where--

(1) such care or services were rendered in a medical emergency of such nature that delay would have been hazardous to life or health;

(2) such care or services were rendered to a veteran in need thereof (A) for an adjudicated service-connected disability, (B) for a non-service-connected disability associated with and held to be aggravating a service-connected disability, (C) for any disability of a veteran who has a total disability permanent in nature from a service-connected disability, or (D) for any illness, injury, or dental condition in the case of a veteran who (i) is a participant in a vocational rehabilitation program (as defined in section 3101(9) of this title [38 USCS § 3101(9)]), and (ii) is medically determined to have been in need of care or treatment to make possible such veteran's entrance into a course of training, or prevent interruption of a course of training, or hasten the return to a course of training which was interrupted because of such illness, injury, or dental condition; and

(3) Department or other Federal facilities were not feasibly available, and an attempt to use them beforehand would not have been reasonable, sound, wise, or practical.

(b) In any case where reimbursement would be in order under subsection (a) of this section, the Secretary may, in lieu of reimbursing such veteran, make payment of the reasonable value of care or services directly--

(1) to the hospital or other health facility furnishing the care or services; or

(2) to the person or organization making such expenditure on behalf of such veteran.

Effective date of section:


Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), in the introductory matter, substituted "the Administrator" for "he" preceding "shall prescribe", in para. (1), substituted "delay" for "they", in para. (2)(D)(ii), substituted "such veteran's" for "his".

1979. Act Dec. 20, 1979 (effective 1/1/80, as provided by § 206 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), purported to substitute "travel and incidental expenses under the terms and conditions set forth in section 111 of this title" for "the necessary travel", however, inasmuch as the phrase "the necessary travel" did not appear in subsec. (a), the language to be inserted was substituted for the phrase "necessary travel" in order to implement the probable intent of Congress.
1989. Act Dec. 18, 1989 (applicable as provided by § 202(b) of such Act, which appears as a note to this section), in subsec. (a)(2)(D), substituted "(i) a participant in a vocational rehabilitation program (as defined in section 1501(9) of this title), and (ii)" for "found to be (i) in need of vocational rehabilitation under chapter 31 of this title and for whom an objective had been selected or (ii) pursuing a course of vocational rehabilitation training and".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 628, as 38 USCS § 1728, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".

Other provisions:

Application of amendment made by Act Dec. 18, 1989. Act Dec. 18, 1989, P. L. 101-237, Title II, § 202(b), 103 Stat. 2067, provides: "The amendment made by subsection (a) [amending subsec. (a)(2)(D) of this section] shall apply with respect to hospital care and medical services received on or after the date of the enactment of this Act."

Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References

This section is referred to in 38 USCS § 1725

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 64

1. Generally

2. Medical emergencies

3. Unavailability of federal facilities

1. Generally

Board did not err in denying veteran reimbursement for costs of hearing aids which he had purchased without obtaining previous authorization. Verna v Derwinski (1991) 1 Vet App 615

Board did not err in denying veteran's brother's claim for reimbursement of medical expenses incurred while veteran was in county hospital prior to his transfer to Veterans' Administration [now Department of Veterans Affairs] hospital; at no time during veteran's life was he found to have any service-connected disabilities. Hayes v Brown (1993) 6 Vet App 66

2. Medical emergencies

Although there was medical emergency and federal facility was unavailable, veteran was not eligible for reimbursement from Veterans' Administration [now Department of Veterans Affairs] for his hospital stay because it did not involve service-connected for any disorder or disability. Smith v Derwinski (1992) 2 Vet App 378

Board failed to support its finding that no medical emergency existed so as to deny veteran's claim for reimbursement for coronary bypass surgery performed at private hospital; fact that Veterans' Administration [now Department of Veterans Affairs] hospital was in same city as hospital where surgery was performed was not adequate basis for finding that Veterans' Administration [now Department of Veterans Affairs] hospital was "available" to perform surgery, rather such determination must be made after consideration of such factors as urgent nature of appellant's medical condition and length of any delay that would have been required to obtain

In deciding veteran's entitlement to benefits under 38 C.F.R. § 17.121, Board of Veterans Appeals erred when it failed to make factual determination as to whether Veterans Administration physician exercised sound medical judgment in determining ending point of medical emergency at issue; in making such decision, board should have considered probative views of private physicians. Bellezza v Principi (2002) 16 Vet App 145, 2002 US App Vet Claims LEXIS 389

3. Unavailability of federal facilities

Although there was medical emergency and federal facility was unavailable, veteran was not eligible for reimbursement from Veterans' Administration [now Department of Veterans Affairs] for his hospital stay because it did not involve service-connected for any disorder or disability. Smith v Derwinski (1992) 2 Vet App 378

In determining whether veteran was entitled to reimbursement for previously unauthorized coronary artery bypass graft surgery, record provided no plausible basis for BVA's finding that surgery in near future could have been directly provided by Veterans' Administration [now Department of Veterans Affairs] hospital; at least, post-surgery Veterans' Administration [now Department of Veterans Affairs] memorandum raised question not adjudicated by Board, namely, whether "lengthy waiting period" at Veterans' Administration [now Department of Veterans Affairs] hospital was so lengthy that Veterans' Administration [now Department of Veterans Affairs] hospital was not feasibly available in order to perform recommended surgery "in the near future." Hennessey v Brown (1994) 7 Vet App 143

Claimant for veterans benefits was not entitled to reimbursement for rental expenses incurred at community residential care facility based on express prohibition of such payments under 38 USCS § 1730(b)(3), and it was not reimbursable as medical expense. Beverly v Nicholson (2005) 19 Vet App 394, 2005 US App Vet Claims LEXIS 836

§ 1729. Recovery by the United States of the cost of certain care and services

(a) (1) Subject to the provisions of this section, in any case in which a veteran is furnished care or services under this chapter [38 USCS §§ 1701 et seq.] for a non-service-connected disability described in paragraph (2) of this subsection, the United States has the right to recover or collect reasonable charges for such care or services (as determined by the Secretary) from a third party to the extent that the veteran (or the provider of the care or services) would be eligible to receive payment for such care or services from such third party if the care or services had not been furnished by a department or agency of the United States.

(2) Paragraph (1) of this subsection applies to a non-service-connected disability--
(A) that is incurred incident to the veteran's employment and that is covered under a workers' compensation law or plan that provides for payment for the cost of health care and services provided to the veteran by reason of the disability;
(B) that is incurred as the result of a motor vehicle accident to which applies a State law that requires the owners or operators of motor vehicles registered in that State to have in force automobile accident reparations insurance;
(C) that is incurred as the result of a crime of personal violence that occurred in a State, or a political subdivision of a State, in which a person injured as the result of such a crime is entitled to receive health care and services at such State's or subdivision's expense for personal injuries suffered as the result of such crime;
(D) that is incurred by a veteran--
(i) who does not have a service-connected disability; and
(ii) who is entitled to care (or payment of the expenses of care) under a health-plan contract; or

(E) for which care and services are furnished before October 1, 2007, under this chapter [38 USCS §§ 1701 et seq.] to a veteran who--
(i) has a service-connected disability; and
(ii) is entitled to care (or payment of the expenses of care) under a health-plan contract.

(3) In the case of a health-plan contract that contains a requirement for payment of a deductible or copayment by the veteran--
(A) the veteran's not having paid such deductible or copayment with respect to care or services furnished under this chapter [38 USCS §§ 1701 et seq.] shall not preclude recovery or collection under this section; and
(B) the amount that the United States may collect or recover under this section shall be reduced by the appropriate deductible or copayment amount, or both.

(b) (1) As to the right provided in subsection (a) of this section, the United States shall be subrogated to any right or claim that the veteran (or the veteran's personal representative, successor, dependents, or survivors) may have against a third party.

(2) (A) In order to enforce any right or claim to which the United States is subrogated under paragraph (1) of this subsection, the United States may intervene or join in any action or proceeding brought by the veteran (or the veteran's personal representative, successor, dependents, or survivors) against a third party.

(B) The United States may institute and prosecute legal proceedings against the third party if--
(i) an action or proceeding described in subparagraph (A) of this paragraph is not begun within 180 days after the first day on which care or services for which recovery is sought are furnished to the veteran by the Secretary under this chapter [38 USCS §§ 1701 et seq.];
(ii) the United States has sent written notice by certified mail to the veteran at the veteran's last-known address (or to the veteran's personal representative or successor) of the intention of the United States to institute such legal proceedings; and
(iii) a period of 60 days has passed following the mailing of such notice.

(C) A proceeding under subparagraph (B) of this paragraph may not be brought after the end of the six-year period beginning on the last day on which the care or services for which recovery is sought are furnished.

(c) (1) The Secretary may compromise, settle, or waive any claim which the United States has under this section.

(2) (A) The Secretary, after consultation with the Comptroller General of the United States, shall prescribe regulations for the purpose of determining reasonable charges for care or services under subsection (a)(1) of this section. Any determination of such charges shall be made in accordance with such regulations.

(B) Such regulations shall provide that reasonable charges for care or services sought to be recovered or collected from a third-party liable under a health-plan contract may not exceed the amount that such third party demonstrates to the satisfaction of the Secretary it would pay for the care or services if provided by
facilities (other than facilities of departments or agencies of the United States) in the same geographic area.
(C) Not later than 45 days after the date on which the Secretary prescribes such regulations (or any amendment to such regulations), the Comptroller General shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives the Comptroller General's comments on and recommendations regarding such regulations (or amendment).

(d) Any contract or agreement into which the Secretary enters with a person under section 3718 of title 31 [31 USCS § 3718] for collection services to recover indebtedness owed the United States under this section shall provide, with respect to such services, that such person is subject to sections 5701 and 7332 of this title [38 USCS §§ 5701 and 7332].

(e) A veteran eligible for care or services under this chapter [38 USCS §§ 1701 et seq.]--
   (1) may not be denied such care or services by reason of this section; and
   (2) may not be required by reason of this section to make any copayment or deductible payment in order to receive such care.

(f) No law of any State or of any political subdivision of a State, and no provision of any contract or other agreement, shall operate to prevent recovery or collection by the United States under this section or with respect to care or services furnished under section 1784 of this title [38 USCS § 1784].

(g) [Deleted]

(h) (1) Subject to paragraph (3) of this subsection, the Secretary shall make available medical records of a veteran described in paragraph (2) of this subsection for inspection and review by representatives of the third party concerned for the sole purposes of permitting the third party to verify--
   (A) that the care or services for which recovery or collection is sought were furnished to the veteran; and
   (B) that the provision of such care or services to the veteran meets criteria generally applicable under the health-plan contract involved.
   (2) A veteran described in this paragraph is a veteran who is a beneficiary of a health-plan contract under which recovery or collection is sought under this section from the third party concerned for the cost of the care or services furnished to the veteran.
   (3) Records shall be made available under this subsection under such conditions to protect the confidentiality of such records as the Secretary shall prescribe in regulations.

(i) For purposes of this section--
   (1) (A) The term "health-plan contract" means an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or similar arrangement, under which health services for individuals are provided or the expenses of such services are paid.
            (B) Such term does not include--
(i) an insurance program described in section 1811 of the Social Security Act (42 U.S.C. 1395c) or established by section 1831 of such Act (42 U.S.C. 1395j);
(ii) a State plan for medical assistance approved under title XIX of such Act (42 U.S.C. 1396 et seq.);
(iii) a workers' compensation law or plan described in subparagraph (A) of subsection (a)(2) of this section; or
(iv) a program, plan, or policy under a law described in subparagraph (B) or (C) of such subsection.

(2) The term "payment" includes reimbursement and indemnification.

(3) The term "third party" means--
(A) a State or political subdivision of a State;
(B) an employer or an employer's insurance carrier;
(C) an automobile accident reparations insurance carrier; or
(D) a person obligated to provide, or to pay the expenses of, health services under a health-plan contract.

Amendments:
1986. Act April 7, 1986 (effective as provided by § 19013(b) of such Act, which appears as a note to this section), substituted this section for one which read:

"(a) In any case in which a veteran is furnished care and services under this chapter for a non-service-connected disability that was incurred--

"(1) incident to the veteran's employment and the disability is covered under a workers' compensation law or plan that provides reimbursement for or indemnification of the cost of health care and services provided to the veteran by reason of the disability,

"(2) as the result of a motor vehicle accident to which applies a State law that requires the owners or operators of motor vehicles registered in that State to have in force automobile accident reparations insurance, or

"(3) as the result of a crime of personal violence that occurred in a State, or a political subdivision of a State, in which a person injured as the result of such a crime is entitled to receive health care and services at such State's or subdivision's expense for personal injuries suffered as the result of such crime,

the United States has the right to recover the reasonable costs of such care and services from the State, or political subdivision of a State, employer, employer's insurance carrier, or automobile accident reparations insurance carrier, as appropriate, to the extent that the veteran, or the provider of care and services to the veteran, would be eligible to receive reimbursement or indemnification for such care and services if the care and services had not been furnished by a department or agency of the United States.

"(b) The amount that may be recovered by the United States under subsection (a) of this section may not exceed the lesser of (1) an amount equal to the reasonable cost of the care and services furnished the veteran under this chapter, as determined by the Administrator, or (2) the maximum amount specified by the law of the State or political subdivision concerned or by any relevant contractual provision to which the veteran was a party or was subject. The Administrator shall prescribe regulations for the determination of the reasonable cost of care and services under clause (1) of the preceding sentence, and any determination of such reasonable value by the Administrator under such clause shall be made in accordance with such regulations. Regulations under the preceding sentence shall be prescribed only after notice and opportunity for public comment.

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"(c)(1) The United States shall, as to the right provided in subsection (a) of this section, be subrogated to any right or claim that the veteran or the veteran's personal representative, successor, dependents, or survivors may have against a State or political subdivision of a State, an employer, an employer's insurance carrier, or an automobile accident reparations insurance carrier.

"(2)(A) In order to enforce any right or claim to which it is subrogated under paragraph (1) of this subsection, the United States may intervene or join in any action or proceeding brought by the veteran or the veteran's personal representative, successor, dependents, or survivors against a State or political subdivision of a State, an employer, an employer's insurance carrier, or an automobile accident reparations insurance carrier.

"(B) If--

"(i) no such action or proceeding has been commenced within one hundred and eighty days after the first day on which care and services for which recovery is sought were furnished to the veteran by the Veterans' Administration under this chapter, and

"(ii) the United States has sent written notice by certified mail to the veteran at the veteran's last-known address (or to the veteran's personal representative or successor) of the intention of the United States to institute legal proceedings,

the United States may, sixty days after the mailing of such notice, institute and prosecute legal proceedings against the State, political subdivision, employer, employer's insurance carrier, or automobile accident reparations insurance carrier.

"(d) A veteran eligible for care and services under this chapter may not be denied such care and services by reason of this section.

"(e) No law of any State or of any political subdivision of a State, and no provision of any contract or agreement entered into, renewed, or modified under any State law, shall operate to prevent recovery by the United States (1) under subsection (a) of this section for care and services furnished under this chapter to any veteran for a non-service-connected disability, or (2) under section 611(b) of this title for care and services furnished under such section to an individual as a humanitarian service in an emergency case.".


1990. Act Nov. 5, 1990 (effective 10/1/90 as provided by § 8011(e) of such Act), in subsec. (a)(2), in subpara. (C), deleted "or" after the concluding semicolon, in subpara. (D), substituted "; or" for the concluding period, and added subpara. (E); in subsec. (c)(2)(B), substituted "if provided by" for "in accordance with the prevailing rates at which the third party makes payments under comparable health-plan contracts with"; and substituted subsec. (g) for one which read: "(g) Amounts collected or recovered on behalf of the United States under this section shall be deposited into the Treasury as miscellaneous receipts.".

1991. Act May 7, 1991, amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 629, as 38 USCS § 1729, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".


1996. Act Oct. 9, 1996, in subsec. (g), substituted "under subsection (f) or (g) of section 1710 of this title for hospital care, medical services, or nursing home care" for "under section
1710(f) of this title for hospital care or nursing home care, under section 1712(f) of this title for medical services, ".

1997. Act Aug. 5, 1997 (effective on enactment, as provided by § 8023(g) of such Act, which appears as 38 USCS § 712 note), in subsec. (a)(1), substituted "reasonable charges for" for "the reasonable cost of"; and, in subsec. (c)(2), in subpara. (A), substituted "reasonable charges for" for "the reasonable cost of" and substituted "charges" for "cost" and, in subpara. (B), substituted "reasonable charges for" for "the reasonable cost of".

Such Act further (effective 10/1/97, as provided by § 8023(g) of such Act, which appears as 38 USCS § 712 note) deleted subsec. (g), which read:

"(g)(1) There is established in the Treasury a fund to be known as the Department of Veterans Affairs Medical-Care Cost Recovery Fund (hereafter referred to in this section as the 'Fund').

"(2) Amounts recovered or collected under this section shall be deposited in the Fund.

"(3) Sums in the Fund shall be available to the Secretary for the following:

"(A) Payment of necessary expenses for the identification, billing, and collection of the cost of care and services furnished under this chapter, and for the administration and collection of payments required under subsection (f) or (g) of section 1710 of this title for hospital care, medical services, or nursing home care and under section 1722A of this title for medications, including--

"(i) the costs of computer hardware and software, word processing and telecommunications equipment, other equipment, supplies, and furniture;

"(ii) personnel training and travel costs;

"(iii) personnel and administrative costs for attorneys in the Office of General Counsel of the Department and for support personnel of such office;

"(iv) other personnel and administrative costs; and

"(v) the costs of any contract for identification, billing, or collection services.

"(B) Payment of the Secretary for reasonable charges, as determined by the Secretary, imposed for (i) services and utilities (including light, water, and heat) furnished by the Secretary, (ii) recovery and collection activities under this section, and (iii) administration of the Fund.

"(4) Not later than January 1 of each year, there shall be deposited into the Treasury as miscellaneous receipts an amount equal to the amount of the unobligated balance remaining in the Fund at the close of business on September 30 of the preceding year minus any part of such balance that the Secretary determines is necessary in order to enable the Secretary to defray, during the fiscal year in which the deposit is made, the expenses, payments, and costs described in paragraph (3)."

Such Act further, in subsec. (a)(2)(E), substituted "October 1, 2002" for "October 1, 1998."


Other provisions:

Application of section. Act Nov. 3, 1981, P. L. 97-72, Title I, § 106(b), 95 Stat. 1051, provided: "Section 629 [redesignated § 1729] of title 38, United States Code, as added by subsection (a), shall apply with respect to care and services furnished under chapter 17 of


Application April 7, 1986 amendments. Act April 7, 1986, P. L. 99-272, Title XIX, Subtitle A, § 19013(b), 100 Stat. 385, provides:

"(1) Except as provided in paragraph (2), section 629 [redesignated § 1729] of title 38, United States Code, as amended by subsection (a), shall apply to care and services provided on or after the date of the enactment of this Act.

"(2)(A) Such section shall not apply so as to nullify any provision of a health-plan contract (as defined in subsection (i) of such section) that--

"(i) was entered into before the date of the enactment of this Act; and

"(ii) is not modified or renewed on or after such date.

"(B) In the case of a health-plan contract (as so defined) that was entered into before such date and which is modified or renewed on or after such date, the amendment made by subsection (a) [amending this section] shall apply--

"(i) with respect to such plan as of the day after the date that it is so modified or renewed; and

"(ii) with respect to care and services provided after such date of modification or renewal.

"(3) For purposes of paragraph (2), the term 'modified' includes any change in premium or coverage."

Reports. Act April 7, 1986, P. L. 99-272, Title XIX, Subtitle A, § 19013(c), 100 Stat. 385, provides:

"(1) Not later than six months after the date of the enactment of this Act, the Administrator of Veterans' Affairs shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on the process for and results of the implementation of section 629 [redesignated § 1729] of title 38, United States Code, as amended by subsection (a). Such report shall show the costs of administration (and a detailed breakdown of such costs) and the amount of receipts and collections under such section.

"(2) Not later than February 1, 1988, the Administrator shall submit to such Committees a report--

"(A) updating the information in the report submitted under paragraph (1); and

"(B) providing information on the process and results of such implementation through at least the end of fiscal year 1987.".

Transfer of funds. Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle B, § 8011(d), 104 Stat. 1388-345, provides:

"(1) Amount to be transferred. The Secretary of the Treasury shall transfer $25,000,000 from the Department of Veterans Affairs Loan Guaranty Revolving Fund to the Department of Veterans Affairs Medical-Care Cost Recovery Fund established by section 629(g) [redesignated § 1729(g)] of title 38, United States Code (as amended by subsection (c)). The amount so transferred shall be available until the end of September 30, 1991, for the support of the equivalent of 800 full-time employees and other expenses described in paragraph (3) of such section.

"(2) Reimbursement of Loan Guaranty Revolving Fund. Notwithstanding section 629(g) [redesignated § 1729(g)] of title 38, United States Code (as amended by subsection (c)), the first $25,000,000 recovered or collected by the Department of Veterans Affairs during fiscal
year 1991 as a result of third-party medical recovery activities shall be credited to the Department of Veterans Affairs Loan Guaranty Revolving Fund.

"(3) Third-party medical recovery activities defined. For the purposes of this subsection, the term 'third-party medical recovery activities' means recovery and collection activities carried out under section 629 [redesignated § 1729] of title 38, United States Code.".

Disposition of funds in Medical-Care Cost Recovery Fund. Act Aug. 5, 1997, P. L. 105-33, Title VIII, Subtitle B, § 8023(c), 111 Stat. 667 (effective 10/1/97, as provided by § 8023(g) of such Act, which appears as 38 USCS § 712 note), provides: "The amount of the unobligated balance remaining in the Department of Veterans Affairs Medical-Care Cost Recovery Fund (established pursuant to section 1729(g)(1) of title 38, United States Code) at the close of June 30, 1997, shall be deposited, not later than December 31, 1997, in the Treasury as miscellaneous receipts, and the Department of Veterans Affairs Medical-Care Cost Recovery Fund shall be terminated when the deposit is made.".

Certification of Department of Veterans Affairs healthcare facilities as Medicare and Medicaid providers. Act Aug. 2, 2002, P. L. 107-206, Title I, Ch. 13, 116 Stat. 888, provides:

"For the purposes of enabling the collection from third-party insurance carriers for non-service related medical care of veterans, all Department of Veterans Affairs healthcare facilities are hereby certified as Medicare and Medicaid providers and the Centers for Medicare and Medicaid Services within the Department of Health and Human Services shall issue each Department of Veterans Affairs healthcare facility a provider number as soon as practicable after the date of enactment of this Act: Provided further, That nothing in the preceding proviso shall be construed to enable the Department of Veterans Affairs to bill Medicare or Medicaid for any medical services provided by the Veterans Health Administration or to require the Centers for Medicare and Medicaid Services to pay for any medical services provided by the Department of Veterans Affairs.".

Code of Federal Regulations

Department of Veterans Affairs-Delegations of authority, 38 CFR Part 2

Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References

This section is referred to in 38 USCS § 1725, 1729A

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:181

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 58

1. Constitutionality
2. Costs related to motor vehicle accidents
3. Costs related to crimes of violence
4. Medicare-related insurance
5. Statute of limitations

1. Constitutionality

Under 38 USCS § 629 [now 38 USCS § 1729], United States is entitled to seek compensation from state’s crime victims compensation board for cost of medical treatment of veterans, who were crime victims, even though medical treatment was rendered without cost to veterans, since U. S. is to be treated as if veterans had received care by entity other than
government hospital subject to board's usual prerequisites for compensation; 38 USCS § 629 [now 38 USCS § 1729] does not violate Tenth Amendment, since it does not require crime victim's compensation board to award compensation to crime victims, but requires that states with victim compensation schemes not deny benefits simply because government treated of victim without cost. United States v New Jersey (1987, CA3 NJ) 831 F.2d 458

2. Costs related to motor vehicle accidents

In action by government to recover cost of medical treatment rendered to veteran seriously injured in hit and run automobile accident, Veteran's Administration [now Department of Veterans Affairs] was entitled to recover notwithstanding fact that accident occurred prior to effective date of 38 USCS § 629 [now 38 USCS § 1729], since triggering event is not accident, but care and services rendered. United States v State Farm Ins. Co. (1984, ED Mich) 599 F Supp 441

Fact that state statute provides that benefits paid under laws of state or federal government are to be subtracted from personal protection insurance benefit does not bar Veteran's Administration [now Department of Veterans Affairs] from recovering from automobile insurer cost of medical treatment of veteran seriously injured in hit and run automobile accident, where 38 USCS § 629 [now 38 USCS § 1729] provides that no law of any state shall prevent recovery. United States v State Farm Ins. Co. (1984, ED Mich) 599 F Supp 441

3. Costs related to crimes of violence

Statute permitted U.S. to recover from state costs of care provided to crime victims at veterans hospitals under state's Criminal Injuries Compensation Act since state act's serious financial hardship requirement would operate in vast majority of cases to prevent federal government from recovering its costs in treating crime victims where private hospital would be able to do so and was thus in conflict with 38 USCS § 629 [now 38 USCS § 1729]. United States v Maryland (1990, CA4 Md) 914 F.2d 551

State statute's "economic loss" requirement under crime victims compensation scheme is preempted by 38 USCS § 629, where Congress intended § 629 to end discrimination against federal hospitals precisely like that state is espousing here, because present scheme places Veteran's Administration [now Department of Veterans Affairs] hospitals—which rarely bill for cost of care provided crime victims—in position which nearly guarantees they will never be eligible for reimbursement of costs. United States v Ohio (1990, SD Ohio) 756 F Supp 340, affd (1992, CA6 Ohio) 957 F.2d 231, reh, en banc, den (1992, CA6) 1992 US App LEXIS 6209 and cert den (1992) 506 US 823, 121 L Ed 2d 40, 113 S Ct 75

4. Medicare-related insurance

Insurer offering gap-filling coverage to Medicare patients may not construe its coverage to exclude reimbursement to VA hospitals because hospitals do not derive benefits from Medicare system; insurer's interpretation would discriminate against Veteran's Administration [now Department of Veterans Affairs] hospitals, and medigap policies are health-plan contracts. United States v Blue Cross & Blue Shield, Inc. (1993, CA4 Md) 989 F.2d 718, cert den (1993) 510 US 914, 126 L Ed 2d 250, 114 S Ct 302

U.S. may recover from private insurer reasonable costs of health care provided by Veteran's Administration [now Department of Veterans Affairs] hospital to veterans under medigap policies, to same extent non-federal provider could recover; only reason federal Medicare program is beyond reach of section is to avoid inefficient procedure of having one arm of federal government reimburse another, but this does not exclude private insurance policies. United States v Capital Blue Cross (1993, CA3 Pa) 992 F.2d 1270, 41 Soc Sec Rep Serv 127

Medigap policies are health-plan contracts as defined by statute since they are policies under which expenses of health services are paid, and plain language of exclusion refers only to Medicare and does nothing to exclude from definition of health-plan contracts those policies issued by private insurance companies as supplement to Medicare benefits. United States v Blue Cross/Blue Shield (1993, CA11 Ala) 999 F.2d 1542, 7 FLW Fed C 806, cert den (1994) 510 US 1112, 127 L Ed 2d 376, 114 S Ct 1056
Medicare-eligible veterans are entitled to recover cost of care and services furnished at Veteran's Administration [now Department of Veterans Affairs] medical center under Medicare supplemental insurance policies, where U.S. brings suit on their behalf under 38 USCS § 1729(a)(1), because contention that insurer need not pay Medicare supplements since Veteran's Administration [now Department of Veterans Affairs] medical center is ineligible to receive benefits from Medicare is without merit. United States v Blue Cross & Blue Shield, Inc. (1992, DC Md) 790 F Supp 106, affd (1993, CA4 Md) 989 F.2d 718, cert den (1993) 510 US 914, 126 L Ed 2d 250, 114 S Ct 302

Medigap insurer must pay U.S. for covered care and services furnished veterans at Veteran's Administration [now Department of Veterans Affairs] hospitals, even though Veteran's Administration [now Department of Veterans Affairs] hospitals may not recover expenses for care and services from Medicare program under 38 USCS § 1729 and are thus not technically "participating hospitals" under Medigap policy, because § 1729(a)(1) and (f) compel conclusion that care and services furnished to nonservice-connected veteran by Veteran's Administration [now Department of Veterans Affairs] hospital must, as matter of law, be deemed to have been furnished by "participating hospital" in action to recover benefits thereunder. United States v Blue Cross & Blue Shield (1992, ND Ala) 791 F Supp 288, affd (1993, CA11 Ala) 999 F.2d 1542, 7 FLW Fed C 806, cert den (1994) 510 US 1112, 127 L Ed 2d 376, 114 S Ct 1056

Health insurer must reimburse federal government pursuant to 38 USCS § 1729(a) for reasonable cost of health care furnished to veterans at Veteran's Administration [now Department of Veterans Affairs] hospital for nonservice-related maladies, where veterans had purchased Medigap policies from insurer which by their terms do not cover health care not eligible for Medicare reimbursement, because since very few private hospital facilities do not participate in Medicare, such policies violate § 1729 by acting to bar recovery to Veteran's Administration [now Department of Veterans Affairs] facilities while permitting recovery by private facilities in same situation. United States v Capital Blue Cross (1992, MD Pa) 796 F Supp 144, affd (1993, CA3 Pa) 992 F.2d 1270, 41 Soc Sec Rep Serv 127

5. Statute of limitations

State's 1-year statute of limitations is no defense to government's claim for cost of medical treatment of veteran injured in hit and run automobile accident, since United States is exempt from operation of statutes of limitations except in those instances where it expressly imposes limitation upon itself. United States v State Farm Ins. Co. (1984, ED Mich) 599 F Supp 441

Action by Veteran's Administration [now Department of Veterans Affairs] to recover medical costs of treating veteran injured in automobile accident is grounded on quasi-contract and thus subject to 6-year statute of limitations for actions founded upon any contract, rather than 3-year limit for actions founded upon tort. United States v State Farm Ins. Co. (1984, ED Mich) 599 F Supp 441

§ 1729A. Department of Veterans Affairs Medical Care Collections Fund

(a) There is in the Treasury a fund to be known as the Department of Veterans Affairs Medical Care Collections Fund.

(b) Amounts recovered or collected under any of the following provisions of law shall be deposited in the fund:

(1) Section 1710(f) of this title [38 USCS § 1710(f)].
(2) Section 1710(g) of this title [38 USCS § 1710(g)].
(3) Section 1711 of this title [38 USCS § 1711].
(4) Section 1722A of this title [38 USCS § 1722A].
(5) Section 1725 of this title [38 USCS § 1725].
(6) Section 1729 of this title [38 USCS § 1729].
(7) Section 1784 of this title [38 USCS § 1784].
(8) Section 8165(a) of this title [38 USCS § 8165(a)].
(10) Public Law 87-693, popularly known as the "Federal Medical Care Recovery Act" (42 U.S.C. 2651 et seq.), to the extent that a recovery or collection under that law is based on medical care or services furnished under this chapter [38 USCS §§ 1701 et seq.].

(c) (1) Subject to the provisions of appropriations Acts, amounts in the fund shall be available, without fiscal year limitation, to the Secretary for the following purposes:
(A) Furnishing medical care and services under this chapter [38 USCS §§ 1701 et seq.], to be available during any fiscal year for the same purposes and subject to the same limitations (other than with respect to the period of availability for obligation) as apply to amounts appropriated from the general fund of the Treasury for that fiscal year for medical care.
(B) Expenses of the Department for the identification, billing, auditing, and collection of amounts owed the United States by reason of medical care and services furnished under this chapter [38 USCS §§ 1701 et seq.].
(2) Amounts available under paragraph (1) may not be used for any purpose other than a purpose set forth in subparagraph (A) or (B) of that paragraph.
(3) [Deleted]

(d) Of the total amount recovered or collected by the Department during a fiscal year under the provisions of law referred to in subsection (b) and made available from the fund, the Secretary shall make available to each Department health care facility [of the Department] an amount that bears the same ratio to the total amount so made available as the amount recovered or collected by such facility during that fiscal year under such provisions of law bears to such total amount recovered or collected during that fiscal year. The Secretary shall make available to each facility the entirety of the amount specified to be made available to such facility by the preceding sentence.

(e) Amounts recovered or collected under the provisions of law referred to in subsection (b) shall be treated for the purposes of sections 251 and 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 901, 902) as offsets to discretionary appropriations (rather than as offsets to direct spending) to the extent that such amounts are made available for expenditure in appropriations Acts for the purposes specified in subsection (c).

(f) [Redesignated]

Explanatory notes:
The words "of the Department" have been enclosed in brackets in subsec. (d) to indicate the probable intent of Congress to delete them.

Effective date of section:
This section took effect on October 1, 1997, pursuant to § 8023(g) of Act Aug. 5, 1997, P. L. 105-33, which appears as 38 USCS § 712 note.

Amendments:
Act Nov. 30, 1999 (effective 180 days after enactment, as provided by § 111(c) of such Act, which appears as 38 USCS § 1725 note), in subsec. (b), redesignated paras. (5) and (6) as paras. (6) and (7), respectively, and added new para. (5).

Act Jan. 23, 2002, in subsec. (b), redesignated para. (7) as para. (8), and inserted new para. (7).

Act Feb. 20, 2003, in subsec. (b), redesignated para. (8) as para. (10), and inserted new paras. (8) and (9).

Act Dec. 16, 2003, in subsec. (b), in the introductory matter, deleted "after June 30, 1997," following "collected"; in subsec. (c), deleted para. (3), which read:

"(3)(A) If for fiscal year 1998 the Secretary determines that the total amount to be recovered under the provisions of law specified in subsection (b) will be less than the amount contained in the latest Congressional Budget Office baseline estimate (computed under section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985) for the amount of such recoveries for fiscal year 1998 by at least $25,000,000, the Secretary shall promptly certify to the Secretary of the Treasury the amount of the shortfall (as estimated by the Secretary) that is in excess of $25,000,000. Upon receipt of such a certification, the Secretary of the Treasury shall, not later than 30 days after receiving the certification, deposit in the fund, from any unobligated amounts in the Treasury, an amount equal to the amount certified by the Secretary.

"(B) If for fiscal year 1998 a deposit is made under subparagraph (A) and the Secretary subsequently determines that the actual amount recovered for that fiscal year under the provisions of law specified in subsection (b) is greater than the amount estimated by the Secretary that was used for purposes of the certification by the Secretary under subparagraph (A), the Secretary shall pay into the general fund of the Treasury, from amounts available for medical care, an amount equal to the difference between the amount actually recovered and the amount so estimated (but not in excess of the amount of the deposit under subparagraph (A) pursuant to such certification).

"(C) If for fiscal year 1998 a deposit is made under subparagraph (A) and the Secretary subsequently determines that the actual amount recovered for that fiscal year under the provisions of law specified in subsection (b) is less than the amount estimated by the Secretary that was used for purposes of the certification by the Secretary under subparagraph (A), the Secretary shall promptly certify to the Secretary of the Treasury the amount of the shortfall. Upon receipt of such a certification, the Secretary of the Treasury shall, not later than 30 days after receiving the certification, deposit in the fund, from any unobligated amounts in the Treasury, an amount equal to the amount certified by the Secretary.";

deleted subsec. (e), which read:

"(e)(1) The Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives quarterly reports on the operation of this section for fiscal years 1998, 1999, and 2000 and for the first quarter of fiscal year 2001. Each such report shall specify the amount collected under each of the provisions specified in subsection (b) during the preceding quarter and the amount originally estimated to be collected under each such provision during such quarter.
“(2) A report under paragraph (1) for a quarter shall be submitted not later than 45 days after the end of that quarter.”;

and redesignated subsec. (f) as subsec. (e).

Other provisions:

Report on implementation of § 8023 of Act Aug. 5, 1997. Act Aug. 5, 1997, P. L. 105-33, Title VIII, Subtitle B, § 8023(f), 111 Stat. 667 (effective 10/1/97, as provided by § 8023(g) of such Act, which appears as 38 USCS § 712 note), provides: "Not later than January 1, 1999, the Secretary of Veterans Affairs shall submit to the Committees on Veterans’ Affairs of the Senate and House of Representatives a report on the implementation of this section. The report shall describe the collections under each of the provisions specified in section 1729A(b) of title 38, United States Code, as added by subsection (a). Information on such collections shall be shown for each of the health service networks (known as Veterans Integrated Service Networks) and, to the extent practicable for each facility within each such network. The Secretary shall include in the report an analysis of differences among the networks with respect to (A) the market in which the networks operates, (B) the effort expended to achieve collections, (C) the efficiency of such effort, and (D) any other relevant information.”.


“(a) Hereafter receipts that would otherwise be credited to the accounts listed in subsection (c) shall be deposited into the Medical Care Collections Fund, and shall be transferred to and merged with the ’Medical services’ account, in fiscal year 2005 and subsequent years, to remain available until expended, to carry out the purposes of the ’Medical services’ account.

“(b) The unobligated balances in the accounts listed in subsection (c), shall be transferred to and merged with the ’Medical services’ account in fiscal year 2005 and subsequent years, and remain available until expended, to carry out the purposes of the ’Medical services’ account: Provided, That the obligated balances in these accounts may be transferred to the ’Medical services’ account at the discretion of the Secretary of Veterans Affairs and shall remain available until expended.

“(c) Veterans Extended Care Revolving Fund; Medical Facilities Revolving Fund; Special Therapeutic and Rehabilitation Fund; Nursing Home Revolving Fund; Veterans Health Services Improvement Fund; and Parking Revolving Fund.”.


Code of Federal Regulations

Department of Veterans Affairs-Delegations of authority, 38 CFR Part 2

Cross References

This section is referred to in 38 USCS § 1729B

[§ 1729B. Repealed]


Other provisions:


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Improvement Fund established under such section shall be transferred to the Department of Veterans Affairs Medical Care Collections Fund established under section 1729A of title 38, United States Code.”.

§ 1730. Community residential care

(a) Subject to this section and regulations to be prescribed by the Secretary under this section, the Secretary may assist a veteran by referring such veteran for placement in, and aiding such veteran in obtaining placement in, a community residential-care facility if--

(1) at the time of initiating the assistance the Secretary--
   (A) is furnishing the veteran medical services on an outpatient basis or hospital, domiciliary, or nursing home care; or
   (B) has furnished the veteran such care or services within the preceding 12 months; and
(2) placement of the veteran in a community residential-care facility is appropriate.

(b) (1) The Secretary may not provide assistance under subsection (a) of this section with respect to a community residential-care facility unless such facility is approved by the Secretary for the purposes of this section.

(2) The Secretary's approval of a facility for the purposes of this section shall be based upon the Secretary's determination, after inspection of the facility, that the facility meets the standards established in regulations prescribed under this section. Such standards shall include the following:
   (A) Health and safety criteria, including a requirement of compliance with applicable State laws and local ordinances relating to health and safety.
   (B) A requirement that the costs charged for care by a facility be reasonable, as determined by the Secretary, giving consideration to such factors as (i) the level of care, supervision, and other services to be provided, (ii) the cost of goods and services in the geographic area in which the facility is located, and (iii) comparability with other facilities in such area providing similar services.
   (C) Criteria for determining the resources that a facility needs in order to provide an appropriate level of services to veterans.
   (D) Such other criteria as the Secretary determines are appropriate to protect the welfare of veterans placed in a facility under this section.

(3) Payment of the charges of a community residential-care facility for any care or service provided to a veteran whom the Secretary has referred to that facility under this section is not the responsibility of the United States or of the Department.

(c) (1) In order to determine continued compliance by community residential-care facilities that have been approved under subsection (b) of this section with the standards established in regulations prescribed under this section, the Secretary shall provide for periodic inspection of such facilities. If the Secretary determines that a facility is not in compliance with such standards, the Secretary (in accordance with regulations prescribed under this section)--
   (A) shall cease to refer veterans to such facility; and
(B) may, with the permission of the veteran (or the person or entity authorized by
law to give permission on behalf of the veteran), assist in removing a veteran
from such facility.

Regulations prescribed to carry out this paragraph shall provide for reasonable notice
and, upon request made on behalf of the facility, a hearing before any action
authorized by this paragraph is taken.

(d) The Secretary shall prescribe regulations to carry out this section. Such regulations
shall include the standards required by subsection (b) of this section.

(e) (1) To the extent possible, the Secretary shall make available each report of an
inspection of a community residential-care facility under subsection (b)(2) or (c)(1) of
this section to each Federal, State, and local agency charged with the responsibility of
licensing or otherwise regulating or inspecting such facility.

(2) The Secretary shall make the standards prescribed in regulations under subsection
(d) of this section available to all Federal, State, and local agencies charged with the
responsibility of licensing or otherwise regulating or inspecting community
residential-care facilities.

(f) For the purpose of this section, the term "community residential-care facility" means a
facility that provides room and board and such limited personal care for and supervision
of residents as the Secretary determines, in accordance with regulations prescribed under
this section, are necessary for the health, safety, and welfare of residents.

Amendments:
redesignated former subpara. (A), cls. (i) and (ii) and former subpara. (B) as para. (1),
subparas. (A) and (B), and para. (2), respectively.
Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 630, as 38 USCS § 1730,
and substituted "Department" for "Veterans' Administration", "Secretary" for "Administrator",
and "Secretary's" for "Administrator's".

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
This section is referred to in 38 USCS § 2062

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:21

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 62
Claimant for veterans benefits was not entitled to reimbursement for rental expenses incurred
at community residential care facility based on express prohibition of such payments under 38
USCS § 1730(b)(3); claimant had raised informal claim for special monthly compensation, and
that issue was remanded for consideration. Beverly v Nicholson (2005) 19 Vet App 394, 2005 US
App Vet Claims LEXIS 836
§ 1731. Assistance to the Republic of the Philippines

The President is authorized to assist the Republic of the Philippines in fulfilling its responsibility in providing medical care and treatment for Commonwealth Army veterans and new Philippine Scouts in need of such care and treatment for service-connected disabilities and non-service-connected disabilities under certain conditions.

Prior law and revision:

This section is based on 38 USC § 2531 (Act June 17, 1957, P. L. 85-56, Title V, Part D, § 531, as added June 18, 1958, P. L. 85-461, § 2(a), 72 Stat. 201).

This section is also based on the following provisions, which were repealed by Act June 18, 1958, P. L. 85-461, § 5, 72 Stat. 203:


Explanatory notes:


Amendments:

1969. Act June 11, 1969, deleted "The total of such grants shall not exceed $1,500,000 for the calendar year 1958, and $1,000,000 for the calendar year 1959." following "such disabilities.".

1973. Act Aug. 2, 1973 (effective 7/1/73, as provided by § 501 of such Act), substituted new catchline and section for ones which read:

"§ 631. Grants to the Republic of the Philippines

"The President, in accordance with the agreement entered into pursuant to the Act of July 1, 1948, respecting hospitals and medical care for Commonwealth Army veterans (63 Stat. 2593), is authorized to assist the Republic of the Philippines in providing medical care and treatment for Commonwealth Army veterans in need of such care and treatment for service-connected disabilities through grants to reimburse the Republic of the Philippines for expenditures incident to hospital care of Commonwealth Army veterans in need thereof for such disabilities."


Other provisions:

Delegation of authority. For delegation to the Administrator of Veterans’ Affairs of certain of the President's authority relating to grants-in-aid to the Republic of the Philippines for medical care and treatment of veterans, see Ex. Or. No. 11762, which appears as 38 USCS § 1733 note.

Research Guide

Federal Procedure:
29 Fed Proc L Ed, Public Lands and Property § 66:724

Am Jur:
77 Am Jur 2d, Veterans and Veterans’ Laws § 55

§ 1732. Contracts and grants to provide for the care and treatment of United States veterans by the Veterans Memorial Medical Center

(a) The President, with the concurrence of the Republic of the Philippines, may authorize the Secretary to enter into contracts with the Veterans Memorial Medical Center, with the approval of the appropriate department of the Government of the Republic of the Philippines, covering the period beginning on October 1, 1981, and ending on September 30, 1994, under which the United States—

(1) will provide for payments for hospital care and medical services (including nursing home care) in the Veterans Memorial Medical Center, as authorized by section 1724 of this title [38 USCS § 1724] and on the terms and conditions set forth in such section, to eligible United States veterans at a per diem rate to be jointly determined for each fiscal year by the two Governments to be fair and reasonable; and

(2) may provide that payments for such hospital care and medical services provided to eligible United States veterans may consist in whole or in part of available medicines, medical supplies, and equipment furnished by the Secretary to the Veterans Memorial Medical Center at valuations therefor as determined by the Secretary, who may furnish such medicines, medical supplies, and equipment through the revolving supply fund pursuant to section 8121 of this title [38 USCS § 8121].

(b) (1) To further assure the effective care and treatment of United States veterans in the Veterans Memorial Medical Center, there is authorized to be appropriated for each fiscal year during the period beginning on October 1, 1981, and ending on September 30, 1990, the sum of $1,000,000 to be used by the Secretary for making grants to the Veterans Memorial Medical Center for the purpose of assisting the Republic of the Philippines in the replacement and upgrading of equipment and in rehabilitating the physical plant and facilities of such center.

(2) Grants under this subsection shall be made on such terms and conditions as prescribed by the Secretary. Such terms and conditions may include a requirement of prior approval by the Secretary of the uses of the funds provided by such grants.

(3) Funds for such grants may be provided only from appropriations made to the Department for the specific purpose of making such grants.
(c) The Secretary may stop payments under a contract or grant under this section upon reasonable notice as stipulated by the contract or grant if the Republic of the Philippines and the Veterans Memorial Medical Center do not maintain the medical center in a well-equipped and effective operating condition as determined by the Secretary.

(d) (1) The authority of the Secretary to enter into contracts and to make grants under this section is effective for any fiscal year only to the extent that appropriations are available for that purpose.

(2) Appropriations made for the purpose of this section shall remain available until expended.

Prior law and revision:
This section is based on 38 USC § 2532 (Act June 17, 1957, P. L. 85-56, Title V, Part D, § 532, as added June 18, 1958, P. L. 85-461, § 2(a), 72 Stat. 201).

Explanatory notes:
A prior § 1732 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3532.

Amendments:
1963. Act June 13, 1963, in para. (1), substituted "ten consecutive fiscal years," for "five consecutive fiscal years" and inserted "ending before July 1, 1963, nor $500,000 for any one fiscal year beginning on or after such date"; in the concluding matter, inserted "Such agreement may also provide that during the contract period specified in paragraph (1) of this section, payments for hospital care and for medical services provided to Commonwealth Army veterans or to United States veterans may consist in whole or in part of available medicines, medical supplies, and equipment furnished by the Administrator to the Veterans Memorial Hospital at valuations therefor as determined by the Administrator. The Administrator is authorized to furnish through the revolving supply fund, pursuant to section 5011 of this title, such medicines, medical supplies, and equipment as necessary for this purpose and to use therefor, as applicable, appropriations available for such payments."

1966. Act Sept. 30, 1966, designated existing matter as subsec. (a); in subsec. (a)(2), as so designated, inserted ", subject to necessary provisions for veterans covered by any modified agreement which may be made pursuant to subsection (b) of this section"; added subsecs. (b)-(e).

1969. Act June 11, 1969, in subsec. (b), substituted "September 30, 1966" for "the effective date of this amendment".

1973. Act Aug. 2, 1973 (effective 7/1/73, as provided by § 501 of such Act), substituted new catchline and section for ones which read:

"§ 632. Modification of agreement with the Republic of the Philippines effectuating the Act of July 1, 1948.

"(a) The President, with the concurrence of the Republic of the Philippines, is authorized to modify the agreement between the United States and the Republic of the Philippines respecting hospitals and medical care for Commonwealth Army veterans (63 Stat. 2593) in either or both of the following respects:

"(1) To provide that in lieu of any grants being made after July 1, 1958, under section 631 of this title, the Administrator may enter into a contract with the Veterans Memorial Hospital, with the approval of the appropriate department of the Government of the Republic of the Philippines, under which the United States will pay for hospital care in the Republic of the Philippines of Commonwealth Army veterans determined by the
Administrator to need such hospital care for service-connected disabilities. Such contract may be for a period of not more than ten consecutive fiscal years, beginning July 1, 1958, and shall provide for payments for such hospital care at a per diem rate to be jointly determined for each fiscal year by the two Governments to be fair and reasonable; but the total of such payments plus any payments for authorized travel expenses in connection with such hospital care shall not exceed $2,000,000 for any one fiscal year ending before July 1, 1963, nor $500,000 for any one fiscal year beginning on or after such date. In addition, such modified agreement may provide that, during the period covered by such contract, medical services for Commonwealth Army veterans determined by the Administrator to be in need thereof for service-connected disabilities shall be provided either in Veterans' Administration facilities, or by contract, or otherwise, by the Administrator in accordance with the conditions and limitations applicable generally to beneficiaries under section 612 of this title.

"(2) To provide for the use by the Republic of the Philippines of beds, equipment, and other facilities of the Veterans Memorial Hospital at Manila, not required for hospital care of Commonwealth Army veterans for service-connected disabilities, for hospital care of other persons in the discretion of the Republic of the Philippines, subject to necessary provisions for veterans could by any modified agreement which may be made pursuant to subsection (b) of this section. If such agreement is modified in accordance with this paragraph, such agreement (A) shall specify that priority of admission and retention in such hospital shall be accorded Commonwealth Army veterans needing hospital care for service-connected disabilities, and (B) shall not preclude the use of available facilities in such hospital on a contract basis for hospital care or medical services for persons eligible therefor from the Veterans’ Administration.

In addition, such agreement may provide for the payment of travel expenses pursuant to section 111 of this title for Commonwealth Army veterans in connection with hospital care or medical services furnished them. Such agreement may also provide that during the contract period specified in paragraph (1) of this section, payments for hospital care and for medical services provided to Commonwealth Army veterans or to United States veterans may consist in whole or in part of available medicines, medical supplies, and equipment furnished by the Administrator to the Veterans Memorial Hospital at valuations therefor as determined by the Administrator. The Administrator is authorized to furnish through the revolving supply fund, pursuant to section 5011 of this title, such medicines, medical supplies, and equipment as necessary for this purpose and to use therefor, as applicable, appropriations available for such payments.

"(b) Subject to the conditions set forth in subsection (c) of this section, such agreement may be further modified after September 30, 1966 to authorize extension of the contract specified in paragraph (1) of subsection (a) for an additional period ending June 30, 1973, and may authorize expansion of such contract to include payments for hospital care at the Veterans Memorial Hospital of Commonwealth Army veterans determined by the Administrator to need such care for non-service-connected disabilities if they are unable to defray the expenses of necessary hospital care. Such modified agreement may also provide for payments for hospital care, determined by the Administrator to be necessary, at the Veterans Memorial Hospital of new Philippine Scouts for service-connected disabilities, and for non-service-connected disabilities if they enlisted before July 4, 1946, and if they qualify as veterans of a war unable to defray the expenses of necessary hospital care. The total of such payments plus any payments for authorized travel expenses in connection with hospital care pursuant to any such modified agreement shall not exceed $1,200,000 for fiscal year 1967, including payments for any period in that year prior to the modified agreement, nor $2,000,000 for any one fiscal year thereafter. Such modified agreement may also provide that during the period covered by such contract medical services shall be continued as provided by the last sentence of paragraph (1) of subsection (a) for Commonwealth Army veterans for service-connected disabilities and medical services for new Philippine Scouts determined by
the Administrator to be in need thereof for service-connected disabilities shall be provided as authorized for Commonwealth Army veterans.

"(c) Any agreement or contract extended and modified pursuant to subsection (b) shall be conditioned on a commitment by the Republic of the Philippines and the Veterans Memorial Hospital that the equipment of such hospital will be replaced and upgraded as needed and that the existing physical plant and facilities of such hospital will be rehabilitated as soon as practicable to place the hospital on a sound and effective operating basis. It shall provide that failure to fulfill such commitment or to maintain the hospital in a well-equipped and effective operating condition, as determined by the Administrator, shall be a ground for stopping payments under the agreement upon reasonable notice as stipulated by the contract.

"(d) To assist the Republic of the Philippines in replacement and upgrading of equipment and in rehabilitating the physical plant and facilities of the Veterans Memorial Hospital, there is hereby authorized to be appropriated the sum of $500,000 to be used by the Administrator for making grants to the Veterans Memorial Hospital for this purpose on such terms and conditions as the Administrator may prescribe. Any such appropriation shall remain available until expended.

"(e) To further assure the effective care and treatment of patients in the Veterans Memorial Hospital, and having due regard for the special kinds of diseases from which these patients frequently suffer, there is hereby authorized to be appropriated for each fiscal year during the six years beginning with fiscal year 1967 the sum of $100,000 to be used by the Administrator for making grants to the Veterans Memorial Hospital for medical research and the training of health service personnel at the hospital. Such grants shall be made on terms and conditions prescribed by the Administrator, including approval by him of all research protocols, principal investigators, and training programs.

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (d), concluding matter, substituted "the Administrator" for "him" preceding "of all education".

1978. Act Oct. 26, 1978, in subsec. (a), in the introductory matter, substituted "contracts" for "a contract", substituted "Veterans Memorial Medical Center" for "Veterans Memorial Hospital", and substituted "September 30, 1981" for "June 30, 1978", in paras. (1), (2), (5), and (7), substituted "Veterans Memorial Medical Center" for "Veterans Memorial Hospital"; in subsec. (b), substituted "October 1, 1981" for "July 1, 1978"; in subsec. (c), substituted "Veterans Memorial Medical Center" for "Veterans Memorial Hospital"; and in subsec. (d), in the introductory matter, substituted "Veterans Memorial Medical Center" for "Veterans Memorial Hospital" and substituted "occurring during the period beginning July 1, 1973, and ending September 30, 1981-" for "during the five years beginning July 1, 1973, and ending June 30, 1981-", in paras. (1) and (2), substituted "Veterans Memorial Medical Center" for "Veterans Memorial Hospital".

1981. Act Nov. 3, 1981, substituted this catchline and section for ones which read:

"§ 632. Contracts and grants to provide hospital care, medical services and nursing home care

"(a) The President, with the concurrence of the Republic of the Philippines, may authorize the Administrator to enter into contracts with the Veterans Memorial Medical Center, with the approval of the appropriate department of the Government of the Republic of the Philippines, covering the period beginning on July 1, 1973, and ending on September 30, 1981, under which the United States--

"(1) will pay for hospital care in the Republic of the Philippines, or for medical services which shall be provided either in the Veterans Memorial Medical Center, or by contract, or otherwise by the Administrator in accordance with the conditions and limitations applicable generally to beneficiaries under section 612 of this title, for Commonwealth
Army veterans and new Philippine Scouts determined by the Administrator to be in need of such hospital care or medical services for service-connected disabilities;

"(2) will pay for hospital care at the Veterans Memorial Medical Center for Commonwealth Army veterans, and for new Philippine Scouts if they enlisted before July 4, 1946, determined by the Administrator to need such care for non-service-connected disabilities if they are unable to defray the expenses of necessary hospital care;

"(3) may provide for the payment of travel expenses pursuant to section 111 of this title for Commonwealth Army veterans and new Philippine Scouts in connection with hospital care or medical services furnished them;

"(4) may provide for payments for nursing home care, on the same terms and conditions as set forth in section 620(a) of this title, for any Commonwealth Army veteran or new Philippine Scout determined to need such care at a per diem rate not to exceed 50 per centum of the hospital per diem rate established pursuant to clause (6) of this subsection;

"(5) may provide that payments for hospital care and for medical services provided to Commonwealth Army veterans and new Philippine Scouts or to United States veterans may consist in whole or in part of available medicines, medical supplies, and equipment furnished by the Administrator to the Veterans Memorial Medical Center at valuations therefor as determined by the Administrator, who may furnish through the revolving supply fund, pursuant to section 5011 of this title, such medicines, medical supplies, and equipment as necessary for this purpose and to use therefore, as applicable, appropriations available for such payments;

"(6) will provide for payments for such hospital care at a per diem rate to be jointly determined for each fiscal year by the two Governments to be fair and reasonable; and

"(7) may stop payments under any such contract upon reasonable notice as stipulated by the contract if the Republic of the Philippines and the Veterans Memorial Medical Center fail to maintain such hospital in a well-equipped and effective operating condition, as determined by the Administrator.

"(b) The total of the payments authorized by subsection (a) of this section shall not exceed $2,000,000 for any one fiscal year ending before October 1, 1981, which shall include an amount not to exceed $250,000 for any one such fiscal year for the purposes of clause (4) of such subsection.

"(c) The contract authorized by subsection (a) of this section may provide for the use by the Republic of the Philippines of beds, equipment, and other facilities of the Veterans Memorial Medical Center at Manila, not required for hospital care of Commonwealth Army veterans or new Philippine Scouts for service-connected disabilities, for hospital care of other persons in the discretion of the Republic of the Philippines except that (1) priority of admission and retention in such hospital shall be accorded Commonwealth Army veterans and new Philippine Scouts needing hospital care for service-connected disabilities, and (2) such use shall not preclude the use of available facilities in such hospital on a contract basis for hospital care or medical services for persons eligible therefor from the Veterans’ Administration.

"(d) To further assure the effective care and treatment of patients in the Veterans Memorial Medical Center, there is authorized to be appropriated for each fiscal year occurring during the period beginning July 1, 1973, and ending September 30, 1981--

"(1) the sum of $50,000 to be used by the Administrator for making grants to the Veterans Memorial Medical Center for the purpose of education and training of health service personnel who are assigned to such hospital; and
“(2) the sum of $50,000 to be used by the Administrator for making grants to the Veterans Memorial Medical Center for the purpose of assisting the Republic of the Philippines in the replacement and upgrading of equipment and in rehabilitating the physical plant and facilities of such hospital.

Such grants shall be made on such terms and conditions as prescribed by the Administrator, including approval by the Administrator of all education and training programs conducted by the hospital under such grants. Any appropriation made for carrying out the purposes of clause (2) of this subsection shall remain available until expended.”.


1991. Act May 7, 1991, amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 632, as 38 USCS § 1732, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".


Other provisions:

Savings provisions. Act Aug. 2, 1973, P. L. 93-82, Title I, § 107(c), 87 Stat. 186, provided "Nothing in subsection (a) of this section [amending this section and 38 USCS § 1731] shall be deemed to affect in any manner any right, cause, obligation, contract (specifically including that contract executed April 25, 1967, between the Government of the Republic of the Philippines and the Government of the United States resulting from Public Law 89-612, which shall remain in force and effect until modified or superseded by an agreement executed under authority of this Act [for full classification, consult USCS Tables volumes]), authorization of appropriation, grant, function, power, or duty vested by law or otherwise under the provisions of section 632 [now § 1732] of title 38, United States Code, in effect on the day before the date of enactment of this section.".

Delegation of authority. For delegation to the Administrator of Veterans Affairs of certain of the President's authority relating to grants-in-aid to the Republic of the Philippines for medical care and treatment of veterans, see Ex. Or. No. 11762, located at 38 USCS § 1733 note.

Ratification of actions of Administrator between Oct. 1, 1986 and Oct. 28, 1986. Act Oct. 28, 1986, P. L. 99-576, Title II, Part A, § 206(a)(2), 100 Stat. 3256, provides: "Any action by the Administrator of Veterans Affairs in contracting under the provisions of section 632(a) [now § 1732(a)] of title 38, United States Code, with respect to the period beginning on October 1, 1986, and ending on the date of the enactment of this Act is hereby ratified.".

Reports on use of funds. Act Oct. 28, 1986, P. L. 99-576, Title II, Part A, § 206(b), 100 Stat. 3256, provides: "Not later than February 1, 1987, 1988, and 1989, the Administrator of Veterans' Affairs shall submit to Congress a report describing the use of funds provided to the Republic of the Philippines under section 632(b) [now § 1732(b)] of title 38, United States Code, during the preceding fiscal year.".

beginning on October 1, 1990, and ending on the date of the enactment of this Act are hereby ratified."

**Code of Federal Regulations**
Department of Veterans Affairs-Medical, 38 CFR Part 17

**Cross References**
This section is referred to in 38 USCS § 1703

**§ 1733. Supervision of program by the President**

The President, or any officer of the United States to whom the President may delegate authority under this section, may from time to time prescribe such rules and regulations and impose such conditions on the receipt of financial aid as may be necessary to carry out this subchapter [38 USCS §§ 1731 et seq.].

**Prior law and revision:**

This section is also based on the following provisions, which were repealed by Act June 18, 1958, P. L. 85-461, § 5, 72 Stat. 203:

**Explanatory notes:**

**Amendments:**
1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), substituted "the President" for "he" and deleted "his" following "delegate".

**Other provisions:**

"By virtue of the authority vested in me by section 633 [now § 1733] of title 38 and by section 301 of title 3 of the United States Code, and as President of the United States of America, it is hereby ordered as follows:

"Section 1. (a) Subject to the provisions of subsection (b) and (c) of this section, the Administrator of Veterans' Affairs is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, the authority vested in the President by sections 631, 632, 633, and 634 [now sections 1731, 1732, this section, and 1734] of title 38 of the United States Code, as amended by section 107(a) of the Veterans Health Care Expansion Act of 1973 (Public Law 93-82; 87 Stat. 184).

"(b) The Secretary of State shall negotiate the agreement, and any modifications thereby with the Republic of the Philippines required by the provisions of sections 631, 632, 633, and 634 [now sections 1731, 1732, this section, and 1734] of title 38 of the United States Code."
“(c) All rules and regulations prescribed by the Administrator pursuant to the authority
delegated to him by this order shall be subject to prior approval by the Director of the Office
of Management and Budget.

“Sec. 2. Nothing in this order shall be construed as modifying or terminating any other
authority heretofore delegated by the President to the Administrator of Veterans' Affairs.”.

§ 1734. Hospital and nursing home care and medical services in the United
States

Explanatory notes:

The amendment made by § 1(a)(1) of Act Oct. 27, 2000, P. L. 106-377, is based on § 501(b)
of Title V of H.R. 5482 (114 Stat. 1441A-57), as introduced on Oct. 18, 2000, which was
enacted into law by such § 1(a)(1).

A prior § 1734 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and
appears as 38 USCS § 3534.

A prior § 634 was redesignated § 635 by Act June 13, 1979, P. L. 96-22, Title I, § 106(a), 93
Stat. 53, effective Oct. 1, 1979, as provided by § 107 of such Act.

Effective date of section:

Act June 13, 1979, P. L. 96-22, Title I, § 107, 93 Stat. 53, provided that this section shall be
effective on October 1, 1979.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 634, as 38 USCS §
1734, and substituted "Department" for "Veterans' Administration" and "Secretary" for
"Administrator".

2000. Act Oct. 27, 2000, designated the existing provisions as subsec. (a); and added subsec.
(b).

2003. Act Nov. 6, 2003, substituted the text of this section for text which read:

"(a) The Secretary, within the limits of Department facilities, may furnish hospital and nursing
home care and medical services to Commonwealth Army veterans and new Philippine
Scouts for the treatment of the service-connected disabilities of such veterans and scouts.
“(b) An individual who is in receipt of benefits under subchapter II or IV of chapter 11 of this title paid by reason of service described in section 107(a) of this title who is residing in the United States and who is a citizen of, or an alien lawfully admitted for permanent residence in, the United States shall be eligible for hospital and nursing home care and medical services in the same manner as a veteran, and the disease or disability for which such benefits are paid shall be considered to be a service-connected disability for purposes of this chapter.”.

§ 1735. Definitions

For the purposes of this subchapter [38 USCS §§ 1731 et seq.].--

(1) The term "Commonwealth Army veterans" means persons who served before July 1, 1946, in the organized military forces of the Government of the Philippines, while such forces were in the service of the Armed Forces pursuant to the military order of the President dated July 26, 1941, including among such military forces organized guerrilla forces under commanders appointed, designated, or subsequently recognized by the Commander in Chief, Southwest Pacific Area, or other competent authority in the Army of the United States, and who were discharged or released from such service under conditions other than dishonorable. The term "new Philippine Scouts" means persons who served in the Philippine Scouts under section 14 of the Armed Forces Voluntary Recruitment Act of 1945, and who were discharged or released from such service under conditions other than dishonorable.

(2) The term "service-connected disabilities" means disabilities determined by the Secretary under laws administered by the Secretary to have been incurred in or aggravated by the service described in paragraph (1) in line of duty.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 18, 1958, P. L. 85-461, § 5, 72 Stat. 203:


References in text:


Explanatory notes:


Amendments:

1966. Act Sept. 30, 1966, in para. (1), inserted "The term 'new Philippine Scouts' means persons who served in the Philippine Scouts under section 14 of the Armed Forces Voluntary Recruitment Act of 1945, and who were discharged or released from such service under conditions other than dishonorable."

1979. Act June 13, 1979 (effective 10/1/79, as provided by § 107 of such Act), redesignated this section as § 635; it formerly appeared as § 634.
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 635, as 38 USCS § 1735, and substituted "administered by the Secretary" for "administered by the Veterans' Administration" and "Secretary" for "Administrator".

Other provisions:
Delegation of authority. For delegation to the Administrator of Veterans' Affairs of certain of the President's authority relating to grants-in-aid to the Republic of the Philippines for medical care and treatment of veterans, see Ex. Or. No. 11762, located at 38 USCS § 1733 note.

SUBCHAPTER V. PAYMENTS TO STATE HOMES

§ 1741. Criteria for payment
§ 1742. Inspections of such homes; restrictions on beneficiaries
§ 1743. Applications
§ 1744. Hiring and retention of nurses: payments to assist States

§ 1741. Criteria for payment

(a) (1) The Secretary shall pay each State at the per diem rate of--
(A) $8.70 for domiciliary care; and
(B) $20.35 for nursing home care and hospital care,
for each veteran receiving such care in a State home, if such veteran is eligible for such care in a Department facility.
(2) The Secretary may pay each State per diem at a rate determined by the Secretary for each veteran receiving extended care services described in any of paragraphs (4) through (6) of section 1710B(a) of this title [38 USCS § 1710B(a)] under a program administered by a State home, if such veteran is eligible for such care under laws administered by the Secretary.

(b) In no case shall the payments made with respect to any veteran under this section exceed one-half of the cost of the veterans' care in such State home.

(c) Whenever the Secretary makes a determination pursuant to section 1720(a)(2)(A) of this title [38 USCS § 1720(a)(2)(A)] that the cost of care furnished by the Department in a general hospital under the direct jurisdiction of the Secretary has increased, Secretary may, effective no earlier than the date of such determination, increase the rates paid under subsection (a) of this section by a percentage not greater than the percentage by which the Secretary has determined that such cost of care has increased.

(d) Subject to section 1743 of this title [38 USCS § 1743], the payment of per diem for care furnished in a State home facility shall commence on the date of the completion of the inspection for recognition of the facility under section 1742(a) of this title [38 USCS § 1742(a)] if the Secretary determines, as a result of that inspection, that the State home meets the standards described in such section.

(e) Payments to States pursuant to this section shall not be considered a liability of a third party, or otherwise be used to offset or reduce any other payment made to assist veterans.

Prior law and revision:

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Explanatory notes:

A prior § 1741 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3541.

Amendments:

1960. Act July 12, 1960, in subsec. (a), purported to substitute "at the per diem rate of $2.50 per diem for each veteran" for "at the annual rate of $700.00 for each veteran"; however, the substitution was made for "at the annual rate of $700 for each veteran" in order to effectuate the probable intent of Congress.


"No reduction shall be made under this subsection by reason of the retention or collection by a State home of any amounts from the estate of a deceased veteran if such amounts are placed in a post fund or other special fund and used for the benefit of the State home or its inhabitants in providing--

"(A) educational, recreational, or entertainment facilities or activities;

"(B) operation of post exchanges; or

"(C) other activities or facilities for the benefit of the home or its inhabitants which are not specifically required by State law (including the cost of any necessary insurance to protect the property of such fund or any of its facilities)."

1964. Act Aug. 19, 1964 (effective as provided by § 3(c) of such Act, which appears as a note to this section), substituted the text of this section for text which read:

"(a) The Administrator shall pay each State at the per diem rate of $2.50 per diem for each veteran of any war cared for in a State home (whether or not he is receiving hospitalization or domiciliary care therein) in such State who is eligible for such care in a Veterans' Administration facility; however, such payment shall not be more, in any case, than one-half of the cost of such veteran's maintenance in such State home.

"(b) The amount payable on account of any State home pursuant to subsection (a) for any veteran cared for therein shall be reduced--

"(1) by one-half of any amounts retained by such home from any payments of pension or compensation made to such veteran; and

"(2) unless the widows or wives of veterans of any war are admitted and maintained in such State home, by any other amounts collected in any manner from such veteran to be used for the support of such State home.

No reduction shall be made under this subsection by reason of the retention or collection by a State home of any amounts from the estate of a deceased veteran if such amounts are placed in a post fund or other special fund and used for the benefit of the State home or its inhabitants in providing--

"(A) educational, recreational, or entertainment facilities or activities;
"(B) operation of post exchanges; or

"(C) other activities or facilities for the benefit of the home or its inhabitants which are not specifically required by State law (including the cost of any necessary insurance to protect the property of such fund or any of its facilities).

"(c) No amounts shall be paid on account of any State home under this section if a bar or canteen is maintained therein where intoxicating liquors are sold.."

1968. Act July 26, 1968, substituted the text of this section for text which read: "The Administrator shall pay each State at the per diem rate of $2.50 for each veteran of any war receiving hospitalization or domiciliary care in a State home in such State if the veteran is eligible for hospitalization or domiciliary care in a Veterans' Administration facility, and at the per diem rate of $3.50 for each veteran of any war receiving nursing home care in a State home in such State, if such veteran meets the requirements of paragraph (1), (2), or (3) of section 610(a) of this title, except that the requirement in clause (B) of such paragraph (1) shall, for this purpose, refer to the inability to defray the expenses of necessary nursing home care; however, such payment shall not be more, in any case, than one-half of the cost of the veteran's maintenance in such State home."

1969. Act Dec. 30, 1969, substituted the text of this section for text which read: "The Administrator shall pay each State at the per diem rate of--

  "(1) $3.50 for hospital or domiciliary care, and

  "(2) $5.00 for nursing home care,

for each veteran of any war receiving such care in a State home, if, in the case of such a veteran receiving domiciliary or hospital care, such veteran is eligible for such care in a Veterans' Administration facility, or if, in the case of such a veteran receiving nursing home care, such veteran meets the requirements of paragraph (1), (2), or (3) of section 610(a) of this title, except that the requirements of clause (B) of such paragraph (1) shall for this purpose refer to the inability to defray the expenses of necessary nursing home care; however, in no case shall the payments made with respect to any veteran under this section exceed one-half of the cost of the veteran's care in such State home."

1973. Act Aug. 2, 1973 (effective 9/1/73, as provided by § 501 of such Act, which appears as 38 USCS § 1701 note) , in para. (1), substituted "$4.50" for "$3.50"; in para. (2), substituted "$6" for "$5"; in para. (3), substituted "$10" for "$7.50"; in the concluding matter, inserted "or of service after January 31, 1955".

1976. Act Sept. 21, 1976, substituted the text of this section for text which read: "The Administrator shall pay each State at the per diem rate of--

  "(1) $4.50 for hospital or domiciliary care,

  "(2) $6.00 for nursing home care, and

  "(3) $10.00 for hospital care,

for each veteran of any war or of service after January 31, 1955 receiving such care in a State home, if, in the case of such a veteran receiving domiciliary or hospital care, such veteran is eligible for such care in a Veterans' Administration facility, or if, in the case of such a veteran receiving nursing home care, such veteran meets the requirements of paragraph (1), (2), or (3) of section 610(a) of this title, except that the requirements of clause (B) of such paragraph (1) shall for this purpose refer to the inability to defray the expenses of necessary nursing home care; however, in no case shall the payments made with respect to any veteran under this section exceed one-half of the cost of the veteran's care in such State home.".
Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), purported to delete "of any war or of service after January 31, 1955"; however, the phrase had previously been deleted in the general amendment of this section by Act Sept. 21, 1976, effective Oct. 1, 1976.

1979. Act Dec. 20, 1979 (effective as provided by § 101(b)(2) of such Act, which appears as a note to this section), in subsec. (a), in para. (1), substituted "$6.35" for "$5.50", in para. (2), substituted "$12.10" for "$10.50", in para. (3), substituted "$13.25" for "$11.50".

1983. Act Nov. 21, 1983 (effective 4/1/84, as provided by § 105(b) of such Act), in subsec. (a), in para (1), substituted "$7.30" for "$6.35", in para. (2) substituted "$17.05" for "$12.10", and, in para. (3), substituted "$15.25" for "$13.25"; and added subsec. (c).

1988. Act May 20, 1988 (effective 1/1/88 as provided by § 134(b)(1) of such Act, which appears as a note to this section), in subsec. (a), substituted paras. (1) and (2) for former paras. (1)-(3) which read:

"(1) $7.30 for domiciliary care,

"(2) $17.05 for nursing home care, and

"(3) $15.25 for hospital care,".

Such Act further (effective 10/1/88 as provided by § 134(b)(2) of such Act, which appears as a note to this section) added subsec. (d).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 641, as 38 USCS § 1741, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".


1995. Act Dec. 21, 1995 repealed subsec. (c), which read: "The Secretary shall submit every three years to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the adequacy of the rates provided in subsection (a) of this section in light of projections over each of the following five years of the demand on the Department for the provision of nursing home care to veterans eligible for such care under this section and sections 1710 and 1720 of this title. The first such report shall be submitted not later than June 30, 1986."); and redesignated subsecs. (d) and (e) as subsecs. (c) and (d), respectively.

1996. Act Oct. 9, 1996, in subsec. (a), designated the existing text as para. (1), and, in such paragraph as so designated, redesignated paras. (1) and (2) as subparas. (A) and (B), and added para. (2).

1999. Act Nov. 30, 1999 (effective on enactment as provided by § 101(h)(1) of such Act, which appears as 38 USCS § 1710B note), in subsec. (a)(2), substituted "extended care services described in any of paragraphs (4) through (6) of section 1710B(a) of this title under a program administered by a State home" for "adult day health care in a State home".


Other provisions:

Payments to States for nursing home care. Act Aug. 19, 1964, P. L. 88-450, § 3(b), 78 Stat. 501, provides: "No payment shall be made to any State home solely by reason of the amendment made by this section [amending this section] on account of nursing home care furnished any veteran except where such care is furnished the veteran by the State home for the first time after the effective date of this section [see note to this section]."

this section] shall take effect on January 1, 1965; except that subsection (b) of section 641 of title 38, United States Code [subsec. (b) of this section], as in effect immediately before such date, shall remain in effect with respect to any amounts retained or collected by any State home before such date."

**Effective date of Sept. 21, 1976 amendment; effect of amendment on payments to States.** Act Sept. 21, 1976, P. L. 94-417, § 1(c), 90 Stat. 1277, provides:

"(1) The amendments made by subsection (a) of this section [amending this section] shall be effective on October 1, 1976.

"(2) At the time of the first payment to a State under section 641 of title 38, United States Code [this section], as amended by subsection (a) of this section, the Administrator of Veterans' Affairs shall pay such State, in a lump sum, an amount equal to the difference between the total amount paid each such State under such section 641 for care provided by such State in a State home from January 1, 1976, to October 1, 1976, and the amount such State would have been paid for providing such care if the amendment made by subsection (a) of this section had been effective on January 1, 1976.".

**Effective date of Dec. 20, 1979 amendments.** Act Dec. 20, 1979, P. L. 96-151, Title I, § 101(b)(2), 93 Stat. 1092, provides: "The amendments made by paragraph (1) [amending this section] shall take effect on January 1, 1980, but, with respect to fiscal year 1980, shall take effect only to such extent and in such amounts as may be specifically provided for such purpose in appropriate Acts.".

**Effective date of May 20, 1988 amendments.** Act May 20, 1988, P. L. 100-322, Title I, Part D, § 134(b), 102 Stat. 507, provides:

"(1) The amendment made by subsection (a)(1) [amending subsec. (a) of this section] shall take effect as of January 1, 1988.

"(2) The amendment made by subsection (a)(2) [adding subsec. (d) to this section] shall take effect on October 1, 1988.".

**Code of Federal Regulations**

Department of Veterans Affairs-Medical, 38 CFR Part 17

Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18

Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a

Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Department of Veterans Affairs-Per diem for adult day health care of veterans in State homes, 38 CFR Part 52

**Cross References**

This section is referred to in 38 USCS §§ 2012, 2303, 5503, 8122, 8126, 8134; 42 USCS §§ 1396a, 1396r-8

**Research Guide**

**Federal Procedure:**

29 Fed Proc L Ed, Public Lands and Property § 66:724

**Am Jur:**
§ 1742. Inspections of such homes; restrictions on beneficiaries

(a) The Secretary may inspect any State home at such times as the Secretary deems necessary. No payment or grant may be made to any home under this subchapter [38 USCS §§ 1741 et seq.] unless such home is determined by the Secretary to meet such standards as the Secretary shall prescribe, which standards with respect to nursing home care shall be no less stringent than those prescribed pursuant to section 1720(b) of this title [38 USCS § 1720(b)].

(b) The Secretary may ascertain the number of persons on account of whom payments may be made under this subchapter [38 USCS §§ 1741 et seq.] on account of any State home, but shall have no authority over the management or control of any State home.

Prior law and revision:
This section is based on 24 USC § 134 (Act Aug. 27, 1888, ch 914, § 1, 25 Stat. 450; Jan 27, 1920, ch 56, 41 Stat. 399).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Explanatory notes:

Amendments:
1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), substituted "the Administrator" for "he", and inserted "No payment or grant may be made to any home under this subchapter unless such home is determined by the Administrator to meet such standards as the Administrator shall prescribe, which standards with respect to nursing home care shall be no less stringent than those prescribed pursuant to section 620(b) of this title.".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 642, as 38 USCS § 1742, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator" wherever appearing.

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17
Department of Veterans Affairs-Per diem for adult day health care of veterans in State homes, 38 CFR Part 52
Department of Veterans Affairs-Grants to States for construction or acquisition of State homes, 38 CFR Part 59

Cross References
This section is referred to in 38 USCS § 1741

Research Guide
Am Jur:
§ 1743. Applications

Payments on account of any veteran cared for in a State home shall be made under this subchapter [38 USCS §§ 1741 et seq.] only from the date the Secretary receives a request for determination of such veteran's eligibility; however, if such request is received by the Secretary within ten days after care of such veteran begins, payments shall be made on account of such veteran from the date care began.

Prior law and revision:
This section is based on 24 USC § 134 note (Act Aug. 21, 1954, ch 782, § 2, 68 Stat 758).

Explanatory notes:
A prior § 1743 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3543.

Amendments:
1982. Act Sept. 8, 1982 deleted "of any war" following "any veteran".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 643, as 38 USCS § 1743, and substituted "Secretary" for "Administrator".

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17
Department of Veterans Affairs-Per diem for adult day health care of veterans in State homes, 38 CFR Part 52

Cross References
This section is referred to in 38 USCS § 1741

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 61

§ 1744. Hiring and retention of nurses: payments to assist States

(a) Payment program. The Secretary shall make payments to States under this section for the purpose of assisting State homes in the hiring and retention of nurses and the reduction of nursing shortages at State homes.

(b) Eligible recipients. Payments to a State for a fiscal year under this section shall, subject to submission of an application, be made to any State that during that fiscal year-
(1) receives per diem payments under this subchapter for that fiscal year; and
(2) has in effect an employee incentive scholarship program or other employee incentive program at a State home designed to promote the hiring and retention of nursing staff and to reduce nursing shortages at that home.

(c) Use of funds received. A State may use an amount received under this section only to provide funds for a program described in subsection (b)(2). Any program shall
meet such criteria as the Secretary may prescribe. In prescribing such criteria, the Secretary shall take into consideration the need for flexibility and innovation.

(d) **Limitations on amount of payment.**

(1) A payment under this section may not be used to provide more than 50 percent of the costs for a fiscal year of the employee incentive scholarship or other employee incentive program for which the payment is made.

(2) The amount of the payment to a State under this section for any fiscal year is, for each State home in that State with a program described in subsection (b)(2), the amount equal to 2 percent of the amount of payments estimated to be made to that State, for that State home, under section 1741 of this title [38 USCS § 1741] for that fiscal year.

(e) **Applications.** A payment under this section for any fiscal year with respect to any State home may only be made based upon an application submitted by the State seeking the payment with respect to that State home. Any such application shall describe the nursing shortage at the State home and the employee incentive scholarship program or other employee incentive program described in subsection (c) for which the payment is sought.

(f) **Source of funds.** Payments under this section shall be made from funds available for other payments under this subchapter [38 USCS §§ 1741 et seq.].

(g) **Disbursement.** Payments under this section to a State home shall be made as part of the disbursement of payments under section 1741 of this title [38 USCS § 1741] with respect to that State home.

(h) **Use of certain receipts.** The Secretary shall require as a condition of any payment under this section that, in any case in which the State home receives a refund payment made by an employee in breach of the terms of an agreement for employee assistance that used funds provided under this section, the payment shall be returned to the State home's incentive program account and credited as a non-Federal funding source.

(i) **Annual report from payment recipients.** Any State home receiving a payment under this section for any fiscal year, shall, as a condition of the payment, be required to agree to provide to the Secretary a report setting forth in detail the use of funds received through the payment, including a descriptive analysis of how effective the incentive program has been on nurse staffing in the State home during that fiscal year. The report for any fiscal year shall be provided to the Secretary within 60 days of the close of the fiscal year and shall be subject to audit by the Secretary. Eligibility for a payment under this section for any later fiscal year is contingent upon the receipt by the Secretary of the annual report under this subsection for the previous fiscal year in accordance with this subsection.

(j) **Regulations.** The Secretary shall prescribe regulations to carry out this section. The regulations shall include the establishment of criteria for the award of payments under this section.

**Explanatory notes:**

Other provisions:

Implementation of section. Act Nov. 30, 2004, P. L. 108-422, Title II, § 201(b), 118 Stat. 2382, provides: "The Secretary of Veterans Affairs shall implement section 1744 of title 38, United States Code, as added by subsection (a), as expeditiously as possible. The Secretary shall establish such interim procedures as necessary so as to ensure that payments are made to eligible States under that section commencing not later than June 1, 2005, notwithstanding that regulations under subsection (j) of that section may not have become final."

SUBCHAPTER VI. SICKLE CELL ANEMIA

§ 1751. Screening, counseling, and medical treatment
§ 1752. Research
§ 1753. Voluntary participation; confidentiality
§ 1754. Reports

§ 1751. Screening, counseling, and medical treatment

The Secretary is authorized to carry out a comprehensive program of providing sickle cell anemia screening, counseling, treatment, and information under the provisions of this chapter [38 USCS §§ 1701 et seq.].

Effective date of section:


Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 651, as 38 USCS § 1751, and substituted "Secretary" for "Administrator".

Research Guide

Federal Procedure:
29 Fed Proc L Ed, Public Lands and Property § 66:724

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 72

§ 1752. Research

The Secretary is authorized to carry out research and research training in the diagnosis, treatment, and control of sickle cell anemia based upon the screening examinations and treatment provided under this subchapter [38 USCS §§ 1751 et seq.].

Effective date of section:

§ 1753. Voluntary participation; confidentiality

(a) The participation by any person in any program or portion thereof under this subchapter [38 USCS §§ 1751 et seq.] shall be wholly voluntary and shall not be a prerequisite to eligibility for or receipt of any other service or assistance from, or to participation in, any other program under this title.

(b) Patient records prepared or obtained under this subchapter [38 USCS §§ 1751 et seq.] shall be held confidential in the same manner and under the same conditions prescribed in section 7332 of this title [38 USCS § 7332].

Effective date of section:


Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), substituted new subsec. (b) for one which read: "The Administrator shall promulgate rules and regulations to insure that all information and patient records prepared or obtained under this subchapter shall be held confidential except for (1) such information as the patient (or his guardian) requests in writing to be released or (2) statistical data compiled without reference to patient names or other identifying characteristics."

1991. Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 653, as 38 USCS § 1753.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans’ Laws § 72

§ 1754. Reports

The Secretary shall include in the annual report to the Congress required by section 529 of this title [38 USCS § 529] a comprehensive report on the administration of this subchapter [38 USCS §§ 1751 et seq.], including such recommendations for additional legislation as the Secretary deems necessary.

Effective date of section:

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 654, as 38 USCS § 1754, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "section 529" for "section 214" and "Secretary" for "Administrator".

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 72

SUBCHAPTER VII.  [REPEALED OR TRANSFERRED]

[§ 1761.  Repealed]
[§ 1762.  Transferred]
[§ 1763.  Repealed]
[§ 1764.  Repealed]
[§§ 1771-1774.  Transferred]

[§ 1761.  Repealed]


A prior § 1761 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3561.

[§ 1762.  Transferred]

This section was transferred to 38 USCS § 1701(9).


[§ 1763.  Repealed]


A prior § 1763 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3563.

[§ 1764.  Repealed]


These sections, relating to treatment and rehabilitation for seriously mentally ill and homeless veterans, were transferred to Chapter 20 and redesignated 38 USCS §§ 2031 et seq. by Act Dec. 21, 2001, P. L. 107-95, § 5(b)(1), 115 Stat. 918.

SUBCHAPTER VIII. HEALTH CARE OF PERSONS OTHER THAN VETERANS

§ 1781. Medical care for survivors and dependents of certain veterans
§ 1782. Counseling, training, and mental health services for immediate family members
§ 1783. Bereavement counseling
§ 1784. Humanitarian care
§ 1785. Care and services during certain disasters and emergencies

§ 1781. Medical care for survivors and dependents of certain veterans

(a) The Secretary is authorized to provide medical care, in accordance with the provisions of subsection (b) of this section, for--

(1) the spouse or child of a veteran who has a total disability, permanent in nature, resulting from a service-connected disability,

(2) the surviving spouse or child of a veteran who (A) died as a result of a service-connected disability, or (B) at the time of death had a total disability permanent in nature, and

(3) the surviving spouse or child of a person who died in the active military, naval, or air service in the line of duty and not due to such person's own misconduct,

who are not otherwise eligible for medical care under chapter 55 of title 10 [10 USCS §§ 1071 et seq.] (CHAMPUS).

(b) In order to accomplish the purposes of subsection (a) of this section, the Secretary shall provide for medical care in the same or similar manner and subject to the same or similar limitations as medical care is furnished to certain dependents and survivors of active duty and retired members of the Armed Forces under chapter 55 of title 10 [10 USCS §§ 1071 et seq.] (CHAMPUS), by--

(1) entering into an agreement with the Secretary of Defense under which that Secretary shall include coverage for such medical care under the contract, or contracts, that Secretary enters into to carry out such chapter 55 [10 USCS §§ 1071 et seq.], and under which the Secretary of Veterans Affairs shall fully reimburse the Secretary of Defense for all costs and expenditures made for the purposes of affording the medical care authorized pursuant to this section; or

(2) contracting in accordance with such regulations as the Secretary shall prescribe for such insurance, medical service, or health plans as the Secretary deems appropriate.

In cases in which Department medical facilities are equipped to provide the care and treatment, the Secretary is also authorized to carry out such purposes through the use of such facilities not being utilized for the care of eligible veterans. A dependent or survivor receiving care under the preceding sentence shall be eligible for the same medical
services as a veteran, including services under sections 1782 and 1783 of this title [38 USCS §§ 1782 and 1783].

(c) For the purposes of this section, a child between the ages of eighteen and twenty-three (1) who is eligible for benefits under subsection (a) of this section, (2) who is pursuing a full-time course of instruction at an educational institution approved under chapter 36 of this title [38 USCS §§ 3670 et seq.], and (3) who, while pursuing such course of instruction, incurs a disabling illness or injury (including a disabling illness or injury incurred between terms, semesters, or quarters or during a vacation or holiday period) which is not the result of such child's own willful misconduct and which results in such child's inability to continue or resume such child's chosen program of education at an approved educational institution shall remain eligible for benefits under this section until the end of the six-month period beginning on the date the disability is removed, the end of the two-year period beginning on the date of the onset of the disability, or the twenty-third birthday of the child, whichever occurs first.

(d) (1) (A) An individual otherwise eligible for medical care under this section who is also entitled to hospital insurance benefits under part A of the medicare program [42 USCS §§ 1395c et seq.] is eligible for medical care under this section only if the individual is also enrolled in the supplementary medical insurance program under part B of the medicare program [42 USCS §§ 1395j et seq.].

(B) The limitation in subparagraph (A) does not apply to an individual who--
(i) has attained 65 years of age as of June 5, 2001; and
(ii) is not enrolled in the supplementary medical insurance program under part B of the medicare program [42 USCS §§ 1395j et seq.] as of that date.

(2) Subject to paragraph (3), if an individual described in paragraph (1) receives medical care for which payment may be made under both this section and the medicare program, the amount payable for such medical care under this section shall be the amount by which (A) the costs for such medical care exceed (B) the sum of--
(i) the amount payable for such medical care under the medicare program; and
(ii) the total amount paid or payable for such medical care by third party payers other than the medicare program.

(3) The amount payable under this subsection for medical care may not exceed the total amount that would be paid under subsection (b) if payment for such medical care were made solely under subsection (b).

(4) In this subsection:
(A) The term "medicare program" means the program of health insurance administered by the Secretary of Health and Human Services under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.).
(B) The term "third party" has the meaning given that term in section 1729(i)(3) of this title [38 USCS § 1729(i)(3)].

Amendments:

1973. Act Aug. 2, 1973 (effective 9/1/73, as provided by § 501 of such Act), substituted this section for one which read:

"§ 613. Fitting and training in use of prosthetic appliances
"Any veteran who is entitled to a prosthetic appliance shall be furnished such fitting and training, including institutional training, in the use of such appliance as may be necessary, whether in a Veterans' Administration facility or other training institution, or by outpatient treatment, including such service under contract, and including necessary travel expenses to and from his home to such hospital or training institution."

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act), in subsec. (a), substituted para. (2) for one which read: "(2) the widow or child of a veteran who died as a result of a service-connected disability"; and, in subsec. (b), in para. (1), substituted "the Secretary" for "he" preceding "enters into" and, in para. (2), substituted "the Administrator" for "he" wherever appearing.

1979. Act Dec. 20, 1979, in subsec. (a), in para. (1), substituted "spouse" for "wife" and deleted "and" following "service-connected disability,"; in para. (2), substituted "surviving spouse" for "widow" and inserted "and", added para. (3); added subsec. (c). For application of this section, as amended, see Other provisions note to this section.

1981. Act Nov. 3, 1981, in the concluding matter of subsec. (b), deleted "particularly" following "medical facilities are" and deleted "most effective" following "to provide the".

1982. Act Sept. 8, 1982 (effective 10/1/82, as provided by § 5(b) of such Act), added subsec. (d).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 613, as 38 USCS § 1713; in subsec. (b), para. (1), substituted "Secretary of Veterans Affairs" for "Administrator", "that Secretary" for "the Secretary", and "Secretary of Defense" for "Secretary" preceding "for all costs"; and, throughout the remainder of the section, substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".

Act Dec. 5, 1991, in subsec. (d), substituted "section 1086(d)(1)" for "the second sentence of section 1086(c)".

2001. Act June 5, 2001, substituted subsec. (d) for one which read: "(d) Notwithstanding section 1086(d)(1) of title 10 or any other provision of law, any spouse, surviving spouse, or child who, after losing eligibility for medical care under this section by virtue of becoming entitled to hospital insurance benefits under part A of title XVIII of the Social Security Act (42 U.S.C. 1395c et seq.), has exhausted any such benefits shall become eligible for medical care under this section and shall not thereafter lose such eligibility under this section by virtue of becoming again eligible for such hospital insurance benefits.".

2002. Act Jan. 23, 2002 transferred this section, enacted as 38 USCS § 1713, to Subchapter VIII of this Chapter and redesignated it as 38 USCS § 1781; and in subsec. (b), in the concluding matter, added the sentence beginning "A dependent or survivor . . .".


Other provisions:

Application of Dec. 20, 1979 amendments. Act Dec. 20, 1979, P. L. 96-151, Title II, § 205(b), 93 Stat. 1095, provides: "The amendments made by subsection (a) [amending this section] shall take effect with respect to fiscal year 1980 only to such extent and for such amounts as may be specifically provided for such purpose in appropriation Acts.".

Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References

This section is referred to in 38 USCS §§ 103, 1701, 8111, 8502, 8520, 8521; 42 USCS § 1395cc
§ 1782. Counseling, training, and mental health services for immediate family members

(a) Counseling for family members of veterans receiving service-connected treatment. In the case of a veteran who is receiving treatment for a service-connected disability pursuant to paragraph (1) or (2) of section 1710(a) of this title [38 USCS § 1710(a)], the Secretary shall provide to individuals described in subsection (c) such consultation, professional counseling, training, and mental health services as are necessary in connection with that treatment.

(b) Counseling for family members of veterans receiving non-service-connected treatment. In the case of a veteran who is eligible to receive treatment for a non-service-connected disability under the conditions described in paragraph (1), (2), or (3) of section 1710(a) of this title [38 USCS § 1710(a)], the Secretary may, in the discretion of the Secretary, provide to individuals described in subsection (c) such consultation, professional counseling, training, and mental health services as are necessary in connection with that treatment if--

   (1) those services were initiated during the veteran's hospitalization; and
   (2) the continued provision of those services on an outpatient basis is essential to permit the discharge of the veteran from the hospital.

(c) Eligible individuals. Individuals who may be provided services under this subsection are--

   (1) the members of the immediate family or the legal guardian of a veteran; or
   (2) the individual in whose household such veteran certifies an intention to live.

(d) Travel and transportation authorized. Services provided under subsections (a) and (b) may include, under the terms and conditions set forth in section 111 of this title [38 USCS § 111], travel and incidental expenses of individuals described in subsection (c) in the case of any of the following:

   (1) A veteran who is receiving care for a service-connected disability.
   (2) A dependent or survivor receiving care under the last sentence of section 1783(b) of this title [38 USCS § 1783(b)].

§ 1783. Bereavement counseling

(a) Deaths of veterans. In the case of an individual who was a recipient of services under section 1782 of this title [38 USCS § 1782] at the time of the death of the veteran, the Secretary may provide bereavement counseling to that individual in the case of a death--

   (1) that was unexpected; or
   (2) that occurred while the veteran was participating in a hospice program (or a similar program) conducted by the Secretary.
(b) **Deaths in active service.** The Secretary may provide bereavement counseling to an individual who is a member of the immediate family of a member of the Armed Forces who dies in the active military, naval, or air service in the line of duty and under circumstances not due to the person's own misconduct.

(c) **Bereavement counseling defined.** For purposes of this section, the term "bereavement counseling" means such counseling services, for a limited period, as the Secretary determines to be reasonable and necessary to assist an individual with the emotional and psychological stress accompanying the death of another individual.

§ 1784. **Humanitarian care**

The Secretary may furnish hospital care or medical services as a humanitarian service in emergency cases, but the Secretary shall charge for such care and services at rates prescribed by the Secretary.

**Research Guide**

*Am Jur:*

77 Am Jur 2d, Veterans and Veterans' Laws § 58

§ 1785. **Care and services during certain disasters and emergencies**

(a) **Authority to provide hospital care and medical services.** During and immediately following a disaster or emergency referred to in subsection (b), the Secretary may furnish hospital care and medical services to individuals responding to, involved in, or otherwise affected by that disaster or emergency.

(b) **Covered disasters and emergencies.** A disaster or emergency referred to in this subsection is any disaster or emergency as follows:

(1) A major disaster or emergency declared by the President under the Robert B. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.).

(2) A disaster or emergency in which the National Disaster Medical System established pursuant to section 2811(b) of the Public Health Service Act (42 U.S.C. 300hh-11(b)) is activated by the Secretary of Health and Human Services under paragraph (3)(A) of that section or as otherwise authorized by law.

(c) **Applicability to eligible individuals who are veterans.** The Secretary may furnish care and services under this section to an individual described in subsection (a) who is a veteran without regard to whether that individual is enrolled in the system of patient enrollment under section 1705 of this title [38 USCS § 1705].

(d) **Reimbursement from other Federal departments and agencies.**

(1) The cost of any care or services furnished under this section to an officer or employee of a department or agency of the United States other than the Department or to a member of the Armed Forces shall be reimbursed at such rates as may be agreed upon by the Secretary and the head of such department or agency or the Secretary concerned, in the case of a member of the Armed Forces, based on the cost of the care or service furnished.
(2) Amounts received by the Department under this subsection shall be credited to the Medical Care Collections Fund under section 1729A of this title [38 USCS § 1729A].

(e) **Report to congressional committees.** Within 60 days of the commencement of a disaster or emergency referred to in subsection (b) in which the Secretary furnishes care and services under this section (or as soon thereafter as is practicable), the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on the Secretary's allocation of facilities and personnel in order to furnish such care and services.

(f) **Regulations.** The Secretary shall prescribe regulations governing the exercise of the authority of the Secretary under this section.

**CHAPTER 18. BENEFITS FOR CHILDREN OF VIETNAM VETERANS AND OTHER VETERANS**

**SUBCHAPTER I. CHILDREN OF VIETNAM VETERANS BORN WITH SPINA BIFIDA**

**SUBCHAPTER II. CHILDREN OF WOMEN VIETNAM VETERANS BORN WITH CERTAIN BIRTH DEFECTS**

**SUBCHAPTER III. CHILDREN OF CERTAIN KOREA SERVICE VETERANS BORN WITH SPINA BIFIDA**

**SUBCHAPTER IV. GENERAL PROVISIONS**

**Amendments:**


2000. Act Nov. 1, 2000, P. L. 106-419, Title IV, § 401(f)(1), (3), 114 Stat. 1860, 1861, substituted the chapter heading for one which read: "CHAPTER 18. BENEFITS FOR CHILDREN OF VIETNAM VETERANS WHO ARE BORN WITH SPINA BIFIDA"; inserted the Subchapter I heading, deleted item 1801, which read: "1801. Definitions.", deleted item 1806, which read: "1806. Applicability of certain administrative provisions", and added the Subchapter II and III headings and items 1811-1816 and 1821-1824.

2003. Act Dec. 16, 2003, P. L. 108-183, Title I, § 102(d)(2), (e)(1), 117 Stat. 2654, substituted the chapter heading for one which read: "CHAPTER 18. BENEFITS FOR CHILDREN OF VIETNAM VETERANS"; and substituted the Subchapter III heading, item 1821, the Subchapter IV heading, and items 1831-1834 for the former Subchapter III heading and former items 1821-1824, which read:

"**SUBCHAPTER III. GENERAL PROVISIONS**

"1821. Definitions.

"1822. Applicability of certain administrative provisions.

"1823. Treatment of receipt of monetary allowance and other benefits.

"1824. Nonduplication of benefits.".
SUBCHAPTER I. CHILDREN OF VIETNAM VETERANS BORN WITH SPINA BIFIDA

§ 1801. Repealed
§ 1802. Spina bifida conditions covered
§ 1803. Health care
§ 1804. Vocational training and rehabilitation
§ 1805. Monetary allowance
§ 1806. Repealed

Cross References

This subchapter is referred to in 38 USCS §§ 1821, 1824

§ 1801. Repealed

This section (Act Sept. 26, 1996, P. L. 104-204, Title IV, § 421(b)(1), 110 Stat. 2923; Nov. 21, 1997, P. L. 105-114, Title IV, § 404(a), 111 Stat. 2294) was repealed by Act Nov. 1, 2000, P. L. 106-419, Title IV, § 401(c)(1), 114 Stat. 1860, effective on the first day of the first month beginning more than one year after 11/1/2000, pursuant to § 401(g) of such Act, which appears as 38 USCS § 1811 note. It contained definitions for purposes of 38 USCS §§ 1801 et seq.

Other provisions:

Purpose of 38 USCS §§ 1801 et seq. Act Sept. 26, 1996, P. L. 104-204, Title IV, § 421(a), 110 Stat. 2923, provides: "The purpose of this section [adding 38 USCS §§ 1801 et seq. and amending 38 USCS § 5312] is to provide for the special needs of certain children of Vietnam veterans who were born with the birth defect spina bifida, possibly as the result of the exposure of one or both parents to herbicides during active service in the Republic of Vietnam during the Vietnam era, through the provision of health care and monetary benefits.".

Effective date of section: Pursuant to § 422(c) of Act Sept. 26, 1996, P. L. 104-204, which appears as 38 USCS § 1151 note, and which provides that notwithstanding § 421(d) (note above), § 421 (adding 38 USCS §§ 1801 et seq., amending the tables of chapters preceding 38 USCS §§ 101 and 1101, and amending 38 USCS § 5312) shall not take effect until October 1, 1997, unless legislation other than Act Sept. 26, 1996, P. L. 104-204, is enacted to provide for an earlier effective date.

§ 1802. Spina bifida conditions covered

This subchapter [38 USCS §§ 1801 et seq.] applies with respect to all forms and manifestations of spina bifida except spina bifida occulta.

Effective date of section: Pursuant to § 422(c) of Act Sept. 26, 1996, P. L. 104-204, which appears as 38 USCS § 1151 note, this section shall not take effect until October 1, 1997, unless legislation other than Act Sept. 26, 1996, P. L. 104-204, is enacted to provide for an earlier effective date.

Amendments:
2000. Act Nov. 1, 2000 (effective on the first day of the first month beginning more than one year after 11/1/00, pursuant to § 401(g) of such Act, which appears as 38 USCS § 1811 note), as amended by Act June 5, 2001 (effective as of 11/1/00, and as if included in Act Nov. 1, 2000 as originally enacted, as provided by § 8(b) of such Act), substituted "This subchapter" for "This chapter".

2001. Act June 5, 2001 (effective as of 11/1/00, and as if included in Act Nov. 1, 2000 as originally enacted, as provided by § 8(b) of such Act) amended Act Nov. 1, 2000, which amended this section.

Other provisions:

Effective date of June 5, 2001 amendments. Act June 5, 2001, P. L. 107-14, § 8(b), 115 Stat. 36, provides that the amendments made by such section to §§ 113(f)(3), 323(a)(1), 401(e)(1), and 402(b) of the Veterans Benefits and Health Care Improvement Act of 2000 (P. L. 106-419) [amending 38 USCS §§ 1802, 3564 note, 3729, and 4303] are effective as of November 1, 2000, and as if included therein as originally enacted.

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:102

V.A. Gen. Counsel Precedent Op. 5-99, which excluded occipital encephalocele suffered by veteran's child from definition of spina bifida, did not preclude finding that child was entitled to benefits for having form or manifestation of spina bifida as indicated by uncontroverted medical evidence. Jones v Principi (2002) 16 Vet App 219, 2002 US App Vet Claims LEXIS 579

§ 1803. Health care

(a) In accordance with regulations which the Secretary shall prescribe, the Secretary shall provide a child of a Vietnam veteran who is suffering from spina bifida with such health care as the Secretary determines is needed by the child for the spina bifida or any disability that is associated with such condition.

(b) The Secretary may provide health care under this section directly or by contract or other arrangement with any health care provider.

(c) For the purposes of this section--

(1) The term "health care"-

(A) means home care, hospital care, nursing home care, outpatient care, preventive care, habilitative and rehabilitative care, case management, and respite care; and

(B) includes-

(i) the training of appropriate members of a child's family or household in the care of the child; and

(ii) the provision of such pharmaceuticals, supplies, equipment, devices, appliances, assistive technology, direct transportation costs to and from approved sources of health care, and other materials as the Secretary determines necessary.

(2) The term "health care provider" includes specialized spina bifida clinics, health care plans, insurers, organizations, institutions, and any other entity or individual
furnishing health care services that the Secretary determines are authorized under this section.

(3) The term "home care" means outpatient care, habilitative and rehabilitative care, preventive health services, and health-related services furnished to an individual in the individual's home or other place of residence.

(4) The term "hospital care" means care and treatment for a disability furnished to an individual who has been admitted to a hospital as a patient.

(5) The term "nursing home care" means care and treatment for a disability furnished to an individual who has been admitted to a nursing home as a resident.

(6) The term "outpatient care" means care and treatment of a disability, and preventive health services, furnished to an individual other than hospital care or nursing home care.

(7) The term "preventive care" means care and treatment furnished to prevent disability or illness, including periodic examinations, immunizations, patient health education, and such other services as the Secretary determines necessary to provide effective and economical preventive health care.

(8) The term "habilitative and rehabilitative care" means such professional, counseling, and guidance services and treatment programs (other than vocational training under section 1804 of this title [38 USCS § 1804]) as are necessary to develop, maintain, or restore, to the maximum extent practicable, the functioning of a disabled person.

(9) The term "respite care" means care furnished on an intermittent basis for a limited period to an individual who resides primarily in a private residence when such care will help the individual to continue residing in such private residence.

**Effective date of section:**

Pursuant to § 422(c) of Act Sept. 26, 1996, P. L. 104-204, which appears as 38 USCS § 1151 note, this section shall not take effect until October 1, 1997, unless legislation other than Act Sept. 26, 1996, P. L. 104-204, is enacted to provide for an earlier effective date.

**Amendments:**

1998. Act Nov. 11, 1998, in subsec. (c)(2), substituted "furnishing health care services that the Secretary determines are authorized" for "who furnishes health care that the Secretary determines authorized".

**Cross References**

This section is referred to in 38 USCS § 1813

**Research Guide**

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:102

§ 1804. Vocational training and rehabilitation

(a) Pursuant to such regulations as the Secretary may prescribe, the Secretary may provide vocational training under this section to a child of a Vietnam veteran who is
suffering from spina bifida if the Secretary determines that the achievement of a vocational goal by such child is reasonably feasible.

(b) Any program of vocational training for a child under this section shall--
   (1) be designed in consultation with the child in order to meet the child's individual needs;
   (2) be set forth in an individualized written plan of vocational rehabilitation; and
   (3) be designed and developed before the date specified in subsection (d)(3) so as to permit the beginning of the program as of the date specified in that subsection.

(c) (1) A vocational training program for a child under this section--
   (A) shall consist of such vocationally oriented services and assistance, including such placement and post-placement services and personal and work adjustment training, as the Secretary determines are necessary to enable the child to prepare for and participate in vocational training or employment; and
   (B) may include a program of education at an institution of higher learning if the Secretary determines that the program of education is predominantly vocational in content.
   (2) A vocational training program under this section may not include the provision of any loan or subsistence allowance or any automobile adaptive equipment.

(d) (1) Except as provided in paragraph (2) and subject to subsection (e)(2), a vocational training program under this section may not exceed 24 months.
   (2) The Secretary may grant an extension of a vocational training program for a child under this section for up to 24 additional months if the Secretary determines that the extension is necessary in order for the child to achieve a vocational goal identified (before the end of the first 24 months of such program) in the written plan of vocational rehabilitation formulated for the child pursuant to subsection (b).
   (3) A vocational training program under this section may begin on the child's 18th birthday, or on the successful completion of the child's secondary schooling, whichever first occurs, except that, if the child is above the age of compulsory school attendance under applicable State law and the Secretary determines that the child's best interests will be served thereby, the vocational training program may begin before the child's 18th birthday.

(e) (1) A child who is pursuing a program of vocational training under this section and is also eligible for assistance under a program under chapter 35 of this title [38 USCS §§ 3500 et seq.] may not receive assistance under both such programs concurrently. The child shall elect (in such form and manner as the Secretary may prescribe) the program under which the child is to receive assistance.
   (2) The aggregate period for which a child may receive assistance under this section and chapter 35 of this title [38 USCS §§ 3500 et seq.] may not exceed 48 months (or the part-time equivalent thereof).

Effective date of section:
Pursuant to § 422(c) of Act Sept. 26, 1996, P. L. 104-204, which appears as 38 USCS § 1151 note, this section shall not take effect until October 1, 1997, unless legislation other than Act Sept. 26, 1996, P. L. 104-204, is enacted to provide for an earlier effective date.
Amendments:

1997. Act Nov. 21, 1997 (effective 10/1/97 as provided by § 404(d) of such Act, which appears as 38 USC § 1801 note), in subsec. (b), substituted "shall-" and paras. (1)-(3) for "shall be designed in consultation with the child in order to meet the child's individual needs and shall be set forth in an individualized written plan of vocational rehabilitation.", in subsec. (c)(1)(B), substituted "institution of higher learning" for "institute of higher education"; and, in subsec. (d), added para. (3).


Other provisions:

Effective date of Nov. 21, 1997 amendments. Act Nov. 21, 1997, P. L. 105-114, Title IV, § 404(d), 111 Stat. 2295, provides: "The amendments made by this section [amending 38 USCS §§ 1801, 1804, 1806, and the chapter analysis preceding 38 USCS § 1801] shall take effect as of October 1, 1997.".

Cross References

This section is referred to in 38 USCS §§ 1803, 1813, 1814

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:102

§ 1805. Monetary allowance

 xciii Discussion and Analysis in the Veterans Benefits Manual

(a) The Secretary shall pay a monthly allowance under this section to any child of a Vietnam veteran for any disability resulting from spina bifida suffered by such child.

(b) (1) The amount of the allowance paid to a child under this section shall be based on the degree of disability suffered by the child, as determined in accordance with such schedule for rating disabilities resulting from spina bifida as the Secretary may prescribe.

(2) The Secretary shall, in prescribing the rating schedule for the purposes of this section, establish three levels of disability upon which the amount of the allowance provided by this section shall be based.

(3) The amounts of the allowance shall be $200 per month for the lowest level of disability prescribed, $700 per month for the intermediate level of disability prescribed, and $1,200 per month for the highest level of disability prescribed. Such amounts are subject to adjustment under section 5312 of this title [38 USCS § 5312].

Effective date of section:

Pursuant to § 422(c) of Act Sept. 26, 1996, P. L. 104-204, which appears as 38 USCS § 1151 note, this section shall not take effect until October 1, 1997, unless legislation other than Act Sept. 26, 1996, P. L. 104-204, is enacted to provide for an earlier effective date.

Amendments:

2000. Act Nov. 1, 2000 (effective on the first day of the first month beginning more than one year after 11/1/2000, pursuant to § 401(g) of such Act, which appears as 38 USCS § 1811 note), in subsec. (a), substituted "this section" for "this chapter"; and repealed subsecs. (c) and (d), which read:
“(c) Notwithstanding any other provision of law, receipt by a child of an allowance under this section shall not impair, infringe, or otherwise affect the right of the child to receive any other benefit to which the child may otherwise be entitled under any law administered by the Secretary, nor shall receipt of such an allowance impair, infringe, or otherwise affect the right of any individual to receive any benefit to which the individual is entitled under any law administered by the Secretary that is based on the child's relationship to the individual.

“(d) Notwithstanding any other provision of law, the allowance paid to a child under this section shall not be considered income or resources in determining eligibility for or the amount of benefits under any Federal or federally assisted program.”.

Cross References
This section is referred to in 38 USCS §§ 1815, 5312

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:102
V.A. Gen. Counsel Precedent Op. 5-99, which excluded occipital encephalocele suffered by veteran's child from definition of spina bifida, did not preclude finding that child was entitled to benefits under 38 USCS § 1805(a) for having form or manifestation of spina bifida as set out in 38 USCS § 1802. Jones v Principi (2002) 16 Vet App 219, 2002 US App Vet Claims LEXIS 579

[§ 1806. Repealed]

Discussion and Analysis in the Veterans Benefits Manual

This section (Act Sept. 26, 1996, P. L. 104-204, Title IV, § 421(b)(1), 110 Stat. 2926; Nov. 21, 1997, P. L. 105-114, Title IV, § 404(b)(1), 111 Stat. 2294) was repealed by Act Nov. 1, 2000, P. L. 106-419, Title IV, § 401(c)(3), 114 Stat. 1860, effective on the first day of the first month beginning more than one year after 11/1/2000, pursuant to § 401(g) of such Act, which appears as 38 USCS § 1811 note. It related to the applicability of certain administrative provisions.

SUBCHAPTER II. CHILDREN OF WOMEN VIETNAM VETERANS BORN WITH CERTAIN BIRTH DEFECTS

§ 1811. Definitions
§ 1812. Covered birth defects
§ 1813. Health care
§ 1814. Vocational training
§ 1815. Monetary allowance
§ 1816. Regulations

Cross References
This subchapter is referred to in 38 USCS §§ 1821, 1824

§ 1811. Definitions

Discussion and Analysis in the Veterans Benefits Manual

In this subchapter [38 USCS §§ 1811 et seq.]:

(1) The term "eligible child" means an individual who--
   (A) is the child (as defined in section 1831(1) of this title [38 USCS § 1831(1)])
   of a woman Vietnam veteran; and
   (B) was born with one or more covered birth defects.
(2) The term "covered birth defect" means a birth defect identified by the Secretary under section 1812 of this title [38 USCS § 1812].

Effective date of section:
This section took effect on December 1, 2001, pursuant to § 401(g) of Act Nov. 1, 2000, P. L. 106-419, which appears as a note to this section.

Amendments:
2003. Act Dec. 16, 2003, in para.(1)(A), substituted "section 1831(1)" for "section 1821(1)".

Other provisions:
Effective date of Nov. 1, 2000 amendments. Act Nov. 1, 2000, P. L. 106-419, Title IV, § 401(g), provides:
"(1) Except as provided in paragraph (2), the amendments made by this section [adding 38 USCS §§ 1811 et seq. and 1821 et seq., repealing 38 USCS §§ 1801 and 1806, and amending 38 USCS §§ 1802 and 1805] shall take effect on the first day of the first month beginning more than one year after the date of the enactment of this Act.

"(2) The Secretary of Veterans Affairs shall identify birth defects under section 1812 of title 38, United States Code (as added by subsection (a) of this section), and shall prescribe the regulations required by subchapter II of chapter 18 of that title [38 USCS §§ 1811 et seq.] (as so added), not later than the effective date specified in paragraph (1)."

Research Guide
Federal Procedure:
4B Fed Proc L Ed, Banking and Financing § 8:1841

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 36

§ 1812. Covered birth defects

(a) Identification. The Secretary shall identify the birth defects of children of women Vietnam veterans that--
(1) are associated with the service of those veterans in the Republic of Vietnam during the Vietnam era; and
(2) result in permanent physical or mental disability.

(b) Limitations.
(1) The birth defects identified under subsection (a) may not include birth defects resulting from the following:
   (A) A familial disorder.
   (B) A birth-related injury.
   (C) A fetal or neonatal infirmity with well-established causes.

(2) In any case where affirmative evidence establishes that a covered birth defect of a child of a woman Vietnam veteran results from a cause other than the active military, naval, or air service of that veteran in the Republic of Vietnam during the Vietnam era, no benefits or assistance may be provided the child under this subchapter [38 USCS §§ 1811 et seq.].

Effective date of section:
§ 1813. Health care

(a) **Needed care.** The Secretary shall provide an eligible child such health care as the Secretary determines is needed by the child for that child’s covered birth defects or any disability that is associated with those birth defects.

(b) **Authority for care to be provided directly or by contract.** The Secretary may provide health care under this section directly or by contract or other arrangement with a health care provider.

(c) **Definitions.** For purposes of this section, the definitions in section 1803(c) of this title [38 USCS § 1803(c)] shall apply with respect to the provision of health care under this section, except that for such purposes--

   (1) the reference to "specialized spina bifida clinic" in paragraph (2) of that section shall be treated as a reference to a specialized clinic treating the birth defect concerned under this section; and

   (2) the reference to "vocational training under section 1804 of this title [38 USCS § 1804]" in paragraph (8) of that section shall be treated as a reference to vocational training under section 1814 of this title [38 USCS § 1814].

**Effective date of section:**

This section took effect on December 1, 2001, pursuant to § 401(g) of Act Nov. 1, 2000, P. L. 106-419, which appears as 38 USCS § 1811 note.

§ 1814. Vocational training

(a) **Authority.** The Secretary may provide a program of vocational training to an eligible child if the Secretary determines that the achievement of a vocational goal by the child is reasonably feasible.

(b) **Applicable provisions.** Subsections (b) through (e) of section 1804 of this title [38 USCS § 1804] shall apply with respect to any program of vocational training provided under subsection (a).

**Effective date of section:**

This section took effect on December 1, 2001, pursuant to § 401(g) of Act Nov. 1, 2000, P. L. 106-419, which appears as 38 USCS § 1811 note.

Cross References

This section is referred to in 38 USCS § 1811

§ 1815. Monetary allowance

Discussion and Analysis in the Veterans Benefits Manual

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(a) **Monetary allowance.** The Secretary shall pay a monthly allowance to any eligible child for any disability resulting from the covered birth defects of that child.

(b) **Schedule for rating disabilities.**

   (1) The amount of the monthly allowance paid under this section shall be based on the degree of disability suffered by the child concerned, as determined in accordance with a schedule for rating disabilities resulting from covered birth defects that is prescribed by the Secretary.

   (2) In prescribing a schedule for rating disabilities for the purposes of this section, the Secretary shall establish four levels of disability upon which the amount of the allowance provided by this section shall be based. The levels of disability established may take into account functional limitations, including limitations on cognition, communication, motor abilities, activities of daily living, and employability.

(c) **Amount of monthly allowance.** The amount of the monthly allowance paid under this section shall be as follows:

   (1) In the case of a child suffering from the lowest level of disability prescribed in the schedule for rating disabilities under subsection (b), $100.

   (2) In the case of a child suffering from the lower intermediate level of disability prescribed in the schedule for rating disabilities under subsection (b), the greater of--

      (A) $214; or

      (B) the monthly amount payable under section 1805(b)(3) of this title [38 USCS § 1805(b)(3)] for the lowest level of disability prescribed for purposes of that section.

   (3) In the case of a child suffering from the higher intermediate level of disability prescribed in the schedule for rating disabilities under subsection (b), the greater of--

      (A) $743; or

      (B) the monthly amount payable under section 1805(b)(3) of this title [38 USCS § 1805(b)(3)] for the intermediate level of disability prescribed for purposes of that section.

   (4) In the case of a child suffering from the highest level of disability prescribed in the schedule for rating disabilities under subsection (b), the greater of--

      (A) $1,272; or

      (B) the monthly amount payable under section 1805(b)(3) of this title [38 USCS § 1805(b)(3)] for the highest level of disability prescribed for purposes of that section.

(d) **Indexing to Social Security benefit increases.** Amounts under paragraphs (1), (2)(A), (3)(A), and (4)(A) of subsection (c) shall be subject to adjustment from time to time under section 5312 of this title [38 USCS § 5312].

**Effective date of section:**

This section took effect on December 1, 2001, pursuant to § 401(g) of Act Nov. 1, 2000, P. L. 106-419, which appears as 38 USCS § 1811 note.

**§ 1816. Regulations**

The Secretary shall prescribe regulations for purposes of the administration of this subchapter [38 USCS §§ 1811 et seq.].
Effective date of section:
This section took effect on December 1, 2001, pursuant to § 401(g) of Act Nov. 1, 2000, P. L. 106-419, which appears as 38 USCS § 1811 note.

SUBSECTION III. CHILDREN OF CERTAIN KOREA SERVICE VETERANS BORN WITH SPINA BIFIDA

§ 1821. Benefits for children of certain Korea service veterans born with spina bifida

(a) Benefits authorized. The Secretary may provide to any child of a veteran of covered service in Korea who is suffering from spina bifida the health care, vocational training and rehabilitation, and monetary allowance required to be paid to a child of a Vietnam veteran who is suffering from spina bifida under subchapter I of this chapter [38 USCS §§ 1802 et seq.] as if such child of a veteran of covered service in Korea were a child of a Vietnam veteran who is suffering from spina bifida under such subchapter.

(b) Spina bifida conditions covered. This section applies with respect to all forms and manifestations of spina bifida, except spina bifida occulta.

(c) Veteran of covered service in Korea. For purposes of this section, a veteran of covered service in Korea is any individual, without regard to the characterization of that individual's service, who--

(1) served in the active military, naval, or air service in or near the Korean demilitarized zone (DMZ), as determined by the Secretary in consultation with the Secretary of Defense, during the period beginning on September 1, 1967, and ending on August 31, 1971; and

(2) is determined by the Secretary, in consultation with the Secretary of Defense, to have been exposed to a herbicide agent during such service in or near the Korean demilitarized zone.

(d) Herbicide agent. For purposes of this section, the term "herbicide agent" means a chemical in a herbicide used in support of United States and allied military operations in or near the Korean demilitarized zone, as determined by the Secretary in consultation with the Secretary of Defense, during the period beginning on September 1, 1967, and ending on August 31, 1971.

Explanatory notes:
A prior § 1821 was redesignated 38 USCS § 1831.

[§§ 1822-1824. Redesignated] Sections 1822-1824 were redesignated 38 USCS §§ 1832-1834, respectively.

§ 1823. Treatment of receipt of monetary allowance and other benefits
(a) **Coordination with other benefits paid to the recipient.** Notwithstanding any other provision of law, receipt by an individual of a monetary allowance under this chapter shall not impair, infringe, or otherwise affect the right of the individual to receive any other benefit to which the individual is otherwise entitled under any law administered by the Secretary.

(b) **Coordination with benefits based on relationship of recipients.** Notwithstanding any other provision of law, receipt by an individual of a monetary allowance under this chapter shall not impair, infringe, or otherwise affect the right of any other individual to receive any other benefit to which such other individual is entitled under any law administered by the Secretary based on the relationship of such other individual to the individual who receives such monetary allowance.

(c) **Monetary allowance not to be considered as income or resources for certain purposes.** Notwithstanding any other provision of law, a monetary allowance paid an individual under this chapter shall not be considered as income or resources in determining eligibility for, or the amount of benefits under, any Federal or federally assisted program.

**Effective date of section:**
This section took effect on December 1, 2001, pursuant to § 401(g) of Act Nov. 1, 2000, P. L. 106-419, which appears as 38 USCS § 1811 note.

§ 1824. **Nonduplication of benefits**

(a) **Monetary allowance.** In the case of an eligible child under subchapter II of this chapter [38 USCS §§ 1811 et seq.] whose only covered birth defect is spina bifida, a monetary allowance shall be paid under subchapter I of this chapter [38 USCS §§ 1802 et seq.]. In the case of an eligible child under subchapter II of this chapter [38 USCS §§ 1811 et seq.] who has spina bifida and one or more additional covered birth defects, a monetary allowance shall be paid under subchapter II of this chapter [38 USCS §§ 1811 et seq.].

(b) **Vocational rehabilitation.** An individual may only be provided one program of vocational training under this chapter [38 USCS §§ 1802 et seq.].

**Effective date of section:**
This section took effect on December 1, 2001, pursuant to § 401(g) of Act Nov. 1, 2000, P. L. 106-419, which appears as 38 USCS § 1811 note.

**SUBCHAPTER IV. GENERAL PROVISIONS**

§ 1831. **Definitions**

§ 1832. Applicability of certain administrative provisions

§ 1833. Treatment of receipt of monetary allowance and other benefits

§ 1834. Nonduplication of benefits

§ 1831. **Definitions**

In this chapter [38 USCS §§ 1802 et seq.]:

1. The term "child" means the following:
(A) For purposes of subchapters I and II of this chapter [38 USCS §§ 1802 et seq. and 1811 et seq.], an individual, regardless of age or marital status, who--
(i) is the natural child of a Vietnam veteran; and
(ii) was conceived after the date on which that veteran first entered the Republic of Vietnam during the Vietnam era.

(B) For purposes of subchapter III of this chapter [38 USCS §§ 1821 et seq.], an individual, regardless of age or marital status, who--
(i) is the natural child of a veteran of covered service in Korea (as determined for purposes of section 1821 of this title [38 USCS § 1821]); and
(ii) was conceived after the date on which that veteran first entered service described in subsection (c) of that section.

(2) The term "Vietnam veteran" means an individual who performed active military, naval, or air service in the Republic of Vietnam during the Vietnam era, without regard to the characterization of that individual's service.

(3) The term "Vietnam era" with respect to--
(A) subchapter I of this chapter [38 USCS §§ 1802 et seq.], means the period beginning on January 9, 1962, and ending on May 7, 1975; and
(B) subchapter II of this chapter [38 USCS §§ 1811 et seq.], means the period beginning on February 28, 1961, and ending on May 7, 1975.

Effective date of section:
This section took effect on December 1, 2001, pursuant to § 401(g) of Act Nov. 1, 2000, P. L. 106-419, which appears as 38 USCS § 1811 note.

Amendments:
2003. Act Dec. 16, 2003, redesignated this section, formerly 38 USCS § 1821, as 38 USCS § 1831; and substituted para. (1) for one which read:

"(1) The term 'child' means an individual, regardless of age or marital status, who--

"(A) is the natural child of a Vietnam veteran; and

"(B) was conceived after the date on which that veteran first entered the Republic of Vietnam during the Vietnam era.".

Cross References
This section is referred to in 38 USCS § 1811

§ 1832. Applicability of certain administrative provisions

(a) Applicability of certain provisions relating to compensation. The provisions of this title specified in subsection (b) apply with respect to benefits and assistance under this chapter in the same manner as those provisions apply to compensation paid under chapter 11 of this title [38 USCS §§ 1101 et seq.].

(b) Specified provisions. The provisions of this title referred to in subsection (a) are the following:

(1) Section 5101(c) [38 USCS § 5101(c)].
(2) Subsections (a), (b)(2), (g), and (i) of section 5110 [38 USCS § 5110].
(3) Section 5111 [38 USCS § 5111].
§ 1833. Treatment of receipt of monetary allowance and other benefits

(a) Coordination with other benefits paid to the recipient. Notwithstanding any other provision of law, receipt by an individual of a monetary allowance under this chapter shall not impair, infringe, or otherwise affect the right of the individual to receive any other benefit to which the individual is otherwise entitled under any law administered by the Secretary.

(b) Coordination with benefits based on relationship of recipients. Notwithstanding any other provision of law, receipt by an individual of a monetary allowance under this chapter shall not impair, infringe, or otherwise affect the right of any other individual to receive any benefit to which such other individual is entitled under any law administered by the Secretary based on the relationship of such other individual to the individual who receives such monetary allowance.

(c) Monetary allowance not to be considered as income or resources for certain purposes. Notwithstanding any other provision of law, a monetary allowance paid an individual under this chapter shall not be considered as income or resources in determining eligibility for, or the amount of benefits under, any Federal or federally assisted program.

Effective date of section:

This section took effect on December 1, 2001, pursuant to § 401(g) of Act Nov. 1, 2000, P. L. 106-419, which appears as 38 USCS § 1811 note.

Amendments:

2003. Act Dec. 16, 2003, redesignated this section, formerly 38 USCS § 1823, as 38 USCS § 1833.
[38 USCS §§ 1802 et seq. or 1811 et seq.] who is also eligible for benefits under subchapter III of this chapter [38 USCS §§ 1821 et seq.], a monetary allowance shall be paid under the subchapter of this chapter elected by the child.

(b) Vocational rehabilitation. An individual may only be provided one program of vocational training under this chapter [38 USCS §§ 1802 et seq.].

Effective date of section:
This section took effect on December 1, 2001, pursuant to § 401(g) of Act Nov. 1, 2000, P. L. 106-419, which appears as 38 USCS § 1811 note.

Amendments:
2003. Act Dec. 16, 2003, redesignated this section, formerly 38 USCS § 1824, as 38 USCS § 1834; and, in subsec. (a), added the sentence beginning "In the case of a child . . .".

CHAPTER 19. INSURANCE

SUBCHAPTER I. NATIONAL SERVICE LIFE INSURANCE
SUBCHAPTER II. UNITED STATES GOVERNMENT LIFE INSURANCE
SUBCHAPTER III. SERVICEMEMBERS' GROUP LIFE INSURANCE
SUBCHAPTER IV. GENERAL

Amendments:
Act Nov. 18, 1988, P. L. 100-687, Div B, Title XIV, § 1401(c), 102 Stat. 4129, amended the analysis of this chapter by adding items 728, 729, and 763.
1991. Act Aug. 6, 1991, P. L. 102-83, § 5(b)(1), 105 Stat. 406, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).
Such Act further, in item 1985, substituted "Secretary" for "Administrator".


Cross References
This chapter is referred to in 38 USCS §§ 101, 106, 5301, 5303A

SUBCHAPTER I. NATIONAL SERVICE LIFE INSURANCE

§ 1901. Definitions
§ 1902. Premium rates and policy values
§ 1903. Amount of insurance
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§ 1924. In-service waiver of premiums
§ 1925. Limited period for acquiring insurance
§ 1926. Authority for higher interest rates for amounts payable to beneficiaries
§ 1927. Authority for higher monthly installments payable to certain annuitants
§ 1928. Authority for payment of interest on settlements
§ 1929. Authority to adjust premium discount rates

Cross References
This subchapter is referred to in 50 USCS Appx § 540

§ 1901. Definitions

For the purposes of this subchapter [38 USCS §§ 1901 et seq.].--
(1) The term "insurance" means National Service Life Insurance.
(2) The terms "widow" or "widower" mean a person who was the lawful spouse of the insured at the maturity of the insurance.
(3) The term "child" means a legitimate child, an adopted child, and, if designated as beneficiary by the insured, a stepchild or an illegitimate child.
(4) The terms "parent", "father", and "mother" mean a father, mother, father through adoption, mother through adoption, persons who have stood in loco parentis to a member of the military or naval forces at any time before entry into active service for a period of not less than one year, and a stepparent, if designated as beneficiary by the insured.

Prior law and revision:
This section is based on 38 USC §§ 801(d)-(f), 802(g) (Acts Oct. 8, 1940, ch 757, Title VI, Part I, §§ 601(d)-(f), 602(g), 54 Stat. 1008; July 11, 1942, ch 504, § 7, 56 Stat. 659; Aug. 1, 1946, ch 728, § 1(a), 60 Stat. 781).

Explanatory notes:

Amendments:

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3
Department of Veterans Affairs-National Service life insurance, 38 CFR Part 8

Research Guide

Am Jur:
37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance §§ 1864, 1865

Annotations:
National Service Life Insurance: change of beneficiary, 13 ALR Fed 6

Law Review Articles:
Benefits for Conscientious Objectors. 19 Catholic Lawyer 62, Winter 1973

I. IN GENERAL

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I. IN GENERAL

1. Generally

2. Constitutionality
   National Service Life Insurance Act (predecessor to 38 USCS §§ 1901 et seq.) is valid exercise of Congressional power over national defense. Wissner v Wissner (1950) 338 US 655, 94 L Ed 424, 70 S Ct 398, reh den (1950) 339 US 926, 94 L Ed 1348, 70 S Ct 619

3. Purpose
   Underlying policy of National Service Life Insurance is to benefit living members of insured's family and friends. United States v Short (1956, CA9 Cal) 240 F.2d 292

4. Construction of statutes and policies
   Both government insurance policies and statutes providing for such policies are to be construed liberally to effectuate their beneficial purpose. United States v Zazove (1948) 334 US 602, 92 L Ed 1601, 68 S Ct 1284, reh den (1948) 335 US 837, 93 L Ed 389, 69 S Ct 12; United States v Sligh (1929, CA9 Ariz) 31 F.2d 735, cert den (1929) 280 US 559, 74 L Ed 614, 50 S Ct 18; United States v Worley (1930, CA8 Neb) 42 F.2d 197; United States v Phillips (1930, CA8 Mo) 44 F.2d 689; Jadin v United States (1947, DC Wis) 74 F Supp 589
   Although government life insurance policies are liberally construed in favor of insured, such policies are contracts, terms of which must be satisfied to obtain recovery thereon, United States v Tyrakowski (1931, CA7 Ill) 50 F.2d 766; Walker v United States (1952, CA5 Miss) 197 F.2d 226; Linton v United States (1955, CA5 Ga) 227 F.2d 254
   Statutory system of national life insurance for servicemen is expression of legislative intent rather than embodiment of agreement between Congress and person insured; hence, only intent of Congress need be ascertained to fix meaning of statutory terms and layman's understanding of policy does not have relevance that it has in construction of commercial contract. Collins v United States (1947, CA10 Okla) 161 F.2d 64, cert den (1947) 331 US 859, 91 L Ed 1866, 67 S Ct 1756
   Construction of National Service Life Insurance policies, and rights and obligations of parties thereunder, are questions of federal law which are not controlled by law of any state. Pack v United States (1949, CA9 Cal) 176 F.2d 770; Taylor v United States (1953, DC Ark) 113 F Supp 143, affd (1954, CA8 Ark) 211 F.2d 794; Simmons v United States (1954, DC Pa) 120 F Supp 641; Dyke v Dyke (1954, DC Tenn) 122 F Supp 529, affd (1955, CA6 Tenn) 227 F.2d 461, cert den (1956) 352 US 850, 1 L Ed 2d 61, 77 S Ct 70
   Sovereign character of government does not render general rules of law of insurance totally inapplicable to determination of government's liability under its insurance policies. United States v Morrell (1953, CA4 Md) 204 F.2d 490, 36 ALR2d 1374, cert den (1953) 346 US 875, 98 L Ed 383, 74 S Ct 128

5. Relationship with state laws
   Construction of National Service Life Insurance policies, and rights and obligations of parties thereunder, are questions of federal law which are not controlled by law of any state. Pack v United States (1949, CA9 Cal) 176 F.2d 770; Taylor v United States (1953, DC Ark) 113 F Supp
143, affd (1954, CA8 Ark) 211 F.2d 794; Simmons v United States (1954, DC Pa) 120 F Supp 641; Dyke v Dyke (1954, DC Tenn) 122 F Supp 529, affd (1955, CA6 Tenn) 227 F.2d 461, cert den (1956) 352 US 850, 1 L Ed 2d 61, 77 S Ct 70

It was intent of Congress that National Service Life Insurance Act (predecessor to 38 USCS §§ 1901 et seq.) take precedence over field and be supreme, state laws and regulations to contrary notwithstanding. Carballo v McFann (1950) 101 Cal App 2d 93, 224 P2d 902

6. Right to insurance

Serviceman's right to insurance benefits must be distinguished from general compensation benefits, since insurance benefits are contracts creating rights which Congress cannot take away without making just compensation. Lynch v United States (1934) 292 US 571, 78 L Ed 1434, 54 S Ct 840 (ovrd in part as stated in Pro-Eco v Board of Comm'r's (1995, CA7 Ind) 57 F.3d 505, 26 ELR 20445)

Serviceman's right to insurance benefits is stronger than his right to general compensation benefits, since insurance benefits are not gratuities of government. Eggen v United States (1932, CA8 Minn) 58 F.2d 616

Personnel of organized military forces of commonwealth of Philippines called and ordered into armed forces of United States under authority of President's Military Order of July 26, 1941, are in active service in land and naval forces of United States and are entitled to insurance. (1942) 40 Op Atty Gen 185

7. Regulations

Since regulations of Administrator [now Secretary] necessary to carry out purposes of statutes providing for government insurance have force of law and are generally as binding as though incorporated in contract of insurance, terms of government insurance policies are to be found in part in policy, in part in statutes under which policies were issued, and in part in regulations promulgated thereunder. Lynch v United States (1934) 292 US 571, 78 L Ed 1434, 54 S Ct 840 (ovrd in part as stated in Pro-Eco v Board of Comm'r's (1995, CA7 Ind) 57 F.3d 505, 26 ELR 20445)

When reviewing insurance regulations of Administrator [now Secretary], court must examine pertinent sections of National Service Life Insurance Act (predecessor to 38 USCS §§ 1901 et seq.) in relation to other sections and in relation to its legislative history in order to determine whether regulation is "not inconsistent" with act and whether it is necessary or appropriate to carry out its purposes. United States v Short (1956, CA9 Cal) 240 F.2d 292

II. CONSTRUCTION OF TERMS

8. Widow or widower

Beneficiary is not widow within meaning of National Service Life Insurance Act (predecessor to 38 USCS §§ 1901 et seq.) where insured obtained divorce from her shortly before his death, although divorce decree prohibited remarriage for 60 days, since decree was final at time of entry. Schurink v United States (1949, CA5 Ala) 177 F.2d 809, cert den (1950) 339 US 928, 94 L Ed 1349, 70 S Ct 627

Congress in using word "widow" intended meaning to be determined by application of local law. Lembcke v United States (1950, CA2 NY) 181 F.2d 703

Proxy marriage between residents of Texas and California, performed in Nevada, was valid marriage, hence wife was "widow" of deceased soldier. Barrons v United States (1951, CA9 Cal) 191 F.2d 92

Person who married insured prior to date of his final divorce decree was not insured's widow where, under local law, attempted marriage was void ab initio. Hendrich v Anderson (1951, CA10 Utah) 191 F.2d 242

In contest between first and second wife of insured, who lived in Durham, North Carolina at the time of his entry into service, certificates of clerks from six counties located in vicinity of
Durham that no divorce proceedings had been instituted between insured and first wife overcame presumption in favor of validity of second marriage. Page v United States (1952, CA4 NC) 193 F.2d 936

9. Child

   Illegitimate child is child within meaning of National Service Life Insurance Act (predecessor to 38 USCS §§ 1901 et seq.). United States v Philippine Nat'l Bank (1961, App DC) 110 US App DC 250, 292 F.2d 743

   Stepdaughter of insured remains his stepdaughter even after insured divorced her mother, and where, after divorce, insured continued from time to time to make contributions to her support and maintenance, stepdaughter has insurable interest in life of insured. Benefield v United States (1945, DC Tex) 58 F Supp 904

10. Parent

   Insured's putative father, who had never married insured's mother, adopted insured, or been subject of court order determining relationship, was not within permitted class under predecessor to 38 USCS § 1916. Gibbs v United States (1948, DC NC) 80 F Supp 907

   Putative father designated as beneficiary of NSLI policy by insured is ineligible beneficiary unless shown to be in loco parentis. Hawkey v United States (1952, DC Ill) 108 F Supp 941

   Natural father is not within permitted class as one who last bore parental relationship to insured, where father deserted family when insured was 8 years old. Conley v United States (1954, DC W Va) 119 F Supp 832

11. Person standing in loco parentis

   Person stands in loco parentis where he has intentionally assumed and established common-law rights and duties of natural parent under common law. Niewiadomski v United States (1947, CA6 Mich) 159 F.2d 683, cert den (1947) 331 US 850, 91 L Ed 1859, 67 S Ct 1730

   Term "in loco parentis" cannot be defined by common-law principles, since such term never had generally accepted common-law meaning. Thomas v United States (1951, CA6 Tenn) 189 F.2d 494, reh den (1952) 343 US 932, 96 L Ed 1341, 72 S Ct 756 and cert den (1951) 342 US 850, 96 L Ed 641, 72 S Ct 78

   Term "in loco parentis", as used in predecessor to 38 USCS § 1901 refers to common-law relationship. Powledge v United States (1951, CA5 Ga) 193 F.2d 438

   Term "in loco parentis" as used in National Service Life Insurance Act (predecessor to 38 USCS §§ 1901 et seq.) should be construed in its usual common-law sense, rather than liberally construed as descriptive term. Bourbeau v United States (1948, DC Me) 76 F Supp 778

   Common-law definition of "in loco parentis," as person who puts himself in situation of lawful parent, by assuming obligations of parenthood, is majority rule in cases involving NSLT policies. Lewis v United States (1952, DC W Va) 105 F Supp 73

12. -Elements of relationship

   Responsibility for support of insured during insured's minority is essential to establish relationship of one in loco parentis. Strauss v United States (1947, CA2 NY) 160 F.2d 1017, cert den (1947) 331 US 820, 91 L Ed 1859, 67 S Ct 1741

   Term "in loco parentis" means any person who has assumed obligations of parents, and obligation is not restricted to support, but includes assumption of other parental obligations. Thomas v United States (1951, CA6 Tenn) 189 F.2d 494, reh den (1952) 343 US 932, 96 L Ed 1341, 72 S Ct 756 and cert den (1951) 342 US 850, 96 L Ed 641, 72 S Ct 78

   Responsibility for support of insured is essential to finding that in loco parentis relationship exists. Baumat v United States (1951, CA2 NY) 191 F.2d 194, revd on other grounds (1952) 344 US 82, 97 L Ed 111, 73 S Ct 122, reh den (1953) 344 US 916, 97 L Ed 706, 73 S Ct 332 and (superseded by statute as stated in Short v United States (1954, DC Cal) 123 F Supp 414)
Family relationship rather than assumption of legal responsibility for support is test for in loco parentis relationship. Jadin v United States (1947, DC Wis) 74 F Supp 589

Support and maintenance of insured are essential to establishing in loco parentis status during minority, but relationship may continue into adulthood without them; to establish in loco parentis relationship, it is not necessary to show that such person and insured lived together continuously. Derrell v United States (1949, DC Mo) 82 F Supp 18

Relative ages of parties is not controlling on question whether person has attained in loco parentis status, but has some bearing on question. Lewis v United States (1952, DC W Va) 105 F Supp 73

13. Intent

Assumption of relationship in loco parentis is primarily question of intention, to be shown by acts, conduct, and declarations of person alleged to stand in that relationship. Leyerly v United States (1947, CA10 Colo) 162 F.2d 79

Existence of in loco parentis relationship is question of intent, and relationship may arise upon assumption of parental duties and offices other than duty to make provision for child which, in some situations, may be relatively unimportant. Thomas v United States (1951, CA6 Tenn) 189 F.2d 494, reh den (1952) 343 US 932, 96 L Ed 1341, 72 S Ct 756 and cert den (1951) 342 US 850, 96 L Ed 641, 72 S Ct 78

Whether person has assumed standing of in loco parentis is primarily question of intent. Reynolds v United States (1951, DC Kan) 96 F Supp 257

14. Inception and duration

Relationship may continue beyond child’s minority, where child continues to treat such persons as parents. Leyerly v United States (1947, CA10 Colo) 162 F.2d 79

In loco parentis relationship may begin after adulthood of insured, but is not established as to adult insured under no mental or physical disability without evidence of adoption and legal liability for support. Powledge v United States (1951, CA5 Ga) 193 F.2d 438

In loco parentis relationship need not have its inception during minority of insured, even though insured is not mentally or physically incapacitated. United States v Rock (1952, App DC) 92 US App DC 1, 200 F.2d 357

In determining questions involving in loco parentis status under laws administered by Veterans' Administration [now Department of Veterans Affairs], generally accepted common-law rule that minority extends to age of 21 years in case of male or female veteran is applicable. 1948 ADVA 793

§ 1902. Premium rates and policy values

Premium rates for insurance shall be the net rates based upon the American Experience Table of Mortality and interest at the rate of 3 per centum per annum. All cash, loan, paid-up, and extended values, and all other calculations in connection with insurance, shall be based upon said American Experience Table of Mortality and interest at the rate of 3 per centum per annum.

Prior law and revision:

This section is based on 38 USC § 802(e) (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(e), 54 Stat. 1009).

Explanatory notes:

Amendments:


Cross References

This section is referred to in 38 USCS §§ 1926, 1927, 1929

Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance §§ 1868, 1870

§ 1903. Amount of insurance

Insurance shall be issued in any multiple of $500 and the amount of insurance with respect to any one person shall be not less than $1,000 or more than $10,000. No person may carry a combined amount of National Service Life Insurance and United States Government life insurance in excess of $10,000 at any one time. The limitations of this section shall not apply to the additional paid up insurance the purchase of which is authorized under section 1907 of this title [38 USCS § 1907].

Prior law and revision:

This section is based on 38 USC §§ 802(q), 803 (Acts Oct. 8, 1940, ch 757, Title VI, Part I, §§ 602(q), 603, 54 Stat. 1009).

Explanatory notes:

A prior § 1903 was transferred by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406, and appears as 38 USCS § 3903.

Amendments:

1971. Act Dec. 15, 1971, inserted "The limitations of this section shall not apply to the additional paid up insurance the purchase of which is authorized under section 707 of this title."

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 703, as 38 USCS § 1903, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:

Effective date of amendment made by Act Dec. 15, 1971. Act Dec. 15, 1971, P. L. 92-193, 85 Stat. 648, provided in part that the amendment made to this section by Act Dec. 15, 1971 is "effective the first day of the first calendar month which begins more than six calendar months after the date of enactment of this Act".

Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance § 1868

§ 1904. Plans of insurance
(a) Insurance may be issued on the following plans: Five-year level premium term, ordinary life, twenty-payment life, thirty-payment life, twenty-year endowment, endowment at age sixty, and endowment at age sixty-five. Level premium term insurance may be converted as of the date when any premium becomes or has become due, or exchanged as of the date of the original policy, upon payment of the difference in reserve, at any time while such insurance is in force and within the term period to any of the foregoing permanent plans of insurance, except that conversion to an endowment plan may not be made while the insured is totally disabled.

(b) Under such regulations as the Secretary may promulgate a policy of participating insurance may be converted to or exchanged for insurance issued under this subsection on a modified life plan. Insurance issued under this subsection shall be on the same terms and conditions as the insurance which it replaces, except (1) the premium rates for such insurance shall be based on the 1958 Commissioners Standard Ordinary Basic Table of Mortality and interest at the rate of 3 per centum per annum; (2) all cash, loan, paid-up, and extended values shall be based on the 1958 Commissioners Standard Ordinary Basic Table of Mortality and interest at the rate of 3 per centum per annum; and (3) at the end of the day preceding the sixty-fifth birthday of the insured the face value of the modified life insurance policy or the amount of extended term insurance thereunder shall be automatically reduced by one-half thereof, without any reduction in premium.

(c) Under such regulations as the Secretary may promulgate, a policy of nonparticipating insurance may be converted to or exchanged for insurance issued under this subsection on a modified life plan. Insurance issued under this subsection shall be on the same terms and conditions as the insurance which it replaces, except that (1) term insurance issued under section 621 of the National Service Life Insurance Act of 1940 shall be deemed for the purposes of this subsection to have been issued under section 1923(b) of this title [38 USCS § 1923(b)]; and (2) at the end of the day preceding the sixty-fifth birthday of the insured the face value of the modified life insurance policy or the amount of extended term insurance thereunder shall be automatically reduced by one-half thereof, without any reduction in premium. Any person eligible for insurance under section 1922(a) [38 USCS § 1922(a)], or section 1925 of this title [38 USCS § 1925] may be granted a modified life insurance policy under this subsection which, subject to exception (2) above, shall be issued on the same terms and conditions specified in section 1922(a) or section 1925 [38 USCS § 1922(a) or 1925], whichever is applicable.

(d) Any insured whose modified life insurance policy is in force by payment or waiver of premiums on the day before the insured's sixty-fifth birthday may upon written application and payment of premiums made before such birthday be granted National Service Life Insurance, on an ordinary life plan, without physical examination, in an amount of not less than $500, in multiples of $250, but not in excess of one-half of the face amount of the modified life insurance policy in force on the day before the insured's sixty-fifth birthday. Insurance issued under this subsection shall be effective on the sixty-fifth birthday of the insured. The premium rate, cash, loan, paid-up, and extended values on the ordinary life insurance issued under this subsection shall be based on the same mortality tables and interest rates as the insurance issued under the modified life policy. Settlement on policies involving annuities on insurance issued under this subsection shall be based on the same mortality or annuity tables and interest rates as.
such settlements on the modified life policy. If the insured is totally disabled on the day before the insured's sixty-fifth birthday and premiums on his modified life insurance policy are being waived under section 1912 of this title [38 USCS § 1912] or the insured is entitled on that date to waiver under such section the insured shall be automatically granted the maximum amount of insurance authorized under this subsection and premiums on such insurance shall be waived during the continuous total disability of the insured.

(e) After June 30, 1972, and under such regulations as the Secretary may promulgate, insurance may be converted to or exchanged for insurance on a modified life plan under the same terms and conditions as are set forth in subsections (b) and (c) of this section except that at the end of the day preceding the seventieth birthday of the insured the face value of the modified life insurance policy or the amount of extended insurance thereunder shall be automatically reduced by one-half thereof, without any reduction in premium. Any insured whose modified life insurance policy issued under this subsection is in force by payment or waiver of premiums on the day before the insured's seventieth birthday may be granted insurance on the ordinary life plan upon the same terms and conditions as are set forth in subsection (d) of this section except that in applying such provisions the seventieth birthday is to be substituted for the sixty-fifth birthday. Notwithstanding any other provision of law or regulations the Secretary under such terms and conditions as the Secretary determines to be reasonable and practicable and upon written application and payment of the required premiums, reserves, or other necessary amounts made within one year from the effective date of this subsection by an insured having in force a modified life plan issued under subsection (b) or (c) of this section, including any replacement insurance issued under subsection (d) of this section or other provision of this title, can exchange such insurance without proof of good health for an amount of insurance issued under this subsection equal to the insurance then in force or which was in force on the day before such insured's sixty-fifth birthday, whichever is the greater.

Prior law and revision:
This section is based on 38 USC § 802(f) (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(f), 54 Stat. 1009; Aug. 1, 1946, ch 728, § 3, 60 Stat 782; Feb. 21, 1947, ch 5, § 2, 61 Stat 5).

References in text:
"Section 621 of the National Service Life Insurance Act of 1940", referred to in subsec. (c), is Act Oct. 8, 1940, ch 757, Title VI, Part I, § 621, as added April 25, 1951, ch 38, Part II, § 10, 65 Stat. 37, which was classified to 38 USC § 822 prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1273. For similar provisions, see 38 USCS § 1923.

"The effective date of this subsection", referred to in subsec. (e), is the effective date of Act Dec. 14, 1971, P. L. 92-193, 85 Stat. 648, which is the first day of the first calendar month beginning more than 6 calendar months after Dec. 15, 1971.

Explanatory notes:

Amendments:
**1964.** Act Oct. 13, 1964 (effective on the first day of the first calendar month which begins
more than six calendar months after the date of enactment, as provided by § 12(d) of such
Act, which appears as 38 USCS § 1925 note), designated existing matter as subsec. (a); and
added subsecs. (b)-(d).

**1971.** Act Dec. 15, 1971 (effective on the first day of the first calendar month which begins
more than six calendar months after the date of enactment, as provided by such Act), added
subsec. (e).

the effective date of this subsection", and substituted "subsection" for "subsections"
preceding "(b) or (c)".

**1986.** Act Oct. 28, 1986, in subsec. (d) substituted "the insured's" for "his" wherever
appearing, and "the insured" for "he" preceding "is entitled" and "shall be"; and in subsec. (e)
substituted "the insured's" for "his" and "the Administrator" for "he" preceding "determines".

**1991.** Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 704, as 38 USCS §
1904, amended the references in this section to reflect the redesignations made by § 5(a) of
such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

**Other provisions:**

§ 12(d), 78 Stat. 1098, provided that the amendments to this section "are effective as of the
first day of the first calendar month which begins more than 6 calendar months after Oct. 13,
1964."

**Effective date of amendment made by Act Dec. 15, 1971.** Act Dec. 15, 1971, P. L. 92-193,
85 Stat. 648, provided in part that the amendment made to this section by Act Dec. 15, 1971
is "effective the first day of the first calendar month which begins more than six calendar
months after the date of enactment of this Act".

**Application and construction of the Oct. 12, 1982 amendment of this section.** For
provisions as to the application and construction of the Oct. 12, 1982 amendment of this
section, see § 5 of such Act, which appears as 10 USCS § 101 note.

**Research Guide**

**Am Jur:**

37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance § 1869

1. Conversion of policies

2. Substitution of policies

1. Conversion of policies

Insured's letter to Veterans Administration [now Department of Veterans Affairs], offering to
purchase endowment policy at stated premium, does not constitute application for conversion of
term policies which he held at that time, even though endowment policy could not have been
issued without canceling term policies due to limitation on maximum amount of insurance, where
there was no indication that insured knew term policies would have to be cancelled, or that he
would have preferred to cancel term policies rather than request for endowment policy. Dupree
v United States (1954, DC Ga) 125 F Supp 122

2. Substitution of policies

Policy upon authorized plan is to be substituted for endowment policy, inadvertently issued,
only with consent of insured. 1947 ADVA 737
§ 1905. Renewal

All level premium term policies, except as otherwise provided in this section, shall cease and terminate at the expiration of the term period. At the expiration of any term period any five-year level premium term policy which has not been exchanged or converted to a permanent plan of insurance and which is not lapsed shall be renewed as level premium term insurance without application for a successive five-year period at the premium rate for the attained age without medical examination. However, renewal will be effected in cases where the policy is lapsed only if the insured makes application for reinstatement and renewal of the term policy within five years after the date of lapse, and reinstatement in such cases shall be under the terms and conditions prescribed by the Secretary. In any case in which the insured is shown by evidence satisfactory to the Secretary to be totally disabled at the expiration of the level premium term period of the insurance under conditions which would entitle the insured to continued insurance protection but for such expiration, his insurance, if subject to renewal under this section, shall be automatically renewed for an additional period of five years at the premium rate for the then attained age, unless the insured has elected insurance on some other available plan.

Prior law and revision:


Amendments:

1970. Act June 25, 1970 (effective 6/25/70, as provided by § 14(a) of such Act, which appears as 38 USCS § 1317 note), substituted "insured makes application for reinstatement and renewal of his term policy within five years after the date of lapse" for "lapse occurred not earlier than two months before the expiration of the term period".

1986. Act Oct. 28, 1986, substituted "the" for "his" preceding "term policy" and "insurance" and substituted "the insured" for "him" following "entitle".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 705, as 38 USCS § 1905, and substituted "Secretary" for "Administrator".

Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance § 1869

I. EXPIRATION AND RENEWAL

1. Generally
2. Renewal
   3. Effective date
   4. Disability or death of insured

II. REINSTATEMENT AND RENEWAL

A. In General

5. Generally
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B. Reinstatement Application

8. Generally
9. Compliance with statutes and regulations
10. Health of applicant
11. Approval or denial of applications
12. -Estoppel to deny application
13. Effective date of reinstatement
14. Premiums

I. EXPIRATION AND RENEWAL

1. Generally
   Policy of released prisoner of war ceased and terminated where he was released on September 12, 1945, and did not apply for continuation of gratuitous policy or waiver of premiums due to disability by September 30, 1945. Fox v United States (1953, CA5 Tex) 201 F.2d 883

2. Renewal
   Beneficiary's filing of claim on expired gratuitous policy and request for waiver of premiums due to insured's disability prior to death do not effect renewal of policy which insured allowed to lapse for nonpayment of premiums. Fox v United States (1953, CA5 Tex) 201 F.2d 883

3. -Effective date
   Administration [now Department] may not apply premium accompanying renewal application to month of January, although veteran signed renewal application on January 31, and also mailed required premiums on that date, where administration [now Department] did not receive application and premiums until February 4, since effective date of insurance is when administration [now Department] approved application. Collier v United States (1950, DC Va) 90 F Supp 215

4. -Disability or death of insured
   When term of contract expires in interim between inception of total disability and 6 months later, or death prior to expiration of 6 months, test whether insured has continued insurance protection is existence of conditions which would entitle him to continued insurance protection but for such expiration. 1950 ADVA 847

II. REINSTATEMENT AND RENEWAL

A. In General

5. Generally
   Predecessor to 38 USCS § 1910, while making reinstated policies incontestable, does not operate to reinstate policies when Veterans' Administration [now Department of Veterans Affairs] unreasonably delays taking action on application for reinstatement. James v United States (1950, CA4 NC) 185 F.2d 115, 22 ALR2d 830
   Right to reinstatement is not governed by provisions of insurance contract. Rowan v United States (1954, CA3 Pa) 211 F.2d 237
   Upon lapse or cash surrender of insurance issued pursuant to 38 USCS § 722 [now 38 USCS § 1922], reinstatement of previously lapsed policies issued under 38 USCS § 723 [now 38 USCS § 1923] is proper, so long as all requirements for reinstatement are met within 5-year term period. 1959 ADVA 966

   Reinstatement implies placing insured in same position that he occupied prior to lapse of policy, but does not imply making of new contract or policy, or changing contractual relation or status of parties. Cleveland v United States (1953, CA6 Tenn) 201 F.2d 398
Reinstatement implies placing insured in condition he was in before forfeiture and does not imply making of new contract or policy. Kalter v United States (1955, DC NY) 130 F Supp 79

7. Miscellaneous

Issuance of new policy upon insured's re-enlistment is not reinstatement of previous 5-year level premium policy allowed to lapse after end of first enlistment, or of beneficiary thereof, even though application for new policy was designated application for reinstatement. Wright v United States (1953, DC Mo) 114 F Supp 693

B. Reinstatement Application

8. Generally

Insurance Service of Veterans' Administration [now Department of Veterans Affairs] is legally justified in relying upon representations of applicant for reinstatement of his national service life insurance. United States v Willoughby (1957, CA9 Cal) 250 F.2d 524

Mere mailing of application for reinstatement of NSLI policy does not effect such reinstatement, even though premium payment is included with application, since reinstatement depends upon application being accepted and approved by Administrator [now Secretary]. Collier v United States (1950, DC Va) 90 F Supp 215

9. Compliance with statutes and regulations

Whatever right insured has to reinstate NSLI policy is contained in statute and regulations, not in insurance contract, and no reinstatement can be effected where application for reinstatement did not conform to requirements of regulations, even though Administrator [now Secretary] accepted such application. United States v Fitch (1950, CA10 NM) 185 F.2d 471

It is duty of Administrator [now Secretary] to deny reinstatement where insured, in applying for reinstatement, has not complied with statutory requirements and regulations. Klish v United States (1962, CA5 Ga) 308 F.2d 371

Upon lapse or cash surrender of insurance issued pursuant to 38 USCS § 722 [now 38 USCS § 1922], reinstatement of previously lapsed policies issued under 38 USCS § 723 [now 38 USCS § 1923] is proper, so long as all requirements for reinstatement are met within 5-year term period. 1959 ADVA 966

10. Health of applicant

Application for reinstatement of NSLI policy which failed to answer question as to whether applicant was in same physical condition as at time policy lapsed, cannot effect reinstatement of policy where applicant was discovered to be suffering from cancer during time period in question, since evidence of insurability as required by statute in regulations was completely lacking. James v United States (1950, CA4 NC) 185 F.2d 115, 22 ALR2d 830

Administrator [now Secretary] cannot waive requirement of proof showing insured is in as good health at time of application for reinstatement as at time policy lapsed, since estoppel by act of agent does not apply against United States. United States v Fitch (1950, CA10 NM) 185 F.2d 471

Applicant's poor health at time agency received application for reinstatement of NSLI policy precludes reinstatement of policy, even though applicant had been in good physical health at time he gave application and check for premium payment to relative, requesting him to mail it to agency, where applicant's relative held application more than 5 days, during which time applicant suffered grave illness. Johnson v United States (1964, CA6 Tenn) 335 F.2d 873

Recovery of insurance benefits may properly be denied where veteran did not furnish evidence of good health when seeking reinstatement, even though administrator [now Secretary] accepted monthly payments from date of application until death three months later. Colizza v United States (1951, DC Pa) 101 F Supp 695

11. Approval or denial of applications

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Interoffice memoranda of Veterans’ Administration [now Department of Veterans Affairs], indicating that some officials at various times thought insured's health would not prevent reinstatement, or that policy had actually become reinstated, do not indicate approval of application for reinstatement, but merely represent tentative opinions not inconsistent with later interoffice memorandum stating that insured was totally disabled on date of application and ineligible for reinstatement. James v United States (1950, CA4 NC) 185 F.2d 115, 22 ALR2d 830

Acceptance of insured's application for reinstatement cannot be established by waiver or estoppel, as anyone who enters into arrangement with United States assumes risk of accurately ascertaining whether agent, purporting to act in name of government, is acting within bounds of his authority. United States v Holley (1952, CA5 Ga) 199 F.2d 575

Acceptance of premiums by Administrator [now Secretary] does not, by itself, operate to reinstate policy. Klish v United States (1962, CA5 Ga) 308 F.2d 371

12. Estoppel to deny application

Government is not estopped to deny application for reinstatement of NSLI policy by reason of its having failed to act on application for period of 6 months, at which time applicant died, where applicant failed to perfect application by giving evidence of insurability as required by regulations and government delay was not unreasonable under circumstances existing at time of application. James v United States (1950, CA4 NC) 185 F.2d 115, 22 ALR2d 830

Since United States cannot be estopped by unauthorized acts of its agents, government is not estopped to deny application for reinstatement of NSLI policy where applicant failed to furnish evidence of his present health as required by statute and regulations, even though Administration [now Department] accepted application without questioning lack of medical evidence. United States v Fitch (1950, CA10 NM) 185 F.2d 471

Letter from Director of Insurance Service stating that insured's premium account had been adjusted does not estop government from denying application for reinstatement of NSLI policy, where such letter was improper under statute and regulations. United States v Holley (1952, CA5 Ga) 199 F.2d 575

Administrator's [now Secretary's] failure to examine veteran's compensation file to determine true state of veteran's health does not estop United States from denying reinstatement of NSLI policy. United States v Willoughby (1957, CA9 Cal) 250 F.2d 524

Administration [now Department] is not estopped to deny reinstatement of NSLI policy by retention of premiums, issuance of receipt, and failure to take action to approve or deny reinstatement application. Colizza v United States (1951, DC Pa) 101 F Supp 695

13. Effective date of reinstatement

Effective date of reinstatement of NSLI policy is date that application therefore was approved by Veterans’ Administration [now Department of Veterans Affairs]. Collier v United States (1950, DC Va) 90 F Supp 215

Although reinstatement does not occur until administrator [now Department] approves application therefore, once approved, reinstatement may be made effective as of prior date. Karas v United States (1954, DC Pa) 118 F Supp 446, affd (1954, CA3 Pa) 214 F.2d 130

14. Premiums

Two months' premiums accompanying application for reinstatement may properly be applied to month of grace and month of application for reinstatement, although such application leaves no premium to be applied to month in which reinstatement became effective by approval. Cleveland v United States (1953, CA6 Tenn) 201 F.2d 398

Premium payments enclosed with reinstatement application may not be applied to periods prior to approval of such application. Collier v United States (1950, DC Va) 90 F Supp 215

Absent requests by applicant as to application of premiums, Veterans’ Administration [now Department of Veterans Affairs] may apply premiums accompanying application to prior month of
grace and to premium month of application; thus policy was not in force where applicant died, without paying additional premiums, after expiration of month of application. Karas v United States (1954, DC Pa) 118 F Supp 446, affd (1954, CA3 Pa) 214 F.2d 130

§ 1906. Policy provisions

Provisions for cash, loan, paid-up, and extended values, dividends from gains and savings, refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable may be provided for in the policy of insurance from time to time by regulations promulgated by the Secretary.

Prior law and revision:
This section is based on 38 USC § 802(f) (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(f), 54 Stat 1009; June 29, 1948, ch 736, 62 Stat. 1109).

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 706, as 38 USCS § 1906, and substituted "Secretary" for "Administrator".

Code of Federal Regulations
Office of the Secretary of Commerce-Legal proceedings, 15 CFR Part 15

Research Guide

Am Jur:
37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance § 1868
1. Generally
2. Surrender of policy for cash
3. Distribution of dividends

1. Generally
A.D.V.A. 187-A is not applicable to claim for insurance benefits as bar to such claim in case where loan was made on insurance and where maturity of policy is alleged as of date policy was in force, prior to loan and interest reaching amount equaling reserve value of policy. 1942 ADVA 499

2. Surrender of policy for cash
Surrender of policy of National Service Life Insurance for its cash value extinguishes all rights under policy unless insured can show that, at time of surrender, he was incompetent or insane; was misled or overreached, to his detriment by Veterans' Administration [now Department of Veterans Affairs]; or contracting parties acted on what was, admittedly, mutual mistake of fact at that time. 1947 ADVA 751

3. Distribution of dividends
In making distribution of special dividend on National Service Life Insurance, law of state under which distribution is made governs, even if person who wrongfully caused death of veteran may share in distribution under law of that state. 1950 ADVA 856

§ 1907. Payment or use of dividends

(a) Until and unless the Secretary has received from the insured a request or directive in writing exercising any other dividend option allowable under the insured's policy, any
dividend accumulations and unpaid dividends shall be applied in payment of premiums becoming due on insurance subsequent to the date the dividend is payable after January 1, 1952.

(b) No claim by an insured for payment in cash of a special dividend declared prior to January 1, 1952, shall be processed by the Secretary unless such claim was received within six years after such dividend was declared. Whenever any claim for payment of a special dividend, the processing of which is barred by this subsection, is received by the Secretary, it shall be returned to the claimant, with a copy of this subsection, and such action shall be a complete response without further communication.

(c) The Secretary, upon application in writing made by the insured for insurance under this subsection, and without proof of good health, is authorized to apply any dividend due and payable on national service life insurance after the date of such application to purchase paid up insurance. Also, the Secretary, upon application in writing made by the insured during the one-year period beginning September 1, 1991, and without proof of good health, is authorized to apply any national service life insurance dividend credits and deposits of such insured existing at the date of the insured's application to purchase paid up insurance. After September 1, 1992, the Secretary may, from time to time, provide for further one-year periods during which insureds may purchase additional paid up insurance from existing dividend credits and deposits. Any such period for the purchase of additional paid up insurance may be allowed only if the Secretary determines in the case of any such period that it would be actuarially and administratively sound to do so. Any dividends, dividend credits, or deposits on endowment policies may be used under this subsection only to purchase additional paid up endowment insurance which matures concurrently with the basic policy. Any dividends, dividend credits, or deposits on policies (other than endowment policies) may be used under this section only to purchase additional paid up whole life insurance. The paid up insurance granted under this subsection shall be in addition to any insurance otherwise authorized under this title, or under prior provisions of law. The paid up insurance granted under this subsection shall be issued on the same terms and conditions as are contained in the standard policies of national service life insurance except (1) the premium rates for such insurance and all cash and loan values thereon shall be based on such table of mortality and rate of interest per annum as may be prescribed by the Secretary; (2) the total disability income provision authorized under section 1915 of this title [38 USCS § 1915] may not be added to insurance issued under this section; and (3) the insurance shall include such other changes in terms and conditions as the Secretary determines to be reasonable and practicable.

Prior law and revision:

This section is based on 38 USC § 802(f) (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(f), 54 Stat. 1009; May 18, 1951, ch 94, 65 Stat. 44).

Amendments:

1970. Act June 25, 1970 (effective 6/25/70, as provided by § 14(a) of such Act, which appears as 38 USCS § 1317 note), designated existing matter as subsec. (a); and added subsec. (b).
1971. Act Dec. 15, 1971 (effective as provided by § 4 of such Act, which appears as a note to this section), substituted new section catchline for one which read: "Dividends to pay premiums"; in subsec. (a), substituted "or directive in writing exercising any other dividend option allowable under his policy," for "in writing for repayment in cash,"; and added subsec. (c).

1982. Act Oct. 12, 1982, in subsec. (c), substituted "before February 1, 1973" for "within six calendar months after the effective date of this subsection".

1986. Act Oct. 28, 1986, in subsecs. (a) and (c) substituted "the insured's" for "his" wherever appearing.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 707, as 38 USCS § 1907, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further, in subsec. (a), substituted "Secretary" for "Veterans' Administration"; and, in subsec. (b), in the sentence beginning "No claim by . . .", substituted "Secretary" for "Veterans' Administration", and in the sentence beginning "Whenever any claim . . .", substituted "by the Secretary" for "in the Veterans' Administration".

Such Act further substituted "Secretary" for "Administrator" wherever appearing.


Other provisions:

Effective date of amendments made by Act Dec. 15, 1971. Act Dec. 15, 1971, P. L. 92-188, § 4, 85 Stat. 645, provides: "The amendments made by this Act [amending this section and 38 USCS §§ 1903, 1941] shall take effect on a date established by the Administrator but in no event later than the first day of the first calendar month which begins more than six calendar months after the date of enactment of this Act."

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Cross References

This section is referred to in 38 USCS §§ 1903, 1941

Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance § 1870

1. Generally
2. Regulations
3. Right of election as to dividends
4. -Relief from election
5. Lapse of policy prior to declaration of dividend
6. Disposition of dividends declared prior to January 1, 1952
7. Application of dividends to unpaid premiums
8. Setoff or claims against dividends

1. Generally
Term "dividend accumulations", as used in predecessor to 38 USCS § 1907, means dividends which become payable on or after January 1, 1952 and which are not withdrawn in cash. 1951 ADVA 889

2. Regulations

Regulation by administrator [now Secretary] providing for payment of all dividends in cash is valid; hence, insured is not entitled to credit on premiums for dividend. Jones v United States (1951, CA8 Ark) 189 F.2d 601

Administrator's [now Secretary's] regulation to effect that, if request for dividends in cash is forwarded by mail, date of mailing will be taken as date of receipt is invalid insofar as it purports to change statutory time for, and condition of, application for payment of dividends in cash. Kane v United States (1957, DC NY) 154 F Supp 95, affd (1958, CA2 NY) 254 F.2d 824

3. Right of election as to dividends

Predecessor to 38 USCS § 1907 does not affect right of insured under policy to request that regular dividends becoming payable on or after January 1, 1952 be held on deposit at interest, but unless such request for payment in cash is made, dividends falling due on and after January 1, 1952 are to be applied in payment of premiums due and unpaid; dividends becoming payable on or after January 1, 1952, which are deposited at interest at request of insured under terms of policy, are not subject to use for automatic payment of premiums becoming due and otherwise unpaid. Johnson v United States (1958, DC Kan) 168 F Supp 447

4. Relief from election

Nothing in applicable statutes or regulations forbids administrator [now Secretary] to give insured opportunity for relief from prior expressed election to receive dividends in cash. Kane v United States (1957, DC NY) 154 F Supp 95, affd (1958, CA2 NY) 254 F.2d 824

5. Lapse of policy prior to declaration of dividend

Government's declaration of dividends upon policy subsequent to lapse of policy for nonpayment will not revive lapsed policy, although dividend is sufficient in amount to pay premium in arrears. Weiss v United States (1951, CA2 NY) 187 F.2d 610, cert den (1951) 342 US 820, 96 L Ed 620, 72 S Ct 38, reh den (1951) 342 US 874, 96 L Ed 657, 72 S Ct 104 and reh den (1952) 342 US 915, 96 L Ed 684, 72 S Ct 357

Special dividend declared on NSLI is not applicable to keep policy in force, where policy lapsed prior to declaration of dividend. Parker v Veterans Administration of United States (1951, CA5 Tex) 193 F.2d 149

Policy which lapsed prior to declaration of dividend is not revived by such declaration, even though declaration entitles insured to sufficient funds to pay all past due premiums to time of his death, since right to such funds did not vest until date of declaration. Weiss v United States (1952, DC NY) 103 F Supp 470, affd (1952, CA2 NY) 199 F.2d 454, reh den (1953) 345 US 914, 97 L Ed 1348, 73 S Ct 643 and cert den (1953) 344 US 934, 97 L Ed 718, 73 S Ct 504

6. Disposition of dividends declared prior to January 1, 1952

National Service Life Insurance dividends becoming payable prior to January 1, 1952 are not to be held on deposit at interest since they are special dividends; National Service Life Insurance dividends becoming due and payable prior to January 1, 1952, which are not paid prior to that date, are not to be applied automatically in payment of premiums becoming due on or after January 1, 1952, where no request for cash payment has been received. 1951 ADVA 889

7. Application of dividends to unpaid premiums

Declared dividend on policy may not be applied to payment of past-due premiums, where it is payable only in cash. Walker v United States (1952, CA5 Miss) 197 F.2d 226

Dividend on policy as to which insured had made written election to receive in cash, may be applied to unpaid premiums to prevent lapse prior to insured's death, where written election did

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not reach Veterans' Administration [now Department of Veterans Affairs] until after insured's death.  Kane v United States (1958, CA2 NY) 254 F.2d 824

Dividends on national service life insurance policies cannot be applied retroactively to unpaid premiums.  Burk v United States (1955, DC Ark) 133 F Supp 63

8. Setoff or claims against dividends

Dividends payable under National Service Life Insurance policy are benefits payable by Veterans' Administration [now Department of Veterans Affairs] under law it administers and relating to veterans, and hence such dividends are not subject to setoff or claims of United States arising under any other act or acts administered by any agency other than Veterans' Administration [now Department of Veterans Affairs].  1949 ADVA 832

§ 1908. Premium payments

The Secretary shall, by regulations, prescribe the time and method of payment of the premiums on insurance, but payments of premiums in advance shall not be required for periods of more than one month each, and may at the election of the insured be deducted from the insured's active-service pay or be otherwise made. An amount equal to the first premium due under a National Service Life Insurance policy may be advanced from current appropriations for active-service pay to any person in the active service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, which amount shall constitute a lien upon any service or other pay accruing to the person for whom such advance was made and shall be collected therefrom if not otherwise paid. No disbursing or certifying officer shall be responsible for any loss incurred by reason of such advance. Any amount so advanced in excess of available service or other pay shall constitute a lien on the policy within the provisions of section 5301(b) of this title [38 USCS § 5301(b)].

Prior law and revision:

This section is based on 38 USC § 802(m)(1) (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(m)(1), 54 Stat. 1011; Feb. 11, 1942, ch 69, 56 Stat. 88).

Amendments:

1986. Act Oct. 28, 1986, substituted "the insured's" for "his".

1991. Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 708, as 38 USCS § 1908, and substituted "Secretary" for "Administrator".

Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance § 1870

Annotations:

Premiums paid, but subject to refund, as operating to prevent lapse or forfeiture of National Service Life Insurance.  36 ALR2d 1382

1. Generally
2. Acknowledgment of remittance
3. Deductions from service pay

4. Deductions from retirement pay

5. Application of premiums
   6. -Credits

7. Waiver of premium

8. Lapse of policy

1. Generally

   Rule holding forfeitures of insurance policies in disfavor is applicable to government's liability under National Service Life Insurance policies, since purpose of such policies is to protect servicemen by low cost insurance otherwise unobtainable. United States v Morrell (1953, CA4 Md) 204 F.2d 490, 36 ALR2d 1374, cert den (1953) 346 US 875, 98 L Ed 383, 74 S Ct 128

   Fact that insured's discharge from military service contained erroneous notation as to due date of premium does not estop government from denying liability under NSLI policy which, subsequent to reinstatement, lapsed for nonpayment of premiums, even though insured relied on date noted on discharge certificate in making premium payments. Kalter v United States (1955, DC NY) 130 F Supp 79

2. Acknowledgment of remittance

   Administration's [now Department's] "Acknowledgement of Remittance" form neither constitutes receipt for payment of premiums relating to specific period of time, nor creates inference that all prior premiums were paid, since form includes express statement that remittance will be applied in conformance with National Service Life Insurance Act (predecessor to 38 USCS §§ 1901 et seq.) and regulations promulgated thereunder. Betterly v United States (1952, DC Pa) 102 F Supp 454, affd (1952, CA3 Pa) 199 F.2d 205

3. Deductions from service pay

   War risk insurance policy issued to enlisted seaman who died in service will be deemed to have been abandoned by insured where, notwithstanding he had authorized deduction from his pay of premiums not otherwise paid, no such deductions were made after end of his first enlistment and, during subsequent enlistments covering period of more than three years, insured accepted every month full amount of his pay and made no effort to provide for payment of premiums. Smith v United States (1934) 292 US 337, 78 L Ed 1295, 54 S Ct 721

   Finding that insured had authorized allotment for insurance premiums entitles beneficiary to payment under policy where failure to make authorized deductions was fault of Army or Veterans Administration [now Department of Veterans Affairs]. Patterson v United States (1949, DC Tenn) 85 F Supp 541

4. Deductions from retirement pay

   Premiums will be considered paid where, upon retirement, soldier indicated upon retirement certificate, in space provided therein, that he desired to continue his national service life insurance allotment from his retirement pay, although no deductions were in fact made and regulations did not provide for allotments or deductions from persons receiving retirement pay. Gray v United States (1957, CA9 Cal) 241 F.2d 626

5. Application of premiums

   Refundable premiums for policy of National Service life insurance paid by insured during period of total disability should be applied by Veterans Administration [now Department of Veterans Affairs] to unpaid premiums due after termination of such disability, where refundable premiums are sufficient to prevent forfeiture of policy, even though request for such application and determination of right to refund is not made until after death of insured. United States v Morrell (1953, CA4 Md) 204 F.2d 490, 36 ALR2d 1374, cert den (1953) 346 US 875, 98 L Ed 383, 74 S Ct 128
Premiums paid for period as to which insured was subsequently held entitled to disability waiver of premiums are applicable to prevent lapse of NSLI policy. Kubala v United States (1954, CA5 Tex) 210 F.2d 943

Premiums paid over period for which they were waived for insured's disability are not required to be applied to unpaid premiums relating to period following termination of waiver. 1947 ADVA 745

Premiums paid but waived under former 38 USC § 802 are to be refunded rather than applied as premiums for period subsequent to expiration of waiver. 1948 ADVA 794

6. Credits
Premium credit item held to account of insured on date of lapse of insurance, sufficient to prevent lapse is to be so used, even though credit resulted in connection with another insurance contract, unless insured has directed that credit is to be used for another purpose; such direction is to be found in provisions of insurance contract, either express or necessarily implied, in communication by insured to Veterans' Administration [now Department of Veterans Affairs], or in any manner in which intention of insured is manifested. 1952 ADVA 902

7. Waiver of premium
Facts that Veterans' Bureau [now Department of Veterans Affairs] failed to notify insured concerning allocation of payment in excess of premium then due, failed to give notice of due dates of premiums or that policy had lapsed or was about to lapse, and retained two monthly premiums after policy had lapsed by its terms for nonpayment of premiums, do not give rise to estoppel or amount to waiver of provision of policy that it shall lapse upon nonpayment of any premium, where Bureau [now Department], at time it received payments, was ignorant of fact that insured had become disabled, so that, by terms of policy, Bureau [now Department] had no power to reinstate it, and where it is not shown that insured was deceived or misled to his detriment, or that he had adequate reason to suppose contract would not be enforced or that forfeiture provided for by policy could be waived. Wilber Nat'l Bank v United States (1935) 294 US 120, 79 L Ed 798, 55 S Ct 362

Late delivery of policy does not operate as waiver of premium due prior to delivery. Rodgers v United States (1946, DC Pa) 66 F Supp 663

8. Lapse of policy
Secretary of Army's issuance of certificate of honorable service subsequent to insured's death has no effect on lapse of policy, which occurred during insured's absence without leave. United States v Griffin (1954, CA8 Ark) 216 F.2d 217, cert den (1955) 348 US 927, 99 L Ed 726, 75 S Ct 339

Accrued service pay in possession of government is not applicable to prevent lapse of policy where insured had made allotment for insurance, but allotment was discontinued upon insured's being put on AWOL status. United States v Griffin (1954, CA8 Ark) 216 F.2d 217, cert den (1955) 348 US 927, 99 L Ed 726, 75 S Ct 339

Failure of government to notify insured of lapse until three months after default in payment of premium and after receipt of two checks mailed over 30 days after premium was due does not estop government from asserting lapse of policy as defense in suit to recover proceeds under policy. Lollos v Veterans Administration (1952, DC NJ) 105 F Supp 870, affd (1953, CA3 NJ) 202 F.2d 153

Insured's statement, upon restoration from AWOL status to active duty status, that he did not desire insurance is sufficient to cause his NSLI policy to lapse at that time. Sawyer v United States (1952, DC Tenn) 107 F Supp 160, affd (1954, CA6 Tenn) 211 F.2d 476

Failure of Veterans' Administration [now Department of Veterans Affairs] to inform veteran that his life insurance policy had lapsed for nonpayment of premiums was harmless since veteran's death certificate indicated that veteran had suffered from lung cancer for one year prior to death and thus, at time he was contacted by VA, he could not have furnished satisfactory...
evidence that he was in good health as required to reinstate his policy. Connelly v Brown (1995) 8 Vet App 84

§ 1909. Effective date of insurance

Insurance may be made effective, as specified in the application, not later than the first day of the calendar month following the date of application therefor, but the United States shall not be liable thereunder for death occurring before such effective date.

Prior law and revision:
This section is based on 38 USC § 802(p) (Act Oct. 8, 1940 ch 757, Title VI, Part I, § 602(p), 54 Stat. 1011).

Amendments:

Research Guide
Am Jur:
37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance § 1868

National Service Life Insurance Act (predecessor to 38 USCS §§ 1901 et seq.), in referring to effective date of insurance as not later than first day of month following application indicates intention that insurance should become effective in future, and same intention also applies to renewal. Collier v United States (1950, DC Va) 90 F Supp 215

§ 1910. Incontestability

Subject to the provisions of section 1911 of this title [38 USCS § 1911] all contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date of issue, reinstatement, or conversion except for fraud, nonpayment of premium, or on the ground that the applicant was not a member of the military or naval forces of the United States. However, in any case in which a contract or policy of insurance is canceled or voided after March 16, 1954, because of fraud, the Secretary shall refund to the insured, if living, or, if deceased, to the person designated as beneficiary (or if none survives, to the estate of the insured) all money, without interest, paid as premiums on such contract or policy for any period subsequent to two years after the date such fraud induced the Secretary to issue, reinstate, or convert such insurance less any dividends, loan, or other payment made to the insured under such contract or policy.

Prior law and revision:
This section is based on 38 USC § 802(w) (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(w), as added Aug. 1, 1946, ch 728, § 9, 60 Stat. 785; March 16, 1954, ch 97, § 1, 68 Stat. 28).

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 710, as 38 USCS § 1910, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), substituted "Secretary" for "Veterans’
Research Guide

Am Jur:
37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance § 1873

I. IN GENERAL

1. Generally
   Predecessor to 38 USCS § 1910, while making reinstated policies incontestable, does not
   have effect of reinstating policies because of unreasonable delay on part of Veterans’
   Administration [now Department of Veterans Affairs]. James v United States (1950, CA4 NC)
   185 F.2d 115, 22 ALR2d 830

2. Purpose
   Congress did not intend incontestability provision to increase or broaden limits of insurance
   contracts of United States, but only to clearly fix enforceability of contracts as set out in policies.
   Neuhard v United States (1949, DC Pa) 83 F Supp 911

3. Construction
   There is no contest of policy within meaning of incontestability provision where government
   admits validity of obligation to pay insurance and merely asks court to determine to whom
   proceeds should be paid. Walker v United States (1950, CA7 Ill) 180 F.2d 217
   In determining whether contest is barred by 38 USCS § 710 [now 38 USCS § 1910],
   distinction must be made between defenses which contest validity of policy, which are barred by
   § 710 [now 38 USCS § 1910], and defenses which, while supporting validity of policy, are
   grounds for nonpayment of proceeds under terms of insurance contract, which are unaffected by
   § 710 [now 38 USCS § 1910]. Kapourelos v United States (1969, ED Pa) 306 F Supp 1034, affd
   (1971, CA3 Pa) 446 F.2d 1181

4. Application to particular policies
   Veterans Administration [now Department of Veterans Affairs] reinstatement of policy, which
   should have been denied by reason of total disability, operates to bind government to terms of
   policy through incontestability provision. James v United States (1950, CA4 NC) 185 F.2d 115,
   22 ALR2d 830
   Endowment policy of National Service Life Insurance inadvertently issued to one who was
   totally disabled is incontestable. 1947 ADVA 737
Incontestable provision of policy does not apply where no valid insurance contract resulted from application of Philippine scout who was not eligible for benefits of National Service Life Insurance Act at time of application or thereafter. 1948 ADVA 785

Insurance issued to person during enlistment subsequently terminated on ground that enlistment was fraudulent is incontestable under provisions of predecessor to 38 USC § 1910, except for fraud relating to insurance or for nonpayment of premium; however, government is not precluded from contesting validity for lack of service in case, if one arises, in which enlistment is shown to have been void ab initio for lack of capacity or other reason. 1950 ADVA 849

Insurance policy issued under provisions of predecessor to 38 USCS § 1922 to person who had indemnity protection under former § 851 and who was discharged prior to April 25, 1951 is incontestable under provisions of predecessor to 38 USCS § 1910. 1953 ADVA 924

5. Regulations

Regulation allowing return of premium payments rather than payment of policy's face value in certain instances arising under 38 USCS § 725 [now 38 USCS § 1925] does not conflict with incontestability provision of 38 USCS § 710 [now 38 USCS § 1910], since regulation deals with terms of insurance contract rather than with validity of policy. Kapourelos v United States (1969, ED Pa) 306 F Supp 1034, affd (1971, CA3 Pa) 446 F.2d 1181

II. FRAUD

6. Generally

Intentional, false, material statements made in written application for reinstatement bar recovery on reinstated policy. Meadors v United States (1954, DC Ky) 118 F Supp 277, affd (1955, CA6 Ky) 219 F.2d 438; Collins v United States (1957, DC Wis) 150 F Supp 334, revd on other grounds (1958, CA7 Wis) 254 F.2d 66; Tupper v United States (1958, DC Ala) 165 F Supp 399, revd on other grounds (1959, CA5 Ala) 270 F.2d 681

7. Intent of applicant

False statements as to health of applicant for reinstatement do not invalidate reinstatement in absence of evidence of applicant's intent to deceive. United States v Thompson (1953, App DC) 93 US App DC 231, 210 F.2d 724

Applicant's statement of good health, at time when he suffered from heart condition, is not sufficient to void reinstatement of NSLI policy on ground of fraud, where application for reinstatement included claim number showing that insured had made application for government compensation and evidence showed that insured acted without fraudulent intent. Thompson v United States (1952, DC Dist Col) 109 F Supp 283, affd (1953, App DC) 93 US App DC 231, 210 F.2d 724

8. Actual or constructive knowledge of government

Government may avoid reinstatement obtained upon insured's false representation of good health, even though reinstatement application disclosed that insured had applied for disability pension, and examination of such application would have disclosed his condition. McDaniel v United States (1952, CA5 Ga) 196 F.2d 291

Reinstatement authorized on basis of insured's false claim of good health may be voided, even though Compensation Division of Veterans' Administration [now Department of Veterans Affairs] had actual knowledge of applicant's true state of health, where compensation files and insurance files were not consolidated until after insured's death. Clohesy v United States (1952, CA7 Ill) 199 F.2d 475

Applicant's fraud in misrepresenting state of health in application for reinstatement is defense available to Veterans' Administration [now Department of Veterans Affairs], even though one section of Veterans' Administration [now Department of Veterans Affairs], which did not handle insurance, had knowledge of such misrepresentations. United States v Cooper (1953, CA6 Ky) 200 F.2d 954

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False statement as to health contained in application for reinstatement of NSLI policy bars such reinstatement, and government may not be charged with constructive notice as to applicant's actual health on basis that insured disclosed existence and number of Veterans' Administration [now Department of Veterans Affairs] file containing information from which true health was determinable. United States v Kiefer (1955, App DC) 97 US App DC 101, 228 F.2d 448, cert den (1956) 350 US 933, 100 L Ed 815, 76 S Ct 305, reh den (1956) 350 US 977, 100 L Ed 847, 76 S Ct 431

Applicant's fraud in misrepresenting state of health in application for reinstatement is defense available to Veterans' Administration [now Department of Veterans Affairs], even though information as to applicant's actual health was in section of Veterans' Administration [now Department of Veterans Affairs] other than that which handled insurance. Clarke v United States (1951, DC Mo) 102 F Supp 338

Administrator [now Secretary] is not estopped to avoid policy for fraudulent statement regarding health, made in application for reinstatement by fact that records of agency showed insured was attending veterans' hospital and was totally disabled, since one branch of agency cannot be held to knowledge of records of other branch. Brown v United States (1952, DC Mo) 102 F Supp 132

9. Evidence

Government's burden of proving fraud in application for reinstatement of NSLI policy is not met by evidence that veteran failed to disclose names and addresses of physicians he had consulted. Kent v United States (1964, WD Va) 227 F Supp 899

10. Miscellaneous

Insured's application for reinstatement of NSLI policy, which stated that applicant's health was as good at that time as at time policy lapsed, is not made fraudulent by fact that insured was suffering from cancer at time of application where, although insured had been to doctor, diagnosis of cancer was not made until after application had been made. Cardwell v United States (1951, CA5 Tex) 186 F.2d 382

Applicant's statement in application for reinstatement that his health was as good on that date as on due date of first premium in default is not fraudulent so as to bar reinstatement of policy, where applicant suffered from slow-developing type of cancer, and expert testimony indicated that health at date of application was substantially same as health on due date of premium. Tupper v United States (1959, CA5 Ala) 270 F.2d 681

Reinstatement of NSLI policy is not voidable on ground that applicant fraudulently misrepresented his health, where veteran, who believed he was in good health, committed suicide, veteran's absence from work was explainable on other grounds, and veteran consulted psychiatrist unable to diagnose any mental disease. Kammer v United States (1952, DC Pa) 107 F Supp 426

§ 1911. Forfeiture

Any person guilty of mutiny, treason, spying, or desertion, or who, because of conscientious objections, refuses to perform service in the Armed Forces of the United States or refuses to wear the uniform of such force, shall forfeit all rights to National Service Life Insurance. No insurance shall be payable for death inflicted as a lawful punishment for crime or for military or naval offense, except when inflicted by an enemy of the United States; but the cash surrender value, if any, of such insurance on the date of such death shall be paid to the designated beneficiary, if living, or otherwise to the beneficiary or beneficiaries within the permitted class in accordance with the order specified in section 1916(b) of this title [38 USCS § 1916(b)].

Prior law and revision:
This section is based on 38 USC § 812 (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 612, 54 Stat. 1013).

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 711, as 38 USCS § 1911, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Cross References
This section is referred to in 38 USCS § 1910

Research Guide

Am Jur:
37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance §§ 1868, 1873

1. Generally

Constitutional and statutory prohibitions against forfeiture are not pertinent to section of predecessor to 38 USCS § 1911, prohibiting payment for death inflicted as punishment for crime, since such prohibition is limitation on risks insured against, rather than forfeiture. Simmons v United States (1954, DC Pa) 120 F Supp 641

2. Purpose

Predecessor to 38 USCS § 1911 was meant to embody public policy of not insuring against death inflicted as punishment for crime. Simmons v United States (1954, DC Pa) 120 F Supp 641

3. Construction

Predecessor to 38 USCS § 1911 contains no ambiguity requiring that it be liberally construed in favor of insured. Simmons v United States (1954, DC Pa) 120 F Supp 641

Word "crime", as used in predecessor to 38 USCS § 1911, refers to civil crimes as opposed to military crimes; since word is not otherwise qualified, it should be construed to mean civil crimes of any type, as long as such crime is punishable by death; no insurance is payable under policy upon life of insured who was lawfully executed by state for murder committed after his discharge from service. Simmons v United States (1954, DC Pa) 120 F Supp 641

4. Application

Word "crime", as used in predecessor to 38 USCS § 1911, refers to civil crimes as opposed to military crimes; since word is not otherwise qualified, it should be construed to mean civil crimes of any type, as long as such crime is punishable by death; no insurance is payable under policy upon life of insured who was lawfully executed by state for murder committed after his discharge from service. Simmons v United States (1954, DC Pa) 120 F Supp 641

Predecessor to 38 USCS § 1911 specifying forfeiture of benefits for commission of certain crimes is not applicable to beneficiaries; thus, beneficiary does not forfeit insurance upon conviction of any of crimes such section enumerates. 1948 ADVA 773
5. Desertion

Insured forfeited benefits of NSLI policy by reason of desertion, regardless of Army's issuance of certificate of honorable service which stated that it was awarded for honest and faithful service, where policy lapsed for default on payments since government is not required to allot payments from accrued service pay to continue insurance in force. United States v Griffin (1954, CA8 Ark) 216 F.2d 217, cert den (1955) 348 US 927, 99 L Ed 726, 75 S Ct 339

Notation in company morning report that insured was AWOL and would be dropped from rolls as deserter is insufficient to show that insured's actions constituted desertion under predecessor to 38 USCS § 1911. Liles v United States (1957, DC NC) 153 F Supp 54

Naval veteran's record, which showed fact of desertion but recorded no discharge or other resulting action, is sufficient to show guilt, and such desertion works forfeiture voiding insurance policy prior to date of sailor's death. 1941 ADVA 483

Insurance granted on application of decedent, following his enlistment in Army in 1942, is not voided or forfeited by fact that he had deserted from prior enlistment in Navy, or that mark of desertion from such enlistment had not been removed from his record. 1943 ADVA 539

Desertion by veteran during 1 period of service is not grounds for forfeiture of special dividend otherwise payable to him by reason of premium payments made during earlier period of service. 1952 ADVA 910

§ 1912. Total disability waiver

(a) Upon application by the insured and under such regulations as the Secretary may promulgate, payment of premiums on insurance may be waived during the continuous total disability of the insured, which continues or has continued for six or more consecutive months, if such disability began (1) after the date of the insured's application for insurance, (2) while the insurance was in force under premium-paying conditions, and (3) before the insured's sixty-fifth birthday. Notwithstanding any other provision of this chapter [38 USCS §§ 1901 et seq.], in any case in which the total disability of the insured commenced on or after the insured's sixtieth birthday but before the insured's sixty-fifth birthday, the Secretary shall not grant waiver of any premium becoming due prior to January 1, 1965.

(b) The Secretary, upon any application made after August 1, 1947, shall not grant waiver of any premium becoming due more than one year before the receipt by the Secretary of application for the same, except as provided in this section. Any premiums paid for months during which waiver is effective shall be refunded. The Secretary shall provide by regulations for examination or reexamination of an insured claiming benefits under this section, and may deny benefits for failure to cooperate. If it is found that an insured is no longer totally disabled, the waiver of premiums shall cease as of the date of such finding and the policy of insurance may be continued by payment of premiums as provided in said policy. In any case in which the Secretary finds that the insured's failure to make timely application for waiver of premiums or the insured's failure to submit satisfactory evidence of the existence or continuance of total disability was due to circumstances beyond the insured's control, the Secretary may grant waiver or continuance of waiver of premiums.

(c) If the insured dies without filing application for waiver, the beneficiary, within one year after the death of the insured, or, if the beneficiary is insane or a minor, within one year after removal of such legal disability, may file application for waiver with evidence.
of the insured's right to waiver under this section. Premium rates shall be calculated without charge for the cost of waiver of premiums provided in this section and no deduction from benefits otherwise payable shall be made on account thereof.

(d) In any case in which an insured has been denied or would have been denied premium waiver under section 602(n) of the National Service Life Insurance Act of 1940 or this section solely because the insured became totally disabled between the date of valid application for insurance and the subsequent effective date thereof, and in which it is shown that (1) the total disability was incurred in line of duty between October 8, 1940, and July 31, 1946, inclusive, or June 27, 1950, and April 30, 1951, inclusive, and (2) the insured remained continuously so totally disabled to the date of death or June 8, 1960, whichever is earlier, the Secretary may grant waiver of premiums from the beginning of and during the continuous total disability of such insured. Application for waiver of premiums under this subsection must be filed by the insured or, in the event of the insured's death, by the beneficiary within two years after the date of enactment of this subsection [enacted June 8, 1960], except that if the insured or the beneficiary be insane or a minor within the two-year period, application for such waiver may be filed within two years after removal of such legal disability, or if an insane insured shall die before the removal of the disability, application may be filed by the beneficiary within two years after the insured's death. No insurance shall be placed in force under this subsection in any case in which there was an award of benefits under the Servicemen's Indemnity Act of 1951 or of gratuitous insurance under section 1922(b) of this title [38 USCS § 1922(b)]. The amount of insurance placed in force hereunder together with any other United States Government life insurance or national service life insurance in force at the time of death, or at the time of the insured's application for waiver hereunder, may not exceed $10,000 and shall be reduced by the amount of any gratuitous insurance awarded under the National Service Life Insurance Act of 1940. Waiver of premiums under this subsection shall render the insurance nonparticipating during the period such premium waiver is in effect. The cost of waiver of premium and death benefits paid as a result of this subsection shall be borne by the United States.

Prior law and revision:
This section is based on 38 USC § 802(n) (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(n), 54 Stat. 1011; July 11, 1942, ch 504, § 5, 56 Stat. 658; Sept. 30, 1944, ch 454, § 7, 58 Stat. 763; Aug. 1, 1946, ch 728, § 7, 60 Stat. 784).

References in text:
"The National Service Life Insurance Act of 1940", referred to in subsec. (d), is Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(n), 54 Stat. 1008, which was generally classified to 38 USC §§ 801 et seq. prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1272. Similar provisions are now contained in this chapter.

"Section 602(n) of the National Service Life Insurance Act of 1940", referred to in subsec. (d), is Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(n), 54 Stat. 1011, which was classified to 38 USC § 802(n), prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1272. Similar provisions are now contained in this section.

Amendments:


1964. Act July 7, 1964 (effective 1/1/65, as provided therein), substituted subsec. (a) for one which read: "Upon application by the insured and under such regulations as the Administrator may promulgate, payment of premiums on insurance may be waived during the continuous total disability of the insured, which continues or has continued for six or more consecutive months, if such disability began (1) after the date of his application for insurance, (2) while the insurance was in force under premium-paying conditions, and (3) before the insured's sixtieth birthday."

1982. Act Oct. 12, 1982, in subsec. (d), substituted "June 8, 1960" for "the date of enactment of this subsection".

1986. Act Oct. 28, 1986, in subsec. (a) substituted "the insured's" for "his" wherever appearing; in subsec. (b) substituted "the insured's" for "his" wherever appearing; in subsec. (d) substituted "the insured's" for "his" and "the insured" for "he" following "because".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 712, as 38 USCS § 1912, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), in subsec. (b), substituted "by the Secretary" for "in the Veterans' Administration", and substituted "Secretary" for "Administrator" wherever appearing.

Other provisions:

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Cross References

This section is referred to in 38 USCS §§ 1904, 1913, 1922, 1922A

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:178

Am Jur:
37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance § 1870

Annotations:

Premiums paid, but subject to refund, as operating to prevent lapse or forfeiture of National Service Life Insurance. 36 ALR2d 1382

I. IN GENERAL

1. Generally
2. Construction
3. Relationship with other laws
4. Application for waiver
5. Notice of waiver
6. Termination of waiver
7. -Grounds
8. -Notice
9. -Failure to appeal termination
10. -Failure to reapply for waiver
I. IN GENERAL

1. Generally

Cases arising under War Risk Insurance Act are pertinent to question of insured's total disability under predecessor to 38 USCS § 1912, since definition of disability in agency regulations is practically identical to definition contained in War Risk Insurance Act. McHam v United States (1949, DC SC) 87 F Supp 84

2. Construction

Predecessor to 38 USCS § 1912 was enacted with humanitarian purpose, and should be accorded liberal interpretation in aid of veteran. Martin v United States (1956, CA7 Ill) 238 F.2d 245

3. Relationship with other laws

Conditions enumerated in predecessor to 38 USCS § 1912 as prerequisites for premium waiver on ground of total disability are not affected by provision of predecessor to 38 USCS § 1921, making government liable for premiums so waived. Weiss v United States (1951, CA2 NY) 187 F.2d 610, cert den (1951) 342 US 820, 96 L Ed 620, 72 S Ct 38, reh den (1951) 342 US 874, 96 L Ed 684, 72 S Ct 357

Cases arising under War Risk Insurance Act are pertinent to question of insured's total disability under predecessor to 38 USCS § 1912, since definition of disability in agency regulations is practically identical to definition contained in War Risk Insurance Act. McHam v United States (1949, DC SC) 87 F Supp 84

4. Application for waiver

Right to waiver of premiums due on national service life insurance policy is not self-executing upon occurrence of disability, but operates only after application therefor is granted; thus, where disabled veteran made such application more than one year after payment of last premium, and more than one year after effective date of statute authorizing waiver of premium on policies held by disabled veterans where such application is made within one year after the effective date of the statute, or one year after payment of the last premium, the policy had lapsed for nonpayment of premiums; and, although widow beneficiary made application for waiver within one year from date of insured's death, she was not entitled to recover on policy upon death of veteran. Cain v United States (1953, DC La) 116 F Supp 150
Papers prepared or caused to be prepared or adopted by insured in applying for waiver of premiums and then sent in to Veterans' Administration [now Department of Veterans Affairs] or so authorized constitute "Written application" required by former 38 USC § 823, irrespective of whether veteran physically signed such application at bottom or elsewhere. 1951 ADVA 885

5. Notice of waiver
   Administration's [now Department] failure to give notice of waiver and termination thereof to insured does not extend waiver to include period subsequent to termination of total disability. 1947 ADVA 745

6. Termination of waiver
   Policy lapses 31 days after due date of premium where Veterans' Administration [now Department of Veterans Affairs] discontinued waiver of premiums and sent notice to veteran, but veteran did not ask for review of decision, seek reinstatement of waiver, or resume payment of premiums. McIntosh v United States (1953, DC Ky) 114 F Supp 241

7. -Grounds
   Insured's failure to cooperate by filling out form showing work history is not such failure to cooperate as would justify terminating waiver under predecessor to 38 USCS § 1912, since relevance of insured's work history to question of disability is, at best, indirect. United States v Barnett (1956, CA5 Tex) 230 F.2d 926

8. -Notice
   Administration's [now Department] failure to give notice of waiver and termination thereof to insured does not extend waiver to include period subsequent to termination of total disability. 1947 ADVA 745

   Amendment of regulation omitting language regarding advising insured of due date of first premium payable after termination of waiver and of amount of premiums payable does not alter insured's rights and responsibilities under contract, and letter notifying insured of termination of waiver but omitting information regarding date and amount of first premium does not invalidate such termination since knowledge of these facts is imputed to insured. 1949 ADVA 808

9. -Failure to appeal termination
   Failure to appeal at time Administrator [now Secretary] decided to terminate waiver did not constitute acquiescence in decision, since predecessor to 38 USCS § 1984 afforded alternative of later suit in District Court. United States v Barnett (1956, CA5 Tex) 230 F.2d 926

10. -Failure to reapply for waiver
    Insured's failure to reapply for waiver within one year of termination of original waiver on ground of failure to cooperate did not bar action by beneficiary, although such action would be barred if termination had been for lack of disability, since one year limitation in predecessor to 38 USCS § 1912(b) did not apply to terminations for other than lack of disability. United States v Barnett (1956, CA5 Tex) 230 F.2d 926

11. Refund of premiums
    Claimant is entitled to refund, notwithstanding that insurance to which it relates has been surrendered for cash, in any case in which claim for premium refund complies with conditions of predecessor to 38 USCS § 1912. 1947 ADVA 751

    Premiums paid but waived under predecessor to 38 USCS § 1912 are to be refunded and are not to be applied as premiums for period subsequent to expiration of waiver. 1948 ADVA 794

II. TOTAL DISABILITY

12. Generally
Total disability in and of itself is not sufficient to establish waiver of premiums. United States v Cooper (1953, CA6 Ky) 200 F.2d 954

Total disability, within meaning of national service insurance, is such disability that any type of work, no matter how light, would aggravate danger from disease which insured is suffering. Stephens v United States (1949, DC Ky) 85 F Supp 620

Premiums may properly be waived under 38 USCS § 712 [now 38 USCS § 1912] for total disability which commenced while insurance was "deemed not to have lapsed" under former 38 USCS § 802(m)(2). 1968 ADVA 990

13. Time of commencement of disability

Insured is not entitled to waiver of premiums on reinstated policy for total disability which began after lapse of original policy but prior to application for reinstatement. Huckaby v United States (1952, CA5 La) 196 F.2d 307

If insured is inducted into service, government cannot refuse to waive premiums on ground that disability of insured existed prior to induction. Tutten v United States (1952, DC Fla) 108 F Supp 404

Premiums on insurance issued to service disabled veteran pursuant to predecessor to 38 USCS § 1922 may properly be waived for disability commencing prior to 60th [now 65th] birthday, even though insurance became effective after 60th [now 65th] birthday. 1956 ADVA 959

14. Determination of disability

Since test for total disability sufficient to waive premiums under predecessor to 38 USCS § 1912 was whether insured was able to work, rather than whether he did work, fact that insured performed some work during period before disease was diagnosed was not conclusive on question whether insured was totally disabled and entitled to waiver. McHam v United States (1949, DC SC) 87 F Supp 84

Test to be applied in determining whether insured was totally disabled under predecessor to 38 USCS § 1912 is not whether he worked, but whether he was in fact able to work. Makowski v United States (1952, DC Pa) 105 F Supp 575

Person might be totally disabled within meaning of predecessor to 38 USCS § 1912, although working full time, as where disease did not manifest itself until policy had lapsed for nonpayment, in which case beneficiary could apply for waiver on ground of insured's disability during period that insured was working, but would not have been if he had known of existence and severity of disease. Sauer v United States (1954, DC Wis) 119 F Supp 137

15. Effect of compensation rating

Veterans' Administration [now Department of Veterans Affairs] grant of 100 per cent disability allowance did not establish insured's disability for purpose of waiver of premiums. Guihan v United States (1953, DC NY) 110 F Supp 738

16. Finality of decision

Administrator's [now Secretary's] decision as to existence and continuity of disability sufficient to grant waiver of premiums is not final, and District Court has jurisdiction of suit alleging that insured was totally disabled prior to default in premiums, which disability continued until his death. United States v Roberts (1951, CA5 Ga) 192 F.2d 893; Hassey v United States (1956, DC Ala) 140 F Supp 1

17. Miscellaneous

Facts that insured was often intoxicated and had fits of despondency culminating in suicide did not establish continuous total disability so as to excuse nonpayment of premiums, where insured worked for short intervals, drew unemployment compensation, and purchased and drove his own car. Walker v United States (1952, CA5 Miss) 197 F.2d 226
Evidence that insured was nervous and sleepy, acted strange, was unable to take orders, and was diagnosed as suffering from dementia praecox, aggravated by his factory job, was sufficient to support conclusion by jury that insured was permanently and totally disabled for purpose of waiver of premium, even though insured worked as assembler in factory for 8 months. Makowski v United States (1952, DC Pa) 105 F Supp 575

Evidence that insured was semi-recluse and acted eccentrically did not establish such disability as excused payment of premiums, where record also disclosed that insured had excellent memory, lived alone and cared for himself, frequently traveled alone, and drove his own car. McNeil v United States (1975, SD Ohio) 392 F Supp 713

III. CIRCUMSTANCES BEYOND CONTROL OF INSURED

18. Generally

Circumstances beyond insured's control excuse his failure to supply sufficient information on his application, as well as failure to make application, and beneficiary is entitled to recover proceeds where application was rejected for such lack of information. Swart v United States (1958, DC Va) 158 F Supp 874

19. Lack of knowledge of condition by insured

Lack of knowledge on part of insured of his true physical condition, induced by humane acts of veterans' administration [now Department of Veterans Affairs] doctors, constitutes circumstance beyond his control, and his beneficiary is entitled to make such application after his death. Kershner v United States (1954, CA9 Or) 215 F.2d 737

Fact that father concealed seriousness of disease from insured does not estop father from asserting, as beneficiary, that insured's unawareness was circumstance beyond insured's control excuseing failure to apply for premium waiver, where insured was totally and permanently disabled from incurable and fatal disease. Sly v United States (1955, CA7 Ill) 220 F.2d 212

Regardless of whether veteran knows that he has total disability, if he does not know that he has incurable disease which is to bring about his death in short time, his lack of knowledge of true condition, induced by either encouragement or ignorance of doctors of Veterans' Administration [now Department of Veterans Affairs], is circumstance beyond his control that excuses his failure to apply for waiver of premiums. United States v Vandver (1956, CA6 Ky) 232 F.2d 398

Doctor's withholding of information as to seriousness and effect of disease is circumstance beyond insured's control, excusing failure to apply for waiver, and entitling beneficiary to waiver upon application within one year of veteran's death. Martin v United States (1956, CA7 Ill) 238 F.2d 245

Insured's failure to apply for waiver of premiums is due to circumstances beyond his control when, during time he could have applied for such waiver, he was suffering from Hodgkin's disease, said to be invariably fatal, but which was incorrectly diagnosed as different, curable disease. United States v Donaldson (1957, CA9 Wash) 246 F.2d 148

Ignorance of insured that he had serious disease, entitling him to waiver of premium because of total disability, is "circumstance beyond his control" excusing requirement that he make application for waiver of premium within one year after premium was due. Klish v United States (1962, CA5 Ga) 308 F.2d 371

Failure to apply for waiver of premiums due to insured's ignorance of disability by Hodgkin's disease, contracted during military service, which fact was unknown until he was on his deathbed, is not unexcused, as a matter of law, on ground that such ignorance was not circumstance beyond his control. Landsman v United States (1953, App DC) 92 US App DC 276, 205 F.2d 18, cert den (1953) 346 US 876, 98 L Ed 383, 74 S Ct 127

Insured's unawareness of his serious illness is circumstance beyond his control, entitling insured to waiver of premiums without application therefor. Alvarez v United States (1955, DC Pa) 133 F Supp 609
20. Mental incapacity of insured

"Circumstances beyond control" means mental incapacity to make application for waiver.  
Aylor v United States (1952, CA5 Tex) 194 F.2d 968

Chronic glomerular nephritis which prevented veteran from thinking clearly did not constitute "circumstances beyond his control."  
Aylor v United States (1952, CA5 Tex) 194 F.2d 968

In order to excuse making of application for waiver of premiums on basis of insured's condition of health as circumstance beyond his control, plaintiff must show that insured was mentally incapable of making application for waiver.  
Horton v United States (1953, CA5 Ala) 207 F.2d 91, cert den (1953) 346 US 903, 98 L Ed 403, 74 S Ct 233

In order for deceased insured's "circumstances beyond his control" to excuse nonpayment of premiums and failure to apply for waiver, beneficiary must show that deceased's mental incapacity was complete and continuous during entire time that he could have applied for waiver to excuse nonpayment.  
Linton v United States (1955, CA5 Ga) 227 F.2d 254

Insured's failure to apply for waiver is not due to circumstances beyond his control where insured was aware of his physical condition and demonstrated his awareness of rights by filing numerous claims and requests with Veterans' Administration [now Department of Veterans Affairs].  
Gossage v United States (1956, CA6 Tenn) 229 F.2d 166

Failure to apply for waiver is not due to circumstances beyond insured's control, even though he was rated 100% disabled for compensation purposes, where he was rational, able to drive his own car and attend to personal business during pertinent period.  
United States v Sinor (1956, CA5 Fla) 238 F.2d 271, cert den (1957) 353 US 985, 1 L Ed 2d 1144, 77 S Ct 1287

Evidence that member of Women's Army Corps contracted Banti's disease during service in Philippines, and thereafter suffered gradual mental deterioration as result of ravages of disease warrants finding by jury that veteran was prevented from filing application for waiver of premiums due to circumstances beyond her control.  
Jensen v United States (1950, DC Utah) 94 F Supp 468

Effects of veteran's various and serious disabilities, in conjunction with constitutional psychopathic state, on his mentality constitute "circumstances beyond his control."  
White v United States (1954, DC Va) 123 F Supp 869

When condition of health is relied upon as circumstance preventing timely application for premium waiver, proof is required to show insured was mentally incapable of doing so.  
Ferguson v United States (1970, ED Va) 309 F Supp 632

Insured, who had excellent memory, lived alone and cared for himself, and frequently traveled alone in his car was not so incompetent as to excuse failure to apply for waiver on grounds that failure was due to circumstances beyond his control.  
McNeil v United States (1975, SD Ohio) 392 F Supp 713

21. Misrepresentations of government

Acts of government, whether negligent or not, in leading serviceman to believe he had no physical ailment, are circumstances beyond his control, entitling him to reinstatement of policy with premiums waived, after he was hospitalized for active tuberculosis, even though application therefor was made after statutory period had expired, where government's failure to discover or notify serviceman that he was totally disabled at time of discharge was cause of late application.  
United States v Myers (1954, CA8 Mo) 213 F.2d 223

Administration's [now Department] failure to advise insured that he could apply for waiver, and statement that lapsed policy would be eligible for reinstatement in 3 years, amounted to misrepresentation of veteran's rights excusing failure to apply for waiver within one year of premium due date.  
Martin v United States (1956, CA7 Ill) 238 F.2d 245

22. Miscellaneous
Failure of insured to apply for waiver of premiums because of illiteracy and advanced tuberculosis is not "due to circumstances beyond his control." Scott v United States (1951, CA5 Miss) 189 F.2d 863, cert den (1951) 342 US 878, 96 L Ed 660, 72 S Ct 169

IV. RIGHTS OF BENEFICIARY

23. Generally

Term beneficiary as used in predecessor to 38 USCS § 1912 included contingent beneficiary. 1949 ADVA 806

24. Nature of rights

Beneficiary's right to have policy reinstated on ground that insured was entitled to waiver of premiums is dependent on insured's right to waiver. Scott v United States (1951, CA5 Miss) 189 F.2d 863, cert den (1951) 342 US 878, 96 L Ed 660, 72 S Ct 169

25. Time limitations for exercise of rights

Beneficiary could not maintain suit for death of insured where policy lapsed for nonpayment of premiums on August 31, 1945 though insured became disabled from tuberculosis on July 13, 1945, where insured failed to file application for waiver of premiums within one year after 1946 Insurance Act became effective. Scott v United States (1951, CA5 Miss) 189 F.2d 863, cert den (1951) 342 US 878, 96 L Ed 660, 72 S Ct 169

Beneficiary has no right to file application for waiver, where insured lost right to file application at time of his death, due to lapse of one year after payment of last premium. United States v Baker (1951, CA10 Utah) 191 F.2d 1004

Beneficiary could not maintain suit for death of insured where policy lapsed for nonpayment of premiums on August 31, 1945 though insured became disabled from tuberculosis on July 13, 1945, where insured failed to file application for waiver of premiums within one year after 1946 Insurance Act became effective. Scott v United States (1951, CA5 Miss) 189 F.2d 863, cert den (1951) 342 US 878, 96 L Ed 660, 72 S Ct 169

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Beneficiary has no right to file application for waiver, where insured lost right to file application at time of his death, due to lapse of one year after payment of last premium. United States v Baker (1951, CA10 Utah) 191 F.2d 1004

Widow of insured, who did not file application for waiver of premiums until five years after death of insured from brain tumor on January 25, 1944, was barred from procuring waiver even though widow had no knowledge of policy in which she was named as beneficiary until short time prior to filing of application for waiver, since insured was not insane when policy lapsed on December 31, 1943, though insured received discharge based on mental illness. Blanchette v United States (1952, DC Me) 102 F Supp 311

§ 1913. Death before six months' total disability

Whenever premiums are not waived under section 1912 of this title [38 USCS § 1912] solely because the insured died prior to the continuance of total disability for six months, and proof of such facts, satisfactory to the Secretary, is filed by the beneficiary with the Department within one year after the insured's death, the insurance shall be deemed to be in force at the date of the death, and the unpaid premiums shall become a lien against the proceeds of the insurance. If the beneficiary is insane or a minor, proof of such facts may be filed within one year after removal of such legal disability.

Prior law and revision:

This section is based on 38 USC § 802(r) (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(r), as added Sept. 30, 1944, ch 454, § 3, 58 Stat. 762).

Amendments:

1986. Act Oct. 28, 1986, substituted "the" for "his" preceding "insurance", "death", and following "proceeds of".
Research Guide

Am Jur:
37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance § 1870
1. Generally
2. Purpose
3. Time for filing of proof
4. Proof of disability
5. Effect of expiration of contract term

1. Generally
Predecessor to 38 USCS § 1913 operates to continue policy in force, not merely subject to
revival. United States v Roberts (1951, CA5 Ga) 192 F.2d 893

2. Purpose
Purpose of predecessor to 38 USCS § 1913 was to provide equivalent to six month grace
period, during which policy remains effective pending proof that disability was such as to allow
for premium waiver. United States v Roberts (1951, CA5 Ga) 192 F.2d 893

3. Time for filing of proof
Proof of total disability of insured under predecessor to 38 USCS § 1913, received by
Veterans' Administration [now Department of Veterans Affairs] more than 6 years after death of
insured, fails to keep insurance in force where neither principal beneficiary, who is legally
competent and alive, nor contingent beneficiary, who is minor, submitted proof within one year
after death of insured. 1952 ADVA 916

4. Proof of disability
Predecessor to 38 USCS § 1913, requiring proof of beneficiary's disability within one year
after its removal, is satisfied by submission, within one year limit, of proof of those facts not
otherwise established by evidence already in agency records. 1948 ADVA 796

5. Effect of expiration of contract term
Expiration of term of contract of level premium term insurance is not to affect adversely any
rights under predecessor to 38 USCS § 1913, when term of contract expires in interim between
inception of total disability and 6 months later, or death prior to expiration of 6 months; test
whether insured has continued insurance protection is existence of conditions which would entitle
him to continued insurance protection but for such expiration. 1950 ADVA 847

§ 1914. Statutory total disabilities

Without prejudice to any other cause of disability, the permanent loss of the use of both
feet, of both hands, or of both eyes, or of one foot and one hand, or of one foot and one
eye, or of one hand and one eye, or the total loss of hearing of both ears, or the organic
loss of speech, shall be deemed total disability for insurance purposes.

Prior law and revision:
This section is based on 38 USC § 802(z) (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(z), as added Aug. 1, 1946, ch 728, § 10, 60 Stat. 788).

Amendments:


Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance § 1874

§ 1915. Total disability income provision

The Secretary shall, except as hereinafter provided, upon application by the insured and proof of good health satisfactory to the Secretary and payment of such extra premium as the Secretary shall prescribe, include in any National Service Life Insurance policy on the life of the insured (except a policy issued under section 620 of the National Service Life Insurance Act of 1940, or section 1922 of this title [38 USCS § 1922]) provisions whereby an insured who is shown to have become totally disabled for a period of six consecutive months or more commencing after the date of such application and before attaining the age of sixty-five and while the payment of any premium is not in default, shall be paid monthly disability benefits from the first day of the seventh consecutive month of and during the continuance of such total disability of $10 for each $1,000 of such insurance in effect when such benefits become payable. The total disability provision authorized under this section shall not be issued unless application therefor is made either prior to the insured's fifty-fifth birthday, or before the insured's sixtieth birthday and prior to January 1, 1966. The total disability provision authorized under this section shall not be added to a policy containing the total disability coverage heretofore issued under section 602(v) of the National Service Life Insurance Act of 1940, or the provisions of this section as in effect before January 1, 1965, except upon surrender of such total disability coverage, proof of good health, if required, satisfactory to the Secretary, and payment of such extra premium as the Secretary shall determine is required in such cases. Participating policies containing additional provisions for the payment of disability benefits may be separately classified for the purpose of dividend distribution from otherwise similar policies not containing such benefits.

Prior law and revision:

This section is based on 38 USC § 802(v)(1) (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(v)(1), as added Aug. 1, 1946, ch 728, § 9, 60 Stat. 785; Aug. 18, 1958, P. L. 85-678, §§ 1, 2, 72 Stat. 630).

References in text:

"Section 620 of the National Service Life Insurance Act of 1940", referred to in this section, is Act Oct. 8, 1940, ch 757, Title VI, Part I, § 620, as added April 25, 1951, ch 39, Part II, § 10, 65 Stat. 36, which was classified to 38 USC § 821 prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1273. Similar provisions are now contained in 38 USCS § 1922.

"Section 602(v) of the National Service Life Insurance Act of 1940", referred to in this section, is Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(v), 54 Stat. 1009, as amended, which was
classified to 38 USC § 802(v), prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1272. Similar provisions are now contained in 38 USCS § 1921.

Amendments:

1964. Act July 7, 1964 (effective 1/1/65, as provided therein), substituted new section for one which read: "The Administrator shall, upon application by the insured and proof of good health satisfactory to the Administrator and payment of such extra premium as the Administrator shall prescribe, include in any National Service Life Insurance policy on the life of the insured (except a policy issued under section 620 of the National Service Life Insurance Act of 1940, or section 722 of this title) provisions whereby an insured who is shown to have become totally disabled for a period of six consecutive months or more commencing after the date of such application and before attaining the age of sixty and while the payment of any premium is not in default, shall be paid monthly disability benefits from the first day of the seventh consecutive month of and during the continuance of such total disability of $10 for each $1,000 of such insurance in effect when such benefits become payable. The total disability provision authorized under this section shall not be added to a policy containing the total disability coverage heretofore issued under section 602(v) of the National Service Life Insurance Act of 1940, except upon surrender of such total disability coverage, proof of good health satisfactory to the Administrator, and payment of such extra premium as the Administrator shall determine is required in such cases. Participating policies containing additional provisions for the payment of disability benefits may be separately classified for the purpose of dividend distribution from otherwise similar policies not containing such benefit.".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 715, as 38 USCS § 1915, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

Cross References

This section is referred to in 38 USCS § 1907

Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance § 1874
1. Generally
2. Denial of application
3. Notice of rejection of application
4. Finality of administrative decision
5. Extent of coverage

1. Generally

Any person to whom National Service Life Insurance policy has been granted is entitled under terms and conditions of policy in statutes to apply for and to receive, if otherwise qualified, total disability income coverage. 1947 ADVA 762

To extent total disability insurance provision governing payment of disability income and relation back to payments to date of proof of disability conflicts with 38 USCS § 1915, provision is unauthorized by law and invalid. Lee v West (2000) 13 Vet App 388, 2000 US App Vet Claims LEXIS 231

2. Denial of application

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Neither tentative approval of application for total disability income rider, as evidenced by “physically approved” stamp, nor retention of premium payments is sufficient to estop government from denying such application.  Morris v United States (1954, DC NC) 122 F Supp 155

3. Notice of rejection of application

Binding effect of administrative determination, that insured's health was unsatisfactory and that application for a total disability income rider to be attached to national service life insurance policy was rejected, was not changed by an unreasonable delay in notifying applicant of the rejection.  Salyers v United States (1964, CA5 Fla) 326 F.2d 623

4. Finality of administrative decision

Administrator's [now Secretary's] decision as to whether applicant's health warrants approval of application for total disability income rider under predecessor to 38 USCS § 1915 will not be disturbed by court unless shown to be arbitrary, capricious, unsupported by substantial evidence, or based on error of law.  Morris v United States (1954, DC NC) 122 F Supp 155

5. Extent of coverage

All holders of disability insurance income riders are entitled under predecessor to 38 USCS § 1915 to disability income coverage for total disability which continued for period of 6 consecutive months or more commencing after date of application and before attaining age of 60 [now 65]; holders of disability income riders having anniversary dates within 6 months after insured's 60th [now 65th] birthday and who had met contractual conditions were also entitled under incontestable rider provisions of applicable regulation to coverage for total disability commencing before anniversary of policy nearest 60th birthday, provided they remained so disabled for at least 6 consecutive months.  1959 ADVA 964

§ 1916.  Insurance which matured before August 1, 1946

(a) Insurance which matured before August 1, 1946, is payable in the following manner:
   (1) If the beneficiary to whom payment is first made was under thirty years of age at the time of maturity, in two hundred and forty equal monthly installments.
   (2) If the beneficiary to whom payment is first made was thirty or more years of age at the time of maturity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary.
   (3) If elected by the insured or a beneficiary entitled to make such an election under prior provisions of law, as a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of the first beneficiary. A refund life income optional settlement is not available in any case in which such settlement would result in payments of installments over a shorter period than one hundred and twenty months. If the mode of payment is changed to a refund life income in accordance with prior provisions of law, after payment has commenced, payment of monthly installments will be adjusted as of the date of maturity of such policy with credit being allowed for payments previously made on the insurance.

(b) Such insurance shall be payable only to a widow, widower, child, parent, brother or sister of the insured. Any installments certain of such insurance remaining unpaid at the death of any beneficiary shall be paid in equal monthly installments in an amount equal
to the monthly installments paid to the first beneficiary, to the person or persons then in being within the following classes, and in the order named, unless designated by the insured in a different order:

(1) To the widow or widower of the insured, if living.
(2) If no widow or widower, to the child or children of the insured, if living, in equal shares.
(3) If no widow, widower, or child, to the parent or parents of the insured who last bore that relationship, if living, in equal shares.
(4) If no widow, widower, child, or parent, to the brothers and sisters of the insured, if living, in equal shares.

(c) The provisions of this section shall not be construed to enlarge the classes of beneficiaries heretofore authorized under section 602(d) of the National Service Life Insurance Act of 1940, for payment of gratuitous insurance.

(d) If no beneficiary of insurance which matured before August 1, 1946, was designated by the insured or if the designated beneficiary did not survive the insured, the beneficiary shall be determined in accordance with the order specified in subsection (b) and the insurance shall be payable in equal monthly installments in accordance with subsection (a). The right of any beneficiary to payment of any installments of such insurance shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (b).

(e) No installments of insurance which matured before August 1, 1946, shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and if no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made, except that if the reserve of a contract of converted National Service Life Insurance, together with dividends accumulated thereon, less any indebtedness under such contract, exceeds the aggregate amount paid to beneficiaries, the excess shall be paid to the estate of the insured unless the estate of the insured would escheat under the laws of the insured's place of residence, in which event no payment shall be made. When the amount of an individual monthly payment of such insurance is less than $5, such amount may, in the discretion of the Secretary, be allowed to accumulate without interest and be disbursed annually.

(f) Any payments of insurance made to a person, represented by the insured to be within the permitted class of beneficiaries, shall be deemed to have been properly made and to satisfy fully the obligation of the United States under such insurance policy to the extent of such payments.

Prior law and revision:

This section is based on 38 USC § 802(g)-(l) (Acts Oct. 8, 1940, ch 757, Title VI, Part I, § 602(g)-(l), 54 Stat. 1009; July 11, 1942, ch 504, § 9, 56 Stat. 659; Sept. 30, 1944, ch 454, §§ 1, 5, 6, 58 Stat. 762; Aug. 1, 1946, ch 728, § 5, 60 Stat. 782).

References in text:
"Section 602(d) of the National Service Life Insurance Act of 1940", referred to in subsec. (c), is Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(d), 54 Stat. 1009, which was classified to 38 USC § 802(d), prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1272.

Amendments:
1986. Act Oct. 28, 1986, in subsec. (e), substituted "the insured's" for "his".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 716, as 38 USCS § 1916, and, in subsec. (e), substituted "Secretary" for "Administrator".

Cross References
This section is referred to in 38 USCS § 1911

Research Guide

Am Jur:
37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance § 1871

Annotations:
National Service Life Insurance: change of beneficiary. 13 ALR Fed 6
Persons eligible to receive proceeds of national service life insurance. 3 ALR2d 846
Trust, or contract to hold for benefit of another, with respect to proceeds of National Service life insurance. 70 ALR2d 1358

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I. IN GENERAL

1. Generally
   Title to proceeds of service insurance is subject to federal control both before and after
   payment by government.  Barton v United States (1948, DC Cal) 75 F Supp 703
   Predecessor to 38 USCS § 1916, setting forth class of permitted beneficiaries, is a term of
   insurance contracts.  Neuhard v United States (1949, DC Pa) 83 F Supp 911

2. Constitutionality
   Restrictions on permitted class of beneficiaries in predecessor to 38 USCS § 1916 are
   constitutional.  United States v Zazove (1948) 334 US 602, 92 L Ed 1601, 68 S Ct 1284, reh den
   (1948) 335 US 837, 93 L Ed 389, 69 S Ct 12
   Predecessor to 38 USCS § 1916(f), deeming payments to satisfy government's obligation if
   made to person represented to be within permitted class, is within power of Congress.  United
   States v Hoffman (1955, DC NJ) 129 F Supp 580

3. Construction
   In determining whether National Service Life Insurance Act of 1940 (predecessor to 38 USCS
   §§ 1901 et seq.) bars payments to deceased beneficiaries' estates, consistent course of
   administrative practice under both  National Service Life Insurance Act and War Risk Insurance
   Act of 1917 is factor which must be accorded weight.  United States v Henning (1952) 344 US
   66, 97 L Ed 101, 73 S Ct 114, reh den (1952) 344 US 910, 97 L Ed 702, 73 S Ct 327

4. Relationship with other laws
   Removal of restrictions on permitted class of beneficiaries under predecessor to 38 USCS §
   1919 does not apply to payment of benefits under policies which matured by reason of insured's
   death prior to August 1, 1946, which continue to be governed by restrictions contained in
   predecessor to 38 USCS § 1916.  Walker v United States (1950, CA7 Ill) 180 F.2d 217

5. Miscellaneous
   Maturity date of policy, for purpose of deciding whether 38 USCS §§ 716 or 717 [now 38
   USCS §§ 1916 or 1917] applies to such policy, is date that payment becomes due, meaning date
   of insured's death.  Walker v United States (1950, CA7 Ill) 180 F.2d 217

II. PAYMENT OPTIONS

6. Generally
Failure of principal beneficiary to complete and return form of election as to mode of payment operates, pursuant to regulation, as election to receive 20 monthly installments certain and for life, and contingent beneficiary is bound by such election and entitled to only remaining installments certain, though neither of beneficiaries was aware that payments would cease in such situation before face value of policy was paid. United States v Foulger (1957, CA10 Utah) 249 F.2d 237

7. Computation of installments

Monthly installments payable for life to beneficiary who was over 30 years of age when insured died are not to be computed by dividing face value of policy by 120 and adding interest at three per cent, but are payable in accordance with mortality tables. United States v Zazove (1948) 334 US 602, 92 L Ed 1601, 68 S Ct 1284, reh den (1948) 335 US 837, 93 L Ed 389, 69 S Ct 12

8. -Death of primary beneficiary

Upon death of primary beneficiary, who elected to receive proceeds of two policies in monthly installments for 120 months certain and for life thereafter, after receiving 52 installments, contingent beneficiary is entitled only to remaining 68 installments, though payments to both beneficiaries totaled less than face value of policies. United States v Yost (1956, CA5 Tex) 229 F.2d 75, cert den (1956) 351 US 971, 100 L Ed 1490, 76 S Ct 1042

9. Regulations

Regulation that if first beneficiary of policy is thirty or more years of age at time of death of insured, amount of monthly payment to which such beneficiary is entitled for 120 months certain and thereafter throughout beneficiary's lifetime shall, for each $1,000 of insurance, be determined by age of beneficiary as of last birthday at time of death of insured in accordance with prescribed schedule based upon American Experience Table of Mortality and interest at 3 per cent per annum, is in accord with proper construction of predecessor to 38 USCS § 1916. United States v Zazove (1948) 334 US 602, 92 L Ed 1601, 68 S Ct 1284, reh den (1948) 335 US 837, 93 L Ed 389, 69 S Ct 12

III. AUTHORIZED CLASSES OF BENEFICIARIES

A. In General

10. Generally

Court will assume that insured was fully advised with respect to his rights to select any person he desired within statutory classes to receive benefits of policy. Washburn v United States (1945, DC Mo) 63 F Supp 224

With exception of spouse of insured and stepchild, and possible exception of adopted child, Congress has limited permissible class of beneficiaries to immediate relatives by blood of insured. Beach v United States (1946, DC Ohio) 79 F Supp 747

11. Purpose of statutory scheme

Purpose of restricting class of permissible beneficiaries under predecessor to 38 USCS § 1916 was to encourage servicemen to meet moral claims of near relatives with whom they have lived. McDonald v United States (1950, DC Mass) 91 F Supp 163

12. Governing law

Question as to whether beneficiary was wife of deceased is determined by law of state in which alleged marriage took place. Brown v United States (1947, CA3 NJ) 164 F.2d 490, cert den (1948) 333 US 873, 92 L Ed 1149, 68 S Ct 902

Whether person from whom insured obtained divorce remains legal widow of insured, eligible to receive proceeds of national service life insurance policy during period between issuance of interlocutory decree and time such decree becomes final is question of state law. Schurink v
Validity of insured's second marriage in Maryland, after obtaining Mexican divorce by correspondence from first wife, must be determined by law of state where both insured and second wife had been domiciled at time of Maryland marriage and, since such law treats as absolutely void any divorce granted by foreign state in which neither of parties is bona fide resident, first wife is legal widow entitled to proceeds of national service life insurance policy. 

United States v Snyder (1949, App DC) 85 US App DC 198, 177 F.2d 44

Eligibility for benefits under national service life insurance policy of person who married insured after issuance of interlocutory divorce decree, but before such decree became final, depends upon validity of such marriage under applicable state law. Gehm v United States (1949, DC NY) 83 F Supp 1003

Determination of designated beneficiary's status as legal widow of insured is question of state law, both as to validity of marriage entered into in such state and as to marriages entered into outside state which are recognized by state as valid. Madewell v United States (1949, DC Tenn) 84 F Supp 329

Decision by Connecticut state court as to validity of marriage is binding on Federal court where regulation of administrator [now Secretary] provided that validity of marriage should be determined by law of place where parties resided at time compensation was claimed, and alleged wives lived in Connecticut at such time. United States v Oswald (1950, DC Del) 91 F Supp 639

B. Widow or Widower

13. Generally

Term widow as used in predecessor to 38 USCS § 1916 means insured's lawful wife at time of his death. Hendrich v Anderson (1951, CA10 Utah) 191 F.2d 242; Trathen v United States (1952, CA3 Pa) 198 F.2d 757; Muir v United States (1950, DC Cal) 93 F Supp 939

14. Right of recovery

Right of deceased soldier's widow to recover is dependent upon her legal status as unremarried widow of deceased, and not upon her morals, her worthiness, or her social standing. Rittgers v United States (1946, CA8 Minn) 154 F.2d 768; Burke v United States (1948, DC Pa) 85 F Supp 93, affd (1949, CA3 Pa) 176 F.2d 438

15. Common law marriage

Under predecessor to 38 USCS § 1916, alleged common-law wife is not within class having insurable interest in insured's life where common-law marriage was void under state law. Branch v United States (1949, DC Okla) 83 F Supp 641

16. Proxy marriage

Woman who had married insured by proxy is legal widow and properly designated as beneficiary of national service life insurance policy, where proxy marriage between woman in Florida and soldier in Scotland was recognized as valid common-law marriage under Florida Law. United States v Layton (1946, DC Fla) 68 F Supp 247

17. Bigamous marriage

Annulment of wife's former marriage subsequent to death of insured does not validate marriage to insured, nor entitle her to benefits of service policy. Castor v United States (1949, CA8 Mo) 174 F.2d 481, cert den (1949) 338 US 836, 94 L Ed 511, 70 S Ct 45, reh den (1949) 338 US 901, 94 L Ed 555, 70 S Ct 245

Wife may not recover under national life insurance policy, where evidence showed that she was married to another at time she married insured, and that no marriage took place with insured
after her subsequent divorce from first husband. Walker v United States (1950, CA7 Ill) 180 F.2d 217

Claimant is not "widow" of veteran if she did not live with veteran after obtaining divorce from former husband to whom she was married at time of her purported marriage to veteran. Erickson v Stogner (1952, App DC) 90 US App DC 278, 195 F.2d 777

Designated beneficiary is not insured's widow, thus not member of permitted class under predecessor to 38 USCS § 1916, where her marriage to insured took place before insured's divorce decree became final. Brown v United States (1947, DC NJ) 72 F Supp 153, affd (1947, CA3 NJ) 164 F.2d 490, cert den (1948) 333 US 873, 92 L Ed 1149, 68 S Ct 902; Gehm v United States (1949, DC NY) 83 F Supp 1003

Second wife of insured is not within class of persons permitted as beneficiaries where her marriage with insured was void because of previous marriage of insured. Derrell v United States (1949, DC Mo) 82 F Supp 18

Insured's second wife is not within permitted class under predecessor to 38 USCS § 1916 where her marriage to insured was void due to failure to obtain divorce from first husband. United States v Leary (1950, DC Dist Col) 90 F Supp 590; Haupt v United States (1953, DC RI) 109 F Supp 762

18. Cohabitation

Wife of deceased insured is not precluded from benefits by alleged common-law marriage where wife, under prevailing state law, is not considered common-law wife of man with whom she lived both before and after insured's death. Rittgers v United States (1946, CA8 Minn) 154 F.2d 768

Fact that veteran's widow was admittedly living with another man, have borne son by such man, does not preclude her from receiving further benefits, where she had not gone through marriage ceremony, either canonical or civil, and local law did not recognize common law marriage. De Lano v United States (1959, DC Dist Col) 183 F Supp 781

19. Remarriage prior to death of insured

Neither insured's first wife, who went through marriage ceremony with another man after insured left her, nor woman who went through legal form of marriage with insured while still married to previous husband, is entitled to proceeds. United States v Burns (1951, DC Ark) 95 F Supp 628, app dismd (1951, CA8 Ark) 190 F.2d 206

Brothers and sisters of insured, rather than person claiming as wife, are entitled to proceeds, where wife did not live with insured after her return from prison and married another prior to death of insured, since presumption of validity of second marriage is not overcome by statement that she knew of no divorce proceeding. United States v Mason (1951, DC Iowa) 103 F Supp 619

First wife of insured, who had remarried without benefit of divorce, is entitled to insurance proceeds. United States v Wilson (1953, DC Tenn) 112 F Supp 428

20. Remarriage after death of insured

Remarriage shortly after insured's death does not disqualify widow under predecessor to 38 USCS § 1916. Trathen v United States (1952, CA3 Pa) 198 F.2d 757

Widow's remarriage after death of insured has no effect on her statutory preference over brothers and sisters upon death of named beneficiary. Riley v United States (1954, CA4 W Va) 212 F.2d 692, 44 ALR2d 1182

Widow receiving monthly installments of insurance under predecessor to 38 USCS § 1916 who remarries is not entitled to duplication of installments of insurance already paid, but is eligible for payment of unpaid installments upon recognition by Veterans' Administration [now Department of Veterans Affairs] of decree annulling such remarriage. 1945 ADVA 636

C. Child
21. Generally
Son of insured by void marriage is entitled to share insurance with children of insured by prior valid marriage where contingent clause merely stated that proceeds should go to "The Surviving children, equally to the Survivor or Survivors" but children by prior marriage of woman who entered into void marriage with insured are not within permitted class. Hendrich v Anderson (1951, CA10 Utah) 191 F.2d 242

22. Stepchild
Stepchild remains within permitted class of beneficiaries under National Service Life Insurance Act (predecessor to 38 USCS §§ 1901 et seq.) after divorce of her mother and insured, where insured continued to make contributions for her support after divorce, such contributions continuing even after stepchild's marriage. Benefield v United States (1945, DC Tex) 58 F Supp 904

Insured's stepchild, designated as beneficiary, is not member of permitted class where marriage of insured and mother is void. Gehm v United States (1949, DC NY) 83 F Supp 1003; Muir v United States (1950, DC Cal) 93 F Supp 939

Insured's stepchild remains member of permitted class under predecessor to 38 USCS § 1916 although insured and stepchild's mother have divorced, where insured continued to live with divorced wife and continued to furnish support for both wife and child as he had done prior to divorce. 1947 ADVA 755

23. Illegitimate child
Illegitimate child is child within meaning of the National Service Life Insurance Act (predecessor to 38 USCS §§ 1901 et seq.) making gratuitous insurance payable, if no widow or widower entitled thereto, to "child or children" of insured, if living, in equal shares. United States v Philippine Nat'l Bank (1961, App DC) 110 US App DC 250, 292 F.2d 743

D. Parent

1. Natural Parent

24. Generally
Father, who through force of circumstances was required to go from one community to another, but who constantly assumed obligation of education of his son, although often placing son in custody of others for temporary periods, is entitled to proceeds of policy in preference to uncle and brother-in-law of insured with whom insured stayed for short intervals. Lewis v United States (1952, DC W Va) 105 F Supp 73

25. Putative father
Insured's putative father, who had never married insured's mother, adopted insured, or been subject of court order determining relationship, is not within permitted class under predecessor to 38 USCS § 1916. Gibbs v United States (1948, DC NC) 80 F Supp 907

Putative father designated as beneficiary of NSLI policy by insured is ineligible beneficiary unless shown to be in loco parentis. Hawkey v United States (1952, DC III) 108 F Supp 941

26. Abandonment or desertion
Under National Service Life Insurance Act of 1940 (predecessor to 38 USCS §§ 1901 et seq.), foster mother of deceased insured takes, after designated beneficiary's death, all accrued policy proceeds, to exclusion of beneficiary's estate and of insured's natural father, who had abandoned his son. Baumet v United States (1952) 344 US 82, 97 L Ed 111, 73 S Ct 122, reh den (1953) 344 US 916, 97 L Ed 706, 73 S Ct 332 and (superseded by statute as stated in Short v United States (1954, DC Cal) 123 F Supp 414)

Natural father is not entitled to payments upon death of person who stood in loco parentis to insured at his death, where father had, in fact, abandoned insured. Baumet v United States
Natural father who had failed to support his children for many years, had not visited them, and had not acted as parent should, is not entitled to balance of proceeds under national insurance policy upon death of natural mother. United States v Kwasniewski (1950, DC Mich) 91 F Supp 847

Natural father is not within permitted class as one who last bore parental relationship to insured, where father deserted family when insured was 8 years old. Conley v United States (1954, DC W Va) 119 F Supp 832

27. Existence of person in loco parentis

Whether natural parent is excluded from permitted class by existence of person standing in loco parentis to insured depends upon whether or not natural parent has ceased to be such in truth and in fact. United States v Henning (1952) 344 US 66, 97 L Ed 101, 73 S Ct 114, reh den (1952) 344 US 910, 97 L Ed 702, 73 S Ct 327

Since assumed parental relationship of insured's grandfather affects relationship of natural father only during grandfather's life, death of grandfather named as beneficiary terminates assumed parental relationship and allows natural father to receive remaining proceeds. Strunk v United States (1948, DC Ky) 80 F Supp 432

Upon death of insured's stepgrandmother, who had last occupied relationship of parent to insured, brother and sister of insured, rather than surviving natural mother, are entitled to proceeds of policy. Seavey v United States (1956, DC Me) 137 F Supp 529

2. Persons In Loco Parentis

a. In General

28. Generally

Congress intended to give serviceman broad discretion in naming as his beneficiary person in whose home he had lived for at least one year as member of family. Jadin v United States (1947, DC Wis) 74 F Supp 589

Court will not interpret term "in loco parentis" liberally for purpose of determining whether person has attained such status in order to take proceeds by operation of law under priorities listed in predecessor to 38 USCS § 1916, since purpose of liberal construction is to effectuate intention of insured, requiring that insured have manifested such intention by naming person as beneficiary; in such case, person claiming as in loco parentis must meet strict standards of common-law. Mansfield v Hester (1949, DC W Va) 81 F Supp 772

29. Acquisition of status

One assuming duties and obligations of either father or mother may qualify as in loco parentis although natural parent is member of same household. Burke v United States (1948, DC Pa) 85 F Supp 93, affd (1949, CA3 Pa) 176 F.2d 438

Two individuals may be found to stand in loco parentis to insured, where grandmother achieved such status prior to being incapacitated, whereupon insured's aunt took over duties of caring for insured. Reynolds v United States (1951, DC Kan) 96 F Supp 257

Only one individual is to occupy status of father, and one of mother, in loco parentis at same time to insured under predecessor to 38 USC § 1916. 1948 ADVA 792

30. -Time

To be within permitted class of beneficiaries, persons standing in loco parentis must have attained such status prior to insured's entry into service. United States v McMaster (1949, CA5 Fla) 174 F.2d 257
31. Duration of status

Person having attained relationship of in loco parentis 11 months prior to insured's entering service is not permissible beneficiary under predecessor to 38 USCS § 1916, since relationship must have existed for at least 1 year for such person to be within permitted class. Campbell v United States (1949, CA5 Miss) 174 F.2d 395

Aunt may not be beneficiary unless she stood in loco parentis to insured for one year prior to his entry into armed forces. Maldonado v United States (1946, DC NY) 69 F Supp 302

Once parental relationship exists for period of one year prior to insured's entry into service, person in loco parentis remains members of permitted class even if relationship subsequently changes. Burke v United States (1948, DC Pa) 85 F Supp 93, aff'd (1949, CA3 Pa) 176 F.2d 438

32. Receipt of benefits

Persons in loco parentis are not restricted to receiving benefits only when named as beneficiary, but may take proceeds by devolution as well. Bland v United States (1950, CA5 Tex) 185 F.2d 395

Person in loco parentis is entitled to benefit of statutory preference accorded parent upon death of named beneficiaries. Dodd v United States (1948, DC Ark) 76 F Supp 991

Person standing in loco parentis need not be named principal beneficiary, but is eligible to take as contingent beneficiary upon determination that named principal beneficiary was not within permitted class. Derrell v United States (1949, DC Mo) 82 F Supp 18

b. Particular Persons

33. Aunt or uncle

Aunt and uncle, who took insured into home at suggestion of natural father after natural mother became mentally ill, and cared for him till he left school stand in loco parentis where natural father suggested they adopt insured, never made attempt to provide support for insured, and moved out of household short time after placing insured there. Leyerly v United States (1947, CA10 Colo) 162 F.2d 79

Aunt stood in loco parentis to insured and is permissible beneficiary of his NSLI policy, where aunt cared for him as if she were his mother, and natural mother, although still alive, never conducted herself towards insured as mother's duty would require. McClendon v United States (1947, CA7 Ill) 163 F.2d 895

Aunt may stand in loco parentis to insured, even though insured had reached majority by time of entrance into service. Bland v United States (1950, CA5 Tex) 185 F.2d 395

Aunt stands "in loco parentis" to insured, who lived, ate, and slept in home of aunt after death of his parents, even though insured was 22 at time he moved into home, where she mended his clothes, took care of him with medicine paid for by her, and treated him as one of her own household. Thomas v United States (1951, CA6 Tenn) 189 F.2d 494, reh den (1952) 343 US 932, 96 L Ed 1341, 72 S Ct 756 and cert den (1951) 342 US 850, 96 L Ed 641, 72 S Ct 78

Fact that uncle sponsored insured's entry into United States at age 15 and aided in his support does not establish relationship in loco parentis, where insured was self-supporting and not living with uncle at time he entered service, and natural father had not delegated parental responsibilities to uncle. Helfgott v United States (1958, CA2 NY) 250 F.2d 818

Aunt may be considered to have stood in loco parentis to insured where, since insured was 13 years old, aunt provided him with home and maintenance, and performed all other services with respect to his living requirements while in her home, although natural mother, who was financially unable to provide for insured, remained on friendly terms with him at all times. Baldwin v United States (1946, DC Mo) 68 F Supp 657

Aunt is not within permitted class as person who stood in loco parentis to insured, where she took insured into her home at time when insured was over 20 years of age and married,
and evidence indicated that insured contributed to support of his wife and child. Maldonado v United States (1946, DC NY) 69 F Supp 302

Aunt may not be regarded as having stood in loco parentis to insured by virtue of having accepted him into her home after death of his mother, where insured worked and paid board, and there was no evidence that aunt intended to assume responsibilities of any other relationship than one explainable by and consistent with blood relationship and affection that exists between aunt and nephew. Bourbeau v United States (1948, DC Me) 76 F Supp 778

Aunt of insured is not, merely by reason of that relationship, within class of permissible beneficiaries, but must stand in loco parentis to insured to be within permitted class. Strunk v United States (1948, DC Ky) 80 F Supp 432

Aunt does not stand in loco parentis to insured where mutual conduct and relationship between her and insured, during time in which insured lived in home of his grandmother, did not extend beyond what is ordinarily and customarily observed between aunt and nephew in like situations, and no intention appeared to have existed on part of either that she should assume any parental obligations toward him, or he any filial duties toward her. Mansfield v Hester (1949, DC W Va) 81 F Supp 772

Aunt designated as contingent beneficiary is in loco parentis and entitled to proceeds, where aunt had raised insured and insured's designation of principal beneficiary was too vague for determination. United States v Collins (1955, DC NC) 136 F Supp 410

34. Cousin

Insured's cousin does not stand in loco parentis so as to be within permitted class, even though cousin provided food and shelter and treated insured as member of family, where insured was 26 years old at time he moved in with cousin, insured worked and paid board, and cousin testified that she had considered insured as brother rather than son. Niewiadomski v United States (1947, CA6 Mich) 159 F.2d 683, cert den (1947) 331 US 850, 91 L Ed 1859, 67 S Ct 1730

Cousin, named beneficiary under policy and described as guardian is in loco parentis as against natural mother, where evidence showed that insured voluntarily left home of his mother due to disagreement and lived at home of cousin, who supported him for 21 months prior to entry into service. Golden v United States (1950, DC Ala) 91 F Supp 950, affd (1951, CA5 Ala) 192 F.2d 81

35. Foster parent

Person is not within permitted class of beneficiaries under predecessor to 38 USCS § 1916 as having stood in loco parentis to insured, where she took insured into her home at request of welfare society, received stipulated sum from society for insured's board, society provided insured with spending money and clothing, and natural father, who was unable to support himself or family due to poor health, never contemplated giving son up for adoption. Strauss v United States (1947, CA2 NY) 160 F.2d 1017, cert den (1947) 331 US 820, 91 L Ed 1859, 67 S Ct 1741

Woman designated as beneficiary by insured, who described her as foster mother, is not in loco parentis as against claim of natural father, where insured never met woman until he had reached adulthood and insured suffered no disability. United States v McMaster (1949, CA5 Fla) 174 F.2d 257

Person into whose home insured was placed by Indian agency, who received monthly support from agency, is permissible beneficiary under predecessor to 38 USCS § 1916 as one standing in loco parentis, where insured and sister were treated as members of family, although natural parents were living. Jadin v United States (1947, DC Wis) 74 F Supp 589

36. Grandparent

Maternal grandmother of insured is within permitted class where he had lived with her more than three years before he entered military service. Smith v United States (1946, DC RI) 69 F Supp 387

37. Miscellaneous
Plaintiffs, who had taken insured into their home when he was 18 years old, fed and clothed him with little or no interruption for 3 or 4 years, and provided him with spending money and separate room have attained relationship of in loco parentis to insured, whom evidence showed to be mentally unstable. Horsman v United States (1946, DC Mo) 68 F Supp 522

Insured's former employer, who took insured into his house when insured was 18 years old and from that time on treated him as member of family, is in loco parentis to insured, even though natural parents were still living. Wood v United States (1947, DC SC) 74 F Supp 732

Person stood in loco parentis to insured and may receive proceeds of insured's NSLI policy where insured had been committed to State Department of Children's Guardian after separation of his natural parents, plaintiff took insured into her home after he graduated from high school, where he lived for more than 2 years as member of her family, plaintiff and her husband maintained separate room for insured in their house, and insured's letters indicated that he considered plaintiff, rather than his natural mother, as real mother. Jensen v United States (1948, DC Me) 78 F Supp 974

Abbot does not stand in loco parentis to monk in abbey so as to entitle Abbot to proceeds of national service life insurance policy, even though named as beneficiary. O'Brien v United States (1949, DC NJ) 84 F Supp 531

Person with whom insured went to live after reaching age 21, who treated him as son, but did not adopt him, is not in loco parentis in order to be eligible as beneficiary under national life insurance. Powledge v United States (1950, DC Ga) 88 F Supp 561, affd (1951, CA5 Ga) 193 F.2d 438

Daughter of adoptive parents of insured does not qualify as his beneficiary upon ground that she stood in loco parentis to him, where evidence showed that though she had contributed materially to his support prior to his entrance into army, her mother was considered head of household and real parent of insured. McDonald v United States (1950, DC Mass) 91 F Supp 163

Beneficiary designated by insured may recover as in loco parentis where beneficiary took insured into his home at age 16 for period of 20 months, when insured was estranged from his mother. Golden v United States (1950, DC Ala) 91 F Supp 950, affd (1951, CA5 Ala) 192 F.2d 81

Elderly woman whom insured had designated as beneficiary is entitled to proceeds as being in loco parentis where, even though insured had never lived in her home, was not related to her by blood or marriage, and had not supported her when working, insured intended to live with her after service, looked upon her as his closest connection, and designated her to be notified if anything happened to him. Banks v United States (1958, DC Conn) 170 F Supp 534, affd (1959, CA2 Conn) 267 F.2d 535

**E. Brother or Sister**

**38. Consanguinity**

Halfblood brothers and sisters are members of permitted class under predecessor to 38 USCS § 1916. Woodward v United States (1948, CA8 Mo) 167 F.2d 774; Strunk v United States (1948, DC Ky) 80 F Supp 432

Contingent beneficiary, half-brother of insured, is entitled to insurance where putative father of insured, principal beneficiary, did not occupy relationship of "in loco parentis" to insured. Gibbs v United States (1948, DC NC) 80 F Supp 907

Designated beneficiary, legitimate child of father of soldier, and hence half-sister of insured (illegitimate), is within class of permitted beneficiaries of National Service Life Insurance benefits. 1950 ADVA 854

**39. Adoption**

Brother by adoption is permissible beneficiary, entitled to recover proceeds of sister's policy designating him as beneficiary. Woodward v United States (1951) 341 US 112, 95 L Ed 806, 71
S Ct 605; McDonald v United States (1950, DC Mass) 91 F Supp 163; Barnes v United States (1951, DC Pa) 95 F Supp 541

Term "sister" as used in National Service Life Insurance Act (predecessor to 38 USCS §§ 1901 et seq.) is to be given liberal construction, thus including insured's adoptive sister within permitted class of beneficiaries under predecessor to 38 USCS § 716. Carpenter v United States (1948, CA3 Pa) 168 F.2d 369, 3 ALR2d 841

40. Foster relationship

Brother or sister by foster relationship is not within term "brother or sister of the insured," as used in predecessor to 38 USCS § 1916 of National Service Life Insurance Act of 1940 (38 USCS §§ 701 et seq. [now 38 USCS §§ 1901 et seq.]). 1952 ADVA 894

41. Miscellaneous

Person adopted by insured's father during father's first marriage is not insured's sister for purposes of predecessor to 38 USCS § 1916. Beach v United States (1946, DC Ohio) 79 F Supp 747

Daughter of insured's putative father is not insured's sister within meaning of predecessor to 38 USCS § 1916. Hawkey v United States (1952, DC Ill) 108 F Supp 941

IV. DESIGNATION AND CHANGE OF BENEFICIARIES

A. Designation

42. Generally

Congress intended that insured should have right to designate person to whom, within permitted class, proceeds would be paid if primary beneficiary did not survive to collect all or any of benefits due under policy, and, unlike situation in nongovernment insurance, rights of such contingent beneficiary are not extinguished by fact that primary beneficiary survives insured. Washburn v United States (1945, DC Mo) 63 F Supp 224

Court will effectuate express wishes of deceased soldier unless it appears that beneficiary does not come within permissible class. Wood v United States (1947, DC SC) 74 F Supp 732

Original designation of beneficiary is subject to same requirement, that insured have intent to make designation and perform some affirmative act to that end, as governs change of beneficiary. Blanchard v United States (1950, DC NH) 91 F Supp 889

43. Validity of particular designations

Widow of soldier killed in line of duty may not be denied benefits of policy issued by government merely because instrument designating wife as beneficiary happened to be in files of war department instead of in files of Veterans' Administration [now Department of Veterans Affairs]. Van Doren v United States (1946, DC Cal) 68 F Supp 222

Neither insured's designation of wife as beneficiary of $2,000 policy left in force after cancellation of all other policies, nor fact that mother was named beneficiary of canceled policies, operates to designate beneficiary of $8,000 insurance to which Veterans' Administration [now Department of Veterans Affairs] determined that insured was entitled, proceeds of which must pass as though insured failed to designate beneficiary. Sights v United States (1950, DC Dist Col) 89 F Supp 235

44. Trustee beneficiary

Evidence that insured intended proceeds of NSLI policy to be held by beneficiaries in trust for his children, although no limitation was evident from insurance policy, is sufficient to award proceeds to insured's wife to be held in trust for children, although wife was not designated as beneficiary, since wife is guardian of children for whom proceeds are being held. Burgess v Murray (1952, CA5 Fla) 194 F.2d 131
Designated beneficiary of NSLI policy holds proceeds subject to constructive trust to distribute them equally among insured's brothers and sisters, where beneficiary promised insured that such distribution would be made if insured designated her as beneficiary, insured's will provided for such distribution, and beneficiary had promised brothers and sisters that proceeds would be divided equally. Voelkel v Tohulka (1957) 236 Ind 588, 141 NE2d 344, 70 ALR2d 1349, cert den (1957) 355 US 891, 2 L Ed 2d 189, 78 S Ct 263

45. Validity of agreement between insured and beneficiary

Agreement between beneficiary and insured that beneficiary would hold proceeds of all NSLI policy for benefit of person not within permitted class of beneficiaries is invalid and unenforceable. Jones v United States (1945, DC Mass) 61 F Supp 406

Contract between insured and beneficiary of NSLI policy, to effect that beneficiary would hold proceeds of policy for benefit of insured's wife and expected child, is valid and enforceable. French v French (1946) 161 Kan 327, 167 P2d 305, cert den (1946) 329 US 727, 91 L Ed 629, 67 S Ct 81

B. Change of Beneficiary

1. In General

46. Generally

Judicial decisions dealing with beneficiary changes under war risk insurance policies are relevant to questions concerning change of beneficiary of National Service Life Insurance cases. Van Doren v United States (1946, DC Cal) 68 F Supp 222; Fleming v Smith (1964) 64 Wash 2d 181, 390 P2d 990

47. Governing law

All cases involving changes of beneficiary under National Service Life Insurance policies are governed by federal law. Dyke v Dyke (1955, CA6 Tenn) 227 F.2d 461, cert den (1956) 352 US 850, 1 L Ed 2d 61, 77 S Ct 70; Fitzstephens v United States (1960, DC Wyo) 189 F Supp 919; Morris v United States (1963, ND Tex) 217 F Supp 220

48. Right to change beneficiary

Right to change beneficiary under policy of National Service life insurance is as absolute as right to designate original beneficiary. Bradley v United States (1944, CA10 Okla) 143 F.2d 573, cert den (1944) 323 US 793, 89 L Ed 632, 65 S Ct 429

Agreement not to change beneficiary of National Service life insurance policy cannot affect insured's statutory right to make such change. Heifner v Soderstrom (1955, DC Iowa) 134 F Supp 174

Insured's right to change beneficiaries of National Service life insurance policy cannot be defeated by claim that insured unalterably transferred title to his insurance policy by delivery of policy with donative purpose. Tompkins v Tompkins (1944, NJ Super Ct) 132 NJL 217, 38 A2d 890

49. -Guardian

Guardian appointed for incompetent insured has power to change beneficiary of NSLI policy upon receiving express authorization from probate court to do so. Murray v United States (1950, DC Mich) 107 F Supp 290, affd (1951, CA6 Mich) 188 F.2d 362, cert den (1951) 342 US 816, 96 L Ed 617, 72 S Ct 30

50. Divorce or separation agreement

Separation agreement between veteran and his first wife in which he agreed to irrevocably name her and their children as beneficiaries of policy and to pay at least specified monthly support money, which agreement was approved in divorce decree granted to first wife, has no
force and effect so far as proceeds of veteran's policy are concerned.  Eldin v United States (1957, DC III) 157 F Supp 34

51. Effectuation of change requirements

Government may waive compliance with regulations as to change of beneficiary of National Service life insurance, since such regulations are for protection of government. Collins v United States (1947, CA10 Okla) 161 F.2d 64, cert den (1947) 331 US 859, 91 L Ed 1866, 67 S Ct 1756

Literal compliance with requirements as to change of beneficiary of National Service life insurance is never necessary to make change effective, and legal technicalities will be brushed aside in order to effectuate intent of insured. Mitchell v United States (1948, CA5 La) 165 F.2d 758, 2 ALR2d 484; Stone v United States (1959, CA5 Ala) 272 F.2d 746

52. Competency of insured

Insured must be mentally competent to effect valid change of beneficiary of National Service Life Insurance policy. Taylor v Taylor (1954, CA8 Ark) 211 F.2d 794; Roecker v United States (1967, CA5 Miss) 379 F.2d 400, cert den (1967) 389 US 1005, 19 L Ed 2d 600, 88 S Ct 563; Lyle v Bentley (1969, CA5 Tex) 406 F.2d 325 (criticized in Coursey v Pudda (2004, SD Ga) 299 F Supp 2d 1368)

Since determination of insured's mental capacity to effect lawful change of beneficiary is governed by federal law, finding of competency is not precluded by state court order adjudicating insured incompetent; veteran's change of beneficiary may properly be given effect, even though he had been adjudged incompetent by state court and treated in state hospital, where medical testimony as to veteran's competency was in conflict and person who prepared change of beneficiary form testified that veteran knew he was taking insurance away from mother and giving it to wife and child. Dyke v Dyke (1955, CA6 Tenn) 227 F.2d 461, cert den (1956) 352 US 850, 1 L Ed 2d 61, 77 S Ct 70

Standard for determining mental capacity for making beneficiary change under NSLI policy is same as that required for executing valid will, deed, or contract. Morris v United States (1963, ND Tex) 217 F Supp 220

Fact that veteran had long history of alcoholism and had been recommended for hospitalization due to mental incompetency does not invalidate his change of beneficiary, where psychiatrist who had examined veteran in hospital testified that veteran was sane and had testamentary capacity to execute change of beneficiary. Frakes v United States (1964, ND Ga) 228 F Supp 475

53. Formal requirements

Insured's formal request for change of beneficiary from mother to wife is sufficient to effect such change, even though form never arrived at VA and subsequent letter to his brother indicated that mother was still beneficiary, where wartime conditions made loss of mail common, at both insured's station in combat zone and at Veterans' Administration [now Department of Veterans Affairs]. Gann v Meek (1948, CA5 Tex) 165 F.2d 857, cert den (1948) 334 US 849, 92 L Ed 1772, 68 S Ct 1500

It is not necessary that change of beneficiary form be delivered to Veterans' Administration [now Department of Veterans Affairs] before death of insured, if insured set in motion steps for its delivery which manifested his intent that it should be so delivered, and change of beneficiary form is effective although lost after mailing. Widney v United States (1949, CA10 Okla) 178 F.2d 880

Loss of form for changing beneficiary, due to wartime circumstances beyond insured's control, does not invalidate insured's change of beneficiary from former wife to sister, since insured had done everything within his power to effectuate change. Elders v United States (1953, DC SC) 116 F Supp 757

54. Affirmative action

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Insured's intent to change beneficiary of National Service life insurance policy must be followed by some affirmative act on part of insured evidencing his exercise of right to change beneficiary. Collins v United States (1947, CA10 Okla) 161 F.2d 64, cert den (1947) 331 US 859, 91 L Ed 1866, 67 S Ct 1756; Gann v Meek (1948, CA5 Tex) 165 F.2d 857, cert den (1948) 334 US 849, 92 L Ed 1772, 68 S Ct 1500; Kluge v United States (1953, CA4 SC) 206 F.2d 344; Stone v United States (1959, CA5 Ala) 272 F.2d 746

Manifest intent of insured to change beneficiary of National Service life insurance policy is given effect when he has done everything reasonably within his power to accomplish his purpose, leaving only ministerial acts to be performed by insurer. Mitchell v United States (1948, CA5 La) 165 F.2d 758, 2 ALR2d 484

Although veteran wrote letter to alleged substitute beneficiary stating that he had already changed beneficiary, told fellow officer of his intention to divorce wife and change beneficiary from wife to mother, and later told same officer that such change had been made, veteran's failure to take any affirmative action to effect change precludes finding that mother was beneficiary, since any change of beneficiary of NSLI insurance requires both insured's intention to make change and some affirmative act having change as its objective. Ford v United States (1949, DC Tenn) 94 F Supp 223

55. Ineligible beneficiary

Even if letter of insured to veterans' administration, by which he attempted to change his designated beneficiary from his wife to his ineligible adopted sister, had effect of nullifying original designation of wife as beneficiary, wife, as insured's widow, is entitled to receive proceeds by operation of law. Drony v United States (1945, DC Dist Col) 59 F Supp 154

Upon insured's otherwise effective change of beneficiary from mother to son and girl friend, fact that girl friend is not within permitted class operates to nullify only her designation, leaving beneficiaries as mother and son, with each entitled to half of proceeds. Lincoln Bank & Trust Co. v United States (1947, DC Ky) 71 F Supp 745

Attempted substitution of ineligible beneficiary does not automatically nullify insured's original designation of eligible beneficiary, and where attempted change was not motivated by ill will toward original beneficiary, proceeds of policy will be distributed to original beneficiary. Batts v United States (1954, DC NC) 120 F Supp 26

2. Affirmative Action Effecting Change

56. Generally

Some form of writing is minimum requirement to give effect to insured's intent to change beneficiary of National Service life insurance policy. Moths v United States (1950, CA7 Ind) 179 F.2d 824

57. Execution of government document

Insured's execution of confidential report to group headquarters, required of all flying officers, that wife was beneficiary of NSLI policy is insufficient to effect valid change of beneficiary from mother to wife, where no formal written change of beneficiary was filed with Veterans' Administration [now Department of Veterans Affairs], even though insured had told wife that she was beneficiary and Veterans' Administration [now Department of Veterans Affairs] determination was that valid change had been effected. Bradley v United States (1944, CA10 Okla) 143 F.2d 573, cert den (1944) 323 US 793, 89 L Ed 632, 65 S Ct 429

Valid change of beneficiary is effected by insured's execution of proper change form and instructions to wife to deliver form to her father in event of insured's death, since insured's actions left undone only ministerial acts of mailing form and recording change. Collins v United States (1947, CA10 Okla) 161 F.2d 64, cert den (1947) 331 US 859, 91 L Ed 1866, 67 S Ct 1756

Insured's execution of Government Insurance Report Form stating that wife was beneficiary of NSLI policy, while mother had been originally designated as beneficiary of such policy, is sufficient to effect valid change of beneficiary, even though original of document was never found,
where copy was introduced in evidence. Mitchell v United States (1948, CA5 La) 165 F.2d 758, 2 ALR2d 484

Insured's execution of 3 different government forms, all designating wife as beneficiary of NSLI policy, is sufficient to effect change of beneficiary from mother to wife. McKewen v McKewen (1948, CA5 Miss) 165 F.2d 761, cert den (1948) 334 US 860, 92 L Ed 1780, 68 S Ct 1530

Insured's execution of form entitled "Designation of Beneficiary" is sufficient to effect change of beneficiary of NSLI policy, even though form was intended for use in connection with 6-month gratuity pay, where both insured and officer who supplied form believed such form was to be used for changing beneficiary of NSLI policies. Shapiro v United States (1948, CA2 NY) 166 F.2d 240, cert den (1948) 334 US 859, 92 L Ed 1779, 68 S Ct 1533; Rosenschein v Citron (1948, App DC) 83 US App DC 346, 169 F.2d 885; Senato v United States (1949, CA2 NY) 173 F.2d 493; Prose v Davis (1949, CA7 Ind) 177 F.2d 478, cert den (1950) 339 US 920, 94 L Ed 1344, 70 S Ct 624; Boring v United States (1950, CA10 Okla) 181 F.2d 931; Woods v United States (1947, DC Ala) 69 F Supp 760; Hartman v United States (1948, DC Mo) 78 F Supp 227; Shannon v United States (1948, DC Ga) 78 F Supp 263; Vaughn v United States (1948, DC Tenn) 78 F Supp 494; Cotter v United States (1948, DC Md) 78 F Supp 495; Horn v United States (1949, DC Pa) 88 F Supp 310; Royer v United States (1950, DC Tenn) 93 F Supp 694; Hornbaker v United States (1951, DC Pa) 94 F Supp 881

Insured's execution of "Designation of Beneficiary" form does not effect change of beneficiary of NSLI policy where such form was meant to be used in connection with 6 months' gratuity pay and evidence of insured's intent at time of execution of form is ambiguous. Butler v Butler (1949, CA5 Ga) 177 F.2d 471

Insured's execution of legal assistance record stating that wife was beneficiary of his NSLI policy is sufficient to effect change of beneficiary from father to wife, where insured also left will bequeathing all property to wife and sent both will and legal assistance record to wife, along with letter indicating that wife was now beneficiary. Moths v United States (1950, CA7 Ind) 179 F.2d 824

Insured's execution of Personal Affairs Statement, declaring beneficiary under NSLI policy different from beneficiary originally designated, is sufficient to effect change of beneficiary to person named in such statement, where evidence indicated that insured considered such change to have been effected. Farmakis v Farmakis (1949, App DC) 84 US App DC 297, 172 F.2d 291, cert den (1949) 337 US 958, 93 L Ed 1757, 69 S Ct 1535; Riley v United States (1953, DC W Va) 116 F Supp 155, affd (1954, CA4 W Va) 212 F.2d 692, 44 ALR2d 1182

Fact that insured executed and signed "Government Insurance Report Form" stating that he had named wife as beneficiary of his NSLI policy is, by itself, insufficient to establish that such change occurred. Coleman v United States (1949, App DC) 85 US App DC 145, 176 F.2d 469

Insured's execution of form for designating or changing address of beneficiary of his 6 months' gratuity pay is sufficient to operate as change of beneficiary of NSLI policy where that was insured's intention, even though such form was also filed with War Department, instead of in files of Veterans' Administration [now Department of Veterans Affairs] as required. Van Doren v United States (1946, DC Cal) 68 F Supp 222

Changing official listing of next of kin is not such affirmative act as will constitute change of beneficiary of NSLI policy. Ramsay v United States (1947, DC Fla) 72 F Supp 613

Insured's execution of government forms entitled "Designation of Beneficiary" and "Personal Affairs Statement" is sufficient to change beneficiary of NSLI policy where insured thought that by such affirmative action he had done all that was necessary to effect such change. Brown v United States (1949, DC Iowa) 84 F Supp 489

58. Correspondence

Written expression of insured's intent or desire to change beneficiaries, directed to original beneficiary, is sufficient to effect change. Lincoln Bank & Trust Co. v United States (1947, DC Ky) 71 F Supp 745
59. -To government agency

Letter from insured to Veterans’ Administration [now Department of Veterans Affairs] requesting change of beneficiary does not constitute affirmative act necessary to accomplish such change, where insured gave orders that letter was to be kept in secure place, indicating that insured retained control over disposition of letter. Hester v Hester (1948, CA5 Tex) 171 F.2d 477

Insured's letter to Veterans' Administration [now Department of Veterans Affairs] stating that he had recently married and wished to change beneficiary from mother to wife is sufficient to effect change of beneficiary to wife, although mother had only been contingent beneficiary, while father was principal beneficiary. Orschein v United States (1949, DC Mo) 85 F Supp 210

60. -To third party

Written expression of insured's intent to change beneficiaries is sufficient to effect change, even though directed to third persons rather than to original beneficiary. Gann v Meek (1948, CA5 Tex) 165 F.2d 857, cert den (1948) 334 US 849, 92 L Ed 1772, 68 S Ct 1500

Letter written by insured to his wife informing her that he had insurance made payable to her is insufficient to change beneficiary without proof that such request was made by him to Veterans Administration. Butler v Butler (1949, CA5 Ga) 177 F.2d 471

Three letters written by insured to his parents stating that he was going to change beneficiary and had named father as substitute beneficiary are insufficient to effect change. Littlefield v Littlefield (1952, CA10 Okla) 194 F.2d 695

Insured's letter to wife, telling her to write to Veterans' Administration [now Department of Veterans Affairs] to have herself, rather than mother, made principal beneficiary of NSLI policy is sufficient to effect valid change of beneficiary, even though Veterans' Administration [now Department of Veterans Affairs] refused to comply with wife's subsequent request. Egleston v United States (1947, DC Ill) 71 F Supp 114, affd (1948, CA7 Ill) 168 F.2d 67

Letter from insured may constitute affirmative act necessary to effect change of beneficiary where it names recipient of letter as insured's agent to effect such change, but mere statement that insured has changed beneficiary, contained in letter from insured to alleged substitute beneficiary, is insufficient to effect such change. Angle v Baker (1948, DC Tenn) 94 F Supp 386

Suggestion of deceased in letter to his aunt alleged to be "person in loco parentis" to insured, advising that he had left her his insurance, does not constitute change of beneficiary, where insurance was made payable to estate of insured. Bearhart v United States (1949, DC Minn) 82 F Supp 652

Letter from insured to wife stating that he had made her beneficiary of his NSLI policy is insufficient to effectuate change where Veterans' Administration [now Department of Veterans Affairs] records contained no request for change and insured's subsequent letters made no mention of insurance. Kell v United States (1952, DC La) 104 F Supp 699, affd (1953, CA5 La) 202 F.2d 143

61. Application for additional insurance

Insured's application for additional insurance is insufficient to constitute affirmative act necessary to change beneficiary of NSLI policy, where insured's original policy was for less than maximum amount and there was no evidence that insured was aware that additional insurance exceeded maximum amount. Bowens v United States (1950, CA5 Ala) 184 F.2d 730

62. Wills

Unmailed letter from insured to Veterans Administration [now Department of Veterans Affairs] requesting change of beneficiary, even assuming letter constituted valid will, does not operate to change beneficiaries where regulation expressly provides that no change of beneficiary may be made by will. Hester v Hester (1948, CA5 Tex) 171 F.2d 477

Prohibition against change of beneficiary by will is found in regulations, not statute. Woods v United States (1947, DC Ala) 69 F Supp 760
Provision of insured's will designating mother as sole beneficiary, rather than joint beneficiary, is insufficient to effect such change, where applicable regulation prohibits testamentary change of beneficiaries under NSLI policies. Owens v Owens (1947) 305 Ky 460, 204 SW2d 580

V. PAYMENT OF PROCEEDS

63. Generally

Phrase "then in being", as used in predecessor to 38 USCS § 1916, requires that such person be alive, and does not disqualify person who was insured's lawful wife on date of his death, even though she has since remarried. Trathen v United States (1952, CA3 Pa) 198 F.2d 757

Title to proceeds of service insurance is subject to federal control both before and after payment by government. Barton v United States (1948, DC Cal) 75 F Supp 703

64. State community property laws

State community property laws cannot operate to divert proceeds of national service life insurance policy to person not designated by insured as beneficiary of such policy. Wissner v Wissner (1950) 338 US 655, 94 L Ed 424, 70 S Ct 398, reh den (1950) 339 US 926, 94 L Ed 1348, 70 S Ct 619; Barton v United States (1948, DC Cal) 75 F Supp 703

Fact that wife made payments on policy premiums from community property funds does not give her equity in, or right to, proceeds of policy as against designated beneficiary. Heifner v Soderstrom (1955, DC Iowa) 134 F Supp 174

65. Criminal conduct of beneficiary

Although situation is not specifically covered by statute, wife who killed husband other than in self-defense or while insane is not entitled to proceeds of his insurance. Shoemaker v Shoemaker (1959, CA6 Tenn) 263 F.2d 931

Contingent beneficiary, who killed principal beneficiary in fit of anger, may not recover remaining installments due principal beneficiary, even though jury in criminal case acquitted contingent beneficiary of murder. United States v Kwasniewski (1950, DC Mich) 91 F Supp 847

Fact that insured's brother killed mother during period of insanity does not preclude his receipt of balance of benefits upon being adjudicated restored to sanity. Moran v United States Veterans' Administration (1953, DC Mich) 115 F Supp 640

Where person otherwise eligible to take proceeds of NSLI policy causes death of insured, proceeds will be paid as if such person predeceased insured. United States v Foster (1965, ED Mich) 238 F Supp 867

66. Error regarding age of insured

Government is not liable to beneficiary for face amount of policy where insured misrepresented his age when applying for insurance, but must pay only that amount which premiums would have purchased for person of insured's true age. Horsman v United States (1946, DC Mo) 68 F Supp 522

Additional amount of National Service Life Insurance, equal to difference between amount paid and amount which would have been payable if correct age of principal beneficiary had been established during his lifetime, is payable to estate of principal beneficiary who has received installments provided for by his election, based on age younger than actual age and whose correct age is established subsequent to his death. 1955 ADVA 956

67. Contingent beneficiary

Surviving wife is entitled, to exclusion of contingent beneficiaries, to all unpaid installment where insured designated wife and father principal beneficiaries, proceeds "to be divided equally or all to survivor," and father died before all installments had been paid. United States on behalf of Jones v Williams (1955, CA5 La) 220 F.2d 46
Veteran’s Administration [now Department of Veterans Affairs] regulation providing that all installments accrued but unpaid to deceased principal beneficiary, who is not entitled to lump sum settlement, should be paid to contingent beneficiary rather than principal beneficiary’s estate is consistent with predecessor to 38 USCS § 1916. United States v Short (1956, CA9 Cal) 240 F.2d 292

Insured's sister, designated as contingent beneficiary, rather than child of insured and wife/primary beneficiary, is entitled to payments, where principal beneficiary survived insured, but not long enough to receive any benefits. Washburn v United States (1945, DC Mo) 63 F Supp 224

68. Estate of insured

Absent lump sum settlement, Congress clearly intended that payment be made to insured's estate only when all beneficiaries and contingent beneficiaries die prior to receiving all remaining payments, whether such payments have accrued or not. United States v Short (1956, CA9 Cal) 240 F.2d 292

69. Estate of beneficiary

Unpaid installments under policy which matured prior to August 1, 1946 do not pass to beneficiary's estate, even though right to payment accrued prior to beneficiary's death. United States v Henning (1952) 344 US 66, 97 L Ed 101, 73 S Ct 114, reh den (1952) 344 US 910, 97 L Ed 702, 73 S Ct 327

Estate of deceased beneficiary may not take proceeds of policies issued under National Service Life Insurance Act (predecessor to 38 USCS §§ 1901 et seq.), even though installments matured prior to beneficiary's death. Baument v United States (1952) 344 US 82, 97 L Ed 111, 73 S Ct 122, reh den (1953) 344 US 916, 97 L Ed 706, 73 S Ct 332 and (superseded by statute as stated in Short v United States (1954, DC Cal) 123 F Supp 414)

Executors of deceased beneficiary are not entitled to recovery under policy where beneficiary died after death of insured, but before any part of proceeds was paid to him, and there was no parent, or person standing in loco parentis, widow, child, brother, or sister of insured soldier surviving him the executors of the deceased beneficiary were not entitled to recover anything under the policy. Hurd v United States (1953, DC Wis) 116 F Supp 343

Government may stop payment on checks representing payment of proceeds where checks were received by primary beneficiary prior to his death, but were never cashed, since such amounts represent payments accrued but unpaid at time of beneficiary's death, which do not pass to beneficiary's estate. Wilson v United States (1956, DC Pa) 144 F Supp 851

70. Particular persons

Stipulation that aunt, uncle, and stepfather, all claiming in loco parentis, were to share proceeds equally is proper as approximation of congressional policy, where government counsel approved stipulation. United States v Hoth (1953, CA9 Wash) 207 F.2d 386

Brothers and sisters are without right to interest in proceeds of national service life insurance where parent of insured is living. Strunk v United States (1948, DC Ky) 80 F Supp 432

Sisters of insured are entitled to remaining installments due natural mother under national insurance policy, where stepfather could not recover, as contingent beneficiary, and natural father could not recover, as parent who last bore relationship. United States v Kwasniewski (1950, DC Mich) 91 F Supp 847

Insured's only surviving sibling is entitled to balance of benefits under insurance contract where mother, principal beneficiary, died after receipt of only part of proceeds, father, named as contingent beneficiary, predeceased principal beneficiary, and insured left neither wife nor children. Moran v United States Veterans' Administration (1953, DC Mich) 115 F Supp 640

Upon death of insured's uncle, who received payments as person standing in loco parentis to insured, neither son nor wife of uncle is eligible to receive remaining payments where neither
person could establish relationship of in loco parentis. Seeley v United States (1957, DC NY) 161 F Supp 888

71. Miscellaneous

   Government's notice to widow that unless she filed claim within sixty days it would start making payments to mother, who was designated beneficiary, entitles government to credit in amount of payments made to mother between expiration of 60-day period and date of suit by widow. Hornbaker v United States (1951, DC Pa) 94 F Supp 881

   Government has no obligation to pay proceeds to woman ultimately determined to be insured's lawful widow where government, in good faith, paid proceeds to woman whose marriage to insure was invalid. United States v Wilson (1953, DC Tenn) 112 F Supp 428

   Proceeds of National Service life insurance policy will be treated as originating in community property for purposes of intestate succession, and divided equally among relatives of insured and spouse named as beneficiary, where premiums were paid during marriage of insured and beneficiary and both insured and beneficiary died intestate without issue. Estate of Allie (1958) 50 Cal 2d 794, 329 P2d 903

§ 1917. Insurance maturing on or after August 1, 1946

(a) The insured shall have the right to designate the beneficiary or beneficiaries of insurance maturing on or after August 1, 1946, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries.

(b) Insurance maturing on or after August 1, 1946, shall be payable in accordance with the following optional modes of settlement:

   (1) In one sum.

   (2) In equal monthly installments of from thirty-six to two hundred and forty in number, in multiples of twelve.

   (3) In equal monthly installments for one hundred and twenty months certain with such payments continuing during the remaining lifetime of the first beneficiary.

   (4) As a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of the first beneficiary; however, such optional settlement shall not be available in any case in which such settlement would result in payments of installments over a shorter period than one hundred and twenty months.

(c) Except as provided in the second and third sentences of this subsection, unless the insured elects some other mode of settlement, such insurance shall be payable to the designated beneficiary or beneficiaries in thirty-six equal monthly installments. The first beneficiary may elect to receive payment under any option which provides for payment over a longer period of time than the option elected by the insured, or if no option has been elected by the insured, in excess of thirty-six months. In the case of insurance maturing after September 30, 1981, and for which no option has been elected by the insured, the first beneficiary may elect to receive payment in one sum. If the option selected requires payment to any one beneficiary of monthly installments of less than $10, the amount payable to such beneficiary shall be paid in such maximum number of monthly installments as are a multiple of twelve as will provide a monthly installment of
not less than $10. If the present value of the amount payable at the time any person initially becomes entitled to payment thereof is not sufficient to pay at least twelve monthly installments of not less than $10 each, such amount shall be payable in one sum. Options (3) and (4) shall not be available if any firm, corporation, legal entity (including the estate of the insured), or trustee is beneficiary.

(d) If the beneficiary of such insurance is entitled to a lump-sum settlement but elects some other mode of settlement and dies before receiving all the benefits due and payable under such mode of settlement, the present value of the remaining unpaid amount shall be payable to the estate of the beneficiary. If no beneficiary is designated by the insured, or if the designated beneficiary does not survive the insured, or if a designated beneficiary not entitled to a lump-sum settlement survives the insured, and dies before receiving all the benefits due and payable, then the commuted value of the remaining unpaid insurance (whether accrued or not) shall be paid in one sum to the estate of the insured. In no event shall there be any payment to the estate of the insured or of the beneficiary of any sums unless it is shown that any sums paid will not escheat.

(e) Under such regulations as the Secretary may promulgate, the cash surrender value of any policy of insurance or the proceeds of an endowment contract which matures by reason of completion of the endowment period may be paid to the insured under option (2) or (4) of this section. All settlements under option (4), however, shall be calculated on the basis of The Annuity Table for 1949. If the option selected requires payment of monthly installments of less than $10, the amount of payable shall be paid in such maximum number of monthly installments as are a multiple of twelve as will provide a monthly installment of not less than $10.

(f) (1) Following the death of the insured and in a case not covered by subsection (d)--
(A) if the first beneficiary otherwise entitled to payment of the insurance does not make a claim for such payment within two years after the death of the insured, payment may be made to another beneficiary designated by the insured, in the order of precedence as designated by the insured, as if the first beneficiary had predeceased the insured; and
(B) if, within four years after the death of the insured, no claim has been filed by a person designated by the insured as a beneficiary and the Secretary has not received any notice in writing that any such claim will be made, payment may (notwithstanding any other provision of law) be made to such person as may in the judgment of the Secretary be equitably entitled thereto.

(2) Payment of insurance under paragraph (1) shall be a bar to recovery by any other person.

Prior law and revision:

This section is based on 38 USC § 802(g), (t), (u) (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(g), 54 Stat 1010; Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(t), (u), as added Aug. 1, 1946, ch 728, § 9, 60 Stat. 785; Aug. 1, 1946, ch 728, § 4, 60 Stat 782; May 23, 1949, ch 135, 63 Stat. 74).

Amendments:
1970. Act June 25, 1970, in subsec. (c), deleted ", or in any case in which an endowment contract matures by reason of the completion of the endowment period" following "or trustee is beneficiary"; and added subsec. (e).

1981. Act Oct. 17, 1981 (effective on enactment on 10/17/81, as provided by § 701(b)(1) of such Act, which appears as 38 USCS § 1114 note), in subsec. (c), substituted "Except as provided in the second and third sentences of this subsection, unless" for "Unless" and inserted the sentence beginning "In the case of insurance . . . .".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 717, as 38 USCS § 1917, and substituted "Secretary" for "Administrator".

2003. Act Dec. 16, 2003 (effective 10/1/2004, as provided by § 103(c) of such Act, which appears as a note to this section), added subsec. (f).

Other provisions:

Effective date of amendments made by Act June 25, 1970. Act June 25, 1970, P. L. 91-291, § 14(a), 84 Stat. 332, provided in part that "these amendments are effective as of the first day of the first calendar month which begins more than 6 calendar months after the date of enactment of this Act [enacted June 25, 1970].".

Effective date of Dec. 16, 2003 amendments. Act Dec. 16, 2003, P. L. 108-183, Title I, § 103(c), 117 Stat. 2655, provides: "The amendments made by subsections (a) and (b) [adding 38 USCS §§ 1917(f) and 1952(c)] shall take effect on October 1, 2004."

Dec. 16, 2003 amendments; transition provision. Act Dec. 16, 2003, P. L. 108-183, Title I, § 103(d), 117 Stat. 2655, provides: "In the case of a person insured under subchapter I or II of chapter 19 of title 38, United States Code [38 USCS §§ 1901 et seq. and 1940 et seq.], who dies before the effective date of the amendments made by subsections (a) and (b), as specified by subsection (c) [note to this section], the two-year and four-year periods specified in subsection (f)(1) of section 1917 of title 38, United States Code, as added by subsection (a), and subsection (c)(1) of section 1952 of such title, as added by subsection (b), as applicable, shall for purposes of the applicable subsection be treated as being the two-year and four-year periods, respectively, beginning on the effective date of such amendments, as so specified.".

Cross References

This section is referred to in 38 USCS § 1922

Research Guide

Am Jur:
37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance §§ 1871, 1872, 1875

Annotations:
National Service Life Insurance: Change of beneficiary. 13 ALR Fed 6
Trust, or contract to hold for benefit of another, with respect to proceeds of National Service Life Insurance. 70 ALR2d 1358

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I. IN GENERAL

1. Constitutionality

   Predecessor to 38 USCS § 1917 removing restrictions on permitted beneficiaries of National
Service Life Insurance does not unconstitutionally impair contract obligations to named
beneficiaries within permitted class who may be removed in favor of beneficiaries outside
permitted class. Kiss v United States (1954, DC Pa) 125 F Supp 718, affd (1955, CA3 Pa) 222
F.2d 263

   Distribution of NSLI proceeds payable to estate to insured's surviving spouse in accordance
with state community property principles embodied in probate laws does not violate Supremacy
Clause of Constitution. VA GCO 1-83

2. Construction

   National Service Life Insurance is contract made in pursuance of federal law and must be
construed with reference to 38 USCS §§ 717 and 3101 [now 38 USCS §§ 1917 and 5301].

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regulations promulgated thereunder, and decisions applicable thereto, rather than by laws and decisions governing private insurance companies. In re Estate of Pechman (1974, Colo App) 532 P2d 385

3. Relationship with other laws
   Removal of restrictions on permitted class of beneficiaries under predecessor to 38 USCS § 1917 does not apply to payment of benefits under policies which matured by reason of insured’s death prior to August 1, 1946, which continue to be governed by restrictions contained in predecessor to 38 USCS § 1916. Walker v United States (1950, CA7 Ill) 180 F.2d 217
   Intent of Congress, under both War Risk Insurance Act and National Service Life Insurance Act (predecessors to 38 USCS §§ 1901 et seq.), that proceeds of matured policy of veterans’ insurance should be exempt from claims of creditors of insured, was not retracted by 1946 amendment removing restrictions on class of permissible beneficiaries. In re Estate of Beall (1956) 384 Pa 14, 119 A2d 216, 54 ALR2d 1329 (ovrd in part by In re Estate of Super (1968) 428 Pa 476, 239 A2d 380)

4. Payment options
   Representative of estate of deceased beneficiary of National Service Life Insurance policy is not entitled to elect optional mode of settlement of insurance payments in lieu of one sum settlement elected by insured. 1954 ADVA 940
   Power of attorney executed by insured who is now missing in action granting authority to wife to modify options vests authority in wife as agent to accomplish valid change of optional settlement from option 4 to option one, lump-sum payment. VA GCO 19-75

II. BENEFICIARIES

A. Designation

5. Generally
   Right to designate beneficiary remains with insured at all times and no other person has right to designate beneficiary, even though such other person paid all premiums on policy. United States v Green (1958, DC W Va) 164 F Supp 697
   Under provisions of statute, holder of national service life insurance contract has absolute right to designate beneficiary of his choice and to change beneficiary at any time without that person’s consent. Dutton v United States (1965, ND Ga) 237 F Supp 670; Spaulding v United States (1966, WD Okla) 261 F Supp 232

6. Permissible beneficiaries
   Wife, named as beneficiary, whose divorce from former husband was void, is entitled to recover proceeds of policy, since restriction on beneficiary eligibility does not apply to policies governed by predecessor to 38 USCS § 1917. Wilson v Kyle (1951, CA5 Tex) 186 F.2d 621
   All restrictions as to permissible beneficiaries were removed as to policies maturing after August 1, 1946. Burton v United States (1951, DC La) 95 F Supp 474, revd on other grounds (1955, CA5 La) 220 F.2d 46

7. Acts constituting designation
   Neither insured's designation of wife as beneficiary of $2,000 policy left in force after cancellation of all other policies, nor fact that mother was named beneficiary of canceled policies, operates to designate beneficiary of $8,000 insurance to which Veterans' Administration [now Department of Veterans Affairs] determined that insured was entitled, proceeds of which must pass as though insured failed to designate beneficiary. Sights v United States (1950, DC Dist Col) 89 F Supp 235

8. Trusts
Although agreement between insured and beneficiary that beneficiary will hold proceeds of NSLI policy for benefit of another is enforceable, there must be clear evidence of such agreement before court will impose constructive or resulting trust. Henderson v Gifford (1957, Okla) 318 P2d 404

Although trust may be imposed upon proceeds of NSLI policy where insured intended that designated beneficiary hold such proceeds for benefit of another, no such trust arises where insured merely contemplated in will that debts of estate would be paid from proceeds of insurance and never informed beneficiary that he was to hold proceeds in trust. In re Estate of Milton (1956) 48 Wash 2d 389, 294 P2d 412

B. Change of Beneficiary

1. In General

9. Generally

Strict rules governing changes of beneficiary under conventional life insurance policies are inapplicable in cases involving National Service Life Insurance policies. Hammack v Hammack (1966, CA5 Miss) 359 F.2d 844; Fleming v Smith (1964) 64 Wash 2d 181, 390 P2d 990

Judicial decisions dealing with beneficiary changes under war risk insurance policies are relevant to questions concerning change of beneficiary of National Service Life Insurance cases. Van Doren v United States (1946, DC Cal) 68 F Supp 222; Fleming v Smith (1964) 64 Wash 2d 181, 390 P2d 990

10. Governing law

All questions involving beneficiary changes of National Service Life Insurance policies are to be resolved according to federal law. Dyke v Dyke (1955, CA6 Tenn) 227 F.2d 461, cert den (1956) 352 US 850, 1 L Ed 2d 61, 77 S Ct 70; Fitzstephens v United States (1960, DC Wyo) 189 F Supp 919; Morris v United States (1963, ND Tex) 217 F Supp 220

Whether guardian may change beneficiary of incompetent's NSLI policy is issue governed by state law and state court must decide validity of state court decree ordering such change of beneficiary. Roecker v United States (1967, CA5 Miss) 379 F.2d 400, cert den (1967) 389 US 1005, 19 L Ed 2d 600, 88 S Ct 563

11. Right to change beneficiary

Right to change beneficiary under policy of National Service life insurance is as absolute as right to designate original beneficiary. Bradley v United States (1944, CA10 Okla) 143 F.2d 573, cert den (1944) 323 US 793, 89 L Ed 632, 65 S Ct 429

Agreement not to change beneficiary of National Service life insurance policy cannot affect insured's statutory right to make such change. Heifner v Soderstrom (1955, DC Iowa) 134 F Supp 174

Beneficiary, in cases involving national service life insurance, who paid all premiums, has no vested right to proceeds, insured having absolute right to change beneficiaries. United States v Green (1958, DC W Va) 164 F Supp 697

Insured's right to change beneficiaries of National Service life insurance policy cannot be defeated by claim that insured unalterably transferred title to his insurance policy by delivery of policy with donative purpose. Tompkins v Tompkins (1944, NJ Super Ct) 132 NJL 217, 38 A2d 890

12. -Guardians

Whether guardian may change beneficiary of incompetent's NSLI policy is issue governed by state law and state court must decide validity of state court decree ordering such change of beneficiary. Roecker v United States (1967, CA5 Miss) 379 F.2d 400, cert den (1967) 389 US 1005, 19 L Ed 2d 600, 88 S Ct 563

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Guardian appointed for incompetent insured has power to change beneficiary of NSLI policy upon receiving express authorization from probate court to do so. Murray v United States (1950, DC Mich) 107 F Supp 290, affd (1951, CA6 Mich) 188 F.2d 362, cert den (1951) 342 US 816, 96 L Ed 617, 72 S Ct 30

Original principal beneficiary need not be notified of change by insured's guardian for such change to be effective, and when such change is effected under order of state court, it may be set aside only for fraud. United States v Tighe (1964, SD Miss) 229 F Supp 680

13. Divorce or separation agreements

Property settlement incident to divorce of insured does not, by itself, operate to change beneficiary of NSLI policy absent affirmative action by insured to effect such change. McCollum v Sieben (1954, CA8 Minn) 211 F.2d 708; United States v Donall (1972, CA6 Mich) 466 F.2d 1246; Kaske v Rothert (1955, DC Cal) 133 F Supp 427; Fitzstephens v United States (1960, DC Wyo) 189 F Supp 919

Provision of separation agreement that neither party would have any claim on other party effects relinquishment of divorced wife's interest in proceeds of NSLI policy, even though insured never effected valid change of beneficiary. O'Brien v Elder (1957, CA5 Fla) 250 F.2d 275


Divorce decree providing that former wife waived and relinquished any claim which she might have against husband for payment of support and any claim she has or might have as heir against husband's estate, does not effect change of beneficiary under husband's government life policy designating wife as beneficiary, since wife relinquished claims against husband but not claim against United States as insurer. Taylor v United States (1972, CA9 Or) 459 F.2d 1007, cert den (1972) 409 US 967, 34 L Ed 2d 232, 93 S Ct 273

State divorce decree providing that all rights of either party to proceeds of any life insurance of other party were extinguished does not, by itself, eliminate former wife as beneficiary of insured's NSLI policy. United States v Donall (1972, CA6 Mich) 466 F.2d 1246

Property settlement executed upon divorce, which provided that all life insurance would be property of insured, does not effect change of beneficiary where insured failed to notify Veterans' Administration [now Department of Veterans Affairs] of change of beneficiary. Fitzstephens v United States (1960, DC Wyo) 189 F Supp 919

Any order in divorce decree purporting to restrict right of policyholder of NSLI to change beneficiary is void ab initio and may be collaterally attacked in probate court. In re Estate of Pechman (1974, Colo App) 532 P2d 385

38 USCS §§ 717 and 3101 [now 38 USCS §§ 1917 and 5301] clearly preclude enforcement of divorce settlement, whereby insured promised to make former wife irrevocable beneficiary of his NSLI policy, but former wife is not statutorily precluded from recovering equivalent of policy proceeds from assets of insured's estate, where insured failed to designate her as beneficiary as required by terms of separation agreement. Will of Hilton (1976) 88 Misc 2d 760, 388 NYS2d 985
Provisions of 38 USCS §§ 717 and 3101 [now 38 USCS §§ 1917 and 5301] guarantee decedent's absolute right to determine beneficiary of NSLI policy and state court has no jurisdiction to enter judgment requiring irrevocable designation of beneficiary of any part of proceeds, nor to place lien on proceeds. Sessions v Sessions (1974, Okla App) 525 P2d 1269

State court in dissolution decree is without authority under 38 USCS § 717(a) [now 38 USCS § 1917(a)] to limit the right of owner of National Service Life Insurance policy to change beneficiaries. In re Marriage of Baratta (1974) 18 Or App 261, 524 P2d 1233

Community property settlement agreement executed by insured, agreeing to name son as irrevocable beneficiary of NSLI policy and to surrender right to change beneficiary of policy is illegal and unenforceable, and son is neither entitled to proceeds of policy, nor to damages for breach of contract. McJunkin v Estate of McJunkin (1973, Tex Civ App Dallas) 493 SW2d 278

Provision of property settlement between insured and ex-wife, to effect that insured would designate his son as beneficiary of NSLI until son reached majority, constitutes assignment of policy proceeds prohibited by 38 USCS § 3101 [now 38 USCS § 5301] and cannot operate to change beneficiary. Fleming v Smith (1966) 69 Wash 2d 277, 418 P2d 147

Under Supremacy Clause, state divorce decree cannot bar veteran from exercising right under 38 USCS § 1917(a) to change beneficiary of National Service Life Insurance policy and denial of former spouse's claim to proceeds is affirmed. Wolfe v Gober (1997) 11 Vet App 1

14. Effectuation of change

Veterans' Administration [now Department of Veterans Affairs] may waive technical requirements for its own protection, but it may not thereby adjudicate question whether valid change of beneficiary has been effected in accordance with prescribed means and method which is legal standard for that purpose. Bradley v United States (1944, CA10 Okla) 143 F.2d 573, cert den (1944) 323 US 793, 89 L Ed 632, 65 S Ct 429

Government may waive compliance with regulations as to change of beneficiary of National Service life insurance, since such regulations are for protection of government. Collins v United States (1947, CA10 Okla) 161 F.2d 64, cert den (1947) 331 US 859, 91 L Ed 1866, 67 S Ct 1756; Mac Farlane v United States (1947, WD La) 161 F.2d 64, cert den (1947) 331 US 859, 91 L Ed 1866, 67 S Ct 1756; Mac Farlane v United States (1979, WD La) 476 F Supp 787

Literal compliance with requirements as to change of beneficiary of National Service life insurance is never necessary to make change effective, and legal technicalities will be brushed aside in order to effectuate intent of insured. Mitchell v United States (1948, CA5 La) 165 F.2d 758, 2 ALR2d 484; Senato v United States (1949, CA2 NY) 173 F.2d 493; Bratcher v United States (1953, CA8 Mo) 205 F.2d 953; Stone v United States (1959, CA5 Ala) 272 F.2d 746; Dutton v United States (1965, ND Ga) 237 F Supp 670; Elmore v United States (1965, ED NC) 240 F Supp 460; Hawkins v United States (1965, ED NY) 245 F Supp 1022

Veteran's manifest intent to change beneficiary, when accompanied by affirmative act of executing official change of beneficiary form, is sufficient to accomplish change of beneficiary even though form was technically incomplete due to failure to include correct policy numbers. Wiley v United States (1968, CA10 Okla) 399 F.2d 844

Literal compliance with regulation which requires that change of beneficiary to be effective must be made by notice in writing signed by insured and forwarded to Veterans' Administration [now Department of Veterans Affairs] is not required. Hart v United States (1949, DC NJ) 84 F Supp 912; Joseph v United States (1950, DC Pa) 89 F Supp 144

The controlling feature as to the effectiveness of a change of beneficiary by the insured under a national service life insurance policy is the real intention of the insured with regard to such change as against a failure to comply with all of the formalities for making his purpose effective, since requirements for change of beneficiary are for benefit and protection of United States and can be waived by government. Spaulding v United States (1966, WD Okla) 261 F Supp 232

Literal compliance with government regulations is unnecessary to effect change of beneficiary of NSLI policy, where it is shown that insured intended to make change and took some affirmative action evidencing exercise of right to make change. Watenpaugh v State Teachers' Retirement System (1959) 51 Cal 2d 675, 336 P2d 165
15. -Competency of insured

Insured must be mentally competent to effect valid change of beneficiary of National Service Life Insurance policy. Taylor v Taylor (1954, CA8 Ark) 211 F.2d 794; Roecker v United States (1967, CA5 Miss) 379 F.2d 400, cert den (1967) 389 US 1005, 19 L Ed 2d 600, 88 S Ct 563; Lyle v Bentley (1969, CA5 Tex) 406 F.2d 325 (criticized in Coursey v Pudda (2004, SD Ga) 299 F Supp 2d 1368)

Since determination of insured' mental capacity to effect lawful change of beneficiary is governed by federal law, finding of competency is not precluded by state court order adjudicating insured incompetent. Dyke v Dyke (1955, CA6 Tenn) 227 F.2d 461, cert den (1956) 352 US 850, 1 L Ed 2d 61, 77 S Ct 70

No presumption of incompetency arises from fact that Veterans' Administration [now Department of Veterans Affairs] has waived payment of premiums due to veteran's incompetence, but presumption of competency does arise from veteran's having been declared competent by both Veterans' Administration [now Department of Veterans Affairs] and state court. Wiley v United States (1968, CA10 Okla) 399 F.2d 844

Standard for determining mental capacity for making beneficiary change under NSLI policy is same as that required for executing valid will, deed, or contract. Morris v United States (1963, ND Tex) 217 F Supp 220

Fact that veteran had long history of alcoholism and had been recommended for hospitalization due to mental incompetency does not invalidate his change of beneficiary, where psychiatrist who had examined veteran in hospital testified that veteran was sane and had testamentary capacity to execute change of beneficiary. Frakes v United States (1964, ND Ga) 228 F Supp 475

Blind man in last stages of terminal brain cancer, who was normally incoherent and disoriented, and who had twice been declared incompetent by physicians, does not meet test of competence to change beneficiary of NSLI policy, where person to be named beneficiary wrote insured's name by guiding his paralyzed hand while he was under extremely heavy dosage of drugs. Henry v United States (1975, DC Dist Col) 396 F Supp 1300

16. -Formal requirements

Presumption that original beneficiary remains entitled to proceeds of policy is raised by facts that no written notice of change was received by Veterans' Administration [now Department of Veterans Affairs] and no written notice was forwarded to Veterans' Administration [now Department of Veterans Affairs] by insured or his agent. Bradley v United States (1944, CA10 Okla) 143 F.2d 573, cert den (1944) 323 US 793, 89 L Ed 632, 65 S Ct 429

It is unnecessary to deliver executed change of beneficiary to Veterans' Administration [now Department of Veterans Affairs] during the life of the insured in order to effect valid change of beneficiary. Collins v United States (1947, CA10 Okla) 161 F.2d 64, cert den (1947) 331 US 859, 91 L Ed 1866, 67 S Ct 1756

Insured's statements as to change of beneficiary on government forms included in insured's military records constitutes sufficient notice of change to insurer, although Veterans' Administration [now Department of Veterans Affairs] never received notice on forms provided for that purpose. McKewen v McKewen (1948, CA5 Miss) 165 F.2d 761, cert den (1948) 334 US 860, 92 L Ed 1780, 68 S Ct 1530

Change of beneficiary of NSLI policy, if actually within insured's intention and evidenced by affirmative act of character required by statute, is effective to make change even though notice to Veterans' Administration [now Department of Veterans Affairs] did not occur until after death of insured. Egleston v United States (1947, DC Ill) 71 F Supp 114, affd (1948, CA7 Ill) 168 F.2d 67

Fact that form on which insured directed Veterans' Administration [now Department of Veterans Affairs] to change beneficiary was lost does not preclude effectiveness of change, where all other evidence indicates that insured intended to make change, actually executed lost forms, and believed that he had made change. Joseph v United States (1950, DC Pa) 89 F Supp 144; Zabor v United States (1952, DC NY) 113 F Supp 287, affd (1954, CA2 NY) 212
Copy of terms of written trust, under which insured changed beneficiary of government insurance policies, constitutes notice of change when received by Veterans’ Administration [now Department of Veterans Affairs], rendering insured’s failure to sign change of beneficiary form harmless. Gerstenlauer v United States (1952, DC NY) 108 F Supp 654

Fact that insured’s service records contained no information on change of beneficiary does not invalidate insured’s efforts to effect such change, where insured frequently spoke of having changed beneficiary from girlfriend to father and father had received notice of beneficiary change from Veterans Administration [now Department of Veterans Affairs]. Lindsey v United States (1954, DC Tenn) 121 F Supp 1

Loss of 2 change of beneficiary forms seeking to effect change of beneficiary from mother to wife does not preclude effectiveness of such change, where insured orally informed members of his crew that wife had been made beneficiary and Adjutant General’s "Report of Death" showed insured's wife as beneficiary. Wilkins v United States (1955, DC Pa) 134 F Supp 408

Effective change of beneficiary of NSLI policy is accomplished by execution of proper change of beneficiary form, although insured delivered form to third person, advised third person to retain form with his valuable papers and send form to Veterans’ Administration [now Department of Veterans Affairs] if anything happened to insured. Elmore v United States (1965, ED NC) 240 F Supp 460

No change of beneficiary is effected where completed forms for such change were left in insured's desk until after his death, having been placed in stamped envelope and addressed to Veterans’ Administration [now Department of Veterans Affairs], since insured's retention of forms indicates that he had not formed definite intention to make change. Berk v United States (1969, ED NY) 294 F Supp 578

Change of beneficiaries from insured's daughter and sister to insured's second wife is not effected by properly executed change of beneficiary form, where form was kept in insured's strongbox, together with his will in which he left all estate to second wife. Tierney v United States (1970, DC Mass) 315 F Supp 1073

17. Intent of insured

Insured's intent to change beneficiary of National Service life insurance policy must be followed by some affirmative act on part of insured evidencing his exercise of right to change beneficiary. Collins v United States (1947, CA10 Okla) 161 F.2d 64, cert den (1947) 331 US 859, 91 L Ed 1866, 67 S Ct 1756; Gann v Meek (1948, CA5 Tex) 165 F.2d 857, cert den (1948) 334 US 849, 92 L Ed 1772, 68 S Ct 1500; Stone v United States (1959, CA5 Ala) 272 F.2d 746; Benard v United States (1966, CA8 Mo) 368 F.2d 897; Dutton v United States (1965, ND Ga) 237 F Supp 670

To give effect to intent of insured to change beneficiary of National Service life insurance policy, claimant must show that insured did everything reasonably within his power to accomplish such change. Shapiro v United States (1948, CA2 NY) 166 F.2d 240, cert den (1948) 334 US 859, 92 L Ed 1779, 68 S Ct 1533; Kell v United States (1953, CA5 La) 202 F.2d 143; Smith v United States (1970, CA5 Ga) 421 F.2d 634, 13 ALR Fed 1; Fitzstephens v United States (1960, DC Wyo) 189 F Supp 919

Insured's remarriage after divorce from woman designated as original beneficiary does not, without affirmative act evidencing his intent, operate to change beneficiary to new wife. McCollum v Sieben (1954, CA8 Minn) 211 F.2d 708

To effectively make change insured need only to form intention to do so and do some affirmative act to effectuate his purpose, and circumstantial evidence will show his intention. Hartman v United States (1948, DC Mo) 78 F Supp 227

Intention and desire of insured soldier will be given effect by court if change of beneficiary has been clearly expressed, and his intention and desire is established. Flood v United States (1948, DC NJ) 78 F Supp 420, affd (1949, CA3 NJ) 172 F.2d 221
Attempts to change beneficiaries are liberally construed to effectuate insured's intent, controlling factors being (1) evidence of real intention of insured to change beneficiary, and (2) some overt act done to effectuate that intent. Mac Farlane v United States (1979, WD La) 476 F Supp 787

Where there are competing parties seeking beneficiary status under national service life insurance policies and purported change of beneficiary under 38 USC § 1917(a), clearly proven intent to change beneficiary may be supported with less proof of overt action, and equivocal proof of intent must be supported with more proof of overt action. Fagan v West (1999) 13 Vet App 48, 1999 US App Vet Claims LEXIS 1033

18. Policies affected by change of beneficiary

Change of beneficiary form is effective to change beneficiary only of NSLI policies listed on such form, and insured's inclusion of word "all" opposite name of substitute beneficiary in space for amount such beneficiary was to receive, if more than 1 beneficiary was specified, does not operate to designate such person as beneficiary of policy not included on form. Cooper v United States (1965, CA6 Tenn) 340 F.2d 845

19. Validity of change of beneficiary

Allegation that beneficiary change was result of undue influence asserted by new beneficiary is not sufficiently supported by evidence merely establishing opportunity to exert undue influence, in absence of evidence concerning events leading up to and surrounding execution of change of beneficiary forms. Lyle v Bentlely (1969, CA5 Tex) 406 F.2d 325 (criticized in Coursey v Pudda (2004, SD Ga) 299 F Supp 2d 1368)

Insured's motive in changing beneficiary of NSLI policy is irrelevant to effectiveness of change, and execution of proper form to change beneficiary is effective to make such change, even though form included comments by insured that change of beneficiary was to "take care of unpaid debts." Stafford v United States (1955, DC La) 128 F Supp 435

Wife's desire to be named beneficiary of insured's service policy, manifested by frequent urging that insured effect change of beneficiary form, does not amount to undue influence rendering change ineffective in absence of evidence that her methods went beyond those that would be used by any wife desiring to be beneficiary of her husband's policy. United States v Cruze (1970, ED Tenn) 328 F Supp 159

20. -Determinations

District Court will not disturb determination of Veterans' Administration [now Department of Veterans Affairs] as to validity of change of beneficiary if determination is supported by substantial evidence. Hawkins v United States (1965, ED NY) 245 F Supp 1022

Adjudication of Veterans' Administration [now Department of Veterans Affairs] as to whether insured took necessary steps to make effective change of beneficiary under NSLI policy should be given substantial weight. Owens v United States (1966, DC SC) 251 F Supp 114

2. Affirmative Action Effecting Change

21. Generally

While writing is minimum requisite to beneficiary change under NSLI policy, form of writing is immaterial and insured's execution of Legal Assistance Record is sufficient affirmative act to change beneficiary of policy. Moths v United States (1950, CA7 Ind) 179 F.2d 824

Writing executed by insured, expressing desire to change beneficiary of NSLI policy, is minimum requirement for effectuating such change. Ward v United States (1966, CA7 Ind) 371 F.2d 108

Required affirmative act is any act in writing which insured reasonably believed was sufficient to effect change of beneficiary, and may consist of insured's application for waiver of premiums. Moore v United States (1955, DC Cal) 129 F Supp 456
22. Execution of government document

Insured's execution of Confidential Data Sheet does not effect change of beneficiary of NSLI policy, since such statement, by itself, merely indicates insured's intent to change beneficiary, but does not constitute affirmative action to consummate change. Bradley v United States (1944, CA10 Okla) 143 F.2d 573, cert den (1944) 323 US 793, 89 L Ed 632, 65 S Ct 429; Parker v United States (1954, DC Colo) 125 F Supp 731

Insured's naming of his wife as beneficiary on government insurance report form prepared during processing for overseas service can be considered such affirmative act as to evidence exercise of his right to change beneficiary where it is accompanied by testimony of brother officer and letter from insured to his wife to effect that he had changed beneficiary of his insurance from his mother to his wife. Mitchell v United States (1948, CA5 La) 165 F.2d 758, 2 ALR2d 484

Record of Emergency Data form signed by insured and designating different beneficiary than contained in NSLI policy is sufficient to effect valid change of beneficiary, even though form was not meant to be used for NSLI policies, where insured had reasonable belief that such designation would effect change. Shapiro v United States (1948, CA2 NY) 166 F.2d 240, cert den (1948) 334 US 859, 92 L Ed 1779, 68 S Ct 1533; Pope v Smalley (1956, CA6 Ky) 229 F.2d 349; Hawkins v Hawkins (1959, CA5 Fla) 271 F.2d 870; Bew v United States (1961, CA4 Va) 286 F.2d 570; Lovato v United States (1961, CA10 NM) 295 F.2d 78; Behrens v United States (1962, CA9 Cal) 299 F.2d 662; Ward v United States (1966, CA7 Ind) 371 F.2d 108; Smith v United States (1970, CA5 Ga) 421 F.2d 634, 13 ALR Fed 1; Walker v United States (1974, CA4 NC) 493 F.2d 700; United States v Williams (1956, DC W Va) 145 F Supp 308, affd (1957, CA4 W Va) 243 F.2d 573; Dutton v United States (1965, ND Ga) 237 F Supp 670; Phillips v United States (1965, SD Ala) 238 F Supp 59; Spaulding v United States (1966, WD Okla) 261 F Supp 232

Insured's execution of Legal Assistance Record stating that wife was beneficiary of his NSLI policy is sufficient to effect change of beneficiary from father to wife, where insured also left will bequeathing all property to wife and sent both will and Legal Assistance Record to wife, along with letter indicating that wife was now beneficiary. Moths v United States (1950, CA7 Ind) 179 F.2d 824

Confidential Statement executed by insured and filed with headquarters squadron, declaring that wife was beneficiary of NSLI policy, effects valid change of beneficiary from mother to wife, even though insured made oral statements to sister and brother that he was leaving insurance in mother's name. Gulley v Gulley (1956, CA9 Nev) 231 F.2d 5

Insured's execution of document, which was normally used in insured's company to obtain information for Marines unable to execute more formal document, stating that mother was beneficiary of his NSLI policy, is sufficient to effect change from aunt to mother. Shack v United States (1956, CA5 Ga) 234 F.2d 934

Insured's execution of Oath And Certificate Of Enlistment upon re-enlisting in service, declaring that he was divorced and childless, is insufficient to change beneficiary of his reinstated NSLI policy from wife to mother, where insured subsequently executed Record of Emergency Data designating sons as persons to receive his gratuity pay, discontinued allotment to mother, and executed allotment for support of children, even though insured also subsequently informed mother that she was beneficiary under policy. Blair v United States (1958, CA10 Okla) 260 F.2d 237

Insured's execution of Record of Emergency Data, designating sister as beneficiary of 6 months' gratuity and serviceman's indemnity, is insufficient to effect change of beneficiary under NSLI policy, even though insured had NSLI policy rather than serviceman's indemnity, where form expressly stated that designation did not operate as change of beneficiary of any insurance contract issued by United States and insured was stationed at established base with nothing to prevent his changing beneficiary by obtaining proper form. Ferguson v Knight (1959, CA5 Tex) 264 F.2d 176
Insured's execution of Air Force Personal Affairs Statement listing wife as beneficiary of NSLI policy, accompanied by evidence that insured physically delivered policy from original beneficiary to wife, in presence of original beneficiary, is sufficient to support jury verdict that insured effected valid change of beneficiary. Wall v Haas (1960, CA5 Ga) 283 F.2d 656

Insured's execution of Record of Emergency Data is insufficient to operate as change of beneficiary under NSLI policy where insured wrote "none" in space provided for listing insurance policies, including NSLI policies. Benard v United States (1966, CA8 Mo) 368 F.2d 897; Baker v United States (1967, CA5 Ga) 386 F.2d 356; Geis v United States (1968, CA9 Wash) 404 F.2d 154; Jones v United States (1971, MD Tenn) 331 F Supp 114

Insured's execution of Record of Emergency Data is insufficient to operate as change of beneficiary under NSLI policy, where insured listed policy on form, but left blank space in which he might have listed beneficiary of insurance. Wells v Ruiz (1967, CA10 NM) 372 F.2d 119; Collins v Collins (1967, CA4 NC) 378 F.2d 1020; Wilmot v United States (1969, DC Dist Col) 297 F Supp 1076, affd (1970, App DC) 139 US App DC 277, 432 F.2d 1339

Insured's execution of form provided by finance office constitutes affirmative act sufficient to effect change of beneficiary of his insurance policy to person designated on such form. Citron v United States (1947, DC Dist Col) 69 F Supp 830, affd (1948, App DC) 83 US App DC 346, 169 F.2d 885

Insured's execution of Officer's Personal Questionnaire and Personal Affairs Statement, stating on both forms that wife was beneficiary of NSLI policy, rather than father named as designated beneficiary, when accompanied by evidence that insured also executed power of attorney appointing wife attorney in fact and 2 wills making her sole distributee of estate, is sufficient to effect valid change of beneficiary. Hart v United States (1949, DC NJ) 84 F Supp 912

Insured's execution of Air Force Personal Affairs Statement, listing wife as recipient of allotment and as beneficiary of NSLI policy, is sufficient to effect change of beneficiary from mother to wife, where such statement was among many forms executed by insured naming wife as beneficiary, all of which had been executed subsequent to insured's designation of mother as original beneficiary, although none were correct form for changing beneficiary. United States v Smith (1958, DC NY) 159 F Supp 741

Parenthetical advice on form that stated form did not operate as a designation or change of beneficiary of any insurance contracts issued by the United States government did not bar acceptance of the form as a change in beneficiary for such insurance if it was the intent of the person completing it to make such a change. Phillips v United States (1965, SD Ala) 238 F Supp 59

Insured's execution of form entitled "Designation or Change of Beneficiary-Servicemen's Indemnity" operates to effect change of beneficiary of insured's NSLI policy, where insured had no serviceman's indemnity due to fact that NSLI policy was in force under premium waiver and evidence indicated his intent to provide for person designated as beneficiary on such form. Owens v United States (1966, DC SC) 251 F Supp 114

Insured's execution of Record of Emergency Data form is effective to change beneficiary of his NSLI policy where insured indicated on form that type of designation was change, such change could only have referred to NSLI policy, and person designated as beneficiary on form was also designated as recipient of insured's personal effects and allotments of pay. McFarland v United States (1972, SD Cal) 351 F Supp 394

Literal compliance with requirement that insured may make change of beneficiary by forwarding completed change of beneficiary form to Veterans' Administration [now Department of Veterans Affairs] is not necessary since it is principally designed for protection of US Government. MacFarlane v United States (1979, WD La) 476 F Supp 787

23. Correspondence
Written expression of insured's intent or desire to change beneficiaries, directed to original beneficiary, is sufficient to effect change. Lincoln Bank & Trust Co. v United States (1947, DC Ky) 71 F Supp 745

24. -To government agency

Insured's letter to Veterans' Administration [now Department of Veterans Affairs] seeking to change beneficiaries of war risk insurance policy given to his brother with instructions to place it in safe deposit box with policies, does not effect change in beneficiaries. Hester v Hester (1948, CA5 Tex) 171 F.2d 477

To effect change of beneficiary of policy of national service life insurance, signed letters or memorandum containing sufficient information sent to Veterans' Administration [now Department of Veterans Affairs] by veteran or his agent are sufficient. Walker v United States (1947, DC Tex) 70 F Supp 422; Orschein v United States (1949, DC Mo) 85 F Supp 210

Valid change of beneficiary under NSLI policy is shown by evidence that insured inquired of local Veterans' Administration [now Department of Veterans Affairs] office whether he could change beneficiary, that upon receiving affirmative answer, insured directed wife to write and sign his name to letter to Veterans' Administration [now Department of Veterans Affairs] requesting such beneficiary change, that insured read letter prior to its being mailed, and that Veterans' Administration [now Department of Veterans Affairs] informed insured that no further action was necessary. Wagner v United States (1957, DC Ind) 153 F Supp 193

Insured's letter to Veterans' Administration [now Department of Veterans Affairs], in his own handwriting, enclosing policy premium and requesting beneficiary change from brother to wife is sufficient to effect change, even though letter referred to wrong policy number and illegibility of handwriting made it impossible for Veterans' Administration [now Department of Veterans Affairs] to determine which policies and parties were involved. Picken v United States (1961, ED Wash) 194 F Supp 696

Evidence supported Board's finding that veteran actually signed and mailed letter to VA indicating desire to change beneficiary from his first wife to administrator of his estate, even though VA had no record of ever receiving change of beneficiary letter, since carbon copy of letter was produced and handwriting identified as veteran's, and change was consistent with veteran's separation agreement, divorce decree, and will. Young v Derwinski (1992) 2 Vet App 59

25. -To third party

Written expression of insured's intent to change beneficiaries is sufficient to effect change, even though directed to third persons rather than to original beneficiary. Gann v Meek (1948, CA5 Tex) 165 F.2d 857, cert den (1948) 334 US 849, 92 L Ed 1772, 68 S Ct 1500

Letter written by insured to his wife informing her that he had insurance made payable to her is insufficient to change beneficiary without proof that such request was made by him to Veterans Administration [now Department of Veterans Affairs]. Butler v Butler (1949, CA5 Ga) 177 F.2d 471

Three letters written by insured to his parents stating that he was going to change beneficiary and had named father as substitute beneficiary are insufficient to establish change. Littlefield v Littlefield (1952, CA10 Okla) 194 F.2d 695

Insured's letter to wife, stating that he wished her to contact Veterans' Administration [now Department of Veterans Affairs] and have herself listed as beneficiary, is sufficient to effect change where insured had done all he could reasonably have done, under particular circumstances, to have beneficiary changed. Egleston v United States (1947, DC Ill) 71 F Supp 114, affd (1948, CA7 Ill) 168 F.2d 67

Change of beneficiary is accomplished by letter from insured to wife, stating "you have the papers to prove your identity and privilege to collect my insurance $10,000 and gratuity pay." Joseph v United States (1950, DC Pa) 89 F Supp 144
Letter written by insured to his wife stating that he had changed beneficiary from his sister to his wife is insufficient to effect change of beneficiary, where testimony as to his oral statements was in conflict. Kell v United States (1952, DC La) 104 F Supp 699, affd (1953, CA5 La) 202 F.2d 143

Insured's letter to sister, stating that she would receive 1/3 of policy proceeds, is insufficient to effect change, although it was admitted to probate under state law as holographic will. Lane v United States (1953, DC SC) 116 F Supp 606

26. Applications

Insured's application for renewal of NSLI policy naming brother as beneficiary does not constitute affirmative act to change beneficiary of prior policy from aunt to brother, where renewal application stated that renewal would be effective as of day following expiration of preceding term and insured's death occurred prior to expiration of preceding term. Willis v United States (1961, CA7 Ill) 291 F.2d 5

27. For additional insurance

Insured's application for additional $9,000 insurance in favor of his mother does not operate to change beneficiary of outstanding $4,000 policy in favor of insured's wife. Bowens v United States (1950, CA5 Ala) 184 F.2d 730

Affirmative act required for change of beneficiary of NSLI policy may consist of insured's application for additional insurance, naming different beneficiaries than in original application, made at time insured carries maximum insurance. Bratcher v United States (1953, CA8 Mo) 205 F.2d 953

Insured's application for 20-year endowment policy listing sister as beneficiary does not constitute affirmative act required to substitute sister as beneficiary of 2 NSLI policies for maximum amount of insurance, where insured was under erroneous impression that he could retain original policies and acquire new 20-year endowment policy. Dupree v United States (1954, DC Ga) 125 F Supp 122

Insured's designation of wife as beneficiary in application for additional policy in amount of $10,000, issued in reduced amount of $8,000 due to outstanding policy for $2,000 with mother as beneficiary, does not operate to make wife beneficiary of original $2,000 policy. Hayes v United States (1955, DC W Va) 133 F Supp 450

Insured's application for additional insurance, naming different beneficiary than designated on original policy, does not constitute affirmative act needed to change beneficiary of original policy, even though insured had typed word "all" in column on new application for amount of insurance to be paid to each beneficiary, where insured indicated on new application that original policy was still in existence. Bagley v United States (1960, ED Wis) 189 F Supp 5

28. Power of attorney

Insured's execution of general power of attorney authorizing wife to pay premiums on, modify, or execute any rights, privileges, or options on any contract of life insurance owned by insured is insufficient to operate as change of beneficiary from mother to wife, where NSLI policy was not expressly mentioned in power of attorney. Wells v Ruiz (1967, CA10 NM) 372 F.2d 119

Power of attorney executed by insured who is now missing in action granting authority to wife to modify options vests authority in wife as agent to accomplish valid change of optional settlement from option 4 to option one, lump-sum payment. VA GCO 19-75

29. Wills

Insured's letter to his sister, which was admitted to probate as holographic will, cannot operate to effect valid change of beneficiary of NSLI policy, since beneficiary change cannot be made by will. Lane v United States (1953, DC SC) 116 F Supp 606

Insured's execution of will in which he designated his mother as beneficiary, after having named wife as original beneficiary, does not operate to effect change of beneficiary, since insured
had done nothing toward complying with regulations governing such changes. Owens v Owens (1947) 305 Ky 460, 204 SW2d 580

30. Miscellaneous

Proof that insured, on day of his marriage, told wife he intended to make her beneficiary of National Service life insurance in place of his mother, that he filled out War Department insurance report naming wife as beneficiary, that he made statements to fellow officer that he had made wife beneficiary, and that he had written letter to wife inquiring whether she had got insurance papers is sufficient to establish change of beneficiary. Mitchell v United States (1948, CA5 La) 165 F.2d 758, 2 ALR2d 484

Valid change of beneficiary from mother to wife is shown by evidence that insured brought piece of paper containing names of wife and mother to company clerk, stating that he decided to have them designated beneficiaries of NSLI policy, although formal change of beneficiary form was not prepared by clerk in time to get insured's signature prior to death. Criscuolo v United States (1956, CA7 Ill) 239 F.2d 280

Insured's request to proper military officer to have change of beneficiary form sent to Veterans' Administration [now Department of Veterans Affairs], and his statement to wife that such change had been made are sufficient affirmative acts to make change effective, although request form was never received by Veterans' Administration [now Department of Veterans Affairs]. Patterson v United States (1967, DC Mass) 269 F Supp 890

Serviceman's affirmative action is sufficient to change beneficiary of national service policy from mother to wife where serviceman stated on three occasions that wife would be beneficiary, executed Record of Emergency Data designating wife as person to be notified in case of death, as principal beneficiary for Serviceman's Indemnity, and as person to receive allotment of pay, and servicemen subsequently designated wife as primary beneficiary for retirement benefits. McFarland v United States (1972, SD Cal) 351 F Supp 394

III. PAYMENT OF PROCEEDS

31. Generally

There is no vested right to the proceeds of an insurance policy by a named beneficiary until death matures the policy. United States v Tighe (1964, SD Miss) 229 F Supp 680

32. Relationship with state laws

State community property laws cannot operate to divert proceeds of national service life insurance policy to person not designated by insured as beneficiary of such policy. Wissner v Wissner (1950) 338 US 655, 94 L Ed 424, 70 S Ct 398, reh den (1950) 339 US 926, 94 L Ed 1348, 70 S Ct 619; Barton v United States (1948, DC Cal) 75 F Supp 703

State statute providing that divorce decree shall determine rights of wife in insurance policy and that policy shall become payable to estate of husband unless otherwise ordered in decree does not apply to payment of proceeds from NSLI policy. United States v Donall (1972, CA6 Mich) 466 F.2d 1246

33. Criminal conduct of beneficiary

Although there is no statutory provision for nonpayment of proceeds when designated beneficiary kills insured, public policy intervenes to prevent that result unless beneficiary was insane or killing was in self defense; consequently widow, designated beneficiary, who killed her insured husband, will not receive payment. Shoemaker v Shoemaker (1959, CA6 Tenn) 263 F.2d 931

Widow who caused death of the insured is not entitled to proceeds of insurance policy as named beneficiary, or as sole legatee under will of the deceased; determination of beneficiary is to be made under local law as if the named beneficiary had predeceased the insured. United States v Foster (1965, ED Mich) 238 F Supp 867
34. Payment to co-beneficiaries

Under national service life insurance policy with insured's mother and minor daughter as co-principal beneficiaries in equal shares with right of survivorship, and his father as contingent beneficiary, upon the deaths of insured and mother, the surviving co-principal beneficiary was entitled to entire benefits of policy, and father was not entitled either individually or as administrator of wife's estate to benefits of policy. Smith v United States (1964, WD Ark) 226 F Supp 656

35. Payment to contingent beneficiary

Survivorship clause of war risk insurance policy means that if either of co-principal beneficiaries fails to qualify, entire remaining unpaid proceeds must be paid to survivor; thus, contingent beneficiary may take balance only upon death of surviving co-principal beneficiary. United States on behalf of Jones v Williams (1955, CA5 La) 220 F.2d 46

36. Miscellaneous

Veterans Administration Veterans' Administration [now Department of Veterans Affairs] is not required to make payments under policy designating insured's father as principal beneficiary and brother as contingent beneficiary, where father predeceased insured and brother thereafter died intestate without next of kin or heirs and without having applied for proceeds payable under policy so that if paid to brother's estate, sum would escheat. Burke v United States (1972, CA8 Ark) 459 F.2d 1017

Government was entitled to recover amount paid beneficiary under policy where due to mistake in serial number army continued payments to administration though same were not deducted from pay of deceased. United States v Jones (1951, DC W Va) 101 F Supp 128

Proceeds of National Service life insurance policy will be treated as originating in community property for purposes of intestate succession, and divided equally among relatives of insured and of spouse named as beneficiary, where premiums were paid during marriage term and both insured and beneficiary died intestate without issue. Estate of Allie (1958) 50 Cal 2d 794, 329 P2d 903

§ 1918. Assignments

(a) Assignments of all or any part of the beneficiary's interest may be made by a designated beneficiary to a widow, widower, child, father, mother, grandfather, grandmother, brother, or sister of the insured, when the designated contingent beneficiary, if any, joins the beneficiary in the assignment, and if the assignment is delivered to the Secretary before any payments of the insurance shall have been made to the beneficiary. However, an interest in an annuity, when assigned, shall be payable in equal monthly installments in such multiple of twelve as most nearly equals the number of installments certain under such annuity, or in two hundred and forty installments, whichever is the lesser. The provisions of this subsection shall not be applicable to insurance maturing after July 26, 1962.

(b) Except as to insurance granted under the provisions of section 1922(b) of this title [38 USCS § 1922(b)], any person to whom insurance maturing after July 26, 1962, is payable may assign all or any portion of such person's interest in such insurance to a widow, widower, child, father, mother, grandfather, grandmother, brother, or sister of the insured when the designated contingent beneficiary, if any, joins the beneficiary in the assignment. Such joinder shall not be required in any case in which the insurance proceeds are payable in a lump sum.

Prior law and revision:
This section is based on 38 USC § 816 (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 616 in part, as added Aug. 1, 1946, ch 728, § 13, 60 Stat. 788).

Amendments:

1962. Act July 27, 1962, designated existing matter as subsec. (a); in subsec. (a), as so designated, inserted "The provisions of this subsection shall not be applicable to insurance maturing on or after the date of enactment of this sentence."; and added subsec. (b).

1979. Act Nov. 28, 1979 (effective 11/28/79, as provided by § 601(b) of such Act, which appears as 38 USCS § 1114 note), in subsec. (b), substituted "such person's" for "his".

1982. Act Oct. 12, 1982, in subsec. (a), substituted "after July 26, 1962" for "on or after the date of enactment of this sentence"; and, in subsec. (b), substituted "after July 26, 1962," for "on or after the date of enactment of this sentence".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 718, as 38 USCS § 1918, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Veterans' Administration".

Other provisions:

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance § 1876
1. Generally
2. Nature and effect of assignment
3. Notice of assignment
4. Agreements constituting assignments
5. Payments to assignee
6. Miscellaneous

1. Generally
Amendment of statute to authorize assignment of particular beneficiary's interest does not validate assignment which was prohibited by statute at time of assignment. Licznerski v United States (1950, CA3 Pa) 180 F.2d 862, cert den (1950) 339 US 987, 94 L Ed 1389, 70 S Ct 1009
Assignment otherwise complying with predecessor to 38 USCS § 1918 is valid without regard to date on which policy giving rise to assigned proceeds matured. 1947 ADVA 738

2. Nature and effect of assignment
Contingent beneficiary who joins in assignment under predecessor to 38 USCS § 1918 relinquishes all right to insurance which his status as designated contingent beneficiary otherwise conferred. 1947 ADVA 738
Assignment is for life of assignee and effects complete and irrevocable relinquishment of all assignor's rights which derive from his designation as beneficiary. 1947 ADVA 738

3. Notice of assignment
Where notice of purported assignment of National Life Insurance Policy was not actually received by Veterans Administration [now Department of Veterans Affairs] until after death of
widow-assignee, there was never a complete assignment under 38 USCS § 718(a) [now 38 USCS § 1918(a)] Alford v United States (1973, ND Ohio) 369 F Supp 1339

4. Agreements constituting assignments

In interpleader action wherein government paid proceeds of policy into court, agreed settlement by parties claiming interest in proceeds is attempted assignment subject to provisions of predecessor to 38 USCS § 1918. United States v Leverett (1952, CA5 Tex) 197 F.2d 30

Agreement between insured and beneficiary that proceeds would be shared among insured's other brothers and sisters is not attempted assignment subject to predecessor to 38 USCS § 1918. Voelkel v Tohulka (1957) 236 Ind 588, 141 NE2d 344, 70 ALR2d 1349, cert den (1957) 355 US 891, 2 L Ed 2d 189, 78 S Ct 263

5. Payments to assignee

Method of payment to assignee is determined by number of installments certain due under assignor's annuity, although age of neither party to assignment has no direct bearing upon method of payment. 1947 ADVA 738

6. Miscellaneous

Manual for Adjudication Procedure for Death Benefits, which was validly promulgated pursuant to 38 USCS § 210(c) [now repealed; for similar provisions, see 38 USCS § 510] to execute policy of limiting assignments to close relatives of insured decedent, was binding in dispute between persons claiming to be beneficiaries. Alford v United States (1973, ND Ohio) 369 F Supp 1339

§ 1919. National Service Life Insurance appropriation

(a) The National Service Life Insurance appropriation is continued and there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the provisions of this chapter [38 USCS §§ 1901 et seq.] and the provisions heretofore prescribed in the National Service Life Insurance Act of 1940, or related Acts, for the payment of liabilities under National Service Life Insurance. Payment from this appropriation shall be made upon and in accordance with awards by the Secretary.

(b) All premiums heretofore and hereafter paid on insurance issued or reinstated under section 602(v)(1) of the National Service Life Insurance Act of 1940 where the requirement of good health was waived under such section because of a service-incurred injury or disability shall be credited directly to the National Service Life Insurance appropriation and any payments of benefits heretofore and hereafter made on such insurance shall be made directly from such appropriation.

Prior law and revision:

This section is based on 38 USC §§ 802(c)(2), (v)(1), 804 (Acts Oct. 8, 1940, ch 757, Title VI, Part I, § 604, 54 Stat. 1011; Oct. 8, 1940, ch 757, Title VI, Part I, § 602(c)(2), (v)(1), as added Aug. 1, 1946, ch 728, §§ 2, 9, 60 Stat. 781, 785).

References in text:

The "National Service Life Insurance Act of 1940", referred to in subsec. (a), is Act Oct. 8, 1940, ch 757, Title VI, Part I, 54 Stat. 1008, which was generally classified to 38 USC §§ 801 et seq. prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1272. For similar provisions, see this chapter.
“Subsections 602(c)(2) and 602(v)(1) of the National Service Life Insurance Act of 1940”, referred to in subsec. (b), are Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(c)(2), (v)(1), 54 Stat. 1009, as amended, which were classified to 38 USC § 802(c)(2) and 802(v)(1), prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1272. For similar provisions, see 38 USCS §§ 1919(b) and 1915, respectively.

Amendments:


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 719, as 38 USCS § 1919, and substituted "Secretary" for "Administrator".

1998. Act Nov. 11, 1998 (effective at the end of the 90-day period beginning on the date of enactment, as provided by § 304(b) of such Act, which appears as a note to this section), in subsec. (b), substituted "section" for "sections 602(c)(2) and" preceding "602(v)(1)" and substituted "section" for "sections" following "under such".

Other provisions:

Effective date of Nov. 11, 1998 amendments. Act Nov. 11, 1998, P. L. 105-368, Title III, § 394(b), 112 Stat. 3334, provides: “The amendments made by this section [amending subsec. (b) of this section] shall take effect at the end of the 90-day period beginning on the date of the enactment of this Act.”.

Cross References

This section is referred to in 38 USCS § 113

Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19

§ 1920. National Service Life Insurance Fund

(a) The National Service Life Insurance Fund heretofore created in the Treasury is continued as a permanent trust fund. Except as otherwise provided in this chapter [38 USCS §§ 1901 et seq.] all premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums, and for the reimbursement of administrative costs under subsection (c). Payments from this fund shall be made upon and in accordance with awards by the Secretary.

(b) The Secretary is authorized to set aside out of such fund such reserve amounts as may be required under accepted actuarial principles to meet all liabilities under such insurance; and the Secretary of the Treasury is authorized to invest and reinvest such fund, or any part thereof, in interest-bearing obligations of the United States or in obligations guaranteed as to principal and interest by the United States, and to sell such obligations for the purposes of such fund.

(c) (1) For each fiscal year for which this subsection is in effect, the Secretary shall, from the National Service Life Insurance Fund, reimburse the "General operating expenses" account of the Department for the amount of administrative costs determined under
paragraph (2) for that fiscal year. Such reimbursement shall be made from any surplus earnings for that fiscal year that are available for dividends on such insurance after claims have been paid and actuarially determined reserves have been set aside. However, if the amount of such administrative costs exceeds the amount of such surplus earnings, such reimbursement shall be made only to the extent of such surplus earnings.

(2) The Secretary shall determine the administrative costs to the Department for a fiscal year for which this subsection is in effect which, in the judgment of the Secretary, are properly allocable to the provision of National Service Life Insurance (and to the provision of any total disability income insurance added to the provision of such insurance).

(3) This subsection shall be in effect only with respect to fiscal year 1996.

Prior law and revision:
This section is based on 38 USC § 805 (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 605, 54 Stat. 1012).

Explanatory notes:

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 720, as 38 USCS § 1920, and substituted "Secretary" for "Administrator".


Cross References
This section is referred to in 38 USCS §§ 113, 1982

Research Guide
Am Jur:
37 Am Jur 2d, Fraud and Deceit § 19

No monies in National Service Life Insurance Fund are available to prevent lapse of policy until such time as Administrator [now Secretary] declares dividend from fund. Weiss v United States (1949, DC NY) 92 F Supp 322, affd (1951, CA2 NY) 187 F.2d 610, cert den (1951) 342 US 820, 96 L Ed 620, 72 S Ct 38, reh den (1951) 342 US 874, 96 L Ed 657, 72 S Ct 104 and reh den (1952) 342 US 915, 96 L Ed 684, 72 S Ct 357

§ 1921. Extra hazard costs

(a) The United States shall bear the excess mortality cost and the cost of waiver of premiums on account of total disability traceable to the extra hazard of military or naval service, as such hazard may be determined by the Secretary.

(b) Whenever benefits under insurance become payable because of the death of the insured as the result of disease or injury traceable to the extra hazard of military or naval service, as such hazard may be determined by the Secretary, the liability for payment of such benefits shall be borne by the United States in an amount which, when added to the reserve of the policy at the time of death of the insured will equal the then value of such
benefits under such policy. Where life contingencies are involved in the calculation of the value of such benefits of insurance heretofore or hereafter matured, the calculation of such liability or liabilities shall be based upon such mortality table or tables as the Secretary may prescribe with interest at the rate of 3 per centum per annum. The Secretary shall transfer from time to time the National Service Life Insurance appropriation to the National Service Life Insurance Fund such sums as may be necessary to carry out the provisions of this section.

(c) Whenever the premiums under insurance are waived because of the total disability of the insured as the result of disease or injury traceable to the extra hazard of military or naval service, as such hazard may be determined by the Secretary, the premiums so waived shall be paid by the United States and the Secretary shall transfer from time to time an amount equal to the amount of such premiums from the National Service Life Insurance appropriation to the National Service Life Insurance Fund.

(d) Whenever benefits under the total disability income provision become, or have become, payable because of total disability of the insured as a result of disease or injury traceable to the extra hazard of the military or naval service, as such hazard may be determined by the Secretary, the liability shall be borne by the United States and the Secretary shall transfer from time to time the National Service Life Insurance Fund any amounts which become, or have become, payable to the insured on account of such total disability. Whenever benefits under the total disability income provision become, or have become, payable because of total disability of the insured, the Secretary shall transfer from time to time any amounts which become, or have become, payable to the insured on account of such total disability, and to transfer the National Service Life Insurance Fund the amount of the reserve held on account of the total disability benefit. When a person receiving such payments on account of total disability recovers from such disability, and is then entitled to continue protection under the total disability income provision, the Secretary shall transfer to the National Service Life Insurance Fund a sum sufficient to set up the then required reserve on such total disability benefit.

(e) Any disability for which a waiver was required as a condition to tendering a person a commission under Public Law 816, Seventy-seventh Congress, shall be deemed to be a disability resulting from an injury or disease traceable to the extra hazard of military or naval service for the purpose of applying this section.

Prior law and revision:


References in text:

"Public Law 816, Seventy-seventh Congress", referred to in subsec. (e), is Act Dec. 18, 1942, ch 768, §§ 1, 2, 56 Stat. 1066, which was classified to 34 USC §§ 853c-5 and 853c-6. Section 1 was repealed by Act July 9, 1952, ch 608, Part VIII, § 803, 66 Stat. 505. Section 2 was omitted in the general revision of titles 10 and 34 by Act Aug. 10, 1956, ch 1041, 70A Stat. 1.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 721, as 38 USCS § 1921, and substituted "Secretary" for "Administrator".

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Research Guide

Am Jur: 37 Am Jur 2d, Fraud and Deceit § 19

1. Generally

Predecessor to 38 USCS § 1921 does not create rights to payment on policy which is lapsed, nor does it enlarge right to payment on lapsed policy beyond that allowed by predecessor to 38 USCS § 1912. Weiss v United States (1949, DC NY) 92 F Supp 322, affd (1951, CA2 NY) 187 F.2d 610, cert den (1951) 342 US 820, 96 L Ed 620, 72 S Ct 38, reh den (1951) 342 US 874, 96 L Ed 657, 72 S Ct 104 and reh den (1952) 342 US 915, 96 L Ed 684, 72 S Ct 357

2. Training duty

Members of National Guard of United States who are ordered for training duty and who die or incur disability while on such training duty come within provisions of predecessor to 38 USCS § 1901 since such provision does not require that death or disability be incurred while in active service; thus, determination whether death or disability is traceable to extra hazard of military or naval service is proper in such cases. 1954 ADVA 946

§ 1922. Service disabled veterans' insurance

(a) Any person who is released from active military, naval, or air service, under other than dishonorable conditions on or after April 25, 1951, and is found by the Secretary to be suffering from a disability or disabilities for which compensation would be payable if 10 per centum or more in degree and except for which such person would be insurable according to the standards of good health established by the Secretary, shall, upon application in writing made within two years from the date service-connection of such disability is determined by the Secretary and payment of premiums as provided in this subchapter [38 USCS §§ 1901 et seq.], be granted insurance by the United States against the death of such person occurring while such insurance is in force. If such a person is shown by evidence satisfactory to the Secretary to have been mentally incompetent during any part of the two-year period, application for insurance under this section may be filed within two years after a guardian is appointed or within two years after the removal of such disability as determined by the Secretary, whichever is the earlier date. If the guardian was appointed or the removal of the disability occurred before January 1, 1959, application for insurance under this section may be made within two years after that date. Insurance granted under this section shall be issued upon the same terms and conditions as are contained in the standard policies of National Service Life Insurance except (1) the premium rates for such insurance shall be based on the Commissioners 1941 Standard Ordinary Table of Mortality and interest at the rate of 21/4 per centum per annum; (2) all cash, loan, paid-up, and extended values shall be based upon the Commissioners 1941 Standard Ordinary Table of Mortality and interest at the rate of 21/4 per centum per annum; (3) all settlements on policies involving annuities shall be calculated on the basis of The Annuity Table for 1949, and interest at the rate of 21/4 per
centum per annum; (4) insurance granted under this section shall be on a nonparticipating basis and all premiums and other collections therefor shall be credited directly to a revolving fund in the Treasury of the United States, and any payments on such insurance shall be made directly from such fund. Appropriations to such fund are hereby authorized. As to insurance issued under this section, waiver of premiums pursuant to section 602(n) of the National Service Life Insurance Act of 1940 and section 1912 of this title [38 USCS § 1912] shall not be denied on the ground that the service-connected disability became total before the effective date of such insurance.

(b) (1) Any person who, on or after April 25, 1951, was otherwise qualified for insurance under the provisions of section 620 of the National Service Life Insurance Act of 1940, or under subsection (a) of this section, but who did not apply for such insurance and who is shown by evidence satisfactory to the Secretary (A) to have been mentally incompetent from a service-connected disability, (i) at the time of release from active service, or (ii) during any part of the two-year period from the date the service connection of a disability is first determined by the Secretary, or (iii) after release from active service but is not rated service-connected disabled by the Secretary until after death; and (B) to have remained continuously so mentally incompetent until date of death; and (C) to have died before the appointment of a guardian, or within two years after the appointment of a guardian; shall be deemed to have applied for and to have been granted such insurance, as of the date of death, in an amount which, together with any other United States Government or National Service life insurance in force, shall aggregate $10,000. The date to be used for determining whether such person was insurable according to the standards of good health established by the Secretary, except for the service-connected disability, shall be the date of release from active service or the date the person became mentally incompetent, whichever is the later.

(2) Payments of insurance granted under subsection (b)(1) of this section shall be made only to the following beneficiaries and in the order named--

   (A) to the widow or widower of the insured, if living and while unremarried;
   (B) if no widow or widower entitled thereto, to the child or children of the insured, if living, in equal shares;
   (C) if no widow or widower or child entitled thereto, to the parent or parents of the insured who last bore that relationship, if living, in equal shares.

(3) No application for insurance payments under this subsection shall be valid unless filed with the Secretary within two years after the date of death of the insured or before January 1, 1961, whichever is the later, and the relationship of the applicant shall be proved as of the date of death of the insured by evidence satisfactory to the Secretary. Persons shown by evidence satisfactory to the Secretary to have been mentally or legally incompetent at the time the right to apply for death benefits expires, may make such application at any time within one year after the removal of such disability.

(4) Notwithstanding section 1917 of this title [38 USCS § 1917], insurance under this subsection shall be payable to the beneficiary determined under paragraph (2) of this subsection in a lump sum.

(c) The premium rate of any term insurance issued under this section shall not exceed the renewal age 70 premium rate.
Prior law and revision:

This section is based on 38 USC § 821 (Act Oct. 8, 1940, ch 757, Title VI, Part I § 620, as added April 25, 1951, ch 39, Part II, § 10, 65 Stat. 36).

References in text:

"Section 602(n) of the National Service Life Insurance Act of 1940", referred to in subsec. (a), is Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(n), 54 Stat. 1009, which was classified to 38 USC § 802(n), prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1272. For similar provisions, see 38 USCS § 1912.

"Section 620 of the National Service Life Insurance Act of 1940", referred to in subsec. (b)(1), is Act Oct. 8, 1940, ch 757, Title VI, Part I, § 620, as added April 25, 1951, ch 39, Part II, § 10, 65 Stat. 36, which was classified to 38 USC § 821 prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1273. For similar provisions, see this section.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 722, as 38 USCS § 1922; amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101); in subsec. (a), substituted "Secretary" for "Veterans' Administration"; in subsec. (b), in para. (1), substituted "Secretary" for "Veterans' Administration", and, in para. (3), substituted "with the Secretary" for "in the Veterans' Administration"; and substituted "Secretary" for "Administrator" wherever appearing.

Act Aug. 14, 1991 (applicable as provided by § 201(b) of such Act which appears as a note to this section), in subsec. (a), substituted "two years" for "one year" and "two-year" for "one-year" wherever appearing; and in subsec. (b), in para. (1), substituted "two years" for "one year" and "two-year" for "one-year" wherever appearing.

Such Act further (applicable as provided by § 202(b) of such Act which appears as a note to this section), in subsec. (b), substituted para. (4) for one which read: "(4) Notwithstanding the provisions of section 717 of this title, insurance under this subsection shall be payable at the election of the first beneficiary in 240 equal monthly installments or under the options specified in section 717(b)(3) or (4). Any installments certain of insurance remaining unpaid at the death of any beneficiary shall be paid in equal monthly installments in an amount equal to the monthly installments paid to the first beneficiary, to the person or persons then in being within the classes specified in subsection (b)(2) of this section and in the order named.", and deleted para. (5), which read: "(5) The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (b)(2) of this section. No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and if no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made.".


Other provisions:

Applicability of Aug. 14, 1991 amendments of subsecs. (a) and (b)(1). Aug. 14, 1991, P. L. 102-86, Title II, § 201(b), 105 Stat. 415, provides: "The amendments made by subsection (a) [amending subsecs. (a) and (b)(1) of this section] shall apply with respect to any person who, on or after September 1, 1991, is found by the Secretary of Veterans Affairs to be
eligible for insurance under section 722 of title 38, United States Code [now 38 USCS § 1922]."

**Applicability of Aug. 14, 1991 amendments of subsecs. (b)(4) and (5).** Act Aug. 14, 1991, P. L. 102-86, Title II, § 201(b), 105 Stat. 415, provides: "The amendments made by subsection (a) [amending subsecs. (b)(4) and (5) of this section] shall apply with respect to deaths occurring before, on, or after the date of the enactment of this Act. In the case of insurance under section 722(b) of title 38, United States Code [now § 38 USCS § 1922(b)] payable by reason of a death before the date of the enactment of this Act, the Secretary shall pay the remaining balance of such insurance in a lump sum as soon as practicable after the date of the enactment of this Act.".

**Cross References**

This section is referred to in 38 USCS §§ 107, 113, 1904, 1912, 1915, 1918, 1922A

**Research Guide**

**Federal Procedure:**

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:311

**Am Jur:**

37 Am Jur 2d, Fraud and Deceit § 19

44A Am Jur 2d, Insurance §§ 1868, 1870, 1871, 1874, 1875

1. Generally

2. Constitutionality

3. Purpose

4. Eligibility for insurance

5. -Nature of discharge

6. -Service connection of disability

7. Applications

8. Determination of insurability

9. -Finality of decision

1. Generally

Upon lapse or cash surrender of insurance issued pursuant to 38 USCS § 722 [now 38 USCS § 1922], reinstatement of previously lapsed policies issued under 38 USCS § 723 [now 38 USCS § 1923] is proper, so long as all requirements for reinstatement are met within 5-year term period. 1959 ADVA 966

2. Constitutionality

Most obvious justification for either one- or two-year limitation would be to bring veterans into SDVI risk pool at earliest possible age, thus spreading risk among younger, relatively healthy veterans; otherwise veterans might wait to apply for coverage until they were older and sicker, thereby increasing costs to such extent that government subsidy would be too costly or premiums would be so high that few veterans could afford coverage, hence statute met rational basis test for equal protection challenge Saunders v Brown (1993) 4 Vet App 320

3. Purpose

Salutory humanitarian purpose of 38 USCS § 722 [now 38 USCS § 1922], intended by Congress, is to provide insurance protection for veterans who have failed to apply due to mental incompetency incurred in service and those beneficial purposes can best be fulfilled by providing forum in federal courts in which arbitrary or capricious action by Administrator [now Secretary] denying policy may be overturned as Congress intended by inserting language in 38 USCS §§

4. Eligibility for insurance

Veteran suffering from disability for which compensation would be payable if 10 percent or more in degree is not made ineligible for insurance provided by predecessor to 38 USCS § 722 [now 38 USCS § 1922] by fact that he would be insurable under Administrator's [now Secretary's] standards for qualifying under good health provisions notwithstanding his disability. 1951 ADVA 884

Persons disabled on their way to report for induction or for active military service are eligible to apply for insurance under predecessor to 38 USCS § 722 [now 38 USCS § 1922] notwithstanding that no compensation would be payable even if disability exceeded 10 percent. 1951 ADVA 888

Applicant insurable except for service connected disabilities is entitled to insurance, but insurance is not issuable to applicant whose uninsurability is due to nonservice connected disability. 1953 ADVA 923

Commissioned officers of Public Health Service, who were deemed to be in active military service under Public Health Service Act (42 USCS § 213), were deemed to be in active military service on or after July 4, 1912, and prior to January 1, 1957, for purpose of applying for insurance under former 38 USC § 620 of National Service Life Insurance Act of 1940, if they were separated during that period and filed application for insurance on or after January 1, 1957. 1956 ADVA 960

5. -Nature of discharge

Veteran discharged from active service for offense involving moral turpitude is not entitled to insurance provided by predecessor to 38 USCS § 1922 under relevant regulation enumerating definitive rules for determining discharge "under other than dishonorable conditions." 1954 ADVA 941

6. -Service connection of disability

Both language and legislative history of 38 USCS § 1922 indicate that veteran's disability must be service connected in order for veteran to qualify for Service Disabled Veterans' Insurance. Alleman v Principi (2003, CA FC) 349 F.3d 1368

For purposes of determining whether disability is service connected under 38 USCS § 722 [now 38 USCS § 1922], veteran is presumed to have been in good health upon entering service and suicide is presumed to result from mental unsoundness where no other adequate motive is shown. Clark v United States (1974, ND Iowa) 379 F Supp 1399

7. Applications

Where veteran's disability was clearly not service-connected as defined by 38 USCS § 101(16) because it arose from veteran's treatment at Department of Veterans Affairs hospital and veteran was awarded compensation under 38 USCS § 1151, veteran's widow was not entitled to Service Disabled Veterans' Insurance under 38 USCS § 1922 because § 1922 benefits were not among those covered by § 1151. Alleman v Principi (2003, CA FC) 349 F.3d 1368

Veterans disabled as result of medical treatment in Department of Veterans Affairs hospital have never been entitled to benefits of 38 USCS § 1922 or its predecessors. Alleman v Principi (2003, CA FC) 349 F.3d 1368

Application for waiver of premiums qualifies as application for insurance under predecessor to 38 USCS § 1922. 1953 ADVA 923

For purposes of 38 USCS § 722 [now 38 USCS § 1922], term "mentally incompetent" does not include transitory condition of relatively brief duration since veteran, who had ample opportunity during his lifetime to establish service connection and to apply for insurance while
competent, failed to avail himself of opportunity and since, therefore, transitory loss of capacity to contract or to manage his own affairs had no practical effect upon his right to obtain insurance benefits had he ever desired such benefits. 1961 ADVA 973


8. Determination of insurability

Under predecessor to 38 USCS § 1922, insurance is not to be granted at administrative level where all evidence procurable is insufficient to determine applicant's insurability. 1953 ADVA 923

9. -Finality of decision

Administrator's [now Secretary's] decision as to whether applicant is insurable under 38 USCS § 722 [now 38 USCS § 1922] is not final, but is subject to review of federal courts under 38 USCS §§ 784 and 785 [now 38 USCS §§ 1984 and 1985]. Clark v United States (1973, CA8) 482 F.2d 586, 32 ALR Fed 777

§ 1922A. Supplemental service disabled veterans' insurance for totally disabled veterans

Discussion and Analysis in the Veterans Benefits Manual

(a) Any person insured under section 1922(a) of this title [38 USCS § 1922(a)] who qualifies for a waiver of premiums under section 1912 of this title [38 USCS § 1912] is eligible, as provided in this section, for supplemental insurance in an amount not to exceed $20,000.

(b) To qualify for supplemental insurance under this section a person must file with the Secretary an application for such insurance. Such application must be filed not later than (1) October 31, 1993, or (2) the end of the one-year period beginning on the date on which the Secretary notifies the person that the person is entitled to a waiver of premiums under section 1912 of this title [38 USCS § 1912], whichever is later.

(c) Supplemental insurance granted under this section shall be granted upon the same terms and conditions as insurance granted under section 1922(a) of this title [38 USCS § 1922(a)], except that such insurance may not be granted to a person under this section unless the application is made for such insurance before the person attains 65 years of age.

(d) No waiver of premiums shall be made in the case of any person for supplemental insurance granted under this section.

Effective date of section:

This section is effective December 1, 1992, as provided by § 205 of Act Oct. 29, 1992, P. L. 102-568, which appears as a note to this section.

Amendments:

1994. Act Nov. 2, 1994, in subsec. (b), substituted "insurance. Such application must be filed not later than (1) October 31, 1993, or (2) the end of the one-year period beginning on the date on which the Secretary" for "insurance not later than the end of (1) the one-year period beginning on the first day of the first month following the month in which this section is
enacted [enacted October 29, 1992], or (2) the one-year period beginning on the date that the Department".

Other provisions:


Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance §§ 1870, 1874

§ 1923. Veterans' Special Life Insurance

(a) Insurance heretofore granted under the provisions of section 621 of the National Service Life Insurance Act of 1940, against the death of the policyholder occurring while such insurance is in force, is subject to the same terms and conditions as are contained in standard policies of National Service Life Insurance on the five-year level premium term plan except (1) such insurance may not be exchanged for or converted to insurance on any other plan; (2) the premium rates for such insurance shall be based on the Commissioner's 1941 Standard Ordinary Table of Mortality and interest at the rate of 21/4 per centum per annum; (3) all settlements on policies involving annuities shall be calculated on the basis of The Annuity Table for 1949, and interest at the rate of 21/4 per centum per annum; (4) all cash, loan, paid-up, and extended values, and, except as otherwise provided in this subsection, all other calculations in connection with insurance issued under this subsection shall be based on table X-18 (1950-54 Intercompany Table of Mortality) and interest at the rate of 21/2 per centum per annum; (5) all premiums and other collections on insurance issued under this subsection shall be issued upon the same terms and conditions as are contained in the standard policies of National Service Life Insurance except (1) after September 1, 1960, limited convertible term insurance may not be issued or renewed on the term plan after the insured's fiftieth birthday; (2) the premium rates for such limited convertible term or permanent plan insurance shall be based on table X-18 (1950-54 Intercompany Table of Mortality) and interest at the rate of 21/2 per centum per annum; (3) all settlements on policies involving annuities on insurance issued under this subsection shall be calculated on the basis of The Annuity Table for 1949, and interest at the rate of 21/2 per centum per annum; (4) all cash, loan, paid-up, and extended values, and, except as otherwise provided in this subsection, all other calculations in connection with insurance issued under this subsection shall be based on table X-18 (1950-54 Intercompany Table of Mortality) and interest at the rate of 21/2 per centum per annum; (5) all premiums and other collections on insurance issued
under this subsection and any total disability income provisions added thereto shall be credited directly to the revolving fund referred to in subsection (a) of this section, which together with interest earned thereon, shall be available for the payment of liabilities under such insurance and any total disability provisions added thereto, including payments of dividends and refunds of unearned premiums.

(c) The Secretary is authorized to invest in, and the Secretary of the Treasury is authorized to sell and retire, special interest-bearing obligations of the United States for the account of the revolving fund with a maturity date as may be agreed upon by the two Secretaries. The rate of interest on such obligations shall be fixed by the Secretary of the Treasury at a rate equal to the rate of interest, computed as of the end of the month preceding the date of issue of such obligations, borne by all marketable interest-bearing obligations of the United States then forming a part of the public debt that are not due or callable until after the expiration of five years from the date of original issue; except that where such average rate is not a multiple of one-eighth of 1 per centum, the rate of interest of such obligations shall be the multiple of one-eighth of 1 per centum nearest such average rate.

(d) (1) For each fiscal year for which this subsection is in effect, the Secretary shall, from the Veterans' Special Life Insurance Fund, reimburse the "General operating expenses" account of the Department for the amount of administrative costs determined under paragraph (2) for that fiscal year. Such reimbursement shall be made from any surplus earnings for that fiscal year that are available for dividends on such insurance after claims have been paid and actuarially determined reserves have been set aside. However, if the amount of such administrative costs exceeds the amount of such surplus earnings, such reimbursement shall be made only to the extent of such surplus earnings.

(2) The Secretary shall determine the administrative costs to the Department for a fiscal year for which this subsection is in effect which, in the judgment of the Secretary, are properly allocable to the provision of Veterans' Special Life Insurance (and to the provision of any total disability income insurance added to the provision of such insurance).

(3) This subsection shall be in effect only with respect to fiscal year 1996.

Prior law and revision:
This section is based on 38 USC § 822(a), (b) (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 621(a), (b), as added April 25, 1951, ch 39, Part II, § 10, 65 Stat. 37; July 23, 1953, ch 240, § 3, 67 Stat. 186).

References in text:
"Section 621 of the National Service Life Insurance Act of 1940", referred to in subsecs. (a) and (b), is Act Oct. 8, 1940, ch 757, Title VI, Part I, § 621, as added April 25, 1951, ch 38, Part II, § 10, 65 Stat. 37, which was classified to 38 USC § 822 prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1273. For similar provisions, see this section.

Explanatory notes:

Amendments:
1958. Act Sept. 2, 1958 (effective 1/1/59, as provided therein), redesignated subsec. (b) as subsec. (c); added new subsec. (b); in subsec. (c), as redesignated, substituted "The rate of interest on such obligations shall be fixed by the Secretary of the Treasury at a rate equal to the rate of interest, computed as of the end of the month preceding the date of issue of such obligations, borne by all marketable interest-bearing obligations of the United States then forming a part of the public debt that are not due or callable until after the expiration of five years from the date of original issue; except that where such average rate is not a multiple of one-eighth of 1 per centum, the rate of interest of such obligations shall be the multiple of one-eighth of 1 per centum nearest such average rate." for "The rate of interest on such obligations shall be fixed by the Secretary of the Treasury at a rate not exceeding the average interest rate on all marketable obligations of the United States Treasury outstanding as of the end of the month preceding the date of issue of this special obligation.".

1961. Act Sept. 13, 1961, added subsecs. (d) and (e).

1974. Act May 24, 1974 (effective as provided by § 12(l) of such Act, which appears as a note to this section), substituted new section catchline for one which read: "Veterans' special term insurance"; substituted new subsec. (a)(4) for one which read: "such insurance and any total disability provision added thereto shall be on a nonparticipating basis and all premiums and other collections therefor shall be credited to a revolving fund in the Treasury of the United States and the payments on such term insurance and any total disability provision added thereto shall be made directly from such fund. Appropriations to such fund are hereby authorized."

"(d) The Administrator shall determine the amount in the revolving fund referred to in subsection (a) of this section which is in excess of the actuarial liabilities of such fund including contingency reserves. Such excess shall be paid in cash as a special dividend, without interest, subject to the conditions provided in this subsection. The Administrator shall determine the administrative cost to the Veterans' Administration of paying such dividend, which cost shall be deducted from the excess and transferred to the appropriations 'General operating expenses-Veterans' Administration'. Insurance issued under section 621 of the National Service Life Insurance Act of 1940 or converted or exchanged under subsection (b) of this section, which was in force by waiver or timely payment of premiums or as paid-up or extended term insurance during one of the premium months beginning with the month of November 1960 and ending with the month of January 1961, may be eligible for the special dividend, subject to such conditions, other than specified in this subsection, as the Administrator shall determine to be reasonable and practicable. The dividend shall be paid as soon as practicable after whichever of the following dates is the latest:

"(1) the date of enactment of this subsection in case of insurance heretofore converted or exchanged under subsection (b) of this section:

"(2) the date insurance issued under section 621 is converted or exchanged under subsection (b) of this section if such conversion or exchange is made within two years after the date of enactment of this subsection; or

"(3) the date of death of the policyholder where insurance issued under section 621 is not converted or exchanged and such death occurs on or after the premium due date in November 1960 and before the expiration of two years after the date of enactment of this subsection.

"(e) After March 1, 1961, the Administrator shall from time to time transfer from the revolving fund referred to in subsection (a) of this section to general fund receipts in the Treasury such
amounts as he determines are in excess of the actuarial liabilities of the fund including contingency reserves.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 723, as 38 USCS § 1923, and, in subsec. (c), substituted "the two Secretaries" for "Administrator and Secretary" and "Secretary" for "Administrator".


Other provisions:

Effective date of amendments made by Act May 24, 1974. Act May 24, 1974, P. L. 93-289, § 12(1), 88 Stat. 173, provides: "The amendments made by section 2 [amending this section] relating to Veterans' Special Life Insurance, shall become effective upon the date of enactment of this Act except that no dividend on such insurance shall be paid prior to January 1, 1974.".

Cross References

This section is referred to in 38 USCS §§ 113, 1904, 1926, 1927, 1929, 1982

Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19
44A Am Jur 2d, Insurance §§ 1868, 1869

Upon lapse or cash surrender of insurance issued pursuant to 38 USCS § 722 [now 38 USCS § 1922], reinstatement of previously lapsed policies issued under 38 USCS § 723 [now 38 USCS § 1923], is proper, so long as all requirements for reinstatement are met within 5-year term period. 1959 ADVA 966

§ 1924. In-service waiver of premiums

(a) Waiver of all premiums on five-year level premium term insurance and that portion of any permanent insurance premiums representing the cost of the pure insurance risk, as determined by the Secretary, granted on National Service Life Insurance or United States Government life insurance under section 622 of the National Service Life Insurance Act of 1940 and in effect on January 1, 1959, shall, unless canceled, continue in effect according to the provisions of such section for the remainder of the insured's continuous active service and for one hundred and twenty days thereafter. Such premium waiver renders the contract of insurance nonparticipating during the period the waiver is in effect.

(b) Whenever benefits become payable because of the maturity of such insurance while under the premium waiver continued by this section, liability for payment of such benefits shall be borne by the United States in an amount which, when added to any reserve of the policy at the time of maturity, will equal the then value of such benefits under such policy. Where life contingencies are involved in the calculation of the value of such benefits, the calculation of such liability or liabilities shall be based upon such mortality table or tables as the Secretary may prescribe with interest at the rate of 21/4 per centum per annum as to insurance issued under sections 620 and 621 of the National Service Life Insurance Act of 1940, at the rate of 3 per centum per annum as to other National Service Life Insurance, and 31/2 per centum per annum as to United States
Government life insurance. The Secretary shall transfer from time to time from the National Service Life Insurance appropriation to the National Service Life Insurance Fund and from the military and naval insurance appropriation to the United States Government Life Insurance Fund such sums as may be necessary to carry out the provisions of this section.

(c) In any case in which insurance continued in force under this section matures on or after January 1, 1972, an amount equal to the amount of premiums, less dividends, waived on and after that date shall be placed as an indebtedness against the insurance and, unless otherwise paid, shall be deducted from the proceeds. In such case, the liability of the Government under subsection (b) of this section shall be reduced by the amount so deducted from the proceeds.

Prior law and revision:
This section is based on 38 USC § 823(a) (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 622(a), as added April 25, 1951, ch 39, Part II, § 10, 65 Stat. 37; July 29, 1955, ch 431, § 2, 69 Stat. 396).

References in text:
"Section 622 of the National Service Life Insurance Act of 1940", referred to in subsec. (a), is Act Oct. 8, 1940, ch 757, Title VI, Part I, § 622, as added April 25, 1951, ch 39, Part II, § 10, 65 Stat. 36, which was classified to 38 USCS § 823 prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1273. Similar provisions are now contained in this section.

"Sections 620 and 621 of the National Service Life Insurance Act of 1940", referred to in subsec. (b), are Act Oct. 8, 1940, ch 757, Title VI, Part I, §§ 620, 621, as added April 25, 1951, ch 39, Part II, § 10, 65 Stat. 36, which were classified to 38 USCS 821, 822, prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1273. Similar provisions are now contained in 38 USCS §§ 1922, 1923.

Amendments:
1971. Act Dec. 15, 1971 (effective 1/1/72, as provided by § 10 of such Act, which appears as 38 USCS § 1311 note), added subsec. (c).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 724, as 38 USCS § 1924, and substituted "Secretary" for "Administrator".

Code of Federal Regulations
Department of Veterans Affairs-United States Government life insurance, 38 CFR Part 6

Research Guide

Am Jur:
37 Am Jur 2d, Fraud and Deceit § 19

§ 1925. Limited period for acquiring insurance

(a) Any person (other than a person referred to in subsection (f) of this section) heretofore eligible to apply for National Service Life Insurance after October 7, 1940, and before January 1, 1957, who is found by the Secretary to be suffering (1) from a service-connected disability or disabilities for which compensation would be payable if 10 percent or more in degree and except for which such person would be insurable according to the standards of good health established by the Secretary; or (2) from a
non-service-connected disability which renders such person uninsurable according to the standards of good health established by the Secretary and such person establishes to the satisfaction of the Secretary that such person is unable to obtain commercial life insurance at a substandard rate, shall, upon application in writing made before May 2, 1966, compliance with the health requirements of this section and payment of the required premiums, be granted insurance under this section.

(b) If, notwithstanding the applicant's service-connected disability, such person is insurable according to the standards of good health established by the Secretary, the insurance granted under this section shall be issued upon the same terms and conditions as are contained in the standard policies of National Service Life Insurance except (1) five-year level premium term insurance may not be issued; (2) the net premium rates shall be based on the 1958 Commissioners Standard Ordinary Basic Mortality Table, increased at the time of issue by such an amount as the Secretary determines to be necessary for sound actuarial operations, and thereafter such premiums may be adjusted as the Secretary determines to be so necessary but at intervals of not less than two years; (3) an additional premium to cover administrative costs to the Government as determined by the Secretary at times of issue shall be charged for insurance issued under this subsection and for any total disability income provision attached thereto, and thereafter such costs may be adjusted as the Secretary determines to be necessary but at intervals of not less than five years; (4) all cash, loan, extended and paid-up insurance values shall be based on the 1958 Commissioners Standard Ordinary Basic Mortality Table; (5) all settlements on policies involving annuities shall be calculated on the basis of The Annuity Table for 1949; (6) all calculations in connection with insurance issued under this subsection shall be based on interest at the rate of 3 1/2 percent per annum; and (7) the insurance shall include such other changes in terms and conditions as the Secretary determines to be reasonable and practicable.

(c) If the applicant's service-connected disability or disabilities render the applicant uninsurable according to the standards of good health established by the Secretary, or if the applicant has a non-service-connected disability which renders the applicant uninsurable according to the standards of good health established by the Secretary and such person establishes to the satisfaction of the Secretary that such person is unable to obtain commercial life insurance at a substandard rate and such uninsurability existed as of the date of approval of this section [enacted Oct. 13, 1964], the insurance granted under this section shall be issued upon the same terms and conditions as are contained in standard policies of National Service Life Insurance, except (1) five-year level premium term insurance may not be issued; (2) the premiums charged for the insurance issued under this subsection shall be increased at the time of issue by such an amount as the Secretary determines to be necessary for sound actuarial operations and thereafter such premiums may be adjusted from time to time as the Secretary determines to be necessary; for the purpose of any increase at time of issue or later adjustment the service-connected group and the non-service-connected group may be separately classified; (3) an additional premium to cover administrative costs to the Government as determined by the Secretary at the time of issue shall be charged for insurance issued under this subsection and for any total disability income provision attached thereto (for which the insured may subsequently become eligible) and thereafter such costs may be adjusted as the Secretary
(d) (1) All premiums and collections on insurance issued pursuant to this section and any total disability income provision attached thereto shall be credited to the Veterans Reopened Insurance Fund, a revolving fund established in the Treasury of the United States, and all payments on such insurance and any total disability provision attached thereto including payments of dividends and refunds of unearned premiums, shall be made from that fund and the interest earned on the assets of that fund. For actuarial and accounting purposes, the assets and liabilities (including liabilities for repayment of advances hereinafter authorized, and adjustment of premiums) attributable to the insured groups established under this section shall be separately determined. Such amounts in the Veterans Special Term Insurance Fund in the Treasury, not exceeding $1,650,000 in the aggregate, as may hereafter be determined by the Secretary to be in excess of the actuarial liabilities of that fund, including contingency reserves, shall be available for transfer to the Veterans Reopened Insurance Fund as needed to provide initial capital. Any amounts so transferred shall be repaid to the Treasury over a reasonable period of time with interest as determined by the Secretary of the Treasury taking into consideration the average yield on all marketable interest-bearing obligations of the United States of comparable maturities then forming a part of the public debt.

(2) The Secretary is authorized to set aside out of the revolving fund established under this section such reserve amounts as may be required under accepted actuarial principles to meet all liabilities on insurance issued under this section and any total disability income provision attached thereto. The Secretary of the Treasury is authorized to invest in and to sell and retire special interest-bearing obligations of the United States for the account of the revolving fund. Such obligations issued for this purpose shall have maturity fixed with due regard for the needs of the fund and shall bear interest at a rate equal to the average market yield (computed by the Secretary of the Treasury on the basis of market quotations as of the end of the calendar month next preceding the date of issue) on all marketable interest-bearing obligations of the United States then forming a part of the public debt which are not due or callable until after the expiration of four years from the end of such calendar month; except that where such average market yield is not a multiple of one-eighth of 1 percent, the rate of interest of such obligation shall be the multiple of one-eighth of 1 percent nearest such market yield.

(3) Notwithstanding the provisions of section 1982 of this title [38 USCS § 1982], the Secretary shall, from time to time, determine the administrative costs to the Government which in the Secretary's judgment are properly allocable to insurance issued under this section and any total disability income provision attached thereto, and shall transfer from the revolving fund, the amount of such cost allocable to the Department to the appropriation "General Operating Expenses, Department of Veterans Affairs", and the remainder of such cost to the general fund receipts in the
Treasury. The initial administrative costs of issuing insurance under this section and any total disability income provision attached thereto shall be so transferred over such period of time as the Secretary determines to be reasonable and practicable.

(e) Notwithstanding the provisions of section 1982 of this title [38 USCS § 1982], a medical examination (including any supplemental examination or tests) when required of an applicant for issuance of insurance under this section or any total disability income provisions attached thereto shall be at the applicant's own expense by a duly licensed physician.

(f) No insurance shall be granted under this section to any person referred to in section 107 of this title [38 USCS § 107] or to any person while on active duty or active duty for training under a call or order to such duty for a period of thirty-one days or more.

Amendments:

1965. Act June 14, 1965 (effective 5/1/65, as provided therein), in subsec. (b)(8), deleted "and all premiums and other collections therefor shall be credited to a revolving fund established in the Treasury of the United States and the payments on such insurance and total disability income provision shall be made directly from such fund" following "basis"; in subsec. (c), substituted a concluding period for ";", (8) all premiums and other collections on the insurance and any total disability income provision attached thereto shall be credited to the National Service Life Insurance appropriation, and the payments on such insurance and total disability income provision shall be made directly from such appropriation. Appropriations necessary to carry out the provisions of this subsection are hereby authorized." following clause (7); substituted new subsec. (d)(1) for one which read: "There is authorized to be appropriated such sums as may be required to provide capital for the revolving fund to carry out the purpose of subsection (b) of this section. Such appropriations shall be advanced to the revolving fund as needed and shall bear interest as determined by the Secretary of the Treasury, taking into consideration the average yield on all marketable interest-bearing obligations of the United States of comparable maturities then forming a part of the public debt and shall be repaid to the Treasury over a reasonable period of time."; in subsec. (d)(2), deleted "subsection (b) of" following "under" wherever appearing; in subsec. (d)(3), deleted "or the National Service Life Insurance appropriations, as appropriate," following "revolving fund, ".

1979. Act Nov. 28, 1979 (effective 11/28/79, as provided by § 601(b) of such Act), in subsec. (b), in clause (6), inserted "and", in clause (7), substituted a concluding period for a semicolon, deleted clause (8) which read: "(8) the insurance and any total disability income provision attached thereto shall be on a nonparticipating basis."; in subsec. (c), deleted clause (4) which read: "(4) the insurance and any total disability income provision attached thereto shall be on a nonparticipating basis."; redesignated clauses (5)-(7) as clauses (4)-(6), respectively, in clause (5), as redesignated, inserted "and"; in subsec. (d)(1), substituted ", including payments of dividends and refunds of unearned premiums, shall be made from that fund and the interest earned on the assets of that fund" for "shall be made from that fund".

1982. Act Oct. 12, 1982, in subsec. (a), substituted "percent" for "per centum", and substituted "before May 2, 1966" for "within one year after the effective date of this section"; and, in subssecs. (b), (c), and (d)(2), substituted "percent" for "per centum" wherever it appears.

1986. Act Oct. 28, 1986, in subsec. (a) substituted "such person" for "he" following "Administrator that"; in subsec. (b) substituted "such person" for "he"; in subsec. (c) substituted "the applicant" for "him" following "render" and "renders" and "such person" for "he" following "Administrator that"; and in subsec. (d)(3) substituted "the Administrator's" for "his".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 725, as 38 USCS § 1925; amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101); in subsec. (d), para. (3), substituted "Department of Veterans Affairs" for "Veterans' Administration" following "General Operating Expenses"; and substituted "Department" for "Veterans' Administration", "Secretary" for "Administrator", and "Secretary's" for "Administrator's" throughout the remainder of the section.

Other provisions:

Effective date of amendments made by Act Oct. 13, 1964. Act Oct. 13, 1964, P. L. 88-664, § 12(d), 78 Stat. 1099, provides: "The amendments made by this section [adding this section and amending 38 USCS § 1904] shall take effect as of the first day of the first calendar month which begins more than six calendar months after the date of enactment of this Act."

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Code of Federal Regulations
Department of Veterans Affairs-National Service life insurance, 38 CFR Part 8

Cross References
This section is referred to in 38 USCS §§ 113, 1904, 1926, 1927, 1929

Research Guide

Am Jur:
37 Am Jur 2d, Fraud and Deceit § 19

1. Generally

2. Regulations

1. Generally

Although decedent, who was otherwise uninsurable veteran, was entitled to issuance of insurance policy under 38 USCS § 725 [now 38 USCS § 1925] pursuant to his application, death within one year from pre-existing non-service-connected disability was validly excepted risk. Kapourelos v United States (1971, CA3 Pa) 446 F.2d 1181

National service life insurance policy, providing that unpaid premiums rather than face value of policy would be paid to beneficiary where death of insured occurred within one year after policy was issued, does not violate 38 USCS § 725 [now 38 USCS § 1925]. Guy v United States (1968, ED La) 280 F Supp 281

2. Regulations

Regulation allowing return of premiums rather than payment on policy where insured dies within one year of issuance of policy is valid as within Administrator's [now Secretary's] authority under 38 USCS § 725(c)(7) [now 38 USCS § 1925(c)(6)]. Kapourelos v United States (1969, ED Pa) 306 F Supp 1034, affd (1971, CA3 Pa) 446 F.2d 1181

§ 1926. Authority for higher interest rates for amounts payable to beneficiaries

Notwithstanding sections 1902, 1923, and 1925 of this title [38 USCS §§ 1902, 1923, and 1925], if the beneficiary of an insurance policy receives the proceeds of such policy under a settlement option under which such proceeds are paid in equal monthly installments over a limited period of months, the interest that may be added to each such
installment may be at a rate that is higher than the interest rate prescribed in the appropriate section of this subchapter [38 USCS §§ 1901 et seq.]. The Secretary may from time to time establish a higher interest rate under the preceding sentence only in accordance with a determination that such higher rate is administratively and actuarially sound for the program of insurance concerned. Any such higher interest rate shall be paid on the unpaid balance of such monthly installments.

**Effective date of section:**

Act Nov. 28, 1979, P. L. 96-128, Title VI, § 601(b), 93 Stat. 988, provided that this section is effective on Nov. 28, 1979.

**Amendments:**

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 726, as 38 USCS § 1926, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted “Secretary” for “Administrator”.

**Cross References**

Payment options, 38 USCS §§ 1916, 1917

**Research Guide**

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19

**§ 1927. Authority for higher monthly installments payable to certain annuitants**

(a) Subject to subsections (b) and (c) of this section, the Secretary may from time to time adjust the dollar amount of the monthly installments payable to a beneficiary of National Service Life Insurance, Veterans Special Life Insurance, or Veterans Reopened Insurance who is receiving the proceeds of such insurance under a life annuity settlement option. The Secretary may make such an adjustment only if the Secretary determines that the adjustment is administratively and actuarially sound for the program of insurance concerned. The Secretary may make such an adjustment without regard to the provisions of sections 1902, 1923, and 1925 of this title [38 USCS §§ 1902, 1923, and 1925] with respect to interest rates and the use of mortality tables.

(b) The Secretary shall determine the amount in the trust funds in the Treasury held for payment of proceeds to National Service Life Insurance, Veterans Special Life Insurance, and Veterans Reopened Insurance beneficiaries attributable to interest and mortality gains on the reserves held for annuity accounts. Such amount shall be available for distribution to the life annuitants referred to in subsection (a) of this section as a fixed percentage of, and in addition to, the monthly installment amount to which the annuitants are entitled under this subchapter [38 USCS §§ 1901 et seq.]. For the purposes of this section, gains on the reserves are defined as funds attributable solely to annuity accounts that are in excess of actuarial liabilities.

(c) The monthly amount of an annuity authorized in sections 1902, 1903, and 1925 of this title [38 USCS §§ 1902, 1903, and 1925], as adjusted under this section, may not be less
than the monthly amount of such annuity that would otherwise be applicable without regard to this section.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 727, as 38 USCS § 1927, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19

§ 1928. Authority for payment of interest on settlements

(a) Subject to subsection (b) of this section, the Secretary may pay interest on the proceeds of a participating National Service Life Insurance, Veterans' Special Life Insurance, and Veterans Reopened Insurance policy from the date the policy matures to the date of payment of the proceeds to the beneficiary or, in the case of an endowment policy, to the policyholder.

(b) (1) The Secretary may pay interest under subsection (a) of this section only if the Secretary determines that the payment of such interest is administratively and actuarially sound for the settlement option involved.

(2) Interest paid under subsection (a) of this section shall be at the rate that is established by the Secretary for dividends held on credit or deposit in policyholders' accounts under the insurance program involved.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 728, as 38 USCS § 1928, and substituted "Secretary" for "Administrator".

Other provisions:

Application and effectiveness of section. Act Nov. 18, 1988, P. L. 100-687, Div B, Title XIV, § 1401(a)(3), 102 Stat. 4129, provides: "The amendments made by this subsection [enacting this section and 38 USCS § 1963] shall take effect with respect to insurance policies maturing after the date of the enactment of this Act."

Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19

§ 1929. Authority to adjust premium discount rates

(a) Notwithstanding sections 1902, 1903, and 1925 of this title [38 USCS §§ 1902, 1903, and 1925] and subject to subsection (b) of this section, the Secretary may from time to time adjust the discount rates for premiums paid in advance on National Service Life Insurance, Veterans' Special Life Insurance, and Veterans Reopened Insurance.
(b) (1) In adjusting a discount rate pursuant to subsection (a) of this section, the Secretary may not set such rate at a rate lower than the rate authorized for the program of insurance involved under section 1902, 1903, and 1925 of this title [38 USCS § 1902, 1903, and 1925].

(2) The Secretary may make an adjustment under subsection (a) of this section only if the Secretary determines that the adjustment is administratively and actuarially sound for the program of insurance involved.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 729, as 38 USCS § 1929, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

Other provisions:

Application and effectiveness of section. Act Nov. 18, 1988, P. L. 100-687, Div B, Title XIV, § 1041(b)(2), 102 Stat. 4129, provides: "The amendment made by paragraph (1) [enacting this section] shall take effect with respect to premiums paid after the date of the enactment of this Act."

Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 19

SUBCHAPTER II. UNITED STATES GOVERNMENT LIFE INSURANCE

§ 1940. Definition
§ 1941. Amount of insurance
§ 1942. Plans of insurance
§ 1943. Premiums
§ 1944. Policy provisions
§ 1945. Renewal
§ 1946. Dividends to pay premiums
§ 1947. Incontestability
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§ 1958. Statutory total permanent disability
§ 1959. Waiver of disability for reinstatement
§ 1960. Waiver of premium payments on due date
§ 1961. Authority for higher interest rates for amounts payable to beneficiaries
§ 1962. Authority for higher monthly installments payable to certain annuitants
§ 1963. Authority for payment of interest on settlements

§ 1940. Definition

For the purposes of this subchapter [38 USCS §§ 1940 et seq.], the term "insurance" means United States Government life insurance.

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 740, as 38 USCS § 1940.

Code of Federal Regulations
Department of Veterans Affairs-United States Government life insurance, 38 CFR Part 6

Research Guide

Am Jur:
44A Am Jur 2d, Insurance § 1864

Forms:
24A. Am Jur Pl & Pr Forms (Rev ed), Veterans and Veterans' Laws, § 33

Right to recover under United States Government Life Insurance policy is governed by federal statutes, regulations, and pertinent case law. Taylor v United States (1972, CA9 Or) 459 F.2d 1007, cert den (1972) 409 US 967, 34 L Ed 2d 232, 93 S Ct 273

§ 1941. Amount of insurance

United States Government life insurance shall be issued against death or total permanent disability in any multiple of $500 and not less than $1,000 or more than $10,000. No person may carry a combined amount of National Service Life Insurance and United States Government life insurance in excess of $10,000 at any one time. The limitations of this section shall not apply to the additional paid up insurance the purchase of which is authorized under section 1907 of this title [38 USCS § 1907].

Prior law and revision:
This section is based on 38 USC §§ 511, 803, (Acts June 7, 1924, ch 320, Title III, § 300 in part, 43 Stat. 624; March 4, 1925, ch 553, § 12, 43 Stat. 1308; Oct. 8, 1940, ch 757, Title VI, Part I, § 603 in part, 54 Stat. 1011).

Amendments:
1971. Act Dec. 15, 1971, inserted "The limitations of this section shall not apply to the additional paid up insurance the purchase of which is authorized under section 707 of this title."

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 741, as 38 USCS § 1941, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:
Effective date of amendment made by Act Dec. 15, 1971. Act Dec. 15, 1971, P. L. 92-188, § 4, 85 Stat. 645, provided that the amendment to this section is effective on a date
§ 1942. Plans of insurance

(a) Regulations shall provide for the right to convert insurance on the five-year level premium term plan into ordinary life, twenty-payment life, endowment maturing at age sixty-two, and into other usual forms of insurance as may be prescribed by the Secretary. Provision shall be made for reconversion of any such policies to a higher premium rate or, upon proof of good health satisfactory to the Secretary, to a lower premium rate, in accordance with regulations to be issued by the Secretary. No reconversion shall be made to a five-year level premium term policy.

(b) An insured who on or after the insured's sixty-fifth birthday has a five-year level premium term policy of insurance in force by payment of premiums may exchange such policy for insurance on a special endowment at age ninety-six plan upon written application; payment of the required premium; and surrender of the five-year level premium term policy and any total disability provision attached thereto with all rights, title, and interests thereunder. However, if it is found by the Secretary subsequent to the exchange that prior thereto the term policy matured because of total permanent disability of the insured or that the insured was entitled to total disability benefits under the total disability provision attached to such policy, the insured, upon surrender of the special endowment at age ninety-six policy and any provision for waiver of premiums issued under subsection (c) of this section with all rights, title, and interest thereunder, will be entitled to benefits payable under the prior contract. In such case, the cash value less any indebtedness on the endowment policy shall be refunded together with any premiums paid on a provision for waiver of premiums. Insurance on the special endowment at age ninety-six plan shall be issued at the attained age of the insured upon the same terms and conditions as are contained in standard policies of United States Government Life Insurance except:

   (1) the insurance shall not mature and no benefits shall be paid thereunder because of total permanent disability;
   (2) the premiums for such insurance shall be as prescribed by the Secretary;
   (3) such insurance cannot be exchanged, converted, or reconverted to any other plan of insurance;
   (4) all cash, loan, paid-up, and extended term insurance values shall be as prescribed by the Secretary; and
   (5) the insurance shall be subject to such other changes in terms and conditions as the Secretary determines to be reasonable and practicable.

(c) The Secretary shall, upon application made by the insured at the same time as the insured exchanges the term policy for an endowment policy issued under the provisions of subsection (b) of this section, and upon payment of such extra premium as the Secretary shall prescribe, include in such endowment policy a provision for waiver of premiums on the policy and on the provision during the total permanent disability of the insured, if such disability began after the date of such application and while the policy and the provision are in force by payment of premiums. The Secretary shall not grant waiver of any premium becoming due more than one year before receipt by the Secretary.
of claim for the same, except as provided in this subsection. Any premiums paid for months during which waiver is effective shall be refunded. The Secretary shall provide by regulations for examination or reexamination of an insured claiming waiver of premiums under this subsection, and may deny waiver for failure to cooperate. If it is found that an insured is no longer totally and permanently disabled, the waiver of premiums shall cease as of the date of such finding and the policy and provision may be continued by payment of premiums as provided therein. In any case in which the Secretary finds that the insured's failure to make timely claim for waiver of premiums, or to submit satisfactory evidence of the existence or continuance of total permanent disability was due to circumstances beyond the insured's control, the Secretary may grant waiver or continuance of waiver of premiums. If the insured dies without filing claim for waiver, the beneficiary, within one year after the death of the insured, or, if the beneficiary is insane or a minor, within one year after removal of such legal disability, may file claim for waiver with evidence of the insured's right to waiver under this subsection. Policies containing a provision for waiver of premiums issued under this subsection may be separately classified for the purpose of dividend distribution from otherwise similar policies not containing such provision.

Prior law and revision:


Amendments:

1962. Act July 25, 1962, designated existing matter as subsec. (a); added subsecs. (b) and (c).

1986. Act Oct. 28, 1986, in subsec. (b) substituted "the insured's" for "his" and "the insured" for "he" preceding "was entitled"; in subsec. (c) substituted "the insured" for "he" preceding "exchanges", substituted "the" for "his" following "exchanges", deleted "his failure" following "premiums, or", and substituted "the insured's" for "his".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 742, as 38 USCS § 1942, and, in subsec. (c), substituted "by the Secretary" for "in the Veterans' Administration".

Such Act further substituted "Secretary" for "Administrator" wherever appearing.

1. Generally
2. Construction of policy
3. Effect of conversion
4. Enforcement of original policy
5. Defenses to action on policy

1. Generally

It was regarded from outset that term insurance was temporary and that it should be converted into other forms. Skelton v United States (1936, CA10 Okla) 88 F.2d 599

2. Construction of policy

Rule of liberal construction in favor of insured applies to converted policies, and such policy is to be construed in light of all its provisions, statute, and administrative construction, but latter is not conclusive. Boyett v United States (1936, CA5 Ga) 86 F.2d 66

3. Effect of conversion
Reinstatement and conversion of policy, induced by mutual mistake as to disability, does not discharge original policy. United States v Schweppe (1930, CA8 Mo) 38 F.2d 595

Acceptance of converted policy, on representation by insured that he was not permanently and totally disabled, for part of amount of original term policy, does not forfeit balance of policy which had matured because of actual permanent and total disability, but does discharge government to extent of conversion. United States v Andrews (1930, CA10 Colo) 43 F.2d 80

Substituted policy supersedes earlier contract, in absence of fraud or mistake. Franks v United States (1929, DC Or) 43 F.2d 455; Marker v United States (1930, DC Idaho) 43 F.2d 456

4. Enforcement of original policy

Conversion of policy in reliance on government medical report that insured's disability was temporary only, when as matter of fact, disability was permanent, does not bar insured from asserting claim under original policy on basis of permanent total disability, though insured delayed for several years after receipt of new policy in asserting his claim. United States v Golden (1929, CA10 NM) 34 F.2d 367

Mere attempt to convert insurance certificate does not estop insured to enforce original certificate, where government was not prejudiced. United States v Acker (1929, CA5 Ala) 35 F.2d 646

Insured's conversion of term policy may be rescinded on basis of mutual mistake where his statement in conversion application to effect that he was not disabled was direct result of misrepresentations by government doctors, but insured may sue on original policy without first rescinding converted policy. Marker v United States (1930, DC Idaho) 43 F.2d 457

5. Defenses to action on policy

Statement in application for convertible term insurance policy that there had not been treatment for disease of enumerated parts of applicant's body constitutes representation, as distinguished from warranty, and misrepresentation in application for convertible term insurance policy will not constitute defense to action on policy unless it was intentionally untrue or was made with reckless disregard for its truth or falsity. United States v Depew (1938, CA10 Kan) 100 F.2d 725

§ 1943. Premiums

The premium rates for insurance shall be the net rates based upon the American Experience Table of Mortality and interest at 31/2 percent per annum. Regulations shall prescribe the time and method of payment of premiums, but payments of premiums in advance shall not be required for periods of more than one month each, and may be deducted from the pay or deposit of the insured or be otherwise made at the insured's election.

Prior law and revision:

This section is based on 38 USC §§ 511, 512, (Acts June 7, 1924, ch 320, Title III, §§ 300 in part, 301 in part, 43 Stat. 624).

Amendments:

1982. Act Oct. 12, 1982 substituted "percent" for "per centum".

1986. Act Oct. 28, 1986, substituted "the insured's" for "his".


Other provisions:
Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

1. Generally

2. Application of money due insured to payment of premiums

3. Waiver

1. Generally

Grace period within which time is given to pay premiums to prevent policy lapse is not extension of insurance, and when such time expires without payment, effect is same as if such time had not been given. United States v Huie (1934, CA5 Ga) 73 F.2d 305

2. Application of money due insured to payment of premiums

After conversion of term policy, government is not authorized to apply money due insured to payment of premiums on new policies, since rule allowing such application to private insurance is not applicable to government insurance. Mikell v United States (1933, CA4 SC) 64 F.2d 301

Government's duty to apply money owed to insured, in order to prevent lapse of policy, is to be determined at time insured defaults on premium payments, not at time suit is brought after insured's death. Mikell v United States (1933, CA4 SC) 64 F.2d 301

Upon insured's re-enlistment within month after his discharge and authorized deduction of premiums from his pay, policy does not lapse where sufficient pay is due insured to pay premiums. Unger v United States (1933, CA10 Okla) 65 F.2d 946

Uncollected pay for flight service, more than sufficient to pay premiums in arrears, applies to keep policy in force. United States v Jones (1938, CA8 Mo) 100 F.2d 65

Unpaid compensation due insured at his death is sufficient to keep policy from lapsing where amount due insured is greater than amount of unpaid premiums, regardless of fact that insured had previously become totally and permanently disabled at time when he was not entitled to such compensation. American Nat'l Bank & Trust Co. v United States (1941, CA7 III) 124 F.2d 743, cert den (1942) 316 US 674, 86 L Ed 1748, 62 S Ct 1042; Shepanek v United States (1941, CA7 III) 124 F.2d 747, cert den (1942) 316 US 674, 86 L Ed 1749, 62 S Ct 1042

Allotments deducted from insured's pay to purchase war bonds are not available to prevent lapse of policy, even though such funds were on deposit at bank. Smith v United States (1940, DC Mont) 32 F Supp 657

Premium credit item held to account of insured on date of collapse of insurance, sufficient amount to prevent lapse, is to be so used even though credit resulted from another insurance contract, unless insured's direction to use credit for another purpose is found in provisions of insurance contract, either express or necessarily implied, in communication by insured to Veterans' Administration [now Department of Veterans Affairs], or in any way in which intention of insured is manifested. 1952 ADVA 902

3. Waiver

Absent showing that insured was deceived or misled to his detriment, or that he had adequate reason to suppose that his contract would not be enforced, or that forfeiture provided for by policy could be waived, government is not estopped to assert forfeiture and did not waive forfeiture for nonpayment of premiums by failing to notify insured concerning allocation of payment in excess of premium then due, failing to give notice of due dates of premiums or that policy had lapsed or was about to lapse, and retaining two monthly premiums after policy had lapsed by its terms for nonpayment of premiums. Wilber Nat'l Bank v United States (1935) 294 US 120, 79 L Ed 798, 55 S Ct 362

Neither sending of premiums by mother of insured after death of insured, nor acceptance of premiums by government official, constitute waiver of lapse of policy. Birmingham v United States (1925, CA8 Mo) 4 F.2d 508

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§ 1944. Policy provisions

(a) Provisions for maturity at certain ages, for continuous installments during the lifetime of the insured or beneficiaries, or both, for refund of premiums, cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable may be provided for in insurance contracts or from time to time by regulations.

(b) All calculations on insurance shall be based upon the American Experience Table of Mortality and interest at 31/2 percent per annum, except that no deduction shall be made for continuous installments during the life of the insured in case the insured's total and permanent disability continues more than two hundred and forty months.

(c) On and after July 19, 1939, the rate of interest charged on any loan secured by a lien on insurance shall not exceed 5 percent per annum.

Prior law and revision:

Amendments:
1982. Act Oct. 12, 1982, in subsecs. (b) and (c), substituted "percent" for "per centum".
1986. Act Oct. 28, 1986, in subsec. (b) substituted "the insured's" for "his".

Other provisions:
Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Cross References
This section referred to in 38 USCS §§ 1961, 1962

§ 1945. Renewal

At the expiration of any term period any insurance policy issued on the five-year level premium term plan which has not been exchanged or converted to a permanent plan of insurance and which is not lapsed shall be renewed as level premium term insurance without application for a successive five-year period at the premium rate for the attained age without medical examination. However, renewal shall be effected in cases where the policy is lapsed only if the insured makes application for reinstatement and renewal of the insured's term policy within five years after the date of lapse, and reinstatement in such cases shall be under the terms and conditions prescribed by the Secretary.

Prior law and revision:
This section is based on 38 USC § 512 (Act June 7, 1924, ch 320, Title III, § 301 in part, as added June 24, 1932, ch 276, 47 Stat. 334; Aug. 2, 1951, ch 286, 65 Stat 151; July 23, 1953, ch 240, § 1, 67 Stat. 186).

Amendments:
1970. Act June 25, 1970 (effective 6/25/70, as provided by § 14(a) of such Act, which appears as 38 USCS § 1317 note), substituted new section for one which read:

"(a) Effective July 23, 1953, at the expiration of any term period any insurance policy issued on the five-year level premium term plan which has not been exchanged or converted to a permanent plan of insurance and which is not lapsed shall be renewed as level premium term insurance without application for a successive five-year period at the premium rate for the attained age without medical examination. However, on and after such date renewal shall be effected in cases where the policy is lapsed only if the lapse occurred not earlier than two months before the expiration of the term period, and reinstatement in such cases shall be under the terms and conditions prescribed by the Administrator. In any case where the five-year level premium term period expired between July 23, 1953, and December 31, 1953, both dates inclusive, under the conditions set forth in the preceding sentence, the insured, notwithstanding the expiration of an intervening five-year period, shall have not less than six months following the date of enactment of this title within which to meet the terms and conditions prescribed by the Administrator under the preceding sentence.

"(b) This section shall take effect on the date of enactment of this title.".

1986. Act Oct. 28, 1986, substituted "the insured's" for "his".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 745, as 38 USCS § 1945, and substituted "Secretary" for "Administrator".

I. RENEWAL

II. REINSTATEMENT

1. Generally

2. Generally
3. Applications
4. Payment of premiums
5. Effective date
6. Total disability provision
7. -Pre-existing disability

I. RENEWAL

1. Generally

Government is not entitled to repudiate renewed insurance contract for failure to pay premium on earlier contract, where certificate of renewal has been issued and failure to pay was not shown to be willful. 1933 ADVA 154

II. REINSTATEMENT

2. Generally

Reinstatement of insurance after lapse is, in effect, issuance of new policy. Irons v Smith (1933, CA4 SC) 62 F.2d 644

Reinstatement of policy continues original policy in force, and where policy lapsed before marriage of insured, but was reinstated after marriage, it remains separate property of insured and does not become community property. In re White's Estate (1939) 43 NM 202, 89 P2d 36

3. Applications

Insured's application and reinstatement of lapsed policy are to be judged in light of statute as it existed when transaction took place. Van Pelt v United States (1943, CA6 Ohio) 134 F.2d 735;
United States v Van Pelt (1944, CA6 Ohio) 142 F.2d 61, cert den (1944) 323 US 740, 89 L Ed 593, 65 S Ct 68

In passing on reinstatement application Veterans' Bureau [now Department of Veterans Affairs] has right, to require physical examination of insured and statement from him that he is in good health, as well as information as to any consultation with physician or any disability, injury, or disease occurring subsequent to enlistment. Van Pelt v United States (1943, CA6 Ohio) 134 F.2d 735; United States v Van Pelt (1944, CA6 Ohio) 142 F.2d 61, cert den (1944) 323 US 740, 89 L Ed 593, 65 S Ct 68

Tender of premium and statement of comparative health on first business day after expiration of limitation period for making such tender is sufficient to allow reinstatement of policy, where last two days of limitation period were holidays. 1937 ADVA 400

4. Payment of premiums

Grace period allowed insured before policy lapses for nonpayment of premiums is not applicable to reinstatement of policy after lapse, so that failure to pay first premium due after reinstatement causes policy to lapse even though insured died before expiration of grace period. United States v Norton (1935, CA5 Fla) 77 F.2d 731

To reinstate insurance in June, on which April premium was not paid, it is necessary to pay April, May, and June premiums. United States v Norton (1935, CA5 Fla) 77 F.2d 731

5. Effective date

Reinstatement is effective on date set forth in Veterans Administration [now Department of Veterans Affairs] letter acknowledging reinstatement, even though letter was not received until after that date; fact that total disability occurred between date of application and date of letter reinstating policy does not preclude recovery on reinstated policy, since physical condition of veteran at time he makes application for reinstatement is controlling. Brown v United States (1928, DC NY) 29 F.2d 856

6. Total disability provision

Regulation providing that total disability provision may be reinstated only upon proof of good health, while other regulation allows reinstatement of policy as whole upon showing that insured is in as good health as at time of lapse, is beyond Administrator's [now Secretary's] authority and void, since total disability provision is part of entire insurance contract, and terms for reinstatement must be same for all parts of insurance contract. United States ex rel. Lyons v Hines (1939) 70 App DC 36, 103 F.2d 737, 122 ALR 674

7. -Pre-existing disability

Reinstated contract does not cover permanent and total disability which existed prior to reinstatement. United States v Kaminsky (1933, CA5 Ga) 64 F.2d 735; United States v Stevens (1933, CA8 Minn) 64 F.2d 853; United States v McIver (1935, CA4 NC) 77 F.2d 208

Reinstated insurance is against total permanent disability occurring during life of policy, and is not contract of indemnity for pre-existing total permanent disability. United States v Anders (1937, CA9 Mont) 88 F.2d 509

§ 1946. Dividends to pay premiums

Until and unless the Secretary has received from the insured a request in writing for payment of dividends in cash or that the dividends be placed on deposit in accordance with the provisions of the insured's policy, any regular annual dividends shall be applied in payment of premiums becoming due on insurance after the date the dividend is payable on or after December 31, 1958.

Amendments:
1986. Act Oct. 28, 1986, substituted "the insured's" for "his".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 746, as 38 USCS § 1946, and substituted "Secretary" for "Veterans' Administration".

Dividends payable under National Service Life Insurance policy (or United States Government Life Insurance policy) are benefits payable by Veterans' Administration [now Department of Veterans Affairs] under law administered by it and relating to veterans, and hence are not subject to setoff or claims of United States arising under any other act or acts administered by any agency other than Veterans' Administration [now Department of Veterans Affairs]. 1949 ADVA 832

§ 1947. Incontestability

Subject to the provisions of section 1954 of this title [38 USCS § 1954] all contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States. The insured under such contract or policy may, without prejudicing the insured's rights, elect to make claim to the Department or to bring suit under section 1984 of this title [38 USCS § 1984] on any prior contract or policy, and if found entitled thereto, shall, upon surrender of any subsequent contract or policy, be entitled to payments under the prior contract or policy. In any case in which a contract or policy of insurance is canceled or voided after March 16, 1954, because of fraud, the Secretary shall refund to the insured, if living, or, if deceased, to the person designated as beneficiary (or if none survives, to the estate of the insured) all money, without interest, paid as premiums on such contract or policy for any period subsequent to two years after the date such fraud induced the Secretary to issue, reinstate, or convert such insurance less any dividends, loan, or other payment made to the insured under such contract or policy.

Prior law and revision:


Amendments:

1986. Act Oct. 28, 1986, substituted "the insured's" for "his".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 747, as 38 USCS § 1947; amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101); and substituted "Secretary" for "Veterans' Administration" following "induced the", substituted "Department" for "Veterans' Administration" following "make claim to the", and substituted "Secretary" for "Administrator" following "fraud, the".

I. IN GENERAL

1. Generally
2. Application
3. Contests of policies
   4. -Acts constituting contest
   5. -Pre-existing disability
6. Estoppel

II. FRAUD
I. IN GENERAL

1. Generally

Predecessor to 38 USCS § 1947 does not create liability or permit payment on contract of insurance which has been fully performed and fully executed. Denny v United States (1939, CA7 Ill) 103 F.2d 960

2. Application

Incontestable provision is applicable only where certificate of insurance was issued. Dobbins v United States (1931, CA9 Cal) 47 F.2d 887; McCormack v United States (1933, CA2 NY) 66 F.2d 519; Continental Illinois Nat'l Bank & Trust Co. v United States (1941, CA7 Ill) 123 F.2d 1013, cert den (1942) 316 US 676, 86 L Ed 1750, 62 S Ct 1104

Predecessor to 38 USCS § 1947 does not protect reinstatement and conversion application for insurance in amount of $10,000 which was never acted upon by Administration [now Department of Veterans Affairs], but does serve to make incontestable conversion and reinstatement of insurance in amount of $5,000 issued mistakenly by Administration [now Department of Veterans Affairs] and subsequently lost prior to veteran's death. 1931 ADVA 64

3. Contests of policies

Policy provisions which allow contest of policy on fewer grounds than enumerated in statute are not binding on government, since statutory terms are part of contract and may not be waived by agent of government. Raives v Raives (1931, CA2 NY) 54 F.2d 267; Wilber Nat'l Bank v United States (1934, CA2 NY) 69 F.2d 526, affd (1935) 294 US 120, 79 L Ed 798, 55 S Ct 362

4. -Acts constituting contest

Government's denial of liability on ground not set forth in predecessor to 38 USCS § 1947 is prohibited contest. United States v Patryas (1938) 303 US 341, 82 L Ed 883, 58 S Ct 551

Government resistance to payment of reinstated policy on ground that insured was totally and permanently disabled prior to reinstatement amounts to contest within generally accepted meaning of word, in violation of incontestability provisions. United States v Patryas (1938) 303 US 341, 82 L Ed 883, 58 S Ct 551

5. -Pre-existing disability

Recovery on reinstated policy may not be defeated on ground that disability was existent at time of reinstatement, in absence of proof of fraud in procuring reinstatement. United States v Chandler (1935, CA5 Ala) 77 F.2d 452

Congress intended to bar defense of antecedent disability with respect to term policies as well as to reinstated and converted policies, and fact that converted policies do not by their terms eliminate antecedent disability from insured risk is not manifestation of intention to grant more liberal contract to those who converted, but recognition that defense is barred. Byrd v United States (1939, CA10 Kan) 106 F.2d 821, 126 ALR 425

Predecessor to 38 USCS § 1947 prevents government from contesting with soldier under contract or policy of insurance, issued pursuant to application by the soldier, fact that his disability
6. Estoppel

Under predecessor to 38 USCS § 1947, government is precluded from asserting defense of estoppel on basis that insured converted or reinstated his policy subsequent to date on which disability is alleged to have occurred. Watson v United States (1930, CA10 Colo) 45 F.2d 590; Long v United States (1930, CA10 Colo) 45 F.2d 590; Sprenchel v United States (1931, CA5 Tex) 47 F.2d 501

II. FRAUD

7. Generally

In action for recovery of payments alleged due under converted and reinstated insurance policy refund of premiums is not prerequisite to government's assertion of defense of fraud in procurement of such reinstatement. Bavisotto v United States (1937, DC NY) 18 F Supp 355

Policy is void if obtained by fraud, even though such provision is not included in policy itself, since statutory provision will be read into it. Lotz v United States (1940, DC Pa) 33 F Supp 9

8. Intent of declarant

Willful false statement in application for reinstatement voids policy. Raives v Raives (1931, CA2 NY) 54 F.2d 267

Unwitting, nonwillful misstatements of fact do not constitute fraud within meaning of predecessor to 38 USCS § 1947. Bailey v United States (1937, CA5 Ga) 92 F.2d 456

Representations in application for reinstatement do not create estoppel, where innocently and mistakenly made. Quirk v United States (1930, DC Pa) 45 F.2d 631

9. Time of statement

Reinstated converted policy, which had been issued after reinstatement of prior war risk policy, is void where first reinstatement had been fraudulently obtained. Jones v United States (1939, CA5 Ga) 106 F.2d 888

10. Statements relating to health

Fraudulent statements in examination for reinstatement of insurance are not rendered harmless by provisions of predecessor to 38 USCS § 1959 permitting reinstatement when applicant is not in good health if his disability is service related. Jones v United States (1939, CA5 Ga) 106 F.2d 888

Failure of insured to disclose in application for reinstatement that he suffered from myocarditis constitutes material misrepresentation, which voids policy. Pence v United States (1941, CA7 Wis) 121 F.2d 804, affd (1942) 316 US 332, 86 L Ed 1510, 62 S Ct 1080, reh den (1942) 316 US 712, 86 L Ed 1777, 62 S Ct 1287

Misrepresentation as to illness and consultation of physicians is fraud avoiding reinstatement of policy. Raives v United States (1930, DC NY) 39 F.2d 142, affd (1931, CA2 NY) 54 F.2d 267

Untrue statements by insured as to his previous condition of health in military service, not made for purpose of obtaining insurance, do not constitute fraud so as to allow cancellation of policy. Hayman v United States (1931, DC Tex) 51 F.2d 800, affd (1932, CA5 Tex) 62 F.2d 118

11. Medical consultations and treatment

Failure to disclose treatments for serious illness, constitutes fraud precluding recovery on policy. United States v Elliott (1934, CA5 Ala) 73 F.2d 374, cert den (1935) 295 US 740, 79 L Ed 1687, 55 S Ct 654
Insured's failure to disclose medical consultation is sufficient to justify finding of fraud in application for reinstatement of war risk insurance policy. Halverson v United States (1941, CA7 Ill) 121 F.2d 420, cert den (1941) 314 US 695, 86 L Ed 556, 62 S Ct 412

False statement in application for reinstatement as to consultation with and treatment by physician voids policy. Jenkins v United States (1926, DC Wis) 24 F.2d 452

Applicant's false statement that he had not consulted physician as to his health within certain specified time before making application is such fraud in obtaining insurance as will invalidate it. Lotz v United States (1940, DC Pa) 33 F Supp 9

12. Estoppel

False statements by insured to secure reinstatement of policy preclude recovery thereon, though officers of Bureau [now Department] failed to examine records of hospitalization. United States v Riggins (1933, CA9 Cal) 65 F.2d 750

Fact that compensation division of Veterans' Administration [now Department of Veterans Affairs] had knowledge that insured was in fact not in good health at time of reinstatement and had consulted physicians to ascertain cause of condition of which he complained may not be used to estop insurance division from canceling policy for fraud. Halverson v United States (1941, CA7 Ill) 121 F.2d 420, cert den (1941) 314 US 695, 86 L Ed 556, 62 S Ct 412

Representations in application for reinstatement do not create estoppel, where innocently and mistakenly made. Quirk v United States (1930, DC Pa) 45 F.2d 631

III. ACTIONS ON POLICIES

13. Converted policies

Insured may bring action on converted policy for total permanent disability, even though original policy contained clause excluding liability for such disability and disability occurred prior to conversion, where converted policy contained no such clause. United States v Patryas (1938) 303 US 341, 82 L Ed 883, 58 S Ct 551

14. Original policies

Insured whose total and permanent disability commenced while his war policy was in force is entitled, under predecessor to 38 USCS § 1947, to benefits provided by such policy, notwithstanding fact that insured had previously converted his insurance policy and surrendered converted policy for cash value. United States v Arzner (1933) 287 US 470, 77 L Ed 436, 53 S Ct 238; United States v Kane (1934, CA9 Wash) 70 F.2d 396; Denny v United States (1939, CA7 Ill) 103 F.2d 960

Insured may recover on original term policy by showing permanent total disability while it was in force, and surrender of converted policy. United States v Andrews (1930, CA10 Colo) 43 F.2d 80

If disability accrued before reinstatement, veteran may surrender reinstated policy and recover on original policy. Watson v United States (1930, CA10 Colo) 45 F.2d 589; Long v United States (1930, CA10 Colo) 45 F.2d 590

Insured is not precluded as matter of law from recovery on original policy simply because he signed application for reinstatement with statement in it that he was not totally and permanently disabled, notwithstanding dispute as to whether he had done so knowingly and intentionally. Sprencel v United States (1931, CA5 Tex) 47 F.2d 501

Predecessor to 38 USCS § 1947 allows insured to bring suit in original policy even though he converted such policy and allowed portion of converted policy to lapse for nonpayment of premiums. United States v Stamey (1931, CA9 Wash) 48 F.2d 150

Insured, who was granted $10,000 insurance, which he let lapse, later reinstating $2,000 thereof, has right to sue for balance of original policy alleging total and permanent disability at time of lapse. United States v Crowell (1931, CA8 Iowa) 48 F.2d 475

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Insured must surrender reinstated or converted policy in order to recover on original policy. Quirk v United States (1930, DC Pa) 45 F.2d 631

Right of election to proceed under original policy, is limited to insured, and, absent statutory authority, neither beneficiary in his own right nor any person other than insured is entitled to exercise such right. 1931 ADVA 26

§ 1948. Total disability provision

The Secretary shall include in United States Government life insurance policies provision whereby an insured, who is totally disabled as a result of disease or injury for a period of four consecutive months or more before attaining the age of sixty-five years and before default in payment of any premium, shall be paid disability benefits at the rate of $5.75 monthly for each $1,000 of insurance in force when total disability benefits become payable. The amount of such monthly payment under the provisions of this section shall not be reduced because of payment of permanent and total disability benefits under the insurance policy. Such payments shall be effective as of the first day of the fifth consecutive month, and shall be made monthly during the continuance of such total disability. Such payments shall be concurrent with or independent of permanent and total disability benefits under the insurance policy. In addition to the monthly disability benefits the payment of premiums on the life insurance and for the total disability benefits authorized by this section shall be waived during the continuance of such total disability. Regulations shall provide for reexaminations of beneficiaries under this section; and, in the event that it is found that an insured is no longer totally disabled, the waiver of premiums and payment of benefits shall cease and the insurance policy, including the total disability provision, may be continued by payment of premiums as provided in said policy and the total disability provision. Neither the dividends nor the amount payable in any settlement under any United States Government life insurance policy shall be decreased because of disability benefits granted under the provisions of this section. The payment of total disability benefits shall not prejudice the right of any insured, who is totally and permanently disabled, to permanent and total disability benefits under the insured's policy. The provision authorized by this section shall not be included in any United States Government life insurance policy heretofore or hereafter issued, except upon application, payment of premium by the insured, and proof of good health satisfactory to the Secretary. The benefit granted under this section shall be on the basis of multiples of $500, and not less than $1,000 or more than the amount of insurance in force at time of application. The Secretary shall determine the amount of the monthly premium to cover the benefits of this section, and in order to continue such benefits in force the monthly premiums shall be payable until the insured attains the age of sixty-five years or until the prior maturity of the policy. In all other respects such monthly premium shall be payable under the same terms and conditions as the regular monthly premium on the United States Government life insurance policy.

Prior law and revision:


Amendments:

1982. Act Oct. 12, 1982 substituted "premium" for "permium" preceding "by the insured".
1986. Act Oct. 28, 1986, substituted "the insured's" for "his".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 748, as 38 USCS § 1948, and substituted "Secretary" for "Administrator".

Other provisions:

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

1. Generally
2. Application
3. Computation of term of disability
4. Waiver of premiums
5. -Termination
6. Reinstatement of provision

1. Generally

Predecessor to 38 USCS § 1948 authorizes total disability provision only as clause in policy of United States Government Life Insurance, making such provision subordinate, additional, and integral part of entire policy. United States ex rel. Lyons v Hines (1939) 70 App DC 36, 103 F.2d 737, 122 ALR 674

2. Application

Total disability excusing payment of premium exists only where insured cannot pursue any gainful occupation, and such disability may exist where he is subject to epileptic seizures, but not where such seizures do not prevent him from working continuously for over two years. Wood v United States (1928, DC Kan) 28 F.2d 771

Insured suffering from active pulmonary tuberculosis is totally disabled for purposes of predecessor to 38 USCS § 1948, excusing nonpayment of premiums. Humble v United States (1931, DC Ky) 49 F.2d 600

Provision for automatic and retroactive waiver of premiums under predecessor to 38 USCS § 1960 is applicable to additional premium required by inclusion of total disability benefit provision. 1938 ADVA 434

3. Computation of term of disability

Proper time frame for measuring consecutive months that must elapse prior to eligibility for disability pension is anniversary date from occurrence of such disability rather than calendar month method, which runs counter to established practice and might work hardship on claimant by prolonging period prior to eligibility. 1934 ADVA 228

4. Waiver of premiums

Total and permanent disability existing at time policy was issued and at time of lapse of policy will not excuse nonpayment of premiums. Schmidt v United States (1933, CA8 Neb) 63 F.2d 390

Disability existing before entry into military service will not excuse payment of premiums. United States v Kaminsky (1933, CA5 Ga) 64 F.2d 735

5. -Termination

Date by which to fix end of premium waiver and of benefits for one found no longer totally disabled is date of decision of finding, and anniversary date of monthly payment is relevant consideration in fixing such date. 1935 ADVA 340

6. Reinstatement of provision
Administrator [now Secretary] may be required by mandamus to reinstate total disability provision as part of veteran's policy of insurance, where his refusal on ground that veteran was not in good health, due to loss of eye in active military service, was unjustified. United States ex rel. Lyons v Hines (1939) 70 App DC 36, 103 F.2d 737, 122 ALR 674

Regulation providing that total disability provision may be reinstated only upon proof of good health, while other regulation allows reinstatement of policy as whole upon showing that insured is in as good health as at time of lapse, is beyond Administrator's [now Secretary's] authority and void, since total disability provision is part of entire insurance contract, and terms for reinstatement must be same for all parts of insurance contract. United States ex rel. Lyons v Hines (1939) 70 App DC 36, 103 F.2d 737, 122 ALR 674

§ 1949. Change of beneficiary

Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries of a United States Government life insurance policy without the consent of such beneficiary or beneficiaries.

Prior law and revision:

This section is based on 38 USC § 512 (Act June 7, 1924, ch 320, Title III, § 301 in part, as added March 4, 1925, ch 553 § 13, 43 Stat. 1309).

Amendments:


I. IN GENERAL

1. Generally
2. Agreement not to change beneficiary
3. Divorce or separation agreement
4. Mental capacity of insured
5. Intent of insured
6. Formal requirements
7. Grounds for avoidance of change of beneficiary
8. Effective date of change
9. Policies affected by change
10. Effect of change on original beneficiary
11. Beneficiary as trustee
12. Regulations
13. -Waiver

II. AFFIRMATIVE ACTION

14. Execution of government documents
15. Correspondence
16. -To government agency
17. -To third party
18. Applications
19. -For reinstatement or conversion
20. Wills
21. Miscellaneous

I. IN GENERAL

1. Generally

Beneficiary of war risk insurance may be changed although possession of policy is in first beneficiary, and such first beneficiary can obtain no rights by holding policy. United States v Sterling (1926, CA2 NY) 12 F.2d 921
Insured may change beneficiary though government's liability under war risk insurance policy has become fixed and vested. Gambill v United States (1939, CA10 Okla) 102 F.2d 667

Under predecessor to 38 USCS § 1949, insured's right to change beneficiary is absolute. Von Der Lippi-Lipski v United States (1925) 55 App DC 202, 4 F.2d 168; Murphy v United States (1934, DC Mass) 5 F Supp 583

Statutory reservation to insured serviceman of right at all times to change beneficiary disabled insured from making irrevocable gift of insurance; hence, where insured had changed beneficiary from his divorced wife to his mother and such change was communicated to and recognized by Veterans' Bureau [now Department of Veterans Affairs] he could recover possession of policy from his divorced wife in action of replevin. Tompkins v Tompkins (1944, NJ Super Ct) 132 NJL 217, 38 A2d 890

2. Agreement not to change beneficiary

Although parents consented to minor son's enlistment in navy upon consideration of his obtaining war risk insurance policy in favor of his mother, his cancellation of policy without notice to parents prior to his death, while still minor, is effective. United States v Williams (1937) 302 US 46, 82 L Ed 39, 58 S Ct 81, reh den (1937) 302 US 779, 82 L Ed 602, 58 S Ct 361

Agreement entered into by insured with his mother that he would not change his designation of her as beneficiary of war risk policy, in consideration of advances made by mother which insured used to pay premiums, is invalid to extent it restricts right of insured to change beneficiary of insurance, without consent of beneficiary named in policy. Von Der Lippi-Lipski v United States (1925) 55 App DC 202, 4 F.2d 168

Agreement not to change beneficiary of war risk policy in consideration of money advanced to insured is invalid. Murphy v United States (1934, DC Mass) 5 F Supp 583

3. Divorce or separation agreement

Divorce decree which incorporated wife's waiver of all claims against her husband did not of itself effect change of beneficiary of husband's government life insurance policy, and lacking effective attempt to change beneficiary, wife is entitled to proceeds at husband's death under Federal law. Taylor v United States (1972, CA9 Or) 459 F.2d 1007, cert den (1972) 409 US 967, 34 L Ed 2d 232, 93 S Ct 273

Insured had legal right to change beneficiaries at all times during his lifetime, notwithstanding the fact that he had transferred all his right, title, and interest to the insurance policy to his former wife as part of the property settlement in connection with the divorce. Bonner v United States (1963, DC Mass) 222 F Supp 539

Provisions of 38 USCS §§ 717(a), 749, and 3101 [now 38 USCS §§ 1917(a), 1949, and 5301] guarantee decedent's absolute right to determine beneficiary of policy and state court has no jurisdiction in divorce proceedings to enter judgment requiring irrevocable designation of beneficiary of any part of proceeds. Sessions v Sessions (1974, Okla App) 525 P2d 1269

4. Mental capacity of insured

Insured who, alone and unadvised, had sufficient mental capacity to secure reinstatement of his United States Government Life Insurance has sufficient mental capacity to effect valid change of beneficiary of such policy. Irons v Smith (1933, CA4 SC) 62 F.2d 644

5. Intent of insured

Insured's intent to change and attempt to carry out intent are sufficient to effect change of beneficiary. Johnson v White (1930, CA8 Ark) 39 F.2d 793

Mere proof of intent is not sufficient to change beneficiary. Kingston v Hines (1926, DC Mich) 13 F.2d 406

6. Formal requirements

Fact that Veterans’ Administration [now Department of Veterans Affairs] did not receive notice of insured's intent to change beneficiary of war risk policy until after death of insured does not invalidate otherwise effective change. Kaschefsky v Kaschefsky (1940, CA6 Mich) 110 F.2d 836

It is not necessary that record be in existence in Bureau of War Risk Insurance [now Department of Veterans Affairs] in order to make change of beneficiary valid, when there is sufficient evidence to show change was made. Shepherdson v United States (1921, DC Pa) 271 F 330

7. Grounds for avoidance of change of beneficiary

Neither fact that sister cared for insured after his separation from wife, nor fact that she advanced him money needed to reinstate policy, constitutes undue influence sufficient to avoid insured's change of beneficiary from wife to sister. Irons v Smith (1933, CA4 SC) 62 F.2d 644

Change of beneficiary is not invalid on ground that one of new beneficiaries exerted undue influence on insured while he was in weakened physical condition, where original beneficiary was only person with insured and his lawyer at time change was requested. Murphy v United States (1934, DC Mass) 5 F Supp 583

8. Effective date of change

Change of beneficiary takes effect on date insured signed written notice, although change was not endorsed upon policy until after insured's death. Murphy v United States (1934, DC Mass) 5 F Supp 583

9. Policies affected by change

Insured's application for reinstatement and conversion of $5,000 of war risk insurance is sufficient to change beneficiary only for that amount of insurance, and original beneficiary remains entitled to any additional insurance purchased by excess premiums which insured forwarded to Veterans’ Administration [now Department of Veterans Affairs]. Heinemann v Heinemann (1931, CA6 Tenn) 50 F.2d 696

10. Effect of change on original beneficiary

Original beneficiary is not entitled to sue on policy where beneficiary was changed, since beneficiary's right to proceeds is extinguished by such change. Irons v Smith (1933, CA4 SC) 62 F.2d 644

Insured's unsuccessful attempt to change beneficiary of war risk insurance policy does not affect rights of person designated as beneficiary prior to such attempt. Elliott v United States (1920, DC Ohio) 271 F 1001

11. Beneficiary as trustee

Agreement between insured and designated beneficiary, undertaken for valid consideration, that beneficiary would distribute proceeds among insured's brothers and sisters, is valid and entitles brothers and sisters to reformation of policy upon designated beneficiary's failure to distribute proceeds according to agreement. Kaschefsky v Kaschefsky (1940, CA6 Mich) 110 F.2d 836

Insured's letters to sister named as beneficiary, stating desire that proceeds be divided equally with others, is sufficient evidence of intent to create trust for court to hold sister as trustee of proceeds for benefit of herself and others. Ambrose v United States (1926, DC NY) 15 F.2d 52

Insured's letter to brother named as beneficiary, stating that if anything happened to him, brother should take care of his three sisters, constitutes brother trustee of proceeds for benefit of sisters. Dorland v Whitmer (1932, Stark Co) 43 Ohio App 285, 12 Ohio L Abs 102, 182 NE 686, motion overr, cert den (1933) 288 US 916, 77 L Ed 989, 53 S Ct 507

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12. Regulations

Regulation under predecessor to 38 USCS §§ 1940 et seq. providing that change of beneficiary must be in writing, signed by insured, and witnessed by at least one person, relates to changes of beneficiary other than by last will, since will may be nuncupative and without writing, or holographic and without attestation, or state law may not require witnesses. United States v Napoleon (1924, CA5 Fla) 296 F 811

13. -Waiver

Government may waive formal compliance with regulations as to change of beneficiary. Johnson v White (1930, CA8 Ark) 39 F.2d 793

Regulations regarding change of beneficiary are for protection of government and may be waived, but where insured expresses desire to change beneficiary, receives proper blanks to effect same, and never returns blanks after signing them, no change of beneficiary is effected. Chichiarelli v United States (1928, DC Colo) 26 F.2d 484

Provision of policy that change of beneficiary is invalid unless endorsed by insured is regulation for benefit of government and may be waived. Murphy v United States (1934, DC Mass) 5 F Supp 583

II. AFFIRMATIVE ACTION

14. Execution of government documents

Instrument changing beneficiary of policy to insured's wife, signed in insured's name by wife, in insured's presence and at his request, is effective as application for change of beneficiary under regulations of Bureau [now Department]. Le Blanc v Curtis (1925, CA5 Ga) 6 F.2d 4

Change of beneficiary of policy is effected by insured's filling out blank form changing designation to his wife, where insurance authorities informed him that first form was incorrectly filled out, and insured thereupon signed blank forms which were later to be filled out by proper authorities, even though such blank forms could not be found at date of trial and had not been recorded with Bureau of War Risk Insurance as required by regulations. Farley v United States (1923, DC Or) 291 F 238

Insured's statement that wife was beneficiary of policy, made on application for disability compensation, is sufficient to effect change from sister to wife. United States v Tuebert (1932, DC NY) 57 F.2d 895

15. Correspondence

Insured's letter to designated beneficiary, stating that if all installments payable under policy of insurance were not paid to beneficiary before her death, he wished remainder to go to his niece, is sufficient to designate niece as residuary beneficiary, regardless of fact that regulation required such change of beneficiary to be sent to Bureau [now Department], rather than to beneficiary. Claffy v Forbes (1922, DC Wash) 280 F 233

16. -To government agency

Insured's letter to Bureau [now Department], expressing wish or desire that part of benefits of war risk policy originally payable to his son should be payable to his wife, is sufficient to effect such change, where Bureau [now Department] had no prescribed form of blank for use in changing designation of beneficiary. Shepherdson v United States (1921, DC Pa) 271 F 330

Letters written to Treasury Department, requesting change of beneficiary of insurance, are sufficient to cause such change although not acted upon by department. Peart v Chaze (1926, DC La) 13 F.2d 908

17. -To third party

Insured's letter to foster parents stating that he had left them insurance by will is sufficient to change beneficiary of war risk policy from insured to foster parents. Morgan v United States (1926, CA4 SC) 13 F.2d 763

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Insured’s statement of desire to change beneficiary, contained in letter to wife, is sufficient to effect change of beneficiary from sister to wife. Johnson v White (1930, CA8 Ark) 39 F.2d 793

Veteran’s letter to sister-in-law is sufficient notice to Veterans’ Bureau [now Department] of change from father to her as beneficiary. Steele v Suwalski (1935, CA7 Wis) 75 F.2d 885, 99 ALR 588

18. Applications

Insured’s application for insurance policy, at time he already carried maximum amount of insurance naming mother and wife as beneficiaries in equal amount, is insufficient to effect change of beneficiary, even though new application was for same amount of insurance as that to which wife was beneficiary and new application named mother as beneficiary, where application did not contain any indication that insured intended it to be application for change of beneficiary. Gifford v United States (1921, DC NJ) 289 F 833

19. For reinstatement or conversion

Statement by insured in application for reinstatement of desire to change beneficiary, although not acted upon prior to death of insured, is sufficient to effect change desired. United States v Johnson (1931, DC Ky) 46 F.2d 549

Insured’s application for reinstatement and conversion of policy, naming wife as beneficiary, is sufficient to effect change from siblings to wife, although application was rejected and later application named no beneficiary, where Veterans’ Administration [now Department of Veterans Affairs] representative knew that insured intended wife to be beneficiary and that insured’s minor child needed constant medical attention. Cady v United States (1933, DC Wash) 4 F Supp 263

20. Wills

Will of insured, designating aunt as beneficiary of policy is effective to change beneficiary designated by law, even though will was invalid due to insured’s minority, since will was intended by insured to be written designation of beneficiary. Helmholz v Horst (1924, CA6 Ohio) 294 F 417, 2 Ohio L Abs 419

Insured’s will leaving all property which he had "power to dispose of" to niece is sufficient to effect change of beneficiary of war risk policy from wife, whom insured had divorced on her fault, to niece. McCarty v Haley (1929, CA7 Ind) 36 F.2d 201

Statement of insured, probated as his will, that mother and father were to receive "all insurance," is sufficient to constitute parents as co-beneficiaries with right of survivorship. United States v Mallery (1931, CA2 NY) 48 F.2d 6

Will not filed with Bureau [now Department] does not work change of beneficiary, but it is operative to pass commuted value of policy to legatee named after death of beneficiary named in policy. In re Tiffany's Will (1930) 137 Misc 627, 244 NYS 255

21. Miscellaneous

Change of beneficiary effected by trust agreement with insured, to which government was not a party, and which was not in compliance with regulations, is not binding on government. Calhoun v Ussery (1930, DC La) 46 F.2d 495


§ 1950. Payment to estates

If no beneficiary of insurance is designated by the insured, either while alive or by last will, or if the designated beneficiary does not survive the insured, then there shall be paid to the estate of the insured the present value of the remaining unpaid monthly installments. If the designated beneficiary survives the insured and dies before receiving
all of the installments of insurance payable and applicable, then there shall be paid to the estate of such beneficiary the present value of the remaining unpaid monthly installments. No payments shall be made to any estate which under the laws of the residence of the insured or the beneficiary, as the case may be, would escheat, but same shall escheat to the United States and be credited to the United States Government Life Insurance Fund.

Prior law and revision:

This section is based on 38 USC § 512 (Act June 7, 1924, ch 320, Title III, § 301, in part, as added March 4, 1925, ch 553, § 13, 43 Stat. 1309).

Amendments:

1986. Act Oct. 28, 1986, substituted "while alive or by last will" for "in his lifetime or by his last will and testament".


Research Guide

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I. IN GENERAL

1. Generally

Insured's signing of application for insurance must be deemed acceptance of all terms in application, including specification of beneficiaries contained therein. Shelly v McKimmons (1939) 32 Cal App 2d 711, 90 P2d 842, cert den (1939) 308 US 610, 84 L Ed 510, 60 S Ct 174
2. Constitutionality

Amendment to predecessor to 38 USCS § 1950 after death of insured did not violate due process. Sizemore v Sizemore's Guardian (1928) 222 Ky 713, 2 SW2d 395 (ovrd in part by Flowers v Flowers' Adm'r (1933) 249 Ky 203, 60 SW2d 596)

Predecessor to 38 USCS § 1950 was constitutional. Tipton v McClary (1932) 227 Mo App 460, 54 SW2d 490; Palmer v Mitchell (1927) 117 Ohio St 87, 5 Ohio L Abs 172, 5 Ohio L Abs 401, 158 NE 187, 55 ALR 566

3. Purpose

Purpose of requiring funds to be paid to insured's estate for distribution under state law is to relieve government of burden of determining legal heirs. Bomar v United States (1935, DC SC) 12 F Supp 881

4. Application

Predecessor to 38 USCS § 1950 governed disposition of insurance proceeds even though insured died prior to its enactment. Madden v United States (1936, DC NY) 18 F Supp 534

Predecessor to 38 USCS § 1950 does not apply to original term insurance which insured had not converted, rights under which had accrued prior to its enactment. Perrydore v Hester (1926) 215 Ala 268, 110 So 403

5. Retroactivity

Interest of beneficiary of war risk insurance policy is vested only so far as government makes it so, and such interest may be divested or changed by government without in any way transgressing any obligations. White v United States (1926) 270 US 175, 70 L Ed 530, 46 S Ct 274; Arehart v United States (1931, CA7 Ill) 54 F.2d 301

Congress had power to make amendment of predecessor to 38 USCS § 1950 retroactive. Singleton v Cheek (1932) 284 US 493, 76 L Ed 419, 52 S Ct 257, 81 ALR 923; Madden v United States (1936, DC NY) 18 F Supp 534

Predecessor to 38 USCS § 1950 was not made invalid by fact that it retroactively took benefit from minor child of insured veteran and vests it in insured's estate. Dowell v United States (1936, CA5 Ga) 86 F.2d 120

Rights of beneficiaries may be changed by amendment of statute after death of insured. United States v Chavez (1936, CA10 NM) 87 F.2d 16

Congress has power to amend statute with respect to distribution of unpaid installments. McKee v Jordan (1932) 225 Ala 598, 144 So 575; First Nat'l Bank v Forester (1931) 223 Ala 218, 135 So 167

Amendments of predecessor to 38 USCS §§ 1941 et seq. related back to time of original Act as regarded rights of persons insured; interest of beneficiary may be divested or changed by government without violating obligations. Adams v Jackson (1938) 23 Tenn App 118, 126 SW2d 899

II. BENEFICIARIES

6. Designation of beneficiary

There is no limitation on beneficiaries who may be designated in converted policy. United States v Garrison (1930, DC Fla) 39 F.2d 225

7. Designation by will

Designation of beneficiary by will may be valid for purposes of predecessor to 38 USCS § 1950, even though will does not comply with state law. Schroeder v United States (1928, DC Ohio) 24 F.2d 420

Insured's naming of person to receive proceeds in his will constitutes designation of beneficiary for purposes of predecessor to 38 USCS § 1950 only if will was made concurrently
with, or subsequent to, insured's application for insurance. Evangeliou v United States (1949, DC Dist Col) 84 F Supp 609

Insured in insurance policy may dispose of unpaid installments by will, and, if he does so, they must be distributed according to will. In re Leonard's Estate (1934) 191 Minn 388, 254 NW 594

Insured's oral will stating that proceeds of insurance policy should go to aunt if anything happened to him constituted designation of beneficiary for purposes of predecessor to 38 USCS § 1950. In re Smith's Estate (1935) 156 Misc 839, 282 NYS 888, affd (1936) 248 App Div 714, 290 NYS 128

Will executed before insurance policy took effect was sufficient to pass proceeds according to its terms where insured named himself as beneficiary. In re Henry's Estate (1934) 153 Misc 208, 275 NYS 454

8. -Cancellation of designation

Cancellation of all previous designations of beneficiaries makes estate of insured beneficiary. United States v Oliver (1932, CA9 Cal) 59 F.2d 55

9. Rights of beneficiary

Policy of insurance does not express contract between beneficiary and government, until beneficiary's interest vests by death of insured. United States v Sterling (1926, CA2 NY) 12 F.2d 921

Beneficiary's rights do not vest unless insurance contract accords such status, and contract includes terms of insurance application, statutes under which policy was issued, amendments to such statutes, and all regulations promulgated thereunder. Newborn v De Witt (1932) 164 Tenn 519, 51 SW2d 478

Death of one beneficiary does not affect rights of co-beneficiary. Stacy v Culbertson (1931) 157 Va 258, 160 SE 50

III. PAYMENTS TO ESTATES

10. Generally

Fact that Veterans Administration [now Department of Veterans Affairs] did not recognize claim until after lapse of period for payment of proceeds in installments is not ground for allowing recovery of total amount of such installments accruing after death of beneficiary, rather than present value of unpaid installments computed as of date of death of beneficiary pursuant to predecessor to 38 USCS § 1950. United States v Citizens Loan & Trust Co. (1942) 316 US 209, 86 L Ed 1387, 62 S Ct 1026, reh den (1942) 316 US 712, 86 L Ed 1777, 62 S Ct 1287

Administrator of insured's estate is entitled to proceeds of insurance policy where insured was murdered by sole beneficiary. Austin v United States (1942, CA7 Ill) 125 F.2d 816

Under predecessor to 38 USCS § 1950 and notwithstanding state laws to contrary, heirs have no right of action on policies, but right of action is in, and suit must be brought by, personal representatives. Butler v United States (1938, DC Tex) 23 F Supp 143

11. Obligations and rights of government

Deposit of insurance and disability compensation payments received from government, by guardian of incompetent veteran, in bank which subsequently becomes insolvent is not entitled to priority of payment out of assets of bank as debt due United States since payment of installments of insurance and disability compensation to guardian of mentally incompetent veteran vests title in ward and operates to discharge obligation of United States with respect to such installments. State ex rel. Sorensen v Horace State Bank (1933) 125 Neb 638, 251 NW 284

Government retains interest in insurance money until it arrives in hands of intended beneficiary, even though beneficiary may be determined under state inheritance laws. Hurley v Hirsch (1933, Tex Civ App) 66 SW2d 387; Hurley v White (1933, Tex Civ App) 66 SW2d 393
12. Disposition of accrued installments

Under yearly renewable term insurance policy, installments of disability benefits which have accrued to insured prior to his death go to his estate or personal representative, rather than to his beneficiary. Singleton v Cheek (1932) 284 US 493, 76 L Ed 419, 52 S Ct 257, 81 ALR 928; McCullough v Smith (1934) 293 US 228, 79 L Ed 297, 55 S Ct 157

Beneficiary, rather than estate of insured, is entitled to disability benefits which have accrued under converted war risk insurance at time of insured's death, or to refund of premiums paid after incapacity, where policy contains provision to effect that payments shall be made to beneficiary until entire 240 monthly installments, including any paid to insured during his lifetime, have been paid. United States v Boshart (1937, CA9 Cal) 91 F.2d 264, 112 ALR 52

Present value of unpaid installments passing to insured's estate under predecessor to 38 USCS § 1950 become part of corpus of estate in hands of administratrix. In re Robbins (1928) 126 Me 555, 140 A 366

Disability installments accrued but unpaid at insured's death become part of his estate. In re Estate of Schwall (1932) 123 Cal App 106, 10 P2d 1013

Accrued installments pass to insured's estate rather than to beneficiary, where insured was totally disabled from time that he was discharged from service to time of his death. Williams v Hodge (1932) 163 Miss 809, 141 So 905

Monthly installments accruing during insured's total disability, which are uncollected at time of his death, are part of insured's estate and subject to disposition according to his will. Ramsey v Saunders (1933) 114 W Va 590, 172 SE 798

Unpaid installments passing to insured's estate upon his death are subject to administration of estate, since distributees take such payments as heirs rather than as beneficiaries. Whaley v Jones (1929) 152 SC 328, 149 SE 841, cert den (1929) 280 US 556, 74 L Ed 611, 50 S Ct 16

13. Estate as trustee

Proceeds of policy paid to insured's estate are held by administrator in trust for insured's sisters, where insured had promised, both orally and in writing, to make sisters beneficiaries of such insurance, although terms of policy provided for different disposition of proceeds. Shelly v McKimmons (1939) 32 Cal App 2d 711, 90 P2d 842, cert den (1939) 308 US 610, 84 L Ed 510, 60 S Ct 174

Proceeds paid to insured's estate are held by administrator in trust for person whom insured intended to name as beneficiary, where evidence sufficiently establishes such intent, even though insured's actions were insufficient to name beneficiary under rules of Veterans' Administration [now Department of Veterans Affairs]. Duncan v Linton (1931, Franklin Co) 38 Ohio App 57, 10 Ohio L Abs 158, 175 NE 621

14. Claims against estate

Divorced wife has no claim against funds in hands of administrator unless entitled to inherit under state law. Sizemore v Sizemore's Guardian (1928) 222 Ky 713, 2 SW2d 395 (ovrd in part by Flowers v Flowers' Adm'r (1933) 249 Ky 203, 60 SW2d 596)

15. -Creditors

Interest of distributee in estate of insured is not exempt from execution. Funk v Luithle (1929) 58 ND 416, 226 NW 595

Bequest of residue of estate, without mentioning insurance policy, is insufficient to make legatee beneficiary in policy payable to estate, as against creditors. First Nat'l Bank v Cann's Ex'r (1932) 247 Ky 618, 57 SW2d 461

Insurance becoming part of estate of intestate is to be distributed according to applicable laws of descent, subject to claims of creditors. In re Hallbom's Estate (1933) 189 Minn 383, 249 NW 417, affd (1934) 291 US 473, 78 L Ed 921, 54 S Ct 497

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Proceeds of insurance in hands of representative of insured's estate are exempt from claims of distributees' creditors. Mixon v Mixon (1932) 203 NC 566, 166 SE 516.

After funds are paid to insured's estate, they are subject to use for payment of indebtedness of insured. Whaley v Jones (1929) 152 SC 328, 149 SE 841, cert den (1929) 280 US 556, 74 L Ed 611, 50 S Ct 16; Vita v Morris (1934, Tex Civ App) 75 SW2d 157.

Proceeds in hands of personal representative of insured are not exempt from claims of creditors. In re Bollow's Estate (1936) 223 Wis 262, 270 NW 82, 109 ALR 429.

16. Disposition of interests of estate

Sole distributee of insured's estate may dispose of his interest in future installments of insurance policy by will. In re Hall (1933) 205 NC 241, 171 SE 61.

Once funds have been paid to insured's estate in accordance with predecessor to 38 USCS § 1950, assignment of any interest in them is valid. Whaley v Jones (1929) 152 SC 328, 149 SE 841, cert den (1929) 280 US 556, 74 L Ed 611, 50 S Ct 16.

17. Escheat

Under predecessor to 38 USCS § 1950, government is not required to pay funds to estate and then seek recovery in probate court on grounds that such funds would escheat, but may deny recovery to estate in first instance. Brown v United States (1933, CA9 Cal) 65 F.2d 65.

Word "residence", as used in predecessor to 38 USCS § 1950, means permanent residence or domicile of insured. Fennell v United States (1933, CA5 Tex) 67 F.2d 768.

Will of insured, who had no relatives, would be construed as designating legatee, where possible, to prevent escheat to United States. Hastings v United States (1943, CA6 Tenn) 133 F.2d 218.

Upon death of intestate insured, who left no heirs under state law, administrator of his estate is not entitled to so much of proceeds as would be sufficient to pay insured's debts and costs and charges of administration as insurance money would escheat to United States. Haley v United States (1942, DC Mont) 46 F Supp 4, vacated on other grounds (1944, CA9 Mont) 145 F.2d 235.

Prohibition against making payments to estate if funds would escheat under predecessor to 38 USCS § 1950 includes such payments which state law requires be transferred from unclaimed estates to state comptroller. In re Hammond's Estate (1958) 3 NY2d 567, 170 NYS2d 505, 147 NE2d 777.

IV. DISTRIBUTIONS FROM ESTATE

18. Generally

Date of death of insured is time at which questions as to who is entitled to estate of insured should be determined under predecessor to 38 USCS § 1950. Singleton v Cheek (1932) 284 US 493, 76 L Ed 419, 52 S Ct 257, 81 ALR 923.

19. Governing law

Distribution of proceeds from estate of insured is controlled by law of his residence. Condon v Mallan (1929, Dist Col App) 58 App DC 371, 30 F.2d 995; Drew v United States (1939, CA6 Tenn) 104 F.2d 938; O'Quin v United States (1928, DC La) 28 F.2d 350, affd (1929, CA5 La) 31 F.2d 756; Sealey v United States (1934, DC Va) 7 F Supp 434; Porter v Watson (1935) 51 Ga App 848, 181 SE 680; Bailey v Norman's Adm'r (1929) 228 Ky 790, 15 SW2d 1005; In re Ryan's Estate (1927) 129 Misc 248, 222 NYS 253, affd (1927) 220 App Div 835, 222 NYS 891; Adams v Jackson (1938) 23 Tenn App 118, 126 SW2d 899.

Construction and validity of purported to pass war risk insurance proceeds are governed by law of state where insured resided at time of death. Sponberg v Lidstrom (1932) 187 Minn 650, 245 NW 636, cert den (1933) 290 US 650, 78 L Ed 564, 54 S Ct 67.
Beneficiary of insurance is to be determined by state intestacy statutes where insured died without dependants or immediate relatives. In re McCormick's Estate (1938) 169 Misc 672, 8 NYS2d 179

20. Taxation

Payments on insurance policy to administrator of insured are not general assets of estate and hence are not subject to state inheritance tax. In re Harris' Estate (1930) 179 Minn 450, 229 NW 781

By virtue of predecessor to 38 USCS § 5301, distributions from estate of insured under predecessor to 38 USCS § 1950 are not subject to state inheritance tax. Tax Com. of Ohio v Rife (1927, Hamilton Co) 27 Ohio App 516, 162 NE 398, affd (1928) 119 Ohio St 83, 6 Ohio L Abs 385, 162 NE 390

§ 1951. Payment of insurance

United States Government life insurance, except as provided in this subchapter [38 USCS §§ 1940 et seq.], shall be payable in two hundred and forty equal monthly installments. When the amount of an individual monthly payment is less than $5, such amount may in the discretion of the Secretary be allowed to accumulate without interest and be disbursed annually.

Prior law and revision:

This section is based on 38 USC § 512 (Act June 7, 1924, ch 320, Title III, § 301 in part, as added March 4, 1925, ch 553, § 13, 43 Stat. 1309; June 2, 1926, ch 449, 44 Stat. 686).

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 751, as 38 USCS § 1951, and substituted "Secretary" for "Administrator".

Cross References

Optional settlements, see 38 USCS § 1952

1. Generally

2. Regulations

3. Interest on past due installments

4. Satisfaction of liens against policies

1. Generally

Rights and interests of beneficiaries are subject to any and all amendments of statutes under which policies were issued. In re Smith's Estate (1931) 141 Misc 651, 253 NYS 825

2. Regulations

Regulation under predecessor to 38 USCS §§ 1940 et seq. providing that payments of installments shall be made to beneficiary last of record until such time as notice of beneficiary change is received protects only payments that have actually been made before receipt of notice. United States v Napoleon (1924, CA5 Fla) 296 F 811

Policy of applying dividends apportioned to policy as payment on existing indebtedness only in instances where amount of such indebtedness exceeded reserve on policy was proper; both loan and lien existing against government life insurance policy were included within term "any indebtedness" which, under Veterans' Administration [now Department of Veterans Affairs] regulations, beneficiary must pay off in cash upon maturity of policy by death if policy was to be paid in monthly installments. 1946 ADVA 731
3. Interest on past due installments

There is nothing in conduct of United States in respect of life and disability insurance from which a agreement on its part to pay interest on past-due installments can be implied. United States v Worley (1930) 281 US 339, 74 L Ed 887, 50 S Ct 291 (superseded by statute as stated in Blue Cross Asso. & Blue Shield Asso. (1989, ASBCA) 89-2 BCA ¶ 21840); Jackson v United States (1930) 281 US 344, 74 L Ed 891, 50 S Ct 294

4. Satisfaction of liens against policies

Administrative practice under relevant regulation and policy provisions of recouping loan indebtedness constituting liens against United States Government Life Insurance policies by reducing each installment of total permanent disability benefits, in proportion indebtedness bears to commuted value of 240 installments certain, results in complete satisfaction of indebtedness after setoff is made from 240th installment; thus, when indebtedness has been fully liquidated through reduction of 240 installments, full installments of deferred annuity at rate of $5.75 for each $1,000 insurance are to be resumed in favor of insured who remains totally permanently disabled. 1959 ADVA 967

§ 1952. Optional settlement

(a) The Secretary may provide in insurance contracts for optional settlements, to be selected by the insured, whereby such insurance may be made payable either in one sum or in installments for thirty-six months or more. A provision may also be included in such contracts authorizing the beneficiary to elect to receive payment of the insurance in installments for thirty-six months or more, but only if the insured has not exercised his right of election as provided in this subchapter [38 USCS §§ 1940 et seq.]. Even though the insured may have exercised the right of election the beneficiary may elect to receive such insurance in installments spread over a greater period of time than that selected by the insured. Notwithstanding any provision to the contrary in any insurance contract, the beneficiary may, in the case of insurance maturing after September 30, 1981, and for which the insured has not exercised the right of election of the insured as provided in this subchapter [38 USCS §§ 1940 et seq.], elect to receive payment of the insurance in one sum.

(b) Under such regulations as the Secretary may promulgate, the cash surrender value of any policy of insurance or the proceeds of an endowment contract which matures by reason of completion of the endowment period may be paid to the insured (1) in equal monthly installments of from thirty-six to two hundred and forty in number, in multiples of twelve; or (2) as a refund life income in monthly installments payable for such periods certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the cash value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of the insured. However, all settlements under option (2) above shall be calculated on the basis of The Annuity Table for 1949. If the option selected requires payment of monthly installments of less than $10, the amount payable shall be paid in such maximum number of monthly installments as are a multiple of twelve as will provide a monthly installment of not less than $10.

(c) (1) Following the death of the insured and in a case not covered by section 1950 of this title [38 USCS § 1950]--
(A) if the first beneficiary otherwise entitled to payment of the insurance does not make a claim for such payment within two years after the death of the insured, payment may be made to another beneficiary designated by the insured, in the order of precedence as designated by the insured, as if the first beneficiary had predeceased the insured; and (B) if, within four years after the death of the insured, no claim has been filed by a person designated by the insured as a beneficiary and the Secretary has not received any notice in writing that any such claim will be made, payment may (notwithstanding any other provision of law) be made to such person as may in the judgment of the Secretary be equitably entitled thereto.

(2) Payment of insurance under paragraph (1) shall be a bar to recovery by any other person.

Prior law and revision:
This section is based on 38 USC § 512 and note (Acts June 7, 1924, ch 320, Title III, § 301 in part, as added March 4, 1925, ch 553, § 13, 43 Stat. 1309; July 3, 1930, ch 863, §§ 1, 2, 46 Stat. 1016).

Amendments:
1981. Act Oct. 17, 1981 (effective on enactment on 10/17/81, as provided by § 701(b)(1) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), inserted the sentence beginning "Notwithstanding any provision to the contrary . . .".
1986. Act Oct. 28, 1986, in subsec. (a), substituted "the" for "his" following "may have exercised".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 752, as 38 USCS § 1952, and substituted "Secretary" for "Administrator".
2003. Act Dec. 16, 2003 (effective 10/1/2004, as provided by § 103(c) of such Act, which appears as 38 USCS § 1917 note) added subsec. (c).

Other provisions:
Effective date of amendments made by Act June 25, 1970. Act June 25, 1970, P. L. 91-291, § 14(a), 84 Stat. 332, provided in part that "these amendments are effective as of the first day of the first calendar month which begins more than 6 calendar months after the date of enactment of this Act [June 25, 1970].".

§ 1953. Assignments

Any person to whom United States Government life insurance shall be payable may assign such person's interest in such insurance to the spouse, child, grandchild, parent, brother, sister, uncle, aunt, nephew, niece, brother-in-law, or sister-in-law of the insured. Insofar as applicable, the definitions contained in section 3 of the World War Veterans' Act, 1924, in effect on December 31, 1958, shall apply to this section.

Prior law and revision:
This section is based on 38 USC 424, 454, 3001(a) (Acts June 7, 1924, ch 320, Title I, §§ 22, 43 Stat 607, 613; March 4, 1925, ch 553, § 1, 43 Stat. 1302; June 17, 1957, P. L. 85-56, Title X, § 1001(a), in part, 71 Stat. 122).

References in text:
“Section 3 of the World War Veterans’ Act, 1924”, referred to in this section, is Act June 7, 1924, ch 320, Title I, § 3, 43 Stat. 607, which was classified to 38 USC § 424, prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(51), 72 Stat. 1271. For similar provisions, see 38 USCS § 101.

Amendments:
1979. Act Nov. 28, 1979 (effective 11/28/79, as provided by § 601(b) of such Act) substituted “such person’s” for “his”.

1. Generally
2. Child
3. Parent
4. Miscellaneous

1. Generally
   Consent decree rendered by state court, which orders proceeds of insurance paid to person other than designated beneficiary, constitutes assignment of proceeds. Robertson v McSpadden (1931, DC Ark) 46 F.2d 702

2. Child
   Word "children" cannot reasonably be limited to minors. Meisner v United States (1924, DC Mo) 295 F 866

3. Parent
   Word "father" does not include illegitimate father. Howard v United States (1924, DC Ky) 2 F.2d 170
   Persons with whom insured, who had no blood relatives, lived for more than two years previous to entering service, being treated as member of family and regarded as their son, stand in loco parentis to insured. Meisner v United States (1924, DC Mo) 295 F 866

4. Miscellaneous
   Assignment of portion of veteran's policy to State of Pennsylvania is not proper since Commonwealth of Pennsylvania is not within permitted class of beneficiaries eligible for assignment. 1940 ADVA 455

§ 1954. Forfeiture

No yearly renewal term insurance or United States Government life insurance shall be payable for death inflicted as a lawful punishment for crime or military offense, except when inflicted by the enemy. In such cases the cash surrender value of United States Government life insurance, if any, on the date of such death shall be paid to the designated beneficiary if living, or if there be no designated beneficiary alive at the death of the insured the said value shall be paid to the estate of the insured.

Prior law and revision:
This section is based on 38 USC § 447 (Act June 7, 1924, ch 320, Title I, § 23 in part, as added March 4, 1925, ch 553, § 3, 43 Stat 1303).
This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:
Amendments:


Cross References

This section is referred to in 38 USCS § 1947

Predecessor to 38 USCS § 1954 bars all rights to statutory benefits without reference to any court-martial proceedings. Smith v United States (1940, DC Mont) 32 F Supp 657

§ 1955. United States Government Life Insurance Fund

(a) All premiums paid on account of United States Government life insurance shall be deposited and covered into the Treasury to the credit of the United States Government Life Insurance Fund and shall be available for the payment of losses, dividends, refunds, and other benefits provided for under such insurance, including such liabilities as shall have been or shall hereafter be reduced to judgment in a district court of the United States or the United States District Court for the District of Columbia, and for the reimbursement of administrative costs under subsection (c). Payments from this fund shall be made upon and in accordance with awards by the Secretary.

(b) The Secretary is authorized to set aside out of the funds so collected such reserve funds as may be required, under accepted actuarial principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is authorized to invest and reinvest the said United States Government Life Insurance Fund, or any part thereof, in interest-bearing obligations of the United States or bonds of the Federal farm-loan banks and to sell said obligations of the United States or the bonds of the Federal farm-loan banks for the purposes of such Fund.

(c) (1) For each fiscal year for which this subsection is in effect, the Secretary shall, from the United States Government Life Insurance Fund, reimburse the "General operating expenses" account of the Department for the amount of administrative costs determined under paragraph (2) for that fiscal year. Such reimbursement shall be made from any surplus earnings for that fiscal year that are available for dividends on such insurance after claims have been paid and actuarially determined reserves have been set aside. However, if the amount of such administrative costs exceeds the amount of such surplus earnings, such reimbursement shall be made only to the extent of such surplus earnings.

(2) The Secretary shall determine the administrative costs to the Department for a fiscal year for which this subsection is in effect which, in the judgment of the Secretary, are properly allocable to the provision of United States Government Life Insurance (and to the provision of any total disability income insurance added to the provision of such insurance).

(3) This subsection shall be in effect only with respect to fiscal year 1996.

Prior law and revision:


This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Explanatory notes:

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 755, as 38 USCS § 1955, and substituted "Secretary" for "Administrator".


Cross References
This section is referred to in 38 USCS §§ 113, 1982
Predecessor to 38 USCS § 1955 does not authorize Administrator [now Secretary] to setoff amounts owed by insured against judgments on war risk policies, and Administrator [now Secretary] must comply with 31 USCS § 227 to collect such setoff. Hines v United States (1939) 70 App DC 206, 105 F.2d 85

§ 1956. Military and naval insurance appropriation
All sums heretofore or hereafter appropriated for the military and naval insurance appropriation and all premiums collected for yearly renewable term insurance deposited and covered into the Treasury to the credit of this appropriation shall be made available to the Department. All premiums that may hereafter be collected for yearly renewable term insurance shall be deposited and covered into the Treasury for the credit of this appropriation. Such sum is made available for the payment of the liabilities of the United States incurred under contracts of yearly renewable term insurance. Payments from this appropriation shall be made upon and in accordance with the awards by the Secretary.

Prior law and revision:
This section is based on 38 USC § 442 and note (Acts June 7, 1924, ch 320, Title I, § 16, 43 Stat. 612; July 3, 1930, ch 863, §§ 1, 2, 46 Stat 1016).
This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 756, as 38 USCS § 1956, and substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".

§ 1957. Extra hazard costs
(a) The United States shall bear the excess mortality and disability cost resulting from the hazards of war on United States Government life insurance.

(b) Whenever benefits under United States Government life insurance become, or have become, payable because of total permanent disability of the insured or because of the death of the insured as a result of disease or injury traceable to the extra hazard of the
military or naval service, as such hazard may be determined by the Secretary, the liability
shall be borne by the United States. In such cases the Secretary shall transfer from the
military and naval insurance appropriation to the United States Government Life
Insurance Fund a sum which, together with the reserve of the policy at the time of
maturity by total permanent disability or death, will equal the then value of such benefits.
When a person receiving total permanent disability benefits under a United States
Government life insurance policy recovers from such disability and is then entitled to
continue a reduced amount of insurance, the Secretary shall transfer to the military and
naval insurance appropriation all of the loss reserve to the credit of such policy claim
except a sum sufficient to set up the then required reserve on the reduced amount of the
insurance that may be continued, which sum shall be retained in the United States
Government Life Insurance Fund for the purpose of such reserve.

(c) Whenever benefits under the total disability provision become, or have become,
payable because of total disability of the insured as a result of disease or injury traceable
to the extra hazard of the military or naval service, as such hazard may be determined by
the Secretary, the liability shall be borne by the United States, and the Secretary shall
transfer from the military and naval insurance appropriation to the United States
Government Life Insurance Fund from time to time any amounts which become or have
become payable to the insured on account of such total disability, and shall transfer from
the United States Government Life Insurance Fund to the military and naval insurance
appropriation the amount of the reserve held on account of the total disability benefit.
When a person receiving such payments on account of total disability recovers from such
disability and is then entitled to continued protection under the total disability provision,
the Secretary shall transfer to the United States Government Life Insurance Fund a sum
sufficient to set up the then required reserve on such total disability benefit.

(d) Any disability for which a waiver was required as a condition to tendering a person a
commission under Public Law 816, Seventy-seventh Congress, shall be deemed to be a
disability resulting from an injury or disease traceable to the extra hazard of military or
naval service for the purpose of applying this section.

Prior law and revision:
This section is based on 38 USC §§ 511, 512(d) and note (Acts June 7, 1924, ch 320, Title III,
§§ 300 in part, 302, 43 Stat. 624; June 7, 1924, ch 320, Title III, § 313, as added Aug. 1,
1946, ch 728, § 15, 60 Stat. 789; July 3, 1930, ch 863, § 2, 46 Stat. 1016); and on 34 USC §
853c-6 (Act Dec. 18, 1942, ch 768, § 2, 56 Stat. 1066).

References in text:
"Public Law 816, Seventy-seventh Congress", referred to in subsec. (d), is Act Dec. 18, 1942,
ch 768, §§ 1, 2, 56 Stat. 1066, which was classified to 34 USC §§ 853c-5 and 853c-6.
Section 1 was repealed by Act July 9, 1952, ch 608, Part VIII, § 803, 66 Stat. 505. Section 2
was omitted in the general revision of titles 10 and 34 by Act Aug. 10, 1956, ch 1041, 70A
Stat. 1.

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 757, as 38 USCS §
1957, and substituted "Secretary" for "Administrator".

§ 1958. Statutory total permanent disability

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the restrictions and terms and conditions of the Matthew Bender Master Agreement.
Without prejudice to any other cause of disability, the permanent loss of the use of both feet, of both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, shall be deemed total permanent disability for insurance purposes. This section shall be deemed to be in effect on and after April 6, 1917, and shall apply only to automatic insurance, yearly renewable term insurance, and United States Government life insurance issued prior to December 15, 1936.

Prior law and revision:
This section is based on 38 USC § 512c (Act June 7, 1924, ch 320, Title III, § 312, as added Aug. 16, 1937, ch 659, § 7, 50 Stat. 661).

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I. IN GENERAL

1. Generally
   Ruling of Administrator [now Secretary] regarding meaning of total permanent disability is not, and manifestly was not intended to be, exact definition of total permanent disability as that phrase is used in policy of war risk insurance, or to be sole guide by which that phrase is to be construed. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272

2. Construction
   In recognition of various meanings inherent in phrase total permanent disability, phrase is to be construed reasonably, with regard for circumstances of each case. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272; United States v Brewer (1937, CA8 Iowa) 87 F.2d 672

   "Total permanent disability" phrase is to be construed reasonably in each case, and any administrative definitions are not to bind the courts. United States v Green (1934, CA8 Mo) 69 F.2d 921

3. Meaning of total permanent disability
   It is not necessary, in order to establish total and permanent disability under insurance policy, to show that insured is bedridden and wholly helpless, and that he has abandoned every possible effort to work. Berry v United States (1941) 312 US 450, 85 L Ed 945, 61 S Ct 637

   Total permanent disability, within meaning of insurance policy, requires something more than incipient or occasional disability. Galloway v United States (1943) 319 US 372, 87 L Ed 1458, 63 S Ct 1077, reh den (1943) 320 US 214, 87 L Ed 1851, 63 S Ct 1443

   Absolute incapacity to work is not essential to recovery on the ground of total permanent disability if there is inability to follow continuously substantially gainful occupation. United States v Sleigh (1929, CA9 Ariz) 31 F.2d 735, cert den (1929) 280 US 559, 74 L Ed 614, 50 S Ct 18; United States v Meserve (1930, CA9 Or) 44 F.2d 549; United States v Rice (1934, CA8 Neb) 72 F.2d 676

   Total and permanent disability means inability to follow continuously substantially gainful occupation and not necessarily occupation in which insured was engaged prior to his service in army and does not require bedridden condition. United States v Rye (1934, CA10 Okla) 70 F.2d 150

   Term "total and permanent disability" does not mean that there must be proof of absolute incapacity to do any work at all, test being whether insured is able to follow continuously some
substantially gainful occupation without material injury to his health. United States v Kane (1934, CA9 Wash) 70 F.2d 396

Test for total permanent disability is whether insured can follow continuously any substantially gainful occupation. Cockrell v United States (1934, CA8 Iowa) 74 F.2d 151; United States v Bodge (1936, CA10 Kan) 85 F.2d 433

Phrase "totally and permanently disabled" has technical meaning quite different from its literal meaning and does not necessarily mean that insured is completely and irretrievably disabled for the rest of his life. Burak v United States (1939, CA9 Wash) 101 F.2d 137, cert den (1939) 308 US 595, 84 L Ed 498, 60 S Ct 126

To recover under permanent total disability clause of war risk insurance, disability must be of such character that it rendered insured incapable of pursuing with reasonable regularity any substantial gainful occupation and based upon conditions which render it reasonably certain that his disability will continue throughout his life. Dixon v United States (1940, CA7 Ill) 113 F.2d 640

4. -Totality of disability

Total disability, within meaning of insurance policy against death or total permanent disability, does not mean helplessness or complete disability, but includes more than that which is partial. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272

Total disability is such as renders it impossible for insured to engage with reasonable regularity in any substantially gainful occupation, and is permanent if reasonably certain to continue through life. Rackoff v United States (1935, CA2 NY) 74 F.2d 720

Recovery cannot be had upon partial disability, though permanent. Hughes v United States (1936, CA10 Okla) 83 F.2d 76; United States v McAlister (1937, CA9 Mont) 88 F.2d 379

5. -Permanence of disability

Permanent disability, for purposes of phrase total permanent disability, means that which is continuing as opposed to that which is temporary. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272

Disability is permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout life of person suffering from it. United States v Kane (1934, CA9 Wash) 70 F.2d 396

Permanent disability means that which is continuing as opposed to that which is temporary, and separate and distinct periods of temporary disability do not constitute that which is permanent. United States v Middleton (1936, CA6 Tenn) 81 F.2d 205

II. RIGHT TO RECOVERY OF DISABILITY BENEFITS

6. Generally

Veteran cannot recover on his policy of war risk insurance unless he becomes totally disabled before its lapse and thereafter remains in that condition. United States v Spaulding (1935) 293 US 498, 79 L Ed 617, 55 S Ct 273, reh den (1935) 294 US 731, 79 L Ed 1261, 55 S Ct 504; United States v White (1931, CA9 Cal) 48 F.2d 584

Provisions of predecessor to 38 USCS §§ 1941 et seq. as amended, are sufficiently comprehensive to authorize its administrators to grant insurance covering past total permanent disability if such action is found necessary to carry out its plan and purpose. United States v Patryas (1938) 303 US 341, 82 L Ed 883, 58 S Ct 551

Under benefit payment provisions of government and life insurance policies, insured secures matured claim at moment of total and permanent disability. United States v Garland (1941, CA4 Va) 122 F.2d 118, 136 ALR 918, cert den (1941) 314 US 685, 86 L Ed 548, 62 S Ct 189

Disability insurance benefits, to which veteran is entitled as permanently and totally disabled, withheld at insured's request continue to accrue in favor of insured until determination is made that insured has recovered; finding of recovery does not alter legal effect of earlier determination.
of total permanent disability which was correct when made and not procured by fraud, and thus insured who was found to have recovered remains entitled to all contractual benefits which had accrued during period prior to recovery when he was deemed totally permanently disabled.

1960 ADVA 969

7. Construction of policy terms
   Insured making claim for total permanent disability is entitled to have policy terms liberally construed in his favor. United States v Cox (1928, CA5 Tex) 24 F.2d 944

8. Regulations
   Regulation of Veterans’ Bureau [now Department of Veterans Affairs] which permits recovery under total permanent disability clause of policy where insured had been employed for 18 months was invalid. Nordberg v United States (1931, DC Mont) 51 F.2d 271

9. Retroactive benefits
   Insured’s right to back benefits for period 6 months prior to proof of disability is dependent upon his offering such proof. United States v Meyer (1935, CA3 NJ) 76 F.2d 354

10. Cause of disability
    Insurance policy covers any permanent total disability that occurs while such insurance is in force, rendering cause of disability irrelevant to insured’s right of recovery. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272

    Fact that disability is due primarily to congenital defects is immaterial under insurance policy if disability occurs while insurance is in force, since disability benefits under such insurance are not limited to disabilities caused by war service. Miller v United States (1935) 294 US 435, 79 L Ed 497, 55 S Ct 440, reh den (1935) 294 US 734, 79 L Ed 1262, 55 S Ct 635

    Self-inflicted disabilities are not covered, and negligent disregard of one’s conduct with knowledge that it may be harmful to him puts him in no better position. United States v Steadman (1934, CA10 Utah) 73 F.2d 706

11. Failure to accept treatment
    Insured, who failed to take medical treatment which would have prevented total and permanent disability, is not entitled to recover on policy. United States v Galloway (1933, CA4 SC) 62 F.2d 1057

    Insured cannot rely on total and permanent disability by neglecting advice of physician to submit himself to treatment where disability is susceptible to such treatment. Prevette v United States (1934, CA4 NC) 68 F.2d 112, cert den (1934) 292 US 622, 78 L Ed 1478, 54 S Ct 633

    Claimant’s negligence in not availing himself of treatment until disease had progressed beyond curable stage precludes his recovery under total permanent disability clause of policy. Puckett v United States (1934, CA5 Ga) 70 F.2d 895, cert den (1934) 293 US 555, 79 L Ed 657, 55 S Ct 99

    Insured who was not disabled at his discharge and left hospital where he was sent for treatment without authority of hospital officials, and continued to refuse to accept hospitalization, may not recover on his insurance even if it were found that proof of disability was otherwise sufficient. United States v Horn (1934, CA4 W Va) 73 F.2d 770

    Insured’s refusal to accept treatment for his disease bars recovery under total permanent disability clause of war risk insurance policy. Theberge v United States (1937, CA2 Vt) 87 F.2d 697

12. Disability after lapse of policy
    Fact that insured died of tuberculosis 6 years after he permitted his policy to lapse by nonpayment of premiums does not establish total and permanent disability at time of such lapse. United States v Stack (1933, CA4 SC) 62 F.2d 1056
Insured can not sustain his claim by showing that condition alleged as permanent might have arisen while his policy was in force, but must show that it did. United States v Sandifer (1935, CA5 La) 76 F.2d 551

Government is not liable on insurance policy for total permanent disability occurring subsequent to its lapse, although total and permanent disability was caused by conditions which arose or existed while policy was in force. Hoskins v United States (1938, CA5 Miss) 100 F.2d 343

Fact that incipient pulmonary tuberculosis became incurable subsequent to lapse of policy does not establish right to recover on policy. Smith v United States (1933, DC Ky) 5 F Supp 475

13. Determination of disability claim

Whether claimed disability is "total permanent" and was such during life of contract are questions of fact and their initial determination is for Veterans' Bureau [now Department of Veterans Affairs]. United States v Green (1934, CA8 Mo) 69 F.2d 921

Under predecessor to 38 USCS §§ 1941 et seq. director of Veterans' Bureau [now Department of Veterans Affairs] has authority to review awards based upon finding of permanent disability and to terminate them when he finds that disability has ceased. United States ex rel. Wilkinson v Hines (1934, Dist Col App) 64 App DC 5, 73 F.2d 514

14. Disability compensation rating

Rating sheet of Veterans' Bureau [now Department of Veterans Affairs] is not conclusive on issue of total and permanent disability. United States v Riley (1931, CA9 Cal) 48 F.2d 203

Certificate of medical board finding only partial disability is not conclusive on that issue. Storey v United States (1932, CA10 Kan) 60 F.2d 484

Rating of permanent and total disability for insurance purposes will have no effect on compensation and vice versa. Miller v United States (1934, CA5 Ga) 71 F.2d 361, affd (1935) 294 US 435, 79 L Ed 977, 55 S Ct 734, 79 L Ed 1262, 55 S Ct 635

Mere fact that government has awarded soldier disability compensation proves nothing in suit on war risk insurance, as latter depends entirely upon contractual rights of respective parties. United States v Matory (1934, CA7 Ill) 71 F.2d 798

There are no compensable degrees of disability under insurance policy, making rating for disability compensation irrelevant to insured's right to recover on policy. Warren v United States (1930, DC Idaho) 42 F.2d 755

15. Discharge for disability

Insured has burden of proving total and permanent disability, and the mere fact that insured was discharged from service on account of rheumatism does not establish right to recover for such disability. Blair v United States (1931, CA8 Ark) 47 F.2d 109

Though insured was discharged on account of pulmonary tuberculosis, he can not be regarded as totally and permanently disabled where he worked thereafter with reasonable regularity at substantially gainful occupations. United States v Diehl (1932, CA4 W Va) 62 F.2d 343

Soldier discharged as physically unfit for military service is entitled to recover on policy on ground of permanent total disability. Marsh v United States (1929, DC Ark) 33 F.2d 554

16. Previous statements as to disability

Insured is estopped to set up total disability by his contrary representation made as condition precedent to reinstatement of his policy under predecessor to 38 USCS § 1959. Wills v United States (1925, DC Mont) 7 F.2d 137

Averment by insured in her application for reinstatement that she was not then totally disabled did not estop her from claiming total disability prior to reinstatement in subsequent suit. Dobbie v United States (1927, DC Tex) 19 F.2d 656

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17. Delay in bringing suit on policy

Long delay before bringing suit is strong indication that insured was not disabled during delay. United States v Nickle (1934, CA8 Mo) 70 F.2d 873

Delay in bringing suit is circumstance to be weighed by trier of facts. United States v Wilson (1935, CA10 Kan) 78 F.2d 465

Long delay in bringing suit suggests insured did not believe he was disabled while policy was in force. United States v West (1935, CA10 Kan) 78 F.2d 785; Hughes v United States (1936, CA10 Okla) 83 F.2d 76

Insured's mental incapacity is factor for consideration in determining effect of his long delay in filing suit for total permanent disability. Plocher v United States (1937, CA6 Ohio) 87 F.2d 860

Failure of insured to file claim on his policy or long delay in instituting suit and is not conclusive against right of plaintiff to recover on policy, but is circumstance for consideration of jury under appropriate instructions. Drew v United States (1939, CA6 Tenn) 104 F.2d 939

18. Receipt of training

Professional training, such as dentistry, subsequent to alleged total permanent disability, is inconsistent with claim of such disability, since insured's inability to continuously engage in gainful occupation forms basis of claim. United States v Fain (1939, CA8 Ark) 103 F.2d 161

19. Vocational training

Fact that insured received vocational training does not preclude his recovery under permanent total disability clause of war risk insurance policy. United States v Nickle (1934, CA8 Mo) 70 F.2d 873

Fact that insured received some vocational training after discharge from service does not preclude his recovery for total permanent disability, but is circumstance for jury to consider under appropriate instructions. Drew v United States (1939, CA6 Tenn) 104 F.2d 939

III. ABILITY TO WORK

20. Generally

Total and permanent disability, as that phrase is used in insurance policy, does not require that insured be absolutely incapable of performing any work. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272; Berry v United States (1941) 312 US 450, 85 L Ed 945, 61 S Ct 637

Ability to work negativing permanent and total disability must be constant ability. Ross v United States (1931, CA5 Tex) 49 F.2d 541

Fact that insured did little work after incurring disability is not conclusive of his inability to do so. United States v Weeks (1933, CA8 Ark) 62 F.2d 1030

Mere fact of insured's working for relatively long periods of time is not conclusive against him, and mere fact of his not working is not conclusive of his disability. United States v Suomy (1934, CA9 Or) 70 F.2d 542

Work record may have effect of negativing claim of total and permanent disability, but veteran has right to negative effect of work record by evidence that performance of work impaired his health. Corrigan v United States (1936, CA9 Idaho) 82 F.2d 106

Nature of work done by insured, conditions under which it was done, and its effect upon insured's life are elements to be considered in determining whether he was totally and permanently disabled before policy lapsed. Robinson v United States (1937, CA2 NY) 87 F.2d 343

Fact that insured did not carry on substantially gainful occupation after onset of disability is strong evidence of inability, but not conclusive of his right to recover on policy. Dupuis v United States (1933, DC Mass) 4 F Supp 675
21. Ability to pursue former occupation

Injury or disease sufficient merely to prevent one from again doing some work of kind he had been accustomed to perform cannot be said to constitute total permanent disability contemplated by insurance policies. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272

Mere fact that insured is unable to follow his former occupation or to do work of kind he was accustomed to perform before his injury does not establish permanent and total character of his disability under war risk policy. Miller v United States (1935) 294 US 435, 79 L Ed 977, 55 S Ct 440, reh den (1935) 294 US 734, 79 L Ed 1262, 55 S Ct 635

Insured, who had meager education and had been farmer prior to disability, is totally and permanently disabled notwithstanding that he is physically able to perform light clerical work. United States v Rasar (1930, CA9 Wash) 45 F.2d 545

If insured is able follow some gainful occupation continuously, he cannot be said to be totally and permanently disabled, though he is unable to follow his prewar occupation. United States v Thomas (1931, CA4 SC) 53 F.2d 192

Fact that insured suffered from tuberculosis does not establish total and permanent disability where he continued his regular employment. Long v United States (1932, CA4 SC) 59 F.2d 602

Insured is not totally and permanently disabled where he could perform clerical duties satisfactorily without injury to himself, though he was unable to perform other kinds of work. United States v Donahue (1933, CA8 Minn) 66 F.2d 838

Veteran cannot be considered as totally and permanently disabled, though he is unable to follow same occupation in which he engaged prior to his entry into service, where he is able to follow continuously lighter or less strenuous work which is substantially gainful in character. United States v Derrick (1934, CA10 Okla) 70 F.2d 162

22. Aptitude for particular work

Insured's failure at attempt to obtain employment, which is due to his inaptitude for particular work rather than his disability, does not establish his right to recover under policy where insured had not made reasonable attempt to adopt himself to suitable employment, although he had means to do so. Miller v United States (1935) 294 US 435, 79 L Ed 977, 55 S Ct 440, reh den (1935) 294 US 734, 79 L Ed 1262, 55 S Ct 635

Doing of some work by insured, for which he was not fitted, cannot be considered "substantially gainful occupation." United States v Perry (1932, CA8 Ark) 55 F.2d 819

Inability of insured to follow occupation to which he is not adaptable does not establish total and permanent disability and there must be some disease bringing about the disability. Freeman v United States (1931, DC Ky) 48 F.2d 233

23. Performance of work at risk to health

Disability does not cease to be total because of insured's intermittent occupational or business activities, where activities are engaged in, without exercise of ordinary care or prudence, at risk of substantially aggravating ailment with which insured is afflicted. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272

If work impairs health of insured and accelerates his disease, it can not be said that he is able to carry on gainful occupation. Robinson v United States (1937, CA2 NY) 87 F.2d 343

Total and permanent disability is not proven where insured could work without risk of harm to himself in occupations not calling for heavy physical exertion. Hill v United States (1939, CA2 Vt) 104 F.2d 159

24. Performance of work resulting in pain or discomfort

Veteran's disability is not made total by fact that any work he might undertake is attended with discomfort, pain, and occasional illnesses, resulting in temporary interruption, as long as work does not involve risk of seriously impairing his health or aggravating ailments from which he suffers. United States v Burns (1934, CA5 Fla) 69 F.2d 636
Administrative definitions of total permanent disability are not binding on federal courts. United States v Green (1934, CA8 Mo) 69 F.2d 921

Efforts of claimants suffering from incipient tuberculosis to do reasonable amount of work in belief that their affliction is merely temporary ought not to be weighed against them. United States v Monger (1934, CA10 Wyo) 70 F.2d 361

Departmental definition of total and permanent disability is not sole and legal test of total and permanent disability. United States v Stephens (1934, CA9 Idaho) 73 F.2d 695

Fact that work always causes pain is not proof of total disability. United States v Deal (1936, CA9 Or) 82 F.2d 929

25. Continuous or regular employment

Fact that insured had been employed in various callings for several years after his discharge from army precludes finding of total and permanent disability. United States v Rice (1931, CA9 Or) 47 F.2d 749

Steady, continuous, profitable employment refutes any claim of total and permanent disability during the time of such employment. United States v Wilson (1931, CA4 SC) 50 F.2d 1063; United States v Seattle Title Trust Co. (1931, CA9 Wash) 53 F.2d 435; United States v Kerr (1932, CA9 Or) 61 F.2d 800; Craneshaw v United States (1933, CA1 Mass) 65 F.2d 649; Eberle v United States (1933, CA7 Ind) 66 F.2d 72; United States v Alvord (1933, CA1 Mass) 66 F.2d 455, cert den (1934) 291 US 661, 78 L Ed 1053, 54 S Ct 376; United States v Ingalls (1933, CA10 NM) 67 F.2d 593; United States v Timmons (1934, CA5 Fla) 68 F.2d 654; Tracy v United States (1934, CA2 Conn) 68 F.2d 834; Young v United States (1935, CA7 Ill) 75 F.2d 819

Evidence showing that insured received salary from private and public employment since shortly after his discharge from the army precludes claim of total disability arising from loss of arm. Parker v United States (1933, CA4 NC) 62 F.2d 1055

Fact that insured was continuously employed at full time wages precludes recovery under war risk policy for total permanent disability. Dukes v United States (1933, CA4 NC) 66 F.2d 73; United States v Younger (1933, CA4 NC) 67 F.2d 149

Total disability which is not continuous, and which does not prevent engagement in gainful occupation for substantial periods, does not warrant recovery on war risk policy. United States v Gwin (1933, CA6 Ky) 68 F.2d 124

Insured with work record showing substantial continuity of employment is not totally and permanently disabled, regardless of allegation that such employment was offered to him out of pity and sympathy. United States v Vineyard (1934, CA5 Ga) 71 F.2d 624, cert den (1934) 293 US 614, 79 L Ed 703, 55 S Ct 141

Fact that, subsequent to his discharge, insured enlisted in national guard and worked with reasonable regularity precludes recovery under policy for total permanent disability. United States v Sears (1935, CA4 NC) 75 F.2d 194

Record of remunerative work performed by veteran after time he claims to have become totally and permanently disabled is irreconcilable with finding of such disability. United States v Becker (1936, CA7 Ind) 86 F.2d 818

Plaintiff in suit on insurance policy who performed manual labor more or less regularly, although suffering from chores or St. Vitus dance, is precluded from recovering for total permanent disability where his condition at time of trial was in no respect different from that at time of his discharge from army as one-half disabled. United States v Sawler (1939, CA1 Mass) 104 F.2d 757

Total disability may exist if insured cannot engage continuously in some occupation, though it is not impossible for him to do some work. O’Hora v United States (1931, DC Pa) 49 F.2d 945

26. Intermittent or temporary employment
Mere fact that insured did some work does not preclude finding of total permanent disability, where other evidence clearly shows disability. Fladeland v United States (1931, CA9 Wash) 53 F.2d 17; United States v Ingle (1931, CA9 Or) 53 F.2d 52; United States v Martin (1931, CA5 Tex) 54 F.2d 554, cert den (1932) 286 US 546, 76 L Ed 1282, 52 S Ct 497; United States v Crume (1931, CA5 Tex) 54 F.2d 556; Green v United States (1932, CA8 Mo) 57 F.2d 9; Smith v United States (1934, DC W Va) 9 F Supp 32

Insured who was able to work only spasmodically, with frequent interruptions or change of employment made necessary by his physical or mental condition, cannot be said to be able to work with substantial continuity. United States v Fitzpatrick (1933, CA10 Okla) 62 F.2d 562

Total permanent disability may be established notwithstanding fact that insured was spasmodically employed. United States v Thomson (1934, CA10 NM) 71 F.2d 860

Although insured occasionally worked at various jobs, he may be found to be suffering total and permanent disability where there was constant ill health. United States v Linde (1934, CA10 Kan) 71 F.2d 925

Veteran with serious and incurable ailment, aggravated by work of any kind, is totally and permanently disabled although he may be gainfully employed for time. United States v Brown (1934, CA10 Utah) 72 F.2d 608

Fact that insured worked spasmodically out of necessity, which work aggravated his condition, does not preclude finding that insured is totally and permanently disabled for purposes of obtaining benefits under his war risk policy. United States v Higbee (1934, CA10 Utah) 72 F.2d 773

Insured's consistent attempts to obtain employment do not preclude his recovery under total permanent disability clause of policy, where each such attempt was terminated due to physical condition forming basis for recovery. United States v Worsley (1934, CA10 Utah) 72 F.2d 776

Employment for limited periods does not defeat recovery, if disability would prevent insured from continuously following substantially gainful occupation. United States v Sanford (1934, CA5 Ga) 73 F.2d 233

Fact that insured worked, though only for short periods, after lapse of policy, precludes finding that insured was permanently and totally disabled before such time. United States v Driscoll (1935, CA7 Ind) 80 F.2d 59, cert den (1936) 297 US 719, 80 L Ed 1004, 56 S Ct 599

Temporary or spasmodic periods of work do not necessarily negative total and permanent disability. United States v Protsch (1943, CA10 Kan) 137 F.2d 92

Fact that insured actually worked when he was physically unable to do so, or worked spasmodically or for short periods, does not negative total and permanent disability. Burgoyne v United States (1932, Dist Col App) 61 App DC 97, 57 F.2d 764

27. Temporary absences

Disability which prevents insured from following "continuously" any substantially gainful occupation does not embrace mere periods of temporary illness incident to all people of normal health, and it is sufficient to prevent recovery that insured works with reasonable regularity. United States v Peet (1932, CA10 Kan) 59 F.2d 728

Veteran who, over period of eight years, was unable to work for periods aggregating only one year, cannot recover for total permanent disability. Russian v United States (1937, CA3 Pa) 87 F.2d 895, cert den (1937) 301 US 689, 81 L Ed 1346, 57 S Ct 796

28. Voluntary termination of employment

Fact that insured voluntarily quit job, complaining of its difficulty and presence of smoke at work site, does not establish that he is unable to continuously follow any gainful occupation. United States v Hill (1932, CA9 Or) 61 F.2d 651

29. Amount of earnings
Evidence that insured, during ten years following his discharge from army, earned $10,000 as collector negatives total and permanent disability, though during that period he received hospital treatment for several months. United States v Perry (1932, CA8 Ark) 55 F.2d 819

Insured's written statement that he had been employed at $80 per month just prior to filing claim does not, by itself, preclude recovery for total permanent disability alleged to result from active tuberculosis contracted during military service. Meyer v United States (1933, CA5 La) 65 F.2d 509

Insured may be found to be totally and permanently disabled despite fact that he had occupied two nominal jobs. United States v Sessin (1936, CA10 Kan) 84 F.2d 667

Insured maybe totally and permanently disabled even though he earned some money, where his physical condition disabled him from continuously following gainful occupation. Anderson v United States (1930, DC Pa) 50 F.2d 268

30. Miscellaneous

Fact that insured engaged in farming and bought interest in mill from his savings does not preclude his recovery for total and permanent disability under war risk policy, where insured's efforts were successful only because his relatives performed all necessary work. United States v Strawbridge (1944, CA5 Miss) 139 F.2d 1014, cert den (1944) 321 US 797, 88 L Ed 1085, 64 S Ct 937

Insured is not totally and permanently disabled where evidence showed that he was capable of performing work of blacksmith, and actually worked as such for eighteen months. Nordberg v United States (1931, DC Mont) 51 F.2d 271

Insured who was employed as state ranger for several months, and who engaged in other employment, cannot be found to have been permanently and totally disabled prior to such employment. Putney v United States (1933, DC Colo) 4 F Supp 376

IV. PARTICULAR INFIRMITIES AS DISABLING

31. Arthritis

Existence of progressive arthritis does not establish that insured was totally and permanently disabled at date of lapse of policy. Edwards v United States (1931, DC Mass) 2 F Supp 49

32. Diabetes

Since diabetes responds to treatment, evidence of existence of such disease does not by itself, support finding of total and permanent disability. United States v Elmore (1934, CA5 Fla) 68 F.2d 551

33. Epilepsy

Although insured suffers from grand mal epilepsy at time of suit and there is evidence that he was suffering from same disease at time his policy lapsed, uncontradicted evidence that insured worked for several of intervening years earning substantial amounts precludes him from recovering. United States v Carper (1935, CA4 W Va) 75 F.2d 191

Fact that insured suffered from fainting spells having characteristics of epilepsy is insufficient to allow recovery for total permanent disability. Birdsell v United States (1933, DC Colo) 4 F Supp 140

Veteran subject to epileptic convulsions is permanently and totally disabled, though he had worked occasionally some and delayed in bringing suit. Sutphin v United States (1936, DC Ky) 15 F Supp 660

34. Eyesight

In view of regulation defining total and permanent disability, loss of sight in one eye is insufficient to support finding of total permanent disability where evidence of ability to work was conflicting. United States v Crain (1933, CA7 Ill) 63 F.2d 528
Evidence that insured worked as teamster and painter until his induction into service, and that for several months thereafter he discharged his military duties, precludes finding he was totally and permanently disabled because of blindness when his policy was issued one week after induction. Mason v United States (1934, CA8 Mo) 75 F.2d 54

Evidence that veteran suffered from amblyopia is sufficient to justify finding of total permanent disability. United States v Harless (1935, CA4 W Va) 76 F.2d 317

Insured’s loss of eyesight is sufficient to support finding of total permanent disability where such loss prevents him from continuously following any substantially gainful occupation. Sheridan v United States (1944, DC NJ) 55 F Supp 996

35. Hearing
Veteran who lost his natural hearing is totally and permanently disabled within valid provision of war risk insurance, though he might get relief by use of ear phones which he could not afford to purchase. United States v Atkinson (1935, CA5 Tex) 76 F.2d 564, affd (1936) 297 US 157, 80 L Ed 555, 56 S Ct 391

Evidence that veteran suffered from partial deafness and loss of equilibrium as result of being struck on head may establish total and permanent disability, but does not sustain burden of proving injury occurred after he had applied for insurance. United States v Mathis (1936, CA10 Kan) 84 F.2d 451

36. Heart disorder
Though insured is permanently disabled on account of valvular heart leak, such fact does not show that disability is total. Gregory v United States (1932, CA4 W Va) 62 F.2d 345

37. Hernia
Fact that insured was weakened as result of operation and suffered from hernia does not establish total and permanent disability. United States v Ellis (1932, CA4 SC) 62 F.2d 348

Fact that no corporation would hire man with potential hernia is no test in determining total and permanent disability of man so affected. United States v Matory (1934, CA7 Ill) 71 F.2d 798

38. Loss of limbs
Insured is not totally and permanently disabled by amputation of leg resulting from accidental gunshot wound, where he actually engaged in gainful occupation after injury. United States v Mayfield (1933, CA10 Okla) 64 F.2d 214

Loss of leg from battle wound does not result in total permanent disability under war risk policy, where record disclosed that insured subsequently engaged in continuous employment at substantial wages. United States v Harris (1933, CA4 NC) 66 F.2d 71

Loss of arm prior to lapse of policy does not show total and permanent disability where insured was not thereby prevented from securing employment. Bridges v United States (1933, CA5 Ga) 67 F.2d 320

Loss of one leg or one arm is not generally sufficient to constitute total disability, however permanent such partial disability may be. United States v Adcock (1934, CA6 Tenn) 69 F.2d 959

Whether loss of one leg constitutes total and permanent disability must be determined in each case. United States v Rice (1934, CA8 Neb) 72 F.2d 676

Mere fact that veteran lost leg does not establish that he is totally and permanently disabled. United States v Tarrer (1935, CA5 Ga) 77 F.2d 423, cert den (1935) 296 US 574, 80 L Ed 405, 56 S Ct 125

Fact that insured has lost his right arm is not conclusive that he is unable to follow some gainful occupation. Hobin v United States (1932, DC Mass) 59 F.2d 224

Veteran with right leg amputated and bayonet wound in left leg is not totally and permanently disabled. Norton v United States (1933, DC Pa) 10 F Supp 446
39. Meningitis

Evidence of spinal meningitis is insufficient to raise question for jury as to total and permanent disability. United States v Tucker (1933, CA4 SC) 65 F.2d 661

Veteran who contracted spinal meningitis while in service, but is able to do light work without aggravating his condition, did not sustain burden of proving total and permanent disability before lapse of policy. Hughes v United States (1936, CA10 Okla) 83 F.2d 76

40. Mental illness

Soldier discharged as mentally deranged and one-half disabled is to be regarded as totally disabled for purposes of policy claim. United States v Cox (1928, CA5 Tex) 24 F.2d 944

Insured may be totally and permanently disabled on account of neurotic condition, without proving absolute incapacity to do any work, and unsuccessful efforts to work do not rebut testimony as to disability. United States v Fulkerson (1933, CA9 Wash) 67 F.2d 288

Recovery on policy is proper where insured was insane at time of his discharge from army and was thereafter unable to continuously follow any gainful occupation. United States v Kelly (1934, CA5 Ga) 68 F.2d 312

Testimony showing that insured was totally disabled by insanity does not establish that condition is permanent. United States v Kiles (1934, CA8 Mo) 70 F.2d 880

Evidence that veteran was discharged from army after nervous breakdown and worked intermittently for 13 years before bringing suit is insufficient to show that he was totally and permanently disabled. United States v Hodges (1935, CA6 Tenn) 74 F.2d 617

Veteran with paralysis agitans is not permanently disabled. Ellison v United States (1935, CA10 Kan) 76 F.2d 868

Whether veteran suffering from general paralysis of insane was totally and permanently disabled was for jury. Muth v United States (1935, CA4 Md) 78 F.2d 525

Veteran with neurocirculatory asthenia, but with substantial work record, is not totally and permanently disabled. United States v Derrick (1936, CA4 SC) 83 F.2d 99

Veteran suffering from pronounced type of catatonic dementia praecox may be totally and permanently disabled even though he had work record. Plocher v United States (1937, CA6 Ohio) 87 F.2d 860

Mentally defective veteran who suffers from paranoia as result of severe alcoholism is not entitled to benefits under total permanent disability clause of policy, where he remains physically able to perform many types of manual labor. Marinelli v United States (1939, CA1 RI) 101 F.2d 192

Disability may result as well from condition of mind and nerves as from other causes, and where man is so inattentive or forgetful as result of mental disorder that he cannot be trusted to carry on even simple forms of work, he is as truly disabled from earning livelihood as one who must refrain from work on account of condition of his vital organs. United States v Taylor (1940, CA4 NC) 110 F.2d 132

Instance or two of hysteria or uncontrolled emotion during period of tension is not proof of total permanent disability by reason of insanity. Galloway v United States (1942, CA9 Cal) 130 F.2d 467, affd (1943) 319 US 372, 87 L Ed 1458, 63 S Ct 1077, reh den (1943) 320 US 214, 87 L Ed 1851, 63 S Ct 1443

Government cannot defend against insured's claim of total disability because of his mental state by contending that he had same disability at time he entered service, where insured was examined and accepted and served in navy approximately a year without objection, until he was struck by shell fragment, after which he was placed in hospital and discharged from service. Jagodnigg v United States (1924, DC Mo) 295 F 916

Fact that insured possessed constitutional psychopathic inferiority at time of his enlistment which rendered him unable to withstand harrowing experiences of war, may render him totally
41. **Multiple sclerosis**

Fact that insured suffered from multiple sclerosis is insufficient to show that insured was totally and permanently disabled at time of lapse of his policy, since disease had not incapacitated him from work. Wilks v United States (1933, CA NY) 65 F.2d 775

42. **Nephritis**

Veteran with nephritis is totally and permanently disabled. United States v Brewer (1937, CA8 Iowa) 87 F.2d 672

Insured who received hospital and medical treatment for nephritis and did some work after his discharge from hospital is totally and permanently disabled in view of testimony that he was not fit for work and that he suffered from uremic fits and almost total blindness. Knight v United States (1930, DC Me) 45 F.2d 202

43. **Permanent injury to limbs or other bodily parts**

Shortening of leg is not necessarily total disability. United States v Weeks (1933, CA8 Ark) 62 F.2d 1030

Mere fact that insured suffered injury to his ankle and was thrown down and rendered unconscious by shell explosion is insufficient in itself to show that total and permanent disability resulted therefrom and existed at time of lapse of policy. United States v Lumbra (1933, CA2 Vt) 63 F.2d 796, affd (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272

Fact that insured was wounded in shoulder by shell fragment does not establish total permanent disability where insured enjoyed almost continuous employment after his discharge. United States v Clement (1933, CA1 NH) 67 F.2d 150

In view of evidence and long delay in bringing suit, claimant failed to sustain burden of proving total and permanent disability resulting from leg wound. United States v Vineyard (1934, CA5 Ga) 71 F.2d 624, cert den (1934) 293 US 614, 79 L Ed 703, 55 S Ct 141

Fact that veteran was incapacitated from performing heavy manual labor by reason of injury to one foot is insufficient to establish total and permanent disability. United States v Haywood (1934, CA5 Ala) 73 F.2d 378

Mere fact that veteran, who had fifth or sixth grade education, sustained severe injury to his left arm does not establish that he was totally and permanently disabled before his discharge. United States v McAlister (1937, CA9 Mont) 88 F.2d 379

Mere fact that veteran incurred permanent injury to one foot does not sustain burden of proving total and permanent disability before lapse of policy. United States v Peet (1937, CA10 Kan) 88 F.2d 597

Insured's injury to neck, requiring wearing of brace, is sufficient to support recovery where injury rendered it impossible for insured to carry on continuously any substantially gainful occupation. Slocum v United States (1932, DC Mass) 2 F Supp 8

44. **Respiratory disease**

Evidence of asthma is insufficient to go to jury on issue of total and permanent disability. United States v Hainer (1932, CA9 Or) 61 F.2d 581

Mere fact that insured suffered from chronic bronchitis does not establish that such condition it produced total disability. United States v Cline (1932, CA4 W Va) 62 F.2d 346; United States v Jones (1932, CA4 NC) 62 F.2d 347

Fact that insured had pneumonia in camp and was slightly gassed in action does not establish total permanent disability where he followed substantially gainful occupation during time of his alleged disability. United States v Perkins (1933, CA10 Okla) 64 F.2d 243
Insured may be totally and permanently disabled by chronic bronchitis and potential tuberculosis. United States v Polley (1933, CA7 Ind) 67 F.2d 598

Veteran with bronchial asthma is not totally and permanently disabled, in view of work record and delay in bringing suit. United States v Smith (1935, CA4 Va) 76 F.2d 850

Incipient tuberculosis and bronchitis and asthma, even if contracted in service, do not establish total and permanent disability. United States v Bishop (1937, CA6 Tenn) 90 F.2d 65

If either pleurisy or tuberculosis has reached its chronic stage, although arrested, and in its course has destroyed either lung or pleura membrane to such extent as to permanently impair insured's body to degree that he can not continuously follow any gainful occupations without physical harm, it has permanently and totally disabled him. Drew v United States (1939, CA6 Tenn) 104 F.2d 939

45. -Tuberculosis

Showing that veteran is afflicted with active pulmonary tuberculosis is sufficient to support recovery on war risk policy. United States v Sligh (1929, CA9 Ariz) 31 F.2d 735, cert den (1929) 280 US 559, 74 L Ed 614, 50 S Ct 18

Since absolute incapacity to do any work is not test for recovery on policy, evidence showing tuberculosis of lungs presents question for jury as to whether total and permanent disability existed at time policy lapsed. McNally v United States (1931, CA8 Minn) 52 F.2d 440

Existence of tuberculosis does not necessarily show total and permanent disability, such question being one of fact for jury. Edwards v United States (1931, CA4 SC) 53 F.2d 622

Total and permanent disability is not shown by evidence that insured had tuberculosis, in absence of showing that disease could not be arrested. Garrison v United States (1932, CA4 SC) 62 F.2d 41; Andrews v United States (1933, CA8 Ark) 63 F.2d 184; United States v Harrell (1933, CA10 Okla) 66 F.2d 231; United States v Schroeder (1935, CA7 Ind) 77 F.2d 173; United States v Bryan (1936, CA5 La) 82 F.2d 784; United States v Atkison (1936, CA5 Miss) 84 F.2d 968; Robinson v United States (1937, CA2 NY) 87 F.2d 343; Parrigan v United States (1933, DC Ky) 6 F Supp 333

Tuberculosis in arrested state is insufficient ground for recovery under permanent total disability clause of insurance policy. United States v Rosborough (1932, CA4 SC) 62 F.2d 348; Huffman v United States (1934, CA4 Va) 70 F.2d 266; United States v Lancaster (1934, CA4 NC) 70 F.2d 515; Burbage v United States (1935, CA5 Ga) 80 F.2d 683; United States v Murray (1936, CA3 Pa) 81 F.2d 743

While incipient tuberculosis may not necessarily render one totally and permanently disabled, evidence of disease presents question for jury as to whether such disability existed at time of lapse of policy. United States v Thomas (1933, CA10 Utah) 64 F.2d 245

To warrant recovery on policy on ground of total and permanent disability at time policy lapsed, incipient tuberculosis must be reasonably certain to become permanent. Falbo v United States (1933, CA9 Idaho) 64 F.2d 948, affd (1934) 291 US 646, 78 L Ed 1042, 54 S Ct 456

Mere fact that insured had pulmonary tuberculosis at time his policy lapsed is insufficient to establish total permanent disability so as to allow recovery under policy. Ivey v United States (1933, CA4 NC) 67 F.2d 204

Mere proof of active tuberculosis and death resulting therefrom, without evidence as to insured's ability to work, is insufficient to show total and permanent disability, there being no evidence that disease could not have been arrested by simple treatment. United States v Lynch (1933, CA5 Tex) 67 F.2d 835; United States v Bryan (1936, CA5 La) 82 F.2d 784

Tuberculosis which can be arrested, and which does not prevent insured from working under proper conditions, does not constitute total and permanent disability. United States v Messinger (1934, CA4 W Va) 68 F.2d 234

In determining whether tuberculosis had reached such stage as to constitute total and permanent disability while the policy was in force, court will look to its subsequent history as well.
as to what was known at time policy lapsed. United States v Townsend (1936, CA4 NC) 81 F.2d 1013

In action on insurance policy, showing of separate and distinct periods of temporary disability from tuberculosis is insufficient to show total permanent disability. United States v Harmon (1940, CA6 Tenn) 110 F.2d 332

Incipient pulmonary tuberculosis is a curable disease and does not alone establish total and permanent disability. Smith v United States (1933, DC Ky) 5 F Supp 475

46. Sleeping sickness

Mere fact that insured was afflicted with sleeping sickness does not establish right to recover for total permanent disability under insurance policy. Gilpin v United States (1933, CA4 W Va) 67 F.2d 245; Wojciechowski v United States (1931, DC NY) 51 F.2d 385

47. Stomach and intestinal dysfunctions

Existence of dysentery is insufficient to show total and permanent disability. United States v Hairston (1932, CA8 Ark) 55 F.2d 825

Fact that insured suffered from duodenal ulcer and kidney infection is insufficient to make question for jury as to total and permanent disability. United States v McCreary (1932, CA9 Or) 61 F.2d 804

Fact that insured had colitis is insufficient to show that he was totally and permanently disabled at time his policy lapsed, where he was almost continuously profitably employed. United States v Pullig (1933, CA8 Ark) 63 F.2d 379

Mere showing of appendicitis does not establish that insured was totally and permanently disabled. Mikell v United States (1933, CA4 SC) 64 F.2d 301

Evidence of dysentery and ulcers is insufficient to support recovery, in view of continuous employment. United States v Jorgensen (1933, CA9 Idaho) 66 F.2d 292

Evidence of diarrhea does not establish total and permanent disability. United States v Ferguson (1934, CA5 Tex) 74 F.2d 44

48. Varicose veins

Evidence of varicose veins is insufficient to show that insured, employed as farmer, was totally and permanently disabled. United States v Luckinbill (1933, CA10 Okla) 65 F.2d 1000

Fact that varicose condition of one leg, which forms basis for insured's claim of total permanent disability, existed prior to service imposes heavy burden of proof on insured, although claim is not precluded. United States v Jones (1934, CA5 Ala) 73 F.2d 376

49. Venereal disease

Mere fact that insured suffered from lumbago and tabes dorsalis, caused by syphilis, does not establish total and permanent disability before lapse of policy. United States v Wiggins (1936, CA5 Ala) 81 F.2d 911

Fact that insured suffered from syphilis and goitre does not, by itself, establish that he was permanently and totally disabled before lapse of policy. United States v Cole (1936, CA7 Ind) 82 F.2d 655

Insured may not recover under total permanent disability clause of policy by reason of having contracted syphilis, where he was employed after discharge from service. Theberge v United States (1937, CA2 VT) 87 F.2d 697

50. Multiple infirmities

Evidence that insured had acute stomach trouble and bronchial trouble after discharge was insufficient to present question for jury as to total and permanent disability at time policy lapsed. United States v Howard (1933, CA5 Fla) 64 F.2d 533
Fact that insured lost one arm and suffered from hyperthyroidism, which is a curable disease, did not establish total and permanent disability. United States v Ivey (1933, CA10 Okla) 64 F.2d 653

Facts that insured contracted pneumonia, influenza, and spinal meningitis while in service did not establish total and permanent disability at time his policy lapsed, though it was later determined that his disease was incurable. United States v Wilfore (1933, CA2 Vt) 66 F.2d 255

Fact that insured suffered loss of eye, hearing in one ear and gunshot wound in leg was insufficient to establish that he was totally and permanently disabled at time of lapse of his policy. United States v Hammons (1933, CA10 Okla) 66 F.2d 912

Evidence that insured suffered from amoebic dysentery and heart weakness did not establish that he was totally and permanently disabled at time his policy lapsed. Hamilton v United States (1934, CA5 Ga) 73 F.2d 786.

Evidence that veteran suffered from nervous spells and trench feet did not establish total and permanent disability before policy lapsed. United States v McCoy (1934, CA5 Ala) 73 F.2d 786

Fact that veteran had bilateral fracture of left ankle and hemorrhoids did not show that he was totally and permanently disabled. Greenwall v United States (1935, CA8 Ark) 76 F.2d 713

Fact that veteran, who had substantial work record, suffered from arthritis and injured back did not establish that he was totally and permanently disabled before lapse of policy. United States v Deal (1936, CA9 Or) 82 F.2d 929

Evidence that veteran suffered from bronchitis, syphilis, and arrested pulmonary tuberculosis did not show that he was totally and permanently disabled before lapse of policy. United States v Craig (1936, CA7 Ind) 83 F.2d 361

Evidence of incipient tuberculosis and adverse reaction to inoculation was insufficient to show that insured was totally and permanently disabled at time his policy lapsed. Dawson v United States (1934, DC Mass) 5 F Supp 509

51. Miscellaneous

Inability to obtain employment on account of skin disease may constitute total permanent disability. United States v Ranes (1931, CA9 Cal) 48 F.2d 582

Evidence of carcinoma is not, by itself, sufficient to show total and permanent disability. United States v Rodman (1934, CA4 NC) 68 F.2d 351

Veteran partially disabled from permanent throat ailment, but able to engage in grocery business, was not totally and permanently disabled. United States v Shashy (1935, CA5 Fla) 75 F.2d 422

Fact that insured spent 10 years in hospitals for sinus treatments did not total and permanent disability before lapse of policy. Stephenson v United States (1935, CA8 Mo) 78 F.2d 355

§ 1959. Waiver of disability for reinstatement

(a) In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant have been complied with, an application for reinstatement, in whole or in part, of lapsed United States Government life insurance may be approved if made within two years after the date of lapse and if the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the period beginning April 6, 1917, and ending July 2, 1921, and the applicant during the applicant's lifetime submits proof satisfactory to the Secretary showing that the applicant is not totally and permanently disabled. As a condition to the acceptance of an application for reinstatement under this section, the applicant shall be required to pay all the back
monthly premiums which would have become payable if such insurance had not lapsed, together with interest at the rates of 5 per centum per annum, compounded annually, on each premium from the date said premium is due by the terms of the policy.

(b) Premium liens established under the provisions of section 304 of the World War Veterans' Act, 1924, shall continue to bear interest at the rate of 5 per centum per annum, compounded annually, and will be deducted from any settlement of insurance to which they are attached.

Prior law and revision:

References in text:
"Section 304 of the World War Veterans' Act, 1924", referred to in this section, is Act June 7, 1924, ch 320, Title III, § 304, 43 Stat. 625, which was classified to 38 USC § 515, prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(51), 72 Stat. 1271. Similar provisions are now contained in this section.

Amendments:
1986. Act Oct. 28, 1986, in subsec. (a) substituted "the applicant's" for "his" and "the applicant" for "he" following "showing that".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 759, as 38 USCS § 1959, and substituted "Secretary" for "Administrator".

I. IN GENERAL

1. Generally
Reinstatement must be in accordance with rules and regulations, and agents of Bureau [now Department of Veterans Affairs] are without power to waive compliance therewith. Sternfeld v United States (1929, DC NY) 32 F.2d 789

2. Regulations
Regulation requiring insured to submit proof of good health prior to reinstatement of total disability clause is inconsistent with predecessor to 38 USCS § 1959, allowing reinstatement of entire policy for certain war-disabled veterans. United States ex rel. Lyons v Hines (1939) 70 App DC 36, 103 F.2d 737, 122 ALR 674

Regulations governing reinstatement have full force and effect of law. Raives v United States (1930, DC NY) 39 F.2d 142, affd (1931, CA2 NY) 54 F.2d 267

3. Evidence
Statements made in applications for reinstatement that insured was not totally and permanently disabled, although explainable, constitute evidence which should be submitted to jury in action on policy. United States v Harris (1935, CA7 Ill) 80 F.2d 771

Presumption that member of armed forces was in sound condition at time of enlistment applies to veterans' attempts to have policy reinstated, regardless of whether reinstatement is sought upon grounds of good health under Veterans' Administration [now Department of Veterans Affairs] regulations or under predecessor to 38 USCS § 1959. Van Pelt v United States (1943, CA6 Ohio) 134 F.2d 735; United States v Van Pelt (1944, CA6 Ohio) 142 F.2d 61, cert den (1944) 323 US 740, 89 L Ed 593, 65 S Ct 68

Regulation requiring insured to submit proof of good health prior to reinstatement of total disability clause is inconsistent with predecessor to 38 USCS § 1959, allowing reinstatement of entire policy for certain war-disabled veterans. United States ex rel. Lyons v Hines (1939) 70 App DC 36, 103 F.2d 737, 122 ALR 674

4. Action on policy

Upon reinstatement of policy under predecessor to 38 USCS § 1959, insured is estopped to sue under original policy claiming total permanent disability at time of reinstatement, since proof that insured is not totally and permanently disabled is prerequisite to reinstatement under predecessor to § 1959. Stevens v United States (1928, CA8 Minn) 29 F.2d 904

Statements made in applications for reinstatement that insured was not totally and permanently disabled, although explainable, constitute evidence which should be submitted to jury in action on policy. United States v Harris (1935, CA7 Ill) 80 F.2d 771

II. PREMIUM LIEN

5. Generally

Lien representing back premiums, established in reinstatement of policy under predecessor to 38 USCS § 1959 is contingent indebtedness against such reinstated insurance only, to be deducted solely from any settlement under such reinstated policy. (1932) 40 Op Atty Gen 562

6. Application

Additional $5,000 of insurance erroneously issued does not represent lapsed insurance, and is not subject to reinstatement, collection of back premiums, or lien under predecessor to 38 USCS § 1959. 1935 ADVA 339

When premium lien is established on reinstatement of insurance and amount of insurance is subsequently reduced, interest on lien from time of reinstatement accrues only against reduced amount of insurance and not on whole amount of former lien. 1954 ADVA 950

7. Settlement of debt

Intent of Congress was that loan should be deducted only from face of policy at time of permanent disability or death. United States v Moskowitz (1948, CA5 Ga) 170 F.2d 870

Policy of applying dividends apportioned to policy as payment on existing indebtedness only in instances where amount of such indebtedness exceeds reserve on policy is proper; both loan and lien existing against government life insurance policy are included within term "any indebtedness" which under Veterans' Administration [now Department of Veterans Affairs] regulations, beneficiary must pay off in cash upon maturity of policy by death if policy is to be paid in monthly installments. 1946 ADVA 731

§ 1960. Waiver of premium payments on due date

(a) The Secretary is authorized to provide by regulations for waiving the payment of premiums on United States Government life insurance on the due date thereof and the insurance may be deemed not to lapse in the cases of the following persons: (1) those who are confined in hospital under the Department for a compensable disability during
the period while they are so confined; (2) those who are rated as temporarily totally disabled by reason of any injury or disease entitling them to compensation during the period of such total disability and while they are so rated; (3) those who, while mentally incompetent and for whom no legal guardian had been or has been appointed, allowed or may allow their insurance to lapse during the period for which they have been or hereafter may be rated mentally incompetent, or until a guardian has notified the Department of the guardian's qualification, but not later than six months after appointment of a guardian. In mentally incompetent cases the waiver is to be made without application and retroactive when necessary. Relief from payment of premiums on the due date thereof shall be for full calendar months, beginning with the month in which said confinement to hospital, the temporary total disability rating, or the mental incompetency began or begins and ending with that month during the half or major fraction of which such persons are no longer entitled to waiver as provided above.

(b) All premiums the payment of which when due is waived as provided in this section shall bear interest at the rate of 5 percent per annum, compounded annually, from the due date of each premium, and if not paid by the insured shall be deducted from the insurance in any settlement thereunder, or when the same matures either because of permanent total disability or death. In the event any lien or other indebtedness established by this section or prior corresponding provision of law exists against any policy of United States Government life insurance in excess of the then cash surrender value thereof at the time of the termination of such policy of insurance for any reason other than by death or total permanent disability the Secretary is authorized to transfer and pay from the military and naval insurance appropriation to the United States Government Life Insurance Fund a sum equal to the amount such lien or indebtedness exceeds the then cash surrender value.

Prior law and revision:
This section is based on 38 USC § 517 and note (Acts June 7, 1924, ch 320, Title III, § 306, 43 Stat. 626; July 3, 1930, ch 863, §§ 1, 2, 46 Stat. 1016).

Amendments:
1982. Act Oct. 12, 1982, in subsec. (b), substituted "percent" for "per centum".
1986. Act Oct. 28, 1986, in subsec. (a), substituted "the guardian" for "his".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 760, as 38 USCS § 1960, and substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".

Other provisions:
Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

1. Generally
2. Mental incompetence

1. Generally
Disability excusing payment of premiums need not involve absolute incapacity, but must be such as prevents insured from following continuously some gainful occupation. United States v McPhee (1929, CA9 Wash) 31 F.2d 243
2. Mental incompetence

Court is without authority to determine question of mental incompetency independently of rating by Veterans' Bureau [now Department of Veterans Affairs] in order to apply retroactive waiver of insurance premiums, but where court has jurisdiction of subject matter and parties, government may waive rating and permit determination of issue of incompetency. United States v Edwards (1927, CA8 Neb) 23 F.2d 477

§ 1961. Authority for higher interest rates for amounts payable to beneficiaries

Notwithstanding section 1944(b) of this title [38 USCS § 1944(b)], if the beneficiary of an insurance policy issued under the provisions of this subchapter receives the proceeds of such policy under a settlement option under which such proceeds are paid in equal monthly installments over a limited period of months, the interest that may be added to each such installment may be at a rate that is higher than the interest rate prescribed in such section. The Secretary may from time to time establish a higher interest rate under the preceding sentence only in accordance with a determination that such higher rate is administratively and actuarially sound. Any such higher interest rate shall be paid on the unpaid balance of such monthly installments.

Effective date of section:

Act Nov. 28, 1979, P. L. 96-128, Title VI, § 601(b), 93 Stat. 988, provided that this section is effective on Nov. 28, 1979.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 761, as 38 USCS § 1961, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

Cross References

Payment options, 38 USCS §§ 1951, 1952

§ 1962. Authority for higher monthly installments payable to certain annuitants

(a) Subject to subsections (b) and (c) of this section, the Secretary may from time to time adjust the dollar amount of the monthly installments payable to a beneficiary of United States Government Life Insurance who is receiving the proceeds of such insurance under a life annuity settlement option. The Secretary may make such an adjustment only if the Secretary determines that the adjustment is administratively and actuarially sound. The Secretary may make such an adjustment without regard to the provisions of section 1944 of this title [38 USCS § 1944] with respect to interest rates and the use of mortality tables.

(b) The Secretary shall determine the amount in the trust fund in the Treasury held for payment of proceeds to United States Government Life Insurance beneficiaries attributable to interest and mortality gains on the reserves held for annuity accounts. Such amount shall be available for distribution to the life annuitants referred to in subsection (a) of this section as a fixed percentage of, and in addition to, the monthly installment.
amount to which the annuitants are entitled under this subchapter [38 USCS §§ 1940 et seq.]. For the purposes of this section, gains on the reserves are defined as funds attributable solely to annuity accounts that are in excess of actuarial liabilities.

(c) The monthly amount of an annuity authorized in section 1944 of this title [38 USCS § 1944], as adjusted under this section, may not be less than the monthly amount of such annuity that would otherwise be applicable without regard to this section.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 762, as 38 USCS § 1962, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

§ 1963. Authority for payment of interest on settlements

(a) Subject to subsection (b) of this section, the Secretary may pay interest on the proceeds of a United States Government Life Insurance policy from the date the policy matures to the date of payment of the proceeds to the beneficiary or, in the case of an endowment policy, to the policyholder.

(b) (1) The Secretary may pay interest under subsection (a) of this section only if the Secretary determines that the payment of such interest is administratively and actuarially sound for the settlement option involved.

(2) Interest paid under subsection (a) shall be at the rate that is established by the Secretary for dividends held on credit or deposit in policyholders' accounts.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 763, as 38 USCS § 1963, and substituted "Secretary" for "Administrator".

Other provisions:

Application and effectiveness of section. This section is effective with respect to insurance policies maturing after enactment as provided by Act Nov. 18, 1988, P. L. 100-687, Div B, Title XIV, § 1401(a)(3), 102 Stat. 4129, which appears as 38 USCS § 1928 note.

SUBCHAPTER III. SERVICEMEMBERS' GROUP LIFE INSURANCE

§ 1965. Definitions
§ 1966. Eligible insurance companies
§ 1967. Persons insured; amount
§ 1968. Duration and termination of coverage; conversion
§ 1969. Deductions; payment; investment; expenses
§ 1970. Beneficiaries; payment of insurance
§ 1971. Basic tables of premiums; readjustment of rates
§ 1972. Benefit certificates
§ 1973. Forfeiture
§ 1975. Jurisdiction of District Courts
§ 1976. Effective date
§ 1977. Veterans' Group Life Insurance
§ 1978. Reinstatement
§ 1979. Incontestability
§ 1980. Option to receive accelerated death benefit
§ 1980A. Traumatic injury protection

Explanatory notes:
A prior Subchapter III of this chapter (Act Sept. 2, 1958, P. L. 85-857, § 1, 72 Stat. 1164), which was comprised of former §§ 781-788, was redesignated Subchapter IV by Act Sept. 29, 1965, P. L. 89-214, § 1(a), 79 Stat. 880, which enacted the provisions presently comprising Subchapter III.

Amendments:

§ 1965. Definitions

For the purpose of this subchapter [38 USCS §§ 1965 et seq.]--

(1) The term "active duty" means--
(A) full-time duty in the Armed Forces, other than active duty for training;
(B) full-time duty (other than for training purposes) as a commissioned officer of the Regular or Reserve Corps of the Public Health Service;
(C) full-time duty as a commissioned officer of the National Oceanic and Atmospheric Administration; and
(D) full-time duty as a cadet or midshipman at the United States Military Academy, United States Naval Academy, United States Air Force Academy, or the United States Coast Guard Academy.

(2) The term "active duty for training" means--
(A) full-time duty in the Armed Forces performed by Reserves for training purposes;
(B) full-time duty for training purposes performed as a commissioned officer of the Reserve Corps of the Public Health Service;
(C) full-time duty as a member, cadet, or midshipman of the Reserve Officers Training Corps while attending field training or practice cruises; and
(D) in the case of members of the National Guard or Air National Guard of any State, full-time duty under sections 316, 502, 503, 504, or 505 of title 32, United States Code [32 USCS §§ 316, 502, 503, 504, or 505].

(3) The term "inactive duty training" means--
(A) duty (other than full-time duty) prescribed or authorized for Reserves (including commissioned officers of the Reserve Corps of the Public Health Service) which duty is scheduled in advance of competent authority to begin at a specific time and place; and
(B) in the case of a member of the National Guard or Air National Guard of any State, such term means duty (other than full-time duty) which is scheduled in advance by competent authority to begin at a specific time and place under

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sections 316, 502, 503, 504, or 505 of title 32, United States Code [32 USCS §§ 316, 502, 503, 504, or 505].

(4) The terms "active duty for training" and "inactive duty training" do not include duty performed as a temporary member of the Coast Guard Reserve, and the term "inactive duty training" does not include (A) work or study performed in connection with correspondence courses, or (B) attendance at an educational institution in an inactive status.

(5) The term "member" means--

(A) a person on active duty, active duty for training, or inactive duty training in the uniformed services in a commissioned, warrant, or enlisted rank, or grade, or as a cadet or midshipman of the United States Military Academy, United States Naval Academy, United States Air Force Academy, or the United States Coast Guard Academy;

(B) a person who volunteers for assignment to the Ready Reserve of a uniformed service and is assigned to a unit or position in which such person may be required to perform active duty, or active duty for training, and each year will be scheduled to perform at least twelve periods of inactive duty training that is creditable for retirement purposes under chapter 1223 of title 10 [10 USCS §§ 12731 et seq.] (or under chapter 67 of that title [former 10 USCS §§ 1331 et seq.] as in effect before the effective date of the Reserve Officer Personnel Management Act);

(C) a person who volunteers for assignment to a mobilization category in the Individual Ready Reserve, as defined in section 12304(i)(1) of title 10 [10 USCS § 12304(i)(1)]; and

(D) a member, cadet, or midshipman of the Reserve Officers Training Corps while attending field training or practice cruises.

(6) The term "uniformed services" means the Army, Navy, Air Force, Marine Corps, Coast Guard, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.

(7) The terms "widow" or "widower" means a person who is the lawful spouse of the insured member at the time of his death.

(8) The term "child" means a legitimate child, a legally adopted child, an illegitimate child as to the mother, or an illegitimate child as to the alleged father, only if (A) he acknowledged the child in writing signed by him; or (B) he has been judicially ordered to contribute to the child's support; or (C) he has been, before his death, judicially decreed to be the father of such child; or (D) proof of paternity is established by a certified copy of the public record of birth or church record of baptism showing that the insured was the informant and was named as father of the child; or (E) proof of paternity is established from service department or other public records, such as school or welfare agencies, which show that with his knowledge the insured was named as the father of the child.

(9) The term "parent" means a father of a legitimate child, mother of a legitimate child, father through adoption, mother through adoption, mother of an illegitimate child, and father of an illegitimate child but only if (A) he acknowledged paternity of the child in writing signed by him before the child's death; or (B) he has been judicially ordered to contribute to the child's support; or (C) he has been judicially decreed to be the father of such child; or (D) proof of paternity is established by a
certified copy of the public record of birth or church record of baptism showing that the claimant was the informant and was named as father of the child; or (E) proof of paternity is established from service department or other public records, such as school or welfare agencies, which show that with his knowledge the claimant was named as father of the child. No person who abandoned or willfully failed to support a child during the child's minority, or consented to the child's adoption may be recognized as a parent for the purpose of this subchapter [38 USCS §§ 1965 et seq.]. However, the immediately preceding sentence shall not be applied so as to require duplicate payments in any case in which insurance benefits have been paid prior to receipt in the administrative office established under subsection 1966(b) of this title [38 USCS § 1966(b)] of sufficient evidence to clearly establish that the person so paid could not qualify as a parent solely by reason of such sentence.

(10) The term "insurable dependent", with respect to a member, means the following:
   (A) The member's spouse.
   (B) The member's child, as defined in the first sentence of section 101(4)(A) of this title [38 USCS § 101(4)(A)].

(11) [Deleted]

References in text:
For the "effective date of the Reserve Officer Personnel Management Act", referred to in para. (5), see § 1691 of Title XVI of Act Oct. 5, 1994, P. L. 103-337, which appears as 10 USCS § 10001 note.

Amendments:
1970. Act June 25, 1970 (effective 6/25/70, as provided by § 14(a) of such Act, which appears as 38 USCS § 1317 note), substituted the text of this section for text which read:
"For the purpose of this subchapter--"
   "(1) The term 'active duty' means full-time duty as a commissioned or warrant officer, or as an enlisted member of a uniformed service under a call or order to duty that does not specify a period of thirty days or less.
   "(2) The term 'member' means a person on active duty in the uniformed services in a commissioned, warrant, or enlisted rank or grade.
   "(3) The term 'uniformed services' means the Army, Navy, Air Force, Marine Corps, Coast Guard, Public Health Service, and Environmental Science Services Administration.".

1971. Act Dec. 15, 1971 (applicable as provided by § 2 of such Act, which appears as a note to this section), added subparas. (7), (8), (9).

1972. Act June 20, 1972, in subpara. (1), in subsubpara. (B), deleted "and" following "Service"; in subsubpara. (C), substituted "; and" for a concluding period, added subsubpara. (D); in subpara. (5)(A), inserted ", or as a cadet or midshipman at the United States Military Academy, United States Naval Academy, United States Air Force Academy, or the United States Coast Guard Academy".

1974. Act May 24, 1974 applicable as provided by § 12(2) of such Act, which appears as a note to this section), in subsec. (1)(C), substituted "National Oceanic and Atmospheric Administration" for "Environmental Science Services Administration"; substituted subpara. (5) for one which read:
   "(5) The term 'member' means--"
"A) a person on active duty, active duty for training, or inactive duty training in the uniformed services in a commissioned, warrant, or enlisted rank or grade, or as a cadet or midshipman at the United States Military Academy, United States Naval Academy, United States Air Force Academy, or the United States Coast Guard Academy; and

"B) a member, cadet, or midshipman of the Reserve Officers Training Corps while attending field training or practice cruises."

in subpara. (6), substituted "National Oceanic and Atmospheric Administration" for "Environmental Science Services Administration".

1986. Act Oct. 28, 1986, in subpara. (5)(B) substituted "such person" for "he"; and in subpara. (9) substituted "the child's minority" for "his minority" and "the child's adoption" for "his adoption".

1991. Act June 13, 1991, in subpara. (4), redesignated cls. (i) and (ii) as cls. (A) and (B), respectively, and, in subparas. (8) and (9), redesignated cls. (a)-(e) as cls. (A)-(E), respectively.

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 765, as 38 USCS § 1965, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


Such Act further (effective 12/1/94 as provided by § 1691 of such Act, which appears as 10 USCS § 10001 note), in para. (5), in subparas. (B) and (C), substituted "chapter 1223 of title 10 (or under chapter 67 of that title as in effect before the effective date of the Reserve Officer Personnel Management Act)" for "chapter 67 of title 10".

1996. Act Oct. 9, 1996, in para. (5), in subpara. (B), added "and" after the concluding semicolon, deleted subparas. (C) and (D), which read:

"(C) a person assigned to, or who upon application would be eligible for assignment to, the Retired Reserve of a uniformed service who has not received the first increment of retirement pay or has not yet reached sixty-one years of age and has completed at least twenty years of satisfactory service creditable for retirement purposes under chapter 1223 of title 10 (or under chapter 67 of that title as in effect before the effective date of the Reserve Officer Personnel Management Act);

"(D) a person transferred to the Retired Reserve of a uniformed service under the temporary special retirement authority provided in section 1331a of title 10 who has not received the first increment of retirement pay or has not reached sixty-one years of age; and",

redesignated subpara. (E) as new subpara. (C).

2000. Act Nov. 1, 2000, in para. (5), in subpara. (B), deleted "and" following the concluding semicolon, redesignated subpara. (C) as subpara. (D), and added new subpara. (C).

2001. Act June 5, 2001 (effective on the first day of the first month that begins more than 120 days after enactment, as provided by § 4(g) of such Act, which appears as 38 USCS § 101 note), added para. (10).

2005. Act May 11, 2005 (effective 12/1/2005, pursuant to § 1032(d) of such Act, which appears as 38 USCS § 1980A note), added para. (11).

2006. Act June 15, 2006, deleted para. (11) which read:

"(11) The term 'activities of daily living' means the inability to independently perform 2 of the 6 following functions:
"(A) Bathing.
"(B) Continence.
"(C) Dressing.
"(D) Eating.
"(E) Toileting.
"(F) Transferring."

Other provisions:

**Application of June 25, 1970 amendments.** Act June 25, 1970, P. L. 91-294, § 14(b), 84 Stat. 333, provides: "The provisions of section 765 (7), (8), and (9) of title 38, United States Code [apparently subparas. (4), (5), and (6) of this section; see the 1970 Amendment note], as added by the first section of this Act shall apply only to servicemen's group life insurance in effect on the life of an insured member who dies on and after the date of enactment of this Act.". For addition of paras. (7), (8), and (9), see the 1971 Amendment note.

**Application of Dec. 15, 1971 amendment.** Act Dec. 15, 1971, P. L. 92-185, § 2, 85 Stat. 643, provides: "The provisions of this Act [amending this section] shall apply only to Servicemen's Group Life Insurance in effect on the life of an insured member who dies on or after the date of enactment of this Act.".

**Effective date of May 24, 1974 amendments.** Act May 24, 1974, P. L. 93-289, § 12(2), 88 Stat. 173, provides: "The amendments relating to Servicemen's Group Life Insurance coverage on a full-time basis for certain members of the Reserves and National Guard shall become effective upon the date of enactment of this Act.".

**Renaming of Servicemen's Group Life Insurance program.** Act Oct. 9, 1996, P. L. 104-275, Title IV, § 405(a), 110 Stat. 3339, provides: "The program of insurance operated by the Secretary of Veterans Affairs under subchapter III of chapter 19 of title 38, United States Code [38 USCS §§ 1965 et seq.], is hereby redesignated as the Servicemembers' Group Life Insurance program."

**References to Servicemen's Group Life Insurance or Advisory Council.** Act Oct. 9, 1996, P. L. 104-275, Title IV, § 405(d), 110 Stat. 3340, provides: "Any reference to Servicemen's Group Life Insurance or to the Advisory Council on Servicemen's Group Life Insurance in any Federal law, Executive order, regulation, delegation of authority, or other document of the Federal Government shall be deemed to refer to Servicemembers' Group Life Insurance or the Advisory Council on Servicemembers' Group Life Insurance, respectively.".

**Code of Federal Regulations**

Department of Veterans Affairs-Servicemen's Group Life Insurance and Veterans' Group Life Insurance, 38 CFR Part 9

**Cross References**

This section is referred to in 38 USCS §§ 1967, 1968, 1969

**Research Guide**

**Federal Procedure:**

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:314, 334

**Am Jur:**

24 Am Jur 2d, Divorce and Separation § 544

44A Am Jur 2d, Insurance § 1878
Forms:

24A  Am Jur Pl & Pr Forms (Rev ed), Veterans and Veterans' Laws, §§ 34, 35

Annotations:

Insurance: Term "children" as used in beneficiary clause of life insurance policy as including illegitimate child. 62 ALR3d 1329

1. Constitutionality
2. Active duty for training
3. Inactive duty training
4. Member
5. Child
6. Parent
7. -Abandonment of child
8. Widow

1. Constitutionality

Statute providing for ways in which paternity could be established did not violate equal protection clause even though child in instant case did not fit within one of alternatives since Congress is not charged with making every option available to every illegitimate child and Congress chose alternative that introduces reliability into paternity disputes by creating opportunity for alleged father to acknowledge or contest paternity and accuracy in paternity determinations is important government interest. Prudential Ins. Co. v Moorhead (1990, CA5 La) 916 F.2d 261

2. Active duty for training

In proceeding by surviving parents of deceased serviceman to collect, as beneficiaries, proceeds of national service life insurance policy, Veterans' Administration [now Department of Veterans Affairs] failed to prove that serviceman had been absent without leave for period of 31 days prior to his death, as defense to payment of policy under 38 USCS § 768(a)(1)(B) [now 38 USCS § 1968(a)(1)(B)], where his change of duty station orders were lost and he was never declared to be on unauthorized leave status or a deserter. Malone v United States Veterans Administration (1973, SD Ohio) 364 F Supp 114

Serviceman is not engaged in active duty for training as member where he is not required to participate in training program and does not elect to do so; thus, serviceman is not entitled to benefits of Servicemembers' Group Life Insurance under § 767 [now § 1967]. Nowinski v Servicemen's Group Life Ins. (1980, ED Pa) 484 F Supp 1060

3. Inactive duty training

Serviceman merely scheduled to begin duty at specified time and place is not thereby on inactive duty training since 38 USCS § 765 [now 38 USCS § 1965] clearly contemplates that status of being on inactive duty training entails actual participation in that duty; thus, serviceman is not entitled to benefits of Servicemembers' Group Life Insurance under § 767 [now § 1967]. Nowinski v Servicemen's Group Life Ins. (1980, ED Pa) 484 F Supp 1060

4. Member

Non-prior service enlistee in nonpay status who was awaiting orders to attend his initial active duty training was "member" of Ready Reserve within meaning of 38 USCS § 765(5)(B) [now 38 USCS § 1965(5)(B)] at time of his death since he was in position of one who "will be" scheduled for training even though at that time unqualified to be so scheduled. Moore v Prudential Ins. Co. (1980, MD Ga) 499 F Supp 418

Insured was no longer member under 38 USCS § 765(5)(B) [now 38 USCS § 1965(5)(B)] where, on effective date of Act increasing maximum amount of coverage under 38 USCS § 767
[now 38 USCS § 1965], he had been transferred from Navy Ready Reserve unit, in which he was required to perform active duty for training, to Reserve Readiness Command Region Four Records Review status where he was required to perform neither active nor inactive duty training creditable for retirement. Garvey v Servicemen's Group Life Ins. (1984, MD Pa) 584 F Supp 623

Claimant's well-pleaded complaint in action to recover life insurance benefits stated claim under Servicemembers Group Life Insurance Act, 38 USCS § 1965, so that federal question jurisdiction applied under 28 USCS § 1331 and complete preemption doctrine was thus inapplicable; application of state law under Fla. Stat. ch. 731.103 to limited issue of date of insured's presumed death did not cause claim to fail as matter of law. Cotton v Prudential Ins. Co. of Am. (2005, ND Fla) 391 F Supp 2d 1137

5. Child


Statute defining "child" for purposes of collecting proceeds of serviceman's life insurance is constitutional, despite imposing conditions that must be met in order for illegitimate children to qualify as beneficiaries. Prudential Ins. Co. v Moorhead (1989, MD La) 730 F Supp 727

6. Parent

Putative father's response to deceased service member's mother's summary judgment motion and that signed writings in which he acknowledged paternity door should exist was inadequate, without more, to rise genuine issue of material fact necessary to overcome summary judgment motion. Prudential Ins. Co. v Whitney (1992, CA8 Mo) 954 F.2d 516

Serviceman's stepfather, who had never adopted serviceman, was not entitled to share in proceeds as one of serviceman's "parents" upon failure of serviceman to designate beneficiary. Prudential Ins. Co. v Johnson (1972, ND) 200 NW2d 115

Under 38 USCS § 765(9) [now 38 USCS § 1965(9)], term "parent" is limited to categories there defined, and does not include person who is stepparent or person in loco parentis. Prudential Ins. Co. v Ellwein (1977, WD NY) 435 F Supp 248

Word "parents" is limited to only natural parents of insured and does not include person who is stepparent or person in loco parentis. Nunn v Nunn (1970) 81 NM 746, 473 P2d 360

7. -Abandonment of child

Statute does not require that abandonment be proved by clear and convincing evidence; proof by preponderance of evidence would suffice. Thomas v Swanson (1989, CA8 Ark) 881 F.2d 523

Divorced mother of deceased serviceman is entitled to half of proceeds of life insurance policy under 10 USCS § 770 where evidence that she made child support payments and maintained contact with deceased was sufficient to show that she was not excluded from definition of "parent" in § 765 [now § 1965] by reason of abandoning or failing to support child. Loacano v Office of Servicemen's Group Life Ins., etc. (1982, ED Mich) 544 F Supp 306, 73 ALR Fed 131

Deceased serviceman's natural mother is entitled to entire proceeds of group life insurance policy issued pursuant to Servicemembers' Group Life Insurance Act (38 USCS §§ 1965 et seq.), where natural father abandoned illegitimate son during his minority and was not aware that son had named him as his father in service department records, because records failed to prove father "parent" of serviceman as that word is defined by § 765(9)(e) [now § 1965(a)]. Prudential Ins. Co. v Whitney (1990, WD Mo) 745 F Supp 1506, affd (1992, CA8 Mo) 954 F.2d 516

Deceased serviceman's natural mother is entitled to entire proceeds of group life insurance policy issued pursuant to Servicemembers' Group Life Insurance Act (38 USCS §§ 1965 et seq.), where natural father abandoned illegitimate son during his minority and was not aware that son had named him as his father in service department records, because records failed to prove
father "parent" of serviceman as that word is defined by § 765(9)(e) [now § 1965(9)]. Prudential Ins. Co. v Whitney (1990, WD Mo) 745 F Supp 1506, affd (1992, CA8 Mo) 954 F.2d 516

Payment of $100,000 or half of proceeds under service members' group life insurance policy to father of deceased member of U.S. Navy cannot be made summarily, even though he has paid total of $13,715 in child support payments, where any support paid was apparently due to criminal conviction and court-ordered child support payments, and there was little or no contact with son after age of 8, because whether or not father "abandoned" son within meaning of 38 USCS § 1965(9) cannot be determined as matter of law. Weber v Prudential Ins. Co. of Am. (2000, DC Conn) 120 F Supp 2d 220

Father had not "abandoned" son within meaning of 38 USCS § 765(9) [now 38 USCS § 1965(9)], where father made court-ordered support payments until son achieved majority, even though father did not provide son with birthday or Christmas gifts, nor provide financial support beyond court order, nor display fatherly attitude toward son; parental relationship can be terminated under 38 USCS § 765(9) [now 38 USCS § 1965(9)] in only three ways: abandonment, failure of support, and consent to adoption, and, in absence of evidence of settled purpose to forego parental duties and obligations, abandonment does not take place. Rahn v Prudential Ins. Co. (1977, Iowa) 259 NW2d 838

8. Widow

Former wife of deceased serviceman who died 4 months before preliminary divorce decree pursuant to separation agreement became final under Nebraska law is not "widow" of deceased for purposes of determining entitlement to proceeds of Servicemembers' Group Life Insurance Policy under 38 USCS § 770 [now 38 USCS § 1970], where deceased had designated that proceeds be distributed as provided "by law", since under § 765 [now 38 USCS § 1965], widow must be lawful spouse at time of serviceman's death, and state probate code which controls, rather than domestic relations law, excludes from definition of surviving spouse participant in valid proceeding concluded by order purporting to terminate all marital property rights against decedent. Prudential Ins. Co. v Dulek (1981, CA8 Neb) 665 F.2d 217

§ 1966. Eligible insurance companies

(a) The Secretary is authorized, without regard to section 3709 of the Revised Statutes, as amended (41 U.S.C. 5), to purchase from one or more life insurance companies a policy or policies of group life insurance to provide the benefits specified in this subchapter [38 USCS §§ 1965 et seq.]. Each such life insurance company must (1) be licensed to issue life insurance in each of the fifty States of the United States and in the District of Columbia, and (2) as of the most recent December 31 for which information is available to the Secretary, have in effect at least 1 percent of the total amount of group life insurance which all life insurance companies have in effect in the United States.

(b) The life insurance company or companies issuing such policy or policies shall establish an administrative office at a place and under a name designated by the Secretary.

(c) The Secretary shall arrange with the life insurance company or companies issuing any policy or policies under this subchapter [38 USCS §§ 1965 et seq.] to reinsure, under conditions approved by the Secretary, portions of the total amount of insurance under such policy or policies with such other life insurance companies (which meet qualifying criteria set forth by the Secretary) as may elect to participate in such reinsurance.
(d) The Secretary may at any time discontinue any policy or policies which the Secretary has purchased from any insurance company under this subchapter [38 USCS §§ 1965 et seq.].

Amendments:

1982. Act Oct. 12, 1982, in subsec. (a), substituted "percent" for "per centum".
1986. Act Oct. 28, 1986, in subsec. (c) substituted "the Administrator" for "him" following "approved by"; and in subsec. (d) substituted "the Administrator" for "he".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 766, as 38 USCS § 1966, and substituted "Secretary" for "Administrator".

Other provisions:

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Cross References


Research Guide

Am Jur:

24 Am Jur 2d, Divorce and Separation § 544
44A Am Jur 2d, Insurance § 1864
Designation of insurers by federal government under regulations prescribed by federal law (38 USCS §§ 765 et seq. [now 38 USCS §§ 1965 et seq.]) amounts to preemption of field of servicemen's life insurance which is, therefore, subject to rules and regulations provided in federal acts. Johnson v Prudential Ins. Co. (1968) 182 Neb 673, 156 NW2d 812

§ 1967. Persons insured; amount

(a) (1) Subject to an election under paragraph (2), any policy of insurance purchased by the Secretary under section 1966 of this title [38 USCS § 1966] shall automatically insure the following persons against death:

(A) In the case of any member of a uniformed service on active duty (other than active duty for training)--
   (i) the member; and
   (ii) each insurable dependent of the member.

(B) Any member of a uniformed service on active duty for training or inactive duty training scheduled in advance by competent authority.

(C) In the case of any member of the Ready Reserve of a uniformed service who meets the qualifications set forth in section 1965(5)(B) of this title [38 USCS § 1965(5)(B)]--
   (i) the member; and
   (ii) each insurable dependent of the member.

(2) (A) A member may elect in writing not to be insured under this subchapter [38 USCS §§ 1965 et seq.].
(B) A member may elect in writing not to insure the member's spouse under this subchapter [38 USCS §§ 1965 et seq.].

(3)

(A) Subject to subparagraphs (B) and (C), the amount for which a person is insured under this subchapter [38 USCS §§ 1965 et seq.] is as follows:

(i) In the case of a member, $400,000.

(ii) In the case of a member's spouse, $100,000.

(iii) In the case of a member's child, $10,000.

(B) A member may elect in writing to be insured or to insure the member's spouse in an amount less than the amount provided for under subparagraph (A). The member may not elect to insure the member's child in an amount less than $10,000. The amount of insurance so elected shall, in the case of a member, be evenly divisible by $50,000 and, in the case of a member's spouse, be evenly divisible by $10,000.

(C) In no case may the amount of insurance coverage under this subsection of a member's spouse exceed the amount of insurance coverage of the member.

(4) (A) An insurable dependent of a member is not insured under this chapter [38 USCS §§ 1901 et seq.] unless the member is insured under this subchapter [38 USCS §§ 1965 et seq.].

(B) An insurable dependent who is a child may not be insured at any time by the insurance coverage under this chapter [38 USCS §§ 1901 et seq.] of more than one member. If an insurable dependent who is a child is otherwise eligible to be insured by the coverage of more than one member under this chapter [38 USCS §§ 1901 et seq.], the child shall be insured by the coverage of the member whose eligibility for insurance under this subchapter [38 USCS §§ 1965 et seq.] occurred first, except that if that member does not have legal custody of the child, the child shall be insured by the coverage of the member who has legal custody of the child.

(5) The insurance shall be effective with respect to a member and the insurable dependents of the member on the latest of the following dates:

(A) The first day of active duty or active duty for training.

(B) The beginning of a period of inactive duty training scheduled in advance by competent authority.

(C) The first day a member of the Ready Reserve meets the qualifications set forth in section 1965(5)(B) of this title [38 USCS § 1965(5)(B)].

(D) The date certified by the Secretary to the Secretary concerned as the date Servicemembers' Group Life Insurance under this subchapter [38 USCS §§ 1965 et seq.] for the class or group concerned takes effect.

(E) In the case of an insurable dependent who is a spouse, the date of marriage of the spouse to the member.

(F) In the case of an insurable dependent who is a child, the date of birth of such child or, if the child is not the natural child of the member, the date on which the child acquires status as an insurable dependent of the member.

(b) Any member (other than one who has elected not to be insured under this subchapter [38 USCS §§ 1965 et seq. for the period or periods of duty involved]--
(1) who, when authorized or required by competent authority, assumes an obligation to perform (for less than thirty-one days) active duty, or active duty for training, or inactive duty training scheduled in advance by competent authority; and
(2) who is rendered uninsurable at standard premium rates according to the good health standards approved by the Secretary, or dies within one hundred and twenty days thereafter, from a disability, or aggravation of a preexisting disability, incurred by such member while proceeding directly to or returning directly from such active duty, active duty for training, or inactive duty training as the case may be;

shall be deemed to have been on active duty, active duty for training, or inactive duty training, as the case may be, and to have been insured under this subchapter [38 USCS §§ 1965 et seq.] at the time such disability was incurred or aggravated, and if death occurs within one hundred and twenty days thereafter as a result of such disability to have been insured at the time of death. In determining whether or not such individual was so authorized or required to perform such duty, and whether or not such member was rendered uninsurable or died within one hundred and twenty days thereafter from a disability so incurred or aggravated, there shall be taken into account the call or order to duty, the orders and authorizations of competent authority, the hour on which the member began to so proceed or to return, the hour on which such member was scheduled to arrive for, or on which such member ceased to perform such duty; the method of travel employed; such member's itinerary; the manner in which the travel was performed; and the immediate cause of disability or death. Whenever any claim is filed alleging that the claimant is entitled to benefits by reason of this subsection, the burden of proof shall be on the claimant.

(c) If a person eligible for insurance under this subchapter [38 USCS §§ 1965 et seq.] is not so insured, or is insured for less than the maximum amount provided for the person under subparagraph (A) of subsection (a)(3), by reason of an election made by a member under subparagraph (B) of that subsection, the person may thereafter be insured under this subchapter [38 USCS §§ 1965 et seq.] in the maximum amount or any lesser amount elected as provided in such subparagraph (B) upon written application by the member, proof of good health of each person (other than a child) to be so insured, and compliance with such other terms and conditions as may be prescribed by the Secretary. Any former member insured under Veterans' Group Life Insurance who again becomes eligible for Servicemembers' Group Life Insurance and declines such coverage solely for the purpose of maintaining such member's Veterans' Group Life Insurance in effect shall upon termination of coverage under Veterans' Group Life Insurance be automatically insured under Servicemembers' Group Life Insurance, if otherwise eligible therefor.

(d) Whenever a member has the opportunity to make an election under subsection (a) not to be insured under this subchapter [38 USCS §§ 1965 et seq.], or to be insured under this subchapter [38 USCS §§ 1965 et seq.] in an amount less than the maximum amount in effect under paragraph (3)(A)(i) of that subsection, and at such other times periodically thereafter as the Secretary concerned considers appropriate, the Secretary concerned shall furnish to the member general information concerning life insurance. Such information shall include--

(1) the purpose and role of life insurance in financial planning;
(2) the difference between term life insurance and whole life insurance;
(3) the availability of commercial life insurance; and
(4) the relationship between Servicemembers' Group Life Insurance and Veterans' Group Life Insurance.

(e) The effective date and time for any change in benefits under the Servicemembers' Group Life Insurance shall be based on the date and time according to the time zone immediately west of the International Date Line.

(f) (1) If a member who is married and who is eligible for insurance under this section makes an election under subsection (a)(2)(A) not to be insured under this subchapter [38 USCS §§ 1965 et seq.], the Secretary concerned shall notify the member's spouse, in writing, of that election.

(2) In the case of a member who is married and who is insured under this section and whose spouse is designated as a beneficiary of the member under this subchapter [38 USCS §§ 1965 et seq.], whenever the member makes an election under subsection (a)(3)(B) for insurance of the member in an amount that is less than the maximum amount provided under subsection (a)(3)(A)(i), the Secretary concerned shall notify the member's spouse, in writing, of that election--

(A) in the case of the first such election; and

(B) in the case of any subsequent such election if the effect of such election is to reduce the amount of insurance coverage of the member from that in effect immediately before such election.

(3) In the case of a member who is married and who is insured under this section, if the member makes a designation under section 1970(a) of this title [38 USCS § 1970(a)] of any person other than the spouse or a child of the member as the beneficiary of the member for any amount of insurance under this subchapter [38 USCS §§ 1965 et seq.], the Secretary concerned shall notify the member's spouse, in writing, that such a beneficiary designation has been made by the member, except that such a notification is not required if the spouse has previously received such a notification under this paragraph and if immediately before the new designation by the member under section 1970(a) of this title [38 USCS § 1970(a)] the spouse is not a designated beneficiary of the member for any amount of insurance under this subchapter [38 USCS §§ 1965 et seq.].

(4) A notification required by this subsection is satisfied by a good faith effort to provide the required information to the spouse at the last address of the spouse in the records of the Secretary concerned. Failure to provide a notification required under this subsection in a timely manner does not affect the validity of any election specified in paragraph (1) or (2) or beneficiary designation specified in paragraph (3).

Explanatory notes:
The comma in subsec. (a)(3)(B) has been enclosed in brackets to indicate the probable intent of Congress to delete such punctuation.

Amendments:
1970. Act June 25, 1970 (effective 6/25/70, as provided by § 14(a) of such Act, which appears as 38 USCS § 1317 note), substituted the text of this section for text which read:

"(a) Any policy of insurance purchased by the Administrator under section 766 of this title shall automatically insure any member of the uniformed services on active duty against death
in the amount of $10,000 from the first day of such duty, or from the date certified by the Administrator to the Secretary concerned as the date Servicemen's Group Life Insurance under this subchapter takes effect, whichever date is the later date, unless such member elects in writing (1) not to be insured under this subchapter, or (2) to be insured in the amount of $5,000.

"(b) If any member elects not to be insured under this subchapter or to be insured in the amount of $5,000, he may thereafter be insured under this subchapter or insured in the amount of $10,000 under this subchapter, as the case may be, upon written application, proof of good health, and compliance with such other terms and conditions as may be prescribed by the Administrator.".

1974. Act May 24, 1974 (effective 5/24/74, as provided by § 12(3) of such Act, which appears as a note to this section), substituted subsec. (a) for one which read: "(a) Any policy of insurance purchased by the Administrator under section 766 of this title shall automatically insure any member of the uniformed service on active duty, active duty for training, or inactive duty training scheduled in advance by competent authority, against death in the amount of $15,000 unless such member elects in writing (1) not to be insured under this subchapter, or (2) to be insured in the amount of $10,000 or $5,000. The insurance shall be effective the first day of active duty or active duty for training, or the beginning of a period of inactive duty training scheduled in advance by competent authority, or from the date certified by the Administrator to the Secretary concerned as the date servicemen's group life insurance under this chapter for the class or group concerned takes effect, whichever is the later date."; in subsec. (b), in para. (2) and the concluding matter, substituted "one hundred and twenty days" for "ninety days" wherever appearing; and substituted subsec. (c) for one which read: "(c) If any member elects not to be insured under this subchapter or to be insured in the amount of $10,000 or $5,000, he may thereafter be insured under this subchapter, as the case may be, upon written application, proof of good health, and compliance with such other terms and conditions as may be prescribed by the Administrator.".

1981. Act Oct. 17, 1981 (effective 12/1/81, as provided by § 701(b)(2) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in the concluding matter, substituted "$35,000" for "$20,000" and inserted "$30,000, $25,000, 20,000"; in subsec. (c), inserted "$30,000, $25,000, $20,000 [.]" and "$35,000, $30,000, $25,000"; and added subsec. (d).

1985. Act Dec. 3, 1985 (effective 12/12/85, as provided by § 401(c)(2), of such Act, which appears as a note to this section), in subsec. (a), in the concluding matter, substituted "$50,000" for "$35,000".

Such Act further (effective 1/1/86, as provided by § 401(c) of such Act, which appears as a note to this section), in subsec. (a), in the concluding matter, substituted "an amount less than $50,000 that is evenly divisible by $10,000" for "the amount of $30,000, $25,000, $20,000, $15,000, $10,000 or $5,000"; in subsec. (c), substituted "any amount less than $50,000, such member may thereafter be insured under this subchapter in the amount of $50,000 or any lesser amount evenly divisible by $10,000" for "the amount of $30,000, $25,000, $20,000, $15,000, $10,000, or $5,000, he may thereafter be insured under this subchapter, as the case may be, upon written application, proof of good health, and compliance with such other terms and conditions as may be prescribed by the Administrator."; and, in subsec. (d), substituted "January 1, 1986" for "the effective date of this subsection" wherever appearing, and in the introductory matter, substituted "in the amount of $50,000 or any lesser amount evenly divisible by $10,000" for "up to a maximum of $35,000 (in any amount divisible by $5,000)".

1986. Act Oct. 28, 1986, in subsec. (b), in para. (2), substituted "such member" for "his", and in the concluding matter substituted "such member" for "he" wherever appearing and "such member's" for "his"; in subsec. (c) substituted "such member's" for "his" and purported to substituted "such member" for "he", but such amendment could not be executed as the word "he" does not appear in text.

1991. Act April 6, 1991 (applicable as provided by § 336(c) of such Act, which appears as a note to this section), in subsecs. (a) and (c), substituted "$100,000" for "$50,000" wherever
appearing; and, in subsec. (d), substituted "May 1, 1991" for "January 1, 1986" wherever appearing; and, in the introductory matter, substituted "$100,000" for "$50,000".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 767, as 38 USCS § 1967, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

1992. Act Oct. 29, 1992 (effective 12/1/92, as provided by § 205 of such Act, which appears as a note to 38 USCS § 1922A), added subsec. (e).

1993. Act Nov. 30, 1993 (applicable with respect to amendments to chapter 19 of title 38, United States Code (38 USCS §§ 1901 et seq.) that take effect after 11/29/92, as provided by § 1175(b) of such Act, added subsec. (f).

1994. Act Oct. 5, 1994, in subsec. (a), in para. (2), deleted "and" after the concluding semicolon, in para. (3), added "and" after the concluding semicolon, and added para. (4), and, in the concluding matter, inserted "or the first day a member of the Reserves meets the qualifications of section 1965(5)(D) of this title, ".

1996. Act Feb. 10, 1996 (effective 4/1/96 as provided by § 646 of such Act), in subsecs. (a) and (c), substituted "$200,000" for "$100,000" wherever appearing; deleted subsec. (e), which read: "In addition to the amounts of insurance otherwise provided under this section, an eligible member may, upon application, obtain increased coverage beyond that provided under this section in the amount of $100,000, or any lesser amount evenly divisible by $10,000,,; and redesignated subsec. (f) as new subsec. (e).

Act Oct. 9, 1996, in subsec. (a), in para. (1), inserted "and" after the concluding semicolon, deleted paras. (3) and (4), which read:

"(3) any member assigned to, or who upon application would be eligible for assignment to, the Retired Reserve of a uniformed service who meets the qualifications set forth in section 1965(5)(C) of this title; and

"(4) any member assigned to the Retired Reserve of a uniform service who meets the qualifications set forth in section 1965(5)(D) of this title, ";

and, in the concluding matter, deleted "or the first day a member of the Reserves, whether or not assigned to the Retired Reserve of a uniformed service, meets the qualifications of section 1965(5)(C) of this title, or the first day a member of the Reserves meets the qualifications of section 1965(5)(D) of this title" following "section 1965(5)(B) of this title," and substituted "Servicemembers' Group Life Insurance" for "Servicemen's Group Life Insurance"; in subsec. (c), substituted "Servicemembers' Group Life Insurance" for "Servicemen's Group Life Insurance" wherever appearing; deleted subsec. (d), which read:

"(d) Notwithstanding any other provision of this section, any member who on May 1, 1991 is a member of the Retired Reserve of a uniformed service (or who upon application would be eligible for assignment to the Retired Reserve of a uniformed service) may obtain increased insurance coverage in the amount of $100,000 or any lesser amount evenly divisible by $10,000 if--

"(1) the member--

"(A) is insured under this subchapter on May 1, 1991; or

"(B) within one year after May 1, 1991, reinstates insurance under this subchapter that had lapsed for nonpayment of premiums; and

"(2) the member submits a written application for the increased coverage to the office established pursuant to section 1966(b) of this title within one year after May 1, 1991, ";

added a new subsec. (d); and, in subsec. (e), substituted "Servicemembers' Group Life Insurance" for "Servicemen's Group Life Insurance".
2000. Act Nov. 1, 2000, in subsec. (a), substituted "subparagraph (B) or (C) of section 1965(5) of this title" for "section 1965(5)(B) of this title" wherever appearing.

Such Act further (effective on the first day of the first month that begins more than 120 days after 11/1/00, as provided by § 312(c) of such Act, which appears as a note to this section), in subsecs. (a), (c), and (d), substituted "$250,000" for "$200,000" wherever appearing.

2001. Act June 5, 2001 (effective on the first day of the first month that begins more than 120 days after enactment, as provided by § 4(g) of such Act, which appears as 38 USCS § 101 note), substituted subsec. (a) for one which read:

"(a) Any policy of insurance purchased by the Secretary under section 1966 of this title shall automatically insure against death--

"(1) any member of a uniformed service on active duty, active duty for training, or inactive duty training scheduled in advance by competent authority; and

"(2) any member of the Ready Reserve of a uniformed service who meets the qualifications set forth in subparagraph (B) or (C) of section 1965(5) of this title;

in the amount of $250,000, unless such member elects in writing (A) not to be insured under this subchapter, or (B) to be insured in an amount less than $250,000 that is evenly divisible by $10,000. The insurance shall be effective the first day of active duty or active duty for training, or the beginning of a period of inactive duty training scheduled in advance by competent authority, or the first day a member of the Ready Reserve meets the qualifications set forth in subparagraph (B) or (C) of section 1965(5) of this title, or the date certified by the Secretary to the Secretary concerned as the date Servicemembers' Group Life Insurance under this subchapter for the class or group concerned takes effect, whichever is the later date.

and, in subsec. (c), substituted the sentence beginning "If a person eligible . . ." for "If any member elects not to be insured under this subchapter or to be insured in any amount less that $250,000, such member may thereafter be insured under this subchapter in the amount of $250,000 or any lesser amount evenly divisible by $10,000 upon written application, proof of good health, and compliance with such other terms and conditions as may be prescribed by the Secretary.".

2005. Act May 11, 2005, § 1012(a)-(c)(1), (d), (f) (repealed by Act Sept. 30, 2005), in subsec. (a), in para. (2), in subpara. (A), inserted ", except with respect to insurance provided under paragraph (3)(A(i)(III))" before the concluding period, and added subpara. (C) which read: "(C) Pursuant to regulations prescribed by the Secretary of Defense, notice of an election of a member with a spouse not to be insured under this subchapter, or to be insured under this subchapter in an amount less than the maximum amount provided under paragraph (3)(A(i)(I)), shall be provided to the spouse of the member.", and, in para. (3), in subpara. (A), in the introductory matter, substituted ", (C), and (D)" for "and (C)".

"(i) In the case of a member--

"(I) $400,000 or such lesser amount as the member may elect as provided in subparagraph (B);

"(II) in the case of a member covered by subsection (e), the amount provided for or elected by the member under subclause (I) plus the additional amount of insurance provided for the member by subsection (e);

"(III) in the case of a member covered by subsection (e) who has made an election under paragraph (2)(A) not to be insured under this subchapter, the amount of insurance provided for the member by subsection (e).".
in subpara. (B), substituted "member, be evenly divisible by $50,000 and, in the case of a member's spouse" for "member or spouse", and added subparas. (D) and (E) which read:

"(D) A member with a spouse may not elect not to be insured under this subchapter, or to be insured under this subchapter in an amount less than the maximum amount provided under subparagraph (A)(i)(I), without the written consent of the spouse.

"(E) Whenever a member who is not married elects not to be insured under this subchapter, or to be insured under this subchapter in an amount less than the maximum amount provided for under subparagraph (A)(i)(I), the Secretary concerned shall provide a notice of such election to any person designated by the member as a beneficiary or designated as the member's next-of-kin for the purpose of emergency notification, as determined under regulations prescribed by the Secretary of Defense."

in subsec. (d), in the introductory matter, substituted "$400,000" for "$250,000"; redesignated subsec. (e) as subsec. (f); and inserted new subsec. (e) which read:

"(e)(1) A member covered by this subsection is any member as follows:

"(A) Any member who dies as a result of one or more wounds, injuries, or illnesses incurred while serving in an operation or area that the Secretary designates, in writing, as a combat operation or a zone of combat, respectively, for purposes of this subsection.

"(B) Any member who formerly served in an operation or area so designated and whose death is determined (under regulations prescribed by the Secretary of Defense) to be the direct result of injury or illness incurred or aggravated while so serving.

"(2) The additional amount of insurance under this subchapter that is provided for a member by this subsection is $150,000, except that in a case in which the amount provided for or elected by the member under subsection (a)(3)(A)(i)(I) exceeds $250,000, the additional amount of insurance under this subchapter that is provided for the member by this subsection shall be reduced to such amount as is necessary to comply with the limitation in paragraph (3).

"(3) The total amount of insurance payable for a member under this subchapter may not exceed $400,000.

"(4) While a member is serving in an operation or area designated as described in paragraph (1), the cost of insurance of the member under this subchapter that is attributable to $150,000 of insurance coverage shall, at the election of the Secretary concerned--

"(A) be contributed as provided in section 1969(b)(2) of this title, rather through deduction or withholding from the member's pay; or

"(B) if deducted or withheld from the member's pay, be reimbursed to the member through such mechanism as the Secretary concerned determines appropriate.".

Act Sept. 30, 2005 (effective as of 8/31/2005, as provided by § 2 of such Act), repealed § 1012 of Act May 11, 2005 (amending this section), and provided that this section shall be applied as if such § 1012 had not been enacted.

Such Act further (effective as of 9/1/2005 and applicable with respect to deaths occurring on or after that date, as provided by § 3(c) of such Act, which appears as a note to this section), in subsec. (a)(3)(A)(i), substituted "$400,000" for "$250,000"; and, in subsec. (d), in the introductory matter, substituted "in effect under paragraph (3)(A)(i) of that subsection" for "of $250,000".
Such Act further (effective as of 9/1/2005, as provided by § 4 of such Act) added subsec. (f).
Such Act further (effective as of 9/1/2005, as provided by § 5(b) of such Act, which appears as a note to this section), in subsec. (a)(3)(B), substituted "member, be evenly divisible by $50,000 and, in the case of a member's spouse," for "member or spouse".

Other provisions:
Effective date of May 24, 1974 amendments. Act May 24, 1974, P. L. 93-289, § 12(3), 88 Stat. 173, provides: "The amendments increasing the maximum amount of Servicemen's Group Life Insurance shall become effective upon the date of enactment of this Act."

"(1) Except as provided in paragraph (2), the amendments made by subsections (a) and (b) [amending this section and 38 USCS § 1977] shall take effect on January 1, 1986.
"(2) The amendment made by subsection (a)(1)(A) [amending this section] shall be deemed to have taken effect on December 12, 1985, with respect to members who--

"(A) died after December 11, 1985, and before January 1, 1986; and

"(B) were, on the date of death, insured in the amount of $35,000 under subchapter III of chapter 19 of title 38, United States Code [38 USCS §§ 1965 et seq.]."

Application of April 6, 1991 amendments. Act April 6, 1991, P. L. 102-25, Title III, Part C, § 336(c) [(1)], 105 Stat. 90, provides: "The amendments made by subsection (a) [amending this section] shall apply with respect to deaths on or after the date of the enactment of this Act."

Death gratuity. Act Nov. 11, 1993, P. L. 103-139, Title VIII, § 8134, 107 Stat. 1471, provides:
"(a)(1) The Secretary of Defense shall pay a death gratuity under this section to each beneficiary under a Servicemen's Group Life Insurance policy in the case of each deceased member of the uniformed services described in paragraph (2).

"(2) This section applies with respect to any member of the uniformed services--

"(A) who died on or after October 29, 1992 (the date of the enactment of the Veterans' Benefits Act of 1992 (Public Law 102-568)), and before December 1, 1992 (the effective date of amendments made by title II of the Act [for full classification, consult USCS Tables volumes], relating to veterans' life insurance programs); and

"(B) whose death was in performance of duty.

"(b)(1) The amount of the death gratuity payable to a beneficiary under this section shall be equal to the amount of the life insurance proceeds paid or payable to that beneficiary under section 1967(a) of title 38, United States Code, by reason of death of such member.

"(2) In the case of a deceased member of the uniformed services who, before death, affirmatively elected, in writing, to apply for an increase in SGLI coverage in an amount less than $100,000 under subsection (e) of section 1967 of title 38, United States Code, the death gratuity paid under this section shall be equal to the amount of the increase so elected.

"(c) A death gratuity may not be paid under this section if the deceased member, before death, affirmatively elected, in writing, to apply for increased SGLI coverage under subsection (e) of section 1967 of title 38, United States Code, and, by reason of a provision of law enacted after October 29, 1992, insurance is payable pursuant to that election.

"(d) A death gratuity shall be payable under this section to an SGLI beneficiary upon receipt of a written application for the payment of such gratuity. Any such application must be received by the Secretary of Defense not later than September 30, 1994.
“(e) In addition to amounts otherwise appropriated in this Act [for full classification, consult USCS Tables volumes], the amount of $5,300,000 is hereby appropriated for, and shall be available only for, the payment of death gratuities under this section. Funds provided under this section shall remain available until expended for any valid claims received by the Secretary of Defense not later than September 30, 1994.”.

Effective date of Feb. 10, 1996 amendments. Act Feb. 10, 1996, P. L. 104-106, Div A, Title VI, Subtitle E, § 646, 110 Stat. 370, provides that the amendments made by such section (amending subsecs. (a) and (c) of this section, deleting subsec. (e) of this section, and redesignating subsec. (f) of this section as new subsec. (d)) are effective April 1, 1996.

Effective date of amendments made by § 312 of Act Nov. 1, 2000. Act Nov. 1, 2000, P. L. 106-419, Title III, Subtitle B, § 312(c), provides: "The amendments made by this section [amending 38 USCS §§ 1967(a), (c), (d), and 1977(a)] shall take effect on the first day of the first month that begins more than 120 days after the date of the enactment of this Act.”.


“(a) Applicability of increase in benefit. Notwithstanding subsection (c) of section 312 of the Veterans Benefits and Health Care Improvement Act of 2000 [note to this section] (Public Law 106-419; 114 Stat. 1854), the amendments made by subsection (a) of that section [amending subsecs. (a), (c), (d) of this section] shall take effect on October 1, 2000, with respect to any member of the uniformed services who died in the performance of duty (as determined by the Secretary concerned) during the period beginning on October 1, 2000, and ending at the close of March 31, 2001, and who on the date of death was insured under the Servicemembers' Group Life Insurance program under subchapter III of chapter 19 of title 38, United States Code [38 USCS §§ 1965 et seq.], for the maximum coverage available under that program.

“(b) Definitions. In this section:

"(1) The term 'Secretary concerned' has the meaning given that term in section 101(25) of title 38, United States Code.

"(2) The term 'uniformed services' has the meaning given that term in section 1965(6) of title 38, United States Code.”.

Repeal of effective date and termination provisions of § 1012 of Act May 11, 2005. Act May 11, 2005, P. L. 109-13, Div A, Title I, § 1012(h), (i), 119 Stat. 246, which formerly appeared as a note to this section, was repealed by § 2 of Act Sept. 30, 2005, P. L. 109-80, effective as of 8/31/2005. Such note provided that § 1012 of Act May 11, 2005, P. L. 109-13, and the amendments made by such section (amending 38 USCS §§ 1967, 1969, 1970, and 1977) were to take effect on the first day of the first month beginning more than 90 days after enactment and that such amendments would terminate on September 30, 2005.

Continuation of May 11, 2005 amendments. Pursuant to § 115 of Act Sept. 30, 2005, P. L. 109-77, which appears as 10 USCS § 1478 note, the provisions of, and amendments made by, § 1012 of Public Law 109-13 (classified to 38 USCS §§ 1967, 1967 note, 1969, 1970, and 1977) shall continue in effect, notwithstanding § 1012(i) of that Public Law (former note to this section), through the earlier of (1) November 18, 2005; or (2) the date of the enactment into law of legislation that supersedes the provisions of, or the amendments made by, such § 1012.

Effective date of amendments made by § 3 of Act Sept. 30, 2005. Act Sept. 30, 2005, P. L. 109-80, § 3(c), 119 Stat. 2046, provides: "The amendments made by this section [amending 38 USCS §§ 1967(a)(3), (d), and 1977(a)] shall take effect as of September 1, 2005, and shall apply with respect to deaths occurring on or after that date.".


Code of Federal Regulations
Department of Veterans Affairs-Servicemen's Group Life Insurance and Veterans' Group Life Insurance, 38 CFR Part 9

Cross References
This section is referred to in 38 USCS §§ 1968, 1977

Research Guide

Am Jur:
24 Am Jur 2d, Divorce and Separation § 544
44A Am Jur 2d, Insurance § 1877
1. Persons covered
2. Effective date of coverage
3. Rules and regulations

1. Persons covered
Advanced reserve officers training corps cadet who died from natural causes while attending a six-weeks' training course at a summer camp was not member of armed forces and was not automatically insured against death by Servicemen's Group Life Insurance Act (38 USCS §§ 765 et seq. [now 38 USCS §§ 1965 et seq.]). Allison v United States (1970, CA6 Ky) 426 F.2d 1324

Serviceman merely scheduled to begin duty at specified time and place is not thereby on inactive duty training since 38 USCS § 765 [now 38 USCS § 1965] clearly contemplates that status of being on inactive duty training entails actual participation in that duty, nor is serviceman engaged in active duty for training as member where he is not required to participate in training program and does not elect to do so; thus, serviceman is not entitled to benefits of Servicemen's Group Life Insurance under § 767 [now § 1967]. Nowinski v Servicemen's Group Life Ins. (1980, ED Pa) 484 F.2d 1324

2. Effective date of coverage
SGLI insurance for nonprior service enlistee in nonpay status was "effective" within meaning of 38 USCS § 767(a) [now 38 USCS § 1967(a)] notwithstanding that enlistee was awaiting orders to attend his initial active duty training at time of his death where (1) enlistees who entered initial active duty training were actually charged premiums for periods dating from their enlistment and (2) method is apparently provided under 38 USCS § 769(a)(4) [now 38 USCS § 1969(a)(4)] for insurer to collect premiums from insurance proceeds. Moore v Prudential Ins. Co. (1980, MD Ga) 499 F Supp 418

Insured was not entitled to increased coverage where, on effective date of amendment to 38 USCS § 767 [now 38 USCS § 1967] increasing to $35,000 maximum amount of insurance upon lives of eligible "members" of uniform services, he had been transferred to Navy Reserve Readiness Command Region Four Records Review status in training category applicable to
persons not physically qualified to perform active duty for training, and was not thereafter required
to perform active duty for training or inactive duty training creditable for retirement, since § 767
[now § 1967] makes maximum insurance effective on first day member of Ready Reserve meets
qualifications set forth in 38 USCS § 765(5)(B) [now 38 USCS § 1965(5)(B)] and since insured,
due to transfer, did not meet such qualifications. Garvey v Servicemen's Group Life Ins. (1984,
MD Pa) 584 F Supp 623

3. Rules and regulations

  District Court properly found that Administrator [now Secretary] of Veterans Affairs acted
within his authority under 38 USCS § 767(c) [now 38 USCS § 1967(c)] in issuing regulation
establishing time limit within which retired military reservists must submit applications for full-time
coverage under Veterans' Insurance Act of 1974, since such regulation was reasonably related to
purposes of Act and was "term or condition" authorized by § 767(c) [now § 1967(c)]. Turney v
United States (1982, CA4 Md) 684 F.2d 307

§ 1968. Duration and termination of coverage; conversion

(a) Each policy purchased under this subchapter [38 USCS §§ 1965 et seq.] shall contain
a provision, in terms approved by the Secretary, to the effect that any insurance
thereunder on any member of the uniformed services, and any insurance thereunder on
any insurable dependent of such a member, unless discontinued or reduced upon the
written request of the insured (or discontinued pursuant to section 1969(a)(2)(B) of this
title [38 USCS § 1969(a)(2)(B)], shall continue in effect while the member is on active
duty, active duty for training, or inactive duty training scheduled in advance by
competent authority during the period thereof, or while the member meets the
qualifications set forth in subparagraph (B) or (C) of section 1965(5) of this title [38
USCS § 1965(5)] and such insurance shall cease as follows:

  (1) With respect to a member on active duty or active duty for training under a call or
order to duty that does not specify a period of less than 31 days, insurance under this
subchapter [38 USCS §§ 1965 et seq.] shall cease as follows:

    (A) 120 days after the separation or release from active duty or active duty for
training, unless on the date of such separation or release the member is totally
disabled, under criteria established by the Secretary, in which event the insurance
shall cease on the earlier of the following dates (but in no event before the end of
120 days after such separation or release):

      (i) The date on which the insured ceases to be totally disabled.

      (ii) The date that is--

        (I) two years after the date of separation or release from such active duty
        or active duty for training, in the case of such a separation or release
during the period beginning on the date that is one year before the date of
the enactment of Veterans' Housing Opportunity and Benefits
Improvement Act of 2006 [enacted June 15, 2006] and ending on
September 30, 2011; and

        (II) 18 months after the date of separation or release from such active duty
or active duty for training, in the case of such a separation or release on or
after October 1, 2011.

    (B) At the end of the thirty-first day of a continuous period of (i) absence without
leave, (ii) confinement by civil authorities under a sentence adjudged by a civilian
court, or (iii) confinement by military authorities under a court-martial sentence
involving total forfeiture of pay and allowances. Any insurance so terminated as the result of such an absence or confinement, together with any beneficiary designation in effect for such insurance at such termination thereof, shall be automatically revived as of the date the member is restored to active duty with pay or to active duty for training with pay.

(2) With respect to a member on active duty or active duty for training under a call or order to duty that specifies a period of less than 31 days, insurance under this subchapter [38 USCS §§ 1965 et seq.] shall cease at midnight, local time, on the last day of such duty, unless on such date the insured is suffering from a disability incurred or aggravated during such period which, within 120 days after such date, (i) results in death, or (ii) renders the member uninsurable at standard premium rates according to the good health standards approved by the Secretary, in which event the insurance shall continue in force to death, or for 120 days after such date, whichever is the earlier date.

(3) With respect to a member on inactive duty training scheduled in advance by competent authority, insurance under this subchapter [38 USCS §§ 1965 et seq.] shall cease at the end of such scheduled training period, unless at such time the insured is suffering from a disability incurred, or aggravated during such period which, within 120 days after the date of such training, (i) results in death, or (ii) renders the member uninsurable at standard premium rates according to the good health standards approved by the Secretary in which event the insurance shall continue in force to death, or for 120 days after the date such training terminated, whichever is the earlier date.

(4) With respect to a member of the Ready Reserve of a uniformed service who meets the qualifications set forth in subparagraph (B) or (C) of section 1965(5) of this title [38 USCS § 1965(5)], insurance under this subchapter [38 USCS §§ 1965 et seq.] shall cease 120 days after separation or release from such assignment, unless on the date of such separation or release the member is totally disabled, under criteria established by the Secretary, in which event the insurance shall cease on the earlier of the following dates (but in no event before the end of 120 days after separation or release from such assignment):

(A) The date on which the insured ceases to be totally disabled.
(B) The date that is--
   (i) two years after the date of separation or release from such assignment, in the case of such a separation or release during the period beginning on the date that is one year before the date of the enactment of Veterans' Housing Opportunity and Benefits Improvement Act of 2006 [enacted June 15, 2006] and ending on September 30, 2011; and
   (ii) 18 months after the date of separation or release from such assignment, in the case of such a separation or release on or after October 1, 2011.

(5) With respect to an insurable dependent of the member, insurance under this subchapter [38 USCS §§ 1965 et seq.] shall cease--

(A) 120 days after the date of an election made in writing by the member to terminate the coverage; or
(B) on the earliest of--
   (i) 120 days after the date of the member's death;
(ii) 120 days after the date of termination of the insurance on the member's life under this subchapter [38 USCS §§ 1965 et seq.]; or
(iii) 120 days after the termination of the dependent's status as an insurable dependent of the member.

(b) (1) Each policy purchased under this subchapter [38 USCS §§ 1965 et seq.] shall contain a provision, in terms approved by the Secretary, that, except as hereinafter provided, Servicemembers' Group Life Insurance which is continued in force after expiration of the period of duty or travel under section 1967(b) or 1968(a) of this title [38 USCS § 1967(b) or 1968(a)], effective the day after the date such insurance would cease--

(A) shall be automatically converted to Veterans' Group Life Insurance (to insure against death of the member only), subject to (i) the timely payment of the initial premium under terms prescribed by the Secretary, and (ii) the terms and conditions set forth in section 1977 of this title [38 USCS § 1977]; or
(B) at the election of the member, shall be converted to an individual policy of insurance as described in section 1977(e) of this title [38 USCS § 1977(e)] upon written application for conversion made to the participating company selected by the member and payment of the required premiums.

(2) Automatic conversion to Veterans' Group Life Insurance under paragraph (1) shall be effective only in the case of an otherwise eligible member or former member who is separated or released from a period of active duty or active duty for training or inactive duty training on or after the date on which the Veterans' Group Life Insurance program (provided for under section 1977 of this title [38 USCS § 1977]) becomes effective.

(3) (A) In the case of a policy purchased under this subchapter [38 USCS §§ 1965 et seq.] for an insurable dependent who is a spouse, upon election of the spouse, the policy may be converted to an individual policy of insurance under the same conditions as described in section 1977(e) of this title [38 USCS § 1977(e)] (with respect to conversion of a Veterans' Group Life Insurance policy to such an individual policy) upon written application for conversion made to the participating company selected by the spouse and payment of the required premiums. Conversion of such policy to Veterans' Group Life Insurance is prohibited.
(B) In the case of a policy purchased under this subchapter [38 USCS §§ 1965 et seq.] for an insurable dependent who is a child, such policy may not be converted under this subsection.

References in text:
The "amendment made by section 5(a) of the Veterans' Insurance Act of 1974 (Public Law 93-289, 88 Stat. 166)", referred to in subsec. (a)(5), is the date established therefor by Act May 24, 1974, P. L. 93-289, § 12(4), 88 Stat. 173, which appears as an Other provisions note to this section.

The "date on which the Veterans' Group Life Insurance program (provided for under section 1977 of this title) becomes effective", referred to in subsec. (b), is the first day of the third calendar month following May, 1974, as provided by § 12(4) of Act May 24, 1974.

For the "effective date of the Reserve Officer Personnel Management Act [Title XVI of Act Oct. 5, 1994, P. L. 103-337]", referred to in subsec. (a)(4)(B), see § 1691 of such Title, which appears as 10 USCS § 10001 note.

Amendments:

1970. Act June 25, 1970 (effective 6/25/70, as provided by § 14(a) of such Act, which appears as 38 USCS § 1317 note), substituted this section for one which read:

"§ 768. Termination of coverage; conversion

"Each policy purchased under this subchapter shall contain a provision, in terms approved by the Administrator, to the effect that any insurance thereunder on any member of the uniformed services shall cease (except in the case of members absent without leave) one hundred and twenty days after his separation or release from active duty, and that during the period such insurance is in force the insured upon request to the administrative office established under subsection 766(b) of this title shall be furnished a list of life insurance companies participating in the program established under this subchapter and upon written application (within such period) to the participating company selected by the insured and payment of the required premiums be granted insurance without a medical examination on a plan then currently written by such company which does not provide for the payment of any sum less than the face value thereof or for the payment of an additional amount as premiums if the insured engages in the military service of the United States, to replace the Servicemen's Group Life Insurance in effect on the insured's life under this subchapter. In addition to life insurance companies participating in the program established under this subchapter, such list shall include additional life insurance companies (not so participating) which meet qualifying criteria, terms, and conditions established by the Administrator and agree to sell insurance to members and former members in accordance with the provisions of the preceding sentence. In the case of any member who is absent without leave for a period of more than thirty-one days, insurance under this subchapter shall cease as of the date such absence commenced. Any such member so absent without leave, upon return to duty, may again be insured under this subchapter, but only if he complies with the requirements set forth in section 767(b) of this section."

1974. Act May 24, 1974 § 5(a)(1)-(3), in subsec. (a), in the introductory matter, inserted "or while the member meets, the qualifications set forth in section 765(5)(B) or (C) of this title," in paras. (2) and (3), substituted "one hundred and twenty days" for "ninety days" wherever appearing, added paras. (4) and (5).

Act May 24, 1974, § 5(a)(4), (5) (effective as provided by § 12(4) of such Act, which appears as a note to this section), substituted subsec. (b) for one which read:

"(b) Each policy purchased under this subchapter shall contain a provision, in terms approved by the Administrator, for the conversion of Servicemen's Group Life Insurance to an individual policy of life insurance--

"(1) with respect to a member on active duty or active duty for training under a call or order to duty that does not specify a period of less than thirty-one days, effective the one hundred and twenty-first day after separation or release from such duty, or at any time thereafter such insurance is in effect;

"(2) with respect to a member on active duty or active duty for training under a call or order to duty that specifies a period of less than thirty-one days, and a member insured during inactive duty training scheduled in advance by competent authority there shall be no right of conversion unless the insurance is continued in force for ninety days after such duty terminates, as the result of a disability incurred or aggravated during such active duty, active duty for training, or inactive duty training, in which event the insurance may be converted effective the day after the end of such ninety-day period.";
and deleted subsec. (c), which read: "(c) An insured eligible to convert insurance under this subchapter upon request to the Office of Servicemen's Group Life Insurance shall be furnished a list of life insurance companies participating in the program established under this subchapter. Upon written application for conversion of Servicemen's Group Life Insurance made by an eligible insured under this subchapter to the participating company he selects and payment of the required premiums the insured shall be granted life insurance on a plan then currently written by such company which does not provide for the payment of any sum less than the face value thereof or for the payment of an additional amount as premiums if the insured engages in the military service of the United States. Such converted insurance shall be issued without a medical examination if application is made within one hundred and twenty days after separation or release from active duty or active duty for training under a call or order to duty that did not specify a period of less than thirty-one days. Medical examinations and evidence of qualifying health conditions may be required in any case where the former member alleges that his insurance is continued in force beyond the normal termination date by reason of a qualifying disability incurred or aggravated during active duty, active duty for training, or inactive duty training. In addition to the life insurance companies participating in the program established under this subchapter, the list furnished to an insured under this section, shall include additional life insurance companies (not so participating) which meet qualifying criteria, terms and conditions established by the Administrator and agree to sell insurance to former members in accordance with the provisions of this section."


1986. Act Oct. 28, 1986, in subsec. (a), in paras. (2) and (3) deleted "his" preceding "death" and substituted "the member" for "him"; and in subsec. (b) substituted "the" for "his" following "day after".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 768, as 38 USCS § 1968, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

1994. Act Oct. 5, 1994, in subsec. (a), in the introductory matter, substituted "subparagraph (B), (C), or (D) of section 1965(5)" for "section 1965(5)(B) or (C)", in para. (4), in subpara. (A), deleted "or" after the concluding semicolon, in subpara. (B), substituted "; or" for a concluding period, and added subpara. (C), and added para. (6).

Act Oct. 5, 1994 (effective 12/1/94 as provided by § 1691 of such Act, which appears as 10 USCS § 10001 note), in subsec. (a)(4)(B), substituted "chapter 1223 of title 10 (or under chapter 67 of that title as in effect before the effective date of the Reserve Officer Personnel Management Act)" for "chapter 67 of title 10".

1996. Act Feb. 10, 1996 (effective 4/1/96, as provided by § 647(c) of such Act, which appears as a note to this section), as amended by Act Oct. 5, 1999 (effective as of 4/1/96, as provided by § 1066(d)(1) of such Act), in subsec. (a), in the introductory matter, inserted "(or discontinued pursuant to section 1969(a)(2)(B) of this title)"

Act Oct. 9, 1996, in subsec. (a), in the introductory matter, substituted "section 1965(5)(B)" for "subparagraph (B), (C), or (D) of section 1965(5)" in paras. (1)(B) and (2), substituted the concluding semicolon for a period, in para. (3), substituted "; and" for a concluding period, in para. (4), substituted "120 days after separation or release from such assignment, unless on" for "one hundred and twenty days after separation or release from such assignment--"

"(A) unless on",

substituted "before the end of 120 days" for "prior to the expiration of one hundred and twenty days", substituted a period for a semicolon after "such assignment", and deleted subpars. (B) and (C), which read:
“(B) unless on the date of such separation or release the member has completed at least twenty years of satisfactory service creditable for retirement purposes under chapter 1223 of title 10 (or under chapter 67 of that title as in effect before the effective date of the Reserve Officer Personnel Management Act) and would upon application be eligible for assignment to or is assigned to the Retired Reserve, in which event the insurance, unless converted to an individual policy under terms and conditions set forth in section 1977(e) of this title shall, upon timely payment of premiums under terms prescribed by the Secretary directly to the administrative office established under section 1966(b) of this title, continue in force until receipt of the first increment of retirement pay by the member or the member's sixty-first birthday, whichever occurs earlier; or

“(C) unless on the date of such separation or release the member is transferred to the Retired Reserve of a uniformed service under the temporary special retirement authority provided in section 1331a of title 10, in which event the insurance, unless converted to an individual policy under terms and conditions set forth in section 1977(e) of this title, shall, upon timely payment of premiums under terms prescribed by the Secretary directly to the administrative office established under section 1966(b) of this title, continue in force until receipt of the first increment of retirement pay by the member or the member's sixty-first birthday, whichever occurs earlier.”,

and deleted paras. (5) and (6), which read:

"(5) with respect to a member of the Retired Reserve who meets the qualifications of section 1965(5)(C) of this title, and who was assigned to the Retired Reserve prior to the date insurance under the amendment made by section 5(a) of the Veterans' Insurance Act of 1974 (Public Law 93-289, 88 Stat. 166) is placed in effect for members of the Retired Reserve, at such time as the member receives the first increment of retirement pay, or the member's sixty-first birthday, whichever occurs earlier, subject to the timely payment of the initial and subsequent premiums, under terms prescribed by the Secretary, directly to the administrative office established under section 1966(b) of this title.

"(6) with respect to a member of the Retired Reserve who meets the qualifications of section 1965(5)(D) of this title, at such time as the member receives the first increment of retirement pay, or the member's sixty-first birthday, whichever occurs earlier, subject to the timely payment of the initial and subsequent premiums, under terms prescribed by the Secretary, directly to the administrative office established under section 1966(b) of this title."

and, in subsec. (b), substituted "Servicemembers' Group Life Insurance" for "Servicemen's Group Life Insurance", designated the sentence beginning "Each policy purchased . . . " as para. (1) and, in such paragraph as so designated, substituted "would cease--" and subparas. (A) and (B) for "would cease, shall be automatically converted to Veterans’ Group Life Insurance subject to (1) the timely payment of the initial premium under terms prescribed by the Secretary, and (2) the terms and conditions set forth in section 1977 of this title.", designated the sentence beginning "Such automatic conversion . . . " as para. (2) and, in such paragraph as so designated, substituted "Automatic conversion to Veterans' Group Life Insurance under paragraph (1)" for "Such automatic conversion", and deleted "Servicemen's Group Life Insurance continued in force under section 1968(a)(4)(B) or (5) of this title shall not be converted to Veterans’ Group Life Insurance. However, a member whose insurance could be continued in force under section 1968(a)(4)(B) of this title, but is not so continued, may, effective the day after the insurance otherwise would cease, convert such insurance to an individual policy under the terms and conditions set forth in section 1977(e) of this title." following "effective.".

2000. Act Nov. 1, 2000, in subsec. (a), substituted "subparagraph (B) or (C) of section 1965(5) of this title" for "section 1965(5)(B) of this title" wherever appearing.

2001. Act June 5, 2001 (effective on the first day of the first month that begins more than 120 days after enactment, as provided by § 4(g) of such Act, which appears as 38 USCS § 101 note), in subsec. (a), in the introductory matter, inserted "and any insurance thereunder on any insurable dependent of such a member," and substituted "and such insurance shall cease as follows:" for ", and such insurance shall cease-", in para. (1), in the introductory matter, substituted "With" for "with", and substituted "31 days, insurance under this subchapter shall cease-" for "thirty-one days-", in subpara. (A), substituted "120 days" for "one hundred and twenty days", and substituted "before the end of 120 days" for "prior to the expiration of one hundred and twenty days", and, in subpara. (B), substituted the concluding period for a semicolon, in para. (2), substituted "With" for "with", substituted "31 days," for "thirty-one days", substituted "120 days" for "one hundred and twenty days" in two places, and substituted the concluding period for a semicolon, in para. (3), substituted "With" for "with", inserted a comma following "competent authority", substituted "120 days" for "one hundred and twenty days" in two places, and substituted the concluding period for "; and", in para. (4), substituted "With" for "with", and inserted "insurance under this subchapter shall cease", and added para. (5); and, in subsec. (b), in para. (1)(A), inserted "(to insure against death of the member only)".

2006. Act June 15, 2006, in subsec. (a), in para. (1), in the introductory matter, substituted "shall cease as follows:" for "shall cease-", in subpara. (A), substituted "shall cease on the earlier of the following dates (but in no event before the end of 120 days after such separation or release):" and cls. (i) and (ii) for "shall cease one year after the date of separation or release from such active duty or active duty for training, or on the date the insured ceases to be totally disabled, whichever is the earlier date, but in no event before the end of 120 days after such separation or release; or", and, in subpara. (B), substituted "At" for "at", and, in para. (4), substituted "shall cease on the earlier of the following dates (but in no event before the end of 120 days after separation or release from such assignment):" and subparas. (A) and (B) for "shall cease one year after the date of separation or release from such assignment, or on the date the insured ceases to be totally disabled, whichever is the earlier date, but in no event before the end of 120 days after separation or release from such assignment."

Other provisions:

Right of persons discharged or released from uniformed services to convert Servicemen's Group Life insurance to individual policies. Act May 24, 1974, P. L. 93-289, § 5(b), 88 Stat. 168, provides: "The amendments made by this Act [enacting 37 USCS § 1907 and 38 USCS §§ 1977-1979 and amending 38 USCS §§ 1923, 1965, 1967-1971, 1974] shall not be construed to deprive any person discharged or released from the uniformed services of the United States prior to the date on which the Veterans' Group Life Insurance program (provided for under section 1977 of title 38, United States Code) becomes effective [see references in text note to this section] of the right to convert Servicemen's Group Life Insurance to an individual policy under the provisions of law in effect prior to such effective date."

Effective date of May 24, 1974 amendments. Act May 24, 1974, P. L. 93-289, § 12(4), 88 Stat. 173, provides: "The amendments made by sections 5(a)(4) and (5) of this Act [amending this section], and those enacting a Veterans' Group Life Insurance program [enacting 38 USCS §§ 1977-1979] shall become effective on the first day of the third calendar month following the month in which this Act is enacted."

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Conversion of SGLI to VGLI. Act Oct. 9, 1996, P. L. 104-275, Title IV, § 402(e), 110 Stat. 3338, provides: "The Servicemembers' Group Life Insurance of any member of the Retired Reserve of a uniformed service shall be converted to Veterans' Group Life Insurance effective 90 days after the date of the enactment of this Act."


Cross References
This section is referred to in 38 USCS §§ 1977, 1980

Research Guide
Am Jur:
24 Am Jur 2d, Divorce and Separation § 544
44A Am Jur 2d, Insurance § 1877

Forms:
16A Fed Procedural Forms L Ed, Veterans and Veterans' Laws § 68:104

Annotations:
Group insurance: construction, application, and effect of policy provision extending conversion privilege to employee after termination of employment. 32 ALR4th 1037

1. Generally
2. Termination
3. Conversion
4. Miscellaneous

1. Generally
Servicemembers' Group Life Insurance is effective for member of Army National Guard upon enlistment and assignment to Guard unit. Foreman v Prudential Ins. Co. (1981, CA5 Ala) 657 F.2d 717

2. Termination
In construing SGLI termination provision, Congress intended courts to rely on definition of absence without leave found in military justice system, which counts first day as whole day, not according to Federal Rules of Civil Procedure 6(a) which excludes first day. Lee v United States (1992, CA11 Ala) 977 F.2d 551, 24 FR Serv 3d 256, 6 FLW Fed C 1349, cert den (1993) 510 US 890, 126 L Ed 2d 201, 114 S Ct 248

In proceeding by surviving parents of deceased serviceman to collect, as beneficiaries, proceeds of national service life insurance policy, Veterans' Administration [now Department of Veterans Affairs] failed to prove that serviceman had been absent without leave for period of 31 days prior to his death, as defense to payment of policy under 38 USCS § 768(a)(1)(B) [now 38 USCS § 1968(a)(1)(B)], where his change of duty station orders were lost and he was never declared to be on unauthorized leave status or a deserter. Malone v United States Veterans Administration (1973, SD Ohio) 364 F Supp 114
3. Conversion

One year and one day after separation of totally disabled, mentally incompetent soldier from military, his Servicemembers' Group Life Insurance is automatically converted to Veterans' Group Life Insurance coverage regardless of whether he made initial VGLI premium payment. Porter v Prudential Ins. Co. (1979, WD Tex) 470 F Supp 203

Fact that 38 USCS § 768 [now 38 USCS § 1968], enabling conversion of Servicemembers' Group Life Insurance may contemplate only one conversion and that plaintiff had already recovered under Servicemembers' Group Life Insurance replacement policy, would not demand a finding that insurability was not waived by combination of factors shown to have existed, that is, use of Servicemembers' Group Life Insurance replacement form application, waiver by agent prior to delivery, and continued acceptance by insurer of premium payments. Atlantic & Pacific Life Ins. Co. v England (1975) 134 Ga App 540, 215 SE2d 302

4. Miscellaneous

Beneficiary was not entitled to increase in coverage authorized by Congress after deceased was discharged from Army but before he died since statutory language in 38 USCS § 1967(a) has no effect on individual who is no longer in active service and who is insured under previously issued policy at lower level. Underwood v Servicemen's Group Ins. (1989, CA10 Utah) 893 F.2d 242, cert den (1990) 495 US 957, 109 L Ed 2d 745, 110 S Ct 2562

For purposes of calculating period of absence without leave, Congress clearly intended running of period to commence on and include first day of service member's absence, hence application of Federal Rules of Civil Procedure Rule 6, which excludes first day in computing period of time, is inapplicable. Lee v United States (1992, CA11 Ala) 977 F.2d 551, 24 FR Serv 3d 256, 6 FLW Fed C 1349, cert den (1993) 510 US 890, 126 L Ed 2d 201, 114 S Ct 248

§ 1969. Deductions; payment; investment; expenses

(a) (1) During any period in which a member, on active duty or active duty for training under a call or order to such duty that does not specify a period of less than thirty-one days, is insured under Servicemembers' Group Life Insurance, there shall be deducted each month from the member's basic or other pay until separation or release from such duty an amount determined by the Secretary (which shall be the same for all such members) as the share of the cost attributable to insuring such member under such policy, less any costs traceable to the extra hazard of such duty in the uniformed service.

(2) (A) During any month in which a member is assigned to the Ready Reserve of a uniformed service under conditions which meet the qualifications of subparagraph (B) or (C) of section 1965(5) of this title [38 USCS § 1965(5)], and is insured under a policy of insurance purchased by the Secretary, under section 1966 of this title [38 USCS § 1966], there shall be contributed from the appropriation made for active duty pay of the uniformed service concerned an amount determined by the Secretary (which shall be the same for all such members) as the share of the cost attributable to insuring such member under this policy, less any costs traceable to the extra hazards of such duty in the uniformed services. Any amounts so contributed on behalf of any individual shall be collected by the Secretary concerned from such individual (by deduction from pay or otherwise) and shall be credited to the appropriation from which such contribution was made.

(B) If an individual who is required pursuant to subparagraph (A) to make a direct remittance of costs to the Secretary concerned fails to make the required remittance within 60 days of the date on which such remittance is due, such individual's insurance with respect to which such remittance is required shall be
terminated by the Secretary concerned. Such termination shall be made by written notice to the individual's official address and shall be effective 60 days after the date of such notice. Such termination of insurance may be vacated if, before the effective date of termination, the individual remits all amounts past due for such insurance and demonstrates to the satisfaction of the Secretary concerned that the failure to make timely remittances was justifiable.

(3) During any fiscal year, or portion thereof, that a member is on active duty or active duty for training under a call or order to such duty that specifies a period of less than thirty-one days, or is authorized or required to perform inactive duty training scheduled in advance by competent authority, and is insured under Servicemembers' Group Life Insurance, the Secretary concerned shall collect from the member (by deduction from pay or otherwise) an amount determined by the Secretary (which shall be the same for all such members) as the share of the cost attributable to insuring such member under such policy, less any costs traceable to the extra hazard of such duty in the uniformed service.

(4) Any amount not deducted from the basic or other pay of a member insured under Servicemembers' Group Life Insurance, or collected from the member by the Secretary concerned, if not otherwise paid, shall be deducted from the proceeds of any insurance thereafter payable. The initial monthly amount under paragraph (1) or (2) hereof, or fiscal year amount under paragraph (3) hereof, determined by the Secretary to be charged under this section for Servicemembers' Group Life Insurance may be continued from year to year, except that the Secretary may redetermine such monthly or fiscal year amounts from time to time in accordance with experience. No refunds will be made to any member of any amount properly deducted from the member's basic or other pay, or collected from the member by the Secretary concerned, to cover the insurance granted under Servicemembers' Group Life Insurance.

(b) For each month for which any member is so insured, there shall be contributed from the appropriation made for active duty pay of the uniformed service concerned an amount determined by the Secretary and certified to the Secretary concerned to be the cost of Servicemembers' Group Life Insurance which is traceable to the extra hazard of duty in the uniformed services. Effective January 1, 1970, such cost shall be determined by the Secretary on the basis of the excess mortality incurred by members and former members of the uniformed services insured under Servicemembers' Group Life Insurance above what their mortality would have been under peacetime conditions as such mortality is determined by the Secretary using such methods and data as the Secretary shall determine to be reasonable and practicable. The Secretary is authorized to make such adjustments regarding contributions from pay appropriations as may be indicated from actual experience.

(c) An amount equal to the first amount due on Servicemembers' Group Life Insurance may be advanced from current appropriations for active-service pay to any such member, which amount shall constitute a lien upon any service or other pay accruing to the person from whom such advance was made and shall be collected therefrom if not otherwise paid. No disbursing or certifying officer shall be responsible for any loss incurred by reason of such advance.
(d) (1) The sums withheld from the basic or other pay of members, or collected from them by the Secretary concerned, under subsection (a) of this section, and the sums contributed from appropriations under subsection (b) of this section, together with the income derived from any dividends or premium rate adjustments received from insurers shall be deposited to the credit of a revolving fund established in the Treasury of the United States. All premium payments and extra hazard costs on Servicemembers' Group Life Insurance and the administrative cost to the Department of insurance issued under this subchapter [38 USCS §§ 1965 et seq.] shall be paid from the revolving fund.

(2) The Secretary is authorized to set aside out of the revolving fund such amounts as may be required to meet the administrative costs to the Department of insurance issued under this subchapter [38 USCS §§ 1965 et seq.] and all current premium payments and extra hazard costs on any insurance policy or policies purchased under section 1966 of this title [38 USCS § 1966]. The Secretary of the Treasury is authorized to invest in and to sell and retire special interest-bearing obligations of the United States for the account of the revolving fund. Such obligations issued for this purpose shall have maturities fixed with due regard for the needs of the fund and shall bear interest at a rate equal to the average market yield (computed by the Secretary of the Treasury on the basis of market quotations as of the end of the calendar month next preceding the date of issue) on all marketable interest-bearing obligations of the United States then forming a part of the public debt which are not due or callable until after the expiration of four years from the end of such calendar month; except that where such average market yield is not a multiple of one-eighth of 1 per centum, the rate of interest of such obligation shall be the multiple of one-eighth of 1 per centum nearest such market yield.

(3) Notwithstanding the provisions of section 1982 of this title [38 USCS § 1982], the Secretary shall, from time to time, determine the administrative costs to the Department which in the Secretary's judgment are properly allocable to insurance issued under this subchapter [38 USCS §§ 1965 et seq.] and shall transfer such cost from the revolving fund to the appropriation "General Operating Expenses, Department of Veterans Affairs".

(e) The Secretary of Defense shall prescribe regulations for the administration of the functions of the Secretaries of the military departments under this section. Such regulations shall prescribe such procedures as the Secretary of Defense, after consultation with the Secretary, may consider necessary to ensure that such functions are carried out in a timely and complete manner and in accordance with the provisions of this section, including specifically the provisions of subsection (a)(2) of this section relating to contributions from appropriations made for active duty pay.

(f) (1) No tax, fee, or other monetary payment may be imposed or collected by any State, or by any political subdivision or other governmental authority of a State, on or with respect to any premium paid under an insurance policy purchased under this subchapter [38 USCS §§ 1965 et seq.].

(2) Paragraph (1) of this subsection shall not be construed to exempt any company issuing a policy of insurance under this subchapter [38 USCS §§ 1965 et seq.] from the imposition, payment, or collection of a tax, fee, or other monetary payment on the net income or profit accruing to or realized by that company from business conducted
under this subchapter [38 USCS §§ 1965 et seq.], if that tax, fee, or payment is applicable to a broad range of business activity.

(g) (1) (A) During any period in which a spouse of a member is insured under this subchapter [38 USCS §§ 1965 et seq.] and the member is on active duty, there shall be deducted each month from the member's basic or other pay until separation or release from active duty an amount determined by the Secretary as the premium allocable to the pay period for providing that insurance coverage. No premium may be charged for providing insurance coverage for a child.

(B) During any month in which a member is assigned to the Ready Reserve of a uniformed service under conditions which meet the qualifications set forth in section 1965(5)(B) of this title [38 USCS § 1965(5)(B)] and the spouse of the member is insured under a policy of insurance purchased by the Secretary under section 1966 of this title [38 USCS § 1966], there shall be contributed from the appropriation made for active duty pay of the uniformed service concerned an amount determined by the Secretary (which shall be the same for all such members) as the share of the cost attributable to insuring the spouse of such member under this policy, less any costs traceable to the extra hazards of such duty in the uniformed services. Any amounts so contributed on behalf of any individual shall be collected by the Secretary concerned from such individual (by deduction from pay or otherwise) and shall be credited to the appropriation from which such contribution was made.

(2) (A) The Secretary shall determine the premium amounts to be charged for life insurance coverage for spouses of members under this subchapter [38 USCS §§ 1965 et seq.].

(B) The premium amounts shall be determined on the basis of sound actuarial principles and shall include an amount necessary to cover the administrative costs to the insurer or insurers providing such insurance.

(C) Each premium rate for the first policy year shall be continued for subsequent policy years, except that the rate may be adjusted for any such subsequent policy year on the basis of the experience under the policy, as determined by the Secretary in advance of that policy year.

(h) Any overpayment of a premium for insurance coverage for an insurable dependent of a member that is terminated under section 1968(a)(5) of this title [38 USCS § 1968(a)(5)] shall be refunded to the member.

Amendments:

1970. Act June 25, 1970 (effective 6/25/70, as provided by § 14(a) of such Act, which appears as 38 USCS § 1317 note), substituted subsecs. (a) and (b) for ones which read:

"(a) During any period in which a member is insured under a policy of insurance purchased by the Administrator, under section 766 of this title, there shall be deducted each month from his basic or other pay until separation or release from active duty an amount determined by the Administrator (which shall be the same for all such members) as the share of the cost attributable to insuring such member under such policy, less any costs traceable to the extra hazard of active duty in the uniformed service. Any amount not deducted from the basic or other pay of a member insured under this subchapter while on active duty, if not otherwise paid, shall be deducted from the proceeds of any insurance thereafter payable. The initial monthly amount determined by the Administrator to be charged under this subsection for
insurance under this subchapter may be continued from year to year, except that the Administrator may redetermine such monthly amount from time to time in accordance with experience. No refunds will be made to any member of any such amount properly deducted from his basic or other pay to cover the insurance granted under this subchapter.

"(b) For each month for which any member is so insured, there shall be contributed from the appropriation made for his pay an amount determined by the Administrator and certified to the Secretary concerned to be the cost of such insurance which is traceable to the extra hazard of active duty in the uniformed services. Such cost shall be determined by the Administrator on the basis of the excess mortality suffered by members and former members of the uniformed services insured under this subchapter above that incurred by the male civilian population of the United States of the same age as the median age of members of the uniformed services (disregarding a fraction of a year) as shown by the records of the uniformed services, the primary insurer or insurers, and the Department of Health, Education, and Welfare, together with the most current estimates of such mortality. The Administrator is authorized to make such adjustments regarding such contributions from pay appropriations as may be indicated from actual experience.";

and in subsec. (d)(1), inserted ", or collected from them by the Secretary concerned,".

1974. Act May 24, 1974, in subsec. (a), in para. (1), substituted "is insured under Servicemen's Group Life Insurance" for "is insured under a policy of insurance purchased by the Administrator, under section 766 of this title", redesignated paras. (2) and (3) as paras. (3) and (4), respectively, added new para. (2), in para. (3), as redesignated, substituted "is insured under Servicemen's Group Life Insurance" for "is insured under a policy of insurance purchased by the Administrator, under section 766 of this title", in para. (4), as redesignated, substituted "Servicemen's Group Life Insurance" for "this subchapter" following "insured under" and "granted under" and substituted "paragraph (1) or (2) hereof, or fiscal year amount under paragraph (3) hereof" for "subsection (1) hereof, or fiscal year amount under subsection (2) hereof", and substituted "Servicemen's Group Life Insurance" for "insurance under this subchapter" following "this section for"; in subsec. (b), substituted "Servicemen's Group Life Insurance" for "such insurance" following "the cost of" and substituted "Servicemen's Group Life Insurance" for "this subchapter" following "insured under"; in subsec. (c), substituted "Servicemen's Group Life Insurance" for "any such insurance"; in subsec. (d)(1), substituted "All premium payments and extra hazard costs on Servicemen's Group Life Insurance and the administrative cost to the Veterans' Administration of insurance issued under this subchapter shall be paid from the revolving fund." for "All premium payments and extra hazard costs on any insurance policy or policies purchased under section 766 of this title and the administrative cost to the Veterans' Administration of insurance issued under this subchapter shall be paid from the revolving fund."; in subsec. (d)(3), substituted "General Operating Expenses, Veterans' Administration" for "General operating expenses, Veterans' Administration"; and added subsec. (e).

1981. Act Oct. 17, 1981 (effective on enactment on 10/17/81, as provided by § 701(b)(1) of such Act, which appears as 38 USCS § 1114 note) added subsec. (f).

1986. Act Oct. 28, 1986, in subsec. (a), in para. (1), substituted "the member's" for "his", in para. (3), substituted "the member" for "him", and in para. (4), substituted "the member" for "him" wherever appearing and "the member's" for "his"; in subsec. (b) substituted "the Administrator" for "he" following "data as"; in subsec. (d)(3) substituted "the Administrator's" for "his"; and in subsec. (e) substituted "the Administrator" for "he" following "groupings as".

1988. Act May 20, 1988 (effective as provided by § 332(b) of such Act which appears as a note to this section) added subsec. (g).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 769, as 38 USCS § 1969, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).
Such Act further substituted "Department" for "Veterans' Administration", "Secretary" for "Administrator", and "Secretary's" for "Administrator's".

1994. Act Oct. 5, 1994, in subsec. (a)(2), substituted "is assigned" for "or is assigned" preceding "to the Reserve" and inserted "or is assigned to the Retired Reserve and meets the qualifications of section 1965(5)(C) of this title,"; and, in subsec. (e), substituted "subparagraph (C) or (D) of section 1965(5)" for "section 1965(5)(C)".

Act Nov. 2, 1994, in subsec. (d)(3), substituted General Operating Expenses, Department of Veterans Affairs" for "General Operating Expenses, Department"; and, in subsec. (e), substituted "subsections (a) and (c) of section 1971" for "sections 1971(a) and (c)" and "subsections (d) and (e) of section 1971" for "sections 1971(d) and (e)".

1996. Act Feb. 10, 1996 (effective 4/1/96, as provided by § 647(c) of such Act, which appears as 38 USCS § 1968 note), in subsec. (a)(2), designated the existing provisions as subpara. (A), and added subpara. (B).


Such Act further, in subsec. (a)(2)(A), deleted "is assigned to the Reserve (other than the Retired Reserve) and meets the qualifications of section 1965(5)(C) of this title or is assigned to the Retired Reserve and meets the qualifications of section 1965(5)(D) of this title," following "section 1965(5)(B) of this title,"; deleted subsec. (e), which read: "(e) The premiums for Servicemen's Group Life Insurance placed in effect or continued in force for a member assigned to the Retired Reserve of a uniformed service who meets the qualifications of subparagraph (C) or (D) of section 1965(5) of this title, shall be established under the criteria set forth in subsections (a) and (c) of section 1971 of this title, except that the Secretary may provide for average premiums for such various age groupings as the Secretary may determine to be necessary according to sound actuarial principles, and shall include an amount necessary to cover the administrative cost of such insurance to the company or companies issuing or continuing such insurance. Such premiums shall be payable by the insureds thereunder as provided by the Secretary directly to the administrative office established for such insurance under section 1966(b) of this title. The provisions of subsections (d) and (e) of section 1971 of this title shall be applicable to Servicemen's Group Life Insurance continued in force or issued to a member assigned to the Retired Reserve of a uniformed service. However, a separate accounting may be required by the Secretary for insurance issued to or continued in force on the lives of members assigned to the Retired Reserve and for other insurance in force under this subchapter. In such accounting, the Secretary is authorized to allocate claims and other costs among such programs of insurance according to accepted actuarial principles."; and redesignated subsecs. (f) and (g) as subsecs. (e) and (f), respectively.

2000. Act Nov. 1, 2000, in subsec. (a)(2)(A), substituted "subparagraph (B) or (C) of section 1965(5) of this title" for "section 1965(5)(B) of this title".

2001. Act June 5, 2001 (effective on the first day of the first month that begins more than 120 days after enactment, as provided by § 4(g) of such Act, which appears as 38 USCS § 101 note), added subsecs. (g) and (h).

2005. Act May 11, 2005, § 1012(c)(2) (repealed by Act Sept. 30, 2005), in subsec. (b), designated the existing provisions as para. (1) and added para. (2), which read: "(2) For each month for which a member insured under this subchapter is serving in an operation or area designated as described by paragraph (1)(A) of section 1967(e) of this title, there may, at the election of the Secretary concerned under paragraph (4)(A) of such section, be contributed from the appropriation made for active duty pay of the uniformed service concerned an amount determined by the Secretary and certified to the Secretary concerned to be the cost of Servicemembers' Group Life Insurance which is traceable to the cost of providing insurance for the member under section 1967 of this title in the amount of $150,000."
Act Sept. 30, 2005 (effective as of 8/31/2005, as provided by § 2 of such Act), repealed § 1012 of Act May 11, 2005 (amending this section), and provided that this section shall be applied as if such § 1012 had not been enacted.

Other provisions:

Effective date and application of May 20, 1988 amendment. Act May 20, 1988, P. L. 100-322, Title III, Part D, § 332(b), 102 Stat. 537, provides: "The amendment made by subsection (a) [adding subsec. (g) of this section] shall take effect with respect to premiums paid for periods beginning after June 30, 1988."

Code of Federal Regulations

Department of Veterans Affairs-Servicemen's Group Life Insurance and Veterans' Group Life Insurance, 38 CFR Part 9

Cross References

This section is referred to in 38 USCS §§ 1968, 1970, 1971, 1980

Research Guide

Am Jur: 24 Am Jur 2d, Divorce and Separation § 544

§ 1970. Beneficiaries; payment of insurance

(a) Any amount of insurance under this subchapter [38 USCS §§ 1965 et seq.] in force on any member or former member on the date of the insured's death shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date of the insured's death, in the following order of precedence:

First, to the beneficiary or beneficiaries as the member or former member may have designated by a writing received prior to death (1) in the uniformed services if insured under Servicemembers' Group Life Insurance, or (2) in the administrative office established under section 1966(b) of this title [38 USCS § 1966(b)] if separated or released from service, or if assigned to the Retired Reserve, and insured under Servicemembers' Group Life Insurance, or if insured under Veterans' Group Life Insurance;

Second, if there be no such beneficiary, to the widow or widower of such member or former member;

Third, if none of the above, to the child or children of such member or former member and descendants of deceased children by representation;

Fourth, if none of the above, to the parents of such member or former member or the survivor of them;

Fifth, if none of the above, to the duly appointed executor or administrator of the estate of such member or former member;

Sixth, if none of the above, to other next of kin of such member or former member entitled under the laws of domicile of such member or former member at the time of the insured's death.

(b) If any person otherwise entitled to payment under this section does not make claim therefor within one year after the death of the member or former member, or if payment
to such person within that period is prohibited by Federal statute or regulation, payment may be made in the order of precedence as if such person had predeceased the member or former member, and any such payment shall be a bar to recovery by any other person.

c) If, within two years after the death of the member or former member, no claim for payment has been filed by any person entitled under the order of precedence set forth in this section, and neither the Secretary nor the administrative office established by the insurance company or companies pursuant to section 1966(b) of this title [38 USCS § 1966(b)] has received any notice that any such claim will be made, payment may be made to a claimant as may in the judgment of the Secretary be equitably entitled thereto, and such payment shall be a bar to recovery by any other person.

d) The member may elect settlement of insurance under this subchapter [38 USCS §§ 1965 et seq.] either in a lump sum or in thirty-six equal monthly installments. If no such election is made by the member the beneficiary or beneficiaries may elect settlement either in a lump sum or in thirty-six equal monthly installments. If the member has elected settlement in a lump sum, the beneficiary or beneficiaries may elect settlement in thirty-six equal monthly installments.

(e) Until and unless otherwise changed, a beneficiary designation and settlement option filed by a member with the member's uniformed service under prior provisions of law will be effective with respect to the increased insurance authorized under the Veterans' Insurance Act of 1974 and the insurance shall be settled in the same proportionate amount as the portion designated for such beneficiary or beneficiaries bore to the amount of insurance heretofore in effect.

(f) Notwithstanding the provisions of any other law, payment of matured Servicemembers' Group Life Insurance or Veterans' Group Life Insurance benefits may be made directly to a minor widow or widower on his or her own behalf, and payment in such case shall be a complete acquittance to the insurer.

(g) Any payments due or to become due under Servicemembers' Group Life Insurance or Veterans' Group Life Insurance made to, or on account of, an insured or a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to (1) collection of amounts not deducted from the member's pay, or collected from him by the Secretary concerned under section 1969(a) of this title [38 USCS § 1969(a)], (2) levy under subchapter D of chapter 64 of the Internal Revenue Code of 1986 (26 U.S.C. 6331 et seq.) (relating to the seizure of property for collection of taxes), and (3) the taxation of any property purchased in part or wholly cut of such payments.

(h) Insurance payable under this subchapter [38 USCS §§ 1965 et seq.] may not be paid in any amount to the extent that such amount would escheat to a State. Payment of insurance under this subchapter [38 USCS §§ 1965 et seq.] may not be made to the estate of the insured or the estate of any beneficiary of the insured unless it is affirmatively shown that any amount to be paid will not escheat to a State. Any amount to be paid under this subchapter [38 USCS §§ 1965 et seq.] shall be reduced to the extent necessary to comply with this subsection.
(i) Any amount of insurance in force on an insurable dependent of a member under this subchapter [38 USCS §§ 1965 et seq.] on the date of the dependent's death shall be paid, upon the establishment of a valid claim therefor, to the member or, in the event of the member's death before payment to the member can be made, then to the person or persons entitled to receive payment of the proceeds of insurance on the member's life under this subchapter [38 USCS §§ 1965 et seq.].

References in text:

Amendments:

1970. Act June 25, 1970 (effective 6/25/70, as provided by § 14(a) of such Act, which appears as 38 USCS § 1317 note), added subsecs. (e)-(g).

1974. Act May 24, 1974, in subsec. (a), substituted "First, to the beneficiary or beneficiaries as the member or former member may have designated by a writing received prior to death (1) in the uniformed services if insured under Servicemen's Group Life Insurance, or (2) in the administrative office established under section 766(b) of this title if separated or released from service, or if assigned to the Retired Reserve, and insured under Servicemen's Group Life Insurance, or if insured under Veterans' Group Life Insurance," for "First, to the beneficiary or beneficiaries as the member or former member may have designated by a writing received in the uniformed services prior to such death;"; in subsec. (e), substituted "the Veterans' Insurance Act of 1974" for "this amendatory Act"; in subsecs. (f) and (g), inserted "or Veterans' Group Life Insurance".


Act Oct. 14, 1982 (effective 10/1/82, as provided by § 401(b) of such Act, in subsec. (c) deleted "If, within four years after the death of the member or former member, payment has not been made pursuant to this section and no claim for payment by any person entitled under this section is pending, the amount payable shall escheat to the credit of the revolving fund referred to in section 769(d)." following "recovery by any person."; and added subsec. (h).

1986. Act Oct. 28, 1986, in subsec. (a) substituted "the insured's" for "his" wherever appearing; and in subsec. (e), substituted "the member's" for "his".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 770, as 38 USCS § 1970, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101, and substituted "Secretary" for "Administrator".


1998. Act Nov. 11, 1998 (effective 90 days after enactment, as provided by § 302(c) of such Act, which appears as a note to this section), in subsec. (g), substituted "Any payments" for "Payments of benefits" and inserted "an insured or".

2001. Act June 5, 2001 (effective on the first day of the first month that begins more than 120 days after enactment, as provided by § 4(g) of such Act, which appears as 38 USCS § 101 note), added subsec. (i).

2005. Act May 11, 2005, § 1012(g) (repealed by Act Sept. 30, 2005), added subsec. (j), which read: "(j) A member with a spouse may not modify the beneficiary or beneficiaries
designated by the member under subsection (a) without providing written notice of such modification to the spouse."

Act Sept. 30, 2005 (effective as of 8/31/2005, as provided by § 2 of such Act), repealed § 1012 of Act May 11, 2005 (amending this section), and provided that this section shall be applied as if such § 1012 had not been enacted.

Other provisions:

**Application and construction of Oct. 12, 1982 amendment.** For provisions as to the application and construction of the amendment made by Act Oct. 12, 1982, see § 5 of such Act, which appears as 10 USCS § 101 note.

**Effective date of Nov. 11, 1998 amendments.** Act Nov. 11, 1998, P. L. 105-368, Title III, § 302(c), 112 Stat. 3333, provides: "The amendments made by this section [adding 38 USCS § 1980 and amending this section and the chapter analysis preceding 38 USCS § 1901] shall take effect 90 days after the date of the enactment of this Act."

**Cross References**

This section is referred to in 38 USCS § 1977

**Research Guide**

**Am Jur:**

24 Am Jur 2d, Divorce and Separation § 544

44A Am Jur 2d, Insurance §§ 1878, 1879

**Forms:**

16A Fed Procedural Forms L Ed, Veterans and Veterans' Laws § 68:103

**Bankruptcy:**

4 Collier on Bankruptcy (Matthew Bender 15th ed. rev), ch 522, Exemptions ¶ 522.02

4 Collier Bankruptcy Practice Guide, ch 74, Exemptions ¶ 74.67

**Annotations:**

National Service Life Insurance: Change of beneficiary, 13 ALR Fed 6

Insurance: Term "children" as used in beneficiary clause of life insurance policy as including illegitimate child, 62 ALR3d 1329

Exemption of proceeds of National Service Life Insurance from claims of creditors, 54 ALR2d 1335

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I. IN GENERAL

1. Generally
   In action for interpleader brought by insurance company against claimants of benefits due under Servicemembers’ Group Life Insurance policy, insurance company would be discharged from liability as stakeholder only upon depositing in court sum equal to face value of policy plus interest accrued over 4 1/2 year period of delay which was caused by insurance company’s demands for further information concerning insured’s illegitimate child and went far beyond fiduciary caution. Prudential Ins. Co. v Armwood (1973, ED NY) 362 F Supp 1328

2. Application
   Restrictions on payment to designated beneficiaries prescribed by 38 USCS § 770(a), (g) [now 38 USCS § 1970(a), (g)], have no application to insurance policy which was not group policy purchased by Administrator [now Secretary] under provisions of 38 USCS §§ 765 et seq. [now 38 USCS §§ 1965 et seq.], where policy was individual replacement policy and premium was paid by deceased veteran, as restrictions imposed on Servicemembers’ Group Life Insurance policies under 38 USCS § 770(a), (g) [now 38 USCS § 1970(a), (g)] are not applicable to successor policies which have been converted from S.G.L.I. policy. Gutierrez v Madero (1978, Tex Civ App Eastland) 564 SW2d 185

3. Governing law
   Federal law recognizes equitable defense that no person should be permitted to profit from his own wrong; widow convicted of murdering her husband on wedding night may not collect proceeds of his insurance. Prudential Ins. Co. v Tull (1982, CA4 Va) 690 F.2d 848

4. Relationship with state laws
   Contention that unmarried minor serviceman killed in action could not determine beneficiaries under military life insurance policy, on grounds that under state law mother retains sole custodial rights, fails because of federal pre-emption. Prudential Ins. Co. v King (1971, CA8 Mo) 453 F.2d 925
State statute prohibiting one convicted of murdering insured from receiving proceeds from life insurance policy on insured's life bars widow convicted in state court of murdering her husband from receiving proceeds of Servicemembers' Group Life Insurance Policy on his life, since statute neither conflicts with 38 USCS § 770 [now 38 USCS § 1970] nor frustrates federal servicemen's insurance plan. Prudential Ins. Co. v Tull (1981, ED Va) 532 F Supp 341, affd (1982, CA4 Va) 690 F.2d 848


State court is not precluded from imposing constructive trust in favor of children of deceased veteran upon proceeds from individual replacement policies. Gutierrez v Madero (1978, Tex Civ App Eastland) 564 SW2d 185

Servicemen’s group life insurance is contract between government of United States and insurers for benefit of those insured, and minor serviceman may exercise right granted to designate beneficiary of his choosing for such insurance, state minority laws to contrary notwithstanding. Davenport v Servicemen's Group Life Ins. Co. (1969) 119 Ga App 685, 168 SE2d 621

5. Claims for proceeds

Father of deceased serviceman failed to make valid and effective claim for proceeds of Servicemembers' Group Life Insurance policy within 1-year period required by 38 USCS § 770(b) [now 38 USCS § 1970(b)] where, after learning of son's death, he dawdled and failed to personally contact casualty assistance officer handling case and he could not rely on misfeasance of others, including his former wife and the casualty assistance officer who suppressed facts and gave false information to insurance company attempting to locate father, in order that wife could collect father's share of money. Gates v United States (1973, CA5 Tex) 481 F.2d 850

State of Kansas is dismissed in interpleader action involving proceeds of servicemen's group life policy even though state alleged it has a claim for expenses incurred by mother of decedent for hospitalization expenses paid by state, because state cannot assert claim under 38 USCS § 770(g) [now 38 USCS § 1970(g)] against potential beneficiary and mother, who may receive distribution under order of precedence in 38 USCS § 770(a) [now 38 USCS § 1970(a)] for undesignated beneficiaries, is entitled to protection of 38 USCS § 770(g) [now 38 USCS § 1970(g)] even though she is not designated beneficiary. Prudential Ins. Co. v Brown (1989, DC Kan) 715 F Supp 1010

II. BENEFICIARIES

A. In General

6. Children

State court is not precluded from imposing constructive trust in favor of children of deceased veteran upon proceeds from individual replacement policies. Gutierrez v Madero (1978, Tex Civ App Eastland) 564 SW2d 185

7. -Illegitimate children

Illegitimate child of serviceman, who acknowledged paternity in writing, is beneficiary of serviceman's insurance, in preference to serviceman's parents. Prudential Ins. Co. v Jack (1971, WD La) 325 F Supp 1194

Word "child" as used in 38 USCS § 770(a) [now 38 USCS § 1970(a)] includes within its scope illegitimate children of a deceased serviceman. Manning v Prudential Ins. Co. (1971, DC Md) 330 F Supp 1198
Language of 38 USCS § 770(a) [now 38 USCS § 1970(a)] must be construed as not including illegitimate, though acknowledged, child of serviceman where child has not been made legitimate by one of methods provided by state law. Dobyns v Prudential Ins. Co. (1971) 227 Ga 253, 179 SE2d 915

8. Parents


Parents of deceased serviceman are awarded proceeds of life insurance policy, where serviceman had not designated beneficiary and was not married, and alleged illegitimate children of serviceman could not qualify as beneficiaries under 38 USCS § 765(8) [now 38 USCS § 1965(8)] because parents are next in line to recover under distribution scheme of 38 USCS § 770 [now 38 USCS § 1970]. Prudential Ins. Co. v Moorhead (1990, MD La) 730 F Supp 731, affd (1990, CA5 La) 916 F.2d 261

9. -Adoptive parents

Nunc pro tunc order showing adoption of deceased soldier does not show right to proceeds. Hooper v United States (1926, CA8 Ark) 13 F.2d 19

10. -Stepparents

Term "parent" does not include non-adoptive stepparent. Lanier v Traub (1991, CA11 Fla) 934 F.2d 287

Natural mother is entitled to insurance proceeds over stepmother, whether or not she abandoned child when divorce decree awarded custody of him to father, since word "parents" as used in 38 USCS § 770 [now 38 USCS § 1970] refers to natural parents. Prudential Ins. Co. v Warner (1971, WD Va) 328 F Supp 1128

Serviceman's stepfather, who had never adopted serviceman, is not entitled to share in proceeds as one of serviceman's "parents" upon failure of serviceman to designate beneficiary and in absence of widow or children. Prudential Ins. Co. v Johnson (1972, ND) 200 NW2d 115

Word "parents" as used in 38 USCS § 770(a) [now 38 USCS § 1970(a)] is limited to only natural parents of insured and does not include person who is stepparent or person in loco parentis. Nunn v Nunn (1970) 81 NM 746, 473 P2d 360

11. -Abandonment of insured by parent

Father of deceased serviceman had not abandoned son within meaning of 38 USCS § 765 [now 38 USCS § 1965] by making sporadic, meager support payments for deceased serviceman, where father was man of modest means and remarried mother of deceased serviceman could not demonstrate willful intent on part of father to abandon deceased serviceman; burden of proof is upon party seeking to oppose claim of otherwise qualifying parent. Prudential Ins. Co. v Ellwein (1977, WD NY) 435 F Supp 248

Divorced mother of deceased serviceman was entitled to half of proceeds of life insurance policy under 38 USCS § 770 [now 38 USCS § 1970] where evidence that she made child support payments and maintained contact with deceased was sufficient to show that she was not excluded from definition of "parent" in § 765 [now § 1965] by reason of abandoning or failing to support child. Loacano v Office of Servicemen's Group Life Ins., etc. (1982, ED Mich) 544 F Supp 306, 73 ALR Fed 131

Father had not "abandoned" son within meaning of 38 USCS § 765(9) [now 38 USCS § 1965(9)], where father made court-ordered support payments until son achieved majority, even though father did not provide son with birthday or Christmas gifts, nor provide financial support beyond court order, nor display fatherly attitude toward son; in absence of evidence of settled purpose to forego parental duties and obligations, abandonment does not take place. Rahn v Prudential Ins. Co. (1977, Iowa) 259 NW2d 838

12. Persons in loco parentis

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Government could not attack validity of judgment that 3 persons stood in loco parentis to insured, where attorney for United States prepared findings, conclusions of law, and judgment in accordance with stipulation to that effect entered into between claimants. United States v Hoth (1953, CA9 Wash) 207 F.2d 386

Question of whether aunt of insured stood in loco parentis to him so as to be proper beneficiary could not be determined on motion for summary judgment. Maldonado v United States (1946, DC NY) 69 F Supp 302

Evidence that insured moved in with grandmother after divorce of his parents, continued to live with her until his entry into service, during which time she provided shelter, food, clothing, and motherly care, was sufficient to establish relationship of in loco parentis where insured changed beneficiary from natural mother to grandmother upon natural mother's death. Smith v United States (1946, DC RI) 69 F Supp 387

Beneficiary has burden of showing that she was in fact "in loco parentis" to insured. Neuhard v United States (1949, DC Pa) 83 F Supp 911

Word "parents" as used in 38 USCS § 770(a) [now 38 USCS § 1970(a)] is limited to only natural parents of insured and does not include person who is stepparent or person in loco parentis. Nunn v Nunn (1970) 81 NM 746, 473 P2d 360

13. Widow or widower

Ex-husband, who was designated beneficiary of servicemember's life insurance policy, was entitled to proceeds of policy, notwithstanding his and servicemember's stipulation in their dissolution decree that each would maintain life insurance naming minor child as sole beneficiary, since servicemember never changed beneficiary designation before her death, and evidence was insufficient to establish that this resulted from ex-husband's undue influence. Prudential Ins. Co. v Hinkel (1997, CA8 Iowa) 121 F.3d 364, cert den (1998) 522 US 1048, 139 L Ed 2d 638, 118 S Ct 693

Widow of insured is estopped to assert claim to proceeds payable to another woman designated as beneficiary and who married insured in good faith not knowing he was already married. Schiefer v United States (1949, DC Pa) 83 F Supp 911

United States can recover amount of pension checks from veteran's widow and corporation which cashed them, where at time she received them as unmarried widow she was in fact common-law wife of another, and so known to be by corporation. United States v Michaelson (1945, DC Minn) 58 F Supp 796

Presumption is raised that woman is lawfully designated beneficiary where insured had designated woman as his lawful wife to be beneficiary of insurance policy, and government finds her to be lawfully designated beneficiary and acting on such finding has for several years paid her monthly installments due on policy. Jones v Gaillard (1941) 241 Ala 571, 4 So 2d 131

14. Constructive trusts

Constructive trust could not be imposed upon proceeds of serviceman's policy in which divorced second wife had been designated beneficiary, where trust was imposed in favor of children of insured's first marriage on basis that state divorce decree had stated that all beneficiary designations were canceled, because 38 USCS § 1970 required that benefit "shall" be paid to beneficiary designated in writing and prohibited seizure of death benefits from designated principal beneficiary under any legal or equitable process. Prudential Life Ins. Co. v Music (1997, WD Mich) 977 F Supp 842

State court is not precluded from imposing constructive trust in favor of children of deceased veteran upon proceeds from individual replacement policies. Gutierrez v Madero (1978, Tex Civ App Eastland) 564 SW2d 185

B. Designation of Beneficiaries

15. Generally
Statement of insured in application of policy that beneficiary is his brother cannot be contradicted 15 years later by administrator of insured, though evidence shows that insured does not know English language and requires interpreter, especially where United States made several payments to designated beneficiary before claim was made by administrator. Sevald v United States (1934, CA7 Ind) 73 F.2d 860, cert den (1935) 295 US 736, 79 L Ed 1684, 55 S Ct 648

Serviceman who is minor can make valid designation of beneficiary on his group life insurance policy. Johnson v Prudential Ins. Co. (1968) 182 Neb 673, 156 NW2d 812

16. Form

Designation in writing by insured of person as beneficiary of insurance may be admitted in evidence to prove rights of beneficiary although written by minor and not sufficient for will. Helmholz v Horst (1924, CA6 Ohio) 294 F 417, 2 Ohio L Abs 419

Serviceman's designation, on Army form, captioned, in part, "Beneficiary Designation," of two friends as beneficiaries under his Servicemembers' Group Life Insurance, indicating 50% share to each, and signing and remitting such form through proper Army channels, constituted legal designation of beneficiaries, notwithstanding under current Army regulations the form used was outmoded. Prudential Ins. Co. v King (1971, CA8 Mo) 453 F.2d 925

Phrase in 38 USCS § 770(a) [now 38 USCS § 1970(a)] requiring that designation of beneficiary be in writing and "received by the uniformed service" does not require that written designation of beneficiary must exist in official service records of serviceman at time of his death; thus, where serviceman filled out unofficial group life beneficiary designation form furnished by Navy personnel man in charge of records who was unable to obtain official form, designating his father as primary beneficiary, form was received by Navy for purposes of section, and discovery of completed form on serviceman's personal belongings after his death was sufficient to entitle father to insurance proceeds. Coomer v United States (1973, CA5 Tex) 471 F.2d 1

In respect to Servicemembers' Group Life Insurance Policy, filling out of form by deceased, DA Form 41 entitled "(Record of Emergency Data) Work Sheet" is not same as naming beneficiary to policy; proceeds of policy will be distributed as if no beneficiary was named. Prudential Ins. Co. v West (1971, WD Ark) 324 F Supp 1049

17. Communication to beneficiary

In action involving proceeds paid into court from a life insurance policy on the life of a serviceman issued pursuant to 38 USCS § 765 [now 38 USCS § 1965], letter written to sister in which serviceman stated that he had split insurance money between another sister and her offers no legal basis for designating them as beneficiaries of the proceeds. Prudential Ins. Co. v Warner (1971, WD Va) 328 F Supp 1128

Claim of serviceman's mother that letter written by serviceman constituted designation of her as sole beneficiary must be rejected and proceeds of Servicemembers' Group Life Insurance policy divided equally between natural parents, where serviceman failed to designate beneficiary under policy. Bozzell v Prudential Ins. Co. (1972, Fla App D3) 270 So 2d 24

18. Communication to government

Letter designating beneficiary is invalid where it is sent to Veterans Administration [now Department of Veterans Affairs] and not to appropriate uniformed service of serviceman as required under of 38 USCS § 770(a) [now 38 USCS § 1970(a)]. Weymann v Wilson (1970, MD Fla) 320 F Supp 980

Form purporting to change decedent's servicemen's life insurance policy was not "received" by uniformed services within meaning of 38 USCS §§ 1965 et seq. and, thus, beneficiary noted on form on file prevailed, where decedent's former wife was noted as beneficiary on form filed with uniformed services, and his sister produced second form found in decedent's records noting her as beneficiary, but although second form was witnessed by military worker who counseled decedent on changing beneficiaries, she did not receive it, and date indicating time document purportedly was received was never entered. Prudential Ins. Co. of Am. v Ligon (1996, MD Ala) 915 F Supp 1183
19. Effect of separation or divorce

Insured serviceman's designation of his second wife as beneficiary prevails over constructive trust imposed upon policy proceeds by state court decree in order to preserve provision of prior divorce decree ordering serviceman to keep in force insurance policies then outstanding for benefit of his children from his first marriage; 38 USCS § 770 [now 38 USCS § 1970] gives insured service member right to freely designate beneficiary and to alter that choice at any time by making proper communications to proper parties and any constructive trust imposed by state decision amounts to seizure which is specifically prohibited by § 770 [now § 1970] and must fail due to supremacy clause. Ridgway v Ridgway (1981) 454 US 46, 70 L Ed 2d 39, 102 S Ct 49

Failure of decedent to comply with notice provision of 38 USCS § 770(a) [now 38 USCS § 1970(a)] by giving written notification to appropriate Armed Forces office that divorce decree provided that decedent would maintain former wife as sole beneficiary of military life insurance policy rendered divorce decree provisions pertaining to such policy unenforceable. Stratton v Servicemen's Group Life Ins. Co. (1976, SD Iowa) 422 F Supp 1119 (criticized in Rice v Office of Servicemembers' Group Life Ins. (2001, CA10 Okla) 260 F.3d 1240)

20. Evidence

Where serviceman in Viet Nam took out insurance naming father as beneficiary but no record of designation of beneficiary was in his file at time of death so insurance was paid to widow, father is entitled to insurance benefits and insurance company is entitled to judgment against widow. Coomer v United States (1973, CA5 Tex) 471 F.2d 1

Where soldier fulfilled all of requirements of 38 USCS §§ 765 [now 38 USCS §§ 1965 et seq.] et seq., designated beneficiary is entitled to proceeds of his life insurance policy, and fact that army regulation which required one copy of insurance certificate be placed in soldier's file was not satisfied is immaterial. Shores v Nelson (1970) 248 Ark 155, 450 SW2d 543

21. Failure to designate beneficiary

Former wife of deceased serviceman who died 4 months before preliminary divorce decree pursuant to separation agreement became final under Nebraska law is not "widow" of deceased for purposes of determining entitlement to proceeds of Servicemembers' Group Life Insurance Policy under 38 USCS § 770 [now 38 USCS § 1970], where deceased had designated that proceeds be distributed as provided "by law", since under § 765 [now § 1965], widow must be lawful spouse at time of serviceman's death, and state probate code which controls, rather than domestic relations law, excludes from definition of surviving spouse participant in valid proceeding concluded by order purporting to terminate all marital property rights against decedent. Prudential Ins. Co. v Dulek (1981, CA8 Neb) 665 F.2d 217

Father of deceased Navy serviceman was not entitled to all proceeds of son's serviceman's group life insurance policy, since record did not reveal whether Navy ever received written beneficiary-designation form indicating that father was intended beneficiary, thus, insurance proceeds are to be split between serviceman's divorced parents, where language of § 770 [now § 1970] requiring receipt of written designation is to be strictly construed and substantial-compliance doctrine is not applicable in cases involving government life insurance. Prudential Ins. Co. v Parker (1988, CA7 Ill) 840 F.2d 6

Serviceman will be deemed not to have designated beneficiary where he completed form DA Form 41 entitled "(Record of Emergency Data) Worksheets" without formerly designating beneficiaries. Prudential Ins. Co. v West (1971, WD Ark) 324 F Supp 1049

Serviceman's stepfather, who had never adopted serviceman, is not entitled to share in proceeds as one of serviceman's "parents" upon failure of serviceman to designate beneficiary and in absence of widow or children. Prudential Ins. Co. v Johnson (1972, ND) 200 NW2d 115

Claim of serviceman's mother that letter written by serviceman constituted designation of her as sole beneficiary must be rejected and proceeds of Servicemembers' Group Life Insurance Policy divided equally between natural parents, where serviceman failed to designate beneficiary of new policy. Bozzell v Prudential Ins. Co. (1972, Fla App D3) 270 So 2d 24

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C. Change of Beneficiaries

22. Generally

Unnamed brothers and sisters are entitled to reformation of policy where deceased veteran had done all that was within his power to change beneficiary in his insurance policy from one of his brothers to all of his brothers and sisters, and for one brother to receive payments due under policy and to distribute them to beneficiaries intended by deceased to receive them, and where such brother refused to make distribution. Kaschefsky v Kaschefsky (1940, CA6 Mich) 110 F.2d 836

38 USCS § 770(a) [now 38 USCS § 1970(a)] is to be strictly construed, and serviceman wishing to change beneficiary of his servicemen's group life insurance policy must strictly comply with the provisions thereof. Stribling v United States (1969, CA8 Ark) 419 F.2d 1350

23. Form

Where, shortly before his death, insured told wife that he had changed beneficiary of his insurance, and insured's brother testified that few days prior to crash he was told by insured that latter had sent in form to change beneficiary of his government insurance from his mother to his wife, and insured filled out and signed confidential statement in which, among other things, he stated that he held national service life insurance policy in amount of $10,000.00, located with his mother at Phoenix, and he gave wife's name as beneficiary thereof, confidential statement tended at least to substantiate brother's declaration. Kendig v Kendig (1948, CA9 Ariz) 170 F.2d 750

No particular form is required to effect change of beneficiary; any simple written and signed designation or change of beneficiary is sufficient; statutory and regulatory writing requirement will not be so narrowly construed as to defeat soldier's intent as manifested in forms signed and received by uniform service prior to his death. Prudential Ins. Co. v Smith (1985, CA5 Miss) 762 F.2d 476

Veteran's application for compensation and vocational training, after lapse of insurance, which stated his desire to reinstate insurance and change beneficiary, is effective change of beneficiary. United States v Johnson (1931, DC Ky) 46 F.2d 549

24. Communication to beneficiary

Serviceman's letters to father, stating that father had been substituted as beneficiary of NSLI policy, are evidence of serviceman's intent to change beneficiary, but do not constitute affirmative act required to make change valid. Littlefield v Littlefield (1952, CA10 Okla) 194 F.2d 695

Although official forms for changing beneficiary of NSLI policy were never found, insured's letter to wife that he had executed such forms is evidence of such past affirmative act. Aguilar v United States (1955, CA9 Ariz) 226 F.2d 414, cert den (1956) 351 US 955, 100 L Ed 1478, 76 S Ct 852

Letter written by deceased person to his mother stating he had made her beneficiary is not admissible in evidence to prove change of beneficiary, such evidence being hearsay. Kingston v Hines (1926, DC Mich) 13 F.2d 406

Allegation that serviceman had written letters telling his foster mother that he had willed $10,000 to her and had made out his life insurance to her stated cause of action, entitling her to day in court to prove, if she could, her claim's validity, over that of serviceman's estranged widow. Spikes v United States (1953, DC La) 117 F Supp 6

25. Communication to government

Evidence that deceased had signed paper which he said was for purpose of changing beneficiary and said he was going to mail it is not sufficient to show change of beneficiary where no one saw what paper was or saw him mail it, and where records of the department did not show its receipt. Layne v United States (1924, CA7 Ill) 3 F.2d 431
Testimony of secretary that insured had signed application for change of beneficiary from sister to wife is insufficient to establish change where records of Veterans Administration [now Department of Veterans Affairs] show no such change. Watson v United States (1950, CA5 Ga) 185 F.2d 292

Sergeant who signed airman's change of beneficiary form in section designated "witnessed and received by" "received" form on behalf of Air Force for purposes of form's effectiveness, and fact that sergeant failed to retain any copies, which were all found in airman's personal effects, did not invalidate form's execution and receipt. Prudential Ins. Co. v Perez (1995, CA9 Cal) 51 F.3d 197, 95 CDOS 2217, 95 Daily Journal DAR 3834

26. Grounds for challenge

Evidence that claimant of insurance signed insured's name to application for change of beneficiary, at request of insured, is admissible, without proving agency from any other source. Le Blanc v Curtis (1925, CA5 Ga) 6 F.2d 4

Evidence that insured was intoxicated when he changed beneficiary, and that letter directing change was written and mailed on Sunday allegedly in contravention of state law, presented question for jury as to validity of change; fact that insured lived for several months after such change of beneficiary not being presumptive evidence that he had knowledge of change and therefore ratified same. Lewis v United States (1932, CA3 Pa) 56 F.2d 563

Court erred in refusing to allow introduction of hospital records into evidence and in denying motion to subpoena witnesses for purpose of proving records where original beneficiary sought to show that deceased lacked mental capacity at time he changed beneficiary. Pritchett v Etheridge (1949, CA5 Tex) 172 F.2d 822

Evidence that original beneficiary paid some premiums on NSLI policy and that insured told her that he had no intention to change beneficiary is insufficient to show that change of beneficiary by insured was result of undue influence, where nurses attending insured at hospital testified that insured was rational, aware, and in possession of his mental faculties. United States v Cruze (1970, ED Tenn) 328 F Supp 159

Insured serviceman had mental capacity to effect change in beneficiary of his servicemen's group life insurance policy, although he suffered from organic mental disorder, where psychiatrist opined 3 months prior to execution of election of beneficiary forms that insured was able to manage his affairs and uncontroverted evidence is that, during relevant time, he handled his own day-to-day business affairs, drove vehicle, paid his own bills, and ordered parts for and instructed son how to repair motorcycle, because evidence shows that he understood nature of his property, nature of act he was performing, and that he knew natural objects of his bounty. Prudential Ins. Co. of Am. v Mehlbrech (1995, DC Or) 878 F Supp 1382 (criticized in Rice v Office of Servicemembers' Group Life Ins. (2001, CA10 Okla) 260 F.3d 1240)

Constructive trust could not be imposed upon proceeds of serviceman's policy in which divorced second wife had been designated beneficiary, where trust was imposed in favor of children of insured's first marriage on basis that state divorce decree had stated that all beneficiary designations were canceled, because 38 USCS § 1970 required that benefit "shall" be paid to beneficiary designated in writing and prohibited seizure of death benefits from designated principal beneficiary under any legal or equitable process. Prudential Life Ins. Co. v Music (1997, WD Mich) 977 F Supp 842

27. Evidence

Change of beneficiary is sufficiently shown where evidence shows deceased expressed his desire to several persons to change beneficiary from his sister to his wife, and that he went to company headquarters to change beneficiary and was informed that it would be done, and that on his deathbed he spoke of beneficiary as having been changed. Johnson v White (1930, CA8 Ark) 39 F.2d 793

Evidence that insured signed confidential statement declaring that wife, rather than mother, was beneficiary of his NSLI policy and that he later told wife he had sent in form changing
beneficiary from mother to wife is sufficient to present question for jury as to whether insured had
effectuated change of beneficiary, where form changing beneficiary could not be found. Kendig v
Kendig (1948, CA9 Ariz) 170 F.2d 750

Although official forms for changing beneficiary of NSLI policy were never found, insured's
letter to wife that he had executed such forms is evidence of such past affirmative act. Aguilar v
United States (1955, CA9 Ariz) 226 F.2d 414, cert den (1956) 351 US 955, 100 L Ed 1478, 76 S Ct 852

Ex-husband, who was designated beneficiary of servicemember's life insurance policy, was
entitled to proceeds of policy, notwithstanding his and servicemember's stipulation in their
dissolution decree that each would maintain life insurance naming minor child as sole beneficiary,
since servicemember never changed beneficiary designation before her death, and evidence was
insufficient to establish that this resulted from ex-husband's undue influence. Prudential Ins. Co. v

Evidence that insured had received blank form for designating beneficiary of his 6 months'
gratuity pay, which form was often used for changing beneficiary of NSLI policy, is insufficient to
establish effective change of beneficiary where no written form was produced in evidence;
testimony of 2 friends and fellow officers of insured is insufficient to establish change of
beneficiary from parents to widow, where no writings in support of testimony have been produced. Cohn v Cohn (1948, App DC) 84 US App DC 218, 171 F.2d 828, cert den (1949) 336 US 962, 93 L Ed 1114, 69 S Ct 892

Although form changing beneficiary of NSLI policy from mother to wife had been lost by time
of insured's death, fact that report of death made by Adjutant General showed wife to be
beneficiary is sufficient proof that such forms had reached Veterans' Administration (now
Department of Veterans Affairs) and change effected. Walker v United States (1947, DC Tex)
70 F Supp 422

Insured's statements to fellow officers that he had changed beneficiary of insurance from
mother to wife is insufficient to establish valid change where Veterans' Administration (now
Department of Veterans Affairs) had no record of such change, although insured had also told
fellow officers that Veterans' Administration (now Department of Veterans Affairs) did not have
beneficiary change properly recorded and that he had written about matter to get it straightened
out, but had not received any answer from Veterans' Administration (now Department of Veterans
Affairs). Ramsay v United States (1947, DC Fla) 72 F Supp 613

Insured's statements to fellow officers that he had changed beneficiary of insurance is
insufficient to establish valid change where Veterans' Administration (now Department of Veterans
Affairs) had no record of such change. Ramsay v United States (1947, DC Fla) 72 F Supp 613

Oral testimony of witnesses cannot be permitted to vary plain significance of printed words to
effect judicial change of beneficiaries, especially where insured is not ignorant of meaning of
"contingent beneficiary". United States v Green (1958, DC W Va) 164 F Supp 697

28. Burden of proof

Burden of proof is upon plaintiff to prove that requisite steps were taken to change beneficiary. Leahy v United States (1926, CA9 Mont) 15 F.2d 949

Ordinarily, person claiming to be substituted beneficiary of National Service Life Insurance
policy has burden of proving change of beneficiary. Senato v United States (1949, CA2 NY) 173
F.2d 493; Coleman v United States (1949, App DC) 85 US App DC 145, 176 F.2d 469; McCollum v Sieben (1954, CA8 Minn) 211 F.2d 708; Criscuolo v United States (1956, CA7 Ill) 239 F.2d 280; Blair v United States (1958, CA10 Okla) 260 F.2d 237; Baker v United States (1967, CA5 Ga) 386 F.2d 356; Geis v United States (1968, CA9 Wash) 404 F.2d 154

Government has burden of proving effective change of beneficiary where it has paid
proceeds to person claiming to be substituted beneficiary. Willis v United States (1961, CA7 Ill)
291 F.2d 5; Benard v United States (1966, CA8 Mo) 368 F.2d 897
§ 1971. Basic tables of premiums; readjustment of rates

(a) Each policy or policies purchased under section 1966 of this title [38 USCS § 1966] shall include for the first policy year a schedule of basic premium rates by age which the Secretary shall have determined on a basis consistent with the lowest schedule of basic premium rates generally charged for new group life insurance policies issued to large employers, this schedule of basic premium rates by age to be applied, except as otherwise provided in this section, to the distribution by age of the amount of group life insurance under the policy at its date of issue to determine an average basic premium per $1,000 of insurance. Each policy so purchased shall also include provisions whereby the basic rates of premium determined for the first policy year shall be continued for subsequent policy years, except that they may be readjusted for any subsequent year, based on the experience under the policy, such readjustment to be made by the insurance company or companies issuing the policy on a basis determined by the Secretary in advance of such year to be consistent with the general practice of life insurance companies under policies of group life insurance issued to large employers.

(b) The total premiums for Servicemembers' Group Life Insurance shall be the sum of the amounts computed according to the provisions of subsection (a) above and the estimated costs traceable to the extra hazard of active duty in the uniformed services as determined by the Secretary, subject to the provision that such estimated costs traceable to the extra hazard shall be retroactively readjusted annually in accordance with section 1969(b) [38 USCS § 1969(b)].

(c) Each policy so purchased shall include a provision that, in the event the Secretary determines that ascertaining the actual age distribution of the amounts of group life insurance in force at the date of issue of the policy or at the end of the first or any subsequent year of insurance thereunder would not be possible except at a disproportionately high expense, the Secretary may approve the determination of a tentative average group life premium, for the first or any subsequent policy year, in lieu of using the actual age distribution. Such tentative average premium rate shall be redetermined by the Secretary during any policy year upon request by the insurance company or companies issuing the policy, if experience indicates that the assumptions made in determining the tentative average premium rate for that policy year were incorrect.

(d) Each policy so purchased shall contain a provision stipulating the maximum expense and risk charges for the first policy year, which charges shall have been determined by the Secretary on a basis consistent with the general level of such charges made by life insurance companies under policies of group life insurance issued to large employers. Such maximum charges shall be continued from year to year, except that the Secretary may redetermine such maximum charges for any year either by agreement with the insurance company or companies issuing the policy or upon written notice given by the Secretary to such companies at least one year in advance of the beginning of the year for which such redetermined maximum charges will be effective.
(e) Each such policy shall provide for an accounting to the Secretary not later than ninety days after the end of each policy year, which shall set forth, in a form approved by the Secretary, (1) the amounts of premiums actually accrued under the policy from its date of issue to the end of such policy year, (2) the total of all mortality and other claim charges incurred for that period, and (3) the amounts of the insurers' expense and risk charge for that period. Any excess of the total of item (1) over the sum of items (2) and (3) shall be held by the insurance company or companies issuing the policy as a special contingency reserve to be used by such insurance company or companies for charges under such policy only, such reserve to bear interest at a rate to be determined in advance of each policy year by the insurance company or companies issuing the policy, which rate shall be approved by the Secretary as being consistent with the rates generally used by such company or companies for similar funds held under other group life insurance policies. If and when the Secretary determines that such special contingency reserve has attained an amount estimated by the Secretary to make satisfactory provision for adverse fluctuations in future charges under the policy, any further excess shall be deposited to the credit of the revolving fund established under section 1969(d)(1) of this title [38 USCS § 1969(d)(1)]. If and when such policy is discontinued, and if after all charges have been made, there is any positive balance remaining in such special contingency reserve, such balance shall be deposited to the credit of the revolving fund, subject to the right of the insurance company or companies issuing the policy to make such deposit in equal monthly installments over a period of not more than two years.

Amendments:

1974. Act May 24, 1974, in subsec. (b), substituted "Servicemen's Group Life Insurance" for "the policy or policies"; and in subsec. (e), substituted "section 769(d)(1)" for "section 766".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 771, as 38 USCS § 1971, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".


Cross References

This section is referred to in 38 USCS § 1977

Research Guide

Am Jur:

24 Am Jur 2d, Divorce and Separation § 544

§ 1972. Benefit certificates

The Secretary shall arrange to have each member insured under a policy purchased under section 1966 of this title [38 USCS § 1966] receive a certificate setting forth the benefits to which the member is entitled thereunder, to whom such benefit shall be payable, to whom claims should be submitted, and summarizing the provisions of the policy principally affecting the member. Such certificate shall be in lieu of the certificate which the insurance company or companies would otherwise be required to issue.
Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 772, as 38 USCS § 1972, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

Research Guide

Am Jur:
24 Am Jur 2d, Divorce and Separation § 544

Annotations:
Group insurance: binding effects of limitations on or exclusions of coverage contained in master group policy but not in literature given individual insureds. 6 ALR4th 835

§ 1973. Forfeiture

Any person guilty of mutiny, treason, spying, or desertion, or who, because of conscientious objections, refuses to perform service in the Armed Forces of the United States or refuses to wear the uniform of such force, shall forfeit all rights to Servicemembers' Group Life Insurance under this subchapter [38 USCS §§ 1965 et seq.]. No such insurance shall be payable for death inflicted as a lawful punishment for crime or for military or naval offense, except when inflicted by an enemy of the United States.

Amendments:


Cross References
This section is referred to in 38 USCS § 1979

Research Guide

Am Jur:
24 Am Jur 2d, Divorce and Separation § 544
44A Am Jur 2d, Insurance § 1877


(a) There is an Advisory Council on Servicemembers' Group Life Insurance. The council consists of--

(1) the Secretary of the Treasury, who is the chairman of the council;
(2) the Secretary of Defense;
(3) the Secretary of Commerce;
(4) the Secretary of Health and Human Services;
(5) the Secretary of Homeland Security; and
(6) the Director of the Office of Management and Budget.

Members of the council shall serve without additional compensation.
(b) The council shall meet at least once a year, or more often at the call of the Secretary of Veterans Affairs. The council shall review the operations of the Department under this subchapter [38 USCS §§ 1965 et seq.] and shall advise the Secretary on matters of policy relating to the Secretary's activities under this subchapter [38 USCS §§ 1965 et seq.].

Amendments:

1970. Act June 25, 1970 (effective 6/25/70, as provided by § 14(a) of such Act, which appears as 38 USCS § 1317 note), inserted "the Secretary of Transportation,"


1986. Act Oct. 28, 1986 substituted "the Administrator" for "his" following "relating to".

1991. Act June 13, 1991 substituted this section for one which read: "There is hereby established an Advisory Council on Servicemen's Group Life Insurance consisting of the Secretary of the Treasury as Chairman, the Secretary of Defense, the Secretary of Commerce, the Secretary of Health and Human Services, the Secretary of Transportation, and the Director of the Office of Management and Budget, each of whom shall serve without additional compensation. The Council shall meet once a year, or oftener at the call of the Administrator, and shall review the operations under this subchapter and advise the Administrator on matters of policy relating to the Administrator activities thereunder."

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 774, as 38 USCS § 1974.


Other provisions:


Act Oct. 6, 1972, P. L. 92-463, §§ 3(2) and 14, 86 Stat. 770, 776 (effective 1/5/73, as provided by § 15 of such Act), which is classified as 5 USCS Appx, provides that the advisory committees in existence on Jan. 5, 1973, are to terminate not later than the expiration of the two-year period following Jan. 5, 1973, unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a board established by the Congress, its duration is otherwise provided for by law.

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Research Guide

Am Jur:

24 Am Jur 2d, Divorce and Separation § 544

§ 1975. Jurisdiction of District Courts
The district courts of the United States shall have original jurisdiction of any civil action or claim against the United States founded upon this subchapter [38 USCS §§ 1965 et seq.].

Amendments:


Cross References

This section is referred to in 38 USCS § 511

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:284, 308, 314, 360

Am Jur:

24 Am Jur 2d, Divorce and Separation § 544
44A Am Jur 2d, Insurance § 1885
77 Am Jur 2d, Veterans and Veterans' Laws § 161

Forms:

16A Fed Procedural Forms L Ed, Veterans and Veterans' Laws §§ 68:103, 104

1. Generally
2. Parties
3. Transfer of action from Claims Court

1. Generally

Jurisdiction under 38 USCS § 775 [now 38 USCS § 1975] is improper in action brought by widow of veteran alleging statutory breach of duty of notice as to right to obtain coverage under Serviceman's Group Life Insurance program and notice that was not given by Federal government due to erroneous data on file as to receipt by veteran of retired pay making him ineligible for program, because government's breach of duty was not kind for which United States is amenable to suit under § 775 [now § 1975]. Denton v United States (1981, CA9 Wash) 638 F.2d 1218

Claim by serviceman's widow, to effect that Army erroneously failed to notify serviceman of his eligibility to participate in Servicemen's Group Life Insurance, constitutes claim against United States which is committed to original jurisdiction of District Courts pursuant to 38 USCS § 775 [now 38 USCS § 1975]. Denton (1977) 215 Ct Cl 951

No federal court jurisdiction exists under 38 USCS §§ 765 et seq. [now 38 USCS §§ 1965 et seq.] based on failure of Administrator of Veterans' Administration [now Secretary of Veterans Affairs] to notify retired reservist of regulatory deadline for applying for Servicemen's Group Life Insurance, as Administrator [now Secretary] has no duty to notify reservist of existence of program, much less specific requirements of eligibility. Turney v United States (1981, DC Md) 525 F Supp 675, affd (1982, CA4 Md) 684 F.2d 307

2. Parties

Claim for benefits from group servicemen's life insurance was properly maintainable against the United States since it undertook to supply data identifying those who occupy the order of
precedence on which identity the insurer is to rely. Shannon v United States (1969, CA5 Ga) 417 F.2d 256

Realignment of parties to create complete diversity is unnecessary in Servicemen's Group Life Insurance Act (38 USCS §§ 1965 et seq.) case/interpleader action involving parties of non-diverse citizenship, where 38 USCS § 1975 provides only for original federal jurisdiction over claims against U.S., because federal subject matter jurisdiction exists under 28 USCS § 1331 since determination of who is entitled to proceeds of insurance policy necessarily requires interpretation of federal law as expressed in Act. Melton v White (1994, WD Okla) 848 F Supp 1511

3. Transfer of action from Claims Court

Claim for benefits arising under Servicemen's Group Life Insurance Act (38 USCS §§ 765 et seq. [now 38 USCS §§ 1965 et seq.]) brought in Court of Claims will be transferred to appropriate United States District Court pursuant to 28 USCS § 1506, since 38 USCS § 775 [now 38 USCS § 1975] provides District Courts with original jurisdiction over such claims. Parker (1971) 196 Ct Cl 775

§ 1976. Effective date

The insurance provided for in this subchapter [38 USCS §§ 1965 et seq.] and the deductions and contributions for that purpose shall take effect on the date designated by the Secretary and certified by the Secretary to each Secretary concerned.

Amendments:

1986. Act Oct. 28, 1986, substituted "the Administrator" for "him" following "certified by".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 776, as 38 USCS § 1976, and substituted "Secretary" for "Administrator".

Other provisions:


"(a) In the case of each veteran who died or dies--

"(1) as a direct result of actions of hostile forces;

"(2) as a direct result of an accident involving a military or naval aircraft or an aircraft under charter to the Department of Defense, Army, Navy, or Air Force;

"(3) as a direct result of the extra hazard of military or naval service, as such hazard may be determined by the Administrator; or

"(4) while performing service for which incentive pay for hazardous duty or special pay is authorized by section 301, 304, or 310 of title 37, United States Code; while in the active military, naval, or air service during the period from January 1, 1957, to the date immediately preceding the date on which the Servicemen's Group Life Insurance program is placed in effect pursuant to section 776 [now section 1976] of title 38, United States Code, both dates inclusive, the Administrator of Veterans' Affairs shall pay a death gratuity to the widow or widower, child or children, or parent or parents of such veteran, as provided in subsection (b), in an amount not exceeding $5,000, determined as provided in subsection (c), but only if application is made for such death gratuity within one year after the date of enactment of this Act.

"(b) The death gratuity authorized by this section [this note] shall be paid to the following classes of persons and in the order named--
“(1) to the widow or widower of the veteran, if living;

“(2) if no widow or widower, to the child or children of the veteran, if living, in equal shares;

“(3) if no widow, widower, or child, to the parent or parents of the veteran who last bore that relationship, if living, in equal shares.

“(c)(1) The death gratuity authorized by this section [this note] shall be $5,000 reduced by the aggregate amount of United States Government Life Insurance and National Service Life Insurance paid or payable on account of the death of such veteran.

“(2) The right of any person to payment of a death gratuity under this section [this note] shall be conditioned upon his being alive to receive such payment. No person shall have a vested right to any such payment and any payment not made during the person's lifetime shall be paid to the person or persons within the permitted class next entitled to priority, as provided in subsection (b).

“(d) Any terms used in this section which are defined in section 101 or 102(b) of title 38, United States Code, shall, for the purposes of this section [this note], have the meanings given to them by such section 101 or 102(b), except that (1) the term 'veteran', as used in this section [this note], includes a person who dies while in the active military, naval, or air service and (2) the term 'child' shall not be limited with respect to age or marital status.

“(e) Appropriations made to the Veterans' Administration for 'Compensation and Pensions' shall be available for the payment of death gratuities under this section [this note]."

Waiver of future benefits of interim coverage. Act Nov. 2, 1966, P. L. 89-730, § 6(e), 80 Stat. 1159, provides: "Any waiver of future benefits executed by any person under section 3(a) of the Act of September 29, 1965 (79 Stat. 886) [note to this section], as in effect prior to the date of the enactment of this Act, shall be of no effect.".

Restitution of amounts deducted from $5,000 death gratuity. Act Nov. 2, 1966, P. L. 89-730, § 6(f), 80 Stat. 1159, provides: "In any case in which the death gratuity paid to any person under section 3 of the Act of September 29, 1965 [note to this section], was reduced pursuant to clause (B) of subsection (c)(1) of such section, as in effect prior to the date of enactment of this Act, the Administrator of Veterans' Affairs shall pay to such person an amount equal to the amount by which such death gratuity was reduced."

Time for filing application for death gratuity. Act Nov. 2, 1966, P. L. 89-730, § 6(g), 80 Stat. 1159, provides: "Notwithstanding the time limitation prescribed in section 3(a) of the Act of September 29, 1965 [note to this section], any application for death gratuity filed under such section shall be valid if filed within one year after the date of enactment of this Act."

Research Guide

Am Jur: 24 Am Jur 2d, Divorce and Separation § 544

§ 1977. Veterans' Group Life Insurance

(a) (1) Veterans' Group Life Insurance shall be issued in the amounts specified in section 1967(a) of this title [38 USCS § 1967(a)]. In the case of any individual, the amount of Veterans’ Group Life Insurance may not exceed the amount of Servicemembers’ Group Life Insurance coverage continued in force after the expiration of the period of duty or travel under section 1967(b) or 1968(a) of this title [38 USCS § 1967(b) or 1968(a)]. No person may carry a combined amount of Servicemembers' Group Life Insurance and Veterans' Group Life Insurance at any one time in excess of the maximum amount for

(2) If any person insured under Veterans' Group Life Insurance again becomes insured under Servicemembers' Group Life Insurance but dies before terminating or converting such person's Veterans' Group Insurance, Veterans' Group Life Insurance shall be payable only if such person is insured under Servicemembers' Group Life Insurance for less than the maximum amount for such insurance in effect under section 1967(a)(3)(A)(i) of this title [38 USCS § 1967(a)(3)(A)(i)], and then only in an amount which, when added to the amount of Servicemembers' Group Life Insurance payable, does not exceed such maximum amount in effect under such section.

(b) Veterans' Group Life Insurance shall (1) provide protection against death; (2) be issued on a renewable five-year term basis; (3) have no cash, loan, paid-up, or extended values; (4) except as otherwise provided, lapse for nonpayment of premiums; and (5) contain such other terms and conditions as the Secretary determines to be reasonable and practicable which are not specifically provided for in this section, including any provisions of this subchapter [38 USCS §§ 1965 et seq.] not specifically made inapplicable by the provisions of this section.

(c) The premiums for Veterans' Group Life Insurance shall be established under the criteria set forth in sections 1971(a) and (c) of this title [38 USCS §§ 1971(a) and (c)], except that the Secretary may provide for average premiums for such various age groupings as the Secretary may decide to be necessary according to sound actuarial principles, and shall include an amount necessary to cover the administrative cost of such insurance to the company or companies issuing such insurance. Such premiums shall be payable by the insureds thereunder as provided by the Secretary directly to the administrative office established for such insurance under section 1966(b) of this title [38 USCS § 1966(b)]. In any case in which a member or former member who was mentally incompetent on the date such member or former member first became insured under Veterans' Group Life Insurance dies within one year of such date, such insurance shall be deemed not to have lapsed for nonpayment of premiums and to have been in force on the date of death. Where insurance is in force under the preceding sentence, any unpaid premiums may be deducted from the proceeds of the insurance. Any person who claims eligibility for Veterans' Group Life Insurance based on disability incurred during a period of duty shall be required to submit evidence of qualifying health conditions and, if required, to submit to physical examinations at their own expense.

(d) Any amount of Veterans' Group Life Insurance in force on any person on the date of such person's death shall be paid, upon the establishment of a valid claim therefor, pursuant to the provisions of section 1970 of this title [38 USCS § 1970]. However, any designation of beneficiary or beneficiaries for Servicemembers' Group Life Insurance filed with a uniformed service until changed, shall be considered a designation of beneficiary or beneficiaries for Veterans' Group Life Insurance, but not for more than sixty days after the effective date of the insured's Veterans' Group Insurance, unless at the end of such sixty-day period, the insured is incompetent in which event such designation may continue in force until the disability is removed but not for more than five years after the effective date of the insured's Veterans' Group Life Insurance. Except as indicated
above in competent cases, after such sixty-day period, any designation of beneficiary or beneficiaries for Veterans' Group Life Insurance to be effective must be by a writing signed by the insured and received by the administrative office established under section 1966(b) of this title [38 USCS § 1966(b)].

(e) An insured under Veterans' Group Life Insurance shall have the right at any time to convert such insurance to an individual policy of life insurance upon written application for conversion made to the participating company the insured selects and payment of the required premiums. The individual policy will be issued without medical examination on a plan then currently written by such company which does not provide for the payment of any sum less than the face value thereof or for the payment of an additional amount as premiums in the event the insured performs active duty, active duty for training, or inactive duty training. The Veterans' Group Life Insurance policy converted to an individual policy under this subsection shall terminate on the day before the date on which the individual policy becomes effective. Upon request to the administrative office established under section 1966(b) of this title [38 USCS § 1966(b)], an insured under Veterans' Group Life Insurance shall be furnished a list of life insurance companies participating in the program established under this subchapter [38 USCS §§ 1965 et seq.]. In addition to the life insurance companies participating in the program established under this subchapter [38 USCS §§ 1965 et seq.], the list furnished to an insured under this section shall include additional life insurance companies (not so participating) which meet qualifying criteria, terms, and conditions established by the Secretary and agree to sell insurance to former members in accordance with the provisions of this section.

(f) The provisions of subsections (d) and (e) of section 1971 of this title [38 USCS § 1971] shall be applicable to Veterans' Group Life Insurance. However, a separate accounting shall be required for each program of insurance authorized under this subchapter [38 USCS §§ 1965 et seq.]. In such accounting, the Secretary is authorized to allocate claims and other costs among such programs of insurance according to accepted actuarial principles.

(g) Any person whose Servicemembers' Group Life Insurance was continued in force after termination of duty or discharge from service under the law as in effect prior to the date on which the Veterans' Group Life Insurance program (provided for under section 1977 of this title [38 USCS § 1977]) became effective, and whose coverage under Servicemembers' Group Life Insurance terminated less than four years prior to such date, shall be eligible within one year from the effective date of the Veterans' Group Life Insurance program to apply for and be granted Veterans' Group Life Insurance in an amount equal to the amount of his Servicemembers' Group Life Insurance which was not converted to an individual policy under prior law. Veterans' Group Life Insurance issued under this subsection shall be issued for a term period equal to five years, less the time elapsing between the termination of the applicant's Servicemembers' Group Life Insurance and the effective date on which the Veterans' Group Life Insurance program became effective. Veterans' Group Life Insurance under this subsection shall only be issued upon application to the administrative office established under section 1966(b) of this title [38 USCS § 1966(b)], payment of the required premium, and proof of good health satisfactory to that office, which proof shall be submitted at the applicant's own expense. Any person who cannot meet the good health requirements for insurance under
this subsection solely because of a service-connected disability shall have such disability waived. For each month for which any eligible veteran, whose service-connected disabilities are waived, is insured under this subsection there shall be contributed to the insurer or insurers issuing the policy or policies from the appropriation "Compensation and Pensions, Department of Veterans Affairs" an amount necessary to cover the cost of the insurance in excess of the premiums established for eligible veterans, including the cost of the excess mortality attributable to such veteran's service-connected disabilities. The Secretary may establish, as he may determine to be necessary according to sound actuarial principles, a separate premium, age groupings for premium purposes, accounting, and reserves, for persons granted insurance under this subsection different from those established for other persons granted insurance under this section. Appropriations to carry out the purpose of this section are hereby authorized.

(h) (1) Notwithstanding any other provision of law, members of the Individual Ready Reserve and the Inactive National Guard are eligible to be insured under Veterans' Group Life Insurance. Any such member shall be so insured upon submission of an application in the manner prescribed by the Secretary and the payment of premiums as required under this section.

    (2) In accordance with subsection (b), Veterans' Group Life Insurance coverage under this subsection shall be issued on a renewable five-year term basis, but the person insured must remain a member of the Individual Ready Reserve or Inactive National Guard throughout the period of the insurance in order for the insurance of such person to be renewed.

    (3) For the purpose of this subsection, the terms "Individual Ready Reserve" and "Inactive National Guard" shall have the meanings prescribed by the Secretary in consultation with the Secretary of Defense.

Effective date of section:

Act May 24, 1974, P. L. 93-289, § 12(4), 88 Stat. 173, provided that this section shall become effective on the first day of the third calendar month following May, 1974.

Amendments:

1981. Act Oct. 17, 1981 (effective 12/1/81, as provided by § 701(b)(2) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted $20,000, $25,000, $30,000, or $35,000" for "or $20,000" preceding "only." and substituted "$35,000" for "$20,000" wherever appearing thereafter.

1985. Act Dec. 3, 1985 (effective 1/1/86, as provided by § 401(c) of such Act, which appears as 38 USCS § 1967 note), in subsec. (a), substituted sentences beginning "Veterans' Group Life Insurance ..." and "In the case of any individual ..." for "Veterans' Group Life Insurance shall be issued in the amount of $5,000, $10,000, $15,000, $20,000, $25,000, $30,000, or $35,000 only.", and substituted "$50,000" for "$35,000" wherever appearing; and added subsec. (h).

1986. Act Oct. 28, 1986, in subsec. (a) substituted "such person's" for "his" wherever appearing, and "such person" for "he"; in subsec. (c) substituted "the Administrator" for "he" following "groupings as", and "such member or former member" for "he"; in subsec. (d) substituted "such person's" for "his"; in subsec. (e) substituted "the insured" for "he"; and in subsec. (g) substituted "the Administrator" for "he" following "establish, as", and purported to substitute "the insured's" for "his", but such amendment could not be executed as the word "his" does not appear in text.
Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 777, as 38 USCS § 1977; amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101); substituted "Secretary" for "Administrator" wherever appearing; and, in subsec. (g), substituted "Department of Veterans Affairs" for "Veterans' Administration".

1992. Act Oct. 29, 1992 (effective 12/1/92, as provided by § 205 of such Act, which appears as a note to 38 USCS § 1922A), in subsec. (a), inserted "and (e)" in two places, substituted "$200,000" for "$100,000" wherever appearing, substituted "60 days" for "sixty days", substituted "60-day period" for "sixty-day period", and deleted "of this section" following "subsection (e)"; in subsec. (b), in cl. (2), substituted "renewable" for "nonrenewable"; and, in subsec. (h), in para. (2), substituted "in accordance with subsection (b)" for "Notwithstanding subsection (b)(2) of this section".

1994. Act Nov. 2, 1994, in subsec. (f), substituted "subsections (d) and (e) of section 1971" for "sections 1971(d) and (e)".

1996. Act Oct. 9, 1996, in subsecs. (a), (d), and (g), substituted "Servicemembers' Group Life Insurance" for "Servicemen's Group Life Insurance", wherever appearing.

Such Act further, in subsec. (a), designated the existing text as para. (1) and, in such paragraph as so designated, deleted "and (e)" following "1967(a)" and "1967(b)", deleted "Any person insured under Veterans' Group Life Insurance who again becomes insured under Servicemen's Group Life Insurance may within 60 days after becoming so insured convert any or all of such person's Veterans' Group Life Insurance to an individual policy of insurance under subsection (e). However, if such a person dies within the 60-day period and before converting such person's Veterans' Group Life Insurance, Veterans' Group Life Insurance will be payable only if such person is insured for less than $200,000 under Servicemen's Group Life Insurance, and then only in an amount which when added to the amount of Servicemen's Group Life Insurance payable shall not exceed $200,000." following "at any one time", and added para. (2); and in subsec. (e), inserted "at any time" and substituted "The Veterans' Group Life Insurance policy converted to an individual policy under this subsection shall terminate on the day before the date on which the individual policy becomes effective." for "The individual policy will be effective the day after the insured's Veterans' Group Life Insurance terminates by expiration of the five-year term period, except in a case where the insured is eligible to convert at an earlier date by reason of again having become insured under Servicemen's Group Life Insurance, in which event the effective date of the individual policy may not be later than the sixty-first day after he again became so insured.".

2000. Act Nov. 1, 2000 (effective on the first day of the first month that begins more than 120 days after 11/1/00, as provided by § 312(c) of such Act, which appears as 38 USCS § 1967 note), in subsec. (a), substituted "$250,000" for "$200,000" wherever appearing.

2005. Act May 11, 2005, § 1012(e) (repealed by Act Sept. 30, 2005), in subsec. (a), in para. (1), substituted "$400,000" for "$250,000", and added "Any additional amount of insurance provided a member under section 1967(e) of this title may not be treated as an amount for which Veterans' Group Life Insurance shall be issued under this section." following "one time."); and, in para. (2), substituted "$400,000" for "$250,000" in two places.

Act Sept. 30, 2005 (effective as of 8/31/2005, as provided by § 2 of such Act), repealed § 1012 of Act May 11, 2005 (amending this section), and provided that this section shall be applied as if such § 1012 had not been enacted.

Such Act further (effective as of 9/1/2005 and applicable with respect to deaths occurring on or after that date, as provided by § 3(c) of such Act, which appears as 38 USCS § 1967 note), in subsec. (a), in para. (1), substituted "at any one time in excess of the maximum amount for Servicemembers' Group Life Insurance in effect under section 1967(a)(3)(A)(i) of this title" for "in excess of $250,000 at any one time", and, in para. (2), substituted "under
Servicemembers' Group Life Insurance for less than the maximum amount for such insurance in effect under section 1967(a)(3)(A)(i) of this title" for "for less than $250,000 under Servicemembers' Group Life Insurance", and substituted "does not exceed such maximum amount in effect under such section" for "does not exceed $250,000".

**Code of Federal Regulations**

Department of Veterans Affairs-Servicemen's Group Life Insurance and Veterans' Group Life Insurance, 38 CFR Part 9

**Cross References**

This section is referred to in 38 USCS §§ 1968, 1980

**Research Guide**

**Am Jur:**

24 Am Jur 2d, Divorce and Separation § 544

44A Am Jur 2d, Insurance § 1877

One year and 1 day after separation of totally disabled, mentally incompetent soldier from military, his Servicemen's Group Life Insurance coverage is automatically converted to Veterans' Group Life Insurance coverage regardless of whether he made initial VGLI premium payment. Porter v Prudential Ins. Co. (1979, WD Tex) 470 F Supp 203

**§ 1978. Reinstatement**

Reinstatement of insurance coverage granted under this subchapter [38 USCS §§ 1965 et seq.] but lapsed for nonpayment of premiums shall be under terms and conditions prescribed by the Secretary.

**Effective date of section:**

Act May 24, 1974, P. L. 93-289, § 12(4), 88 Stat. 173, provided that this section shall become effective on the first day of the third calendar month following May, 1974.

**Amendments:**

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 778, as 38 USCS § 1978, and substituted "Secretary" for "Administrator".

**Research Guide**

**Am Jur:**

24 Am Jur 2d, Divorce and Separation § 544

**Annotations:**

Reinstatement of lapsed national service life insurance. 22 ALR2d 838

**§ 1979. Incontestability**

Subject to the provision of section 1973 of this title [38 USCS § 1973], insurance coverage granted under this subchapter [38 USCS §§ 1965 et seq.] shall be incontestable from the date of issue, reinstatement, or conversion except for fraud or nonpayment of premium.

**Effective date of section:**
Act May 24, 1974, P. L. 93-289, § 12(4), 88 Stat. 173, provided that this section shall become effective on the first day of the third calendar month following May, 1974.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 779, as 38 USCS § 1979, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Research Guide

Am Jur:

24 Am Jur 2d, Divorce and Separation § 544

§ 1980. Option to receive accelerated death benefit

(a) For the purpose of this section, a person shall be considered to be terminally ill if the person has a medical prognosis such that the life expectancy of the person is less than a period prescribed by the Secretary. The maximum length of such period may not exceed 12 months.

(b) (1) A terminally ill person insured under Servicemembers' Group Life Insurance or Veterans' Group Life Insurance may elect to receive in a lump-sum payment a portion of the face value of the insurance as an accelerated death benefit reduced by an amount necessary to assure that there is no increase in the actuarial value of the benefit paid, as determined by the Secretary.

(2) The Secretary shall prescribe the maximum amount of the accelerated death benefit available under this section that the Secretary finds to be administratively practicable and actuarially sound, but in no event may the amount of the benefit exceed the amount equal to 50 percent of the face value of the person's insurance in force on the date the election of the person to receive the benefit is approved.

(3) A person making an election under this section may elect to receive an amount that is less than the maximum amount prescribed under paragraph (2). The Secretary shall prescribe the increments in which a reduced amount under this paragraph may be elected.

(c) The portion of the face value of insurance which is not paid in a lump sum as an accelerated death benefit under this section shall remain payable in accordance with the provisions of this chapter [38 USCS §§ 1901 et seq.].

(d) Deductions under section 1969 of this title [38 USCS § 1969] and premiums under section 1977(c) of this title [38 USCS § 1977(c)] shall be reduced, in a manner consistent with the percentage reduction in the face value of the insurance as a result of payment of an accelerated death benefit under this section, effective with respect to any amounts which would otherwise become due on or after the date of payment under this section.

(e) The Secretary shall prescribe regulations to carry out this section. Such regulations shall include provisions regarding--

(1) the form and manner in which an application for an election under this section shall be made; and

(2) the procedures under which any such application shall be considered.
(f) (1) An election to receive a benefit under this section shall be irrevocable.
   (2) A person may not make more than one election under this section, even if the
       election of the person is to receive less than the maximum amount of the benefit
       available to the person under this section.

(g) If a person insured under Servicemembers' Group Life Insurance elects to receive a
    benefit under this section and the person's Servicemembers' Group Life Insurance is
    thereafter converted to Veterans' Group Life Insurance as provided in section 1968(b) of
    this title [38 USCS § 1968(b)], the amount of the benefit paid under this section shall
    reduce the amount of Veterans' Group Life Insurance available to the person under
    section 1977(a) of this title [38 USCS § 1977(a)].

(h) Notwithstanding any other provision of law, the amount of the accelerated death
    benefit received by a person under this section shall not be considered income or
    resources for purposes of determining eligibility for or the amount of benefits under any
    Federal or federally-assisted program or for any other purpose.

Effective date of section:
This section took effect 90 days after enactment, pursuant to § 302(c) of Act Nov. 11, 1998, P.
L. 105-368, which appears as 38 USCS § 1970 note.

Research Guide

Am Jur:
24 Am Jur 2d, Divorce and Separation § 544
44A Am Jur 2d, Insurance § 1880

§ 1980A. Traumatic injury protection

(a) (1) A member of the uniformed services who is insured under Servicemembers' Group
    Life Insurance shall automatically be insured for traumatic injury in accordance with this
    section. Insurance benefits under this section shall be payable if the member, while so
    insured, sustains a traumatic injury on or after December 1, 2005, that results in a
    qualifying loss specified pursuant to subsection (b)(1).
       (2) If a member suffers more than one such qualifying loss as a result of traumatic
           injury from the same traumatic event, payment shall be made under this section in
           accordance with the schedule prescribed pursuant to subsection (d) for the single loss
           providing the highest payment.

(b) (1) A member who is insured against traumatic injury under this section is insured
    against such losses due to traumatic injury (in this section referred to as "qualifying
    losses") as are prescribed by the Secretary by regulation. Qualifying losses so prescribed
    shall include the following:
       (A) Total and permanent loss of sight.
       (B) Loss of a hand or foot by severance at or above the wrist or ankle.
       (C) Total and permanent loss of speech.
       (D) Total and permanent loss of hearing in both ears.
       (E) Loss of thumb and index finger of the same hand by severance at or above the
           metacarpophalangeal joints.
(F) Quadriplegia, paraplegia, or hemiplegia.
(G) Burns greater than second degree, covering 30 percent of the body or 30 percent of the face.
(H) Coma or the inability to carry out the activities of daily living resulting from traumatic injury to the brain.

(2) For purposes of this subsection:
(A) The term "quadriplegia" means the complete and irreversible paralysis of all four limbs.
(B) The term "paraplegia" means the complete and irreversible paralysis of both lower limbs.
(C) The term "hemiplegia" means the complete and irreversible paralysis of the upper and lower limbs on one side of the body.
(D) The term "inability to carry out the activities of daily living" means the inability to independently perform two or more of the following six functions:
   (i) Bathing.
   (ii) Continence.
   (iii) Dressing.
   (iv) Eating.
   (v) Toileting.
   (vi) Transferring.

(3) The Secretary may prescribe, by regulation, conditions under which coverage otherwise provided under this section is excluded.

(4) A member shall not be considered for the purposes of this section to be a member insured under Servicemembers' Group Life Insurance if the member is insured under Servicemembers' Group Life Insurance only as an insurable dependent of another member pursuant to subparagraph (A)(ii) or (C)(ii) of section 1967(a)(1) of this title [38 USCS § 1967(a)(1)].

(c) (1) A payment may be made to a member under this section only for a qualifying loss that results directly from a traumatic injury sustained while the member is covered against loss under this section and from no other cause.

   (2) (A) A payment may be made to a member under this section for a qualifying loss resulting from a traumatic injury only for a loss that is incurred during the applicable period of time specified pursuant to subparagraph (B).

   (B) For each qualifying loss, the Secretary shall prescribe, by regulation, a period of time to be the period of time within which a loss of that type must be incurred, determined from the date on which the member sustains the traumatic injury resulting in that loss, in order for that loss to be covered under this section.

(d) Payments under this section for qualifying losses shall be made in accordance with a schedule prescribed by the Secretary, by regulation, specifying the amount of payment to be made for each type of qualifying loss, to be based on the severity of the qualifying loss. The minimum payment that may be prescribed for a qualifying loss is $25,000, and the maximum payment that may be prescribed for a qualifying loss is $100,000.

(e) (1) During any period in which a member is insured under this section and the member is on active duty, there shall be deducted each month from the member's basic or other pay until separation or release from active duty an amount determined by the
Secretary (which shall be the same for all such members) as the share of the cost attributable to provided coverage under this section, less any costs traceable to the extra hazards of such duty in the uniformed services.

(2) During any month in which a member is assigned to the Ready Reserve of a uniformed service under conditions which meet the qualifications set forth in section 1965(5)(B) of this title [38 USCS § 1965(5)(B)] and is insured under a policy of insurance purchased by the Secretary under section 1966 of this title [38 USCS § 1966], there shall be contributed from the appropriation made for active duty pay of the uniformed service concerned an amount determined by the Secretary (which shall be the same for all such members) as the share of the cost attributable to provided coverage under this section, less any costs traceable to the extra hazards of such duty in the uniformed services. Any amounts so contributed on behalf of any member shall be collected by the Secretary concerned from such member (by deduction from pay or otherwise) and shall be credited to the appropriation from which such contribution was made in advance on a monthly basis.

(3) The Secretary shall determine the premium amounts to be charged for traumatic injury protection coverage provided under this section.

(4) The premium amounts shall be determined on the basis of sound actuarial principles and shall include an amount necessary to cover the administrative costs to the insurer or insurers providing such insurance.

(5) Each premium rate for the first policy year shall be continued for subsequent policy years, except that the rate may be adjusted for any such subsequent policy year on the basis of the experience under the policy, as determined by the Secretary in advance of that policy year.

(6) The cost attributable to insuring members under this section for any month or other period specified by the Secretary, less the premiums paid by the members, shall be paid by the Secretary concerned to the Secretary. The Secretary shall allocate the amount payable among the uniformed services using such methods and data as the Secretary determines to be reasonable and practicable. Payments under this paragraph shall be made on a monthly basis or at such other intervals as may be specified by the Secretary and shall be made within 10 days of the date on which the Secretary provides notice to the Secretary concerned of the amount required.

(7) For each period for which a payment by a Secretary concerned is required under paragraph (6), the Secretary concerned shall contribute such amount from appropriations available for active duty pay of the uniformed service concerned.

(8) The sums withheld from the basic or other pay of members, or collected from them by the Secretary concerned, under this subsection, and the sums contributed from appropriations under this subsection, together with the income derived from any dividends or premium rate adjustments received from insurers shall be deposited to the credit of the revolving fund established in the Treasury of the United States under section 1869(d)(1) of this title [38 USCS § 1869(d)(1)].

(f) When a claim for benefits is submitted under this section, the Secretary of Defense or, in the case of a member not under the jurisdiction of the Secretary of Defense, the Secretary concerned, shall certify to the Secretary whether the member with respect to whom the claim is submitted--
(1) was at the time of the injury giving rise to the claim insured under Servicemembers' Group Life Insurance for the purposes of this section; and
(2) has sustained a qualifying loss.

(g) (1) Payment for a loss resulting from traumatic injury may not be made under the insurance coverage under this section if the member dies before the end of a period prescribed by the Secretary, by regulation, for such purpose that begins on the date on which the member sustains the injury.
(2) If a member eligible for a payment under this section dies before payment to the member can be made, the payment shall be made to the beneficiary or beneficiaries to whom the payment would be made if the payment were life insurance under section 1967(a) of this title [38 USCS § 1967(a)].

(h) Coverage for loss resulting from traumatic injury provided under this section shall cease at midnight on the date of the termination of the member's duty status in the uniformed services that established eligibility for Servicemembers' Group Life Insurance. The termination of coverage under this section is effective in accordance with the preceding sentence, notwithstanding any continuation after the date specified in that sentence of Servicemembers' Group Life Insurance coverage pursuant to 1968(a) of this title [38 USCS § 1968(a)] for a period specified in that section.

(i) Insurance coverage provided under this section is not convertible to Veterans' Group Life Insurance.

(j) Regulations under this section shall be prescribed in consultation with the Secretary of Defense.

Effective date of section:
This section took effect on the first day of the first month beginning more than 180 days after enactment, as provided by § 1032(d) of Act May 11, 2005, P. L. 109-13, which appears as a note to this section.

Amendments:
2006. Act June 15, 2006, substituted subsec. (a) for one which read: "(a) A member who is insured under subparagraph (A)(i), (B), or (C)(i) of section 1967(a)(1) shall automatically be issued a traumatic injury protection rider that will provide for a payment not to exceed $100,000 if the member, while so insured, sustains a traumatic injury that results in a loss described in subsection (b)(1). The maximum amount payable for all injuries resulting from the same traumatic event shall be limited to $100,000. If a member suffers more than 1 such loss as a result of traumatic injury, payment will be made in accordance with the schedule in subsection (d) for the single loss providing the highest payment."; in subsec. (b), in para. (1), in the introductory matter, substituted "insured against traumatic injury under this section is insured against such losses due to traumatic injury (in this section referred to as ‘qualifying losses’) as are prescribed by the Secretary by regulation. Qualifying losses so prescribed shall include the following:" for "issued a traumatic injury protection rider under subsection (a) is insured against such traumatic injuries, as prescribed by the Secretary, in collaboration with the Secretary of Defense, including, but not limited to--", in subpara. (A), substituted "Total" for "total" and substituted the concluding period for a concluding semicolon, in subpara. (B), substituted "Loss" for "loss" and substituted the concluding period for a concluding semicolon, in subparas. (C) and (D), substituted "Total" for "total" and substituted the concluding periods for concluding semicolons, in subpara. (E), substituted "Loss" for "loss" and substituted the concluding period for a concluding semicolon, in subpara. (F),
substituted "Quadriplegia" for "quadriplegia" and substituted the concluding period for a concluding semicolon, in subpara. (G), substituted "Burns" for "burns" and substituted the concluding period for "; and", and, in subpara. (H), substituted "Coma" for "coma", in para. (2), in the introductory matter, substituted "subsection:" for "subsection--", in subpara. (A), substituted "The" for "the" and substituted "four limbs." for "4 limbs;", in subpara. (B), substituted "The" for "the" and substituted the concluding period for "; and", and, in subpara. (C), substituted "The" for "the" and substituted "one side" for "1 side", and added subpara. (D), in para. (3), deleted ", in collaboration with the Secretary of Defense," following "Secretary", substituted "may prescribe" for "shall prescribe", and substituted "conditions under which coverage otherwise provided under this section is excluded" for "the conditions under which coverage against loss will not be provided", and added para. (4); substituted subsec. (c) for one which read:

"(c) A payment under this section may be made only if--

"(1) the member is insured under Servicemembers’ Group Life Insurance when the traumatic injury is sustained;

"(2) the loss results directly from that traumatic injury and from no other cause; and

"(3) the member suffers the loss before the end of the period prescribed by the Secretary, in collaboration with the Secretary of Defense, which begins on the date on which the member sustains the traumatic injury, except, if the loss is quadriplegia, paraplegia, or hemiplegia, the member suffers the loss not later than 365 days after sustaining the traumatic injury.";

in subsec. (d), substituted "qualifying losses shall be made in accordance with a schedule prescribed by the Secretary, by regulation, specifying the amount of payment to be made for each type of qualifying loss, to be based on the severity of the qualifying loss." and the sentence beginning "The minimum payment that may . . ." for "losses described in subsection (b)(1) shall be--";

"(1) made in accordance with a schedule prescribed by the Secretary, in collaboration with the Secretary of Defense;

"(2) based on the severity of the covered condition; and

"(3) in an amount that is equal to not less than $25,000 and not more than $100,000.";

in subsec. (e), in para. (1), deleted "of Veterans Affairs" following "the Secretary" and deleted "as the premium allocable to the pay period for providing traumatic injury protection under this section" preceding "(which shall", in para. (2), deleted "of Veterans Affairs" following "purchased by the Secretary", deleted "of Veterans Affairs" following "determined by the Secretary" and substituted "Secretary concerned" for "Secretary of the concerned service", in para. (3), deleted "of Veterans Affairs" following "The Secretary", in para. (5), deleted "of Veterans Affairs" following "determined by the Secretary", substituted paras. (6)-(8) for ones which read:

"(6) The cost attributable to insuring such member under this section, less the premiums deducted from the pay of the member's uniformed service, shall be paid by the Secretary of Defense to the Secretary of Veterans Affairs. This amount shall be paid on a monthly basis, and shall be due within 10 days of the notice provided by the Secretary of Veterans Affairs to the Secretary of the concerned uniformed service.

"(7) The Secretary of Defense shall provide the amount of appropriations required to pay expected claims in a policy year, as determined according to sound actuarial principles by the Secretary of Veterans Affairs."
"(8) The Secretary of Defense shall forward an amount to the Secretary of Veterans Affairs that is equivalent to half the anticipated cost of claims for the current fiscal year, upon the effective date of this legislation;",

substituted subsec. (f) for one which read: "(f) The Secretary of Defense shall certify whether any member claiming the benefit under this section is eligible."; in subsec. (g), inserted the paragraph designator "(1)" and, in para. (1) as so designated, substituted "may not be made under the insurance coverage under this section" for "will not be made" and substituted "a period prescribed by the Secretary, by regulation, for such purpose that begins on the date" for "the period prescribed by the Secretary, in collaboration with the Secretary of Defense, which begins on the date", inserted the paragraph designator "(2)", and, in para. (2) as designated, substituted "If a member eligible for a payment under this section" for "If the member", substituted "shall be" for "will be" and substituted "to the beneficiary or beneficiaries to whom the payment would be made if the payment were life insurance under section 1967(a) of this title." for "according to the member's most current beneficiary designation under Servicemembers' Group Life Insurance, or a by law designation, if applicable."); in subsec. (h), substituted "termination of the member's duty status in the unified services that established eligibility for Servicemembers' Group Life Insurance" for "member's separation from the uniformed service", deleted "Payment will not be made for any loss resulting from injury incurred after the date a member is separated from the uniformed services." following "Insurance.", and added the sentence beginning "The termination of coverage . . . "; and added subsec. (j).

Other provisions:
Repeal of provision relating to eligibility for retroactive traumatic injury benefits. Act May 11, 2005, P. L. 109-13, Div A, Title I, § 1032(c), 119 Stat. 259, which formerly appeared as a note to this section, was repealed by Act June 15, 2006, P. L. 109-233, Title V, § 501(c)(2), 120 Stat. 415. Such note provided for eligibility for coverage under this section if the qualifying loss was a direct result of injuries incurred in Operation Enduring Freedom or Operation Iraqi Freedom.

"(1) In general. The amendments made by this section [adding 38 USCS §§ 1965(11) and 1980A] shall take effect on the first day of the first month beginning more than 180 days after the date of enactment of this Act.

"(2) Rulemaking. Before the effective date described in paragraph (1), the Secretary of Veterans Affairs, in collaboration with the Secretary of Defense, shall issue regulations to carry out the amendments made by this section [adding 38 USCS §§ 1965(11) and 1980A].".

"(1) Eligibility. A member of the uniformed services who during the period beginning on October 7, 2001, and ending at the close of November 30, 2005, sustains a traumatic injury resulting in a qualifying loss is eligible for coverage for that loss under section 1980A of title 38, United States Code, if, as determined by the Secretary concerned, that loss was a direct result of a traumatic injury incurred in the theater of operations for Operation Enduring Freedom or Operation Iraqi Freedom.

"(2) Certification of persons entitled to payment. The Secretary concerned shall certify to the life insurance company issuing the policy of life insurance for Servicemembers' Group Life Insurance under chapter 19 of title 38, United States Code [38 USCS §§ 1901 et seq.], the name and address of each person who the Secretary concerned determines to be entitled by reason of paragraph (1) to a payment under section 1980A of title 38, United States Code, plus such additional information as the Secretary of Veterans Affairs may require.
“(3) Funding. At the time a certification is made under paragraph (2), the Secretary concerned, from funds then available to that Secretary for the pay of members of the uniformed services under the jurisdiction of that Secretary, shall pay to the Secretary of Veterans Affairs the amount of funds the Secretary of Veterans Affairs determines to be necessary to pay all costs related to payments to be made under that certification. Amounts received by the Secretary of Veterans Affairs under this paragraph shall be deposited to the credit of the revolving fund in the Treasury of the United States established under section 1969(d) of title 38, United States Code.

“(4) Qualifying loss. For purposes of this subsection, the term 'qualifying loss' means--

“(A) a loss specified in the second sentence of subsection (b)(1) of section 1980A of title 38, United States Code, as amended by subsection (a); and

“(B) any other loss specified by the Secretary of Veterans Affairs pursuant to the first sentence of that subsection.

“(5) Secretary concerned. For purposes of this subsection, the term 'Secretary concerned' has the meaning given that term in paragraph (25) of section 101 of title 38, United States Code.”.

SUBCHAPTER IV. GENERAL

§ 1981. Replacement of surrendered and expired insurance
§ 1982. Administrative cost
§ 1983. Settlements for minors or incompetents
§ 1984. Suits on insurance
§ 1985. Decisions by the Secretary
§ 1986. Deposits in and disbursements from trust funds
§ 1987. Penalties
§ 1988. Savings provision

Amendments:
1965. Act Sept. 29, 1965, P. L. 89-214, § 1(a), 79 Stat. 880, which enacted present Subchapter III, redesignated this heading, which formerly appeared as Subchapter III, as Subchapter IV.

§ 1981. Replacement of surrendered and expired insurance

(a) Any person who surrendered a policy of National Service Life Insurance or United States Government Life insurance on a permanent plan for its cash value while in the active service after April 24, 1951, and before January 1, 1957, who was entitled on December 31, 1958, to reinstate or replace such insurance under section 623 of the National Service Life Insurance Act of 1940, may, upon application in writing made while on continuous active duty which began before January 1, 1959, or within one hundred and twenty days after separation therefrom, be granted, without medical examination, permanent plan insurance on the same plan not in excess of the amount surrendered for cash, or may reinstate such surrendered insurance upon payment of the required reserve and the premium for the current month. Waiver of premiums and total disability income benefits otherwise authorized under this chapter [38 USCS §§ 1901 et seq.] shall not be denied in any case of issue or reinstatement of insurance on a permanent plan under this section or the prior corresponding provision of law in which it is shown to the satisfaction of the Secretary that total disability of the applicant began
before the date of application. The cost of the premiums waived and total disability income benefits paid by virtue of the preceding sentence and the excess mortality cost in any case where the insurance matures by death from such total disability shall be borne by the United States and the Secretary shall transfer from time to time from the National Service Life Insurance appropriation to the National Service Life Insurance Fund and from the military and naval insurance appropriation to the United States Government Life Insurance Fund such sums as may be necessary to reimburse the funds for such costs.

(b) Any person who had United States Government life insurance or National Service Life Insurance on the five-year level premium term plan, the term of which expired while such person was in the active service after April 25, 1951, or within one hundred and twenty days after separation from such active service, and in either case before January 1, 1957, who was entitled on December 31, 1958, to replace such insurance under section 623 of the National Service Life Insurance Act of 1940, shall, upon application made while on continuous active duty which began before January 1, 1959, or within one hundred and twenty days after separation therefrom, payment of premiums and evidence of good health satisfactory to the Secretary, be granted an equivalent amount of insurance on the five-year level premium term plan at the premium rate for such person's then attained age.

Prior law and revision:
This section is based on 38 USCS § 824 (Act Oct. 8, 1940, ch 735, Title VI, Part I, § 623(a), (b), as added Aug. 1, 1956, ch 837, Title V, § 501(a)(4), 70 Stat 880).

References in text:
"Section 623 of the National Service Life Insurance Act of 1940", referred to in this section, is Act Oct. 8, 1940, ch 757, Title VI, Part I, § 623, as added Aug. 1, 1956, ch 837, Title V, § 501(a)(4), 70 Stat. 880, which was classified to 38 USCS § 824, prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(75), 72 Stat. 1273. For similar provisions, see this section.

Amendments:
1986. Act Oct. 28, 1986, in subsec. (b), substituted "such person" for "he" and "such person's" for "his" respectively.
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 781, as 38 USCS § 1981, and substituted "Secretary" for "Administrator".

Code of Federal Regulations
Department of Veterans Affairs-United States Government life insurance, 38 CFR Part 6
Department of Veterans Affairs-National Service life insurance, 38 CFR Part 8

Research Guide
Am Jur:
44A Am Jur 2d, Insurance § 1868
77 Fed Proc L Ed, Veterans and Veterans' Affairs §§ 215, 223

Annotations:
Reinstatement of lapsed national service life insurance. 22 ALR2d 838

§ 1982. Administrative cost

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Except as provided in sections 1920(c), 1923(d), and 1955(c) of this title [38 USCS §§ 1920(c), 1923(d), and 1955(c)], the United States shall bear the cost of administration in connection with this chapter [38 USCS §§ 1901 et seq.], including expenses for medical examinations, inspections when necessary, printing and binding, and for such other expenditures as are necessary in the discretion of the Secretary.

Prior law and revision:
This section is based on 38 USC §§ 459c and note, 511, 806 (Acts June 7, 1924, ch 320, Title III, § 300 in part, 43 Stat 624; June 7, 1924, ch 320, Title I, § 36, as added May 29, 1928, ch 875, § 6, 45 Stat. 965; July 3, 1930, ch 863, § 1, 46 Stat. 1016; Oct. 8, 1940, ch 757, Title VI, Part I, § 606, 54 Stat. 1012).

Explanatory notes:

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 782, as 38 USCS § 1982, and substituted "Secretary" for "Administrator".
1996. Act Jan. 26, 1996, substituted "Except as provided in sections 1920(c), 1923(d), and 1955(c) of this title, the United States" for "The United States".

Code of Federal Regulations
Department of Veterans Affairs-United States Government life insurance, 38 CFR Part 6
Department of Veterans Affairs-National Service life insurance, 38 CFR Part 8

Cross References
This section is referred to in 38 USCS §§ 1925, 1969

Research Guide
Am Jur:
77 Fed Proc L Ed, Veterans and Veterans' Affairs §§ 215, 223

§ 1983. Settlements for minors or incompetents
When an optional mode of settlement of National Service Life Insurance or United States Government life insurance heretofore or hereafter matured is available to a beneficiary who is a minor or incompetent, such option may be exercised by such beneficiary's fiduciary, person qualified under the Act of February 25, 1933 (25 U.S.C. 14), or person recognized by the Secretary as having custody of the person or the estate of such beneficiary, and the obligation of the United States under the insurance contract shall be fully satisfied by payment of benefits in accordance with the mode of settlement so selected.

Prior law and revision:
This section is based on 38 USC 802(x) (Act Oct. 8, 1940, ch 757, Title VI, Part I, § 602(x), as added Aug. 1, 1946, ch 728, § 9, 60 Stat 781).

Amendments:
1986. Act Oct. 28, 1986, substituted "such beneficiary's" for "his".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 783, as 38 USCS § 1983, and substituted "Secretary" for "Administrator".

Code of Federal Regulations

Department of Veterans Affairs-United States Government life insurance, 38 CFR Part 6
Department of Veterans Affairs-National Service life insurance, 38 CFR Part 8

Research Guide

Am Jur:

44A Am Jur 2d, Insurance § 1875
77 Fed Proc L Ed, Veterans and Veterans' Affairs §§ 215, 223

§ 1984. Suits on insurance

(a) In the event of disagreement as to claim, including claim for refund of premiums, under contract of National Service Life Insurance, United States Government life insurance, or yearly renewable term insurance between the Secretary and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the United States District Court for the District of Columbia or in the district court of the United States in and for the district in which such person or any one of them resides, and jurisdiction is conferred upon such courts to hear and determine all such controversies. All persons having or claiming to have an interest in such insurance may be made parties to such suit, and such as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct. In all cases where the Secretary acknowledges the indebtedness of the United States upon any such contract of insurance and there is a dispute as to the person or persons entitled to payment, a suit in the nature of a bill of interpleader may be brought at the request of the Secretary in the name of the United States against all persons having or claiming to have any interest in such insurance in the United States District Court for the District of Columbia or in the district court in and for the district in which any such claimant resides; however, no less than thirty days before instituting such suit the Secretary shall mail a notice of such intention to each of the persons to be made parties to the suit. The courts of appeals for the several circuits, including the District of Columbia, shall respectively exercise appellate jurisdiction and, except as provided in section 1254 of title 28 [28 USCS § 1254], the decrees of such courts of appeals shall be final.

(b) No suit on yearly renewable term insurance, United States Government life insurance, or National Service Life Insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made. For the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded. The limitation of six years is suspended for the period elapsing between the filing with the Secretary of the claim sued upon and the denial of the claim. However, if a claim is timely filed the claimant
shall have not less than ninety days from the date of mailing of notice of denial within which to file suit. After June 28, 1936, notice of denial of the claim under a contract of insurance shall be by registered mail or by certified mail directed to the claimant's last address of record. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the Secretary shall have three years in which to bring suit after the removal of their disabilities. If suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year though the period of limitation has elapsed. No State or other statute of limitations shall be applicable to suits filed under this section.

(c) In any suit, action, or proceeding brought under the provisions of this section subpoenas for witnesses who are required to attend a court of the United States in any district may run into any other district. However, no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the court being first had upon proper application and cause shown. The word "district" and the words "district court" as used in this section shall be construed to include the District of Columbia and the United States District Court for the District of Columbia.

(d) Attorneys of the Department, when assigned to assist in the trial of cases, and employees of the Department when ordered in writing by the Secretary to appear as witnesses, shall be paid the regular travel and subsistence allowance paid to other employees when on official travel status.

(e) Part-time and fee-basis employees of the Department, in addition to their regular travel and subsistence allowance, when ordered in writing by the Secretary to appear as witnesses in suits under this section, may be allowed, within the discretion and under written orders of the Secretary, a fee in an amount not to exceed $50 per day.

(f) Employees of the Department who are subpoenaed to attend the trial of any suit, under the provisions of this section, as witnesses for a party to such suit shall be granted court leave or authorized absence, as applicable, for the period they are required to be away from the Department in answer to such subpoenas.

(g) Whenever a judgment or decree shall be rendered in an action brought under the provisions of this section, the court, as a part of its judgment or decree, shall determine and allow reasonable fees for the attorneys of the successful party or parties and apportion same if proper, said fees not to exceed 10 per centum of the amount recovered and to be paid by the Department out of the payments to be made under the judgment or decree at a rate not exceeding one-tenth of each of such payments until paid; except that, in a suit brought by or on behalf of an insured during the insured's lifetime for waiver of premiums on account of total disability, the court, as part of its judgment or decree, shall determine and allow a reasonable fee to be paid by the insured to the insured's attorney.

(h) The term "claim" as used in this section means any writing which uses words showing an intention to claim insurance benefits; and the term "disagreement" means a denial of the claim, after consideration on its merits, by the Secretary or any employee or organizational unit of the Department heretofore or hereafter designated therefor by the Secretary.
(i) The Attorney General of the United States is authorized to agree to a judgment to be rendered by the chief judge of the United States court having jurisdiction of the case, pursuant to compromise approved by the Attorney General upon the recommendation of the United States attorney charged with the defense, upon such terms and for sums within the amount claimed to be payable, in any suit brought under the provisions of this section, on a contract of yearly renewable term insurance, and the Secretary shall make payments in accordance with any such judgment. The Comptroller General of the United States shall allow credit in the accounts of disbursing officers for all payments of insurance made in accordance with any such judgment. All such judgments shall constitute final settlement of the claim and no appeal therefrom shall be authorized.

Prior law and revision:

Amendments:
1960. Act June 11, 1960, in subsec. (b), inserted "or by certified mail".
1982. Act Oct. 12, 1982, in subsec. (b), substituted "the claim. However, if" for "said claim: Provided, That in any case in which"; and, in subsec. (c), substituted "district. However," for "district: Provided, That", and substituted "in this section" for "herein".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 784, as 38 USCS § 1984; in subsec. (a), substituted "Secretary" for "Veterans' Administration"; and, in subsec. (b), in the sentence beginning "The limitation of . . .", substituted "with the Secretary" for "in the Veterans' Administration", and, in the sentence beginning "Infants, insane persons . . .", substituted "Secretary" for "Veterans' Administration".

Such Act further, in subsecs. (d)-(i), substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator" wherever appearing.

Other provisions:
Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Code of Federal Regulations
Department of Veterans Affairs-United States Government life insurance, 38 CFR Part 6
Department of Veterans Affairs-National Service life insurance, 38 CFR Part 8
Department of Veterans Affairs-Board of Veterans' Appeals: Appeals regulations, 38 CFR Part 19

Cross References
Travel and subsistence allowances of government employees on official business, generally, 5 USCS §§ 5701 et seq

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Certification of question to Court of Appeals, 28 USCS § 1254
Certiorari to Court of Appeals, 28 USCS § 1254
Review by Court of Appeals of final decision of District Court, 28 USCS § 1291
Action against United States in District Court upon express contract, 28 USCS § 1346
Venue of actions against United States, generally, 28 USCS § 1402
Time for appeal to Court of Appeals, 28 USCS § 2107
Conclusiveness of finding of death after absence as inapplicable to this section, 38 USCS § 108
Incontestability of insurance contracts, 38 USCS §§ 1910, 1947, 1979
Forfeiture of insurance rights, 38 USCS §§ 1911, 1954, 1973
Certain bars to benefits as inapplicable to insurance, 38 USCS § 5303
Disclosure of medical records, 38 USCS § 5701
Board of Veterans' Appeals, 38 USCS §§ 7101 et seq
This section is referred to in 38 USCS §§ 108, 511, 1947, 1985, 5905

Research Guide

**Federal Procedure:**
4 Moore's Federal Practice (Matthew Bender 3d ed.), ch 22, Interpleader § 22.08
5 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 804, Hearsay Exceptions; Declarant Unavailable § 804.03
8 Fed Proc L Ed, Courts and Judicial System § 20:444

**Am Jur:**
32 Am Jur 2d, Federal Courts § 280
44A Am Jur 2d, Insurance §§ 1867,1881, 1882, 1885-1894, 1901
45 Am Jur 2d, Interpleader §§ 17, 33, 36, 39, 54
77 Am Jur 2d, Veterans and Veterans' Laws §§ 157, 161

**Forms:**

**Annotations:**
Validity, construction, and application of 38 USCS § 211(a) precluding judicial or other review of administrative decisions on veterans' benefits. 18 ALR Fed 915
What constitutes claim "under contract" of veterans' or servicemen's insurance within meaning of 38 USCS § 784(a), conferring jurisdiction on district courts to review such claims. 32 ALR Fed 784
What constitutes denial of "incidents or advantages of employment" under 38 USCS sec. 2021(b)(3) which may not be denied employee because of obligation as member of reserve component of Armed Forces. 51 ALR Fed 893
Who is “parent” entitled to proceeds of serviceman's group life insurance, where there are no named beneficiaries, and no surviving widow or children, under 38 USCS § 770(a). 73 ALR Fed 135

Applicability to fringe benefits of Vietnam Era Veterans’ Readjustment Assistance Act provision establishing veterans' reemployment rights (38 USCS § 2021). 83 ALR Fed 908

When the statute of limitations begins to run against an action on, or relating to, national service life insurance policy. 44 ALR2d 1189

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I. IN GENERAL

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   Serviceman's right to insurance benefits must be distinguished from general compensation
   benefits, since insurance benefits are contracts creating rights which Congress cannot take away
   without making just compensation. Lynch v United States (1934) 292 US 571, 78 L Ed 1434, 54
   S Ct 840 (ovrd in part as stated in Pro-Eco v Board of Comm'rs (1995, CA7 Ind) 57 F.3d 505, 26
   ELR 20445)

   Decisions of questions of fact and law relating to claims under insurance policies are
   withdrawn from exclusiveness of administrator's [now Secretary's] jurisdiction. Hines v United
   States (1939) 70 App DC 206, 105 F.2d 85

2. Constitutionality
   World War Veterans' Act § 19 (former 38 USC § 445), limiting consent to suit, was
   constitutional as applied to claim accruing in 1920 but not prosecuted until 1935. Jenkins v
   United States (1936, CA5 Ga) 86 F.2d 123, cert den (1937) 300 US 675, 81 L Ed 880, 57 S Ct
   673, reh den (1937) 301 US 713, 81 L Ed 1365, 57 S Ct 789

3. Purpose
   Intent of Congress, in reference to all claims for veterans' insurance, is that government be
   given opportunity to determine merits of claim before maintenance of action thereon. Burgett v
   United States (1935, CA7 Ill) 80 F.2d 151, 104 ALR 167; Coffey v United States (1938, CA7 Ill)
   97 F.2d 762, 117 ALR 940

   Congressional purpose in defining "claim" is to avoid technical refinements and to enable
   unlearned and unlettered to present their grievances to veterans' bureau [now now Department of
   Veterans Affairs] by and through simple and informal procedure. United States v Wallace (1941,
   CA10 Okla) 123 F.2d 484

   Salutory humanitarian purpose of 38 USCS § 722 [now 38 USCS § 1922], intended by
   Congress, is to provide insurance protection for veterans who have failed to apply due to mental
   incompetency incurred in service and those beneficial purposes can best be fulfilled by providing
   forum in federal courts in which arbitrary or capricious action by Administrator [now Secretary]
   denying policy may be overturned, as Congress intended by inserting language in 38 USCS §§
   784, 785 [now 38 USCS §§ 1984, 1985] creating exceptions to finality of decisions by
   Administrator [now Secretary] on insurance matters. Clark v United States (1973, CA8) 482
   F.2d 586, 32 ALR Fed 777

   Intent of Congress in enactment of statute requiring that there must be denial by director
   [now Secretary] to claimant before suit can be brought is to establish definite rule that before
   suit is brought claimant must make claim for insurance and prosecute his cause on appeal
   through appellate agencies of bureau [now Department] before he shall have right to enter suit.
   Rosario v United States (1939) 70 App DC 323, 106 F.2d 844, cert den (1939) 308 US 606, 84 L
   Ed 507, 60 S Ct 143
4. Construction

Both government insurance policies and statutes providing for such policies are to be construed liberally to effectuate their beneficial purpose. United States v Zazove (1948) 334 US 602, 92 L Ed 1601, 68 S Ct 1284, reh den (1948) 335 US 837, 93 L Ed 389, 69 S Ct 12

Statutes providing for government insurance and insurance policies issued thereunder are to be liberally construed in favor of insured. United States v Sligh (1929, CA9 Ariz) 31 F.2d 735, cert den (1929) 280 US 559, 74 L Ed 614, 50 S Ct 18; United States v Worley (1930, CA8 Neb) 42 F.2d 197

38 USCS § 784 [now 38 USCS § 1984] must be construed as remedial. United States v Lund (1935, CA7 Wis) 76 F.2d 723

38 USCS § 784 [now 38 USCS § 1984] should be construed and applied to accomplish its purpose without resorting to refinements and technicalities. Drew v United States (1939, CA6 Tenn) 104 F.2d 939

Provision defining claim is liberally construed. United States v Wallace (1941, CA10 Okla) 123 F.2d 484

Reasonable construction of 38 USCS § 784 [now 38 USCS § 1984] is that there shall be but one right, that is, right to benefit payments, and but one critical contingency which conditions that right, namely occurrence of permanent total disability or death while policy remains in force. Roskos v United States (1942, CA3 NJ) 130 F.2d 751, cert den (1942) 317 US 696, 87 L Ed 557, 63 S Ct 437

Statutes permitting suits against government must be strictly complied with but in borderline cases questions as to compliance should be construed in favor of complainants, wherever possible. Blanton v United States (1936, DC Ala) 17 F Supp 327

Veterans' legislation is to be construed liberally in favor of veteran. Hartness v United States (1938, DC Okla) 23 F Supp 171

5. Relationship with other laws

Allegations by beneficiary of national service life insurance policy that insured, at time of his disappearance was totally and permanently disabled, are sufficient to bring beneficiary within premium waiver provisions stated in predecessor to 38 USCS § 712. Peak v United States (1957) 353 US 43, 1 L Ed 2d 631, 77 S Ct 613

Tucker Act (28 USCS §§ 1346(a), 1491) is applicable to suit brought under 38 USCS § 784 [now 38 USCS § 1984]. United States v Salmon (1930, CA5 Miss) 42 F.2d 353

Statutory provision that decisions of veterans' administration [now Department of Veterans Affairs] upon questions concerning pensions, compensation allowances, and special privileges, all of which are gratuities, are final and not subject to judicial review was not applicable to claims under war risk insurance contracts. United States v Robinson (1939, CA9 Cal) 103 F.2d 713

Since automatic free insurance provided by Servicemen's Indemnity Act of 1951 (65 Stat. 33) created contract of insurance, widow of deceased serviceman was not precluded from obtaining judicial review of veterans' administration [now Department of Veterans Affairs] determination that soldier's mother was true beneficiary of his insurance. Wilkinson v United States (1957, CA2 NY) 242 F.2d 735, cert den (1957) 355 US 839, 2 L Ed 2d 51, 78 S Ct 52

6. Administrative processing of claims

Discretion of administrator under former § 17 of World War Veterans' Act was not conclusive, as former § 19 provided for judicial determination of controversy. Hines v United States (1939) 70 App DC 206, 105 F.2d 85

Administrator [now Secretary] had authority to confer power on insurance claims council to effect disagreement in cases where no appeal was taken to administrator [now Secretary]; and administrator [now Secretary] could delegate to solicitor of veterans' administration [now Department of Veterans Affairs] power to act on appeal. (1931) 36 Op Atty Gen 456
7. -Regulations

Regulation approved by administrator [now Secretary], providing decisions of insurance
claims council could be made basis for disagreements, was effective as to notices of such
decisions given subsequent to its adoption, but ineffective as to such notices given prior to its
adoption.  Chicago Bank of Commerce v United States (1935, DC Ill) 9 F Supp 895

Interdepartmental appeals are entirely controlled by departmental regulations, and statutory
provision that denial of claim of insurance by any employee or agency of veterans’ administration
[now Department of Veterans Affairs] should constitute disagreement for purpose of limitation
statute does not govern or regulate appeals from one departmental agency to another.  Sullivan
v United States (1937, DC Ky) 26 F Supp 876, affd (1941, CA6 Ky) 116 F.2d 576

8. -Reopening of claims

There is nothing in 38 USCS § 784 [now 38 USCS § 1984] or in procedure of Veterans’
Administration [now Department of Veterans Affairs] that prohibits reopening and consideration of
claim that has been denied by administration [now Department].  Rosario v United States (1939)
70 App DC 323, 106 F.2d 844, cert den (1939) 306 US 606, 84 L Ed 507, 60 S Ct 143

Veterans’ bureau [now Department of Veterans Affairs] has authority to reopen for further
consideration veteran’s claim for benefits of contract.  Kane v United States (1939, DC Mass) 25
F Supp 839

II. CONDITIONS PRECEDENT TO SUIT

A. In General

9. Generally

There must be "claim" and "disagreement," before suit can be commenced and this is
jurisdictional prerequisite.  United States v Lyke (1927, CA9 Ariz) 19 F.2d 876;  United States v
Knott (1934, CA6 Ky) 69 F.2d 907;  Wilson v United States (1934, CA10 Colo) 70 F.2d 176;
United States v Knoles (1935, CA8 SD) 75 F.2d 557;  United States v Primilton (1935, CA5 La)
76 F.2d 555;  Pelkey v United States (1934, Dist Col App) 63 App DC 211, 71 F.2d 221

Claimant's anticipation that government will reject claim does not suspend requirement of
disagreement under predecessor to 38 USCS § 784 [now 38 USCS § 1984].  United States v
Knott (1934, CA6 Ky) 69 F.2d 907

Dismissal is proper where evidence fails to show disagreement.  Burgett v United States
(1935, CA7 Ill) 80 F.2d 151, 104 ALR 167

United States can be sued only by its consent and right to sue it on war risk insurance
contract is given and as prerequisite thereto insured must show disagreement with bureau [now
Department] respecting his claim.  United States v Rasmussen (1938, CA10 Okla) 95 F.2d 842;
Kontovich v United States (1938, CA6 Tenn) 99 F.2d 661, cert den (1939) 306 US 651, 83 L Ed
1050, 59 S Ct 644;  Portland Trust & Sav. Bank v United States (1938, DC Or) 24 F Supp 953

Making of claim for war risk insurance and disagreement as to claim must both be shown as
conditions precedent to jurisdiction to entertain suit on claim.  Bono v United States (1940, CA2
NY) 113 F.2d 724

Suit on war risk insurance contract is suit against government; one of conditions of its
consent to be sued is existence of "disagreement" between veterans’ administration [now
Department of Veterans Affairs] and claimant.  Leyerly v United States (1947, CA10 Colo) 162
F.2d 79

Petition must allege disagreement between claimant and bureau of war risk insurance [now
Department of Veterans Affairs].  Howard v United States (1924, DC Ky) 2 F.2d 170

10. Claim

Only purpose of requiring filing of claim as prerequisite to suit is to give notice to
government that claim is being made under policy so that it may make investigation and pay
any amount due claimant without being subjected to trouble and expense of litigation; and any claim showing 'intention to claim insurance benefits' answers this purpose. United States v Townsend (1936, CA4 NC) 81 F.2d 1013

Purpose of requiring filing of claim as prerequisite to suit on war risk insurance policy is to give notice to government, such claim being the physical writing which furnishes desired information and not assertion of legal right under policy, that investigation may be made and any amount due claimant paid without being subjected to trouble and expense of litigation. Gambill v United States (1939, CA10 Okla) 102 F.2d 667; Johnson v United States (1939, CA10 Okla) 102 F.2d 729; Drew v United States (1939, CA6 Tenn) 104 F.2d 939

Filing of claim and its denial constitute "disagreement" which is jurisdictional fact which must appear on face of pleadings in order for plaintiff to maintain action on contract of war risk insurance. Moore v United States (1945, DC Ky) 59 F Supp 660, app dismd (1946, CA6 Ky) 156 F.2d 372

11. Disagreement

Existence of disagreement is jurisdictional prerequisite to action on war risk insurance policy and must be established by plaintiff. United States v Brundage (1943, CA6 Mich) 136 F.2d 206

Both capacity to sue and disagreement between veterans' bureau [now Department of Veterans Affairs] and claimant having interest in policy are deemed indispensable prerequisites to jurisdiction of district court over controversies arising from contracts of war risk insurance. Dellaporta v United States (1939, DC Mass) 27 F Supp 839

12. Waiver

Disagreement may be waived by failure to make timely and specific objections, and such question cannot be raised for first time on appeal where court has general jurisdiction of subject matter. Berntsen v United States (1930, CA9 Cal) 41 F.2d 663

Defendant waives objection to jurisdiction where it goes to trial on merits. Quinn v United States (1932, CA3 Pa) 58 F.2d 19

Condition precedent to jurisdiction that disagreement exists as to insurance may be waived by government's failure to raise jurisdictional objection that disagreement was not shown in District Court. United States v Kiles (1934, CA8 Mo) 70 F.2d 880

Introduction of evidence by defendant on question of disability does not waive jurisdictional requirement of "disagreement" on claim. Egan v United States (1935, CA7 Ill) 80 F.2d 404

Requirement of disagreement as preliminary to suit cannot be waived, and jurisdiction cannot be conferred on court by acceptance by claimant of decision as final of any individual or board, unless action is taken in name of administrator [now Secretary] on appeal to him. Harp v United States (1932, DC Ark) 2 F Supp 32

B. Claim

13. Generally

Term "claim" is any writing which alleges permanent and total disability at time when contract of insurance was in force and is merely physical writing and not assertion of legal right. Coffey v United States (1938, CA7 Ill) 97 F.2d 762, 117 ALR 940

Substance of "claim" is declaration of intention to claim insurance benefits under contract of insurance; it is merely physical writing which furnishes desired information and not assertion of legal right. Cable v United States (1939, CA7 Ill) 104 F.2d 541

14. Requirements and sufficiency of claim

"Claim" required must assert in substance definite and positive claim to benefits under policy. United States v Lockwood (1936, CA5 La) 81 F.2d 468

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There must be unequivocal application for award of insurance on basis of permanent and
total disability in order to constitute claim for such award. Coats v United States (1933, DC SC)
9 F Supp 444

Nothing falls within term "claim" except present claim which, though it may be deficient in
form, yet asserts in substance definite and positive claim to benefits under policy. Cannon v
United States (1941, DC Pa) 45 F Supp 106, affd (1942, CA3 Pa) 128 F.2d 452

15. -Intention to claim benefits

Series of letters as to what benefits representatives of deceased veteran might be entitled,
showing mere desire, but not intention, to make claim, were insufficient to constitute "claim."
United States v Lockwood (1936, CA5 La) 81 F.2d 468

Letter making claim for war risk insurance was sufficient if it used words showing intention to
claim insurance benefits. United States v Meakins (1938, CA9 Mont) 96 F.2d 751

Claim need not be couched in technical language, nor actually demand insurance benefits,
but was sufficient to meet definition in predecessor to 38 USCS § 784 [now 38 USCS § 1984]
where words showing intention to claim such insurance benefits were used. Coffey v United
States (1938, CA7 Ill) 97 F.2d 762, 117 ALR 940

Any claim showing intention to claim insurance benefits answers purpose as prerequisite to
suit. Gambill v United States (1939, CA10 Okla) 102 F.2d 667

Letter of inquiry using "words showing an intention to claim insurance benefits" will be
construed as claim. Simmons v United States (1940, CA4 NC) 110 F.2d 296, reh den (1940,
CA4 NC) 111 F.2d 618

Letter to veterans' bureau [now Department of Veterans Affairs] which did not assert that
insured was totally and permanently disabled when policy was in force, or claim that insured was
titled to insurance benefits, or use words showing intention to claim such benefits, did not
constitute claim, but was mere inquiry as to whether insured was entitled to insurance payments
in addition to compensation. Cook v United States (1944, CA10 Okla) 145 F.2d 290

16. -Notice of claim

Only purpose of requiring filing of claim as prerequisite to suit is to give notice to
government that claim is being made under policy so that it may make investigation and pay
any amount due claimant without being subjected to trouble and expense of litigation. United
States v Powell (1938, CA4 SC) 93 F.2d 788

Claim, or instrument purporting to be claim, must use words sufficiently definite to apprise
veterans' bureau [now Department of Veterans Affairs] that insured under policy of insurance
contended that by reason of his total and permanent disability, while insurance policy was in force,
he was entitled to benefits of same and, if denied benefits, intended to file suit to recover same as
provided by law. United States v Wallace (1941, CA10 Okla) 123 F.2d 484

In averring that her wards are beneficial owners of two thirds of trust fund of government
converted life policy, guardian was making claim to portion of proceeds of policy; such notice to
veterans' administration [now Department of Veterans Affairs] amounted to claim under contract
of insurance. Shaull v United States (1947, App DC) 82 US App DC 174, 161 F.2d 891

Insured must assert that proof entitled him to benefits under terms of his policy and put
administration [now Department] on notice to consider such proof in support of his claim before
administration [now Department] could consider due proof of permanent total disability under
former 38 USC § 445. 1933 ADVA 193

17. -Inquiries and requests for information

Letters merely making inquiries or requesting information do not constitute claims. Chavez v
United States (1934, CA10 NM) 74 F.2d 508

An inquiry is not a claim. United States v Primilton (1935, CA5 La) 76 F.2d 555
Letter requesting forms and information for filing claim in behalf of widow or named veteran was insufficient to constitute "claim," which must be something administrator [now Secretary] could refuse.  Werner v United States (1936, CA2 NY) 86 F.2d 113

Letter by beneficiary to bureau asking for blanks to make claim was not "claim" within statute.  Bandy v United States (1940, DC Tenn) 33 F Supp 752

18. -Miscellaneous

Claim was insufficient where nature and extent of disability is described merely as "10% harsh, high-pitched breathing."  Ross v United States (1935, CA7 Ill) 77 F.2d 212

Fair test to be applied in determining sufficiency of claim under statute was whether claimant in case of disagreement would be ultimate beneficiary of judgment under policy; claimant was not required to disclose with particularity names of others interested in litigation in case of disagreement.  Drew v United States (1939, CA6 Tenn) 104 F.2d 939

19. Form of claim

Beneficiary's claim to insurance made upon form supplied by bureau [now Department], was sufficient.  United States v Martin (1935, CA10 Kan) 80 F.2d 460

Instrument relied on to constitute "claim" must be of such character as to form basis for denial and disagreement; use of words merely showing desire to claim insurance benefits is insufficient, as also are words announcing that claim will later be made.  United States v Wallace (1941, CA10 Okla) 123 F.2d 484

Execution and delivery in 1922, of form 526, captioned "Application of Veteran Disabled in World War for Compensation and Vocational Training" was sufficient, under then existing law, upon which to base disagreement set up as condition precedent to bringing action for insurance benefits.  Wojciekowski v United States (1937, DC Mass) 21 F Supp 14

Properly executed VA Form 355, Claim for National Service Life Insurance, constituted valid claim for National Service Life Insurance death benefits under all applicable sections of National Service Life Insurance, Life Insurance Act of 1940, including those benefits payable as result of application of provisions of former 38 USC § 802; provision of former § 802 requiring beneficiary to file proof of existence of certain facts within stated time limits was satisfied upon submission by beneficiary within prescribed time limits of proof of those facts which are not established by evidence already of record in Veterans' Administration [now Department of Veterans Affairs].  1948 ADVA 796

20. -Applications

An application for a disability allowance is not "claim."  Tyson v United States (1935, CA4 NC) 76 F.2d 533, affd (1936) 297 US 121, 80 L Ed 520, 56 S Ct 390

Insured is not required to claim immediate insurance benefits to meet test of "claim," and application for reinstatement of policy and for waiver of premiums meets test.  Myers v United States (1953, DC Mo) 112 F Supp 809, mod on other grounds (1954, CA8 Mo) 213 F.2d 223

21. -Correspondence

Attorney's letter to veterans' bureau [now Department of Veterans Affairs] not alleging total and permanent disability of insured was insufficient to constitute "claim."  Corn v United States (1934, CA10 Okla) 74 F.2d 438

Letter written to Insurance Claim Counsel, United States Veterans' Bureau [now Department of Veterans Affairs], constituted claim where writer requested payment of his war risk insurance at stated rate per month since date named, at which time his insurance was stated by him to be in force, on ground of total and permanent disability at and ever since such date, even though letter was not accompanied by any evidence as to his physical condition at time insurance was in force or at time of writing letter.  Burgett v United States (1935, CA7 Ill) 80 F.2d 151, 104 ALR 167

Letter is sufficient as claim where, within time allowed for filing claim, service officer of American Legion and county judge at home of veteran address letter to veterans' bureau [now
Department of Veterans Affairs] in which he requested certain blanks, all of which are prescribed by bureau [now Department of Veterans Affairs] for use of veterans in making various claims for his benefits, and in postscript to letter it is stated: "Name of veteran; John B. Wallace. Above veteran now deceased. Claim filed by beneficiary." United States v Wallace (1941, CA10 Okla) 123 F.2d 484

Letter by attorney for insured’s widow which warned government not to pay money due under policy to another person pending legal proceedings to determine whether rights of that other person were obtained by fraud or undue influence, and which did not advise that present claim was being presented or asserted on behalf of widow, was insufficient as assertion of claim for widow. Cannon v United States (1941, DC Pa) 45 F Supp 106, aff’d (1942, CA3 Pa) 128 F.2d 452

22. -Collateral actions

Action to have designated beneficiary of National Service Life Insurance policy declared trustee of proceeds for benefit of insured’s widow did not constitute claim against United States so as to give District Court jurisdiction. Pack v United States (1949, CA9 Cal) 176 F.2d 770

Action by policyholder to compel Veterans Administration [now Department of Veterans Affairs] to retain special dividend on deposit at interest was not action on claim. Candell v United States (1951, CA10 Colo) 189 F.2d 442

23. -Miscellaneous

Action for reinstatement of lapsed insurance policy is not "claim." Meadows v United States (1930) 281 US 271, 74 L Ed 852, 50 S Ct 279, 73 ALR 310

There was no sufficient claim for insurance benefits where veteran merely made "Application of Person Disabled in and Discharged from Service," referring to insurance but failing to allege existence of permanent and total disability when contract of insurance was in force. Dias v United States (1937, DC Mass) 21 F Supp 266

Controversy between veterans’ administration [now Department of Veterans Affairs] and insured as to whether war risk insurance policy has lapsed is "claim. . . under a contract of insurance," and federal district court has jurisdiction of action brought by insured. Lufkin v United States (1958, DC NH) 168 F Supp 451, 1 FR Serv 2d 1060

C. Disagreement

24. Generally

Inability to agree must relate to identical claim which is subject of suit. Berntsen v United States (1930, CA9 Cal) 41 F.2d 663

Disagreement is at least prima facie made where jurisdictional defect is not pleaded. Cunningham v United States (1933, CA5 Tex) 67 F.2d 714

Filing of claim and its denial, constituting disagreement, is jurisdictional to maintenance of action on contract of war risk insurance. Johnson v United States (1939, CA10 Okla) 102 F.2d 729; United States v Wallace (1941, CA10 Okla) 123 F.2d 484

Disagreement arises only when claim has been filed with veterans’ administration [now Department of Veterans Affairs] and rejected. Leyerly v United States (1947, CA10 Colo) 162 F.2d 79

In action to recover on national service insurance policy, disagreement is jurisdictional and disagreement arises only when claim has been properly filed with and rejected by veterans’ administration [now Department of Veterans Affairs]. United States v Christensen (1953, CA10 Okla) 207 F.2d 757

25. Disagreement subsequent to filing of suit
There is no disagreement where claim is filed six days before expiration of time allowed for filing same, and notice of rejection is not given insured until after expiration of such time and after suit is filed. Stallman v United States (1933, CA8 Iowa) 67 F.2d 675

Action on policy cannot be maintained where disagreement occurs after commencement of action, and amendment cannot cure pleading. Baraby v United States (1932, DC Mont) 1 F Supp 443; Albek v United States (1933, DC NY) 4 F Supp 1020; Taylor v United States (1933, DC SC) 9 F Supp 443

26. Failure or delay in acting on claim

Failure to pass on claim, no matter how long matter is delayed, is not "disagreement"; there must be affirmative action indicating denial of claim. Griffin v United States (1932, CA7 Ill) 60 F.2d 339; Maulis v United States (1932, DC III) 56 F.2d 444; Kelley v United States (1932, DC Mich) 59 F.2d 743; Ginochio v United States (1934, DC III) 8 F Supp 389, affd (1934, CA7 Ill) 74 F.2d 42

No disagreement existed as to disability claim under government insurance where claimant refused to furnish further information as to his industrial activities, as required by duly authorized regulation, and no decision or expression of opinion on merits had been made, since appellate board had determined only that requested information must be furnished. Burgett v United States (1935, CA7 Ill) 80 F.2d 151, 104 ALR 167

Mere failure or delay in acting on claim does not constitute disagreement such as to confer jurisdiction on District Court to adjudicate claim. United States v Bell (1935, CA4 NC) 80 F.2d 516

No disagreement existed as to insurance claim where beneficiary demanded payment of National Service Life Insurance policy issued to insured, who had not been heard from for 7 years, and Veterans Administration [now Department of Veterans Affairs] replied that no decision as to death benefits could be made until official report of insured's death had been received from service department. United States v Christensen (1953, CA10 Okla) 207 F.2d 757

Delay in acting on claim, or failure to take action on claim, does not constitute disagreement so as to allow suit under predecessor to 38 USCS § 784 [now 38 USCS § 1984], but such action may be compelled by mandamus. Anderson v United States (1932, DC KY) 5 F Supp 269

27. Denial of claim

Disagreement contemplated by predecessor to 38 USCS § 784 [now 38 USCS § 1984] must be rejection of very claim which applicant later presents by his suit. Berntsen v United States (1930, CA9 Cal) 41 F.2d 663

There was sufficient disagreement where director of bureau [now Department] refers one seeking information as to claim to his assistant, and latter stated that claim has been disallowed. United States v Bass (1933, CA7 Ind) 64 F.2d 467

Letter from general counsel of bureau [now Department] advising claimant that director had denied claim was prima facie proof of disagreement. Falbo v United States (1933, CA9 Idaho) 64 F.2d 948, affd (1934) 291 US 646, 78 L Ed 1042, 54 S Ct 456

Necesity of filing claim is not dispensed with because claim may be rejected; it is rejection which makes suit necessary. United States v Knott (1934, CA6 Ky) 69 F.2d 907

Word "denial" signifies something more than intradepartmental act; it implies communication of intradepartmental act or decision to claimant. United States v Green (1936, CA6 Tenn) 84 F.2d 449

Cause dismissed because denial of claim by chief of awards division did not constitute disagreement as required was properly reinstated. United States v Hossmann (1936, CA8 Mo) 84 F.2d 808

In deciding whether reply of bureau of war risk insurance [now Department of Veterans Affairs] was denial of veteran's claim on war risk insurance which creates disagreement so as to authorize action on claim in district court, court must interpret such reply in light of original
application and give it that interpretation which appeared reasonable from all surrounding circumstances. Neely v United States (1940, CA4 W Va) 115 F.2d 448

Where assistant director of veterans' bureau [now Department] acting expressly for the director [now Secretary] informed plaintiff that he was entitled to insurance benefits of only $1.91 per month, this amounted to denial of larger claim which was in suit and created disagreement on which plaintiff could sue. Biven v United States (1944, App DC) 79 US App DC 61, 142 F.2d 570

Disallowance of claim by beneficiary written by assistant director of claims division of veterans' bureau [now Department of Veterans Affairs] constituted disagreement authorizing action. Bandy v United States (1940, DC Tenn) 33 F Supp 752

28. -By regional authority

Denial by regional manager of disability rating was "disagreement." United States v Hill (1933, CA8 Ark) 62 F.2d 1022

Refusal of regional rating board to give insured rating of total permanent disability constituted disagreement. Norton v United States (1930, DC Tenn) 57 F.2d 869

"Disagreement exists where regional adjudication officer, by letter, advises claimant of denial of his claim, forming basis for action in court, provided such officer is competent to act for veteran's bureau [now Department of Veterans Affairs]. Spanner v United States (1937, DC Mass) 19 F Supp 465

29. -Claims involving multiple parties

Inferential denial of claim arising from award of benefits to person other than claimant is insufficient to constitute required disagreement. Chavez v United States (1934, CA10 NM) 74 F.2d 508

Submission and denial satisfy exactions of statute in respect of disagreement precedent to right of recovery on heirs' part, and heirs' right in that respect inured to benefit of executor and administrator respectively of insured and beneficiary, entitling such representatives to join in suit on policy, where all heirs of both insured and beneficiary submit claim and it is denied. Johnson v United States (1939, CA10 Okla) 102 F.2d 729

Right of each parent to benefits is separate and distinct; although claim of one and its denial without reference to other does not constitute "disagreement" as to both, court may acquire jurisdiction to hear and determine claims of all persons having interest in insurance benefits. Leyerly v United States (1947, CA10 Colo) 162 F.2d 79

Suit can be maintained by insured's mother who is beneficiary in policy, though she has filed no claim, where claim by widow of insured was denied on its merits. Hunnewell v United States (1933, DC NH) 2 F Supp 389

Government is estopped to assert against other children that no claim had been filed where government has denied claim of one child. Robinson v United States (1935, DC NY) 12 F Supp 160

30. -Miscellaneous

Denial by director [now Secretary] of total and permanent disability amounts to disagreement supporting action on policy. United States v De Armond (1931, CA8 Mo) 48 F.2d 465

Denial of claim amounted to disagreement based on assertion that insured was totally and permanently disabled on September 30, 1919, at which time policy lapsed where insured made claim on ground of disability from June 22, 1919. United States v Alberty (1933, CA10 Okla) 63 F.2d 965

Petition and proof showing submission of claim to veterans' bureau [now Department of Veterans Affairs] and letter from chief of award division stating that policy had lapsed, but not showing pendency and decision by director [now Secretary] was insufficient to show required disagreement. Eidam v United States (1934, CA8 Neb) 74 F.2d 350
Answer to letter inquiring about rights, amounting to claim, advising veteran that it was necessary for him to furnish evidence of his complete disability between time of lapse of policy and time of complete disability rating allowed did not constitute denial of claim, and limitations did not begin to run. Morris v United States (1938, CA5 Miss) 96 F.2d 731

Suit lay on policy after veterans' bureau [now Department of Veterans Affairs] had given formal written notice of denial of plaintiff's claim and recited in notice that it should be considered as evidence of disagreement. Roberts v United States (1932, DC Iowa) 56 F.2d 639

Director's [now Secretary's] denial of application for permanent disability rating from date of discharge of insured was disagreement. Miller v United States (1932, DC NY) 57 F.2d 889

Letters demanding payment of insurance on ground insured was totally and permanently disabled from time of discharge from army was sufficient "claim," and included subsequent date on which insurance was alleged to have been reinstated and matured, and decision of council that insured was not so disabled when insurance was in force is denial of claim and constituted "disagreement." Moragne v United States (1936, DC SC) 16 F Supp 1008

Suit begun before claim under policy was denied was properly dismissed, and it could not be reinstated after denial of claim. Atkinson v United States (1941, DC Mass) 39 F Supp 198

31. Form of denial

Whether or not regulations of bureau [now Department of Veterans Affairs] confer on regional managers and rating boards power to deny claim, such denial cannot arise from informal conversation relating to claim. United States v Burleyson (1930, CA9 Cal) 44 F.2d 502

32. -Correspondence

Disagreement was established by letter from general counsel for veterans' bureau [now Department of Veterans Affairs] stating that evidence was insufficient to show permanent and total disability prior to lapse date of policy. Straw v United States (1933, CA9 Cal) 62 F.2d 757

Letter to insured stating that claim was barred was "disagreement." Harris v United States (1935, CA9 Idaho) 80 F.2d 612; O'Kane v United States (1936, DC Pa) 15 F Supp 1070

Letter to bureau [now Department] showing intention to claim insurance benefits, and letter from bureau [now Department] showing denial of claim was sufficient to constitute "claim" and "disagreement." United States v Townsend (1936, CA4 NC) 81 F.2d 1013

In action to recover on contract of war risk insurance, petition alleging presentation of claim by letters and correspondence, and denial of claim by letters was sufficient to charge existence of valid disagreement and to support proof thereof, in absence of appropriate attack for objectionable generality. United States v Rasmussen (1938, CA10 Okla) 95 F.2d 842

In response to claim for benefits under war risk insurance policy, letter of director of insurance, stating that illegitimate child of deceased veteran was not heir at law under state law, that claim could not be paid as requested, and that only remedy was resort to courts, did not constitute denial of claim, but entitles claimant to assume that letter means that no further consideration would be given to claimed heirship unless such heirship was established by court proceedings, and statute of limitation was thereby suspended until such determination. Live Stock Nat'l Bank v United States (1939, CA7 Ill) 106 F.2d 240

Letter signed by chief of awards division, advising plaintiff that his insurance was not payable, constituted denial of his claim. Simmons v United States (1940, CA4 NC) 110 F.2d 296, reh den (1940, CA4 NC) 111 F.2d 618

Letter from director of insurance denying insured's claim was sufficient to constitute "disagreement" requisite to suit. Sullivan v United States (1941, CA6 Ky) 116 F.2d 576

Letter written by assistant director in charge of compensation and insurance claims of veterans' bureau [now Department of Veterans Affairs] in reply to plaintiff's claim for insurance benefits constituted denial of claim and created disagreement between plaintiff and bureau [now Department of Veterans Affairs], although such letter contained paragraph to effect that plaintiff's
claim for compensation, which was separate and distinct from his claim for insurance, would be
given further consideration.  Thrasher v United States (1943, CA5 Fla) 132 F.2d 747

Even if letter which was mere inquiry as to whether insured was entitled to insurance
payments in addition to compensation could regarded as claim based on permanent and total
disability, it was denied by letter in reply stating that policy has lapsed for nonpayment and that it
is not shown that insured was suffering from service-connected disability of compensable degree
at time policy had lapsed.  Cook v United States (1944, CA10 Okla) 145 F.2d 290

Where mother of deceased soldier, through her attorney, wrote veterans' bureau [now
Department of Veterans Affairs], advising them of soldier's death, requesting reinstatement of life
insurance which he carried at time of his discharge from army, and asking that letter be
considered as sufficient application to save claim and asking for blank forms on which to file claim,
bureaus [now Department of Veterans Affairs] reply that insurance had lapsed for nonpayment of
premiums and, therefore, that no insurance was payable, was denial of any right to make claim
329 US 722, 91 L Ed 626, 67 S Ct 66

Letter to plaintiff's counsel by government's counsel inconsistent with government's answer
denyng plaintiff's allegation of disagreement was insufficient to give court jurisdiction.  Taylor v
United States (1933, DC SC) 9 F Supp 443

33. Discontinuance of payments

Discontinuance of disability benefit payments on prior claim of total permanent disability is not
"disagreement" required for subsequent action.  Egan v United States (1935, CA7 Ill) 80 F.2d
404

Discontinuance of payments under policy is not disagreement.  Smith v United States (1932,
DC Iowa) 56 F.2d 636

34. Miscellaneous

Correspondence with veterans' bureau [now Department of Veterans Affairs] through United
States senator was insufficient to constitute "disagreement." United States v Collins (1932, CA4
W Va) 61 F.2d 1002

Letter from son of insured informing veterans' bureau of death of insured in lapsed policy, and
suggestions that widow was entitled to receive insurance, but making no statement as to total and
permanent disability excusing nonpayment of premiums and answering letter from bureau stating
that policy has lapsed did not show "disagreement." United States v Peters (1933, CA8 Ark) 62
F.2d 977

There was no "disagreement" necessary for court's jurisdiction where claimant stated it was
his intention to appeal his case, if necessary, to director of the bureau [now Secretary of Veterans
Affairs] and never notified bureau of any change of intent [now Department].  Brown v United
States (1934, CA7 Ill) 73 F.2d 309

There is no "disagreement" where insured never receives any communication concerning his
application and is never paid any benefits under policy.  Ross v United States (1935, CA7 Ill) 77
F.2d 212

Claim for compensation does not constitute application for insurance benefits; hence,
jurisdictional disagreement is lacking.  Kemp v United States (1935, CA7 Ill) 77 F.2d 213

Underlying purpose of limitations expressed in 1930 amendment was to provide uniform
limitation upon commencement of suits to recover benefits under insurance policies and to fix
definite date beyond which suit can not be maintained.  United States v Wallace (1941, CA10
Okla) 123 F.2d 484

Action to enforce trust allegedly imposed upon proceeds of life insurance policy is not suit
involving disagreement as to claim of insurance where no dispute exists as to government's
liability to pay proceeds to designated beneficiary.  Tohulka v United States (1953, CA7 Ind) 204
F.2d 414

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the restrictions and terms and conditions of the Matthew Bender Master Agreement.
It is not tantamount to "disagreement as to claim" where conditions precedent to allowance of insurance claim are within regulatory authority of administration [now Department] upon compliance is enforced. Waters v United States (1963, CA5 La) 316 F.2d 301

In suit brought by guardian of two minor sons of insured to establish parol trust in proceeds of government converted life policy, denial of existence of parol trust by United States and its assertion that it would have paid money to trustee who had been designated as beneficiary except for claim of guardian, is admission by United States of existence of disagreement with her as to manner in which proceeds should be disbursed. Shaull v United States (1947, App DC) 82 US App DC 174, 161 F.2d 891

Averment of interest in proceeds of policy under trust agreement with insured, and disregard of plaintiff's claim in making payments, showed "disagreement" supporting action. Calhoun v Ussery (1930, DC La) 46 F.2d 495

Mere allegation that government has disagreed with insured concerning his right to benefits sued for, but has failed to furnish insured with letter of disagreement, is insufficient to show actual disagreement. Scranton Lackawanna Trust Co. v United States (1932, DC Pa) 57 F.2d 210

Correspondence between claimant's counsel and veterans' bureau [now Department of Veterans Affairs] was insufficient to show disagreement within statute at time suit was filed. Owens v United States (1933, DC La) 7 F Supp 757

Where veteran has made no unequivocal application for award for permanent and total disability, award could not go beyond what was applied for and could not be regarded as disagreement. Coats v United States (1933, DC SC) 9 F Supp 444

III. DISABILITY AS GROUND FOR RECOVERY OF BENEFITS

A. In General

35. Generally

Total disability which has not become permanent before lapse of policy does not mature it, and permanent disability which has not become total does not do so either. Eggen v United States (1932, CA8 Minn) 58 F.2d 616

In order to recover on expired war risk insurance policy, disability at time of expiration must have been permanent and total. United States v Ware (1940, CA5 La) 110 F.2d 739

Contingency on which claim is founded is contingency on which liability under policy is bottomed, namely, permanent disability or death while policy remains in force. Boyd v United States (1942, DC Wis) 47 F Supp 339

36. Condition of insured

It is not necessary that petitioner be bedridden, wholly helpless, or that he should abandon every possible effort in order for the jury to find that he is totally and permanently disabled. Berry v United States (1941) 312 US 450, 85 L Ed 945, 61 S Ct 637

Bedfast condition is not prerequisite to recovery on contract of war risk insurance. United States v Atchley (1940, CA10 Kan) 116 F.2d 266

Insured need not necessarily be bedfast or bedridden in order to be entitled to disability benefits, and disabled insured should not be penalized merely because he "carried on" seemingly as well person to detriment of his health. Putney v United States (1933, DC Colo) 4 F Supp 376; Smith v United States (1933, DC Ky) 5 F Supp 475

37. -Permanence of disability

Disability is permanent if it is founded on conditions which make it reasonably certain that it will continue throughout life. Eggen v United States (1932, CA8 Minn) 58 F.2d 616; Asher v United States (1933, CA8 Ark) 63 F.2d 20

In action on war risk insurance policy, plaintiff could not recover, where, though there could be no question but that insured was suffering from adhesions prior to lapse of policy, and that
they resulted in total disability, there was no substantial evidence that at that time it was reasonably certain that disability would continue throughout insured's lifetime. United States v Marsh (1939, CA4 Va) 107 F.2d 173, reh den (1939, CA4 Va) 108 F.2d 558

It was not enough to justify recovery on war risk insurance policy to show that ailment causing disability at time of lapse of policy, but known to be frequently curable, subsequently turned out badly and was not cured. United States v Marsh (1939, CA4 Va) 107 F.2d 173, reh den (1939, CA4 Va) 108 F.2d 558

War risk insurance policy did not cover total temporary disability or partial permanent disability and does not authorize or permit any payment for physical or mental impairment that was less than "total permanent disability." United States v Bemis (1939, CA9 Or) 107 F.2d 894

In action on war risk insurance policy, based on claim that insured had become totally and permanently disabled before his policy lapsed, plaintiff must show that at lapse insured was permanently disabled, and this must always remain uncertain when treatments were available which gave reasonable hope of success. United States v Thomburgh (1940, CA8 Mo) 111 F.2d 278, cert den (1940) 311 US 664, 85 L Ed 426, 61 S Ct 21

38. Totality of disability

Permanent partial disability was not sufficient to justify recovery under expired war risk insurance policy. United States v Ware (1940, CA5 La) 110 F.2d 739

In action on war risk insurance policy, it was incumbent on plaintiff to show condition of total and permanent disability during period of insurance protection, and it was not enough to establish that he was partially permanently disabled or temporarily totally disabled while policy was in force. Thatenhorst v United States (1941, CA10 Kan) 119 F.2d 567

39. Cause of disability

War risk insurance policy covered any permanent total disability that occurred while such insurance was in force, rendering cause of disability irrelevant to insured's right of recovery. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272

Fact that disability was due primarily to congenital defects was immaterial under war risk insurance policy if disability occurred while insurance was in force, since disability benefits under such insurance were not limited to disabilities caused by war service. Miller v United States (1935) 294 US 435, 79 L Ed 977, 55 S Ct 440, reh den (1935) 294 US 734, 79 L Ed 1262, 55 S Ct 635

40. Failure or refusal to accept treatment

Insured may not convert total temporary disability existing before lapse into total permanent disability by neglecting his condition after lapse, and failure to take treatment may destroy whatever probative value death or permanency of disability occurring after lapse would otherwise have. Eggen v United States (1932, CA8 Minn) 58 F.2d 616

Failure of insured to accept hospitalization and treatment is to be considered in holding insured not entitled to recover. United States v Horn (1934, CA4 W Va) 73 F.2d 770; United States v Anderson (1935, CA4 SC) 76 F.2d 337; United States v Walker (1935, CA5 La) 77 F.2d 415, cert den (1935) 296 US 612, 80 L Ed 434, 56 S Ct 132; Smith v United States (1933, DC Ky) 5 F Supp 475

Veteran refusing hospitalization and delaying suit fails to sustain burden of proving total and permanent disability in action. United States v Anderson (1935, CA4 SC) 76 F.2d 337

Failure to take treatment may destroy whatever probative value death or permanency of disability occurring after lapse of insurance policy would otherwise have. United States v Marsh (1939, CA4 Va) 107 F.2d 173, reh den (1939, CA4 Va) 108 F.2d 558

Failure to take treatment did not estop insured from claiming total and permanent disability under war risk insurance policy, but it was circumstance to be considered with other evidence in deciding whether disease was shown to have reached such stage prior to lapse of policy as to constitute such liability. United States v Watson (1939, CA4 SC) 107 F.2d 370

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One who declines or fails to take hospitalization when offered is not entitled to recover on insurance policy. Watts v United States (1938, DC Miss) 24 F Supp 969 (superseded by statute as stated in Farris v State (2004, App) 2004 Miss App LEXIS 1126)

41. Cessation of disability

Evidence of progress towards recovery is admissible on issue of cessation of disability. United States v Schroeder (1935, CA7 Ind) 77 F.2d 173; United States v Edson (1935, CA7 Ill) 79 F.2d 866

Where verdict in previous trial held veteran totally and permanently disabled and later government ceased payments because it held that veteran was no longer totally and permanently disabled, in a subsequent trial brought by veteran it was proper for government to introduce evidence of activities of veteran prior to first verdict as bearing on condition of veteran subsequent to such time, especially where veteran himself testified as to his condition prior to such time. Burak v United States (1939, CA9 Wash) 101 F.2d 137, cert den (1939) 308 US 595, 84 L Ed 498, 60 S Ct 126

Judgment for plaintiff in suit on war risk insurance policy was final adjudication as between parties that disabled person was totally and permanently disabled, but it did not preclude government from obtaining subsequent adjudication that total and permanent disability had ceased. Brown v United States (1941, DC Ill) 39 F Supp 82

B. Ability to Work

1. In General

42. Generally

Total disability is inability to follow continuously any substantially gainful occupation. United States v Tyrakowski (1931, CA7 Ill) 50 F.2d 766; Asher v United States (1933, CA8 Ark) 63 F.2d 20; United States v Caldwell (1934, CA3 Pa) 69 F.2d 200; United States v Baker (1934, CA9 Idaho) 73 F.2d 691; Hughes v United States (1936, CA10 Okla) 83 F.2d 76

In action based on disability, plaintiff must show that while policy was in force insured suffered bodily impairment such as to make it, throughout his life, impossible for him to follow with substantial continuity any substantially gainful occupation. O'Quinn v United States (1934, CA5 La) 70 F.2d 599

One was totally disabled within war risk policy when he was not able to make a living by work without injury to his health. United States v Stand (1939, CA10 Okla) 102 F.2d 472

Test as to whether veteran has suffered total and permanent disability is not whether he may perform any service for any one but whether he has suffered bodily impairment which makes it impossible for him to follow any substantially gainful occupation, and whether this condition is reasonably likely to continue. United States v Calvey (1940, CA3 Pa) 110 F.2d 327

Test in determining whether insured claiming under expired war risk insurance policy was totally and permanently disabled was not whether he was able to follow the occupation in which he was engaged prior to entering service, but whether he was able to follow any substantially gainful occupation continuously. United States v Ware (1940, CA5 La) 110 F.2d 739

Test of total disability is whether insured is able to engage with reasonable regularity in substantially gainful occupation. Adams v United States (1940, CA7 Ill) 116 F.2d 199

Test of total and permanent disability is whether plaintiff, at time his policy lapses for nonpayment of premiums, has disability which renders it impossible for him to follow continuously in substantially gainful occupation, founded upon conditions which indicate with reasonable certainty that such impairment will continue throughout his life. United States v McCain (1941, CA10 Kan) 118 F.2d 479

Criterion in determining "total permanent disability" is ability to hold job or perform labor in ordinary competition of life. Knight v United States (1930, DC Me) 45 F.2d 202
43. Substantially gainful occupation

"Substantially gainful occupation," within rule for determining total permanent disability, is any kind of work for which insured may be fitted, or competent, or qualified mentally or physically. United States v Harth (1932, CA8 Iowa) 61 F.2d 541

44. Continuity and regularity

Word "continuously" as used in director's [now Secretary's] regulation relating to permanent disability meant reasonable regularity. Carter v United States (1931, CA4 NC) 49 F.2d 221

"Continuously," as used in rule for determining permanent disability, means continuity and regularity, as other men normally work. United States v Harth (1932, CA8 Iowa) 61 F.2d 541

45. Miscellaneous

Mentally deficient insured was entitled to recover on war risk insurance policy where was able to work before he entered army and was unable to work after he is discharged from army. Hilbert v United States (1942, DC Ill) 43 F Supp 838

2. Capacity for or Performance of Limited Work

46. Generally

It is not necessary to prove absolute inability to do any kind of work in order to recover on insurance. United States v Crume (1931, CA5 Tex) 54 F.2d 556

Fact that soldier has done work of some kind in some measure does not, without more, negative his claim of total permanent disability, and mere fact that soldier has done no work, or only little, does not establish his claim of total permanent disability; some who are totally incapacitated for work may, by strong will power or because of necessity, continue to work, against advice of physicians, and, perhaps, at risk of serious physical injury. United States v Caldwell (1934, CA3 Pa) 69 F.2d 200

Insured cannot recover where insured can follow continuously light work, which is substantially gainful. United States v Derrick (1934, CA10 Okla) 70 F.2d 162

To establish total disability within war risk policy, it was unnecessary to prove absolute inability to do any kind of work. United States v Stand (1939, CA10 Okla) 102 F.2d 472

Phrase "total and permanent disability" does not mean that party must be unable to do anything whatever, and it does not mean that there must be proof of absolute incapacity to do any work at all. Knapp v United States (1940, CA7 Ill) 110 F.2d 420

In action on war risk insurance policy, plaintiff must show that while policy was still in force he was incapable of pursuing with reasonable regularity any substantially gainful occupation and that disability was of permanent character; however, it was not necessary that plaintiff abandon every possible effort to work in order for jury to find that he was totally and permanently disabled. Tyrakoski v United States (1941, CA7 Ill) 119 F.2d 339

47. Capacity to perform duties of previous occupation

Mere fact that insured was unable to follow his former occupation or to do work of kind he was accustomed to perform before his injury did not establish permanent and total character of his disability under war risk policy. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272; Miller v United States (1935) 294 US 435, 79 L Ed 977, 55 S Ct 440, reh den (1935) 294 US 734, 79 L Ed 1262, 55 S Ct 635

Testimony that plaintiff was unable to perform duties that he could perform prior to alleged disability did not establish total and permanent disability. Corrigan v United States (1936, CA9 Idaho) 82 F.2d 106

It could be reasonably inferred that insurance section of Veterans' Administration [now Department of Veterans Affairs] had knowledge of veteran's application for compensation as disabled veteran from evidence showing that identifying number assigned to application for compensation was endorsed on his application for insurance prior to its approval by insurance
section; veteran’s application for compensation as disabled World War veteran was part of records of Veterans’ Administration [now Department of Veterans Affairs]; hence, its knowledge thereof, with respect to alleged fraud in his application for war risk insurance, was actual, not imputed, knowledge. United States v Kelley (1943, CA9 Cal) 136 F.2d 823

Mere proof of inability to work at farming or roadwork did not show total and permanent disability, where it was not shown that insured made any effort to do other kinds of work. Crouch v United States (1935, DC W Va) 11 F Supp 232

48. Performance of work upon occasional or irregular basis

If insured is able to follow gainful occupations only spasmodically, with frequent interruptions due to disability, he is entitled to recover compensation for disability. Ford v United States (1930, CA1 Mass) 44 F.2d 754; Burgoyn v United States (1932, Dist Col App) 61 App DC 97, 57 F.2d 764

Fact that insured worked spasmodically with frequent interruptions made necessary by his physical condition did not refute finding of total permanent disability. United States v Pearson (1933, CA10 Okla) 65 F.2d 996

Occasional work for short periods by one generally disabled because of impairment of mind or body does not as matter of law negative total disability. Coyner v United States (1939, CA7 Ill) 103 F.2d 629

Occasional period of work done by insured claiming under expired war risk insurance policy was not sufficient to negative total permanent disability when there was other evidence tending substantially to show permanent total disability, but when he worked for substantial length of time without injury and compensation was shown in any great amount, then these factors outweighed expert testimony. United States v Ware (1940, CA5 La) 110 F.2d 739

Insured who can work only spasmodically, with frequent interruptions or changes in employment necessitated by his condition, cannot be said to be able to follow continuously substantially gainful occupation within meaning of policy. United States v Atchley (1940, CA10 Kan) 116 F.2d 266

Ability to work spasmodically from time to time or to work for considerable periods did not conclusively prove that insured was not totally and permanently disabled within meaning of war risk policy. United States v McCain (1941, CA10 Kan) 118 F.2d 479

Veteran who is victim of dementia praecox was held to have become totally and permanently disabled within meaning of his policy of war risk insurance at time when he became unable to perform competently type of work at which he had formerly been skilled, developed delusions of persecution, and was diagnosed by physician as being in early stages of dementia praecox, so that policy matured at such time, even though he was gainfully employed at spasmodic intervals for some time thereafter. Shelley v United States (1956, DC Ky) 142 F Supp 436

49. Performance of work resulting in impairment of health

Disability does not cease to be total because of insured's intermittent occupational or business activities, where activities are engaged in, without exercise of ordinary care or prudence, at risk of substantially aggravating ailment with which insured is afflicted. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272

Insured is totally disabled if unable, without injury to his health, to make his living by working. United States v Martin (1931, CA5 Tex) 54 F.2d 554, cert den (1932) 286 US 546, 76 L Ed 1282, 52 S Ct 497; United States v Crume (1931, CA5 Tex) 54 F.2d 556

Work record may have effect of negating claim of total and permanent disability, but veteran has right to negative effect of work record by evidence that performance of work impaired his health. Corrigan v United States (1936, CA9 Idaho) 82 F.2d 106

50. Performance of work after lapse of policy

Mere fact that one has done some work after lapse of his policy is not of itself sufficient to defeat his claim of total permanent disability; he may have worked when really unable and at risk
of endangering his health or life, but, manifestly, work performed may be such as to conclusively negative total permanent disability at earlier time. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272; Harris v United States (1934, CA4 Va) 70 F.2d 889

Fact that insured worked at his regular trade almost continuously for 11 years after lapse of policy prevented recovery, though he testified that he worked under great difficulties and in great pain. United States v Wilson (1931, CA4 SC) 50 F.2d 1063

Employment after lapse of policy may be of such duration and nature that it conclusively refutes any idea of total permanent disability. Nicolay v United States (1931, CA10 Colo) 51 F.2d 170

Though having great probative effect to negative total permanent disability before lapse of policy, it is not conclusive against insured that he has earned money or has been at work with substantial continuity since lapse of policy. United States v Martin (1931, CA5 Tex) 54 F.2d 554, cert den (1932) 286 US 546, 76 L Ed 1282, 52 S Ct 497; United States v Crume (1931, CA5 Tex) 54 F.2d 556

Fact that insured physician practiced his profession for many years after lapse of policy and had substantial income therefrom precluded finding of total permanent disability during life of policy. United States v Ingalls (1933, CA10 NM) 67 F.2d 593

Fact that insured was gainfully employed for seven years after lapse of policy, though absent occasionally on account of sickness, precluded finding of total permanent disability before lapse. United States v Timmons (1934, CA5 Fla) 68 F.2d 636

Work with frequent interruptions after lapse of policy did not preclude finding of total permanent disability before lapse. United States v Caldwell (1934, CA3 Pa) 69 F.2d 200

Fact that insured worked with substantial continuity in gainful employments for 11 years after lapse of policy and his condition was not materially worse at end of that time precluded finding of total permanent disability before lapse. United States v Burns (1934, CA5 Fla) 69 F.2d 636

Insured had burden of showing that work was not substantially gainful where insured worked for 10 years after lapse of policy. United States v Baker (1934, CA9 Idaho) 73 F.2d 691

Fact that insured worked 8 or 10 years, at short hours, after lapse precluded recovery. United States v Baker (1934, CA9 Idaho) 73 F.2d 691

Fact that insured worked from third year through tenth year after lapse of policy fairly continuously precluded recovery, though his arthritis prevented work for first two years after lapse of policy. United States v Steadman (1934, CA10 Utah) 73 F.2d 706

Insured was not entitled to recover where insured, for three years after lapse of policy, earned substantial sums. United States v Krueger (1935, CA7 Ind) 77 F.2d 171

Work record after lapse of policy is important in determining disability before lapse. United States v Harris (1935, CA7 Ill) 80 F.2d 771; Corrigan v United States (1936, CA9 Idaho) 82 F.2d 106

Fact that insured worked for five years after lapse prevented finding of total permanent disability. Evans v United States (1936, CA7 Ill) 83 F.2d 539

Work done may be such as conclusively to negative total permanent disability at earlier time. United States v Nelson (1939, CA8 Ark) 102 F.2d 515, cert den (1939) 308 US 550, 84 L Ed 462, 60 S Ct 81

Fact that insured worked 18 months after lapse of policy prevented finding of total permanent disability before lapse. Nordberg v United States (1931, DC Mont) 51 F.2d 271

51. Miscellaneous

As matter of law, insured was not totally and permanently disabled where insured, though suffering with pulmonary tuberculosis, was regularly employed for ten years after lapse of policy. Long v United States (1932, CA4 SC) 59 F.2d 602

It is true that one having tuberculosis with proper care might probably recover; however, in most cases, those having incipient tuberculosis are unaware of seriousness of their affliction and
are inclined to belief that it is merely cold or some other temporary trouble, and their efforts to do reasonable amount of work in belief that their affliction is merely temporary ought not to be weighed against them. United States v Monger (1934, CA10 Wyo) 70 F.2d 361

Fact that work was given to insured through sympathy did not overcome effect of proving nature and extent of work done by him since lapse of policy. United States v Vineyard (1934, CA5 Ga) 71 F.2d 624, cert den (1934) 293 US 614, 79 L Ed 703, 55 S Ct 141

Fact that work always causes pain is not proof of total disability. United States v Deal (1936, CA9 Or) 82 F.2d 929

In action to recover disability benefits under war risk insurance policies, where there was substantial evidence to show that insured was insane person on date on which bar of limitations otherwise would have been effective, jury need not believe that insured was raving lunatic at crucial date, and before that time he might well have held office boy's job, working under close supervision, and still not have been able to protect his rights under World War Veterans' Act. United States v Randall (1944, CA2 NY) 140 F.2d 70

3. Time of Disability

52. Prior to issuance of policy

Instructed verdict for government was proper where insured became totally and permanently disabled after entry into military service, but before application for policies at issue in suit was made, since war risk insurance did not ordinarily cover loss already suffered at time policy was issued. Jordan v United States (1929, CA9 Ariz) 36 F.2d 43, 73 ALR 312

Soldier who became totally and permanently disabled after his entry into the military service but before application for a policy can not recover on policy issued. Anderson v United States (1929, CA9 Mont) 36 F.2d 45; United States v Jensen (1929, CA9 Or) 36 F.2d 47

Fact that insured was injured and partially disabled before issuance of policy should be considered on question whether insured became permanently and totally disabled after, instead of before, issuance of policy, and before lapse of policy. United States v Jones (1934, CA5 Ala) 73 F.2d 376

53. During term of policy

Under war risk policy insuring against "total permanent disability," occasion, source, and cause of petitioner's illness or injury were immaterial if he was totally and permanently disabled during life of policy. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272

There can be no recovery on war risk policy unless plaintiff showed death or total permanent disability of insured during life of policy; insured could pay premiums after discharge from service and keep policy alive so as to give protection thereafter from death or total permanent disability during life of policy. Eggen v United States (1932, CA8 Minn) 58 F.2d 616

In action on war risk insurance policy, evidence was insufficient where, though it afforded possible inference that disease, pulmonary tuberculosis, from which assured died, had its beginning during life of policy, it afforded no reasonable inference, deduction, or conclusion that disease totally or permanently disabled him before policy lapsed. Fleming v United States (1939, CA6 Tenn) 106 F.2d 452, mod on other grounds (1939, CA6 Tenn) 107 F.2d 952

Benefits accruing out of contract of war risk insurance extended only to death and total permanent disability occurring while it was in force. United States v Bemis (1939, CA9 Or) 107 F.2d 894

Condition of permanent and total disability shown not only to have existed during life of policy but continuing to date of trial was indispensable foundation for judgment upon war risk insurance policy. Edmunds v United States (1938, DC Or) 24 F Supp 742, app dismd (1939, CA9 Or) 101 F.2d 1021

54. At time of lapse of policy
It was not total permanent disability covered by policy where at time of lapse of policy insured had disease which was certain to render him totally and permanently disabled thereafter. Wilks v United States (1933, CA2 NY) 65 F.2d 775

Fact that veteran, at time of lapse of war risk insurance policy, might have been suffering from nervous disorder affecting partial permanent disability would not afford recovery in his action on war risk insurance policy, even where it clearly established that it had developed into total and permanent disability subsequent to lapse of policy. United States v Fain (1939, CA8 Ark) 103 F.2d 161

55. Subsequent to lapse of policy

Verdict finding that permanent and total disability supervened after default in payment of premiums did not support judgment for plaintiff. United States v McPhee (1929, CA9 Wash) 31 F.2d 243

Recovery could not be had on contract of war risk insurance for temporary total disability, or for permanent partial disability, or for total permanent disability occurring after expiration of policy. United States v Sumner (1934, CA6 Ky) 69 F.2d 770; United States v Russian (1934, CA3 Pa) 73 F.2d 363; United States v Smith (1935, CA4 Va) 76 F.2d 850; United States v Bryan (1936, CA5 La) 82 F.2d 784; Hughes v United States (1936, CA10 Okla) 83 F.2d 76

It frequently happens that total and permanent disability shown to exist at time of trial became such long after contract lapsed; quite often incipient condition during life of policy may develop progressively into condition that is totally and permanently disabling after lapse; that is not enough to establish liability. Stephenson v United States (1935, CA8 Mo) 78 F.2d 355

In action on war risk insurance policy, it was not sufficient to show that insured, while policy was in force, had tuberculosis which resulted in total and permanent disability after policy had lapsed. United States v Watson (1939, CA4 SC) 107 F.2d 370

In action on war risk insurance policy, plaintiff could not recover if total permanent disability occurred subsequent to lapse of policy, and this was true even though it be shown that total permanent disability was caused by conditions which arose or existed while policy was in full force and effect. Thatenhorst v United States (1941, CA10 Kan) 119 F.2d 567

4. Particular Infirmitiess

56. Loss of limbs or sensors

Defective right eye and loss of right hand are permanent but not total disability. Miller v United States (1934, CA5 Ga) 71 F.2d 361, affd (1935) 294 US 435, 79 L Ed 977, 55 S Ct 440, reh den (1935) 294 US 734, 79 L Ed 1262, 55 S Ct 635

Whether loss of one leg constitutes total and permanent disability must be determined in each case. United States v Rice (1934, CA8 Neb) 72 F.2d 676

Evidence showing loss of natural hearing of both ears during life of policy makes prima facie case of disability. United States v Atkinson (1935, CA5 Tex) 76 F.2d 564, affd (1936) 297 US 157, 80 L Ed 555, 56 S Ct 391

Loss of use of one leg does not constitute total disability. United States v Tarrer (1935, CA5 Ga) 77 F.2d 423, cert den (1935) 296 US 574, 80 L Ed 405, 56 S Ct 125

Loss of limb does not constitute permanent total disability. United States v Fields (1939, CA8 Ark) 102 F.2d 535

Loss of use of one arm or one leg is not considered total disability for war risk insurance. Gray v United States (1940, CA8 Ark) 109 F.2d 728

57. Mental disorders

Instance or two of hysteria or uncontrolled emotion during period of tension was not proof of total permanent disability by reason of insanity; and observation by friend even of long-standing of insured's conduct upon return from service, given many years later, and in the knowledge of present condition of insured, was not proof of total permanent disability of insured at period.
Evidence fails to establish that insured was totally and permanently disabled from mental injury sustained during service, where insured signed statement when he was discharged from army that he had no injury or disability, and after his discharge he was not adjudged insane and was able to work at various times, and suit was not brought until about 15 years after lapse of policy. Crouch v United States (1935, DC W Va) 11 F Supp 232

Veteran who was a victim of dementia praecox became totally and permanently disabled within meaning of his policy of war risk insurance at time when he became unable to perform competently type of work at which he had formerly been skilled, developed delusions of persecution, and was diagnosed by physician as being in early stages of dementia praecox, so that policy matured at such time, even though he was gainfully employed at spasmodic intervals for some time thereafter. Shelley v United States (1956, DC Ky) 142 F Supp 436

58. Tuberculosis

It is presumed that tuberculosis existing after discharge from service was contracted while in service; this presumption does not go to degree or permanency of disability. Mulivrana v United States (1930, CA9 Wash) 41 F.2d 734; Runkle v United States (1930, CA10 Colo) 42 F.2d 804; United States v Le Duc (1931, CA8 Minn) 48 F.2d 789, cert den (1931) 284 US 631, 76 L Ed 537, 52 S Ct 14; United States v Wescoat (1931, CA4 W Va) 49 F.2d 193; United States v Patterson (1931, CA3 Pa) 51 F.2d 922; United States v Monger (1934, CA10 Wyo) 70 F.2d 361; United States v Huddleston (1936, CA7 Ill) 81 F.2d 593

Statement of insured, upon discharge, and in his application for compensation, and evidence that he was employed after his discharge, were not conclusive on issue of total and permanent disability, but evidence was insufficient to support finding that incipient tuberculosis continued and created total and permanent disability before time of lapse of policy. United States v Rentfrow (1932, CA10 Okla) 60 F.2d 488

Insured was not entitled to recover on account of tuberculosis if tuberculosis with which insured was afflicted during the life of the policy was of such character or had progressed only to such stage that it was possible to arrest its progress and render him able again to engage in some substantially gainful occupation without injury to his health, even though such occupation might involve only light labor and might be carried on only under conditions which would not cause recurrence of disease. United States v Messinger (1934, CA4 W Va) 68 F.2d 234

Existence of pulmonary tuberculosis did not of itself establish total and permanent disability. Crews v United States (1939, CA7 Ill) 102 F.2d 485

In action on war risk insurance policy, showing of separate and distinct periods of temporary disability from tuberculosis was insufficient to show total permanent disability. United States v Harmon (1940, CA6 Tenn) 110 F.2d 332

If insured was suffering from active pulmonary tuberculosis during life of policy, he was totally disabled; possibility that it might cease to be active and become arrested did not affect permanency of disability. Humble v United States (1931, DC Ky) 49 F.2d 600

It was not sufficient to prove that tuberculosis eventually was not cured or that insured died from it; it must be shown that it was fairly evident before lapse of the policy that he would be permanently totally disabled. Watts v United States (1938, DC Miss) 24 F Supp 969 (superseded by statute as stated in Farris v State (2004, App) 2004 Miss App LEXIS 1126)

59. Other particular infirmities

Evidence showing that insured received gun shot or shrapnel wounds in leg while in service overseas established total and permanent disability at time policy lapsed. United States v Scarborough (1932, CA9 Cal) 57 F.2d 137

Diabetes is not necessarily permanently disabling. United States v Elmore (1934, CA5 Fla) 68 F.2d 551

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Bronchial asthma ordinarily does not totally and permanently disable person until it has progressed to advanced stages. United States v Smith (1935, CA4 Va) 76 F.2d 850

Duodenal ulcer is not incurable or always totally disabling. United States v Martin (1935, CA10 Kan) 80 F.2d 460

60. Multiple infirmities
Finding of disability on date claimed was proper where in an action to recover disability benefits under war risk insurance contract, evidence indicated that, when disability was claimed to exist, plaintiff was suffering from chronic bronchitis, bronchial asthma, allergic rhinitis, under-nutrition, functional neurosis, chronic spastic colitis, hemorrhoids, secondary anemia, and decayed teeth and shortly thereafter it was discovered that he was also afflicted on date disability was claimed with incurable disease known as paralysis agitans. United States v Barton (1941, CA5 Fla) 117 F.2d 540

Veteran suffering from permanent heart and nervous diseases, and duodenal ulcer, and unfitted by training for any occupation not requiring physical exertion, was permanently and totally disabled. Walsh v United States (1938, DC Minn) 24 F Supp 877, app dismd (1939, CA8 Minn) 106 F.2d 1021

IV. PRACTICE AND PROCEDURE

A. In General

61. Generally
Right of recovery in war risk insurance cases was dependent on contract, and it was not within province of jury to award from public funds gratuities to relatives of deceased ex-soldiers. United States v Le Duc (1931, CA8 Minn) 48 F.2d 789, cert den (1931) 284 US 631, 76 L Ed 537, 52 S Ct 14

In considering subject of war risk insurance, all reasonable presumptions were indulged in favor of insured, basis of this action was contract, and parties' rights were governed by its terms. United States v Tyrakowski (1931, CA7 Ill) 50 F.2d 766

In action under life policy issued by United States, United States has proprietary status and does not appear in its sovereign capacity. Cushman v United States (1942, DC Cal) 43 F Supp 810, affd (1943, CA9 Cal) 136 F.2d 815, cert den (1943) 320 US 786, 88 L Ed 473, 64 S Ct 194

62. Governing law
Federal Rules of Civil Procedure are applicable to suits on claims for government insurance in Federal District Courts, and such suits are not subject to state statute relating to summary judgments where provisions of state statute are inconsistent with federal procedure specified for suits upon insurance policies. United States v Lindholm (1935, CA9 Cal) 79 F.2d 784, 103 ALR 213

California summary judgment act did not apply to action in United States district court in California on war risk insurance. United States v Stevenson (1935, CA9 Cal) 79 F.2d 788

Sovereign character of government does not render general rules of law of insurance totally inapplicable to determination of government's liability under its insurance policies. United States v Morrell (1953, CA4 Md) 204 F.2d 490, 36 ALR2d 1374, cert den (1953) 346 US 875, 98 L Ed 383, 74 S Ct 128

Statutes of state in which federal District Court is located relative to amendments do not apply to suits against United States on insurance policy. Dellaporta v United States (1939, DC Mass) 27 F Supp 839

63. Conclusiveness of prior federal determination
Judgment in action on war risk insurance policy, wherein issue was whether or not policy was in force on given date by virtue of payment of premiums by insured, was not res judicata in action on same policy in which issue was whether or not policy was in force at much later date by virtue
of act of Congress designed to accomplish that result. Pippin v United States (1941) 74 App DC 131, 121 F.2d 98

Court is bound by prior adjudication of disability and may refuse to admit testimony as to work record of plaintiff prior to date of such adjudication; government by consenting to suit places itself in same situation as private litigant as far as doctrine of estoppel by judgment is concerned. Edmunds v United States (1938, DC Or) 24 F Supp 742, app dismd (1939, CA9 Or) 101 F.2d 1021

Judgment that veteran was permanently disabled for War Risk Insurance was not res judicata in action for compensation under World War Veterans' Act. Hines v Welch (1928, Dist Col App) 57 App DC 371, 23 F.2d 979

Judgment on disability at one date was not res judicata as to suit brought relative to another date where insured alleged disability as of certain date but sought to amend declaration to include subsequent date, which motion was denied. Vincent v United States (1935, Dist Col App) 64 App DC 178, 76 F.2d 428

64. -Agency determinations

Contrary finding of medical advisory board prevents finding for United States that insured was permanently and totally disabled when policy was issued. United States v Domangue (1935, CA7 Ill) 79 F.2d 647

In action on war risk insurance policy, court had power to determine whether director of veterans' bureau [now Secretary of Veterans Affairs] acted arbitrarily and capriciously in finding that insured was not suffering from compensable disability. Larmon v United States (1929, DC Ky) 37 F.2d 584

District Court will not disturb Veterans' Administration [now Department of Veterans Affairs] determination as to validity of change of beneficiary if determination is supported by substantial evidence. Hawkins v United States (1965, ED NY) 245 F Supp 1022

District Court will give substantial weight to Veterans' Administration [now Department of Veterans Affairs] determination as to effectiveness of alleged beneficiary change. Owens v United States (1966, DC SC) 251 F Supp 114

Federal court had full jurisdiction under 38 USCS § 784 to determine rightful beneficiary to proceeds of National Service Life Insurance policy, and was not bound by a prior administrative decision regarding proper beneficiary. Phillips v United States (1970, SD Miss) 332 F Supp 601, affd (1971, CA5 Miss) 440 F.2d 993

65. Conclusiveness of prior state determination

Decree of state court directing insured's guardian to effect change of beneficiary may not be collaterally attacked in federal district court. United States v Tighe (1964, SD Miss) 229 F Supp 680

66. -Marital matters

Judgment of state court holding that one was not common-law wife of insured was not binding on federal court in suit on war risk policy. Ramsey v United States (1932, CA5 Ga) 61 F.2d 444

In suit by administrator of deceased veteran's estate to recover benefits of war risk insurance policy, adjudication of state court was binding on federal courts as to validity of alleged common-law marriage between veteran and beneficiary named in policy unless upon proper showing federal court found that such adjudication was nullity, since existence of valid common-law marriage between deceased veteran and beneficiary named in war risk insurance policy depended upon law of state in which common-law marriage took place. Live Stock Nat'l Bank v United States (1939, CA7 Ill) 106 F.2d 240

Declaratory judgment by state court in Connecticut that first marriage of decedent was not dissolved by divorce proceeding in Arkansas was binding on federal court to interpleader action
filed by United States to determine right to proceeds of national service life insurance policy. United States v Oswald (1950, DC Del) 91 F Supp 639

67. -Estate matters

   State court judgment determining right to administration of estate of deceased holder of war risk policy was not subject to collateral attack in any other court. Cuff v United States (1933, CA9 Cal) 64 F.2d 624, cert den (1933) 290 US 676, 78 L Ed 583, 54 S Ct 96

   Decree of state court upholding nuncupative will was not subject to collateral attack. Brown v United States (1933, CA9 Cal) 65 F.2d 65

   Judgment of state probate court as to heirship was not binding on United States in action on war risk policy where not accompanied by record. Fennell v United States (1933, CA5 Tex) 67 F.2d 768

   Declaratory judgment that testamentary disposition of government insurance policy on life of veteran was made in veteran's will, and that there was therefore no escheat to United States, was not binding on United States where United States was not party to judgment proceedings. Hastings v United States (1943, CA6 Tenn) 133 F.2d 218

   Determination of state orphans' court as to time of death of decedent was not conclusive on United States in action on policy of war risk insurance. English v United States (1928, DC Md) 25 F.2d 335

68. Proceeding in forma pauperis

   Where plaintiff makes application for leave to proceed in forma pauperis, it is unnecessary for attorney to make supplemental affidavit showing that he has no contingent interest in claim. Deadrich v United States (1933, CA9) 67 F.2d 318

   Necessity of obtaining order of court permitting claimant to sue in forma pauperis is not legal excuse for delay in instituting suit beyond period of limitation. Weaver v United States (1934, CA4 NC) 72 F.2d 20

69. Dismissal of action

   Fact that beneficiaries and representatives appealed from judgment dismissing insured's suit on war risk policy did not preclude their right to bring new suit. Dumas v United States (1939, CA10 Kan) 103 F.2d 676

   Motion of United States to dismiss, treated as motion for summary judgment, would be sustained in action by wife of serviceman to recover proceeds of policy of life insurance where United States had satisfactorily discharged its obligations by procuring coverage for decedent with private insurer and by conveying to insurer accurate information respecting distribution of insurance funds. Jackson v United States (1975, ND Miss) 398 F Supp 607

70. Settlement of action

   Claim under contract of insurance on which premiums were not paid, but which was kept in force, may be settled by courts. United States v Sellers (1935, CA5 Miss) 75 F.2d 623, cert den (1935) 295 US 763, 79 L Ed 1705, 55 S Ct 923

71. Availability of mandamus against agency

   Mandamus is proper remedy to require decision by veterans' [now Department of Veterans Affairs] bureau on claim where bureau [now Department of Veterans Affairs] fails to act on claim. United States v Bell (1935, CA4 NC) 80 F.2d 516

   Remedy by action in district in which one claiming as beneficiary resides was exclusive in case of disagreement under War Risk Insurance Act (predecessor to 38 USCS §§ 1940 et seq.), and mandamus proceedings could not be brought in District of Columbia court to compel director of Bureau of War Risk Insurance [now Secretary of Veterans Affairs] to pay claim. United States ex rel. Norris v Forbes (1922) 51 App DC 248, 278 F 331
Decision of bureau [now Department of Veterans Affairs] finding insured was not totally disabled could not be reviewed by mandamus.  Forbes v Welch (1923) 52 App DC 303, 286 F 765

Under statute providing remedy in event of disagreement concerning claim under contract of insurance between veterans' administration [now Department of Veterans Affairs] and any person claiming under it, action on claim which may be brought against United States is exclusive and mandamus will not lie to compel payment of proceeds of policy.  Morgan v Hines (1940) 72 App DC 331, 113 F.2d 849, cert den (1940) 311 US 706, 85 L Ed 458, 61 S Ct 174

Mandamus would not lie to compel administrator [now Secretary] of veterans affairs to make payments under war risk insurance policy, even though remedy, which was exclusive, was barred by limitations.  Tyer v Hines (1941) 73 App DC 196, 117 F.2d 782

Where denial of award was by regional adjudication officer, instead of by regional manager, and appeal was taken, that appeal must be prosecuted to final denial before suit could be brought, proper remedy in such case being mandamus to compel action on claim.  Anderson v United States (1932, DC Ky) 5 F Supp 269

In action brought to determine whether or not insured is entitled to have disability income clause added to policies, federal district court does not have jurisdiction because (1) action is not in fact based upon a "disagreement as to any claim arising under" existing policy, and (2) action is by nature one calling for exercise of mandamus authority although nominally one for declaration of rights of parties; thus, where there is failure to establish independent jurisdiction, plaintiff in reality has requested court to exercise original mandamus authority with which it is not vested.  Birge v United States (1953, DC Okla) 111 F Supp 685

Award of compensation, discretionary with director [now Secretary], is not subject to mandamus unless he acts beyond his authority.  Hines v Welch (1928, Dist Col App) 57 App DC 371, 23 F.2d 979

Administrator [now Secretary] jurisdiction to set aside orders by predecessor is not subject to mandamus.  United States ex rel. Finley v Hines (1928, Dist Col App) 58 App DC 120, 25 F.2d 544

**72. Miscellaneous**

Since suit against United States must be conducted strictly in accordance with statute, court will not determine, in suit by widow for proceeds of national service life insurance policy, whether proceeds paid to mother of deceased were imposed with trust.  Pack v United States (1949, CA9 Cal) 176 F.2d 770

State court is not precluded from imposing constructive trust in favor of children of deceased veterans upon proceeds from individual replacement policy.  Gutierrez v Madero (1978, Tex Civ App Eastland) 564 SW2d 185

**B. Administrative Proceedings**

**73. Generally**

Statute which defines disagreement prerequisite to action on war risk insurance policy to include denial of claim thereon by any employee or agent of administrator of veterans' affairs [now Secretary of Veterans Affairs] does not affect right of claimant to appeal to administrator [now Secretary] from denial by subordinate or touch on administrator's [now Secretary's] power to review such denial on his own motion but merely provides claimant with option to pursue his judicial remedy without first prosecuting administrative appeal.  Morgan v Hines (1940) 72 App DC 331, 113 F.2d 849, cert den (1940) 311 US 706, 85 L Ed 458, 61 S Ct 174

**74. Administrative appeals**

Appeal to director of veterans' bureau [now Secretary of Veterans Affairs], and action of director [now Secretary] thereon, is essential to maintenance of action.  Fouts v United States (1933, CA5 Ga) 67 F.2d 249
When insured files claim with veterans' bureau [now Department of Veterans Affairs] and appeals from determination thereon, he cannot maintain action on claim prior to determination of such appeal. Hansen v United States (1933, CA7 Ill) 67 F.2d 613, cert den (1934) 291 US 670, 78 L Ed 1060, 54 S Ct 454

Failure to appeal to director from rejection of claim by appellate board precludes bringing suit, required "disagreement" being absent. United States v Earwood (1934, CA5 Ga) 71 F.2d 507, vacated on other grounds (1935) 294 US 695, 79 L Ed 1233, 55 S Ct 511

Appeal taken to administrator [now Secretary] after receipt by claimant of letter rejecting his claim superseded disagreement, and there was no disagreement until appeal was disposed of. Thelin v United States (1934, CA7 Ill) 73 F.2d 101; Albek v United States (1933, DC NY) 4 F Supp 1020

Where denial of award is by regional adjudication officer, instead of by regional manager, and appeal is taken, that appeal must be prosecuted to final denial before suit can be brought; proper remedy in such case being mandamus to compel action on claim. Anderson v United States (1932, DC Ky) 5 F Supp 269

75. Final decisions

Denial of claim by insurance claims council was not final denial. Lopez v United States (1936, CA4 NC) 82 F.2d 982

Contention that there has been no final decision because veteran had appealed to administrator [now Secretary] which appeal was pending when suit was filed, was wholly untenable where veteran received letter denying claim. Robinson v United States (1936, CA5 Tex) 84 F.2d 885

Denial of claim for war risk insurance benefits must be final and administrative relief exhausted before action could be instituted. Gambill v United States (1939, CA10 Okla) 102 F.2d 667

C. Jurisdiction

1. In General

76. Generally

Congress alone can prescribe terms on which claim for benefits may be recovered, and it is not within province of courts to extend or limit clear expression of those terms. Cannon v United States (1941, DC Pa) 45 F Supp 106, affd (1942, CA3 Pa) 128 F.2d 452

77. Consent to suit

United States may be sued only by its consent and right to sue it on war risk insurance contract was given and as prerequisite thereto insured must show disagreement with bureau [now Department] respecting his claim. United States v Rasmussen (1938, CA10 Okla) 95 F.2d 842; Kontovich v United States (1938, CA6 Tenn) 99 F.2d 661, cert den (1939) 306 US 651, 83 L Ed 1050, 59 S Ct 644; Portland Trust & Sav. Bank v United States (1938, DC Or) 24 F Supp 953

Suit on war risk insurance contract was suit against government; one of conditions of its consent to be sued was existence of "disagreement" between veterans' administration [now Department of Veterans Affairs] and claimant. Leyerly v United States (1947, CA10 Colo) 162 F.2d 79

Consent to be sued should not be extended beyond plain terms of authorizing statute. Leyerly v United States (1947, CA10 Colo) 162 F.2d 79

Rule that suits against United States may be maintained only by permission of United States applied with full force to war risk insurance cases. Jewell v United States (1939, DC Ky) 27 F Supp 836
Right to sue government is conferred under certain conditions and existence of such conditions at time of filing suit is an indispensable requisite of jurisdiction. McCoy v United States (1944, DC Ark) 54 F Supp 960

78. Claims Court

Claims upon war risk insurance were not within jurisdiction of court of claims, jurisdiction thereof conferred on federal district courts being exclusive. McBean v United States (1934) 80 Ct Cl 227

Court of Claims had no jurisdiction over cases described in predecessor to 38 USCS § 784. Peyton v United States (1951) 120 Ct Cl 722, 100 F Supp 823, cert den (1952) 343 US 909, 96 L Ed 1326, 72 S Ct 639

Claim for benefits arising under Servicemen's Group Life Insurance Act (38 USCS §§ 765 et seq. [now 38 USCS § 1965 et seq.]) brought in Court of Claims were transferred to appropriate United States district court pursuant to 28 USCS § 1506, since 38 USCS § 775 [now 38 USCS § 1975] provided district courts with original jurisdiction over such claims. Parker (1971) 196 Ct Cl 775

79. State courts

State court had jurisdiction of action by alleged beneficiary against designated beneficiary for proceeds of National Service Life Insurance policy which had been paid to such designated beneficiary by Veterans Administration [now Department of Veterans Affairs], where alleged beneficiary filed no claim on policy with Veterans Administration [now Department of Veterans Affairs]. Fleming v Smith (1966) 69 Wash 2d 277, 418 P2d 147

County court in Wisconsin could not determine who was entitled to proceeds but could distribute proceeds in accordance with directions of veterans' bureau [now Department of Veterans Affairs]. In re Greiner's Estate (1928) 195 Wis 332, 218 NW 437

State court had jurisdiction to distribute estate of deceased soldier, consisting of unaccrued installments on government insurance policy, in accordance with laws of state. In re Greiner's Estate (1928) 195 Wis 332, 218 NW 437

State court had jurisdiction of action to establish trust in proceeds of veterans' insurance. Mueller v Mueller (1921) 222 Ill App 435

State court had jurisdiction of action by sisters of insured in war risk policy against beneficiary named in such policy to declare trust. Dorland v Whitmer (1932, Stark Co) 43 Ohio App 285, 12 Ohio L Abs 102, 182 NE 686, motion overr, cert den (1933) 288 US 616, 77 L Ed 989, 53 S Ct 507

80. Miscellaneous

In action on war risk insurance policy brought in federal district court for Massachusetts in which United States moved to join third-party claimant who was resident of and personally served in New Jersey, jurisdiction was acquired over such third-party claimant solely for limited purpose of adjudicating her claim to proceeds of insurance policy, and her appearance did not constitute any sort of waiver or estoppel giving court jurisdiction over her for any other purpose. Moreno v United States (1941, CA1 Mass) 120 F.2d 128

Federal court had no jurisdiction under predecessor to 38 USCS § 1984 to adjudicate claim by insured's wife based on agreement by insured, made part of property settlement, to name his children as beneficiaries of NSLI policy until such time as insured remarried. Kaske v Rohtert (1955, DC Cal) 133 F Supp 427

2. District Courts

a. In General

81. Generally
United States district court has jurisdiction of suit on policy. United States v Napoleon (1924, CA5 Fla) 296 F 811; Salzer v United States (1922, DC NY) 300 F 764, affd (1924, CA2 NY) 300 F 767

Provision as to disagreement conferring jurisdiction on district court does not dispense with necessity of rating of incompetency required as prerequisite to waiver of payment of premiums during period of incompetency. United States v Edwards (1927, CA8 Neb) 23 F.2d 477

District court has jurisdiction to adjudicate rights under veteran's insurance contract where claim has been presented as provided by statute and disagreement has arisen thereon between United States and claimant. United States v Robinson (1939, CA9 Cal) 103 F.2d 713

District courts of United States are courts of limited jurisdiction, and presumption at every stage of cause is that cause is outside jurisdiction of court of United States unless contrary appears from record. United States v Green (1939, CA9) 107 F.2d 19

Jurisdiction of court depends upon disagreement as to claim and is question court must determine for itself without jury. Pelkey v United States (1934, Dist Col App) 63 App DC 211, 71 F.2d 221

82. Exclusive jurisdiction

Jurisdiction conferred upon district courts by predecessor to 38 USCS § 1984 was exclusive. United States v Pfitsch (1921) 256 US 547, 65 L Ed 1084, 41 S Ct 569

United States district courts had exclusive jurisdiction to review claims for refunds of premium and cash payment on war insurance. Holliday v United States (1949) 114 Ct Cl 702, 87 F Supp 367

83. Contractual predicate

Jurisdiction conferred extends to determination of defenses interposed by government, but does not permit recovery by insured of premiums improperly paid on erroneous assumption that disability is temporary only, since such payments involve claim against government as to which jurisdiction was not conferred. United States v Golden (1929, CA10 NM) 34 F.2d 367

District Court had jurisdiction under predecessor to 38 USCS § 1984 to adjudicate disagreements as to existence and continuity of serviceman's disability under national service life insurance policy, regardless of fact that existence of policy was dependent upon outcome of suit, where Congress had mandated that policy would be deemed to be in force if specified conditions existed. United States v Roberts (1951, CA5 Ga) 192 F.2d 893

Claim that veteran met statutory conditions for issuance of valid national service life insurance policy was within jurisdiction of district court under 38 USCS § 784 [now 38 USCS § 1984], although Veterans Administration [now Department of Veterans Affairs] denied existence of contract of insurance, where statute made issuance of policy mandatory upon meeting of conditions. Clark v United States (1973, CA8) 482 F.2d 586, 32 ALR Fed 777

Suit having been properly brought in District of Columbia, court has power to also adjudicate all claims with respect to policy, including those made by nonresident trustee designated as beneficiary and adult son of insured who claims to be cestui que trustent along with two other minor sons. Shaul v United States (1947, App DC) 82 US App DC 174, 161 F.2d 891

Predecessor to 38 USCS § 1984 did not provide district court with jurisdiction over claim that veteran had statutory right to insurance, application for which was denied by Veterans Administration [now Department of Veterans Affairs], since no contract of insurance existed under which disagreement could arise. Skovgaard v United States (1953, App DC) 92 US App DC 70, 202 F.2d 363, cert den (1953) 345 US 994, 97 L Ed 1401, 73 S Ct 1134, reh den (1953) 346 US 842, 98 L Ed 362, 74 S Ct 15

Predecessor to 38 USCS § 1984 did not permit actions in District Court as to claims arising under contracts of insurance where complaint was not based on presently effective contract of insurance. Schilling v United States (1951, DC Mich) 101 F Supp 525

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District Court had no jurisdiction under terms of 38 USCS § 784 [now 38 USCS § 1984] over action for benefits under national service life insurance policy even though veteran made two premium payments prior to disapproval and Veterans’ Administration [now Department of Veterans Affairs] inadvertently issued policy bearing effective date of veteran's death. Outlaw v United States (1967, DC SC) 293 F Supp 935

38 USCS § 784 [now 38 USCS § 1984] requires that there be contract of insurance in force in order to vest jurisdiction in district court, precluding jurisdiction of action based on Administrator's [now Secretary's] decision that veteran, due to false and fraudulent statements, had forfeited eligibility for disabled veterans' insurance. McKay v United States (1968, SD Tex) 286 F Supp 1003

84. -Lapsed policies

Court has no jurisdiction where national service life policy sued on by beneficiary has lapsed and has not been reinstated. Rowan v United States (1953, DC Pa) 115 F Supp 503, affd (1954, CA3 Pa) 211 F.2d 237

Congress did not confer jurisdiction upon federal district courts to try cases involving lapsed, unreinstated policies where administrator [now Secretary] allegedly was arbitrary in denying death claims. Robison v United States (1955, DC Idaho) 133 F Supp 9

85. -Reinstated policies

For predecessor to 38 USCS § 1984 to confer jurisdiction over action relating to claim on reinstated insurance policy, reinstatement must have been in accord with statute and regulations in effect at time of purported reinstatement, and no jurisdiction existed over claim related to policy which had been reinstated by Veterans Administration [now Department of Veterans Affairs] without following procedures required by statute and regulations. United States v Fitch (1950, CA10 NM) 185 F.2d 471

Under predecessor to 38 USCS § 1984, district court had jurisdiction over veteran's action to reinstate policy allegedly wrongfully declared to be lapsed by Veterans Administration [now Department of Veterans Affairs], since disagreement related to question whether policy, once admittedly in force, had ceased to be in force. Lufkin v United States (1958, DC NH) 168 F Supp 451, 1 FR Serv 2d 1060

86. Miscellaneous

Predecessor to 38 USCS § 1984 did not confer jurisdiction over claim for reinstatement of government insurance policy, since any right to reinstatement flowed from statutory provision, rather than from contract of insurance, precluding such claim from being one "under contract". Meadows v United States (1930) 281 US 271, 74 L Ed 852, 50 S Ct 279, 73 ALR 310

District court was without jurisdiction to render judgment for payment of future installments of total disability insurance and to reserve jurisdiction of cause in order to determine whether total permanent disability of insured continued, since jurisdiction exists only in event of disagreement. United States v Jackson (1929, CA10 Kan) 34 F.2d 241, 73 ALR 316, affd (1930) 281 US 344, 74 L Ed 891, 50 S Ct 294

District court had no jurisdiction of suit to declare status of plaintiff as enlisted man during World War without regard to contract of insurance under War Risk Insurance Act. Burlingham v United States (1929, CA8 Minn) 34 F.2d 881

In absence of diversity of citizenship, federal court had no jurisdiction of suit brought by brothers and sisters of designated beneficiaries in national service life insurance for declaration that any money paid to such beneficiaries should be held in trust for all of them. Tohulka v United States (1953, CA7 Ind) 204 F.2d 414

Federal court did not have jurisdiction of complaint to recover proceeds of policy which veterans' administration [now Department of Veterans Affairs] refused to issue to partially disabled navy veteran, since suit was not on "contract of insurance." Skovgaard v United States

Government's discontinuance of insurance benefits previously approved did not confer jurisdiction upon district court where no new claim was presented. Smith v United States (1932, DC Iowa) 56 F.2d 636

Jurisdiction of federal district courts is broad enough to cover all claims arising under National Service Life Insurance Act of 1940, including claims for benefits under policies (or disability income riders) alleged to be in force by operation of law. Morris v United States (1954, DC NC) 122 F Supp 155

Predecessor to 38 USCS § 1984 conferred on district court jurisdiction over claim for disability benefits under national service life insurance policy, even though policy actually issued to veteran did not contain disability rider, where dispute related to whether veteran's policy should have contained disability provisions. Morris v United States (1954, DC NC) 122 F Supp 155

b. Review of Agency Determinations

87. Generally

Fact that award was made by bureau [now Department] after action was properly commenced did not defeat right to judgment. Anderson v United States (1932, DC Ky) 5 F Supp 269

Court was without jurisdiction where disagreement was reopened and was being reconsidered by bureau [now Department] when action was brought. Taylor v United States (1932, DC NC) 57 F.2d 331

88. Denial of coverage

Predecessor to 38 USCS § 1984 did not confer jurisdiction on federal court over action based on denial of application for reinstatement of NSLI policy, since claim was to compel issuance of policy, rather than under existing contract. United States v Fitch (1950, CA10 NM) 185 F.2d 471; Ginelli v United States (1950, DC Mass) 94 F Supp 874; Rowan v United States (1953, DC Pa) 115 F Supp 503, affd (1954, CA3 Pa) 211 F.2d 237

Although Veterans' Administration [now Department of Veterans Affairs] had determined that no policy was in existence, district court had jurisdiction under predecessor to 38 USCS § 1984 over claim for benefits of national service life insurance policy where serviceman had made application for such policy more than 3 years prior to his death, premiums on policy had been deducted from his pay for period between receipt of application by Veterans' Administration [now Department of Veterans Affairs] and serviceman's disability discharge for leukemia condition, and VA notified claimant of rejection of original application after serviceman's death from leukemia. Gamez v United States (1951, DC Tex) 95 F Supp 656

38 USCS § 784 [now 38 USCS § 1984] did not provide district court with jurisdiction over action for benefits of national service life insurance policy, where Veterans' Administration [now Department of Veterans Affairs] disapproved application for such policy, even though veterans' check for premium was cashed prior to disapproval and veteran died prior to disapproval of application, since suit amounted to action to compel issuance of policy. Maxwell v United States (1970, ND Cal) 313 F Supp 245

89. Additional coverage

Under 38 USCS § 784 [now 38 USCS § 1984], District Court had jurisdiction over claim that Administrator's [now Secretary's] refusal to issue extended coverage to holder of effective national service life insurance policy was arbitrary and capricious. Salyers v United States (1964, CA5 Fla) 326 F.2d 623

Court had jurisdiction under 38 USCS § 784 [now 38 USCS § 1984] to review decision of administrator [now Secretary] denying application for attachment of disability income rider to applicant's life insurance policy; such denial constitutes disagreement as to claim. Salyers v United States (1964, CA5 Fla) 326 F.2d 623

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Predecessor to 38 USCS § 1984 did not give district court jurisdiction over claim based on refusal to issue extended coverage, even though valid policy of insurance existed, since claim actually constituted request for new insurance. Birge v United States (1953, DC Okla) 111 F Supp 685

Court had no jurisdiction under 38 USCS § 784 [now 38 USCS § 1984] to entertain action by beneficiary of deceased veteran's national service life insurance policy based on rejection of policyholder's application for additional insurance. McClendon v United States (1971, WD Okla) 327 F Supp 704

90. -Reinstatement

Decision of Director of United States Veterans' Bureau [now Secretary of Veterans Affairs] that applicant for reinstatement of lapsed insurance policy issued under War Risk Insurance Act of October 6, 1917, at time of making application, was totally and permanently disabled, was not subject to review by courts. Meadows v United States (1930) 281 US 271, 74 L Ed 852, 50 S Ct 279, 73 ALR 310

Although finding of bureau [now Department] as to insured's right to compensation binds court, effect of such finding as reinstatement of policy is matter for court to determine, as is also question as to whether insured was, or was not, at time, dead or totally and permanently disabled. United States v Ellison (1935, CA4 W Va) 74 F.2d 864, cert den (1935) 295 US 750, 79 L Ed 1695, 55 S Ct 829

91. Forfeiture of coverage

38 USCS § 784 [now 38 USCS § 1984] required that there be contract of insurance in force in order to vest jurisdiction in district court, precluding jurisdiction of action based on Administrator's [now Secretary's] decision that veteran, due to false and fraudulent statements, had forfeited eligibility for disabled veterans' insurance. McKay v United States (1968, SD Tex) 286 F Supp 1003

92. Payments under policies

Federal district court had jurisdiction to review Administrator's [now Secretary's] determination denying claim for proceeds of NSLI policy brought under 38 USCS § 722 [now 38 USCS § 1922] by mother of son who committed suicide shortly after leaving service and who had not applied for policy, as her complaint set forth "claim under contract" as that phrase is used in 38 USCS § 784 [now 38 USCS § 1984] and also fell within language of 38 USCS § 785 [now 38 USCS § 1985] providing for review of "other appropriate court proceedings". Clark v United States (1973, CA8) 482 F.2d 586, 32 ALR Fed 777

Though allowance of compensation was for bureau [now Department], court had jurisdiction where controversy arose upon question of allowance and collection. Holtrich v United States (1931, DC Idaho) 49 F.2d 445

93. Miscellaneous

In action on war risk policy, court had jurisdiction to determine right of insured to compensation claimed to have been due him when his policy lapsed for nonpayment of premiums, but allowance of such compensation was matter for veterans' bureau. United States v Hendrickson (1931, CA10 NM) 53 F.2d 797

D. Defenses

94. Fraud

In absence of proof of fraud of insured at time of reinstatement of policy, it was no defense that insured was totally and permanently disabled at time of reinstatement. United States v Chandler (1935, CA5 Ala) 77 F.2d 452

As bearing on question, in action on convertible term insurance policy, whether policy was invalid for fraud on part of insured in stating in application for policy that there has been no
treatment for enumerated diseases, officers of Veterans' Administration [now Department of Veterans Affairs] were not required to search records of another department of government for purpose of ascertaining whether representations made in application were true or false; purpose of propounding questions and receiving answers thereto in application for convertible term insurance policy as to whether there had been treatment for disease of enumerated parts of body was to elicit relevant and material information which might not be disclosed by medical examination and such information may well furnish basis for determining whether further examination or inquiry should be made, and it would be presumed, in action on policy, defended on ground of fraud in making answers, that government took information into consideration and relied upon it in issuance of policy. United States v Depew (1938, CA10 Kan) 100 F.2d 725

In action to recover total and permanent disability benefits under reinstated converted policy which had been issued after reinstatement of prior war risk policy, evidence justified finding of fraud in procuring first reinstatement and judgment denying recovery. Jones v United States (1939, CA5 Ga) 106 F.2d 888

Question of willful misstatement of facts with intent to defraud, when insured answered questions in application for reinstatement of his insurance, was for jury. United States v Robins (1941, CA5 Miss) 117 F.2d 145

Government's motion for judgment notwithstanding verdict on ground of equitable fraud would be denied where, in action for reinstatement, jury found against government on issue of legal fraud. Rountree v United States (1943, DC La) 49 F Supp 840, affd (1944, CA5 La) 141 F.2d 1009

In action by veteran to establish rights to benefits and protection under both contract of life insurance and contract for total disability income benefits, the evidence did not sustain the government's contention that life insurance policy and disability rider were void for reason that policy was reinstated and rider issued on strength of fraudulent misrepresentation by the veteran; misrepresentation would not constitute a defense to an action on a policy unless it was intentionally untrue or was made with a reckless disregard for its truth or falsity. Kent v United States (1964, WD Va) 227 F Supp 899

95. Lapse or ineffective reinstatement of policy

Fact that portion of policy is converted into ordinary life policy and then lapsed is no defense on remainder of policy. United States v Stamey (1931, CA9 Wash) 48 F.2d 150

Acceptance of premiums on application for reinstatement does not estop United States from asserting policy is not reinstated where acceptance is conditional and beneficiary does not execute receipt for return of premiums as was agreed. United States v Norton (1935, CA5 Fla) 77 F.2d 731

Under National Service Life Insurance Act, United States cannot be sued in action upon lapsed national service life insurance policy. Rowan v United States (1954, CA3 Pa) 211 F.2d 237

Plaintiff could in reply charge that government officers were in error and ignorant of total permanent disability of insured at time of discharge and the attempt to convert insurance was by mutual mistake and of no effect where government answered that policy which had been converted into ordinary life policy has lapsed. Stamey v United States (1929, DC Wash) 37 F.2d 188

96. Partial or temporary disability

Partial disability at time of lapse of war risk insurance policy does not warrant recovery, even though total disability may subsequently result. United States v Still (1941, CA4 SC) 120 F.2d 876, cert den (1941) 314 US 671, 86 L Ed 537, 62 S Ct 135

If insured has only incipient tuberculosis he must continue to pay his premiums until his total disability develops to that stage where it can be said with reasonable certainty that it will be permanent. Watts v United States (1938, DC Miss) 24 F Supp 969 (superseded by statute as stated in Farris v State (2004, App) 2004 Miss App LEXIS 1126)
97. Prior total disability

In action by insured, United States may defend on ground that insured was totally and permanently disabled when policy was issued and that therefore policy covers death only. Hicks v United States (1933, CA4 Va) 65 F.2d 517

Government could not sustain defense of prior total disability where insured had been inducted into army and government had in other ways dealt with him as sane person and issued to him its insurance policy and deducted premiums from his pay. Continental Illinois Nat'l Bank & Trust Co. v United States (1945, CA7 Ill) 153 F.2d 490

98. Mistake

Government made payment under absolute obligation to do so, without any mistake of fact as to disability of insured, where United States, upon application of insured, paid to insured cash surrender value of policy for which he had exchanged war risk policy, and it had received no notice whatsoever of insured's disability. United States v Garland (1941, CA4 Va) 122 F.2d 118, 136 ALR 918, cert den (1941) 314 US 685, 86 L Ed 548, 62 S Ct 189

99. Misconduct

In proceeding by surviving parents of deceased serviceman to collect, as beneficiaries, proceeds of national service life insurance policy, Veterans' Administration [now Department of Veterans Affairs] failed to prove that serviceman had been absent without leave for period of 31 days prior to his death, as defense to payment of policy under 38 USCS § 768(a)(1)(B) [now 38 USCS § 1968(a)(1)(B)], where his change of duty station orders were lost and he was never declared to be on unauthorized leave status or a deserter. Malone v United States Veterans Administration (1973, SD Ohio) 364 F Supp 114

100. Waiver of defense

Government's failure to respond to plaintiff's affirmative reply setting up notice of facts relied upon for rescission did not amount to waiver by government to deny knowledge of such facts where plaintiff alleged that government was estopped from asserting defense of fraud by acceptance of premiums long after facts showing fraud became known. Halverson v United States (1941, CA7 Ill) 121 F.2d 420, cert den (1941) 314 US 695, 86 L Ed 556, 62 S Ct 412

E. Limitation of Actions

1. In General

101. Generally

Time prescribed for bringing suit is not strictly speaking statute of limitations, but it is in nature of special statutory limitation which is in reality statute of creation, in which time is of essence of right claimed and limitation is inherent part of statute from which right in question arises, and to such limitations rules governing pure statutes of limitations do not apply. Vaughn v United States (1942, DC Ark) 43 F Supp 306

102. Purpose

Purpose of limitation made by Act of 1930 was to substitute uniform rule of limitation for suits on contracts of insurance in lieu of state statutes. United States v Towery (1939) 306 US 324, 83 L Ed 678, 59 S Ct 522, reh den (1939) 306 US 668, 83 L Ed 1063, 59 S Ct 640

Statute which requires suit to be brought on war risk insurance policy within six years after right of claim accrued or within one year after date of approval of statute, which also grants consent of United States to be sued on such condition, is one of repose and was intended to prescribe uniform rule of limitation for suits on contracts of war risk insurance. Goldsborough v United States (1939, DC Dist Col) 31 F Supp 93

Statute of limitations was obviously designed for repose. Albek v United States (1941, DC Mass) 38 F Supp 1021
103. Construction

Provision limiting actions on government insurance may not be construed to bar rights accruing to insured, yet leave suit by beneficiary without limitation. United States v Tarrer (1935, CA5 Ga) 77 F.2d 423, cert den (1935) 296 US 574, 80 L Ed 405, 56 S Ct 125

Statute of limitations in favor of sovereign must be strictly construed in its favor. United States v Ardito (1936, CA6 Mich) 86 F.2d 787; Coleman v United States (1937, DC Tenn) 18 F Supp 71, affd (1939, CA6 Tenn) 100 F.2d 903

Construction of provision limiting actions related to government insurance must be governed by legislative intent. Johnson v United States (1937, CA8 Minn) 87 F.2d 940, 109 ALR 949

When consent to sue the government is given, it is no broader than limitations which condition it, and these must be construed in favor of government. Coleman v United States (1939, CA6 Tenn) 100 F.2d 903

The term "ninety days" cannot be construed as three months. Ash v United States (1941, DC Mass) 37 F Supp 464

104. Application

Testimony of secretary that insured had signed application for change of beneficiary from sister to wife was insufficient to establish change where records of Veterans Administration [now Department of Veterans Affairs] showed no such change. Watson v United States (1950, CA5 Ga) 185 F.2d 292

Time limit for bringing new suit after failure of former one is jurisdictional. Jewell v United States (1939, DC Ky) 27 F Supp 836

105. -Administrative proceedings

Statute of limitations applies not to administrative consideration of claims but only to bringing of suit thereon. Ball v United States (1939, CA6 Ohio) 101 F.2d 272, cert den (1939) 308 US 563, 84 L Ed 473, 60 S Ct 74, reh den (1939) 308 US 635, 84 L Ed 528, 60 S Ct 134

Even if administrator [now Secretary] could entertain appeal after expiration of time for appeal to claim council, suit will not lie after limitation of time to sue has expired, where claimant takes no proceedings for review by such administrator [now Secretary]. Thomas v United States (1934, DC Minn) 12 F Supp 639

Interdepartmental appeals are entirely controlled by departmental regulations, and statutory provision that denial of claim of insurance by any employee or agency of veterans' administration [now Department of Veterans Affairs] should constitute disagreement for purpose of limitation statute does not govern or regulate appeals from one departmental agency to another. Sullivan v United States (1937, DC Ky) 26 F Supp 876, affd (1941, CA6 Ky) 116 F.2d 576

106. Laches

Insured was not guilty of laches in asserting that his acceptance of converted policy was result of mutual mistake as to character of his disability. United States v Golden (1929, CA10 NM) 34 F.2d 367

Suit to reform policy and to recover on same as reformed was not barred by laches. Johnson v White (1930, CA8 Ark) 39 F.2d 793

Conjecture unsupported by proof that claim might have been made to veterans' bureau [now Department of Veterans Affairs] many years before suit was brought could not be accepted as substitute for required clear and satisfactory evidence necessary to justify long delay in bringing suit. United States v McCoy (1934, CA5 Ala) 73 F.2d 786

Acquiescence in disallowance of claim for thirteen years was bar to beneficiary's effort to obtain revival of claim by intervention in proceeding instituted by administrator of insured. Live Stock Nat'l Bank v United States (1941, CA7 Ill) 122 F.2d 179, cert den (1942) 315 US 802, 86 L Ed 1202, 62 S Ct 631
Power to fix period of limitations in which suits may be brought on war risk insurance policies belongs to Congress, and principle of laches should not be applied in such cases unless it rises to dignity of estoppel.  Tarter v United States (1937, DC Ky) 17 F Supp 691

Laches on part of plaintiff precluded his reliance upon estoppel.  Coleman v United States (1937, DC Tenn) 18 F Supp 71, affd (1939, CA6 Tenn) 100 F.2d 903

107. Miscellaneous

Claim was barred where suit is brought on war risk insurance policy 13 years after cause of action accrued and no claim had been made during such period.  Wilson v United States (1934, CA10 Colo) 70 F.2d 176

Limitation period had expired where insured became disabled in June 1919 and died in January 1921, and claim was not filed until July 1932, and suit was not brought until April 1935.  Dowell v United States (1936, CA5 Ga) 86 F.2d 120

Suit was barred where claim was denied January 2, 1920 and suit instituted February 23, 1932 though decision on claim was delayed for 11 months after date of filing in 1919.  United States v Arditto (1936, CA6 Mich) 86 F.2d 787

Suit was barred after July 1, 1933, where, in action on war risk policy, complaint showed that contingency on which claim was founded occurred at latest on July 1, 1972; hence, when insured died on March 25, 1934 and beneficiary filed informal claim with veterans' administration [now Department of Veterans Affairs] on July 28, 1934, which claim was denied as also was more formal subsequent claim, suit commenced on November 6, 1940 was barred by the statute.  Roskos v United States (1942, CA3 NJ) 130 F.2d 751, cert den (1942) 131 US 696, 87 L Ed 557, 63 S Ct 437

2. Operation of Limitation Period

108. Commencement and running of limitation period

Limitation period for total disability benefits under policy of government insurance begins to run at time when right to payments under policy first accrues, not from time for payment of each monthly installment in which such policy is payable.  United States v Towery (1939) 306 US 324, 83 L Ed 678, 59 S Ct 522, reh den (1939) 306 US 668, 83 L Ed 1063, 59 S Ct 640

As long as insured under converted policy keeps his policy in force by payment of premiums, he may make his claim, and, if denied, bring suit for total and permanent disability at any time, provided it is done within 6 years "after the right accrued."  Campbell v United States (1933, DC La) 3 F Supp 942

109. -Contingency upon which claim founded

"The contingency on which the claim is founded," and from which six-year period of limitations begins to run, is based on permanent disability or death while policy is in force and does not mean time when each particular payment, or right of any particular person to payment, accrues.  United States v Towery (1939) 306 US 324, 83 L Ed 678, 59 S Ct 522, reh den (1939) 306 US 668, 83 L Ed 1063, 59 S Ct 640

Date of disability is contingency which starts statute running where total disability precedes death.  United States v Towery (1939) 306 US 324, 83 L Ed 678, 59 S Ct 522, reh den (1939) 306 US 668, 83 L Ed 1063, 59 S Ct 640;  Roskos v United States (1942, CA3 NJ) 130 F.2d 751, cert den (1942) 317 US 696, 87 L Ed 557, 63 S Ct 437;  Domena v United States (1945, CA1 Puerto Rico) 149 F.2d 810;  Baker v United States (1942, DC Mont) 50 F Supp 36

Contingency which starts statute running in case of claims for permanent total disability is date of inception of total disability.  McDowell v United States (1939, CA10 Okla) 107 F.2d 553;  Simmons v United States (1940, CA4 NC) 110 F.2d 296, reh den (1940, CA4 NC) 111 F.2d 618;  Sullivan v United States (1941, CA6 Ky) 116 F.2d 576;  Roskos v United States (1942, CA3 NJ) 130 F.2d 751, cert den (1942) 317 US 696, 87 L Ed 557, 63 S Ct 437
Contingency on which claim for war risk insurance was founded was death of insured in 1918 and not refusal of government to pay installments which fell due after 1938, so that action on policy brought in 1939 was barred by statute requiring such actions to be brought within 6 years after right accrued for which claim was made. Bono v United States (1940, CA2 NY) 113 F.2d 724

If total and permanent disability does not occur before insured's death intervenes, it is death which conditions claim, and period of limitations begins accordingly, but where total and permanent disability exists it necessarily precedes death and, hence, is condition which operates to mature claim against which period of limitations runs. Roskos v United States (1942, CA3 NJ) 130 F.2d 751, cert den (1942) 317 US 376, 87 L Ed 557, 63 S Ct 437

Action on claim based on maturing by death of converted war risk insurance policy did not arise until contingency of death occurred; therefore, suit filed within six years thereafter is in time, although policy has lapsed for nonpayment of premiums more than six years before action was brought. Moskowitz v United States (1944, CA5 Ga) 145 F.2d 196

Contingency which starts statute running in case of claim for death benefits is date of death. Riley v United States (1954, CA4 W Va) 212 F.2d 692, 44 ALR2d 1182; United States v Willhite (1955, CA4 NC) 219 F.2d 343; Prifti v United States (1941, DC Mass) 37 F Supp 121; Jones v Gaillard (1941) 241 Ala 571, 4 So 2d 131

"Contingency on which claim is founded" means death of insured, and limitations begin to run from that date and not from due date of each installment which would have been payable to beneficiary from date of death; thus, that suit filed 12 years after death for unpaid monthly installments within 6 years of time of suit is barred as to all installments. Cole v United States (1940) 72 App DC 118, 112 F.2d 203, cert den (1940) 311 US 647, 85 L Ed 413, 61 S Ct 31, reh den (1940) 311 US 726, 85 L Ed 473, 61 S Ct 130

110. -Death

If insured has been continuously and unexplainedly absent for period of 7 years so that he may be presumed dead as of end of 7th year, statute of limitations on claim for death benefits begins to run at expiration of 7 year period, notwithstanding that it is established as matter of fact that death occurred prior to expiration of such period; to compute six-year limitation period from date which trier of fact establishes as date of death, in disappearance case, would be to say that beneficiary's right to recover expires before she can successfully prosecute lawsuit to enforce that right; it is only when beneficiary proves merely fact of insured's seven years unexplained absence that statute establishes presumption of death as of end of period; "contingency on which claim is founded" must, therefore, mean end of seven-year period when presumption of death arises. Peak v United States (1957) 353 US 354, 1 L Ed 2d 631, 77 S Ct 613

Cause of action for death benefits under policy of government insurance accrues on death of insured, rather than on date of official notice to beneficiary. Riley v United States (1954, CA4 W Va) 212 F.2d 692, 44 ALR2d 1182

Action on national service policy brought within six years after expiration of seven-year period after insured's unexplained absence is timely, though policy lapsed within seven-year period, and recovery can be had only on basis that insured died prior to lapse of policy. United States v Willhite (1955, CA4 NC) 219 F.2d 343

Limitation period of 38 USCS § 784 [now 38 USCS § 1984] begins to run at death of insured, and administrative proceedings, even though they include initial grant of benefits followed by revocation, do not erase time already accrued between death and filing of claim. De Castillo v United States (1970, App DC) 141 US App DC 310, 438 F.2d 151

Action upon war risk insurance policy which was in full force and effect at time of disappearance of insured was not barred by limitations if brought at end of seven years, ripening presumption of death; presumption was of death and not of time of death. Howard v United States (1939, DC Wash) 28 F Supp 985

Right of action on war risk insurance policy accrued when insured was killed. Prifti v United States (1941, DC Mass) 37 F Supp 121
Claim for death benefits under policy of government insurance generally accrues on date of death of insured. Jones v Gaillard (1941) 241 Ala 571, 4 So 2d 131

111. -Denial of claim

Appeal from denial of claim eliminates denial, and there is no denial until disposition of appeal. Hansen v United States (1933, CA7 Ill) 67 F.2d 613, cert den (1934) 291 US 670, 78 L Ed 1060, 54 S Ct 454; Thelin v United States (1934, CA7 Ill) 73 F.2d 101; Brown v United States (1934, CA7 Ill) 73 F.2d 309; Anderson v United States (1932, DC Ky) 5 F Supp 269; Albek v United States (1933, DC NY) 4 F Supp 1020

Limitation begin to run from denial of claim where claimant fails to appeal to administrator [now Secretary]. Harris v United States (1934, CA4 NC) 72 F.2d 982

As regards limitation, claim was denied when notice of denial reached destination, though not actually received by claimant until later date. United States v Tarrer (1935, CA5 Ga) 77 F.2d 423, cert den (1935) 296 US 574, 80 L Ed 405, 56 S Ct 125; United States v Craig (1936, CA7 Ind) 83 F.2d 361; Creasy v United States (1933, DC Va) 4 F Supp 175

Suit begun July 6, 1932 was barred where claim for insurance benefits was made April 10, 1919, and denied July 26, 1922 since right to bring suit accrued thereupon and suit could be instituted within six years after such date; period during which claim is pending could not be added to time allowed for bringing suit. United States v McQuilkin (1937, CA7 Ill) 88 F.2d 476, cert den (1937) 301 US 683, 81 L Ed 1341, 57 S Ct 784

Although letter from veterans’ administration [now Department of Veterans Affairs] might not have been understood as denial of claim for insurance, where suit was not brought until ten years thereafter, it must be assumed that letter was taken as denial and therefore suit was too late. Burns v United States (1939, CA2 NY) 101 F.2d 83

Fact that veterans’ administrator [now Secretary] reconsidered claim and then denied it did not revive right to sue which had already been barred where right to sue on claim was outlawed by statute of limitations between time original claim was denied and time a renewed claim was made. Ball v United States (1939, CA6 Ohio) 101 F.2d 272, cert den (1939) 308 US 563, 84 L Ed 473, 60 S Ct 74, reh den (1939) 308 US 635, 84 L Ed 528, 60 S Ct 134

Denial of claim for war risk insurance benefits must have been final, and administrative relief exhausted before action could be instituted; otherwise statute of limitations was suspended; where claim was for full benefits under war risk insurance policy, payment of part only, without denial of balance, did not preclude bringing timely suit after denial of such balance. Gambill v United States (1939, CA10 Okla) 102 F.2d 667

Reconsideration of claim by veterans’ administration [now Department of Veterans Affairs] which had already been denied did not have effect of nullifying statutory limitation on claim on war risk policy which had been barred by running of statute. Neely v United States (1940, CA4 W Va) 115 F.2d 448

While veterans’ administration [now Department of Veterans Affairs] had authority to consider claims upon which right to sue has been lost by lapse of time, such consideration could not raise fallen bar of statute so as to revive right to sue. Roskos v United States (1942, CA3 NJ) 130 F.2d 751, cert den (1942) 317 US 696, 87 L Ed 557, 63 S Ct 437

Where mother of deceased soldier, through her attorney, wrote veterans’ bureau [now Department of Veterans Affairs] advising them of soldier’s death, requesting reinstatement of life insurance which he carried at time of his discharge from army, and asking that letter be considered as sufficient application to save claim and asking for blank forms on which to file claim, reply that insurance had lapsed for nonpayment of premiums and, therefore, that no insurance was payable was a denial of any right to make claim thereto, and statutory period for commencement of action on such policy began to run from date of reply. Dyer v United States (1946, App DC) 81 US App DC 4, 154 F.2d 14, cert den (1946) 329 US 722, 91 L Ed 626, 67 S Ct 66

Reopening and reconsideration of claim after denial eliminated denial, and there was no denial until further decision. Taylor v United States (1932, DC NC) 57 F.2d 331

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Decision of administrator's claims council, and not that of board of appeals, constituted "disagreement" which was necessary prerequisite to action in court, and which started running of limitations against such action. Thomas v United States (1934, DC Minn) 12 F Supp 639

Suit brought by veteran's widow individually and as administratrix on September 22, 1932 was not barred where veteran's claim was reopened after his death in 1931 and was finally denied by board of appeal on April 29, 1932. Kane v United States (1939, DC Mass) 25 F Supp 839

112. -Disability

Period of limitations begins to run against suit for permanent total disability benefits and death benefits at date of occurrence of total and permanent disability. Cable v United States (1939, CA7 Ill) 104 F.2d 541

Statute begins to run when claimant becomes totally and permanently disabled, and not from date when he is notified of this rating. Simmons v United States (1940, CA4 NC) 110 F.2d 296, reh den (1940, CA4 NC) 111 F.2d 618; Sullivan v United States (1941, CA6 Ky) 116 F.2d 576

Under benefit provisions of government war risk and life insurance policies, insured secured matured claim at moment of total and permanent disability, though proof of disability might be condition precedent to insurer's liability under certain types of insurance policies. United States v Garland (1941, CA4 Va) 122 F.2d 118, 136 ALR 918, cert den (1941) 314 US 685, 86 L Ed 548, 62 S Ct 189

Right of action on claim for permanent total disability benefits accrues on date of inception of total disability. Roskos v United States (1942, CA3 NJ) 130 F.2d 751, cert den (1942) 317 US 696, 87 L Ed 557, 63 S Ct 437

Action brought in 1941 was barred where insured was discharged from army for physical disability in 1918 and died in 1937, and his wife's claim on policy was denied in 1940, since period of limitations began to run when disability occurred. Domena v United States (1945, CA1 Puerto Rico) 149 F.2d 810

In suit to recover monthly installments from date of insured's disability to date of his death, allegedly due under war risk insurance policy, six-year period of limitation began to run against administrator of insured from date of disability and not from date of death. Vaughn v United States (1942, DC Ark) 43 F Supp 306

Suit for waiver of premiums and payment of benefits on national service life insurance policy for disability of loss of speech was barred by 6-year limitation period under 38 USCS § 784 [now 38 USCS § 1984] where claim arose upon surgical removal of claimant's larynx 8 years prior to bringing suit. Galligan v United States (1983, ED NY) 565 F Supp 896, affd without op (1983, CA2 NY) 742 F.2d 1436

113. Bar to subsequent related claims

Procuring of summons, service of copy on United States Attorney, and mailing of another copy to Attorney General were not beginning of suit against United States on war risk insurance policy within requirement of statute of limitations, where statute permitting such action to be brought provides that plaintiff must file petition with clerk of court, stating facts upon which claim was based, and that he must cause one copy of this to be served upon District Attorney and mail another to Attorney General. Munro v United States (1938) 303 US 36, 82 L Ed 633, 58 S Ct 421

Plaintiff could be admitted as plaintiff in capacity of administrator of beneficiaries although statute of limitations had run against his claim in that capacity where he was suing also as administrator of insured. United States v Powell (1938, CA4 SC) 93 F.2d 788

Where suit is for benefit of all persons having interest in proceeds of contract, others having such interest may become parties after period of limitations has run if suit is filed within required time by heir of insured or by beneficiary of policy whose claim has been made and denied. Johnson v United States (1939, CA10 Okla) 102 F.2d 729
It is filing of petition that determines when suit is brought. Genesee Valley Trust Co. v United States (1940, CA2 NY) 116 F.2d 407

Where insurance under converted war risk insurance policy lapsed on August 1, 1931, for nonpayment of July 1st premium and claim was filed July 3, 1931, with veterans' administration [now Department of Veterans Affairs] and was disallowed, where notice was given on November 16, 1931, where insured died on February 25, 1937, and where his brother, beneficiary in another policy, on July 12, 1937, reopened question of disability and former decision was reaffirmed, and notice given April 21, 1939, even if period of pendency of latter claim could operate to suspend limitations in favor of action on original claim so as to be added to time of pendency of original claim, six-year statute of limitations would still bar action on original claim filed on June 22, 1942. Moskowitz v United States (1944, CA5 Ga) 145 F.2d 196

Subsequent filing of other claims after action on first claim has been barred by running of statute of limitations will not raise bar to suit. Dyer v United States (1946, App DC) 81 US App DC 4, 154 F.2d 14, cert den (1946) 329 US 722, 91 L Ed 626, 67 S Ct 66

Second claim on war risk insurance policy could not operate to restore right to sue government lost by inaction for over seven years after first claim had first been rejected. Albek v United States (1941, DC Mass) 38 F Supp 1021

Suspension provisions do not apply to proceedings arising after suit upon claim has been barred. Boyd v United States (1942, DC Wis) 47 F Supp 339

Any attempt to revive claim for purpose of avoiding statute of limitations would not be allowed where there was nothing to indicate that first denial of claim was not treated as final denial. Baker v United States (1942, DC Mont) 50 F Supp 36

114. Miscellaneous

Contention that claim of insured's estate did not arise until payments to his father's imposter were discontinued was without merit. United States v Chavez (1936, CA10 NM) 87 F.2d 16

Period of limitations began to run when veterans' administration [now Department of Veterans Affairs] stopped payments under gratuitous national service life insurance policy, and five-year period between insured's death and the filing of the claim on which payments were made should not be taken into consideration. Tubongbanua v United States (1963, DC Dist Col) 223 F Supp 379

3. Commencement of Action For Purposes of Limitation Period

115. Generally

Courts are not justified in extending time by implication where governments' consent to be sued is definitely limited in point of time. Weaver v United States (1934, CA4 NC) 72 F.2d 20

Congress, by extending time for filing claims under gratuitous life insurance to seven years, did not by implication extend jurisdiction of courts over actions on such claims to seven years. Prado Del Castillo v United States (1959, CA9 Ariz) 272 F.2d 326, cert den (1960) 361 US 966, 4 L Ed 2d 546, 80 S Ct 595

116. Service of process

Procurement of summons and serving of copy on United States Attorney and sending another to Attorney General did not begin suit on war risk insurance policy so as to toll statute of limitations. Munro v United States (1938) 303 US 36, 82 L Ed 333, 58 S Ct 421

Suit on policy in South Dakota was barred by limitation because such action was not deemed commenced until service of copy of petition on United States District Attorney. Walton v United States (1934, CA8 SD) 73 F.2d 15

Suit on claim was commenced at date of service on district attorney, though he was absent from his office on first attempt to serve him. Creasy v United States (1933, DC Va) 4 F Supp 175
Where veteran suing in New York had summons served within limitation period, action was timely though petition was not filed until after expiration of such period. Miller v United States (1936, DC NY) 13 F Supp 684

Suit was barred where plaintiff's statement was not served upon district attorney until after limitation period had expired. Henry v United States (1936, DC Pa) 15 F Supp 651

Suit was begun for purpose of statute of limitations when petition was delivered to marshal for service upon district attorney. Creasy v United States (1937, DC Va) 20 F Supp 280

Action was not seasonably begun when original claim on which it was based was not filed for administrative payment until after period of limitation had run. Jewell v United States (1939, DC Ky) 27 F Supp 836

117. Amendment of pleading

Complaint filed by brother and sister of veteran as administrators of his estate and of estate of his deceased mother, beneficiary of his insurance, was amendatory of original complaint filed as individuals and hence within limitation period. Lopez v United States (1936, CA4 NC) 82 F.2d 982

Amended petition not setting up new cause is timely where original was filed within limitation period. Eidam v United States (1936, CA8 Neb) 86 F.2d 192

Where insured, in contract of war risk insurance, was bachelor, and his mother was beneficiary, and both died, some of accumulated installments were due estate of insured and some were due estate of beneficiary, but no part of them was due insured's father in his individual capacity, suit filed by father within period of limitation, though in his individual capacity, was sufficient on which to base subsequent amendments by himself and others in their proper capacities, such amendments not changing cause of action, and relating back to institution of suit. United States v Rasmussen (1938, CA10 Okla) 95 F.2d 842

Amended petition is of no avail where original action is barred. Harrop v United States (1935, DC Neb) 10 F Supp 753

4. Tolling or Suspension of Limitation Period

a. In General

118. Generally

Limitation is not suspended where no claim is pending. Kemp v United States (1935, CA7 Ill) 77 F.2d 213

Nonaction by claimant under war risk term policy cannot be permitted to suspend indefinitely running of statutory period of limitation or allowed to encourage attempts to enforce stale claims in courts. United States v Kelley (1940, CA8 Mo) 110 F.2d 922, cert den (1940) 311 US 669, 85 L Ed 430, 61 S Ct 29

119. Regulations

Administrator's regulation cannot extend period of limitations. Chicago Bank of Commerce v United States (1935, DC III) 9 F Supp 895

Regulation attempting to extend period of suspension of limitations, is invalid. Harrop v United States (1935, DC Neb) 10 F Supp 753

120. Administrative appeals

Term “disagreement” includes denial of claim by any subordinate body of veterans' administration [now Department of Veterans Affairs], but in no way abrogates right of appeal to administrator [now Secretary], including right of review by board of veterans' appeals; hence, limitation of time for suit on claim denied by board was suspended from date of filing claim. Howard v United States (1938, CA6 Tenn) 97 F.2d 987
121. Negotiations

Action filed within 1 year after December, 1931, was not barred where payments were suspended in March, 1926, but bureau [now Department] participated in negotiations of claimant for reopening of matter until finally closed by bureau [now Department] in December 1931. United States v Bollman (1934, CA8 Iowa) 73 F.2d 133

Doctrine of "continued negotiations" was not applicable where seven years lapsed between filing of first and second claims on war risk insurance policy, and there is nothing to show that bureau [now Department] or any of parties, during that interval considered claim pending. Dyer v United States (1946, App DC) 81 US App DC 4, 154 F.2d 14, cert den (1946) 329 US 722, 91 L Ed 626, 67 S Ct 66

122. Miscellaneous

Listing of soldier as deserter did not toll limitations because contingency on which claim was founded is death of soldier within 120 days of enlistment. United States v Siegel (1955, CA9 Wash) 225 F.2d 869

War does not toll six-year period of limitations. Aguilar v United States (1960, DC Dist Col) 183 F Supp 598

b. Administrative Processing and Disposition of Claim

123. Generally

Proviso for 90 days additional time does not apply to claim filed after suit on it has become completely barred. Dowell v United States (1936, CA5 Ga) 86 F.2d 120

Provision allowing claimant 90 days from date of mailing of notice of denial within which to file suit merely makes certain that insured shall have period of at least 90 days from date of mailing of notice of denial for bringing of suit. United States v Pastell (1937, CA4 NC) 91 F.2d 575, 112 ALR 1125

Provisions for 90 days additional time are applicable to suits pending in district court or in court of appeals, on appeal. Walden v United States (1939, CA6 Mich) 106 F.2d 611

Filing of demand by guardian, denial by administrator [now Secretary] of veterans affairs, and failure to bring suit within 90 days from date of mailing of notice of denial does not take away right of insane person to institute suit at any time within three years of removal of his disability. Jensen v United States (1937, DC Idaho) 19 F Supp 494

124. Computation of extension period

For purposes of determining period elapsing between filing of claim sued upon and denial of such claim, suspension ends on date when notice of denial reaches its destination, rather than date when notice is dated or when actual administrative decision was made. United States v Walker (1935, CA5 La) 77 F.2d 415, cert den (1935) 296 US 612, 80 L Ed 434, 56 S Ct 132

Mere fact that notice of denial did not actually reach the insured's representative for several days after it reached proper address, due to representative's absence from home, is not ground for extending time for filing suit. United States v Tarrer (1935, CA5 Ga) 77 F.2d 423, cert den (1935) 296 US 574, 80 L Ed 405, 56 S Ct 125

Action commenced within 90 days after date of letter rejecting claim is not barred. Robinson v United States (1936, CA5 Tex) 84 F.2d 885

Filing of petition with clerk within 90 days after filing suit is timely though not file marked until after expiration of 90-day period. Milton v United States (1939, CA5 La) 105 F.2d 253
Claimant has minimum of 90 days in which to file suit after mailing of notice of denial of claim, and not 90 days in addition to period of suspension.  Walden v United States (1939, CA6 Mich) 106 F.2d 611;  Cohen v United States (1941, CA5 Miss) 121 F.2d 1007

Suit to recover benefits of war risk insurance policy instituted on 91st day after mailing of notice of denial of claim must be dismissed on motion.  Ash v United States (1941, DC Mass) 37 F Supp 464

If it is assumed that claim was filed by deceased between June 29, 1931 and July 3, 1931, then suit should have been filed no later than 90 days after May 11, 1936, date of denial of claim.  Boyd v United States (1942, DC Wis) 47 F Supp 339

125. Filing of claim

Claim deposited in mail was not "filed" within meaning of 38 USCS § 784 [now 38 USCS § 1984]; evidence must be sufficient to show that mailed claim was received by bureau [now Department] within limitation period.  Weaver v United States (1934, CA4 NC) 72 F.2d 20

Affidavit asserting nothing more than partial disability since discharge and application for insurance limited to converted policy was insufficient to constitute claim that would toll statute of limitations.  Stender v United States (1935, CA8 Minn) 75 F.2d 579

After claim is filed, statute of limitations is suspended until final denial.  Gambill v United States (1939, CA10 Okla) 102 F.2d 667

Statute of limitations begins to run from date of soldier's death on war risk insurance policies and was not tolled by letters of inquiry as to such insurance because they did not constitute claims within meaning of statute.  McEntire v United States (1940, CA5 Ga) 115 F.2d 429

Claims filed after expiration of statutory time for filing are of no avail.  Cook v United States (1944, CA10 Okla) 145 F.2d 290

Claim was filed with bureau [now Department] at date letter containing it was received by bureau [now Department].  Creasy v United States (1933, DC Va) 4 F Supp 175

Claim was not filed with bureau [now Department] until paper was delivered to proper officer and lodged by him in his office, mere mailing of claim being insufficient.  Young v United States (1934, DC Idaho) 5 F Supp 500

Claimant cannot, by filing new claim with veterans' administration [now Department of Veterans Affairs], raise already fallen bar of statute of limitations so as to revive right to sue.  Sullivan v United States (1937, DC Ky) 26 F Supp 876, affd (1941, CA6 Ky) 116 F.2d 576

Mere inquiry or request for information is not assertion of claim tolling statute of limitations.  Wang v United States (1961, SD NY) 196 F Supp 240, affd (1962, CA2 NY) 302 F.2d 262

126. Duration of suspension of limitation period

Unexpired limitation period is suspended until disagreement is ended where limitation period has not expired when claim is filed and then unexpired limitation period starts running again.  United States v Gower (1934, CA10 Okla) 71 F.2d 366;  United States v Thomson (1934, CA10 NM) 71 F.2d 860;  Hipkins v United States (1932, DC Md) 1 F Supp 505;  Campbell v United States (1933, DC La) 3 F Supp 942;  Creasy v United States (1933, DC Va) 4 F Supp 175

Delay of sixteen years by veteran in taking action on war risk insurance claim was not conclusive of existence of disagreement so as to terminate period when limitations are suspended against action or claim.  Neely v United States (1940, CA4 W Va) 115 F.2d 448

Occurring of "contingency" immediately starts six-year statute of limitations running which is tolled subsequently during period that claim is filed and until its "denial."  Williams v United States (1955, DC NC) 134 F Supp 333

The statute of limitations was suspended not only from the filing of the insurance claim until the denial of the claim based on an erroneous report of the army but also until the final denial, some 16 years after the claim was filed.  Tupaz v United States (1970, DC Dist Col) 308 F Supp 950
127. Miscellaneous

Suit brought in July, 1936 was timely where period of limitation was suspended during whole period that claim was held in veterans' administration [now Department of Veterans Affairs], and where veteran died in 1920, total permanent disability having occurred while his insurance was in force and having continued to his death, claim was filed in 1931, rejected June 10, 1935, additional evidence submitted in 1936 and again denied July 10, 1936. Danner v United States (1938, CA8 Iowa) 100 F.2d 43

Where paid claim was paid in 1919 and government denied other part in 1934, statute of limitations began running in 1934, since period of limitations is suspended during period between filing of claim and denial of claim. Gambill v United States (1939, CA10 Okla) 102 F.2d 667

c. Renewal of Action Dismissed for Procedural Defects

128. Generally

Provision in predecessor to 38 USCS § 1984, allowing new suit to be brought within one year of failure of certain original suits, was inapplicable to suit for compensation, rather than insurance, benefits, where suit was commenced by insured's administratrix and voluntarily dismissed before suit in question was started. Kemp v United States (1935, CA7 Ill) 77 F.2d 213

Statutory provision that if suit was seasonably begun and failed for defect in process, or for other reasons not affecting merits, new action, if one lies, may be brought within one year though period of limitations has elapsed, merely extends period of limitations, but it does not abrogate principle of res judicata. American Nat'l Bank & Trust Co. v United States (1944, App DC) 79 US App DC 62, 142 F.2d 571

129. Construction

Provision for bringing new suits notwithstanding running of statute of limitation is highly remedial and should be liberally construed. Dumas v United States (1939, CA10 Kan) 103 F.2d 676

130. Parties

Under provision for bringing new suit though statute of limitation has expired, there must be identity of parties, but such requirement is satisfied if plaintiff in second suit claims through, and sues as successor to, assignee or grantee of, or personal representative, of plaintiff in first action. Dumas v United States (1939, CA10 Kan) 103 F.2d 676

Provision allowing new suit to be brought within one year of dismissal of certain original suits is applicable only where original action was brought by proper parties. Ballenger v United States (1935, DC Ky) 11 F Supp 911

131. Basis for dismissal of original action

Sustaining demurrer on ground that petition did not show disagreement supporting suit was not bar to another action on original claim. Griffin v United States (1932, CA7 Ill) 60 F.2d 339

Suit on policy, dismissed because filed before any disagreement existed, was proper basis for commencing second action within one year after dismissal. Johnson v United States (1934, CA9 Mont) 68 F.2d 588

Order dismissing action against United States on ground that disagreement did not exist as to claim upon which right to sue was conditioned was not insufficient as failing to show that dismissal was on ground not going to merits of claim. Burgett v United States (1935, CA7 Ill) 80 F.2d 151, 104 ALR 167

Action on war risk insurance policy for permanent total disability benefits dismissed on ground that policy had lapsed when disability arose, was decision on merits and barred another action within year to recover benefits, on ground that award of compensation, not collected, continued policy in force. Clegg v United States (1940, CA10 Utah) 112 F.2d 886
One year's extension of time for commencing suit granted does not apply to case where original suit failed because barred by statute of limitations. Genesee Valley Trust Co. v United States (1940, CA2 NY) 116 F.2d 407

Dismissal was on merits where plaintiff sued on same policy of war risk insurance and suit was dismissed for want of prosecution on January 31, 1940, hence, new suit filed on January 27, 1941, was barred by doctrine of res judicata notwithstanding statutory provision. American Nat'l Bank & Trust Co. v United States (1944, App DC) 79 US App DC 62, 142 F.2d 571

Where, in action under war risk insurance policy, court did not grant government's motion to remove case from operation of rules of civil procedure, dismissal following death of plaintiff on ground that action was not revived within time permitted by law was not within provision permitting new action when original action was dismissed for reasons not affecting merits. Derrin v United States (1941, DC Or) 41 F Supp 530

132. Miscellaneous

Suit by administrator of deceased insured, commenced less than 1 year after insured's original suit, which had been dismissed after his death for failure to prosecute, was timely, notwithstanding that jurisdictional requisite of disagreement was lacking at time original suit was filed. Johnson v United States (1934, CA9 Mont) 68 F.2d 588

Where claim on policy of war risk insurance in which soldier's mother was beneficiary was filed by soldier's father, and erroneously stated that policy was issued to father, but clearly showed that father was claiming installments due on policy which had accrued by reason of total permanent disability occurring during veteran's lifetime and before policy lapsed, and claim was considered and disallowed on its merits, subsequent action on such claim by father as administrator of mother's estate brought within statutory period after affirmance of the disallowance was not barred by limitations. Curtik v United States (1937, DC Mass) 19 F Supp 447

Second suit commenced within one year from dismissal of first suit which was brought before disagreement was reached and dismissed for lack of jurisdiction was within period of limitation. Mack v United States (1939, DC SC) 29 F Supp 65

Suit is barred where permission given by statute to sue United States upon contract of war risk insurance has expired nearly year before suit is brought. Prifti v United States (1941, DC Mass) 37 F Supp 121

d. Disability of Claimant

(1). In General

133. Generally

Provision that persons under legal disability shall have three years in which to bring suit after removal of their disabilities does not mean that such persons may bring suit without having right or claim to sue on, and it does not confer any right upon such persons; its only effect is to keep alive such rights as they have or acquire. Winslow v United States (1945, App DC) 79 US App DC 366, 147 F.2d 157

(2). Mental Incompetents

134. Generally

Term "insane persons" is not restricted to persons legally adjudged insane. Holm v United States (1936, DC Iowa) 15 F Supp 662

Principle that insured must put Administration [now Department] on notice to consider proof in support of claim and must assert that such proof entitles him to benefits under terms of his policy to qualify for such consideration is not applicable where filing of claim for permanent and total disability benefits is prevented by veteran's insanity, notwithstanding appointment of committee,
135. **Time of commencement of disability**

Provision relative to incompetents includes cases where total and permanent disability occurred first and was followed by mental incompetency. United States v Lund (1935, CA7 Wis) 76 F.2d 723

Statute of limitations on claims for government insurance is tolled by mental incompetency, even where claim accrued prior to insured's incompetency. United States v Pastell (1937, CA4 NC) 91 F.2d 575, 112 ALR 1125

136. **Determination of competence**

In action to recover disability benefits under war risk insurance policies, where there was substantial evidence to show that insured was insane person on date on which bar of limitations otherwise would have been effective, jury need not believe that insured was raving lunatic at crucial date, and before that time he might well have held office boy's job, working under close supervision, and still not have been able to protect his rights under Veterans’ Act. United States v Randall (1944, CA2 NY) 140 F.2d 70

Adjudication by probate court of competency of plaintiff at time of appointment of guardian for him was not conclusive on federal district court but was entitled to consideration with other evidence in case. Viccioni v United States (1936, DC RI) 15 F Supp 547, affd (1939, CA1 RI) 101 F.2d 192

Verdict of jury of state court restoring insured to the management of his own estate was not adjudication that insured was not then incompetent person with respect to running of statute of limitations against action on policy. Hilbert v United States (1942, DC Ill) 43 F Supp 838

137. **Removal of disability**

Filing of demand by guardian, denial by administrator [now Secretary] of veterans’ affairs, and failure to bring suit within 90 days from date of mailing of notice of denial does not take away right of insane person to institute suit at any time within three years of removal of his disability. Jensen v United States (1937, DC Idaho) 19 F Supp 494

138. **Appointment of guardian**

Disability of insanity is to be considered as removed upon appointment of guardian who sues. United States v Earwood (1934, CA5 Ga) 71 F.2d 507, vacated on other grounds (1935) 294 US 695, 79 L Ed 1233, 55 S Ct 511

Appointment of committee or guardian for incompetent veteran does not remove veteran's disability for purposes of statute of limitations. Wolf v United States (1935, DC NY) 10 F Supp 899

Appointment of guardian is not removal of disability operating to start limitations running against insane person. Shambegian v United States (1936, DC RI) 14 F Supp 93; Portland Trust & Sav. Bank v United States (1938, DC Or) 24 F Supp 953

139. **Death**

Disability of veteran by reason of insanity is removed by his death, and thereafter suit may be brought within three years after removal of such disability. Coleman v United States (1939, CA6 Tenn) 100 F.2d 903

140. **Maintenance of suit by guardian during disability**

Guardian of an insane veteran was entitled to sue for ward after expiration of limitation periods but before disability of ward was removed; provision for tolling statute of limitations during insanity of veteran did not prevent insane insured veteran from maintaining action by his guardian at any time during duration of incompetency, without waiting until disability was removed. Johnson v United States (1937, CA8 Minn) 87 F.2d 940, 109 ALR 949
Guardian has no authority to waive any right of his ward. Shambegian v United States (1936, DC RI) 14 F Supp 93

Action instituted November 22, 1935, by guardian appointed February 14, 1933, for veteran alleged to have been mentally incompetent from time of discharge from army was not demurrable. Holm v United States (1936, DC Iowa) 15 F Supp 662

Suit by guardian of insane World War veteran on policy of war risk insurance was not barred where brought while veteran was incompetent and insane, such suit not being barred until three years after disability has been removed. Portland Trust & Sav. Bank v United States (1938, DC Or) 24 F Supp 953

141. Miscellaneous

Government was not estopped to claim statute of limitation by giving incorrect information by veterans' bureau [now Department of Veterans Affairs] that no record had been found of any application for or issuance of policy, whereby insane veteran's guardian and subsequent administrator was deceived and caused not to file timely claim or suit. Coleman v United States (1939, CA6 Tenn) 100 F.2d 903

Where action by veteran in his own name to recover total and permanent disability benefits under a war risk policy was dismissed for want of jurisdiction because action was not brought within time allowed by statute, and there was no fraud in procuring judgment of dismissal and there was no suggestion that attorneys for defendant knew that plaintiff was incompetent, judgment of dismissal was bar to subsequent suit on same cause of action brought by incompetent veteran by his next friend. McCoy v United States (1944, DC Ark) 54 F Supp 960

(3). Minors

142. Generally

Allowance of period in which infant beneficiaries may sue after reaching maturity does not permit suits by such infants on claims which became barred during lifetime of insured. Winslow v United States (1945, App DC) 79 US App DC 366, 147 F.2d 157

Limitation period for bringing suit under national service policy was tolled from time that decedent's son filed claim for death benefits after attaining his majority until claim was denied by Veterans Administration [now Department of Veterans Affairs]. Timoni v United States (1969, App DC) 135 US App DC 407, 419 F.2d 294

Action brought within 3 years of plaintiff's attainment of majority was timely. Robinson v United States (1935, DC NY) 12 F Supp 160

143. Maintenance of suit by representative during disability

Claim of minor child made through administrator was barred; limitation period was not tolled during minority of insured where right of action was in another, such as trustee or administrator, even though proceeds were for ultimate benefit of minor. Dowell v United States (1936, CA5 Ga) 86 F.2d 120

Action by executrix for minor children within 3 years after appointment was timely. Crew v United States (1933, DC La) 3 F Supp 1023

144. Miscellaneous

Suit on policy of war risk insurance instituted on March 24, 1933, by administratrix and distributee of estate of veteran who died March 30, 1919, holder of uncollected bonus which restored policy, was barred under statute prohibiting suit unless brought within 6 years after right accrued and permitting suit by infant within 3 years after majority in spite of fact that administratrix did not become of age until June 3, 1930, because of fact that she had no claim enforceable in her own right. Smallwood v United States (1937, CA4 Va) 91 F.2d 287

Infant beneficiary could not bring suit within 3 years after removal of disability where war risk term insurance policy had lapsed in veteran's lifetime, but it afterwards revived and matured by
reason of his total permanent disability, and thereafter, in his lifetime, statutory period of limitations elapsed and suit on policy was barred. Winslow v United States (1945, App DC) 79 US App DC 366, 147 F.2d 157

Even though widow’s right to insurance has been cut off by lapse of 6-year period provided in 38 USCS § 784, her minor child’s rights are not cut off with hers. Philippine Nat’l Bank v United States (1962, App DC) 112 US App DC 126, 300 F.2d 718

Limitation exception as to infant was inapplicable where infant had no interest in installment accruing prior to death of father. Ballenger v United States (1935, DC Ky) 11 F Supp 911

F. Pleadings
1. In General
145. Generally

Opinion evidence as to disability or to degree or permanency of injury to insured under war risk insurance policy was admissible, since such evidence related to question not satisfactorily understood by laymen. Runkle v United States (1930, CA10 Colo) 42 F.2d 804; United States v Smith (1933, CA2 NY) 68 F.2d 38; United States v Russian (1934, CA3 Pa) 73 F.2d 363; United States v Bowman (1934, CA10 Utah) 73 F.2d 716

Allegation in action to recover on insurance policy, to effect that plaintiff was entitled to recover as set out in policy of insurance, was not defective where copy of policy is set out in complaint and other allegations properly indicated basis for claim. Covey v United States (1920, DC Iowa) 263 F 768

Petition alleging that Veterans’ Administration [now Department of Veterans Affairs] decision was unjust, arbitrary and unlawful was legal conclusion and therefore insufficient. Silberschein v United States (1923, DC Mich) 285 F 397, aff’d (1924) 266 US 221, 69 L Ed 256, 45 S Ct 69 (superseded by statute as stated in New York v Eadarso (1996, ED NY) 946 F Supp 240)

Documents representing application for payment of insurance and communications with bureau [now Department] showing denial of claim are not foundation of plaintiff’s claim; plaintiff will be required to specifically set out in his pleading date of application and of disagreement with bureau [now Department]. Kenneth v United States (1931, DC La) 51 F.2d 122

Plaintiff, suing on a war risk insurance policy, was required to plead and prove facts showing jurisdiction. Bigley v United States (1934, DC Tex) 6 F Supp 748

In suits on contracts of war risk insurance, pleading must show that action sought to be maintained was within consent of sovereign in every respect, including statutes limiting time within which, after accrual of cause of action, suit thereon was maintainable. Lewis v United States (1939, DC Tenn) 27 F Supp 894

146. Service

By filing its answer and participating in trial, government waived service of process. United States v Harris (1935, CA7 Ill) 80 F.2d 771

Claimant was required to file verified petition and serve copy thereof on United States District Attorney and mail copy to Attorney General. Cassarello v United States (1919, DC Pa) 265 F 326; Shepherdson v United States (1921, DC Pa) 271 F 330

Failure of plaintiff to send copy of petition by registered mail to Attorney General and file affidavit with clerk was waived when United States Attorney made general appearance and pled to merits. Wilhelm v United States (1937, DC NC) 18 F Supp 600

147. Amendment

Plaintiff’s amendment of complaint to accord with proofs is properly permitted where government is not prejudiced by such amendment. United States v Oliver (1932, CA9 Cal) 59 F.2d 55
Permitting amendment of answer during trial is not abuse of discretion. O'Quinn v United States (1934, CA5 La) 70 F.2d 599

Defendant's exception that no cause of action was shown by allegations, because they do not allege specific date when total and permanent disability began and that it fell within life of policy, could be overruled and treated as demand for bill of particulars to permit plaintiff to amend complaint. Daniel v United States (1937, DC La) 20 F Supp 496

148. Miscellaneous

Soldier could recover where wound was received after period to apply for insurance had expired, although complaint did not state date policy was issued. United States v Suomy (1934, CA9 Or) 70 F.2d 542

Reply based on reinstated policy after lapse for nonpayment of premiums was not departure although complaint was based on policy in force when insured died. Kintner v United States (1934, CA10 Colo) 71 F.2d 961

Petition is sufficient if it alleges that policy was in force when veteran died by reason of actual payment of premium. Eidam v United States (1936, CA8 Neb) 86 F.2d 192

Petition of an incompetent, alleging total and permanent disability and required disagreement was sufficient. Viccioni v United States (1936, DC RI) 14 F Supp 95

2. Statute of Limitations

149. Generally

Requirement for timely institution of suit constituted jurisdictional condition precedent which could not be waived or abrogated by estoppel, and with which plaintiff must show compliance to make out prima facie case. Lynch v United States (1935, CA5 Ga) 80 F.2d 418, cert den (1936) 298 US 658, 80 L Ed 1384, 56 S Ct 683, reh den (1936) 298 US 692, 80 L Ed 1409, 56 S Ct 937; United States v Trollinger (1936, CA4 Va) 81 F.2d 167, cert dismd (1936) 299 US 617, 81 L Ed 455, 57 S Ct 757

Petition was required to affirmatively show that right of action was not barred by limitation. United States v Trollinger (1936, CA4 Va) 81 F.2d 167, cert dismd (1936) 299 US 617, 81 L Ed 455, 57 S Ct 757

Petition should have pleaded that limitation period was suspended during consideration of veteran's claim in bureau [now Department]. United States v Valndza (1936, CA6 Ohio) 81 F.2d 615

In suit on war risk insurance policy, it was essential that plaintiff allege facts which brought him squarely within time provisions. Vaughn v United States (1942, DC Ark) 43 F Supp 306

150. Defensive pleading

Action by widow of World War veteran to recover automatic insurance benefits was barred by six-year limitation from date of death of veteran under statute without its being pleaded. Morgan v United States (1940, CA5 Ga) 115 F.2d 427, cert den (1941) 312 US 701, 85 L Ed 1135, 61 S Ct 806

Fact that suit was not commenced within one year was jurisdictional defect which need not be affirmatively pleaded. Miller v United States (1932, DC NY) 57 F.2d 889

Fairness demanded that government raise question of statute of limitations upon trial, or be precluded from raising it upon appeal, since running of limitations might be suspended during certain contingencies, which contingencies might be shown on trial of case if question of limitations was raised. Vincent v United States (1935, Dist Col App) 64 App DC 178, 76 F.2d 428

151. Waiver
Whether or not action was commenced within limitation period was question of fact, and where parties stipulated with respect to it, they waived it and were bound. United States v Thomson (1934, CA10 NM) 71 F.2d 860

Government waived its defense of limitations by failing to rely upon such defense at trial. United States v Ellison (1935, CA4 W Va) 74 F.2d 864, cert den (1935) 295 US 750, 79 L Ed 1695, 55 S Ct 829

Failure to object to additional allegation of complaint which accrues after original complaint was filed constituted waiver of statute of limitations. United States v Craig (1936, CA7 Ind) 83 F.2d 361

3. Other Particular Matters

152. Disagreement as to claim

Disagreement between claimant and bureau [now Department] is jurisdictional, and failure of district attorney to verify answer to verified complaint, to which plaintiff interposed no objection, requires award of nonsuit on plaintiff's failure to prove disagreement. Manke v United States (1930, CA9 Cal) 38 F.2d 624, cert den (1930) 282 US 837, 75 L Ed 743, 51 S Ct 26

Motion made at trial to dismiss on ground original complaint failed to allege requisite disagreement came too late where second paragraph of complaint was filed without objection and government entered general denial. United States v Craig (1936, CA7 Ind) 83 F.2d 361

In action to recover on contract of war risk insurance, where petition was sufficient to charge existence of valid disagreement and bill of exceptions was stricken, binding presumption arose that substantial evidence was submitted to show valid jurisdictional disagreement existed. United States v Rasmussen (1938, CA10 Okla) 95 F.2d 842

To confer jurisdiction on court pursuant to predecessor to 38 USCS § 1984, it must appear on face of complaint against United States in suit under contract of veterans' insurance that there has been disagreement on insurance claim between Veterans Administration [now Department of Veterans Affairs] and plaintiff. Covey v United States (1920, DC Iowa) 263 F 768; Howard v United States (1924, DC Ky) 2 F.2d 170; Reece v United States (1927, DC Mo) 17 F.2d 856

Under War Risk Insurance Act (predecessor to 38 USCS §§ 1940 et seq.), district court had jurisdiction of action on policy of war risk insurance only where there had been disagreement between Bureau of War Risk Insurance [now Department of Veterans Affairs] and plaintiff, and petition must allege such disagreement so as to show jurisdiction on its face. Howard v United States (1924, DC Ky) 2 F.2d 170

Petition failing to show disagreement between bureau [now Department] and claimant is insufficient. Reece v United States (1927, DC Mo) 17 F.2d 856; United States v Thomas (1936, CA6 Tenn) 85 F.2d 614

153. Time of disability of claimant

In suit instituted in 1954 to recover proceeds of national service life insurance policy issued to insured who had been missing since disappearing from his army unit in 1943, a complaint alleging that prior to insured's disappearance he had become totally and permanently disabled and had died in 1943, and that his total and permanent disability during time policy was in force entitled him to waiver of premiums on policy, was sufficient as against claims by government, first, that, because insured's death must, under predecessor to 38 USC § 108, be presumed to have occurred in 1950, at end of seven years' unexplained absence, policy had, at time of death, lapsed for nonpayment of premiums, and, second, in alternative, that, if claim was founded on insured's death in 1943, it was barred by six-year statute of limitations which, under predecessor to 38 USC § 1984, was applicable to claims on national service life insurance policies. Peak v United States (1957) 353 US 43, 1 L Ed 2d 631, 77 S Ct 613

Complaint alleging total and permanent disability between specified dates, but not alleging such disability at time suit was brought, did not state cause of action, in view of definition of "total
and permanent disability” in regulations. Personius v United States (1933, CA9 Idaho) 65 F.2d 646

Failure of complaint to allege that total and permanent disability occurred during period policy was in force could be cured by evidence, not excepted to, establishing such fact. United States v Anderson (1934, CA9 Or) 70 F.2d 537

Petition was deficient where it failed to allege total permanent disability during life of policy and could not support judgment for plaintiff even if evidence made out good case; hence, judgment for plaintiff will be reversed though no objection was made to complaint in trial court; in absence of allegation of total and permanent disability at date of lapse of policy, complaint wholly failed to state cause of action. United States v Payne (1934, CA9 Wash) 73 F.2d 900, cert dismd (1936) 296 US 659, 80 L Ed 469, 56 S Ct 87

154. Designation of plaintiff as beneficiary

Petition was sufficient to allege designation of plaintiffs as beneficiaries under War Risk Insurance Act (predecessor to 38 USCS §§ 1940 et seq.) where it alleged that petitioners were sole beneficiaries of duly probated will of insured, even though will was not exhibited, and petition did not allege that insurance was actually mentioned in will. United States v Napoleon (1924, CA5 Fla) 296 F 811

Allegation in complaint that insured took out policy "designating no authorized person as beneficiary on such policy" was insufficient to show that wife of insured had not been designated as beneficiary. United States v Smith (1932, CA9 Wash) 55 F.2d 141, 81 ALR 926

Complaint alleging plaintiff was brother and beneficiary of insured was sufficient. Christensen v Christensen (1926, DC NY) 14 F.2d 475

G. Parties

1. In General

155. Generally

Language of predecessor to allowing all persons having or claiming to have interest in insurance to be made parties to suit, cannot be restricted to mean that only persons who have filed claims which have been denied, and who have or claim to have interest in such claims, may be made parties to action, but must be construed to allow person with interest in insurance to be made party whether or not such interest is specified in claim. Coffey v United States (1938, CA7 Ill) 97 F.2d 762, 117 ALR 940

Purpose of provision to join all interested parties is to avoid multiplicity of suits growing out of same insurance policy. Blanton v United States (1936, DC Ala) 17 F Supp 327

156. Governmental parties

Secretary of the Treasury was not proper party to suit on policy. Elliott v United States (1920, DC Ohio) 271 F 1001

In action brought pursuant to 38 USCS §§ 705 and 784(a) [now 38 USCS §§ 1905 and 1984(a)] to recover benefits of serviceman's group life insurance policy, cause of action was against private insurer rather than United States absent breach of obligation undertaken by United States pursuant to veterans insurance program; Administrator [now Secretary] of Veterans Affairs was not necessary party to action brought under such sections. Mosby v United States (1976, ND Ohio) 423 F Supp 689

157. -United States

Though controversy was confined to question of who was to receive proceeds, United States was proper party defendant where petitioner's claim was denied by bureau [now Department]. Ambrose v United States (1926, DC NY) 15 F.2d 52
State court had jurisdiction to determine rights under contract by beneficiary in war risk insurance policy to pay proceeds to another and United States was not necessary party to action. Bostrom v Bostrom (1931) 60 ND 792, 236 NW 732

158. Secretary of Veterans Affairs

Administrator [now Secretary] of Veterans Affairs was not necessary party in action by insured to recover under permanent total disability clause of government insurance policy. United States v Golden (1929, CA10 NM) 34 F.2d 367

Veterans' bureau [now Department of Veterans Affairs] was not proper party to suit to establish trust in proceeds of policy. Calhoun v Ussery (1930, DC La) 46 F.2d 495

159. Interpleader

Court may properly refuse motion of United States to bring in additional parties. United States v Napoleon (1924, CA5 Fla) 296 F 811

Designation of answer as interpleader cannot cut off right of claimant to assert her full claim, though in excess of amount admitted to be due by defendant, it being considered as consolidation in equity suit of claims made under policy by adverse claimants. Heinemann v Heinemann (1931, CA6 Tenn) 50 F.2d 696

Joinder of husband as party plaintiff is permissive where husband and wife sued to recover automatic national service life insurance, where husband had not joined wife in filing claim which had been denied, where answer of government interpleaded third-party defendant and prayed for full determination of controversy, thereby becoming suitor and subjecting itself to procedural rules of the court. Leyerly v United States (1947, CA10 Colo) 162 F.2d 79

Veterans' Administration [now Department of Veterans Affairs] payment of NSLI proceeds to primary beneficiary, serviceman's wife who had shot and killed insured, after her criminal indictment but preceding conviction, and its failure to interplead wife and contingent beneficiaries under 38 USCS § 784 [now 38 USCS § 1984], constituted abuse of discretion under 5 USCS § 706, entitling contingent beneficiaries to policy proceeds. Glass v United States (1974, CA10 Okla) 506 F.2d 379

In action for interpleader brought by insurance company against claimants of benefits due under Serviceman's Group Life Insurance policy, insurance company would be discharged from liability as stakeholder only upon depositing in court a sum equal to face value of policy plus interest accrued over 4 1/2 year period of delay which was caused by insurance company's demands for further information concerning insured's illegitimate child and went far beyond fiduciary caution. Prudential Ins. Co. v Armwood (1973, ED NY) 362 F Supp 1328

160. Intervention

Statute of limitations does not bar intervention by another beneficiary, to participate in proceeds, where administrator of one beneficiary has brought suit upon claim, institution of one suit being potentially for benefit of all interested. Marsh v United States (1938, CA4 Va) 97 F.2d 327

Intervention in an action seasonably instituted after disagreement under policy was permitted, even though parties seeking to intervene have not filed claim or instituted suit within period of limitation. Marsh v United States (1938, CA4 Va) 97 F.2d 327

Intervenor's claim that he was beneficiary of express trust in proceeds of National Service Life insurance policy created by serviceman must be dismissed where claimant admittedly was not member of class eligible to be beneficiaries under predecessor to 38 USCS § 1916. Jones v United States (1945, DC Mass) 61 F Supp 406

161. Miscellaneous

Government retained appealable interest in suit under contract of National Service Life Insurance even though government admitted its liability and brought suit in nature of bill of interpleader. United States v Leverett (1952, CA5 Tex) 197 F.2d 30
Fact that government brought suit in nature of bill of interpleader against all persons claiming to have any interest in contract of National Service Life Insurance did not take away government's interest in decision of case. United States v Snyder (1949, App DC) 85 US App DC 198, 177 F.2d 44

District court had no jurisdiction to entertain petition under War Risk Insurance Act by distant relative with whom insured has lived but who had no interest in policy or in estate of decedent. Dellaporta v United States (1939, DC Mass) 27 F Supp 839

2. Beneficiaries, Heirs, and Devisees

a. In General

162. Generally

One named as beneficiary was proper party to suit on policy, though insured was married to another at time of his application, and it was proper for court to adjudicate right to proceeds as between named beneficiary and widow who also joined in action. United States v Vance (1931, CA8 Mo) 48 F.2d 472

Beneficiary of war risk insurance policy was not necessary party to action by administrator of insured claiming total and permanent disability prior to death of insured. United States v Smith (1932, CA9 Wash) 55 F.2d 141, 81 ALR 926

Heirs within permitted class of beneficiaries were entitled to resumption of payments where mother of insured to whom government made no payments consented to payment to such heirs; devisees of insured were not necessary parties to such action where will was insufficient as designation of such devisees of beneficiary. Hatch v United States (1928, DC NY) 29 F.2d 213

163. Rights and interests of beneficiaries

Fact that insured made no claim for compensation for disability was not material in action by beneficiary after death of insured. United States v Phillips (1930, CA8 Mo) 44 F.2d 689

Failure of beneficiary of war risk insurance policy to appear in action on policy by insured's administrator claiming total and permanent disability prior to death of insured did not warrant judgment in favor of administrator for installments accruing subsequently to death of insured, where beneficiary, although concededly alive, could not be located. United States v Smith (1932, CA9 Wash) 55 F.2d 141, 81 ALR 926

Right of beneficiary to timely sue for payments accruing after insured's death is independent and maintainable though neither insured nor his representative sued for payments due prior to such death. Ivy v United States (1936, CA5 Miss) 84 F.2d 37

Where insured first claimed total disability as of January, 1934, and, when veterans' administration [now Department of Veterans Affairs] rejected this claim, he did not contest decision, and upon second claim veterans' administration [now Department of Veterans Affairs] found that he became totally disabled on March 12, 1937, and this decision was accepted by insured, beneficiary of policy was bound by this decision after death of insured in absence of some showing of mistake or fraud or overreaching, or of inability on the part of insured to appreciate and understand nature of his act. Whiting v United States (1941) 74 App DC 148, 122 F.2d 196

Beneficiary's interest in war risk term insurance policy was derivative from that of veteran. Winslow v United States (1945, App DC) 79 US App DC 366, 147 F.2d 157

Principle that insured must put Administration [now Department] on notice of claim and must assert that such proof entitled him to benefits under terms of his policy to qualify for such consideration was not applicable where filing of claim for permanent and total disability benefits was prevented by veteran's insanity, notwithstanding appointment of committee, and thus failure to file timely claim was excusable if insanity of insured prevented filing such claim. 1954 ADVA 938

b. Death of Beneficiary
164. Generally

Action by distributees of deceased beneficiary would be dismissed, since proceeds went to relatives of insured on death of beneficiary, though insured died before beneficiary died. Salzer v United States (1922, DC NY) 300 F 764, affd (1924, CA2 NY) 300 F 767

165. Heirs of beneficiary

Upon death of deceased veteran's brother, claim made by brother as beneficiary of government insurance inured to benefit of father as sole distributee of both veteran's and brother's estates. Marsh v United States (1938, CA4 Va) 97 F.2d 327

Father of soldier could not sue in his own right, as heir of soldier's mother, on policy of war risk insurance in which mother was beneficiary. Curtik v United States (1937, DC Mass) 19 F Supp 447

District court did not have jurisdiction of action on war risk policy by mother of beneficiary as his sole heir. Jewell v United States (1939, DC Ky) 27 F Supp 836

166. Personal representative of estate

In action to recover on contract of war risk insurance where insured was bachelor and his mother was beneficiary, and both were dead, personal representatives of estates of persons entitled to accumulated installments were proper parties plaintiff. United States v Rasmussen (1938, CA10 Okla) 95 F.2d 842

Since administrator of insured was entitled to recover payments which had accrued at date of death of insured, he could maintain action to recover same without joining administrator of beneficiary entitled to recover installments accruing between date of death of insured and that of death of beneficiary. Gordon v United States (1929, DC Idaho) 37 F.2d 925

Installments accruing on policy of war risk insurance during lifetime of veteran and commuted value of installments due after death of beneficiary became property of estate of insured, and while not recoverable in action by beneficiary's administrator, petition should not be dismissed, but court should adjudicate rights of beneficiary's personal representative. Curtik v United States (1937, DC Mass) 19 F Supp 447

Beneficiary in policy having died before policy was revived, administrator of veteran's successor was proper party to make claim or file suit on policy. Jacobs v United States (1939, DC La) 28 F Supp 220, affd (1940, CA5) 112 F.2d 51, cert den (1940) 311 US 694, 85 L Ed 449, 61 S Ct 133

167. Children

In suit by administrator of estate of deceased veteran claiming war risk insurance benefits, illegitimate child of deceased, claiming as heir through its mother as common-law wife of decedent who was named as beneficiary, was proper party defendant. Live Stock Nat'l Bank v United States (1939, CA7 Ill) 106 F.2d 240

Daughter of deceased veteran, who was neither his administratrix nor beneficiary of his insurance, was not entitled to sue on his insurance as funds accruing prior to his death passed to his personal representative, while sums due because of his death were payable to designated beneficiary or to his estate. Butler v United States (1937, DC Okla) 18 F Supp 5

168. Siblings

Brother and sister of deceased veteran could not sue in their individual capacities to recover payments on war risk insurance which already accrued at the time of death of insured. Lopez v United States (1936, CA4 NC) 82 F.2d 982

Natural mother suing to recover on policy need not join natural brothers and sisters of insured, since latter had no right under Louisiana law. O'Quain v United States (1928, DC La) 28 F.2d 350, affd (1929, CA5 La) 31 F.2d 756
169. Spouse

In action brought by administratrix of insured, it was not necessary to make divorced wife, named as beneficiary, party defendant, and entry of default against her did not destroy her rights under policy. United States v Smith (1932, CA9 Wash) 55 F.2d 141, 81 ALR 926

Claim by veteran's putative wife, named as beneficiary of government insurance, was not effective as claim in behalf of both her and veteran's lawful wife. United States v Primilton (1935, CA5 La) 76 F.2d 555

In suit by administrator of deceased veterans' estate to recover benefits of war risk insurance policy, where common-law wife of decedent, named as beneficiary, was made party defendant, it was error not to adjudicate her interest. Live Stock Nat'l Bank v United States (1939, CA7 Ill) 106 F.2d 240

Widow of insured, not designated as beneficiary, was not entitled to bring action for installments accruing after death of insured, and she could not sue to recover installments which accrued during his life, since administrator of estate had exclusive right of action. Ballenger v United States (1935, DC Ky) 11 F Supp 911

In action by administrator of veteran, putative wife of decedent who had collected installments on policy is not an indispensable party. Succession of Lynch v United States (1936, DC La) 17 F Supp 674

3. Administrator or Executor

170. Generally

Where insured died pending appeal by defendant, delay in substituting administratrix was not ground for dismissal of appeal, where delay was caused by failure of administratrix to inform appellant of her appointment. United States v Hibbard (1936, CA9 Idaho) 83 F.2d 785

Monthly payments which accrued under war risk insurance policy prior to death of insured and commuted value of unaccrued installments at death of beneficiary were assets of estate of insured for which personal representative of estate had exclusive right to maintain action. Johnson v United States (1939, CA10 Okla) 102 F.2d 729

Executor of estate of insured was not necessary party to suit to require resumption of payments to heirs within permitted class where award was not payable to estate but to plaintiffs. Hatch v United States (1928, DC NY) 29 F.2d 213

Since administrator of insured is entitled to recover payments which have accrued at date of death of insured, he may maintain action to recover same without joining administrator of beneficiary entitled to recover installments accruing between date of death of insured and that of death of beneficiary. Gordon v United States (1929, DC Idaho) 37 F.2d 925

No suit was commenced by veteran where veteran verified petition on February 10, 1931, and died on March 14, 1931, and his attorney, without knowledge of the veteran's death, filed petition on March 31, 1931; hence, veteran's administrator could not be substituted therein as plaintiff, though letter of special assistant United States Attorney stated this could be done. Spencer v United States (1936, DC Mass) 14 F Supp 46

171. Mixed capacity of representative

If brother and sister were respectively administrators of estates of insured and of beneficiary, complaint filed in their individual capacity to recover accrued but unpaid installment of insurance could be amended so as to name them in their representative capacity. Lopez v United States (1936, CA4 NC) 82 F.2d 982

Joinder of widow individually as beneficiary was proper where veteran died after instituting action on his insurance policy, and his widow, as executrix of his estate, was substituted as plaintiff. United States v Wilson (1936, CA9 Wash) 85 F.2d 444
Claim filed by administrator of insured entitled him to recover as administrator of beneficiaries although he had not filed claim in latter capacity. United States v Powell (1938, CA4 SC) 93 F.2d 788

Claim filed by plaintiff as beneficiary of veteran's war risk insurance policy would support action to recover insurance benefits in capacity of administratrix of estate of insured as well as in beneficiary's individual capacity, and successor administrator could be substituted as plaintiff upon death of administratrix; in action by mother of World War veteran on his war risk term insurance policy, to recover benefits both as beneficiary and as administratrix of her son's estate, upon her death, her administratrix may properly be substituted as plaintiff in each capacity. Coffey v United States (1938, CA7 Ill) 97 F.2d 762, 117 ALR 940

H. Trial

1. In General

172. Venue

Change of venue was not permissible. Johnson v United States (1929, DC Wash) 35 F.2d 355

Action to recover monthly and total disability benefits under converted war risk policy could be brought either in district court for District of Columbia or in district in which veteran resided. First Nat'l Bank v United States (1939, DC Dist Col) 30 F Supp 730

173. Continuance

Court may err in denying continuance. Darrow v United States (1932, CA9 Ariz) 61 F.2d 124

Motions to amend petition and continue case to procure evidence in support of amendment were properly denied when without foundation in fact. Marinelli v United States (1939, CA1 RI) 101 F.2d 192

174. Reference

Court had right to strike objectionable portions of auditor's report where suit on war risk policy was heard by auditor and order of reference provided that auditor's report was to be used only if "approved by the court." Gay v United States (1941, CA7 Ill) 118 F.2d 160

175. Jury trial

United States could not appeal to court of appeals to complain that court tried case without jury where case was tried without jury on motion of United States. Law v United States (1925) 266 US 494, 69 L Ed 401, 45 S Ct 175; United States v McGovern (1924, CA9 Mont) 299 F 302

Plaintiff could complain that case was tried without jury, though he did not object or ask for jury, where judge and parties erroneously believed they were not entitled to jury. Crouch v United States (1925, CA4 Va) 8 F.2d 435

Plaintiff in action on policy of war risk insurance was entitled to trial by jury. Whitney v United States (1925, CA9 Wash) 8 F.2d 476; Hacker v United States (1927, CA5 Tex) 16 F.2d 702

Plaintiff was entitled to jury trial in suit on veterans' insurance policies. United States v Salmon (1930, CA5 Miss) 42 F.2d 353; Patterson v United States (1932, Dist Col App) 61 App DC 178, 58 F.2d 1079

Right to trial by jury, preserved by statutes conferring jurisdiction on district courts of United States under World War Veterans' Act, could be exercised or waived. United States v Green (1939, CA9) 107 F.2d 19

Trials were to be by court rather than to jury. Allen v United States (1926, DC Tex) 10 F.2d 807
In action by insured's widow to be adjudged beneficiary of husband's national service life insurance, where district court had exclusive jurisdiction under 38 USCS § 784 [now 38 USCS § 1984], plaintiff was entitled to jury trial. Baran v Hoszwa (1974, ND Ohio) 62 FRD 444, 39 Ohio Misc 105, 68 Ohio Ops 2d 268, 18 FR Serv 2d 1540

In action involving competency of an insured under National Service Life Insurance Policy to change named beneficiary, case proceeded to jury trial only by consent of parties and it was very doubtful that jury trial was properly allowed. Henry v United States (1975, DC Dist Col) 396 F Supp 1300

2. Evidence

a. In General

176. Generally

While legislation relating to veterans was to be liberally construed, right to recover under war risk insurance policy was subject to ordinary rules of evidence. United States v Balance (1932, Dist Col App) 61 App DC 226, 59 F.2d 1040

177. Admissibility

In action on policy not designating beneficiary, application for policy was admissible in evidence to establish rights of intended beneficiary and to limit right of executor; state law providing that unless application was attached to policy it is not admissible has no application to suit on war risk policy. Cassarello v United States (1922, CA3 Pa) 279 F 396

While judicial notice is taken of Veterans Administration [now Department of Veterans Affairs] regulations, they are nevertheless admissible. United States v Lawson (1931, CA9 Idaho) 50 F.2d 646

Portions of reports relating to prognosis or opinion as to probable course which insured's disease will take are inadmissible where actual course of disease has been determined by experience. Long v United States (1932, CA4 SC) 59 F.2d 602

Objections to veterans' testimony that he was transferred to tuberculosis ward were without substance. United States v Sessin (1936, CA10 Kan) 84 F.2d 667

Correspondence in interval between filing and denial of claim was inadmissible where claim under policy was filed June 6, 1919, and not denied until September 24, 1934. United States v Meakins (1938, CA9 Mont) 96 F.2d 751

Admission in evidence of regulation regarding war risk insurance, to which policy was made subject by terms of application for insurance, could not be objected to on ground that regulation was not attached to policy as required by state law, since contract of insurance made pursuant to federal statute must be construed with reference to such statute. Cassarello v United States (1919, DC Pa) 271 F 486, affd (1922, CA3 Pa) 279 F 396

In action alleging change of beneficiary of NSLI policy, evidence was admissible to show insured's purpose in executing particular writing and his understanding of effect of his act where writing itself did not refer to any specific benefits, or is ambiguous. Moore v United States (1955, DC Cal) 129 F Supp 456

178. Competence

Veterans Administration [now Department of Veterans Affairs] form letter to effect that insurance was granted in certain amount, effective as of certain date, and lapsed for nonpayment of premiums due on specified date, involves questions of law as well as fact and was incompetent to establish correctness of such conclusions. United States v Tracy (1928, CA9 Wash) 28 F.2d 570

Photostatic copy of death certificate filed with state bureau of vital statistics was not competent evidence of cause of death. United States v Johnson (1934, CA8 Neb) 72 F.2d 614

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Evidence that disability had continued during passage of time was competent and cogent evidence of permanency of such disability. McGovern v United States (1923, DC Mont) 294 F 108, affd (1924, CA9 Mont) 299 F 302

Judge properly refused to receive, in behalf of plaintiff, affidavits of soldiers who were in service with insured, since the affidavits were not competent. Demeter v United States (1933, Dist Col App) 62 App DC 208, 66 F.2d 188

179. Materiality

Portion of report estimating disability of soldier for compensation purposes was immaterial to claim for war risk insurance, due to different standards of measurement of disability for insurance and compensation purposes. Runkle v United States (1930, CA10 Colo) 42 F.2d 804; Warren v United States (1930, DC Idaho) 42 F.2d 755

Compensation reports and ratings were material to allegation of insured that sufficient uncollected compensation was due him to revive insurance policy. United States v Smith (1932, CA9 Wash) 55 F.2d 141, 81 ALR 926

Occupation of insured before joining Navy was immaterial. Proechel v United States (1932, CA8 Minn) 59 F.2d 648, cert den (1932) 287 US 658, 77 L Ed 568, 53 S Ct 122

Fact that after lapse of war risk policy insured applied for life insurance and stated that his health was good and fact that he worked continuously for one year after lapse was to be considered on question of disability before lapse. United States v Wilfore (1933, CA2 VT) 66 F.2d 255

Statements of insured when he applied for life insurance after lapse of war risk policy were to be considered as negativing disability. United States v Baker (1934, CA9 Idaho) 73 F.2d 691

Fact that insured had to have help of his wife and others in operation of retail store was material to issue but was not proof of total disability. United States v Shashy (1935, CA5 Fla) 75 F.2d 422

In suit on war risk insurance policy, testimony about some harrowing experiences of insured on battlefield was relevant and material on question of insured's mental and physical condition. Becker v United States (1944, CA7 Ind) 145 F.2d 171

180. Credibility and weight

Insured's formal statement of no disability at time of discharge could be considered on question of disability but was not conclusive. United States v Jensen (1933, CA9 Idaho) 66 F.2d 19; Muth v United States (1935, CA4 Md) 78 F.2d 525

Insured's statement, subsequent to discharge, that he did not consider himself totally disabled, was not conclusive. United States v Worsley (1934, CA10 Utah) 72 F.2d 776

Veterans' claim of disability by reason of heart and lung trouble caused by poison gas will be rejected in view of contrary medical testimony. United States v Tate (1935, CA5 La) 75 F.2d 822

Admission of veteran into service refuted contention that he was totally and permanently disabled before policy came into effect. United States v Domangue (1935, CA7 Ill) 79 F.2d 647

Inconsistencies between veteran's application for civilian insurance and his contention of total and permanent disability at trial was for jury to resolve. United States v Bodge (1936, CA10 Kan) 85 F.2d 433

181. Judicial notice

Courts recognize fact that tuberculosis in its incipient stage is usually not incurable malady. Eggen v United States (1932, CA8 Minn) 58 F.2d 616; Walters v United States (1933, CA5 Tex) 63 F.2d 299; United States v Messinger (1934, CA4 W Va) 68 F.2d 234; United States v Sumner (1934, CA6 Ky) 69 F.2d 770; United States v Schroeder (1935, CA7 Ind) 77 F.2d 173; United States v Walker (1935, CA5 La) 77 F.2d 415, cert den (1935) 296 US 612, 80 L Ed 434, 56 S Ct 132; United States v Little (1935, CA5 La) 77 F.2d 420
Court could take judicial notice of fact that, since discovery and general use of insulin, diabetes was not necessarily permanently disabling. United States v Elmore (1934, CA5 Fla) 68 F.2d 551

Court could take judicial cognizance of character of pulmonary tuberculosis. United States v McIver (1935, CA4 NC) 77 F.2d 208

Fact that duodenal ulcer was not incurable or not always totally disabling was matter of common knowledge. United States v Martin (1935, CA10 Kan) 80 F.2d 460

Court could take notice that many cases of tuberculosis were curable. United States v Johnson (1936, CA5 Ala) 81 F.2d 867; Elliott v United States (1935, DC Ky) 13 F Supp 132

Court could take judicial notice that men in armed forces were strongly urged to take out policies of national life insurance. Jadin v United States (1947, DC Wis) 74 F Supp 589

182. -Agency rules and regulations

While judicial notice is taken of Veterans Administration [now Department of Veterans Affairs] regulations, they are nevertheless admissible. United States v Lawson (1931, CA9 Idaho) 50 F.2d 646; United States v Stand (1939, CA10 Okla) 102 F.2d 472

Judicial notice could be taken of Veterans Administration [now Department of Veterans Affairs] procedures for deciding claim and for notifying claimant that claim was rejected and that disagreement existed. Smith v United States (1932, DC Iowa) 56 F.2d 636

183. Hearsay statements

Hearsay evidence may be received in behalf of plaintiff when trustworthy and necessary to ascertainment of truth and administration of justice. United States v Wescoat (1931, CA4 W Va) 49 F.2d 193

Testimony in behalf of plaintiff which is hearsay cannot be received. United States v McCreary (1939, CA9 Or) 105 F.2d 297

Letter written by deceased person to his mother stating he had made her beneficiary was not admissible in evidence to prove change of beneficiary, such evidence being hearsay. Kingston v Hines (1926, DC Mich) 13 F.2d 406

184. Self-serving declarations

Self-serving declarations of insured contained in reports of physicians to bureau were not admissible in behalf of plaintiff. United States v Wilson (1931, CA4 SC) 50 F.2d 1063; United States v Balance (1932, Dist Col App) 61 App DC 226, 59 F.2d 1040

Reports of physical examinations prepared for government were not made inadmissible on behalf of plaintiff by fact that such reports contained self-serving declarations by insured. United States v Smith (1932, CA9 Wash) 55 F.2d 141, 81 ALR 926

Ratings, findings, and rulings of Veterans Administration [now Department of Veterans Affairs] were incompetent and immaterial if attempted to be used as self-serving declarations. Quinn v United States (1932, CA3 Pa) 58 F.2d 19

Judge properly refused to receive, in behalf of plaintiff, sworn application of plaintiff for compensation other than insurance, since this was merely self-serving declaration. Demeter v United States (1933, Dist Col App) 62 App DC 208, 66 F.2d 188

185. Miscellaneous

Court could, in its discretion, allow another claimant of fund to take benefit of proof as affecting her interests and rights in policy where settlement between plaintiff and defendant was made under mistake of fact. Heinemann v Heinemann (1931, CA6 Tenn) 50 F.2d 696

Allegation of disability may be controverted by inconsistent written statements signed by insured. Seals v United States (1934, CA5 La) 70 F.2d 519

b. Evidence as to Particular Matters
186. Designation of beneficiary

Letter which insured wrote his daughter was not admissible as narrative of substantive fact that he took out insurance for her benefit, but was admissible as proper token of his intent and purpose in taking out insurance. Foster v Winingham (1948, CA10 Okla) 169 F.2d 46

Instrument executed by insured when he made application for policy, clearly showing intention to make his aunt beneficiary, was competent evidence to show aunt is entitled to proceeds, though attempt to probate instrument as will had failed, and though aunt could not have been beneficiary under statute in existence when application for policy was made, since amendment of statute permitting aunt to be beneficiary related back to policy. Schroeder v United States (1928, DC Ohio) 24 F.2d 420

187. Change of beneficiary

Evidence that deceased had signed paper which he said was for purpose of changing beneficiary and said he was going to mail it was not sufficient to show change of beneficiary where no one saw what paper was or saw him mail it, where he told no one that he had mailed it, and where records of department did not show its receipt. Layne v United States (1924, CA7 Ill) 3 F.2d 431

Designation in writing by insured of person as beneficiary of insurance could be admitted in evidence to prove change of beneficiary although written by a minor and not sufficient for a will. Helmholtz v Horst (1924, CA6 Ohio) 294 F 417, 2 Ohio L Abs 419

Evidence that claimant of war risk insurance signed insured's name to application for change of beneficiary, at request of insured, was admissible, without proving agency from any other source. Le Blanc v Curtis (1925, CA5 Ga) 6 F.2d 4

Serviceman's letters stating that he was going to change or had changed beneficiary were admissible in evidence. Littlefield v Littlefield (1952, CA10 Okla) 194 F.2d 695

Testimony concerning reasons why insured might have wished to change beneficiary and letters to alleged substitute beneficiary of NSLI policy were admissible only to prove insured's intention to change beneficiary, not to show affirmative act for purpose of effectuating that intention. Littlefield v Littlefield (1952, CA10 Okla) 194 F.2d 695

Government forms executed by insured were admissible to determine insured's intent with respect to his government benefits, and could not be objected to as hearsay. Ward v United States (1966, CA7 Ind) 371 F.2d 108

Evidence that insured had received blank form for designating beneficiary of his 6 months' gratuity pay, which form was often used for changing beneficiary of NSLI policy, was insufficient to establish effective change of beneficiary where no written form was produced in evidence. Cohn v Cohn (1948, App DC) 84 US App DC 218, 171 F.2d 828, cert den (1949) 336 US 962, 93 L Ed 1114, 69 S Ct 828

Testimony of friends and fellow officers of insured was insufficient to establish change of beneficiary from parents to widow, where no writings in support of testimony were produced. Cohn v Cohn (1948, App DC) 84 US App DC 218, 171 F.2d 828, cert den (1949) 336 US 962, 93 L Ed 1114, 69 S Ct 828

Relative financial situations of contesting parties was relevant insofar as it reflected on insured's intent to change beneficiary. Cohn v Cohn (1948, App DC) 84 US App DC 218, 171 F.2d 828, cert den (1949) 336 US 962, 93 L Ed 1114, 69 S Ct 828; Watson v United States (1950, CA5 Ga) 185 F.2d 292; Benard v United States (1966, CA8 Mo) 368 F.2d 897

Insured's intention to change beneficiary and his performance of required affirmative act in writing could be proved by circumstantial evidence. Walker v United States (1947, DC Tex) 70 F Supp 422; Hartman v United States (1948, DC Mo) 78 F Supp 227

Veterans Administration [now Department of Veterans Affairs] determination of whether insured took necessary steps to effect proper change of beneficiary of NSLI policy should be given substantial weight in suit by individual alleging to be beneficiary of such policy. Owens v United States (1966, DC SC) 251 F Supp 114
Evidence that original beneficiary paid some premiums on NSLI policy and that insured told her that he had no intention to change beneficiary was insufficient to show that change of beneficiary by insured was result of undue influence, where nurses attending insured at hospital testified that insured was rational, aware, and in possession of his mental faculties. United States v Cruze (1970, ED Tenn) 328 F Supp 159

A serviceman was held not to have taken sufficient affirmative action, pursuant to an intent to change the beneficiary of his life insurance policy, where he made it known only that the would-be new beneficiary was to be notified in case of an emergency and was to receive pay benefits should he be killed or missing; it was not enough that the serviceman sent to the would-be substitute a letter stating that he had already changed the insurance over to her name. Jones v United States (1971, MD Tenn) 331 F Supp 114

188. Death of insured

Unauthenticated coroner's certificate of death was not admissible. United States v Blackburn (1929, CA9 Wash) 33 F.2d 564

In action on war risk policy, certificate of death by undertaker was inadmissible. United States v Harrison (1931, CA4 W Va) 49 F.2d 227

Suicide notes of insured were res gestae and were properly received with evidence of his disappearance, on question of death of insured. United States v O'Brien (1931, CA4 Va) 51 F.2d 37

Photostatic copies of coroner's report of inquest obtained from government bureau and of death certificate obtained from municipal bureau of vital statistics were inadmissible to prove cause and manner of death of insured. United States v Johnson (1934, CA8 Neb) 72 F.2d 614

Failure of Veterans' Administration [now Department of Veterans Affairs] to find that underlying mental unsoundness which precipitated suicide of plaintiff's son eight days after his discharge from Navy basic training was service connected was not supported by substantial evidence where veteran was presumed to be of sound condition when entering military service, and where suicide was presumed to result from mental unsoundness where no adequate motive was shown. Clark v United States (1974, ND Iowa) 379 F Supp 1399

189. Disability of insured

Court would not, under guise of liberal construction, close its eyes to undisputed facts disclosed by record in case and sustain verdict for plaintiff on theory of constructive total permanent disability which found support only in series of superimposed retroactive presumptions. United States v Le Duc (1931, CA8 Minn) 48 F.2d 789, cert den (1931) 284 US 631, 76 L Ed 537, 52 S Ct 14

Evidence must show that insured was at time of his discharge totally disabled and that he has continued and will continue to be so disabled as result of same malady. United States v Crume (1931, CA5 Tex) 54 F.2d 556

Evidence merely of sleeplessness, nervous condition, and unemployment do not show total disability, though it can be considered with other evidence. United States v Hill (1932, CA9 Or) 61 F.2d 651

Evidence of two witnesses that insured was a hard working and industrious man before he entered service was sufficient to show there was no abnormality in mental condition of insured before issuance of policy, and further evidence sustained finding that abnormal mental condition occurred while policy was in force. United States v Adams (1934, CA10 Okla) 70 F.2d 486

190. -Condition subsequent to lapse of policy

Insured's injuries, exposure, and illness prior to lapse of policy, and his condition in subsequent years, was significant to claim that insured suffered total permanent disability prior to lapse of policy, but only to extent that such factors tended to show whether insured was in fact totally and permanently disabled during life of war risk insurance policy. Lumbra v United States

All facts of case, including as matters of first importance, soldier's injuries and his condition when policy was in force, and including also post-war history of his war-inflicted injuries and post-war conduct of injured soldier himself, must be considered in determining whether he sustained during life of the policy "total permanent disability." United States v Caldwell (1934, CA3 Pa) 69 F.2d 200

Evidence of veteran's condition subsequent to lapse of his policy was admissible only to show nature and extent of his disability prior to lapse. Magenton v United States (1935, CA8 SD) 75 F.2d 410

In action on war risk insurance policy for disability benefits, it was permissible to give weight to subsequent conditions and findings insofar as such conditions and findings tended to shed light on question whether insured became totally disabled before his policy lapsed. United States v Nelson (1939, CA8 Ark) 102 F.2d 515, cert den (1939) 308 US 550, 84 L Ed 462, 60 S Ct 81

In suit on war risk insurance policy for disability benefits, where sole issue submitted to jury by trial court was whether insured was totally and permanently disabled while policy was in force, plaintiff was entitled to have consideration given to his condition as found by physicians many years later, insofar as such condition would aid in resolving question of totality and permanency of his disability at time of such expiration of policy. United States v Fields (1939, CA8 Ark) 102 F.2d 535

Evidence of subsequent disability was admissible on issue as to disability at previous date; declarations by insured as to his health were not conclusive against him, and evidence might show permanent disability at time of discharge. Nichols v United States (1931, DC Ky) 48 F.2d 293

191. -Unemployment

Fact that insured refrains from work because of injury did not necessarily indicate existence of total disability. Hanagan v United States (1932, CA7 Ill) 57 F.2d 860

Insured's persistent but unsuccessful efforts for many years to find job he could hold were persuasive evidence that none existed. United States v Worsley (1934, CA10 Utah) 72 F.2d 776

Nonemployment, of itself, was not evidence of impairment or basis of recovery on insurance. United States v McAlister (1937, CA9 Mont) 88 F.2d 379

In action on war risk insurance policy for disability benefits, evidence of plaintiff that upon his return from army he was unable to work was mere conclusion and had no probative force. United States v Nelson (1939, CA8 Ark) 102 F.2d 515, cert den (1939) 308 US 550, 84 L Ed 462, 60 S Ct 81

One who has serious and incurable ailment for which rest was recognized treatment, and which would be aggravated by work, motion, or movement, might nevertheless be totally and permanently disabled, but mere fact that he was not working was not conclusive of his disability. Adams v United States (1940, CA7 Ill) 116 F.2d 199

192. -Sufficiency of evidence

Date on which it is alleged insured became totally and permanently disabled is date cause of action accrues. Wilson v United States (1934, CA10 Colo) 70 F.2d 176

Evidence leaving to speculation degree of disability at requisite time was insufficient. United States v Krueger (1935, CA7 Ind) 77 F.2d 171

Fact that work caused pain and insured went bankrupt after first year's work was not sufficient proof of total permanent disability. United States v Deal (1936, CA9 Or) 82 F.2d 929

In action on war risk insurance policy for disability benefits, testimony of plaintiff that he was sick was not sufficient in itself to support conclusion that he was totally and permanently disabled. United States v Nelson (1939, CA8 Ark) 102 F.2d 515, cert den (1939) 308 US 550, 84 L Ed 462, 60 S Ct 81

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Evidence was insufficient to sustain contention of plaintiff that he was totally and permanently disabled while his policy was in force. United States v Fields (1939, CA8 Ark) 102 F.2d 535

In action on war risk insurance policy, evidence was sufficient to support finding that plaintiff became totally and permanently disabled on or prior to date of lapse of policy. United States v Green (1939, CA9) 107 F.2d 19

Insured could not recover monthly disability benefits under converted war risk insurance policy, which had been surrendered for cash value, although surrender was alleged to be void by fact that insured was totally and permanently disabled at time of surrender, where no finding to that effect had been made by Veterans' Administrator [now Department of Veterans Affairs] and existence of disability at that time was matter of conjecture rather than fact. United States v Garland (1941, CA4 Va) 122 F.2d 118, 136 ALR 918, cert den (1941) 314 US 685, 86 L Ed 548, 62 S Ct 189

193. -Miscellaneous

Evidence that insured knew of his right to compensation for disability and made no claim therefor and statements by insured as to his ability to work were properly excluded on issue of total and permanent disability. United States v Phillips (1930, CA8 Mo) 44 F.2d 689

Disability was conclusively disproven where insured twice re-enlisted and passed physical exam each time. United States v Le Duc (1931, CA8 Minn) 48 F.2d 789, cert den (1931) 284 US 631, 76 L Ed 537, 52 S Ct 14

Tag, field medical card, and envelope in which card was contained, identified by plaintiff as having been attached to his clothing in field hospital in France and worn by him when being sent to United States with group of disabled soldiers, were properly received in evidence for plaintiff. United States v Wescoat (1931, CA4 W Va) 49 F.2d 193

Letter from director of bureau [now Secretary of Veterans Affairs] relating to disability for compensation purposes was not admissible; but reports of physicians were admissible. McNally v United States (1931, CA8 Minn) 52 F.2d 440

Disability was not permanent before lapse where plaintiff's evidence was consistent with hypothesis that disability was not permanent before lapse of policy and also consistent with hypothesis that it was permanent before lapse. Eggen v United States (1932, CA8 Minn) 58 F.2d 616

Fact that death of insured occurred within three years after discharge from Navy could not be considered as bearing on question of total permanent disability before discharge, where death was not connected with any disability existing before discharge. Proechel v United States (1932, CA8 Minn) 59 F.2d 648, cert den (1932) 287 US 658, 77 L Ed 568, 53 S Ct 122

Work and activities of veteran after lapse of policy where one leg was disabled was proof of nondisability. United States v Jones (1934, CA5 Ala) 73 F.2d 376

Remarriage of veteran after discharge was circumstance indicating he did not then believe he was totally and permanently disabled. Hughes v United States (1936, CA10 Okla) 83 F.2d 76

In suit on war risk insurance policy in which the main issue is whether or not plaintiff was totally and permanently disabled on particular date, and in which plaintiff relied on auditor's report as making prima facie case, it was not incumbent on plaintiff to offer proof in chief as to his physical condition subsequent to said date but evidence of plaintiff's physical condition subsequent to time alleged in his complaint was admissible when offered by either side, as bearing on his condition at date alleged. Gay v United States (1941, CA7 Ill) 118 F.2d 160

194. Waiver of premiums

Burden was on plaintiff to prove excuse for nonpayment of premiums where insured paid no premiums on his war risk insurance policy after his discharge in 1919 and died in 1921. Crews v United States (1939, CA7 Ill) 102 F.2d 485
No presumption of incompetency arose from waiver of payment of premiums due to veteran's incompetency, but presumption of competency did arise from veteran's having been declared competent by both agency and state court. Wiley v United States (1968, CA10 Okla) 399 F.2d 844

Evidence established that failure of insured to make application for waiver of premiums within statutory period was due to circumstances beyond his control where government failed to notify him that he was suffering from tuberculosis at time of his discharge. Myers v United States (1953, DC Mo) 112 F Supp 809, mod on other grounds (1954, CA8 Mo) 213 F.2d 223

c. Particular Matters as Evidence

(1). In General

195. Financial condition of insured

Evidence as to poverty of insured is admissible on issue of disability. United States v Dudley (1933, CA9 Idaho) 64 F.2d 743

Veteran’s weekly earnings card, being part of his work record, was admissible. Jennings v United States (1934, CA5 Ga) 73 F.2d 470

Admissibility of evidence as to insured’s financial condition and individuality must be determined in each particular case. Cockrell v United States (1934, CA8 Iowa) 74 F.2d 151

196. Receipt of other government compensation

Evidence received in behalf of United States that insured was receiving compensation was reversible error; error was not cured by instruction withdrawing evidence. Chrisman v United States (1932, CA9 Wash) 61 F.2d 673; Rose v United States (1934, CA10 NM) 70 F.2d 68

Evidence that government paid compensation to insured is relevant on question whether work performed by insured is voluntary and not because of financial necessity. Prevette v United States (1934, CA4 NC) 68 F.2d 112, cert den (1934) 292 US 622, 78 L Ed 1478, 54 S Ct 633

In action upon war risk insurance policy it was error to admit evidence showing amount plaintiff was paid by government for compensation. Rose v United States (1934, CA10 NM) 70 F.2d 68

Cross-examination of insured concerning compensation from government, other than insurance, was harmless. Taylor v United States (1934, CA5 Ala) 71 F.2d 76

Court did not err in excluding evidence of insured’s disability compensation where, in action on war risk policy, government did not contend that insured was malingering and plaintiff does not seek to explain insured’s work record by financial necessity; whether or not insured had received disability compensation from government was immaterial. United States v Brundage (1943, CA6 Mich) 136 F.2d 206

Evidence of payment of compensation to insured under another governmental obligation was inadmissible where sole issue was disability at time policy lapsed. Lomicka v United States (1932, DC NY) 2 F Supp 766

Judge properly refused to receive, in behalf of plaintiff, notice from government to insured that he was awarded $30 monthly as compensation other than insurance. Demeter v United States (1933, Dist Col App) 62 App DC 208, 66 F.2d 188

197. Medical records of treatment

Reports of physical examinations made by Veterans Administration [now Department of Veterans Affairs] or by doctors employed by United States Government are admissible in behalf of plaintiff where report is properly identified. Runkle v United States (1930, CA10 Colo) 42 F.2d 804

Signed medical reports as to physical examinations of insured, made under authority of Veterans Administration [now Department of Veterans Affairs] and taken from its files, are not
confidential or privileged when required to be produced in any suit or proceeding pending in United States court. United States v Cole (1930, CA6 Ohio) 45 F.2d 339

Tag affixed to insured's clothing at hospital showing his hospital record was admissible on question of disability. United States v Wescoat (1931, CA4 W Va) 49 F.2d 193

X-ray photographs are improperly received where proper foundation is not laid. United States v La Favor (1934, CA9 Wash) 72 F.2d 827

Doctor's notations made on card when insured applied for work were res gestae and were properly received in evidence on behalf of defendant where insured was required to furnish health certificate to get work and insured signed other side of card. Jennings v United States (1934, CA5 Ga) 73 F.2d 470

Documentary evidence made during treatment of insured by government doctors is admissible if sufficiently certified. Cohen v United States (1935, CA7 III) 77 F.2d 140

Error, if any, in excluding veteran's hospital record, not authenticated, was harmless where it was merely cumulative. United States v Chandler (1937, CA5 Ala) 87 F.2d 356

In action on war risk insurance policy, admission of certain records of War Department [now Department of Army] pertaining to health of insured at time of his discharge from service, and general plan of routine followed in making examinations of veterans at time of their discharge from service, was clearly admissible. Thatenhorst v United States (1941, CA10 Kan) 119 F.2d 567

Court erred in refusing to allow introduction of hospital records into evidence and in denying motion to subpoena witnesses for purpose of proving said records where original beneficiary sought to show that deceased lacked mental capacity at time he changed beneficiary. Pritchett v Etheridge (1949, CA5 Tex) 172 F.2d 822

**198. Department of Veterans Affairs records**

Letter from veterans' bureau [now Department of Veterans Affairs], concerning rating of insured for compensation purposes, offered in behalf of plaintiff, was properly excluded. McNally v United States (1931, CA8 Minn) 52 F.2d 440

Letters of veterans' bureau [now Department of Veterans Affairs] which had bearing on physical condition of insured were properly received though letters concerned disability compensation other than insurance. United States v Dougherty (1931, CA7 III) 54 F.2d 721

Records of veterans' bureau [now Department of Veterans Affairs] concerning ratings for disability compensation other than insurance were properly admitted in behalf of plaintiff to show connection of disabilities to service. Quinn v United States (1932, CA3 Pa) 58 F.2d 19

Veteran's compensation ratings and drawings were properly received, on cross-examination of insured and his wife, as evidence for defendant, to negative finding of total permanent disability. Jennings v United States (1934, CA5 Ga) 73 F.2d 470

In action on war risk policy, statements by insured in application for disability allowance and retirement from military service could be relied upon by government to show falsity of insured's answers to questions in his application for reinstatement of policy. Pence v United States (1941, CA7 Wis) 121 F.2d 804, affd (1942) 316 US 332, 86 L Ed 1510, 62 S Ct 1080, reh den (1942) 316 US 712, 86 L Ed 1777, 62 S Ct 1287

**199. Employment records**

Work record of insured after lapse of policy is admissible as bearing on condition before lapse. United States v Alger (1934, CA9 Idaho) 68 F.2d 592

Evidence of continuous employment for 8 years after lapse of policy negative total and permanent disability and overrode opinion evidence as to such disability. Tracy v United States (1934, CA2 Conn) 68 F.2d 834

Card kept by insured's employer showing weekly earnings of insured was properly received in behalf of defendant. Jennings v United States (1934, CA5 Ga) 73 F.2d 470

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Witness was properly allowed to testify as to entries made in payroll of company which had employed veteran, where books were in official custody of witness, under his supervision, and person who had made entries was dead. McConnell v United States (1936, CA3 Pa) 81 F.2d 639

It was not reversible error for court to receive in evidence, on behalf of defendant, entries in payroll books concerning work and earnings of insured, though witness did not make original entries, where it was shown that one who made original entries was dead. United States v Poe (1936, CA5 Ala) 81 F.2d 799

Work record after lapse of policy prevented finding of total permanent disability before lapse. Russian v United States (1935, DC Pa) 12 F Supp 660

200. Receipt of vocational training

Fact that insured took vocational training after lapse of policy is evidence that he was not totally and permanently disabled when policy lapsed, but it is not conclusive of that fact. United States v Alger (1934, CA9 Idaho) 68 F.2d 592; O'Quinn v United States (1934, CA5 La) 70 F.2d 599; Stephenson v United States (1935, CA8 Mo) 78 F.2d 355

Vocational training is to be weighed with other evidence on issue of total and permanent disability. United States v Worsley (1934, CA10 Utah) 72 F.2d 776

Fact that insured declined vocational training on ground that he was too busy with stock raising was considered as negativing disability. United States v Baker (1934, CA9 Idaho) 73 F.2d 691

In action on war risk insurance policy, for disability benefits, fact of insured's vocational training over long period was inconsistent with theory of total and permanent disability. United States v Nelson (1939, CA8 Ark) 102 F.2d 515, cert den (1939) 308 US 550, 84 L Ed 462, 60 S Ct 81

Vocational training undertaken by veteran does not conclusively negative total permanent disability. United States v Bemis (1939, CA9 Or) 107 F.2d 894

Fact that insured took vocational training in subsequent year did not refute finding of total disability, but evidence of conduct and condition of insured during years following expiration date of policy were relevant on question of his permanent and total disability on that date. United States v Randall (1944, CA2 NY) 140 F.2d 70

201. Miscellaneous

Error of admitting evidence of insured's blindness was harmless where same facts were established by abundant evidence which was properly admitted. United States v Cole (1930, CA6 Ohio) 45 F.2d 339

Cross-examination of plaintiff concerning his activities in bootlegging and dealing in stolen automobiles was harmless in view of testimony of plaintiff. Walters v United States (1933, CA5 Tex) 63 F.2d 299

Defendant can, on cross-examination, bring out facts showing that failure to work is due to lack of necessity and not inability. Jennings v United States (1934, CA5 Ga) 73 F.2d 470

(2). Delay in Instituting Suit on Claim

202. Generally

Delay of 13 years in bringing suit was not insuperable barrier to recovery where suit was not barred by any statute of limitations, but was for consideration with all other evidence. Berry v United States (1941) 312 US 450, 85 L Ed 945, 61 S Ct 637

Long delay in bringing suit on war risk insurance policy was to be taken into consideration by court. United States v Sumner (1934, CA6 Ky) 69 F.2d 770

In determining whether case has been made, delay in bringing suit may be considered, but it has less weight where veteran of meager education is afflicted with incurable brain disease, than
where veteran is conscious of his rights during delay. United States v Flippence (1934, CA10 Utah) 72 F.2d 611

In action on war risk insurance policy, insured's delay from 1918 to 1931 in making claim for disability was circumstance to be considered with other evidence, though it was not per se proof of anything. United States v Strawbridge (1944, CA5 Miss) 139 F.2d 1014, cert den (1944) 321 US 797, 78 L Ed 1085, 64 S Ct 937

203. Evidentiary effect of delay

In absence of clear and satisfactory evidence explaining, excusing, or justifying it, petitioner's long delay after lapse of policy before bringing suit is to be taken as strong evidence that he was not totally and permanently disabled before policy lapsed. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272; United States v Spaulding (1935) 293 US 498, 79 L Ed 617, 55 S Ct 273, reh den (1935) 294 US 731, 79 L Ed 1261, 55 S Ct 504

It must affirmatively appear that there is total and permanent disability determinable as of time policy was in force; and petitioner's long delay before bringing suit is to be taken as strong evidence that he was not totally and permanently disabled before policy lapsed. United States v Johnson (1934, CA10 Okla) 70 F.2d 399

Long delay in bringing suit is strong evidence that veteran was not totally and permanently disabled prior to lapse of his policy. Magenton v United States (1935, CA8 SD) 75 F.2d 410; United States v Peet (1937, CA10 Kan) 88 F.2d 597; Roberts v United States (1936, DC Idaho) 17 F Supp 641

There is strong evidentiary presumption that one who was totally and permanently disabled in 1918 would not postpone claim of insurance until 1931. Lawhon v United States (1936, CA10 Okla) 82 F.2d 921

Long delay in making claim causes factual presumption against merit of claim and puts heavier burden on claimant to show clear case. Watts v United States (1938, DC Miss) 24 F Supp 969 (superseded by statute as stated in Farris v State (2004, App) 2004 Miss App LEXIS 1126)

Long delay in bringing suit is not conclusive against plaintiff, but only strong evidence against him. Watts v United States (1938, DC Miss) 24 F Supp 969 (superseded by statute as stated in Farris v State (2004, App) 2004 Miss App LEXIS 1126)

204. -Burden of proof

Insured was under heavy burden of proving disability where insured permitted 10 years to elapse without payment of premiums. Keelen v United States (1933, CA5 La) 65 F.2d 513

Fact that appellee delayed more than 11 years before bringing suit, and that during that time he was engaged in some substantially gainful occupation, puts upon him the burden of proving that he had suffered "total permanent disability" before his policy lapsed. United States v Burns (1934, CA5 Fla) 69 F.2d 636

It was incumbent upon insured to prove with clear and satisfactory evidence that he was disabled while the policy was in force and that such disability would continue where suit was delayed until 13 years after policy lapsed, and during intervening period, except when temporarily suffering from acute attack of his ailment, or taking vocational training, claimant was engaged in substantially gainful employment. O'Quinn v United States (1934, CA5 La) 70 F.2d 599

Long delay in bringing suit casts heavy burden on veteran. United States v Mathis (1936, CA10 Kan) 84 F.2d 451

Mentally and physically disabled veteran could sustain burden of proving he was totally and permanently disabled before lapse of policy, despite long delay in bringing suit. United States v Bodge (1936, CA10 Kan) 85 F.2d 433

205. -Miscellaneous
Facts that insured did not bring suit during the 10 years available to him, and his wife did not sue until two years after his death, in absence of explanation, constituted strong evidence that insured was not totally and permanently disabled before his policy lapsed. United States v Russian (1934, CA3 Pa) 73 F.2d 363

Veteran’s long delay in bringing suit did not uphold his contention of disability. United States v Steadman (1934, CA10 Utah) 73 F.2d 706

In view of insured's work record, and long delay before suit, insured did not sustain burden of proving total and permanent disability before his policy lapsed. Werth v United States (1935, CA4 Va) 75 F.2d 192

Veteran refusing hospitalization and delaying suit did not sustain burden of proving total and permanent disability. United States v Anderson (1935, CA4 SC) 76 F.2d 337

Incipient tuberculosis and bronchitis and asthma, even if of service origin, did not establish total and permanent disability, in view of long delay in bringing suit. United States v Bishop (1937, CA6 Tenn) 90 F.2d 65

In insured's suit on war risk insurance policy for disability benefits, where plaintiff contended that he was totally and permanently disabled while his policy was in force, fact that he made no demands upon government for payment of benefits until twelve years after alleged total and permanent disability was strong evidence against such contention. United States v Fields (1939, CA8 Ark) 102 F.2d 535

Where insured, whose war risk insurance policy expired in August 1918, did not file claim for benefits until in June 1931, his failure to make claim earlier was strong circumstance against his right to recover. United States v Ware (1940, CA5 La) 110 F.2d 739

In action on war risk insurance policy, fact that, for more than ten years after policy lapsed, insured made no claim that he was totally disabled was strong evidence that insured was not totally and permanently disabled prior to lapse of policy. United States v Kusch (1940, CA6 Mich) 110 F.2d 955

Evidence failed to establish that insured was totally and permanently disabled from mental injury sustained during service, where insured signed statement when he was discharged from army that he had no injury or disability, and after his discharge he was not adjudged insane and was able to work at various times, and suit was not brought until about 15 years after lapse of policy. Crouch v United States (1935, DC W Va) 11 F Supp 232

Wait of 10 or 12 years before bringing suit was strong suggestion veteran was not totally and permanently disabled before lapse of policy. Fairbanks v United States (1936, DC Mont) 17 F Supp 550, affd (1937, CA9 Mont) 89 F.2d 949

d. Testimonial Evidence

(1). In General

206. Generally

Objection that question to doctor invaded province of jury was sufficient where question requires witness to give his opinion as to ultimate fact in issue. United States v Sullivan (1935, CA9 Idaho) 74 F.2d 799

Failure to except when similar question had previously been asked, objected to, and objection overruled could not be construed as consent to like testimony preventing objection to its extension. United States v Provost (1935, CA5 Fla) 75 F.2d 190

Answer to question over objection was not prejudicial where witness testified to substantially same thing at another point without objection. United States v Bryan (1936, CA5 La) 82 F.2d 784

207. Testimony as to particular matters
Testimony of insured’s secretary that insured had executed form changing beneficiary of NSLI policy from sister to wife was insufficient to establish effective change, where form was not found in agency file. Watson v United States (1950, CA5 Ga) 185 F.2d 292

Testimony of friends and fellow officers of insured was insufficient to establish change of beneficiary from parents to widow, where no writings in support of testimony had been produced. Cohn v Cohn (1948, App DC) 84 US App DC 218, 171 F.2d 828, cert den (1949) 336 US 962, 93 L Ed 1114, 69 S Ct 892

Serviceman’s widow could testify concerning statements made to her by serviceman concerning his NSLI policy. Dutton v United States (1965, ND Ga) 237 F Supp 670

Evidence in form of insured’s statements as to his intent to change beneficiary and accomplishment of some affirmative act to effect such change was competent and admissible testimony; thus, testimony of military personnel contacted by insured regarding his National Service Life Insurance as to use and effect of certain forms for changing beneficiaries and as to statements made by insured of his intent to change beneficiaries was admissible in evidence. Spaulding v United States (1966, WD Okla) 261 F Supp 232

208. Miscellaneous

Fact that insured, while in employ of railroad company, made false claim that his injury was received from falling from boxcar in order to obtain hospital treatment, was immaterial on question of liability on policy, except on question of his credibility as witness. La Marche v United States (1928, CA9 Wash) 28 F.2d 828

(2). Medical Matters

209. Generally

Failure to call physician to corroborate testimony affects weight but not sufficiency of plaintiff’s evidence where plaintiff’s evidence makes out prima facie case. Hicks v United States (1933, CA4 Va) 65 F.2d 517

Evidence may fail to show claimant is totally and permanently disabled notwithstanding doctor’s opinion. United States v Doublehead (1934, CA10 Okla) 70 F.2d 91

Medical experts cannot properly give opinions as to substantial gainfulness of occupations which insured can follow or testify generally that insured is disabled within definition of policy. United States v Provost (1935, CA5 Fla) 75 F.2d 190

Opinion of physician cannot establish total and permanent disability of insured. United States v Chandler (1935, CA5 Ala) 77 F.2d 452

Whether veteran can continuously follow gainful occupation is not question for expert witness. Rackoff v United States (1935, CA2 NY) 78 F.2d 671

In action on war risk insurance policy for disability benefits, question whether insured became totally and permanently disabled before his policy lapsed was not to be resolved by opinion evidence. United States v Nelson (1939, CA8 Ark) 102 F.2d 515, cert den (1939) 308 US 550, 84 L Ed 462, 60 S Ct 81

210. Admissibility of testimony of physicians

Testimony of physician, who examined insured without intent to create evidence, is properly received. United States v Roberts (1932, CA10 Colo) 62 F.2d 594

Affidavit of physician, who died before trial that he treated insured for tuberculosis was not admissible, in absence of showing that he acted in official capacity in performance of public duty. Seals v United States (1934, CA5 La) 70 F.2d 519; United States v Buck (1934, CA5 Ala) 70 F.2d 1007

Court could not receive opinion of doctor that insured was disabled during life of policy, where opinion was based solely on examination and statements of insured 14 years after lapse of policy. United States v Matory (1934, CA7 Ill) 71 F.2d 798
Requesting from physician opinion as to whether insured was totally and permanently disabled within meaning of insurance policy and during its life was improper. Hamilton v United States (1934, CA5 Ga) 73 F.2d 357

Doctor who examined insured for first time ten years after lapse of policy and examined history of case could testify that in his opinion insured was disabled before lapse of policy. United States v Russian (1934, CA3 Pa) 73 F.2d 363

Opinion evidence was admissible to show veteran's physical condition and ability to work at critical period. United States v Russian (1934, CA3 Pa) 73 F.2d 363

Province of jury is not invaded by opinion of expert where disability is little understood by laymen; test of admissibility is jury's inability to judge for themselves. United States v Bowman (1934, CA10 Utah) 73 F.2d 716

Opinion of doctor as to total and permanent disability of insured should be excluded. United States v National Bank of Commerce (1934, CA9 Wash) 73 F.2d 721; United States v Price (1935, CA5 Ala) 77 F.2d 345

Admission of testimony based upon medical examination made 14 years after time of alleged disability was error. Stephenson v United States (1935, CA8 Mo) 78 F.2d 355

Permitting medical expert to give opinion that insured cannot carry on continuously gainful occupation was reversible error. United States v Harris (1935, CA9 Mont) 79 F.2d 341

Testimony of medical expert that insured was disabled before lapse of policy was incompetent. United States v Noble (1935, CA9 Mont) 79 F.2d 342

Permitting doctor to testify that insured was unable to continuously pursue gainful occupation was error. United States v Sparks (1935, CA7 Ind) 80 F.2d 392

Permitting medical witnesses to testify that veteran was totally and permanently disabled at time of their examination of him and for many years prior thereto was prejudicial error. United States v Craig (1936, CA7 Ind) 83 F.2d 361

In suit on war risk insurance policy, admission of testimony of expert's interpretation of x-ray of plaintiff's chest without producing x-ray plate was error. Gay v United States (1941, CA7 Ill) 118 F.2d 160

Where records relating to examination of veteran by several government doctors were introduced through one of their number, any expert should be permitted to give his opinion thereon since physician who made original report was not produced for cross-examination. Edmunds v United States (1938, DC Or) 24 F Supp 742, app dismd (1939, CA9 Or) 101 F.2d 1021

Depositions of physicians were properly received in behalf of defendant, as against contention they were superseded by commissioner's summary. Demeter v United States (1933, Dist Col App) 62 App DC 208, 66 F.2d 188

211. Weight of testimony of physicians

Medical opinions that respondent became totally and permanently disabled before policy lapsed were without weight where experts failed to give proper weight to his fitness for naval air service or to work he performed, and misinterpreted "total permanent disability" as used in policy and statute authorizing insurance. United States v Spaulding (1935) 293 US 498, 79 L Ed 617, 55 S Ct 273, reh den (1935) 294 US 731, 79 L Ed 1261, 55 S Ct 504

Opinion of experts which is contrary to physical facts or is obviously false cannot be given weight in determining disability. United States v Hill (1933, CA8 Ark) 62 F.2d 1022

Jury is bound by expert testimony concerning whether condition was incurable on certain date. United States v Wilfore (1933, CA2 Vt) 66 F.2d 255

Testimony of physician that insured was totally and permanently disabled at time of lapse of his policy could not be credited in face of physical facts showing contrary. United States v Donahue (1933, CA8 Minn) 66 F.2d 838
Testimony of physician that cancer of mouth might have existed for more than year before his examination was mere surmise and was not sufficient to support finding of that fact. United States v Rodman (1934, CA4 NC) 68 F.2d 351

Opinion of physician that insured was totally and permanently disabled 11 years before that time, based on what insured told physician few days before trial and on hospital record, could not support finding of that fact. United States v Burns (1934, CA5 Fla) 69 F.2d 636

Doctor's testimony of veteran's disability at time policy lapsed based solely on what veteran told him just prior to trial was devoid of probative value. United States v Burns (1934, CA5 Fla) 69 F.2d 636

Testimony of doctor based entirely on conversation with insured 13 years after lapse of policy could not support finding of total permanent disability before lapse. United States v Doublehead (1934, CA10 Okla) 70 F.2d 91

Testimony of experts did not support finding that insured had encephalitis lethargica during life of policy, where they testified that medical science was as yet unable to say when these germs of disease, if such they were, invade human system and that they could not positively say insured was inflicted with disease at time when policy was in effect and that matter was uncertain. United States v Koskey (1934, CA9 Cal) 71 F.2d 501

Opinion testimony that veteran was totally and permanently disabled, based upon conflicting evidence and departmental definition of total and permanent disability, invaded province of jury and was entitled to no weight. United States v Baker (1934, CA9 Idaho) 73 F.2d 691

Question of weight of certificate of government physician, introduced by plaintiff, that insured was not disabled when discharged from army was for jury. United States v Stephens (1934, CA9 Idaho) 73 F.2d 695

In determining whether there was substantial evidence to sustain verdict in veteran's favor in suit on a war risk insurance policy, expert testimony that insured was totally and permanently disabled would be disregarded. United States v Steadman (1934, CA10 Utah) 73 F.2d 706

Opinion of physician that veteran was totally and permanently disabled was without probative weight. United States v Shashy (1935, CA5 Fla) 75 F.2d 422

Opinions of physicians as to condition of insured 4 years before examination were merely speculative and had little or no probative value. United States v Krueger (1935, CA7 Ind) 77 F.2d 171

Weight of expert's opinion might be affected by his stated definition of "total permanent disability." United States v Frost (1936, CA9 Ariz) 82 F.2d 152

Retroactive diagnoses of medical experts are highly speculative and not proof of disability when refuted by inconsistent acts of veteran. United States v Becker (1936, CA7 Ind) 86 F.2d 818

Testimony of medical men as to extent of veteran's disability is of no value where policy has lapsed. Wilner v United States (1936, CA7 Ill) 87 F.2d 164, cert den (1937) 301 US 683, 81 L Ed 1341, 57 S Ct 783

In action on war risk insurance policy where sole issue submitted to jury by trial court was whether insured was totally and permanently disabled before policy expired, opinion of medical witness was not substantial evidence. United States v Fields (1939, CA8 Ark) 102 F.2d 535

Opinions of medical witnesses that work impaired plaintiff's health was without weight where there was substantial evidence to show he worked with reasonable regularity. Roberts v United States (1936, DC Idaho) 17 F Supp 641

212. Admissibility and weight of testimony of nonexperts

Testimony of insured, not expert, as to permanence of his diabetes had no probative value. United States v Elmore (1934, CA5 Fla) 68 F.2d 551

Lay witness could not testify on matters of opinion and judgment as medical witnesses; but lay witness could testify that insured had night sweats, coughed continuously, could work only a
short time without resting, that he continued to expectorate and that he gradually grew weaker.
United States v Monger (1934, CA10 Wyo) 70 F.2d 361

Only expert witnesses could give information on inquiry whether given case of tuberculosis was incipient or had been arrested. United States v McShane (1934, CA10 Colo) 70 F.2d 991, cert den (1934) 293 US 610, 79 L Ed 700, 55 S Ct 141

Opinion of lay witness based on facts previously given by him is admissible at judge's discretion. Taylor v United States (1934, CA5 Ala) 71 F.2d 76

Testimony of insured and his wife of insured's compensation rating and drawings, brought out on cross-examination, was admissible to show whether he is totally and permanently disabled. Jennings v United States (1934, CA5 Ga) 73 F.2d 470

Witness not qualified as expert was not competent to testify that veteran worked when he should have been in bed, as to why he quit work, or as to what ailed him. McConnell v United States (1936, CA3 Pa) 81 F.2d 639

Lay witness, from his observations of another person, could testify as to existence of state of apparent health or of state of apparent sickness or disease. Corrigan v United States (1936, CA9 Idaho) 82 F.2d 106

Insured's employer could give his opinion as to whether insured appeared as strong as before war and appeared to be exhausted when working. Corrigan v United States (1936, CA9 Idaho) 82 F.2d 106

Testimony of lay witnesses was admissible as to health and physical condition of insured, in action on claim for total permanent disability and death benefits under war risk insurance contract, where plaintiffs relied upon pulmonary tuberculosis as cause of alleged permanent disability. Cox v United States (1939, CA7 Ill) 103 F.2d 133

Testimony of lay witnesses is not competent upon matters of opinion and is not as weighty as that of medical witnesses, but lay witnesses may testify to actual facts within their knowledge, and when these facts, together with medical testimony, show case of total and permanent disability, plaintiff is entitled to recover. Watts v United States (1938, DC Miss) 24 F Supp 969 (superseded by statute as stated in Farris v State (2004, App) 2004 Miss App LEXIS 1126)

213. Examination of witnesses

Hypothetical question to physician was proper in view of subsequent testimony establishing facts assumed. Proechel v United States (1932, CA8 Minn) 59 F.2d 648, cert den (1932) 287 US 658, 77 L Ed 658, 53 S Ct 122

Objection to hypothetical question on ground that facts recited therein have not been established was properly overruled where counsel fails to point out omitted facts when requested by judge. United States v Nickle (1932, CA8 Mo) 60 F.2d 372 (superseded by statute as stated in United States v Iron Shell (1980, CA8 SD) 633 F.2d 77, 7 Fed Rules Evid Serv 269, 55 ALR Fed 664)

Question whether, in opinion of witness, insured is able to engage continuously in any gainful occupation, and answer thereto that he could not, are improper whether witness is lay witness or expert, since this may be invasion of province of jury, but this is harmless in view of other evidence of disability. United States v Sauls (1933, CA4 NC) 65 F.2d 886; Hamilton v United States (1934, CA5 Ga) 73 F.2d 357; United States v Bowman (1934, CA10 Utah) 73 F.2d 716; United States v Sullivan (1935, CA9 Idaho) 74 F.2d 799; Rackoff v United States (1935, CA2 NY) 78 F.2d 671

Hypothetical question to physician, based on insured's work record after his discharge, as to whether insured was permanently and totally disabled at time of discharge was improper. Prevette v United States (1934, CA4 NC) 68 F.2d 112, cert den (1934) 292 US 622, 78 L Ed 1478, 54 S Ct 83

Physician allowed to testify as to disability or injury of insured must be shown to have necessary qualifications to give such testimony. United States v Matory (1934, CA7 Ill) 71 F.2d 798; United States v Craig (1936, CA7 Ind) 83 F.2d 361

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Objection to hypothetical question put to expert witness made after question was answered was not too late. United States v Young (1934, CA9 Idaho) 73 F.2d 690, cert den (1935) 294 US 714, 79 L Ed 1248, 55 S Ct 512

Court improperly permitted doctor to testify, in answer to hypothetical question, that, in his opinion, insured was totally and permanently disabled during life of policy, since this invaded province of jury. United States v Young (1934, CA9 Idaho) 73 F.2d 690, cert den (1935) 294 US 714, 79 L Ed 1248, 55 S Ct 512; United States v Steadman (1934, CA10 Utah) 73 F.2d 706; United States v Shashy (1935, CA5 Fla) 75 F.2d 422; Stephenson v United States (1935, CA8 Mo) 78 F.2d 355; United States v Driscoll (1935, CA7 Ind) 80 F.2d 59, cert den (1936) 297 US 719, 80 L Ed 1004, 56 S Ct 599

Physician's opinion as to existence of total and permanent disability is inadmissible when made in response to hypothetical question which was based upon official or policy definition of total and permanent disability, since witness was, in effect, giving his opinion as to whether disability of insured was such as entitled him to benefits under terms of policy. United States v Young (1934, CA9 Idaho) 73 F.2d 690, cert den (1935) 294 US 714, 79 L Ed 1248, 55 S Ct 512; United States v Stephens (1934, CA9 Idaho) 73 F.2d 695; United States v Sullivan (1935, CA9 Idaho) 74 F.2d 799; United States v Provost (1935, CA5 Fla) 75 F.2d 190

Hypothetical question asked physician which included conflicting evidence and departmental definition of total and permanent disability invaded province of jury. United States v Stephens (1934, CA9 Idaho) 73 F.2d 695

Hypothetical question as to insured's disability was objectionable where question incorporated administrative definition of disability, which had been disapproved as not constituting legal test of total and permanent disability. United States v Stephens (1934, CA9 Idaho) 73 F.2d 695

Question invaded province of jury where physician was given definition of total and permanent disability contained in policy and asked whether he believed veteran to come within that definition. United States v Sullivan (1935, CA9 Idaho) 74 F.2d 799

Permitting expert to testify as to whether insured could have followed gainful occupation from date of enlistment to date of suit was error where question was so broad as to call for use of common knowledge. United States v Sampson (1935, CA9 Mont) 79 F.2d 131

It is improper to ask doctor what he had seen men doing on his ranch, since this had no bearing on his qualification as expert and was not otherwise relevant. Corrigan v United States (1936, CA9 Idaho) 82 F.2d 106

Hypothetical question must be based on facts established and not on opinions of another expert witness, since one expert cannot base his opinion on opinion of another expert. Corrigan v United States (1936, CA9 Idaho) 82 F.2d 106

Questions permitting expert witness to base opinion on the opinions of other experts is improper. Corrigan v United States (1936, CA9 Idaho) 82 F.2d 106

Hypothetical question asked medical witness as to whether or not insured was totally and permanently disabled before lapse of policy was improper. United States v Frost (1936, CA9 Ariz) 82 F.2d 152

Answer of medical expert of plaintiff to hypothetical question that in his opinion plaintiff was totally and permanently disabled prior to lapse of policy was reversible error. United States v Hibbard (1936, CA9 Idaho) 83 F.2d 785

214. Hearsay evidence

Testimony of insured that his physician diagnosed his case as tuberculosis should have been stricken. United States v Hill (1932, CA9 Or) 61 F.2d 651

Testimony of clerk of veteran's physician as to what doctor said concerning veteran's condition, following examination of him, was hearsay and properly excluded. Harris v United States (1934, CA4 Va) 70 F.2d 889
Testimony of insured that "they told me I had a rapid heart, lungs out of shape, and a spot on my right lung," and that "a doctor" told him he had inflammation of lungs and spots on his lungs, was inadmissible as hearsay. United States v Buck (1934, CA5 Ala) 70 F.2d 1007

Testimony of witness that doctors told him plaintiff was disabled was hearsay and properly excluded. Luke v United States (1936, CA5 Ga) 84 F.2d 823

Letter from unidentified surgeon which stated veteran had convulsive seizures which did not look like true epilepsy was properly rejected as hearsay. Lockett v United States (1936, CA5 Ga) 86 F.2d 1

215. -Res gestae

Statement made by insured concerning his disability was erroneously admitted in behalf of beneficiary, where there was no showing that it was res gestae or expression of his feeling. United States v Phillips (1930, CA8 Mo) 44 F.2d 689

Judge properly received testimony of spontaneous expressions of insured concerning his mental or physical condition. Wilks v United States (1933, CA2 NY) 65 F.2d 775

216. -Statements during medical examinations

Physician's testimony of declarations of insured at time of examination are properly received in behalf of plaintiff. United States v Tyrakowski (1931, CA7 Ill) 50 F.2d 766

Doctor's testimony as to history of case told by insured to doctor was not admissible in absence of showing of purpose of giving such history to doctor. United States v Nickle (1932, CA8 Mo) 60 F.2d 372 (superseded by statute as stated in United States v Iron Shell (1980, CA8 SD) 633 F.2d 77, 7 Fed Rules Evid Serv 269, 55 ALR Fed 664)

Letter by veteran to official of veterans' bureau [now Department of Veterans Affairs] asking about his rights under his war risk insurance policy amounted to "claim." Morris v United States (1938, CA5 Miss) 96 F.2d 731

Letter advising department that veteran was totally and permanently disabled when discharged from army is sufficient as "claim." Raymond v United States (1933, DC Mo) 4 F Supp 757

217. Miscellaneous

Admission of evidence in behalf of beneficiary that 13-year-old boy could have done work which insured did during disability was harmless error. United States v Phillips (1930, CA8 Mo) 44 F.2d 689

Medical witnesses for government are properly permitted to testify as to what kind of work veteran was able to do when examined by them. McConnell v United States (1936, CA3 Pa) 81 F.2d 639

Testimony as to the effect of veteran's condition on his ability to work is admissible. Corrigan v United States (1936, CA9 Idaho) 82 F.2d 106

Testimony of government physicians that insured can do light work is merely to form issue for jury. United States v Bodge (1936, CA10 Kan) 85 F.2d 433

Opinions of medical witnesses that work impaired plaintiff's health was without weight where there was substantial evidence to show he worked with reasonable regularity. Roberts v United States (1936, DC Idaho) 17 F Supp 641

3. Proof of Claim

a. Burden of Proof

218. Burden upon claimant

Veteran must prove essential elements of cause of action alleged. O'Quinn v United States (1934, CA5 La) 70 F.2d 599
Veteran must establish his claim by proof satisfactory to court where no defense is made. United States v Lindholm (1935, CA9 Cal) 79 F.2d 784, 103 ALR 213

In measuring quantum of evidence necessary to sustain possible verdict for plaintiff in action on policy, remedial purposes of act must be considered. United States v Hartley (1938, CA9 Mont) 99 F.2d 923

Each war risk insurance case must stand or fall on facts supporting it. Fairbanks v United States (1936, DC Mont) 17 F Supp 550, affd (1937, CA9 Mont) 89 F.2d 949

Individual claiming interest in proceeds of National Service life insurance policy in hands of designated beneficiary must produce evidence sufficient to show that insured intended to create trust or contract for benefit of third party. Henderson v Gifford (1957, Okla) 318 P2d 404; In re Estate of Milton (1956) 48 Wash 2d 389, 294 P2d 412

219. Burden upon government

Government has burden of proving that reinstatement of policy after lapse has been procured by fraud, where government asserts such fraud as defense to action on policy. Pence v United States (1942) 316 US 332, 86 L Ed 1510, 62 S Ct 1080, reh den (1942) 316 US 712, 86 L Ed 1777, 62 S Ct 1287

Government has burden of proof in establishing defense of estoppel predicated upon misrepresentations of insured contained in applications for reinstatement of policy. Quirk v United States (1930, DC Pa) 45 F.2d 631

Government, in suit to set aside policy, is subject to same rules regarding burden of proof, quantity and character of evidence, and presumptions as attend prosecution of like action by other individual. Hayman v United States (1931, DC Tex) 51 F.2d 800, affd (1932, CA5 Tex) 62 F.2d 118

Insured's designation of beneficiary, accompanied by statement of relationship to insured, fixes such relationship presumptively, and government or adverse claimants have burden of disproving such relationship. Jones v Gaillard (1941) 241 Ala 571, 4 So 2d 131

220. Change of beneficiary

Burden of proof is upon plaintiff to prove that requisite steps were taken to change beneficiary. Leahy v United States (1926, CA9 Mont) 15 F.2d 949

Party who claims to be substituted beneficiary under National Service Life Insurance policy has burden of showing that valid change of beneficiary has taken place. Bradley v United States (1944, CA10 Okla) 143 F.2d 573, cert den (1944) 323 US 793, 89 L Ed 632, 65 S Ct 429; Collins v United States (1947, CA10 Okla) 161 F.2d 64, cert den (1947) 331 US 859, 91 L Ed 1866, 67 S Ct 1756

Ordinarily, person claiming to be substituted beneficiary of National Service Life Insurance policy has burden of proving change of beneficiary. Blair v United States (1958, CA10 Okla) 260 F.2d 237; Baker v United States (1967, CA5 Ga) 386 F.2d 356; Geis v United States (1968, CA9 Wash) 404 F.2d 154

Government has burden of proving effective change of beneficiary where it has paid proceeds to person claiming to be substituted beneficiary. Willis v United States (1961, CA7 III) 291 F.2d 5; Benard v United States (1966, CA8 Mo) 368 F.2d 897

221. Claim and disagreement

Plaintiff has burden of proving that claim has been made and that there is disagreement thereon before action is commenced. United States v Densmore (1932, CA9 Cal) 58 F.2d 748, cert den (1932) 287 US 598, 77 L Ed 521, 53 S Ct 24; United States v Knott (1934, CA6 Ky) 69 F.2d 907; United States v Prinimine (1935, CA5 La) 76 F.2d 555

Burden is on claimant to show that she or someone else for her has made to veterans' bureau [now Department of Veterans Affairs] claim in writing for insurance benefits. Cannon v United States (1941, DC Pa) 45 F Supp 106, affd (1942, CA3 Pa) 128 F.2d 452

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In action to recover benefits under policy, it is incumbent upon plaintiff to prove date of filing of claim and that suit was brought within time permitted by statute. Boyd v United States (1942, DC Wis) 47 F Supp 339

222. Death of insured

 Administratrix suing on war risk policy after insured's unexplained absence for more than seven years had burden of proving that death occurred prior to time that policy lapsed. McCune v United States (1932, CA6 Ky) 56 F.2d 572

 In action based on death of insured, plaintiff has burden of proving death of insured during life of policy. McCune v United States (1932, CA6 Ky) 56 F.2d 572

 Presumption of death from absence was insufficient to establish death prior to time that policy lapsed. English v United States (1928, DC Md) 25 F.2d 335

 Whether burden rests upon beneficiary to establish that insurance contract was in force and effect at time of death of insured should be determined by rules applicable to similar cases where both parties to action are private parties. Rodgers v United States (1946, DC Pa) 66 F Supp 663

 Certified decision of board for correction of naval records, reviewed and approved by Secretary of Navy, that mark of desertion be removed, that because of unexplained absence of over seven years seaman was presumed to have died, and that death was not result of his own misconduct, satisfied requirement that insured have died at time when his insurance was in force. Martinson v United States (1958, DC Minn) 162 F Supp 305

223. Payment of premiums

 Burden is upon administrator of deceased veteran to show that bonus $60 was not paid to veteran prior to his death and was applicable to payment of premium of policy. Bank of Arizona v United States (1934, CA9 Ariz) 73 F.2d 811

 Where case is being tried on theory that veteran failed to pay premium on certain date, veteran had burden of proving payment of later premium. Rackoff v United States (1935, CA2 NY) 78 F.2d 671

224. Miscellaneous

 Party asserting mental incapacity to effect valid change of beneficiary has burden of proving such incapacity by preponderance of evidence. Morris v United States (1963, ND Tex) 217 F Supp 220; Bonner v United States (1963, DC Mass) 222 F Supp 539

b. Presumptions and Inferences

225. Competency

 No presumption of incompetency arose from fact that Veterans' Administration [now Department to Veterans Affairs] had waived payment of premiums due to veteran's incompetency, but presumption of competency did arise from veteran's having been declared competent by both Veterans' Administration [now Department to Veterans Affairs] and state court. Wiley v United States (1968, CA10 Okla) 399 F.2d 844

226. Death

 38 USCS § 108, providing that death may be considered as sufficiently proved upon establishing continued and unexplained absence for period of 7 years, does not preclude National Service Life Insurance policy beneficiary seeking to recover proceeds of policy issued to insured, who has been continuously and unexplainably absent for more than 7 years, from introducing evidence from which jury might conclude that insured's presumed death occurred at date earlier than expiration of 7 year period, and at time when policy was still in force, which jury might so conclude if beneficiary can prove allegations concerning insured's frail health and disability or other relevant facts relating to time of his disappearance. Peak v United States (1957) 353 US 43, 1 L Ed 2d 631, 77 S Ct 613

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227. Disability

It is presumed that tuberculosis existing after discharge from service was contracted while in service; this presumption does not go to degree or permanency of disability. Mulivrana v United States (1930, CA9 Wash) 41 F.2d 734; Runkle v United States (1930, CA10 Colo) 42 F.2d 804; United States v Le Duc (1931, CA8 Minn) 48 F.2d 789, cert den (1931) 284 US 631, 76 L Ed 537, 52 S Ct 14; United States v Wescoat (1931, CA4 W Va) 49 F.2d 193

Presumption concerning health and disabilities was not applicable to suits on war risk policies. O’Quinn v United States (1934, CA5 La) 70 F.2d 599

There is strong evidentiary presumption that one who was totally and permanently disabled in 1918 would not postpone claim of insurance until 1931. Lawhon v United States (1936, CA10 Okla) 82 F.2d 921

228. Marital relationship

Widow’s relationship with man other than her husband, where shown to be in its inception illicit and meretricious because her husband was then living, raises presumption that it continued to be so even after death of her husband, and to prove common-law remarriage, it is necessary to produce proof overcoming such presumption. Rittgers v United States (1946, CA8 Minn) 154 F.2d 768

Evidence by first wife that she had never received any divorce papers was not sufficient to entitle her to recover proceeds on ground that she was “widow” where she had remarried, and insured had remarried twice and had son, since marriages are presumed valid unless rebutted by convincing evidence. Harsley v United States (1951, App DC) 88 US App DC 150, 187 F.2d 213

Second wife was not entitled to proceeds of policy where she married deceased 21 days after personal service on deceased of divorce action filed by first wife, since service of summons overcame presumption of validity of second marriage. Cavanaugh v United States (1951, DC Mo) 94 F Supp 776

229. Miscellaneous

Presumption is raised that woman is lawfully designated beneficiary where insured had designated woman as his lawful wife to be beneficiary of war risk insurance policy, and government finds her to be lawfully designated beneficiary and acting on such finding has for several years paid her monthly installments due on policy. Jones v Gaillard (1941) 241 Ala 571, 4 So 2d 131

230. Generally

230.1. Burden of Proof


Burden is on insured to prove total permanent disability arising during life of policy, but not to prove exact time and place of injury. La Marche v United States (1928, CA9 Wash) 28 F.2d 828

Insured has burden of proving total and permanent disability, and mere fact that he was discharged from service on account of rheumatism is not proof of such disability. Blair v United States (1931, CA8 Ark) 47 F.2d 109

Burden is on insured to show total disability reasonably certain to continue permanently. United States v Russian (1934, CA3 Pa) 73 F.2d 363

Insured has burden of proving total and permanent disability while his policy was in force, and it is not enough to show permanent partial disability or temporary total disability. United States v Jones (1935, CA5 Tex) 74 F.2d 986
Burden of proving total and permanent disability is upon veteran, without regard to administrative ruling on that subject. United States v Knoles (1935, CA8 SD) 75 F.2d 557

231. Commencement of disability during term of policy

Though plaintiff had burden of proving total permanent disability during life of policy, mere failure to prove exact time and place of injury is not fatal where evidence warrants finding that disability existed during life of policy. La Marche v United States (1928, CA9 Wash) 28 F.2d 828

In action based on disability, plaintiff has burden of proving total permanent disability during life of policy. United States v McPhee (1929, CA9 Wash) 31 F.2d 243; United States v Le Duc (1931, CA8 Minn) 48 F.2d 789, cert den (1931) 284 US 631, 76 L Ed 537, 52 S Ct 14; United States v Tyrakowski (1931, CA7 Ill) 50 F.2d 766; Nicolay v United States (1931, CA10 Colo) 51 F.2d 170; Quinn v United States (1932, CA3 Pa) 58 F.2d 19; Walters v United States (1933, CA5 Tex) 63 F.2d 299

Burden is on plaintiff to prove service connection of disabilities, and that such disabilities were total and permanent within life of policy. Quinn v United States (1932, CA3 Pa) 58 F.2d 19

Eggen v United States (1932, CA8 Minn) 58 F.2d 616

Burden of proving total and permanent disability while policy was in force is on insured. United States v Suomy (1934, CA9 Or) 70 F.2d 542; United States v Sanford (1934, CA5 Ga) 73 F.2d 233; United States v Horn (1934, CA4 W Va) 73 F.2d 770; Franklin v United States (1934, Dist Col App) 64 App DC 15, 73 F.2d 655; United States v Taylor (1937, CA5 La) 87 F.2d 994

Plaintiff cannot sustain his claim by showing that condition alleged as permanent might have arisen while his policy was in force; he must show that it did. United States v Sandifer (1935, CA5 La) 76 F.2d 551

In action on contract of war risk term insurance, veteran's burden of proving total and permanent disability from last effective date of such contract was not satisfied by proof that disease in question had its periods of remission during which he could work without injury to himself. Denny v United States (1939, CA7 Ill) 103 F.2d 960

In action on war risk insurance policy, plaintiff must show that before policy lapsed he was totally disabled and that his disability was of permanent character. Adams v United States (1940, CA7 Ill) 116 F.2d 199

Burden is on insured to show that he became totally and permanently disabled before policy lapsed. United States v Atchley (1940, CA10 Kan) 116 F.2d 266

Burden of proving permanent and total disability while insurance contract was in effect is upon plaintiff. Walsh v United States (1938, DC Minn) 24 F Supp 877, app dismd (1939, CA8 Minn) 106 F.2d 1021

232. Disability as precluding substantially gainful employment

Insured has burden of proving physical impairment preventing him from continuously following substantially gainful occupation, and that such impairment is reasonably certain to continue throughout life. United States v Hill (1933, CA8 Ark) 62 F.2d 1022

Where suit was delayed until thirteen years after policy lapsed, and during intervening period, except when temporarily suffering from acute attack of his ailment, or taking vocational training, claimant was engaged in substantially gainful employment, it was incumbent on him to produce clear and satisfactory evidence that he was totally and permanently disabled while policy was in force, and to sustain burden of proof, that impairment was such as to make it, throughout his life, impossible for him to follow with substantial continuity any substantially gainful employment. O'Quinn v United States (1934, CA5 La) 70 F.2d 599

In order to recover under insurance policy, burden is on plaintiff not only to show character and extent of his injury, but also to show that result of injury is to disable him permanently from
following any substantially gainful occupation. United States v Bemis (1939, CA9 Or) 107 F.2d 894

One claiming total permanent disability under insurance policy has burden to prove that while policy was in full force and effect he suffered an impairment of mind or body, which continually renders it impossible for him to follow any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that it will continue throughout life of insured. Dye v United States (1941, CA10 Okla) 123 F.2d 385

233. Termination of disability

Burden is on defendant to establish that disability existing prior to July 4, 1934 did not continue after that date where, in action on war risk insurance policy, jury found that plaintiff became totally permanently disabled on April 5, 1919, and that disability continued until date of entry of judgment, April 11, 1929, and administrator [now Secretary] ordered monthly payments halted on July 4, 1934, because he found that total disability had ended, and plaintiff brought second action to recover for disability which had accrued subsequent to July 4, 1934. Anderson v United States (1942, CA3 Pa) 126 F.2d 169

Government, in its defense of action to recover for total and permanent disability for periods since previous judgment in plaintiff's favor, has burden of affirmatively establishing its contention that plaintiff has, since time previous judgment was rendered, recovered ability to continuously follow gainful occupation. Countee v United States (1942, CA7 Ill) 127 F.2d 761, 142 ALR 1165, cert den (1942) 317 US 628, 87 L Ed 508, 63 S Ct 44

234. Presumptions and inferences

Proof of death or total permanent disability after lapse of policy, resulting from injury or disease existing before lapse is not conclusive that insured was totally and permanently disabled before lapse; and such proof may not even sustain inference of total permanent disability before lapse where proof does not show death or existence of total permanent disability before expiration of several years after lapse of policy. Eggen v United States (1932, CA8 Minn) 58 F.2d 616

Government was entitled to benefit of inference that insured's own testimony would not have aided him in his contention that he was totally and permanently disabled before policy expired where insured was present at trial but did not testify. United States v Fields (1939, CA8 Ark) 102 F.2d 535

On question of disability of insured, all legitimate doubts arising from evidence must be resolved in favor of plaintiff. Putney v United States (1933, DC Colo) 4 F Supp 376

235. Miscellaneous

Insured had burden of proving disability where evidence showed that insured actually engaged in his usual occupation notwithstanding his claim that he suffered from heart disease. United States v Pollock (1934, CA5 Fla) 68 F.2d 633

Widow of veteran had burden of proving that husband's suffering from pulmonary tuberculosis at time of discharge from army resulted in his total and permanent disability. Carey v United States (1934, CA10 Okla) 69 F.2d 766

Beneficiaries had burden of proving dementia praecox existed while policy was in force, that it was permanent and irremediable, and that insured was unable to follow continuously any substantially gainful employment where this mental state was alleged cause of insured's death. United States v Johnson (1934, CA8 Neb) 72 F.2d 614

Petitioner's failure to prove by preponderance of evidence that insured though semi-recluse and acted eccentrically, was totally and permanently disabled, thereby excusing payment of National Service Life Insurance premiums, where record showed decedent had excellent memory, lived alone and cared for himself, traveled alone frequently and drove his car. McNeil v United States (1975, SD Ohio) 392 F Supp 713

(2). Standard of Proof

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236. Generally

To make case of total and permanent disability one for jury, plaintiff must introduce substantial evidence of such disability. United States v Lyle (1931, CA6 Tenn) 54 F.2d 357

Plaintiff must show probability, not mere possibility, that total permanent disability of insured came into existence during life of policy. Meyer v United States (1933, CA5 La) 65 F.2d 509; United States v Sandifer (1935, CA5 La) 76 F.2d 551; United States v McIver (1935, CA4 NC) 77 F.2d 208; United States v Walker (1935, CA5 La) 77 F.2d 415, cert den (1935) 296 US 612, 80 L Ed 434, 56 S Ct 132

Existence of total and permanent disability must be established by evidence that is more than mere possible inference. Cunningham v United States (1933, CA5 Tex) 67 F.2d 714

Insured is required to make stronger than normal proof of total permanent disability during life of policy where insured engaged in various employments for years at substantial remuneration after lapse of policy. United States v Pollock (1934, CA5 Fla) 68 F.2d 633

Evidence of total permanent disability before lapse of policy must be definite and certain. United States v Anderson (1935, CA4 SC) 76 F.2d 337

237. Clear and convincing evidence

Existence of pre-war disability of veteran was significant in determining post-war disability as caused by varicose condition of one leg, and in such case proof of total and permanent disability must be very clear and convincing. United States v Jones (1934, CA5 Ala) 73 F.2d 376

Plaintiff's case must be established by clear and convincing evidence. United States v Tarrer (1935, CA5 Ga) 77 F.2d 423, cert den (1935) 296 US 574, 80 L Ed 405, 56 S Ct 125

238. Preponderance of evidence

Claimant attempting to recover for death or permanent total disability of insured under veteran's insurance policy had burden of proving such death or disability by preponderance of evidence. United States v Spaulding (1935) 293 US 498, 79 L Ed 617, 55 S Ct 273, reh den (1935) 294 US 731, 79 L Ed 1261, 55 S Ct 504

In action on war risk insurance policy, burden was on plaintiff to prove his case by preponderance of evidence only. American Nat'l Bank & Trust Co. v United States (1939, CA7 Ill) 104 F.2d 783

In action on war risk policy, insured must prove by preponderance of evidence that he became totally and permanently disabled during life of policy, and this burden was not carried by leaving evidence in realm of speculation. Galloway v United States (1942, CA9 Cal) 130 F.2d 467, affd (1943) 319 US 372, 87 L Ed 1458, 63 S Ct 1077, reh den (1943) 320 US 214, 87 L Ed 1851, 63 S Ct 1443

Court or jury could not speculate as to permanence, totality, or date of disability of insured, but must be convinced by slight preponderance, at least, of satisfactory evidence. Putney v United States (1933, DC Colo) 4 F Supp 376

Petitioner failed to prove by preponderance of evidence that insured, though he was a semirecluse and acted eccentrically, was totally and permanently disabled, thereby excusing payment of National Service Life Insurance premiums, where record showed decedent had excellent memory, lived alone and cared for himself, traveled alone frequently and drove his car. McNeil v United States (1975, SD Ohio) 392 F Supp 713

239. Reasonable certainty

Total permanent disability must be shown with reasonable certainty. United States v Elmore (1934, CA5 Fla) 68 F.2d 551

In action on war risk insurance policy for total and permanent disability, it was incumbent upon plaintiff to establish by substantial evidence that insured had, prior to lapse of his policy, suffered such impairment of mind or body as rendered it impossible for him to follow continuously
and substantially gainful occupation and rendering it reasonably certain that such impairment would continue through his life. Knapp v United States (1940, CA7 Ill) 110 F.2d 420

4. Determination of Claim

a. In General

240. Generally

In action on war risk policy, neither judge nor jury may credit testimony positively contradicted by physical facts. Roberts v United States (1932, CA10 Colo) 57 F.2d 514; United States v Harth (1932, CA8 Iowa) 61 F.2d 541; United States v Perkins (1933, CA10 Okla) 64 F.2d 243; United States v Hammons (1933, CA10 Okla) 66 F.2d 912; United States v Ingalls (1933, CA10 NM) 67 F.2d 593

Case should not go to jury where physical facts positively contradict statements of witnesses. United States v Hansen (1934, CA9 Idaho) 70 F.2d 230, cert den (1934) 293 US 604, 79 L Ed 695, 55 S Ct 119

Neither jury nor court may credit testimony which is positively contradicted by physical facts. Deadrich v United States (1935, CA9 Nev) 74 F.2d 619

241. Evaluation of evidence

If there are facts tending to establish total and permanent disability, it is ordinarily for jury to consider and weigh them; it is for them to consider and weigh testimony of insured's physical condition, medical and expert opinions as to nature of it, its extent and probable duration, his life history since his injury, and particularly his work record, in light of all other facts and of human experience; if, summed up and counted for all its worth, testimony in favor of insured does not make out case of total and permanent disability, courts must say so, and verdict that it does may not stand. United States v Vineyard (1934, CA5 Ga) 71 F.2d 624, cert den (1934) 293 US 614, 79 L Ed 703, 55 S Ct 141

Weight to be given certificate, stating veteran not to have been disabled at time of his discharge, given by government medical officer and introduced by insured was for jury's determination. United States v Stephens (1934, CA9 Idaho) 73 F.2d 695

242. -Conflicting evidence

Conflicting statements of insured in testimony and at time of discharge from army and application for compensation could not be basis of setting aside finding of jury for plaintiff, since it was question for jury which of inconsistent statements were true. United States v Tyrakowski (1931, CA7 Ill) 50 F.2d 766

Inconsistencies between veteran's application for civilian insurance and his contention of total and permanent disability at trial was for jury to resolve. United States v Bodge (1936, CA10 Kan) 85 F.2d 433

Question was for jury where, in action on war risk policy, evidence as to total and permanent disability of insured at time policy lapsed is contradictory. Walker v United States (1942, CA5 Miss) 130 F.2d 587

In action on war risk policy, where it was shown that insured in his insurance application represented that he had not been ill or contracted any disease or consulted physician in regard to his health between date of his discharge and date of his application, and that in prior application for compensation and disability allowance he had stated that he had certain ailments, but did not say how mild or severe they were or that he had contracted them since date of his discharge, or that he had consulted physician concerning them, conflict, if any, was for jury to resolve; where it was also shown that insured's prior application for compensation and disability allowance had been denied with finding that he had no ailment other than "aortitis, chronic, mild, with good cardiac tolerance," rated less than 25% permanent partial and that such ailment was not incurred in or aggravated by service, whether his statement in his application, filed shortly thereafter, that
he had not been ill was false representation was question for jury. United States v Kelley (1943, CA9 Cal) 136 F.2d 823

In action on war risk insurance policy, conflicts in testimony and questions as to credibility of witnesses present issues for jury. United States v Strawbridge (1944, CA5 Miss) 139 F.2d 1014, cert den (1944) 321 US 797, 88 L Ed 1085, 64 S Ct 937

b. Determination of Particular Issues

(1). In General

243. Designation of beneficiary

Jury could find that serviceman has done all that was reasonably necessary to effectuate change of beneficiary of national service life policies from evidence that serviceman executed Record of Emergency Data upon his remarriage, designating his wife as beneficiary of certain servicemen's benefits. Smith v United States (1970, CA5 Ga) 421 F.2d 634, 13 ALR Fed 1

244. Fraud in obtaining insurance

Withdrawing from jury issue of fraud tendered is connection with plaintiff's application for reinstatement of his insurance was not error. United States v Atkinson (1935, CA5 Tex) 76 F.2d 564, affd (1936) 297 US 157, 80 L Ed 555, 56 S Ct 391

In action on government insurance policy question of insured's fraud on defendant in procuring issuance of policy was, under evidence, for jury. Edwards v United States (1944, CA6 Tenn) 140 F.2d 526

245. Payment of premiums

Whether or not payments of premiums were made so as to prevent lapse of policy was question for jury. United States v Kiles (1934, CA8 Mo) 70 F.2d 880

246. Consequences of delay in instituting suit on claim

Fact that insured waited 13 years before bringing suit on war risk insurance policy to establish total and permanent disability did not bar his recovery, but was matter for jury to consider in connection with all other evidence in case. Berry v United States (1941) 312 US 450, 85 L Ed 945, 61 S Ct 637

In action on war risk insurance policy, insured's delay in 1918 to 1931 in making claim for disability was circumstance that was properly submitted to jury for consideration with other evidence, though it is not per se proof of anything. United States v Strawbridge (1944, CA5 Miss) 139 F.2d 1014, cert den (1944) 321 US 797, 88 L Ed 1085, 64 S Ct 937

Plaintiff's excuse for long delay in bringing suit in question for jury. Tarter v United States (1937, DC Ky) 17 F Supp 691

(2). Disability of Claimant

247. Generally

Question of what constitutes total and permanent disability under government insurance policy is question of fact for jury depending upon all attendant circumstances, where facts are in dispute or support different reasonable inferences. Galloway v United States (1943) 319 US 372, 87 L Ed 1458, 63 S Ct 1077, reh den (1943) 320 US 214, 87 L Ed 1851, 63 S Ct 1443

Whether insured is totally and permanently disabled is question for jury. United States v Meserve (1930, CA9 Or) 44 F.2d 549; United States v Stamey (1931, CA9 Wash) 48 F.2d 150; United States v Burke (1931, CA9 Wash) 50 F.2d 653; United States v Woltman (1932, Dist Col App) 61 App DC 52, 57 F.2d 418; United States v Irwin (1932, CA5 Ga) 61 F.2d 488; United States v Roberts (1932, CA10 Colo) 62 F.2d 594; United States v Hill (1933, CA8 Ark) 62 F.2d 1022; United States v Ford (1934, CA10 Okla) 71 F.2d 83; United States v Brown (1934, CA10 Utah) 72 F.2d 608; United States v O'Daniel (1934, CA5 Tex) 73 F.2d 886; United
Determination by veterans' bureau [now Department of Veterans Affairs] that there was no total permanent disability during life of policy had no force in trial of war risk insurance cases, since that question was tried de novo. Third Nat'l Bank & Trust Co. v United States (1931, CA6 Ohio) 53 F.2d 599; United States v Knoles (1935, CA8 SD) 75 F.2d 557

Question of total and permanent disability was for jury, where evidence showed that insured had worked and received substantial remuneration. United States v Francis (1933, CA9 Mont) 64 F.2d 865; United States v Burleyson (1933, CA9 Cal) 64 F.2d 868

Total and permanent disability was question for jury, though insured did not show cause of his disability and did not corroborate his testimony by medical evidence. Hicks v United States (1933, CA4 Va) 65 F.2d 517

Whether insured, who was shot in back while in service, was totally and permanently disabled at time of lapse of his policy was for jury, in spite of evidence that insured took vocational training and conflict in opinion evidence. United States v Alger (1934, CA9 Idaho) 68 F.2d 592

Evidence as to total and permanent disability from wounds received in battle made case for jury, though evidence showed that insured performed some work. United States v Caldwell (1934, CA3 Pa) 69 F.2d 200

Whether insured was totally and permanently disabled from paralysis agitans was question for jury on contradictory statements of insured and expert witnesses. Odom v United States (1934, CA4 SC) 70 F.2d 104

In action on insurance policy, question of total disablement is one of fact to be determined by fact-finder. Kinney v United States (1943, CA4 NC) 139 F.2d 164

In action on war risk insurance policy, wherein it is alleged that while policy was in effect insured became permanently and totally disabled from following continuously any substantially gainful occupation, whether permanent and total disability existed on date his policy expired was for jury. Becker v United States (1944, CA7 Ind) 145 F.2d 171

In action on war risk insurance policy, question of total and permanent disability prior to date policy expired was for jury. Zufall v United States (1940, DC Pa) 36 F Supp 999, affd (1941, CA3 Pa) 118 F.2d 1014

248. Time of commencement of disability

Where insured had progressive disease, so that it was difficult to determine at what time disability became total, it was question for jury to determine whether it became total after reinstatement of policy, even though insured testified his physical condition was same at time of reinstatement as at time of trial. United States v Meyer (1935, CA3 NJ) 76 F.2d 354

Question was for jury whether insured was suffering from disease when discharged, 10 days prior to expiration of policy where veteran, who lived forty-one days after lapse of his war risk insurance, was suffering from encephalitis lethargica, evidence being produced that under different conditions disease was of slow development, or of sudden onset. United States v Meakins (1938, CA9 Mont) 96 F.2d 751

In action on war risk insurance policy for total and permanent disability, "just when line was crossed between temporary total disability and permanent disability" was question for court, trying case without jury, to decide upon consideration of all evidence. Knapp v United States (1940, CA7 Ill) 110 F.2d 420

249. Particular infirmities or disorders as disabling

Total and permanent disability of insured who had undergone abdominal operation was question for jury. United States v Kims (1932, CA9 Idaho) 61 F.2d 644
Evidence as to mental condition of insured when discharged from army presented question for jury as to total and permanent disability resulting from insanity.  Asher v United States (1933, CA8 Ark) 63 F.2d 20

Where insured received severe gunshot wound while in service, evidence as to total disability resulting therefrom presented question for jury.  United States v Albano (1933, CA9 Idaho) 63 F.2d 677

Evidence that insured had influenza in France, that he later inhaled gas while testing gas mask, and thereafter had pneumonia presented question for jury as to total and permanent disability.  United States v Bass (1933, CA7 Ind) 64 F.2d 467

Whether insured was totally and permanently disabled was question for jury, on evidence that he received slight gunshot wound, suffered from dysentery and abdominal soreness.  United States v Dudley (1933, CA9 Idaho) 64 F.2d 743

Whether insured was totally and permanently disabled on account of tuberculosis at time of lapse of his policy was question for jury.  Le Blanc v United States (1933, CA5 La) 65 F.2d 514;  United States v Messinger (1934, CA4 W Va) 68 F.2d 234

Total and permanent disability resulting from gassing while in service was question for jury.  United States v Jensen (1933, CA9 Idaho) 66 F.2d 19

Whether insured was totally and permanently disabled at time of lapse of his policy from hernia which became progressively worse while he was in service and resulted in operation at base hospital was question for jury.  United States v Fritz (1933, CA3 Pa) 66 F.2d 300

Whether mitral insufficiency rendered insured totally and permanently disabled was question for jury.  United States v Ellis (1933, CA5 Tex) 67 F.2d 765

Whether loss of one leg constituted total and permanent disability must be determined in each case and was question for jury.  United States v Rice (1934, CA8 Neb) 72 F.2d 676

Question of disability was for jury where insured, at time policy was in force, was suffering from active pulmonary tuberculosis, and upon being discharged from service, he retired to his father's farm and was treated by physicians, who prescribed light exercise with rest, and thereafter he had no regular employment and was able only to perform light chores, and at all times observed all instructions imparted to him by physicians concerning his illness.  Adams v United States (1940, CA7 Ill) 116 F.2d 199

Whether insured became totally disabled from dementia praecox after his enlistment and while his policy was in force was jury question.  Nall v United States (1934, DC Miss) 8 F Supp 69

c. Instructions for Determination of Issues

250. Generally

In action on war risk policy, court must give jury benefit of its view as to facts, leaving to them determination of issue.  Garrison v United States (1932, CA4 SC) 62 F.2d 41

Requested instruction, vague and ambiguous, was properly refused where matter in contemplation was clearly and correctly stated in charge of court.  United States v Rice (1934, CA8 Neb) 72 F.2d 676

Special instruction requested by government which excluded testimony relied on by insured and excepted by general charge was error.  Cohan v United States (1935, CA7 Ill) 77 F.2d 140

Refusal to make requested instructions covered in general charge is not error.  Luke v United States (1936, CA5 Ga) 84 F.2d 823

251. Defenses

Judge should charge on principles applicable to defense of government where he charges at length on plaintiff's theory.  United States v Messinger (1934, CA4 W Va) 68 F.2d 234

252. Burden of proof
Instruction, given on request of plaintiff, that there could be preponderance of evidence and recovery thereon though case was not proved beyond reasonable doubt was harmless. Wilks v United States (1933, CA2 NY) 65 F.2d 775

Charge as to burden of proof and construction to be given insurance contract was fair and comprehensive. McConnell v United States (1936, CA3 Pa) 81 F.2d 639

Instruction in action on war risk insurance policy that long delay in filing suit enhanced plaintiff's burden of proof was erroneous. American Nat'l Bank & Trust Co. v United States (1939, CA7 Ill) 104 F.2d 783

253. -Presumptions

Court could properly instruct jury that it was presumed that sleeping sickness of insured was contracted while in service. United States v Eliasson (1927, CA9 Mont) 20 F.2d 821

Instruction on presumption of origin of tuberculosis could be harmless error. United States v Wescoat (1931, CA4 W Va) 49 F.2d 193; United States v Patterson (1931, CA3 Pa) 51 F.2d 922

Instructions requested by plaintiff were properly refused where such instructions omitted qualification that presumption went only to disability, not to extent of disability. Meyer v United States (1933, CA5 La) 65 F.2d 509; Le Blanc v United States (1933, CA5 La) 65 F.2d 514

Judge properly gave defendant's requested instruction limiting statutory presumption that tuberculosis was connected with service. Le Blanc v United States (1933, CA5 La) 65 F.2d 514

Instruction on service connection presumption concerning tuberculosis was erroneous but harmless in view of another instruction. United States v Monger (1934, CA10 Wyo) 70 F.2d 361

In view of evidence, instruction that there was presumption of soundness of insured at enlistment was not prejudicial, but instruction that active tuberculosis found to exist prior to particular date was presumed to be of service origin was prejudicial error. United States v Garder (1934, CA8 Mo) 72 F.2d 518

254. Determination of disability

Instruction that if insured was totally and permanently disabled at enlistment because of dementia praecox government should recover, but if disease was progressive, and he was only partially disabled at that time, insured should recover was proper. Nall v United States (1934, DC Miss) 8 F Supp 69

Instruction was proper where instruction that if condition of plaintiff at time of previous trial was same as at time of present trial verdict should be returned for plaintiff was coupled with instructions that plaintiff was required to establish permanent total disability from time veterans' administration [now Department of Veterans Affairs] claimed he was no longer disabled continuing to date of trial where insured had previously been adjudged disabled. Edmunds v United States (1938, DC Or) 24 F Supp 742, app dismd (1939, CA9 Or) 101 F.2d 1021

Instruction defining total permanent disability is erroneous where effect is to prevent recovery if any work was possible. Burgoyne v United States (1932, Dist Col App) 61 App DC 97, 57 F.2d 764

255. -Particular infirmities

Charge of court ridiculing government contention that arrested tuberculosis did not create permanent and total disability was ground for reversal. United States v Messinger (1934, CA4 W Va) 68 F.2d 234

Court properly refused to charge jury that they could consider other causes where there was no evidence to show disability from any cause other than tuberculosis. Lynch v United States (1934, CA5 Ga) 73 F.2d 316

Instruction that paralysis agitans was totally and permanently disabling as matter of law was reversible error. United States v Coward (1935, CA4 SC) 76 F.2d 875
In view of admitted loss of veteran's left eye and other disabilities existing when discharged, judge correctly told jury, statement of soldier at time of discharge that "he was under no disability," was incorrect. United States v Fancher (1936, CA5 Miss) 84 F.2d 306

Requested instruction that arrested or quiescent pulmonary tuberculosis was not permanent or total disability was request for comment of fact by court and not proposition of law and could be refused where disability alleged and proved was result of several diseases and conditions. Edmunds v United States (1938, DC Or) 24 F Supp 742, app dismd (1939, CA9 Or) 101 F.2d 1021

I. Judgment

1. In General

256. Direction of verdict

Court may direct verdict for defendant at close of all evidence notwithstanding plaintiff's evidence in chief makes prima facie case. United States v Ingalls (1933, CA10 NM) 67 F.2d 593

Trial judge should not direct verdict for defendant unless evidence is so conclusive that were verdict rendered for plaintiff, court, in exercise of sound judicial discretion, would be compelled to set it aside. Harris v United States (1934, CA4 Va) 70 F.2d 889

Directed verdict for government is proper where evidence is such that any verdict for plaintiff would be based upon speculation. Boone v United States (1935, CA4 NC) 79 F.2d 702

Each case must be governed by particular facts and circumstances and upon application for directed verdict all undisputed facts favorable to party against whom verdict is asked and all reasonable inferences therefrom are regarded as true. Watts v United States (1938, DC Miss) 24 F Supp 969 (superseded by statute as stated in Farris v State (2004, App) 2004 Miss App LEXIS 1126)

Case was properly submitted to jury where evidence and reasonable inferences therefrom taken most strongly against party asking directed verdict tended to show that insured had become totally and permanently disabled before lapse of policy. Watts v United States (1938, DC Miss) 24 F Supp 969 (superseded by statute as stated in Farris v State (2004, App) 2004 Miss App LEXIS 1126)

Judge should grant defendant's motion for directed verdict where there is no substantial evidence to sustain verdict for plaintiff. United States v Stewart (1932, Dist Col App) 61 App DC 115, 58 F.2d 520; Asher v United States (1933, CA8 Ark) 63 F.2d 20; Hicks v United States (1933, CA4 Va) 65 F.2d 517; United States v Alger (1934, CA9 Idaho) 68 F.2d 592; Odom v United States (1934, CA4 SC) 70 F.2d 104; United States v Russian (1934, CA3 Pa) 73 F.2d 363; Muth v United States (1935, CA4 Md) 78 F.2d 525; Burbage v United States (1935, CA5 Ga) 80 F.2d 683

257. -Grounds

Verdict should be directed for government in suit to collect benefits for total permanent disability where evidence was not sufficient to support finding that insured was permanently and totally disabled, and no reasonable inference to such effect was justified. Lumbra v United States (1934) 290 US 551, 78 L Ed 492, 54 S Ct 272; United States v Spaulding (1935) 293 US 498, 79 L Ed 617, 55 S Ct 273, reh den (1935) 294 US 731, 79 L Ed 1261, 55 S Ct 504

Instructed verdict for government was proper where insured became totally and permanently disabled after entry into military service, but before application for policies at issue in suit was made, since war risk insurance did not ordinarily cover loss already suffered at time policy was issued. Jordan v United States (1929, CA9 Ariz) 36 F.2d 43, 73 ALR 312

Directed verdict was not proper where evidence makes prima facie case for plaintiff based on disability, and reasonable men might differ as to whether insured was permanently and totally disabled during life of policy. United States v Fritz (1933, CA3 Pa) 66 F.2d 300
Directed verdict for government was proper where evidence showed incipient tuberculosis which was arrested by hospitalization and long delay in bringing suit. Huffman v United States (1934, CA4 Va) 70 F.2d 266

Considering claimant's long delay in bringing suit, court did not err in directing verdict for government. Harris v United States (1934, CA4 Va) 70 F.2d 889

Direction of verdict for government was unavoidable where there was no evidence to show that tuberculosis from which insured died existed during period his policy was in force. Furbee v United States (1934, CA4 W Va) 73 F.2d 190

In view of veteran's long delay in bringing suit and his work record, he failed to sustain burden of proving total and permanent disability, and court should direct verdict for government. Deadrich v United States (1935, CA9 Nev) 74 F.2d 619

In view of veteran's work record, long delay in bringing suit, and statement that his policy has lapsed, court's direction of verdict for government was proper. Foote v United States (1935, CA5 Ga) 80 F.2d 48

Direction of verdict for veteran suffering from mitral stenosis was error in view of his denial of disability in applications for reinstatement of his policy and his work record. United States v Harris (1935, CA7 Ill) 80 F.2d 771

Directed verdict for government was proper where evidence that tubercular veteran was totally disabled prior to lapse of policy is sufficient for jury, but there was no testimony that condition was incurable. United States v Frost (1936, CA9 Ariz) 82 F.2d 152

Disability was not total and verdict for government was properly directed where over period of eight years, veteran was unable to work for periods aggregating about year. Russian v United States (1937, CA3 Pa) 87 F.2d 895, cert den (1937) 301 US 689, 81 L Ed 1346, 57 S Ct 796

Verdict was properly directed for government where, in action on policy of converted war risk insurance, there was evidence that insured at time of trial was suffering from myocarditis or angina pectoris and that inception of this disease antedated lapse of policy, but no evidence that at that time it had reached such stage as to constitute total and permanent disability within meaning of policy. Rodgers v United States (1939, CA4 SC) 104 F.2d 884

Court could refuse to direct verdict for government where substantial evidence, which jury might believe in preference to that contradictory of it, tended to show total permanent disability while policy was in force. United States v Munn (1939, CA5 Ga) 105 F.2d 578

In action on war risk insurance policy, evidence of insured's illness, showing probable origin in influenza, development of pleurisy, and steady decline in health was substantial evidence from which jury might infer that insured had tuberculosis during life of policy and that it was of such character or had reached such stage at that time as to constitute total and permanent disability and preclude direction of verdict for either plaintiff or defendant. United States v Brown (1939, CA4 SC) 107 F.2d 401

Court properly denied motion for directed verdict where there was competent and convincing evidence of plaintiff's disability. Edmunds v United States (1938, DC Or) 24 F Supp 742, app dismd (1939, CA9 Or) 101 F.2d 1021

2. Recovery

258. Generally

Sums paid as premiums are not recoverable where complaint contains no allegations upon which such recovery can be based. United States v Lyke (1927, CA9 Ariz) 19 F.2d 876

Payment of judgment against government on war risk insurance policy was mandated, notwithstanding claimed set-off not reduced to judgment; judgment against government on war risk insurance policy was not immune from set-off statute. Hines v United States (1939) 70 App DC 206, 105 F.2d 85

259. Benefits
Beneficiary can recover no more than installments due at date of intervention in suit on policy. United States v Worley (1930, CA8 Neb) 42 F.2d 197

It was not error for court to award recovery from date of injury rather than date of discharge although, through inadvertence, complainant prayed for recovery from subsequent date. United States v Rye (1934, CA10 Okla) 70 F.2d 150

Proof of disability was condition precedent to recovery of benefits relating back to date not exceeding 6 months prior to receipt of such proof. United States v Meyer (1935, CA3 NJ) 76 F.2d 354

It was error to award payments from date of disability where, under terms of policy contract, total permanent disability benefits might relate back to date not exceeding six months prior to receipt of due proof of said total permanent disability, but where point was not raised and there was stipulation as to date claim was filed, judgment would be corrected in Court of Appeals. United States v Robins (1941, CA5 Miss) 117 F.2d 145

260. -Future installments

Judgment could not be entered against United States for amount of insurance installments maturing after action was instituted by beneficiary, where certificate did not disclose any supplemental petition in respect to such installments. United States v Worley (1930) 281 US 339, 74 L Ed 887, 50 S Ct 291 (superseded by statute as stated in Blue Cross Asso. & Blue Shield Asso. (1989, ASBCA) 89-2 BCA ¶ 21840)

Court should not direct payment of future installments and should not reserve jurisdiction for purpose of directing such payments. United States v Lyke (1927, CA9 Ariz) 19 F.2d 876; United States v Jackson (1929, CA10 Kan) 34 F.2d 241, 73 ALR 316, affd (1930) 281 US 344, 74 L Ed 891, 50 S Ct 294; United States v Andrews (1930, CA10 Colo) 43 F.2d 80

Recovery against United States on war risk insurance policy should not include future installments maturing after action. United States v Andrews (1930, CA10 Colo) 43 F.2d 80

261. Costs

Costs may not be awarded generally against United States, in action on soldier's insurance policy, upon condition that they be paid from accumulated funds in hands of Veterans' Bureau [now Department of Veterans Affairs], if any, available for that purpose; rule that courts, in absence of statute directly authorizing it, will not give judgment against United States for costs or expenses is applicable to suits upon government insurance policies. United States v Worley (1930) 281 US 339, 74 L Ed 887, 50 S Ct 291 (superseded by statute as stated in Blue Cross Asso. & Blue Shield Asso. (1989, ASBCA) 89-2 BCA ¶ 21840); United States v Gianakouras (1930, CA6 Ohio) 41 F.2d 521; United States v Martin (1930, CA8 Ark) 42 F.2d 202

Fact that order dismissing action against United States on claim under war risk insurance policy was silent as to costs was not ground for setting order aside at instance of plaintiff, since question of plaintiff's chargeability for costs could be determined by court if attempt was made to tax such costs against him. Burgett v United States (1935, CA7 Ill) 80 F.2d 151, 104 ALR 167

Named beneficiary under national service policy may not recover expenses of litigation from Veterans Administration [now Department of Veterans Affairs] where it made initial payments of proceeds to beneficiary, but third party thereafter challenged beneficiary's right to proceeds and filed state court suit claiming policy proceeds, which resulted in extensive litigation in state courts as well as administrative proceedings, allegedly exhausting entire amount of proceeds to which beneficiary was ultimately found to be entitled. Smith v United States (1972, CA9 Wash) 460 F.2d 985

Costs incurred by government as defendant, not necessary to trial and determination of plaintiff's right in first instance, cannot be recovered or deducted when judgment is rendered in plaintiff's favor; government has right to require services of its own officers without payment of costs. Bastrop State Bank & Trust Co. v United States (1934, DC La) 7 F Supp 1006

262. Attorney's fees
Attorneys' fees are not limited to 10 percent of installments which became due before decree, but may also include 10 percent of installments to be paid in future. Saunders v United States (1927, CA7 Ill) 22 F.2d 619

Attorney who procured judgment for totally disabled discharged veteran, reinstating national service life policy with premiums waived, was entitled to fee representing percentage of any payments under policy; thus, following attorney's investigation of facts and skillful handling of suit, he was entitled to receive, as his fee, ten per cent of any payments, rather than five per cent allowed by district court. United States v Myers (1954, CA8 Mo) 213 F.2d 223

Award of attorneys' fees of $1,000 did not exceed statutory 10 percent limit merely because plaintiff received only $5,000, where recovery on $10,000 National Service Life Insurance policy was divided between plaintiff and insured's widow pursuant to agreement. United States v Donaldson (1957, CA9 Wash) 246 F.2d 148

10 percent of amount of recovery is maximum award of attorneys' fees, and court may fix award at lower percent. Cotter v United States (1948, DC Md) 78 F Supp 495

Attorney for plaintiffs awarded face value of national service life insurance policy in amount of $10,000 was awarded fee of $500, that sum to be paid over to him by Veterans' Administration [now Department of Veterans Affairs]. Malone v United States Veterans Administration (1973, SD Ohio) 364 F Supp 114

263. Interest

There is nothing in conduct of United States in respect of life and disability insurance from which agreement on its part to pay interest from date any installment may be due can be implied; judgment for plaintiff should not include interest. United States v Worley (1930) 281 US 339, 74 L Ed 887, 50 S Ct 291 (superseded by statute as stated in Blue Cross Asso. & Blue Shield Asso. (1989, ASBCA) 89-2 BCA ¶ 21840); Jackson v United States (1930) 281 US 344, 74 L Ed 891, 50 S Ct 294

Prevailing party is not entitled to recover interest and costs in suit against United States to recover NSLI policy proceeds. Dutton v United States (1965, ND Ga) 237 F Supp 670

J. Appellate Review

1. In General

264. Generally

Court of appeals will not review sufficiency of evidence where defendant does not make motion for directed verdict to sustain verdict for plaintiff at close of evidence. Milleson v United States (1935, CA8 Mo) 78 F.2d 60

Plaintiff cannot assert on appeal that verdict for defendant is contrary to evidence where plaintiff did not make motion for directed verdict at trial. McConnell v United States (1936, CA3 Pa) 81 F.2d 639

Court of appeals has no duty to appraise evidence where, plaintiff made no motion for verdict. Walker v United States (1942, CA5 Miss) 130 F.2d 587

In action on war risk insurance policy by insured's administrator against United States and insured's executrix, order setting aside default entered against individual defendant and allowing her to plead was procedural only and was not appealable final judgment. Kummer v United States (1945, CA6 Mich) 148 F.2d 191

265. Jurisdiction

Supreme Court of United States has no jurisdiction by direct writ of error to review judgment of District Court terminating liability of United States to beneficiary under policy of insurance, but review in first instance must be Circuit Court of Appeals. Crouch v United States (1924) 266 US 180, 69 L Ed 233, 45 S Ct 71
Court of Veteran's Appeal has jurisdiction of veteran's life insurance claims disputes; Congress has created system where claimant who is dissatisfied with agency determination in insurance claim has two possible courses of action—bring suit on claim in U.S. District Court, or appeal to Board of Veterans Appeals and, if dissatisfied with that decision, appeal to Board of Veterans Appeals pursuant to 38 USCS § 7252. Young v Derwinski (1990) 1 Vet App 70

266. Standard of review

It is ordinarily question for jury to say, under appropriate instructions, whether total permanent disability exists, and where there is substantial evidence on which verdict can rest, verdict must be upheld on that issue. United States v Martin (1931, CA5 Tex) 54 F.2d 554, cert den (1932) 286 US 546, 76 L Ed 1282, 52 S Ct 497; United States v Crume (1931, CA5 Tex) 54 F.2d 556

On review of evidence on appeal from judgment on verdict for plaintiff, question is whether there is in record any substantial evidence to support verdict and judgment. United States v Harth (1932, CA8 Iowa) 61 F.2d 541; United States v Harrell (1933, CA10 Okla) 66 F.2d 231; United States v Fancher (1936, CA5 Miss) 84 F.2d 536

Verdict must be upheld on evidence where it accords with any reasonable view of evidence. Keelen v United States (1933, CA5 La) 65 F.2d 513

Verdict of total and permanent disability resting on evidence reasonably tending to prove existence of that condition may not be disturbed. United States v Jones (1934, CA5 Ala) 73 F.2d 376

On appeal from judgment on verdict for plaintiff, court of appeals will view evidence in light most favorable to plaintiff, giving him benefit of such favorable inferences as may be drawn from evidence. United States v Newcomer (1935, CA8 Iowa) 78 F.2d 50

On appeal by defendant from judgment on verdict for plaintiff supported by evidence, court of appeals will not substitute its opinion on evidence for finding of jury. United States v Huddleston (1936, CA7 Ill) 81 F.2d 593

On appeal in action on convertible term insurance policy where general finding in favor of plaintiff covered issue of fraud in making misrepresentation in application for insurance and was equivalent to special finding on that question of fact, evidence and its fair inferences must be viewed in light most favorable to plaintiff. United States v Depew (1938, CA10 Kan) 100 F.2d 725

On review of judgment for plaintiff, it is not function of reviewing court to weigh evidence, but to determine whether judgment is supported by substantial testimony. United States v Nelson (1939, CA8 Ark) 102 F.2d 515, cert den (1939) 308 US 550, 84 L Ed 462, 60 S Ct 81

On review of judgment for plaintiff where question for review is whether, on evidence, trial court should have found issues for appellee, reviewing court must assume as established all facts tending to support claim and there should be drawn in favor of appellee all inferences fairly deductible from such facts. United States v Fields (1939, CA8 Ark) 102 F.2d 535; United States v Fain (1939, CA8 Ark) 103 F.2d 161

In action to recover disability benefits under insurance contract, procedural errors occurring in trial are not sufficient to require reversal unless appellate court is of opinion that such errors affected substantial rights of parties. United States v Barton (1941, CA5 Fla) 117 F.2d 540

Judgment will stand where finding of court without jury that insured was permanently but not totally disabled at time his insurance policy lapsed is not clearly erroneous. Kinney v United States (1943, CA4 NC) 139 F.2d 164

In reviewing case to determine whether there is substantial evidence to support verdict for plaintiff, court of appeals does not review evidence; all conflicts are resolved in favor of verdict, and reviewing court considers only evidence tending to support verdict. Becker v United States (1944, CA7 Ind) 145 F.2d 171

267. -Evidentiary rulings
Admission of evidence not contained in auditor's report was discretionary and not subject to review except for abuse of discretion where suit on war risk insurance policy was heard by auditor, and order of reference contained provision that parties would not be heard to introduce evidence not disclosed before auditor unless good cause for such failure to disclose evidence was shown. Gay v United States (1941, CA7 Ill) 118 F.2d 160

268. -Findings of fact

In determining whether or not finding of trial court was clearly wrong, evidence should be viewed in light most favorable to insured, and all inferences should be drawn in his favor which are fairly deducible from facts. United States v Atchley (1940, CA10 Kan) 116 F.2d 266

269. -Direction of verdict

Direction of verdict for government in action on policy will be sustained if supported by substantial evidence. Britt v United States (1932, CA6 Tenn) 59 F.2d 733

On appeal by plaintiff from judgment for defendant on directed verdict, evidence must be viewed in light most favorable to plaintiff. Odom v United States (1934, CA4 SC) 70 F.2d 104

270. Disposition of case

Court of appeals will remand case for new trial and will not direct judgment to be entered for defendant where judgment for plaintiff is not supported by evidence. Rentfrow v United States (1933, CA10 Okla) 67 F.2d 747

Court of appeals will enter judgment for plaintiff pursuant to jury's verdict where, in action on government insurance policy, defendant moves for judgment notwithstanding verdict solely on ground that evidence so clearly and unmistakably shows that insured was guilty of fraud in procurement of policy in suit as to leave no question for jury to decide, and defendant relies on no error occurring in course of trial and makes no objection to instructions given by court. Edwards v United States (1944, CA6 Tenn) 140 F.2d 526

Case will be remanded to proceed on merits where converted insurance policy lapsed and was reinstated, and unpaid premiums were charged against insurance, and action on such policy based on death of insured was incorrectly decided to have been barred by statute of limitations. Moskowitz v United States (1944, CA5 Ga) 145 F.2d 196

Plaintiff was entitled to another jury trial where jury could not agree as to whether insured had become totally and permanently disabled before policy lapsed for nonpayment of premium. Lynch v United States (1947, CA2 NY) 162 F.2d 987

2. Grounds for Review

a. In General

271. Conduct of trial

Conversation between judge and counsel on question by juror whether vocational training was available was not prejudicial to plaintiff. Whiteside v United States (1929, CA9 Or) 35 F.2d 452

Remarks and hostile attitude of judge against government was prejudicial and ground for reversal. Mason v United States (1933, CA2 VI) 63 F.2d 791

Judge did not err in comment withdrawing effect of declaration of insured at time of discharge that he was in good health, in view of serious disabilities manifestly existing then. United States v Fancher (1936, CA5 Miss) 84 F.2d 306

In action on war risk policy, judge's remark that if written statements of work done by plaintiff while at vocational training, on which he was paid, were false by collusion with supervisor as plaintiff said, supervisor ought to have been indicted, and judge's questions to plaintiff about his testimony that he knew his statement of good health in policy application was false when he made it were not grounds for new trial. Walker v United States (1942, CA5 Miss) 130 F.2d 587
272. Disposition of motion for directed verdict

Where insured's evidence that he was totally and permanently disabled before policy lapsed was controverted in material respects by other evidence, denial of directed verdict for insured was not error. Seals v United States (1934, CA5 La) 70 F.2d 519

It was error to deny directed verdict for government where Plaintiff failed to sustain burden of proving total and permanent disability while policy was in force. United States v Owen (1934, CA5 Ala) 71 F.2d 360

In absence of evidence showing that insured's disability was permanent, it was error to deny motion of government for directed verdict. United States v Gower (1934, CA10 Okla) 71 F.2d 366

Trial court erred in denying government's motion for directed verdict where permanent disability was not shown to have been total. United States v Tate (1935, CA5 La) 75 F.2d 822

In action on war risk insurance policy, where there was no substantial evidence that insured became totally and permanently disabled before policy lapsed, it was error to deny government's motion for directed verdict. United States v Watson (1939, CA4 SC) 107 F.2d 370

273. Award of benefits

It was not error for court to award recovery from date of injury rather than date of discharge although through inadvertence complainant prayed for recovery from subsequent date. United States v Rye (1934, CA10 Okla) 70 F.2d 150

Where under terms of policy contract, total permanent disability benefits might relate back to date not exceeding six months prior to receipt of due proof of said total permanent disability, it was error to award disability benefit payments from date of total permanent disability, found by jury, but where point was not made in lower court and there was stipulation as to date claim was filed, judgment would be corrected in court of appeals. United States v Robins (1941, CA5 Miss) 117 F.2d 145

274. Miscellaneous

Ruling requiring plaintiff to elect whether to stand on original policy or reinstated policy was harmless where evidence does not make prima facie case under either. Werth v United States (1935, CA4 Va) 75 F.2d 192

Form of verdict as follows, "We, the jury in the above entitled action, find for the plaintiff, and fix the date of the beginning of his permanent and total disability from," submitted to jury, was not erroneous. Burak v United States (1939, CA9 Wash) 101 F.2d 137, cert den (1939) 308 US 595, 84 L Ed 498, 60 S Ct 126

In action in federal court, there was no error in permitting witness to refresh his memory from letter written by him on February 15, 1922, relative to examination of insured which he made on February 8, 1920, or in requiring government to produce it for that purpose. United States v Smith (1941, CA9 Or) 117 F.2d 911

b. Evidentiary Rulings

275. Admission of evidence

Admission of evidence in behalf of beneficiary that 13-year-old boy could have done work which insured did during disability was harmless error. United States v Phillips (1930, CA8 Mo) 44 F.2d 689

Statement made by insured concerning his disability was erroneously admitted in behalf of beneficiary where there was no showing that it was res gestae or expression of his feeling, but error was harmless. United States v Phillips (1930, CA8 Mo) 44 F.2d 689

Court erroneously received opinion of doctor that insured was disabled during life of policy, where opinion was based solely on examination and statements of insured 14 years after lapse of policy. United States v Matory (1934, CA7 Ill) 71 F.2d 798
Admission of testimony based upon medical examination made 14 years after time of alleged disability was error. Stephenson v United States (1935, CA8 Mo) 78 F.2d 355

Permitting expert to testify as to whether insured could have followed gainful occupation from date of enlistment to date of suit was error where question was so broad as to call for use of common knowledge. United States v Sampson (1935, CA9 Mont) 79 F.2d 131

Permitting medical expert to give opinion that insured could not carry on continuously gainful occupation was reversible error. United States v Harris (1935, CA9 Mont) 79 F.2d 341

Permitting doctor to testify that insured was unable to continuously pursue gainful occupation was error. United States v Sparks (1935, CA7 Ind) 80 F.2d 392

It was not reversible error for court to receive in evidence, on behalf of defendant, entries in payroll books concerning work and earnings of insured, though witness did not make original entries, where it was shown that one who made the original entries was dead. United States v Poe (1936, CA5 Ala) 81 F.2d 799

Permitting medical witnesses to testify that veteran was totally and permanently disabled at time of their examination of him and for many years prior thereto was prejudicial error. United States v Craig (1936, CA7 Ind) 83 F.2d 361

276. Exclusion of evidence

Court erroneously excluded opinion of physician that insured could not carry on gainful occupation from November 1918 until his death. Runkle v United States (1930, CA10 Colo) 42 F.2d 804

Court erred in refusing to receive testimony that insured complained of pain immediately after discharge from navy, but exclusion of testimony as to pain and complaints of pain was harmless error in view of testimony given by another witness and in view of failure of evidence as whole to establish permanency of disability. Proechel v United States (1932, CA8 Minn) 59 F.2d 648, cert den (1932) 287 US 658, 77 L Ed 568, 53 S Ct 122

Court erred in refusing to permit plaintiff, in order to negative effect of work record, to show by opinion of doctor that insured's diseases impaired his ability to perform duties of farmer and that performance of duties of farmer would be injurious to insured. Corrigan v United States (1936, CA9 Idaho) 82 F.2d 106

Court erred in refusing to allow introduction of hospital records into evidence and in denying motion to subpena witnesses for purpose of proving stated records where original beneficiary sought to show that deceased lacked mental capacity to change beneficiary. Pritchett v Etheridge (1949, CA5 Tex) 172 F.2d 822

277. Miscellaneous

Ruling that report of physical examination of veteran spoke for itself was not error. Milleson v United States (1935, CA8 Mo) 78 F.2d 60

In view of Federal Rules of Civil Procedure Rule 15(b), court properly treats issue of fraud as if it had been raised by pleadings where, in action on government life insurance policy, leave to file amended answer setting out that insured made false statements in his application was denied, but at trial application was admitted in evidence without objection and also evidence that some of answers therein were false; issue of fraud, though not raised by pleadings, was tried by implied consent of parties. United States v Cushman (1943, CA9 Cal) 136 F.2d 815, cert den (1943) 320 US 786, 88 L Ed 473, 64 S Ct 194

c. Instructions to Jury

278. Generally

It was not reversible error to give instruction where there was no evidence in case to which instruction objected to would have been related. Burak v United States (1939, CA9 Wash) 101 F.2d 137, cert den (1939) 308 US 595, 84 L Ed 498, 60 S Ct 126
279. Denial
Refusal to make requested instructions covered in general charge was not error. Luke v United States (1936, CA5 Ga) 84 F.2d 823

280. Tender of instruction
Plaintiff cannot complain on appeal where plaintiff made no exception to instructions given on request of defendant. Meyer v United States (1933, CA5 La) 65 F.2d 509

Failure to except to instruction given on request of defendant defeats allegation of error in instruction. Taylor v United States (1934, CA5 Ala) 71 F.2d 76

281. Miscellaneous
Instruction, given on request of plaintiff, that there could be preponderance of evidence and recovery thereon though case was not proved beyond reasonable doubt was harmless. Wilks v United States (1933, CA2 NY) 65 F.2d 775

Instruction barring recovery if insured could follow gainful employment at cost of pain and suffering was erroneous. United States v Harless (1935, CA4 W Va) 76 F.2d 317

Instruction that paralysis agitans was totally and permanently disabling as matter of law was reversible error. United States v Coward (1935, CA4 SC) 76 F.2d 875

Judge erred in giving instruction, requested by defendant, excluding evidence of insured's condition after, which evidence included examinations by physicians on which physicians based opinions as to condition before lapse of policy. Cohan v United States (1935, CA7 Ill) 77 F.2d 140

Instruction ignoring days of grace for payment of premiums was not reversible error where theory of trial was that injury and disability occurred several years before lapse. Rackoff v United States (1935, CA2 NY) 78 F.2d 671

Instruction that evidence showed total permanent disability was not reversible error, in view of nature of exception of defendant and failure to point out error and seek correction. United States v Fancher (1936, CA5 Miss) 84 F.2d 306

§ 1985. Decisions by the Secretary

Except in the event of suit as provided in section 1984 of this title [38 USCS § 1984], or other appropriate court proceedings, all decisions rendered by the Secretary under the provisions of this chapter [38 USCS §§ 1901 et seq.] shall be final and conclusive on all questions of law or fact, and no other official of the United States shall have jurisdiction to review any such decisions.

Prior law and revision:
This section is based on 38 USC 808, 2211(a) (Acts Oct. 8, 1940, ch 757, Title VI, Part I, § 608, 54 Stat. 1012; Aug. 1, 1946, ch 728, § 12, 60 Stat 788; June 17, 1957, P. L. 85-56, Title II, Part B, § 211(a), 71 Stat. 92).

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 785, as 38 USCS § 1985, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

Code of Federal Regulations
Department of Veterans Affairs-United States Government life insurance, 38 CFR Part 6
Department of Veterans Affairs-National Service life insurance, 38 CFR Part 8
Cross References
Finality of decisions of Secretary, generally, 38 USCS § 511

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Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:179

Am Jur:
44A Am Jur 2d, Insurance § 1867

Annotations:
Validity, construction, and application of 38 USCS § 211(a) precluding judicial or other review of administrative decisions on veterans' benefits. 18 ALR Fed 915

1. Generally
2. Claims on policies
   3. -Refusal of additional coverage
   4. -Denial of application for reinstatement
   5. -Forfeiture

1. Generally
Though allowance of compensation was for bureau [now Department of Veterans Affairs], court had jurisdiction where controversy arose upon question of allowance and collection. Hollrich v United States (1931, DC Idaho) 49 F.2d 445

Finality of decisions of Administrator [now Secretary] of Veterans Affairs is applicable where United States, in reliance on Administrator's [now Secretary's] decision, is seeking affirmative judgment for recovery of money, as well as where judicial review of decisions of Administrator [now Secretary] is sought against United States. United States v Crockett (1958, DC Me) 158 F Supp 460

2. Claims on policies
In action on war risk policy, court had jurisdiction to determine right of insured to compensation claimed to have been due him when his policy lapsed for nonpayment of premiums, but allowance of such compensation was matter for veterans' bureau [now Department of Veterans Affairs]. United States v Hendrickson (1931, CA10 NM) 53 F.2d 797

Although finding of bureau [now Department] as to insured's right to compensation bound court, effect of such finding as reinstatement of policy was matter for court to determine, as was also question as to whether insured was, or was not, at time, dead or totally and permanently disabled. United States v Ellison (1935, CA4 W Va) 74 F.2d 864, cert den (1935) 295 US 750, 79 L Ed 1695, 55 S Ct 829

Federal District Court had jurisdiction to review Administrator's [now Secretary's] determination denying claim for proceeds of NSLI policy brought under 38 USCS § 722 [now 38 USCS § 1922] by mother of son who committed suicide shortly after leaving service and who had not applied for policy, as her complaint set forth "claim under contract" as that phrase is used in 38 USCS § 784 [now 38 USCS § 1984] and also fell within language of 38 USCS § 785 [now 38 USCS § 1985] providing for review of "other appropriate court proceedings". Clark v United States (1973, CA8) 482 F.2d 586, 32 ALR Fed 777

Federal court did not have jurisdiction of complaint to recover proceeds of policy which Veterans' Administration [now Department of Veterans Affairs] refused to issue to partially disabled navy veteran, since suit was not on "contract of insurance." Skovgaard v United States (1953, App DC) 92 US App DC 70, 202 F.2d 363, cert den (1953) 345 US 994, 97 L Ed 1401, 73 S Ct 1134, reh den (1953) 346 US 842, 98 L Ed 362, 74 S Ct 15
Federal district court did not have jurisdiction to review decisions of Administrator [now Secretary] of Veterans Affairs involving payments under Servicemen's Indemnity Act. Ford v United States (1955, DC Ga) 135 F Supp 95, affd (1956, CA5 Ga) 230 F.2d 533

Question of distribution of unpaid portion of insurance money must be decided in first instance by United States veterans' bureau [now Department of Veterans Affairs]. In re Greiner's Estate (1928) 195 Wis 332, 218 NW 437

3. -Refusal of additional coverage

Under 38 USCS § 784 [now 38 USCS § 1984], District Court had jurisdiction over claim that Administrator's [now Secretary's] refusal to issue extended coverage to holder of effective national service life insurance policy was arbitrary and capricious. Salyers v United States (1964, CA5 Fla) 326 F.2d 623

Predecessor to 38 USCS § 1984 did not give District Court jurisdiction over claim based on refusal to issue extended coverage, even though valid policy of insurance existed, since claim actually constitutes request for new insurance. Birge v United States (1953, DC Okla) 111 F Supp 685

Court had no jurisdiction under 38 USCS § 784 to entertain action by beneficiary of deceased veteran's national service life insurance policy based on rejection of policyholder's application for additional insurance. McClendon v United States (1971, WD Okla) 327 F Supp 704

4. -Denial of application for reinstatement

Decision of Director of United States Veterans' Bureau [now Department of Veterans Affairs] that applicant for reinstatement of lapsed insurance policy issued under the War Risk Insurance Act of October 6, 1917, 40 Stat at L 398, chap 105, at time of making application, was totally and permanently disabled, was not subject to review by courts. Meadows v United States (1930) 281 US 271, 74 L Ed 852, 50 S Ct 279, 73 ALR 310

Predecessor to 38 USCS § 1984 did not confer jurisdiction on federal court over action based on denial of application for reinstatement of NSLI policy, since claim was to compel issuance of policy, rather than under existing contract. United States v Fitch (1950, CA10 NM) 185 F.2d 471; Ginelli v United States (1950, DC Mass) 94 F Supp 874; Rowan v United States (1953, DC Pa) 115 F Supp 503, affd (1954, CA3 Pa) 211 F.2d 237

Although Veterans' Administration [now Department of Veterans Affairs] had determined that no policy was in existence, District Court had jurisdiction under predecessor to 38 USCS § 1984 over claim for benefits of national service life insurance policy where serviceman had made application for such policy more than 3 years prior to his death, premiums on policy had been deducted from his pay for period between receipt of application by Veterans' Administration [now Department of Veterans Affairs] and serviceman's disability discharge for leukemia condition, and Veterans' Administration [now Department of Veterans Affairs] notified claimant of rejection of original application after serviceman's death from leukemia. Gamez v United States (1951, DC Tex) 95 F Supp 656

38 USCS § 784 did not provide District Court with jurisdiction over action for benefits of national service life insurance policy, where Veterans' Administration [now Department of Veterans Affairs] disapproved application for such policy, even though veterans' check for premium was cashed prior to disapproval and veteran died prior to disapproval of application, since suit amounted to action to compel issuance of policy. Maxwell v United States (1970, ND Cal) 313 F Supp 245

No action lay where veteran made application for additional insurance which was denied because of nonservice-connected disability because there was no contract for additional insurance and no action lies in attempt to compel United States to be insurer. McClendon v United States (1971, WD Okla) 327 F Supp 704

5. -Forfeiture
38 USCS § 784 [now 38 USCS § 1984] requires that there be contract of insurance in force in order to vest jurisdiction in District Court, precluding jurisdiction of action based on Administrator's [now Secretary's] decision that veteran, due to false and fraudulent statements, had forfeited eligibility for disabled veterans' insurance. McKay v United States (1968, SD Tex) 286 F Supp 1003

§ 1986. Deposits in and disbursements from trust funds

All cash balances in the United States Government Life Insurance Fund and the National Service Life Insurance Fund on January 1, 1959, together with all moneys thereafter accruing to such funds, including premiums, appropriated moneys, the proceeds of any sales of investments which may be necessary to meet current expenditures, and interest on investments, shall be available for disbursement for meeting all expenditures and making investments authorized to be made from such funds.

Prior law and revision:
This section is based on 38 USC § 805a (Act Feb. 10, 1942, ch 55, 56 Stat. 87).

Amendments:

Code of Federal Regulations
Department of Veterans Affairs-United States Government life insurance, 38 CFR Part 6
Department of Veterans Affairs-National Service life insurance, 38 CFR Part 8

Cross References
National Service Life Insurance Fund, 38 USCS § 1920
United States Government Life Insurance Fund, 38 USCS § 1955

§ 1987. Penalties

(a) Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in anywise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any application for insurance or reinstatement thereof, waiver of premiums or claim for benefits under National Service Life Insurance, United States Government life insurance, or yearly renewable term insurance for any person, shall be fined not more than $1,000, or be imprisoned for not more than one year, or both.

(b) Whoever in any claim for National Service Life Insurance, United States Government life insurance, or yearly renewable term insurance makes any sworn statement of a material fact knowing it to be false, shall be guilty of perjury and shall be fined not more than $5,000, or be imprisoned for not more than two years, or both.

Prior law and revision:
This section is based on 38 USC 813, 815 (Act Oct. 8, 1940, ch 757, Title VI, Part I, §§ 613, 615, 54 Stat. 1013).
This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Amendments:
1986. Act Oct. 28, 1986, in subsec. (a) substituted "any" for "himself or any other".

Code of Federal Regulations
Department of Veterans Affairs-United States Government life insurance, 38 CFR Part 6
Department of Veterans Affairs-National Service life insurance, 38 CFR Part 8

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Am Jur:
32 Am Jur 2d, False Pretenses § 87
44A Am Jur 2d, Insurance § 1868
Evidence is insufficient to prove falsity of affidavit and that affidavit was presented to the veterans' bureau [now Department of Veterans Affairs]; where affidavit that certain person was making claim under policy states immaterial fact which will not support prosecution for perjury.
Hill v United States (1931, CA10 Kan) 54 F.2d 599

§ 1988. Savings provision

Nothing in this title or any amendment or repeal made by the Act enacting this title shall affect any right, remedy, liability, authorization or requirement pertaining to Government insurance, the respective insurance funds, or the insurance appropriations, authorized or prescribed under the provisions of the War Risk Insurance Act, the World War Veterans' Act, 1924, the National Service Life Insurance Act of 1940, or any related Act, which was in effect on December 31, 1958.

References in text:
"The War Risk Insurance Act", referred to in this section, is Act Sept. 2, 1914, ch 293, 38 Stat. 711, which was repealed by Act June 7, 1924, ch 320, Title VI, §§ 600, 601, 43 Stat. 629, subject to the limitations provided in Act June 7, 1924, ch 320, Title VI, § 602, 43 Stat. 630.
"The World War Veterans' Act, 1924", referred to in this section, is Act June 7, 1924, ch 320, 43 Stat. 607, which was generally classified to 38 USC §§ 421 et seq. and was repealed by Act Sept. 2, 1958, P. L. 85-857, § 14(51), 72 Stat. 1271 in the general revision of Title 38.

Amendments:

Code of Federal Regulations
Department of Veterans Affairs-United States Government life insurance, 38 CFR Part 6
Department of Veterans Affairs-National Service life insurance, 38 CFR Part 8
CHAPTER 20.  BENEFITS FOR HOMELESS VETERANS

SUBCHAPTER I. PURPOSE; DEFINITIONS; ADMINISTRATIVE MATTERS

SUBCHAPTER II. COMPREHENSIVE SERVICE PROGRAMS

SUBCHAPTER III. TRAINING AND OUTREACH

SUBCHAPTER IV. TREATMENT AND REHABILITATION FOR SERIOUSLY MENTAL ILL AND HOMELESS VETERANS

SUBCHAPTER V. HOUSING ASSISTANCE

SUBCHAPTER VI. LOAN GUARANTEE FOR MULTIFAMILY TRANSITIONAL HOUSING

SUBCHAPTER VII. OTHER PROVISIONS

Amendments:

SUBCHAPTER I. PURPOSE; DEFINITIONS; ADMINISTRATIVE MATTERS

§ 2001. Purpose
§ 2002. Definitions
§ 2003. Staffing requirements

§ 2001. Purpose

The purpose of this chapter [38 USCS §§ 2001 et seq.] is to provide for the special needs of homeless veterans.

Other provisions:


"For purposes of this Act [for full classification, consult USCS Tables volumes]:

"(1) The term 'homeless veteran' has the meaning given such term in section 2002 of title 38, United States Code, as added by section 5(a)(1).

"(2) The term 'grant and per diem provider' means an entity in receipt of a grant under section 2011 or 2012 of title 38, United States Code, as so added."

National goal to end homelessness among veterans. Act Dec. 21, 2001, P. L. 107-95, § 3, 115 Stat. 903, provides:

"(a) National goal. Congress hereby declares it to be a national goal to end chronic homelessness among veterans within a decade of the enactment of this Act.

"(b) Cooperative efforts encouraged. Congress hereby encourages all departments and agencies of Federal, State, and local governments, quasi-governmental organizations, private and public sector entities, including community-based organizations, faith-based organizations, and individuals to work cooperatively to end chronic homelessness among veterans within a decade."

Sense of the Congress regarding the needs of homeless veterans and the responsibility of Federal agencies. Act Dec. 21, 2001, P. L. 107-95, § 4, 115 Stat. 904, provides:

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"It is the sense of the Congress that--

"(1) homelessness is a significant problem in the veterans community and veterans are disproportionately represented among homeless men;

"(2) while many effective programs assist homeless veterans to again become productive and self-sufficient members of society, current resources provided to such programs and other activities that assist homeless veterans are inadequate to provide all needed essential services, assistance, and support to homeless veterans;

"(3) the most effective programs for the assistance of homeless veterans should be identified and expanded;

"(4) federally funded programs for homeless veterans should be held accountable for achieving clearly defined results;

"(5) Federal efforts to assist homeless veterans should include prevention of homelessness; and

"(6) Federal agencies, particularly the Department of Veterans Affairs, the Department of Housing and Urban Development, and the Department of Labor, should cooperate more fully to address the problem of homelessness among veterans."

**Evaluation centers for homeless veterans programs.** Act Dec. 21, 2001, P. L. 107-95, § 6(a), 115 Stat. 919, provides: "The Secretary of Veterans Affairs shall support the continuation within the Department of Veterans Affairs of at least one center for evaluation to monitor the structure, process, and outcome of programs of the Department of Veterans Affairs that address homeless veterans."

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**Federal Procedure:**

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:309

§ 2002. Definitions

In this chapter [38 USCS §§ 2001 et seq.]:

(1) The term "homeless veteran" means a veteran who is homeless (as that term is defined in section 103(a) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11302(a)).

(2) The term "grant and per diem provider" means an entity in receipt of a grant under section 2011 or 2012 of this title [38 USCS § 2011 or 2012].

**Code of Federal Regulations**

Department of Veterans Affairs-VA Homeless Providers Grant and Per Diem Program, 38 CFR Part 61

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**Federal Procedure:**

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:309

§ 2003. Staffing requirements

(a) **VBA staffing at regional offices.** The Secretary shall ensure that there is at least one full-time employee assigned to oversee and coordinate homeless veterans programs
at each of the 20 Veterans Benefits Administration regional offices that the Secretary determines have the largest homeless veteran populations within the regions of the Administration. The programs covered by such oversight and coordination include the following:

1. Housing programs administered by the Secretary under this title or any other provision of law.
2. Compensation, pension, vocational rehabilitation, and education benefits programs administered by the Secretary under this title or any other provision of law.
3. The housing program for veterans supported by the Department of Housing and Urban Development.
4. The homeless veterans reintegration program of the Department of Labor under section 2021 of this title [38 USCS § 2021].
5. The programs under section 2033 of this title [38 USCS § 2033].
6. The assessments required by section 2034 of this title [38 USCS § 2034].
7. Such other programs relating to homeless veterans as may be specified by the Secretary.

(b) VHA case managers. The Secretary shall ensure that the number of case managers in the Veterans Health Administration is sufficient to assure that every veteran who is provided a housing voucher through section 8(o) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)) is assigned to, and is seen as needed by, a case manager.

Research Guide
Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:309

SUBCHAPTER II. COMPREHENSIVE SERVICE PROGRAMS

§ 2011. Grants
§ 2012. Per diem payments
§ 2013. Authorization of appropriations

§ 2011. Grants
(a) Authority to make grants.

1. Subject to the availability of appropriations provided for such purpose, the Secretary shall make grants to assist eligible entities in establishing programs to furnish, and expanding or modifying existing programs for furnishing, the following to homeless veterans:
   (A) Outreach.
   (B) Rehabilitative services.
   (C) Vocational counseling and training
   (D) Transitional housing assistance.
2. The authority of the Secretary to make grants under this section expires on September 30, 2005.

(b) Criteria for grants. The Secretary shall establish criteria and requirements for grants under this section, including criteria for entities eligible to receive grants, and shall
publish such criteria and requirements in the Federal Register. The criteria established under this subsection shall include the following:

(1) Specification as to the kinds of projects for which grants are available, which shall include--
   (A) expansion, remodeling, or alteration of existing buildings, or acquisition of facilities, for use as service centers, transitional housing, or other facilities to serve homeless veterans; and
   (B) procurement of vans for use in outreach to and transportation for homeless veterans for purposes of a program referred to in subsection (a).

(2) Specification as to the number of projects for which grants are available.

(3) Criteria for staffing for the provision of services under a project for which grants are made.

(4) Provisions to ensure that grants under this section--
   (A) shall not result in duplication of ongoing services; and
   (B) to the maximum extent practicable, shall reflect appropriate geographic dispersion and an appropriate balance between urban and other locations.

(5) Provisions to ensure that an entity receiving a grant shall meet fire and safety requirements established by the Secretary, which shall include--
   (A) such State and local requirements that may apply; and
   (B) fire and safety requirements applicable under the Life Safety Code of the National Fire Protection Association or such other comparable fire and safety requirements as the Secretary may specify.

(6) Specification as to the means by which an entity receiving a grant may contribute in-kind services to the start-up costs of a project for which a grant is sought and the methodology for assigning a cost to that contribution for purposes of subsection (c).

(c) Funding limitations. A grant under this section may not be used to support operational costs. The amount of a grant under this section may not exceed 65 percent of the estimated cost of the project concerned.

(d) Eligible entities. The Secretary may make a grant under this section to an entity applying for such a grant only if the applicant for the grant--
   (1) is a public or nonprofit private entity with the capacity (as determined by the Secretary) to effectively administer a grant under this section;
   (2) demonstrates that adequate financial support will be available to carry out the project for which the grant is sought consistent with the plans, specifications, and schedule submitted by the applicant; and
   (3) agrees to meet the applicable criteria and requirements established under subsections (b) and (g) and has, as determined by the Secretary, the capacity to meet such criteria and requirements.

(e) Application requirement. An entity seeking a grant for a project under this section shall submit to the Secretary an application for the grant. The application shall set forth the following:
   (1) The amount of the grant sought for the project.
   (2) A description of the site for the project.
(3) Plans, specifications, and the schedule for implementation of the project in accordance with criteria and requirements prescribed by the Secretary under subsection (b).

(4) Reasonable assurance that upon completion of the work for which the grant is sought, the project will become operational and the facilities will be used principally to provide to veterans the services for which the project was designed, and that not more than 25 percent of the services provided under the project will be provided to individuals who are not veterans.

(f) Program requirements. The Secretary may not make a grant for a project to an applicant under this section unless the applicant in the application for the grant agrees to each of the following requirements:

(1) To provide the services for which the grant is made at locations accessible to homeless veterans.

(2) To maintain referral networks for homeless veterans for establishing eligibility for assistance and obtaining services, under available entitlement and assistance programs, and to aid such veterans in establishing eligibility for and obtaining such services.

(3) To ensure the confidentiality of records maintained on homeless veterans receiving services through the project.

(4) To establish such procedures for fiscal control and fund accounting as may be necessary to ensure proper disbursement and accounting with respect to the grant and to such payments as may be made under section 2012 of this title [38 USCS § 2012].

(5) To seek to employ homeless veterans and formerly homeless veterans in positions created for purposes of the grant for which those veterans are qualified.

(g) Service center requirements. In addition to criteria and requirements established under subsection (b), in the case of an application for a grant under this section for a service center for homeless veterans, the Secretary shall require each of the following:

(1) That such center provide services to homeless veterans during such hours as the Secretary may specify and be open to such veterans on an as-needed, unscheduled basis.

(2) That space at such center be made available, as mutually agreeable, for use by staff of the Department of Veterans Affairs, the Department of Labor, and other appropriate agencies and organizations in assisting homeless veterans served by such center.

(3) That such center be equipped and staffed to provide or to assist in providing health care, mental health services, hygiene facilities, benefits and employment counseling, meals, transportation assistance, and such other services as the Secretary determines necessary.

(4) That such center be equipped and staffed to provide, or to assist in providing, job training, counseling, and placement services (including job readiness and literacy and skills training), as well as any outreach and case management services that may be necessary to carry out this paragraph.

(h) Recovery of unused grant funds.

(1) If a grant recipient under this section does not establish a program in accordance with this section or ceases to furnish services under such a program for which the
grant was made, the United States shall be entitled to recover from such recipient the total of all unused grant amounts made under this section to such recipient in connection with such program.

(2) Any amount recovered by the United States under paragraph (1) may be obligated by the Secretary without fiscal year limitation to carry out provisions of this subchapter [38 USCS §§ 2011 et seq.].

(3) An amount may not be recovered under paragraph (1) as an unused grant amount before the end of the three-year period beginning on the date on which the grant is made.

Other provisions:

Code of Federal Regulations
Department of Veterans Affairs-VA Homeless Providers Grant and Per Diem Program, 38 CFR Part 61

Cross References
This section is referred to in 38 USCS §§ 2002, 2012, 2065

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Am Jur:
45A Am Jur 2d, Job Discrimination §§ 168-213

§ 2012. Per diem payments

(a) Per diem payments for furnishing services to homeless veterans.
(1) Subject to the availability of appropriations provided for such purpose, the Secretary, pursuant to such criteria as the Secretary shall prescribe, shall provide to a recipient of a grant under section 2011 of this title [38 USCS § 2011] (or an entity eligible to receive a grant under that section which after November 10, 1992, establishes a program that the Secretary determines carries out the purposes described in that section) per diem payments for services furnished to any homeless veteran--

(A) whom the Secretary has referred to the grant recipient (or entity eligible for such a grant); or

(B) for whom the Secretary has authorized the provision of services.

(2) (A) The rate for such per diem payments shall be the daily cost of care estimated by the grant recipient or eligible entity adjusted by the Secretary under subparagraph (B). In no case may the rate determined under this paragraph exceed the rate authorized for State homes for domiciliary care under subsection (a)(1)(A) of section 1741 of this title [38 USCS § 1741], as the Secretary may increase from time to time under subsection (c) of that section.

(B) The Secretary shall adjust the rate estimated by the grant recipient or eligible entity under subparagraph (A) to exclude other sources of income described in subparagraph (D) that the grant recipient or eligible entity certifies to be correct.
(C) Each grant recipient or eligible entity shall provide to the Secretary such information with respect to other sources of income as the Secretary may require to make the adjustment under subparagraph (B).
(D) The other sources of income referred to in subparagraphs (B) and (C) are payments to the grant recipient or eligible entity for furnishing services to homeless veterans under programs other than under this subchapter [38 USCS §§ 2011 et seq.], including payments and grants from other departments and agencies of the United States, from departments or agencies of State or local government, and from private entities or organizations.
(3) In a case in which the Secretary has authorized the provision of services, per diem payments under paragraph (1) may be paid retroactively for services provided not more than three days before the authorization was provided.

(b) Inspections. The Secretary may inspect any facility of a grant recipient or entity eligible for payments under subsection (a) at such times as the Secretary considers necessary. No per diem payment may be provided to a grant recipient or eligible entity under this section unless the facilities of the grant recipient or eligible entity meet such standards as the Secretary shall prescribe.

(c) Life Safety Code.
(1) Except as provided in paragraph (2), a per diem payment may not be provided under this section to a grant recipient or eligible entity unless the facilities of the grant recipient or eligible entity, as the case may be, meet applicable fire and safety requirements under the Life Safety Code of the National Fire Protection Association or such other comparable fire and safety requirements as the Secretary may specify.
(2) During the five-year period beginning on the date of the enactment of this section [enacted Dec. 21, 2001], paragraph (1) shall not apply to an entity that received a grant under section 3 of the Homeless Veterans Comprehensive Service Programs Act of 1992 (Public Law 102-590; 38 U.S.C. 7721 note) before that date if the entity meets fire and safety requirements established by the Secretary.
(3) From amounts available for purposes of this section, not less than $5,000,000 shall be used only for grants to assist entities covered by paragraph (2) in meeting the Life Safety Code of the National Fire Protection Association or such other comparable fire and safety requirements as the Secretary may specify.

Cross References
This section is referred to in 38 USCS §§ 2002, 2011

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Am Jur:
45A Am Jur 2d, Job Discrimination §§ 36-39

§ 2013. Authorization of appropriations

There are authorized to be appropriated to carry out this subchapter [38 USCS §§ 2011 et seq.] amounts as follows:
(1) $60,000,000 for fiscal year 2002.
(2) $75,000,000 for fiscal year 2003.
(3) $75,000,000 for fiscal year 2004.
(4) $99,000,000 for fiscal year 2005.

Amendments:
2004. Act Nov. 30, 2004, in para. (4), substituted "$99,000,000" for "$75,000,000".

SUBCHAPTER III. TRAINING AND OUTREACH
§ 2021. Homeless veterans reintegration programs
§ 2022. Coordination of outreach services for veterans at risk of homelessness
§ 2023. Demonstration program of referral and counseling for veterans transitioning from certain institutions who are at risk for homelessness

§ 2021. Homeless veterans reintegration programs
(a) In general. Subject to the availability of appropriations provided for such purpose, the Secretary of Labor shall conduct, directly or through grant or contract, such programs as the Secretary determines appropriate to provide job training, counseling, and placement services (including job readiness and literacy and skills training) to expedite the reintegration of homeless veterans into the labor force.

(b) Requirement to monitor expenditures of funds.
(1) The Secretary of Labor shall collect such information as that Secretary considers appropriate to monitor and evaluate the distribution and expenditure of funds appropriated to carry out this section. The information shall include data with respect to the results or outcomes of the services provided to each homeless veteran under this section.
(2) Information under paragraph (1) shall be furnished in such form and manner as the Secretary of Labor may specify.

(c) Administration through the Assistant Secretary of Labor for Veterans' Employment and Training. The Secretary of Labor shall carry out this section through the Assistant Secretary of Labor for Veterans' Employment and Training.

(d) Biennial report to Congress. Not less than every two years, the Secretary of Labor shall submit to Congress a report on the programs conducted under this section. The Secretary of Labor shall include in the report an evaluation of services furnished to veterans under this section and an analysis of the information collected under subsection (b).

(e) Authorization of appropriations.
(1) There are authorized to be appropriated to carry out this section amounts as follows:
   (A) $50,000,000 for fiscal year 2002.
   (B) $50,000,000 for fiscal year 2003.
   (C) $50,000,000 for fiscal year 2004.
   (D) $50,000,000 for fiscal year 2005.
   (E) $50,000,000 for fiscal year 2006.
   (F) $50,000,000 for each of fiscal years 2007 through 2009.
(2) Funds appropriated to carry out this section shall remain available until expended. Funds obligated in any fiscal year to carry out this section may be expended in that fiscal year and the succeeding fiscal year.

Amendments:

Cross References
This section is referred to in 38 USCS § 2011

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Federal Procedure:
18 Moore's Federal Practice (Matthew Bender 3d ed.), ch 133, Intersystem Preclusion § 133.42

Am Jur:
48 Am Jur 2d, Labor and Labor Relations § 261
Former employee was not entitled to full federal retirement benefits where he did not have valid civil service reemployment rights following his service in Air National Guard. Moravec v OPM (2004, CA FC) 393 F.3d 1263

§ 2022. Coordination of outreach services for veterans at risk of homelessness

(a) Outreach plan. The Secretary, acting through the Under Secretary for Health, shall provide for appropriate officials of the Mental Health Service and the Readjustment Counseling Service of the Veterans Health Administration to develop a coordinated plan for joint outreach by the two Services to veterans at risk of homelessness, including particularly veterans who are being discharged or released from institutions after inpatient psychiatric care, substance abuse treatment, or imprisonment.

(b) Matters to be included. The outreach plan under subsection (a) shall include the following:

(1) Strategies to identify and collaborate with non-Department entities used by veterans who have not traditionally used Department services to further outreach efforts.
(2) Strategies to ensure that mentoring programs, recovery support groups, and other appropriate support networks are optimally available to veterans.
(3) Appropriate programs or referrals to family support programs.
(4) Means to increase access to case management services.
(5) Plans for making additional employment services accessible to veterans.
(6) Appropriate referral sources for mental health and substance abuse services.

(c) Cooperative relationships. The outreach plan under subsection (a) shall identify strategies for the Department to enter into formal cooperative relationships with entities outside the Department to facilitate making services and resources optimally available to veterans.

(d) Review of plan. The Secretary shall submit the outreach plan under subsection (a) to the Advisory Committee on Homeless Veterans for its review and consultation.
(e) Outreach program.
(1) The Secretary shall carry out an outreach program to provide information to homeless veterans and veterans at risk of homelessness. The program shall include at a minimum-
   (A) provision of information about benefits available to eligible veterans from the Department; and
   (B) contact information for local Department facilities, including medical facilities, regional offices, and veterans centers.
(2) In developing and carrying out the program under paragraph (1), the Secretary shall, to the extent practicable, consult with appropriate public and private organizations, including the Bureau of Prisons, State social service agencies, the Department of Defense, and mental health, veterans, and homeless advocates--
   (A) for assistance in identifying and contacting veterans who are homeless or at risk of homelessness;
   (B) to coordinate appropriate outreach activities with those organizations; and
   (C) to coordinate services provided to veterans with services provided by those organizations.

(f) Reports.
(1) Not later than October 1, 2002, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives an initial report that contains an evaluation of outreach activities carried out by the Secretary with respect to homeless veterans, including outreach regarding clinical issues and other benefits administered under this title. The Secretary shall conduct the evaluation in consultation with the Under Secretary for Benefits, the Department of Veterans Affairs central office official responsible for the administration of the Readjustment Counseling Service, the Director of Homeless Veterans Programs, and the Department of Veterans Affairs central office official responsible for the administration of the Mental Health Strategic Health Care Group.
(2) Not later than December 31, 2005, the Secretary shall submit to the committees referred to in paragraph (1) an interim report on outreach activities carried out by the Secretary with respect to homeless veterans. The report shall include the following:
   (A) The Secretary's outreach plan under subsection (a), including goals and time lines for implementation of the plan for particular facilities and service networks.
   (B) A description of the implementation and operation of the outreach program under subsection (e).
   (C) A description of the implementation and operation of the demonstration program under section 2023 of this title [38 USCS § 2023].
(3) Not later than July 1, 2007, the Secretary shall submit to the committees referred to in paragraph (1) a final report on outreach activities carried out by the Secretary with respect to homeless veterans. The report shall include the following:
   (A) An evaluation of the effectiveness of the outreach plan under subsection (a).
   (B) An evaluation of the effectiveness of the outreach program under subsection (e).
   (C) An evaluation of the effectiveness of the demonstration program under section 2023 of this title [38 USCS § 2023].
(D) Recommendations, if any, regarding an extension or modification of such outreach plan, such outreach program, and such demonstration program.

§ 2023. Demonstration program of referral and counseling for veterans transitioning from certain institutions who are at risk for homelessness

(a) Program authority. The Secretary and the Secretary of Labor (hereinafter in this section referred to as the "Secretaries") shall carry out a demonstration program for the purpose of determining the costs and benefits of providing referral and counseling services to eligible veterans with respect to benefits and services available to such veterans under this title and under State law.

(b) Location of demonstration program. The demonstration program shall be carried out in at least six locations. One location shall be a penal institution under the jurisdiction of the Bureau of Prisons.

(c) Scope of program.
   (1) To the extent practicable, the demonstration program shall provide both referral and counseling services, and in the case of counseling services, shall include counseling with respect to job training and placement (including job readiness), housing, health care, and other benefits to assist the eligible veteran in the transition from institutional living.
   (2) (A) To the extent that referral or counseling services are provided at a location under the program, referral services shall be provided in person during such period of time that the Secretaries may specify that precedes the date of release or discharge of the eligible veteran, and counseling services shall be furnished after such date.
   (B) The Secretaries may, as part of the program, furnish to officials of penal institutions outreach information with respect to referral and counseling services for presentation to veterans in the custody of such officials during the 18-month period that precedes such date of release or discharge.
   (3) The Secretaries may enter into contracts to carry out the referral and counseling services required under the program with entities or organizations that meet such requirements as the Secretaries may establish.
   (4) In developing the program, the Secretaries shall consult with officials of the Bureau of Prisons, officials of penal institutions of States and political subdivisions of States, and such other officials as the Secretaries determine appropriate.

(d) Duration. The authority of the Secretaries to provide referral and counseling services under the demonstration program shall cease on the date that is four years after the date of the commencement of the program.

(e) Definition. In this section, the term "eligible veteran" means a veteran who--
   (1) is a resident of a penal institution or an institution that provides long-term care for mental illness; and
   (2) is at risk for homelessness absent referral and counseling services provided under the demonstration program (as determined under guidelines established by the Secretaries).

Cross References
§ 2031. General treatment

(a) In providing care and services under section 1710 of this title [38 USCS § 1710] to veterans suffering from serious mental illness, including veterans who are homeless, the Secretary may provide (directly or in conjunction with a governmental or other entity) --

(1) outreach services;

(2) care, treatment, and rehabilitative services (directly or by contract in community-based treatment facilities, including halfway houses); and

(3) therapeutic transitional housing assistance under section 2032 of this title [38 USCS § 2032], in conjunction with work therapy under subsection (a) or (b) of section 1718 of this title [38 USCS § 1718] and outpatient care.

(b) The authority of the Secretary under subsection (a) expires on December 31, 2006.

Amendments:


§ 2032. Therapeutic housing

(a) The Secretary, in connection with the conduct of compensated work therapy programs, may operate residences and facilities as therapeutic housing.

(b) The Secretary may use such procurement procedures for the purchase, lease, or other acquisition of residential housing for purposes of this section as the Secretary considers
appropriate to expedite the opening and operation of transitional housing and to protect the interests of the United States.

(c) A residence or other facility may be operated as transitional housing for veterans described in paragraphs (1) and (2) of section 1710(a) of this title [38 USCS § 1710(a)] under the following conditions:

(1) Only veterans described in those paragraphs and a house manager may reside in the residence or facility.
(2) Each resident, other than the house manager, shall be required to make payments that contribute to covering the expenses of board and the operational costs of the residence or facility for the period of residence in such housing.
(3) In order to foster the therapeutic and rehabilitative objectives of such housing (A) residents shall be prohibited from using alcohol or any controlled substance or item, (B) any resident violating that prohibition may be expelled from the residence or facility, and (C) each resident shall agree to undergo drug testing or such other measures as the Secretary shall prescribe to ensure compliance with that prohibition.
(4) In the establishment and operation of housing under this section, the Secretary shall consult with appropriate representatives of the community in which the housing is established and shall comply with zoning requirements, building permit requirements, and other similar requirements applicable to other real property used for similar purposes in the community.
(5) The residence or facility shall meet State and community fire and safety requirements applicable to other real property used for similar purposes in the community in which the transitional housing is located, but fire and safety requirements applicable to buildings of the Federal Government shall not apply to such property.

(d) The Secretary shall prescribe the qualifications for house managers for transitional housing units operated under this section. The Secretary may provide for free room and subsistence for a house manager in addition to, or instead of payment of, a fee for the services provided by the manager.

(e) (1) The Secretary may operate as transitional housing under this section--

(A) any suitable residential property acquired by the Secretary as the result of a default on a loan made, guaranteed, or insured under chapter 37 of this title [38 USCS §§ 3701 et seq.];
(B) any suitable space in a facility under the jurisdiction of the Secretary that is no longer being used (i) to provide acute hospital care, or (ii) as housing for medical center employees; and
(C) any other suitable residential property purchased, leased, or otherwise acquired by the Secretary.

(2) In the case of any property referred to in paragraph (1)(A), the Secretary shall--

(A) transfer administrative jurisdiction over such property within the Department from the Veterans Benefits Administration to the Veterans Health Administration; and
(B) transfer from the General Post Fund to the Loan Guaranty Revolving Fund under chapter 37 of this title [38 USCS §§ 3701 et seq.] an amount (not to exceed the amount the Secretary paid for the property) representing the amount the
(3) In the case of any residential property obtained by the Secretary from the Department of Housing and Urban Development under this section, the amount paid by the Secretary to that Department for that property may not exceed the amount that the Secretary of Housing and Urban Development would charge for the sale of that property to a nonprofit organization or a State for use as a shelter for homeless persons. Funds for such charge shall be derived from the General Post Fund.

(f) The Secretary shall prescribe--
(1) a procedure for establishing reasonable payment rates for persons residing in transitional housing; and
(2) appropriate limits on the period for which such persons may reside in transitional housing.

(g) The Secretary may dispose of any property acquired for the purpose of this section. The proceeds of any such disposal shall be credited to the General Post Fund.

(h) Funds received by the Department under this section shall be deposited in the General Post Fund. The Secretary may distribute out of the fund such amounts as necessary for the acquisition, management, maintenance, and disposition of real property for the purpose of carrying out such program. The Secretary shall manage the operation of this section so as to ensure that expenditures under this subsection for any fiscal year shall not exceed by more than $500,000 proceeds credited to the General Post Fund under this section. The operation of the program and funds received shall be separately accounted for, and shall be stated in the documents accompanying the President's budget for each fiscal year.

Amendments:
2001. Act Dec. 21, 2001, which transferred Subchapter VII of Chapter 17 (former 38 USCS §§ 1771 et seq.) to Chapter 20 and redesignated it as Subchapter IV of Chapter 20 (38 USCS §§ 2031 et seq.), redesignated this section, formerly 38 USCS § 1772, as 38 USCS § 2032.

Cross References
This section is referred to in 38 USCS §§ 2031, 2042, 2062

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Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 71

§ 2033. Additional services at certain locations

(a) Subject to the availability of appropriations, the Secretary shall operate a program under this section to expand and improve the provision of benefits and services by the Department to homeless veterans.

(b) The program shall include the establishment of sites under the jurisdiction of the Secretary to be centers for the provision of comprehensive services to homeless veterans.
The services to be provided at each site shall include a comprehensive and coordinated array of those specialized services which may be provided under existing law. The Secretary shall carry out the program under this section in sites in at least each of the 20 largest metropolitan statistical areas.

(c) The program shall include the services of such employees of the Veterans Benefits Administration as the Secretary determines appropriate at sites under the jurisdiction of the Secretary at which services are provided to homeless veterans.

(d) The program under this section shall terminate on December 31, 2006.

Amendments:

2001. Act Dec. 21, 2001, which transferred Subchapter VII of Chapter 17 (former 38 USCS §§ 1771 et seq.) to Chapter 20 and redesignated it as Subchapter IV of Chapter 20 (38 USCS §§ 2031 et seq.), redesignated this section, formerly 38 USCS § 1773, as 38 USCS § 2033; in subsec. (b), deleted "not fewer than eight programs (in addition to any existing programs providing similar services) at" preceding "sites", and added the sentence beginning "The Secretary shall carry out . . ."; and, in subsec. (d), substituted "December 31, 2006" for "December 31, 2001".

Cross References

This section is referred to in 38 USCS § 2003 § 2034. Coordination with other agencies and organizations

(a) In assisting homeless veterans, the Secretary shall coordinate with, and may provide services authorized under this title in conjunction with, State and local governments, other appropriate departments and agencies of the Federal Government, and nongovernmental organizations.

(b) (1) The Secretary shall require the director of each medical center or the director of each regional benefits office to make an annual assessment of the needs of homeless veterans living within the area served by the medical center or regional office, as the case may be.

(2) Each such assessment shall be made in coordination with representatives of State and local governments, other appropriate departments and agencies of the Federal Government, and nongovernmental organizations that have experience working with homeless persons in that area.

(3) Each such assessment shall identify the needs of homeless veterans with respect to the following:

(A) Health care.
(B) Education and training.
(C) Employment.
(D) Shelter.
(E) Counseling.
(F) Outreach services.

(4) Each assessment shall also indicate the extent to which the needs referred to in paragraph (3) are being met adequately by the programs of the Department, of other departments and agencies of the Federal Government, of State and local governments, and of nongovernmental organizations.
(5) Each assessment shall be carried out in accordance with uniform procedures and guidelines prescribed by the Secretary.

(6) The Secretary shall review each annual assessment under this subsection and shall consolidate the findings and conclusions of each such assessment into the next annual report submitted to Congress under section 2065 of this title [38 USCS § 2065].

(c) In furtherance of subsection (a), the Secretary shall require the director of each medical center and the director of each regional benefits office, in coordination with representatives of State and local governments, other Federal officials, and nongovernmental organizations that have experience working with homeless persons in the areas served by such facility or office, to--

(1) develop a list of all public and private programs that provide assistance to homeless persons or homeless veterans in the area concerned, together with a description of the services offered by those programs;

(2) seek to encourage the development by the representatives of such entities, in coordination with the director, of a plan to coordinate among such public and private programs the provision of services to homeless veterans;

(3) take appropriate action to meet, to the maximum extent practicable through existing programs and available resources, the needs of homeless veterans that are identified in the assessment conducted under subsection (b); and

(4) attempt to inform homeless veterans whose needs the director cannot meet under paragraph (3) of the services available to such veterans within the area served by such center or office.

Amendments:

2001. Act Dec. 21, 2001, which transferred Subchapter VII of Chapter 17 (former 38 USCS §§ 1771 et seq.) to Chapter 20 and redesignated it as Subchapter IV of Chapter 20 (38 USCS §§ 2031 et seq.), redesignated this section, formerly 38 USCS § 1774, as 38 USCS § 2034; and, in subsec. (b), in para. (1), inserted "annual", and added para. (6).

Cross References

This section is referred to in 38 USCS §§ 2003, 2065, 2066

SUBCHAPTER V. HOUSING ASSISTANCE

§ 2041. Housing assistance for homeless veterans
§ 2042. Supported housing for veterans participating in compensated work therapies
§ 2043. Domiciliary care programs

§ 2041. Housing assistance for homeless veterans

(a) (1) To assist homeless veterans and their families in acquiring shelter, the Secretary may enter into agreements described in paragraph (2) with--

(A) nonprofit organizations, with preference being given to any organization named in, or approved by the Secretary under, section 5902 of this title; or

(B) any State or any political subdivision thereof.

(2) To carry out paragraph (1), the Secretary may enter into agreements to sell, lease, lease with an option to purchase, or donate real property, and improvements thereon, acquired by the Secretary as the result of a default on a loan made, insured, or
guaranteed under this chapter [38 USCS §§ 2001 et seq.]. Such sale or lease or donation shall be for such consideration as the Secretary determines is in the best interests of homeless veterans and the Federal Government.

(3) The Secretary may enter into an agreement under paragraph (1) of this subsection only if:

(A) the Secretary determines that such an action will not adversely affect the ability of the Department--

(i) to fulfill its statutory missions with respect to the Department loan guaranty program and the short- and long-term solvency of the Veterans Housing Benefit Program Fund under this chapter [38 USCS §§ 2001 et seq.]; or

(ii) to carry out other functions and administer other programs authorized by law;

(B) the entity to which the property is sold, leased, or donated agrees to--

(i) utilize the property solely as a shelter primarily for homeless veterans and their families,

(ii) comply with all zoning laws relating to the property,

(iii) make no use of the property that is not compatible with the area where the property is located, and

(iv) take such other actions as the Secretary determines are necessary or appropriate in the best interests of homeless veterans and the Federal Government; and

(C) the Secretary determines that there is no significant likelihood of the property being sold for a price sufficient to reduce the liability of the Department or the veteran who defaulted on the loan.

(4) The term of any lease under this subsection may not exceed three years.

(5) An approved entity that leases a property from the Secretary under this section shall be responsible for the payment of any taxes, utilities, liability insurance, and other maintenance charges or similar charges that apply to the property.

(6) Any agreement, deed, or other instrument executed by the Secretary under this subsection shall be on such terms and conditions as the Secretary determines to be appropriate and necessary to carry out the purpose of such agreement.

(b) (1) Subject to paragraphs (2) and (3), the Secretary may make loans to organizations described in paragraph (1)(A) of subsection (a) to finance the purchase of property by such organizations under such subsection.

(2) In making a loan under this subsection, the Secretary-

(A) shall establish credit standards to be used for this purpose;

(B) may, pursuant to section 3733(a)(6) of this title, provide that the loan will bear interest at a rate below the rate that prevails for similar loans in the market in which the loan is made; and

(C) may waive the collection of a fee under section 3729 of this title in any case in which the Secretary determines that such a waiver would be appropriate.

(c) The Secretary may not enter into agreements under subsection (a) after December 31, 2008.

Amendments:
§ 2042. Supported housing for veterans participating in compensated work therapies

The Secretary may authorize homeless veterans in the compensated work therapy program to be provided housing through the therapeutic residence program under section 2032 of this title or through grant and per diem providers under subchapter II of this chapter [38 USCS §§ 2011 et seq.].

§ 2043. Domiciliary care programs

(a) Authority. The Secretary may establish up to 10 programs under section 1710(b) of this title (in addition to any program that is established as of the date of the enactment of this section [enacted Dec. 21, 2001]) to provide domiciliary services under such section to homeless veterans.

(b) Authorization of appropriations. There are authorized to be appropriated to the Secretary $5,000,000 for each of fiscal years 2003 and 2004 to establish the programs referred to in subsection (a).

SUBCHAPTER VI. LOAN GUARANTEE FOR MULTIFAMILY TRANSITIONAL HOUSING

§ 2051. General authority
§ 2052. Requirements
§ 2053. Default
§ 2054. Audit
§ 2051. General authority

(a) The Secretary may guarantee the full or partial repayment of a loan that meets the requirements of this subchapter [38 USCS §§ 2051 et seq.].

(b) (1) Not more than 15 loans may be guaranteed under subsection (a), of which not more than five such loans may be guaranteed during the 3-year period beginning on the date of the enactment of this subchapter [enacted Nov. 11, 1998].

(2) A guarantee of a loan under subsection (a) shall be in an amount that is not less than the amount necessary to sell the loan in a commercial market.

(3) Not more than an aggregate amount of $100,000,000 in loans may be guaranteed under subsection (a).

(c) A loan may not be guaranteed under this subchapter [38 USCS §§ 2051 et seq.] unless, before closing such loan, the Secretary has approved the loan.

(d) (1) The Secretary shall enter into contracts with a qualified nonprofit organization, or other qualified organization, that has experience in underwriting transitional housing projects to obtain advice in carrying out this subchapter [38 USCS §§ 2051 et seq.], including advice on the terms and conditions necessary for a loan that meets the requirements of section 2052 of this title.

(2) For purposes of paragraph (1), a nonprofit organization is an organization that is described in paragraph (3) or (4) of subsection (c) of section 501 of the Internal Revenue Code of 1986 [26 USCS § 501] and is exempt from tax under subsection (a) of such section.

(e) The Secretary may carry out this subchapter [38 USCS §§ 2051 et seq.] in advance of the issuance of regulations for such purpose.

(f) The Secretary may guarantee loans under this subchapter [38 USCS §§ 2051 et seq.] notwithstanding any requirement for prior appropriations for such purpose under any provision of law.

(g) Notwithstanding any other provision of law, a multifamily transitional housing project that is funded by a loan guaranteed under this subchapter [38 USCS §§ 2051 et seq.] may accept uncompensated voluntary services performed by any eligible entity (as that term is defined in section 2011(d) of this title) in connection with the construction, alteration, or repair of such project.

Effective date of section:

This section took effect on October 1, 1998, pursuant to § 602(f) of Act Nov. 11, 1998, P. L. 105-368, which appears as 38 USCS § 2106 note.
Amendments:

2001. Act Dec. 21, 2001, which transferred Subchapter VI of Chapter 37 (former 38 USCS §§ 3771 et seq.) to Chapter 20, redesignated this section, formerly 38 USCS § 3772, as 38 USCS § 2051; and, in subsec. (d)(1), substituted “section 2052 of this title” for “section 3773 of this title”.


Cross References

This section is referred to in 38 USCS § 2052

§ 2052. Requirements

(a) A loan referred to in section 2051 of this title meets the requirements of this subchapter [38 USCS §§ 2051 et seq.] if each of the following requirements is met:

1. The loan--
   A. is for--
       i. construction of, rehabilitation of, or acquisition of land for a multifamily transitional housing project described in subsection (b), or more than one of such purposes; or
       ii. refinancing of an existing loan for such a project; and
   B. may also include additional reasonable amounts for--
       i. financing acquisition of furniture, equipment, supplies, or materials for the project; or
       ii. in the case of a loan made for purposes of subparagraph (A)(i), supplying the organization carrying out the project with working capital relative to the project.

2. The loan is made in connection with funding or the provision of substantial property or services for such project by either a State or local government or a nongovernmental entity, or both.

3. The maximum loan amount does not exceed the lesser of--
   A. that amount generally approved (utilizing prudent underwriting principles) in the consideration and approval of projects of similar nature and risk so as to assure repayment of the loan obligation; and
   B. 90 percent of the total cost of the project.

4. The loan is of sound value, taking into account the creditworthiness of the entity (and the individual members of the entity) applying for such loan.

5. The loan is secured.

6. The loan is subject to such terms and conditions as the Secretary determines are reasonable, taking into account other housing projects with similarities in size, location, population, and services provided.

(b) For purposes of this subchapter [38 USCS §§ 2051 et seq.], a multifamily transitional housing project referred to in subsection (a)(1) is a project that--

1. provides transitional housing to homeless veterans, which housing may be single room occupancy (as defined in section 8(n) of the United States Housing Act of 1937 (42 U.S.C. 1437f(n))); and

2. provides supportive services and counseling services (including job counseling) at the project site with the goal of making such veterans self-sufficient.
(3) requires that each such veteran seek to obtain and maintain employment;
(4) charges a reasonable fee for occupying a unit in such housing; and
(5) maintains strict guidelines regarding sobriety as a condition of occupying such unit.

(c) Such a project--
(1) may include space for neighborhood retail services, other commercial activities, or job training programs; and
(2) may provide transitional housing to veterans who are not homeless and to homeless individuals who are not veterans if--
   (A) at the time of taking occupancy by any such veteran or homeless individual, the transitional housing needs of homeless veterans in the project area have been met;
   (B) the housing needs of any such veteran or homeless individual can be met in a manner that is compatible with the manner in which the needs of homeless veterans are met under paragraph (1); and
   (C) the provisions of paragraphs (4) and (5) of subsection (b) are met.

(d) In determining whether to guarantee a loan under this subchapter [38 USCS §§ 2051 et seq.], the Secretary shall consider--
(1) the availability of Department of Veterans Affairs medical services to residents of the multifamily transitional housing project; and
(2) the extent to which needs of homeless veterans are met in a community, as assessed under section 107 of Public Law 102-405.

References in text:
"Section 107 of Public Law 102-405", referred to in this section, is § 107 of Act Oct. 9, 1992, P. L. 102-405, which is partially classified to 38 USCS §§ 527 note and 1712 note.

Effective date of section:
This section took effect on October 1, 1998, pursuant to § 602(f) of Act Nov. 11, 1998, P. L. 105-368, which appears as 38 USCS § 2106 note.

Amendments:
2001. Act Dec. 21, 2001, which transferred Subchapter VI of chapter 37 (former 38 USCS §§ 3771 et seq.) to Chapter 20, redesignated this section, formerly 38 USCS § 3773, as 38 USCS § 2052; and, in subsec. (a), substituted "section 2051 of this title" for "section 3772 of this title".

Cross References
This section is referred to in 38 USCS § 2051

§ 2053. Default
(a) The Secretary shall take such steps as may be necessary to obtain repayment on any loan that is in default and that is guaranteed under this subchapter [38 USCS §§ 2051 et seq.].
(b) Upon default of a loan guaranteed under this subchapter [38 USCS §§ 2051 et seq.] and terminated pursuant to State law, a lender may file a claim under the guarantee for an amount not to exceed the lesser of--
   (1) the maximum guarantee; or
   (2) the difference between--
      (A) the total outstanding obligation on the loan, including principal, interest, and expenses authorized by the loan documents, through the date of the public sale (as authorized under such documents and State law); and
      (B) the amount realized at such sale.

Effective date of section:
This section took effect on Oct. 1, 1998, pursuant to § 602(f) of Act Nov. 11, 1998, P. L. 105-368, which appears as 38 USCS § 2106 note.

Amendments:
2001. Act Dec. 21, 2001, which transferred Subchapter VI of chapter 37 (former 38 USCS §§ 3771 et seq.) to Chapter 20, redesignated this section, formerly 38 USCS § 3774, as 38 USCS § 2053.

§ 2054. Audit

(a) During each of the first 3 years of operation of a multifamily transitional housing project with respect to which a loan is guaranteed under this subchapter [38 USCS §§ 2051 et seq.], there shall be an annual, independent audit of such operation. Such audit shall include a detailed statement of the operations, activities, and accomplishments of such project during the year covered by such audit. The party responsible for obtaining such audit (and paying the costs therefor) shall be determined before the Secretary issues a guarantee under this subchapter [38 USCS §§ 2051 et seq.].

(b) After the first three years of operation of such a multifamily transitional housing project, the Secretary may provide for periodic audits of the project.

Effective date of section:
This section took effect on Oct. 1, 1998, pursuant to § 602(f) of Act Nov. 11, 1998, P. L. 105-368, which appears as 38 USCS § 2106 note.

Amendments:
1999. Act Nov. 30, 1999, designated the existing provisions as subsec. (a), and added subsec. (b).
2001. Act Dec. 21, 2001, which transferred Subchapter VI of chapter 37 (former 38 USCS §§ 3771 et seq.) to Chapter 20, redesignated this section, formerly 38 USCS § 3775, as 38 USCS § 2054.

SUBCHAPTER VII. OTHER PROVISIONS

§ 2061. Grant program for homeless veterans with special needs
§ 2062. Dental care
§ 2063. Employment assistance
§ 2064. Technical assistance grants for nonprofit community-based groups
§ 2065. Annual report on assistance to homeless veterans
§ 2061. Grant program for homeless veterans with special needs

(a) Establishment. The Secretary shall carry out a program to make grants to health care facilities of the Department and to grant and per diem providers in order to encourage development by those facilities and providers of programs for homeless veterans with special needs.

(b) Homeless veterans with special needs. For purposes of this section, homeless veterans with special needs include homeless veterans who are--
   (1) women, including women who have care of minor dependents;
   (2) frail elderly;
   (3) terminally ill; or
   (4) chronically mentally ill.

(c) Funding.
   (1) From amounts appropriated to the Department for "Medical Care" for each of fiscal years 2003, 2004, and 2005, $5,000,000 shall be available for each such fiscal year for the purposes of the program under this section.
   (2) The Secretary shall ensure that funds for grants under this section are designated for the first three years of operation of the program under this section as a special purpose program for which funds are not allocated through the Veterans Equitable Resource Allocation system.

Other provisions:

Study of outcome effectiveness of grant program for homeless veterans with special needs. Act Dec. 21, 2001, P. L. 107-95, § 7, 115 Stat. 919, provides:

"(a) Study. The Secretary of Veterans Affairs shall conduct a study of the effectiveness during fiscal year 2002 through fiscal year 2004 of the grant program under section 2061 of title 38, United States Code, as added by section 5(a), in meeting the needs of homeless veterans with special needs (as specified in that section). As part of the study, the Secretary shall compare the results of programs carried out under that section, in terms of veterans' satisfaction, health status, reduction in addiction severity, housing, and encouragement of productive activity, with results for similar veterans in programs of the Department or of grant and per diem providers that are designed to meet the general needs of homeless veterans.

"(b) Report. Not later than March 31, 2005, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report setting forth the results of the study under subsection (a)."

Code of Federal Regulations

Department of Veterans Affairs-VA Homeless Providers Grant and Per Diem Program, 38 CFR Part 61

§ 2062. Dental care

(a) In general. For purposes of section 1712(a)(1)(H) of this title, outpatient dental services and treatment of a dental condition or disability of a veteran described in subsection (b) shall be considered to be medically necessary, subject to subsection (c), if--
(1) the dental services and treatment are necessary for the veteran to successfully gain or regain employment;
(2) the dental services and treatment are necessary to alleviate pain; or
(3) the dental services and treatment are necessary for treatment of moderate, severe, or severe and complicated gingival and periodontal pathology.

(b) Eligible veterans. Subsection (a) applies to a veteran--
(1) who is enrolled for care under section 1705(a) of this title; and
(2) who, for a period of 60 consecutive days, is receiving care (directly or by contract) in any of the following settings:
   (A) A domiciliary under section 1710 of this title.
   (B) A therapeutic residence under section 2032 of this title.
   (C) Community residential care coordinated by the Secretary under section 1730 of this title.
   (D) A setting for which the Secretary provides funds for a grant and per diem provider.
(3) For purposes of paragraph (2), in determining whether a veteran has received treatment for a period of 60 consecutive days, the Secretary may disregard breaks in the continuity of treatment for which the veteran is not responsible.

(c) Limitation. Dental benefits provided by reason of this section shall be a one-time course of dental care provided in the same manner as the dental benefits provided to a newly discharged veteran.

§ 2063. Employment assistance
The Secretary may authorize homeless veterans receiving care through vocational rehabilitation programs to participate in the compensated work therapy program under section 1718 of this title.

§ 2064. Technical assistance grants for nonprofit community-based groups

(a) Grant program. The Secretary shall carry out a program to make grants to entities or organizations with expertise in preparing grant applications. Under the program, the entities or organizations receiving grants shall provide technical assistance to nonprofit community-based groups with experience in providing assistance to homeless veterans in order to assist such groups in applying for grants under this chapter [38 USCS §§ 2001 et seq.] and other grants relating to addressing problems of homeless veterans.

(b) Funding. There is authorized to be appropriated $750,000 for each of fiscal years 2002 through 2005 to carry out the program under this section.

Code of Federal Regulations
Department of Veterans Affairs-VA Homeless Providers Grant and Per Diem Program, 38 CFR Part 61

§ 2065. Annual report on assistance to homeless veterans

(a) Annual report. Not later than June 15 of each year, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report
on the activities of the Department during the calendar year preceding the report under programs of the Department under this chapter [38 USCS §§ 2001 et seq.] and other programs of the Department for the provision of assistance to homeless veterans.

(b) General contents of report. Each report under subsection (a) shall include the following:

(1) The number of homeless veterans provided assistance under the programs referred to in subsection (a).
(2) The cost to the Department of providing such assistance under those programs.
(3) The Secretary's evaluation of the effectiveness of the programs of the Department in providing assistance to homeless veterans, including:
   (A) residential work-therapy programs;
   (B) programs combining outreach, community-based residential treatment, and case-management; and
   (C) contract care programs for alcohol and drug-dependence or use disabilities).
(4) The Secretary's evaluation of the effectiveness of programs established by recipients of grants under section 2011 of this title and a description of the experience of those recipients in applying for and receiving grants from the Secretary of Housing and Urban Development to serve primarily homeless persons who are veterans.
(5) Any other information on those programs and on the provision of such assistance that the Secretary considers appropriate.

(c) Health care contents of report. Each report under subsection (a) shall include, with respect to programs of the Department addressing health care needs of homeless veterans, the following:

(1) Information about expenditures, costs, and workload under the program of the Department known as the Health Care for Homeless Veterans program (HCHV).
(2) Information about the veterans contacted through that program.
(3) Information about program treatment outcomes under that program.
(4) Information about supported housing programs.
(5) Information about the Department's grant and per diem provider program under subchapter II of this chapter [38 USCS §§ 2011 et seq.].
(6) The findings and conclusions of the assessments of the medical needs of homeless veterans conducted under section 2034(b) of this title.
(7) Other information the Secretary considers relevant in assessing those programs.

(d) Benefits content of report. Each report under subsection (a) shall include, with respect to programs and activities of the Veterans Benefits Administration in processing of claims for benefits of homeless veterans during the preceding year, the following:

(1) Information on costs, expenditures, and workload of Veterans Benefits Administration claims evaluators in processing claims for benefits of homeless veterans.
(2) Information on the filing of claims for benefits by homeless veterans.
(3) Information on efforts undertaken to expedite the processing of claims for benefits of homeless veterans.
(4) Other information that the Secretary considers relevant in assessing the programs and activities.

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Amendments:

Cross References
This section is referred to in 38 USCS § 2034

§ 2066. Advisory Committee on Homeless Veterans

(a) Establishment.
(1) There is established in the Department the Advisory Committee on Homeless Veterans (hereinafter in this section referred to as the "Committee").
(2) The Committee shall consist of not more than 15 members appointed by the Secretary from among the following:
   (A) Veterans service organizations.
   (B) Advocates of homeless veterans and other homeless individuals.
   (C) Community-based providers of services to homeless individuals.
   (D) Previously homeless veterans.
   (E) State veterans affairs officials.
   (F) Experts in the treatment of individuals with mental illness.
   (G) Experts in the treatment of substance use disorders.
   (H) Experts in the development of permanent housing alternatives for lower income populations.
   (I) Experts in vocational rehabilitation.
   (J) Such other organizations or groups as the Secretary considers appropriate.
(3) The Committee shall include, as ex officio members, the following:
   (A) The Secretary of Labor (or a representative of the Secretary selected after consultation with the Assistant Secretary of Labor for Veterans' Employment).
   (B) The Secretary of Defense (or a representative of the Secretary).
   (C) The Secretary of Health and Human Services (or a representative of the Secretary).
   (D) The Secretary of Housing and Urban Development (or a representative of the Secretary).
(4) (A) The Secretary shall determine the terms of service and allowances of the members of the Committee, except that a term of service may not exceed three years. The Secretary may reappoint any member for additional terms of service.
   (B) Members of the Committee shall serve without pay. Members may receive travel expenses, including per diem in lieu of subsistence for travel in connection with their duties as members of the Committee.

(b) Duties.
(1) The Secretary shall consult with and seek the advice of the Committee on a regular basis with respect to the provision by the Department of benefits and services to homeless veterans.
(2) In providing advice to the Secretary under this subsection, the Committee shall--
   (A) assemble and review information relating to the needs of homeless veterans;
   (B) provide an on-going assessment of the effectiveness of the policies, organizational structures, and services of the Department in assisting homeless veterans; and
(C) provide on-going advice on the most appropriate means of providing assistance to homeless veterans.

(3) The Committee shall--
(A) review the continuum of services provided by the Department directly or by contract in order to define cross-cutting issues and to improve coordination of all services with the Department that are involved in addressing the special needs of homeless veterans;
(B) identify (through the annual assessments under section 2034 of this title and other available resources) gaps in programs of the Department in serving homeless veterans, including identification of geographic areas with unmet needs, and provide recommendations to address those gaps;
(C) identify gaps in existing information systems on homeless veterans, both within and outside the Department, and provide recommendations about redressing problems in data collection;
(D) identify barriers under existing laws and policies to effective coordination by the Department with other Federal agencies and with State and local agencies addressing homeless populations;
(E) identify opportunities for increased liaison by the Department with nongovernmental organizations and individual groups providing services to homeless populations;
(F) with appropriate officials of the Department designated by the Secretary, participate with the Interagency Council on the Homeless under title II of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11311 et seq.);
(G) recommend appropriate funding levels for specialized programs for homeless veterans provided or funded by the Department;
(H) recommend appropriate placement options for veterans who, because of advanced age, frailty, or severe mental illness, may not be appropriate candidates for vocational rehabilitation or independent living; and
(I) perform such other functions as the Secretary may direct.

(c) Reports.
(1) Not later than March 31 of each year, the Committee shall submit to the Secretary a report on the programs and activities of the Department that relate to homeless veterans. Each such report shall include--
(A) an assessment of the needs of homeless veterans;
(B) a review of the programs and activities of the Department designed to meet such needs;
(C) a review of the activities of the Committee; and
(D) such recommendations (including recommendations for administrative and legislative action) as the Committee considers appropriate.
(2) Not later than 90 days after the receipt of a report under paragraph (1), the Secretary shall transmit to the Committees on Veterans' Affairs of the Senate and House of Representatives a copy of the report, together with any comments and recommendations concerning the report that the Secretary considers appropriate.
(3) The Committee may also submit to the Secretary such other reports and recommendations as the Committee considers appropriate.
(4) The Secretary shall submit with each annual report submitted to the Congress pursuant to section 529 of this title a summary of all reports and recommendations of the Committee submitted to the Secretary since the previous annual report of the Secretary submitted pursuant to that section.

(d) **Termination.** The Committee shall cease to exist December 31, 2006.

**CHAPTER 21. SPECIALLY ADAPTED HOUSING FOR DISABLED VETERANS**

§ 2101. Veterans eligible for assistance
§ 2102. Limitations on assistance furnished
§ 2102A. Assistance for veterans residing temporarily in housing owned by a family member
§ 2103. Furnishing of plans and specifications
§ 2104. Benefits additional to benefits under other laws
§ 2105. Nonliability of United States
§ 2106. Veterans' mortgage life insurance
§ 2107. Coordination of administration of benefits

**Amendments:**


1988. Act May 20, 1988, P. L. 100-322, Title III, Part D, § 333(a)(2), 102 Stat. 539, effective as provided by § 332(b) of such Act, which appears as 38 USCS § 2106 note, amended the analysis of this chapter by substituting item 806 for one which read: "806. Mortgage Protection Life Insurance".

1991. Act Aug. 6, 1991, P. L. 102-83, § 5(b)(1), 105 Stat. 406, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1992. Act Oct. 29, 1992, Title II, § 204(b), 106 Stat. 4325, amended the analysis of this chapter by substituting item 2106 for one which read: "2106. Veteran's mortgage life insurance.".


**Cross References**

This chapter is referred to in 2 USCS § 905; 26 USCS § 6334; 31 USCS § 3803; 38 USCS §§ 106, 113, 3711

**§ 2101. Veterans eligible for assistance**

(a) **Acquisition of housing with special features.**

(1) Subject to paragraph (3), the Secretary may assist a disabled veteran described in paragraph (2) in acquiring a suitable housing unit with special fixtures or movable facilities made necessary by the nature of the veteran's disability, and necessary land therefor.
(2) A veteran is described in this paragraph if the veteran is entitled to compensation under chapter 11 of this title [38 USCS §§ 1101 et seq.] for a permanent and total service-connected disability that meets any of the following criteria:
   (A) The disability is due to the loss, or loss of use, of both lower extremities such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair.
   (B) The disability is due to-
      (i) blindness in both eyes, having only light perception, plus
      (ii) loss or loss of use of one lower extremity.
   (C) The disability is due to the loss or loss of use of one lower extremity together with-
      (i) residuals of organic disease or injury; or
      (ii) the loss or loss of use of one upper extremity, which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair.
   (D) The disability is due to the loss, or loss of use, of both upper extremities such as to preclude use of the arms at or above the elbows.

(3) The regulations prescribed under subsection (d) shall require that assistance under paragraph (1) may be provided to a veteran only if the Secretary finds that-
   (A) it is medically feasible for the veteran to reside in the proposed housing unit and in the proposed locality;
   (B) the proposed housing unit bears a proper relation to the veteran's present and anticipated income and expenses; and
   (C) the nature and condition of the proposed housing unit are such as to be suitable to the veteran's needs for dwelling purposes.

(b) Adaptations to residence of veteran.
   (1) Subject to paragraph (3), the Secretary shall assist any disabled veteran described in paragraph (2) (other than a veteran who is eligible for assistance under subsection (a))-
      (A) in acquiring such adaptations to such veteran's residence as are determined by the Secretary to be reasonably necessary because of such disability; or
      (B) in acquiring a residence already adapted with special features determined by the Secretary to be reasonably necessary for the veteran because of such disability.

(2) A veteran is described in this paragraph if the veteran is entitled to compensation under chapter 11 of this title [38 USCS §§ 1101 et seq.] for a permanent and total service-connected disability that meets either of the following criteria:
   (A) The disability is due to blindness in both eyes with 5/200 visual acuity or less.
   (B) The disability includes the anatomical loss or loss of use of both hands.

(3) Assistance under paragraph (1) may be provided only to a veteran who the Secretary determines-
   (A) is residing in and reasonably intends to continue residing in a residence owned by such veteran or by a member of such veteran's family; or
   (B) if the veteran's residence is to be constructed or purchased, will be residing in and reasonably intends to continue residing in a residence owned by such veteran or by a member of such veteran's family.
(c) (1) The Secretary may provide assistance under subsection (a) to a member of the Armed Forces serving on active duty who is suffering from a disability described in subparagraph (A), (B), (C), or (D) of paragraph (2) of that subsection if such disability is the result of an injury incurred or disease contracted in or aggravated in line of duty in the active military, naval, or air service. Such assistance shall be provided to the same extent as assistance is provided under that subsection to veterans eligible for assistance under that subsection and subject to the requirements of paragraph (3) of that subsection.

(2) The Secretary may provide assistance under subsection (b) to a member of the Armed Forces serving on active duty who is suffering from a disability described in subparagraph (A) or (B) of paragraph (2) of that subsection if such disability is the result of an injury incurred or disease contracted in or aggravated in line of duty in the active military, naval, or air service. Such assistance shall be provided to the same extent as assistance is provided under that subsection to veterans eligible for assistance under that subsection and subject to the requirements of paragraph (3) of that subsection.

(d) Regulations. Assistance under this section shall be provided in accordance with such regulations as the Secretary may prescribe.

Prior law and revision:

This section is based on 38 USC § 2601 (Act June 17, 1957, P. L. 85-56, Title VI, § 601, 71 Stat 114).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Explanatory notes:

A prior § 2101 (Act Sept. 3, 1958, P.L. 85-857, § 1, 72 Stat. 1222) was repealed by Act June 24, 1965, P. L. 89-50, § 1(a), 79 Stat. 173, effective July 1, 1966, as provided by § 1(d) of such Act. Such section related to eligibility for mustering-out payments.

Amendments:

1959. Act Sept. 8, 1959, substituted this section for one which read: "The Administrator is authorized, under such regulations as he may prescribe, to assist any veteran, who is entitled to compensation under chapter 11 of this title, based on service after April 20, 1898, for permanent and total service-connected disability due to the loss, or loss of use, by reason of amputation, ankylosis, progressive muscular dystrophies, or paralysis of both lower extremities, such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair, in acquiring a suitable housing unit with special fixtures or movable facilities made necessary by the nature of the veteran's disability, and necessary land therefor. The regulations of the Administrator shall include, but not be limited to, provisions requiring findings that (1) it is medically feasible for such veteran to reside in the proposed housing unit and in the proposed locality; (2) the proposed housing unit bears a proper relation to the veteran's present and anticipated income and expenses; and (3) the nature and condition of the proposed housing unit are such as to be suitable to the veteran's needs for dwelling purposes."

1964. Act Aug. 4, 1964, in para. (2), substituted a semicolon for ", and such permanent and total disability is such as to preclude locomotion without the aid of a wheelchair,"

1977. Act Oct. 3, 1977 (effective 10/1/77, as provided by § 501 of such Act, which appears as 38 USCS § 1114 note), substituted para. (3) for one which read: "(3) due to the loss or loss of use of one lower extremity together with residuals of organic disease or injury which so affect the functions of balance or propulsion as to preclude locomotion without resort to a wheelchair."

1980. Act Oct. 7, 1980 (effective 10/1/80, as provided by § 601(b) of such Act, which appears as 38 USCS § 1114 note), designated existing matter as subsec. (a), added subsec. (b).

1986. Act Oct. 28, 1986, in subsec. (a), in the introductory matter, substituted "the Administrator" for "he", deleted a comma after "veteran", and substituted "title" for "title, based on service after April 20, 1898,"; in subsec. (b)(1), inserted or in acquiring a residence already adapted with special features determined by the Administrator to be reasonably necessary for the veteran because of such disability".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 801, as 38 USCS § 2101, and substituted "Secretary" for "Administrator".


2004. Act Dec. 10, 2004, substituted the text of this section for text which read:

"(a) The Secretary is authorized, under such regulations as the Secretary may prescribe, to assist any veteran who is entitled to compensation under chapter 11 of this title for permanent and total service-connected disability--

"(1) due to the loss, or loss of use, of both lower extremities, such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair, or

"(2) which includes (A) blindness in both eyes, having only light perception, plus (B) loss or loss of use of one lower extremity, or

"(3) due to the loss or loss of use of one lower extremity together with (A) residuals of organic disease or injury, or (B) the loss or loss of use of one upper extremity, which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair.,

in acquiring a suitable housing unit with special fixtures or movable facilities made necessary by the nature of the veteran's disability, and necessary land therefor. The regulations of the Secretary shall include, but not be limited to, provisions requiring findings that (1) it is medically feasible for such veteran to reside in the proposed housing unit and in the proposed locality; (2) the proposed housing unit bears a proper relation to the veteran's present and anticipated income and expenses; and (3) the nature and condition of the proposed housing unit are such as to be suitable to the veteran's needs for dwelling purposes.

"(b)(1) Subject to paragraph (2) of this subsection, the Secretary, under regulations which the Secretary shall prescribe, shall assist any veteran (other than a veteran who is eligible for assistance under subsection (a) of this section) who is entitled to compensation under chapter 11 of this title for a permanent and total service-connected disability which--

"(A) is due to blindness in both eyes with 5/200 visual acuity or less, or

"(B) includes the anatomical loss or loss of use of both hands,

in acquiring such adaptations to such veteran's residence as are determined by the Secretary to be reasonably necessary because of such disability or in acquiring a residence already adapted with special features determined by the Secretary to be reasonably necessary for the veteran because of such disability.

"(2) Assistance under paragraph (1) of this subsection may be provided only to a veteran who the Secretary determines is residing in and reasonably intends to continue residing
in a residence owned by such veteran or by a member of such veteran's family or, if the veteran's residence is to be constructed or purchased, will be residing in and reasonably intends to continue residing in a residence owned by such veteran or by a member of such veteran's family.

"(c)(1) The Secretary may provide assistance under subsection (a) to a member of the Armed Forces serving on active duty who is suffering from a disability described in paragraph (1), (2), or (3) of that subsection if such disability is the result of an injury incurred or disease contracted in or aggravated in line of duty in the active military, naval, or air service. Such assistance shall be provided to the same extent as assistance is provided under that subsection to veterans eligible for assistance under that subsection and subject to the requirements of the second sentence of that subsection.

"(2) The Secretary may provide assistance under subsection (b) to a member of the Armed Forces serving on active duty who is suffering from a disability described in subparagraph (A) or (B) of paragraph (1) of that subsection if such disability is the result of an injury incurred or disease contracted in or aggravated in line of duty in the active military, naval, or air service. Such assistance shall be provided to the same extent as assistance is provided under that subsection to veterans eligible for assistance under that subsection and subject to the requirements of paragraph (2) of that subsection.".

2006. Act June 15, 2006 (effective as of December 10, 2004, as if enacted immediately after enactment of Act December 10, 2004, as provided in § 105(b) of Act June 15, 2006, which appears as a note to this section), in subsec. (a)(3), in the introductory matter, substituted "subsection (d)" for "subsection (c)"; redesignated subsec. (c) as subsec. (d); and inserted new subsec. (c).

Other provisions:


Code of Federal Regulations

Department of the Army-Claims against the United States, 32 CFR Part 536
Department of Veterans Affairs-Adjudication, 38 CFR Part 3
Department of Veterans Affairs-Veterans mortgage life insurance, 38 CFR Part 8a

Cross References

This section is referred to in 38 USCS §§ 2102, 2104

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 74

Order of United States Court of Appeals for Veterans Claims directing that specially adapted housing benefits be awarded to veteran was affirmed, because 38 USCS § 2101(a) merely required that (1) veteran be entitled to compensation under 38 USCS §§ 1101 et seq., and (2) compensation be that which was awarded for permanent and total service-connected disability; those requirements were met in this case. Kilpatrick v Principi (2003, CA FC) 327 F.3d 1375

Action brought on behalf of disabled veteran borrower must be dismissed for failure to state claim, where Veterans Rehabilitation Act (38 USCS §§ 2101 et seq.) together with Veterans Judicial Review Act (38 USCS §§ 7251 et seq.) and applicable federal regulations provide carefully tailored scheme designed to address all questions of law and fact regarding veterans

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benefits, because permitting plaintiffs to pursue private cause of action would circumvent Congress's intent that this type of claim be resolved by Department of Veterans Affairs. Denson v Merchants & Farmers Bank (1996, SD Miss) 946 F Supp 470

Court of Appeals for Veterans Claims does not have jurisdiction under 38 USCS § 511(a) to review manner in which Secretary disburses special adaptive housing grant pursuant to 38 USCS § 2101(a) since manner in which funds are disbursed is committed solely to Secretary's discretion. Werden v West (2000) 13 Vet App 463, 2000 US App Vet Claims LEXIS 359

§ 2102. Limitations on assistance furnished

(a) The assistance authorized by section 2101(a) of this title [38 USCS § 2101(a)] shall be afforded under one of the following plans, at the option of the veteran--

1) where the veteran elects to construct a housing unit on land to be acquired by such veteran, the Secretary shall pay not to exceed 50 percent of the total cost to the veteran of (A) the housing unit and (B) the necessary land upon which it is to be situated;

2) where the veteran elects to construct a housing unit on land acquired by such veteran prior to application for assistance under this chapter [38 USCS §§ 2101 et seq.], the Secretary shall pay not to exceed the smaller of the following sums: (A) 50 percent of the total cost to the veteran of the housing unit and the land necessary for such housing unit, or (B) 50 percent of the cost to the veteran of the housing unit plus the full amount of the unpaid balance, if any, of the cost to the veteran of the land necessary for such housing unit;

3) where the veteran elects to remodel a dwelling which is not adapted to the requirements of such veteran's disability, acquired by such veteran prior to application for assistance under this chapter [38 USCS §§ 2101 et seq.], the Secretary shall pay not to exceed (A) the cost to the veteran of such remodeling; or (B) 50 percent of the cost to the veteran of such remodeling; plus the smaller of the following sums: (i) 50 percent of the cost to the veteran of such dwelling and the necessary land upon which it is situated, or (ii) the full amount of the unpaid balance, if any, of the cost to the veteran of such dwelling and the necessary land upon which it is situated; and

4) where the veteran has acquired a suitable housing unit, the Secretary shall pay not to exceed the smaller of the following sums: (A) 50 percent of the cost to the veteran of such housing unit and the necessary land upon which it is situated, or (B) the full amount of the unpaid balance, if any, of the cost to the veteran of such housing unit and the necessary land upon which it is situated.

(b) Except as provided in section 2104(b) of this title [38 USCS § 2104(b)], the assistance authorized by section 2101(b) of this title [38 USCS § 2101(b)] shall be limited to the lesser of--

1) the actual cost, or, in the case of a veteran acquiring a residence already adapted with special features, the fair market value, of the adaptations determined by the Secretary under such section 2101(b) to be reasonably necessary, or

2) $10,000.

(c) The amount of assistance afforded under subsection (a) for a veteran authorized assistance by section 2101(a) of this title [38 USCS § 2101(a)] shall not be reduced by

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reason that title to the housing unit, which is vested in the veteran, is also vested in any other person, if the veteran resides in the housing unit.

(d) (1) The aggregate amount of assistance available to a veteran under sections 2101(a) and 2102A of this title [38 USCS §§ 2101(a) and 2102A] shall be limited to $50,000.

(2) The aggregate amount of assistance available to a veteran under sections 2101(b) and 2102A of this title [38 USCS §§ 2101(b) and 2102A] shall be limited to $10,000.

(3) No veteran may receive more than three grants of assistance under this chapter [38 USCS §§ 2101 et seq.].

Prior law and revision:
This section is based on 38 USC § 2602 (Act June 17, 1957, P. L. 85-56, Title VI, § 602, 71 Stat. 114).
This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Explanatory notes:
A prior § 2102 (Act Sept. 3, 1958, P.L. 85-857, § 1, 72 Stat. 1223) was repealed by Act June 24, 1965, P.L. 89-50, § 1(a), 79 Stat. 173, effective July 1, 1966, as provided by § 1(d) of such Act. The section related to the determination of the amount of mustering-out payments.

Amendments:
1969. Act June 6, 1969, in the preliminary matter, substituted "$12,500" for "$10,000".
1970. Act Oct. 23, 1970, substituted para. (3) for one which read: "where the veteran elects to remodel a dwelling, which is not adapted to the requirements of his disability, acquired by him prior to application for assistance under this chapter, the Administrator shall pay not to exceed the total of (A) 50 per centum of the cost to the veteran of such remodeling, plus (B) the smaller of the following sums: (i) 50 per centum of the cost to the veteran of such dwelling and the necessary land upon which it is situated, or (ii) the full amount of the unpaid balance, if any, of the cost to the veteran of such dwelling and the necessary land upon which it is situated; and".
1972. Act July 10, 1972, in the preliminary matter, substituted "$17,500" for "$12,500".
1974. Act Dec. 31, 1974 (effective 12/31/74, as provided by § 10 of such Act, which appears as 38 USCS § 3702 note), in the preliminary matter, substituted "$25,000" for "$17,500".
1978. Act Oct. 18, 1978 (effective 10/1/78, as provided by § 108(a) of such Act, which appears as 38 USCS § 3702 note), in the preliminary matter, substituted "$30,000" for "$25,000".
1980. Act Oct. 7, 1980 (effective 10/1/80, as provided by § 601(b) of such Act, which appears as 38 USCS § 1114 note), designated existing matter as subsec. (a); in subsec. (a), preliminary matter, as so designated, substituted "section 801(a)" for "section 801"; and added subsec. (b).
1981. Act Oct. 17, 1981 (effective on enactment as provided by § 701(b)(1) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), in the introductory matter, substituted "$30,000" for "$32,500", in paras. (1) and (2), substituted "such veteran" for "him", and in para. (3), substituted "such veteran's" for "his" and "such veteran" for "him"; and in subsec. (b), substituted "section 804(b)" for "section 804(b)(2)".

1984. Act Oct. 24, 1984 (effective 1/1/85, as provided by § 304(b) of such Act), in subsec. (a), substituted "$35,500" for "$32,500"; and, in subsec. (b)(2), substituted "$6,000" for "$5,000".

1986. Act Oct. 28, 1986, in subsec. (b)(1), substituted "cost, or, in the case of a veteran acquiring a residence already adapted with special features, the fair market value," for "cost".

1988. Act May 20, 1988 (effective 4/1/88 as provided by § 304 of such Act, which appears as a note to this section), in subsec. (a), in the introductory matter, substituted "$38,000" for "$35,500"; and in subsec. (b)(2), substituted "$6,500" for "$6,000".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 802, as 38 USCS § 2102, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

1998. Act June 9, 1998 (applicable as provided by § 8204(b) of such Act, which appears as a note to this section), in subsec. (a), in the introductory matter, substituted "$43,000" for "$38,000"; and, in subsec. (b)(2), substituted "$8,250" for "$6,500".


2001. Act Dec. 27, 2001, in subsec. (a), in the introductory matter, substituted "$48,000" for "$43,000"; and, in subsec. (b)(2), substituted "$9,250" for "$8,250".

2003. Act Dec. 16, 2003 (applicable as provided by § 402(c) of such Act, which appears as a note to this section), in subsec. (a), in the introductory matter, substituted "$50,000" for "$48,000"; and, in subsec. (b)(2), substituted "$10,000" for "$9,250".

2006. Act June 15, 2006, in subsec. (a), in the introductory matter, deleted "shall be limited in the case of any veteran to one housing unit, and necessary land therefor, and" following "title" and substituted "veteran--" for "veteran but shall not exceed $50,000 in any one case--"; and added subsec. (d).

Other provisions:

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.


Application of June 9, 1998 amendments. Act June 9, 1998, P. L. 105-178, Title VIII, Subtitle B, § 8204(b), 112 Stat. 494, provides: "The amendments made by subsection (a) [amending subsecs. (a) and (b)(2) of this section] shall apply with respect to limitations under section 2102 of such title on assistance furnished to a veteran under section 2101 of such title on or after October 1, 1998."

Application of Dec. 16, 2003 amendments. Act Dec. 16, 2003, P. L. 108-183, Title IV, § 402(c), 117 Stat. 2664, provides: "The amendments made by subsections (a) and (b) [amending 38 USCS §§ 2102 and 3902(a)] shall apply with respect to assistance furnished on or after the date of the enactment of this Act."

Code of Federal Regulations
Department of the Army-Claims against the United States, 32 CFR Part 536
Department of Veterans Affairs-Veterans mortgage life insurance, 38 CFR Part 8a
Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 74

1. Generally
2. Ownership of property

1. Generally

Eligible veteran who had acquired suitable housing unit and paid for it in full prior to application was not entitled to any amount; however, such veteran was not precluded from applying for and receiving assistance under other plans. 1949 ADVA 813

2. Ownership of property

Actual possession of title to land and housing involved is not absolute prerequisite to extension of benefits, but no extension of benefits is available upon mere contemplation of or negotiation for purchase of land or housing, and grant without actual title being in veteran is made only under circumstances wherein veteran has contracted to purchase property under contract conditional upon approval and payment of Veterans' Administration [now Department of Veterans Affairs] grant, or where arrangements have been made and delivery of deed and mortgage have been escrowed pending approval and making of Veterans' Administration [now Department of Veterans Affairs] grant and only at point when ultimate consummation of title in veteran depends only upon accomplishing administrative or mechanical processes coincidental with passing of title. 1949 ADVA 810

§ 2102A. Assistance for veterans residing temporarily in housing owned by a family member

(a) Provision of assistance. In the case of a disabled veteran who is described in subsection (a)(2) or (b)(2) of section 2101 of this title [38 USCS § 2101] and who is residing, but does not intend to permanently reside, in a residence owned by a member of such veteran's family, the Secretary may assist the veteran in acquiring such adaptations to such residence as are determined by the Secretary to be reasonably necessary because of the veteran's disability.

(b) Amount of assistance. The assistance authorized under subsection (a) may not exceed--

(1) $14,000, in the case of a veteran described in section 2101(a)(2) of this title [38 USCS § 2101(a)(2)]; or

(2) $2,000, in the case of a veteran described in section 2101(b)(2) of this title [38 USCS § 2101(b)(2)].

(c) Limitation. The assistance authorized by subsection (a) shall be limited in the case of any veteran to one residence.

(d) Regulations. Assistance under this section shall be provided in accordance with such regulations as the Secretary may prescribe.

(e) Termination. No assistance may be provided under this section after the end of the five-year period that begins on the date of the enactment of the Veterans' Housing Opportunity and Benefits Improvement Act of 2006 [enacted June 15, 2006].

§ 2103. Furnishing of plans and specifications
The Secretary is authorized to furnish to veterans eligible for assistance under this chapter [38 USCS §§ 2101 et seq.], without cost to the veterans, model plans and specifications of suitable housing units.

Prior law and revision:
This section is based on 38 USC § 2603 (Act June 17, 1957, P. L. 85-56, Title VI, § 603, 71 Stat. 115).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Explanatory notes:
A prior § 2103 (Act Sept. 3, 1958, P.L. 85-857, § 1, 72 Stat. 1223) was repealed by Act June 24, 1965, P.L. 89-50, § 1(a), 79 Stat. 173, effective July 1, 1966, as provided by § 1(d) of such Act. The section related to payment of mustering-out payments to beneficiaries of deceased members of Armed Forces.

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 803, as 38 USCS § 2103, and substituted “Secretary” for “Administrator”.

Code of Federal Regulations
Department of the Army-Claims against the United States, 32 CFR Part 536
Department of Veterans Affairs-Veterans mortgage life insurance, 38 CFR Part 8a

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans’ Laws § 74

§ 2104. Benefits additional to benefits under other laws

(a) Any veteran who accepts the benefits of this chapter [38 USCS §§ 2101 et seq.] shall not by reason thereof be denied the benefits of chapter 37 of this title [38 USCS §§ 3701 et seq.]; however, except as provided in subsection (b) of this section, the assistance authorized by section 2101 of this title [38 USCS § 2101] shall not be available to any veteran more than once.

(b) A veteran eligible for assistance under section 2101(b) of this title [38 USCS § 2101(b)] shall not by reason of such eligibility be denied benefits for which such veteran becomes eligible under section 2101(a) of this title [38 USCS § 2101(a)] or benefits relating to home health services under section 1717(a)(2) of this title [38 USCS § 1717(a)(2)]. However, no particular type of adaptation, improvement, or structural alteration provided to a veteran under section 1717(a)(2) of this title [38 USCS § 1717(a)(2)] may be provided to such veteran under section 2101(b) of this title [38 USCS § 2101(b)].

Prior law and revision:
This section is based on 38 USC § 2604 (Act June 17, 1957, P. L. 85-56, Title VI, § 604, 71 Stat. 115).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Explanatory notes:

A prior § 2104 (Act Sept. 3, 1958, P.L. 85-857, § 1, 72 Stat. 1223) was repealed by Act June 24, 1965, P.L. 89-50, § 1(a), 79 Stat. 173, effective July 1, 1966, as provided by § 1(d) of such Act. The section related to time limitations.

Amendments:

1980. Act Oct. 7, 1980 (effective 10/1/80, as provided by § 601(b) of such Act, which appears as 38 USCS § 1114 note)), designated existing matter as subsec. (a); in subsec. (a), as so designated, substituted "except as provided in subsection (b) of this section, the assistance authorized by section 801 of this title" for "the assistance authorized by this chapter"; and added subsec. (b).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 804, as 38 USCS § 2104, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


Code of Federal Regulations

Department of the Army-Claims against the United States, 32 CFR Part 536
Department of Veterans Affairs-Veterans mortgage life insurance, 38 CFR Part 8a

Cross References

This section is referred to in 38 USCS § 2102

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 74

§ 2105. Nonliability of United States

The Government of the United States shall have no liability in connection with any housing unit, or necessary land therefor, or adaptation acquired under the provisions of this chapter [38 USCS §§ 2101 et seq.].

Prior law and revision:

This section is based on 38 USC § 2605 (Act June 17, 1957, P. L. 85-56, Title VI, § 605, 71 Stat. 115).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Explanatory notes:
A prior § 2105 (Act Sept. 3, 1958, P.L. 85-857, § 1, 72 Stat. 1224) was repealed by Act June 24, 1965, P.L. 89-50, § 1(a), 79 Stat. 173, effective July 1, 1966, as provided by § 1(d) of such Act. The section related to administration of the mustering-out payments provisions.

Amendments:
1980. Act Oct. 7, 1980 (effective 10/1/80, as provided by § 601(b) of such Act), substituted "unit, or necessary land therefor, or adaptation" for "unit, or necessary land therefor,"

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 805, as 38 USCS § 2105.

Code of Federal Regulations
Department of the Army-Claims against the United States, 32 CFR Part 536
Department of Veterans Affairs-Veterans mortgage life insurance, 38 CFR Part 8a

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 74

§ 2106. Veterans' mortgage life insurance

(a) The United States shall automatically insure any eligible veteran age 69 or younger who is or has been granted assistance in securing a suitable housing unit under this chapter [38 USCS §§ 2101 et seq.] against the death of the veteran unless the veteran (1) submits to the Secretary in writing the veterans' election not to be insured under this section, or (2) fails to respond in a timely manner to a request from the Secretary for information on which the premium for such insurance can be based.

(b) The amount of insurance provided a veteran under this section may not exceed the lesser of $90,000 or the amount of the loan outstanding on the housing unit. The amount of such insurance shall be reduced according to the amortization schedule of the loan and may not at any time exceed the amount of the outstanding loan with interest. If there is no outstanding loan on the housing unit, insurance is not payable under this section. If an eligible veteran elects not to be insured under this section, the veteran may thereafter be insured under this section, but only upon submission of an application, payment of required premiums, and compliance with such health requirements and other terms and conditions as may be prescribed by the Secretary.

(c) The premiums charged a veteran for insurance under this section shall be paid at such time and in such manner as the Secretary prescribes. The rates for such premiums shall be based on such mortality data as the Secretary considers appropriate to cover only the mortality cost of insuring standard lives. In the case of a veteran receiving compensation or other cash benefits paid to the veteran by the Secretary, the Secretary shall deduct from such compensation or other benefits the premiums charged the veteran under this section.

(d) (1) The United States shall bear the costs of insurance under this section to the extent that such costs exceed premiums established by the Secretary. Premiums collected on insurance under this section shall be credited to the "Veterans Insurance and Indemnities" appropriation account, and all disbursements of insurance proceeds under this section shall be made from that account.
(2) There are authorized to be appropriated to the Secretary for such account such amounts as may be necessary to carry out this section.

(e) Any amount of insurance in force under this section on the date of the death of an eligible veteran insured under this section shall be paid to the holder of the mortgage loan, for payment of which the insurance was granted, for credit on the loan indebtedness. Any liability of the United States under such insurance shall be satisfied when such payment is made. If the Secretary is the holder of the mortgage loan, the insurance proceeds shall be credited to the loan indebtedness and deposited in the Veterans Housing Benefit Program Fund established by section 3722 of this title [38 USCS § 3722].

(f) The Secretary may prescribe such regulations relating to eligibility for insurance under this section, the maximum amount of insurance, the effective date of insurance, the maximum duration of insurance, and other pertinent matters not specifically provided for in this section as the Secretary determines are in the best interest of veterans or the United States.

(g) The amount of the insurance in force at any time shall be the amount necessary to pay the mortgage indebtedness in full, except as otherwise limited by subsection (b) of this section or regulations prescribed by the Secretary under this section.

(h) The Secretary shall issue to each veteran insured under this section a certificate setting forth the benefits to which the veteran is entitled under the insurance.

(i) Insurance under this section shall terminate upon whichever of the following events first occurs:
   (1) Satisfaction of the veteran's indebtedness under the loan upon which the insurance is based.
   (2) Termination of the veteran's ownership of the property securing the loan.
   (3) Discontinuance of payment of premiums by the veteran.

(j) Termination of life insurance under this section shall not affect the guaranty or insurance of the loan by the Secretary.

Amendments:

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in subsec. (a), substituted "$40,000," for "$30,000.".

1986. Act Oct. 28, 1986, in subsec. (b), substituted, "the veteran's" for "his"; in subsec. (c), substituted, "the veteran" for "he" following "section,"; in subsec. (d) substituted "the veteran's" for "his"; in subsec. (g), in para. (2), substituted "the Administrator" for "he" following "Government", "fixed by", "determined by" and "which", and substituted "the Administrator's" for "his", in para. (2) substituted "the veteran" for "he", in para. (5) substituted "the Administrator" for "him" following "estimated by"; and in subsec. (h) substituted "the Administrator's" for "his" following "which in" and "the veteran's" for "his".

1988. Act May 20, 1988 (effective as provided by § 333(b) of such Act, which appears as a note to this section) substituted this section for one which read:

"§ 806. Mortgage Protection Life Insurance

"(a) The Administrator is authorized, without regard to section 3709 of the Revised Statutes, as amended (41 U.S.C. 5), to purchase from one or more life insurance companies a policy
or policies of mortgage protection life insurance on a group basis to provide the benefits specified in this section.

"(b) Any policy of insurance purchased by the Administrator under this section shall be placed in effect on a date determined by the Administrator and shall automatically insure any eligible veteran who is or has been granted assistance in securing a suitable housing unit under this chapter against the death of the veteran, unless the veteran elects in writing not to be insured under this section or fails to timely respond to a request from the Administrator for information on which the veteran's premium can be based.

"(c) The initial amount of insurance provided hereunder shall not exceed the lesser of the following amounts: (1) $40,000, (2) the amount of the loan outstanding on such housing unit on the date insurance under this section is placed in effect, or (3) in the case of a veteran granted assistance in securing a housing unit on or after such date the amount of the original loan. The amount of such insurance shall be reduced according to the amortization schedule of the loan and at no time shall exceed the amount of the outstanding loan with interest. If there is no outstanding loan on the housing unit no insurance shall be payable hereunder. If any eligible veteran elects not to be insured under this section, the veteran may thereafter be insured hereunder only upon application, payment of required premiums, and compliance with such health requirements and other terms and conditions as may be prescribed by the Administrator.

"(d) The premium rates charged a veteran for insurance under this section shall be paid at such times and in such manner as the Administrator shall prescribe and shall be based on such mortality data as the Administrator deems appropriate to cover only the mortality cost of insuring standard lives. The Administrator is authorized and directed to deduct the premiums charged veterans for life insurance under this section from any compensation or other cash benefits payable to them by the Veterans' Administration and to pay such premiums to the insurer or insurers for such insurance. Any veterans insured hereunder not eligible for cash benefits from the Veterans' Administration may pay the amount of the veteran's premiums directly to the insurer or insurers for insurance hereunder.

"(e) The United States shall bear all of the cost of the insurance provided under this section except the amount of the premium rates established for eligible veterans under subsection (d) as the mortality cost of insuring standard lives. For each month for which any eligible veteran is insured under a policy purchased under this section there shall be contributed to the insurer or insurers issuing the policy or policies from the appropriation 'Compensation and Pensions, Veterans' Administration' an amount necessary to cover the cost of the insurance in excess of the premiums established for eligible veterans, including the cost of administration and the cost of the excess mortality attributable to the veterans' disabilities. Appropriations to carry out the purposes of this section are hereby authorized.

"(f) Any amount of insurance in force under this section on the date of death of an eligible veteran insured hereunder shall be paid only to the holder of the mortgage loan, the payment of which such insurance was granted, for credit on the loan indebtedness and the liability of the insurer under such insurance shall be satisfied when such payment is made. If the Administrator is the holder of the mortgage loan, the insurance proceeds shall be credited to the loan indebtedness and, as appropriate, deposited in either the direct loan or loan guaranty revolving fund established by section 1823 or 1824 of this title, respectively.

"(g) Each policy purchased under this section shall also provide, in terms approved by the Administrator, for the following:

"(1) reinsurance, to the extent and in a manner to be determined by the Administrator to be in the best interest of the veterans or the Government, with other insurers which meet qualifying criteria established by the Administrator as may elect to participate in such reinsurance.
“(2) that at any time the Administrator determines such action to be in the best interest of veterans or the Government the Administrator may (A) discontinue the entire policy, or (B) at the Administrator's option, exclude from coverage under such policy loans made after a date fixed by the Administrator for such purpose; however, any insurance previously issued to a veteran under such policy may not be canceled by the insurer solely because of termination of the policy by the Administrator with respect to new loans. If the policy is wholly discontinued, the Administrator shall have the right to require the transfer, to the extent and in a manner to be determined by the Administrator, to any new company or companies with which the Administrator has negotiated a new policy or policies, the amounts, as determined by the existing insurer or insurers with the concurrence of the Administrator of any policy or contingency reserves with respect to insurance previously in force:

“(3) issuance of each veteran insured under this section of a uniform type of certificate setting forth the benefits to which the veteran is entitled under the insurance;

“(4) any other provisions which are reasonably necessary or appropriate to carry out the provisions of this section; and

“(5) an accounting to the Administrator not later than ninety days after the end of each policy year which shall set forth, in a form approved by the Administrator, (A) the amount of premiums paid by veterans and contributions made by the Veterans' Administration accrued under the contract or agreement from its date of issue to the end of such contract year; (B) the total of all mortality and other claim charges incurred for that period; and (C) the amount of the insurer's expense and risk charges, if any, for that period. Any excess of the total item (A) over the sum of items (B) and (C) shall be held by the insurer as a contingency reserve to be used by such insurer for charges under the contract or agreement only. The contingency reserve shall bear interest at a rate to be determined in advance of each contract year by the insurer, which rate shall be approved by the Administrator if consistent with the rates generally used by the insurer for similar funds held under plans of group life insurance. If and when the Administrator determines that such contingency reserve has attained an amount estimated by the Administrator to make satisfactory provision for adverse fluctuations in future charges under the contract, the Administrator shall require the insurer to adjust the premium rates and contributions so as to prevent any further substantial accretions to the contingency reserve. If and when the contract or agreement is discontinued and if after all charges have been made there is any positive balance remaining in the contingency reserve, such balance shall be payable to the Administrator and by him deposited to the appropriation 'Compensation and Pensions, Veterans' Administration,' subject to the right of the insurer to make such payment in equal monthly installments over a period of not more than two years.

“(h) With respect to insurance contracted for under this section, the Administrator is authorized to adopt such regulations relating to eligibility of the veteran for insurance, maximum amount of insurance, maximum duration of insurance, and other pertinent factors not specifically provided for in this section, which in the Administrator's judgment are in the best interest of veterans or the Government. Insurance contracted for under this section shall take effect as to eligible veterans heretofore granted assistance under this chapter on a date determined by the Administrator, and as to eligible veterans hereafter granted assistance under this chapter at the time of the closing of the veteran's loan. The amount of the insurance at any time shall be the amount necessary to pay the mortgage indebtedness in full, except as otherwise limited by the policy.

“(i) Insurance contracted for under this section shall terminate upon whichever of the following events first occurs:

“(1) satisfaction of the veteran's indebtedness under the loan upon which the insurance is based;
“(2) the veteran's seventieth birthday;
“(3) termination of the veteran's ownership of the property securing the loan;
“(4) discontinuance of payment of premiums by the veteran; or
“(5) discontinuance of the entire contract or agreement.

"(j) Termination of the mortgage protection life insurance will in no way affect the guaranty or insurance of the loan by the Administrator.".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 806, as 38 USCS § 2106, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator".

1992. Act Oct. 29, 1992 (effective 12/1/92, as provided by § 205 of such Act, which appears as a note to 38 USCS § 1922A), in subsec. (b), deleted "initial" preceding "amount of insurance", and substituted "$90,000" for "$40,000".

1994. Act Nov. 2, 1994 substituted the section heading for one which read: "§ 2106. Veterans' Mortgage Life Insurance".

1998. Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 602(f) of such Act, which appears as a note to this section), in subsec. (e), substituted "deposited in the Veterans Housing Benefit Program Fund established by section 3722 of this title" for ", as appropriate, deposited in either the direct loan or loan guaranty revolving fund established by section 3723 or 3724 of this title, respectively".

2002. Act Dec. 6, 2002, in subsec. (a), inserted "age 69 or younger"; and, in subsec. (i), deleted para. (2) which read: "(2) The veteran's seventieth birthday.", and redesignated paras. (3) and (4) as paras. (2) and (3), respectively.

Other provisions:

Effective date of May 20, 1988 amendment. Act May 20, 1988, P. L. 100-322, Title III, Part D, § 333(b), 102 Stat. 539, provides: "The amendment made by subsection (a) [amending this section] shall take effect on the first day of the fourth month beginning after the date of the enactment of this Act."

Savings provision; discontinuance of contract program. Act May 20, 1988, P. L. 100-322, Title III, Part D, § 333(c)-(e), 102 Stat. 539, provides:

"(c) Savings provision. Mortgage protection life insurance granted to any veteran under the former section 806 shall continue in force with the United States as insurer, subject to the terms of subsection (d). Nothing in that subsection shall impair any rights of any veteran or mortgage loan holder under the former section 806 that matured before the effective date specified in subsection (b) [note to this section].

"(d) Discontinuance of contract program.(1) Effective as of the effective date specified in subsection (b) [note to this section], the Administrator shall discontinue the policy of insurance purchased in accordance with the former section 806.

"(2) All premiums collected or received by the insurer on or after such effective date under a policy purchased under the former section 806 shall be promptly forwarded to the Administrator and shall be credited to the 'Veterans Insurance and Indemnities' appropriation account. Any positive balance of the contingency reserve maintained by the insurer under such policy remaining after all charges have been made shall be payable to the Administrator and shall be deposited by the Administrator in such account, except that such balance may, upon the election of the insurer, be paid by the insurer in equal monthly installments over a period of not more than two years beginning on the date, after such effective date, that the Administrator specifies.
“(e) Former section 806 defined. For the purpose of subsections (c) and (d), the term ‘former section 806’ means section 806 of title 38, United States Code, as in effect on the day before the effective date specified in subsection (b) [note to this section].”.

Effective date of Title VI of Act Nov. 11, 1998. Act Nov. 11, 1998, P. L. 105-368, Title VI, § 602(f), 112 Stat. 3348, provides: "This title and the amendments made by this title [for full classification, consult USCS Tables volumes] shall take effect on October 1, 1998.”.

Code of Federal Regulations
Department of Veterans Affairs-Veterans mortgage life insurance, 38 CFR Part 8a

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 74

§ 2107. Coordination of administration of benefits

The Secretary shall provide for the coordination of the administration of programs to provide specially adapted housing that are administered by the Under Secretary for Health and such programs that are administered by the Under Secretary for Benefits under this chapter [38 USCS §§ 2101 et seq.], chapter 17 [38 USCS §§ 1701 et seq.], and chapter 31 [38 USCS §§ 3101 et seq.] of this title.

CHAPTER 23. BURIAL BENEFITS

§ 2301. Flags
§ 2302. Funeral expenses
§ 2303. Death in Department facility; plot allowance
§ 2304. Claims for reimbursement
§ 2305. Persons eligible under prior law
§ 2306. Headstones, markers, and burial receptacles
§ 2307. Death from service-connected disability
§ 2308. Transportation of deceased veteran to a national cemetery

Amendments:


1991. Act Aug. 6, 1991, P. L. 102-83, §§ 4(a)(3), (4), 5(b)(1), 105 Stat. 404, 406, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and, in item 2303 (formerly 903), by substituting "Department" for "Veterans' Administration".

§ 2301. Flags

(a) The Secretary shall furnish a flag to drape the casket of each--

(1) deceased veteran who--
    (A) was a veteran of any war, or of service after January 31, 1955;  
    (B) had served at least one enlistment; or  
    (C) had been discharged or released from the active military, naval, or air service  
        for a disability incurred or aggravated in line of duty; and  

(2) deceased individual who at the time of death was entitled to retired pay under  
    chapter 67 of title 10 [10 USCS §§ 1331 et seq.] or would have been entitled to  
    retired pay under that chapter but for the fact that the person was under 60 years of  
    age.

(b) After the burial of the veteran the flag so furnished shall be given to the veteran's next  
    of kin. If no claim is made for the flag by the next of kin, it may be given, upon request,  
    to a close friend or associate of the deceased veteran. If a flag is given to a close friend or  
    associate of the deceased veteran, no flag shall be given to any other person on account of  
    the death of such veteran.

(c) For the purpose of this section, the term "Mexican border period" as defined in  
    paragraph (30) of section 101 of this title [38 USCS § 101] includes the period beginning  
    on January 1, 1911, and ending on May 8, 1916.

(d) In the case of any person who died while in the active military, naval, or air service  
    after May 27, 1941, the Secretary shall furnish a flag to the next of kin, or to such other  
    person as the Secretary considers most appropriate, if such next of kin or other person is  
    not otherwise entitled to receive a flag under this section or under section 1482(a) of title  
    10 [10 USCS § 1482(a)].

(e) The Secretary shall furnish a flag to drape the casket of each deceased person who is  
    buried in a national cemetery by virtue of eligibility for burial in such cemetery under  
    section 2402(6) of this title [38 USCS § 2402(6)]. After the burial, the flag shall be given  
    to the next of kin or to such other person as the Secretary considers appropriate.

(f) (1) The Secretary shall furnish a flag to drape the casket of each deceased member or  
    former member of the Selected Reserve (as described in section 10143 of title 10 [10  
    USCS § 10143]) who is not otherwise eligible for a flag under this section or section  
    1482(a) of title 10 [10 USCS § 1482(a)]--
    (A) who completed at least one enlistment as a member of the Selected Reserve or,  
        in the case of an officer, completed the period of initial obligated service as a  
        member of the Selected Reserve;  
    (B) who was discharged before completion of the person's initial enlistment as a  
        member of the Selected Reserve or, in the case of an officer, period of initial
obligated service as a member of the Selected Reserve, for a disability incurred or
aggravated in line of duty; or

(C) who died while a member of the Selected Reserve.

(2) A flag may not be furnished under subparagraph (A) or (B) of paragraph (1) in the
case of a person whose last discharge from service in the Armed Forces was under
conditions less favorable than honorable.

(3) After the burial, a flag furnished under paragraph (1) shall be given to the next of
kin or to such other person as the Secretary considers appropriate.

(g) A flag may not be furnished under this section in the case of a person described in
section 2411(b) of this title [38 USCS § 2411(b)].

(h) (1) The Secretary may not procure any flag for the purposes of this section that is not
wholly produced in the United States.

(2) (A) The Secretary may waive the requirement of paragraph (1) if the Secretary
determines--

(i) that the requirement cannot be reasonably met; or

(ii) that compliance with the requirement would not be in the national interest
of the United States.

(B) The Secretary shall submit to Congress in writing notice of a determination
under subparagraph (A) not later than 30 days after the date on which such
determination is made.

(3) For the purpose of paragraph (1), a flag shall be considered to be wholly produced
in the United States only if--

(A) the materials and components of the flag are entirely grown, manufactured, or
created in the United States;

(B) the processing (including spinning, weaving, dyeing, and finishing) of such
materials and components is entirely performed in the United States; and

(C) the manufacture and assembling of such materials and components into the
flag is entirely performed in the United States.

Prior law and revision:
This section is based on 38 USC § 2801 (Act June 17, 1957, P. L. 85-86, Title VIII, § 801, 71
Stat. 117).

This section is also based on the following provisions, which were repealed by Act June 17,
1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Veterans' Regulation No. 9(a), para. I (as amended July 11, 1939, ch 263, 53 Stat. 999; Aug.

Amendments:

1961. Act Sept. 14, 1961, in subsec. (a)(1), inserted "or of Mexican border service"; and
added subsec. (c).

(a)(1), substituted ", of Mexican border service, or of service after January 31, 1955" for "or of
Mexican border service".

1967. Act Aug. 31, 1967 (effective on the first day of the first calendar month which begins
more than 10 days after 8/31/1967, as provided by § 405(a) of such Act, which appears as 38
USCS § 101 note), added subsec. (d).
1970. Act Dec. 24, 1970 (effective 1/1/71, as provided by §10(a) of such Act), in subsec. (a)(1), deleted "of Mexican border service," following "of any war,"; and substituted new subsec. (c) for one which read: "For the purpose of this section, the term 'Mexican border service' means active military, naval, or air service during the period beginning on January 1, 1911, and ending on April 5, 1917, in Mexico, or the borders thereof, or in the waters adjacent thereto."


1986. Act Oct. 28, 1986, in subsec. (b), substituted "the veteran's" for "his".

1989. Act Dec. 18, 1989, in subsec. (a), in the introductory matter, substituted "Secretary" for "Administrator", and in subsecs. (d) and (e), substituted "Secretary" for "Administrator" wherever appearing.


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 901, as 38 USCS § 2301, and amended the references in this section to reflect the redesignations made by §5(a) of such Act (see Table III preceding 38 USCS § 101).

1992. Act Oct. 28, 1992, substituted subsec. (a) for one which read:

"(a) The Secretary shall furnish a flag to drape the casket of each deceased veteran who--

"(1) was a veteran of any war, or of service after January 31, 1955;

"(2) had served at least one enlistment; or

"(3) had been discharged or released from the active military, naval, or air service for a disability incurred or aggravated in line of duty."


Such Act further (applicable as provided by §1073(b) of such Act, which appears as a note to this section) added subsec. (g).

2001. Act June 5, 2001, in subsec. (f), in para. (1), in the introductory matter, substituted "(as described in section" for "(as described in section" and, in para. (2), substituted "subparagraph" for "subparagraphs".

2002. Act Dec. 6, 2002 (applicable as provided by §201(d) of such Act, which appears as 38 USCS § 112 note), redesignated subsec. (g) as subsec. (h), and inserted new subsec. (g).

Other provisions:


Application of subsec. (g). Act Oct. 17, 1998, P. L. 105-261, Div A, Title X,Subtitle H, § 1073(b), 112 Stat. 2138, provides: "Subsection (g) of section 2301 of title 38, United States Code, as added by subsection (a), shall apply to flags procured by the Secretary of Veterans Affairs for the purposes of section 2301 of title 38, United States Code, after the end of the 30-day period beginning on the date of the enactment of this Act."

Cross References
This section is referred to in 10 USCS § 1491; 38 USCS § 113

Research Guide
Law Review Articles:

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§ 2302. Funeral expenses

Discussion and Analysis in the Veterans Benefits Manual

(a) In the case of a deceased veteran--

(1) who at the time of death was in receipt of compensation (or but for the receipt of retirement pay would have been entitled to compensation) or was in receipt of pension, or

(2) who was a veteran of any war or was discharged or released from the active military, naval, or air service for a disability incurred or aggravated in line of duty, whose body is held by a State (or a political subdivision of a State), and with respect to whom the Secretary determines--

(A) that there is no next of kin or other person claiming the body of the deceased veteran, and

(B) that there are not available sufficient resources to cover burial and funeral expenses,

the Secretary, in the Secretary's discretion, having due regard to the circumstances in each case, may pay a sum not exceeding $300 to such person as the Secretary prescribes to cover the burial and funeral expenses of the deceased veteran and the expense of preparing the body and transporting it to the place of burial. For the purpose of this subsection, the term "veteran" includes a person who died during a period deemed to be active military, naval, or air service under section 106(c) of this title [38 USCS § 106(c)].

(b) Except as hereafter provided in this subsection, no deduction shall be made from the burial allowance because of the veteran's net assets at the time of the death of such veteran, or because of any contribution from any source toward the burial and funeral expenses (including transportation) unless the amount of expenses incurred is covered by the amount actually paid therefor by the United States, a State, any agency or political subdivision of the United States or of a State, or the employer of the deceased veteran.

No claim shall be allowed (1) for more than the difference between the entire amount of the expenses incurred and the amount paid by any or all of the foregoing, or (2) when the burial allowance would revert to the funds of a public or private organization or would discharge such an organization's obligation without payment. The burial allowance or any part thereof shall not be paid in any case where specific provision is otherwise made for payment of expenses of funeral, transportation, and interment under any other Act.

Prior law and revision:

This section is based on 38 USC § 2802 (Act June 17, 1957, P. L. 85-56, Title VIII, § 802(a), 71 Stat. 117; Aug. 18, 1958, P. L. 85-674, § 1, 72 Stat. 624).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:

1964. Act July 7, 1964, in subsec. (b), substituted "or of a State, or" for "or of a State, "
deleted ", or a burial association" following "deceased veteran", substituted "No claim shall be
allowed (1) for more than the difference between the entire amount of the expenses incurred
and the amount paid by any or all of the foregoing, or (2) when the burial allowance would
revert to the funds of a public or private organization or would discharge such an
organization's obligation without payment." for "No claim shall be allowed for more than the
difference between the entire amount of the expenses incurred, and the amount paid by any
or all of the foregoing.", and deleted "The Administrator shall not deny or reduce the amount
of the burial allowance otherwise payable because of a cash contribution made by a burial
association to any person other than the person rendering burial and funeral services."
preceding "The burial allowance".

1966. Act March 7, 1966, substituted new subsec. (a) for one which read:

"(a) Where a veteran dies who--

"(1) was a veteran of any war;

"(2) had been discharged from the active military, naval, or air service for a disability
incurred or aggravated in line of duty; or

"(3) was in receipt of, or but for the receipt of retirement pay would have been entitled to,

the Administrator, in his discretion having due regard to the circumstances in each case, may
pay a sum not exceeding $250 to such person as he prescribes to cover the burial and
funeral expenses of the deceased veteran and the expense of preparing the body and
transporting it to the place of burial."

1978. Act Oct. 18, 1978, P. L. 95-476 (effective 10/18/78, as provided by § 205(a) of such Act,
which appears as 38 USCS § 2303 note), in subsec. (a), concluding matter, substituted "in
the Administrator's discretion" for "in his discretion" and substituted "as the Administrator
prescribes" for "as he prescribes"; and in subsec. (b), substituted "the death of such veteran"
for "his death".

Act Oct. 18, 1978, P. L. 95-479 (effective 10/1/78, as provided by § 401(a) of such Act, which
appears as 38 USCS § 1114 note), in subsec. (a), concluding matter, substituted "$300" for
"$250".

1981. Act Aug. 13, 1981 (effective with respect to deaths occurring after 9/30/1981, as
provided by § 2001(a)(2) of such Act, which appears as a note to this section), in subsec. (a),
substituted "When a veteran dies who was in receipt of compensation (or but for the receipt
of retirement pay would have been entitled to compensation) or in receipt of pension," for
"Where a veteran dies--

"(1) of a service-connected disability; or

"(2) who was (A) a veteran of any war; (B) discharged from the active military, naval, or
 air service for a disability incurred or aggravated in line of duty; or (C) in receipt of (or but
 for the receipt of retirement pay would have been entitled to) disability compensation;".

9/20/1982, as provided by § 403(b) of such Act, which appears as a note to this section), in
subsec. (a), substituted "In the case of a deceased veteran--

"(1) who at the time of death was in receipt of compensation (or but for the receipt of
retirement pay would have been entitled to compensation) or was in receipt of pension, or

"(2) who was a veteran of any war or was discharged or released from the active military,
naval, or air service for a disability incurred or aggravated in line of duty, whose body is
held by a State (or a political subdivision of a State), and with respect to whom the Administrator determines--

"(A) that there is no next of kin or other person claiming the body of the deceased veteran, and

"(B) that there are not available sufficient resources to cover burial and funeral expenses, the Administrator,"

for "When a veteran dies who was in receipt of compensation (or but for the receipt of retirement pay would have been entitled to compensation) or in receipt of pension, the Administrator,".


Other provisions:


Code of Federal Regulations

Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Cross References

This section is referred to in 38 USCS §§ 113, 2303, 2304, 2307, 2308; 50 USCS Appx § 461

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:172, 174

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 139

1. Generally

2. Foreign burial

1. Generally

Veteran dishonorably discharged from enlistment entered into prior to November 11, 1918, who was honorably discharged from later enlistment entered into between November 12, 1918 and July 2, 1921, was not honorably discharged World War veteran for purposes of reimbursement of burial expenses. 1938 ADVA 428

Person who was inducted into military service on July 10, 1941 and was transferred on October 10, 1941 to Enlisted Reserve Corps under honorable conditions because he was over 28
years of age was not included within term “veteran of any war” for purposes of payment of burial expenses. 1943 ADVA 523

Burial expenses of person who performed no active duty during World II were not payable, even though such person was medically examined and accepted for military service. 1943 ADVA 525

Burial and funeral expenses could not be paid under 38 USCS §§ 902 et seq. [now 38 USCS §§ 2302 et seq.] on account of deaths of members of allied forces admitted to veterans hospitals under 38 USCS § 109. VA GCO 19-79

Veteran’s surviving spouse was not entitled to burial allowance and recoupment of transportation costs where it was undisputed that veteran was not in receipt of any compensation or pension benefits from Veterans’ Administration [now Department of Veterans Affairs] at time of his death. Melson v Derwinski (1991) 1 Vet App 334

Widow’s claim for burial benefits was properly denied since deceased was member of Philippine Scouts which do not qualify for veterans’ benefits. Elarde v Derwinski (1991) 1 Vet App 562

Veteran who was not receiving any monthly payment at time of his death was not in receipt of compensation for purposes of qualifying for burial allowance. Osborne v Principi (1992) 3 Vet App 368

2. Foreign burial

Expenses in funeral and burial of United States veteran incurred by foreign government are not payable by Administration [now Department] either from statutory burial allowance or from accrued pension or compensation due and unpaid at death of veteran, where such expenses were paid pursuant to legal obligation by foreign government; but if such disbursement for funeral expenses was made by foreign government from general funds not specifically authorized for such purposes, that is, in nature of advance or emergency payment, such expenses are payable. 1954 ADVA 937

§ 2303. Death in Department facility; plot allowance

discussion and Analysis in the Veterans Benefits Manual

(a) (1) When a veteran dies in a facility described in paragraph (2), the Secretary shall--

(A) pay the actual cost (not to exceed $300) of the burial and funeral or, within such limits, may make contracts for such services without regard to the laws requiring advertisement for proposals for supplies and services for the Department; and

(B) when such a death occurs in a State, transport the body to the place of burial in the same or any other State.

(2) A facility described in this paragraph is--

(A) a facility of the Department (as defined in section 1701(3) of this title [38 USCS § 1701(3)]) to which the deceased was properly admitted for hospital, nursing home, or domiciliary care under section 1710 or 1711(a) of this title [38 USCS § 1710 or 1711(a)]; or

(B) an institution at which the deceased veteran was, at the time of death, receiving--

(i) hospital care in accordance with section 1703 of this title [38 USCS § 1703];

(ii) nursing home care under section 1720 of this title [38 USCS § 1720]; or

(iii) nursing home care for which payments are made under section 1741 of this title [38 USCS § 1741].
(b) In addition to the benefits provided for under section 2302 of this title [38 USCS § 2302] and subsection (a) of this section, in the case of a veteran who is eligible for burial in a national cemetery under section 2402 of this title [38 USCS § 2402] and who is not buried in a national cemetery or other cemetery under the jurisdiction of the United States--

   (1) if such veteran is buried (without charge for the cost of a plot or interment) in a cemetery, or a section of a cemetery, that (A) is used solely for the interment of persons who are (i) eligible for burial in a national cemetery, and (ii) members of a reserve component of the Armed Forces not otherwise eligible for such burial or former members of such a reserve component not otherwise eligible for such burial who are discharged or released from service under conditions other than dishonorable, and (B) is owned by a State or by an agency or political subdivision of a State, and Secretary shall pay to such State, agency, or political subdivision the sum of $300 as a plot or interment allowance for such veteran; and

   (2) if such veteran is eligible for a burial allowance under section 2302 of this title [38 USCS § 2302] or under subsection (a) of this section, or was discharged from the active military, naval, or air service for a disability incurred or aggravated in line of duty, and such veteran is buried in a cemetery, or a section of a cemetery, other than as described in clause (1) of this subsection, the Secretary shall pay a sum not exceeding $300 as a plot or interment allowance for such veteran; and

Prior law and revision:

This section is based on 38 USC § 2803 (Act June 17, 1957, P. L. 85-56, Title VIII, § 803(a), 71 Stat. 117; Aug. 18, 1958, P. L. 85-674, § 1, 72 Stat. 624).

This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:

Veterans' Regulation No. 9(a), paras. II, Ill, No. 9(b), para. I, No. 9(c), para. I (as amended Act Oct. 17, 1940, ch 893, § 2(a), 54 Stat. 1195; July 24, 1946, ch 601, 60 Stat. 654).

Amendments:

1959. Act June 25, 1959, in subsec. (b), inserted "(including Alaska)" wherever appearing, inserted "continental", second time appearing, and deleted ", or to the place of burial within Alaska if the deceased was a resident of Alaska who had been brought to the United States as a beneficiary of the Veterans' Administration for hospital or domiciliary care" preceding ". Where such a death".

1960. Act July 12, 1960, in subsec. (b), substituted "In addition to the foregoing, when such a death occurs in the continental United States or Hawaii, the Administrator shall transport the body to the place of burial in the continental United States or Hawaii." for "In addition to the foregoing, when such a death occurs in the continental United States (including Alaska), the Administrator shall transport the body to the place of burial in the continental United States (including Alaska).".
1961. Act July 21, 1961, substituted new subsec. (b) for one which read: "In addition to the foregoing, when such a death occurs in the continental United States or Hawaii, the Administrator shall transport the body to the place of burial in the continental United States or Hawaii. Where such a death occurs in a Territory, a Commonwealth, or a possession of the United States, the Administrator shall transport the body to the place of burial within such Territory, Commonwealth, or possession."

1966. Act March 3, 1966, in subsec. (b), deleted "For purposes of this subsection the term 'State' includes the Canal Zone." following "or any other State."

1973. Act June 18, 1973 (effective as provided by § 10(b) of such Act, which appears as a note to this section), substituted this section for one which read:

"§ 903. Death in Veterans' Administration facility

"(a) Where death occurs in a Veterans' Administration facility to which the deceased was properly admitted for hospital or domiciliary care under authority of section 610 or 611(a) of this title, the Administrator shall pay the actual cost (not to exceed $250) of the burial and funeral.

"(b) In addition to the foregoing, when such a death occurs in a State, the Administrator shall transport the body to the place of burial in the same, or any other State.

"(c) Within the limits prescribed in subsection (a), the Administrator may make contracts for burial and funeral services without regard to the laws requiring advertisement for proposals for supplies and services for the Veterans' Administration."

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), preliminary matter, inserted ", nursing home," and substituted "611(a)" for "611".

1978. Act Oct. 18, 1978, P. L. 95-476 (effective as provided by § 205 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), preliminary matter, inserted ", nursing home," and substituted "611(a)" for "611".

1978. Act Oct. 18, 1978, P. L. 95-476 (effective as provided by § 205 of such Act, which appears as a note to this section), substituted subsec. (b) for one which read: "In addition to the foregoing, if such a veteran, or a veteran eligible for a burial allowance under section 902 of this title, is not buried in a national cemetery or other cemetery under the jurisdiction of the United States, the Administrator, in his discretion, having due regard for the circumstances in each case, may pay a sum not exceeding $150, as a plot or interment allowance to such person as he prescribes. In any case where any part of the plot or interment expenses have been paid or assumed by a State, any agency or political subdivision of a State, or the employer of the deceased veteran, no claim for such allowance shall be allowed for more than the difference between the entire amount of the expenses incurred and the amount paid or assumed by any or all of the foregoing entities.".

Act Oct. 18, 1978, P. L. 95-479 (effective 10/1/78, as provided by § 401(a) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a)(1), substituted "$300" for "$250".

1981. Act Aug. 13, 1981, in subsec. (b), in the introductory matter, inserted "who was discharged from the active military, naval, or air service for a disability incurred or aggravated in line of duty, or who is a veteran of any war".

1982. Act Oct. 14, 1982 (effective with respect to death occurring after 9/30/1982, as provided by § 404(b) of such Act, which appears as a note to this section), in subsec. (a), in the introductory matter, substituted "When a veteran dies in a Veterans' Administration facility (as defined in section 601(4) of this title)" for "Where death occurs in a Veterans' Administration facility", and inserted "or in an institution at which the deceased veteran was receiving nursing home care under section 620 of this title at the expense of the United States at the time of death".

1986. Act April 7, 1986, in subsec. (a), in the introductory matter, inserted "hospital care in accordance with section 603 of this title or".

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1989. Act Dec. 18, 1989, in subsec. (a), in the introductory matter, substituted "Secretary" for "Administrator"; and in subsec. (b), in paras. (1) and (2), substituted "Secretary" for "Administrator" wherever appearing.

1990. Act Nov. 5, 1990 (applicable as provided by § 8042(b) of such Act, which appears as a note to this section), in subsec. (b)(2), inserted "(other than a veteran whose eligibility for benefits under this subsection is based on being a veteran of any war)".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 903, as 38 USCS § 2303, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Department" for "Veterans' Administration".

1996. Act Oct. 9, 1996 substituted subsec. (a) for one which read:

"(a) When a veteran dies in a Department facility (as defined in section 1701(4) of this title) to which the deceased was properly admitted for hospital, nursing home, or domiciliary care under section 1710 or 1711(a) of this title or in an institution at which the deceased veteran was receiving hospital care in accordance with section 1703 of this title or nursing home care under section 1720 of this title at the expense of the United States at the time of death, the Secretary--

"(1) shall pay the actual cost (not to exceed $300) of the burial and funeral or, within such limits, make contracts for such services without regard to the laws requiring advertisement for proposals for supplies and services for the Department; and

"(2) shall, when such a death occurs in a State, transport the body to the place of burial in the same or any other State.".

1997. Act Nov. 21, 1997, in subsec. (a)(2)(A), substituted "a facility of the Department (as defined in section 1701(3) of this title)" for "a Department facility (as defined in section 1701(4) of this title)".

2000. Act Nov. 1, 2000 (applicable as provided by § 333(b) of such Act, which appears as a note to this section), in subsec. (b)(1), substituted subpara. (A) for one which read: "(A) is used solely for the interment of persons eligible for burial in a national cemetery, and".

2001. Act Dec. 27, 2001 (applicable to deaths occurring on or after 12/1/2001, as provided by § 501(b)(2) of such Act, which appears as a note to this section), in subsec. (b), substituted "$300" for "$150" in two places.

2003. Act Dec. 16, 2003, in subsec. (b), in the introductory matter, substituted "burial in a national cemetery under section 2402 of this title" for "a burial allowance under such section 2302, or under such subsection, who was discharged from the active military, naval, or air service for a disability incurred or aggravated in line of duty, or who is a veteran of any war", and, in para. (2), substituted "is eligible for a burial allowance under section 2302 of this title or under subsection (a) of this section, or was discharged from the active military, naval, or air service for a disability incurred or aggravated in line of duty, and such veteran" for "(other than a veteran whose eligibility for benefits under this subsection is based on being a veteran of any war)".

Other provisions:

Effective date of June 18, 1973 amendments. Act June 18, 1973, P. L. 93-43, § 10(b), 87 Stat. 88, provides: "Clause (1) of section 5(a) [amending this section] shall take effect on the first day of the second calendar month following the date of enactment of this Act.".

"(a) Except as provided in subsection (b), the amendments made by this title [enacting 38 USCS § 2408 and amending 38 USCS §§ 2302, 2306, 3698] shall take effect on the date of the enactment of this Act.

"(b) The amendment made by section 202(a) of this title [amending this section] shall take effect on October 1, 1978.".


**Application of Nov. 5, 1990 amendments.** Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle E, § 8042(b), 104 Stat. 1388-349, provides: "This section [amending subsec. (b)(2) of this section] shall apply to deaths occurring on or after November 1, 1990."

**Application of Nov. 1, 2000 amendments.** Act Nov. 1, 2000, P. L. 106-419, Title III, Subtitle D, § 333(b), 114 Stat. 1857, provides: "The amendment made by subsection (a) [amending subsec. (b)(1)(A) of this section] shall apply with respect to the burial of persons dying on or after the date of the enactment of this Act."

**Application of Dec. 27, 2001 amendments.** Act Dec. 27, 2001, P. L. 107-103, Title V, § 501(b)(2), 115 Stat. 994, provides: "The amendments made by paragraph (1) [amending subsec. (b) of this section] shall apply to deaths occurring on or after December 1, 2001."

**Code of Federal Regulations**

Department of Veterans Affairs-Adjudication, 38 CFR Part 3

**Cross References**

This section is referred to in 38 USCS §§ 113, 2307

Burial and funeral expenses could not be paid under 38 USCS §§ 902 et seq. [now 38 USCS §§ 2302 et seq.] on account of deaths of members of allied forces admitted to veterans hospitals under 38 USCS § 109. VA GCO 19-79

Board's failure to consider widow's entitlement to burial benefits because veteran died in Department facility required remand for adjudication under 38 USCS § 2303. Moffitt v Brown (1997) 10 Vet App 214

§ 2304. **Claims for reimbursement**

cvivDiscussion and Analysis in the Veterans Benefits Manual

Applications for payments under section 2302 of this title [38 USCS § 2302] must be filed within two years after the burial of the veteran. If the burial allowance was not payable at the death of the veteran because of the nature of the veteran's discharge from the service, but after the veteran's death the veteran's discharge has been corrected by competent authority so as to reflect a discharge from the service under conditions other than dishonorable, then the burial allowance may be paid if a claim is filed within two years from the date of correction of the discharge. If a claimant's application is incomplete at the time it is originally submitted, the Secretary shall notify the applicant of the evidence necessary to complete the application. If such evidence is not received within one year from the date of such notification, no allowance may be paid.

**Prior law and revision:**

This section is based on 38 USC § 2804 (Act June 17, 1957, P. L. 85-56, Title VIII, § 804, 71 Stat. 118).
This section is also based on the following provisions, which were repealed by Act June 17, 1957, P. L. 85-56, Title XXII, § 2202, 71 Stat. 162:


Amendments:

1963. Act April 2, 1963, inserted "If the burial allowance was not payable at the death of the veteran because of the nature of his discharge from the service, but after his death his discharge has been corrected by competent authority so as to reflect a discharge from the service under conditions other than dishonorable, then the burial allowance may be paid if a claim is filed within two years from whichever last occurs, the date of correction of the discharge or the date of enactment of this sentence."

1969. Act June 11, 1969, deleted "whichever last occurs," following "two years from" and "or the date of enactment of this sentence" following "of the discharge".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USC § 905, as 38 USC § 2305, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USC § 101).

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:174, 175

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 148

Burial claim filed more than 2 years after burial, but within 2 years after entry of court decision that service as member of Russian Railway Service Corps by deceased was Army service, was timely filed. VA GCO 14-75

§ 2305. Persons eligible under prior law

cviii Discussion and Analysis in the Veterans Benefits Manual

The death of any person who had a status which would, under the laws in effect on December 31, 1957, afford entitlement to the burial benefits and other benefits provided for in this chapter [38 USC §§ 2301 et seq.], but who did not meet the service requirements contained in this chapter [38 USC §§ 2301 et seq.], shall afford entitlement to such benefits, notwithstanding the failure of such person to meet such service requirements.

Prior law and revision:

This section is based on 38 USC § 2805 (Act June 17, 1957, P. L. 85-56, Title VIII, § 805, 71 Stat. 118).

Amendments:

1. Generally
Veteran dishonorably discharged from enlistment occurring at time of World War but receiving pension for previous peacetime service from which he was discharged under honorable conditions was entitled to burial allowance. 1936 ADVA 379
Burial expenses were payable for war veteran who, although not actually receiving pension at date of death, was held entitled to receive pension prior to his death, notwithstanding he was dishonorably discharged from his last period of war service. 1942 ADVA 498

2. Aliens
Burial allowance was payable for neutral alien who enlisted prior to November 11, 1918 and was honorably discharged subsequent to that date. 1934 ADVA 266

3. Womens Army Auxiliary Corps
Members of Women's Army Auxiliary Corps, not having other qualifying service, were nonetheless eligible for burial in national cemetery and entitled to government headstone or marker. VA GCO 17-75

§ 2306. Headstones, markers, and burial receptacles
(a) The Secretary shall furnish, when requested, appropriate Government headstones or markers at the expense of the United States for the unmarked graves of the following:
(1) Any individual buried in a national cemetery or in a post cemetery.
(2) Any individual eligible for burial in a national cemetery (but not buried there), except for those persons or classes of persons enumerated in section 2402(4), (5), and (6) of this title [38 USCS § 2402(4), (5), and (6)].
(3) Soldiers of the Union and Confederate Armies of the Civil War.
(4) Any individual described in section 2402(5) of this title [38 USCS § 2402(5)] who is buried in a veterans' cemetery owned by a State.
(5) Any individual who at the time of death was entitled to retired pay under chapter 1223 of title 10 [10 USCS §§ 12731 et seq.] or would have been entitled to retired pay under that chapter but for the fact that the person was under 60 years of age.

(b) (1) The Secretary shall furnish, when requested, an appropriate memorial headstone or marker for the purpose of commemorating an eligible individual whose remains are unavailable. Such a headstone or marker shall be furnished for placement in a national cemetery area reserved for that purpose under section 2403 of this title [38 USCS § 2403], a veterans' cemetery owned by a State, or, in the case of a veteran, in a State, local, or private cemetery.
(2) For purposes of paragraph (1), an eligible individual is any of the following:
(A) A veteran.
(B) The spouse or surviving spouse of a veteran.
(3) For purposes of paragraph (1), the remains of an individual shall be considered to be unavailable if the individual's remains--
have not been recovered or identified;
(B) were buried at sea, whether by the individual's own choice or otherwise;
(C) were donated to science; or
(D) were cremated and the ashes scattered without interment of any portion of the ashes.

(4) For purposes of this subsection:
(A) The term "veteran" includes an individual who dies in the active military, naval, or air service.
(B) The term "surviving spouse" includes an unremarried surviving spouse whose subsequent remarriage was terminated by death or divorce.

(c) A headstone or marker furnished under subsection (a), (b), or (d) of this section may be of any material, including but not limited to marble, granite, bronze, or slate, requested by the person entitled to request such headstone or marker if the material requested is determined by the Secretary (1) to be cost effective, and (2) in a case in which the headstone or marker is to be placed in a national cemetery, to be aesthetically compatible with the area of the cemetery in which it is to be placed.

(d) (1) The Secretary shall furnish, when requested, an appropriate Government marker at the expense of the United States for the grave of an individual described in paragraph (2) or (5) of subsection (a) who is buried in a private cemetery, notwithstanding that the grave is marked by a headstone or marker furnished at private expense. Such a marker may be furnished only if the individual making the request for the Government marker certifies to the Secretary that the marker will be placed on the grave for which the marker is requested.

(2) Any marker furnished under this subsection shall be delivered by the Secretary directly to the cemetery where the grave is located.
(3) The authority to furnish a marker under this subsection expires on December 31, 2006.
(4) Not later than February 1, 2006, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the use of the authority under this subsection. The report shall include the following:
(A) The rate of use of the benefit under this subsection, shown by fiscal year.
(B) An assessment as to the extent to which markers furnished under this subsection are being delivered to cemeteries and placed on grave sites consistent with the provisions of this subsection.
(C) The Secretary's recommendation for extension or repeal of the expiration date specified in paragraph (3).

(e) (1) The Secretary of Veterans Affairs shall provide an outer burial receptacle for each new grave in an open cemetery under the control of the National Cemetery Administration in which remains are interred in a casket. The Secretary of the Army may provide an outer burial receptacle for such a grave in the Arlington National Cemetery.
(2) The use of outer burial receptacles in a cemetery under the control of the National Cemetery Administration or in the Arlington National Cemetery shall be in accordance with regulations or procedures approved by the Secretary of Veterans Affairs or Secretary of the Army, respectively.
(3) Regulations or procedures under paragraph (2) may specify that--
(A) an outer burial receptacle other than a grave liner be provided in lieu of a grave liner at the election of the survivors of the interred veteran; and
(B) if an outer burial receptacle other than a grave liner is provided in lieu of a grave liner upon an election of such survivors, such survivors be required--
   (i) to pay the amount by which the cost of the outer burial receptacle exceeds the cost of the grave liner that would otherwise have been provided in the absence of the election; and
   (ii) to pay the amount of the administrative costs incurred by the Secretary (or, with respect to Arlington National Cemetery, the Secretary of the Army) in providing the outer burial receptacle in lieu of such grave liner.

(4) Regulations or procedures under paragraph (2) may provide for the use of a voucher system, or other system of reimbursement approved by the Secretary (or, with respect to Arlington National Cemetery, the Secretary of the Army), for payment for outer burial receptacles other than grave liners provided under such regulations or procedures.

(f) (1) When the Secretary has furnished a headstone or marker under subsection (a) for the unmarked grave of an individual, the Secretary shall, if feasible, add a memorial inscription to that headstone or marker rather than furnishing a separate headstone or marker under that subsection for the surviving spouse of such individual.
   (2) When the Secretary has furnished a memorial headstone or marker under subsection (b) for purposes of commemorating a veteran or an individual who died in the active military, naval, or air service, the Secretary shall, if feasible, add a memorial inscription to that headstone or marker rather than furnishing a separate memorial headstone or marker under that subsection for the surviving spouse of such individual.

(g) (1) A headstone or marker may not be furnished under subsection (a) for the unmarked grave of a person described in section 2411(b) of this title [38 USCS § 2411(b)].
   (2) A memorial headstone or marker may not be furnished under subsection (b) for the purpose of commemorating a person described in section 2411(b) of this title [38 USCS § 2411(b)].
   (3) A marker may not be furnished under subsection (d) for the grave of a person described in section 2411(b) of this title [38 USCS § 2411(b)].

Amendments:

1978. Act Oct. 18, 1978, P. L. 95-476 (effective 10/18/78, as provided by § 205(a) of such Act, which appears as 38 USCS § 2303 note), added subssecs. (c) and (d).
Act Oct. 18, 1978, P. L. 95-479 (effective 10/1/78, as provided by § 401(a) of such Act, which appears as 38 USCS § 1114 note), in subsec. (b), deleted "dying in the service, and" following "any veteran".

1980. Act Oct. 7, 1980 (applicable as provided by § 601(c) of such Act, which appears as a note to this section), added subsec. (a)(4).

1981. Act Oct. 17, 1981 (applicable as provided by § 701(b)(6) of such Act, which appears as 38 USCS § 1114 note) substituted subsec. (b) for one which read: "The Administrator shall furnish, when requested, an appropriate memorial headstone or marker to commemorate any veteran whose remains have not been recovered or identified or were buried at sea, for
placement by the applicant in a national cemetery area reserved for such purposes under the provisions of section 1003 of this title, or in any private or local cemetery."


1989. Act Dec. 18, 1989, in subsec. (a), in the introductory matter, substituted "Secretary" for "Administrator"; in the introductory matter to subsec. (b) and in subsec. (c), substituted "Secretary" for "Administrator"; in subsec. (d), substituted "Secretary" for "Administrator" wherever appearing, and "Secretary's" for "Administrator's", and in subsec. (e), in para. (1), substituted "Secretary" for "Administrator", and in para. (2), substituted "Secretary of Veterans Affairs or Secretary of the Army" for "Administrator or the Secretary".

Such Act further, in subsec. (d), substituted "cost of acquiring" for "actual costs incurred by or on behalf of such person in acquiring", and "this subsection" for "the preceding sentence", and inserted the sentence beginning "The cost referred . . . ".

Such Act further (applicable as provided by § 504(b) of such Act, which appears as a note to this section), in subsec. (e)(1), substituted the sentence beginning "The Secretary of Veterans . . . " for "The Secretary may provide a grave liner for any grave in a cemetery within the National Cemetery System in which remains are interred in a casket."

1990. Act Nov. 5, 1990 (applicable as provided by § 8041(b) of such Act, which appears as a note to this section), deleted subsec. (d), which read: "In lieu of furnishing a headstone or marker under subsection (a)(2) or (b) of this section, the Secretary, in the Secretary's discretion, having due regard for the circumstances in each case, may reimburse the person entitled to request such headstone or marker for the cost of acquiring a non-Government headstone or marker for placement in any cemetery other than a national cemetery in connection with the burial or memorialization of the deceased individual. The cost referred to in the preceding sentence is the cost actually incurred by or on behalf of such person or the cost prepaid by the deceased individual, as the case may be. Reimbursement under this subsection may be made only upon the request of the person entitled to request the headstone or marker and may not be made in an amount in excess of the average actual cost, as determined by the Secretary, of headstones and markers furnished under subsections (a) and (b) of this section.", and redesignated subsec. (e) as new subsec. (d).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 906, as 38 USCS § 2306, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


1996. Act Oct. 9, 1996 substituted the section heading for one which read: "§ 2306. Headstones, markers, and grave liners"; and, in subsec. (d), in para. (1), substituted "an outer burial receptacle" for "a grave liner" in two places, in para. (2), substituted "outer burial receptacles" for "grave liners" and substituted "regulations or procedures" for "specifications and procedures", and added paras. (3) and (4).

1998. Act Nov. 11, 1998 (applicable as provided by § 401(d) of such Act, which appears as a note to this section) substituted subsec. (b) for one which read:

"(b) The Secretary shall furnish, when requested, an appropriate memorial headstone or marker for the purpose of commemorating any veteran--

"(1) whose remains have not been recovered or identified,

"(2) whose remains were buried at sea, whether by the veteran's own choice or otherwise,

"(3) whose remains were donated to science, or
“(4) whose remains were cremated and the ashes scattered without interment of any portion of the ashes,

for placement by the applicant in a national cemetery area reserved for such purpose under the provisions of section 2403 of this title or in a State, local, or private cemetery.”;

and added subsec. (e).

Such Act further, in subsec. (d), in paras. (1) and (2), substituted "under the control of the National Cemetery Administration" for "within the National Cemetery System".


Such Act further (applicable as provided by § 502(d) of such Act, which appears as a note to this section), in subsec. (c), substituted "subsection (a), (b), or (d)" for "subsection (a) or (b)", redesignated subsecs. (d) and (e) as subsecs. (e) and (f), respectively, and inserted new subsec. (d).

2002. Act Dec. 6, 2002 (applicable as provided by § 201(d) of such Act, which appears as 38 USCS § 112 note), added subsec. (g).

Other provisions:

Effective date of June 18, 1973 amendments. Act June 18, 1973, P. L. 93-43, § 10(c), 87 Stat. 88, provides: "Clause (2) of section 5(a) [adding this section and 38 USCS § 2307] and sections 6 and 7 of this Act [repealing 24 USCS §§ 271-276, 278-279d, 281-282, 286-290, 296 and enacting 24 USCS §§ 271 note, 276 note, 38 USCS § 2404 note] shall take effect September 1, 1973, or on such earlier date as the President may prescribe and publish in the Federal Register."


Application of Oct. 17, 1981 amendment. Act Oct. 17, 1981, P. L. 97-66, Title VII, § 701(b)(6), 95 Stat. 1038, which appears as 38 USCS § 1114 note, provides that the amendment made to this section by § 603 of such Act is applicable with respect to veterans dying before, on, or after enactment on Oct. 17, 1981.


Application of Nov. 5, 1990 amendments. Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle E, § 8041(b), 104 Stat. 1388-349, provides: "This section [deleting subsec. (d) of this section and redesignating subsec. (e) as new subsec. (d)] shall apply to deaths occurring on or after November 1, 1990."

Application of amendments made by § 401(a) and (b) of Act Nov. 11, 1998. Act Nov. 11, 1998, P. L. 105-368, Title IV, § 401(d), 112 Stat. 3335, provides: "The amendments made by subsections (a) and (b) [amending this section] shall apply to deaths occurring after the date of the enactment of this Act."

Application of Dec. 27, 2001 amendments. Act Dec. 27, 2001, P. L. 107-103, Title V, § 502(d), 115 Stat. 995; Dec. 6, 2002, P. L. 107-330, Title II, § 203(a), 116 Stat. 2824 (effective as if included in the enactment of § 502 of Act Dec. 27, 2001, as provided by § 203(b) of Act Dec. 6, 2002), provides: "The amendments made by subsections (a) and (b) [amending this section] shall apply with respect to markers for the graves of individuals dying on or after September 11, 2001.".

Code of Federal Regulations

Department of Veterans Affairs-Adjudication, 38 CFR Part 3
§ 2307. Death from service-connected disability

In any case in which a veteran dies as the result of a service-connected disability or disabilities, the Secretary, upon the request of the survivors of such veteran, shall pay the burial and funeral expenses incurred in connection with the death of the veteran in an amount not exceeding the greater of (1) $2,000, or (2) the amount authorized to be paid under section 8134(a) of title 5 [5 USCS § 8134(a)] in the case of a Federal employee whose death occurs as the result of an injury sustained in the performance of duty. Funeral and burial benefits provided under this section shall be in lieu of any benefits authorized under sections 2302 and 2303(a)(1) and (b)(2) of this title [38 USCS §§ 2302 and 2303(a)(1) and (b)(2)].

Effective date of section:
Act June 18, 1973, P. L. 93-43, § 10(c), 87 Stat. 88, provided that this section shall take effect September 1, 1973, or on such earlier date as the President may prescribe and publish in the Federal Register.

Amendments:
1978. Act Oct. 18, 1978 (effective 10/1/78, as provided by § 401(a) of such Act, which appears as 38 USCS § 1114 note), inserted "the greater of (1) $1,100, or (2)"
1988. Act May 20, 1988 (effective 4/1/88 as provided by § 304 of such Act, which appears as 38 USCS § 2102 note) substituted "$1,500" for "$1,100".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 907, as 38 USCS § 2307, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act. (see Table III preceding 38 USCS § 101).
2001. Act Dec. 27, 2001 (applicable to deaths occurring on or after 9/11/2001, as provided by § 501(a)(2) of such Act, which appears as a note to this section), substituted "$2,000" for "$1,500".
2003. Act Dec. 16, 2003, substituted "and (b)(2)" for "and (b)"

Other provisions:

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Cross References
This section is referred to in 2 USCS § 905; 38 USCS §§ 113, 2308
Burial and funeral expenses could not be paid under 38 USCS §§ 902 et seq. [now 38 USCS § 2302 et seq.] on account of deaths of members of allied forces admitted to veterans hospitals under 38 USCS § 109. VA GCO 19-79

§ 2308. Transportation of deceased veteran to a national cemetery

Where a veteran dies as the result of a service-connected disability, or is in receipt of (but for the receipt of retirement pay or pension under this title would have been entitled to) disability compensation, the Secretary may pay, in addition to any amount paid pursuant to section 2302 or 2307 of this title [38 USCS § 2302 or 2307], the cost of transportation of the deceased veteran for burial in a national cemetery. Such payment shall not exceed the cost of transportation to the national cemetery nearest the veteran's last place of residence in which burial space is available.

Effective date of section:

Amendments: 1989. Act Dec. 18, 1989, substituted "Secretary" for "Administrator". 1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 908, as 38 USCS § 2308, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Cross References
This section is referred to in 38 USCS § 113

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3

CHAPTER 24. NATIONAL CEMETERIES AND MEMORIALS

§ 2400. Establishment of National Cemetery Administration; composition of Administration
§ 2401. Advisory Committee on Cemeteries and Memorials
§ 2402. Persons eligible for interment in national cemeteries
§ 2403. Memorial areas
§ 2404. Administration
§ 2405. Disposition of inactive cemeteries
§ 2406. Acquisition of lands
§ 2407. Authority to accept and maintain suitable memorials
§ 2408. Aid to States for establishment, expansion, and improvement of veterans' cemeteries
§ 2409. Memorial areas in Arlington National Cemetery
§ 2410. Burial of cremated remains in Arlington National Cemetery
§ 2411. Prohibition against interment or memorialization in the National Cemetery System [National Cemetery Administration] or Arlington National Cemetery of persons committing Federal or State capital crimes
§ 2412. Lease of land and buildings
§ 2413. Prohibition on certain demonstrations at cemeteries under control of the National Cemetery Administration and at Arlington National Cemetery
[§§ 2414-3000. Reserved]

Explanatory notes:
"National Cemetery Administration" has been inserted in brackets in item 2411 on the authority of § 403(d)(1) of Act Nov. 11, 1998, P. L. 105-368, which appears as 38 USCS § 2400 note, and which provides that any reference in a law, map, regulation, document, paper, or other record of the United States to the National Cemetery System shall be deemed to be a reference to the National Cemetery Administration.

Amendments:
1973. Act June 18, 1973, P. L. 93-43, § 2(a), 87 Stat. 75 (effective 6/18/73, as provided by § 10(a) of such Act), added chapter heading and chapter analysis.
1991. Act Aug. 6, 1991, P. L. 102-83, § 5(b)(1), 105 Stat. 406, amended the analysis of this chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).
1998. Act Nov. 11, 1998, P. L. 105-368, Title IV, § 403(c)(4), 112 Stat. 3338, amended the analysis of this chapter by substituting item 2400 from one which read: "2400. Establishment of National Cemetery System; composition of such system; appointment of director."

Cross References
This chapter is referred to in 36 USCS § 2105; 38 USCS § 107; 46 USCS § 11201

§ 2400. Establishment of National Cemetery Administration; composition of Administration
(a) There shall be within the Department a National Cemetery Administration responsible for the interment of deceased servicemembers and veterans. The National Cemetery Administration shall be headed by the Under Secretary for Memorial Affairs, who shall perform such functions as may be assigned by the Secretary.

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(b) The national cemeteries and other facilities under the control of the National Cemetery Administration shall consist of--

(1) national cemeteries transferred from the Department of the Army to the Veterans' Administration by the National Cemeteries Act of 1973;
(2) cemeteries under the jurisdiction of the Veterans' Administration on the date of enactment of this chapter [enacted June 18, 1973]; and
(3) any other cemetery, memorial, or monument transferred to the Veterans' Administration by the National Cemeteries Act of 1973, or later acquired or developed by the Secretary.

References in text:

Effective date of section:
Act June 18, 1973, P. L. 93-43, § 10(a), 87 Stat. 88, provided "The first section [38 USCS § 101 note], and sections 2 [enacting 38 USCS §§ 2400 et seq. and amending 5 USCS § 5316], 3 [38 USCS § 2404 note], 4 [enacting 38 USCS § 218 and repealing 38 USCS § 625], and 8 [amending former 38 USCS § 3505] of this Act shall take effect on the date of enactment of this Act."

Amendments:
1986. Act Oct. 28, 1986, in subsec. (a), substituted "servicemembers" for "servicemen" and "The" for "To assist him in carrying out his responsibilities in administering the cemeteries within the System".

1988. Act Oct. 25, 1988 (generally effective 3/15/89, as provided by § 18 of such Act, which appears as 38 USCS § 301 note), in subsec. (a), substituted the sentence beginning "Such system shall . . ." for one which read: "The Administrator may appoint a Director, National Cemetery System, who shall perform such functions as may be assigned by the Administrator.".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1000, as 38 USCS § 2400, and, in subsec. (a), substituted "Department" for "Veterans' Administration".

1998. Act Nov. 11, 1998 substituted the section heading for one which read: "§ 2400. Establishment of National Cemetery System; composition of such system; appointment of director"; in subsec. (a), substituted "National Cemetery Administration responsible" for "National Cemetery System", and substituted "The National Cemetery Administration shall be headed by the Under Secretary for Memorial Affairs" for "Such system shall be headed by the Director of the National Cemetery System"; and, in subsec. (b), substituted "national cemeteries and other facilities under the control of the National Cemetery Administration" for "National Cemetery System".

Other provisions:
Transfer of national cemeteries and functions relating to national cemeteries to Veterans' Administration. For transfer of national cemeteries and functions relating to national cemeteries to Veterans' Administration, see Act June 18, 1973, P. L. 93-43, § 6, 87 Stat. 81, which appears as a note to 38 USCS § 2404.

“(a) Authority. The authority of the Administrator of Veterans’ Affairs under chapter 24 of title 38, United States Code [38 USCS §§ 2400 et seq.], to develop and acquire cemeteries as part of the National Cemetery System includes, but is not limited to, the authority to establish additional national cemeteries to serve the needs of veterans and their families in--

“(1) San Francisco, California;
“(2) Chicago, Illinois;
“(3) Cleveland, Ohio;
“(4) Pittsburgh, Pennsylvania;
“(5) Dallas/Fort Worth, Texas;
“(6) Miami, Florida;
“(7) Seattle, Washington;
“(8) Atlanta, Georgia;
“(9) Phoenix/Tucson, Arizona;
“(10) Birmingham, Alabama; and
“(11) any other State in which a national cemetery is not available for the burial of veterans.

“(b) Land acquisition. The Administrator may acquire land necessary for a cemetery authorized by subsection (a) of this section by donation, purchase, condemnation, exchange of lands in the United States public domain, or otherwise.”.

Redesignation of Veterans' Administration. As to redesignation of the Veterans' Administration as the Department of Veterans Affairs, see § 10 of the Department of Veterans Affairs Act (Act Oct. 25, 1988, P. L. 100-527, § 10, 102 Stat. 2640), which appears as 38 USCS § 201 note.


“(a) In general. Pershing Hall, an existing memorial in Paris, France, owned by the United States, together with the personal property of such memorial, is hereby placed under the jurisdiction, custody, and control of the Department of Veterans Affairs to that the memorial to the commander-in-chief, officers, men, and auxiliary services of the American Expeditionary Forces in France during World War I may be continued in an appropriate manner and financial support be provided therefor.

“(b) Administration.(1)(A) The Secretary of Veterans Affairs shall administer, operate, develop, and improve Pershing Hall and its site in such manner as the Secretary determines is in the best interests of the United States, which may include use of Pershing Hall to meet the needs of veterans. To meet such needs, the Secretary may establish and operate a regional or other office to disseminate information, respond to inquiries, and otherwise assist veterans and their families in obtaining veterans' benefits.

“(B) To carry out the purposes of this section, the Secretary may enter into agreements authorized by subsection (c) to fund the operation of the memorial and projects authorized by subsection (d)(6).
"(2)(A) The Secretary shall, after consultation with the American Battle Monuments Commission, provide for a portion of Pershing Hall to be specifically dedicated, with appropriate exhibitions and monuments, to the memory of the commander-in-chief, officers, men, and auxiliary services of the American Expeditionary Forces in France during World War I.

"(B) The establishment and continuing supervision of the memorial that is dedicated pursuant to subparagraph (A) shall be carried out by the American Battle Monuments Commission.

"(3) To the extent that funds are available in the Pershing Hall Revolving Fund established by subsection (d), the Secretary may incur such expenses with respect to Pershing Hall as the Secretary determines necessary or appropriate.

"(4) The Secretary of Veterans Affairs may provide the allowances and benefits described in section 707 of title 38, United States Code, to personnel of the Department of Veterans Affairs who are United States citizens and are assigned by the Secretary to Pershing Hall.

"(c) Leases.(1) The Secretary may enter into agreements as the Secretary determines necessary or appropriate for the operation, development, and improvement of Pershing Hall and its site, including the leasing of portions of the Hall for terms not to exceed 99 years in areas that are newly constructed or substantially rehabilitated and for not to exceed 20 years in other areas of the Hall.

"(2) Leases entered into by the Secretary under this subsection shall be for consideration in the form of cash or in-kind, or a combination of the two, as determined by the Secretary, which shall include the value of space leased back to the Secretary by the lessee, net of rent paid by the Secretary, and the present value of the residual interest of the Secretary at the end of the lease term.

"(d) Fund.(1) There is hereby established the Pershing Hall Revolving Fund to be administered by the Secretary of Veterans Affairs.

"(2) There shall be transferred to the Pershing Hall Revolving Fund, at such time or times as the Secretary may determine without limitation as to year, amounts as determined by the Secretary, not to exceed $1,000,000 in total, from funds appropriated to the Department of Veterans Affairs for the construction of major projects. The account from which any such amount is transferred shall be reimbursed promptly from other funds as they become part of the Pershing Hall Revolving Fund.

"(3) The Pershing Hall Memorial Fund, established in the Treasury of the United States pursuant to section 2 of the Act of June 28, 1935 (Public Law 74-171; 49 Stat. 426) [former 36 USCS § 492], is hereby abolished and the corpus of the fund, including accrued interest, is transferred to the Pershing Hall Revolving Fund.

"(4) Funds received by the Secretary from operation of Pershing Hall or from any lease or other agreement with respect to Pershing Hall shall be deposited in the Pershing Hall Revolving Fund.

"(5) The Secretary of the Treasury shall invest any portion of the Revolving Fund that, as determined by the Secretary of Veterans Affairs, is not required to meet current expenses of the Fund. Each investment shall be made in an interest bearing obligation of the United States or an obligation guaranteed as to principal and interest by the United States that, as determined by the Secretary of Veterans Affairs, has a maturity suitable for the Revolving Fund. The Secretary of the Treasury shall credit to the Revolving Fund the interest on, and the proceeds from the sale or redemption of, such obligations.
“(6)(A) Subject to subparagraphs (B) and (C), the Secretary of Veterans Affairs may expend not more than $100,000 from the Fund in any fiscal year upon projects, activities, and facilities determined by the Secretary to be in keeping with the mission of the Department.

“(B) An expenditure under subparagraph (A) may be made only from funds that will remain in the Fund in any fiscal year after payment of expenses incurred with respect to Pershing Hall for such fiscal year and only after the reimbursement of all amounts transferred to the Fund under subsection (d)(2) has been completed.

“(C) An expenditure authorized by subparagraph (A) shall be reported by the Secretary to the Congress no later than November 1 of each year for the fiscal year ending on the previous September 30.

“(e) Waiver. The Secretary may carry out the provisions of this section without regard to section 8122 of title 38, United States Code, subchapter II of chapter 5 of title 40, United States Code [40 USCS §§ 521 et seq.], sections 541 through 555 and 1302 of title 40, United States Code, or any other provision of law inconsistent with this section.”.

Reimbursement of Construction, major projects account. Act Oct. 21, 1998, P. L. 105-276, Title I, 112 Stat. 2466, provides: "During fiscal year 1999, or in subsequent fiscal years, the 'Construction, major projects' account shall be reimbursed, in the amount transferred, from other funds as they become part of the Pershing Hall Revolving Fund.”.

Redesignation of National Cemetery System and establishment of Under Secretary for Memorial Affairs. Act Nov. 11, 1998, P. L. 105-368, Title IV, § 403(a)(1), 112 Stat. 3337, provides: "The National Cemetery System of the Department of Veterans Affairs shall hereafter be known and designated as the National Cemetery Administration. The position of Director of the National Cemetery System is hereby redesignated as Under Secretary of Veterans Affairs for Memorial Affairs.”.

References to National Cemetery System and its Director. Act Nov. 11, 1998, P. L. 105-368, Title IV, § 403(d), 112 Stat. 3339, provides:

“(1) Any reference in a law, map, regulation, document, paper, or other record of the United States to the National Cemetery System shall be deemed to be a reference to the National Cemetery Administration.

“(2) Any reference in a law, map, regulation, document, paper, or other record of the United States to the Director of the National Cemetery System shall be deemed to be a reference to the Under Secretary of Veterans Affairs for Memorial Affairs.”.

Establishment of additional national cemeteries. Act Nov. 30, 1999, P. L. 106-117, Title VI, Subtitle B, § 611, 113 Stat. 1580, provides:

“(a) Establishment. The Secretary shall establish, in accordance with chapter 24 of title 38, United States Code [38 USCS §§ 2401 et seq.], a national cemetery in each of the six areas in the United States that the Secretary determines to be most in need of such a cemetery to serve the needs of veterans and their families.

“(b) Obligation of funds in fiscal year 2000. The Secretary shall obligate, from the advance planning fund in the Construction, Major Projects account appropriated to the Department for fiscal year 2000, such amounts for costs that the Secretary estimates are required for the planning and commencement of the establishment of national cemeteries under this section.

“(c) Reports.(1) Not later than 120 days after the date of the enactment of this Act, the Secretary shall submit to Congress a report on the establishment of the national cemeteries under subsection (a). The report shall set forth the following:

“(A) The six areas of the United States determined by the Secretary to be most in need of the establishment of a new national cemetery.
"(B) A schedule for such establishment.

"(C) An estimate of the costs associated with such establishment.

"(D) The amount obligated from the advance planning fund under subsection (b).

"(2) Not later than one year after the date on which the report described in paragraph (1) is submitted, and annually thereafter until the establishment of the national cemeteries under subsection (a) is complete, the Secretary shall submit to Congress a report that updates the information included in the report described in paragraph (1)."


"Section 1. Short title.

"This Act may be cited as the 'National Cemetery Expansion Act of 2003'.

"Sec. 2. Establishment of new national cemeteries.

"(a) Establishment. Not later than 4 years after the date of the enactment of this Act, the Secretary of Veterans Affairs, in accordance with chapter 24 of title 38, United States Code [38 USCS §§ 2401 et seq.], shall establish six new national cemeteries. The new cemeteries shall be located in the following locations (those locations having been determined by the Secretary of Veterans Affairs to be the most appropriate locations for new national cemeteries):

"(1) Southeastern Pennsylvania.

"(2) The Birmingham, Alabama, area.

"(3) The Jacksonville, Florida, area.

"(4) The Bakersfield, California, area.

"(5) The Greenville/Columbia, South Carolina, area.

"(6) The Sarasota County, Florida, area.

"(b) Funds. Amounts appropriated for the Department of Veterans Affairs for any fiscal year after fiscal year 2003 for Advance Planning shall be available for the purposes of subsection (a).

"(c) Site selection process. In determining the specific sites for the new cemeteries required by subsection (a) within the locations specified in that subsection, the Secretary shall solicit the advice and views of representatives of State and local veterans organizations and other individuals as the Secretary considers appropriate.

"(d) Initial report. Not later than 120 days after the date of the enactment of this Act, the Secretary shall submit to Congress a report on the establishment of the national cemeteries required by subsection (a). The report shall--

"(1) set forth a schedule for the establishment of each such cemetery and an estimate of the costs associated with the establishment of each such cemetery; and

"(2) identify the amount of Advance Planning Funds obligated for purposes of this section as of the submission of the report.

"(e) Annual reports. The Secretary shall submit to Congress an annual report on the implementation of this section until the establishment of all six cemeteries is completed and each such cemetery has opened. The Secretary shall include in each such annual report an update of the information provided under paragraphs (1) and (2) of subsection (d).
“(f) Definition of Southeastern Pennsylvania. In this section, the term ‘southeastern Pennsylvania’ means the city of Philadelphia and Berks County, Bucks County, Chester County, Delaware County, Philadelphia County, and Montgomery County in the State of Pennsylvania.”.

Code of Federal Regulations
Department of Veterans Affairs-General provisions, 38 CFR Part 1
Department of Veterans Affairs-National Cemeteries of the Department of Veterans Affairs, 38 CFR Part 38

Cross References
This section is referred to in 38 USCS § 307

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 140

§ 2401. Advisory Committee on Cemeteries and Memorials

There shall be appointed by the Secretary an Advisory Committee on Cemeteries and Memorials. The Secretary shall advise and consult with the Committee from time to time with respect to the administration of the cemeteries for which the Secretary is responsible, and with respect to the selection of cemetery sites, the erection of appropriate memorials, and the adequacy of Federal burial benefits. The Committee shall make periodic reports and recommendations to the Secretary and to Congress.

Effective date of section:

Amendments:
1986. Act Oct. 28, 1986, substituted "the Administrator" for "he" following "which".

Other provisions:
Termination of advisory committees, boards and councils, established after Jan. 5, 1973. Act Oct. 6, 1972, P. L. 92-463, §§ 3(2) and 14, 86 Stat. 770, 776 (effective 1/5/73, as provided by § 15 of such Act), which is classified as 5 USCS Appx, provides that advisory committees established after Jan. 5, 1973, are to terminate not later than the expiration of the two-year period beginning on the date of establishment unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a board established by the Congress, its duration is otherwise provided for by law.

Termination of reporting requirements. For termination, effective May 15, 2000, of provisions of law requiring submittal to Congress of any annual, semiannual, or other regular periodic report listed in House Document No. 103-7 (in which a periodic report to Congress on the Advisory Committee on Cemeteries and Memorials is listed on page 145), see § 3003 of Act Dec. 21, P. L. 104-66, which appears as 31 USCS § 1113 note.
§ 2402. Persons eligible for interment in national cemeteries

Under such regulations as the Secretary may prescribe and subject to the provisions of section 6105 of this title [38 USCS § 6105], the remains of the following persons may be buried in any open national cemetery under the control of the National Cemetery Administration:

(1) Any veteran (which for the purposes of this chapter [38 USCS §§ 2400 et seq.] includes a person who died in the active military, naval, or air service).

(2) Any member of a Reserve component of the Armed Forces, and any member of the Army National Guard or the Air National Guard, whose death occurs under honorable conditions while such member is hospitalized or undergoing treatment, at the expense of the United States, for injury or disease contracted or incurred under honorable conditions while he is performing active duty for training, inactive duty training, or undergoing that hospitalization or treatment at the expense of the United States.

(3) Any member of the Reserve Officers’ Training Corps of the Army, Navy, or Air Force whose death occurs under honorable conditions while he is--

(A) attending an authorized training camp or on an authorized practice cruise;
(B) performing authorized travel to or from that camp or cruise; or
(C) hospitalized or undergoing treatment, at the expense of the United States, for injury or disease contracted or incurred under honorable conditions while such member is--

(i) attending that camp or on that cruise;
(ii) performing that travel; or
(iii) undergoing that hospitalization or treatment at the expense of the United States.

(4) Any citizen of the United States who, during any war in which the United States is or has been engaged, served in the armed forces of any government allied with the United States during that war, and whose last such service terminated honorably.

(5) The spouse, surviving spouse (which for purposes of this chapter [38 USCS §§ 2400 et seq.] includes a surviving spouse who had a subsequent remarriage), minor child (which for purposes of this chapter [38 USCS §§ 2400 et seq.] includes a child under 21 years of age, or under 23 years of age if pursuing a course of instruction at an approved educational institution), and, in the discretion of the Secretary, unmarried adult child of any of the persons listed in paragraphs (1) through (4) and paragraph (7).

(6) Such other persons or classes of persons as may be designated by the Secretary.

(7) Any person who at the time of death was entitled to retired pay under chapter 1223 of title 10 [10 USCS §§ 12731 et seq.] or would have been entitled to retired pay under that chapter but for the fact that the person was under 60 years of age.

(8) Any individual whose service is described in subsection (a) or (b) of section 107 of this title [38 USCS § 107] if such individual at the time of death--
(A) was a citizen of the United States or an alien lawfully admitted for permanent
residence in the United States; and
(B) resided in the United States.

Effective date of section:
Act June 18, 1973, P. L. 93-43, § 10(a), 87 Stat. 88, provided that this section is effective on

Amendments:
1986. Act Oct. 28, 1986, in para. (2), substituted "such member" for "he"; in para. (3)(C)
substituted "such member" for "he"; and in para. (5) deleted "wife, husband," following "The".
1989. Act Dec. 18, 1989, in the introductory matter, and in paras. (5) and (6), substituted
"Secretary" for "Administrator".
1991. Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the
redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38
USCS § 101).
Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1002, as 38 USCS § 2402.
Act Nov. 2, 1994, in para. (5), inserted "spouse," and "(which for purposes of this chapter
includes an unremarried surviving spouse who had a subsequent remarriage which was
terminated by death or divorce)".
1996. Act Oct. 9, 1996, in para. (5), inserted "(which for purposes of this chapter includes a
child under 21 years of age, or under 23 years of age if pursuing a course of instruction at an
approved educational institution)".
1998. Act Nov. 11, 1998, in the introductory matter, substituted "under the control of the
National Cemetery Administration" for "in the National Cemetery System".
2000. Act Nov. 1, 2000, in para. (7), substituted "chapter 1223 of title 10" for "chapter 67 of
title 10".
Such Act further (applicable with respect to deaths occurring on or after 11/1/00, as provided
by § 331(c) of such Act, which appears as 38 USCS § 107 note), added para. (8).
2003. Act Dec. 16, 2003 (applicable with respect to deaths occurring on or after enactment,
as provided by § 212(c) of such Act, which appears as 38 USCS § 107 note), in para. (8), in
the introductory matter, substituted "subsection (a) or (b) of section 107" for "section 107(a)".
Such Act further (applicable with respect to deaths occurring on or after 1/1/2000, as
provided by § 502(b) of such Act, which appears as a note to this section), in para. (5),
substituted "(which for purposes of this chapter includes a surviving spouse who had a
subsequent remarriage)" for "(which for purposes of this chapter includes an unremarried
surviving spouse who had a subsequent remarriage which was terminated by death or
divorce)".

Other provisions:
Eligibility of former prisoners of war for burial in Arlington National Cemetery. Act Nov.
"(a) Eligibility for burial. Former prisoners of war described in subsection (b) are eligible for
burial in Arlington National Cemetery, Arlington, Virginia.
"(b) Eligible former POWs. A former prisoner of war referred to in subsection (a) is a former
prisoner of war--

"(1) who dies on or after the date of the enactment of this Act; and
“(2) who, while a prisoner of war, served honorably in the active military, naval, or air service, as determined under regulations prescribed by the Secretary of the military department concerned.

“(c) Savings provision. This section may not be construed to make ineligible for burial in Arlington National Cemetery a former prisoner of war who is eligible to be buried in that cemetery under another provision of law.

“(d) Regulations. This section shall be carried out under regulations prescribed by the Secretary of the Army. Those regulations may prescribe a minimum period of internment as a prisoner of war for purposes of eligibility under this section for burial in Arlington National Cemetery.

“(e) Definitions. For purposes of this section:

“(1) The term ‘former prisoner of war’ has the meaning given such term in section 101(32) of title 38, United States Code.

“(2) The term ‘active military, naval, or air service’ has the meaning given such term in section 101(24) of such title.”.


Cross References

This section is referred to in 38 USCS §§ 107, 2301, 2306

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 140

Law Review Articles:

Benefits for Conscientious Objectors. 19 Catholic Lawyer 62, Winter 1973

Under predecessor to 38 USCS § 2402, remains of former member of armed forces who had served on active duty and had been honorably discharged were entitled to burial in a national cemetery, and Secretary of the Army lacked power by regulation to exclude such from burial in national cemetery because of criminal conviction subsequent to his discharge. Thompson v Clifford (1968, App DC) 132 US App DC 351, 408 F.2d 154

Under predecessor to 38 USCS § 2402, privilege of interment in national cemeteries did not include persons in revenue-cutter service [coast guard] dying during period of peace. (1910) 28 Op Atty Gen 543

§ 2403. Memorial areas

(a) The Secretary shall set aside, when available, suitable areas in national cemeteries to honor the memory of members of the Armed Forces and veterans--

(1) who are missing in action;
(2) whose remains have not been recovered or identified;
(3) whose remains were buried at sea, whether by the member's or veteran's own choice or otherwise;
(4) whose remains were donated to science; or
(5) whose remains were cremated and the ashes scattered without interment of any portion of the ashes.
(b) Under regulations prescribed by the Secretary, group memorials may be placed to honor the memory of groups of individuals referred to in subsection (a), and appropriate memorial headstones and markers may be placed to honor the memory of individuals referred to in subsection (a) and section 2306(b) of this title [38 USCS § 2306(b)].

(c) All national and other veterans' cemeteries under the control of the National Cemetery Administration shall be considered national shrines as a tribute to our gallant dead and, notwithstanding the provisions of any other law, the Secretary is hereby authorized to permit appropriate officials to fly the flag of the United States of America at such cemeteries twenty-four hours each day.

Effective date of section:

Amendments:
1981. Act Oct. 17, 1981 substituted subsec. (a) for one which read: "The Administrator shall set aside, when available, suitable areas in national cemeteries to honor the memory of members of the Armed Forces missing in action, or who died or were killed while serving in such forces and whose remains have not been identified, have been buried at sea or have been determined to be nonrecoverable."


1989. Act Dec. 18, 1989, in the introductory matter of subsec. (a), and in subsecs. (b) and (c), substituted "Secretary" for "Administrator".


1998. Act Nov. 11, 1998 substituted subsec. (b) for one which read: "(b) Under regulations prescribed by the Secretary, appropriate memorials or markers shall be erected to honor the memory of those individuals, or group of individuals, referred to in subsection (a) of this section."; and, in subsec. (c), substituted "under the control of the National Cemetery Administration" for "in the National Cemetery System created by this chapter".

Other provisions:
Application of Oct. 17, 1981 amendment. Act Oct. 17, 1981, P. L. 97-66, Title VII, § 701(b)(6), 95 Stat. 1038, which appears as 38 USCS § 1114 note, provides that the amendment made to this section by § 603 of such Act is applicable with respect to veterans dying before, on, or after enactment on Oct. 17, 1981.

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Cross References
This section is referred to in 38 USCS §§ 2306, 2411

§ 2404. Administration

(a) The Secretary is authorized to make all rules and regulations which are necessary or appropriate to carry out the provisions of this chapter [38 USCS §§ 2400 et seq.], and may designate those cemeteries which are considered to be national cemeteries.
(b) In conjunction with the development and administration of cemeteries for which the Secretary is responsible, the Secretary shall provide all necessary facilities including, as necessary, superintendents' lodges, chapels, crypts, mausoleums, and columbaria.

(c) (1) Subject to paragraph (2), each grave in a national cemetery shall be marked with an appropriate marker. Such marker shall bear the name of the person buried, the number of the grave, and such other information as the Secretary shall by regulation prescribe.

   (2) The grave markers referred to in paragraph (1) shall be upright for interments that occur on or after January 1, 1987, except that--
   
   (A) in the case of any cemetery scheduled to be closed by September 30, 1991, as indicated in the documents submitted by the Administrator of Veterans' Affairs to the Congress in justification for the amounts included for Veterans' Administration programs in the President's Budget for fiscal year 1987, the Secretary may provide for flat grave markers;

   (B) in the case of any cemetery with a section which has flat markers on October 28, 1986, the Secretary may continue to provide for flat grave markers in such section;

   (C) in the case of any cemetery located on the grounds of or adjacent to a Department health-care facility, the Secretary may provide for flat grave markers;

   and

   (D) in the case of grave sites of cremated remains that are interred in the ground, the Secretary may provide for flat grave markers.

(d) There shall be kept in each national cemetery, and at the main office of the Department, a register of burials in each cemetery setting forth the name of each person buried in the cemetery, the number of the grave in which the veteran is buried, and such other information as the Secretary by regulation may prescribe.

(e) In carrying out the Secretary's responsibilities under this chapter [38 USCS §§ 2400 et seq.] the Secretary may contract with responsible persons, firms, or corporations for the care and maintenance of such cemeteries under the Secretary's jurisdiction as the Secretary shall choose, under such terms and conditions as the Secretary may prescribe.

(f) (1) The Secretary is authorized to convey to any State, or political subdivision thereof, in which any national cemetery is located, all right, title, and interest of the United States in and to any Government owned or controlled approach road to such cemetery if, prior to the delivery of any instrument of conveyance, the State or political subdivision to which such conveyance is to be made notifies the Secretary in writing of its willingness to accept and maintain the road included in such conveyance. Upon the execution and delivery of such a conveyance, the jurisdiction of the United States over the road conveyed shall cease and thereafter vest in the State or political subdivision concerned.

   (2) The Secretary may, to the extent of appropriated funds available for such purpose, make a contribution to local authorities for the construction of road improvements or traffic controls or other devices on land adjacent to a national cemetery if the Secretary determines that such a contribution is essential to ensure safe ingress to or egress from the cemetery.
(g) Notwithstanding any other provision of law, the Secretary may at such time as the Secretary deems desirable, relinquish to the State in which any cemetery, monument, or memorial under the Secretary's jurisdiction is located, such portion of legislative jurisdiction over the lands involved as is necessary to establish concurrent jurisdiction between the Federal Government and the State concerned. Such partial relinquishment of jurisdiction under the authority of this subsection may be made by filing with the Governor of the State involved a notice of such relinquishment and shall take effect upon acceptance thereof by the State in such manner as its laws may prescribe.

Effective date of section:


Amendments:

1986. Act Oct. 28, 1986, in subsec. (b), substituted "the Administrator" for "he" following "which"; in subsec. (c), substituted "Subject to paragraph (2), each" for "Each" and added para. (2); in subsec. (d), substituted "the veteran" for "he"; in subsec. (e) substituted "the Administrator's" for "his" wherever appearing, and "the Administrator" for "he" following "jurisdiction as" and "conditions as"; and in subsec. (g) substituted "the Administrator's" for "his" and "the Administrator" for "he" preceding "deems".

1988. Act May 20, 1988, in subsec. (c)(2), in subpara. (A), deleted "and" following the semicolon, in subpara. (B), substituted a semicolon for the concluding period, and added subpars. (C) and (D); and in subsec. (f), designated the existing provisions as para. (1) and added para. (2).


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1004, as 38 USCS § 2004, and, in subpara. (c)(2)(A), substituted "Administrator of Veterans' Affairs" for "Secretary".

Such Act further, in subsecs. (c)(2)(C) and (d), substituted "Department" for "Veterans' Administration".

Other provisions:

Studies; recommendations to Congress. Act June 18, 1973, P. L. 93-43, § 3, 87 Stat. 78 (effective 6/18/73, as provided by § 10(a) of such Act), provides:

"(a) The Administrator shall conduct a comprehensive study and submit his recommendations to Congress within twelve months after the convening of the first session of the Ninety-third Congress concerning:

"(1) criteria which govern the development and operation of the National Cemetery System, including the concept of regional cemeteries;

"(2) the relationship of the National Cemetery System to other burial benefits provided by Federal and State Governments to servicemen and veterans;

"(3) steps to be taken to conform the existing System to the recommended criteria;

"(4) the private burial and funeral costs in the United States;

"(5) current headstone and marker programs; and
“(6) the marketing and sales practices of non-Federal cemeteries and interment facilities, or any person either acting on their behalf or selling or attempting to sell any rights, interest, or service therein, which is directed specifically toward veterans and their dependents.

“(b) The Administrator shall also, in conjunction with the Secretary of Defense, conduct a comprehensive study of and submit their joint recommendations to Congress within twelve months after the convening of the first session of the Ninety-third Congress concerning:

“(1) whether it would be advisable in carrying out the purposes of this Act [adding this section, among other things; for full classification, consult USCS Table volumes] to include the Arlington National Cemetery within the National Cemetery System established by this Act;

“(2) the appropriateness of maintaining the present eligibility requirements for burial at Arlington National Cemetery; and

“(3) the advisability of establishing another national cemetery in or near the District of Columbia.”.

Transfer of functions relating to national cemeteries. Act June 18, 1973, P. L. 93-43, § 6, 87 Stat. 81 (effective Sept. 1, 1973, or on such earlier date as the President may prescribe and publish in the Federal Register, as provided by § 10(c) of such Act), provides:

“(a)(1) There are hereby transferred from the Secretary of the Army to the Administrator of Veterans’ Affairs all jurisdiction over, and responsibility for, (A) all national cemeteries (except the cemetery at the United States Soldiers’ and Airmen’s Home and Arlington National Cemetery), and (B) any other cemetery (including burial plots), memorial, or monument under the jurisdiction of the Secretary of the Army immediately preceding the effective date of this section (except the cemetery located at the United States Military Academy at West Point) which the President determines would be appropriate in carrying out the purposes of this Act [for full classification, consult USCS Tables volumes].

“(2) There are hereby transferred from the Secretary of the Navy, and the Secretary of the Air Force to the Administrator of Veterans’ Affairs all jurisdiction over, and responsibility for, any cemetery (including burial plots), memorial, or monument under the jurisdiction of either Secretary immediately preceding the effective date of this section (except those cemeteries located at the United States Naval Academy at Annapolis, the United States Naval Home Cemetery at Philadelphia, and the United States Air Force Academy at Colorado Springs) which the President determines would be appropriate in carrying out the purposes of this Act [for full classification, consult USCS Tables volumes].

“(b) So much of the personnel, property, records, and unexpended balances of appropriations, allocations, and other funds available to, or under the jurisdiction of, the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force, in connection with functions transferred by this Act, as determined by the Director of the Office of Management and Budget, are transferred to the Administrator of Veterans’ Affairs.

“(c) All offenses committed and all penalties and forfeitures incurred under any of the provisions of law amended or repealed by this Act [for full classification, consult USCS Tables volumes] may be prosecuted and punished in the same manner and with the same effect as if such amendments or repeals had not been made.

“(d) All rules, regulations, orders, permits, and other privileges issued or granted by the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force with respect to the cemeteries, memorials, and monuments transferred to the Veterans’ Administration by this Act, unless contrary to the provisions of such Act [for full classification, consult USCS Tables volumes], shall remain in full force and effect until modified, suspended,
overruled, or otherwise changed by the Administrator of Veterans' Affairs, by any court of competent jurisdiction, or by operation of law.

"(e) No suit, action, or other proceeding commenced by or against any officer in his official capacity as an official of the Department of the Army, the Department of the Navy, or the Department of the Air Force with respect to functions transferred under subsection (a) or (c) of this section shall abate by reason of the enactment of this section. No cause of action by or against any such department with respect to functions transferred under such subsection (a) or by or against any officer thereof in his official capacity, shall abate by reason of the enactment of this section. Causes of actions, suits, or other proceedings may be asserted by or against the United States or such officer of the Veterans' Administration as may be appropriate and, in any litigation pending when this section takes effect, the court may at any time, upon its own motion or that of any party, enter an order which will give effect to the provisions of this subsection. If before the date this section takes effect, any such department, or officer thereof in his official capacity, is a party to a suit with respect to any function so transferred, such suit shall be continued by the Administrator of Veterans' Affairs."

Effect of repeals by § 7 on transfer provisions of § 6(a) of Act June 18, 1973. For effect of the repeals by § 7 of Act June 18, 1973 [repealing 24 USCS §§ 271-276, 278-279d, 281-282, 286-290, 296] on the functions, powers, and duties of the Secretaries concerned with respect to cemeteries, memorials or monuments to which the transfer provisions of § 6(a) of Act June 18, 1973 [note this section] apply, see note containing Act June 18, 1973, § 7(b), located at 24 USCS §§ 271-276 note.

Flat grave markers in certain national cemeteries. Act May 20, 1988, P. L. 100-322, Title III, Part E, § 341(b), 102 Stat. 539, provides: "Notwithstanding section 1004(c)(2) of title 38, United States Code [subsec. (c)(2) of this section], the Administrator may provide for flat grave markers in the cases of the national cemeteries in Riverside, California; Bourne, Massachusetts; Augusta, Michigan; and Indiantown Gap, Pennsylvania; and the proposed national cemetery approved by the Administrator, as of July 31, 1987, for Northern California."

Flat grave markers in Florida National Cemetery. Act June 13, 1991, P. L. 102-54, § 11, 105 Stat. 273, provides: "Notwithstanding section 1004(c)(2) of title 38, United States Code [subsec. (c)(2) of this section], the Secretary may provide for flat grave markers in that section of the Florida National Cemetery in which preplaced grave liners were installed before July 30, 1988."

Flat grave markers at Willamette National Cemetery. Act Nov. 2, 1994, P. L. 103-446, Title VIII, § 804, 108 Stat. 4675, provides: "Notwithstanding section 2404(c)(2) of title 38, United States Code, the Secretary of Veterans Affairs may provide for flat grave markers at the Willamette National Cemetery, Oregon."

Use of flat grave markers at Santa Fe National Cemetery, New Mexico. Act Nov. 30, 1999, P. L. 106-117, Title VI, Subtitle B, § 612, 113 Stat. 1580, provides, "Notwithstanding section 2404(c)(2) of title 38, United States Code, the Secretary may provide for flat grave markers at the Santa Fe National Cemetery, New Mexico."

Independent study on improvements to veterans' cemeteries. Act Nov. 30, 1999, P. L. 106-117, Title VI, Subtitle B, § 613, 113 Stat. 1581, provides,

"(a) Study. Not later than 180 days after the date of the enactment of this Act, the Secretary shall enter into a contract with one or more qualified organizations to conduct a study of national cemeteries described in subsection (b). For purposes of this section, an entity of Federal, State, or local government is not a qualified organization.

"(b) Matters studied.(1) The study conducted pursuant to the contract entered into under subsection (a) shall include an assessment of each of the following:

"(A) The one-time repairs required at each national cemetery under the jurisdiction of the National Cemetery Administration of the Department of Veterans Affairs to ensure
a dignified and respectful setting appropriate to such cemetery, taking into account the variety of age, climate, and burial options at individual national cemeteries.

"(B) The feasibility of making standards of appearance of active national cemeteries, and the feasibility of making standards of appearance of closed national cemeteries, commensurate with standards of appearance of the finest cemeteries in the world.

"(C) The number of additional national cemeteries that will be required for the interment and memorialization in such cemeteries of individuals qualified under chapter 24 of title 38, United States Code [38 USCS §§ 2401 et seq.], who die after 2005.

"(D) The advantages and disadvantages of the use by the National Cemetery Administration of flat grave markers and upright grave markers.

"(E) The current condition of flat grave marker sections at each of the national cemeteries.

"(2) In presenting the assessment of additional national cemeteries required under paragraph (1)(C), the report shall identify by five-year period, beginning with 2005 and ending with 2020, the following:

"(A) The number of additional national cemeteries required during each such five-year period.

"(B) With respect to each such five-year period, the areas in the United States with the greatest concentration of veterans whose needs are not served by national cemeteries or State veterans' cemeteries.

"(c) Report.(1) Not later than one year after the date on which a qualified organization enters into a contract under subsection (a), the organization shall submit to the Secretary a report setting forth the results of the study conducted and conclusions of the organization with respect to such results.

"(2) Not later than 120 days after the date on which a report is submitted under paragraph (1), the Secretary shall transmit to the Committees on Veterans' Affairs of the House of Representatives and the Senate a copy of the report, together with any comments on the report that the Secretary considers appropriate.".

**Code of Federal Regulations**

Department of Veterans Affairs-General provisions, 38 CFR Part 1

**Cross References**

This section is referred to in 38 USCS § 2408

**Research Guide**

*Am Jur:*

77 Am Jur 2d, Veterans and Veterans' Laws § 140

**§ 2405. Disposition of inactive cemeteries**

(a) The Secretary may transfer, with the consent of the agency concerned, any inactive cemetery, burial plot, memorial, or monument within the Secretary's control to the Department of the Interior for maintenance as a national monument or park, or to any other agency of the Government. Any cemetery transferred to the Department of the Interior shall be administered by the Secretary of the Interior as a part of the National
Park System, and funds appropriated to the Secretary of the Interior for such system shall be available for the management and operation of such cemetery.

(b) The Secretary may also transfer and convey all right, title, and interest of the United States in or to any inactive cemetery or burial plot, or portion thereon, to any State, county, municipality, or proper agency thereof, in which or in the vicinity of which such cemetery or burial plot is located, but in the event the grantee shall cease or fail to care for and maintain the cemetery or burial plot or the graves and monuments contained therein in a manner satisfactory to the Secretary, all such right, title, and interest transferred or conveyed by the United States, shall revert to the United States.

(c) If a cemetery not under the control of the National Cemetery Administration has been or is to be discontinued, the Secretary may provide for the removal of remains from that cemetery to any cemetery under the control of such Administration. The Secretary may also provide for the removal of the remains of any veteran from a place of temporary interment, or from an abandoned grave or cemetery, to a national cemetery.

Effective date of section:

Amendments:
1986. Act Oct. 28, 1986, in subsec. (a), substituted "the Administrator's" for "his"; and in subsec. (c) substituted "The Administrator" for "He".
1989. Act Dec. 18, 1989, substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing, and in subsec. (a), inserted "of the Interior" following "to the Secretary".
1998. Act Nov. 11, 1998, in subsec. (c), substituted "under the control of the National Cemetery Administration" for "within the National Cemetery System" and substituted "under the control of such Administration" for "within such System".

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 140

§ 2406. Acquisition of lands

As additional lands are needed for national cemeteries, they may be acquired by the Secretary by purchase, gift (including donations from States or political subdivisions thereof), condemnation, transfer from other Federal agencies, exchange, or otherwise, as the Secretary determines to be in the best interest of the United States.

Effective date of section:

Amendments:
1986. Act Oct. 28, 1986, substituted "the Administrator" for "he" following "as".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1006, as 38 USCS § 2406.


Cross References
This section is referred to in 38 USCS § 115

Research Guide
Am Jur:
26 Am Jur 2d, Eminent Domain § 55
77 Am Jur 2d, Veterans and Veterans' Laws §§ 24, 140
1. Generally
2. Grants
3. Condemnation

1. Generally
Under predecessor to 38 USCS § 2406 vesting of fee-simple title, and jurisdiction, in United States were simultaneous; where title had not vested, personal effects of superintendent, on grounds, was subject to state taxation. (1872) 14 Op Atty Gen 27

No statutory officer had the power to make any contract, or to acquire any land, or to do any other official act, unless some law had conferred such power upon him. (1939) 39 Op Atty Gen 373

2. Grants
Under predecessor to 38 USCS § 2406, grant required acceptance, and administrative officer had no power to accept unless such power had been conferred by law. (1939) 39 Op Atty Gen 373

Voluntary grants (and devises), not falling within the statutory authority of any administrative officer either to accept or to reject, could ripen into full and complete transfers of title by reason of subsequent action on the part of Congress, and even in the absence of express acceptance certain presumptions could arise, particularly with the passage of time. (1939) 39 Op Atty Gen 373

3. Condemnation
Under predecessor to 38 USCS § 2406, award of damages for land condemned by the United States bore interest until payment was made, in conformity with state statute, although such statute was not compulsory on federal courts. United States v Sargent (1908, CA8 Minn) 162 F 81

§ 2407. Authority to accept and maintain suitable memorials

Subject to such restrictions as the Secretary may prescribe, the Secretary may accept gifts, devises, or bequests from legitimate societies and organizations or reputable individuals, made in any manner, which are made for the purpose of beautifying national cemeteries, or are determined to be beneficial to such cemetery. The Secretary may make land available for this purpose, and may furnish such care and maintenance as the Secretary deems necessary.
Effective date of section:

Amendments:
1986. Act Oct. 28, 1986, substituted "the Administrator" for "he" preceding "may" and "deems" and substituted "The Administrator" for "He".

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 140

§ 2408. Aid to States for establishment, expansion, and improvement of veterans' cemeteries

(a) Subject to subsection (b) of this section, the Secretary may make grants to any State to assist such State in establishing, expanding, or improving veterans' cemeteries owned by such State. Any such grant may be made only upon submission of an application to the Secretary in such form and manner, and containing such information, as the Secretary may require.

(b) Grants under this section shall be subject to the following conditions:
   (1) The amount of a grant under this section may not exceed--
       (A) in the case of the establishment of a new cemetery, the sum of: (i) the cost of improvements to be made on the land to be converted into a cemetery; and (ii) the cost of initial equipment necessary to operate the cemetery; and
       (B) in the case of the expansion or improvement of an existing cemetery, the sum of: (i) the cost of improvements to be made on any land to be added to the cemetery; and (ii) the cost of any improvements to be made to the existing cemetery.
   (2) If the amount of a grant under this section is less than the amount of costs referred to in subparagraph (A) or (B) of paragraph (1), the State receiving the grant shall contribute the excess of such costs over the grant.
   (3) If a State that has received a grant under this section to establish, expand, or improve a veterans' cemetery ceases to own such cemetery, ceases to operate such cemetery as a veterans' cemetery, or uses any part of the funds provided through such grant for a purpose other than that for which the grant was made, the United States shall be entitled to recover from such State the total of all grants made under this section to such State in connection with such cemetery.

(c) (1) In addition to the conditions specified in subsection (b) of this section, any grant to a State under this section to assist such State in establishing a veterans’ cemetery shall be made on the condition that such cemetery shall conform to such standards and guidelines relating to site selection, planning, and construction as the Secretary may by regulation prescribe. In prescribing regulations for the purposes of the preceding sentence, the
Secretary shall take into account the standards and guidelines for site selection, planning, and construction that are applicable to cemeteries under the control of the National Cemetery Administration, including those provided in subsections (b), (c), and (d) of section 2404 of this title [38 USCS § 2404].

(2) The Secretary may by regulation prescribe such additional terms and conditions for grants under this section as the Secretary considers appropriate.

(d) (1) In addition to the conditions specified in subsections (b) and (c), any grant made to a State under this section to assist such State in establishing, expanding, or improving a veterans' cemetery shall be made subject to the condition specified in paragraph (2).

(2) For purposes of paragraph (1), the condition described in this paragraph is that, after the date of the receipt of the grant, such State prohibit the interment or memorialization in that cemetery of a person described in section 2411(b) of this title [38 USCS § 2411(b)], subject to the receipt of notice described in subsection (a)(2) of such section, except that for purposes of this subsection--

(A) such notice shall be furnished to an appropriate official of such State; and

(B) a finding described in subsection (b)(3) of such section shall be made by an appropriate official of such State.

(e) Amounts appropriated to carry out this section shall remain available until expended. If all funds from a grant under this section have not been utilized by a State for the purpose for which the grant was made within three years after such grant is made, the United States shall be entitled to recover any such unused grant funds from such State.

Effective date of section:

Amendments:
1984. Act March 2, 1984, in subsec. (a)(2), inserted ", and such sums as may be necessary for fiscal year 1985 and for each of the four succeeding fiscal years,\".

1988. Act May 20, 1988, in subsec. (b), deleted para. (1) which read: "No State may receive grants under this section in any fiscal year in a total amount in excess of 20 per centum of the total amount appropriated for such grants for such fiscal year.,"; redesignated paras. (2)-(4) as paras. (1)-(3), respectively, in para. (1) as so redesignated, substituted "percent" for "per centum", and, in para. (2) as so redesignated, substituted "percent" for "per centum" and "paragraph (1)\" for "paragraph (2)\".

Act Nov. 18, 1988, in subsec. (a)(2), substituted "nine" for "four".

1989. Act Dec. 18, 1989, in subsecs. (a)(1) and (c), substituted "Secretary" for "Administrator" wherever appearing.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1008, as 38 USCS § 2408, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


1997. Act Nov. 21, 1997, redesignated subsec. (d) as subsec. (e); and added a new subsec. (d).

1998. Act Nov. 11, 1998, in subsec. (a), substituted para. (2) for one which read: "(2) There is authorized to be appropriated $5,000,000 for fiscal year 1980 and for each of the four
succeeding fiscal years, and such sums as may be necessary for fiscal year 1985 and for each of the fourteen succeeding fiscal years, for the purpose of making grants under paragraph (1) of this subsection."; in subsec. (c)(1), substituted "under the control of the National Cemetery Administration" for "in the National Cemetery System"; in subsec. (d)(1), substituted "November 21, 1997," for "the date of the enactment of this subsection" and substituted "subject to the condition specified in" for "on the condition described in"; and, in subsec. (e), substituted "shall remain available until expended" for "shall remain available until the end of the second fiscal year following the fiscal year for which they are appropriated".

Such Act further (applicable with respect to grants under this section made after the end of the 60-day period beginning on enactment, as provided by § 404(a)(2) of such Act, which appears as a note to this section), in subsec. (b), substituted paras. (1) and (2) for ones which read:

"(1) The amount of any grant under this section may not exceed an amount equal to 50 percent of the total of the value of the land to be acquired or dedicated for the cemetery and the cost of the improvements to be made on such land, with the remaining amount to be contributed by the State receiving the grant.

"(2) If at the time of a grant under this section the State receiving the grant dedicates for the purposes of the cemetery involved land already owned by the State, the value of such land may be considered in determining the amount of the State's contribution under paragraph (1) of this subsection, but the value of such land may not be used for more than an amount equal to 50 percent of the amount of such contribution and may not be used as part of such State's contribution for any subsequent grant under this section."

2003. Act Dec. 16, 2003, in subsec. (a), deleted "(1)" before "Subject to" and deleted para. (2), which read: "(2) There is authorized to be appropriated such sums as may be necessary for fiscal year 1999 and for each succeeding fiscal year through fiscal year 2004 for the purpose of making grants under paragraph (1)."; in subsec. (d)(1), deleted "on or after November 21, 1997," following "grant made"; and, in subsec. (e), substituted "Amounts appropriated to carry out this section" for "Sums appropriated under subsection (a) of this section".

Other provisions:

Application of amendment made by § 404(a)(1) of Act Nov. 11, 1998. Act Nov. 11, 1998, P. L. 105-368, Title IV, § 404(a)(2), 112 Stat. 3339, provides: "The amendment made by paragraph (1) [amending subsec. (b) of this section] shall apply with respect to grants under section 2408 of title 38, United States Code, made after the end of the 60-day period beginning on the date of the enactment of this Act."

Code of Federal Regulations

Department of Veterans Affairs-Aid to states for establishment, expansion, and improvement of veterans' cemeteries, 38 CFR Part 39

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:55

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 140

As Philippine Commonwealth Army was not deemed to have been active military service of United States under 38 USCS § 107(a), court was without power to issue mandamus compelling
federal authorities to allow burial of petitioner's father's remains at Arlington National Cemetery. Realuyo v Metzler (2003, SD NY) 263 F Supp 2d 686

§ 2409. Memorial areas in Arlington National Cemetery

(a) The Secretary of the Army may set aside, when available, a suitable area or areas in Arlington National Cemetery, Virginia, to honor the memory of members of the Armed Forces and veterans--

(1) who are missing in action;
(2) whose remains have not been recovered or identified;
(3) whose remains were buried at sea, whether by the member's or veteran's own choice or otherwise;
(4) whose remains were donated to science; or
(5) whose remains were cremated and whose ashes were scattered without interment of any portion of the ashes.

(b) Under regulations prescribed by the Secretary of the Army, appropriate memorials or markers may be erected in Arlington National Cemetery to honor the memory of those individuals, or group of individuals, referred to in subsection (a) of this section.

Amendments:


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1009, as 38 USCS § 2409.

Other provisions:


"Sec. 301. Short title.
This title may be cited as the 'Columbia Orbiter Memorial Act'.

"Sec. 302. Construction of memorial to crew of Columbia Orbiter at Arlington National Cemetery.

"(a) Construction required. The Secretary of the Army shall, in consultation with the Administrator of the National Aeronautics and Space Administration, construct at an appropriate place in Arlington National Cemetery, Virginia, a memorial marker honoring the seven members of the crew of the Columbia Orbiter who died on February 1, 2003, over the State of Texas during the landing of space shuttle mission STS-107.

"(b) Availability of funds. Of the amount appropriated or otherwise made available by title II of the Department of Defense Appropriations Act, 2003 (Public Law 107-248) under the heading 'Operation and Maintenance, Army', $500,000 shall be available for the construction of the memorial marker required by subsection (a).

"303. Donations for memorial for crew of Columbia Orbiter.

"(a) Authority to accept donations. The Administrator of the National Aeronautics and Space Administration may accept gifts and donations of services, money, and property (including
personal, tangible, or intangible property) for the purpose of an appropriate memorial or monument to the seven members of the crew of the Columbia Orbiter who died on February 1, 2003, over the State of Texas during the landing of space shuttle mission STS-107, whether such memorial or monument is constructed by the Administrator or is the memorial marker required by section 302.

"(b) Transfer.(1) The Administrator may transfer to the Secretary of the Army any services, money, or property accepted by the Administrator under subsection (a) for the purpose of the construction of the memorial marker required by section 302.

"(2) Any moneys transferred to the Secretary under paragraph (1) shall be merged with amounts in the account referred to in subsection (b) of section 302, and shall be available for the purpose referred to in that subsection.

"(c) Expiration of authority. The authority of the Administrator to accept gifts and donations under subsection (a) shall expire 5 years after the date of the enactment of this Act.”.

§ 2410. Burial of cremated remains in Arlington National Cemetery

(a) The Secretary of the Army shall designate an area of appropriate size within Arlington National Cemetery for the unmarked interment, in accordance with such regulations as the Secretary may prescribe, of the ashes of persons eligible for interment in Arlington National Cemetery whose remains were cremated. Such area shall be an area not suitable for the burial of casketed remains.

(b) The Secretary of each military department shall make available appropriate forms on which those members of the Armed Forces who so desire may indicate their desire to be buried within the area to be designated under subsection (a).

Amendments:

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1004, as 38 USCS § 2410.

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 140

§ 2411. Prohibition against interment or memorialization in the National Cemetery System [National Cemetery Administration] or Arlington National Cemetery of persons committing Federal or State capital crimes

(a) (1) In the case of a person described in subsection (b), the appropriate Federal official may not--

(A) inter the remains of such person in a cemetery in the National Cemetery System [National Cemetery Administration] or in Arlington National Cemetery; or

(B) honor the memory of such person in a memorial area in a cemetery in the National Cemetery System [National Cemetery Administration] (described in section 2403(a) of this title [38 USCS § 2403(a)]) or in such an area in Arlington

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National Cemetery (described in section 2409(a) of this title [38 USCS § 2409(a)]).

(2) In the case of a person described in subsection (b)(1) or (b)(2), the prohibition under paragraph (1) shall not apply unless written notice of a conviction referred to in subsection (b)(1) or (b)(2), as the case may be, is received by the appropriate Federal official before such official approves an application for the interment or memorialization of such person. Such written notice shall be furnished to such official by the Attorney General, in the case of a Federal capital crime, or by an appropriate State official, in the case of a State capital crime.

(b) A person referred to in subsection (a) is any of the following:
   (1) A person who has been convicted of a Federal capital crime and whose conviction is final (other than a person whose sentence was commuted by the President).
   (2) A person who has been convicted of a State capital crime and whose conviction is final (other than a person whose sentence was commuted by the Governor of a State).
   (3) A person who--
      (A) is found (as provided in subsection (c)) to have committed a Federal capital crime or a State capital crime, but
      (B) has not been convicted of such crime by reason of such person not being available for trial due to death or flight to avoid prosecution.

(c) A finding under subsection (b)(3) shall be made by the appropriate Federal official. Any such finding may only be made based upon a showing of clear and convincing evidence, after an opportunity for a hearing in a manner prescribed by the appropriate Federal official.

(d) For purposes of this section:
   (1) The term "Federal capital crime" means an offense under Federal law for which a sentence of imprisonment for life or the death penalty may be imposed.
   (2) The term "State capital crime" means, under State law, the willful, deliberate, or premeditated unlawful killing of another human being for which a sentence of imprisonment for life or the death penalty may be imposed.
   (3) The term "appropriate Federal official" means--
      (A) the Secretary, in the case of the National Cemetery System [National Cemetery Administration]; and
      (B) the Secretary of the Army, in the case of Arlington National Cemetery.

Explanatory notes:
"National Cemetery Administration" has been inserted in brackets in the section heading and in subsecs. (a)(1)(A), (B), and (d)(3)(A) on the authority of § 403(d)(1) of Act Nov. 11, 1998, P. L. 105-368, which appears as 38 USCS § 2400 note, and provides that any reference in a law, map, regulation, document, paper, or other record of the United States to the National Cemetery System shall be deemed to be a reference to the National Cemetery Administration.

Amendments:
2002. Act Dec. 6, 2002, in subsec. (a)(2), substituted "In the case of a person described in subsection (b)(1) or (b)(2), the prohibition" for "The prohibition", and substituted "referred to in subsection (b)(1) or (b)(2), as the case may be," for "or finding under subsection (b)".

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2006. Act Jan. 6, 2006 (applicable to funerals and burials occurring on or after enactment, as provided by § 662(e) of such Act, which appears as 10 USCS § 985 note), in subsec. (b), in para. (1), substituted "and whose conviction is final (other than a person whose sentence was commuted by the President)" for "for which the person was sentenced to death or life imprisonment", and, in para. (2), substituted "and whose conviction is final (other than a person whose sentence was commuted by the Governor of a State)" for "for which the person was sentenced to death or life imprisonment without parole"; and, in subsec. (d), in para. (1), substituted "a sentence of imprisonment for life or the death penalty may be imposed" for "the death penalty or life imprisonment may be imposed", and, in para. (2), substituted "a sentence of imprisonment for life or the death penalty may be imposed" for "the death penalty or life imprisonment without parole may be imposed".

Other provisions:

Applicability of section. Act Nov. 21, 1997, P. L. 105-116, § 1(c), 111 Stat. 2382, provides: "Section 2411 of title 38, United States Code, as added by subsection (a), shall apply with respect to applications for interment or memorialization made on or after the date of the enactment of this Act."

Rulemaking. Act Jan. 6, 2006, P. L. 109-163, Div A, Title VI, Subtitle D, § 662(d)(1), 119 Stat. 3315, provides: "The Secretary of Veterans Affairs shall prescribe regulations to ensure that a person is not interred in any cemetery in the National Cemetery System unless a good faith effort has been made to determine whether such person is ineligible for such interment or honors by reason of being a person described in section 2411(b) of title 38, United States Code, or is otherwise ineligible for such interment under Federal law."

Cross References

This section is referred to in 38 USCS 612, 2408

§ 2412. Lease of land and buildings

(a) Lease authorized. The Secretary may lease any undeveloped land and unused or underutilized buildings, or parts or parcels thereof, belonging to the United States and part of the National Cemetery Administration.

(b) Term. The term of a lease under subsection (a) may not exceed 10 years.

(c) Lease to public or nonprofit organizations.

(1) A lease under subsection (a) to any public or nonprofit organization may be made without regard to the provisions of section 3709 of the Revised Statutes (41 U.S.C. 5).

(2) Notwithstanding section 1302 of title 40 [40 USCS § 1302] or any other provision of law, a lease under subsection (a) to any public or nonprofit organization may provide for the maintenance, protection, or restoration of the leased property by the lessee, as a part or all of the consideration for the lease.

(d) Notice. Before entering into a lease under subsection (a), the Secretary shall give appropriate public notice of the intention of the Secretary to enter into the lease in a newspaper of general circulation in the community in which the lands or buildings concerned are located.

(e) National Cemetery Administration Facilities Operation Fund.

(1) There is established on the book of the Treasury an account to be known as the "National Cemetery Administration Facilities Operation Fund" (in this section referred to as the "Fund").
(2) The Fund shall consist of the following:
   (A) Proceeds from the lease of land or buildings under this section.
   (B) Proceeds of agricultural licenses of lands of the National Cemetery Administration.
   (C) Any other amounts appropriated to or otherwise authorized for deposit in the Fund by law.

(3) Amounts in the Fund shall be available to cover costs incurred by the National Cemetery Administration in the operation and maintenance of property of the Administration.

(4) Amounts in the Fund shall remain available until expended.

§ 2413. Prohibition on certain demonstrations at cemeteries under control of the National Cemetery Administration and at Arlington National Cemetery

(a) Prohibition. No person may carry out:
   (1) a demonstration on the property of a cemetery under the control of the National Cemetery Administration or on the property of Arlington National Cemetery unless the demonstration has been approved by the cemetery superintendent or the director of the property on which the cemetery is located; or
   (2) with respect to such a cemetery, a demonstration during the period beginning 60 minutes before and ending 60 minutes after a funeral, memorial service, or ceremony is held, any part of which demonstration-
      (A) (i) takes place within 150 feet of a road, pathway, or other route of ingress to or egress from such cemetery property; and
      (ii) includes, as part of such demonstration, any individual willfully making or assisting in the making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral, memorial service, or ceremony; or
      (B) is within 300 feet of such cemetery and impedes the access to or egress from such cemetery.

(b) Demonstration. For purposes of this section, the term "demonstration" includes the following:
   (1) Any picketing or similar conduct.
   (2) Any oration, speech, use of sound amplification equipment or device, or similar conduct that is not part of a funeral, memorial service, or ceremony.
   (3) The display of any placard, banner, flag, or similar device, unless such a display is part of a funeral, memorial service, or ceremony.
   (4) The distribution of any handbill, pamphlet, leaflet, or other written or printed matter other than a program distributed as part of a funeral, memorial service, or ceremony.

Other provisions:
Construction of section. Act May 29, 2006, P. L. 109-228, § 2(b), 120 Stat. 388, provides: "Nothing in section 2413 of title 38, United States Code (as amended by subsection (a)), shall be construed as limiting the authority of the Secretary of Veterans Affairs, with respect to property under control of the National Cemetery Administration, or the Secretary of the Army, with respect to Arlington National Cemetery, to issue or enforce regulations that prohibit or restrict conduct that is not specifically covered by section 2413 of such title (as so added).".

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PART III. READJUSTMENT AND RELATED BENEFITS

CHAPTER 30. ALL-VOLUNTEER FORCE EDUCATIONAL ASSISTANCE PROGRAM
CHAPTER 31. TRAINING AND REHABILITATION FOR VETERANS WITH SERVICE-CONNECTED DISABILITIES
CHAPTER 32. POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE
CHAPTER 34. VETERANS' EDUCATIONAL ASSISTANCE
CHAPTER 35. SURVIVORS' AND DEPENDENTS' EDUCATIONAL ASSISTANCE
CHAPTER 36. ADMINISTRATION OF EDUCATIONAL BENEFITS
CHAPTER 37. HOUSING AND SMALL BUSINESS LOANS
CHAPTER 39. AUTOMOBILES AND ADAPTIVE EQUIPMENT FOR CERTAIN DISABLED VETERANS AND MEMBERS OF THE ARMED FORCES
CHAPTER 41. JOB COUNSELING, TRAINING, AND PLACEMENT SERVICE FOR VETERANS
CHAPTER 42. EMPLOYMENT AND TRAINING OF VETERANS
CHAPTER 43. EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

Amendments:

1965. Act June 24, 1965, P. L. 89-50, § 1(b), 79 Stat. 173 (effective 7/1/66, as provided by § 1(d) of such Act), deleted item 43 which read: "43. Mustering-Out Payments . . . . 2101".

1966. Act March 3, 1966, P. L. 89-358, §§ 4(c), 6(b), 80 Stat. 23, 27 (effective 3/3/66, as provided by § 12(a) of such Act), deleted item 33 which read: "33. Education of Korean Conflict Veterans . . . . 1601"; added items 34 and 36; and substituted new item 41 for one which read: "41. Unemployment Benefits for Veterans . . . . 2001".

1968. Act Oct. 23, 1968, P. L. 90-631, § 2(h)(2), 82 Stat. 1333 (effective 12/1/68, as provided by § 6(a) of such Act), substituted item 35 for one which read: "35. War Orphan's Educational Assistance . . . . 1701".


1972. Act Oct. 24, 1972, P. L. 92-540, Title V, §§ 502(b), 503(b), 86 Stat. 1097 (effective 90 days after 10/24/72, as provided by § 601(b) of such Act), substituted item 41 for one which read: "41. Job Counseling and Employment Placement Service for Veterans . . . . 2001"; and added item 42.

1974. Act Dec. 3, 1974, P. L. 93-508, Title IV, § 404(b), 88 Stat. 1600 (effective 12/2/74, as provided by § 503 of such Act), added item 43.

Act Dec. 31, 1974, P. L. 93-569, § 7(d), 88 Stat. 1866 (effective 12/31/74, as provided by § 10 of such Act), substituted item 37 for one which read: "37. Home, Farm, and Business Loans . . . . 1801".

Act Oct. 15, 1976, P. L. 94-502, Title III, § 309(b), 90 Stat. 2391, (effective 10/15/76, as provided by § 703(b) of such Act), substituted item 35 for one which read: "35. War Orphans' and Widows' Educational Assistance . . . 1700".

1980. Act Oct. 17, 1980, P. L. 96-466, Title I, § 101(b), 94 Stat. 2186 (effective 4/1/81, as provided by § 802(a)(1) of such Act), substituted item 31 for one which read: "31. Vocational Rehabilitation . . . 1501".

1981. Act Nov. 3, 1981, P. L. 97-72, Title III, § 302(b)(2), 95 Stat. 1059 (effective as provided by § 305 of such Act, which appears as 38 USCS § 1841 note) substituted item 37 for one which read: "37. Home, Condominium, and Mobile Home Loans . . . 1801".


Act Aug. 6, 1991, P. L. 102-83, § 5(b)(2), 105 Stat. 406, revised the analysis of this Part by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1994. Act Oct. 13, 1994, P. L. 103-353, § 2(b)(1), 108 Stat. 3169 (effective and applicable as provided by § 8 of such Act, which appears as 38 USCS § 4301 note), amended the analysis of this Part by substituting item 43 for one which read: "43. Veteran's Reemployment Rights . . . 2021".

Nov. 2, 1994, P. L. 103-446, Title XII, § 1201(h)(1), 108 Stat. 4688 purported to amend the analysis of this Part by substituting "42. Employment and Training of Veterans . . . 4211" for existing item 42; however, the amendment was not executed because the existing item was identical.

Other provisions:

Application and construction of the Oct. 12, 1982 amendment of this Part analysis. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this Part analysis, see § 5 of such Act, which appears as 10 USCS § 101 note.

CHAPTER 30. ALL-VOLUNTEER FORCE EDUCATIONAL ASSISTANCE PROGRAM

SUBCHAPTER I. PURPOSES; DEFINITIONS
SUBCHAPTER II. BASIC EDUCATIONAL ASSISTANCE
SUBCHAPTER III. SUPPLEMENTAL EDUCATIONAL ASSISTANCE
SUBCHAPTER IV. TIME LIMITATION FOR USE OF ELIGIBILITY AND ENTITLEMENT; GENERAL AND ADMINISTRATIVE PROVISIONS

Amendments:
SUBCHAPTER I. PURPOSES; DEFINITIONS

§ 3001. Purposes
§ 3002. Definitions

The purposes of this chapter [38 USCS §§ 3001 et seq.] are--

(1) to provide a new educational assistance program to assist in the readjustment of members of the Armed Forces to civilian life after their separation from military service;
(2) to extend the benefits of a higher education to qualifying men and women who might not otherwise be able to afford such an education;
(3) to provide for vocational readjustment and to restore lost educational opportunities to those service men and women who served on active duty after June 30, 1985;
(4) to promote and assist the All-Volunteer Force program and the Total Force Concept of the Armed Forces by establishing a new program of educational assistance based upon service on active duty or a combination of service on active
duty and in the Selected Reserve (including the National Guard) to aid in the recruitment and retention of highly qualified personnel for both the active and reserve components of the Armed Forces; (5) to give special emphasis to providing educational assistance benefits to aid in the retention of personnel in the Armed Forces; and (6) to enhance our Nation's competitiveness through the development of a more highly educated and productive work force.

Explanatory notes:

A prior § 3001 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5101.

Amendments:

1987. Act June 1, 1987, deleted "and" at the end of para. (2), redesignated paras. (2) and (3) as paras. (4) and (5) respectively, substituted "; and" for a period at the end of para. (5) as redesignated, and added new paras. (2), (3), and (6).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1401, as 38 USCS § 3001.

Code of Federal Regulations

Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws §§ 124, 125, 130, 132, 135

§ 3002. Definitions

For the purposes of this chapter [38 USCS §§ 3001 et seq.],--

(1) The term "basic educational assistance" means educational assistance provided under subchapter II of this chapter [38 USCS §§ 3011 et seq.].

(2) The term "supplemental educational assistance" means educational assistance provided under subchapter III of this chapter [38 USCS §§ 3021 et seq.].

(3) The term "program of education"--

(A) has the meaning given such term in section 3452(b) of this title [38 USCS § 3452(b)];

(B) includes--

(i) a preparatory course for a test that is required or used for admission to an institution of higher education; and

(ii) a preparatory course for a test that is required or used for admission to a graduate school;

(C) in the case of an individual who is not serving on active duty, includes (i) a full-time program of apprenticeship or of other on-job training approved as provided in clause (1) or (2), as appropriate, of section 3687(a) of this title [38
USCS § 3687(a)], and (ii) a cooperative program (as defined in section 3482(a)(2) of this title [38 USCS § 3482(a)(2)]).

(4) The term "Selected Reserve" means the Selected Reserve of the Ready Reserve of any of the reserve components (including the Army National Guard of the United States and the Air National Guard of the United States) of the Armed Forces, as required to be maintained under section 10143(a) of title 10 [10 USCS § 10143(a)].

(5) The term "Secretary of Defense" means the Secretary of Defense, except that it means the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy.

(6) The term "active duty" does not include any period during which an individual (A) was assigned full time by the Armed Forces to a civilian institution for a course of education which was substantially the same as established courses offered to civilians, (B) served as a cadet or midshipman at one of the service academies, or (C) served under the provisions of section 12103(d) of title 10 [10 USCS § 12103(d)] pursuant to an enlistment in the Army National Guard or the Air National Guard, or as a Reserve for service in the Army Reserve, Navy Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve.

(7) The term "active duty" includes full-time National Guard duty first performed after June 30, 1985, by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State for the purpose of organizing, administering, recruiting, instructing, or training the National Guard.

(8) The term "educational institution" has the meaning given such term in section 3452(c) of this title [38 USCS § 3452(c)].

Explanatory notes:

A prior § 3002 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5102.

Amendments:

1986. Act Oct. 28, 1986, substituted para. (3) for one which read: "The term 'program of education' has the meaning given such term in section 1652(b) of this title.".

1988. Act Nov. 18, 1988, in para. (3)(B), substituted "in the case of an individual who is not serving on active duty, includes" for "includes".

Such Act further (effective Jan. 1, 1989, as provided by § 108(c) of such Act, which appears as a note to this section), in para. (3)(B), inserted "(i)" and inserted ", and (ii) a cooperative program (as defined in section 1682(a)(2) of this title)".

1989. Act Dec. 18, 1989, substituted para. (5) for one which read: "The term 'Secretary' means the Secretary of Defense with respect to members of the Armed Forces under the jurisdiction of the Secretary of a military department and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.".

1990. Act Nov. 5, 1990 (applicable as provided by § 563(b) of such Act, which appears as a note to this section), added para. (7).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1402, as 38 USCS § 3002, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1994. Act Oct. 5, 1994 (effective 12/1/94 as provided by § 1691 of such Act, which appears as 10 USCS § 10001 note), in para. (4), substituted "section 10143(a) of title 10" for "section
268(b) of title 10" and, in para. (6), substituted "section 12103(d) of title 10" for "section 511(d) of title 10".

Act Nov. 2, 1994 added para. (8).


1999. Act Nov. 30, 1999, in para. (3), in subpara. (A), substituted the concluding semicolon for ", and", redesignated subpara. (B) as subpara. (C), and added new subpara. (B).

2002. Act Nov. 25, 2002 (effective on 3/1/2003 pursuant to § 1704(g) of such Act, which appears as 10 USCS § 101 note), in para. (5), substituted "of Homeland Security" for "of Transportation".


Other provisions:


Application of para. (7). Act Nov. 5, 1990, P. L. 101-510, Div A, Title V, Part F, § 563(b), 104 Stat. 1575; Aug. 6, 1991, P. L. 102-83, § 5(c)(2), 105 Stat. 406, provides: "The amendment made by this section [adding para. (7) of this section] shall apply only to individuals who before the date of entry on active duty, as defined in section 3002(7) of title 38, United States Code [para (7) of this section] (as added by subsection (a)), have never served on active duty as defined in section 101(21) of that title."


"(1) An individual may only become eligible for benefits under chapter 30 of title 38, United States Code [38 USCS §§ 3001 et seq.], as a result of the amendment made by subsection (a) [amending para. (7) of this section] by making an election to become entitled to basic educational assistance under such chapter. The election may only be made during the nine-month period beginning on the date of the enactment of this Act and in the manner required by the Secretary of Defense.

"(2) In the case of any individual making an election under paragraph (1)--

"(A) the basic pay of an individual who, while a member of the Armed Forces, makes an election under paragraph (1) shall be reduced (in a manner determined by the Secretary of Defense) until the total amount by which such basic pay is reduced is $1,200; or

"(B) to the extent that basic pay is not so reduced before the individual's discharge or release from active duty, the Secretary of Veterans Affairs shall collect from an individual who makes such an election an amount equal to the difference between $1,200 and the total amount of reductions under subparagraph (A), which amount shall be paid into the Treasury as miscellaneous receipts.

"(3) In the case of any individual making an election under paragraph (1), the 10-year period referred to in section 3031 of such title shall begin on the later of--

"(A) the date determined under such section 3031; or

"(B) the date on which the election under paragraph (1) becomes effective.".

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References

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§ 3011. Basic educational assistance entitlement for service on active duty

Except as provided in subsection (c) of this section, each individual--

(1) who--

(A) after June 30, 1985, first becomes a member of the Armed Forces or first enters on active duty as a member of the Armed Forces and--

(i) who (I) in the case of an individual whose obligated period of active duty is three years or more, serves at least three years of continuous active duty in the Armed Forces, or (II) in the case of an individual whose obligated period of active duty is less than three years, serves at least two years of continuous active duty in the Armed Forces; or

(ii) who serves in the Armed Forces and is discharged or released from active duty (I) for a service-connected disability, for a medical condition which preexisted such service on active duty and which the Secretary determines is not service connected, for hardship, or for a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of each military department in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Homeland Security with respect to the Coast Guard when it is not
operating as a service in the Navy; (II) for the convenience of the Government, if, in the case of an individual with an obligated period of service of two years, the individual completes not less than 20 months of continuous active duty under that period of obligated service, or, in the case of an individual with an obligated period of service of at least three years, the individual completes not less than 30 months of continuous active duty under that period of obligated service; or (III) involuntarily for the convenience of the Government as a result of a reduction in force, as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy; 

(B) as of December 31, 1989, is eligible for educational assistance benefits under chapter 34 of this title [38 USCS §§ 3451 et seq.] and was on active duty at any time during the period beginning on October 19, 1984, and ending on July 1, 1985, continued on active duty without a break in service and-

(i) after June 30, 1985, serves at least three years of continuous active duty in the Armed Forces; or 

(ii) after June 30, 1985, is discharged or released from active duty (I) for a service-connected disability, for a medical condition which preexisted such service on active duty and which the Secretary determines is not service connected, for hardship, or for a physical or mental condition that was not characterized as a disability, as described in subparagraph (A)(ii)(I) of this paragraph; (II) for the convenience of the Government, if the individual completed not less than 30 months of continuous active duty after that date; or (III) involuntarily for the convenience of the Government as a result of a reduction in force, as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy; or 

(C) as of December 31, 1989, was eligible for educational assistance benefits under chapter 34 of this title [38 USCS §§ 3451 et seq.] and-- 

(i) was not on active duty on October 19, 1984; 

(ii) reenlists or reenters on a period of active duty after October 19, 1984; and 

(iii) on or after July 1, 1985, either-- 

(I) serves at least three years of continuous active duty in the Armed Forces; or 

(II) is discharged or released from active duty (aa) for a service-connected disability, for a medical condition which preexisted such service on active duty and which the Secretary determines is not service connected, for hardship, or for a physical or mental condition that was not characterized as a disability, as described in subparagraph (A)(ii)(I) of this paragraph, (bb) for the convenience of the Government, if the individual completed not less than 30 months of continuous active duty after that date, or (cc) involuntarily for the convenience of the Government as a result of a reduction in force, as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the
Secretary of Defense or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy;
(2) who completes the requirements of a secondary school diploma (or equivalency certificate), or successfully completes (or otherwise receives academic credit for) the equivalent of 12 semester hours in a program of education leading to a standard college degree, before applying for benefits under this section; and
(3) who, after completion of the service described in clause (1) of this subsection--
(A) continues on active duty;
(B) is discharged from active duty with an honorable discharge;
(C) is released after service on active duty characterized by the Secretary concerned as honorable service and is placed on the retired list, is transferred to the Fleet Reserve or Fleet Marine Corps Reserve, or is placed on the temporary disability retired list; or
(D) is released from active duty for further service in a reserve component of the Armed Forces after service on active duty characterized by the Secretary concerned as honorable service;

is entitled to basic educational assistance under this chapter [38 USCS §§ 3001 et seq.].

(b) (1) Except as provided in paragraph (2), the basic pay of any individual described in subsection (a)(1)(A) of this section who does not make an election under subsection (c)(1) of this section shall be reduced by $100 for each of the first 12 months that such individual is entitled to such pay.
(2) In the case of an individual covered by paragraph (1) who is a member of the Selected Reserve, the Secretary of Defense shall collect from the individual an amount equal to $1,200 not later than one year after completion by the individual of the two years of service on active duty providing the basis for such entitlement. The Secretary of Defense may collect such amount through reductions in basic pay in accordance with paragraph (1) or through such other method as the Secretary of Defense considers appropriate.
(3) Any amount by which the basic pay of an individual is reduced under this subsection shall revert to the Treasury and shall not, for purposes of any Federal law, be considered to have been received by or to be within the control of such individual.

(c) (1) An individual described in subsection (a)(1)(A) of this section may make an election not to receive educational assistance under this chapter [38 USCS §§ 3001 et seq.]. Any such election shall be made at the time the individual initially enters on active duty as a member of the Armed Forces. Any individual who makes such an election is not entitled to educational assistance under this chapter [38 USCS §§ 3001 et seq.]
(2) An individual who after December 31, 1976, receives a commission as an officer in the Armed Forces upon graduation from the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, or the Coast Guard Academy is not eligible for educational assistance under this section.
(3) An individual who after December 31, 1976, receives a commission as an officer in the Armed Forces upon completion of a program of educational assistance under section 2107 of title 10 [10 USCS § 2107] is not eligible for educational assistance under this section if the individual enters on active duty--
(A) before October 1, 1996; or
(B) after September 30, 1996, and while participating in such program received more than $3,400 for each year of such participation.

(d) (1) For purposes of this chapter [38 USCS §§ 3001 et seq.], any period of service described in paragraphs (2) and (3) of this subsection shall not be considered a part of an obligated period of active duty on which an individual's entitlement to assistance under this section is based.

(2) The period of service referred to in paragraph (1) is any period terminated because of a defective enlistment and induction based on--

(A) the individual's being a minor for purposes of service in the Armed Forces;
(B) an erroneous enlistment or induction; or
(C) a defective enlistment agreement.

(3) The period of service referred to in paragraph (1) is also any period of service on active duty which an individual in the Selected Reserve was ordered to perform under section 12301, 12302, 12304, 12306, or 12307 of title 10 [10 USCS § 12301, 12302, 12304, 12306, or 12307] for a period of less than 2 years.

(e) (1) Any individual eligible for educational assistance under this section who does not make an election under subsection (c)(1) may contribute amounts for purposes of receiving an increased amount of basic educational assistance as provided for under section 3015(g) of this title [38 USCS § 3015(g)]. Such contributions shall be in addition to any reductions in the basic pay of such individual under subsection (b).

(2) An individual covered by paragraph (1) may make the contributions authorized by that paragraph at any time while on active duty, but not more frequently than monthly.

(3) The total amount of the contributions made by an individual under paragraph (1) may not exceed $600. Such contributions shall be made in multiples of $20.

(4) Contributions under this subsection shall be made to the Secretary of the military department concerned. That Secretary shall deposit any amounts received as contributions under this subsection into the Treasury as miscellaneous receipts.

(f) (1) For the purposes of this chapter [38 USCS §§ 3001 et seq.], a member referred to in paragraph (2) or (3) of this subsection who serves the periods of active duty referred to in that paragraph shall be deemed to have served a continuous period of active duty the length of which is the aggregate length of the periods of active duty referred to in that paragraph.

(2) This subsection applies to a member who--

(A) after a period of continuous active duty of not more than 12 months, is discharged or released from active duty under subclause (I) or (III) of subsection (a)(1)(A)(ii) of this section; and
(B) after such discharge or release, reenlists or re-enters on a period of active duty.

(3) This subsection applies to a member who after a period of continuous active duty as an enlisted member or warrant officer, and following successful completion of officer training school, is discharged in order to accept, without a break in service, a commission as an officer in the Armed Forces for a period of active duty.
(g) Notwithstanding section 3002(6)(A) of this title [38 USCS § 3002(6)(A)], a period during which an individual is assigned full time by the Armed Forces to a civilian institution for a course of education as described in such section 3002(6)(A) shall not be considered a break in service or a break in a continuous period of active duty of the individual for the purposes of this chapter [38 USCS §§ 3001 et seq.].

(h) (1) Notwithstanding section 3002(6)(B) of this title [38 USCS § 3002(6)(B)], a member referred to in paragraph (2) of this subsection who serves the periods of active duty referred to in subparagraphs (A) and (C) of that paragraph shall be deemed to have served a continuous period of active duty whose length is the aggregate length of the periods of active duty referred to in such subparagraphs.

   (2) This subsection applies to a member who--
   (A) during the obligated period of active duty on which entitlement to assistance under this section is based, commences pursuit of a course of education--
      (i) at a service academy; or
      (ii) at a post-secondary school for the purpose of preparation for enrollment at a service academy;
   (B) fails to complete the course of education; and
   (C) re-enters on a period of active duty.

(i) The Secretary concerned shall inform any member of the Armed Forces who has not completed that member's obligated period of active duty (as described in subsection (a)(1)(A)) and who indicates the intent to be discharged or released from such duty for the convenience of the Government of the minimum active duty requirements for entitlement to educational assistance benefits under this chapter [42 USCS §§ 3001 et seq.]. Such information shall be provided to the member in a timely manner.

Explanatory notes:
A prior § 3011 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5111.


Amendments:
1985. Act Nov. 8, 1985, in subsec. (a)(1)(B), deleted "and without a break in service on active duty since December 31, 1976," following "of this title".

1986. Act Oct. 28, 1986, in subsec. (a), in the introductory matter, inserted a comma following "section"; in para. (1), in subpara. (A)(ii)(II), inserted "continuous", and in subpara. (B)(ii)(II), inserted "continuous", in subpara. (B), inserted "and was on active duty on October 19, 1984, and without a break in service since October 19, 1984,"; and in subsec. (b), substituted "Any amount by which the basic pay of an individual is reduced under this subsection shall revert to the Treasury and shall not, for purposes of any Federal law, be considered to have been received by or to be within the control of such individual." for "Amounts withheld from basic pay under this subsection shall revert to the Treasury.".

1988. Act Nov. 18, 1988, in subsec. (a), in para. (1), in subpara. (A)(ii)(I), inserted ", as the individual's initial obligated period of active duty,"; substituted para. (2) for one which read: "who, before completion of the service described in clause (1) of this subsection, has received a secondary school diploma (or an equivalency certificate); and"; in subsec. (b), substituted "chapter" for "subsection"; and added subsec. (d).

Such Act further (effective as provided by § 102(c) of such Act, which appears as a note to this section), in subsec. (a)(1), in subparas. (A)(ii) and (B)(ii), in item (I), inserted ", for a medical condition which preexisted such service on active duty and which the Administrator determines is not service connected," substituted "; (II)" for ", or (II)", and inserted "; or (III) involuntarily for the convenience of the Government as a result of a reduction in force, as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy".

1989. Act Dec. 18, 1989, in subsec. (a)(2), inserted (i)" and ", and (ii) an individual described in clause (1)(A) of this subsection may meet such requirement by having successfully completed the equivalent of such 12 semester hours before the end of the individual's initial obligated period of active duty".

Such Act further, in subsec. (a)(1), in paras. (A)(ii) and (B)(ii), substituted "Secretary" for "Administrator".

1990. Act Nov. 5, 1990 (effective 10/19/84 as provided by § 562(c) of such Act, which appears as a note to this section), in subsec. (a)(1), in subpara. (A)(ii)(I), substituted "for" for "or for" preceding "hardship", and inserted ", or for a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of each military department in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy", and, in subpara. (B)(ii)(I), substituted "for" for "or for" preceding "hardship" and inserted ", or for a physical or mental condition that was not characterized as a disability, as described in subparagraph (A)(ii)(I) of this paragraph"; and, in subsec. (d), in para. (1), substituted "paragraphs (2) and (3)" for "paragraph (2)"; and added para. (3).

1991. Act March 22, 1991, in subsec. (a)(3), redesignated former subpara. (C) as subpara. (D), and substituted new subparas. (A), (B), and (C) for former subparas. (A) and (B), which read:

"(A) is discharged from service with an honorable discharge, is placed on the retired list, is transferred to the Fleet Reserve or Fleet Marine Corps Reserve, or is placed on the temporary disability retired list;

"(B) continues on active duty; or".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1411, as 38 USCS § 3011.

1992. Act Oct. 29, 1992 (effective 10/28/86, as provided by § 302(b) of such Act, which appears as a note to this section), in subsec. (a), in para. (1), in subsec. (B), in the introductory matter, substituted "at any time during the period beginning on October 19, 1984, and ending on July 1, 1985, continued on active duty without a break in service and-" for "on October 19, 1984, and without a break in service since October 19, 1984, and-"

Such Act further, in subsec. (a), in para. (2), in the introductory matter, inserted ", except as provided in subsection (e) of this section."; and added subsec. (e).

Such Act further (effective as if enacted on 6/30/85 and applicable to the payment of educational assistance for education or training pursued on or after 10/1/93, as provided by § 304(b) of such Act) added subsec. (f).

Such Act further (effective as if enacted on 10/19/84, as provided by § 305(b) of such Act) added subsec. (g).
Such Act further (effective as if enacted on 6/30/85 and applicable to the payment of educational assistance for education or training pursued on or after 10/1/93, as provided by § 306(b) of such Act) added subsec. (h).

1994. Act Nov. 2, 1994, in subsec. (e), substituted "October 28, 1994," for "the end of the 24-month period beginning on the date of enactment of this subsection"; and, in subsec. (f)(1), substituted "the length of which" for "whose length".


Act Sept. 23, 1996, in subsec. (c), in para. (2), deleted "or upon completion of a program of educational assistance under section 2107 of title 10" following "Coast Guard Academy", and added para. (3).

1998. Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 203(b) of such Act, which appears as a note to this section), in subsec. (a)(2), substituted "successfully completed (or otherwise received academic credit for)" for "successfully completed" in two places.

Such Act further (effective 120 days after enactment, as provided by § 207(d)(1) of such Act, which appears as a note to this section) added subsec. (i).

1999. Act Nov. 30, 1999 (effective and applicable as provided by § 702(c) of such Act, which appears as a note to this section), in subsec. (f), in para. (1), substituted "paragraph (2) or (3)" for "paragraph (2)", and added para. (3).

Such Act further, in subsec. (i), deleted "Federal" before "Government".

2000. Act Nov. 1, 2000, in subsec. (a), in para. (1)(A), substituted cl. (i) for one which read: "(i) who (I) serves, as the individual's initial obligated period of active duty in the Armed Forces, or (II) in the case of an individual whose initial period of active duty is less than three years, serves at least two years of continuous active duty in the Armed Forces; or", in cl. (ii), substituted "if, in the case of an individual with an obligated period of service of two years, the individual completes not less than 20 months of continuous active duty under that period of obligated service, or, in the case of an individual with an obligated period of service of at least three years, the individual completes not less than 30 months of continuous active duty under that period of obligated service" for "in the case of an individual who completed not less than 20 months of continuous active duty, if the initial obligated period of active duty of the individual was less than three years, or in the case of an individual who completed not less than 30 months of continuous active duty if the initial obligated period of active duty of the individual was at least three years", and substituted para. (2) for one which read:

"(2) who, except as provided in subsection (e) of this section, completed the requirements of a secondary school diploma (or equivalency certificate) not later than--

"(A) the original ending date of the individual's initial obligated period of active duty in the case of an individual described in clause (1)(A) of this subsection, regardless of whether the individual is discharged or released from active duty on such date; or

"(B) December 31, 1989, in the case of an individual described in clause (1)(B) of this subsection;

except that (i) an individual described in clause (1)(B) of this subsection may meet the requirement of this clause by having successfully completed (or otherwise received academic credit for) the equivalent of 12 semester hours in a program of education leading to a standard college degree, and (ii) an individual described in clause (1)(A) of this subsection may meet such requirement by having successfully completed (or
otherwise received academic credit for) the equivalent of such 12 semester hours before
the end of the individual's initial obligated period of active duty; and"

in subsec. (d)(1), substituted "obligated period of active duty on which an individual's
entitlement to assistance under this section is based" for "individual's initial obligated period
of active duty"; deleted subsec. (e), which read: ":(e) For the purposes of subsection (a)(2) of
this section, an individual who was on active duty on August 2, 1990, and who completes the
requirements of a secondary school diploma (or equivalency certificate) before October 28,
1994, shall be considered to have completed such requirements within the individual's initial
obligated period of active duty."; in subsec. (h)(2)(A), in the introductory matter, substituted
"during the obligated period of active duty on which entitlement to assistance under this
section is based," for "during an initial period of active duty,"; and, in subsec. (i), deleted
"initial" preceding "obligated".

Such Act further (effective 5/1/2001, as provided by § 105(c) of such Act, which appears as a
note to this section), added subsec. (e).

2001. Act June 5, 2001 (effective as if enacted on 11/1/2000, immediately after enactment of
Act Nov. 1, 2000, P. L. 106-419, as provided by § 7(a)(2) of the 2001 Act, which appears as a
note to this section), in subsec. (a)(1)(A)(i), substituted "(I) in the case of an individual whose
obligated period of active duty is three years or more, serves at least three years of
continuous active duty in the Armed Forces, or (II) in the case of an individual whose
obligated period of active duty is less than three years, serves" for "serves an obligated
period of active duty of".

Such Act further (effective as if included in the enactment of § 105 of Act Nov. 1, 2000, P. L.
106-419, as provided by § 7(c)(4) of the 2001 Act, which appears as a note to this section), in
subsec. (e), in para. (2), inserted ", but not more frequently than monthly", in para. (3),
substituted "$20" for "$4" and, in para. (4), substituted "Secretary of the military department
concerned. That" for "Secretary. The", and deleted "by the Secretary" following "received".

Act Dec. 27, 2001, in subsec. (a)(1), in subpara. (A)(ii), deleted "or" following the concluding
semicolon, in subpara. (B)(ii), added "or" following the semicolon, and added subpara. (C).

Such Act further (applicable as provided by § 106(b) of such Act, which appears as a note to
this section), in subsec. (c)(3)(B), substituted "$3,400" for "$2,000".

2002. Act Nov. 25, 2002 (effective on 3/1/2003 pursuant to § 1704(g) of such Act, which
appears as 10 USCS § 101 note), in subsec. (a)(1), in subparas. (A)(ii)(I), (B)(ii)(III), and
(C)(iii)(II)(cc), substituted "of Homeland Security" for "of Transportation".

Such Act further (effective as above) purported to amend subsec. (a)(1)(A)(ii)(II) by
substituting "of Homeland Security" for "of Transportation"; however, the substitution was
made in subsec. (a)(1)(A)(ii)(III) in order to effectuate the probable intent of Congress.

Act Dec. 6, 2002, in subsec. (a)(1)(C)(ii), deleted "on or following "duty".

the basic pay" for "The basic pay", designated the former second sentence as para. (3) and,
in such paragraph as so designated, substituted "this subsection" for "this chapter", and
inserted para. (2).

Other provisions:

§ 303(b), 100 Stat 3269, provides: "The amendments made by subsection (a) [amending this
section and 38 USCS § 3012(c)] shall apply to any reduction in basic pay made under section
1411(b) [redesignated § 3011(b)] or 1412(c) [redesignated § 3012(c)] of title 38, United
States Code, after December 31, 1985.".

Effective date of amendments made by § 102 of Act Nov. 18, 1988. Act Nov. 18, 1988, P.
L. 100-689, Title I, Part A, § 102(c), 102 Stat. 4163, provides:
"The amendments made by this section [amending 38 USCS §§ 3011-3013, 5303A] shall take effect--

"(1) as of July 1, 1985, with respect to individuals discharged or released for a medical condition which preexisted service on active duty or in the Selected Reserve and which the Administrator determines is not service connected; and

"(2) as of October 1, 1987, with respect to individuals involuntarily discharged or released for the convenience of the Government as a result of a reduction in force.".


Act Oct. 29, 1992, P. L. 102-568, Title III, § 304(b), 106 Stat. 4328, provides: "The amendments made by this subsection (a) [amending this section] shall take effect as if enacted on June 30, 1985, and apply to the payment of educational assistance for education or training pursued on or after October 1, 1993.".

Act Oct. 29, 1992, P. L. 102-568, Title III, § 305(b), 106 Stat. 4328, provides: "The amendment made by subsection (a) [amending this section] shall take effect as if enacted on October 19, 1984.".

Act Oct. 29, 1992, P. L. 102-568, Title III, § 306(b), 106 Stat. 4328, provides: "The amendment made by subsection (a) [amending this section] shall take effect as if enacted on June 30, 1985, and apply to the payment of educational assistance for education training pursued on or after October 1, 1993.".

Notification of extension of period for completion of diploma requirement. Act Oct. 29, 1992, P. L. 102-568, Title III, § 303(b), 106 Stat. 4327, provides: "Not later than 60 days after the date of enactment of this Act, the Secretary of each of the military departments shall notify each individual who was on active duty in the Armed Forces on August 2, 1990, and who has not met the requirements of a secondary school diploma (or equivalency certificate), the extension of the period for the completion of such requirements afforded by the amendments made by this section [amending subsec. (a)(2) and adding subsec. (e) of this section and amending subsec. (a)(2) and adding subsec. (f) of 38 USCS § 3012].".

Effective date of amendments made by § 203(a) of Act Nov. 11, 1998. Act Nov. 11, 1998, P. L. 105-368, Title II, Subtitle A, § 203(b), 112 Stat. 3326, provides: "Not later than 60 days after the date of enactment of this Act, the Secretary of each of the military departments shall notify each individual who was on active duty in the Armed Forces on August 2, 1990, and who has not met the requirements of a secondary school diploma (or equivalency certificate), of the extension of the period for the completion of such requirements afforded by the amendments made by this section [amending 38 USCS §§ 3011(a)(2), 3012(a)(2), 3018(b)(4)(ii), 3018A(a)(2), 3018B(a)(1)(B), (a)(2)(B), and 3018C(a)(3)] shall take effect on October 1, 1998.".

Effective date of amendments made by § 207(a), (b) of Act Nov. 11, 1998. Act Nov. 11, 1998, P. L. 105-368, Title II, Subtitle A, § 207(d)(1), 112 Stat. 3328, provides: "The amendments made by subsections (a) and (b) [adding 38 USCS §§ 3011(i) and 3012(g)] shall take effect 120 days after the date of the enactment of this Act.".

Effective date of amendment made by § 702(a) of Act Nov. 30, 1999. Act Nov. 30, 1999, P. L. 106-117, Title VII, Subtitle A, § 702(c), 113 Stat. 1583, provides: "The amendments made by subsection (a) [amending subsec. (f) of this section] shall take effect on the date of the enactment of this Act and apply with respect to an individual first appointed as a commissioned officer on or after July 1, 1985.".

this section [adding 38 USCS §§ 3011(e) and 3012(f), and amending 38 USCS § 3015] shall take effect on May 1, 2001.”.

Contributions under 38 USCS § 3011(e) or 3012(f), as added effective May 1, 2001; transitional provisions. Act Nov. 1, 2000, P. L. 106-419, Title I, Subtitle A, § 105(d), 114 Stat. 1830, provides:

“(1) During the period beginning on May 1, 2001, and ending on July 31, 2001, an individual described in paragraph (2) may make contributions under section 3011(e) or 3012(f) of title 38, United States Code (as added by subsection (a)), whichever is applicable to that individual, without regard to paragraph (2) of that section and otherwise in the same manner as an individual eligible for educational assistance under chapter 30 of such title [38 USCS §§ 3001 et seq.] who is on active duty.

“(2) Paragraph (1) applies in the case of an individual who--

"(A) is discharged or released from active duty during the period beginning on the date of the enactment of this Act and ending on April 30, 2001; and

"(B) is eligible for educational assistance under chapter 30 of title 38, United States Code [38 USCS §§ 3001 et seq.].".


Effective date of amendments made by § 7(c) of Act June 5, 2001. Act June 5, 2001, P. L. 107-14, § 7(c)(4), 115 Stat. 33, provides: "The amendments made by this subsection [amending 38 USCS §§ 3011(e), 3012(f), and 3015(g)] shall take effect as if included in the enactment of section 105 of the Veterans Benefits and Health Care Improvement Act of 2000 (Public Law 106-419; 114 Stat. 1828) [enacted Nov. 1, 2000].".

Application of amendments made by § 106(a) of Act Dec. 27, 2001. Act Dec. 27, 2001, P. L. 107-103, Title I, § 106(b), 115 Stat. 983, provides: "The amendments made by subsection (a) [amending 38 USCS §§ 3011(c)(3)(B) and 3012(d)(3)(B)] shall apply with respect to educational assistance allowances paid under chapter 30 of title 38, United States Code, for months beginning after the date of the enactment of this Act.".

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

Cross References
This section is referred to in 10 USCS § 2006; 38 USCS §§ 3012, 3013, 3015-3018, 3018A, 3018B, 3021, 3031, 3232, 3462, 4214, 5303A; 42 USCS § 12603

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 126-128
1. Generally
2. Under particular circumstances

1. Generally

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Veteran was properly denied conversion from Chapter 34 to Chapter 30 benefits since he acknowledged that he did not qualify for conversion and statute was clear and unambiguous. Kelly v Derwinski (1992) 3 Vet App 171

2. Under particular circumstances

Veteran was not eligible for educational benefits since his final discharge was general, March 1988 honorable discharge was not based on three years’ continuous active service commencing after June 30, 1985, and remaining honorable discharges were granted prior to June 30, 1985. Carr v Brown (1993) 5 Vet App 2

Although veteran was eligible for educational-assistance benefits under 38 USCS § 3452(a), when those benefits were terminated for all veterans, he was disqualified from conversion into eligibility for benefits under 38 USCS ch. 30 by 38 USCS § 3011(c)(2) and 38 CFR § 21.7044(c) because he did not meet exception set forth under § 21.7044(d) where he was commissioned upon graduating from military academy after December 1976 and before completing military service needed to establish such entitlement. Burton v Nicholson (2005) 19 Vet App 249, 2005 US App Vet Claims LEXIS 517

§ 3012. Basic educational assistance entitlement for service in the Selected Reserve

(a) Except as provided in subsection (d) of this section, each individual--

(1) who--

(A) after June 30, 1985, first becomes a member of the Armed Forces or first enters on active duty as a member of the Armed Forces--

(i) serves an obligated period of active duty of at least two years of continuous active duty in the Armed Forces, subject to subsection (b) of this section, characterized by the Secretary concerned as honorable service; and

(ii) subject to subsection (b) of this section and beginning within one year after completion of the service on active duty described in subclause (i) of this clause, serves at least four years of continuous duty in the Selected Reserve during which the individual participates satisfactorily in training as required by the Secretary concerned;

(B) as of December 31, 1989, is eligible for educational assistance under chapter 34 of this title [38 USCS §§ 3451 et seq.] and was on active duty at any time during the period beginning on October 19, 1984, and ending on July 1, 1985, continued on active duty without a break in service and-

(i) after June 30, 1985, serves at least two years of continuous active duty in the Armed Forces, subject to subsection (b) of this section, characterized by the Secretary concerned as honorable service; and

(ii) after June 30, 1985, subject to subsection (b) of this section and beginning within one year after completion of such two years of service, serves at least four continuous years in the Selected Reserve during which the individual participates satisfactorily in training as prescribed by the Secretary concerned; or

(C) as of December 31, 1989, was eligible for educational assistance under chapter 34 of this title [38 USCS §§ 3451 et seq.] and--

(i) was not on active duty on October 19, 1984;

(ii) reenlists or reenters on a period of active duty after October 19, 1984; and

(iii) on or after July 1, 1985--
(I) serves at least two years of continuous active duty in the Armed Forces, subject to subsection (b) of this section, characterized by the Secretary concerned as honorable service; and
(II) subject to subsection (b) of this section and beginning within one year after completion of such two years of service, serves at least four continuous years in the Selected Reserve during which the individual participates satisfactorily in training as prescribed by the Secretary concerned;

(2) who completes the requirements of a secondary school diploma (or equivalency certificate), or successfully completes (or otherwise receives academic credit for) the equivalent of 12 semester hours in a program of education leading to a standard college degree, before applying for benefits under this section; and
(3) who, after completion of the service described in clause (1) of this subsection--
(A) is discharged from service with an honorable discharge, is placed on the retired list, or is transferred to the Standby Reserve or an element of the Ready Reserve other than the Selected Reserve after service in the Selected Reserve characterized by the Secretary concerned as honorable service; or
(B) continues on active duty or in the Selected Reserve;

is entitled to basic educational assistance under this chapter [38 USCS §§ 3001 et seq.]

(b) (1) (A) The requirement of two years of service under clauses (1)(A)(i) and (1)(B)(i) of subsection (a) of this section is not applicable to an individual who is discharged or released, during such two years, from active duty in the Armed Forces (i) for a service-connected disability, (ii) for a medical condition which preexisted such service on active duty and which the Secretary determines is not service connected, (iii) for hardship, (iv) in the case of an individual discharged or released after 20 months of such service, for the convenience of the Government, (v) involuntarily for the convenience of the Government as a result of a reduction in force, as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, or (vi) for a physical or mental condition that was not characterized as a disability, as described in section 3011(a)(1)(A)(ii)(I) of this title [38 USCS § 3011(a)(1)(A)(ii)(I)].

(B) The requirement of four years of service under clauses (1)(A)(ii) and (1)(B)(ii) of subsection (a) of this section is not applicable to an individual--
(i) who, during the two years of service described in clauses (1)(A)(i) and (1)(B)(i) of subsection (a) of this section, was discharged or released from active duty in the Armed Forces for a service-connected disability, for a medical condition which preexisted such service on active duty and which the Secretary determines is not service connected, or for a physical or mental condition not characterized as a disability, as described in section 3011(a)(1)(A)(ii)(I) of this title [38 USCS § 3011(a)(1)(A)(ii)(I)], if the individual was obligated, at the beginning of such two years of service, to serve such four years of service;
(ii) who, during the four years of service described in clauses (1)(A)(ii) and (1)(B)(ii) of subsection (a) of this section, is discharged or released from
service in the Selected Reserve (I) for a service-connected disability, (II) for a medical condition which preexisted the individual's becoming a member of the Selected Reserve and which the Secretary determines is not service connected, (III) for hardship, (IV) in the case of an individual discharged or released after 30 months of such service, for the convenience of the Government, (V) involuntarily for the convenience of the Government as a result of a reduction in force, as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, or (VI) for a physical or mental condition not characterized as a disability, as described in section 3011(a)(1)(A)(ii)(I) of this title [38 USCS § 3011 (a)(1)(A)(ii)(I)]; or (iii) who, before completing the four years of service described in clauses (1)(A)(ii) and (1)(B)(ii) of subsection (a) of this section, ceases to be a member of the Selected Reserve during the period beginning on October 1, 1991, and ending on September 30, 1999, by reason of the inactivation of the person's unit of assignment or by reason of involuntarily ceasing to be designated as a member of the Selected Reserve pursuant to section 10143(a) of title 10 [10 USCS § 10143(a)].

(2) After an individual begins service in the Selected Reserve within one year after completion of the service described in clause (A)(i) or (B)(i) of subsection (a)(1) of this section, the continuity of service of such individual as a member of the Selected Reserve shall not be considered to be broken--

(A) by any period of time (not to exceed a maximum period prescribed by the Secretary concerned by regulation) during which the member is not able to locate a unit of the Selected Reserve of the member's Armed Force that the member is eligible to join or that has a vacancy; or

(B) by any other period of time (not to exceed a maximum period prescribed by the Secretary concerned by regulation) during which the member is not attached to a unit of the Selected Reserve that the Secretary concerned, pursuant to regulations, considers to be inappropriate to consider for such purpose.

(c) (1) Except as provided in paragraph (2), the basic pay of any individual described in subsection (a)(1)(a) of this section who does not make an election under subsection (d)(1) of this section shall be reduced by $100 for each of the first 12 months that such individual is entitled to such pay.

(2) In the case of an individual covered by paragraph (1) who is a member of the Selected Reserve, the Secretary of Defense shall collect from the individual an amount equal to $1,200 not later than one year after completion by the individual of the two years of service on active duty providing the basis for such entitlement. The Secretary of Defense may collect such amount through reductions in basic pay in accordance with paragraph (1) or through such other method as the Secretary of Defense considers appropriate.

(3) Any amount by which the basic pay of an individual is reduced under this subsection shall revert to the Treasury and shall not, for purposes of any Federal law, be considered to have been received by or to be within the control of such individual.
(d) (1) An individual described in subsection (a)(1)(A) of this section may make an election not to receive educational assistance under this chapter [38 USCS §§ 3001 et seq.]. Any such election shall be made at the time the individual initially enters on active duty as a member of the Armed Forces. Any individual who makes such an election is not entitled to educational assistance under this chapter [38 USCS §§ 3001 et seq.].

(2) An individual who after December 31, 1976, receives a commission as an officer in the Armed Forces upon graduation from the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, or the Coast Guard Academy is not eligible for educational assistance under this section.

(3) An individual who after December 31, 1976, receives a commission as an officer in the Armed Forces upon completion of a program of educational assistance under section 2107 of title 10 [10 USCS § 2107] is not eligible for educational assistance under this section if the individual enters on active duty--

A) before October 1, 1996; or
B) after September 30, 1996, and while participating in such program received more than $3,400 for each year of such participation.

(e) (1) An individual described in subclause (I) or (III) of subsection (b)(1)(B)(ii) of this section may elect entitlement to basic educational assistance under section 3011 of this title [38 USCS § 3011], based on an obligated period of active duty of two years, in lieu of entitlement to assistance under this section.

(2) An individual who makes the election described in paragraph (1) of this subsection shall, for all purposes of this chapter [38 USCS §§ 3001 et seq.], be considered entitled to educational assistance under section 3011 of this title [38 USCS § 3011] and not under this section. Such an election is irrevocable.

(f) (1) Any individual eligible for educational assistance under this section who does not make an election under subsection (d)(1) may contribute amounts for purposes of receiving an increased amount of basic educational assistance as provided for under section 3015(g) of this title [38 USCS § 3015(g)]. Such contributions shall be in addition to any reductions in the basic pay of such individual under subsection (c).

(2) An individual covered by paragraph (1) may make the contributions authorized by that paragraph at any time while on active duty, but not more frequently than monthly.

(3) The total amount of the contributions made by an individual under paragraph (1) may not exceed $600. Such contributions shall be made in multiples of $20.

(4) Contributions under this subsection shall be made to the Secretary of the military department concerned. That Secretary shall deposit any amounts received as contributions under this subsection into the Treasury as miscellaneous receipts.

(g) (1) The Secretary concerned shall inform any member of the Armed Forces who has not completed that member's initial service (as described in paragraph (2)) and who indicates the intent to be discharged or released from such service for the convenience of the Government of the minimum service requirements for entitlement to educational assistance benefits under this chapter [38 USCS §§ 3001 et seq.]. Such information shall be provided to the member in a timely manner.

(2) The initial service referred to in paragraph (1) is the initial obligated period of active duty (described in subparagraph (A)(i) or (B)(i) of subsection (a)(1)) or the...
period of service in the Selected Reserve (described in subparagraph (A)(ii) or (B)(ii) of subsection (a)(1)).

Explanatory notes:
A prior § 3012 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5112.

Amendments:
1985. Act Nov. 8, 1985, in subsec. (a)(1)(B), deleted "and without a break in service on active duty since December 31, 1976," following "of this title".
1986. Act Oct. 28, 1986, in subsec. (a), in the introductory matter, substituted "subsection (d)" for "subsection (b), and in para. (1)(B) inserted "and was on active duty on October 19, 1984, and without a break in service since October 19, 1984,"; in subsec. (b)(1) inserted "such"; and in subsec. (c), substituted "Any amount by which the basic pay of an individual is reduced under this subsection shall revert to the Treasury and shall not, for purposes of any Federal law, be considered to have been received by or to be within the control of such individual." for "Amounts withheld from basic pay under this paragraph shall revert to the Treasury."
1988. Act Nov. 18, 1988, in subsec. (a), in para. (1), in subpara. (A)(i), inserted ", as the individual's initial obligated period of active duty," and in para. (2), substituted "completed the requirements of" for "received", and inserted ", except that an individual described in clause (1)(B) of this subsection may meet the requirement of this clause by having successfully completed the equivalent of 12 semester hours in a program of education leading to a standard college degree"; in subsec. (c), substituted "chapter" for "subsection"; and added subsec. (e).
Such Act further (effective as provided by § 102(c) of such Act, which appears as 38 USCS § 3011 note), in subsec. (a), in para. (1), in subparas. (A)(i) and (B)(i), inserted ", subject to subsection (b) of this section,"; and substituted subsec. (b)(1) for one which read: "The requirement of four years of service under clauses (1)(A)(ii) and (1)(B)(ii) of subsection (a) of this section is not applicable to an individual who is discharged or released from service in the Selected Reserve for a service-connected disability, for hardship, or (in the case of an individual discharged or released after three and one-half years of such service) for the convenience of the Government.".
1989. Act Dec. 18, 1989, in subsec. (a)(2), inserted "(i)" and ", and (ii) an individual described in clause (1)(A) of this subsection may meet such requirement by having successfully completed the equivalent of such 12 semester hours before the end of the individual's initial obligated period of active duty".
Such Act further, in subsec. (b)(1), in subparas. (A), (B)(i), and (B)(ii), substituted "Secretary" for "Administrator".
Such Act further, in subsec. (a)(1), in subpara. (A)(ii), substituted "and beginning within one year after completion" for "and after completion", in subpara. (B)(ii), substituted "and beginning within one year after completion" for "and after completion"; and in subsec. (b)(2), in the introductory matter, substituted "After an individual begins service in the Selected Reserve within one year after completion of the service described in clause (A)(i) or (B)(i) of subsection (a)(1) of this section, the continuity of service of such individual as a member of the Selected Reserve" for "Continuity of service of a member of the selected Reserve for purposes of such clauses".
1990. Act Nov. 5, 1990 (effective 10/19/84, as provided by § 562(c) of such Act, which appears as 38 USCS § 3011 note), in subsec. (b), in para. (1), in subpara. (A), substituted
"(v)" for "or (v)" and inserted ", or (vi) for a physical or mental condition that was not characterized as a disability, as described in section 1411(a)(1)(A)(ii)(I) of this title", in subpara. (B), in cl. (i), substituted "or" for "or for" preceding "medical condition" and inserted ", or for a physical or mental condition not characterized as a disability, as described in section 1411(a)(1)(A)(ii)(I) of this title", and, in cl. (ii), substituted "(V)" for "or (V)" and inserted ", or (VI) for a physical or mental condition not characterized as a disability, as described in section 1411(a)(1)(A)(ii)(I) of this title".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1412, as 38 USCS § 3012, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


Act Oct. 29, 1992 (effective 10/28/86, as provided by § 302(b) of such Act, which appears as 38 USCS § 3011 note), in subsec. (a), in para. (1), in subpara. (B), substituted "at any time during the period beginning on October 19, 1984, and ending on July 1, 1985, continued on active duty without a break in service and-" for "on October 19, 1984, and without a break in service since October 19, 1984, and-".

Such Act further, in subsec. (a), in para. (2), inserted "except as provided in subsection (f) of this section,"; and added subsec. (f).


Act Sept. 23, 1996, in subsec. (d), in para. (2), deleted "or upon completion of a program of educational assistance under section 2107 of title 10 following "Coast Guard Academy", and added para. (3).  

1998. Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 203(b) of such Act, which appears as 38 USCS § 3011 note), in subsec. (a)(2), substituted "successfully completed (or otherwise received academic credit for)" for "successfully completed in two places.

Such Act further (effective 120 days after enactment, as provided by § 207(d)(1) of such Act, which appears as 38 USCS § 3011 note) added subsec. (g).


2000. Act Nov. 1, 2000, in subsec. (a), in para. (1)(A)(i), substituted "an obligated period of active duty of at least two years of continuous active duty in the Armed Forces" for ", as the individual's initial obligated period of active duty, at least two years of continuous active duty in the Armed Forces", and substituted para. (2) for one which read: "(2) who, except as provided in subsection (f) of this section, before completion of the service described in clause (1) of this subsection, has completed the requirements of a secondary school diploma (or an equivalency certificate), except that (i) an individual described in clause (1)(B) of this subsection may meet the requirement of this clause by having successfully completed (or otherwise received academic credit for) the equivalent of 12 semester hours in a program of education leading to a standard college degree, and (ii) an individual described in clause (1)(A) of this subsection may meet such requirement by having successfully completed (or otherwise received academic credit for) the equivalent of such 12 semester hours before the end of the individual's initial obligated period of active duty; and", in subsec. (e)(1), deleted "initial" preceding "obligated"; deleted subsec. (f), which read: "(f) For the purposes of
subsection (a)(2) of this section, an individual who was on active duty on August 2, 1990, and
who completes the requirements of a secondary school diploma (or equivalency certificate)
before October 28, 1994, shall be considered to have completed such requirements within
the individual's initial obligated period of active duty.; and, in subsec. (g)(2), substituted
"subparagraph" for "subparagraphs" in two places.

Such Act further (effective 5/1/2001, as provided by § 105(c) of such Act, which appears as
28 USCS § 3011 note), added subsec. (f).

2001. Act June 5, 2001 (effective as if included in the enactment of § 105 of Act Nov. 1, 2000,
P. L. 106-419, as provided by § 7(c)(4) of the 2001 Act, which appears as 38 USCS § 3011
note), in subsec. (f), in para. (2), inserted ", but not more frequently than monthly", in para. (3),
substituted "$20" for "$4" and, in para. (4), substituted "Secretary of the military department
concerned. That" for "Secretary. The", and deleted "by the Secretary" following "received".

Act Dec. 27, 2001, in subsec. (a)(1), in subpara. (A)(ii), deleted "or" following the concluding
semicolon, in subpara. (B)(ii), added "or" following the semicolon, and added subpara. (C).

Such Act further (applicable as provided by § 106(b) of such Act, which appears as 38 USCS
§ 3011 note), in subsec. (d)(3)(B), substituted "$3,400" for "$2,000".

2002. Act Nov. 25, 2002 (effective on 3/1/2003 pursuant to § 1704(g) of such Act, which
appears as 10 USCS § 101 note), in subsec. (b)(1), in subparas. (A)(v) and (B)(ii)(V),
substituted "of Homeland Security" for "of Transportation".

2004. Act Dec. 10, 2004, in subsec. (c), substituted ",(1) Except as provided in paragraph (2),
the basic pay" for "The basic pay", designated the former second sentence as para. (3), and,
in such paragraph as so designated, substituted "this subsection" for "this chapter", and
inserted para. (2).


Other provisions:

Applicability of 1986 amendment to subsec. (c). For the application of the amendment to
subsec. (c) of this section by Act Oct. 28, 1986, P. L. 99-576, Title III, Part A, § 303(a)(2), 100
Stat. 3269, see § 303(b) of such Act, which appears as 38 USCS § 3011 note.

Notification of extension of period for completion of diploma requirement. For
notification provision relating to the extension, pursuant to 1992 amendments, of the period
for meeting secondary school diploma or equivalency certificate requirements, see § 303(b)

Code of Federal Regulations

Department of Veterans Affairs-Adjudication,   38 CFR Part 3
Department of Veterans Affairs-Vocational rehabilitation and education,   38 CFR Part 21

Cross References

This section is referred to in     10 USCS § 2006; 38 USCS §§ 3013, 3016-3018, 3018A,
3018B, 3021, 3031, 5303A

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 126

§ 3013. Duration of basic educational assistance

(a) (1) Subject to section 3695 of this title [38 USCS § 3695] and except as provided in
paragraphs (2) and (3) of this subsection, each individual entitled to basic educational
assistance under section 3011 of this title [38 USCS § 3011] is entitled to 36 months of educational assistance benefits under this chapter [38 USCS §§ 3001 et seq.] (or the equivalent thereof in part-time educational assistance).

(2) Subject to section 3695 of this title [38 USCS § 3695] and subsection (d) of this section, in the case of an individual described in section 3011(a)(1)(A)(ii)(I) or (III) of this title [38 USCS § 3011(a)(1)(A)(ii)(I) or (III)] who is not also described in section 3011(a)(1)(A)(i) of this title [38 USCS § 3011(a)(1)(A)(i)] or an individual described in section 3011(a)(1)(A)(ii)(I) or (III) of this title [38 USCS § 3011(a)(1)(A)(ii)(I) or (III)] who is not also described in section 3011(a)(1)(B)(i) of this title [38 USCS § 3011(a)(1)(B)(i)], the individual is entitled to one month of educational assistance benefits under this chapter [38 USCS §§ 3001 et seq.] for each month of continuous active duty served by such individual after June 30, 1985, as part of the obligated period of active duty on which such entitlement is based in the case of an individual described in section 3011(a)(1)(B)(ii)(I) or (III) of this title [38 USCS § 3011(a)(1)(B)(ii)(I) or (III)], after June 30, 1985.

(b) Subject to section 3695 of this title [38 USCS § 3695] and subsection (d) of this section, each individual entitled to basic educational assistance under section 3012 of this title [38 USCS § 3012] is entitled to (1) one month of educational assistance benefits under this chapter [38 USCS §§ 3001 et seq.] for each month of continuous active duty served by such individual after June 30, 1985, as part of the obligated period of active duty on which such entitlement is based in the case of an individual described in section 3012(a)(1)(A) of this title [38 USCS § 3012(a)(1)(A)], or in the case of an individual described in section 3012(a)(1)(B) of this title [38 USCS § 3012(a)(1)(B)], after June 30, 1985, and (2) one month of educational assistance benefits under this chapter [38 USCS §§ 3001 et seq.] for each four months served by such individual in the Selected Reserve "after the applicable date specified in clause (1) of this subsection (other than any month in which the individual served on active duty).

(c) (1) Subject to section 3695 of this title [38 USCS § 3695] and except as provided in paragraph (2) of this subsection, each individual entitled to basic educational assistance under section 3018 of this title [38 USCS § 3018] is entitled to 36 months of educational assistance under this chapter [38 USCS §§ 3001 et seq.] (or the equivalent thereof in part-time educational assistance).

(2) Subject to section 3695 of this title [38 USCS § 3695], an individual described in clause (B) or (C) of section 3018(b)(3) of this title [38 USCS § 3018(b)(3)] whose discharge or release from active duty prevents the reduction of the basic pay of such individual by $1,200 is entitled to the number of months of assistance under this chapter [38 USCS §§ 3001 et seq.] that is equal to the lesser of--

(A) 36 multiplied by a fraction the numerator of which is the amount by which the basic pay of the individual has been reduced under section 3018(c) [38 USCS § 3018(c)] and the denominator of which is $1,200; or

(B) the number of months the individual has served on continuous active duty after June 30, 1985.
(3) Subject to section 3695 of this title [38 USCS § 3695] and subsection (d) of this section, an individual described in clause (B) or (C)(ii) of section 3018(b)(3) of this title [38 USCS § 3018(b)(3)] (other than an individual described in paragraph (2) of this subsection) is entitled to the number of months of educational assistance under this chapter that is equal to the number of months the individual has served on continuous active duty after June 30, 1985.

(d) Subject to section 3695 of this title [38 USCS § 3695], each individual entitled to educational benefits under section 3018A, 3018B, or 3018C of this title [38 USCS §§ 3018A, 3018B, or 3018C] is entitled to the lesser of--

(1) 36 months of educational assistance under this chapter (or the equivalent thereof in part-time educational assistance); or

(2) the number of months of such educational assistance (or such equivalent thereof) that is equal to the number of months served by such individual on active duty.

(e) No individual may receive basic educational assistance benefits under this chapter [38 USCS §§ 3001 et seq.] for a period in excess of 36 months (or the equivalent thereof in part-time educational assistance).

(f) (1) Notwithstanding any other provision of this chapter or chapter 36 of this title [38 USCS §§ 3001 et seq., 3670 et seq.], any payment of an educational assistance allowance described in paragraph (2) shall not--

(A) be charged against any entitlement of any individual under this chapter; or

(B) be counted toward the aggregate period for which section 3695 of this title [38 USCS § 3695] limits an individual's receipt of assistance.

(2) Subject to paragraph (3), the payment of the educational assistance allowance referred to in paragraph (1) is the payment of such an allowance to an individual for pursuit of a course or courses under this chapter if the Secretary finds that the individual--

(A) in the case of a person not serving on active duty, had to discontinue such course pursuit as a result of being ordered to serve on active duty under section 688, 12301(a), 12301(d), 12301(g), 12302, or 12304 of title 10 [10 USCS § 688, 12301(a), 12301(d), 12301(g), 12302, or 12304]; or

(B) in the case of a person serving on active duty, had to discontinue such course pursuit as a result of being ordered to a new duty location or assignment or to perform an increased amount of work; and

(C) failed to receive credit or lost training time toward completion of the individual's approved education, professional, or vocational objective as a result of having to discontinue, as described in subparagraph (A) or (B), his or her course pursuit.

(3) The period for which, by reason of this subsection, an educational assistance allowance is not charged against entitlement or counted toward the applicable aggregate period under section 3695 of this title [38 USCS § 3695] shall not exceed the portion of the period of enrollment in the course or courses for which the individual failed to receive credit or with respect to which the individual lost training time, as determined under paragraph (2)(C) of this subsection.

Explanatory notes:
A prior § 3013 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5113.

Amendments:

1986. Act Oct. 28, 1986, in subsec. (a)(2), inserted "after the date of the beginning of the period for which the individual's basic pay is reduced under section 1411(b) of this title, in the case of an individual described in section 1411(a)(1)(A)(ii)(I) of this title, or after June 30, 1985, in the case of an individual described in section 1411(a)(1)(B)(ii)(I) of this title"; in subsec. (b), in para. (1), inserted "after the date of the beginning of the period for which such individual's basic pay is reduced under section 1412(c) of this title, in the case of an individual described in section 1412(a)(1)(A), or after June 30, 1985, in the case of an individual described in section 1412(a)(1)(B) of this title", and in para. (2), inserted "after the applicable date specified in clause (1) of this subsection".

1988. Act Nov. 18, 1988, in subsec. (a), in para. (2), substituted "Subject to section 1795 of this title and subsection (c) of this section, in" for "In", and substituted "continuous active duty served by such individual after June 30, 1985, as part of the individual's initial obligated period of active duty in the case of an individual described in section 1411(a)(1)(A)(ii)(I) or (III) of this title, or in the case of an individual described in section 1411(a)(1)(B)(ii)(I) or (III) of this title, after June 30, 1985." for "active duty served by such individual after the date of the beginning of the period for which the individual's basic pay is reduced under section 1411(b) of this title, in the case of an individual described in section 1411(a)(1)(A)(ii)(I) of this title, or after June 30, 1985, in the case of an individual described in section 1411(a)(1)(B)(ii)(I) of this title.", and in subsec. (b)(1), substituted "continuous active duty served by such individual after June 30, 1985, as part of the individual's initial obligated period of active duty in the case of an individual described in section 1412(a)(1)(A) of this title, or in the case of an individual described in section 1412(a)(1)(B) of this title, after June 30, 1985, and" for "active duty served by such individual after the date of the beginning of the period for which such individual's basic pay is reduced under section 1412(c) of this title, in the case of an individual described in section 1412(a)(1)(A), or after June 30, 1985, in the case of an individual described in section 1412(a)(1)(B) of this title, and", and redesignated subsec. (c) as (d), and added a new subsec. (c).

Such Act further (effective as provided by § 102(c) of such Act, which appears as 38 USCS § 3011 note), in subsec. (a)(2), inserted "or (III)" in both places it appears.

1989. Act Dec. 18, 1989, in subsec. (a)(2), substituted "subsection (d)" for "subsection (c)" and "1411(a)(1)(A)(ii)(I)" for "1411(a)(1)(B)(ii)(I)" the second place it appears; in subsec. (b), substituted "subsection (d)" for "subsection (c)"; and in subsec. (c), in para. (1), substituted "paragraphs (2) and (3)" for "paragraph (2)", and added para. (3).

1990. Act Nov. 5, 1990, redesignated former subsec. (d) as subsec. (e); and added subsec. (d).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1413, as 38 USCS § 3013, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


1996. Act Oct. 9, 1996, in subsec. (d), substituted ", 3018B, or 3018C" for "or 3018B".
§ 3014. Payment of basic educational assistance

(a) The Secretary shall pay to each individual entitled to basic educational assistance who is pursuing an approved program of education a basic educational assistance allowance to help meet, in part, the expenses of such individual's subsistence, tuition, fees, supplies, books, equipment, and other educational costs.

(b) (1) In the case of an individual entitled to basic educational assistance who is pursuing education or training described in subsection (a) or (c) of section 2007 of title 10 [10 USCS § 2007], the Secretary shall, at the election of the individual, pay the individual a basic educational assistance allowance to meet all or a portion of the charges of the educational institution for the education or training that are not paid by the Secretary of the military department concerned under such subsection.

(2) (A) The amount of the basic educational assistance allowance payable to an individual under this subsection for a month shall be the amount of the basic educational assistance allowance to which the individual would be entitled for the month under section 3015 of this title [38 USCS § 3015].

(B) The maximum number of months for which an individual may be paid a basic educational assistance allowance under paragraph (1) is 36.
(C) The number of months of entitlement charged under this chapter [38 USCS §§ 3001 et seq.] in the case of an individual who has been paid a basic educational assistance allowance under this subsection shall be equal to the number (including any fraction) determined by dividing the total amount of such educational assistance allowance paid the individual by the full-time monthly institutional rate of educational assistance which such individual would otherwise be paid under subsection (a)(1), (b)(1), (c)(1), (d)(1), or (e)(1) of section 3015 of this title [38 USCS § 3015], as the case may be.

Explanatory notes:
The amendments made by § 1 of Act Oct. 30, 2000, P. L. 106-398, are based on § 1602(b)(2) of Subtitle A of Title XVI of Division A of H.R. 5408 (114 Stat. 1654A-359), as introduced on Oct. 6, 2000, which was enacted into law by such § 1.

Amendments:


2000. Act Oct. 30, 2000, designated the existing provisions as subsec. (a), and added subsec. (b).

2001. Act June 5, 2001 (effective as if enacted on 11/1/2000, immediately after the enactment of Act Nov. 1, 2000, P. L. 106-419, as provided by § 7(b)(3) of the 2001 Act, which appears as a note to this section), in subsec. (b)(2), in subpara. (A), deleted "(without regard to subsection (g) of that section) were payment made under that section instead of under this subsection" following "title", and added subpara. (C).

Other provisions:
Effective date of amendments made by § 7(b)(1) and (2) of Act June 5, 2001. Act June 5, 2001, P. L. 107-14, § 7(b)(3), 115 Stat. 31, provides: "The amendments made by this subsection [amending 38 USCS §§ 3014(b)(2), 3015(a), (b), and (h), and 3032(b)] shall take effect as if enacted on November 1, 2000, immediately after the enactment of the Veterans Benefits and Health Care Improvement Act of 2000 (Public Law 106-419) [enacted Nov. 1, 2000].".

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

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77 Am Jur 2d, Veterans and Veterans' Laws § 135

§ 3014A. Accelerated payment of basic educational assistance for education leading to employment in high technology occupation in high technology industry

(a) An individual described in subsection (b) who is entitled to basic educational assistance under this subchapter may elect to receive an accelerated payment of the basic educational assistance allowance otherwise payable to the individual under section 3015 of this title [38 USCS § 3015].

(b) An individual described in this subsection is an individual who is--
(1) enrolled in an approved program of education that leads to employment in a high
technology occupation in a high technology industry (as determined pursuant to
regulations prescribed by the Secretary); and
(2) charged tuition and fees for the program of education that, when divided by the
number of months (and fractions thereof) in the enrollment period, exceeds the
amount equal to 200 percent of the monthly rate of basic educational assistance
allowance otherwise payable to the individual under section 3015 of this title [38
USCS § 3015].

(c) (1) The amount of the accelerated payment of basic educational assistance made to an
individual making an election under subsection (a) for a program of education shall be
the lesser of--

(A) the amount equal to 60 percent of the established charges for the program of
education; or
(B) the aggregate amount of basic educational assistance to which the individual
remains entitled under this chapter at the time of the payment.

(2) In this subsection, the term "established charges", in the case of a program of
education, means the actual charges (as determined pursuant to regulations prescribed
by the Secretary) for tuition and fees which similarly circumstanced nonveterans
enrolled in the program of education would be required to pay. Established charges
shall be determined on the following basis:

(A) In the case of an individual enrolled in a program of education offered on a
term, quarter, or semester basis, the tuition and fees charged the individual for the
term, quarter, or semester.
(B) In the case of an individual enrolled in a program of education not offered on
a term, quarter, or semester basis, the tuition and fees charged the individual for
the entire program of education.

(3) The educational institution providing the program of education for which an
accelerated payment of basic educational assistance allowance is elected by an
individual under subsection (a) shall certify to the Secretary the amount of the
established charges for the program of education.

(d) An accelerated payment of basic educational assistance made to an individual under
this section for a program of education shall be made not later than the last day of the
month immediately following the month in which the Secretary receives a certification
from the educational institution regarding--

(1) the individual's enrollment in and pursuit of the program of education; and
(2) the amount of the established charges for the program of education.

(e) (1) Except as provided in paragraph (2), for each accelerated payment of basic
educational assistance made to an individual under this section, the individual's
entitlement to basic educational assistance under this chapter shall be charged the number
of months (and any fraction thereof) determined by dividing the amount of the
accelerated payment by the full-time monthly rate of basic educational assistance
allowance otherwise payable to the individual under section 3015 of this title [38 USCS §
3015] as of the beginning date of the enrollment period for the program of education for
which the accelerated payment is made.
(2) If the monthly rate of basic educational assistance allowance otherwise payable to an individual under section 3015 of this title [38 USCS § 3015] increases during the enrollment period of a program of education for which an accelerated payment of basic educational assistance is made under this section, the charge to the individual's entitlement to basic educational assistance under this chapter shall be determined by prorating the entitlement chargeable, in the matter provided for under paragraph (1), for the periods covered by the initial rate and increased rate, respectively, in accordance with regulations prescribed by the Secretary.

(f) The Secretary may not make an accelerated payment under this section for a program of education to an individual who has received an advance payment under section 3680(d) of this title [38 USCS § 3680(d)] for the same enrollment period.

(g) The Secretary shall prescribe regulations to carry out this section. The regulations shall include requirements, conditions, and methods for the request, issuance, delivery, certification of receipt and use, and recovery of overpayment of an accelerated payment under this section.

Effective date of section:
This section became effective on October 1, 2002, pursuant to § 104(c) of Act Dec. 27, 2001, P. L. 107-103, which appears as a note to this section.

Amendments:
2002. Act Dec. 6, 2002, substituted the section heading for one which read: "§ 3014A. Accelerated payment of basic educational assistance for education leading to employment in high technology industry"; and, in subsec. (b)(1), substituted "employment in a high technology occupation in a high technology industry " for "employment in a high technology industry".

Other provisions:
Effective date and applicability of Dec. 27, 2001 amendments. Act Dec. 27, 2001, P. L. 107-103, Title I, § 104(c), 115 Stat. 982, provides: "The amendments made by this section [adding this section and amending 38 USCS § 3680(g) and the chapter analysis preceding 38 USCS § 3001] shall take effect October 1, 2002, and shall apply with respect to enrollments in courses or programs of education or training beginning on or after that date.".

§ 3015. Amount of basic educational assistance

(a) The amount of payment of educational assistance under this chapter [38 USCS §§ 3001 et seq.] is subject to section 3032 of this title [38 USCS § 3032]. Except as otherwise provided in this section, in the case of an individual entitled to an educational assistance allowance under this chapter [38 USCS §§ 3001 et seq.] whose obligated period of active duty on which such entitlement is based is three years, a basic educational assistance allowance under this subchapter [38 USCS §§ 3011 et seq.] shall be paid--

(1) for an approved program of education pursued on a full-time basis, at the monthly rate of--

(A) for months beginning on or after January 1, 2002, $800;
(B) for months occurring during fiscal year 2003, $900;
(C) for months occurring during fiscal year 2004, $985; and
(D) for months occurring during a subsequent fiscal year, the amount for months occurring during the previous fiscal year increased under subsection (h); or
(2) at an appropriately reduced rate, as determined under regulations which the Secretary shall prescribe, for an approved program of education pursued on less than a full-time basis.

(b) In the case of an individual entitled to an educational assistance allowance under section 3011 or 3018 of this title [38 USCS § 3011 or 3018] whose obligated period of active duty on which such entitlement is based is two years, a basic educational assistance allowance under this chapter [38 USCS §§ 3001 et seq.] shall (except as provided in the succeeding subsections of this section) be paid--
(1) for an approved program of education pursued on a full-time basis, at the monthly rate of--
(A) for months beginning on or after January 1, 2002, $650;
(B) for months occurring during fiscal year 2003, $732;
(C) for months occurring during fiscal year 2004, $800; and
(D) for months occurring during a subsequent fiscal year, the amount for months occurring during the previous fiscal year increased under subsection (h); or
(2) at an appropriately reduced rate, as determined under regulations which the Secretary shall prescribe, for an approved program of education pursued on less than a full-time basis.

(c) (1) The amount of basic educational allowance payable under this chapter [38 USCS §§ 3001 et seq.] to an individual referred to in paragraph (2) of this subsection is the amount determined under subsection (a) of this section.
(2) Paragraph (1) of this subsection applies to an individual entitled to an educational assistance allowance under section 3011 of this title [38 USCS § 3011]--
(A) whose obligated period of active duty on which such entitlement is based is less than three years;
(B) who, beginning on the date of the commencement of such obligated period of active duty, serves a continuous period of active duty of not less than three years; and
(C) who, after the completion of that continuous period of active duty, meets one of the conditions set forth in subsection (a)(3) of such section 3011 [38 USCS § 3011].

(d) (1) In the case of an individual who has a skill or specialty designated by the Secretary concerned as a skill or specialty in which there is a critical shortage of personnel or for which it is difficult to recruit, the Secretary concerned, pursuant to regulations to be prescribed by the Secretary of Defense, may, at the time the individual first becomes a member of the Armed Forces, increase the rate of the basic educational assistance allowance applicable to such individual to such rate in excess of the rate prescribed under subsections (a), (b), and (c) of this section as the Secretary of Defense considers appropriate, but the amount of any such increase may not exceed $950 per month.
(2) In the case of an individual who after October 7, 1997, receives an enlistment bonus under section 308a or 308f of title 37 [37 USCS § 308a or 308f], receipt of that
bonus does not affect the eligibility of that individual for an increase under paragraph (1) in the rate of the basic educational assistance allowance applicable to that individual, and the Secretary concerned may provide such an increase for that individual (and enter into an agreement with that individual that the United States agrees to make payments pursuant to such an increase) without regard to any provision of law (enacted before, on, or after the date of the enactment of this paragraph [enacted Oct. 17, 1998]) that limits the authority to make such payments.

(e) (1) (A) Except as provided in subparagraph (B) of this paragraph and subject to paragraph (2) of this subsection, in the case of an individual who on December 31, 1989, was entitled to educational assistance under chapter 34 of this title [38 USCS §§ 3451 et seq.], the rate of the basic educational assistance allowance applicable to such individual under this chapter [38 USCS §§ 3001 et seq.] shall be increased by the amount equal to one-half of the educational assistance allowance that would be applicable to such individual under such chapter 34 [38 USCS §§ 3451 et seq.] (as of the time the assistance under this chapter [38 USCS §§ 3001 et seq.] is provided and based on the rates in effect on December 31, 1989) if such chapter [38 USCS §§ 3451 et seq.] were in effect.

(B) Notwithstanding subparagraph (A) of this paragraph, in the case of an individual described in that subparagraph who is pursuing a cooperative program on or after October 9, 1996, the rate of the basic educational assistance allowance applicable to such individual under this chapter [38 USCS §§ 3001 et seq.] shall be increased by the amount equal to one-half of the educational assistance allowance that would be applicable to such individual for pursuit of full-time institutional training under chapter 34 [38 USCS §§ 3451 et seq.] (as of the time the assistance under this chapter [38 USCS §§ 3001 et seq.] is provided and based on the rates in effect on December 31, 1989) if such chapter were in effect.

(2) The number of months for which the rate of the basic educational assistance allowance applicable to an individual is increased under paragraph (1) of this subsection may not exceed the number of months of entitlement to educational assistance under chapter 34 of this title [38 USCS §§ 3451 et seq.] that the individual had remaining on December 31, 1989.

(f) In the case of an individual for whom the Secretary of Defense made contributions under section 3222(c) of this title [38 USCS § 3222(c)] and who is entitled to educational assistance under section 3018A, 3018B, or 3018C of this chapter [38 USCS § 3018A, 3018B, or 3018C], the Secretary shall increase the rate of the basic educational assistance allowance applicable to such individual in excess of the rate provided under subsection (a) of this section in a manner consistent with, as determined by the Secretary of Defense, the agreement entered into with such individual pursuant to the rules and regulations issued by the Secretary of Defense under section 3222(c) of this title [38 USCS § 3222(c)].

(g) In the case of an individual who has made contributions authorized by section 3011(e) or 3012(f) of this title [38 USCS § 3011(e) or 3012(f)], effective as of the first day of the enrollment period following receipt of such contributions from such individual by the Secretary concerned, the monthly amount of basic educational assistance allowance applicable to such individual under subsection (a), (b), or (c) shall be the monthly rate otherwise provided for under the applicable subsection increased by--
(1) an amount equal to $5 for each $20 contributed by such individual under section 3011(e) or 3012(f) of this title [38 USCS § 3011(e) or 3012(f)], as the case may be, for an approved program of education pursued on a full-time basis; or
(2) an appropriately reduced amount based on the amount so contributed, as determined under regulations which the Secretary shall prescribe, for an approved program of education pursued on less than a full-time basis.

(h) (1) With respect to any fiscal year, the Secretary shall provide a percentage increase in the rates payable under subsections (a)(1) and (b)(1) equal to the percentage by which--

(A) the Consumer Price Index (all items, United States city average) for the 12-month period ending on the June 30 preceding the beginning of the fiscal year for which the increase is made, exceeds
(B) such Consumer Price Index for the 12-month period preceding the 12-month period described in subparagraph (A).

(2) Any increase under paragraph (1) in a rate with respect to a fiscal year after fiscal year 2004 and before fiscal year 2014 shall be rounded down to the next lower whole dollar amount. Any such increase with respect to a fiscal year after fiscal year 2013 shall be rounded to the nearest whole dollar amount.

Explanatory notes:

The amendments made by § 1 of Act Oct. 30, 2000, P. L. 106-398, are based on § 1602(b)(3) of Subtitle A of Title XVI of Division A of H.R. 5408 (114 Stat. 1654A-359), as introduced on Oct. 6, 2000, which was enacted into law by such § 1.

Amendments:

1988. Act Nov. 18, 1988, in subsec. (a), substituted "The amount of payment of educational assistance under this chapter is subject to section 1432 of this title. Except for "Subject to section 1432 of this title and except"; and, in subsec. (b), in the introductory matter, inserted "or 1418".

1989. Act Nov. 29, 1989, in subsec. (c), substituted "$400 per month, in the case of an individual who first became a member of the Armed Forces before the date of the enactment of the National Defense Authorization Act for Fiscal Years 1990 and 1991, or $700 per month, in the case of an individual who first became a member of the Armed Forces on or after that date" for "$400 per month".

Act Dec. 18, 1989, in subsecs. (a)(2) and (b)(2), substituted "Secretary" for "Administrator";
and in subsec. (c), substituted "prescribed by the Secretary of Defense," for "prescribed by the Secretary," and inserted "of Defense", following "Secretary".


1991. Act April 6, 1991, in subsec. (a), in the introductory matter, substituted ", (c), (d), (e), and (f)" for "and (c)"; in subsec. (b), in the introductory matter, substituted "Except as provided in subsections (c), (d), (e), and (f), in" for "In"; and added subsec. (f).


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1415, as 38 USCS § 3015, and amended the references in this section to reflect the redesignations made by § 5(c)(1) of such Act (see Table III preceding 38 USCS § 101).

1992. Act Oct. 29, 1992, § 301(a), (c) (effective 4/1/93, as provided by § 301(e) of such Act, which appears as 10 USCS § 2131 note), as amended by § 12009(d)(1) of Act Aug. 10, 1993
Section 307(a), (b) of such Act (effective as if enacted on 6/30/85 and applicable to the payment of educational assistance for education or training pursued on or after 9/1/93, as provided by § 307(c) of such Act, as amended by § 12009(d)(2) of Act Aug. 10, 1993 (effective as if included in the enactment of Act Oct. 29, 1992, as provided by § 12009(d)(3) of the 1993 Act), in subsecs. (a) and (b), substituted "(f), and (g)" for "and (f)"; redesignated subsecs. (c)-(f) as (d)-(g), respectively, and added a new subsec. (c); and, in subsec. (d) as redesignated, substituted "shall provide a percentage increase in the monthly rates payable under subsections (a)(1) and (b)(1) of this section" for "may continue to pay, in lieu of the rates payable under subsection (a)(1) or (b)(1) of this section, the monthly rates payable under paragraph (1) of this subsection and may provide a percentage increase in such rates", and redesignated para. (3) as new para. (2), and in such paragraph as so redesignated, substituted "shall" for "may" wherever appearing.

Section 307(a), (b) of such Act (effective as if enacted on 6/30/85 and applicable to the payment of educational assistance for education or training pursued on or after 9/1/93, as provided by § 307(c) of such Act, as amended by § 12009(d)(2) of Act Aug. 10, 1993 (effective as if included in the enactment of Act Oct. 29, 1992, as provided by § 12009(d)(3) of the 1993 Act), in subsecs. (a) and (b), substituted "(f), and (g)" for "and (f)"; redesignated subsecs. (c)-(f) as (d)-(g), respectively, and added a new subsec. (c); and, in subsec. (d) as redesignated, substituted "shall provide a percentage increase in the monthly rates payable under subsections (a)(1) and (b)(1) of this section" for "may continue to pay, in lieu of the rates payable under subsection (a)(1) or (b)(1) of this section, the monthly rates payable under paragraph (1) of this subsection and may provide a percentage increase in such rates", and redesignated para. (3) as new para. (2), and in such paragraph as so redesignated, substituted "shall" for "may" wherever appearing.

1993. Act Aug. 10, 1993, in subsec. (g), deleted para. (1), which read: "With respect to the fiscal year beginning on October 1, 1993, the Secretary shall provide a percentage increase in the monthly rates payable under subsections (a)(1) and (b)(1) of this section equal to the percentage by which the Consumer Price Index (all items, United States city average, published by the Bureau of Labor Statistics) for the 12-month period ending June 30, 1993, exceeds such Consumer Price Index for the 12-month period ending June 30, 1992."; deleted "(2)" preceding "With respect to any fiscal year beginning on or after October 1, 1994","; redesignated subparas. (A) and (B) as new paras. (1) and (2), respectively, and in para. (2) as redesignated, substituted "paragraph (1)" for "subparagraph (A)".

Such Act further (applicable as if included in the enactment of Act Oct. 29, 1992, as provided by § 12009(d)(3) of such Act, which appears as a note to this section), amended the directory language of Act Oct. 29, 1992, without affecting the text of this section.


1997. Act Nov. 21, 1997, in subsec. (e)(1), designated the existing provisions as subpara. (A) and, in subpara. (A) as so designated, substituted "Except as provided in in subparagraph (B) of this paragraph and subject to paragraph (2)" for "Subject to paragraph (2)", and added subpara. (B).

1998. Act June 9, 1998 (effective and applicable as provided by § 8203(a)(4) of such Act, which appears as a note to this section), in subsec. (a), in the introductory matter, deleted "subsections (b), (c), (d), (e), (f), and (g) of" preceding "this section" and, in para. (1), substituted "$528 (as increased from time to time under subsection (g))" for "$400"; in subsec. (b), in the introductory matter, substituted "in" for "Except as provided in subsections (c), (d), (e), (f), and (g) in" and inserted "(except as provided in the succeeding subsections of this section)"; and, in para. (1), substituted "$429 (as increased from time to time under subsection (g))" for "$325"; and, in subsec. (g), in the introductory matter, substituted ", the Secretary shall provide a percentage increase (rounded to the nearest dollar) in the rates payable under subsections (a)(1) and (b)(1)" for "beginning on or after October 1, 1994, the Secretary shall provide a percentage increase (rounded to the nearest dollar) in the rates payable under subsections (a)(1) and (b)(1)"; and inserted ", at the time the individual first becomes a member of the Armed Forces," and substituted "$950 per month" for "$400 per month, in the case of an individual who first became a member of the Armed Forces before"
November 29, 1989, or $700 per month, in the case of an individual who first became a member of the Armed Forces on or after that date.

Such Act further, in subsec. (d), designated the existing provisions as para. (1) and added para. (2).

2000. Act Oct. 30, 2000, in subsecs. (a)(1) and (b)(1), deleted "subsection (g)" following "under"; redesignated subsec. (g) as subsec. (h); and inserted new subsec. (g).

Act Nov. 1, 2000, in subsec. (a), in the introductory matter, inserted "in the case of an individual entitled to an educational assistance allowance under this chapter whose obligated period of active duty on which such entitlement is based is three years,"; in subsec. (b), in the introductory matter, substituted "whose obligated period of active duty on which such entitlement is based is two years," for "and whose initial obligated period of active duty is two years,"; and, in subsec. (c)(2), substituted subparas. (A) and (B) for ones which read:

"(A) whose initial obligated period of active duty is less than three years;

"(B) who, beginning on the date of the commencement of the person's initial obligated period of such duty, serves a continuous period of active duty of not less than three years; and"

Such Act further (effective and applicable as provided by § 101(b) of such Act, which appears as a note to this section), in subsec. (a)(1), substituted "$650" for "$528"; and, in subsec. (b)(1), substituted "$528" for "$429".

Such Act further (effective 5/1/2001, as provided by § 105(c) of such Act, which appears as 28 USCS § 3011 note) purported to amend subsecs. (a)(1) and (b)(1) by substituting "subsection (h)" for "subsection (g)"; however, these amendments could not be executed because "subsection (g)" did not appear in such subsections.

Such Act further (effective 5/1/2001, as provided by § 105(c) of such Act, which appears as 28 USCS § 3011 note), redesignated subsec. (g) as subsec. (h); and inserted new subsec. (g).

2001. Act June 5, 2001 (effective as if enacted on 11/1/2000, immediately after enactment of Act Nov. 1, 2000, P. L. 106-419, as provided by § 7(b)(3) of the 2001 Act, which appears as 38 USCS § 3014 note), in subsecs. (a)(1) and (b)(1), inserted "subsection (h)"; and deleted subsec. (h), as redesignated by Act Nov. 1, 2000, which read:

"(h) In the case of an individual who has been paid a basic educational assistance allowance under section 3014(b) of this title, the rate of the basic educational assistance allowance applicable to the individual under this section shall be the rate otherwise applicable to the individual under this section reduced by an amount equal to--

"(1) the aggregate amount of such allowances paid the individual under such section 3014(b); divided by

"(2) 36."

Such Act further (effective as if included in the enactment of § 105 of Act Nov. 1, 2000, P. L. 106-419, as provided by § 7(c)(4) of the 2001 Act, which appears as 38 USCS § 3011 note), in subsec. (g), in the introductory matter, inserted "effective as of the first day of the enrollment period following receipt of such contributions from such individual by the Secretary concerned,"; and in para. (1), substituted "$5" for "$1", substituted "$20" for "$4", and inserted "of this title".

Act Dec. 27, 2001, in subsec. (a), substituted para. (1) for one which read: "(1) at the monthly rate of $650 (as increased from time to time under subsection (h)) for an approved program of education pursued on a full-time basis; or"; and, in subsec. (b), substituted para. (1) for one which read: "(1) at the monthly rate of $528 (as increased from time to time under subsection (h)) for an approved program of education pursued on a full-time basis; or".

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2003. Act Dec. 16, 2003, in subsec. (h), designated the existing provisions as para. (1) and, in such paragraph, in the introductory matter, deleted "(rounded to the nearest dollar)" following "increase", redesignated former paras. (1) and (2) as subparas. (A) and (B), respectively, and, in subpara. (B) as redesignated, substituted "subparagraph (A)" for "paragraph (1)"", and added new para. (2).

Other provisions:

Accounts from which payments made; effect of 1992 amendments. For provision that amendments made to subsecs. (a)(1), (b)(1), and (f) (now (g)) of this section by § 301(a), (c) of Act Oct. 29, 1992, P. L. 102-568, shall not be construed to change the account from which payment is made for that portion of a payment under 38 USCS §§ 3001 et seq. which is a Montgomery GI bill rate increase and a title III benefit is paid, see § 301(e)(2) of such Act, which appears as 10 USCS § 2131 note.

Limitation of cost-of-living adjustments for Montgomery GI Bill benefits. Act Aug. 10, 1993, P. L. 103-66, Title XII, § 12009(c), 107 Stat. 416, provides: "The fiscal year 1995 cost-of-living adjustments in the rates of educational assistance payable under chapter 30 of title 38, United States Code [38 USCS §§ 3001 et seq.], and under chapter 106 of title 10, United States Code [10 USCS §§ 2131 et seq.], shall be the percentage equal to 50 percent of the percentage by which such assistance would be increased under section 3015(g) of title 38, and under [former] section 2131(b)(2) of title 10, United States Code, respectively, but for this section.".


Effective date and application of June 9, 1998 amendments. Act June 9, 1998, P. L. 105-178, Title VIII, Subtitle B, § 8203(a)(4), 112 Stat. 493, provides: "The amendments made by this subsection [amending subsecs. (a), (b), and (g) of this section] shall take effect on October 1, 1998, and shall apply with respect to educational assistance allowances paid for months after September 1998. However, no adjustment in rates of educational assistance shall be made under subsection (g) of section 3015 of title 38, United States Code, as amended by paragraph (2), for fiscal year 1999.".

Effective date and application of amendment made by § 565(a) of Act Oct. 17, 1998. Act Oct. 17, 1998, P. L. 105-261, Div A, Title V, Subtitle G, § 565(b), 112 Stat. 2029, provides: "The amendments made by subsection (a) [amending subsec. (d) of this section] shall take effect on October 1, 1998, and shall apply with respect to individuals who first become members of the Armed Forces on or after that date.".

Effective date and application of amendment made by § 101 of Act Nov. 1, 2000. Act Nov. 1, 2000, P. L. 106-419, Title I, Subtitle A, § 101(b), 114 Stat. 1824, provides: "The amendments made by subsection (a) shall take effect on November 1, 2000, and shall apply with respect to educational assistance allowances paid under chapter 30 of title 38, United States Code, for months after October 2000.".

No CPI adjustment for fiscal years 2003 and 2004. Act Dec. 27, 2001, P. L. 107-103, Title I, § 101(b), 115 Stat. 978, provides: "No adjustment in rates of educational assistance shall be made under section 3015(h) of title 38, United States Code, for fiscal years 2003 and 2004.".

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References

This section is referred to in 10 USCS § 2006; 38 USCS §§ 3018A, 3032, 3035; 42 USCS § 12603

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Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 135

There is no indication in 38 USCS § 3015 that amount of educational assistance allowance that is actually paid is determinative of duration of veteran's education-benefits entitlement under 38 USCS § 3013, and decision of Board of Veterans' Appeals that veteran is not entitled to payment of educational assistance allowance for any period of time after 36 months of education-benefits eligibility had expired is affirmed. Breeden v West (2000) 13 Vet App 398, 2000 US App Vet Claims LEXIS 206

§ 3016. Inservice enrollment in a program of education

(a) A member of the Armed Forces who--

(1) first becomes a member or first enters on active duty as a member of the Armed Forces after June 30, 1985, and does not make an election under section 3011(c)(1) or section 3012(d)(1) [38 USCS §§ 3011(c)(1), 3012(d)(1)];

(2) completes at least two years of service on active duty after such date;

(3) after such service, continues on active duty or in the Selected Reserve without a break in service (except as described in section 3012(b)(2) of this title [38 USCS § 3012(b)(2)]); and

(4) but for section 3011(a)(1)(A)(i)(I) or 3012(a)(1)(A)(ii) of this title [38 USCS § 3011(a)(1)(A)(i)(I) or 3012(a)(1)(A)(ii)] would be eligible for basic educational assistance,

may receive educational assistance under this chapter [38 USCS §§ 3001 et seq.] for enrollment in an approved program of education while continuing to perform the duty described in section 3011(a)(1)(A)(i)(I) or 3012(a)(1)(A)(ii) of this title [38 USCS § 3011(a)(1)(A)(i)(I) or 3012(a)(1)(A)(ii)].

(b) A member of the Armed Forces who--

(1) as of December 31, 1989, is eligible for educational assistance benefits under chapter 34 of this title [38 USCS §§ 3451 et seq.];

(2) after June 30, 1985, has served the two years required by section 3012(a)(1)(B)(i) [38 USCS § 3012(a)(1)(B)(i)]; and

(3) but for section 3012(a)(1)(B)(ii) of this title [38 USCS § 3012(a)(1)(B)(ii)] would be eligible for basic educational assistance,

may, after December 31, 1989, receive educational assistance under this chapter [38 USCS §§ 3001 et seq.] for enrollment in an approved program of education while continuing to perform the duty described in section 3012(a)(1)(B)(ii) of this title [38 USCS § 3012(a)(1)(B)(ii)].

(c) A member of the Armed Forces who--

(1) completes at least two years of service on active duty after June 30, 1985;

(2) after such service continues on active duty without a break in service; and

(3) but for section 3018(b)(3)(A) of this title [38 USCS § 3018(b)(3)(A)] would be entitled to basic educational assistance under this chapter [38 USCS §§ 3001 et seq.],
may receive such assistance for enrollment in an approved program of education while continuing to perform the service described in section 3018(b)(2) of this title [38 USCS § 3018(b)(2)].

Amendments:
1986. Act Oct. 28, 1986, substituted this section for one which read: "A member of the Armed Forces who has completed at least two years of service on active duty after June 30, 1985, has continued on active duty or in the Selected Reserve without a break in service (except as described in section 1412(b)(2) of this title), and who but for section 1411(a)(1) or 1412(a)(1) of this title would be eligible for basic educational assistance may receive educational assistance under this chapter for enrollment in an approved program of education while continuing to perform the duty described in section 1411(a)(1) or 1412(a)(1) of this title."


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1416, as 38 USCS § 3016, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

§ 3017. Death benefit

(a) (1) In the event of the service-connected death of any individual--
   (A) who--
      (i) is entitled to basic educational assistance under this chapter [38 USCS §§ 3001 et seq.]; or
      (ii) is on active duty in the Armed Forces and but for clause (1)(A)(i) or clause (2) of section 3011(a) [38 USCS § 3011(a)] or clause (1)(A)(i) or (ii) or clause (2) of section 3012(a) of this title [38 USCS § 3012(a)] would be eligible for such basic educational assistance; and
   (B) who dies while on active duty or within one year after discharge or release from active duty,

   the Secretary shall make a payment, subject to paragraph (2)(B) of this subsection, in the amount described in subsection (b) of this section to the person or persons described in paragraph (2)(A) of this subsection.

(2) (A) The payment referred to in paragraph (1) of this subsection shall be made to the person or persons first listed below who is surviving on the date of such individual's death:
      (i) The beneficiary or beneficiaries designated by such individual under the individual's Servicemembers' Group Life Insurance policy.
      (ii) The surviving spouse of the individual.
      (iii) The surviving child or children of the individual, in equal shares.
      (iv) The surviving parent or parents of the individual, in equal shares.
   (B) If no such person survives such individual, no payment shall be made under this section.

(b) The amount of any payment made under this section shall be equal to--
   (1) the total of--
(A) the amount reduced from the individual's basic pay under section 3011(b),
3012(c), 3018(c), 3018A(b), 3018B(b), 3018C(b), or 3018C(e) of this title [38
USCS § 3011(b), 3012(c), 3018(c), 3018A(b), 3018B(b), 3018C(b), or 3018C(e)];
(B) the amount reduced from the individual's retired pay under section 3018C(e)
of this title [38 USCS § 3018C(e)];
(C) the amount collected from the individual by the Secretary under section
3018B(b), 3018C(b), or 3018C(e) of this title [38 USCS § 3018B(b), 3018C(b), or
3018C(e)]; and
(D) the amount of any contributions made by the individual under section 3011(e)
or 3012(f) of this title [38 USCS § 3011(e) or 3012(f)], less
(2) the total of--
(A) the amount of educational assistance that has been paid to the individual
under this chapter [38 USCS §§ 3001 et seq.] before the payment is made under
this section; and
(B) the amount of accrued benefits paid or payable with respect to such individual
in connection with this chapter [38 USCS §§ 3001 et seq.].

(c) A payment under this section shall be considered to be a benefit under this title and,
for purposes of section 3035(b)(1) [38 USCS § 3035(b)(1)], it shall be considered to be
an entitlement earned under this subchapter [38 USCS §§ 3011 et seq.].

Effective date of section:
This section took effect as of July 1, 1985, pursuant to § 101(c) of Act Nov. 18, 1988, P. L.
100-689, which appears as a note to this section.

Amendments:
(2)(A) of section 1411(a) or clause (1)(A)(i) or (ii) or clause (2) of section 1412(a) of this title"
for "but for section 1411(a)(1)(A)(i) or division (i) or (ii) of section 1412(a)(1)(A) of this title".
Such Act further, in subsec. (a)(1)(B), substituted "Secretary" for "Administrator".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1417, as 38 USCS §
3017, and amended the references in this section to reflect the redesignations made by § 5(a)
of such Act (see Table III preceding 38 USCS § 101).
discharge or release from active duty".
"Servicemen's".
preceding "of section 3011(a)".
2001. Act June 5, 2001 (effective as of 5/1/2001, as provided by § 7(d)(2) of such Act, which
appears as a note to this section), in subsec. (b), substituted para. (1) for one which read: 
"(1) the amount reduced from the individual's pay under section 3011(b), 3012(c), or 3018(c) of
this title, less".
2006. Act June 15, 2006, in subsec. (b)(1)(D), substituted "3011(e)" for "3011(c)".

Other provisions:
Effective date of Nov. 18, 1988 amendments. Act Nov. 18, 1988, P. L. 100-689, Title I, Part
A, § 101(c), 102 Stat. 4162, provides: "The amendments made by this section [adding this
§ 3018. Opportunity for certain active-duty personnel to withdraw election not to enroll

(a) Notwithstanding any other provision of this chapter [38 USCS §§ 3001 et seq.], during the period beginning December 1, 1988, and ending June 30, 1989 (hereinafter in this section referred to as the "open period"), an individual who--

(1) first became a member of the Armed Forces or first entered on active duty as a member of the Armed Forces during the period beginning July 1, 1985, and ending June 30, 1988;

(2) has continuously served on active duty without a break in service since the date the individual first became such a member or first entered on active duty as such a member; and

(3) is serving on active duty during the open period,

shall have the opportunity, in accordance with this section and on such form as the Secretary of Defense shall prescribe, to withdraw an election made under section 3011(c)(1) or 3012(d)(1) of this title [38 USCS § 3011(c)(1) or 3012(d)(1)] not to receive educational assistance under this chapter [38 USCS §§ 3001 et seq.].

(b) An individual described in clauses (1) through (3) of subsection (a) of this section who made an election under section 3011(c)(1) or 3012(d)(1) of this title [38 USCS § 3011(c)(1) or 3012(d)(1)] and who--

(1) while serving on active duty during the open period, makes a withdrawal of such an election;

(2) continues to serve the period of service which, at the beginning of the open period, such individual was obligated to serve;

(3) (A) serves the obligated period of service described in clause (2) of this subsection;

(B) before completing such obligated period of service, is discharged or released from active duty for (i) a service-connected disability, (ii) a medical condition which preexisted such service and which the Secretary determines is not service connected, (iii) hardship, or (iv) a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of each military department in accordance with regulations prescribed by the Secretary of Defense (or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service of the Navy); or

(C) before completing such obligated period of service, is (i) discharged or released from active duty for the convenience of the Government after completing not less than 20 months of such period of service, if such period was less than three years, or 30 months, if such period was at least three years, or (ii)
involuntarily discharged or released from active duty for the convenience of the Government as a result of a reduction in force, as determined by the Secretary concerned in accordance with regulations prescribed by the Secretary of Defense; (4) before applying for benefits under this section--
(A) completes the requirements of a secondary school diploma (or equivalency certificate); or
(B) successfully completes (or otherwise receives academic credit for) the equivalent of 12 semester hours in a program of education leading to a standard college degree; and
(5) upon completion of such obligated period of service--
(A) is discharged from service with an honorable discharge, is placed on the retired list, is transferred to the Fleet Reserve or Fleet Marine Corps Reserve, or is placed on the temporary disability retired list;
(B) continues on active duty; or
(C) is released from active duty for further service in a reserve component of the Armed Forces after service on active duty characterized by the Secretary concerned as honorable service,
is entitled to basic educational assistance under this chapter [38 USCS §§ 3001 et seq.].

(c) The basic pay of an individual withdrawing, under subsection (b)(1) of this section, an election under section 3011(c)(1) or 3012(d)(1) of this title [38 USCS § 3011(c)(1) or 3012(d)(1)] shall be reduced by--
(1) $1,200; or
(2) in the case of an individual described in clause (B) or (C) of subsection (b)(3) of this section whose discharge or release from active duty prevents the reduction of the basic pay of such individual by $1,200, an amount less than $1,200.

(d) A withdrawal under subsection (b)(1) of this section is irrevocable.

Amendments:

1991. Act March 22, 1991, in subsec. (b)(4), substituted "(i)" for a comma, and inserted ", or (ii) has successfully completed the equivalent of 12 semester hours in a program of education leading to a standard college degree".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1418, as 38 USCS § 3018, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Act Aug. 14, 1991 (effective Dec. 18, 1989 as provided by § 506(b) of such Act), amended the directory language of Act Dec. 18, 1988, without affecting the text of this section.

1992. Act Oct. 29, 1992 (effective as if enacted on 12/1/88, as provided by § 309(b) of such Act, which appears as a note to this section), in subsec. (b)(3), in subpara. (B), substituted "(iii)" for "or (iii)", and inserted ", or (iv) a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of each military department in accordance with regulations prescribed by the Secretary of Defense (or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service of the Navy)".

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1998. Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 203(b) of such Act, which appears as 38 USCS § 3011 note), in subsec. (b)(4)(ii), substituted "successfully completed (or otherwise received academic credit for)" for "successfully completed".

2000. Act Nov. 1, 2000, in subsec. (b), substituted para. (4) for one which read: "(4) before completing such obligated period of service (i) has completed the requirements of a secondary school diploma (or an equivalency certificate), or (ii) has successfully completed (or otherwise received academic credit for) the equivalent of 12 semester hours in a program of education leading to a standard college degree; and".

2002. Act Nov. 25, 2002 (effective on 3/1/2003 pursuant to § 1704(g) of such Act, which appears as 10 USCS § 101 note), in subsec. (b)(3)(B)(iv), substituted "of Homeland Security" for "of Transportation".

Other provisions:


Cross References
This section is referred to in 38 USCS §§ 3013, 3015, 3016, 3017, 3021

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77 Am Jur 2d, Veterans and Veterans' Laws § 126

§ 3018A. Opportunity for certain active-duty personnel to enroll before being involuntarily separated from service

(a) Notwithstanding any other provision of law, an individual who--
(1) after February 2, 1991, is involuntarily separated (as such term is defined in section 1141 of title 10 [10 USCS § 1141]) with an honorable discharge;
(2) before applying for benefits under this section, has completed the requirements of a secondary school diploma (or equivalency certificate) or has successfully completed (or otherwise received academic credit for) the equivalent of 12 semester hours in a program of education leading to a standard college degree;
(3) in the case of any individual who has made an election under section 3011(c)(1) or 3012(d)(1) of this title [38 USCS § 3011(c)(1) or 3012(d)(1)], withdraws such election before such separation pursuant to procedures which the Secretary of each military department shall provide in accordance with regulations prescribed by the Secretary of Defense for the purpose of carrying out this section or which the Secretary of Homeland Security shall provide for such purpose with respect to the Coast Guard when it is not operating as a service in the Navy;
(4) in the case of any person enrolled in the educational benefits program provided by chapter 32 of this title [38 USCS §§ 3201 et seq.] makes an irrevocable election, pursuant to procedures referred to in paragraph (3), before such separation to receive benefits under this section in lieu of benefits under such chapter 32 [38 USCS §§ 3201 et seq.]; and
(5) before such separation elects to receive assistance under this section pursuant to procedures referred to in paragraph (3),
is entitled to basic educational assistance under this chapter [38 USCS §§ 3001 et seq.].

(b) The basic pay of an individual described in subsection (a) shall be reduced by $1,200.

(c) A withdrawal referred to in subsection (a)(3) is irrevocable.

(d) (1) Except as provided in paragraph (3), an individual who is enrolled in the educational benefits program provided by chapter 32 of this title [38 USCS §§ 3201 et seq.] and who makes the election described in subsection (a)(4) shall be disenrolled from such chapter 32 program as of the date of such election.

   (2) For each individual who is disenrolled from such program, the Secretary shall refund--

   (A) as provided in section 3223(b) of this title [38 USCS § 3223(b)], to the individual the unused contributions made by the individual to the Post-Vietnam Era Veterans Education Account established pursuant to section 3222(a) of this title [38 USCS § 3222(a)]; and

   (B) to the Secretary of Defense the unused contributions (other than contributions made under section 3222(c) of this title [38 USCS § 3222(c)]) made by such Secretary to the Account on behalf of such individual.

(3) Any contribution made by the Secretary of Defense to the Post-Vietnam Era Veterans Education Account pursuant to subsection (c) of section 3222 of this title [38 USCS § 3222] on behalf of any individual referred to in paragraph (1) shall remain in such Account to make payments of benefits to such individual under section 3015(f) of this title [38 USCS § 3015(f)].

Amendments:


   Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1418A, as 38 USCS § 3018A, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


   Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 203(b) of such Act, which appears as 38 USCS § 3011 note), in subsec. (a)(2), substituted "successfully completed (or otherwise received academic credit for)" for "successfully completed".

2002. Act Nov. 25, 2002 (effective on 3/1/2003 pursuant to § 1704(g) of such Act, which appears as 10 USCS § 101 note), in subsec. (a)(3), substituted "of Homeland Security" for "of Transportation".

2006. Act June 15, 2006, in subsec. (a), in paras. (4) and (5), deleted "of this subsection" following "paragraph (3)"; in subsec. (b), deleted "of this section" following "subsection (a)"; in subsec. (c), deleted "of this section" following "subsection (a)(3)"; in subsec. (d), in para. (1), deleted "of this subsection" following "paragraph (3)" and deleted "of this subsection" following "subsection (a)(4)"; and, in para. (3), deleted "of this subsection" following "paragraph (1)" and substituted "of this title" for "of this chapter".

Cross References

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§ 3018B. Opportunity for certain persons to enroll

(a) Notwithstanding any other provision of law--

(1) the Secretary of Defense shall, subject to the availability of appropriations, allow an individual who--

(A) is separated from the active military, naval, or air service with an honorable discharge and receives voluntary separation incentives under section 1174a or 1175 of title 10 [10 USCS § 1174a or 1175];

(B) before applying for benefits under this section, has completed the requirements of a secondary school diploma (or equivalency certificate) or has successfully completed (or otherwise received academic credit for) the equivalent of 12 semester hours in a program of education leading to a standard college degree;

(C) in the case of any individual who has made an election under section 3011(c)(1) or 3012(d)(1) of this title [38 USCS § 3011(c)(1) or 3012(d)(1)], withdraws such election before such separation pursuant to procedures which the Secretary of each military department shall provide in accordance with regulations prescribed by the Secretary of Defense for the purpose of carrying out this section or which the Secretary of Homeland Security shall provide for such purpose with respect to the Coast Guard when it is not operating as service in the Navy;

(D) in the case of any person enrolled in the educational benefits program provided by chapter 32 of this title [38 USCS §§ 3201 et seq.] makes an irrevocable election, pursuant to procedures referred to in subparagraph (C) of this paragraph, before such separation to receive benefits under this section in lieu of benefits under such chapter 32 [38 USCS §§ 3201 et seq.]; and

(E) before such separation elects to receive assistance under this section pursuant to procedures referred to in subparagraph (C) of this paragraph; or

(2) the Secretary, in consultation with the Secretary of Defense, shall, subject to the availability of appropriations, allow an individual who--

(A) separated before October 23, 1992, from the active military, naval, or air service with an honorable discharge and received or is receiving voluntary separation incentives under section 1174a or 1175 of title 10 [10 USCS § 1174a or 1175];

(B) before applying for benefits under this section, has completed the requirements of a secondary school diploma (or equivalency certificate) or has successfully completed (or otherwise received academic credit for) the equivalent of 12 semester hours in a program of education leading to a standard college degree;

(C) in the case of any individual who has made an election under section 3011(c)(1) or 3012(d)(1) of this title [38 USCS § 3011(c)(1) or 3012(d)(1)],
withdraws such election before making an election under this paragraph pursuant to procedures which the Secretary shall provide, in consultation with the Secretary of Defense and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as service in the Navy, which shall be similar to the regulations prescribed under paragraph (1)(C) of this subsection; (D) in the case of any person enrolled in the educational benefits program provided by chapter 32 [38 USCS §§ 3201 et seq.] of this title makes an irrevocable election, pursuant to procedures referred to in subparagraph (C) of this paragraph, before making an election under this paragraph to receive benefits under this section in lieu of benefits under such chapter 32 [38 USCS §§ 3201 et seq.]; and (E) before October 23, 1993, elects to receive assistance under this section pursuant to procedures referred to in subparagraph (C) of this paragraph, to elect to become entitled to basic education assistance under this chapter [38 USCS §§ 3001 et seq.].

(b)

(1) The basic pay or voluntary separation incentives of an individual who makes an election under subsection (a)(1) to become entitled to basic education assistance under this chapter [38 USCS §§ 3001 et seq.] shall be reduced by $1,200.

(2) The Secretary shall collect $1,200 from an individual who makes an election under subsection (a)(2) to become entitled to basic education assistance under this chapter [38 USCS §§ 3001 et seq.], which shall be paid into the Treasury of the United States as miscellaneous receipts.

(c) A withdrawal referred to in subsection (a)(1)(C) or (a)(2)(C) of this section is irrevocable.

(d)

(1) Except as provided in paragraph (3) of this subsection, an individual who is enrolled in the educational benefits program provided by chapter 32 of this title [38 USCS §§ 3201 et seq.] and who makes the election described in subsection (a)(1)(D) or (a)(2)(D) of this section shall be disenrolled from such chapter 32 [38 USCS §§ 3201 et seq.] program as of the date of such election.

(2) For each individual who is disenrolled from such program, the Secretary shall refund--

(A) as provided in section 3223(b) of this title [38 USCS § 3223(b)], to the individual the unused contributions made by the individual to the Post-Vietnam Era Veterans Education Account established pursuant to section 3222(a) of this title [38 USCS § 3222(a)]; and

(B) to the Secretary of Defense the unused contributions (other than contributions made under section 3222(c) of this title [38 USCS § 3222(c)]) made by such Secretary to the Account on behalf of such individual.

(3) Any contribution made by the Secretary of Defense to the Post-Vietnam Era Veterans Education Account pursuant to subsection (c) of section 3222 of this title [38 USCS § 3222] on behalf of any individual referred to in paragraph (1) of this subsection shall remain in such account to make payments of benefits to such individual under section 3015(f) of this title [38 USCS § 3015(f)].
Amendments:

1994. Act Nov. 2, 1994, in subsec. (a)(2)(A), substituted "October 29, 1992," for "the date of enactment of this section"; and, in subsec. (d), in para. (1), substituted "(a)(2)(D) of this section" for "(a)(2)(D) of this subsection", and, in para. (3), substituted "such account" for "such Account", substituted "section 3015(f)" for "section 3015(e)" and substituted "this title" for "this chapter" preceding the concluding period.

1998. Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 203(b) of such Act, which appears as 38 USCS § 3011 note), in subsec. (a), in paras. (1)(B) and (2)(B), substituted "successfully completed (or otherwise received academic credit for)" for "successfully completed".

Such Act further, in subsec. (a)(2)(E), substituted "before October 23, 1993," for "before the one-year period beginning on the date of enactment of this section, ".

2002. Act Nov. 25, 2002 (effective on 3/1/2003 pursuant to § 1704(g) of such Act, which appears as 10 USCS § 101 note), in subsec. (a), in paras. (1)(C) and (2)(C), substituted "of Homeland Security" for "of Transportation".

Cross References

This section is referred to in 38 USCS §§ 3013, 3035

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§ 3018C. Opportunity for certain VEAP participants to enroll

Discussion and Analysis in the Veterans Benefits Manual

(a) Notwithstanding any other provision of law, an individual who--
(1) is a participant on October 9, 1996 in the educational benefits program provided by chapter 32 of this title [38 USCS §§ 3201 et seq.];
(2) is serving on active duty (excluding the periods referred to in section 3202(1)(C) of this title [38 USCS § 3202(1)(C)]) on such date;
(3) before applying for benefits under this section, has completed the requirements of a secondary school diploma (or equivalency certificate) or has successfully completed (or otherwise received academic credit for) the equivalent of 12 semester hours in a program of education leading to a standard college degree;
(4) if discharged or released from active duty after the date on which the individual makes the election described in paragraph (5), is discharged or released therefrom with an honorable discharge; and
(5) during the one-year period beginning on October 9, 1996, makes an irrevocable election to receive benefits under this section in lieu of benefits under chapter 32 of this title [38 USCS §§ 3201 et seq.], pursuant to procedures which the Secretary of each military department shall provide in accordance with regulations prescribed by the Secretary of Defense for the purpose of carrying out this section or which the Secretary of Homeland Security shall provide for such purpose with respect to the Coast Guard when it is not operating as a service in the Navy;

may elect to become entitled to basic educational assistance under this chapter [38 USCS §§ 3001 et seq.].

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(b) With respect to an individual who makes an election under subsection (a) to become entitled to basic education assistance under this chapter [38 USCS §§ 3001 et seq.]-

(1) the basic pay of the individual shall be reduced (in a manner determined by the Secretary of Defense) until the total amount by which such basic pay is reduced is $1,200; or

(2) to the extent that basic pay is not so reduced before the individual's discharge or release from active duty as specified in subsection (a)(4), the Secretary shall collect from the individual an amount equal to the difference between $1,200 and the total amount of reductions under paragraph (1), which shall be paid into the Treasury of the United States as miscellaneous receipts.

(c) (1) Except as provided in paragraph (3), an individual who is enrolled in the educational benefits program provided by chapter 32 of this title [38 USCS §§ 3201 et seq.] and who makes the election described in subsection (a)(5) shall be disenrolled from such chapter 32 program as of the date of such election.

(2) For each individual who is disenrolled from such program, the Secretary shall refund--

(A) to the individual, as provided in section 3223(b) of this title [38 USCS § 3223(b)] and subject to subsection (b)(2) of this section, the unused contributions made by the individual to the Post-Vietnam Era Veterans Education Account established pursuant to section 3222(a) of this title [38 USCS § 3222(a)]; and

(B) to the Secretary of Defense the unused contributions (other than contributions made under section 3222(c) of this title [38 USCS § 3222(c)]) made by such Secretary to the Account on behalf of such individual.

(3) Any contribution made by the Secretary of Defense to the Post-Vietnam Era Veterans Education Account pursuant to subsection (c) of section 3222 of this title [38 USCS § 3222] on behalf of any individual referred to in paragraph (1) shall remain in such account to make payments of benefits to such individual under section 3015(f) of this title [38 USCS § 3015(f)].

(d) The procedures provided in regulations referred to in subsection (a) shall provide for notice of the requirements of subparagraphs (B), (C), and (D) of section 3011(a)(3) [38 USCS § 3011(a)(3)] and of subparagraph (A) of section 3012(a)(3) of this title [38 USCS § 3012(a)(3)]. Receipt of such notice shall be acknowledged in writing.

(e) (1) A qualified individual (described in paragraph (2)) may make an irrevocable election under this subsection, during the one-year period beginning on the date of the enactment of this subsection [enacted Nov. 1, 2000], to become entitled to basic educational assistance under this chapter [38 USCS §§ 3001 et seq.]. Such an election shall be made in the same manner as elections made under subsection (a)(5).

(2) A qualified individual referred to in paragraph (1) is an individual who meets each of the following requirements:

(A) The individual was a participant in the educational benefits program under chapter 32 of this title [38 USCS §§ 3201 et seq.] on or before October 9, 1996.

(B) The individual has continuously served on active duty since October 9, 1996 (excluding the periods referred to in section 3202(1)(C) of this title [38 USCS § 3202(1)(C)]), through at least April 1, 2000.

(C) The individual meets the requirements of subsection (a)(3).
(D) The individual, when discharged or released from active duty, is discharged or released therefrom with an honorable discharge.

(3) (A) Subject to the succeeding provisions of this paragraph, with respect to a qualified individual who makes an election under paragraph (1) to become entitled to basic education assistance under this chapter [38 USCS §§ 3001 et seq.].--

(i) the basic pay of the qualified individual shall be reduced (in a manner determined by the Secretary concerned) until the total amount by which such basic pay is reduced is $2,700; and

(ii) to the extent that basic pay is not so reduced before the qualified individual's discharge or release from active duty as specified in subsection (a)(4), at the election of the qualified individual--

(I) the Secretary concerned shall collect from the qualified individual; or

(II) the Secretary concerned shall reduce the retired or retainer pay of the qualified individual by an amount equal to the difference between $2,700 and the total amount of reductions under clause (i), which shall be paid into the Treasury of the United States as miscellaneous receipts.

(B) (i) The Secretary concerned shall provide for an 18-month period, beginning on the date the qualified individual makes an election under paragraph (1), for the qualified individual to pay that Secretary the amount due under subparagraph (A).

(ii) Nothing in clause (i) shall be construed as modifying the period of eligibility for and entitlement to basic education assistance under this chapter [38 USCS §§ 3001 et seq.] applicable under section 3031 of this title [38 USCS § 3031].

(C) The provisions of subsection (c) shall apply to qualified individuals making elections under this subsection in the same manner as they applied to individuals making elections under subsection (a)(5).

(4) With respect to qualified individuals referred to in paragraph (3)(A)(ii), no amount of educational assistance allowance under this chapter [38 USCS §§ 3001 et seq.] shall be paid to the qualified individual until the earlier of the date on which--

(A) the Secretary concerned collects the applicable amount under subclause (I) of such paragraph; or

(B) the retired or retainer pay of the qualified individual is first reduced under subclause (II) of such paragraph.

(5) The Secretary, in conjunction with the Secretary of Defense, shall provide for notice to participants in the educational benefits program under chapter 32 of this title [38 USCS §§ 3201 et seq.] of the opportunity under this subsection to elect to become entitled to basic educational assistance under this chapter [38 USCS §§ 3001 et seq.].

Explanatory notes:

Section 1 of Act Oct. 30, 2000, P. L. 106-398, enacted into law § 1601 of H.R. 5408 (114 Stat. 1654A-357), as introduced on Oct. 6, 2000, which amended this section. However, pursuant to § 104(c)(1) of Act Nov. 1, 2000, P. L. 106-419, as of the enactment of Act Nov. 1, 2000, P. L. 106-419, the amendments made by § 1601 of H.R. 5408 shall be deemed for all purposes not to have taken effect and such § 1601 shall cease to be in effect.

Amendments:
1997. Act Nov. 21, 1997, in subsec. (a), in para. (1), substituted "October 9, 1996" for "the date of the enactment of the Veterans' Benefits Improvements Act of 1996", in para. (4), substituted "after the date on which the individual makes the election described" for "during the one-year period specified" and, in para. (5), substituted "October 9, 1996" for "the date of the enactment of the Veterans' Benefits Improvements Act of 1996".

1998. Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 203(b) of such Act, which appears as 38 USCS § 2011 note), in subsec. (a)(3), substituted "successfully completed (or otherwise received academic credit for)" for "successfully completed".

2000. Act Nov. 1, 2000, in subsec. (b), in the introductory matter, substituted "subsection (a) or (e)" for "subsection (a)"; and added subsec. (e).

2001. Act June 5, 2001, in subsec. (b), in the introductory matter, deleted "or (e)" following "subsection (a)".

2002. Act Nov. 25, 2002 (effective on 3/1/2003 pursuant to § 1704(g) of such Act, which appears as 10 USCS § 101 note), in subsec. (a)(5), substituted "of Homeland Security" for "of Transportation".

Act Dec. 6, 2002, in subsec. (e)(2)(B), deleted a comma after "April".

Other provisions:

Treatment of certain amounts collected under subsec. (b) between Nov. 1, 2000 and June 5, 2001. Act June 5, 2001, P. L. 107-14, § 7(e)(2), 115 Stat. 33, provides: "Any amount collected under section 3018C(b) of title 38, United States Code (whether by reduction in basic pay under paragraph (1) of that section, collection under paragraph (2) of that section, or both), with respect to an individual who enrolled in basic educational assistance under section 3018C(e) of that title, during the period beginning on November 1, 2000, and ending on the date of the enactment of this Act, shall be treated as an amount collected with respect to the individual under section 3018C(e)(3)(A) of that title (whether as a reduction in basic pay under clause (i) of that section, a collection under clause (ii) of that section, or both) for basic educational assistance under section 3018C of that title.".

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§ 3019. Tutorial assistance

(a) An individual entitled to an educational assistance allowance under this chapter [38 USCS §§ 3001 et seq.] shall also be entitled to benefits provided an eligible veteran under section 3492 of this title [38 USCS § 3492], subject to the conditions applicable to an eligible veteran under such section.

(b) The amount of such benefits payable under this section may not exceed $100 per month, for a maximum of twelve months, or until a maximum of $1,200 is utilized. This amount is in addition to the amount of educational assistance payable to the individual under this chapter [38 USCS §§ 3001 et seq.].

(c) (1) An individual's period of entitlement to educational assistance under this chapter [38 USCS §§ 3001 et seq.] shall be charged only with respect to the amount of tutorial assistance paid to the individual under this section in excess of $600.

(2) An individual's period of entitlement to educational assistance under this chapter [38 USCS §§ 3001 et seq.] shall be charged at the rate of one month for each amount
of assistance paid to the individual under this section in excess of $600 that is equal to
the amount of the monthly educational assistance allowance which the individual is
otherwise eligible to receive for full-time pursuit of an institutional course under this
chapter [38 USCS §§ 3001 et seq.].

Explanatory notes:
A prior § 3020 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105
Stat. 238. For similar provisions, see 38 USCS § 5120.

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1419, as 38 USCS §
3019, and amended the references in this section to reflect the redesignations made by § 5(a)
of such Act (see Table III preceding 38 USCS § 101).

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§ 3020. Transfer of entitlement to basic educational assistance: members of
the Armed Forces with critical military skills

(a) In general. Subject to the provisions of this section, each Secretary concerned may,
for the purpose of enhancing recruitment and retention of members of the Armed Forces
with critical military skills and at such Secretary's sole discretion, permit an individual
described in subsection (b) who is entitled to basic educational assistance under this
subchapter [38 USCS §§ 3011 et seq.] to elect to transfer to one or more of the
dependents specified in subsection (c) a portion of such individual's entitlement to such
assistance, subject to the limitation under subsection (d).

(b) Eligible individuals. An individual referred to in subsection (a) is any member of
the Armed Forces who, at the time of the approval by the Secretary concerned of the
member's request to transfer entitlement to basic educational assistance under this
section--
(1) has completed six years of service in the Armed Forces;
(2) either--
(A) has a critical military skill designated by the Secretary concerned for purposes
of this section; or
(B) is in a military specialty designated by the Secretary concerned for purposes
of this section as requiring critical military skills; and
(3) enters into an agreement to serve at least four more years as a member of the
Armed Forces.

(c) Eligible dependents. An individual approved to transfer an entitlement to basic
educational assistance under this section may transfer the individual's entitlement as
follows:
(1) To the individual's spouse.
(2) To one or more of the individual's children.
(3) To a combination of the individuals referred to in paragraphs (1) and (2).
(d) **Limitation on months of transfer.** The total number of months of entitlement transferred by an individual under this section may not exceed 18 months.

(e) **Designation of transferee.** An individual transferring an entitlement to basic educational assistance under this section shall—
   (1) designate the dependent or dependents to whom such entitlement is being transferred;
   (2) designate the number of months of such entitlement to be transferred to each such dependent; and
   (3) specify the period for which the transfer shall be effective for each dependent designated under paragraph (1).

(f) **Time for transfer; revocation and modification.**
   (1) Subject to the time limitation for use of entitlement under section 3031 of this title, an individual approved to transfer entitlement to basic educational assistance under this section may transfer such entitlement at any time after the approval of the individual's request to transfer such entitlement without regard to whether the individual is a member of the Armed Forces when the transfer is executed.
   (2) (A) An individual transferring entitlement under this section may modify or revoke at any time the transfer of any unused portion of the entitlement so transferred.
      (B) The modification or revocation of the transfer of entitlement under this paragraph shall be made by the submittal of written notice of the action to both the Secretary concerned and the Secretary of Veterans Affairs.

(g) **Commencement of use.** A dependent to whom entitlement to basic educational assistance is transferred under this section may not commence the use of the transferred entitlement until—
   (1) in the case of entitlement transferred to a spouse, the completion by the individual making the transfer of six years of service in the Armed Forces; or
   (2) in the case of entitlement transferred to a child, both—
      (A) the completion by the individual making the transfer of 10 years of service in the Armed Forces; and
      (B) either—
         (i) the completion by the child of the requirements of a secondary school diploma (or equivalency certificate); or
         (ii) the attainment by the child of 18 years of age.

(h) **Additional administrative matters.**
   (1) The use of any entitlement to basic educational assistance transferred under this section shall be charged against the entitlement of the individual making the transfer at the rate of one month for each month of transferred entitlement that is used.
   (2) Except as provided under subsection (e)(2) and subject to paragraphs (5) and (6), a dependent to whom entitlement is transferred under this section is entitled to basic educational assistance under this subchapter [38 USCS §§ 3011 et seq.] in the same manner as the individual from whom the entitlement was transferred.
   (3) (A) Subject to subparagraph (B), the monthly rate of educational assistance payable to a dependent to whom entitlement is transferred under this section shall be
the monthly amount payable under sections 3015 and 3022 of this title [38 USCS §§ 3015 and 3022] to the individual making the transfer.

(B) The monthly rate of assistance payable to a dependent under subparagraph (A) shall be subject to the provisions of section 3032 of this title [38 USCS § 3032], except that the provisions of subsection (a)(1) of that section shall not apply even if the individual making the transfer to the dependent under this section is on active duty during all or any part of enrollment period of the dependent in which such entitlement is used.

(4) The death of an individual transferring an entitlement under this section shall not affect the use of the entitlement by the dependent to whom the entitlement is transferred.

(5) Notwithstanding section 3031 of this title [38 USCS § 3031], a child to whom entitlement is transferred under this section may not use any entitlement so transferred after attaining the age of 26 years.

(6) The administrative provisions of this chapter [38 USCS §§ 3001 et seq.] (including the provisions set forth in section 3034(a)(1) of this title [38 USCS § 3034(a)(1)]) shall apply to the use of entitlement transferred under this section, except that the dependent to whom the entitlement is transferred shall be treated as the eligible veteran for purposes of such provisions.

(7) The purposes for which a dependent to whom entitlement is transferred under this section may use such entitlement shall include the pursuit and completion of the requirements of a secondary school diploma (or equivalency certificate).

(i) Overpayment.

(1) In the event of an overpayment of basic educational assistance with respect to a dependent to whom entitlement is transferred under this section, the dependent and the individual making the transfer shall be jointly and severally liable to the United States for the amount of the overpayment for purposes of section 3685 of this title [38 USCS § 3685].

(2) Except as provided in paragraph (3), if an individual transferring entitlement under this section fails to complete the service agreed to by the individual under subsection (b)(3) in accordance with the terms of the agreement of the individual under that subsection, the amount of any transferred entitlement under this section that is used by a dependent of the individual as of the date of such failure shall be treated as an overpayment of basic educational assistance under paragraph (1).

(3) Paragraph (2) shall not apply in the case of an individual who fails to complete service agreed to by the individual--

(A) by reason of the death of the individual; or

(B) for a reason referred to in section 3011(a)(1)(A)(ii)(I) of this title [38 USCS § 3011(a)(1)(A)(ii)(I)].

(j) Approvals of transfer subject to availability of appropriations. The Secretary concerned may approve transfers of entitlement to basic educational assistance under this section in a fiscal year only to the extent that appropriations for military personnel are available in that fiscal year for purposes of making deposits in the Department of Defense Education Benefits Fund under section 2006 of title 10 [10 USCS § 2006] in that fiscal year to cover the present value of future benefits payable from the Fund for the
Department of Defense portion of payments of basic educational assistance attributable to increased usage of benefits as a result of such transfers of entitlement in that fiscal year.

(k) **Regulations.** The Secretary of Defense shall prescribe regulations for purposes of this section. Such regulations shall specify the manner and effect of an election to modify or revoke a transfer of entitlement under subsection (f)(2) and shall specify the manner of the applicability of the administrative provisions referred to in subsection (h)(5) to a dependent to whom entitlement is transferred under this section.

(l) **Annual report.**
   (1) Not later than January 31 each year (beginning in 2003), the Secretary of Defense shall submit to the Committees on Armed Services and the Committees on Veterans’ Affairs of the Senate and House of Representatives a report on the transfers of entitlement to basic educational assistance under this section that were approved by each Secretary concerned during the preceding fiscal year.
   (2) Each report shall set forth--
      (A) the number of transfers of entitlement under this section that were approved by such Secretary during the preceding fiscal year; or
      (B) if no transfers of entitlement under this section were approved by such Secretary during that fiscal year, a justification for such Secretary's decision not to approve any such transfers of entitlement during that fiscal year.

(m) **Secretary concerned defined.** Notwithstanding section 101(25) of this title [38 USCS § 101(25)], in this section, the term "Secretary concerned" means--
   (1) the Secretary of the Army with respect to matters concerning the Army;
   (2) the Secretary of the Navy with respect to matters concerning the Navy or the Marine Corps;
   (3) the Secretary of the Air Force with respect to matters concerning the Air Force; and
   (4) the Secretary of Defense with respect to matters concerning the Coast Guard, or the Secretary of Homeland Security when it is not operating as a service in the Navy.

Explanatory notes:

Amendments:
2002. Act Nov. 25, 2002 (effective on 3/1/2003 pursuant to § 1704(g) of such Act, which appears as 10 USCS § 101 note), in subsec. (m)(4), substituted "of Homeland Security" for "of Transportation".
Act Dec. 2, 2002 (effective as if included in the enactment of this section by Act Dec. 28, 2001, P. L. 107-107, as provided by § 643(c)(1) of the 2002 Act, which appears as a note to this section), in subsec. (h), in para. (2), substituted "paragraphs (5) and (6)" for "paragraphs (4) and (5)" and deleted "and at the same rate" following "manner", redesignated paras. (3)-(6) as paras. (4)-(7), respectively, and inserted new para. (3).

Other provisions:
**Plan for implementation.** Act Dec. 28, 2001, P. L. 107-107, Div A, Title VI, Subtitle E, § 654(c), 115 Stat. 1157, provides: "Not later than June 30, 2002, the Secretary of Defense shall submit to Congress a report describing the manner in which the Secretaries of the
military departments and the Secretary of Transportation propose to exercise the authority granted by section 3020 of title 38, United States Code, as added by subsection (a). The report shall include the regulations prescribed under subsection (k) of that section for purposes of the exercise of the authority.


SUBCHAPTER III. SUPPLEMENTAL EDUCATIONAL ASSISTANCE

§ 3021. Supplemental educational assistance for additional service
§ 3022. Amount of supplemental educational assistance
§ 3023. Payment of supplemental educational assistance under this subchapter

§ 3021. Supplemental educational assistance for additional service

(a) The Secretary concerned, pursuant to regulations to be prescribed by the Secretary of Defense, may provide for the payment of supplemental educational assistance under this subchapter [38 USCS §§ 3021 et seq.] to any individual eligible for basic educational assistance under section 3011 or 3018 of this title [38 USCS § 3011 or 3018] who--

(1) serves five or more consecutive years of active duty in the Armed Forces after the years of active duty counted under section 3011(a)(1) of this title [38 USCS § 3011(a)(1)] without a break in such service; and

(2) after completion of the service described in clause (1) of this subsection--

(A) is discharged from service with an honorable discharge, is placed on the retired list, is transferred to the Fleet Reserve or Fleet Marine Corps Reserve, or is placed on the temporary disability retired list;

(B) continues on active duty without a break in service; or

(C) is released from active duty for further service in a reserve component of the Armed Forces after service on active duty characterized by the Secretary concerned as honorable service.

(b) The Secretary concerned, pursuant to regulations to be prescribed by the Secretary of Defense, may provide for the payment of supplemental educational assistance under this subchapter [38 USCS §§ 3021 et seq.] to any individual eligible for basic educational assistance under section 3012 or 3018 of this title [38 USCS § 3012 or 3018] who--

(1) serves two or more consecutive years of active duty in the Armed Forces after the years of active duty counted under section 3012(a)(1) of this title [38 USCS § 3012(a)(1)] and four or more consecutive years of duty in the Selected Reserve in addition to the years of duty in the Selected Reserve counted under such section without a break in service; and

(2) after completion of the service described in clause (1) of this subsection--

(A) is discharged from service with an honorable discharge, is placed on the retired list, is transferred to the Fleet Reserve or Fleet Marine Corps Reserve, or is placed on the temporary disability retired list; or

(B) continues on active duty or in the Selected Reserve.
(c) Continuity of service of a member in the Selected Reserve for purposes of subsection 
(b)(1) of this section shall not be considered to be broken--

(1) by any period of time (not to exceed a maximum period prescribed by the 
Secretary concerned by regulation) during which the member is not able to locate a 
unit of the Selected Reserve of the member's Armed Force that the member is eligible 
to join or that has a vacancy; or

(2) by any other period of time (not to exceed a maximum period prescribed by the 
Secretary concerned by regulation) during which the member is not attached to a unit 
of the Selected Reserve that the Secretary concerned, pursuant to regulations, 
considers to be inappropriate to consider for such purpose.

(d) A period of active duty or duty in the Selected Reserve that occurs before the period 
of duty by which the individual concerned qualifies for basic educational assistance may 
not be counted for purposes of this section.

Explanatory notes:

A prior § 3021 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 
Stat. 238. For similar provisions, see 38 USCS § 5121.

Effective date of section:

Act Oct. 19, 1984, P. L. 98-525, Title VII, § 702(b), 98 Stat. 2563, which appears as a note to 
this section, provides that this section shall take effect on July 1, 1986.

Amendments:

1986. Act Oct. 28, 1986, in subsec. (a)(1), substituted "after" for "in addition to"; and in 
subsec. (b)(1) substituted "after" for "in addition to", and in subsec. (c) substituted "the 
member's" for "his".

1988. Act Nov. 18, 1988, in subsec. (a), in the introductory matter, inserted "or 1418"; and in 
subsec. (b), in the introductory matter, inserted "or 1418".

1989. Act Dec. 18, 1989, in subsec. (a) introductory matter, and in subsec. (b) introductory 
matter, inserted "of Defense".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1421, as 38 USCS § 
3021, and amended the references in this section to reflect the redesignations made by § 5(a) 
of such Act (see Table III preceding 38 USCS § 101).

Other provisions:

98-525, Title VII, § 702(b), 98 Stat. 2563, provides: "Subchapter III of chapter 30 of title 38, 
United States Code [38 USCS §§ 3021 et seq.], as added by subsection (a), shall take effect 
on July 1, 1986.".

Code of Federal Regulations

Department of Veterans Affairs-Adjudication, 38 CFR Part 3
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling 
programs, 48 CFR Part 871

Cross References

This section is referred to in 10 USCS §§ 708, 2006; 38 USCS § 3022

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the restrictions and terms and conditions of the Matthew Bender Master Agreement.
§ 3022. Amount of supplemental educational assistance

(a) The amount of payment of educational assistance under this chapter [38 USCS §§ 3001 et seq.] is subject to section 3032 of this title [38 USCS § 3032]. Except as otherwise provided under subsection (b) of this section, supplemental educational assistance under section 3021 of this title [38 USCS § 3021] shall be paid--

(1) at a monthly rate of $300 for an approved program of education pursued on a full-time basis; or

(2) at an appropriately reduced rate, as determined under regulations which the Secretary shall prescribe, for an approved program of education pursued on less than a full-time basis.

(b) In the case of a member of the Armed Forces for whom the Secretary concerned has provided for the payment of supplemental educational assistance who has a skill or specialty designated by the Secretary concerned, pursuant to regulations to be prescribed by the Secretary of Defense, as a skill or specialty in which there is a critical shortage of personnel, the Secretary concerned, pursuant to such regulations, may increase the rate of the supplemental educational assistance allowance applicable to such individual to such rate in excess of the rate prescribed under subsection (a) of this section as the Secretary concerned considers appropriate, but the amount of any such increase may not exceed $300 per month.

Explanatory notes:

A prior § 3022 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5122.

Effective date of section:

Act Oct. 19, 1984, P. L. 98-525, Title VII, § 702(b), 98 Stat. 2563, which appears as 38 USCS § 1421 note, provides that this section shall take effect on July 1, 1986.

Amendments:

1988. Act Nov. 18, 1988, in subsec. (a), in the introductory matter, substituted "The amount of payment of educational assistance under this chapter is subject to section 1432 of this title. Except" for "Subject to section 1432 of this title and except".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1422, as 38 USCS § 3022, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Code of Federal Regulations

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References

This section is referred to in 38 USCS § 3032

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 135
§ 3023. Payment of supplemental educational assistance under this subchapter

The Secretary shall increase the monthly basic educational assistance allowance paid to an individual who is entitled to supplemental educational assistance under this subchapter [38 USCS §§ 3021 et seq.] by the monthly amount of the supplemental educational assistance to which the individual is entitled.

Explanatory notes:
A prior § 3023 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5123.

Effective date of section:
Act Oct. 19, 1984, P. L. 98-525, Title VII, § 702(b), 98 Stat. 2563, which appears as 38 USCS § 1421 note, provides that this section shall take effect on July 1, 1986.

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1423, as 38 USCS § 3023.

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 135

SUBCHAPTER IV. TIME LIMITATION FOR USE OF ELIGIBILITY AND ENTITLEMENT; GENERAL AND ADMINISTRATIVE PROVISIONS

§ 3031. Time limitation for use of eligibility and entitlement
§ 3032. Limitations on educational assistance for certain individuals
§ 3033. Bar to duplication of educational assistance benefits
§ 3034. Program administration
§ 3035. Allocation of administration and of program costs
§ 3036. Reporting requirement

§ 3031. Time limitation for use of eligibility and entitlement

(a) Except as provided in subsections (b) through (g), and subject to subsection (h), of this section, the period during which an individual entitled to educational assistance under this chapter [38 USCS §§ 3001 et seq.] may use such individual's entitlement expires at the end of the 10-year period beginning on the date of such individual's last discharge or release from active duty, except that such 10-year period shall begin--

(1) in the case of an individual who becomes entitled to such assistance under clause (A) or (B) of section 3012(a)(1) of this title [38 USCS § 3012(a)(1)], on the later of the date of such individual's last discharge or release from active duty or the date on
which the four-year requirement described in clause (A)(ii) or (B)(ii), respectively, of such section 3012(a)(1) is met;

(2) in the case of an individual who becomes entitled to such assistance under section 3011(a)(1)(B) [38 USCS § 3011(a)(1)(B)], on the later of the date of such individual's last discharge or release from active duty or January 1, 1990; and

(3) in the case of an individual who becomes entitled to such assistance under section 3011(a)(1)(C) or 3012(a)(1)(C) of this title [38 USCS § 3011(a)(1)(C) or 3012(a)(1)(C)], on December 27, 2001.

(b) In the case of any eligible individual who has been prevented, as determined by the Secretary, from pursuing a program of education under this chapter [38 USCS §§ 3001 et seq.] within the 10-year period prescribed by subsection (a) of this section because such individual had not met the nature of discharge requirement of this chapter before the nature of such individual's discharge or release was changed by appropriate authority, release was under conditions described in section 3011(a)(3) or 3012(a)(3) [38 USCS § 3011(a)(3) or 3012(a)(3)] such 10-year period shall not run during the period of time that such individual was so prevented from pursuing such program of education.

(c) In the case of an individual eligible for educational assistance under the provisions of this chapter [38 USCS §§ 3001 et seq.] who, after such individual's last discharge or release from active duty, was detained by a foreign government or power, the 10-year period described in subsection (a) of this section shall not run (1) while such individual is so detained, or (2) during any period immediately following such individual's release from such detention during which such individual is hospitalized at a military, civilian, or Department of Veterans Affairs medical facility.

(d) In the case of an individual eligible for educational assistance under this chapter [38 USCS §§ 3001 et seq.]--

(1) who was prevented from pursuing such individual's chosen program of education before the expiration of the 10-year period for use of entitlement under this chapter [38 USCS §§ 3001 et seq.] otherwise applicable under this section because of a physical or mental disability which was not the result of the individual's own willful misconduct, and

(2) who applies for an extension of such 10-year period within one year after (A) the last day of such period, or (B) the last day on which such individual was so prevented from pursuing such program, whichever is later,

such 10-year period shall not run with respect to such individual during the period of time that such individual was so prevented from pursuing such program and such 10-year period will again begin running on the first day following such individual's recovery from such disability on which it is reasonably feasible, as determined under regulations which the Secretary shall prescribe, for such individual to initiate or resume pursuit of a program of education with educational assistance under this chapter [38 USCS §§ 3001 et seq.].

(e) (1) Except as provided in paragraph (2) of this subsection, in the case of an individual described in section 3011(a)(1)(B), 3011(a)(1)(C), 3012(a)(1)(B), or 3012(a)(1)(C) of this title [38 USCS § 3011(a)(1)(B), 3011(a)(1)(C), 3012(a)(1)(B), or 3012(a)(1)(C)] who is
entitled to basic educational assistance under this chapter, the 10-year period prescribed in subsection (a) of this section shall be reduced by an amount of time equal to the amount of time that such individual was not serving on active duty during the period beginning on January 1, 1977, and ending on June 30, 1985.

(2) In the case of an individual to which paragraph (1) of this subsection is applicable and who is described in section 3452(a)(1)(B) of this title [38 USCS § 3452(a)(1)(B)], the 10-year period prescribed in subsection (a) of this section shall not be reduced by any period in 1977 before the individual began serving on active duty.

(f) (1) If an individual eligible for educational assistance under this chapter [38 USCS §§ 3001 et seq.] is enrolled under this chapter [38 USCS §§ 3001 et seq.] in an educational institution regularly operated on the quarter or semester system and the period of such individual's entitlement under this chapter [38 USCS §§ 3001 et seq.] would, under section 3013 [38 USCS § 3013], expire during a quarter or semester, such period shall be extended to the end of such quarter or semester.

(2) If an individual eligible for educational assistance under this chapter [38 USCS §§ 3001 et seq.] is enrolled under this chapter [38 USCS §§ 3001 et seq.] in an educational institution not regularly operated on the quarter or semester system and the period of such individual's entitlement under this chapter [38 USCS §§ 3001 et seq.] would, under section 3013 [38 USCS § 3013], expire after a major portion of the course is completed, such period shall be extended to the end of the course or for 12 weeks, whichever is the lesser period of extension.

(g) In the case of an individual described in section 3011(f)(3) of this title [38 USCS § 3011(f)(3)], the period during which that individual may use the individual's entitlement to educational assistance allowance expires on the last day of the 10-year period beginning on the date of the enactment of the Veterans Millennium Health Care and Benefits Act [enacted Nov. 30, 1999] if that date is later than the date that would otherwise be applicable to that individual under this section.

(h) For purposes of subsection (a) of this section, an individual's last discharge or release from active duty shall not include any discharge or release from a period of active duty of less than 90 days of continuous service unless the individual involved is discharged or released for a service-connected disability, for a medical condition which preexisted such service and which the Secretary determines is not service connected, for hardship, or as a result of a reduction in force as described in section 3011(a)(1)(A)(ii)(III) of this title [38 USCS § 3011(a)(1)(A)(ii)(III)].

Amendments:

1986. Act Oct. 28, 1986, in subsec. (a), substituted "(e) for "(d); in subsec. (b), deleted "subchapter II or III of" following "education under", substituted "of this chapter" for "of such subchapter", deleted "(1)" preceding "before", and deleted "or (2) with respect to educational assistance under subchapter II of this chapter, the Administrator determined, under regulations prescribed by the Administrator, that such discharge or release was under conditions described in section 1411(a)(3) or 1412(a)(3) of this title," following "authority,", redesignated subsec. (e) as subsec. (f); and added a new subsec. (e).

Such Act further directed that subsec. (e)(2) be amended by inserting "not" after "educational institution"; however, such amendment was executed to subsec. (f)(2), as redesignated, to reflect the probable intent of Congress.
1988. Act Nov. 18, 1988, in subsec. (a), substituted "beginning on the date of such individual's last discharge or release from active duty, except that such 10-year period shall begin--" and paras. (1) and (2) for "beginning on (1) the date of such individuals last discharge or release from active duty, or (2) the last day on which such individual becomes entitled to such assistance, whichever is later.".

1989. Act Dec. 18, 1989, in subsec. (a), in the introductory matter, inserted ", and subject to subsection (g),"; in subsec. (e), substituted "(1) Except as provided in paragraph (2) of this subsection, in" for "In", and added para. (2).

Such Act further, in subsec. (f), in paras. (1) and (2), substituted", under section 1413," for ", under this section,"; and added subsec. (g).

Such Act further, in subsecs. (b) and (d), substituted "Secretary" for "Administrator"; and in subsec. (c), substituted "Department of Veterans Affairs" for "Veterans' Administration".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1431, as 38 USCS § 3031, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1992. Act Oct. 29, 1992 (effective 10/28/86, as provided by § 302(b) of such Act, which appears as 38 USCS § 3011 note), in subsec. (e), in para. (1), substituted "June 30, 1985" for "October 18, 1984".

1999. Act Nov. 30, 1999, in subsec. (a), in the introductory matter, substituted "through (g)" for "through (e)" and substituted "subsection (h)" for "subsection (g)"; redesignated subsec. (g) as subsec. (h); and added new subsec. (g).

2001. Act Dec. 27, 2001, in subsec. (a), in para. (1), deleted "and" following the concluding semicolon, in para. (2), substituted "; and" for a concluding period, and added para. (3); and, in subsec. (e)(1), substituted "section 3011(a)(1)(B), 3011(a)(1)(C), 3012(a)(1)(B), or 3012(a)(1)(C)" for "section 3011(a)(1)(B) or 3012(a)(1)(B)".

2002. Act Dec. 6, 2002, in subsec. (a)(3), substituted "December 27, 2001" for "the date of the enactment of this paragraph".

Other provisions:
Delimiting period; individual ineligible by reason of secondary school diploma requirement. Act Nov. 1, 2000, P. L. 106-419, Title I, Subtitle A, § 102(e), 114 Stat. 1825, provides:

"(1) In the case of an individual described in paragraph (2), with respect to the time limitation under section 3031 of title 38, United States Code, for use of eligibility and entitlement of basic educational assistance under chapter 30 of such title, the 10-year period applicable under such section shall begin on the later of--

"(A) the date of the enactment of this Act; or

"(B) the date of the individual's last discharge or release from active duty.

"(2) An individual referred to in paragraph (1) is an individual who--

"(A) before the date of the enactment of this Act, was not eligible for such basic educational assistance by reason of the requirement of a secondary school diploma (or equivalency certificate) as a condition of eligibility for such assistance as in effect on the date preceding the date of the enactment of this Act; and

"(B) becomes entitled to basic educational assistance under section 3011(a)(2), 3012(a)(2), or 3018(b)(4) of title 38, United States Code, by reason of the amendments made by this section [amending 10 USCS § 16132 and 38 USCS §§ 3011, 3012, 3017, and 3018].".
Delimiting period; individual ineligible by reason of initial obligated period of active duty requirement. Act Nov. 1, 2000, P. L. 106-419, Title I, Subtitle A, § 103(e), 114 Stat. 1826, provides:

"(1) In the case of an individual described in paragraph (2), with respect to the time limitation under section 3031 of title 38, United States Code, for use of eligibility and entitlement of basic educational assistance under chapter 30 of such title, the 10-year period applicable under such section shall begin on the later of--

"(A) the date of the enactment of this Act; or

"(B) the date of the individual's last discharge or release from active duty.

"(2) An individual referred to in paragraph (1) is an individual who--

"(A) before the date of the enactment of this Act, was not eligible for basic educational assistance under chapter 30 of such title [38 USCS §§ 3001 et seq.] by reason of the requirement of an initial obligated period of active duty as condition of eligibility for such assistance as in effect on the date preceding the date of the enactment of this Act; and

"(B) on or after such date becomes eligible for such assistance by reason of the amendments made by this section [amending 38 USCS §§ 3011, 3012, 3013, and 3105].".

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

Cross References
This section is referred to in 10 USCS § 16133

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 129

§ 3032. Limitations on educational assistance for certain individuals

(a) In the case of an individual entitled to educational assistance under this chapter [38 USCS §§ 3001 et seq.] who is pursuing a program of education--

(1) while on active duty; or

(2) on less than a half-time basis,

the amount of the monthly educational assistance allowance payable to such individual under this chapter [38 USCS §§ 3001 et seq.] is the amount determined under subsection (b) of this section.

(b) The amount of the educational assistance allowance payable to an individual described in subsection (a) of this section is the least of the following: (1) the amount of the educational assistance allowance otherwise payable to such individual under this chapter [38 USCS §§ 3001 et seq.], (2) the established charges for tuition and fees that the educational institution involved requires similarly circumstanced nonveterans enrolled in the same program to pay, or (3) the amount of the charges of the educational
institution elected by the individual under section 3014(b)(1) of this title [38 USCS § 3014(b)(1)].

(c) (1) Except as provided in paragraph (2) of this subsection, the amount of the monthly educational assistance allowance payable to an individual pursuing a full-time program of apprenticeship or other on-job training under this chapter [38 USCS §§ 3001 et seq.] is--

(A) for each of the first six months of the individual's pursuit of such program, 75 percent of the monthly educational assistance allowance otherwise payable to such individual under this chapter [38 USCS §§ 3001 et seq.];

(B) for each of the second six months of the individual's pursuit of such program, 55 percent of such monthly educational assistance allowance; and

(C) for each of the months following the first 12 months of the individual's pursuit of such program, 35 percent of such monthly educational assistance allowance.

(2) In any month in which an individual pursuing a program of education consisting of a program of apprenticeship or other on-job training fails to complete 120 hours of training, the amount of monthly educational assistance allowance payable under this chapter [38 USCS §§ 3001 et seq.] to the individual shall be limited to the same proportion of the applicable rate determined under paragraph (1) of this subsection as the number of hours worked during such month, rounded to the nearest eight hours, bears to 120 hours.

(3) (A) Except as provided in subparagraph (B) of this paragraph, for each month that an individual is paid a monthly educational assistance allowance under this chapter [38 USCS §§ 3001 et seq.], the individual's entitlement under this chapter [38 USCS §§ 3001 et seq.] shall be charged at the rate of--

(i) 75 percent of a month in the case of payments made in accordance with paragraph (1)(A) of this subsection;

(ii) 55 percent of a month in the case of payments made in accordance with paragraph (1)(B) of this subsection; and

(iii) 35 percent of a month in the case of payments made in accordance with paragraph (1)(C) of this subsection.

(B) Any such charge to the individual's entitlement shall be reduced proportionately in accordance with the reduction in payment under paragraph (2) of this subsection.

(d) (1) (A) The amount of the educational assistance allowance payable under this chapter [38 USCS §§ 3001 et seq.] to an individual who enters into an agreement to pursue, and is pursuing, a program of education exclusively by correspondence is an amount equal to 55 percent of the established charge which the institution requires nonveterans to pay for the course or courses pursued by such individual.

(B) For purposes of this paragraph, the term "established charge" means the lesser of--

(i) the charge for the course or courses determined on the basis of the lowest extended time payment plan offered by the institution and approved by the appropriate State approving agency; or

(ii) the actual charge to the individual for such course or courses.

(2) Such allowance shall be paid quarterly on a pro rata basis for the lessons completed by the individual and serviced by the institution.
(3) In each case in which the rate of payment to an individual is determined under paragraph (1) of this subsection, the period of entitlement of such individual under this chapter [38 USCS §§ 3001 et seq.] shall be charged at the rate of one month for each payment of educational assistance to the individual that is equal to the amount of monthly educational assistance the individual would otherwise be eligible to receive for full-time pursuit of an institutional course under this chapter [38 USCS §§ 3001 et seq.].

(e) (1) Notwithstanding subsection (a) of this section, each individual who is pursuing a program of education consisting exclusively of flight training approved as meeting the requirements of section 3034(d) of this title [38 USCS § 3034(d)] shall be paid an educational assistance allowance under this chapter [38 USCS §§ 3001 et seq.] in the amount equal to 60 percent of the established charges for tuition and fees which similarly circumstanced nonveterans enrolled in the same flight course are required to pay.

(2) No educational assistance allowance may be paid under this chapter [38 USCS §§ 3001 et seq.] to an individual for any month during which such individual is pursuing a program of education consisting exclusively of flight training until the Secretary has received from that individual and the institution providing such training a certification of the flight training received by the individual during that month and the tuition and other fees charged for that training.

(3) The number of months of entitlement charged in the case of any individual for a program of education described in paragraph (1) of this subsection shall be equal to the number (including any fraction) determined by dividing the total amount of educational assistance paid such individual for such program by the monthly rate of educational assistance which, except for paragraph (1) of this subsection, such individual would otherwise be paid under subsection (a)(1), (b)(1), (d), or (e)(1) of section 3015 of this title [38 USCS § 3015], as the case may be.

(4) The number of solo flying hours for which an individual may be paid an educational assistance allowance under this subsection may not exceed the minimum number of solo flying hours required by the Federal Aviation Administration for the flight rating or certification which is the goal of the individual's flight training.

(f) (1) Subject to paragraph (3), the amount of educational assistance payable under this chapter for a licensing or certification test described in section 3452(b) of this title [38 USCS § 3452(b)] is the lesser of $2,000 or the fee charged for the test.

(2) The number of months of entitlement charged in the case of any individual for such licensing or certification test is equal to the number (including any fraction) determined by dividing the total amount of educational assistance paid such individual for such test by the full-time monthly institutional rate of educational assistance which, except for paragraph (1), such individual would otherwise be paid under subsection (a)(1), (b)(1), (d), or (e)(1) of section 3015 of this title [38 USCS § 3015], as the case may be.

(3) In no event shall payment of educational assistance under this subsection for such a test exceed the amount of the individual's available entitlement under this chapter [38 USCS §§ 3001 et seq.].

(g) (1) Subject to paragraph (3), the amount of educational assistance payable under this chapter for a national test for admission or national test providing an opportunity for
course credit at institutions of higher learning described in section 3452(b) of this title [38 USCS § 3452(b)] is the amount of the fee charged for the test.

(2) The number of months of entitlement charged in the case of any individual for a test described in paragraph (1) is equal to the number (including any fraction) determined by dividing the total amount of educational assistance paid such individual for such test by the full-time monthly institutional rate of educational assistance, except for paragraph (1), such individual would otherwise be paid under subsection (a)(1), (b)(1), (d), or (e)(1) of section 3015 of this title [38 USCS § 3015], as the case may be.

(3) In no event shall payment of educational assistance under this subsection for a test described in paragraph (1) exceed the amount of the individual's available entitlement under this chapter [38 USCS §§ 3001 et seq.].

Amendments:

1986. Act Oct. 28, 1986, substituted the heading of this section for one which read: "Limitation on educational assistance for certain individuals", and added subsec. (c).

1988. Act Nov. 18, 1988, in subsec. (c), in para. (3), substituted "(A) Except as provided in subparagraph (B) of this paragraph, for" for "For", redesignated subparas. (A)-(C) as cls. (i)-(iii), respectively and added subpara. (B); and added subsec. (e).

Such Act further (effective 1/1/89, as provided by § 108(c) of such Act, which appears as 38 USCS § 1402 note), added subsec. (d).

1989. Act Dec. 18, 1989 (effective 9/30/90 as provided by § 422(d) of such Act, which appears as 10 USCS § 2131 note), added subsec. (f).

1991. Act March 22, 1991, in subsec. (f)(3), substituted "(c), or (d)(1)" for "or (c)".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1432, as 38 USCS § 3032, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1992. Act Oct. 29, 1992 (applicable to certain flight training received after 9/30/92, as provided by § 310(d) of such Act, which appears as 10 USCS § 2131 note), in subsec. (f), in para. (1), deleted "(other than tuition and fees charged for or attributable to solo flying hours)" following "for tuition and fees", and added para. (4).

1994. Act Nov. 2, 1994, in subsec. (f)(3), substituted "(d), or (e)(1)" for "(c), or (d)(1)".

1996. Act Oct. 9, 1996 deleted subsec. (d), which read:

"(d)(1) The amount of the monthly educational assistance allowance payable to an individual pursuing a cooperative program under this chapter shall be 80 percent of the monthly allowance otherwise payable to such individual under section 3015 and section 3022, if applicable, of this title.

"(2) For each month that an individual is paid a monthly educational assistance allowance for pursuit of a cooperative program under this chapter], the individual's entitlement under this chapter shall be charged at the rate of 80 percent of a month."

and redesignated subsecs. (e) and (f) as subsecs. (d) and (e), respectively.

2000. Act Nov. 1, 2000 (effective 3/1/01 and applicable with respect to licensing and certification tests approved on or after such date, as provided by § 122(d) of such Act, which appears as a note to this section) added subsec. (f).

2001. Act June 5, 2001 (effective as if enacted on 11/1/2000, immediately after enactment of Act Nov. 1, 2000, P. L. 106-419, as provided by § 7(b)(3) of the 2001 Act, which appears as 38 USCS § 3014 note), in subsec. (b), substituted "the least of the following:" for "the lesser..."
of", deleted "or" preceding "(2)". and inserted ", or (3) the amount of the charges of the educational institution elected by the individual under section 3014(b)(1) of this title".


Other provisions:

Effective date and application of amendments made by § 122 of Act Nov. 1, 2000. Act Nov. 1, 2000, P. L. 106-419, Title I, Subtitle C, § 122(d), provides: "The amendments made by this section [amending 38 USCS §§ 3452(b), 3501(a)(5), and the chapter analysis preceding 38 USCS § 3670, and adding 38 USCS § 3032(f), 3232(c), 3482(h), 3532(f), and 3689], shall take effect on March 1, 2001, and shall apply with respect to licensing and certification tests approved by the Secretary of Veterans Affairs on or after such date.".

Increase in benefit for individuals pursuing apprenticeship or on-job training; Montgomery GI Bill. Act Dec. 10, 2004, P. L. 108-454, Title I, § 103(a), 118 Stat. 3600, provides:

"For months beginning on or after October 1, 2005, and before January 1, 2008, subsection (c)(1) of section 3032 of title 38, United States Code, shall be applied as if-

"(1) the reference to '75 percent' in subparagraph (A) were a reference to '85 percent';

"(2) the reference to '55 percent' in subparagraph (B) were a reference to '65 percent';

and

"(3) the reference to '35 percent' in subparagraph (C) were a reference to '45 percent'.".

Cross References

This section is referred to in 38 USCS §§ 3015, 3022, 3034

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 135

§ 3033. Bar to duplication of educational assistance benefits

(a) (1) An individual entitled to educational assistance under a program established by this chapter [38 USCS §§ 3001 et seq.] who is also eligible for educational assistance under a program under chapter 31, 32, or 35 of this title [38 USCS §§ 3100 et seq., 3201 et seq., or 3500 et seq.], under chapter 106 or 107 of title 10 [10 USCS §§ 2131 et seq. or 2141 et seq.], or under the Hostage Relief Act of 1980 (Public Law 96-449; 5 U.S.C. 5561 note) may not receive assistance under two or more of such programs concurrently but shall elect (in such form and manner as the Secretary may prescribe) under which program to receive educational assistance.

(2) An individual entitled to educational assistance under chapter 34 of this title [38 USCS §§ 3451 et seq.] may not receive assistance under this chapter [38 USCS §§ 3001 et seq.] before January 1, 1990.

(b) A period of service counted for purposes of repayment under chapter 109 of title 10 [10 USCS §§ 2171 et seq.] of an education loan may not also be counted for purposes of entitlement to educational assistance under this chapter [38 USCS §§ 3001 et seq.].

(c) An individual who serves in the Selected Reserve may not receive credit for such service under both the program established by this chapter and the program established

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by chapter 106 of title 10 [10 USCS §§ 2131 et seq.] but shall elect (in such form and manner as the Secretary may prescribe) the program to which such service is to be credited.

Amendments:

1986. Act Oct. 28, 1986, in subsec. (a)(1), substituted "chapter 31, 32, or 35 of this title, under chapter 106 or 107 of title 10, or under the Hostage Relief Act of 1980 (Public Law 96-449; 5 U.S.C. 5561 note) may not receive assistance under two or more of such programs" for "chapter 31, 34, or 35 of this title or under chapter 106 or 107 of title 10 may not receive assistance under both programs; and substituted subsec. (c) for one which read: "An individual who is entitled to educational assistance under chapter 106 of title 10 may not also receive educational assistance under this chapter based on entitlement under section 1412 of this title.".

1989. Act Dec. 18, 1989, in subsecs. (a)(1) and (c), substituted "Secretary" for "Administrator".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1433, as 38 USCS § 3033.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 135

§ 3034. Program administration

(a) (1) Except as otherwise provided in this chapter [38 USCS §§ 3001 et seq.], the provisions of sections 3470, 3471, 3474, 3476, 3482(a), 3483, and 3485 of this title [38 USCS §§ 3470, 3471, 3474, 3476, 3482(a), 3483, and 3485] and the provisions of subchapters I and II of chapter 36 of this title [38 USCS §§ 3670 et seq., 3680 et seq.] such chapter (with the exception of sections 3680(c), 3680(f), and 3687 [38 USCS §§ 3680(c), 3680(f), and 3687]) shall be applicable to the provision of educational assistance under this chapter [38 USCS §§ 3001 et seq.].

(2) The term "eligible veteran", as used in the provisions of the sections enumerated in paragraph (1) of this subsection, shall be deemed to include an individual who is eligible for educational assistance under this chapter [38 USCS §§ 3001 et seq.].

(3) The Secretary may, without regard to the application to this chapter [38 USCS §§ 3001 et seq.] of so much of the provisions of section 3471 of this title [38 USCS § 3471] as prohibit the enrollment of an eligible veteran in a program of education in which the veteran is "already qualified", and pursuant to such regulations as the Secretary shall prescribe, approve the enrollment of such individual in refresher courses (including courses which will permit such individual to update knowledge and skills or be instructed in the technological advances which have occurred in the individual's field of employment during and since the period of such veteran's active military service), deficiency courses, or other preparatory or special education or training courses necessary to enable the individual to pursue an approved program of education.
(b) Regulations prescribed by the Secretary of Defense under this chapter [38 USCS §§ 3001 et seq.] shall be uniform for the Armed Forces under the jurisdiction of the Secretary of a military department.

(c) Payment of educational assistance allowance in the case of an eligible individual pursuing a program of education under this chapter [38 USCS §§ 3001 et seq.] on less than a half-time basis shall be made in a lump-sum amount for the entire quarter, semester, or term not later than the last day of the month immediately following the month in which certification is received from the educational institution that such individual has enrolled in and is pursuing a program at such institution. Such lump-sum payment shall be computed at the rate determined under section 3032(b) of this title [38 USCS § 3032(b)].

(d) The Secretary may approve the pursuit of flight training (in addition to a course of flight training that may be approved under section 3680A(b) of this title [38 USCS § 3680A(b)]) by an individual entitled to basic educational assistance under this chapter [38 USCS §§ 3001 et seq.] if--

1. such training is generally accepted as necessary for the attainment of a recognized vocational objective in the field of aviation;
2. the individual possesses a valid private pilot certificate and meets, on the day the individual begins a course of flight training, the medical requirements necessary for a commercial pilot certificate; and
3. the flight school courses meet Federal Aviation Administration standards for such courses and are approved by the Federal Aviation Administration and the State approving agency.

(e) (1) In the case of a member of the Armed Forces who participates in basic educational assistance under this chapter [38 USCS §§ 3001 et seq.], the Secretary shall furnish the information described in paragraph (2) to each such member. The Secretary shall furnish such information as soon as practicable after the basic pay of the member has been reduced by $1,200 in accordance with section 3011(b) or 3012(c) of this title [38 USCS § 3011(b) or 3012(c)] and at such additional times as the Secretary determines appropriate.

2. The information referred to in paragraph (1) is information with respect to the benefits, limitations, procedures, eligibility requirements (including time-in-service requirements), and other important aspects of the basic educational assistance program under this chapter, including application forms for such basic educational assistance under section 5102 of this title [38 USCS § 5102].
3. The Secretary shall furnish the forms described in paragraph (2) and other educational materials to educational institutions, training establishments, and military education personnel, as the Secretary determines appropriate.
4. The Secretary shall use amounts appropriated for readjustment benefits to carry out this subsection and section 5102 of this title [38 USCS § 5102] with respect to application forms under that section for basic educational assistance under this chapter [38 USCS §§ 3001 et seq.].

Amendments:

1986. Act Oct. 28, 1986, in subsec. (a), substituted "1683, and 1685" for "1683" and substituted "(with the exception of sections 1780(c), 1780(g), and 1787)" for "(with the
exception of sections 1777, 1780(a)(5), 1780(b), 1786, 1787, and 1792 of such chapter); and substituted subsec. (b) for one which read:

"(b) An educational assistance allowance for any period may not be paid to an individual enrolled in or pursuing a program of education under this chapter until the Administrator has received--

"(1) from such individual a certification as to such individual's actual attendance during such period; and

"(2) from the educational institution a certification, or an endorsement of the individual's certificate, that such individual was enrolled in and pursuing a program of education during such period.")

Such Act further redesignated subsec. (c) as subsec. (d) and added a new subsec. (c).

1988. Act Nov. 18, 1988, in subsec. (a), inserted "1786(a)"; deleted subsec. (c), which read: "When an eligible individual is pursuing a program of education under this chapter by correspondence, the individual's entitlement under this chapter shall be charged at the rate of one month's entitlement for each month of benefits paid to the individual."; and redesignated former subsec. (d) as subsec. (c).

Act Nov. 18, 1988 (effective 8/15/89, as provided by § 106(d) of such Act, which appears as a note to this section), in subsec. (a), designated the first sentence as para. (1) and designated the second sentence as para. (2), in para. (2) as so designated, substituted "the provisions of the sections enumerated in paragraph (1) of this subsection" for "those provisions", and added para. (3).

1989. Act Dec. 18, 1989, in subsec. (a)(1), deleted "1780(g)" following "1780(c),"; deleted subsec. (b) which read: "(b) The Administrator may, pursuant to regulations which the Administrator shall prescribe, determine and define enrollment in, pursuit of, and attendance at, any program of education by an individual enrolled in or pursuing a program of education under this chapter for any period for which the individual receives educational assistance under this chapter. Subject to such reports and proof as the Administrator may require to show an individual's enrollment in and satisfactory pursuit of such individual's program, the Administrator may withhold payment of benefits to such individual until the required proof is received and the amount of the payment is appropriately adjusted."; and redesignated subsec. (c) as subsec. (b).

Such Act further, in subsecs. (a)(3) substituted "Secretary" for "Administrator", wherever appearing and purported in subsec. (b) to substitute "Secretary" for "Administrator" wherever appearing but such amendment could not be executed as subsec. (b) was deleted by § 415(b)(2) of such Act.

Such Act further, in subsec. (a), in para. (1), inserted "1780(f),", in para. (3), substituted "employment during and since the period of such veteran's active military service)" for "employment); and added subsec. (c).

Such Act further (effective 9/30/90 as provided by § 422(d) of such Act, which appears as 10 USCS § 16131 note), added subsec. (d).


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1434, as 38 USCS § 3034, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1992. Act Oct. 29, 1992 (applicable as provided by § 313(b) of such Act, which appears as 10 USCS § 2136 note), in subsec. (a), in para. (1), deleted "3473," following "3471,"; and, in subsec. (d), in para. (1), substituted "3680A(b)" for "3473(b).

1994. Act Nov. 2, 1994 (effective 10/1/94, as provided by § 601(d) of such Act, which appears as a note to this section), in subsec. (d), deleted para. (2), which read: "This
subsection shall not apply to a course of flight training that commences on or after October 1, 1994.

1998. Act Nov. 11, 1998 (applicable as provided by § 204(c) of such Act, which appears as 10 USCS § 16136 note), in subsec. (d)(2), substituted "pilot certificate" for "pilot's license" in two places, and inserted ", on the day the individual begins a course of flight training, ."

Such Act further (effective 180 days after enactment, as provided by § 206(b) of such Act, which appears as a note to this section) added subsec. (e).

Other provisions:


Determinations of status or character of service. Act Dec. 18, 1989, P. L. 101-237, Title IV, § 413(b), 103 Stat. 2085, provides: "Through July 1, 1990, no provision of law shall preclude the Department of Veterans Affairs, in making determinations of the active-duty or Selected Reserve status, or the character of service, of individuals receiving benefits under chapter 30 or 32 of title 38, United States Code [38 USCS §§ 3001 et seq. or 3201 et seq.], or chapter 106 of title 10 [10 USCS §§ 2131 et seq.], United States Code, from continuing to use any category of information provided by the Department of Defense or Department of Transportation that the Department of Veterans Affairs was using prior to the date of the enactment of this Act, if the Secretary of Veterans Affairs determines that the information has proven to be sufficiently reliable in making such determinations."

Evaluation of providing assistance for flight training. Act Dec. 18, 1989, P. L. 101-237, Title IV, § 422(c), 103 Stat. 2090, effective Sept. 30, 1990, as provided by § 422(d) of such Act, which appears as 10 USCS § 2131 note, provides:

"(c) Evaluation of providing assistance for flight training.

"(1)(A) The Secretary of Veterans Affairs shall conduct an evaluation of paying educational assistance for flight training under chapter 30 of title 38, United States Code [38 USCS §§ 3001 et seq.], and chapter 106 of title 10 [10 USCS §§ 2131 et seq.], United States Code.

"(B) The evaluation required by subparagraph (A) shall be designed to determine the effectiveness of the provision of educational assistance referred to in such subparagraph in preparing the recipients of such assistance for recognized vocational objectives in the field of aviation.

"(2) Not later than January 31, 1994, the Secretary shall submit to the Committees on Veterans’ Affairs of the Senate and the House of Representatives a report on the evaluation required by paragraph (1). Such report shall include--

"(A) information, separately as to payments made under chapter 30 of title 38, United States Code [38 USCS §§ 3001 et seq.], and payments made under chapter 106 of title 10, United States Code [10 USCS §§ 2131 et seq.] regarding--

"(i) the number of recipients paid educational assistance allowances for flight training;

"(ii) the amount of such assistance;

"(iii) the amount paid by the recipients for such training;

"(iv) the vocational objectives of the recipients; and
“(v) the extent to which the training (I) assists the recipients in achieving employment in the field of aviation, or (II) was used only or primarily for recreational or avocational purposes; and

“(B) any recommendations for legislation that the Secretary considers appropriate to include in the report.”.

Ratification of use of certain information by the Department of Veterans Affairs. Act Aug. 15, 1990, P. L. 101-366, Title II, § 206(b), 104 Stat. 442, provides: "Any use by the Department of Veterans Affairs, during the period beginning on July 2, 1990, and ending on the date of the enactment of this Act, of any category of information provided by the Department of Defense or the Department of Transportation for making determinations described in section 413(b) of the Veterans' Benefits Amendments of 1989 (Public Law 101-237) [note to this section] is hereby ratified.”.

Act Oct. 29, 1992; savings provision. Act Oct. 29, 1992, P. L. 102-568, Title III, § 313(b), 106 Stat. 4333, which appears as 10 USCS § 16136 note, provides that the amendments made by subsec. (a)(4) of such section [amending this section] are not applicable to any person receiving educational assistance for pursuit of an independent study program in which the person was enrolled on the date of enactment of such section for as long as such person is continuously thereafter so enrolled and meets the requirements of eligibility for such assistance for the pursuit of such program under title 38, United States Code, or title 10, United States Code, in effect on that date.

Effective date of Nov. 2, 1994 amendments. Act Nov. 2, 1994, P. L. 103-446, Title VI, § 601(d), 108 Stat. 4671, provides: "The amendments made by this section [amending this section, 38 USCS § 3241(b), and 10 USCS § 2136(c)] shall take effect as of October 1, 1994.”.

Effective date of Nov. 11, 1998 amendment adding subsec. (e). Act Nov. 11, 1998, P. L. 105-368, Title II, Subtitle A, § 206(b), 112 Stat. 3328, provides: "The amendment made by this section [adding subsec. (e) of this section] shall take effect 180 days after the date of the enactment of this Act.”.

Cross References
This section is referred to in  38 USCS § 3032, 3680A, 3688

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws §§ 132, 133

§ 3035.  Allocation of administration and of program costs

(a) Except to the extent otherwise specifically provided in this chapter [38 USCS §§ 3001 et seq.], the educational assistance programs established by this chapter [38 USCS §§ 3001 et seq.] shall be administered by the Department of Veterans Affairs.

(b) (1) Except to the extent provided in paragraphs (2), (3), and (4), payments for entitlement earned under subchapter II of this chapter [38 USCS §§ 3011 et seq.] shall be made from funds appropriated to, or otherwise available to, the Department of Veterans Affairs for the payment of readjustment benefits and from transfers from the Post-Vietnam Era Veterans Education Account pursuant to section 3232(b)(2)(B) of this title [38 USCS § 3232(b)(2)(B)].

(2) Payments for entitlements earned under subchapter II of this chapter [38 USCS §§ 3011 et seq.] that is established under section 3015(d) of this title [38 USCS §
3015(d)] at a rate in excess of the rate prescribed under subsection (a) or (b) of section 3015 of this title [38 USCS § 3015] shall, to the extent of that excess, be made from the Department of Defense Education Benefits Fund established under section 2006 of title 10 [10 USCS § 2006] or from appropriations made to the Department of Homeland Security, as appropriate.

(3) Payment for entitlements established under section 3018A or 3018B of this title [38 USCS § 3018A or 3018B] shall be made--

(A) except as provided in subparagraphs (B) and (C) of this paragraph, from the Department of Defense Education Benefits Fund established under section 2006 of title 10 [10 USCS § 2006];

(B) in the case of any individual described in section 3018A(a)(3), 3018B(a)(1)(C), or 3018B(a)(2)(C) of this title [38 USCS § 3018A(a)(3), 3018B(a)(1)(C), or 3018B(a)(2)(C) ], from funds appropriated, or otherwise available, to the Department of Veterans Affairs for the payment of readjustment benefits; and

(C) in the case of the increase in payments made under section 3015(f) of this title [38 USCS § 3015(f)], from the Post-Vietnam Era Veterans Education Account established pursuant to section 3222(a) of this title [38 USCS § 3222(a)].

(4) Payments attributable to the increased usage of benefits as a result of transfers of entitlement to basic educational assistance under section 3020 of this title [38 USCS § 3020] shall be made from the Department of Defense Education Benefits Fund established under section 2006 of title 10 [10 USCS § 2006] or from appropriations made to the Department of Transportation, as appropriate.

(c) Payments for educational assistance provided under subchapter III of this chapter [38 USCS §§ 3021 et seq.] shall be made from the Department of Defense Education Benefits Fund established under section 2006 of title 10 [10 USCS § 2006] or from appropriations made to the Department of Homeland Security, as appropriate.

(d) Funds for the payment by the Secretary of benefits under this chapter [38 USCS §§ 3001 et seq.] that are to be paid from the Department of Defense Education Benefits Fund shall be transferred to the Department of Veterans Affairs from such Fund as necessary and in accordance with agreements entered into under section 2006 of title 10 [10 USCS § 2006] by the Secretary, the Secretary of Defense, and the Secretary of the Treasury. Funds for the payment by the Secretary of benefits under this chapter [38 USCS §§ 3001 et seq.] that are to be paid from appropriations made to the Department of Homeland Security shall be transferred to the Department of Veterans Affairs as necessary. The Secretary and the Secretary of Homeland Security shall enter into an agreement for the manner in which such transfers are to be made.

(e) Payments for tutorial assistance benefits under section 3019 of this title [38 USCS § 3019] shall be made--

(1) in the case of the first $600 of such benefits paid to an individual, from funds appropriated, or otherwise available, to the Department of Veterans Affairs for the payment of readjustment benefits; and

(2) in the case of payments to an individual for such benefits in excess of $600, from--
(A) funds appropriated, or otherwise available, to the Department of Veterans Affairs for the payment of readjustment benefits;
(B) the Department of Defense Education Benefits Fund established under section 2006 of title 10 [10 USCS § 2006]; and
(C) funds appropriated to the Department of Homeland Security, in the same proportion as the Fund described in subclause (B) of this clause and the funds described in subclause (A) or (C) of this clause are used to pay the educational assistance allowance to the individual under this chapter [38 USCS §§ 3001 et seq.].

Amendments:

1986. Act Oct. 28, 1986, in subsec. (b)(2), substituted "subsection (a) or (b) of section 1415" for "section 1415(a)".


1989. Act Dec. 18, 1989, in subsecs. (a), (b)(1), (d)(2) and (e), substituted "Department of Veterans Affairs" for "Veterans' Administration"; and in subsec. (d), substituted "Secretary" for "Administrator", wherever appearing.

1990. Act Nov. 5, 1990, in subsec. (b), in para. (1), substituted "paragraphs (2) and (3)" for "paragraph (2)", and added para. (3).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1435, as 38 USCS § 3035, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


1994. Act Nov 2, 1994, in subsec. (b), in para. (2), substituted "section 3015(d)" for "section 3015(c)"; and, in para. (3)(C), substituted "section 3015(f)" for "section 3015(e)".

1996. Act Oct. 9, 1996, in subsec. (b)(1), inserted "and from transfers from the Post-Vietnam Era Veterans Education Account pursuant to section 3232(b)(2)(B) of this title".

2002. Act Nov. 25, 2002 (effective on 3/1/2003 pursuant to § 1704(g) of such Act, which appears as 10 USCS § 101 note), in subsecs. (b)(2), (c), (d), and (e)(2)(C), substituted "of Homeland Security" for "of Transportation" wherever appearing.

Act Dec. 2, 2002 (effective as if the amendment was made by § 654 of Act Dec. 28, 2001, P. L. 107-107, as provided by § 643(c)(2) of the 2002 Act, which appears as a note to this section), in subsec. (b), in para. (1), substituted "paragraphs (2), (3), and (4)" for "paragraphs (2) and (3) of this subsection", and added para. (4).

Act Dec. 6, 2002 (effective as if included in the enactment of Act Dec. 28, 2001, P. L. 107-107, as provided by § 308(c)(2) of Act Dec. 6, 2002, which appears as a note to this section) purported to make the same amendments as Act Dec. 2, 2002; however, in order to effectuate the probable intent of Congress, these amendments were not executed.

Other provisions:


Effective date of Dec. 6, 2002 amendments. Act Dec. 6, 2002, P. L. 107-330, Title III, § 308(c)(2), 116 Stat. 2824, provides: "The amendments made by this subsection [amending subsec. (b) of this section] shall take effect as if included in the enactment of the National

Cross References
This section is referred to in 38 USCS § 3017

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans’ Laws § 124

§ 3036. Reporting requirement

Discussion and Analysis in the Veterans Benefits Manual

(a) The Secretary of Defense and the Secretary shall submit to the Congress at least once every two years separate reports on the operation of the program provided for in this chapter [38 USCS §§ 3001 et seq.].

(b) The Secretary of Defense shall include in each report submitted under this section—
(1) information including (A) the extent to which the benefit levels provided under this chapter [38 USCS §§ 3001 et seq.] are adequate to achieve the purposes of inducing individuals to enter and remain in the Armed Forces and of providing an adequate level of financial assistance to help meet the cost of pursuing a program of education, (B) whether it is necessary for the purposes of maintaining adequate levels of well-qualified active-duty personnel in the Armed Forces to continue to offer the opportunity for educational assistance under this chapter [38 USCS §§ 3001 et seq.] to individuals who have not yet entered active-duty service, and (C) describing the efforts under sections 3011(i) and 3012(g) of this title [38 USCS §§ 3011(i) and 3012(g)] to inform members of the Armed Forces of the minimum service requirements for entitlement to educational assistance benefits under this chapter [38 USCS §§ 3001 et seq.] and the results from such efforts; and
(2) such recommendation for administrative and legislative changes regarding the provision of educational assistance to members of the Armed Forces and veterans, and their dependents, as the Secretary of Defense considers appropriate.

(c) The Secretary shall include in each report submitted under this section—
(1) information concerning the level of utilization of educational assistance and of expenditures under this chapter [38 USCS §§ 3001 et seq.]; and
(2) such recommendations for administrative and legislative changes regarding the provision of educational assistance to members of the Armed Forces and veterans, and their dependents, as the Secretary considers appropriate.

(d) No report shall be required under this section after January 1, 2005.

Amendments:
1989. Act Dec. 18, 1989, in subsecs. (a), (c) and (d)(2), substituted "Secretary" for "Administrator", wherever appearing; and in subsec. (b), in the introductory matter and in para. (2), inserted "of Defense".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1436, as 38 USCS § 3036.
1998. Act Nov. 11, 1998 (applicable with respect to reports to Congress submitted by the Secretary of Defense under this section on or after 1/1/2000, as provided by § 207(d)(2) of such Act, which appears as a note to this section), in subsec. (b)(1), substituted "(B)" for "and (B)", and inserted ", and (C) describing the efforts under sections 3011(i) and 3012(g) of this title to inform members of the Armed Forces of the minimum service requirements for entitlement to educational assistance benefits under this chapter and the results from such efforts".

2000. Act Nov. 1, 2000 substituted subsec. (d) for one which read:

"(d)(1) The first report by the Secretary of Defense under this section shall be submitted not later than January 1, 1986.

"(2) The first report by the Secretary under this section shall be submitted not later than January 1, 1988."

Other provisions:
Application of Nov. 11, 1998 amendments. Act Nov. 11, 1998, P. L. 105-368, Title II, Subtitle A, § 207(d)(2), 112 Stat. 3328, provides: "The amendments made by subsection (c) [amending subsec. (b)(1) of this section] shall apply with respect to reports to Congress submitted by the Secretary of Defense under section 3036 of title 38, United States Code, on or after January 1, 2000.".

CHAPTER 31. TRAINING AND REHABILITATION FOR VETERANS WITH SERVICE-CONNECTED DISABILITIES

§ 3100. Purposes
§ 3101. Definitions
§ 3102. Basic entitlement
[§ 3102A] [§ 1502A. Repealed]
§ 3103. Periods of eligibility
§ 3104. Scope of services and assistance
§ 3105. Duration of rehabilitation programs
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§ 3118. Personnel training, development, and qualifications
§ 3119. Rehabilitation research and special projects
§ 3120. Program of independent living services and assistance
§ 3121. Veterans' Advisory Committee on Rehabilitation
§ 3100. Purposes

The purposes of this chapter [38 USCS §§ 3100 et seq.] are to provide for all services and assistance necessary to enable veterans with service-connected disabilities to achieve maximum independence in daily living and, to the maximum extent feasible, to become employable and to obtain and maintain suitable employment.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1500, as 38 USCS § 3100.

Other provisions:

"(1) Except as provided in paragraph (2), the amendments made by subsections (a) and (b) of section 101 [adding 38 USCS §§ 3100, 3113, 3115, 3117 and amending 38 USCS prec. § 3100 and §§ 3101-3107, 3109, 3111] shall become effective on April 1, 1981.

"(2) The provisions of sections 1508, 1512, 1516, 1518, 1519, 1520, and 1521 of title 38, United States Code, as added by section 101(a) [now 38 USCS §§ 3108, 3112, 3116, 3118-3121], shall become effective on October 1, 1980.

"(3) Notwithstanding paragraph (2), the provisions of chapter 31 of title 38, United States Code, as in effect on the day before the date of the enactment of this Act [former 38 USCS §§ 1501 et seq.] (other than section 1504, relating to subsistence allowances, and section 1507, relating to loans [former 38 USCS 1504, 1507]), shall continue in effect until March 31, 1981.

"(4) Effective on October 1, 1980, sections 1504 and 1507 are repealed [former 38 USCS 1504, 1507]. During the period beginning on October 1, 1980, and ending on March 31, 1981, the provisions of sections 1508 and 1512 of title 38, United States Code, as added by section 101(a) [now 38 USCS §§ 3108, 3112], shall apply to veterans pursuing a program of vocational rehabilitation training under chapter 31 of such title in the same manner as sections 1504 and 1507 of such title, respectively, applied to veterans pursuing a program of vocational rehabilitation training under such chapter on September 30, 1980.

"(5) Subsection (c) of section 101 [adding 38 USCS § 3108 note] shall become effective on October 1, 1980. Subsection (d) of such section [adding 38 USCS § 3107 note] shall become effective on the date of the enactment of this Act."

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 68
1. Generally
2. Private actions

1. Generally

Fees charged by state or political subdivision, in connection with licensing trainee to engage in particular occupation, are payable as reasonable incidents of rehabilitation of trainee necessary to make him employable, and cost of transportation to required examination for license is payable as incident of program to attain employability; other fees required by law as condition to practice of profession are exactions conditioning practice of profession or vocation, as distinguished from preparation for admission to practice, and are not payable as part of training expense; fees and other charges prescribed by nongovernment organizations rather than by law such as labor union initiation fees and union membership dues which are incident to placement training are payable, provided there are no facilities for necessary training available without paying such charges as necessary incident of training; but union initiation fees and membership dues required to begin work following completion of training are not payable as necessary part of preparation for employment. 1944 ADVA 557

2. Private actions
Veterans' Vocational Rehabilitation Act does not authorize private actions since there is no suggestion in language of act or legislative history that statute guarantees federal employment or provides for private enforcement actions, and creating private right of action to enforce VVR would not be consistent with overall legislative scheme. Harris v Adams (1989, CA6 Mich) 873 F.2d 929, 1 AD Cas 1475, 49 BNA FEP Cas 1304, 131 BNA LRRM 2405, 50 CCH EPD ¶ 38973

§ 3101.  Definitions

For the purposes of this chapter [38 USCS §§ 3100 et seq.]--
(1) The term "employment handicap" means an impairment, resulting in substantial part from a disability described in section 3102(1)(A) of this title [38 USCS § 3102(1)(A)], of a veteran's ability to prepare for, obtain, or retain employment consistent with such veteran's abilities, aptitudes, and interests.
(2) The term "independence in daily living" means the ability of a veteran, without the services of others or with a reduced level of the services of others, to live and function within such veteran's family and community.
(3) The term "program of education" has the meaning provided in section 3452(b) of this title [38 USCS § 3452(b)].
(4) The term "program of independent living services and assistance" includes (A) the services provided for in this chapter [38 USCS §§ 3100 et seq.] that are needed to enable a veteran to achieve independence in daily living, including such counseling, diagnostic, medical, social, psychological, and educational services as are determined by the Secretary to be needed for such veteran to achieve maximum independence in daily living, and (B) the assistance authorized by this chapter [38 USCS §§ 3100 et seq.] for such veteran.
(5) The term "rehabilitated to the point of employability" means rendered employable in an occupation for which a vocational rehabilitation program has been provided under this chapter [38 USCS §§ 3100 et seq.].
(6) The term "rehabilitation program" means (A) a vocational rehabilitation program, or (B) a program of independent living services and assistance authorized under section 3120 of this title [38 USCS § 3120] for a veteran for whom a vocational goal has been determined not to be currently reasonably feasible.
(7) The term "serious employment handicap" means a significant impairment, resulting in substantial part from a service-connected disability rated at 10 percent or more, of a veteran's ability to prepare for, obtain, or retain employment consistent with such veteran's abilities, aptitudes, and interests.
(8) The term "vocational goal" means a gainful employment status consistent with a veteran's abilities, aptitudes, and interests.
(9) The term "vocational rehabilitation program" includes--
   (A) the services provided for in this chapter [38 USCS §§ 3100 et seq.] that are needed for the accomplishment of the purposes of this chapter [38 USCS §§ 3100 et seq.], including such counseling, diagnostic, medical, social, psychological, independent living, economic, educational, vocational, and employment services as are determined by the Secretary to be needed--
      (i) in the case of a veteran for whom the achievement of a vocational goal has not been determined not to be currently reasonably feasible, (I) to determine whether a vocational goal is reasonably feasible, (II) to improve such veteran's potential to participate in a program of services designed to achieve a
vocational goal, and (III) to enable such veteran to achieve maximum independence in daily living, and
(ii) in the case of a veteran for whom the achievement of a vocational goal is determined to be reasonably feasible, to enable such veteran to become, to the maximum extent feasible, employable and to obtain and maintain suitable employment, and
(B) the assistance authorized by this chapter [38 USCS §§ 3100 et seq.] for a veteran receiving any of the services described in clause (A) of this paragraph.

Explanatory notes:
A prior § 3101 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5301.

Effective date of section:
Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(1), 94 Stat. 2217, provided that this section is effective on April 1, 1981.

Amendments:
1989. Act Dec. 18, 1989, in paras. (4) and (9)(A), substituted "Secretary" for "Administrator".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1501, as 38 USCS § 3101, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).
1996. Act Oct. 9, 1996 (effective and applicable as provided by § 101(j) of such Act, which appears as a note to this section), in para. (1), inserted ", resulting in substantial part from a disability described in section 3102(1)(A) of this title,", in para. (6), inserted "authorized under section 3120 of this title" and, in para. (7), inserted ", resulting in substantial part from a service-connected disability rated at 10 percent or more,".

Other provisions:

"(1) Except as provided in paragraph (2), the amendments made by this section [for full classification, consult USCS Tables volumes] shall take effect on the date of the enactment of this Act.

"(2) The amendments made by subsection (a) (other than paragraph (2)), subsection (d) (other than subparagraphs (A) and (B) of paragraph (1)), and subsection (i) [amending 38 USCS §§ 3101(1), (7), 3104(a)(12), (b), (c), and 3120(b)] shall only apply with respect to claims of eligibility or entitlement to services and assistance (including claims for extension of such services and assistance) under chapter 31 of title 38, United States Code, received by the Secretary of Veterans Affairs on or after the date of the enactment of this Act, including those claims based on original applications, and applications seeking to reopen, revise, reconsider, or otherwise adjudicate or readjudicate on any basis claims for services and assistance under such chapter."

Cross References
This section is referred to in 38 USCS §§ 1728, 3695

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§ 3102. Basic entitlement

A person shall be entitled to a rehabilitation program under the terms and conditions of this chapter [38 USCS §§ 3100 et seq.] if--

(1) the person--
   (A) is--
      (i) a veteran who has a service-connected disability rated at 20 percent or more which was incurred or aggravated in service on or after September 16, 1940; or
      (ii) hospitalized or receiving outpatient medical care, services, or treatment for a service-connected disability pending discharge from the active military, naval, or air service, and the Secretary determines that--
         (I) the hospital (or other medical facility) providing the hospitalization, care, services, or treatment is doing so under contract or agreement with the Secretary concerned, or is under the jurisdiction of the Secretary of Veterans Affairs or the Secretary concerned; and
         (II) the person is suffering from a disability which will likely be compensable at a rate of 20 percent or more under chapter 11 of this title [38 USCS §§ 1101 et seq.]; and
   (B) is determined by the Secretary to be in need of rehabilitation because of an employment handicap; or

(2) the person is a veteran who--
   (A) has a service-connected disability rated at 10 percent which was incurred or aggravated in service on or after September 16, 1940; and
   (B) is determined by the Secretary to be in need of rehabilitation because of a serious employment handicap.

Explanatory notes:

A prior § 3102 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5302.

Effective date of section:

Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(1), 94 Stat. 2217, provided that this section is effective on April 1, 1981.
Amendments:

1989. Act Dec. 18, 1989, in paras. (1)(B) and (2), substituted "Secretary" for "Administrator".  

1990. Act Nov. 5, 1990 (applicable as provided by § 8021(b) of such Act, which appears as a note to this section), in para. (1)(A) and (B), inserted "at a rate of 20 percent or more".  

1991. Act March 22, 1991, in para. (1)(B), substituted "or receiving outpatient medical care, services, or treatment for a service-connected disability pending discharge from the active military, naval, or air service, and the Secretary determines that (i) the hospital (or other medical facility) providing the hospitalization, care, services, or treatment either is doing so under contract or agreement with the Secretary concerned or is under the jurisdiction of the Secretary of Veterans Affairs or the Secretary concerned, and (ii) the person is suffering from a disability which" for "for a service-connected disability in a hospital over which the Secretary concerned has jurisdiction pending discharge or release from active military, naval, or air service and is suffering from a disability which the Secretary determines".  

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1502, as 38 USCS § 3102.  

1992. Act Oct. 29, 1992 (effective 10/1/93, as provided by § 404(b) of such Act, which appears as a note to this section) substituted the text of this section for text which read: "A person shall be entitled to a rehabilitation program under the terms and conditions of this chapter if such person--  

"(1)(A) is a veteran who has a service-connected disability which is, or but for the receipt of retired pay would be, compensable at a rate of 20 percent or more under chapter 11 of this title and which was incurred or aggravated in service on or after September 16, 1940, or   

"(B) is hospitalized or receiving outpatient medical care, services, or treatment for a service-connected disability pending discharge from the active military, naval, or air service, and the Secretary determines that (i) the hospital (or other medical facility) providing the hospitalization, care, services, or treatment either is doing so under contract or agreement with the Secretary concerned or is under the jurisdiction of the Secretary of Veterans Affairs or the Secretary concerned, and (ii) the person is suffering from a disability which will likely be compensable at a rate of 20 percent or more under chapter 11 of this title; and  

"(2) is determined by the Secretary to be in need of rehabilitation because of an employment handicap.".  

1996. Act Oct. 9, 1996 (effective on enactment, as provided by § 101(j) of such Act, which appears as 38 USCS § 3101 note), in para. (1)(A)(i), substituted "rated at 20 percent or more" for "which is, or but for the receipt of retired pay would be, compensable at a rate of 20 percent or more under chapter 11 of this title and", in para. (2), in subpara. (A), substituted "rated at 10 percent" for "which is, or but for the receipt of retired pay would be, compensable at a rate of 10 percent under chapter 11 of this title and", and substituted subpara. (B) for one which read: "(B) has a serious employment handicap.".  

Other provisions:

Application of 1990 amendments of para. (1). Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle C, § 8021(b), 104 Stat. 1388-347, provides: "The amendments made by this section [amending para. (1) of this section] shall apply to veterans and other persons originally applying for assistance under chapter 31 of title 38, United States Code [38 USCS §§ 3100 et seq.], on or after November 1, 1990.".  

Effective date and application of 1992 amendment. Act Oct. 29, 1992, P. L. 102-568, Title IV, § 404(b), 106 Stat. 4338; Nov. 2, 1994, P. L. 103-446, Title VI, § 602(c)(1), 108 Stat. 4671 (effective as of 10/29/92, as provided by § 602(c)(2) of such Act), provides: "The amendment
made by subsection (a) [amending this section] shall take effect on October 1, 1993, but shall not apply to veterans and other persons who originally applied for assistance under chapter 31 of title 38, United States Code [38 USCS §§ 3100 et seq.], before November 1, 1990."

Cross References
This section is referred to in 38 USCS §§ 3103, 3106, 3113, 3120

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Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 68
1. Generally
2. Requirement that disability be service-connected
3. Charge for vocational training

1. Generally
Veteran, receiving benefits for disability incurred in course of vocational rehabilitation training, is not entitled to further training on basis of such injury. 1951 ADVA 871

2. Requirement that disability be service-connected
Claimant was no longer entitled to vocational rehabilitation training where disability on which vocational handicap and need and feasibility of training was predicated was erroneously determined to be service-connected. 1944 ADVA 600
Regulation's requirement that veteran's service-connected disability must "materially contribute" to veteran's employment handicap is inconsistent with statute and therefore in excess of Secretary's statutory authority; neither language nor plain meaning of statute requires that there be causal nexus between veteran's service-connected disability and veteran's employment in order for veteran to be entitled to chapter 31 vocational rehabilitation. Davenport v Brown (1995) 7 Vet App 476

3. Charge for vocational training
Charge for instruction of trainees which exceeded charges paid by other students pursuing same course or courses and receiving identical services was payable so long as proposed rate was reasonable and proffered services practicable and necessary to proper purpose. 1944 ADVA 580

[§ 3102A]  [§ 1502A. Repealed]
The bracketed section number "3102A" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.


§ 3103. Periods of eligibility
cxixDiscussion and Analysis in the Veterans Benefits Manual

(a) Except as provided in subsection (b), (c), or (d) of this section, a rehabilitation program may not be afforded to a veteran under this chapter [38 USCS §§ 3100 et seq.] after the end of the twelve-year period beginning on the date of such veteran's discharge or release from active military, naval, or air service.
(b) (1) In any case in which the Secretary determines that a veteran has been prevented from participating in a vocational rehabilitation program under this chapter [38 USCS §§ 3100 et seq.] within the period of eligibility prescribed in subsection (a) of this section because a medical condition of such veteran made it infeasible for such veteran to participate in such a program, the twelve-year period of eligibility shall not run during the period of time that such veteran was so prevented from participating in such a program, and such period of eligibility shall again begin to run on the first day following such veteran's recovery from such condition on which it is reasonably feasible, as determined under regulations which the Secretary shall prescribe, for such veteran to participate in such a program.

(2) In any case in which the Secretary determines that a veteran has been prevented from participating in a vocational rehabilitation program under this chapter [38 USCS §§ 3100 et seq.] within the period of eligibility prescribed in subsection (a) of this section because--
   (A) such veteran had not met the requirement of a discharge or release from active military, naval or air service under conditions other than dishonorable before (i) the nature of such discharge or release was changed by appropriate authority, or (ii) the Secretary determined, under regulations prescribed by the Secretary, that such discharge or release was under conditions other than dishonorable, or
   (B) such veteran's discharge or dismissal was, under section 5303 of this title [38 USCS § 5303], a bar to benefits under this title before the Secretary made a determination that such discharge or dismissal is not a bar to such benefits, the twelve-year period of eligibility shall not run during the period of time that such veteran was so prevented from participating in such a program.

(3) In any case in which the Secretary determines that a veteran has been prevented from participating in a vocational rehabilitation program under this chapter [38 USCS §§ 3100 et seq.] within the period of eligibility prescribed in subsection (a) of this section because such veteran had not established the existence of a service-connected disability rated at 10 percent or more, the twelve-year period of eligibility shall not run during the period such veteran was so prevented from participating in such a program.

(c) In any case in which the Secretary determines that a veteran is in need of services to overcome a serious employment handicap, such veteran may be afforded a vocational rehabilitation program after the expiration of the period of eligibility otherwise applicable to such veteran if the Secretary also determines, on the basis of such veteran's current employment handicap and need for such services, that an extension of the applicable period of eligibility is necessary for such veteran and--
   (1) that such veteran had not previously been rehabilitated to the point of employability;
   (2) that such veteran had previously been rehabilitated to the point of employability but (A) the need for such services had arisen out of a worsening of such veteran's service-connected disability that precludes such veteran from performing the duties of the occupation for which such veteran was previously trained in a vocational rehabilitation program under this chapter [38 USCS §§ 3100 et seq.], or (B) the occupation for which such veteran had been so trained is not suitable in view of such veteran's current employment handicap and capabilities; or
(3) under regulations which the Secretary shall prescribe, that an extension of the period of eligibility of such veteran is necessary to accomplish the purposes of a rehabilitation program for such veteran.

(d) In any case in which the Secretary has determined that a veteran's disability or disabilities are so severe that the achievement of a vocational goal currently is not reasonably feasible, such veteran may be afforded a program of independent living services and assistance in accordance with the provisions of section 3120 of this title [38 USCS § 3120] after the expiration of the period of eligibility otherwise applicable to such veteran if the Secretary also determines that an extension of the period of eligibility of such veteran is necessary for such veteran to achieve maximum independence in daily living.

(e) In any case in which the Secretary has determined that a veteran was prevented from participating in a vocational rehabilitation program under this chapter [38 USCS §§ 3100 et seq.] within the period of eligibility otherwise prescribed in this section as a result of being ordered to serve on active duty under section 688, 12301(a), 12301(d), 12301(g), 12302, or 12304 of title 10 [10 USCS § 688, 12301(a), 12301(d), 12301(g), 12302, or 12304], such period of eligibility shall not run for the period of such active duty service plus four months.

Explanatory notes:
A prior § 3103 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5303.

Effective date of section:
Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(1), 94 Stat. 2217, provided that this section is effective on April 1, 1981.

Amendments:
1991. Act May 7, 1991, amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).
Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1503, as 38 USCS § 3103, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).
1996. Act Oct. 9, 1996 (effective on enactment, as provided by § 101(j) of such Act, which appears as 38 USCS § 3101 note), in subsec. (b)(3), substituted "rated at 10 percent or more" for "described in section 3102(1)(A)(i) of this title"; in subsec. (c), in the introductory matter, substituted "current" for "particular" and, in para. (2), substituted "veteran's current employment" for "veteran's employment"; and, in subsec. (d), substituted "in accordance with the provisions of section 3120 of this title" for "under this chapter".
2001. Act Dec. 27, 2001 (effective as of 9/11/2001, as provided by § 103(e) of such Act, which appears as 38 USCS § 3013 note), as amended by Act Dec. 6, 2002 (effective as of
12/27/2001 and as if included in Act Dec. 27, 2001 as originally enacted, as provided by § 308(h) of the 2002 Act, which appears as a note to this section, added subsec. (e).

2002. Act Dec. 6, 2002 (effective as of 12/27/2001 and as if included in Act Dec. 27, 2001 as originally enacted, as provided by § 308(h) of such Act, which appears as a note to this section) made technical corrections which did not affect the text of this section.

Other provisions:
Effective date of Dec. 6, 2002 amendment. Act Dec. 6, 2002, P. L. 107-330, Title III, § 308(h), 116 Stat. 2829, provided that the amendment made by such section to § 103(c)(2) of Act Dec. 27, 2001 (adding subsec. (e) of this section) is effective as of December 27, 2001, and as if included in 2001 act as originally enacted.

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans’ Laws § 68

§ 3104. Scope of services and assistance

(a) Services and assistance which the Secretary may provide under this chapter [38 USCS §§ 3100 et seq.], pursuant to regulations which the Secretary shall prescribe, include the following:

(1) Evaluation, including periodic reevaluations as appropriate with respect to a veteran participating in a rehabilitation program, of the potential for rehabilitation of a veteran, including diagnostic and related services (A) to determine whether the veteran has an employment handicap or a serious employment handicap and whether a vocational goal is reasonably feasible for such veteran, and (B) to provide a basis for planning a suitable vocational rehabilitation program or a program of services and assistance to improve the vocational rehabilitation potential or independent living status of such veteran, as appropriate.

(2) Educational, vocational, psychological, employment, and personal adjustment counseling.

(3) An allowance and other appropriate assistance, as authorized by section 3108 of this title [38 USCS § 3108].

(4) A work-study allowance as authorized by section 3485 of this title [38 USCS § 3485].

(5) Placement services to effect suitable placement in employment, and postplacement services to attempt to insure satisfactory adjustment in employment.

(6) Personal adjustment and work adjustment training.

(7) (A) Vocational and other training services and assistance, including individualized tutorial assistance, tuition, fees, books, supplies, handling charges, licensing fees, and equipment and other training materials determined by the Secretary to be necessary to accomplish the purposes of the rehabilitation program in the individual case.

(B) Payment for the services and assistance provided under subparagraph (A) of this paragraph shall be made from funds available for the payment of readjustment benefits.

(8) Loans as authorized by section 3112 of this title [38 USCS § 3112].

(9) Treatment, care, and services described in chapter 17 of this title [38 USCS §§ 1701 et seq.].
(10) Prosthetic appliances, eyeglasses, and other corrective and assistive devices.
(11) Services to a veteran's family as necessary for the effective rehabilitation of such veteran.
(12) For veterans with the most severe service-connected disabilities who require homebound training or self-employment, or both homebound training and self-employment, such license fees and essential equipment, supplies, and minimum stocks of materials as the Secretary determines to be necessary for such a veteran to begin employment and are within the criteria and cost limitations that the Secretary shall prescribe in regulations for the furnishing of such fees, equipment, supplies, and stocks.
(13) Travel and incidental expenses under the terms and conditions set forth in section 111 of this title [38 USCS § 111], plus, in the case of a veteran who because of such veteran's disability has transportation expenses in addition to those incurred by persons not so disabled, a special transportation allowance to defray such additional expenses during rehabilitation, job seeking, and the initial employment stage.
(14) Special services (including services related to blindness and deafness) including--
   (A) language training, speech and voice correction, training in ambulation, and one-hand typewriting;
   (B) orientation, adjustment, mobility, reader, interpreter, and related services; and
   (C) telecommunications, sensory, and other technical aids and devices.
(15) Services necessary to enable a veteran to achieve maximum independence in daily living.
(16) Other incidental goods and services determined by the Secretary to be necessary to accomplish the purposes of a rehabilitation program in an individual case.

(b) A rehabilitation program (including individual courses) to be pursued by a veteran shall be subject to the approval of the Secretary.

Explanatory notes:
A prior § 3104 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5304.

Effective date of section:
Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(1), 94 Stat. 2217, provided that this section is effective on April 1, 1981.

Amendments:
1988. Act May 20, 1988 (effective on the 60th day after enactment, as provided by § 16(b)(2) of such Act, which appears as a note to this section), in subsec. (a)(7), designated the existing provisions as subpara. (A), substituted a comma for the period following "case" and added "and (B) job-readiness skills development and counseling under section 14(a)(2) of the Veterans' Job Training Act (29 U.S.C. 1721 note) for a participant in a program of training under such Act.".
1989. Act Dec. 18, 1989, in subsecs. (a) and (c), substituted "Secretary" for "Administrator", wherever appearing.
1991. Act March 22, 1991 (applicable as provided by § 3(b)(2) of such Act, which appears as a note to this section), in subsec. (a)(7), inserted the subpara. designator "(A)", redesignated
former cls. (A) and (B) as cls. (i) and (ii) and, in cl. (i) as redesignated, substituted "handling charges, licensing" for "and licensing", and added subpara. (B).


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1504, as 38 USCS § 3104, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1996. Act Oct. 9, 1996 (effective and applicable as provided by § 101(j) of such Act, which appears as 38 USCS § 3101 note), in subsec. (a), in para. (1), substituted "the veteran has an employment handicap or" for "such veteran's disability or disabilities cause" and inserted "reasonably", in para. (7)(A), deleted "(i)" following "including" and deleted ", and (ii) job-readiness skills development and counseling under section 14(a)(2) of the Veterans' Job Training Act (29 U.S.C. 1721 note) for a participant in a program of training under such Act" following "case," and, in para. (12), substituted "For veterans with the most severe service-connected disabilities who require" for "For the most severely disabled veterans requiring"; deleted subsec. (b), which read: "(b) A program of independent living services and assistance may include the types of services and assistance described in section 702 of the Rehabilitation Act of 1973 (29 U.S.C. 796a)."; and redesignated subsec. (c) as new subsec. (b).

Other provisions:

Veterans pursuing program of vocational rehabilitation under former 38 USCS § 1504. Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(4), 105 Stat. 238, which appears as 38 USCS § 3100 note, provides that during the period beginning on Oct. 1, 1980, and ending on Mar. 31, 1981, the provisions of 38 USCS § 3108 shall apply to veterans pursuing a program of vocational rehabilitation training under this chapter in the same manner as former 38 USCS § 1504 applied to veterans pursuing such a program under this chapter on Sept. 30, 1980.


"(a) In general. Except as provided in subsection (b), the provisions of and amendments made by this Act [for full classification, consult USCS Tables volumes] shall take effect on the date of the enactment of this Act.

"(b) Exceptions.(1) The following provisions of or amendments made by this Act shall take effect for all of fiscal year 1988 and subsequent fiscal years:

"(A) Clause (5) of subsection (b) of section 2002A [now 4102A] of title 38, United States Code, as added by section 2(a)(2) of this Act.

"(B) Subsection (a) of section 2003A [now 4103A] of such title, as amended by section 2(e)(1)(A) of this Act.

"(C) Paragraphs (1), (2), and (3) of section 2004(a) [now 4104(a)] of such title, as amended by section 3(a) of this Act.

"(D) Paragraphs (2) through (5) of section 1774(a) [now 3674(a)] of such title, as added by section 13(a)(1) of this Act.

"(2) The provisions of and amendments made by sections 4 through 11 [for full classification, consult USCS Tables volumes] shall take effect on the 60th day after the date of the enactment of this Act.".

this section] shall apply only to payments made on or after the date of the enactment of this Act.”.

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
This section is referred to in 38 USCS §§ 1163, 1524, 3105, 3106, 3117, 3120

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans’ Laws §§ 68, 69, 76
1. Generally
2. Relationship with other laws
3. Subsistence allowances

1. Generally
Person who receives retainer pay is entitled to receive increased pension at same time, with retainer pay in such cases to be considered as a basic award of pension and any increase to consist only of difference between retainer pay and total amount payable. 1945 ADVA 656

2. Relationship with other laws
Veterans given on-the-job training by Federal agencies without being paid salary or wage were not rendering gratuitous or voluntary services within meaning of former 31 USC § 655, and such training of veterans without compensation was proper; allowances paid to veterans while in training was not salary for purposes of former 5 USC § 58, and thus veteran is entitled to receive salary or wages from agency in which he was training while at the same time receiving allowances in form of increased pension benefits. 1944 ADVA 576

Regulation precluding retroactive induction into chapter 31 vocational rehabilitation program for period in which veteran received educational benefits under another VA program is impermissibly restrictive to extent it imposes limits on veteran’s receipt of such benefits to period that does not correspond to effective date of disability award, as language § 5113(a) clearly commands. Bernier v Brown (1995) 7 Vet App 434, app dismd without op (1995, CA FC) 73 F.3d 377, reported in full (1995, CA FC) 1995 US App LEXIS 36579

VA regulation stating that flight training could only be authorized in degree curriculums in field of aviation that included required flight training was not inconsistent with statute since it gives Secretary broad discretion in implementing vocational rehabilitation programs. Clarke v Brown (1997) 10 Vet App 20

3. Subsistence allowances
Veteran whose right to receive compensation had been suspended for failure to report for physical examination requested for compensation purposes was not barred from continuing training; but so long as he persisted in refusal to report for physical examination, he was limited to amount of subsistence allowance available under applicable regulation without any compensation or other benefit. 1948 ADVA 784

Veteran pursuing training, who was determined to be employable, was entitled at that time to 2 months’ postrehabilitation subsistance allowance, and subsequent re-entry by veteran into active military service during 2-month period did not deprive him of right to 2 months' allowance. 1952 ADVA 893

Female veteran pursuing vocational rehabilitation training is not entitled to claim her husband as dependent for purposes of receiving increased subsistence allowance. 1952 ADVA 900

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§ 3105. Duration of rehabilitation programs

(a) In any case in which the Secretary is unable to determine whether it currently is reasonably feasible for a veteran to achieve a vocational goal, the period of extended evaluation under section 3106(c) of this title [38 USCS § 3106(c)] may not exceed twelve months, except that such period may be extended for additional periods of up to six months each if the Secretary determines before granting any such extension that it is reasonably likely that, during the period of any such extension, a determination can be made whether the achievement of a vocational goal is reasonably feasible in the case of such veteran.

(b) Except as provided in subsection (c) of this section, the period of a vocational rehabilitation program for a veteran under this chapter [38 USCS §§ 3100 et seq.] following a determination of the current reasonable feasibility of achieving a vocational goal may not exceed forty-eight months, except that the counseling and placement and postplacement services described in section 3104(a)(2) and (5) of this title [38 USCS § 3104(a)(2) and (5)] may be provided for an additional period not to exceed eighteen months in any case in which the Secretary determines the provision of such counseling and services to be necessary to accomplish the purposes of a rehabilitation program in the individual case.

(c) The Secretary may extend the period of a vocational rehabilitation program for a veteran to the extent that the Secretary determines that an extension of such period is necessary to enable such veteran to achieve a vocational goal if the Secretary also determines--

(1) that such veteran had previously been rehabilitated to the point of employability but (A) such veteran's need for further vocational rehabilitation has arisen out of a worsening of such veteran's service-connected disability that precludes such veteran from performing the duties of the occupation for which such veteran had been so rehabilitated, or (B) the occupation for which such veteran had been so rehabilitated is not suitable in view of such veteran's current employment handicap and capabilities; or

(2) under regulations which the Secretary shall prescribe, that such veteran has a serious employment handicap and that an extension of such period is necessary to accomplish the purposes of a rehabilitation program for such veteran.

(d) Unless the Secretary determines that a longer period is necessary and likely to result in a substantial increase in a veteran's level of independence in daily living, the period of a program of independent living services and assistance for a veteran under this chapter [38 USCS §§ 3100 et seq.] (following a determination by the Secretary that such veteran's disability or disabilities are so severe that the achievement of a vocational goal currently is not reasonably feasible) may not exceed twenty-four months.

(e) (1) Notwithstanding any other provision of this chapter or chapter 36 of this title [38 USCS §§ 3100 et seq. or §§ 3670 et seq.], any payment of a subsistence allowance and other assistance described in paragraph (2) shall not--

(A) be charged against any entitlement of any veteran under this chapter [38 USCS §§ 3100 et seq.]; or

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(B) be counted toward the aggregate period for which section 3695 of this title [38 USCS § 3695] limits an individual's receipt of allowance or assistance.

(2) The payment of the subsistence allowance and other assistance referred to in paragraph (1) is the payment of such an allowance or assistance for the period described in paragraph (3) to a veteran for participation in a vocational rehabilitation program under this chapter if the Secretary finds that the veteran had to suspend or discontinue participation in such vocational rehabilitation program as a result of being ordered to serve on active duty under section 688, 12301(a), 12301(d), 12301(g), 12302, or 12304 of title 10 [10 USCS § 688, 12301(a), 12301(d), 12301(g), 12302, or 12304].

(3) The period for which, by reason of this subsection, a subsistence allowance and other assistance is not charged against entitlement or counted toward the applicable aggregate period under section 3695 of this title [38 USCS § 3695] shall be the period of participation in the vocational rehabilitation program for which the veteran failed to receive credit or with respect to which the veteran lost training time, as determined by the Secretary.

Explanatory notes:

A prior § 3105 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5305.

Effective date of section:

Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(1), 94 Stat. 2217, provided that this section is effective on April 1, 1981.

Amendments:

1986. Act Oct. 28, 1986, in subsec. (a), inserted "currently"; in subsec. (b), inserted "current"; and in subsec. (d), inserted "currently".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1505, as 38 USCS § 3105, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1996. Act Oct. 9, 1996 (effective on enactment, as provided by § 101(j) of such Act, which appears as 38 USCS § 3101 note), in subsec. (c)(1), substituted "veteran's current employment" for "veteran's employment".

2001. Act Dec. 27, 2001 (effective as of 9/11/2001, as provided by § 103(e) of such Act, which appears as 38 USCS § 3013 note), added subsec. (e).

Cross References

This section is referred to in 38 USCS §§ 3106, 3108

Research Guide

Am Jur:

24 Am Jur 2d, Divorce and Separation § 540
77 Am Jur 2d, Veterans and Veterans' Laws § 68
§ 3106. Initial and extended evaluations; determinations regarding serious employment handicap

(a) The Secretary shall provide any veteran who has a service-connected disability rated at 10 percent or more and who applies for benefits under this chapter [38 USCS §§ 3100 et seq.] with an initial evaluation consisting of such services described in section 3104(a)(1) of this title [38 USCS § 3104(a)(1)] as are necessary (1) to determine whether such veteran is entitled to and eligible for benefits under this chapter [38 USCS §§ 3100 et seq.], and (2) in the case of a veteran who is determined to be entitled to an eligible for such benefits, to determine--

(A) whether such veteran has a serious employment handicap, and
(B) whether the achievement of a vocational goal currently is reasonably feasible for such veteran if it is reasonably feasible to make such determination without extended evaluation.

(b) In any case in which the Secretary has determined that a veteran has a serious employment handicap and that the achievement of a vocational goal currently is reasonably feasible for such veteran, such veteran shall be provided an individualized written plan of vocational rehabilitation developed under section 3107(a) of this title [38 USCS § 3107(a)].

(c) In any case in which the Secretary has determined that a veteran has a serious employment handicap but the Secretary is unable to determine, in an initial evaluation pursuant to subsection (a) of this section, whether or not the achievement of a vocational goal currently is reasonably feasible, such veteran shall be provided with an extended evaluation consisting of the services described in section 3104(a)(1) of this title [38 USCS § 3104(a)(1)], such services under this chapter [38 USCS §§ 3100 et seq.] as the Secretary determines necessary to improve such veteran's potential for participation in a program of services designed to achieve a vocational goal and enable such veteran to achieve maximum independence in daily living, and assistance as authorized by section 3108 of this title [38 USCS § 3108].

(d) In any case in which the Secretary has determined that a veteran has a serious employment handicap and also determines, following such initial and any such extended evaluation, that achievement of a vocational goal currently is not reasonably feasible, the Secretary shall determine whether the veteran is capable of participating in a program of independent living services and assistance under section 3120 of this title [38 USCS § 3120].

(e) The Secretary shall in all cases determine as expeditiously as possible whether the achievement of a vocational goal by a veteran currently is reasonably feasible. In the case of a veteran provided extended evaluation under subsection (c) of this section (including any periods of extensions under section 3105(a) of this title [38 USCS § 3105(a)]), the Secretary shall make such determination not later than the end of such extended evaluation or period of extension, as the case may be. In determining whether the achievement of a vocational goal currently is reasonably feasible, the Secretary shall resolve any reasonable doubt in favor of determining that such achievement currently is reasonably feasible.
(f) In connection with each period of extended evaluation of a veteran and each rehabilitation program for a veteran who is determined to have a serious employment handicap, the Secretary shall assign a Department of Veterans Affairs employee to be responsible for the management and followup of the provision of all services (including appropriate coordination of employment assistance under section 3117 of this title [38 USCS § 3117]) and assistance under this chapter [38 USCS §§ 3100 et seq.] to such veteran.

Explanatory notes:
A prior § 3106 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5306.

Effective date of section:
Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(1), 94 Stat. 2217, provided that this section is effective on April 1, 1981.

Amendments:

1989. Act Dec. 18, 1989, in subsecs. (a)-(e), substituted "Secretary" for "Administrator", wherever appearing; and in subsec. (e), substituted "Department of Veterans Affairs" for "Veterans' Administration".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1506, as 38 USCS § 3106, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1994. Act Nov. 2, 1994, in subsec. (a), substituted "clause (i) or (ii) of section 3102(1)(A)" for "section 3102(1)(A) or (B)".

1996. Act Oct. 9, 1996 (effective on enactment, as provided by § 101(j) of such Act, which appears as 38 USCS § 3101 note), in subsec. (a), substituted "rated at 10 percent or more" for "described in clause (i) or (ii) of section 3102(1)(A) of this title"; in subsec. (b), deleted "counseling in accordance with" following "provided"; in subsec. (c), substituted "with an extended" for "with extended"; redesignated subsecs. (d) and (e) as subsecs. (e) and (f), respectively, and added new subsec. (d).

Cross References
This section is referred to in 38 USCS §§ 1163, 3105, 3107-3109, 3118, 3120, 4211

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 68

§ 3107. Individualized vocational rehabilitation plan

(a) The Secretary shall formulate an individualized written plan of vocational rehabilitation for a veteran described in section 3106(b) of this title [38 USCS § 3106(b)]. Such plan shall be developed with such veteran and shall include, but not be limited to (1) a statement of long-range rehabilitation goals for such veteran and intermediate rehabilitation objectives related to achieving such goals, (2) a statement of the specific services (which shall include counseling in all cases) and assistance to be provided under this chapter [38 USCS §§ 3100 et seq.], (3) the projected date for the initiation and the
anticipated duration of each such service, and (4) objective criteria and an evaluation
procedure and schedule for determining whether such objectives and goals are being
achieved.

(b) The Secretary shall review at least annually the plan formulated under subsection (a)
of this section for a veteran and shall afford such veteran the opportunity to participate in
each such review. On the basis of such review, the Secretary shall (1) redevelop such
plan with such veteran if the Secretary determines, under regulations which the Secretary
shall prescribe, that redevelopment of such plan is appropriate, or (2) disapprove
redevelopment of such plan if the Secretary determines, under such regulations, that
redevelopment of such plan is not appropriate.

(c) (1) Each veteran for whom a plan has been developed or redeveloped under
subsection (a) or (b)(1), respectively, of this section or in whose case redevelopment of a
plan has been disapproved under subsection (b)(2) of this section, shall be informed of
such veteran's opportunity for a review as provided in paragraph (2) of this subsection.

(2) In any case in which a veteran does not agree to such plan as proposed, to such
plan as redeveloped, or to the disapproval of redevelopment of such plan, such
veteran may submit to the person described in section 3106(f) of this title [38 USCS §
3106(f)] a written statement containing such veteran's objections and request a review
of such plan as proposed or redeveloped, or a review of the disapproval of
redevelopment of such plan, as the case may be.

(3) The Secretary shall review the statement submitted under paragraph (2) of this
subsection and the plan as proposed or as redeveloped, and, if applicable, the
disapproval of redevelopment of the plan, and render a decision on such review not
later than ninety days after the date on which such veteran submits such statement,
unless the case is one for which a longer period for review, not to exceed 150 days
after such veteran submits such statement, is allowed under regulations prescribed by
the Secretary, in which case the Secretary shall render a decision no later than the last
day of the period prescribed in such regulations.

Explanatory notes:

A prior § 3107 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105
Stat. 238. For similar provisions, see 38 USCS § 5307.

Effective date of section:

Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(1), 94 Stat. 2217, provided that this
section is effective on April 1, 1981.

Amendments:

1989. Act Dec. 18, 1989, in subsecs. (a), (b) and (c)(3), substituted "Secretary" for
"Administrator", wherever appearing.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1507, as 38 USCS §
3107, and amended the references in this section to reflect the redesignations made by § 5(a)
of such Act (see Table III preceding 38 USCS § 101).

1996. Act Oct. 9, 1996 (effective on enactment, as provided by § 101(j) of such Act, which
appears as 38 USCS § 3101 note), in subsec. (c)(2), substituted "3106(f)" for "3106(e)".

Other provisions:
Vocational rehabilitation programs. Act Oct. 17, 1980, P. L. 96-466, Title I, § 101(d), 94 Stat. 2186 (effective 10/17/80, as provided by § 802(a)(5) of such Act), provided:

"With respect to veterans who are participating in a program of vocational rehabilitation under chapter 31 of title 38, United States Code [38 USCS §§ 3100 et seq.], on March 31, 1981—

"(1) individualized written plans of vocational rehabilitation shall be formulated under section 1507 of such title (as amended by subsection (a)) [this section] for such veterans to the extent that and at such times as the Administrator determines that the formulation of such plans is feasible and on the basis of such priorities for the formulation of such plans as the Administrator shall prescribe; and

"(2) extensions may be granted a veteran under sections 1503(c) and 1505(c)(2) [now §§ 3103(c) and 3105(c)(2)] of such title (as amended by subsection (a)) without regard to the requirement for a determination of a serious employment handicap."

Veterans pursuing program of vocational rehabilitation under former 38 USCS § 1507. Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(4), 105 Stat. 238, which appears as 38 USCS § 3100 note, provides that during the period beginning on Oct. 1, 1980, and ending on Mar. 31, 1981, the provisions of 38 USCS § 3112 shall apply to veterans pursuing a program of vocational rehabilitation training under this chapter in the same manner as former 38 USCS § 1507 applied to veterans pursuing such a program under this chapter on Sept. 30, 1980.

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References
This section is referred to in 38 USCS §§ 1524, 3106, 3120

Research Guide
Am Jur:
24A Am Jur 2d, Divorce and Separation § 1003
77 Am Jur 2d, Veterans and Veterans' Laws § 68

§ 3108. Allowances

(a) (1) Except in the case of a veteran who makes an election under subsection (f) of this section and subject to the provisions of paragraph (3) of this subsection, each veteran shall be paid a subsistence allowance in accordance with this section during a period determined by the Secretary to be a period of such veteran's participation under this chapter [38 USCS §§ 3100 et seq.] in a rehabilitation program.

(2) In any case in which the Secretary determines, at the conclusion of such veteran's pursuit of a vocational rehabilitation program under this chapter [38 USCS §§ 3100 et seq.], that such veteran has been rehabilitated to the point of employability, such veteran shall be paid a subsistence allowance, as prescribed in this section for full-time training for the type of program that the veteran was pursuing, for two months while satisfactorily following a program of employment services provided under section 3104(a)(5) of this title [38 USCS § 3104(a)(5)].

(3) A subsistence allowance may not be paid under this chapter [38 USCS §§ 3100 et seq.] to a veteran for any period during which such veteran is being provided with an initial evaluation under section 3106(a) of this title [38 USCS § 3106(a)] or during
which such veteran is being provided only with counseling or with placement or postplacement services under section 3105(b) of this title [38 USCS § 3105(b)].

(b) (1) Except as otherwise provided in this section, the Secretary shall determine the subsistence allowance to be paid to a veteran under this chapter [38 USCS §§ 3100 et seq.] in accordance with the following table, which shall be the monthly amount shown in column II, III, IV, or V (whichever is applicable as determined by the veteran's dependency status) opposite the appropriate type of program being pursued as specified in column I:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of program</td>
<td>No dependents</td>
<td>One dependent</td>
<td>Two dependents</td>
<td>More than two dependents</td>
</tr>
<tr>
<td>Institutional training:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time</td>
<td>$366</td>
<td>$454</td>
<td>$535</td>
<td>$39</td>
</tr>
<tr>
<td>Three-quarter time</td>
<td>$275</td>
<td>$341</td>
<td>$400</td>
<td>$30</td>
</tr>
<tr>
<td>Half-time</td>
<td>$184</td>
<td>$228</td>
<td>$268</td>
<td>$20</td>
</tr>
<tr>
<td>Farm cooperative,</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>apprentice, or other</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>on-job training:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time</td>
<td>$320</td>
<td>$387</td>
<td>$446</td>
<td>$29</td>
</tr>
<tr>
<td>Extended evaluation:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time</td>
<td>$366</td>
<td>$454</td>
<td>$535</td>
<td>$39</td>
</tr>
<tr>
<td>Independent living training:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time</td>
<td>$366</td>
<td>$454</td>
<td>$535</td>
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<td>Three-quarter time</td>
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</tr>
<tr>
<td>Half-time</td>
<td>$184</td>
<td>$228</td>
<td>$268</td>
<td>$20</td>
</tr>
</tbody>
</table>

(2) With respect to the fiscal year beginning on October 1, 1994, the Secretary shall provide a percentage increase in the monthly rates payable under paragraph (1) of this subsection equal to the percentage by which the Consumer Price Index (all items, United States city average published by the Bureau of Labor Statistics) for the 12-month period ending June 30, 1994, exceeds such Consumer Price Index for the 12-month period ending June 30, 1993.

(3) With respect to any fiscal year beginning on or after October 1, 1995, the Secretary shall continue to pay, in lieu of the rates payable under paragraph (1) of this subsection, the monthly rates payable under this subsection for the previous fiscal year and shall provide, for any such fiscal year, a percentage increase in such rates equal to the percentage by which--

(A) the Consumer Price Index (all items, United States city average) for the 12-month period ending on June 30 preceding the beginning of the fiscal year for which the increase is made, exceeds

(B) such Consumer Price Index for the 12-month period preceding the 12-month period described in subparagraph (A).

(c) (1) In any case in which the vocational rehabilitation program for a veteran includes training on the job by an employer in any month, such employer shall be required to submit to the Secretary a statement in writing showing any wage, compensation, or other
income paid (directly or indirectly) by the employer to such veteran for such month. Based upon such written statement, the Secretary is authorized to reduce the subsistence allowance of such veteran to an amount considered equitable and just in accordance with criteria which the Secretary shall establish in regulations which the Secretary shall prescribe.

(2) A veteran pursuing on-job training or work experience as part of a vocational rehabilitation program in a Federal, State, or local government agency or federally recognized Indian tribe under the provisions of section 3115(a)(1) of this title [38 USCS § 3115(a)(1)] without pay or for nominal pay shall be paid the appropriate subsistence allowance rate provided in subsection (b) of this section for an institutional program.

(d) (1) The Secretary shall, in accordance with regulations which the Secretary shall prescribe, define full-time and each part-time status for veterans participating in rehabilitation programs under this chapter [38 USCS §§ 3100 et seq.].

(2) A veteran participating in extended evaluation on less than a full-time basis may be paid a proportional subsistence allowance in accordance with regulations which the Secretary shall prescribe.

(e) In any case in which a veteran is pursuing a rehabilitation program on a residential basis in a specialized rehabilitation facility, the Secretary may (1) pay to such facility the cost of such veteran's room and board in lieu of payment to such veteran of the subsistence allowance (not including any portion payable for any dependents) payable under subsection (b) of this section, and (2) pay to such veteran that portion of the allowance for dependents payable, as determined by such veteran's dependency status, under subsection (b) of this section for a full-time institutional program.

(f) (1) (A) In any case in which the Secretary determines that a veteran is eligible for and entitled to rehabilitation under this chapter [38 USCS §§ 3100 et seq.], to the extent that such veteran has remaining eligibility for and entitlement to educational assistance benefits under chapter 30 of this title [38 USCS §§ 3001 et seq.], such veteran may elect, as part of a vocational rehabilitation program under this chapter, to pursue an approved program of education and receive allowances and other forms of assistance equivalent to those authorized for veterans enrolled under chapter 30 of this title [38 USCS §§ 3001 et seq.], if the Secretary approves the educational, professional, or vocational objective chosen by such veteran for such program.

(B) In the event that such veteran makes such an election, the terms and conditions applicable to the pursuit of a comparable program of education and the payment of allowances and provision of assistance under chapter 30 of this title [38 USCS §§ 3001 et seq.] for such a comparable program shall be applied to the pursuit of the approved program of education under this chapter [38 USCS §§ 3100 et seq.].

(2) A veteran who is receiving an allowance pursuant to paragraph (1) of this subsection may not receive any of the services or assistance described in section 3104(a)(3), (7), and (8) of this title [38 USCS § 3104(a)(3), (7), and (8)] (other than an allowance and other assistance under this subsection).
(g) (1) Notwithstanding any other provision of this title and subject to the provisions of paragraph (2) of this subsection, no subsistence allowance may be paid under this section in the case of any veteran who is pursuing a rehabilitation program under this chapter [38 USCS §§ 3100 et seq.] while incarcerated in a Federal, State, or local penal institution for conviction of a felony.

(2) Paragraph (1) of this subsection shall not apply in the case of any veteran who is pursuing a rehabilitation program under this chapter [38 USCS §§ 3100 et seq.] while residing in a halfway house or participating in a work-release program in connection with such veteran's conviction of a felony.

(h) Notwithstanding any other provision of this title, the amount of subsistence allowance, or other allowance under subsection (f) of this section, that may be paid to a veteran pursuing a rehabilitation program for any month for which such veteran receives compensation at the rate prescribed in section 1114(j) of this title [38 USCS § 1114(j)] as the result of hospital treatment (not including post-hospital convalescence) or observation at the expense of the Department of Veterans Affairs may not exceed, when added to any compensation to which such veteran is entitled for such month, an amount equal to the greater of--

(1) the sum of--

(A) the amount of monthly subsistence or other allowance that would otherwise be paid to such veteran under this section, and

(B) the amount of monthly compensation that would be paid to such veteran if such veteran were not receiving compensation at such rate as the result of such hospital treatment or observation; or

(2) the amount of monthly compensation payable under section 1114(j) of this title [38 USCS § 1114(j)].

(i) Payment of a subsistence allowance may be made in advance in accordance with the provisions of section 3680(d) of this title [38 USCS § 3680(d)].

Explanatory notes:

A prior § 3108 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5308.

Amendments:

1982. Act Oct. 14, 1982, in subsec. (g)(2), inserted "not" following "shall" and deleted "if the Administrator determines that all the veteran's living expenses are being defrayed by a Federal, State, or local government", following "felony".

1984. Act Oct. 19, 1984, in subsec. (f)(1), in subpara. (A), inserted "30 or" following "benefits under chapter", and substituted "either chapter 30 or chapter 34" for "chapter 34" following enrolled under, and in subpara. (B), inserted "30 or".

Act Oct. 24, 1984 (effective 10/1/84, as provided by § 205 of such Act, which appears as a note to this section), in subsec. (b), substituted the table for one which read:

<table>
<thead>
<tr>
<th>Type of program dependents</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>One</td>
<td>Two</td>
<td>More than two</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The amount in column IV, plus the following for
Institutional training:

<table>
<thead>
<tr>
<th>Type of Program</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-time</td>
<td>$310</td>
<td>$384</td>
<td>$452</td>
<td>$33</td>
<td></td>
</tr>
<tr>
<td>Three-quarter-time</td>
<td>233</td>
<td>288</td>
<td>339</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>Half-time</td>
<td>155</td>
<td>193</td>
<td>227</td>
<td>17</td>
<td></td>
</tr>
</tbody>
</table>

Farm cooperative, apprentice, or other on-job training:

<table>
<thead>
<tr>
<th>Type of Program</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-time</td>
<td>271</td>
<td>327</td>
<td>377</td>
<td>24</td>
<td></td>
</tr>
</tbody>
</table>

Extended evaluation:

<table>
<thead>
<tr>
<th>Type of Program</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-time</td>
<td>310</td>
<td>384</td>
<td>452</td>
<td>$33</td>
<td></td>
</tr>
</tbody>
</table>

Independent living training:

<table>
<thead>
<tr>
<th>Type of Program</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-time</td>
<td>310</td>
<td>384</td>
<td>452</td>
<td>33</td>
<td></td>
</tr>
<tr>
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<td>233</td>
<td>288</td>
<td>339</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>Half-time</td>
<td>155</td>
<td>193</td>
<td>227</td>
<td>17</td>
<td></td>
</tr>
</tbody>
</table>

The amount in column IV, plus the following for each dependent in excess of two:

<table>
<thead>
<tr>
<th>Type of Program</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Institutional training:</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time</td>
<td>282</td>
<td>349</td>
<td>411</td>
<td>$30</td>
<td></td>
</tr>
<tr>
<td>Three-quarter-time</td>
<td>212</td>
<td>262</td>
<td>308</td>
<td>23</td>
<td></td>
</tr>
<tr>
<td>Half-time</td>
<td>141</td>
<td>175</td>
<td>206</td>
<td>15</td>
<td></td>
</tr>
</tbody>
</table>

1989. Act Dec. 18, 1989 (effective 1/1/90, as provided by § 402(b) of such Act, which appears as a note to this section), in subsec. (b), substituted the table for one which read:

```
<table>
<thead>
<tr>
<th>Type of program</th>
<th>dependents</th>
<th>dependent</th>
<th>dependents</th>
<th>dependents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Column I</td>
<td>Column II</td>
<td>Column III</td>
<td>Column IV</td>
<td>Column V</td>
</tr>
<tr>
<td>No</td>
<td>One</td>
<td>Two</td>
<td>More than two</td>
<td></td>
</tr>
</tbody>
</table>

Institutional training:

<table>
<thead>
<tr>
<th>Type of Program</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
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<tbody>
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<td></td>
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<td>193</td>
<td>227</td>
<td>17</td>
<td></td>
</tr>
</tbody>
</table>

Farm cooperative, apprentice, or other on-job training:

<table>
<thead>
<tr>
<th>Type of Program</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-time</td>
<td>271</td>
<td>327</td>
<td>377</td>
<td>24</td>
<td></td>
</tr>
</tbody>
</table>

Extended evaluation:

<table>
<thead>
<tr>
<th>Type of Program</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
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<td>384</td>
<td>452</td>
<td>33</td>
<td></td>
</tr>
</tbody>
</table>

Independent living training:

<table>
<thead>
<tr>
<th>Type of Program</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
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<tbody>
<tr>
<td>Full-time</td>
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<td></td>
</tr>
<tr>
<td>Three-quarter-time</td>
<td>233</td>
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<td>339</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>Half-time</td>
<td>155</td>
<td>193</td>
<td>227</td>
<td>17</td>
<td></td>
</tr>
</tbody>
</table>
```

Such Act further, in the entire section, substituted "Secretary" for "Administrator"; wherever appearing, and in subsec. (h), substituted "Department of Veterans Affairs" for "Veterans' Administration".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1508, as 38 USCS § 3108, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).
1992. Act Oct. 29, 1992 (effective 10/1/93, as provided by § 405(c) of such Act, which appears as a note to this section), in subsec.(b), designated the existing provisions as para. (1), substituted the table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of program dependents</td>
<td>dependent dependents</td>
<td>dependents</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>One</td>
<td>Two</td>
<td>More than two</td>
<td></td>
</tr>
</tbody>
</table>

- The amount in column IV, plus the following for each dependent in excess of two:
- Institutional training:
  - Full-time ............... $333 $413 $486 $35
  - Three-quarter time .... $250 $310 $364 $27
  - Half-time ............... $167 $207 $244 $18
- Farm cooperative, apprentice, or other on-job training:
  - Full-time ............... $291 $352 $405 $26
- Extended evaluation:
  - Full-time ............... $333 $413 $486 $35
- Independent living training:
  - Full-time ............... $333 $413 $486 $35
  - Three-quarter time .... $250 $310 $364 $27
  - Half-time ............... $167 $207 $244 $18

and added paras. (2) and (3).

1994. Act Nov. 2, 1994, in subsec. (c)(2), inserted "or federally recognized Indian tribe".

1996. Act Oct. 9, 1996 (effective on enactment, as provided by § 101(j) of such Act, which appears as 38 USCS § 3101 note), in subsec. (a)(2), substituted "while satisfactorily following a program of employment services provided under section 3104(a)(5) of this title" for "following the conclusion of such pursuit"; and, in subsec. (f)(1), in subpara. (A), inserted "eligible for and", substituted "chapter 30" for "chapter 30 or 34" following "benefits under", and substituted "chapter 30" for "either chapter 30 or chapter 34" following "enrolled under" and, in subpara. (B), substituted "chapter 30" for "chapter 30 or 34".

Other provisions:

**Applicability of subsection (g)(1) to apportionments made before Oct. 17, 1980.** Act Oct. 17, 1980, P. L. 96-466, Title I, § 101(c), 94 Stat. 2186 (effective 10/1/80, as provided by § 802(a)(5) of such Act), provided: "The provisions of section 1508(g)(1) of title 38, United States Code [subsec. (g)(1) of this section], as added by subsection (a), shall not apply to an apportionment made under section 3107(c) [now section 5307(c)] of such title before the date of the enactment of this Act."

**Effective date; veterans pursuing program of vocational rehabilitation under this chapter.** Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(2)-(4), 94 Stat. 2217, located at 38 USCS § 3100 note, provided that the amendment made to this section by Act Oct. 17, 1980, is effective on Oct. 1, 1980; however, the provisions of this section, as in effect on Oct. 16, 1980, shall continue in effect until March 31, 1981. During the period beginning on Oct. 1, 1980 and ending on March 31, 1981, the provisions of this section, as amended by Act Oct. 17, 1980, shall apply to veterans pursuing a program of vocational rehabilitation training under Chapter 31 of Title 38 [38 USCS §§ 3100 et seq.], in the same manner as former 38 USCS § 1504 applied to veterans pursuing a program of vocational rehabilitation training under such Chapter 31 on Sept. 30, 1980.
§ 3109. Entitlement to independent living services and assistance

In any case in which the Secretary has determined under section 3106(e) of this title [38 USCS § 3106(e)] that the achievement of a vocational goal by a veteran currently is not reasonably feasible, such veteran shall be entitled, in accordance with the provisions of section 3120 of this title [38 USCS § 3120], to a program of independent living services and assistance designed to enable such veteran to achieve maximum independence in daily living.

Explanatory notes:

A prior § 3109 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5309.

Effective date of section:

Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(1), 94 Stat. 2217, provided that this section is effective on April 1, 1981.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1509, as 38 USCS § 3109, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).
1996. Act Oct. 9, 1996 (effective on enactment, as provided by § 101(j) of such Act, which appears as 38 USCS § 3101 note) substituted "3106(e)" for "3106(d)".

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§ 3110. Leaves of absence

The Secretary shall prescribe such regulations as the Secretary determines necessary for granting leaves of absence to veterans pursuing rehabilitation programs under this chapter [38 USCS §§ 3100 et seq.]. During authorized leaves of absence, a veteran shall be considered to be pursuing such program.

Explanatory notes:
A prior § 3110 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5310.

Effective date of section:
Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(1), 94 Stat. 2217, provided that this section is effective on April 1, 1981.

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1510, as 38 USCS § 3110.

§ 3111. Regulations to promote satisfactory conduct and cooperation

The Secretary shall prescribe such rules and regulations as the Secretary determines necessary to promote satisfactory conduct and cooperation on the part of veterans who are pursuing rehabilitation programs under this chapter [38 USCS §§ 3100 et seq.]. In any case in which the Secretary determines that a veteran has failed to maintain satisfactory conduct or cooperation, the Secretary may, after determining that all reasonable counseling efforts have been made and are not reasonably likely to be effective, discontinue services and assistance unless the Secretary determines that mitigating circumstances exist. In any case in which such services and assistance have been discontinued, the Secretary may reinstitute such services and assistance only if the Secretary determines that--

(1) the cause of the unsatisfactory conduct or cooperation of such veteran has been removed; and
(2) the rehabilitation program which such veteran proposes to pursue (whether the same or revised) is suitable to such veteran's abilities, aptitudes, and interests.

Explanatory notes:
A prior § 3111 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5311.

Effective date of section:
Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(1), 94 Stat. 2217, provided that this section is effective on April 1, 1981.

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Amendments:


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77 Am Jur 2d, Veterans and Veterans' Laws § 68

Placement of appellant in interrupted status in vocational rehabilitation program was proper where appellant exhibited unsatisfactory conduct and cooperation and VA personnel fulfilled their obligations by notifying him, attempting to discuss situation with him, and by making reasonable efforts to provide him with counseling. McRae v Brown (1996) 9 Vet App 229, app dismd (1996, CA FC) 106 F.3d 424, reported in full (1996, CA FC) 1996 US App LEXIS 34798 and cert den (1997) 520 US 1245, 137 L Ed 2d 1057, 117 S Ct 1855

§ 3112. Revolving fund loans

The revolving fund established pursuant to part VII of Veterans Regulation Numbered 1(a) is continued in effect, and may be used by the Secretary, under regulations prescribed by the Secretary, for making advances, not in excess of twice the amount of the full-time institutional monthly subsistence allowance for a veteran with no dependents (as provided in section 3108(b) of this title [38 USCS § 3108(b)]) to veterans pursuing rehabilitation programs under this chapter [38 USCS §§ 3100 et seq.]. Such advances, and advances from such fund made before the effective date of the Veterans' Rehabilitation and Education Amendments of 1980, shall bear no interest and shall be repaid in such installments, as may be determined by the Secretary, by proper deductions from future payments of compensation, pension, subsistence allowance, educational assistance allowance, or retirement pay.

References in text:

"The revolving fund established pursuant to part VII of Veterans Regulation Numbered 1(a)", referred to in this section, is the vocational rehabilitation revolving fund established by para. 8 of part VII of Veterans Regulation Numbered 1(a) as added by Act March 24, 1943, ch 22, § 2, 57 Stat. 44, which was classified to former chapter 12A of title 38. The appropriation for such fund made by Act July 12, 1943, ch 218, § 1, 57 Stat. 434, was reduced by Act June 24, 1954, ch 359, Title I, § 101, in part, 68 Stat. 293, and repealed by Act Sept. 2, 1958, P. L. 85-857, § 14(82), 72 Stat. 1272. Part VII of Veterans Regulation Numbered 1(a) was repealed by § 14(67) of Act Sept. 2, 1958, P. L. 85-857, effective Jan. 1, 1959.

"The effective date of the Veterans' Rehabilitation and Education Amendments of 1980", referred to in this section, is the effective date of Act Oct. 17, 1980, P. L. 96-466, 94 Stat. 2171. The effective date of such Act is provided for in § 802, which appears as notes to 38 USCS §§ 3100, 3202, 3224, 3452, 3681, 4101, and 5314.

Explanatory notes:

A prior § 3112 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5312.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1512, as 38 USCS § 3112, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:

Effective date of section; transition provision. Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(2), (4), 94 Stat. 2217, located at 38 USCS § 3100 note, provided that this section is effective on Oct. 1, 1980 and during the period beginning on Oct. 1, 1980, and ending on March 31, 1981, the provisions of this section shall apply to veterans pursuing a program of vocational rehabilitation training under Chapter 31 of Title 38 [38 USCS §§ 3100 et seq.], in the same manner as former 38 USCS § 1507 applied to veterans pursuing a program of vocational rehabilitation training under such Chapter 31 on Sept. 30, 1980.

Cross References

This section is referred to in 38 USCS § 3104

§ 3113. Vocational rehabilitation for hospitalized members of the Armed Forces and veterans

cxxDiscussion and Analysis in the Veterans Benefits Manual

(a) Services and assistance may be provided under this chapter [38 USCS §§ 3100 et seq.] to a person described in subparagraphs (A)(ii) and (B) of section 3102(1) of this title [38 USCS § 3102(1)] who is hospitalized pending discharge from active military, naval, or air service. In such cases, no subsistence allowance shall be paid.

(b) Services and assistance may be provided under this chapter [38 USCS §§ 3100 et seq.] to a veteran who is receiving care in a Department of Veterans Affairs hospital, nursing home, or domiciliary facility or in any other hospital or medical facility.

Explanatory notes:

A prior § 3113 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5313.

Effective date of section:

Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(1), 94 Stat. 2217, provided that this section is effective on April 1, 1981.

Amendments:

1989. Act Dec. 18, 1989, in subsec. (b), substituted "Department of Veterans Affairs" for "Veterans' Administration".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1513, as 38 USCS § 3113, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1994. Act Nov. 2, 1994, in subsec. (a), substituted "subparagraphs (A)(ii) and (B) of section 3102(1)" for "section 3102(1)(B) and (2)".

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§ 3114. Vocational rehabilitation outside the United States

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Under regulations which the Secretary shall prescribe, a vocational rehabilitation program under this chapter [38 USCS §§ 3100 et seq.] may be provided outside the United States if the Secretary determines that such training is (1) necessary in the particular case to provide the preparation needed to render a veteran employable and enable such veteran to obtain and retain suitable employment, and (2) in the best interest of such veteran and the Federal Government.

Explanatory notes:
A prior § 3114 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5314.

Effective date of section:
Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(1), 94 Stat. 2217, provided that this section is effective on April 1, 1981.

Amendments:

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77 Am Jur 2d, Veterans and Veterans' Laws § 68

§ 3115. Rehabilitation resources

(a) Notwithstanding any other provision of law, for the purpose of providing services under this chapter [38 USCS §§ 3100 et seq.], the Secretary may--

(1) use the facilities of any Federal agency (including the Department of Veterans Affairs), of any State or local government agency receiving Federal financial assistance, or of any federally recognized Indian tribe, to provide training or work experience as part or all of a veteran's vocational rehabilitation program without pay or for nominal pay in any case in which the Secretary determines that such training or work experience is necessary to accomplish such veteran's rehabilitation;

(2) use the facilities, staff, and other resources of the Department of Veterans Affairs;

(3) employ such additional personnel and experts as the Secretary considers necessary; and

(4) use the facilities and services of any Federal, State, or other public agency, any agency maintained by joint Federal and State contributions, any federally recognized Indian tribe, any public or private institution or establishment, and any private individual.

(b) (1) While pursuing on-job training or work experience under subsection (a)(1) of this section at a Federal agency, a veteran shall be considered to be an employee of the United States for the purposes of the benefits of chapter 81 of title 5 [5 USCS §§ 8101 et seq.], but not for the purposes of laws administered by the Office of Personnel Management.
(2) Except as provided in chapter 17 of this title [38 USCS §§ 1701 et seq.], hospital care and medical services provided under this chapter [38 USCS §§ 3100 et seq.] shall be furnished in facilities over which the Secretary has direct jurisdiction.

(3) Use of the facilities of a State or local government agency under subsection (a)(1) of this section or use of facilities and services under subsection (a)(4) of this section, shall be procured through contract, agreement, or other cooperative arrangement.

(4) The Secretary shall prescribe regulations providing for the monitoring of training and work experiences provided under such subsection (a)(1) at State or local government agencies and otherwise ensuring that such training or work experience is in the best interest of the veteran and the Federal Government.

(c) For purposes of this section, the term "federally recognized Indian tribe" means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village or regional corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

References in text:
The "Alaska Native Claims Settlement Act", referred to in this section, is Act Dec. 18, 1971, P. L. 92-203, 85 Stat. 688, which appears generally as 43 USCS §§ 1601 et seq. For full classification of this Act, consult USCS Tables volumes.

Explanatory notes:
A prior § 3115 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5315.

Effective date of section:
Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(1), 94 Stat. 2217, provided that this section is effective on April 1, 1981.

Amendments:
1988. Act Nov. 18, 1988, in subsec. (a)(1), inserted ", or of any State or local government agency receiving Federal financial assistance," after "Administration);" and in subsec. (b), in para. (1), inserted "a Federal agency", and substituted paras. (3) and (4) for former para. (3) which read: "Use of facilities and services under clause (4) of subsection (a) of this section, shall be procured through contract, agreement, or other cooperative arrangement."

1989. Act Dec. 18, 1989, substituted "Secretary" for "Administrator", wherever appearing; and in subsec. (a), substituted "Department of Veterans Affairs" for "Veterans' Administration".


1994. Act Nov. 2, 1994, in subsec. (a), in para. (1), deleted "or" following "Veterans Affairs)" and inserted "or of any federally recognized Indian tribe,"; and, in para. (4), inserted "any federally recognized Indian tribe,"; and added subsec. (c).

Cross References
This section is referred to in 38 USCS § 3108

Research Guide
Am Jur:
§ 3116. Promotion of employment and training opportunities

(a) The Secretary shall actively promote the development and establishment of employment, training, and other related opportunities for (1) veterans who are participating or who have participated in a rehabilitation program under this chapter [38 USCS §§ 3100 et seq.], (2) veterans with service-connected disabilities, and (3) other veterans to whom the employment emphases set forth in chapter 42 of this title [38 USCS §§ 4211 et seq.] apply. The Secretary shall promote the development and establishment of such opportunities through Department of Veterans Affairs staff outreach efforts to employers and through Department of Veterans Affairs coordination with Federal, State, and local governmental agencies and appropriate nongovernmental organizations. In carrying out the provisions of this subsection with respect to veterans referred to in clause (3) of the first sentence of this subsection, the Secretary shall place particular emphasis on the needs of categories of such veterans on the basis of applicable rates of unemployment.

(b) (1) The Secretary, pursuant to regulations prescribed in accordance with paragraph (3) of this subsection, may make payments to employers for providing on-job training to veterans who have been rehabilitated to the point of employability in individual cases in which the Secretary determines that such payment is necessary to obtain needed on-job training or to begin employment. Such payments may not exceed the direct expenses incurred by such employers in providing such on-job training or employment opportunity.

(2) In any case in which a veteran described in paragraph (1) of this subsection participates in on-job training described in such paragraph that satisfies the criteria for payment of a training assistance allowance under section 3687 of this title [38 USCS § 3687], such veteran shall, to the extent that such veteran has remaining eligibility for and entitlement to such allowance, be paid such allowance.

(3) The Secretary shall prescribe regulations under this subsection in consultation with the Secretary of Labor and, in prescribing such regulations, shall take into consideration the provisions of title V of the Rehabilitation Act of 1973 (29 U.S.C. ch. 16, subch. V [29 USCS §§ 791 et seq.]) and section 4212 of this title [38 USCS § 4212], and regulations prescribed under such provisions.

Explanatory notes:

A prior § 3116 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5316.

Effective date of section:


Amendments:

1989. Act Dec. 18, 1989, substituted "Secretary" and "Department of Veterans Affairs" for "Administrator" and "Veterans' Administration", respectively, wherever appearing.
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1516, as 38 USCS § 3116, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:


"(a) In general. In carrying out section 1516(b) of title 38, United States Code [subsec. (b) of this section], the Secretary of Veterans Affairs shall take all feasible steps to establish and encourage, for veterans who are eligible to have payments made on their behalf under such section, the development of training opportunities through programs of job training consistent with the provisions of the Veterans' Job Training Act [29 USCS § 1721 note] (as redesignated by section 201(a)(1) of this Act) so as to utilize programs of job training established by employers pursuant to such Act [29 USCS § 1721 note].

"(b) Directive. In carrying out such Act [29 USCS § 1721 note], the Secretary of Veterans Affairs shall take all feasible steps to ensure that, in the cases of veterans who are eligible to have payments made on their behalf under both such Act [29 USCS § 1721 note] and section 1516(b) of title 38, United States Code [subsec. (b) of this section], the authority under such section is utilized, to the maximum extent feasible and consistent with the veteran's best interests, to make payments to employers on behalf of such veterans.".

Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 68

§ 3117. Employment assistance

(a) (1) A veteran with a service-connected disability rated at 10 percent or more who has participated in a vocational rehabilitation program under this chapter [38 USCS §§ 3100 et seq.] or a similar program under the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.) and who the Secretary has determined to be employable shall be furnished assistance in obtaining employment consistent with such veteran's abilities, aptitudes, interests, and employment handicap, including assistance necessary to insure that such veteran receives the benefit of any applicable provisions of law or regulation providing for special consideration or emphasis or preference for such veteran in employment or training.

(2) Assistance provided under this subsection may include--

(A) direct placement of such veteran in employment;

(B) utilization of employment, training, and placement services under chapter 41 of this title [38 USCS §§ 4100 et seq.]; and

(C) utilization of the job development and placement services of (i) programs under the Rehabilitation Act of 1973 [29 USCS §§ 701 et seq.], (ii) the State employment service and the Veterans' Employment Service of the Department of Labor, (iii) the Office of Personnel Management, (iv) any other public or nonprofit organization having placement services available, and (v) any for-profit entity in a case in which the Secretary has determined that services necessary to
provide such assistance are available from such entity and that comparably effective services are not available, or cannot be obtained cost-effectively, from the entities described in subclauses (i) through (iv) of this clause.

(b) (1) In any case in which a veteran has completed a vocational rehabilitation program for self-employment in a small business enterprise under this chapter [38 USCS §§ 3100 et seq.], the Secretary shall assist such veteran in securing, as appropriate, a loan under subchapter IV of chapter 37 of this title [38 USCS §§ 3741 et seq.] and shall cooperate with the Small Business Administration to assist such veteran to secure a loan for the purchase of equipment needed to establish such veteran's own business and to insure that such veteran receives the special consideration provided for in section 4(b)(1) of the Small Business Act (15 U.S.C. 633(b)(1)).

(2) In the case of a veteran described in clause (12) of section 3104(a) of this title [38 USCS § 3104(a)] who has trained under a State rehabilitation program with the objective of self-employment in a small business enterprise, the Secretary may, subject to the limitations and criteria provided for in such clause, provide such veteran with such supplementary equipment and initial stocks and supplies as are determined to be needed by such veteran if such supplementary equipment and initial stocks and supplies, or assistance in acquiring them, are not available through the State program or other sources.

Explanatory notes:
A prior § 3117 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5317.

Effective date of section:
Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(a)(1), 94 Stat. 2217, provided that this section is effective on April 1, 1981.

Amendments:
1981. Act Nov. 3, 1981 (effective 180 days after enactment, as provided by § 305 of such Act, which appears as 38 USCS § 3741 note), in subsec. (b)(1), inserted "shall assist such veteran in securing, as appropriate, a loan under subchapter IV of chapter 37 of this title and".

1988. Act Nov. 18, 1988 in subsec. (a)(2)(C), deleted "and" following "Management," and inserted ", and (v) any for-profit entity in a case in which the Administrator has determined that services necessary to provide such assistance are available from such entity and that comparably effective services are not available, or cannot be obtained cost-effectively, from the entities described in subclauses (i) through (iv) of this clause.".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1517, as 38 USCS § 3117, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1996. Act Oct. 9, 1996 (effective on enactment, as provided by § 101(j) of such Act, which appears as 38 USCS § 3101 note), in subsec. (a)(1), inserted "rated at 10 percent or more".
2002. Act Nov. 7, 2002, in subsec. (a)(2), substituted subpara. (B) for one which read: "(B) utilization of the services of disabled veterans outreach program specialists under section 4103A of this title; and".

2006. Act June 15, 2006, in subsec. (b)(1), substituted "section 4(b)(1)" for "section 8" and substituted "633(b)(1)" for "633(b)".

Other provisions:
Authority of Administrator to promulgate regulations. For the authority and effective date for the Administrator of Veterans’ Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

Cross References
This section is referred to in 38 USCS § 3106

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans’ Laws § 68

§ 3118. Personnel training, development, and qualifications

(a) The Secretary shall provide a program of ongoing professional training and development for Department of Veterans Affairs counseling and rehabilitation personnel engaged in providing rehabilitation services under this chapter [38 USCS §§ 3100 et seq.]. The objective of such training shall be to insure that rehabilitation services for disabled veterans are provided in accordance with the most advanced knowledge, methods, and techniques available for the rehabilitation of handicapped persons. For this purpose, the Secretary may employ the services of consultants and may make grants to and contract with public or private agencies (including institutions of higher learning) to conduct such training and development.

(b) The Secretary shall coordinate with the Commissioner of the Rehabilitation Services Administration in the Department of Education and the Assistant Secretary for Veterans’ Employment in the Department of Labor in planning and carrying out personnel training in areas of mutual programmatic concern.

(c) Notwithstanding any other provision of law, the Secretary shall establish such qualifications for personnel providing evaluation and rehabilitation services to veterans under this chapter [38 USCS §§ 3100 et seq.] and for employees performing the functions described in section 3106(f) of this title [38 USCS § 3106(f)] as the Secretary determines are necessary and appropriate to insure the quality of rehabilitation programs under this chapter. In establishing such qualifications, the Secretary shall take into account the qualifications established for comparable personnel under the Rehabilitation Act of 1973 (29 U.S.C. ch. 16) [29 USCS §§ 701 et seq.].

Explanatory notes:
A prior § 3118 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5318.

Effective date of section:

Amendments:

1989. Act Dec. 18, 1989, substituted "Secretary" for "Administrator" wherever appearing; and in subsec. (a), substituted "Department of Veterans Affairs" for "Veterans' Administration".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1518, as 38 USCS § 3118, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1996. Act Oct. 9, 1996 (effective on enactment, as provided by § 101(j) of such Act, which appears as 38 USCS § 3101 note), in subsec. (c), substituted "3106(f)" for "3106(e)".

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 68

§ 3119. Rehabilitation research and special projects

(a) The Secretary shall carry out an ongoing program of activities for the purpose of advancing the knowledge, methods, techniques, and resources available for use in rehabilitation programs for veterans. For this purpose, the Secretary shall conduct and provide support for the development or conduct, or both the development and conduct, of--

(1) studies and research concerning the psychological, educational, employment, social, vocational, industrial, and economic aspects of the rehabilitation of disabled veterans, including new methods of rehabilitation; and

(2) projects which are designed to increase the resources and potential for accomplishing the rehabilitation of disabled veterans.

(b) For the purpose specified in subsection (a) of this section, the Secretary is authorized to make grants to or contract with public or nonprofit agencies, including institutions of higher learning.

(c) The Secretary shall cooperate with the Commissioner of the Rehabilitation Services Administration and the Director of the Institute of Handicapped Research in the Department of Education, the Assistant Secretary for Veterans' Employment in the Department of Labor, and the Secretary of Health and Human Services regarding rehabilitation studies, research, and special projects of mutual programmatic concern.

Effective date of section:


Amendments:


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§ 3120. Program of independent living services and assistance

(a) The Secretary may, under contracts with entities described in subsection (f) of this section, or through facilities of the Veterans Health Administration, which possess a demonstrated capability to conduct programs of independent living services for severely handicapped persons, provide, under regulations which the Secretary shall prescribe, programs of independent living services and assistance under this chapter, in various geographic regions of the United States, to veterans described in subsection (b) of this section.

(b) A program of independent living services and assistance may be made available under this section only to a veteran who has a serious employment handicap resulting in substantial part from a service-connected disability described in section 3102(1)(A)(i) of this title [38 USCS § 3102(1)(A)(i)] and with respect to whom it is determined under section 3106(d) or (e) of this title [38 USCS § 3106(d) or (e)] that the achievement of a vocational goal currently is not reasonably feasible.

(c) The Secretary shall, to the maximum extent feasible, include among those veterans who are provided with programs of independent living services and assistance under this section substantial numbers of veterans described in subsection (b) of this section who are receiving long-term care in Department of Veterans Affairs hospitals and nursing homes and in nursing homes with which the Secretary contracts for the provision of care to veterans.

(d) A program of independent living services and assistance for a veteran shall consist of such services described in section 3104(a) and (b) of this title [38 USCS § 3104(a) and (b)] as the Secretary determines necessary to enable such veteran to achieve maximum independence in daily living. Such veteran shall have the same rights with respect to an individualized written plan of services and assistance as are afforded veterans under section 3107 of this title [38 USCS § 3107].

(e) Programs of independent living services and assistance shall be initiated for no more than 2,500 veterans in each fiscal year, and the first priority in the provision of such programs shall be afforded to veterans for whom the reasonable feasibility of achieving a vocational goal is precluded solely as a result of a service-connected disability.

(f) Entities described in this subsection are (1) public or nonprofit agencies or organizations, and (2) for-profit entities in cases in which the Secretary determines that services comparable in effectiveness to services available from such an entity are not available, or cannot be obtained cost-effectively from, public or nonprofit agencies or through facilities of the Veterans Health Administration.

Effective date of section:


Amendments:
1986. Act Oct. 28, 1986, in the section heading, substituted "Program" for "Pilot program"; in subsec. (a), in para. (1), substituted "1989" for "1985", in para. (2), inserted "currently", in paras. (5) and (6), substituted "1989" for "1985"; and substituted subsec. (b) for one which read:

"(b) Not later than September 30, 1984, the Administrator shall submit to the Congress a report on the programs of independent living services and assistance provided for in subsection (a) of this section. Such report shall include--

"(1) the results of a study which the Administrator shall conduct of the accomplishments and cost-effectiveness of such programs, including the extent to which (A) such programs have met needs for comprehensive independent living services that would not otherwise have been met, (B) severely disabled veterans have achieved and maintained greater independence in daily living as a result of participation in the programs, and (C) costs of care in hospital, nursing home, and domiciliary facilities have been and may be avoided as the result of such programs; and

"(2) the Administrator's recommendations for any legislative changes with respect to the provision of independent living services and assistance to veterans for whom the achievement of a vocational goal is not feasible."

1988. Act Nov. 18, 1988, in subsec. (a), in para. (1), substituted "entities described in paragraph (7) of this subsection" for "public or nonprofit private agencies or organizations", and added para. (7).

1989. Act Dec. 18, 1989, deleted subsec. (b) which read: "Not later than February 1, 1989, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives statistical data regarding veterans' participation in the program conducted under subsection (a) of this section during fiscal years 1987 and 1988 and any recommendations of the Administrator for administrative or legislative action or both regarding the program.".

Such Act further, in subsec. (a), substituted "The" for "(1) During fiscal years 1982 through 1989, the", "subsection (f) of this section" for "paragraph (7) of this subsection", and "subsection (b) of this section" for "paragraph (2) of this subsection", deleted para. (5) which read: "Any contract for services initiated with respect to any veteran under this section before the end of fiscal year 1989 may be continued in effect after the end of such year for the purposes of providing services and assistance to such veteran in accordance with the provisions of this chapter", redesignated paras. (2)-(4), (6) and (7) as subsecs. (b)-(f), respectively; in subsec. (b), as redesignated, deleted "and who is selected pursuant to criteria provided for in regulations prescribed under paragraph (1) of this subsection", preceeding the concluding period; in subsec. (c), as redesignated, substituted "subsection (b) of this section" for "paragraph (2) of this subsection"; in subsec. (e), as redesignated, substituted "fiscal year" for "of the fiscal years 1982 through 1989"; and in subsec. (f), as redesignated, substituted "subsection", "(1)", and "(2)" for "paragraph", "(A)", and "(B)", respectively.

Such Act further, in subsec. (a), substituted "Secretary" for "Administrator" wherever appearing; in subsec. (c), as redesignated, substituted "Department of Veterans Affairs" for "Veterans’ Administration" and "Secretary" for "Administrator", wherever appearing; and in subsecs. (d) and (f), as redesignated, substituted "Secretary" for "Administrator".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1520, as 38 USCS § 3120, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1994. Act Nov. 2, 1994, in subsecs. (a) and (f), substituted "Veterans Health Administration" for "Department of Medicine and Surgery".

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Such Act further, in subsec. (b), purported to substitute "section 3102(1)(A)(i)" for "section 3012(1)(A)"; although the latter phrase did not appear in the subsection, the substitution was made for "section 3102(1)(A)" in order to effectuate the intent of Congress.

1996. Act Oct. 9, 1996 (effective and applicable as provided by § 101(j) of such Act, which appears as 38 USCS § 3101 note), in subsec. (b), substituted "3106(d) or (e)" for "3106(d)". Such Act further (effective as above) purported to amend subsec. (b) by substituting "serious employment handicap resulting in substantial part from a service-connected disability described in section 3102(1)(A)(i)" for "service-connected disability described in section 3102(1)(A)"; however, the substitution was made for "service-connected disability described in section 3102(1)(A)(i)" in order to effectuate the probable intent of Congress.

2001. Act Dec. 27, 2001 (effective as of 9/30/2001, as provided by § 508(b) of such Act, which appears as a note to this section), in subsec. (e), substituted "2,500" for "five hundred".

Other provisions:

Redesignation of Veterans Health Services and Research Administration; references to Department of Medicine and Surgery. Act May 7, 1991, P.L. 102-40, § 2, 105 Stat. 187, which appears as 38 USCS § 301 note, provides for the redesignation of the Veterans Health Services and Research Administration as the Veterans Health Administration. Such Act further provides that any reference to the Department of Medicine and Surgery of the Veterans' Administration shall be deemed to refer to the Veterans Health Administration.


Cross References
This section is referred to in 38 USCS § 3109

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Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 68

§ 3121. Veterans' Advisory Committee on Rehabilitation

(a) (1) The Secretary shall appoint an advisory committee to be known as the Veterans' Advisory Committee on Rehabilitation (hereinafter in this section referred to as the "Committee").

(2) The members of the Committee shall be appointed by the Secretary from the general public and shall serve for terms to be determined by the Secretary not to exceed three years. Veterans with service-connected disabilities shall be appropriately represented in the membership of the Committee, and the Committee shall also include persons who have distinguished themselves in the public and private sectors in the fields of rehabilitation medicine, vocational guidance, vocational rehabilitation, and employment and training programs. The Secretary may designate one of the members of the Committee appointed under this paragraph to chair the Committee.

(3) The Committee shall also include as ex officio members the following: (A) one representative from the Veterans Health Administration and one from the Veterans Benefits Administration, (B) one representative from the Rehabilitation Services Administration of the Department of Education and one from the National Institute for Handicapped Research of the Department of Education, and (C) one...
representative of the Assistant Secretary of Labor for Veterans' Employment and Training of the Department of Labor.

(b) The Secretary shall, on a regular basis, consult with and seek the advice of the Committee with respect to the administration of veterans' rehabilitation programs under this title.

(c) The Committee shall submit to the Secretary an annual report on the rehabilitation programs and activities of the Department of Veterans Affairs and shall submit such other reports and recommendations to the Administrator as the Committee determines appropriate. The annual report shall include an assessment of the rehabilitation needs of veterans and a review of the programs and activities of the Department of Veterans Affairs designed to meet such needs. The Secretary shall submit with each annual report submitted to the Congress pursuant to section 529 of this title [38 USCS § 529] a copy of all reports and recommendations of the Committee submitted to the Secretary since the previous annual report of the Secretary was submitted to the Congress pursuant to such section.

Effective date of section:

Amendments:
1989. Act Dec. 18, 1989, substituted "Secretary" and "Department of Veterans Affairs" for "Administrator" and "Veterans' Administration", respectively, wherever appearing.
Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1521, as 38 USCS § 3121; and, in subsec. (c), substituted "section 529" for "section 214".
1994. Act Nov. 2, 1994, in subsec. (a)(3), substituted "Veterans Health Administration" for "Department of Medicine and Surgery" and "Veterans Benefits Administration" for "Department of Veterans' Benefits".

Other provisions:
Termination of advisory committees, boards and councils, established after Jan. 5, 1973. Act Oct. 6, 1972, P. L. 92-463, §§ 3(2) and 14, 86 Stat. 770, 776 (effective 1/5/73, as provided by § 15 of such Act), which is classified as 5 USCS Appx, provides that advisory committees established after Jan. 5, 1973, are to terminate not later than the expiration of the two-year period beginning on the date of establishment unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a board established by the Congress, its duration is otherwise provided for by law.

Redesignation of Veterans Health Services and Research Administration; references to Department of Medicine and Surgery. Act May 7, 1991, P.L. 102-40, § 2, 105 Stat. 187, which appears as 38 USCS § 301 note, provides for the redesignation of the Veterans Health Services and Research Administration as the Veterans Health Administration. Such Act further provides that any reference to the Department of Medicine and Surgery of the Veterans' Administration shall be deemed to refer to the Veterans Health Administration.

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Am Jur:
CHAPTER 32. POST-VIETNAM ERA VETERANS’ EDUCATIONAL ASSISTANCE

SUBCHAPTER I. PURPOSE; DEFINITIONS
SUBCHAPTER II. ELIGIBILITY; CONTRIBUTIONS; AND MATCHING FUND
SUBCHAPTER III. ENTITLEMENT; DURATION
SUBCHAPTER IV. ADMINISTRATION

Explanatory notes:
The bracketed section number "3242" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.


Amendments:


Act Aug. 6, 1991, P. L. 102-83, § 5(b)(1), 105 Stat. 406, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:
Application and construction of the Oct. 12, 1982 amendment of this chapter analysis.
For provisions as to the application and construction of the Oct. 12, 1982 amendment of this chapter analysis, see § 5 of such Act, which appears as 10 USCS § 101 note.

SUBCHAPTER I. PURPOSE; DEFINITIONS

§ 3201. Purpose
§ 3202. Definitions

§ 3201. Purpose

It is the purpose of this chapter [38 USCS §§ 3201 et seq.] (1) to provide educational assistance to those men and women who enter the Armed Forces after December 31, 1976, and before July 1, 1985, (2) to assist young men and women in obtaining an education they might not otherwise be able to afford, and (3) to promote and assist the all
volunteer military program of the United States by attracting qualified men and women to serve in the Armed Forces.

Explanatory notes:

A prior § 3201 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5501.

Amendments:


Short titles:


Other provisions:


Termination of enrollments in Post-Vietnam era veteran’s educational assistance program. Act Oct. 28, 1986, P. L. 99-576, Title III, Part A, § 309(c), (d), 100 Stat. 3270, provides:

"(c) Exception. Notwithstanding the amendments made by subsection (a) [amending this section and 38 USCS §§ 3202, 3221], any individual on active duty in the Armed Forces who was eligible on June 30, 1985, to enroll in the program established by chapter 32 of title 38, United States Code [38 USCS §§ 3201 et seq.], may enroll, before April 1, 1987, in such program.

"(d) Notice requirement. The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, shall carry out activities for the purpose of notifying, to the maximum extent feasible, individuals described in subsection (c) of the opportunity provided by such subsection.”.

Code of Federal Regulations

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

Research Guide

Forms:

24A  Am Jur Pl & Pr Forms (1999), Veterans and Veterans’ Laws, § 18

§ 3202. Definitions

For the purposes of this chapter [38 USCS §§ 3201 et seq.],--

(1) (A) The term "eligible veteran" means any veteran who is not eligible for educational assistance under chapter 34 of this title [38 USCS §§ 3451 et seq.] and who (i) entered military service on or after January 1, 1977, and before July 1, 1985,
served on active duty for a period of more than 180 days commencing on or after January 1, 1977, and was discharged or released therefrom under conditions other than dishonorable, or (ii) entered military service on or after January 1, 1977, and before July 1, 1985, and was discharged or released from active duty after January 1, 1977, for a service-connected disability.

(B) The requirement of discharge or release, prescribed in subparagraph (A), shall be waived in the case of any participant who has completed his or her first obligated period of active duty (which began after December 31, 1976) or 6 years of active duty (which began after December 31, 1976), whichever period is less.

(C) For the purposes of subparagraphs (A) and (B), the term "active duty" does not include any period during which an individual (i) was assigned full time by the Armed Forces to a civilian institution for a course of education which was substantially the same as established courses offered to civilians, (ii) served as a cadet or midshipman at one of the service academies, or (iii) served under the provisions of section 511(d) of title 10 [10 USCS § 511(d)] pursuant to an enlistment in the Army National Guard or the Air National Guard, or as a Reserve for service in the Army Reserve, Navy Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve.

(D) (i) The requirement of ineligibility for educational assistance under chapter 34 of this title [38 USCS §§ 3451 et seq.], prescribed in subparagraph (A), shall be waived in the case of a veteran described in division (ii) of this subparagraph who elects to receive benefits under this chapter [38 USCS §§ 3201 et seq.] instead of assistance under such chapter 34 [38 USCS §§ 3451 et seq.]. A veteran who makes such an election shall be ineligible for assistance under such chapter. Such an election is irrevocable.

(ii) A veteran referred to in division (i) of this subparagraph is a veteran who before January 1, 1977, performed military service described in subparagraph (C)(iii), is entitled under section 3452(a)(3)(C) of this title [38 USCS § 3452(a)(3)(C)] to have such service considered to be "active duty" for the purposes of chapter 34 of this title [38 USCS §§ 3451 et seq.], and is eligible for assistance under such chapter only by reason of having such service considered to be active duty.

(2) The term "program of education"--

(A) has the meaning given such term in section 3452 (b) of this title [38 USCS § 3452(b)], and

(B) includes (i) a full-time program of apprenticeship or other on-job training approved as provided in clause (1) or (2), as appropriate, of section 3687(a) of this title [38 USCS § 3687(a)], and (ii) in the case of an individual who is not serving on active duty, a cooperative program (as defined in section 3482(a)(2) of this title [38 USCS § 3482(a)(2)]).

(3) The term "participant" is a person who is participating in the educational benefits program established under this chapter [38 USCS §§ 3201 et seq.].

(4) The term "educational institution" has the meaning given such term in section 3452(c) of this title [38 USCS § 3452(c)].

(5) The term "training establishment" has the meaning given such term in section 3452(c) of this title [38 USCS § 3452(c)].
Explanatory notes:

A prior § 3202 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 5502.

Effective date of section:


Amendments:

1980. Act Oct. 17, 1980, in para. (1)(A), inserted "who is not eligible for educational assistance under chapter 34 of this title and", and deleted "initially" following "(i)" and "(ii)."


1986. Act Oct. 28, 1986, in para. (1)(A), inserted "and before July 1, 1985," and substituted "January 1, 1977" for "such date" following "after"; substituted para. (2) for one which read: "The terms 'program of education' and 'educational institution' shall have the same meaning ascribed to them in sections 1652(b) and 1652(c), respectively, of this title."; and added paras. (4) and (5).

1988. Act Nov. 18, 1988 (effective 1/1/89, as provided by § 108(c) of such Act, which appears as 38 USCS § 3002 note), in para. (2)(B) inserted "(i)" and inserted ", and (ii) in the case of an individual who is not serving on active duty, a cooperative program (as defined in section 1682(a)(2) of this title)".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1602, as 38 USCS § 3202, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


Other provisions:


Enrollment in program before April 1, 1987. Act Oct. 28, 1986, P. L. 99-576, Title III, Part A, § 309(c), (d), 100 Stat. 3270, which appears as 38 USCS § 3201 note, provided for continued eligibility for enrollment in the program established by 38 USCS §§ 3201 et seq. until April 1, 1987, of individuals on active duty in the Armed Forces who were eligible therefor on June 30, 1985, and required notice of such continued eligibility to affected individuals.

Code of Federal Regulations

Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:12

Forms:

24A Am Jur Pl & Pr Forms (1999), Veterans and Veterans' Laws, § 18

Law Review Articles:
SUBCHAPTER II. ELIGIBILITY; CONTRIBUTIONS; AND MATCHING FUND

§ 3221. Eligibility
§ 3222. Contributions; matching fund
§ 3223. Refunds of contributions upon disenrollment
§ 3224. Death of participant
§ 3225. Discharge or release under conditions which would bar the use of benefits

§ 3221. Eligibility

(a) Each person entering military service on or after January 1, 1977, and before July 1, 1985, shall have the right to enroll in the educational benefits program provided by this chapter [38 USCS §§ 3201 et seq.] (hereinafter in this chapter referred to as the "program" except where the text indicates otherwise) at any time during such person's service on active duty before July 1, 1985. When a person elects to enroll in the program, such person must participate for at least 12 consecutive months before disenrolling or suspending participation.

(b) The requirement for 12 consecutive months of participation required by subsection (a) of this section shall not apply when (1) the participant suspends participation or disenrolls from the program because of personal hardship as defined in regulations issued jointly by the Secretary and the Secretary of Defense, or (2) the participant is discharged or released from active duty.

(c) A participant shall be permitted to suspend participation or disenroll from the program at the end of any 12-consecutive-month period of participation. If participation is suspended, the participant shall be eligible to make additional contributions to the program under such terms and conditions as shall be prescribed by regulations issued jointly by the Secretary and the Secretary of Defense.

(d) If a participant disenrolls from the program, such participant forfeits any entitlement to benefits under the program except as provided in subsection (e) of this section. A participant who disenrolls from the program is eligible for a refund of such participant's contributions as provided in section 3223 of this title [38 USCS § 3223].

(e) A participant who has disenrolled may be permitted to reenroll in the program under such conditions as shall be prescribed jointly by the Secretary and the Secretary of Defense.

(f) An individual who serves in the Selected Reserve may not receive credit for such service under both the program established by this chapter [38 USCS §§ 3201 et seq.] and
the program established by chapter 106 of title 10 [10 USCS §§ 2131 et seq.] but shall elect (in such form and manner as the Secretary of Veterans Affairs may prescribe) the program to which such service is to be credited.

**Effective date of section:**


**Amendments:**


Such Act further, in subsecs. (b), (c) and (e), substituted "Secretary" for "Administrator"; in subsec. (b), deleted "(hereinafter in this chapter referred to as the 'Secretary')" following "Defense"; and in subsecs. (c) and (d), inserted "of Defense".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1621, as 38 USCS § 3221, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

**Other provisions:**

**Recommendation to Congress.** Act Oct. 15, 1976, P. L. 94-502, Title IV, § 408, 90 Stat. 2397 (effective 1/1/77, as provided by § 406 of such Act), provided:

"(a)(1) No individual on active duty in the Armed Forces may initially enroll in the educational assistance program provided for in chapter 32 of title 38, United States Code [38 USCS §§ 3201 et seq.]. (as added by section 404 of this Act) after December 31, 1981, unless--

"(A) before June 1, 1981, the President submits to both Houses of Congress a written recommendation that such program continue to be open for new enrollments; and

"(B) before the close of the 60-day period after the day on which the President submits to Congress the recommendation described in subparagraph (A), neither the House of Representatives nor the Senate adopts, by an affirmative vote of a majority of those present and voting in that House, a resolution which in substance disapproves such recommendation.

"(2) For purposes of computing the 60-day period referred to in paragraph (1)(B), there shall be excluded--

"(A) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain or an adjournment of the Congress sine die, and

"(B) any Saturday and Sunday, not excluded under the preceding subparagraph, when either House is not in session.

"The recommendation referred to in paragraph (1)(A) shall be delivered to both Houses of Congress on the same day and shall be delivered to the Clerk of the House of Representatives if the House is not in session and to the Secretary of the Senate if the Senate is not in session.

"(b) If new enrollments after December 31, 1981, in the educational assistance program provided for in such chapter 32 [38 USCS §§ 3201 et seq.] are authorized after the application of the provisions of subsection (a), then effective January 1, 1982, section 1622(b) [now section 3222(b)] of title 38, United States Code, is amended by striking out 'Veterans' Administration' and inserting in lieu thereof 'Department of Defense'."

Enrollment in program before April 1, 1987. Act Oct. 28, 1986, P. L. 99-576, Title III, Part A, § 309(c), (d), 100 Stat. 3270, which appears as 38 USCS § 3201 note, provided for continued eligibility for enrollment in the program established by 38 USCS §§ 3201 et seq. until April 1, 1987, of individuals on active duty in the Armed Forces who were eligible therefor on June 30, 1985, and required notice of such continued eligibility to affected individuals.

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs. 48 CFR Part 871

Research Guide
Forms:
24A  Am Jur Pl & Pr Forms (1999), Veterans and Veterans' Laws, § 18
Individual who has not participated for 12 consecutive months because of hardship situation, but upon discharge has participated for 11 months, is eligible for Chapter 32 educational benefits. VA GCO 11-77

§ 3222. Contributions; matching fund

(a) Except as provided in subsections (c) and (d) of this section, each person electing to participate in the program shall agree to have a monthly deduction made from such person's military pay. Such monthly deduction shall be in any amount not less than $25 nor more than $100 except that the amount must be divisible by 5. Any such amount contributed by the participant or contributed by the Secretary of Defense pursuant to subsection (c) of this section shall be deposited in a deposit fund account entitled the "Post-Vietnam Era Veterans Education Account" (hereinafter in this chapter [38 USCS §§ 3201 et seq.] referred to as the "fund") to be established in the Treasury of the United States. Contributions made by the participant shall be limited to a maximum of $2,700.

(b) Except as otherwise provided in this chapter [38 USCS §§ 3201 et seq.], each monthly contribution made by a participant under subsection (a) shall entitle the participant to matching funds from the Department of Veterans Affairs at the rate of $2 for each $1 contributed by the participant.

(c) The Secretary of Defense is authorized to contribute to the fund of any participant such contributions as the Secretary of Defense deems necessary or appropriate to encourage persons to enter or remain in the Armed Forces, including contributions in lieu of, or to reduce the amount of, monthly deductions under subsection (a) of this section. The Secretary of Defense is authorized to issue such rules and regulations as the Secretary of Defense deems necessary or appropriate to implement the provisions of this subsection.

(d) Subject to the maximum contribution prescribed by subsection (a) of this section, a participant shall be permitted, while serving on active duty, to make a lump-sum contribution to the fund. A lump-sum contribution to the fund by a participant shall be in
addition to or in lieu of monthly deductions made from such participant's military pay and shall be considered, for the purposes of paragraph (2) of section 3231(a) of this title [38 USCS § 3231(a)], to have been made by monthly deductions from such participant's military pay in the amount of $100 per month or in such lesser amount as may be specified by such participant pursuant to regulations issued jointly by the Secretary of Defense and the Secretary.

(e) Any amount transferred to the Secretary from the Secretary of a military department under an interagency agreement for the administration by the Department of Veterans Affairs of an educational assistance program established by the Secretary of Defense under chapter 107 of title 10 [10 USCS §§ 2141 et seq.] may be deposited into and disbursed from the fund for the purposes of such program.

Effective date of section:

Amendments:
1976. Act Oct. 15, 1976 (effective 1/1/82 and applicable as provided by § 408 of such Act, which appears as 38 USCS § 3221 note), in subsec. (b), substituted "Department of Defense" for "Veterans' Administration".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(d)(2) of such Act, which appears as 38 USCS § 3224 note), in subsec. (a), substituted "Except as provided in subsections (c) and (d) of this section, each" for "Each", substituted "$25" for "$50", and substituted "$100" for "$75"; in subsec. (c), inserted ", including contributions in lieu of, or to reduce the amount of, monthly deductions under subsection (a) of this section"; and added subsection (d).


1983. Act Nov. 21, 1983, in subsec. (d), inserted "of this title".

1989. Act Dec. 18, 1989, in subsec. (a), inserted "of Defense"; in subsec. (b), substituted "Department of Veterans Affairs" for "Veterans' Administration"; in subsec. (c), inserted "of Defense" following "Secretary", wherever appearing; in subsec. (d), inserted "of Defense" following "Secretary", and substituted "Secretary" for "Administrator"; and in subsec. (e), inserted "of Defense" following "established by the Secretary", substituted "Secretary" for "Administrator", and substituted "Department of Veterans Affairs" for "Veterans' Administration".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1622, as 38 USCS § 3222, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:
Conditional 1976 amendment. Act Oct. 15, 1976, P. L. 94-502, Title IV, § 408(b), 90 Stat. 2398, located at 38 USCS § 3221 note, provided that subsec. (b) of this section, is amended by substituting "Department of Defense" for "Veterans' Administration", effective Jan. 1, 1982, if new enrollments after Dec. 31, 1981, in the educational assistance program provided by this chapter are authorized after application of § 408(a) of such Act [38 USCS § 3221 note].

Payments made by government for certain enlistees and reenlistees. Act Sept. 8, 1980, P. L. 96-342, Title IX, § 903, 94 Stat. 1115, which appears as 10 USCS § 2141 note, provides that repayment contributions by those receiving assistance under this chapter (38 USCS §§ 3201 et seq.) shall be made by the Federal government.

"(a) In general. Upon receipt before January 1, 1992, of an application from an individual described in subsection (b)(3), the Secretary of Veterans Affairs shall--

"(1) not later than 60 days after receiving such application, refund to the individual concerned the amount, if any, of the individual's unused contributions to the VEAP Account;

"(2)(A) if the individual has received educational assistance under chapter 32 of title 38, United States Code [38 USCS §§ 3201 et seq.], for the pursuit of a program of education, pay to the individual (out of funds appropriated to the readjustment benefits account) a sum equal to the amount by which the amount of the educational assistance that the individual would have received under chapter 34 of such title [38 USCS §§ 3451 et seq.] for the pursuit of such program exceeds the amount of the educational assistance that the individual did receive under such chapter 32 for the pursuit of such program; or

"(B) if the individual has not received educational assistance under such chapter 32, pay to the individual (out of funds appropriated to the Department of Veterans Affairs Readjustment Benefits account) a sum equal to the amount of educational assistance that the individual would have received under chapter 34 of such title [38 USCS §§ 3451 et seq.] for the pursuit of a program of education if the individual had been entitled to assistance under such program during the period ending on December 31, 1989; and

"(3) refund to the Secretary of Defense the unused contributions by such Secretary to the VEAP Account on behalf of such individual.

"(b) Definitions. For purposes of this section--

"(1) the term "VEAP Account" means the Post-Vietnam Era Veterans Education Account established pursuant to section 1622(a) of title 38, United States Code [subsec. (a) of this section];

"(2) the term "active duty" has the same meaning given such term by section 101(21) of such title 38;

"(3) the term "individual described in subsection (b)(3)" means an individual who--

"(A) before January 1, 1977, commenced the third academic year as a cadet or midshipman at one of the service academies or the third academic year as a member of the Senior Reserve Officers' Training Corps in a program of educational assistance under section 2104 or 2107 of title 10, United States Code;

"(B) served on active duty for a period of more than 180 days pursuant to an appointment as a commissioned officer received upon graduation from one of the service academies or upon satisfactory completion of advanced training (as defined in section 2101 of such title 10) as a member of the Senior Reserve Officers' Training Corps;

"(C) after such period of active duty, was discharged or released therefrom under conditions other than dishonorable or continued to serve on active duty without a break in service; and

"(D) if enrolled under the program of educational assistance provided under chapter 32 of title 38, United States Code [38 USCS §§ 3201 et seq.], submits to the Secretary of Veterans Affairs, as part of the application made by the individual under
subsection (a) in such form and manner as such Secretary shall prescribe by January 1, 1991, an irrevocable election to be disenrolled from such program at that time; and "(4) the term "service academies" means the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, and the United States Coast Guard Academy.".

Cross References
This section is referred to in 38 USCS §§ 3015, 3018B, 3035, 3223, 3243
Service Academy graduates were entitled to educational assistance under § 207 of law entitled Refunds for Certain Service Academy Graduates (38 USCS § 3222 note) even though they previously received tuition benefits from Navy. Tallman v Brown (1997, CA FC) 105 F.3d 613
Service person who has completed obligated period of active duty or 6 years of active duty (which ever is less), which began after December 31, 1976, is still on active duty, is still making monthly contributions, but has made less than 12 monthly contributions, may nonetheless be entitled to Chapter 32 educational benefits before making 12 consecutive monthly contributions.
VA GCO 11-77

§ 3223. Refunds of contributions upon disenrollment

(a) Contributions made to the program by a participant may be refunded only after the participant has disenrolled from the program or as provided in section 3224 of this title [38 USCS § 3224].

(b) If a participant disenrolls from the program prior to discharge or release from active duty, such participant's contributions will be refunded on the date of the participant's discharge or release from active duty or within 60 days of receipt of notice by the Secretary of the participant's discharge or disenrollment, except that refunds may be made earlier in instances of hardship or other good reason as prescribed in regulations issued jointly by the Secretary and the Secretary of Defense.

(c) If a participant disenrolls from the program after discharge or release from active duty, the participant's contributions shall be refunded within 60 days of receipt of an application for a refund from the participant.

(d) In the event the participant (1) dies while on active duty, (2) dies after discharge or release from active duty, or (3) disenrolls or is disenrolled from the program without having utilized any entitlement, the participant may have accrued under the program, or, in the event the participant utilizes part of such participant's entitlement and disenrolls or is disenrolled from the program, the amount contributed by the Secretary of Defense under the authority of section 3222(c) of this title [38 USCS § 3222(c)] remaining in the fund shall be refunded to such Secretary.

Effective date of section:

Amendments:
1983. Act Nov. 21, 1983, in subsecs. (a) and (d), inserted "of this title".

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Death of participant

In the event of a participant's death, the amount of such participant's unused contributions to the fund shall be paid to the living person or persons first listed below:

1. The beneficiary or beneficiaries designated by such participant under such participant's Servicemembers' Group Life Insurance policy.
2. The surviving spouse of the participant.
3. The surviving child or children of the participant, in equal shares.
4. The surviving parent or parents of the participant, in equal shares.

If there is no such person living, such amount shall be paid to such participant's estate.

Effective date of section:

Amendments:
1980. Act Oct. 17, 1980, substituted the text of this section for text which read:

"(a) If a participant dies, the amount of such participant's unused contributions to the fund shall be paid (1) to the beneficiary or beneficiaries designated by such participant under such participant's Servicemen's Group Life Insurance policy, or (2) to the participant's estate if no beneficiary has been designated under such policy or if the participant is not insured under the Servicemen's Group Life Insurance program.

"(b) If a participant dies after having been discharged or released from active duty and before using any or all of the contributions which the participant made to the fund, such unused contributions shall be paid as prescribed in subsection (a) of this section."


Other provisions:
If a participant in the program is discharged or released from active duty under dishonorable conditions, such participant is automatically disenrolled and any contributions made by such participant shall be refunded to such participant on the date of such participant's discharge or release from active duty or within 60 days from receipt of notice by the Secretary of such discharge or release, whichever is later.

Effective date of section:

Amendments:

SUBCHAPTER III. ENTITLEMENT; DURATION

§ 3231. Entitlement; loan eligibility
§ 3232. Duration; limitations
§ 3233. Apprenticeship or other on-job training
§ 3234. Tutorial assistance

§ 3231. Entitlement; loan eligibility

(a) (1) Subject to the provisions of section 3695 of this title [38 USCS § 3695] limiting the aggregate period for which any person may receive assistance under two or more programs of educational or vocational assistance administered by the Department of Veterans Affairs, a participant shall be entitled to a maximum of 36 monthly benefit payments (or their equivalent in the event of part-time benefits).

(2) Except as provided in subsection (e) of this section, in paragraph (5)(E) of this subsection, and section 3233 of this title [38 USCS § 3233] and subject to section 3241 of this title [38 USCS § 3241], amount of the monthly payment to which any eligible veteran is entitled shall be ascertained by (A) adding all contributions made to the fund by the eligible veteran, (B) multiplying the sum by 3, (C) adding all contributions made to the fund for such veteran by the Secretary of Defense, and (D) dividing the sum by the lesser of 36 or the number of months in which contributions were made by such veteran.

(3) Payment of benefits under this chapter [38 USCS §§ 3201 et seq.] may be made only for periods of time during which an eligible veteran is actually enrolled in and pursuing an approved program of education and, except as provided in paragraph (4), only after an eligible veteran has been discharged or released from active duty.

(4) Payment of benefits under this chapter [38 USCS §§ 3201 et seq.] may be made after a participant has completed his or her first obligated period of active duty (which began after December 31, 1976), or 6 years of active duty (which began after December 31, 1976), whichever period is less.

(5) (A) Notwithstanding any other provision of this chapter or chapter 36 of this title [38 USCS §§ 3201 et seq. or 3670 et seq.], any payment of an educational assistance allowance described in subparagraph (B) of this paragraph--
(i) shall not be charged against the entitlement of any eligible veteran under this chapter [38 USCS §§ 3201 et seq.]; and
(ii) shall not be counted toward the aggregate period for which section 3695 of this title [38 USCS § 3695] limits an individual's receipt of assistance.

(B) The payment of an educational assistance allowance referred to in subparagraph (A) of this paragraph is any payment of a monthly benefit under this chapter to an eligible veteran for pursuit of a course or courses under this chapter [38 USCS §§ 3201 et seq.] if the Secretary finds that the eligible veteran--

(i) in the case of a person not serving on active duty, had to discontinue such course pursuit as a result of being ordered, in connection with the Persian Gulf War to serve on active duty under section 688, 12301(a), 12301(d), 12301(g), 12302, or 12304 of title 10 [10 USCS § 688, 12301(a), 12301(d), 12301(g), 12302, or 12304]; or
(ii) in the case of a person serving on active duty, had to discontinue such course pursuit as a result of being ordered to a new duty location or assignment or to perform an increased amount of work; and
(iii) failed to receive credit or training time toward completion of the individual's approved educational, professional, or vocational objective as a result of having to discontinue, as described in clause (i) or (ii) of this subparagraph, his or her course pursuit.

(C) The period for which, by reason of this subsection, an educational assistance allowance is not charged against entitlement or counted toward the applicable aggregate period under section 3695 of this title [38 USCS § 3695] shall not exceed the portion of the period of enrollment in the course or courses for which the individual failed to receive credit or with respect to which the individual lost training time, as determined under subparagraph (B)(iii) of this paragraph.

(D) The amount in the fund for each eligible veteran who received a payment of an educational assistance allowance described in subparagraph (B) of this paragraph shall be restored to the amount that would have been in the fund for the veteran if the payment had not been made. For purposes of carrying out the previous sentence, the Secretary of Defense shall deposit into the fund, on behalf of each such veteran, an amount equal to the entire amount of the payment made to the veteran.

(E) In the case of a veteran who discontinues pursuit of a course or courses as described in subparagraph (B) of this paragraph, the formula for ascertaining the amount of the monthly payment to which the veteran is entitled in paragraph (2) of this subsection shall be implemented as if--

(i) the payment made to the fund by the Secretary of Defense under subparagraph (D) of this paragraph, and
(ii) any payment for a course or courses described in subparagraph (B) of this paragraph that was paid out of the fund, had not been made or paid.

(b) Any enlisted member of the Armed Forces participating in the program shall be eligible to enroll in a course, courses, or program of education for the purpose of attaining a secondary school diploma (or an equivalency certificate), as authorized by
section 3491(a) of this title [38 USCS § 3491(a)], during the last six months of such member's first enlistment and at any time thereafter.

(c) When an eligible veteran is pursuing a program of education under this chapter [38 USCS §§ 3201 et seq.] by correspondence, such eligible veteran's entitlement shall be charged at the rate of 1 month's entitlement for each month of benefits paid to the eligible veteran (computed on the basis of the formula provided in subsection (a)(2) of this section).

(d) (1) Subject to the provisions of paragraph (2) of this subsection, the amount of the educational assistance benefits paid to an eligible veteran who is pursuing a program of education under this chapter [38 USCS §§ 3201 et seq.] while incarcerated in a Federal, State, or local penal institution for conviction of a felony may not exceed the lesser of (A) such amount as the Secretary determines, in accordance with regulations which the Secretary shall prescribe, is necessary to cover the cost of established charges for tuition and fees required of similarly circumstanced nonveterans enrolled in the same program and the cost of necessary supplies, books, and equipment, or (B) the applicable monthly benefit payment otherwise prescribed in this section or section 3233 of this title [38 USCS § 3233]. The amount of the educational assistance benefits payable to a veteran while so incarcerated shall be reduced to the extent that the tuition and fees of the veteran for any course are paid under any Federal program (other than a program administered by the Secretary) or under any State or local program.

(2) Paragraph (1) of this subsection shall not apply in the case of any veteran who is pursuing a program of education under this chapter while residing in a halfway house or participating in a work-release program in connection with such veteran's conviction of a felony.

(e) (1) Subject to subsection (a)(1) of this section, each individual who is pursuing a program of education consisting exclusively of flight training approved as meeting the requirements of section 3241(b) of this title [38 USCS § 3241(b)] shall be paid educational assistance under this chapter in the amount equal to 60 percent of the established charges for tuition and fees which similarly circumstanced nonveterans enrolled in the same flight course are required to pay.

(2) No payment may be paid under this chapter [38 USCS §§ 3201 et seq.] to an individual for any month during which such individual is pursuing a program of education consisting exclusively of flight training until the Secretary has received from that individual and the institution providing such training a certification of the flight training received by the individual during that month and the tuition and other fees charged for that training.

(3) The entitlement of an eligible veteran pursuing a program of education described in paragraph (1) of this subsection shall be charged at the rate of one month for each amount of educational assistance paid which is equal to the monthly benefit otherwise payable to such veteran (computed on the basis of the formula provided in subsection (a)(2) of this section).

(4) The number of solo flying hours for which an individual may be paid an educational assistance allowance under this subsection may not exceed the minimum number of solo flying hours required by the Federal Aviation Administration for the flight rating or certification which is the goal of the individual's flight training.
Explanatory notes:

The bracketed reference "10 USCS §§ 12301(a), (d), (g), 12302, 12304, 688" has been inserted on authority of Act Oct. 5, 1994, P. L. 103-337, § 1662(e)(2), 108 Stat. 2992, which transferred 10 USCS §§ 672, 673, and 673b to 10 USCS §§ 12301, 12302, and 12304, respectively.

Effective date of section:


Amendments:

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(d)(2) of such Act, which appears as 38 USCS § 3224 note), in subsec. (a), substituted para. (1) for one which read: "(1) A participant shall be entitled to a maximum of 36 monthly benefit payments (or their equivalent in the event of part-time benefit payments)."; and substituted subsec. (b) for one which read: "Any enlisted member of the Armed Forces participating in the program shall be eligible to participate in the Predischarge Education Program (PREP), authorized by subchapter VI of chapter 34 of this title, during the last 6 months of such member's first enlistment."

1981. Act Aug. 13, 1981, in subsec. (c), deleted "either" after pursuing" and deleted "or a program of flight training" after "correspondence"; and deleted subsec. (d) which read: "(d) Eligible veterans participating in the program shall be eligible for education loans authorized by subchapter III of chapter 36 of this title in such amounts and on the same terms and conditions as provided in such subchapter, except that the term "eligible veteran" as used in such subchapter shall be deemed to include "eligible veteran" as defined in this chapter.". For the effective date and application of such amendments, see the Other provisions note to this section.

1986. Act Oct. 28, 1986, in subsec. (a)(2), substituted "Except as provided in section 1633 of this title and subject to section 1641 of this title, the" for "The".


Such Act further (effective 1/1/89 as provided by § 108(c) of such Act, which appears as 38 USCS § 3002 note) added subsec. (d).


1991. Act March 22, 1991 (effective 4/1/91 as provided by § 7(c) of such Act, which appears as a note to this section), in subsec. (a)(2), inserted "subsection (f) of this section and"; and added subsec. (f).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1631, as 38 USCS § 3231, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


1992. Act Oct. 29, 1992 (applicable to certain flight training received after 9/30/92, as provided by § 310(d) of such Act, which appears as 10 USCS § 16131 note), in subsec. (f), in para. (1), deleted "(other than tuition and fees charged for or attributable to solo flying hours)" following "for tuition and fees"; and added para. (4).

1996. Act Oct. 9, 1996 deleted subsec. (d), which read:

"(d) The amount of the monthly benefit payment to an individual pursuing a cooperative program under this chapter shall be 80 percent of the monthly benefit otherwise payable to
"(2) For each month that an individual is paid a monthly benefit payment for pursuit of a cooperative program under this chapter, the individual's entitlement under this chapter shall be charged at the rate 80 percent of a month."

and redesignated subsecs. (e) and (f) as subsecs. (d) and (e), respectively.


2001. Act Dec. 27, 2001 (effective as of 9/11/2001, as provided by § 103(e) of such Act, which appears as 38 USCS § 3013 note), in subsec. (a)(5)(B), in cl. (i), substituted "to serve on active duty under section 688, 12301(a), 12301(d), 12301(g), 12302, or 12304 of title 10;" for ", in connection with the Persian Gulf War, to serve on active duty under section 672(a), (d), or (g), 673, 673b, or 688 of title 10;", and, in cl. (ii), deleted ", in connection with such War," following "ordered".

Other provisions:


"(a) Except as provided in subsection (b), the amendments made by sections 2003 and 2005 [amending this section among other things; for classification, consult USCS Tables volumes] shall take effect on October 1, 1981.

"(b) The amendments made by such sections shall not apply to any person receiving educational assistance under section [former] 1677 of title 38, United States Code, as such section was in effect on August 31, 1981, for the pursuit of a program of education (as defined in section 1652(b) of such title [now 38 USCS § 3452(b)]) in which such person was enrolled on that date, for as long as such person is continuously thereafter so enrolled and meets the requirements of eligibility for such assistance for the pursuit of such program under the provisions of chapters 34 and 36 of such title [38 USCS §§ 3451 et seq., 3670 et seq.], as in effect on that date.


Code of Federal Regulations

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

Cross References

This section is referred to in 38 USCS § 3222

§ 3232. Duration; limitations

(a) (1) Except as provided in paragraphs (2) and (3), and subject to paragraph (4), of this subsection, educational assistance benefits shall not be afforded an eligible veteran under this chapter [38 USCS §§ 3201 et seq.] more than 10 years after the date of such veteran's last discharge or release from active duty.

(2) (A) If any eligible veteran was prevented from initiating or completing such veteran's chosen program of education during the delimiting period determined under paragraph (1) of this subsection because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall, upon
application made in accordance with subparagraph (B) of this paragraph, be granted an extension of the applicable delimiting period for such length of time as the Secretary determines, from the evidence, that such veteran was so prevented from initiating or completing such program of education.

(B) An extension of the delimiting period applicable to an eligible veteran may be granted under subparagraph (A) of this paragraph by reason of the veteran's mental or physical disability only if the veteran submits an application for such extension to the Secretary within one year after (i) the last date of the delimiting period otherwise applicable to the veteran under paragraph (1) of this subsection, or (ii) the termination date of the period of the veteran's mental or physical disability, whichever is later.

(3) When an extension of the applicable delimiting period is granted an eligible veteran under paragraph (2) of this subsection, the delimiting period with respect to such veteran shall again begin to run on the first day after such veteran's recovery from such disability on which it is reasonably feasible, as determined in accordance with regulations prescribed by the Secretary, for such veteran to initiate or resume pursuit of a program of education with educational assistance under this chapter [38 USCS §§ 3201 et seq.].

(4) For purposes of paragraph (1) of this subsection, a veteran's last discharge or release from active duty shall not include any discharge or release from a period of active duty of less than 90 days of continuous service unless the individual involved is discharged or released for a service-connected disability, for a medical condition which preexisted such service and which the Secretary determines is not service connected, for hardship, or as a result of a reduction in force as described in section 3011(a)(I)(A)(ii)(III) of this title [38 USCS § 3011(a)(I)(A)(ii)(III)].

(b) (1) In the event that an eligible veteran has not utilized any or all of such veteran's entitlement by the end of the delimiting period applicable to the veteran under subsection (a) of this section and at the end of one year thereafter has not filed a claim for utilizing such entitlement, such eligible veteran is automatically disenrolled.

(2) (A) Any contributions which were made by a veteran disenrolled under paragraph (1) of this subsection and remain in the fund shall be refunded to the veteran after notice of disenrollment is transmitted to the veteran and the veteran applies for such refund.

(B) If no application for refund of contributions under subparagraph (A) of this paragraph is received from a disenrolled veteran within one year after the date the notice referred to in such subparagraph is transmitted to the veteran, it shall be presumed that the veteran's whereabouts is unknown and the funds shall be transferred to the Secretary for payments for entitlement earned under subchapter II of chapter 30 [38 USCS §§ 3011 et seq.].

(c) (1) Subject to paragraph (3), the amount of educational assistance payable under this chapter [38 USCS §§ 3201 et seq.] for a licensing or certification test described in section 3452(b) of this title [38 USCS § 3452(b)] is the lesser of $2,000 or the fee charged for the test.

(2) The number of months of entitlement charged in the case of any individual for such licensing or certification test is equal to the number (including any fraction)
determined by dividing the total amount paid to such individual for such test by the full-time monthly institutional rate of the educational assistance allowance which, except for paragraph (1), such individual would otherwise be paid under this chapter [38 USCS §§ 3201 et seq.].

(3) In no event shall payment of educational assistance under this subsection for such a test exceed the amount of the individual's available entitlement under this chapter [38 USCS §§ 3201 et seq.].

(d) (1) Subject to paragraph (3), the amount of educational assistance payable under this chapter for a national test for admission or national test providing an opportunity for course credit at institutions of higher learning described in section 3452(b) of this title [38 USCS § 3452(b)] is the amount of the fee charged for the test.

(2) The number of months of entitlement charged in the case of any individual for a test described in paragraph (1) is equal to the number (including any fraction) determined by dividing the total amount of educational assistance paid such individual for such test by the full-time monthly institutional rate of educational assistance, except for paragraph (1), such individual would otherwise be paid under this chapter [38 USCS §§ 3201 et seq.].

(3) In no event shall payment of educational assistance under this subsection for a test described in paragraph (1) exceed the amount of the individual's available entitlement under this chapter [38 USCS §§ 3201 et seq.].

Effective date of section:

Amendments:
1982. Act Sept. 13, 1982 substituted "section 1322(a) of title 31" for "subsection (a) of section 725s of title 31"; and substituted "section 1322(a)" for "the last proviso of that subsection".

1983. Act Nov. 21, 1983, deleted a comma following "title 31", and substituted "such section" for "section 1322(a)".

1986. Act Oct. 28, 1986, substituted this section for one which read: "No educational assistance benefits shall be afforded an eligible veteran under this chapter beyond the date of 10 years after such veteran's last discharge or release from active duty. In the event an eligible veteran has not utilized any or all of such veteran's entitlement by the end of the 10-year period, such eligible veteran is automatically disenrolled and any contributions made by such veteran remaining in the fund shall be refunded to the veteran following notice to the veteran and an application by the veteran for such refund. If no application is received within 1 year from date of notice, it will be presumed for the purposes of section 1322(a) of title 31 that the individual's whereabouts is unknown and the funds shall be transferred as directed in such section.".


Such Act further, in subsec. (a), in paras. (2) and (3), substituted "Secretary" for "Administrator", wherever appearing.

1991. Act March 22, 1991, in subsec. (b)(1), inserted "and at the end of one year thereafter has not filed a claim for utilizing such entitlement".
§ 3233. Apprenticeship or other on-job training

(a) Except as provided in subsection (b) of this section, the amount of the monthly benefit payment to an individual pursuing a full-time program of apprenticeship or other on-job training under this chapter [38 USCS §§ 3201 et seq.] is--

(1) for each of the first six months of the individual's pursuit of such program, 75 percent of the monthly benefit payment otherwise payable to such individual under this chapter [38 USCS §§ 3201 et seq.];
(2) for each of the second six months of the individual's pursuit of such program, 55 percent of such monthly benefit payment; and
(3) for each of the months following the first 12 months of the individual's pursuit of such program, 35 percent of such monthly benefit payment.

(b) In any month in which an individual pursuing a program of education consisting of a program of apprenticeship or other on-job training fails to complete 120 hours of training, the amount of the monthly benefit payment payable under this chapter [38 USCS §§ 3201 et seq.] to the individual shall be limited to the same proportion of the applicable rate determined under subsection (a) of this section as the number of hours worked during such month, rounded to the nearest eight hours, bears to 120 hours.

(c) For each month that an individual is paid a monthly benefit payment under this chapter [38 USCS §§ 3201 et seq.], the individual's entitlement under this chapter [38 USCS §§ 3201 et seq.] shall be charged at the rate of--

(1) 75 percent of a month in the case of payments made in accordance with subsection (a)(1) of this section;
(2) 55 percent of a month in the case of payments made in accordance with subsection (a)(2) of this section; and
(3) 35 percent of a month in the case of payments made in accordance with subsection (a)(3) of this section.

(d) For any month in which an individual fails to complete 120 hours of training, the entitlement otherwise chargeable under subsection (c) of this section shall be reduced in the same proportion as the monthly benefit payment payable is reduced under subsection (b) of this section.

Amendments:


Other provisions:
Increase in benefit for individuals pursuing apprenticeship or on-job training; post-Vietnam Era veterans' educational assistance. Act Dec. 10, 2004, P. L. 108-454, Title I, § 103(b), 118 Stat. 3600, provides:
“For months beginning on or after October 1, 2005, and before January 1, 2008, subsection (a) of section 3233 of title 38, United States Code, shall be applied as if—

“(1) the reference to '75 percent' in paragraph (1) were a reference to '85 percent';

“(2) the reference to '55 percent' in paragraph (2) were a reference to '65 percent'; and

“(3) the reference to '35 percent' in paragraph (3) were a reference to '45 percent'.”.

Cross References
This section is referred to in 38 USCS § 3231

§ 3234. Tutorial assistance

(a) An individual entitled to benefits under this chapter [38 USCS §§ 3201 et seq.] shall also be entitled to the benefits provided an eligible veteran under section 3492 of this title [38 USCS § 3492], subject to the conditions applicable to an eligible veteran under such section. Any amount paid to an individual under this section shall be in addition to the amount of other benefits paid under this chapter [38 USCS §§ 3201 et seq.].

(b) An individual's period of entitlement to educational assistance under this chapter [38 USCS §§ 3201 et seq.] shall be charged only with respect to the amount of educational assistance paid to the individual under this section in excess of $600.

(c) An individual's period of entitlement to educational assistance under this chapter [38 USCS §§ 3201 et seq.] shall be charged at the rate of one month for each amount of assistance paid to the individual under this section in excess of $600 that is equal to the amount of monthly educational assistance the individual is otherwise eligible to receive for full-time pursuit of an institutional course under this chapter [38 USCS §§ 3201 et seq.].

(d) Payments of benefits under this section shall be made--

(1) in the case of the first $600 of such benefits paid to an individual, from funds appropriated, or otherwise available, to the Department of Veterans Affairs for the payment of readjustment benefits; and

(2) in the case of payments to an individual for such benefits in excess of $600, from the fund from contributions made to the fund by the veteran and by the Secretary of Defense in the same proportion as these contributions are used to pay other educational assistance to the individual under this chapter [38 USCS §§ 3201 et seq.].

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1634, as 38 USCS § 3234, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Cross References
This section is referred to in 38 USCS § 3680A

SUBCHAPTER IV. ADMINISTRATION

§ 3241. Requirements

§ 3242. [§ 1642. Repealed]

§ 3243. Deposits; reports

§ 3241. Requirements

(a) (1) The provisions of sections 3470, 3471, 3474, 3483, and 3491(a)(1) of this title [38 USCS §§ 3470, 3471, 3474, 3483, and 3491(a)(1)] and the provisions of chapter 36 of this title [38 USCS §§ 3670 et seq.] (with the exception of section 3687 [38 USCS § 3687]) shall be applicable with respect to individuals who are pursuing programs of education while serving on active duty.

(2) The Secretary may, without regard to the application to this chapter [38 USCS §§ 3201 et seq.] of so much of the provisions of section 3471 of this title [38 USCS § 3471] as prohibit the enrollment of an eligible veteran in a program of education in which the veteran is "already qualified", and pursuant to such regulations as the Secretary shall prescribe, approve the enrollment of such individual in refresher courses (including courses which will permit such individual to update knowledge and skills or be instructed in the technological advances which have occurred in the individual's field of employment during and since the period of such veteran's active military service), deficiency courses, or other preparatory or special education or training courses necessary to enable the individual to pursue an approved program of education.

(b) The Secretary may approve the pursuit of flight training (in addition to a course of flight training that may be approved under section 3680A(b) of this title [38 USCS § 3680A(b)]) by an individual entitled to basic educational assistance under this chapter [38 USCS §§ 3201 et seq.] if--

(1) such training is generally accepted as necessary for the attainment of a recognized vocational objective in the field of aviation;

(2) the individual possesses a valid pilot certificate and meets, on the day the individual begins a course of flight training, the medical requirements necessary for a commercial pilot certificate; and

(3) the flight school courses meet Federal Aviation Administration standards for such courses and are approved by the Federal Aviation Administration and the State approving agency.

(c) The provisions of sections 3470, 3471, 3474, 3476, 3483, and 3491(a) [38 USCS §§ 3470, 3471, 3474, 3476, 3483, and 3491(a)] (other than clause (1)) of this title and the provisions of chapter 36 of this title [38 USCS §§ 3670 et seq.] (with the exception of
section 3687 [38 USCS § 3687]) shall be applicable with respect to individuals who are pursuing programs of education following discharge or release from active duty.

Effective date of section:

Amendments:
1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(d)(2) of such Act, which appears as 38 USCS § 3224 note), inserted "1663," and substituted "and 1691(a)(1)" for "1696, and 1698".

1981. Act Aug. 13, 1981 (effective as provided by § 2006 of such Act, which appears as 38 USCS § 3231 note), substituted this section for one which read: "The provisions of sections 1663, 1670, 1671, 1673, 1674, 1676, 1677, 1681(c), 1683, and 1691(a)(1) of this title and the provisions of chapter 36 of this title, with the exception of sections 1777, 1780(c), and 1787, shall be applicable to the program.".

1986. Act Oct. 28, 1986, designated existing matter as subsec. (a) and in such subsec. as so designated, inserted "1685" and substituted "section 1787 shall be applicable with respect to individuals who are pursuing programs of education while serving on active duty." for "sections 1777, 1780(c), and 1787) shall be applicable to the program."; and added subsec. (b).

1988. Act Nov. 18, 1988 (effective 8/15/89, as provided by § 106(d) of such Act, which appears as 38 USCS § 3034 note), in subsec. (a), designated the existing provisions as para. (1), and added para. (2); and, in subsec. (b), substituted "1691(a)(other than clause(1))" for "1691(a)(1)".

1989. Act Dec. 18, 1989, in subsec. (a)(2), substituted "employment during and since the period of such veteran's active military service") for "employment")", and substituted "Secretary" for "Administrator", wherever appearing.


Such Act further (effective 4/1/91 as provided by § 7(c) of such Act, which appears as 38 USCS § 3231 note) redesignated former subsec. (b) as subsec. (c); and added new subsec. (b).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1641, as 38 USCS § 3241, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1992. Act Oct. 29, 1992 (applicable as provided by § 313(b) of such Act, which appears as 10 USCS § 16136 note), in subsec. (a), in para. (1), deleted "3473," following "3471,".; in subsec. (b), in para. (1), substituted "3680A(b)" for "3473(b)"; and, in subsec. (c), deleted "3473," following "3471,".

1994. Act Nov. 2, 1994 (effective 10/1/94, as provided by § 601(d) of such Act, which appears as 38 USCS § 3034 note), in subsec. (b), deleted para. (2), which read: "This subsection shall not apply to a course of flight training that commences on or after October 1, 1994.", deleted the designation for para. (1), and redesignated subparas. (A), (B), and (C) as paras. (1), (2), and (3), respectively.

Such Act further, in subsec. (c), deleted "1663," preceding "3470".

1998. Act Nov. 11, 1998 (applicable as provided by § 204(c) of such Act, which appears as 10 USCS § 16136 note), in subsec. (b)(2), substituted "pilot certificate" for "pilot's license" in two places, and inserted ", on the day the individual begins a course of flight training,".

Code of Federal Regulations

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§ 3243. Deposits; reports

Deductions made by the Department of Defense from the military pay of any participant shall be promptly transferred to the Secretary for deposit in the fund. The Secretary of Defense shall also submit to the Secretary a report each month showing the name, service number, and the amount of the deduction made from the military pay of each initial enrollee, any contribution made by the Secretary of Defense pursuant to section 3222(c) of this title [38 USCS § 3222(c)], as well as any changes in each participant's enrollment and/or contribution. The report shall also include any additional information the Secretary and the Secretary of Defense deem necessary to administer this program. The Secretary shall maintain accounts showing contributions made to the fund by individual participants and by the Secretary of Defense as well as disbursements made from the fund in the form of benefits.

Effective date of section:


Amendments:

1983. Act Nov. 21, 1983, inserted "of this title".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1643, as 38 USCS § 3243, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).
SUBCHAPTER I. PURPOSE--DEFINITIONS
SUBCHAPTER II. ELIGIBILITY AND ENTITLEMENT
SUBCHAPTER III. ENROLLMENT
SUBCHAPTER IV. PAYMENTS TO ELIGIBLE VETERANS; VETERAN-STUDENT SERVICES
SUBCHAPTER V. SPECIAL ASSISTANCE FOR THE EDUCATIONALLY DISADVANTAGED
[VI. REPEALED]

Explanatory notes:


Amendments:

1967. Act Aug. 31, 1967, P. L. 90-77, Title III, §§ 302(c), 304(b), 306(b)(1), 81 Stat. 185, 186, 188 (effective 10/1/67, as provided by § 405(a) of such Act), added items 1677 and 1678; and substituted items 1683-1687 for items 1683-1686 which read:
"1683. Measurement of courses.
"1684. Overcharges by educational institutions.
"1685. Approval of courses.
"1686. Discontinuance of allowances.".


"SUBCHAPTER IV. PAYMENTS TO ELIGIBLE VETERANS
"1681. Educational assistance allowance.
"1682. Computation of educational assistance allowances.
"1683. Apprenticeship or other on-job training.
"1684. Measurement of courses.
"1685. Overcharges by educational institutions.
"1686. Approval of courses.
"1687. Discontinuance of allowances.";

and added item 1697A.

1976. Act Oct. 15, 1976, P. L. 94-502, Title II, § 210(4), 90 Stat. 2388 (effective 10/15/76, as provided by § 703(b) of such Act), redesignated item 1697A as item 1698.

1977. Act Nov. 23, 1977, P. L. 95-202, Title II, § 201(c)(1), 91 Stat. 1438 (effective 1/1/78, as provided by § 501 of such Act), added item 1682A.

1980. Act Oct. 17, 1980, P. L. 96-466, Title VI, § 601(a)(2), 94 Stat. 2208 (effective 10/1/80, as provided by § 802(f)(1) of such Act), deleted subchapter VI heading and items 1695-1698 which read:

"SUBCHAPTER VI. PREDISCHARGE EDUCATION PROGRAM"

"1695. Purpose: definition.

"1696. Payment of educational assistance allowance.

"1697. Educational and vocational guidance.

"1698. Coordination with and participation by Department of Defense."


1988. Act Nov. 18, 1988, P. L. 100-689, Title I, Part A, § 107(c)(2)(B), 102 Stat. 4169, amended the analysis of this chapter by substituting item 1692 for one which read "1692. Special supplementary assistance."

Act Nov. 18, 1988, P. L. 100-689, Title I, Part B, § 124(c)(1), 102 Stat. 4175, in the chapter analysis, deleted items 1682A and 1686 which read: "1682A. Accelerated payment of educational assistance allowances" and "1686. Education loans."

1989. Act Dec. 18, 1989, P. L. 101-237, Title IV, § 405(d)(4)(B), 103 Stat. 2082, effective 5/1/90 and applicable as provided by § 405(e) of such Act, which appears as 10 USCS § 2136 note, amended the analysis of this chapter by substituting item 1685 for one which read: "1685. Veteran-student services."


Act Aug. 6, 1991, P. L. 102-83, § 5(b)(1), 105 Stat. 406, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1992. Act Oct. 29, 1992, P. L. 102-568, Title III, § 313(a)(3)(B), 106 Stat. 4332, applicable as provided by § 313(b) of such Act, which appears as 10 USCS § 2136 note, amended the analysis of this chapter by deleting item 3473, which read: "3473. Disapproval of enrollment in certain courses."

SUBCHAPTER I. PURPOSE--DEFINITIONS

§ 3451. Purpose

§ 3452. Definitions

§ 3451. Purpose

The Congress of the United States hereby declares that the education program created by this chapter [38 USCS §§ 3451 et seq.] is for the purpose of (1) enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and
restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country.

Explanatory notes:

Provisions similar to those contained in clauses (3) and (4) of this section were contained in former 38 USC § 1601(c), prior to repeal by Act March 3, 1966, P. L. 89-358, § 4(a), 80 Stat. 23.

Amendments:


Other provisions:

Savings provisions. Act March 3, 1966, P. L. 89-358, § 4(b), 80 Stat. 23, provided: "Nothing in this Act [adding 38 USCS §§ 3451 et seq., among other things; for full classification, consult USCS Tables volumes] or any amendment or repeal made by it, shall affect any right or liability (civil or criminal) which matured under chapter 33 of title 38 [former 38 USC §§ 1601 et seq.] before the date of enactment of this Act; and all offenses committed, and all penalties and forfeitures incurred, under any provision of law amended or repealed by this Act, may be punished or recovered, as the case may be, in the same manner and with the same effect as if such amendments or repeals had not been made."

Effective date and application of Act March 3, 1966. Act March 3, 1966, P. L. 89-358, § 12(a), 80 Stat. 28, provided: "Except as otherwise specifically provided, the provisions of this Act [adding 38 USCS §§ 3451 et seq., among other things; for full classification of this Act, consult USCS Tables volumes] shall take effect on the date of its enactment, but no educational assistance allowance shall be payable under chapter 34 of title 38, United States Code, as added by section 2 of this Act [38 USCS §§ 3451 et seq.], for any period before June 1, 1966, nor for the month of June 1966, unless (1) the eligible veteran commenced the pursuit of the course of education on or after June 1, 1966, or (2) the pursuit of such course continued through June 30, 1966."

Code of Federal Regulations

Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18

Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a

Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws §§ 124, 135

Forms:
Annotations:

Who is "individual with handicaps" under Rehabilitation Act of 1973 (29 USCS §§ 701 et seq.). 97 ALR Fed 40

Law Review Articles:

Benefits for Conscientious Objectors. 19 Catholic Lawyer 62, Winter 1973

Constitutional Law--Due Process--Conscientious Objectors Entitled to Same Veterans Educational Benefits Received By Regular Servicemen. 6 Creighton L Rev 393, 1972-73

Constitutional Law--Equal Protection--Veteran's Educational Benefits for Conscientious Objectors. 8 Suffolk Univ L Rev 1239, Summer 1974


1. Generally

2. Constitutionality

3. Purpose

4. Applicability

1. Generally

State law, which excludes from state benefits honorably discharged conscientious objector who is eligible for federal educational benefits under provisions of 38 USCS §§ 1651 et seq., 1661 et seq. [now 38 USCS §§ 3451, et seq., 3461 et seq.], is invalid as state legislation, effect of which would be to frustrate congressional intention and to produce result diametrically opposed to those sought by federal law, and cannot stand, particularly in absence of showing of any present or future compelling state interest. Reynolds v Dukakis (1977, DC Mass) 441 F Supp 646

2. Constitutionality

Statutory scheme restricting educational benefits under Veterans' Readjustment Benefits Act of 1966 (38 USCS 1651-1697 [now 38 USCS §§ 3451-3497]) to veterans who served on active duty, thus denying benefits to conscientious objectors who performed required alternative civilian service, does not violate such conscientious objectors' First Amendment rights of free exercise of religion, since (1) withholding of educational benefits involved, at most, only incidental burden on free exercise of religion by conscientious objectors, (2) Act was enacted pursuant to Congress' powers under Article 1, § 8, of Constitution to advance neutral, secular governmental interests of enhancing military service and aiding readjustment to civilian life of military personnel who served on active duty, and (3) conscientious objectors who performed alternative civilian service were excluded not because of any legislative design to interfere with their free exercise of religion, but because to include them would not rationally promote Act's purposes-government's substantial interest in raising and supporting armies being of kind and weight clearly sufficient to sustain challenged legislation; although statutory scheme restricting educational benefits under Veterans' Readjustment Benefits Act of 1966 (38 USCS §§ 1651-1697 [now 38 USCS §§ 3451-3497]) to veterans who served on active duty, thus denying benefits to conscientious objectors who performed required alternative civilian service, would violate such conscientious objectors' Fifth Amendment due process rights, incorporating equal protection principles, if exclusion of such conscientious objectors was product of vindictive policy to punish them for adhering to their beliefs, nevertheless there is nothing to indicate that exclusion was product of such policy, and thus statutory scheme is not unconstitutional on such ground. Johnson v Robison (1974) 415 US 361, 39 L Ed 2d 389, 94 S Ct 1160 (criticized in Hall v United States Dep't Veterans' Affairs (1996, CA11 Fla) 85 F.3d 532, 9 FLW Fed C 1171) and (superseded by statute as stated in Menendez v United States (1999, DC Puerto Rico) 67 F Supp 2d 42)
Legislation to make service in the armed forces more attractive by extending educational benefits to veterans is within Congress' power to raise and support armies under Article 1, § 8, of Constitution. Johnson v Robison (1974) 415 US 361, 39 L Ed 2d 389, 94 S Ct 1160 (criticized in Hall v United States Dep't Veterans' Affairs (1996, CA11 Fla) 85 F.3d 532, 9 FLW Fed C 1171) and (superseded by statute as stated in Menendez v United States (1999, DC Puerto Rico) 67 F Supp 2d 42)

3. Purpose

Purpose of Veterans' Readjustment Benefits Act of 1966 (38 USCS 1651-1697 [now 38 USCS §§ 3451-3497]) is not primarily to eliminate the educational gaps between persons who served their country and those who did not, but rather is to compensate for the disruption that military service causes to civilian lives; the aim of the Act is to assist those who served on active duty in the armed forces to readjust to civilian life. Johnson v Robison (1974) 415 US 361, 39 L Ed 2d 389, 94 S Ct 1160 (criticized in Hall v United States Dep't Veterans' Affairs (1996, CA11 Fla) 85 F.3d 532, 9 FLW Fed C 1171) and (superseded by statute as stated in Menendez v United States (1999, DC Puerto Rico) 67 F Supp 2d 42)

4. Applicability

Commissioned Corps of Public Health Service was not within purview of Veterans' Readjustment Assistance Act of 1952 (38 USCS § 1651 et seq. [now 38 USCS § 3451 et seq.]), but members of Commissioned Corps of Public Health Service, detailed by proper authority for duty with Army, Navy, or Coast Guard, were members of such forces and, while on such detailed service, were within definition of "armed forces" under former 38 USC § 911; members of Commissioned Corps of Public Health Service in active service outside continental limits of United States or in Alaska in time of war who would otherwise be entitled to full military benefits on account of such service were not within purview of Veterans' Readjustment Assistance Act of 1952, unless such service was performed as member of, or on detail to, Army, Navy, Air Force, Marine Corps, or Coast Guard of United States. 1952 ADVA 919

§ 3452. Definitions

For the purposes of this chapter [38 USCS §§ 3451 et seq.] and chapter 36 of this title [38 USCS §§ 3670 et seq.]--

(a) (1) The term "eligible veteran" means any veteran who--
(A) served on active duty for a period of more than 180 days, any part of which occurred after January 31, 1955, and before January 1, 1977, and was discharged or released therefrom under conditions other than dishonorable;
(B) contracted with the Armed Forces and was enlisted in or assigned to a reserve component prior to January 1, 1977, and as a result of such enlistment or assignment served on active duty for a period of more than 180 days, any part of which commenced within 12 months after January 1, 1977, and was discharged or released from such active duty under conditions other than dishonorable; or
(C) was discharged or released from active duty, any part of which was performed after January 31, 1955, and before January 1, 1977, or following entrance into active service from an enlistment provided for under subparagraph (B), because of a service-connected disability.

(2) The requirement of discharge or release, prescribed in subparagraph (A) or (B) of paragraph (1), shall be waived in the case of any individual who served more than 180 days in an active duty status for so long as such individual continues on active duty without a break therein.
(3) For purposes of paragraph (1)(A) and section 3461(a) [38 USCS § 3461(a)], the term "active duty" does not include any period during which an individual (A) was assigned full time by the Armed Forces to a civilian institution for a course of education which was substantially the same as established courses offered to civilians, (B) served as a cadet or midshipman at one of the service academies, or (C) served under the provisions of section 12103(d) of title 10 [10 USCS § 12103(d)] pursuant to an enlistment in the Army National Guard or the Air National Guard or as a Reserve for service in the Army Reserve, Navy Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve unless at some time subsequent to the completion of such period of active duty for training such individual served on active duty for a consecutive period of one year or more (not including any service as a cadet or midshipman at one of the service academies).

(b) The term "program of education" means any curriculum or any combination of unit courses or subjects pursued at an educational institution which is generally accepted as necessary to fulfill requirements for the attainment of a predetermined and identified educational, professional, or vocational objective. Such term also means any curriculum of unit courses or subjects pursued at an educational institution which fulfill requirements for the attainment of more than one predetermined and identified educational, professional, or vocational objective if all the objectives pursued are generally recognized as being reasonably related to a single career field. Such term also means any unit course or subject, or combination of courses or subjects, pursued by an eligible veteran at an educational institution, required by the Administrator of the Small Business Administration as a condition to obtaining financial assistance under the provisions of section 7(i)(1) of the Small Business Act (15 U.S.C. 636(i)(1)). Such term also includes licensing or certification tests, the successful completion of which demonstrates an individual's possession of the knowledge or skill required to enter into, maintain, or advance in employment in a predetermined and identified vocation or profession, provided such tests and the licensing or credentialing organizations or entities that offer such tests are approved by the Secretary in accordance with section 3689 of this title [38 USCS § 3689]. Such term also includes any course, or combination of courses, offered by a qualified provider of entrepreneurship courses. Such term also includes national tests for admission to institutions of higher learning or graduate schools (such as the Scholastic Aptitude Test (SAT), Law School Admission Test (LSAT), Graduate Record Exam (GRE), and Graduate Management Admission Test (GMAT)) and national tests providing an opportunity for course credit at institutions of higher learning (such as the Advanced Placement (AP) exam and College-Level Examination Program (CLEP)).

(c) The term "educational institution" means any public or private elementary school, secondary school, vocational school, correspondence school, business school, junior college, teachers' college, college, normal school, professional school, university, or scientific or technical institution, or other institution furnishing education for adults. Such term includes any entity that provides training required for completion of any State-approved alternative teacher certification program (as determined by the Secretary). Such term also includes any private entity (that meets such requirements as the Secretary may establish) that offers, either directly or under an agreement with another entity (that meets such requirements), a course or courses to fulfill requirements for the attainment of
a license or certificate generally recognized as necessary to obtain, maintain, or advance in employment in a profession or vocation in a high technology occupation (as determined by the Secretary). Such term also includes any qualified provider of entrepreneurship courses.

(d) The term "dependent" means--
   (1) a child of an eligible veteran;
   (2) a dependent parent of an eligible veteran; and
   (3) the spouse of an eligible veteran.

(e) The term "training establishment" means any of the following:
   (1) An establishment providing apprentice or other on-job training, including those under the supervision of a college or university or any State department of education.
   (2) An establishment providing self-employment on-job training consisting of full-time training for a period of less than six months that is needed or accepted for purposes of obtaining licensure to engage in a self-employment occupation or required for ownership and operation of a franchise that is the objective of the training.
   (3) A State board of vocational education.
   (4) A Federal or State apprenticeship registration agency.
   (5) The sponsor of a program of apprenticeship.
   (6) An agency of the Federal Government authorized to supervise such training.

(f) The term "institution of higher learning" means a college, university, or similar institution, including a technical or business school, offering postsecondary level academic instruction that leads to an associate or higher degree if the school is empowered by the appropriate State education authority under State law to grant an associate or higher degree. When there is no State law to authorize the granting of a degree, the school may be recognized as an institution of higher learning if it is accredited for degree programs by a recognized accrediting agency. Such term shall also include a hospital offering educational programs at the postsecondary level without regard to whether the hospital grants a postsecondary degree. Such term shall also include an educational institution which is not located in a State, which offers a course leading to a standard college degree, or the equivalent, and which is recognized as such by the secretary of education (or comparable official) of the country or other jurisdiction in which the institution is located.

(g) The term "standard college degree" means an associate or higher degree awarded by (1) an institution of higher learning that is accredited as a collegiate institution by a recognized regional or national accrediting agency; or (2) an institution of higher learning that is a "candidate" for accreditation as that term is used by the regional or national accrediting agencies; or (3) an institution of higher learning upon completion of a course which is accredited by an agency recognized to accredit specialized degree-level programs. For the purpose of this section, the accrediting agency must be one recognized by the Secretary of Education under the provisions of section 3675 of this title [38 USCS § 3675].
(h) The term "qualified provider of entrepreneurship courses" means any of the following entities insofar as such entity offers, sponsors, or cosponsors an entrepreneurship course (as defined in section 3675(c)(2) of this title [38 USCS § 3675(c)(2)]):


(2) The National Veterans Business Development Corporation (established under section 33 of the Small Business Act (15 U.S.C. 657c)).

Explanatory notes:


Provisions similar to those contained in subsecs. (a)-(d) were contained in former 38 USC §§ 1601(a)(2), (3), (5), (6), and 1611(a)(1), prior to repeal by Act March 3, 1966, P. L. 89-358, § 4(a), 80 Stat. 23.

Amendments:

1967. Act Aug. 31, 1967 (effective on the first day of the first calendar month which begins more than 10 days after enactment, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), added subsec. (e).

1970. Act March 26, 1970, in subsec. (b), inserted "Such term also means any curriculum of unit courses or subjects pursued at an educational institution which fulfill requirements for the attainment of more than one predetermined and identified educational, professional, or vocational objective if all the objectives pursued are generally recognized as being reasonably related to a single career field."; and substituted new subsec. (c) for one which read: "The term 'educational institution' means any public or private secondary school, vocational school, correspondence school, business school, junior college, teachers' college, college, normal school, professional school, university, or scientific or technical institution, or any other institution if it furnishes education at the secondary school level or above.".

Act Dec. 24, 1970, in subsec. (a)(2), substituted "more than one hundred and eighty days" for "at least two years"; in subsec. (b), inserted "Such term also means any unit course or subject, or combination of courses or subjects, pursued by an eligible veteran at an educational institution, required by the Administrator of the Small Business Administration as a condition to obtaining financial assistance under the provisions of 402(a) of the Economic Opportunity Act of 1964 (42 U.S.C. 2902(a)).".

1974. Act Dec. 3, 1974, in subsec. (a)(3), inserted "unless at some time subsequent to the completion of such period of active duty for training such individual served on active duty for a consecutive period of one year or more (not including any service as a cadet or midshipman at one of the service academies)".

1976. Act Oct. 15, 1976, § 402 (effective 1/1/77, as provided by § 406 of such Act, which appears as 38 USCS § 3201 note), in subsec. (a), substituted para. (1) for one which read: "(1) The term 'eligible veteran' means any veteran who (A) served on active duty for a period of more than 180 days any part of which occurred after January 31, 1955, and who was discharged or released therefrom under conditions other than dishonorable or (B) was discharged or released from active duty after such date for a service-connected disability." and, in para. (2), inserted "or (B)".

Act Oct. 15, 1976, §§ 202, 210(1), 211(1) (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a)(2), substituted "such individual" for "he"; in subsec. (d)(3), substituted "spouse" for "wife"; in subsec. (e), deleted "United States Code," following "title 29,;" and added subsecs. (f) and (g).
1980. Act Oct. 17, 1980, § 801(a), in the introductory matter, inserted "and chapter 36 of this title"; in subsecs. (e), (f) and (g), substituted "The" for "For the purposes of this chapter and chapter 36 of this title, the"; and in subsec. (g), substituted "Secretary" for "Commissioner".

Act Oct. 17, 1980, § 307(a), in subsec. (f), inserted "Such term shall also include an educational institution which is not located in a State, which offers a course leading to a standard college degree, or the equivalent, and which is recognized as such by the secretary of education (or comparable official) of the country or other jurisdiction in which the institution is located.".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1652, as 38 USCS § 3452, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1994. Act Nov. 2, 1994, in subsec. (c), added the sentence beginning "For the period ending . . .".

1996. Act Oct. 9, 1996, in subsec. (c), substituted "Such" for "For the period ending on September 30, 1996, such".

2000. Act Nov. 1, 2000 (effective 3/1/01 and applicable with respect to licensing and certification tests approved on or after such date, as provided by § 122(d) of such Act, which appears as 38 USCS § 3032 note), in subsec. (b), added the sentence beginning "Such term also includes licensing or . . .".

2001. Act June 5, 2001, in subsec. (a), in para. (1), in subpara. (A), deleted "or" following the concluding semicolon and, in subpara. (C), substituted "subparagraph (B)" for "clause (B) of this paragraph", in para. (2), substituted "subparagraph (A) or (B) of paragraph (1)" for "paragraph (1)(A) or (B)" and substituted "180 days" for "one hundred and eighty days" and, in para. (3), substituted "section 12103(d) of title 10" for "section 511(d) of title 10"; and, in subsec. (e), substituted "the Act of August 16, 1937, popularly known as the 'National Apprenticeship Act' (29 U.S.C. 50 et seq.)," for "chapter 4C of title 29, .".

Act Dec. 27, 2001 (applicable as provided by § 110(b) of such Act, which appears as a note to this section), in subsec. (c), added the sentence beginning "Such term also includes . . . .".

2003. Act Dec. 16, 2003 (applicable as provided by § 305(f) of such Act, which appears as a note to this section), in subsec. (b), added the sentence beginning "Such term also includes any course . . .", in subsec. (c), added the sentence beginning "Such term also includes any qualified provider . . .", and added subsec. (h).

Such Act further (effective six months after enactment and applicable to self-employment on-job training approved and pursued on or after that date, as provided by § 301(b) of such Act, which appears as a note to this section), in subsec. (e), substituted "means any of the following:" and paras. (1)-(6) for "means any establishment providing apprentice or other training on the job, including those under the supervision of a college or university or any State department of education, or any State apprenticeship agency, or any State board of vocational education, or any joint apprenticeship committee, or the Bureau of Apprenticeship and Training established pursuant to the Act of August 16, 1937, popularly known as the 'National Apprenticeship Act' (29 U.S.C. 50 et seq.), or any agency of the Federal Government authorized to supervise such training.


Other provisions:

Effective date and application of section. Act March 3, 1966, P. L. 89-358, § 12(a), 80 Stat. 28, located at 38 USCS § 3451 note, provided that this section is effective on March 3, 1966, but no educational assistance allowance shall be payable under this chapter (38 USCS §§ 3451 et seq.) for any period before June 1, 1966, nor for the month of June 1966, unless (1) the eligible veteran commenced the pursuit of the course of education on or after June 1, 1966, or (2) the pursuit of such course continued through June 30, 1966.

Effective date of amendments made by Titles II and IV of Act Dec. 3, 1974. Act Dec. 3, 1974, P. L. 93-508, Title V, § 503, 88 Stat. 1601, provided: "Titles II and IV of this Act [amending this section, among other things; for full classification of these Titles, consult USCS Tables volumes] shall become effective on the date of their enactment."

Effective date and application of amendments made by Title III of Act Oct. 17, 1980. Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(c), 94 Stat. 2218, provided:

"(1) Except as provided in paragraph (2), the amendments made by title III [amending this section, among other things; for full classification of this title, consult USCS Tables volumes] shall become effective on October 1, 1980.

"(2) Paragraph (2) of section 1691(a) of title 38, United States Code, as added by section 311(2) [38 USCS § 3491(a)], shall not apply to any person receiving educational assistance under chapter 34 of title 38, United States Code [38 USCS §§ 3451 et seq.], on October 1, 1980, for the pursuit of a program of education, as defined in section 1652(b) of such title [subsec. (b) of this section], in which such person is enrolled on that date, for as long as such person continuously thereafter is so enrolled and meets the requirements of eligibility for such assistance for pursuit of such program."


Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section (see the Amendments note to this section), see § 5 of such Act, which appears as 10 USCS § 101 note.

Application of Dec. 27, 2001 amendments. Act Dec. 27, 2001, P. L. 107-103, Title I, § 110(b), 115 Stat. 986, provides: "The amendments made by subsection (a) [amending 38 USCS §§ 3452(c) and 3501(a)(6)] shall apply to enrollments in courses beginning on or after the date of the enactment of this Act."

Effective date and applicability of amendment made by § 301(a) of Act Dec. 16, 2003. Act Dec. 16, 2003, P. L. 108-183, Title III, § 301(b), 117 Stat. 2658, provides: "The amendment made by subsection (a) [amending subsec. (e) of this section] shall take effect on the date that is six months after the date of the enactment of this Act and shall apply to self-employment on-job training approved and pursued on or after that date."


Code of Federal Regulations

Office of Postsecondary Education, Department of Education-Talent search, 34 CFR Part 643

Office of Postsecondary Education, Department of Education-Educational opportunity centers, 34 CFR Part 644
SUBCHAPTER II. ELIGIBILITY AND ENTITLEMENT

§ 3461. Eligibility; entitlement; duration
§ 3462. Time limitations for completing a program of education

(a) Entitlement. Except as provided in subsection (c) and in the second sentence of this subsection, each eligible veteran shall be entitled to educational assistance under this chapter [38 USCS §§ 3451 et seq.] or chapter 36 [38 USCS §§ 3670 et seq.] for a period of one and one-half months (or the equivalent thereof in part-time educational assistance) for each month or fraction thereof of the veteran's service on active duty after January 31, 1955. If an eligible veteran has served a period of 18 months or more on active duty after January 31, 1955, and has been released from such service under conditions that would
satisfy the veteran's active duty obligation, the veteran shall be entitled to educational assistance under this chapter [38 USCS §§ 3451 et seq.] or chapter 36 [38 USCS §§ 3670 et seq.] for a period of 45 months (or the equivalent thereof in part-time educational assistance). In the case of any person serving on active duty on December 31, 1976, or a person whose eligibility is based on section 3452(a)(1)(B) of this chapter, the ending date for computing such person's entitlement shall be the date of such person's first discharge or release from active duty after December 31, 1976.

(b) **Entitlement limitations.** Whenever the period of entitlement under this section of an eligible veteran who is enrolled in an educational institution regularly operated on the quarter or semester system ends during a quarter or semester, such period shall be extended to the termination of such unexpired quarter or semester. In educational institutions not operated on the quarter or semester system, whenever the period of eligibility ends after a major portion of the course is completed such period shall be extended to the end of the course or for twelve weeks, whichever is the lesser period.

(c) **Duration of entitlement.** Except as provided in subsection (b) and in subchapter V of this chapter [38 USCS §§ 3490 et seq.], no eligible veteran shall receive educational assistance under this chapter in excess of 45 months.

**Explanatory notes:**

Provisions similar to those contained in subsecs. (a)-(c) of this section were contained in former 38 USC 1610, 1611(a)(2), (3), (b), prior to repeal by Act March 3, 1966, P. L. 89-358, § 4(a), 80 Stat. 23.

**Amendments:**

1967. Act Aug. 31, 1967 (effective as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in subsec. (b), introductory matter, inserted "and in section 1678 of this chapter".

1968. Act Oct. 23, 1968 (effective as provided by § 6(a) of such Act, which appears as 38 USCS § 3500 note), substituted new subsec. (a) for one which read: "Except as provided in subsection (b), each eligible veteran shall be entitled to educational assistance under this chapter for a period of one month (or to the equivalent thereof in part-time educational assistance) for each month or fraction thereof of his service on active duty after January 31, 1955."; deleted subsec. (b) which read:

"(b) Except as provided in subsection (c) and in section 1678 of this chapter, in no event shall an eligible veteran receive educational assistance under this chapter for a period which, when combined with education and training received under any or all of the laws listed below, will exceed thirty-six months--"

"(1) parts VII or VIII, Veterans Regulation Numbered 1(a), as amended;

"(2) title II of the Veterans' Readjustment Assistance Act of 1952;

"(3) the War Orphans' Educational Assistance Act of 1956;

"(4) chapters 31, 33, and 35 of this title."

redesignated subsec. (c) as subsec. (b), added a new subsec. (c), and deleted subsec. (d), which read: "If an eligible veteran is entitled to educational assistance under this chapter and also to vocational rehabilitation under chapter 31 of this title, he must, if he wants either, elect whether he will receive educational assistance or vocational rehabilitation. If an eligible veteran is entitled to educational assistance under this chapter and is not entitled to such
vocational rehabilitation, but after beginning his program of education becomes entitled (as determined by the Administrator) to such vocational rehabilitation, he must, if he wants either, elect whether to continue to receive educational assistance or whether to receive such vocational rehabilitation. If he elects to receive vocational rehabilitation, the program of education under this chapter shall be utilized to the fullest extent practicable in determining the character and duration of vocational rehabilitation to be furnished him.

1970. Act March 26, 1970, in subsec. (c), substituted "subchapters V and VI of this chapter" for "section 1678 of this title".

1972. Act Oct. 24, 1972, in subsec. (a), inserted "or chapter 36".

1974. Act Dec. 3, 1974 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), in subsec. (a), inserted "plus an additional number of months, not exceeding nine, as may be utilized in pursuit of a program of education leading to a standard undergraduate college degree"; and in subsec. (c), substituted "subsections (a) and (b)" for "subsection (b)".

1976. Act Oct. 15, 1976, § 211(2) (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), substituted "the veteran's" for "his" wherever appearing and substituted "the veteran" for "he".

Act Oct. 15, 1976 § 203 (effective 10/1/76, as provided by § 703(a) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), substituted "45 months (or the equivalent thereof in part-time educational assistance)." for "36 months (or the equivalent thereof in part-time educational assistance) plus an additional number of months, not exceeding nine, as may be utilized in pursuit of a program of education leading to a standard undergraduate college degree."; substituted new subsec. (c) for one which read: "Except as provided in subsections (a) and (b) and in subchapters V and VI of this chapter, no eligible veteran shall receive educational assistance under this chapter in excess of thirty-six months.".

Act Oct. 15, 1976, § 403(a) (effective 1/1/77, as provided by § 406 of such Act, which appears as 38 USCS § 3201), in subsec. (a), inserted "In the case of any person serving on active duty on December 31, 1976, or a person whose eligibility is based on section 1652(a)(1)(B) of this chapter, the ending date for computing such person's entitlement shall be the date of such person's first discharge or release from active duty after December 31, 1976.".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(f)(1) of such Act, which appears as 38 USCS § 5314 note), in subsec. (c), substituted "subchapter V" for "subchapters V and VI".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1661, as 38 USCS § 3461, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

2006. Act June 15, 2006, in subsecs. (a) and (b), inserted the subsection headings, which headings formerly appeared as centered headings preceding such subsections; and, in subsec. (c), inserted the subsection heading "Duration of Entitlement."

Other provisions:

Effective date and application of section. Act March 3, 1966, P. L. 89-358, § 12(a), 80 Stat. 28, located at 38 USCS § 3451 note, provided that this section is effective on March 3, 1966, but no educational assistance allowance shall be payable under this chapter (38 USCS §§ 3451 et seq.) for any period before June 1, 1966, nor for the month of June 1966, unless (1) the eligible veteran commenced the pursuit of the course of education on or after June 1, 1966, or (2) the pursuit of such course continued through June 30, 1966.

Code of Federal Regulations

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Flight training school cannot recover from government difference between what veteran was paid in educational benefits under 38 USCS §§ 1651 et seq. [now 38 USCS §§ 3451 et seq.] and total cost of training, where Veterans' Administration [now Department of Veterans Affairs] mistakenly certified veteran for more months of entitlement than he was due and paid him based on actual entitlement after course was completed, since VA was without statutory authority to certify longer entitlement than veteran was due and had no power to pay larger amount in educational benefits. Augusta Aviation, Inc. v United States (1982, CA11 Ga) 671 F.2d 445

2. Constitutionality

In determining whether Fifth Amendment equal protection is denied by statutory scheme restricting educational benefits under Veterans' Readjustment Benefits Act of 1966 (38 USCS 1651-1697 [38 USCS §§ 3451-3497]) to veterans who served on active duty, thus denying benefits to conscientious objectors who performed required alternative civilian service, statutory classification will not be subjected to strict scrutiny rather than traditional rational basis test, since (1) challenged classification does not violate right to free exercise of religion by conscientious objectors, and (2) class of conscientious objectors is not suspect class deserving special judicial protection—such class not possessing immutable characteristic determined solely by accident of birth, and not being saddled with such disabilities, or subject to such history of purposeful unequal treatment, or relegated to such position of political powerlessness as to command extraordinary protection from majoritarian political process. Johnson v Robison (1974) 415 US 361, 39 L Ed 2d 389, 94 S Ct 1160 (criticized in Hall v United States Dep't Veterans' Affairs (1996, CA11 Fla) 85 F.3d 532, 9 FLW Fed C 1171) and (superseded by statute as stated in Menendez v United States (1999, DC Puerto Rico) 67 F Supp 2d 42)
3. Computation of entitlement

Veterans Administration [now Department of Veterans Affairs] policy under which extensions of delimiting date for educational benefits are denied based on veteran's inability to complete education due to alcoholism does not violate equal protection or due process rights, but does violate Rehabilitation Act (29 USCS § 794). Tinch v Walters (1983, ED Tenn) 573 F Supp 346, affd (1985, CA6 Tenn) 765 F.2d 599

Computation of period for which education allowance is to be granted under 38 USCS § 1661(a) [38 USCS § 3461(a)] must be based on "corresponding days" (from any given day of one calendar month to corresponding day of next), rather than actual calendar months. VA GCO 18-79

Computation for multiple periods of noncontinuous service is to be accomplished by combining all includable periods of active duty and then dividing by 30, as opposed to giving credit for one month's service for each calendar month in which at least one day of active duty occurs. VA GCO 18-79

§ 3462. Time limitations for completing a program of education

cxxiii Discussion and Analysis in the Veterans Benefits Manual

(a) Delimiting period for completion.

(1) Subject to paragraph (4) of this subsection, no educational assistance shall be afforded an eligible veteran under this chapter [38 USCS §§ 3451 et seq.] beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall, upon application made within one year after (A) the last date of the delimiting period otherwise applicable under this section, (B) the termination of the period of such mental or physical disability, or (C) October 1, 1980, whichever is the latest, be granted an extension of the applicable delimiting period for such length of time as the Secretary determines, from the evidence, that such veteran was so prevented from initiating or completing such program of education. When an extension of the applicable delimiting period is granted a veteran under the preceding sentence, the delimiting period with respect to such veteran will again begin running on the first day following such veteran's recovery from such disability on which it is reasonably feasible, as determined in accordance with regulations which the Secretary shall prescribe, for such veteran to initiate or resume pursuit of a program of education with educational assistance under this chapter [38 USCS §§ 3451 et seq.].

(2), (3) [Deleted]

(4) For purposes of paragraph (1) of this subsection, a veteran's last discharge or release from active duty shall not include any discharge or release from a period of active duty of less than 90 days of continuous service unless the individual involved is discharged or released for a service-connected disability, for a medical condition which preexisted such service and which the Secretary determines is not service connected, for hardship, or as a result of a reduction in force as described in section 3011(a)(1)(A)(ii)(III) of this title.

(b) Correction of discharge. In the case of any eligible veteran who has been prevented, as determined by the Secretary, from completing a program of education
under this chapter [38 USCS §§ 3451 et seq.] within the period prescribed by subsection (a), because the veteran had not met the nature of discharge requirements of this chapter [38 USCS §§ 3451 et seq.] before a change, correction, or modification of a discharge or dismissal made pursuant to section 1553 of title 10, the correction of the military records of the proper service department under section 1552 of title 10, or other corrective action by competent authority, then the 10-year delimiting period shall run from the date the veteran's discharge or dismissal was changed, corrected, or modified.

(c) Savings clause. In the case of any eligible veteran who was discharged or released from active duty before June 1, 1966 the 10-year delimiting period shall run from such date, if it is later than the date which otherwise would be applicable. In the case of any eligible veteran who was discharged or released from active duty before August 31, 1967, and who pursues a course of farm cooperative training, apprenticeship or other training on the job, the 10-year delimiting period shall run from August 31, 1967 if it is later than the date which would otherwise be applicable.

(d) Prisoners of war. In the case of any veteran (1) who served on or after January 31, 1955, (2) who became eligible for educational assistance under the provisions of this chapter [38 USCS §§ 3451 et seq.] or chapter 36 of this title [38 USCS §§ 3670 et seq.], and (3) who, subsequent to the veteran's last discharge or release from active duty, was captured and held as a prisoner of war by a foreign government or power, there shall be excluded, in computing his 10-year period of eligibility for educational assistance, any period during which the veteran was so detained and any period immediately following the veteran's release from such detention during which the veteran was hospitalized at a military, civilian, or Department of Veterans Affairs medical facility.

(e) Termination of assistance. No educational assistance shall be afforded any eligible veteran under this chapter [38 USCS §§ 3451 et seq.] or chapter 36 of this title [38 USCS §§ 3670 et seq.] after December 31, 1989.

Explanatory notes:

Provisions similar to those in subsecs. (a) and (b) of this section were contained in former 38 USC §§ 1612(a), (c), and 1613(a) prior to repeal by Act March 3, 1966, P. L. 89-358, § 4(a), 80 Stat. 23.

Amendments:

1967. Act Aug. 31, 1967 (effective as provided by § 405 of such Act, which appears as 38 USCS § 101 note), in subsec. (c), inserted "In the case of any eligible veteran who was discharged or released from active duty before the date of enactment of this sentence and who pursues a course of farm cooperative training, apprenticeship or other training on the job, or flight training within the provisions of section 1677 of this chapter, the eight-year delimiting period shall run from the date of enactment of this sentence, if it is later than the date which would otherwise be applicable."

1974. Act July 10, 1974, in subsec. (a), substituted "10" for "eight"; in subsec. (b), substituted "10-year" for "8-year"; in subsec. (c), substituted "10-year" for "8-year" following "under this chapter, the" and substituted "10-year" for "eight-year" following "of this chapter, the"; and added subsec. (d).

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), substituted "the veteran's" for "his"; in subsec. (b), substituted "the veteran's" and "the veteran" for "his" and "he", respectively; and
in subsec. (d), substituted "the veteran's" and "the veteran" for "his" and "he", respectively whenever appearing.

Act Oct. 15, 1976 (effective 1/1/77, as provided by § 406 of such Act, which appears as 38 USCS § 3201 note), added subsec. (e).

1977. Act Nov. 23, 1977 (effective 5/31/1976 as provided by § 501 of such Act, which appears as 38 USCS § 101 note), redesignated subsec. (a) as subsec. (a)(1); in subsec. (a)(1), as so redesignated, inserted "; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall, upon application, be granted an extension of the applicable delimiting period for such length of time as the Administrator determines, from the evidence, that such veteran was prevented from initiating or completing such program of education,"; and added subsec. (a)(2).

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1) of such Act, which appears as 38 USCS § 3452 note), in subsec. (a)(1), inserted "made within one year after (A) the last date of the delimiting period otherwise applicable under this section, (B) the termination of the period of such mental or physical disability, or (C) the effective date of the Veterans' Rehabilitation and Education Amendments of 1980, whichever is the latest", inserted "so" preceding "prevented", and inserted "When an extension of the applicable delimiting period is granted a veteran under the preceding sentence, the delimiting period with respect to such veteran will again begin running on the first day following such veteran's recovery from such disability on which it is reasonably feasible, as determined in accordance with regulations which the Administrator shall prescribe, for such veteran to initiate or resume pursuit of a program of education with educational assistance under this chapter.".

1981. Act Aug. 13, 1981 (effective 10/1/1981, as provided by § 2006 of such Act, which appears as 38 USCS § 3231 note), in subsec. (c), deleted "or flight training within the provisions of section 1677 of this chapter," after "other training on the job,".

Act Nov. 3, 1981 (effective 1/1/82, as provided by § 201(b) of such Act), added subsec. (a)(3).

1982. Act Oct. 12, 1982, in subsec. (a)(2)(B), substituted "November 23, 1977," for "the date of enactment of this paragraph"; and, in subsec. (c), substituted "June 1, 1966" for "the date for which an educational assistance allowance is first payable under this chapter", and substituted "August 31, 1967" for "the date of enactment of this sentence", in two places.

Act Oct. 14, 1982 (effective 10/1/82 as provided by § 206(c) of such Act, which appears as a note to this section), in subsec. (a)(3), in subpara. (C)(i), substituted "shall" for "may" following "Educational assistance" and substituted "unless the Administrator determines, based on an examination of the veteran's employment and training history, that the veteran is not in need of such a program or course in order to obtain a reasonably stable employment situation consistent with the veteran's abilities and aptitudes." for "only if the veteran has been determined by the Administrator to be in need of such a program or course in order to achieve a suitable occupational or vocational objective."; and, in subpara (D), substituted "December 31, 1984" for "December 31, 1983".


Such Act further, in subssecs. (a) and (b), substituted "Secretary" for "Administrator", wherever appearing; and in subsec. (d), substituted "Department of Veterans Affairs" for "Veterans' Administration".

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1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1662, as 38 USCS § 3462, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


"(3)(A) Subject to subparagraph (C) of this paragraph and notwithstanding the provisions of paragraph (1) of this subsection, an eligible veteran who served on active duty during the Vietnam era shall be permitted to use any of such veteran's unused entitlement under section 3461 of this title for the purpose of pursuing--

"(i) a program of apprenticeship or other on-job training;

"(ii) a course with an approved vocational objective; or

"(iii) a program of secondary education, if the veteran does not have a secondary school diploma (or an equivalency certificate).

"(B) Upon completion of a program or course pursued by virtue of eligibility provided by this paragraph, the Secretary shall provide the veteran with such employment counseling as may be necessary to assist the veteran in obtaining employment consistent with the veteran's abilities, aptitudes, and interests.

"(C)(i) Educational assistance shall be provided a veteran for pursuit of a program or course described in clause (i) or (ii) of subparagraph (A) of this paragraph using eligibility provided by this paragraph unless the Secretary determines, based on an examination of the veteran's employment and training history, that the veteran is not in need of such a program or course in order to obtain a reasonably stable employment situation consistent with the veteran's abilities and aptitudes. Any such determination shall be made in accordance with regulations which the Secretary shall prescribe.

"(ii) Educational assistance provided a veteran for pursuit of a program described in clause (iii) of subparagraph (A) of this paragraph using eligibility provided by this paragraph shall be provided at the rate determined under section 3491(b)(2) of this title.

"(D) Educational assistance may not be provided by virtue of this paragraph after December 31, 1984.".

2003. Act Dec. 16, 2003 (effective on enactment, as provided by § 306(h)(1) of such Act, which appears as a note to this section), in subsec. (a), deleted para. (2), which read:

"(2)(A) Notwithstanding the provisions of paragraph (1) of this subsection, any veteran shall be permitted to use any of such veteran's unused entitlement under section 3461 of this title for the purposes of eligibility for an education loan, pursuant to the provisions of subchapter III of chapter 36 of this title, after the delimiting date otherwise applicable to such veteran under such paragraph (1), if such veteran was pursuing an approved program of education on a full-time basis at the time of the expiration of such veteran's eligibility.

"(B) Notwithstanding any other provision of this chapter or chapter 36 of this title, any veteran whose delimiting period is extended under subparagraph (A) of this paragraph may continue to use any unused loan entitlement under this paragraph as long as the veteran continues to be enrolled on a full-time basis in pursuit of the approved program of education in which such veteran was enrolled at the time of expiration of such veteran's eligibility (i) until such entitlement is exhausted, (ii) until the expiration of two years after November 23, 1977, or the date of the expiration of the delimiting date otherwise applicable to such veteran under paragraph (1) of this

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subsection, whichever is later, or (iii) until such veteran has completed the approved program of education in which such veteran was enrolled at the end of the delimiting period referred to in paragraph (1) of this subsection, whichever occurs first."

2006. Act June 15, 2006, in subsecs. (a)-(c), inserted the subsection headings, which headings formerly appeared as centered headings preceding such subsections; and, in subsecs. (d) and (e), inserted the subsection headings.

Other provisions:

Effective date and application of section. Act March 3, 1966, P. L. 89-358, § 12(a), 80 Stat. 28, located at 38 USCS § 3451 note, provided that this section is effective on March 3, 1966, but no educational assistance allowance shall be payable under this chapter (38 USCS §§ 3451 et seq.) for any period before June 1, 1966, nor for the month of June 1966, unless (1) the eligible veteran commenced the pursuit of the course of education on or after June 1, 1966, or (2) the pursuit of such course continued through June 30, 1966.

Veterans' educational assistance; time extension. Act May 31, 1974, P. L. 93-293, § 1, 88 Stat. 176 provided: "Notwithstanding any other provision of law, the eight-year delimiting date for pursuit of educational programs under chapter 34 of title 38, United States Code [38 USCS §§ 3451 et seq.], for eligible veterans discharged or released from active duty between January 31, 1955, and September 1, 1966 (except for those veterans whose discharges are subject to the provisions of section 1662(b) of such chapter [now 38 USCS § 3462(b)], or who are pursuing courses of farm cooperative training, apprenticeship or other training on the job, or flight training under such chapter), shall run from July 1, 1966.".

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section (see the Amendments note to this section), see § 5 of such Act, which appears as 10 USCS § 101 note.

Publication of regulations. Act Oct. 14, 1982, P. L. 97-306, Title II, § 206(b), 96 Stat. 1435, provides: "(1) Not later than 30 days after the date of the enactment of this Act, the Administrator of Veterans' Affairs shall publish in the Federal Register, for public review and comment for a period not to exceed 30 days, proposed regulations under section 1662(a)(3)(C)(i) of title 38, United States Code [subsec. (a)(3)(C)(i) of this section], as amended by subsection (a).

"(2) Not later than 90 days after the date of the enactment of this Act, the Administrator shall publish in the Federal Register final regulations under such section 1662(a)(3)(C)(i) [subsec. (a)(3)(C)(i) of this section]."


Cross References

This section is referred to in 38 USCS §§ 3512, 3698

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 124

Annotations:

Who is "individual with handicaps" under Rehabilitation Act of 1973 (29 USCS §§ 701 et seq.). 97 ALR Fed 40

1. Generally
2. Effect of alcoholism on time limits

1. Generally

Extension of basic 10-year delimiting period for using G.I. Bill veterans' educational benefits is precluded for veteran, who has not pursued education during that period because of primary alcoholism, under provision of 38 USCS § 1662 [now 38 USCS § 3462] which precludes extensions because of veteran's own willful misconduct during that period, since it appears that Congress intended that Veterans' Administration [now Department of Veterans Affairs] apply same test for willful misconduct under § 1662 [now § 3462] that Veterans' Administration [now Department of Veterans Affairs] applies under other veterans' benefits statutes, where it must be assumed that Congress, at the time § 1662 [now § 3462] was enacted, was aware that Veterans' Administration [now Department of Veterans Affairs] regulation construing term willful misconduct included primary alcoholism as willful misconduct. Traynor v Turnage (1988) 485 US 535, 99 L Ed 2d 618, 108 S Ct 1372, 1 ADD 469, 2 AD Cas 214, 46 CCH EPD ¶ 37924 (superseded by statute as stated in Larrabee v Derwinski (1992, CA2 Conn) 968 F.2d 1497) and (superseded by statute as stated in Menendez v United States (1999, DC Puerto Rico) 67 F Supp 2d 42)

2. Effect of alcoholism on time limits

Regulation equating primary alcoholism with willful misconduct, for purposes of § 1662(a)(1) [now § 3462(a)(1)] extending educational assistance beyond 10 years where veteran was prevented from initiating or completing program within such period because of physical or mental disability which did not result from veteran's own willful misconduct, discriminates against otherwise qualified individual solely by reason of his handicap in violation of Rehabilitation Act (29 USCS § 794). Tinch v Walters (1985, CA6 Tenn) 765 F.2d 599

Veterans Administration [now Department of Veterans Affairs] refusal to extend delimiting date for use of education benefits for veteran claiming incapacity to timely use benefits due to alcoholism was not unreasonable, since Congress specifically considered issue at time it established delimiting date. Burns v Nimmo (1982, ND Iowa) 545 F Supp 544

Veterans Administration [now Department of Veterans Affairs] policy under which extensions of delimiting date for educational benefits are denied based on veteran's inability to complete education due to alcoholism does not violate equal protection or due process rights, but does violate Rehabilitation Act (29 USCS § 794). Tinch v Walters (1983, ED Tenn) 573 F Supp 346, affd (1985, CA6 Tenn) 765 F.2d 599

Veterans Administration [now Department of Veterans Affairs] regulation (38 CFR § 301(c)(2)) precluding determination that primary alcoholism is disease which permits extension of time limits under 38 USCS § 1662(a)(1) [now 38 USCS § 3462(a)(1)] for utilizing educational benefits does not exceed statutory authority under 38 USCS § 210(c)(1) [now repealed] however, regulation violates 29 USCS § 794 prohibiting discrimination against handicapped persons in program receiving federal financial assistance. McKelvey v Walters (1984, DC Dist Col) 596 F Supp 1317, revd on other grounds (1986, App DC) 253 US App DC 126, 792 F.2d 194, affd (1988) 485 US 535, 99 L Ed 2d 618, 108 S Ct 1372, 1 ADD 469, 2 AD Cas 214, 46 CCH EPD ¶ 37924 (superseded by statute as stated in Larrabee v Derwinski (1992, CA2 Conn) 968 F.2d 1497) and (superseded by statute as stated in Menendez v United States (1999, DC Puerto Rico) 67 F Supp 2d 42)

[§ 3463] [§ 1663. Repealed]

The bracketed section number "3463" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

DESCRIPTION

102-16, § 2(b)(1)(A), 105 Stat. 49. This section provided for educational and vocational counseling for any eligible veteran.

SUBCHAPTER III. ENROLLMENT

§ 3470. Selection of program
§ 3471. Applications; approval
[§ 3472] [§ 1672. Repealed]
[§ 3473. Repealed]
§ 3474. Discontinuance for unsatisfactory conduct or progress
[§ 3475] [§ 1675. Repealed]
§ 3476. Education outside the United States
[§ 3477] [§ 1677. Repealed]
[§ 3478] [§ 1678. Repealed]

§ 3470. Selection of program

Subject to the provisions of this chapter [38 USCS §§ 3451 et seq.], each eligible veteran may select a program of education to assist the veteran in attaining an educational, professional, or vocational objective at any educational institution (approved in accordance with chapter 36 of this title [38 USCS §§ 3670 et seq.]) selected by the veteran, which will accept and retain the veteran as a student or trainee in any field or branch of knowledge which such institution finds the veteran qualified to undertake or pursue.

Explanatory notes:
Provisions similar to those contained in this section were contained in former 38 USC § 1620 prior to repeal by Act March 3, 1966, P.L. 89-358, § 4(a), 80 Stat. 23.

Amendments:
1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), substituted "the veteran" for "him" wherever appearing.

Other provisions:
Effective date and application of section. Act March 3, 1966, P.L. 89-358, § 12(a), 80 Stat. 28, located at 38 USCS § 3451 note, provided that this section is effective on March 3, 1966, but no educational assistance allowance shall be payable under this chapter (38 USCS §§ 3451 et seq.) for any period before June 1, 1966, nor for the month of June 1966, unless (1) the eligible veteran commenced the pursuit of the course of education on or after June 1, 1966, or (2) the pursuit of such course continued through June 30, 1966.

Code of Federal Regulations
Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18
Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a
Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

Cross References
This section is referred to in 10 USCS § 16136; 38 USCS §§ 3034, 3241

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 130

Removal of veteran from position as contract representative at college was inappropriate even though veteran failed to notify Veterans' Administration [now Department of Veterans Affairs] through proper channels of change in educational program where veteran informally informed Veterans' Administration [now Department of Veterans Affairs] of changes in schedule and never attempted to defraud government. Joyce v United States (1986) 9 Cl Ct 440

§ 3471. Applications; approval

Any eligible veteran, or any person on active duty (after consultation with the appropriate service education officer, who desires to initiate a program of education under this chapter [38 USCS §§ 3451 et seq.] shall submit an application to the Secretary which shall be in such form, and contain such information, as the Secretary shall prescribe. The Secretary shall approve such application unless the Secretary finds that (1) such veteran or person is not eligible for or entitled to the educational assistance for which application is made, (2) the veteran's or person's selected educational institution or training establishment fails to meet any requirement of this chapter or chapter 36 of this title [38 USCS §§ 3451 et seq. or 3670 et seq.], (3) the veteran's or person's enrollment in, or pursuit of, the program of education selected would violate any provision of this chapter or chapter 36 of this title [38 USCS §§ 3451 et seq. or 3670 et seq.], or (4) the veteran or person is already qualified, by reason of previous education or training, for the educational, professional, or vocational objective for which the program of education is offered. The Secretary shall not treat a person as already qualified for the objective of a program of education offered by a qualified provider of entrepreneurship courses solely because such person is the owner or operator of a business. The Secretary shall notify the veteran or person of the approval or disapproval of the veteran's or person's application.

Explanatory notes:
Provisions similar to those contained in this section were contained in former 38 USC § 1621 prior to repeal by Act March 3, 1966, P.L. 89-358, § 4(a), 80 Stat. 23.

Amendments:
1972. Act Oct. 24, 1972, substituted the text of this section for text which read: "Any eligible veteran who desires to initiate a program of education under this chapter shall submit an application to the Administrator which shall be in such form, and contain such information, as the Administrator shall prescribe. The Administrator shall approve such application unless he finds that such veteran is not eligible for or entitled to the educational assistance applied for, or that his program of education fails to meet any of the requirements of this chapter, or that he is already qualified. The Administrator shall notify the eligible veteran of the approval or disapproval of his application."
1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which
appears as 38 USCS § 3693 note), substituted "the Administrator" for "he" preceding "finds";
substituted "the veteran's or person's" for "his" wherever appearing; and substituted "the
veteran or person" for "he".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1) of such Act, which
appears as 38 USCS § 3452 note), substituted the sentence beginning "The Administrator
shall approve . . ." for "The Administrator shall approve such application unless the
Administrator finds that such veteran or person is not eligible for or entitled to the educational
assistance applied for, or the veteran's or person's program of education fails to meet any of
the requirements of this chapter, or that the veteran or person is already qualified.".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1671, as 38 USCS §
3471.

2003. Act Dec. 16, 2003 (applicable as provided by § 305(f) of such Act, which appears as 38
USCS § 3452 note), inserted the sentence beginning "The Secretary shall not treat . . .".

Other provisions:
Effective date and applicability of section. Act March 3, 1966, P.L. 89-358, § 12(a), 80
Stat. 28, located at 38 USCS § 3451 note, provided that this section is effective on March 3,
1966, but no educational assistance allowance shall be payable under this chapter (38 USCS
§§ 3451 et seq.) for any period before June 1, 1966, nor for the month of June 1966, unless
(1) the eligible veteran commenced the pursuit of the course of education on or after June 1,
1966, or (2) the pursuit of such course continued through June 30, 1966.

Cross References
This section is referred to in 10 USCS § 16136; 38 USCS §§ 3034, 3241, 3482, 3491

Research Guide

Federal Procedure:
33A Fed Proc. L Ed, Veterans and Veterans' Affairs § 79:194

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 131, 132

Action of administrator of Veterans' Administration [now Department of Veterans Affairs] in
denying educational benefits to veteran who had received "blue" discharge, which signified
separation from service under conditions neither honorable nor dishonorable, was not reviewable
by Federal District Court. Longemecker v Higley (1955, App DC) 97 US App DC 144, 229 F.2d
27

[§ 3472] [§ 1672. Repealed]

The bracketed section number "3472" was inserted to preserve numerical continuity following
406.

This section (Added Act March 3, 1966, P.L. 89-358, § 2, 80 Stat. 15) was repealed by Act
Oct. 24, 1972, P.L. 92-540, Title IV, § 401(6), 86 Stat. 1090. It provided for a change of
program. For similar provisions, see 38 USCS § 3691.

[§ 3473. Repealed]

This section (Added March 3, 1966, P. L. 89-358, § 2, 80 Stat. 16; Aug. 31, 1967, P. L. 90-77,
Title III, §§ 302(a), 303(a), 81 Stat. 185; March 26, 1970, P. L. 91-219, Title II, § 202, 84 Stat.
§ 3474. **Discontinuance for unsatisfactory conduct or progress**

The Secretary shall discontinue the educational assistance allowance of an eligible veteran if, at any time, the Secretary finds that according to the regularly prescribed standards and practices of the educational institution, the veteran's attendance, conduct, or progress is unsatisfactory. The Secretary may renew the payment of the educational assistance allowance only if the Secretary finds that--

(1) the veteran will be resuming enrollment at the same educational institution in the same program of education and the educational institution has both approved such veteran's reenrollment and certified it to the Department of Veterans Affairs; or

(2) in the case of a proposed change of either educational institution or program of education by the veteran--

(A) the cause of the unsatisfactory attendance, conduct, or progress has been removed;

(B) the program proposed to be pursued is suitable to the veteran's aptitudes, interests, and abilities; and

(C) if a proposed change of program is involved, the change meets the requirements for approval under section 3691 of this title [38 USCS § 3691].

**Explanatory notes:**

Provisions similar to those contained in the first sentence of this section were contained in former 38 USC §§ 1624 prior to repeal by Act March 3, 1966, P. L. 89-358, § 4(a), 80 Stat. 23.

**Amendments:**

1976. Act Oct. 15, 1976, § 211(8) (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in the preliminary matter, substituted "the veteran's" for "his" and substituted "the Administrator" for "he" following "only if"; in para. (2), substituted "the veteran's" for "his".

Act Oct. 15, 1976 § 206 (effective 12/1/76, as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), in the preliminary matter, inserted "Unless the
Administrator finds there are mitigating circumstances, progress will be considered unsatisfactory at any time the eligible veteran is not progressing at a rate that will permit such veteran to graduate within the approved length of the course based on the training time as certified to the Veterans' Administration.

1977. Act Nov. 23, 1977 (effective as provided by § 501 of such Act, which appears as 38 USCS § 101 note), in the preliminary matter, inserted "or within such other length of time (exceeding such approved length) as the Administrator determines to be reasonable in accordance with regulations".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1) of such Act, which appears as 38 USCS § 3452 note), in the introductory matter, deleted "Unless the Administrator finds there are mitigating circumstances, progress will be considered unsatisfactory at any time the eligible veteran is not progressing at a rate that will permit such veteran to graduate within the approved length of the course based on the training time as certified to the Veterans' Administration, or within such other length of time (exceeding such approved length) as the Administrator determines to be reasonable in accordance with regulations." following "unsatisfactory."

1989. Act Dec. 18, 1989, substituted paras. (1) and (2) for ones which read:

"(1) the cause of the unsatisfactory conduct or progress of the eligible veteran has been removed; and

"(2) the program which the eligible veteran now proposes to pursue (whether the same or revised) is suitable to the veteran's aptitudes, interests, and abilities."

Such Act further, in the introductory matter, substituted "attendance, conduct," for "conduct" and "Secretary" for "Administrator", wherever appearing.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1674, as 38 USCS § 3474, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:

Effective date and application of section. Act March 3, 1966, P. L. 89-358, § 12(a), 80 Stat. 28, located at 38 USCS § 3451 note, provided that this section is effective on March 3, 1966, but no educational assistance allowance shall be payable under this chapter (38 USCS §§ 3451 et seq.) for any period before June 1, 1966, nor for the month of June 1966, unless (1) the eligible veteran commenced the pursuit of the course of education on or after June 1, 1966, or (2) the pursuit of such course continued through June 30, 1966.

Approval process study; authorization of appropriations; implementation of amendments to be suspended. Act Nov. 23, 1977, P. L. 95-202, Title III, § 305(b)(2)-(4), 91 Stat. 1443 (effective 11/23/77, as provided by § 501 of such Act); Oct. 17, 1980, P. L. 96-466, Title VIII, § 801(m)(2), 94 Stat. 2217 (effective 10/1/80, as provided by § 802(h) of such Act), provided:

"(2) The Administrator of Veterans' Affairs, in consultation with appropriate bodies, officials, persons, departments, and agencies, shall conduct a study to investigate (A) specific methods of improving the process by which postsecondary educational institutions and courses at such institutions are and continue to be approved for purposes of chapters 32, 34, 35, and 36 of title 38, United States Code [38 USCS §§ 3201 et seq., 3451 et seq., 3500 et seq., and 3670 et seq.]; and (B) in recognition of the importance of assuring that Federal assistance is made available to those eligible veterans and persons seriously pursuing and making satisfactory progress toward an educational or vocational objective under such chapters, the need for legislative or administrative action in regard to sections 1674 and 1724 of title 38, United States Code [now 38 USCS §§ 3474, 3524], and the regulations prescribed thereunder. A report of such study, together with such
specific recommendations for administrative or legislative action as the Administrator
deems appropriate, shall be submitted to the President and the Congress not later than
September 30, 1979, except that the portion of the report of such study described in
clause (B) of the preceding sentence shall be submitted not later than September 30,
1978.

"(3) For the purpose of carrying out paragraph (2) of this subsection, there are authorized
to be appropriated $1,000,000.

"(4)(A) Until such time as the Administrator submits the report required under the second
sentence of paragraph (2) of this subsection the Administrator shall suspend
implementation of the amendments to sections 1674 and 1724 of title 38, United States
Code [now this section and 38 USCS § 3524], made by sections 206 and 307,
respectively, of Public Law 94-502, in the case of any accredited educational institution
which submits to the Administrator its course catalog or bulletin and a certification that
the policies and regulations described in clauses (6) and (7) of section 1776(b) [now 38
USCS § 3676(b)(6), (7)] are being enforced by such institution, unless the Administrator
finds, pursuant to regulations which the Administrator shall prescribe, that such catalog or
bulletin fails to state fully and clearly such policies and regulations.

"(B) The Administrator shall, where appropriate, bring to the attention of the Council
on Postsecondary Accreditation and the appropriate accrediting and licensing bodies
such catalogs, bulletins, and certifications submitted under subparagraph (A) of this
paragraph which the Administrator believes may not be in compliance with the
standards of such accrediting and licensing body.".

Cross References
This section is referred to in 10 USCS § 16136; 38 USCS §§ 3034, 3241

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 136

[§ 3475] [§ 1675. Repealed]
The bracketed section number "3475" was inserted to preserve numerical continuity following
406.

This section (Added Act March 3, 1966, P. L. 89-358, § 2, 80 Stat. 16) was repealed by Act
Oct. 24, 1972, P. L. 92-540, Title IV, § 401(6), 86 Stat. 1090. It provided for a period of
operation for approval. For similar provisions, see 38 USCS § 3689.

§ 3476. Education outside the United States
An eligible veteran may not enroll in any course offered by an educational institution not
located in a State unless that educational institution is an approved institution of higher
learning and the course is approved by the Secretary. The Secretary may deny or
discontinue educational assistance under this chapter [38 USCS §§ 3451 et seq.] in the
case of any veteran enrolled in an institution of higher learning not located in a State if
the Secretary determines that such enrollment is not in the best interest of the veteran or
the Federal Government.

Explanatory notes:
Provisions similar to those contained in this section were contained in former 38 USC § 1620 (second and third sentences) prior to repeal by Act March 3, 1966, P. L. 89-358, § 4(a), 80 Stat. 23.

Amendments:

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), substituted "the Administrator's" for "his" and substituted "the Administrator" for "he" preceding "finds".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1) of such Act, which appears as 38 USCS § 3452 note), substituted new section for one which read: "An eligible veteran may not pursue a program of education at an educational institution which is not located in a State, unless such program is pursued at an approved educational institution of higher learning. The Administrator in the Administrator's discretion may deny or discontinue the educational assistance under this chapter of any veteran in a foreign educational institution if the Administrator finds that such enrollment is not for the best interest of the veteran or the Government.".


1994. Act Nov. 2, 1994 (applicable with respect to courses approved on or after the date of enactment, as provided by § 604(b) of such Act, which appears as a note to this section), substituted the first sentence for one which read: "An eligible veteran may not enroll in any course at an educational institution not located in a State unless such course is pursued at an approved institution of higher learning and the course is approved by the Secretary.".

Effective date and application of section. Act March 3, 1966, P. L. 89-358, § 12(a), 80 Stat. 28, located at 38 USCS § 3451 note, provided that this section is effective on March 3, 1966, but no educational assistance allowance shall be payable under this chapter (38 USCS §§ 3451 et seq.) for any period before June 1, 1966, nor for the month of June 1966, unless (1) the eligible veteran commenced the pursuit of the course of education on or after June 1, 1966, or (2) the pursuit of such course continued through June 30, 1966.

Application of amendment made by Act Nov. 2, 1994. Act Nov. 2, 1994, P. L. 103-446, Title VI, § 604(b), 108 Stat. 4671, provides: "The amendment made by subsection (a) [amending this section] shall apply with respect to courses approved on or after the date of the enactment of this Act."

Cross References

This section is referred to in 10 USCS § 16136; 38 USCS §§ 3034, 3241

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 130

[§ 3477] [§ 1677. Repealed]

The bracketed section number "3477" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

§ 3478  [§ 1678. Repealed]
The bracketed section number "3478" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

This section (Added Act Aug. 31, 1967, P. L. 90-77, Title III, § 306(a), 81 Stat. 188) was repealed by Act March 26, 1970, P. L. 91-219, Title II, § 204(a)(2), 84 Stat. 79. It provided for special training for the educationally disadvantaged. For similar provisions, see 38 USCS §§ 3490 et seq.

SUBCHAPTER IV. PAYMENTS TO ELIGIBLE VETERANS; VETERAN-STUDENT SERVICES

§ 3481. Educational assistance allowance
§ 3482. Computation of educational assistance allowances
[§ 3482A]  [§ 1682A. Repealed]
§ 3483. Approval of courses
§ 3484. Apprenticeship or other on-job training; correspondence courses
§ 3485. Work-study allowance
[§ 3486]  [§ 1686. Repealed]
[§ 3487]  [§ 1687. Repealed]

Amendments:

§ 3481. Educational assistance allowance

(a) General. The Secretary shall, in accordance with the applicable provisions of this section and chapter 36 of this title [38 USCS §§ 3670 et seq.], pay to each eligible veteran who is pursuing a program of education under this chapter [38 USCS §§ 3451 et seq.] an educational assistance allowance to meet, in part, the expenses of the veteran's subsistence, tuition, fees, supplies, books, equipment, and other educational costs.

(b) Institutional training. The educational assistance allowance of an eligible veteran pursuing a program of education, other than a program exclusively by correspondence, at an educational institution shall be paid as provided in chapter 36 of this title [38 USCS §§ 3670 et seq.].

Explanatory notes:
Provisions similar to those contained in subsecs. (a), (b), (d), and (e) of this section were contained in former 38 USC § 1631 prior to repeal by Act March 3, 1966, P. L. 89-358, § 4(a), 80 Stat. 23.

Amendments:

Act Dec. 24, 1970, in subsec. (b)(2), inserted "(excluding programs of apprenticeship and programs of other on-job training authorized by section 1683 of this title)".

1972. Act Oct. 24, 1976, substituted new section for one which read:

"(a) The Administrator shall pay to each eligible veteran who is pursuing a program of education under this chapter an educational assistance allowance to meet, in part, the expenses of his subsistence, tuition, fees, supplies, books, equipment, and other educational costs.

"(b) The educational assistance allowance of an eligible veteran shall be paid, as provided in section 1682 of this title, only for the period of his enrollment as approved by the Administrator; but no allowance shall be paid--

"(1) to any veteran enrolled in a course which leads to a standard college degree for any period when such veteran is not pursuing his course in accordance with the regularly established policies and regulations of the educational institution and the requirements of this chapter, or of chapter 36;

"(2) to any veteran enrolled in a course which does not lead to a standard college degree (excluding programs of apprenticeship and programs of other on-job training authorized by section 1683 of this title) for any day of absence in excess of thirty days in a twelve-month period, not counting as absences weekends or legal holidays established by Federal or State law during which the institution is not regularly in session; or

"(3) to any veteran pursuing his program exclusively by correspondence for any period during which no lessons were serviced by the institution.

"(c) The Administrator may, pursuant to such regulations as he may prescribe, determine enrollment in, pursuit of, and attendance at, any program of education or course by an eligible veteran for any period for which he receives an educational assistance allowance under this chapter for pursuing such program or course.

"(d) No educational assistance allowance shall be paid to an eligible veteran enrolled in a course in an educational institution which does not lead to a standard college degree for any period until the Administrator shall have received--

"(1) from the eligible veteran a certification as to his actual attendance during such period or where the program is pursued by correspondence a certificate as to the number of lessons actually completed by the veteran and serviced by the institution; and

"(2) from the educational institution, a certification, or an endorsement on the veteran's certificate, that such veteran was enrolled in and pursuing a course of education during such period and, in the case of an institution furnishing education to a veteran exclusively by correspondence, a certificate, or an endorsement on the veteran's certificate, as to the number of lessons completed by the veteran and serviced by the institution.

"Notwithstanding the foregoing, the Administrator may pay an educational assistance allowance representing the initial payment of an enrollment period, not exceeding one full month, upon receipt of a certificate of enrollment.

"(e) Educational assistance allowances shall be paid as soon as practicable after the Administrator is assured of the veteran's enrollment in and pursuit of the program of education for the period for which such allowance is to be paid.".

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), substituted "chapter 36" for "section 1780" and substituted "the veteran's" for "his"; and in subsec. (b), substituted "chapter 36" for "section 1780".
1981. Act Aug. 13, 1981 (effective Oct. 1, 1981, as provided by § 2006 of such Act, which appears as 38 USCS § 3231 note), in subsec. (b), deleted "or a program of flight training" after "correspondence"; deleted subsec. (c) including the center heading preceding such subsection which read:

"Flight Training"

"No educational assistance allowance for any month shall be paid to an eligible veteran who is pursuing a program of education consisting exclusively of flight training until the Administrator shall have received a certification from the eligible veteran and the institution as to actual flight training received by, and to cost thereof to, the veteran during that month."


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1681, as 38 USCS § 3481.

2006. Act June 15, 2006, in subsecs. (a) and (b), inserted the subsection headings, which headings formerly appeared as centered headings preceding such subsections.

Other provisions:

Effective date and application of section. Act March 3, 1966, P. L. 89-358, § 12(a), 80 Stat. 28, located at 38 USCS § 3451 note, provided that this section is effective on March 3, 1966, but no educational assistance allowance shall be payable under this chapter (38 USCS §§ 3451 et seq.) for any period before June 1, 1966, nor for the month of June 1966, unless (1) the eligible veteran commenced the pursuit of the course of education on or after June 1, 1966, or (2) the pursuit of such course continued through June 30, 1966.

Code of Federal Regulations

Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18

Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a

Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

Cross References

This section is referred to in 38 USCS § 3491

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 135

1. Generally

2. Constitutionality

3. Tests

4. Taxation

5. Miscellaneous

1. Generally
Portion of educational assistance allowance provided under 38 USCS §§ 3481 et seq. not expended for educational purposes, is includible in gross income under 12 USCS §§ 1701 et seq. for determining amount of federally-assisted rent payment. Ortiz v Department of Housing & Urban Dev. (1977, DC Puerto Rico) 448 F Supp 953

Fact that state pays full tuition for incarcerated veterans to attend colleges or other schools does not affect their entitlement to benefits under 38 USCS § 3481. VA GCO 7-76

2. Constitutionality

Evaluating propriety of suspension of veterans' educational assistance benefits requires considering private interest at stake, fairness and reliability of existing procedures preceding termination and public interest in avoiding administrative burdens that might result from required procedures; injunction against such termination and additional procedural requirements of 30 days advance written notice of termination, during which time veteran can explore and challenge basis for such termination and to seek in-person interview with Veterans' Administration [now Department of Veterans Affairs] representative that is informational rather than adversary in nature, are proper. Devine v Cleland (1980, CA9) 616 F.2d 1080

Eligible veterans possess constitutionally protected property interests in receipt of Veterans' Administration [now Department of Veterans Affairs] educational benefits. Mathes v Hornbarger (1987, CA7 Ind) 821 F.2d 439

3. Tests

Veterans' Administration [now Department of Veterans Affairs] may pay for administration of College Level Examination Program (CLEP) test to veterans eligible for GI Bill benefits where objective of examination is counseling of veteran for placement in proper educational program, but not for purpose of enabling veteran to obtain advance credit or degree. VA GCO 11-74

4. Taxation

There is no rational basis to Revenue Rule (80-173) which treats Veterans Administration [now Department of Veterans Affairs] benefits received by flight trainees differently for tax purposes than those received by other veteran trainees. Baker v United States (1983, ND Ga) 575 F Supp 508, 84-1 USTC ¶ 9110, 53 AFTR 2d 660, affd (1984, CA11 Ga) 748 F.2d 1465, 85-1 USTC ¶ 9101, 55 AFTR 2d 509, reh den, en banc (1985, CA11 Ga) 756 F.2d 885 and acq

5. Miscellaneous

Government is entitled to deduct amount paid veteran in form of subsistence payments in suit by veteran to recover back pay during period of unwarranted removal. Getzoff v United States (1953) 124 Ct Cl 232, 109 F Supp 712

§ 3482. Computation of educational assistance allowances

(a) (1) Except as provided in subsection (b) [,] (c), or (g) of this section, or section 3687 of this title [38 USCS § 3687], while pursuing a program of education under this chapter [38 USCS §§ 3451 et seq.] of half-time or more, each eligible veteran shall be paid the monthly educational assistance allowance set forth in column II, III, IV, or V (whichever is applicable as determined by the veteran's dependency status) opposite the applicable type of program as shown in column I:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of program</td>
<td>dependents</td>
<td>dependent</td>
<td>dependents</td>
<td>dependents</td>
</tr>
<tr>
<td>No</td>
<td>One</td>
<td>Two</td>
<td>More than two</td>
<td></td>
</tr>
<tr>
<td>The amount in column IV, plus the following for each dependent in excess of two:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Institutional training:

<table>
<thead>
<tr>
<th>Full-time</th>
<th>$376</th>
<th>$448</th>
<th>$510</th>
<th>$32</th>
</tr>
</thead>
<tbody>
<tr>
<td>Three-quarter time</td>
<td>283</td>
<td>336</td>
<td>383</td>
<td>24</td>
</tr>
<tr>
<td>Half-time</td>
<td>188</td>
<td>224</td>
<td>255</td>
<td>17</td>
</tr>
<tr>
<td>Cooperative</td>
<td>304</td>
<td>355</td>
<td>404</td>
<td>23</td>
</tr>
</tbody>
</table>

(2) A "cooperative" program, other than a "farm cooperative" program, means a full-time program of education which consists of institutional courses and alternate phases of training in a business or industrial establishment with the training in the business or industrial establishment being strictly supplemental to the institutional portion.

(b) The educational assistance allowance of an individual pursuing a program of education--

(1) while on active duty, or

(2) on less than a half-time basis,

shall be computed at the rate of (A) the established charges for tuition and fees which the institution requires similarly circumstanced nonveterans enrolled in the same program to pay, or (B) $376 per month for a full-time course, whichever is the lesser. An individual's entitlement shall be charged for institutional courses on the basis of the applicable monthly training time rate as determined under section 3688 of this title [38 USCS § 3688].

(c) (1) An eligible veteran who is enrolled in an educational institution for a "farm cooperative" program consisting of institutional agricultural courses prescheduled to fall within 44 weeks of any period of 12 consecutive months and who pursues such program on--

(A) a full-time basis (a minimum of ten clock hours per week or four hundred and forty clock hours in such year pre-scheduled to provide not less than eighty clock hours in any three-month period),

(B) a three-quarter-time basis (a minimum of 7 clock hours per week), or

(C) a half-time basis (a minimum of 5 clock hours per week),

shall be eligible to receive an educational assistance allowance at the appropriate rate provided in the table in paragraph (2) of this subsection, if such eligible veteran is concurrently engaged in agricultural employment which is relevant to such institutional agricultural courses as determined under standards prescribed by the Secretary. In computing the foregoing clock hour requirements there shall be included the time involved in field trips and individual and group instruction sponsored and conducted by the educational institution through a duly authorized instructor of such institution in which the veteran is enrolled.

(2) The monthly educational assistance allowance of an eligible veteran pursuing a farm cooperative program under this chapter [38 USCS §§ 3451 et seq.] shall be paid as set forth in column II, III, IV, or V (whichever is applicable as determined by the veteran's dependency status) opposite the basis shown in column I:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basis</td>
<td>No</td>
<td>More than two</td>
<td>One</td>
<td>Two</td>
</tr>
<tr>
<td>dependents</td>
<td>dependents</td>
<td>dependents</td>
<td>dependent</td>
<td></td>
</tr>
</tbody>
</table>
The amount in column IV, plus the following for each dependent in excess of two:

<table>
<thead>
<tr>
<th></th>
<th>$304</th>
<th>$355</th>
<th>$404</th>
<th>$23</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-time</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Three-quarter</td>
<td>228</td>
<td>266</td>
<td>303</td>
<td>18</td>
</tr>
<tr>
<td>Half-time</td>
<td>152</td>
<td>178</td>
<td>202</td>
<td>12</td>
</tr>
</tbody>
</table>

(d) (1) Notwithstanding the prohibition in section 3471 of this title [38 USCS § 3471] prohibiting enrollment of an eligible veteran in a program of education in which such veteran has "already qualified," a veteran shall be allowed up to six months of educational assistance (or the equivalent thereof in part-time assistance) for the pursuit of refresher training to permit such veteran to update such veteran's knowledge and skills and to be instructed in the technological advances which have occurred in such veteran's field of employment during and since the period of such veteran's active military service.

(2) A veteran pursuing refresher training under this subsection shall be paid an educational assistance allowance based upon the rate prescribed in the table in subsection (a)(1) or in subsection (c)(2) of this section, whichever is applicable.

(3) The educational assistance allowance paid under the authority of this subsection shall be charged against the period of entitlement the veteran has earned pursuant to section 3461(a) of this title [38 USCS § 3461(a)].

(e) The educational assistance allowance of an eligible veteran pursuing an independent study program which leads to a standard college degree shall be computed at the rate provided in subsection (b) of this section. If the entire training is to be pursued by independent study, the amount of such veteran's entitlement to educational assistance under this chapter shall be charged in accordance with the rate at which the veteran is pursuing the independent study program but at not more than the rate at which such entitlement is charged for pursuit of such program on less than a half-time basis. In any case in which independent study is combined with resident training, the educational assistance allowance shall be paid at the applicable institutional rate based on the total training time determined by adding the number of semester hours (or the equivalent thereof) of resident training to the number of semester hours (or the equivalent thereof) of independent study that do not exceed the number of semester hours (or the equivalent thereof) required for the less than half-time institutional rate, as determined by the Secretary, for resident training. A veteran's entitlement shall be charged for a combination of independent study and resident training on the basis of the applicable monthly training time rate as determined under section 3688 of this title [38 USCS § 3688].

(f) The educational assistance allowance of an eligible veteran pursuing a course by open circuit television shall be computed in the same manner that such allowance is computed under subsection (e) of this section for an independent study program.

(g) (1) Subject to the provisions of paragraph (2) of this subsection, the amount of the educational assistance allowance paid to an eligible veteran who is pursuing a program of education under this chapter [38 USCS §§ 3451 et seq.] while incarcerated in a Federal, State, or local penal institution for conviction of a felony may not exceed such amount as
the Secretary determines, in accordance with regulations which the Secretary shall
prescribe, is necessary to cover the cost of established charges for tuition and fees
required of similarly circumstanced nonveterans enrolled in the same program and to
cover the cost of necessary supplies, books, and equipment, or the applicable monthly
educational assistance allowance prescribed for a veteran with no dependents in
subsection (a)(1) or (c)(2) of this section or section 3687(b)(1) of this title [38 USCS §
3687(b)(1)], whichever is the lesser. The amount of the educational assistance allowance
payable to a veteran while so incarcerated shall be reduced to the extent that the tuition
and fees of the veteran for any course are paid under any Federal program (other than a
program administered by the Secretary) or under any State or local program.

(2) Paragraph (1) of this subsection shall not apply in the case of any veteran who is
pursuing a program of education under this chapter [38 USCS §§ 3451 et seq.] while
residing in a halfway house or participating in a work-release program in connection
with such veteran's conviction of a felony.

(h) (1) Subject to paragraph (3), the amount of educational assistance payable under this
chapter [38 USCS §§ 3451 et seq.] for a licensing or certification test described in section
3452(b) of this title [38 USCS § 3452(b)] is the lesser of $2,000 or the fee charged for the
test.

(2) The number of months of entitlement charged in the case of any individual for
such licensing or certification test is equal to the number (including any fraction)
determined by dividing the total amount paid to such individual for such test by the
full-time monthly institutional rate of the educational assistance allowance which,
except for paragraph (1), such individual would otherwise be paid under this chapter
[38 USCS §§ 3451 et seq.].

(3) In no event shall payment of educational assistance under this subsection for such
test exceed the amount of the individual's available entitlement under this chapter
[38 USCS §§ 3451 et seq.].

Explanatory notes:
Provisions similar to those contained in subsecs. (a), (b)(2), (c)(1), (2) of this section were
contained in former 38 USC §§ 1611(c), 1632(a), (b), (f), and (e) prior to repeal by Act March

The bracketed comma was inserted in subsec. (a)(1) to reflect the probable intent of
Congress.

Amendments:
1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which
appears as 38 USCS § 101 note), in subsec. (a)(1), substituted "Except as provided in
subsection (b), (c)(1), or (d) of this section, or section 1677 or 1683 of this title" for "Except as
provided in subsection (b) or (c)(1)", substituted "column II, III, IV, or V" for "column II, III, or
IV", and substituted new table for one which read:

<table>
<thead>
<tr>
<th>&quot;Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of program</td>
<td>No</td>
<td>One</td>
<td>More than</td>
</tr>
<tr>
<td></td>
<td>dependents</td>
<td>dependent</td>
<td>two</td>
</tr>
</tbody>
</table>

Institutional:
Full-time ............. | $100    | $125       | $150      |
Three-quarter-time    | 75       | 95         | 115       |
Half-time ............. | 50       | 65         | 75        |
Cooperative           | 80       | 100        | 120";
in subsec. (b), concluding matter, substituted "$130" for "$100"; and added subsec. (d).

1968. Act Oct. 23, 1968 (effective 12/1/68, as provided by § 6(a) of such Act, which appears as 38 USCS § 3500), in subsec. (a)(2), inserted ", other than a 'farm cooperative' program,"; substituted new subsec. (c)(2) for one which read: "In the case of any eligible veteran who is pursuing any program of education exclusively by correspondence, one-fourth of the elapsed time in following such program of education shall be charged against the veteran's period of entitlement."; and substituted new subsec. (d) for one which read: "An eligible veteran enrolled in an educational institution for a 'farm cooperative' program consisting of institutional agricultural courses for a minimum of 12 clock hours per week, shall be eligible to receive an educational assistance allowance at the appropriate rate provided in the table in subsection (a)(1) of this section opposite the word 'Cooperative' under Column I of such table, if such eligible veteran is concurrently engaged in agricultural employment which is relevant to such institutional agricultural courses as determined under standards prescribed by the Administrator.".

1970. Act March 26, 1970, § 103(a)-(d) (effective 2/1/70, as provided by § 301 of such Act, which appears as a note to this section), in subsec. (a)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Type of program</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>$130</td>
<td>$155</td>
<td>$175</td>
<td>$10</td>
</tr>
<tr>
<td>One</td>
<td>95</td>
<td>115</td>
<td>135</td>
<td>7</td>
</tr>
<tr>
<td>Two</td>
<td>80</td>
<td>75</td>
<td>85</td>
<td>5</td>
</tr>
</tbody>
</table>

"Institutional:

Full-time ............... $130       $155       $175            $10
Three-quarter time ...... 95        115        135              7
Half-time ............... 80        75         85              5
Cooperative ............... 105        125        145              7"

in subsec. (b), concluding matter, and subsec. (c)(2), substituted "$175" for "$130"; and, in subsec. (d)(2), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Type of program</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>$105</td>
<td>$125</td>
<td>$145</td>
<td>$7</td>
</tr>
<tr>
<td>One</td>
<td>75</td>
<td>90</td>
<td>105</td>
<td>5</td>
</tr>
<tr>
<td>Two</td>
<td>50</td>
<td>60</td>
<td>70</td>
<td>3</td>
</tr>
</tbody>
</table>

"Cooperative ............... 105        125        145              7"

Act March 26, 1970, § 204(a)(3), in subsec. (b), concluding matter, inserted "Notwithstanding provisions of section 1681 of this title, payment of the educational assistance allowance provided by this subsection may, and the educational assistance allowance provided by section 1696(b) shall, be made to an eligible veteran in an amount computed for the entire quarter, semester, or term during the month immediately following the month in which certification is received from the educational institution that the veteran has enrolled in and is pursuing a program at such institution.".
Act Dec. 24, 1970, in subsec. (c)(1), inserted "The term 'established charge' as used herein means the charge for the course or courses determined on the basis of the lowest extended time payment plan offered by the institution and approved by the appropriate State approving agency or the actual cost to the eligible veteran, whichever is the lesser.".

1972. Act Oct. 24, 1972, §§ 303, 401(4), (5), in subsec. (a)(1), substituted "or (c)" for "(c)(1), or (d)" and substituted "1787" for "1683"; in subsec. (b), concluding matter deleted "Notwithstanding provisions of section 1681 of this title, payment of the educational assistance allowance provided by this subsection may, and the educational assistance allowance provided by section 1696(b) shall, be made to an eligible veteran in an amount computed for the entire quarter, semester, or term during the month immediately following the month in which certification is received from the educational institution that the veteran has enrolled in and is pursuing a program at such institution." following "whichever is the lesser."; deleted subsec. (c) which read:

"(c)(1) The educational assistance allowance of an eligible veteran pursuing a program of education exclusively by correspondence shall be computed on the basis of the established charge which the institution requires nonveterans to pay for the course or courses pursued by the eligible veteran. The term 'established charge' as used herein means the charge for the course or courses determined on the basis of the lowest extended time payment plan offered by the institution and approved by the appropriate State approving agency or the actual cost to the eligible veteran, whichever is the lesser. Such allowance shall be paid quarterly on a pro rata basis for the lessons completed by the veteran and serviced by the institution, as certified by the institution.

"(2) The period of entitlement of any eligible veteran who is pursuing any program of education exclusively by correspondence shall be charged with one month for each $175 which is paid to the veteran as an educational assistance allowance for such course."; redesignated subsec. (d) as subsec. (c); in subsec. (c)(1), as so redesignated; in subpara. (A), substituted "(a minimum of ten clock hours per week or four hundred and forty clock hours in such year prescheduled to provide not less than eighty clock hours in any three-month period)" for "(a minimum of 12 clock hours per week)"; in subpara. (B), substituted "7" for "9", in subpara. (C), substituted "5" for "6", and in the concluding matter, inserted "In computing the foregoing clock hour requirements there shall be included the time involved in field trips and individual and group instruction sponsored and conducted by the educational institution through a duly authorized instructor of such institution in which the veteran is enrolled.".

Such Act further, in subsec. (a)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of program</td>
<td>No</td>
<td>One</td>
<td>Two</td>
<td>More than two</td>
</tr>
<tr>
<td>dependents</td>
<td>dependent</td>
<td>dependents</td>
<td>dependents</td>
<td></td>
</tr>
</tbody>
</table>

The amount in column IV, plus the following for each dependent in excess of two:

Institutional:

<table>
<thead>
<tr>
<th>Basis</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-time</td>
<td>$175</td>
<td>$205</td>
<td>$230</td>
<td>$13</td>
<td></td>
</tr>
<tr>
<td>Three-quarter-time</td>
<td>128</td>
<td>152</td>
<td>177</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>Half-time</td>
<td>81</td>
<td>100</td>
<td>114</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>Cooperative</td>
<td>141</td>
<td>167</td>
<td>192</td>
<td>10</td>
<td></td>
</tr>
</tbody>
</table>

in subsec. (b), concluding matter, substituted "$220" for "$175"; and in subsec. (c)(2), as redesignated by Act Oct. 24, 1972, § 303, substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basis</td>
<td>No</td>
<td>One</td>
<td>Two</td>
<td>More than two</td>
</tr>
</tbody>
</table>

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The amount in Column IV, plus the following for each dependent in excess of two:

<table>
<thead>
<tr>
<th>Type of program</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-time</td>
<td></td>
<td>$141</td>
<td>$165</td>
<td>$190</td>
<td>$10</td>
</tr>
<tr>
<td>Three-quarter-time</td>
<td>101</td>
<td>119</td>
<td>138</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>Half-time</td>
<td></td>
<td>67</td>
<td>79</td>
<td>92</td>
<td>4&quot;</td>
</tr>
</tbody>
</table>

Section 601(a) of Act Oct. 24, 1972, which appears as a note to this section, provided that these amendments are generally effective Oct. 1, 1972.

1974. Act Dec. 3, 1974, § 102(2)-(4) (effective 9/1/74, as provided by § 501 of such Act, which appears as a note to this section), in subsec. (a)(1), substituted new table for one which read:

"Column I Column II Column III Column IV Column V
Type of program No One Two More than two

dependents dependents dependents dependents
The amount in column IV, plus the following for each dependent in excess of two:

<table>
<thead>
<tr>
<th>Type of program</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Institutional:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time</td>
<td></td>
<td>$220</td>
<td>$261</td>
<td>$298</td>
<td>$18</td>
</tr>
<tr>
<td>Three-quarter time</td>
<td>165</td>
<td>196</td>
<td>224</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>Half-time</td>
<td></td>
<td>110</td>
<td>131</td>
<td>149</td>
<td>9</td>
</tr>
<tr>
<td>Cooperative</td>
<td></td>
<td>177</td>
<td>208</td>
<td>236</td>
<td>14&quot;</td>
</tr>
</tbody>
</table>

in subsec. (b), concluding matter, substituted "$260" for "$220"; and in subsec. (c)(2), substituted new table for one which read:

"Column I Column II Column III Column IV Column V
Basis No One Two More than two

dependents dependents dependents dependents
The amount in column IV, plus the following for each dependent in excess of two:

<table>
<thead>
<tr>
<th>Type of program</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-time</td>
<td></td>
<td>$177</td>
<td>$208</td>
<td>$236</td>
<td>$14</td>
</tr>
<tr>
<td>Three-quarter time</td>
<td>133</td>
<td>156</td>
<td>177</td>
<td>11</td>
<td></td>
</tr>
<tr>
<td>Half-time</td>
<td></td>
<td>89</td>
<td>104</td>
<td>118</td>
<td>7&quot;</td>
</tr>
</tbody>
</table>

Act Dec. 3, 1974, § 204 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), added subsec. (d).

1975. Act Jan. 2, 1975 (effective 1/1/75, as provided by § 206 of such Act, which appears as a note to this section), in subsec. (b), concluding matter, substituted "$270" for "$260".
### 1976. Act Oct. 15, 1976 (effective 10/1/76, as provided by § 703(a) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of program</td>
<td>No</td>
<td>One</td>
<td>Two</td>
<td>More than two</td>
</tr>
<tr>
<td>dependents</td>
<td>dependent</td>
<td>dependents</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The amount in column IV, plus the following for each dependent in excess of two:

**Institutional:**

- **Full-time** ............... $270 $321 $366 $22
- **Three-quarter time** ...... 203 240 275 11
- **Half-time** ............... 135 160 182 11
- **Cooperative** ............. 217 255 289 17

In subsec. (b), concluding matter, substituted "$292" for "$270"; in subsec. (c)(2), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basis</td>
<td>No</td>
<td>One</td>
<td>Two</td>
<td>More than two</td>
</tr>
<tr>
<td>dependents</td>
<td>dependent</td>
<td>dependents</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The amount in column IV, plus the following for each dependent in excess of two:

- **Full-time** ............... $217 $255 $289 $17
- **Three-quarter time** ...... 163 191 218 13
- **Half-time** ............... 109 128 145 9

And added subsec. (e).

### 1977. Act Nov. 23, 1977, in subsec. (a)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of program</td>
<td>No</td>
<td>One</td>
<td>Two</td>
<td>More than two</td>
</tr>
<tr>
<td>dependents</td>
<td>dependent dependents</td>
<td></td>
<td>dependents</td>
<td></td>
</tr>
</tbody>
</table>

The amount in column IV, plus the following for each dependent in excess of two:

**Institutional training:**

- **Full-time** ............... $292 $347 $396 $24
- **Three-quarter time** ...... 219 260 297 18
- **Half-time** ............... 146 174 198 12
- **Cooperative** ............. 235 276 313 18

In subsec. (b), concluding matter, substituted "$311" for "$292"; and in subsec. (c)(2), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basis</td>
<td>No</td>
<td>One</td>
<td>Two</td>
<td>More than two</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Type of program</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Institutional:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time</td>
<td>$311</td>
<td>$370</td>
<td>$422</td>
<td>$26</td>
<td></td>
</tr>
<tr>
<td>Three-quarter</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>time</td>
<td>233</td>
<td>277</td>
<td>317</td>
<td>19</td>
<td></td>
</tr>
<tr>
<td>Half-time</td>
<td>156</td>
<td>185</td>
<td>211</td>
<td>13</td>
<td></td>
</tr>
<tr>
<td>Cooperative</td>
<td>251</td>
<td>294</td>
<td>334</td>
<td>19</td>
<td></td>
</tr>
<tr>
<td>Cooperatives</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

in subsec. (b), concluding matter, substituted "$327" for "$311"; and in subsec. (c)(2), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Basis</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>depen-</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>dents</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Type of program</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-time</td>
<td>$251</td>
<td>$294</td>
<td>$334</td>
<td>$18</td>
<td></td>
</tr>
<tr>
<td>Three-quarter</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>time</td>
<td>188</td>
<td>221</td>
<td>251</td>
<td>15</td>
<td></td>
</tr>
<tr>
<td>Half-time</td>
<td>126</td>
<td>147</td>
<td>167</td>
<td>10</td>
<td></td>
</tr>
</tbody>
</table>
The amount in column IV, plus the following for each dependent in excess of two:

<table>
<thead>
<tr>
<th>Institutional training: Full-time</th>
<th>$327</th>
<th>$389</th>
<th>$443</th>
<th>$27</th>
</tr>
</thead>
<tbody>
<tr>
<td>Three-quarter time</td>
<td>245</td>
<td>292</td>
<td>332</td>
<td>20</td>
</tr>
<tr>
<td>Half-time</td>
<td>164</td>
<td>195</td>
<td>222</td>
<td>14</td>
</tr>
<tr>
<td>Cooperative</td>
<td>264</td>
<td>309</td>
<td>351</td>
<td>21</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basis</td>
<td>No</td>
<td>One</td>
<td>Two</td>
<td>More than two</td>
</tr>
<tr>
<td>dependent</td>
<td>dependent</td>
<td>dependents</td>
<td>dependents</td>
<td></td>
</tr>
<tr>
<td>Full-time</td>
<td>$264</td>
<td>$309</td>
<td>$351</td>
<td>$20</td>
</tr>
<tr>
<td>Three-quarter time</td>
<td>198</td>
<td>232</td>
<td>263</td>
<td>15</td>
</tr>
<tr>
<td>Half-time</td>
<td>132</td>
<td>155</td>
<td>176</td>
<td>10</td>
</tr>
</tbody>
</table>

Act Oct. 17, 1980, §§ 308-310, 602(a) (effective 10/1/80, as provided by § 802(c)(1), (f)(1) of such Act), in subsec. (b), concluding matter, inserted "An individual's entitlement shall be charged for institutional courses on the basis of the applicable monthly training time rate as determined under section 1788 of this title."; substituted new subsec. (e) for one which read: "The educational assistance allowance of an eligible veteran pursuing an independent study program which leads to a standard college degree shall be computed at the rate provided in subsection (b)(2) of this section. In those cases where independent study is combined with resident training and the resident training constitutes the major portion of such training, the maximum allowance may not exceed the full-time institutional allowance provided under subsection (a)(1) of this section."; and added subsecs. (f) and (g).

1981. Act Aug. 13, 1981 (effective as provided by § 2006 of such Act, which appears as 38 USCS § 3231 note), in subsec. (a)(1), introductory matter, deleted "1677 or" before "1787 of this title".

1982. Act Oct. 14, 1982, in subsec. (a)(1), substituted "(c), or (g)" for "or (c)"; in subsec. (e), substituted "the amount of such veteran's entitlement to educational assistance under this chapter shall be charged in accordance with the rate at which the veteran is pursuing the independent study program but at not more than the rate at which such entitlement is charged for pursuit of such program on less than a half-time basis" for "entitlement shall be charged at one-half of the full-time institutional rate"; and, in subsec. (g), in para. (1), added the sentence beginning "The amount of educational . . .", and in para. (2), inserted "not" following "shall", and deleted "if the Administrator determines that all the veteran's living expenses are being defrayed by a Federal, State, or local government".


1984. Act Oct. 24, 1984 (effective 10/1/78, as provided by § 205 of such Act, which appears as 38 USCS § 3108 note), in subsec. (a)(1), substituted the table for one which read:
<table>
<thead>
<tr>
<th>Type of program</th>
<th>No</th>
<th>One</th>
<th>Two</th>
<th>More than two</th>
</tr>
</thead>
<tbody>
<tr>
<td>dependents</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The amount in column IV, plus the following for each dependent in excess of two:

**Institutional:**
- Full-time: $342, $407, $464, $29
- Three-quarter time: 257, 305, 348, 22
- Half-time: 171, 204, 232, 15
- Cooperative: 276, 323, 367, 21

Such Act further, in subsec. (b), in the concluding matter, substituted "$376" for "$342"; and, in subsec. (c)(2), substituted the table for one which read:

<table>
<thead>
<tr>
<th>Type of program</th>
<th>No</th>
<th>One</th>
<th>Two</th>
<th>More than two</th>
</tr>
</thead>
<tbody>
<tr>
<td>dependents</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The amount in column IV, plus the following for each dependent in excess of two:

- Full-time: $276, $323, $367, $21
- Three-quarter time: 207, 242, 275, 16
- Half-time: 138, 162, 184, 11

1989. Act Dec. 18, 1989, in subsecs. (c), (e) and (g), substituted "Secretary" for "Administrator", wherever appearing.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1682, as 38 USCS § 3482, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1996. Act Oct. 9, 1996, in subsec. (f), deleted "in part" following "course".

2000. Act Nov. 1, 2000 (effective 3/1/01 and applicable with respect to licensing and certification tests approved on or after such date, as provided by § 122(d) of such Act, which appears as a note to this section) added subsec. (h).

Other provisions:

Effective date and application of section. Act March 3, 1966, P. L. 89-358, § 12(a), 80 Stat. 28, located at 38 USCS § 3451 note, provided that this section is effective on March 3, 1966, but no educational assistance allowance shall be payable under this chapter (38 USCS §§ 3451 et seq.) for any period before June 1, 1966, nor for the month of June 1966, unless (1) the eligible veteran commenced the pursuit of the course of education on or after June 1, 1966, or (2) the pursuit of such course continued through June 30, 1966.

Overpayment to veterans by Tangipahoa Parish School Board, Amite, Louisiana. Act Aug. 19, 1968, P. L. 90-493, § 5, 82 Stat. 809, provided that any veteran determined by the Administrator of Veterans' Affairs to have received overpayments of educational benefits under former chapter 33 of title 38, United States Code in connection with the institutional on-farm training program conducted by the Tangipahoa Parish School Board, Amite, Louisiana, would be relieved of all liability to the United States for the amount of such
overpayment, remaining due on Aug. 19, 1968, by making application for relief within two years following Aug. 19, 1968.


**Application of Oct. 24, 1972 amendment.** Act Oct. 24, 1972, P. L. 92-540, Title VI, §§ 601(a), 86 Stat. 1099, provides: "The rate increases provided in Title I of this Act [for full classification, consult USCS Tables volumes] and the rate increases provided by the provisions of section 1787, title 38, United States Code [38 USCS § 3687] (as added by section 316 of this Act) shall become effective October 1, 1972; except, for those veterans and eligible persons in training on the date of enactment, the effective date shall be the date of the commencement of the current enrollment period, but not earlier than September 1, 1972."

**Savings provisions.** Act Oct. 24, 1972, p. 1. 92-540, Title VI, § 602(b), 86 Stat. 1099, which appears as 38 USCS § 3686 note, provided that notwithstanding the provisions of Act Oct. 24, 1972, § 602(a), any enrollment agreement entered into by an eligible veteran prior to Jan. 1, 1973, shall continue to be subject to the provisions of subsec. (c) of this section as it existed prior to repeal by Act Oct. 24, 1972, § 303.


**Application of subsec. (g)(1) of this section.** Act Oct. 17, 1980, P. L. 96-466, Title VI, § 602(d), 94 Stat. 2209 (effective 10/1/80, as provided by § 802(f)(1) of such Act), provided: "The provisions of section 1682(g)(1) of title 38, United States Code, as added by subsection (a) [subsec. (g)(1) of this section], shall not apply to an apportionment made under section 3107(c) of such title [now 38 USCS § 5307(c)] before the date of the enactment of this Act."

**Cross References**

This section is referred to in 10 USCS § 16136; 38 USCS §§ 3002, 3034, 3202, 3491, 3492, 3680

1. Generally
2. Constitutionality

1. Generally

Government may set off amounts already paid and to be paid against sums administrator of deceased serviceman has recovered from government under federal Tort Claims Act [28 USCS §§ 1346(b), 2671 et seq.]. Knecht v United States (1956, DC Pa) 144 F Supp 786, affd (1957, CA3 Pa) 242 F.2d 929

2. Constitutionality

1980 Amendments limiting education benefits of incarcerated veterans (38 USCS §§ 1682(g) and 1780(a)(6) [now 38 USCS §§ 3482(g) and former 3680(a)(6)]) are constitutional. Jackson v Congress of United States (1983, SD NY) 558 F Supp 1288

38 USCS § 1682(g) [now 38 USCS § 3482(g)] limiting benefits to incarcerated veteran to cost of tuition, fees, and supplies does not violate equal protection clause of Fifth Amendment to U. S. Constitution by denying incarcerated veterans subsistence benefits to which they would be entitled if they had not been incarcerated; nor does § 1682(g) [now § 3482(g)] constitute bill of attainder under Article I § 9 of Constitution. Greenwell v Walters (1984, MD Tenn) 596 F Supp 693

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§ 3482A. Repealed

The bracketed section number "3482A" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.


§ 3483. Approval of courses

An eligible veteran shall receive the benefits of this chapter [38 USCS §§ 3451 et seq.] while enrolled in a course of education offered by an educational institution only if such course is approved in accordance with the provisions of subchapter I of chapter 36 of this title [38 USCS §§ 3670 et seq.].

Explanatory notes:


Amendments:

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act), redesignated this section as § 1686, it formerly appeared as § 1685.

1972. Act Oct. 24, 1972, redesignated this section as § 1683; it formerly appeared as § 1686.


Other provisions:

Effective date and application of section. Act March 3, 1966, P. L. 89-358, § 12(a), 80 Stat. 28, located at 38 USCS § 3451 note, provided that this section is effective on March 3, 1966, but no educational assistance allowance shall be payable under this chapter (38 USCS §§ 3451 et seq.) for any period before June 1, 1966, nor for the month of June 1966, unless (1) the eligible veteran commenced the pursuit of the course of education on or after June 1, 1966, or (2) the pursuit of such course continued through June 30, 1966.

Cross References

This section is referred to in 10 USCS 16136; 38 USCS §§ 3034, 3241, 3670

§ 3484. Apprenticeship or other on-job training; correspondence courses

Any eligible veteran may pursue a program of apprenticeship or other on-job training or a program of education exclusively by correspondence and be paid an educational assistance allowance or training assistance allowance, as applicable, under the provisions of section 3687 or 3686 of this title [38 USCS § 3687 or 3686].

Amendments:
§ 3485. Work-study allowance

(a) (1) Individuals utilized under the authority of subsection (b) shall be paid an additional educational assistance allowance (hereinafter in this section referred to as "work-study allowance"). Such allowance shall be paid in return for an individual's entering into an agreement described in paragraph (3).

(2) Such work-study allowance shall be paid in an amount equal to the product of--
   (A) the applicable hourly minimum wage; and
   (B) the number of hours worked during the applicable period.

(3) An agreement described in this paragraph is an agreement of an individual to perform services, during or between periods of enrollment, aggregating not more than a number of hours equal to 25 times the number of weeks in the semester or other applicable enrollment period, required in connection with a qualifying work-study activity.

(4) For the purposes of this section, the term "qualifying work-study activity" means any of the following:
   (A) The outreach services program under chapter 63 of this title [38 USCS §§ 6301 et seq.] as carried out under the supervision of a Department employee or, during the period preceding December 27, 2006, outreach services to servicemembers and veterans furnished by employees of a State approving agency.
   (B) The preparation and processing of necessary papers and other documents at educational institutions or regional offices or facilities of the Department.
   (C) The provision of hospital and domiciliary care and medical treatment under chapter 17 of this title [38 USCS §§ 1701 et seq.], including, during the period preceding December 27, 2006, the provision of such care to veterans in a State home for which payment is made under section 1741 of this title [38 USCS § 1741].
   (D) Any other activity of the Department as the Secretary determines appropriate.
   (E) In the case of an individual who is receiving educational assistance under chapter 1606 of title 10 [10 USCS §§ 16131 et seq.], an activity relating to the administration of that chapter at Department of Defense, Coast Guard, or National Guard facilities.
   (F) During the period preceding December 27, 2006, an activity relating to the administration of a national cemetery or a State veterans' cemetery.

(5) An individual may elect, in a manner prescribed by the Secretary, to be paid in advance an amount equal to 40 percent of the total amount of the work-study allowance agreed to be paid under the agreement in return for the individual's
agreement to perform the number of hours of work specified in the agreement (but not more than an amount equal to 50 times the applicable hourly minimum wage).

(6) For the purposes of this subsection and subsection (e), the term "applicable hourly minimum wages" means--

(A) the hourly minimum wage under section 6(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)); or

(B) the hourly minimum wage under comparable law of the State in which the services are to be performed, if such wage is higher than the wage referred to in subparagraph (A) and the Secretary has made a determination to pay such higher wage.

(b) Notwithstanding any other provision of law, the Secretary shall, subject to the provisions of subsection (e) of this section, utilize, in connection with the activities specified in subsection (a)(1) of this section, the services of individuals who are pursuing programs of rehabilitation, education, or training under chapter 30, 31, 32, or 34 of this title [38 USCS §§ 3001 et seq., 3100 et seq., 3201 et seq., or 3451 et seq.] or chapter 106 of title 10 [10 USCS §§ 2131 et seq.], at a rate equal to at least three-quarters of that required of a full-time student. In carrying out this section, the Secretary, wherever feasible, shall give priority to veterans with disabilities rated at 30 percent or more for purposes of chapter 11 of this title [38 USCS §§ 1101 et seq.]. In the event an individual ceases to be at least a three-quarter-time student before completing such agreement, the individual may, with the approval of the Secretary, be permitted to complete such agreement.

(c) The Secretary shall determine the number of individuals whose services the Department of Veterans Affairs can effectively utilize and the types of services that such individuals may be required to perform, on the basis of a survey, which the Secretary shall conduct annually, of each Department of Veterans Affairs' regional office in order to determine the numbers of individuals whose services can effectively be utilized during an enrollment period in each geographical area where Department of Veterans Affairs activities are conducted, and shall determine which individuals shall be offered agreements under this section in accordance with regulations which the Secretary shall prescribe, including as criteria (1) the need of the individual to augment the individual's educational assistance or subsistence allowance; (2) the availability to the individual of transportation to the place where the individual's services are to be performed; (3) the motivation of the individual; and (4) in the case of a disabled veteran pursuing a course of vocational rehabilitation under chapter 31 of this title [38 USCS §§ 3100 et seq.], the compatibility of the work assignment to the veteran's physical condition.

(d) While performing the services authorized by this section, individuals shall be deemed employees of the United States for the purposes of the benefits of chapter 81 of title 5 [5 USCS §§ 8101 et seq.] but not for the purposes of laws administered by the Office of Personnel Management.

(e) (1) Subject to paragraph (2) of this subsection, the Secretary may, notwithstanding any other provision of law, enter into an agreement with an individual under this section, or a modification of such an agreement, whereby the individual agrees to perform services of the kind described in clauses (A) through (E) of subsection (a)(1) of this
section and agrees that the Secretary shall, in lieu of paying the work-study allowance payable for such services, as provided in subsection (a) of this section, deduct the amount of the allowance from the amount which the individual has been determined to be indebted to the United States by virtue of such individual's participation in a benefits program under this chapter, chapter 30, 31, 32, 35, or 36 of this title [38 USCS §§ 3451 et seq., 3001 et seq., 3100 et seq., 3201 et seq., 3500 et seq., or 3670 et seq.], or chapter 106 of title 10 [10 USCS §§ 2131 et seq.] (other than an indebtedness arising from a refund penalty imposed under section 2135 [10 USCS § 16135] of such title).

(2) (A) Subject to subparagraph (B) of this paragraph, the provisions of this section (other than those provisions which are determined by the Secretary to be inapplicable to an agreement under this subsection) shall apply to any agreement authorized under paragraph (1) of this subsection.

(B) For the purposes of this subsection, the Secretary may--
(i) waive, in whole or in part, the limitations in subsection (a) of this section concerning the number of hours and periods during which services can be performed by the individual and the provisions of subsection (b) of this section requiring the individual's pursuit of a program of rehabilitation, education, or training;
(ii) in accordance with such terms and conditions as may be specified in the agreement under this subsection, waive or defer charging interest and administrative costs pursuant to section 5315 of this title [38 USCS § 5315] on the indebtedness to be satisfied by performance of the agreement; and
(iii) notwithstanding the indebtedness offset provisions of section 5314 of this title [38 USCS § 5314], waive or defer until the termination of an agreement under this subsection the deduction of all or any portion of the amount of indebtedness covered by the agreement from future payments to the individual as described in section 5314 of this title [38 USCS § 5314].

(3) (A) Subject to the provisions of subparagraphs (B) and (C) of this paragraph, an agreement authorized under this subsection shall terminate in accordance with the provisions of this section and the terms and conditions of the agreement which are consistent with this subsection.

(B) In no event shall an agreement under this subsection continue in force after the total amount of the individual's indebtedness described in paragraph (1) of this subsection has been recouped, waived, or otherwise liquidated.

(C) Notwithstanding the provisions of subparagraphs (A) and (B) of this paragraph, if the Secretary finds that an individual was without fault and was allowed to perform services described in the agreement after its termination, the Secretary shall, as reasonable compensation therefor, pay the individual at the applicable hourly minimum wage rate for such services as the Secretary determines were satisfactorily performed.

(4) The Secretary shall promulgate regulations to carry out this subsection.

Explanatory notes:
The bracketed reference “10 USCS § 16135” has been inserted on the authority of § 1663(b)(2) of Act Oct. 5, 1994, P. L. 103-337, which redesignated 10 USCS § 2135 as 10 USCS § 16135.

Amendments:
1974. Act Dec. 3, 1974 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), in subsec. (a), substituted "Such work-study allowance shall be paid in the amount of $625 in return for such veteran-student's agreement to perform services, during or between periods of enrollment, aggregating two hundred and fifty hours" for "Such work-study allowance shall be paid in advance in the amount of $250 in return for such veteran-student's agreement to perform services, during or between periods of enrollment, aggregating one hundred hours"., and substituted "An agreement may be entered into for the performance of services for periods of less than two hundred and fifty hours, in which case the amount of the work-study allowance to be paid shall bear the same ratio to the number of hours of work agreed to be performed as $625 bears to two hundred and fifty hours."; and in subsec. (c), deleted "(not to exceed eight hundred man-years or their equivalent in man-hours during any fiscal year)" following "effectively utilize".

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (b), inserted "In the event the veteran ceases to be a full-time student before completing such agreement, the veteran may, with the approval of the Administrator, be permitted to complete such agreement."; and in subsec. (c), substituted "the Administrator" for "he" wherever appearing and substituted "the veteran's" for "his" preceding "educational assistance" and "services".

1977. Act Nov. 23, 1977 (effective 10/1/1977, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), in subsec. (a), substituted "in an amount equal to either the amount of the hourly minimum wage in effect under section 6(a) of the Fair Labor Standards Act of 1938 times two hundred and fifty or $625, whichever is the higher," for "in the amount of $625", and substituted "An agreement may be entered into for the performance of services for periods of less than two hundred and fifty hours. An agreement may be entered into for the performance of services for periods of less than two hundred and fifty hours. The amount of the work-study allowance to be paid under any such agreement shall be determined by multiplying the number of hours of work performed by the veteran-student under such agreement times either the hourly minimum wage in effect under section 6(a) of the Fair Labor Standards Act of 1938 during the period the work is to be performed or $2.50, whichever is the higher. A veteran-student shall be paid in advance an amount equal to 40 per centum of the total amount of the work-study allowance agreed to be paid under the agreement in return for the veteran-student's agreement to perform the number of hours of work specified in the agreement." for "An agreement may be entered into for the performance of services for periods of less than two hundred and fifty hours, in which case the amount of the work-study allowance to be paid shall bear the same ratio to the number of hours of work agreed to be performed as $625 bears to two hundred and fifty hours. In the case of any agreement providing for the performance of services for one hundred hours or more, the veteran student shall be paid $250 in advance, and in the case of any agreement for the performance of services for less than one hundred hours, the amount of the advance payment shall bear the same ratio to the number of hours of work agreed to be performed as $625 bears to two hundred and fifty hours.".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(h) of such Act, which appears as 38 USCS § 3452 note), in subsec. (d), substituted "Office of Personnel Management" for "Civil Service Commission".


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1986. Act Oct. 28, 1986, in subsec. (b), substituted “rehabilitation, education, or training under chapter 30, 31, 32, or 34” for “education or training under chapters 31 and 34”.

1989. Act Dec. 18, 1989, (effective 5/1/90 and applicable to services performed on or after that date, as provided by § 405(e) of such Act, which appears as 10 USCS § 16136 note), substituted the section heading for one which read: “§ 1685. Veteran-student services”; in subsec. (a), designated the existing provisions as para. (1), in para. (1), as redesignated, substituted “Such work-study allowance shall be paid in an amount equal to the applicable hourly minimum wage times the number of hours worked during the applicable period, in return for such individual's agreement to perform services, during or between periods of enrollment, aggregating not more than a number of hours equal to 25 times the number of weeks in the semester or other applicable enrollment period,” for “Such work-study allowance shall be paid in an amount equal to either the amount of the hourly minimum wage in effect under section 6(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)) times two hundred and fifty or $625, whichever is the higher, in return for such veteran-student's agreement to perform services, during or between periods of enrollment, aggregating two hundred and fifty hours during a semester or other applicable enrollment period,”, deleted two sentences which read: “An agreement may be entered into the performance of services for periods of less than two hundred and fifty hours. The amount of the work-study allowance to be paid under any such agreement shall be determined by multiplying the number of hours of work performed by the veteran-student under such agreement times either the hourly minimum wage in effect under section 6(a) of the Fair Labor Standards Act of 1938 during the period the work is to be performed or $2.50, whichever is the higher.” preceding “An individual”, deleted “or” following “Title,”, deleted the period following “appropriate” and inserted “,”, inserted “Coast Guard, or National Guard”, in para. (2), inserted “and subsection (e) of this section,”; in subsec. (b), inserted “subject to the provisions of subsection (e) of this section,”; and added para. (2); in subsec. (b), substituted “subsection (a)(1)” for “subsection (a)”, “individuals who are pursuing programs of rehabilitation, education, or training under chapter 30, 31, 32, or 34 of this title or chapter 106 of title 10, at a rate equal to at least three-quarters of that required of a full-time student.” for “of veteran-students who are pursuing full-time programs of rehabilitation, education, or training under chapters 30, 31, 32, or 34 of this title or chapter 106 of title 10, at a rate equal to at least three-quarters of that required of a full-time student.” for “the veteran ceases to be a full-time student before completing such agreement, the veteran”, and “percent” for “per centum”; in subsec. (c), substituted “individuals” for “veteran-students” in two places, substituted “individuals” for “veterans”, in para. (1)-(3), substituted “individual” for “veteran” and “individuals” for “veterans”, wherever appearing; and in subsec. (d), substituted “individuals” for “veteran-students”.

Such Act further, throughout the entire section, substituted “Secretary” for “Administrator”, and “Department of Veterans Affairs” for “Veterans’ Administration”, wherever appearing.

1991. Act March 22, 1991, in subsec. (a), in para. (1), redesignated former cls. (1)-(5) as cls. (A)-(E), and in cl. (E) as redesignated, inserted “Coast Guard, or National Guard”, in para. (2), inserted “and subsection (e) of this section”; in subsec. (b), inserted “subject to the provisions of subsection (e) of this section,”; and added subsec. (e).

Act May 7, 1991, amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1685, as 38 USCS § 3485, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1992. Act Oct. 29, 1992, in subsec. (a), in para. (1), substituted “40 percent” for “40 per centum”, and inserted “(but not more than an amount equal to 50 times the applicable hourly minimum wage)".
1998. Act Nov. 11, 1998 (applicable with respect to agreements entered into under this section on or after 1/1/99, as provided by § 202(b) of such Act, which appears as a note to this section), in subsec. (a)(1), substituted "An individual may elect, in a manner prescribed by the Secretary, to be paid in advance" for "An individual shall be paid in advance".


Act Dec. 27, 2001 (applicable as provided by § 107(b) of such Act, which appears as a note to this section), substituted subsec. (a) for one which read:

"(a)(1) Individuals utilized under the authority of subsection (b) of this section shall be paid an additional educational assistance allowance (hereinafter referred to as 'work-study allowance'). Such work-study allowance shall be paid in an amount equal to the applicable hourly minimum wage times the number of hours worked during the applicable period, in return for such individual's agreement to perform services, during or between periods of enrollment, aggregating not more than a number of hours equal to 25 times the number of weeks in the semester or other applicable enrollment period, required in connection with (A) the outreach program under subchapter II of chapter 77 of this title as carried out under the supervision of a Department of Veterans Affairs employee, (B) the preparation and processing of necessary papers and other documents at educational institutions or regional offices or facilities of the Department of Veterans Affairs, (C) the provision of hospital and domiciliary care and medical treatment under chapter 17 of this Title, (D) any other activity of the Department of Veterans Affairs as the Secretary shall determine appropriate, or (E) in the case of an individual who is receiving educational assistance under chapter 106 of title 10, activities relating to the administration of such chapter at Department of Defense, Coast Guard, or National Guard facilities. An individual may elect, in a manner prescribed by the Secretary, to be paid in advance an amount equal to 40 percent of the total amount of the work-study allowance agreed to be paid under the agreement in return for the individual's agreement to perform the number of hours of work specified in the agreement (but not more than an amount equal to 50 times the applicable hourly minimum wage).

"(2) For the purposes of paragraph (1) of this subsection and subsection (e) of this section, the term applicable hourly minimum wage means (A) the hourly minimum wage under section 6(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)), or (B) the hourly minimum wage under comparable law of the State in which the services are to be performed, if such wage is higher than the wage referred to in clause (A) and the Secretary has made a determination to pay such higher wage."

2002. Act Dec. 6, 2002, in subsec. (a)(4), in subparas. (A), (C), and (F), substituted "the period preceding December 27, 2006" for "the five-year period beginning on the date of the enactment of the Veterans Education and Benefits Expansion Act of 2001".

2003. Act Dec. 16, 2003 (effective 90 days after enactment, as provided by § 306(h)(2) of such Act, which appears as a note to this section), in subsec. (e)(1), deleted "(other than an education loan under subchapter III)" following "or 36".


Other provisions:

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Application of Nov. 11, 1998 amendment. Act Nov. 11, 1998, P. L. 105-368, Title II, Subtitle A, § 202(b), 112 Stat. 3326, provides: "The amendment made by subsection (a) [amending subsec. (a)(1) of this section] shall apply with respect to agreements entered into under section 3485 of title 38, United States Code, on or after January 1, 1999.".
Application of Dec. 27, 2001 amendment. Act Dec. 27, 2001, P. L. 107-103, Title I, § 107(b), 115 Stat. 984, provides: "The amendment made by this section [amending subsec. (a) of this section] shall apply with respect to agreements entered into under section 3485 of title 38, United States Code, on or after the date of the enactment of this Act."

Effective date of Dec. 16, 2003 amendments. Act Dec. 16, 2003, P. L. 108-183, Title III, § 306(h)(2), 117 Stat. 2661, provides: "The amendments made by subsections (e), (f), and (g) [repealing 38 USCS §§ 3698 and 3699, and amending 38 USCS §§ 3485(e)(1), 3512, and the chapter analysis preceding § 3670] shall take effect 90 days after the date of the enactment of this Act."

Cross References
This section is referred to in 10 USCS § 16136; 38 USCS §§ 1712A, 3034, 3104, 3241, 3537, 5314, 5315, 7722

Research Guide

Am Jur:

45A Am Jur 2d, Job Discrimination §§ 40-104
77 Am Jur 2d, Veterans and Veterans' Laws § 135

1. Generally
2. Relationship with other laws
3. Employment activities

1. Generally
Work-study students must work for Veterans' Administration [now Department of Veterans Affairs], under direct supervision and control of Veterans' Administration [now Department of Veterans Affairs] employee, but may be assigned to assist in outreach services. VA GCO 18-75

2. Relationship with other laws
Congress never intended that allowances paid to veterans under work-study program should be considered wages for purposes of Dual Compensation Act (5 USCS § 5532). VA GCO 3-75

3. Employment activities
Work-study veteran-student may not be used to provide transportation to school for service-disabled veteran training under provisions of 38 USCS §§ 1500 et seq [now 38 USCS §§ 3100 et seq.]. VA GCO 12-76

[§ 3486] [§ 1686. Repealed]
The bracketed section number "3486" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.


[§ 3487] [§ 1687. Repealed]
The bracketed section number "3487" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

SUBCHAPTER V. SPECIAL ASSISTANCE FOR THE EDUCATIONALLY DISADVANTAGED

§ 3490. Purpose

It is the purpose of this subchapter [38 USCS §§ 3490 et seq.] (1) to encourage and assist veterans who have academic deficiencies to attain a high school education or its equivalent and to qualify for and pursue courses of higher education, (2) to assist eligible veterans to pursue postsecondary education through tutorial assistance where required, and (3) to encourage educational institutions to develop programs which provide special tutorial, remedial, preparatory, or other educational or supplementary assistance to such veterans.

Amendments:


Code of Federal Regulations

Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18

Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a

Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

§ 3491. Elementary and secondary education and preparatory educational assistance

(a) In the case of any eligible veteran who--
(1) has not received a secondary school diploma (or an equivalency certificate), or
(2) is not on active duty and who, in order to pursue a program of education for which the veteran would otherwise be eligible, needs refresher courses, deficiency courses, or other preparatory or special educational assistance to qualify for admission to an appropriate educational institution,

the Secretary may, without regard to so much of the provisions of section 3471 of this title [38 USCS § 3471] as prohibit the enrollment of an eligible veteran in a program of education in which the veteran is "already qualified", approve the enrollment of such
veteran in an appropriate course or courses or other special educational assistance program.

(b) (1) The Secretary shall pay to an eligible veteran pursuing a course or courses or program pursuant to subsection (a)(2) of this section, an educational assistance allowance as provided in sections 3481 and 3482(a) or (b) of this title [38 USCS § 3481 and 3482(a) or (b)].

(2) The Secretary shall pay to an eligible veteran described in subsection (a)(1) of this section who is pursuing a course or courses or program under this subchapter [38 USCS §§ 3490 et seq.] for the purpose of attaining a secondary school diploma (or an equivalency certificate) an educational assistance allowance (A) at the rate of established charges for tuition and fees required of similarly circumstanced nonveterans enrolled in the same course, courses, or program, or (B) at the institutional full-time rate provided in section 3482(a) of this title [38 USCS § 3482(a)], whichever is the lesser.

(c) The provisions of section 3473(d)(1) of this title [38 USCS § 3473(d)(1)] relating to the disapproval of enrollment in certain courses, shall be applicable to the enrollment of an eligible veteran who, while serving on active duty, enrolls in one or more courses under this subchapter [38 USCS §§ 3490 et seq.] for the purpose of attaining a secondary school diploma (or an equivalency certificate).

References in text:

Amendments:
1972. Act Oct. 24, 1972, substituted new subsec. (b) for one which read: "The Administrator shall pay to an eligible veteran pursuing a course or courses or program pursuant to subsection (a) of this section, an educational assistance allowance as provided in sections 1681 and 1682 (a) or (b) of this title; except that no enrollment in adult evening secondary school courses shall be approved in excess of half-time training as defined pursuant to section 1684 of this title."

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), in para. (1), substituted "the veteran's" for "his", and in para. (2) and the concluding matter, substituted "the veteran" for "he".

1980. Act Oct. 17, 1980, in subsec. (a), in the preliminary matter, deleted "not on active duty" following "veteran", in para. (1), deleted "at the time of the veteran's discharge or release from active duty" preceding ", or", and in para. (2), inserted "is not on active duty and who,"; redesignated subsec. (b) as subsec. (b)(1); in subsec. (b)(1), as so redesignated, inserted "(2)"; added subsec. (b)(2); and added subsec. (c).


Act Oct. 14, 1982, in subsec. (c), substituted "section 1673(d)(1)" for "section 1673(d)".

1989. Act Dec. 18, 1989, in subsecs. (a) and (b), substituted "Secretary" for "Administrator", wherever appearing.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1691, as 38 USCS § 3491, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).
Other provisions:

Effective date and application of amendments made by Act Oct. 17, 1980. Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(c), 94 Stat. 2218, which appears as 38 USCS § 3452 note, provided that the amendments made to this section by Act Oct. 17, 1980, are effective on Oct. 1, 1980; however, subsec. (a)(2) of this section, as added by Act Oct. 17, 1980, shall not apply to any person receiving educational assistance under chapter 34 of title 38 (38 USCS §§ 3451 et seq.) on Oct. 1, 1980, for the pursuit of a program of education, as defined in 38 USCS § 3452(b), in which such person is enrolled on that date, for as long as such person continuously thereafter is so enrolled and meets the requirements of eligibility for such assistance for pursuit of such program.

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Cross References

This section is referred to in 38 USCS §§ 3231, 3241, 3462, 3473, 3533, 3680

§ 3492. Tutorial assistance

(a) In the case of any eligible veteran who--

(1) is enrolled in and pursuing a postsecondary course of education on a half-time or more basis at an educational institution; and

(2) has a deficiency in a subject required as a part of, or which is prerequisite to, or which is indispensable to the satisfactory pursuit of, an approved program of education,

the Secretary may approve individualized tutorial assistance for such veteran if such assistance is necessary for the veteran to complete such program successfully.

(b) The Secretary shall pay to an eligible veteran receiving tutorial assistance pursuant to subsection (a) of this section, in addition to the educational assistance allowance provided in section 3482 of this title [38 USCS § 3482], the cost of such tutorial assistance in an amount not to exceed $100 per month, for a maximum of twelve months, or until a maximum of $1,200 is utilized, upon certification by the educational institution that--

(1) the individualized tutorial assistance is essential to correct a deficiency of the eligible veteran in a subject required as a part of, or which is prerequisite to, or which is indispensable to the satisfactory pursuit of, an approved program of education;

(2) the tutor chosen to perform such assistance is qualified and is not the eligible veteran's parent, spouse, child (whether or not married or over eighteen years of age), brother, or sister; and

(3) the charges for such assistance do not exceed the customary charges for such tutorial assistance.

Amendments:

1972. Act Oct. 24, 1972, in subsec. (a)(2), deleted "marked" preceding "deficiency"; in subsec. (b), in the introductory matter, inserted "," following "month" and inserted "or until a maximum of $450 is utilized," and in para. (1), deleted "marked" preceding "deficiency".

1974. Act Dec. 3, 1974 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), in subsec. (b), introductory matter, substituted "$60" for "$50", "twelve months" for "nine months", and "$720" for "$450".)

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1976. Act Oct. 15, 1976 (effective 10/1/76, as provided by § 703(a) of such Act, which appears as 38 USCS § 3693 note), in subsec. (b), introductory matter, substituted "$65" for "$60" and "$780" for "$720".

1977. Act Nov. 23, 1977 (effective 10/1/77, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), in subsec. (b), introductory matter, substituted "$69" for "$65" and "$828" for "$780".

1980. Act Oct. 17, 1980, §§ 201(5), 312 (effective 10/1/80, as provided by § 802(b)(1), (c)(1) of such Act, which appear as 38 USCS §§ 3452, 3482 notes, respectively), in subsec. (b), in the preliminary matter, substituted "$72" and "$869" for "$69" and "$828", respectively, and in para. (2), inserted "and is not the eligible veteran's parent, spouse, child (whether or not married or over eighteen years of age), brother, or sister".

Act Oct. 17, 1980, § 211(5), (effective 1/1/81, as provided by § 802(b)(2) of such Act, which appears as 38 USCS § 3452 note), in subsec. (b), preliminary matter, as amended by Act Oct. 17, 1980, § 201(5), substituted "$76" and "$911" for "$72" and "$869", respectively.

1984. Act Oct. 24, 1984 (effective 10/1/78, as provided by § 205 of such Act, which appears as 38 USCS § 3108 note), in subsec. (b), in the introductory matter, substituted "$84" for "$76" and substituted "$1,008" for "$911".

1988. Act Nov. 18, 1988 substituted the section heading for one which read: "1692. Special supplementary assistance"; and, in subsec. (b), substituted "$100" for "$84" and "$1,200" for "$1,008".

1989. Act Dec. 18, 1989, in subsecs. (a) and (b), substituted "Secretary" for "Administrator".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1692, as 38 USCS § 3492, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Cross References
This section is referred to in 38 USCS §§ 3019, 3234, 3533

§ 3493. Effect on educational entitlement

The educational assistance allowance or cost of individualized tutorial assistance authorized by this subchapter [38 USCS §§ 3490 et seq.] shall be paid without charge to any period of entitlement the veteran may have earned pursuant to section 3461(a) of this title [38 USCS § 3461(a)].

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1693, as 38 USCS § 3493, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

[ VI. REPEALED]

[§§ 3495-3498] [§ 1695-1698. Repealed]

[§§ 3495-3498] [§ 1695-1698. Repealed]

The bracketed section numbers "3495-3498" were inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

CHAPTER 35. SURVIVORS' AND DEPENDENTS' EDUCATIONAL ASSISTANCE

SUBCHAPTER I. DEFINITIONS
SUBCHAPTER II. ELIGIBILITY AND ENTITLEMENT
SUBCHAPTER III. PROGRAM OF EDUCATION
SUBCHAPTER IV. PAYMENTS TO ELIGIBLE PERSONS
SUBCHAPTER V. SPECIAL RESTORATIVE TRAINING
SUBCHAPTER VI. MISCELLANEOUS PROVISIONS
SUBCHAPTER VII. PHILIPPINE COMMONWEALTH ARMY AND PHILIPPINE SCOUTS

Explanatory notes:
The bracketed section numbers "3522", "3525", "3526", "3538", "3567", "3568" were inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

Amendments:

1966. Act March 3, 1966, P. L. 89-358, § 3(a)(10), 80 Stat. 21, amended the analysis of this chapter by deleting item 1726 which read: "1726. Institutions listed by Attorney General."; deleting items 1763-1768 which read:
"1763. Control by agencies of the United States.
"1764. Conflicting interests.
"1765. Reports by institutions.
"1766. Overpayments to eligible persons.
"1767. Examination of records.
"1768. False or misleading statements."); and deleting the Subchapter VII heading and items 1771-1778 which read:
*SUBCHAPTER VII--STATE APPROVING AGENCIES
"1771. Designation.
"1772. Approval of courses.
"1773. Cooperation.
"1774. Reimbursement of expenses.
"1775. Approval of accredited courses.
"1776. Approval of nonaccredited courses.
"1777. Notice of approval of courses.
"1778. Disapproval of courses.

Act Sept. 30, 1966, P. L. 89-613, § 2, 80 Stat. 862, amended the analysis of this chapter by adding the Subchapter VII heading and items 1765, 1766.


1970. Act March 26, 1970, P. L. 91-219, Title II, § 207(b), 84 Stat. 82, amended the analysis of this chapter by adding item 1763.

1972. Act Oct. 24, 1972, P. L. 92-540, Title IV, § 405, 86 Stat. 1091, amended the analysis of this chapter by deleting item 1722 which read: "1722. Change of program."; deleting item 1725 which read: "1725. Period of operation for approval."; and substituting items 1733-1736 for former items 1733-1737 which read:

"1733. Measurement of courses.
"1734. Overcharges by educational institutions.
"1735. Approval of courses.
"1736. Discontinuance of allowances.
"1737. Specialized vocational training courses.".


1991. Act Aug. 6, 1991, P. L. 102-83, § 5(b)(1), 105 Stat. 406, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


**SUBCHAPTER I. DEFINITIONS**

§ 3500. Purpose
§ 3501. Definitions

§ 3500. Purpose

The Congress hereby declares that the educational program established by this chapter [38 USCS §§ 3500 et seq.] is for the purpose of providing opportunities for education to children whose education would otherwise be impeded or interrupted by reason of the disability or death of a parent from a disease or injury incurred or aggravated in the Armed Forces after the beginning of the Spanish-American War, and for the purpose of aiding such children in attaining the educational status which they might normally have aspired to and obtained but for the disability or death of such parent. The Congress further declares that the educational program extended to the surviving spouses of veterans who died of service-connected disabilities and to spouses of veterans with a service-connected total disability permanent in nature is for the purpose of assisting them in preparing to support themselves and their families at a standard of living level which the veteran, but for the veteran's death or service disability, could have expected to provide for the veteran's family.

Effective date of section:

Act Oct. 23, 1968, P. L. 90-631, § 6(a), 82 Stat. 1335, provided that this section is effective on the first day of the second calendar month which begins after Oct. 23, 1968.

Amendments:

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), substituted "surviving spouses" for "widows", substituted "spouses" for "wives", and substituted "the veteran's" for "his" wherever appearing.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1700, as 38 USCS § 3500.

Code of Federal Regulations

Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18

Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a

Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 137

Appellant was not entitled to retroactive chapter 35 educational assistance benefits that were established to assist offspring in obtaining education that they might have achieved but for disability or death of veteran parent, since appellant's education was not impeded or interrupted...
§ 3501. Definitions

(a) For the purposes of this chapter [38 USCS §§ 3500 et seq.] and chapter 36 of this title [38 USCS §§ 3670 et seq.]--

(1) The term "eligible person" means--
   (A) a child of a person who--
       (i) died of a service-connected disability,
       (ii) has a total disability permanent in nature resulting from a service-connected disability, or who dies while a disability so evaluated was in existence, or
       (iii) at the time of application for benefits under this chapter [38 USCS §§ 3500 et seq.] is a member of the Armed Forces serving on active duty listed, pursuant to section 556 of title 37 [37 USCS § 556] and regulations issued thereunder, by the Secretary concerned in one or more of the following categories and has been so listed for a total of more than ninety days: (A) missing in action, (B) captured in line of duty by hostile force, or (C) forcibly detained or interned in line of duty by a foreign government or power,
   (B) the surviving spouse of any person who died of a service-connected disability,
   (C) the spouse of any member of the Armed Forces serving on active duty who, at the time of application for benefits under this chapter [38 USCS §§ 3500 et seq.] is listed, pursuant to section 556 of title 37 [37 USCS § 556] and regulations issued thereunder, by the Secretary concerned in one or more of the following categories and has been so listed for a total of more than ninety days: (i) missing in action (ii) captured in line of duty by a hostile force, or (iii) forcibly detained or interned in line of duty by a foreign government or power, or
   (D) (i) the spouse of any person who has a total disability permanent in nature resulting from a service-connected disability, or (ii) the surviving spouse of a veteran who died while a disability so evaluated was in existence, arising out of active military, naval, or air service after the beginning of the Spanish-American War, but only if such service did not terminate under dishonorable conditions. The standards and criteria for determining whether or not a disability arising out of such service is service connected shall be those applicable under chapter 11 of this title [38 USCS §§ 1101 et seq.].

(2) The term "child" includes individuals who are married and individuals who are above the age of twenty-three years.

(3) The term "duty with the Armed Forces" as used in section 3512 of this title [38 USCS § 3512] means (A) active duty, (B) active duty for training for a period of six or more consecutive months, or (C) active duty for training required by section 12103(d) of title 10 [10 USCS § 12103(d)].

(4) The term "guardian" includes a fiduciary legally appointed by a court of competent jurisdiction, or any other person who has been appointed by the Secretary under section 5502 of this title [38 USCS § 5502] to receive payment of benefits for the use and benefit of the eligible person.
(5) The term "program of education" means any curriculum or any combination of unit courses or subjects pursued at an educational institution which is generally accepted as necessary to fulfill the requirements for the attainment of a predetermined and identified educational, professional, or vocational objective. Such term also includes any preparatory course described in section 3002(3)(B) of this title [38 USCS § 3002(3)(B)]. Such term also includes licensing or certification tests, the successful completion of which demonstrates an individual's possession of the knowledge or skill required to enter into, maintain, or advance in employment in a predetermined and identified vocation or profession, provided such tests and the licensing or credentialing organizations or entities that offer such tests are approved by the Secretary in accordance with section 3689 of this title [38 USCS § 3689]. Such term also includes national tests for admission to institutions of higher learning or graduate schools (such as the Scholastic Aptitude Test (SAT), Law School Admission Test (LSAT), Graduate Record Exam (GRE), and Graduate Management Admission Test (GMAT)) and national tests providing an opportunity for course credit at institutions of higher learning (such as the Advanced Placement (AP) exam and College-Level Examination Program (CLEP)).

(6) The term "educational institution" means any public or private secondary school, vocational school, correspondence school, business school, junior college, teachers' college, college, normal school, professional school, university, or scientific or technical institution, or any other institution if it furnishes education at the secondary school level or above. Such term also includes any private entity (that meets such requirements as the Secretary may establish) that offers, either directly or under an agreement with another entity (that meets such requirements), a course or courses to fulfill requirements for the attainment of a license or certificate generally recognized as necessary to obtain, maintain, or advance in employment in a profession or vocation in a high technology occupation (as determined by the Secretary).

(7) The term "special restorative training" means training furnished under subchapter V of this chapter [38 USCS §§ 3540 et seq.].

(8) The term "total disability permanent in nature" means any disability rated total for the purposes of disability compensation which is based upon an impairment reasonably certain to continue throughout the life of the disabled person.

(9) The term "training establishment" means any establishment providing apprentice or other training on the job, including those under the supervision of a college or university or any State department of education, or any State apprenticeship agency, or any State board of vocational education, or any joint apprenticeship committee, or the Bureau of Apprenticeship and Training established pursuant to the Act of August 16, 1937, popularly known as the "National Apprenticeship Act" (29 U.S.C. 50 et seq.), or any agency of the Federal Government authorized to supervise such training.

(10) The term "institution of higher learning" means a college, university, or similar institution, including a technical or business school, offering postsecondary level academic instruction that leads to an associate or higher degree if the school is empowered by the appropriate State education authority under State law to grant an associate or higher degree. When there is no State law to authorize the granting of a degree, the school may be recognized as an institution of higher learning if it is accredited for degree programs by a recognized accrediting agency. Such term shall
also include a hospital offering educational programs at the postsecondary level without regard to whether the hospital grants a postsecondary degree. Such term shall also include an educational institution which is not located in a State, which offers a course leading to a standard college degree, or the equivalent, and which is recognized by the secretary of education (or comparable official) of the country or other jurisdiction in which the institution is located.

(11) The term "standard college degree means an associate or higher degree awarded by (A) an institution of higher learning that is accredited as a collegiate institution by a recognized regional or national accrediting agency; or (B) an institution of higher learning that is a "candidate" for accreditation as that term is used by the regional or national accrediting agencies; or (C) an institution of higher learning upon completion of a course which is accredited by an agency recognized to accredit specialized degree-level programs. For the purpose of this section, the accrediting agency must be one recognized by the Secretary of Education under the provisions of section 3675 of this title [38 USCS § 3675].

(b) If an eligible person has attained the person's majority and is under no known legal disability, all references in this chapter [38 USCS §§ 3500 et seq.] to "parent or guardian" shall refer to the eligible person.

(c) Any provision of this chapter [38 USCS §§ 3500 et seq.] which requires any action to be taken by or with respect to the parent or guardian of an eligible person who has not attained the person's majority, or who, having attained the person's majority, is under a legal disability, shall not apply when the Secretary determines that its application would not be in the best interest of the eligible person, would result in undue delay, or would not be administratively feasible. In such a case the Secretary, where necessary to protect the interest of the eligible person, may designate some other person (who may be the eligible person) as the person by or with respect to whom the action so required should be taken.

(d) No eligible person may be afforded educational assistance under this chapter [38 USCS §§ 3500 et seq.] unless such person was discharged or released after each period such person was on duty with the Armed Forces under conditions other than dishonorable, or while such person is on duty with the Armed Forces.

Explanatory notes:
A prior § 3501 was redesignated by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238. For similar provisions, see 38 USCS § 6101.

Amendments:
1959. Act Sept. 8, 1959, in subsecs. (a)(1) and (d), inserted "the Spanish-American War, ".

1960. Act Sept. 14, 1960, in subsec. (a)(1), substituted "the Korean conflict, or the induction period" for "or the Korean conflict", inserted "arising out of service during the Spanish-American War, World War I, World War II, or the Korean conflict", and inserted "The standards and criteria for determining whether or not a disability arising out of service during the induction period is service-connected shall be those applicable under chapter 11 of this title, except that the disability must (A) be shown to have directly resulted from, and the causative factor therefor must be shown to have arisen out of, the performance of active military, naval, or air service (but not including service described under section 106 of this title), or (B) have resulted (i) directly from armed conflict or (ii) from an injury or disease received while engaged in extrahazardous service (including such service under conditions
simulating war)."; added subsec. (a)(9); in subsec. (d), substituted "the Korean conflict, or the induction period" for "or the Korean conflict".

1964. Act July 7, 1964, in subsec. (a)(1), inserted "Such term also includes the child of a person who has a total disability permanent in nature resulting from a service-connected disability arising out of service as described in the first sentence hereof, or who died while a disability so evaluated was in existence."; added subsec. (a)(10); and in subsec. (d), substituted "disability or death" for "death" wherever appearing.

1965. Act Sept. 30, 1965, in subsec. (a)(1), substituted "The standards and criteria for determining whether or not a disability arising out of such service is service connected shall be those applicable under chapter 11 of this title." for "The standards and criteria for determining whether or not a disability arising out of service during the Spanish-American War, World War I, World War II, or the Korean conflict is service-connected shall be those applicable under chapter 11 of this title. The standards and criteria for determining whether or not a disability arising out of service during the induction period is service-connected shall be those applicable under chapter 11 of this title, except that the disability must (A) be shown to have directly resulted from, and the causative factor therefor must be shown to have arisen out of, the performance of active military, naval, or air service (but not including service described under section 106 of this title), or (B) have resulted (i) directly from armed conflict or (ii) from an injury or disease received while engaged in extrahazardous service (including such service under conditions simulating war)."

Act Nov. 8, 1965, in subsec. (a)(1), substituted

"The term 'eligible person' means a child of a person who--

"(A) died of a service-connected disability, or

"(B) has a total disability permanent in nature resulting from a service-connected disability, or who died while a disability so evaluated was in existence,

arising out of active military, naval, or air service after the beginning of the Spanish-American War and prior to the end of the induction period, but only if such service did not terminate under dishonorable conditions."

for "The term 'eligible person' means a child of a person who died of a service-connected disability arising out of active military, naval, or air service during the Spanish-American War, World War I, World War II, the Korean conflict, or the induction period, but only if such service did not terminate under dishonorable conditions. Such term also includes the child of a person who has a total disability permanent in nature resulting from a service-connected disability arising out of service as described in the first sentence hereof, or who died while a disability so evaluated was in existence."; in subsec. (a)(9), deleted "(A) the period beginning September 16, 1940, and ending December 6, 1941, and the period beginning January 1, 1947, and ending June 26, 1950, and (B)" following "means"; in subsec. (d), substituted "after the beginning of the Spanish-American War and prior to the end of the induction period," for "during the Spanish-American War, World War I, World War II, the Korean conflict, or the induction period.".

1966. Act March 3, 1966, in subsec. (a), in para. (1), in the concluding matter, deleted "and prior to the end of the induction period" following "Spanish-American War", in para. (3)(C), substituted "511(d) of title 10" for "1013(c)(1) of title 50", deleted paras. (8) and (9) which read:

"(8) The term 'State' includes the Canal Zone.

"(9) The term 'induction period' means the period beginning on February 1, 1955, and ending on the day before the first day thereafter on which individuals (other than individuals liable for induction by reason of a prior deferment) are no longer liable for
induction for training and service into the Armed Forces under the Universal Military Training and Service Act.

redesignated para. (10) as para. (8); and, in subsec. (d), deleted "and prior to the end of the induction period" following "Spanish-American War".

1968. Act Oct. 23, 1968 (effective 12/1/68, as provided by § 6(a) of such Act, which appears as 38 USCS § 3500), in subsec. (a), substituted para. (1) for one which read:

"The term 'eligible person' means a child of a person who--

"(A) died of a service-connected disability, or

"(B) has a total disability permanent in nature resulting from a service-connected disability, or who died while a disability so evaluated was in existence, arising out of active military, naval, or air service after the beginning of the Spanish-American War, but only if such service did not terminate under dishonorable conditions. The standards and criteria for determining whether or not a disability arising out of such service is service connected shall be those applicable under chapter 11 of this title."

and substituted subsec. (d) for one which read: "The Congress hereby declares that the educational program established by this chapter is for the purpose of providing opportunities for education to children whose education would otherwise be impeded or interrupted by reason of the disability or death of a parent from a disease or injury incurred or aggravated in the Armed Forces after the beginning of the Spanish-American War, and for the purpose of aiding such children in attaining the education status which they might normally have aspired to and obtained but for the disability or death of such parent.".


1970. Act Dec. 24, 1970, in subsec. (a)(1), in subpara. (A)(i), deleted "or" following "disability,"; in subpara. (A)(ii), inserted "or" following "existence,"; added subpara. (A)(iii), in subpara. (B), deleted "or" following "disability,"; redesignated subpara. (C) as subpara. (D), and added new subpara. (C).

1972. Act Oct. 24, 1972, substituted new subsec. (a)(6) for one which read: "The term 'educational institution' means any public or private secondary school, vocational school, business school, junior college, teachers' college, college, normal school, professional school, university, or scientific or technical institution, or any other institution if it furnishes education at the secondary school level or above."

1974. Act May 31, 1974 (effective 7/1/74, as provided by § 401 of such Act, which appears as 38 USCS § 1114 note), substituted new subsec. (a)(4) for one which read: "The term 'guardian' includes a fiduciary legally appointed by a court of competent jurisdiction, or any person who is determined by the Administrator in accordance with section 3202 of this title to be otherwise legally vested with the care of the eligible person."

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a)(1), in subpara. (B), substituted "surviving spouse" for "widow", in subpara. (C), substituted "spouse" for "wife", and in subpara. (D), substituted "spouse" and "surviving spouse" for "wife" and "widow", respectively; added, subsec. (a)(10), (11); in subsec. (b), substituted "the person's" for "his" and deleted "himself" following "the eligible person"; in subsec. (c), substituted "such person's" for "his" wherever appearing; and in subsec. (d), substituted "such person" for "he" wherever appearing.

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1), (h) of such Act, which appears as 38 USCS § 3452 note), in subsec. (a), in the preliminary matter, inserted "and chapter 36 of this title", in para. (9), substituted "The" for "For the purposes of this chapter and chapter 36 of this title, the", in para. (10), substituted "The" for "For the purposes of this title".
chapter and chapter 36 of this title, the" and inserted "Such term shall also include an educational institution which is not located in a State, which offers a course leading to a standard college degree, or the equivalent, and which is recognized by the secretary of education (or comparable official) of the country or other jurisdiction in which the institution is located."


1991. Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1701, as 38 USCS § 3501, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


2000. Act Nov. 1, 2000, in subsec. (a)(5), added the sentence beginning "Such term also includes any . . .".

Section 122(a) of such Act (effective 3/1/01 and applicable with respect to licensing and certification tests approved on or after such date, as provided by § 122(d) of such Act, which appears as 38 USCS § 3032 note), in subsec. (a)(5), added the sentence beginning "Such term also includes licensing or . . .".


Such Act further (applicable as provided by § 110(b) of such Act, which appears as 38 USCS § 3452 note), in subsec. (a)(6), added the sentence beginning "Such term also includes . . .".


Other provisions:

Eligible person. Act Sept. 14, 1960, P. L. 86-785, § 5, 74 Stat. 1024; Oct. 15, 1962, P. L. 87-815, § 2(b), 76 Stat. 927, formerly classified as a note to this section, was repealed by Act June 11, 1969, P. L. 91-24, § 14(c), 83 Stat. 35, except as to any indebtedness which may be due the Government as the result of any benefits granted under § 5. This note contained a savings clause which granted five years of educational training to certain children of veterans dying of disabilities incurred subsequent to the Korean War.

Termination of eligibility periods. For termination of eligibility period for a wife or widow, or an eligible person eight years from Oct. 24, 1972, see note containing Act Oct. 24, 1972, § 604, located at 38 USCS § 3512.

Cross References

Sentencing Guidelines for the United States Courts, 18 USCS Appx § 2B1.1

This section is referred to in 5 USCS § 5924; 38 USCS §§ 3511, 3512, 3540, 3563, 3565, 3686, 3687, 7721
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Am Jur:
77 Am Jur 2d, Veterans and Veterans’ Laws § 137

Law Review Articles:
Benefits for Conscientious Objectors. 19 Catholic Lawyer 62, Winter 1973
Constitutional Law--Due Process--Conscientious Objectors Entitled to Same Veterans Educational Benefits Received By Regular Servicemen. 6 Creighton L Rev 393, 1972-73
Constitutional Law--Equal Protection--Veteran's Educational Benefits for Conscientious Objectors. 8 Suffolk Univ L Rev 1239, Summer 1974

Veteran's daughter was entitled to DEA benefits since she met statute's definition of child, veteran's hearing disability was permanent and total, and was service-connected since, despite fact that part of rating was attributable to pre-existing, non-service-related condition, disability would not have been rated as total except for veteran's service-connected disability. Kimberlin v Brown (1993) 5 Vet App 174

Appellant was not entitled to dependents' educational assistance under 38 USCS § 3501 where veteran died in 1988, service connection for veteran's cause of death was retroactively granted as result of change in law in 1994, and appellant completed college education in 1992. Pfau v West (1999) 12 Vet App 515, 1999 US App Vet Claims LEXIS 824

SUBCHAPTER II. ELIGIBILITY AND ENTITLEMENT

§ 3510. Eligibility and entitlement generally
§ 3511. Duration of educational assistance
§ 3512. Periods of eligibility
§ 3513. Application
§ 3514. Processing of applications

§ 3510. Eligibility and entitlement generally

Each eligible person shall, subject to the provisions of this chapter [38 USCS §§ 3500 et seq.], be entitled to receive educational assistance.

Amendments:

Code of Federal Regulations

Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18
Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a
Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
§ 3511. Duration of educational assistance

(a) (1) Each eligible person shall be entitled to educational assistance under this chapter [38 USCS §§ 3500 et seq.] for a period not in excess of 45 months (or to the equivalent thereof in part-time training). In no event may the aggregate educational assistance afforded to a spouse made eligible under both sections 3501(a)(1)(D)(i) and 3501(a)(1)(D)(ii) of this title [38 USCS §§ 3501(a)(1)(D)(i) and 3501(a)(1)(D)(ii)] exceed 45 months.

(2) (A) Notwithstanding any other provision of this chapter [38 USCS §§ 3500 et seq.] or chapter 36 of this title [38 USCS §§ 3670 et seq.], any payment of an educational assistance allowance described in subparagraph (B) of this paragraph shall not--

(i) be charged against the entitlement of any individual under this chapter [38 USCS §§ 3500 et seq.]; or

(ii) be counted toward the aggregate period for which section 3695 of this title [38 USCS § 3695] limits an individual's receipt of assistance.

(B) The payment of the educational assistance allowance referred to in subparagraph (A) of this paragraph is the payment of such an allowance to an individual for pursuit of a course or courses under this chapter if the Secretary finds that the individual--

(i) had to discontinue such course pursuit as a result of being ordered to serve on active duty under section 688, 12301(a), 12301(d), 12301(g), 12302, or 12304 of title 10 [10 USCS § 688, 12301(a), 12301(d), 12301(g), 12302, or 12304]; and

(ii) failed to receive credit or training time toward completion of the individual's approved educational, professional, or vocational objective as a result of having to discontinue, as described in clause (i) of this subparagraph, his or her course pursuit.

(C) The period for which, by reason of this subsection, an educational assistance allowance is not charged against entitlement or counted toward the applicable aggregate period under section 3695 of this title [38 USCS § 3695] shall not exceed the portion of the period of enrollment in the course or courses for which the individual failed to receive credit or with respect to which the individual lost training time, as determined under subparagraph (B)(ii) of this paragraph.

(b) If any eligible person pursuing a program of education, or of special restorative training, under this chapter [38 USCS §§ 3500 et seq.] ceases to be an "eligible person" because--

(1) the parent or spouse from whom eligibility is derived is found no longer to have a "total disability permanent in nature", as defined in section 3501(a)(8) of this title [38 USCS § 3501(a)(8)],
(2) the parent or spouse from whom eligibility is derived based upon the provisions of section 3501(a)(1)(A)(iii) or 3501(a)(1)(C) of this title [38 USCS § 3501(a)(1)(A)(iii) or 3501(a)(1)(C)] is no longer listed in one of the categories specified therein, or
(3) the spouse, as an eligible person under section 3501(a)(1)(D) of this title [38 USCS § 3501(a)(1)(D)], is divorced, without fault on such person's part, from the person upon whose disability such person's eligibility is based,

then such eligible person (if such person has sufficient remaining entitlement) may, nevertheless, be afforded educational assistance under this chapter [38 USCS §§ 3500 et seq.] until the end of the quarter or semester for which enrolled if the educational institution in which such person is enrolled is operated on a quarter or semester system, or if the educational institution is not so operated until the end of the course, or until 12 weeks have expired, whichever first occurs.

(c) Any entitlement used by an eligible person as a result of eligibility under section 3501(a)(1)(A)(iii), 3501(a)(1)(C), or 3501(a)(1)(D)(i) of this title [38 USCS § 3501(a)(1)(A)(iii), 3501(a)(1)(C), or 3501(a)(1)(D)(i)] shall be deducted from any entitlement to which such person may subsequently be entitled under this chapter [38 USCS §§ 3500 et seq.].

Explanatory notes:
The bracketed reference "10 USCS §§ 12301(a), (d), (g), 12302, 12304, 688" has been inserted on authority of Act Oct. 5, 1994, P. L. 103-337, § 1662(e)(2), 108 Stat. 2992, which transferred 10 USCS §§ 672, 673, and 673b to 10 USCS §§ 12301, 12302, and 12304, respectively.

Amendments:
1966. Act March 3, 1966, in subsec. (b), substituted "34" for "33" and inserted "or under chapter 33 of this title as in effect before February 1, 1965".
1968. Act Oct. 23, 1968 (effective 12/1/68, as provided by § 6(a) of such Act, which appears as 38 USCS § 3500 note), substituted subsec. (b) for former subssecs. (b)-(d), which read:

"(b) The period of entitlement of an eligible person under this chapter shall be reduced by a period equivalent to any period of education or training received by him under chapter 31 or 34 of this title or under chapter 33 of this title as in effect before February 1, 1965.

"(c) If an eligible person is entitled to educational assistance under this chapter and also to vocational rehabilitation under chapter 31 of this title, he must elect whether he will receive educational assistance or vocational rehabilitation. If an eligible person is entitled to educational assistance under this chapter and is not entitled to such vocational rehabilitation, but after beginning his program of education or special restorative training becomes entitled (as determined by the Administrator) to such vocational rehabilitation, he must elect whether to continue to receive educational assistance or whether to receive such vocational rehabilitation. If he elects to receive vocational rehabilitation, the program of education or special restorative training pursued under this chapter shall be utilized to the fullest extent practicable in determining the character and duration of vocational rehabilitation to be furnished him.

"(d) If any child pursuing a program of education, or of specialized restorative training, under this chapter ceases to be an 'eligible person' because the parent from whom eligibility is derived is found to no longer have a 'total disability permanent in nature', as defined in section 1701(a)(10) of this title, then such child (if he has sufficient remaining entitlement)
may, nevertheless, be afforded educational assistance under this chapter until the end of a
quarter or semester for which enrolled if the educational institution in which he is enrolled is
operated on a quarter or semester system, or if the educational institution is not so operated
until the end of the course, or until nine weeks have expired, whichever first occurs.”.

1701(a)(10)”.

redesignated para. (2) as para. (3), added new para. (2), in para. (3), as so redesignated,
substituted “1701(a)(1)(D)” for “1701(a)(1)(C)”.

1976. Act Oct. 15, 1976, § 303 (effective 10/1/76, as provided by § 703(a) of such Act, which
appears as 38 USCS § 3693 note), in subsec. (a), substituted “45” for “thirty-six”; and in
subsec. (b), concluding matter, substituted “12” for “nine”.

Such Act further (effective 10/15/76, as provided by § 703(b) of such Act, which appears as
38 USCS § 3693 note), in subsec. (b), in para. (3), substituted “the spouse” for “she” and
substituted “such person’s” for “her” wherever appearing, in the concluding matter,
substituted “such person” for “he or she” wherever appearing.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1711, as 38 USCS §
3511, and amended the references in this section to reflect the redesignations made by § 5(a)
of such Act (see Table III preceding 38 USCS § 101).

Act Oct. 10, 1991 redesignated subsec. (a) as subsec. (a)(1), and added para. (2).

2001. Act Dec. 27, 2001 (effective as of 9/11/2001, as provided by § 103(e) of such Act,
which appears as 38 USCS § 3013 note), in subsec. (a)(2)(B)(i), substituted “to serve on
active duty under section 688, 12301(a), 12301(d), 12301(g), 12302, or 12304 of title 10,” for
“, in connection with the Persian Gulf War, to serve on active duty under section 672(a), (d),
or (g), 673, 673b, or 688 of title 10;”.

Such Act further added subsec. (c).

Such Act further (applicable as provided by § 108(c) of such Act, which appears as a note
to this section), in subsec. (a)(1), added the sentence beginning “In no event . . .”.


Other provisions:

L. 107-103, Title I, § 108(c)(4), provides: “The amendments made by this subsection
[amending 38 USCS §§ 3511(a)(1) and 3512(b)] shall apply with respect to any determination
(whether administrative or judicial) of the eligibility of a spouse or surviving spouse for
educational assistance under chapter 35 of title 38, United States Code [38 USCS §§ 3500 et
seq.], made on or after the date of the enactment of this Act, whether pursuant to an original
claim for such assistance or pursuant to a reapplication or attempt to reopen or readjudicate
a claim for such assistance.”.

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References
This section is referred to in 38 USCS §§ 3512, 3533, 3541

Research Guide
Am Jur:

77 Am Jur 2d, Veterans and Veterans’ Laws § 137
§ 3512. Periods of eligibility

(a) The educational assistance to which an eligible person within the meaning of section 3501(a)(1)(A) of this title [38 USCS § 3501(a)(1)(A)] is entitled under section 3511 of this title [38 USCS § 3511] or subchapter V of this chapter [38 USCS §§ 3540 et seq.] may be afforded the person during the period beginning on the person's eighteenth birthday, or on the successful completion of the person's secondary schooling, whichever first occurs, and ending on the person's twenty-sixth birthday, except that--

(1) if the person is above the age of compulsory school attendance under applicable State law, and the Secretary determines that the person's best interests will be served thereby, such period may begin before the person's eighteenth birthday;
(2) if the person has a mental or physical handicap, and the Secretary determines that the person's best interest will be served by pursuing a program of special restorative training or a specialized course of vocational training approved under section 3536 of this title [38 USCS § 3536], such period may begin before the person's eighteenth birthday, but not before the person's fourteenth birthday;
(3) if the Secretary first finds that the parent from whom eligibility is derived has a service-connected total disability permanent in nature, or if the death of the parent from whom eligibility is derived occurs, after the eligible person's eighteenth birthday but before the person's twenty-sixth birthday, then (unless paragraph (4) or (5) applies) such period shall end 8 years after the date that is elected by that person to be the beginning date of entitlement under section 3511 of this title [38 USCS § 3511] or subchapter V of this chapter [38 USCS §§ 3540 et seq.] if--

(A) the Secretary approves that beginning date;
(B) the eligible person elects that beginning date by not later than the end of the 60-day period beginning on the date on which the Secretary provides written notice to that person of that person's opportunity to make such election, such notice including a statement of the deadline for the election imposed under this subparagraph; and
(C) that beginning date--

(i) in the case of a person whose eligibility is based on a parent who has a service-connected total disability permanent in nature, is the date determined pursuant to subsection (d), or any date between the two dates described in subsection (d); and

(ii) in the case of a person whose eligibility is based on the death of a parent, is between--

(I) the date of the parent's death; and

(II) the date of the Secretary's decision that the death was service-connected;

(4) if the person otherwise eligible under paragraph (3) fails to elect a beginning date of entitlement in accordance with that paragraph, the beginning date of the person's entitlement shall be the date of the Secretary's decision that the parent has a service-connected total disability permanent in nature, or that the parent's death was service-connected, whichever is applicable;

(5) if the person serves on duty with the Armed Forces as an eligible person after the person's eighteenth birthday but before the person's twenty-sixth birthday, then such
period shall end eight years after the person's first discharge or release from such duty with the Armed Forces (excluding from such eight years all periods during which the eligible person served on active duty before August 1, 1962, pursuant to (A) a call or order thereto issued to the person as a Reserve after July 30, 1961, or (B) an extension of an enlistment, appointment, or period of duty with the Armed Forces pursuant to section 2 of Public Law 87-117) [former 10 USCS § 263 note]; however, in no event shall such period be extended beyond the person's thirty-first birthday by reason of this paragraph;

(6) if the person becomes eligible by reason of the provisions of section 3501(a)(1)(A)(iii) of this title [38 USCS § 3501(a)(1)(A)(iii)] after the person's eighteenth birthday but before the person's twenty-sixth birthday, then (unless paragraph (5) applies) such period shall end eight years after the date on which the person becomes eligible by reason of such provisions, but in no event shall such period be extended beyond the person's thirty-first birthday by reason of this clause;

(7) (A) if such person is enrolled in an educational institution regularly operated on the quarter or semester system and such period ends during a quarter or semester, such period shall be extended to the end of the quarter or semester; or

(B) if such person is enrolled in an educational institution operated on other than a quarter or semester system and such period ends after a major portion of the course is completed, such period shall be extended to the end of the course, or until 12 weeks have expired, whichever first occurs; and

(8) if the person is pursuing a preparatory course described in section 3002(3)(B) of this title [38 USCS § 3002(3)(B)], such period may begin on the date that is the first day of such course pursuit, notwithstanding that such date may be before the person's eighteenth birthday, except that in no case may such person be afforded educational assistance under this chapter [38 USCS §§ 3500 et seq.] for pursuit of secondary schooling unless such course pursuit would otherwise be authorized under this subsection.

(b) (1) (A) Except as provided in subparagraph (B) or (C), a person made eligible by subparagraph (B) or (D) of section 3501(a)(1) of this title [38 USCS § 3501(a)(1)] may be afforded educational assistance under this chapter during the 10-year period beginning on the date (as determined by the Secretary) the person becomes an eligible person within the meaning of section 3501(a)(1)(B), 3501(a)(1)(D)(i), or 3501(a)(1)(D)(ii) of this title [38 USCS § 3501(a)(1)(B), 3501(a)(1)(D)(i), or 3501(a)(1)(D)(ii)]. In the case of a surviving spouse made eligible by clause (ii) of section 3501(a)(1)(D) of this title [38 USCS § 3501(a)(1)(D)], the 10-year period may not be reduced by any earlier period during which the person was eligible for educational assistance under this chapter as a spouse made eligible by clause (i) of that section.

(B) Notwithstanding subparagraph (A), an eligible person referred to in that subparagraph may, subject to the Secretary's approval, elect a later beginning date for the 10-year period than would otherwise be applicable to the person under that subparagraph. The beginning date so elected may be any date between the beginning date determined for the person under subparagraph (A) and whichever of the following dates applies:
(i) The date on which the Secretary notifies the veteran from whom eligibility is derived that the veteran has a service-connected total disability permanent in nature.

(ii) The date on which the Secretary determines that the veteran from whom eligibility is derived died of a service-connected disability.

(C) Notwithstanding subparagraph (A), an eligible person referred to in that subparagraph who is made eligible under section 3501(a)(1)(B) of this title [38 USCS § 3501(a)(1)(B)] by reason of the death of a person on active duty may be afforded educational assistance under this chapter during the 20-year period beginning on the date (as determined by the Secretary) such person becomes an eligible person within the meaning of such section.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, in the case of any eligible person (as defined in section 3501(a)(1)(B), (C), or (D) of this title [38 USCS § 3501(a)(1)(B), (C), or (D)]) who was prevented from initiating or completing such person's chosen program of education within such period because of a physical or mental disability which was not the result of such person's own willful misconduct, such person shall, upon application made within one year after (A) the last date of the delimiting period otherwise applicable under this section, (B) the termination of the period of mental or physical disability, or (C) October 1, 1980, whichever is the latest, be granted an extension of the applicable delimiting period for such length of time as the Secretary determines, from the evidence, that such person was so prevented from initiating or completing such program of education. When an extension of the applicable delimiting period is granted under the exception in the preceding sentence, the delimiting period will again begin running on the first day following such eligible person's recovery from such disability on which it is reasonably feasible, as determined in accordance with regulations which the Secretary shall prescribe, for such eligible person to initiate or resume pursuit of a program of education with educational assistance under this chapter [38 USCS §§ 3500 et seq.].

(3) [Deleted]

(c) Notwithstanding the provisions of subsection (a) of this section, an eligible person may be afforded educational assistance beyond the age limitation applicable to such person under such subsection if (1) such person suspends pursuit of such person's program of education after having enrolled in such program within the time period applicable to such person under such subsection, (2) such person is unable to complete such program after the period of suspension and before attaining the age limitation applicable to such person under such subsection, and (3) the Secretary finds that the suspension was due to conditions beyond the control of such person; but in no event shall educational assistance be afforded such person by reason of this subsection beyond the age limitation applicable to such person under subsection (a) of this section plus a period of time equal to the period such person was required to suspend the pursuit of such person's program, or beyond such person's thirty-first birthday, whichever is earlier.

(d) The term "first finds" as used in this section means the effective date of the rating or date of notification to the veteran from whom eligibility is derived establishing a service-connected total disability permanent in nature whichever is more advantageous to the eligible person.
(e) No person made eligible by section 3501(a)(1)(C) of this title [38 USCS § 3501(a)(1)(C)] may be afforded educational assistance under this chapter [38 USCS §§ 3501 et seq.] beyond 10 years after the date on which the spouse was listed by the Secretary concerned in one of the categories referred to in such section or December 24, 1970, whichever last occurs.

(f), (g) [Deleted]

(h) Notwithstanding any other provision of this section, if an eligible person, during the delimiting period otherwise applicable to such person under this section, serves on active duty pursuant to an order to active duty issued under section 688, 12301(a), 12301(d), 12301(g), 12302, or 12304 of title 10 [10 USCS § 688, 12301(a), 12301(d), 12301(g), 12302, or 12304], or is involuntarily ordered to full-time National Guard duty under section 502(f) of title 32 [32 USCS § 502(f)], such person shall be granted an extension of such delimiting period for the length of time equal to the period of such active duty plus four months.

Amendments:

1962. Act Oct. 15, 1962, P. L. 87-815, in subsec. (a), deleted para. (3) which read:

"(3) if he had not reached his twenty-third birthday on June 29, 1956, and--

"(A) he had reached his eighteenth birthday on such date; or

"(B) he serves on duty with the Armed Forces as an eligible person before his twenty-third birthday and on or after such date; or

"(C) the death of the parent from whom eligibility was derived occurs after such date and after his eighteenth birthday but before his twenty-third birthday;

then such period shall end five years after such date, his first discharge or release after such date from duty with the Armed Forces if such duty began before his twenty-third birthday, or the death of such parent, whichever occurs last, except that in no event shall such period be extended beyond his thirty-first birthday by reason of this paragraph; and",

the last occurs for "first occurs"; and inserted paras. (3) and (4).


1964. Act July 7, 1964, substituted new subsec. (a)(3) for one which read: "If the death of the parent from whom eligibility is derived occurs after the eligible person's eighteenth birthday but before his twenty-third birthday, then (unless paragraph (4) applies) such period shall end five years after the death of such parent";

Act Aug. 31, 1967 (effective as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in subsec. (a), in the introductory matter, and paras. (3) and (4), substituted "the meaning of section 1701(a)(1)(A)"; and added subsec. (d).

1968. Act Oct. 23, 1968 (effective 12/1/68, as provided by § 6(a) of such Act, which appears as 38 USCS § 3500 note), in subsec. (a), introductory matter, inserted "within the meaning of section 1701(a)(1)(A)"; and substituted new subsec. (b) for one which read: "No eligible person may be afforded educational assistance under this chapter unless he was discharged or released after each period he was on duty with the Armed Forces under conditions other than dishonorable, or while he is on duty with the Armed Forces."

Act Dec. 24, 1970, in subsec. (b), introductory matter, substituted "1701(a)(1)(B) or (D)" for "1701(a)(1)(B) or (C)"; and added subsecs. (f) and (g).


1976. Act Oct. 15, 1976 § 310(7)-(9) (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), in the introductory matter, substituted "the person" for "him" and substituted "the person's" for "his" wherever appearing, in paras. (1) and (2), substituted "the person" for "he" and substituted "the person's" for "his" wherever appearing, in para. (3), substituted "the person's" for "his", and in para. (4), substituted "the person" for "he" preceding "serves", substituted "the person's" for "his" wherever appearing, and substituted "the person" for "him" preceding "as a Reserve"; in subsec. (c), substituted "such person" for "him" preceding "under" wherever appearing, substituted "such person" for "he" preceding "suspends", "is", and "was", and substituted "such person's" for "his" wherever appearing; in subsec. (d), as redesignated by Act Oct. 15, 1976, § 304, substituted "the" for "her" preceding "spouse"; and in subsec. (f), as redesignated by Act Oct. 15, 1976, § 304, substituted "such person" for "he".

Act Oct. 15, 1976, § 304 (effective 10/1/76, as provided by § 703(a) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), in paras. (3) and (4), substituted "8" for "five" wherever appearing, and substituted new para. (5) for one which read:

"(5)(A) if he is enrolled in an educational institution regularly operated on a quarter or semester system and such period ends during the last half of a quarter or semester, such period shall be extended to the end of the quarter or semester; or

"(B) if he is enrolled in an educational institution operated other than on a quarter or semester system and such periods ends during the last half of the course, such period shall be extended to the end of the course, or until nine weeks have expired, whichever first occurs.");

deleted subsec. (d) which read: "Notwithstanding the provisions of subsection (a) of this section, an eligible person may be afforded educational assistance beyond the age limitation applicable to him under such subsection by a period of time equivalent to any period of time which elapses between the eighteenth birthday of such eligible person or the date on which an application for benefits of this chapter is filed on behalf of such eligible person, whichever is later, and the date of final approval of such application by the Administrator; but in no event shall educational assistance under this chapter be afforded an eligible person beyond his thirty-first birthday by reason of this subsection.; and redesignated subsecs. (e)-(g) (as so designated prior to amendment by Act Nov. 23, 1977) as subsecs. (d)-(f), respectively.

1977. Act Nov. 23, 1977 (effective 5/31/76, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), in subsec. (b), redesignated existing matter as para. (1), redesignated paras. (1) and (2) as subparas. (A) and (B), and added para. (2); redesignated subsec. (f) (as so designated after amendment by Act Oct. 15, 1976, § 304) as subsec. (g); and added new subsec. (f).

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1) of such Act, which appears as 38 USCS § 3452 note), in subsec. (a), in para. (4), deleted "and" following "paragraph;", redesignated para. (5) as para. (6), and added new para. (5); in subsec. (b)(2), inserted "made within one year after (A) the last date of the delimiting period otherwise applicable under this section, (B) the termination of the period of mental or physical disability, or (C) the effective date of the Veterans' Rehabilitation and Education Amendments of 1980, whichever is the latest", inserted "so" following "such person was" and inserted "When an extension of the applicable delimiting period is granted under the exception in the preceding sentence, the delimiting period will again begin running on the first day following such eligible person's recovery from such disability on which it is reasonably feasible, as determined in
accordance with regulations which the Administrator shall prescribe, for such eligible person to initiate or resume pursuit of a program of education with educational assistance under this chapter.

1981. Act Oct. 17, 1981 (effective on enactment on 10/17/81, as provided by § 701(b)(1) of such Act, which appears as 38 USCS § 1114 note), in subsec. (b)(1), in the introductory matter, inserted "of the following", in cl. (A), substituted "The date" for "the date", and a period for ", or", and substituted cls. (B) and (C) for former cl. (B), which read: "(B) the date of death of the spouse from whom eligibility is derived.


1983. Act Nov. 21, 1983, in subsec. (b)(2), in cl. (C), substituted "October 1, 1980" for "the effective date of the Veterans Rehabilitation and Education Amendments of 1980".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1712, as 38 USCS § 3512, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).  

2000. Act Nov. 1, 2000, in subsec. (a), in para. (3), substituted "8 years after the date that is elected by that person to be the beginning date of entitlement under section 3511 of this title or subchapter V of this chapter if--" and subparas. (A)-(C) for "8 years after, whichever date last occurs: (A) the date on which the Secretary first finds that the parent from whom eligibility is derived has a service-connected total disability permanent in nature, or (B) the date of death of the parent from whom eligibility is derived;", in para. (5), deleted "and" following the concluding semicolon, in para. (6), substituted "; and" for a concluding period, and added para. (7).

2001. Act June 5, 2001 (effective as if enacted on 11/1/2000, immediately after enactment of Act Nov. 1, 2000, as provided by § 7(f)(2) of the 2001 Act, in subsec. (a)(3), substituted subpara. (B) for one which read: "(B) the eligible person makes that election after the person's eighteenth birthday but before the person's twenty-sixth birthday; and", and, in subpara. (C)(i), substituted "the date determined pursuant to" for "between the dates described in".  

Such Act further, in subsec. (a)(5), substituted "paragraph (4)" for "clause (4) of this subsection".

Such Act further purported to amend subsec. (b)(2) by substituting "willful" for "willfull"; however, this amendment could not be executed because the word "willfull" did not appear in such subsection.

Act Dec. 27, 2001 (applicable as provided by § 108(c)(4) of such Act, which appears as 38 USCS § 3511 note), in subsec. (b), substituted para. (1) for one which read:

"(1) No person made eligible by section 3501(a)(1)(B) or (D) of this title may be afforded educational assistance under this chapter beyond 10 years after whichever of the following last occurs:

"(A) The date on which the Secretary first finds the spouse from whom eligibility is derived has a service-connected total disability permanent in nature."
"(B) The date of death of the spouse from whom eligibility is derived who dies while a total disability evaluated as permanent in nature was in existence.

"(C) The date on which the Secretary determines that the spouse from whom eligibility is derived died of a service-connected disability."

and deleted para. (3), which read:

"(3)(A) Notwithstanding the provisions of paragraph (1) of this subsection, any eligible person (as defined in clause (B) or (D) of section 3501(a)(1) of this title) may, subject to the approval of the Secretary, be permitted to elect a date referred to in subparagraph (B) of this paragraph to commence receiving educational assistance benefits under this chapter. The date so elected shall be the beginning date of the delimiting period applicable to such person under this section.

"(B) The date which an eligible person may elect under subparagraph (A) of this paragraph is any date during the period beginning on the date the person became an eligible person within the meaning of clause (B) or (D) of section 3501(a)(1) of this title and ending on the date determined under subparagraph (A), (B), or (C) of paragraph (1) of this subsection to be applicable to such person."

Such Act further deleted subsec. (g), which read: "(g) Any entitlement used by any eligible person as a result of eligibility under the provisions of section 3501(a)(1)(A)(iii) or 3501(a)(1)(C) of this title shall be deducted from any entitlement to which such person may subsequently become entitled under the provisions of this chapter."

Such Act further (effective as of 9/11/2001, as provided by § 103(e) of such Act, which appears as 38 USCS § 3013 note), added subsec. (h).

2002. Act Dec. 6, 2002 (effective 11/1/2000, as provided by § 308(e)(2) of such Act, which appears as a note to this section), in subsec. (a), in para. (3), substituted "paragraph (4) or (5)" for "paragraph (4)", in subpara. (C)(i), substituted "subsection (d), or any date between the two dates described in subsection (d)" for "subsection (d)", redesignated paras. (4)-(7) as paras. (5)-(8), respectively, inserted new para. (4), and, in para. (6) as redesignated, substituted "paragraph (5)" for "paragraph (4)".

2003. Act Dec. 16, 2003 (effective as of 9/11/2001, as provided by § 303(b) of such act, which appears as a note to this section), in subsec. (h), inserted "or is involuntarily ordered to full-time National Guard duty under section 502(f) of title 32,"

Such Act further (effective 90 days after enactment, as provided by § 306(h)(2) of such Act, which appears as a note to this section), deleted subsec. (f), which read: "(f) Any eligible person (as defined in section 3501(a)(1)(B), (C), or (D) of this chapter) shall be entitled to an additional period of eligibility for an education loan under subchapter III of chapter 36 of this title beyond the maximum period provided for in this section pursuant to the same terms and conditions set forth with respect to an eligible veteran in section 3462(a)(2) of this title."


Other provisions:

Children of Spanish-American War veterans. Act Sept. 8, 1959, P. L. 86-236, § 2, 73 Stat. 471; Oct. 15, 1962, P. L. 87-815, § 2(b), 76 Stat. 927, formerly classified as a note to this section, was repealed by Act June 11, 1969, P. L. 91-24, § 14(b), 83 Stat. 35, effective June 11, 1969, except as to any indebtedness which may be due the Government as the result of any benefits granted thereunder. Section 2 contained a savings clause which granted 5 years of educational training to certain children of Spanish-American War veterans.

Extension of period for completion of education. Act Oct. 4, 1961, P. L. 87-377, § 2, 75 Stat. 806, formerly classified as a note to this section, was repealed by Act June 11, 1969, P.
L. 91-24, § 14(d), 83 Stat. 35, effective June 11, 1969, except as to any indebtedness which may be due the Government as the result of any benefits granted thereunder. Section 2 contained a savings clause which granted 5 years of education training to certain children in the Philippines.

Termination of eligibility periods. Act July 7, 1964, P. L. 88-361, § 5, 78 Stat. 298, provided: "In the case of any individual who is an 'eligible person' within the meaning of section 1701(a)(1) of title 38, United States Code [now 38 USCS § 3501(a)(1)], solely by virtue of the amendments made by this Act, and who is above the age of seventeen years and below the age of twenty-three years on the date of enactment of this Act, the period referred to in section 1712 of title 38, United States Code [this section], shall not end with respect to such individual until the expiration of the five-year period which begins on the date of enactment of this Act, excluding from such five-year period any period of time which may elapse between the date on which application for benefits of chapter 35, United States Code [38 USCS §§ 3500 et seq.], is filed on behalf of an eligible person and the date of final approval of such application by the Administrator of Veterans' Affairs; but in no event shall educational assistance under chapter 35, title 38, United States Code [38 USCS §§ 3500 et seq.], be afforded to any eligible person beyond his thirty-first birthday by reason of this section [this note]."

Act Nov. 8, 1965, P. L. 89-349, § 2, 79 Stat. 1313, provided: "In the case of any individual who is an 'eligible person' within the meaning of section 1701(a)(1) of title 38, United States Code [now 38 USCS § 3501(a)(1)], solely by virtue of the amendment made by this Act, and who is above the age of seventeen years and below the age of twenty-three years on the date of enactment of this Act, the period referred to in section 1712 [now section 3512] of title 38, United States Code [this section], shall not end with respect to such individual until the expiration of the five-year period which begins on the date of enactment of this Act."

Act Aug. 31, 1967, P. L. 90-77, § 307(b), 81 Stat. 189, provided: "In the case of any eligible person (within the meaning of section 1701(a)(1) or 1765(a) of title 38, United States Code [now 38 USCS § 3501(a)(1) or 3565(a)]) who is made eligible for educational assistance under the provisions of chapter 35 of title 38, United States Code [38 USCS §§ 3500 et seq.], solely by virtue of the amendments made by subsection (a) of this section, and who on the effective date of this Act [see 38 USCS § 101 note] is below the age of twenty-six years, the period referred to in section 1712 of such title [this section] shall not end with respect to such person until the expiration of the five-year period which begins on the effective date of this Act, excluding from such five-year period any period of time which may elapse between the date on which application for benefits of such chapter 35 [38 USCS §§ 3500 et seq.] is filed on behalf of such person and the date of final approval of such application by the Administrator of Veterans' Affairs; but in no event shall educational assistance under such chapter 35 [38 USCS §§ 3500 et seq.] be afforded to any eligible person beyond his thirty-first birthday by reason of this section [this section and this note]."

Running of delimiting period. Act Oct. 23, 1968, P. L. 90-631, § 2(f), 82 Stat. 1333 (effective 12/1/68, as provided by § 6(a) of such Act); Oct. 17, 1981, P. L. 97-66, Title VI, § 605(b), 95 Stat. 1036 (effective on enactment on 10/17/81, as provided by § 701(b)(1) of such Act, which appears as 38 USCS § 1114 note), provides:

"(1) Except as provided in paragraph (2) of this subsection, in the case of any person who is an eligible person by reason of subparagraph (B) or (D) of section 1701(a)(1) of title 38, United States Code [now 38 USCS § 3501(a)(1)(B) or (D)], if the date of death or the date of the determination of service-connected total disability permanent in nature of the person from whom eligibility is derived occurred before December 1, 1968, the 10-year delimiting period referred to in section 1712(b)(1) of such title [subsec. (b)(1) of this section] shall run from such date.

"(2) If the death of the person from whom such eligibility is derived occurred before December 1, 1968, and the date on which the Administrator of Veterans' Affairs determines that such person died of a service-connected disability is later than December 1, 1968, the delimiting

"(a) Notwithstanding the provisions of section 1712(b) of title 38, United States Code [subsec. (b) of this section], a wife or widow (1) eligible to pursue a program of education exclusively by correspondence by virtue of the provisions of section 1786 of such title (as added by section 316 of this Act) [now 38 USCS § 3686] or (2) entitled to receive the benefits of subsection (a) of section 1733 of this title (as added by Section 313 of this Act) [now 38 USCS § 3533(a)] shall have 10 years from the date of the enactment of this Act in which to complete such a program of education or receive such benefits.

"(b) Notwithstanding the provisions of section 1712(a) or 1712(b) of title 38, United States Code [subsecs. (a), (b) of this section], an eligible person, as defined in section 1701(a)(1) of such title [now 38 USCS § 3501(a)(1)], who is entitled to pursue a program of apprenticeship or other on-job training by virtue of the provisions of section 1787 of such title (as added by section 316 of this Act) [now 38 USCS § 3687] shall have 10 years from the date of the enactment of this Act in which to complete such a program of training, except that an eligible person defined in section 1701(a)(1)(A) of such title [now 38 USCS § 3501(a)(1)(A)] may not be afforded educational assistance beyond his thirty-first birthday.".

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.


Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References
This section is referred to in 38 USCS §§ 3501, 3565

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 137

Ten-year period described in 38 USCS § 3512(b)(1) does not begin until last of three possible alternatives set forth in subsection (b)(1) has been eliminated and regulation limiting period of eligibility for dependents' educational assistance to fixed term of ten years is unlawful. Ozer v Principi (2001) 14 Vet App 257, 2001 US App Vet Claims LEXIS 69

§ 3513. Application
The parent or guardian of a person or the eligible person if such person has attained legal majority for whom educational assistance is sought under this chapter [38 USCS §§ 3500 et seq.] shall submit an application to the Secretary which shall be in such form and contain such information as the Secretary shall prescribe. If the Secretary finds that the person on whose behalf the application is submitted is an eligible person, the Secretary shall approve the application provisionally. The Secretary shall notify the parent or guardian or eligible person (if the person has attained legal majority) of the provisional approval or of the disapproval of the application.

Amendments:

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), substituted new section for one which read: "The parent or guardian of a person for whom educational assistance is sought under this chapter shall submit an application to the Administrator which shall be in such form and contain such information as the Administrator shall prescribe. If the Administrator finds that the person on whose behalf the application is submitted is an eligible person, he shall approve the application provisionally. The Administrator shall notify the parent or guardian of his provisional approval, or of his disapproval of the application.".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1713, as 38 USCS § 3513.

Code of Federal Regulations

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:196

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 137

§ 3514. Processing of applications

(a) Further processing of an application for educational assistance and the award of such assistance shall be pursuant to the requirements of subchapters III and IV of this chapter [38 USCS §§ 3520 et seq., 3531 et seq.] unless the parent or guardian requests special restorative training for the eligible person, in which case the application will be processed under subchapter V of this chapter [38 USCS §§ 3540 et seq.].

(b) If the request for special restorative training is approved, educational assistance will be afforded pursuant to the terms of subchapter V of this chapter [38 USCS §§ 3540 et seq.]. If the request for special restorative training is disapproved, or if approved the restorative training is completed or discontinued, any educational assistance subsequently afforded will be in accordance with subchapters III and IV of this chapter [38 USCS §§ 3520 et seq., 3531 et seq.].

Amendments:

§ 3520. Educational and vocational counseling

The Secretary may, upon request, arrange for educational or vocational counseling for persons eligible for benefits under this chapter to assist such persons in selecting their educational, vocational, or professional objectives and in developing their programs of education.

Amendments:

1968. Act Oct. 23, 1968 (effective 12/1/68, as provided by § 6(a) of such Act, which appears as 38 USCS § 3500 note), designated existing matter as subsec. (a); in subsec. (a), as so designated, inserted "for a person eligible within the meaning of section 1701(a)(1)(A)"; and added subsec. (b).

1970. Act Dec. 24, 1970, in subsec. (b), substituted "section 1701(a)(1)(B), (C), or (D)" for "section 1701(a)(1)(B) or (C)".

1972. Act Oct. 24, 1972, in subsec. (a), inserted "Such counseling shall not be required where the eligible person has been accepted for, or is pursuing, courses which lead to a standard college degree, at an approved institution."

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), substituted "such person's" for "his" wherever appearing.

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1) of such Act, which appears as 38 USCS § 3452 note), in subsec. (a), substituted "may, upon request, arrange for" for "shall arrange for, and the eligible person shall take advantage of,", and deleted "Such counseling shall not be required where the eligible person has been accepted for, or is pursuing, courses which lead to a standard college degree, at an approved institution." following "person's program of education."


1986. Act Oct. 28, 1986, substituted this section and catchline for ones which read:

"§ 1720: Development of educational plan

"(a) Upon provisional approval of an application for educational assistance for a person eligible within the meaning of section 1701(a)(1)(A) of this title, the Administrator may, upon request, arrange for educational or vocational counseling to assist the parent or guardian and the eligible person in selecting such person's educational, vocational, or professional objective and in developing such person's program of education. During, or after, such
counseling, the parent or guardian shall prepare for the eligible person an educational plan which shall set forth the selected objective, the proposed program of education, a list of the educational institutions at which such program would be pursued, an estimate of the sum which would be required for tuition and fees in completion of such program, and such other information as the Administrator shall require. This educational plan shall be signed by the parent or guardian and shall become an integral part of the application for educational assistance under this chapter.

"(b) The Administrator may, on request, arrange for educational counseling for persons eligible for educational assistance under section 1701(a)(1)(B), (C), or (D) of this title."


Other provisions:

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References

This section is referred to in 38 USCS § 3561

§ 3521. Approval of application

The Secretary shall approve an application if the Secretary finds that--
(1) the proposed program of education constitutes a "program of education" as that term is defined in this chapter [38 USCS §§ 3500 et seq.];
(2) the eligible person is not already qualified, by reason of previous education or training, for the educational, professional, or vocational objective for which the program of education is offered;
(3) the eligible person's proposed educational institution or training establishment is in compliance with all the requirements of this chapter and chapter 36 of this title [38 USCS §§ 3500 et seq. and 3670 et seq.]; and
(4) it does not appear that the enrollment in or pursuit of such person's program of education would violate any provisions of this chapter or chapter 36 of this title [38 USCS §§ 3500 et seq. or 3670 et seq.].

Amendments:

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), substituted "the Administrator" for "he".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1) of such Act, which appears as 38 USCS § 3452 note), substituted new section for one which read:

"The Administrator shall finally approve an application if the Administrator finds (1) that section 1720 of this title has been complied with, (2) that the proposed program of education constitutes a "program of education" as that term is defined in this chapter, (3) that the eligible person is not already qualified, by reason of previous education or training, for the educational, professional, or vocational objective for which the courses of the program of
education are offered, and (4) that it does not appear that the pursuit of such program would violate any provision of this chapter.

1986. Act Oct. 28, 1986, substituted the catchline of this section for one which read "Final approval of application"; in the introductory matter deleted "finally" following "shall", deleted para. (1) which read: "section 1720 of this title has been complied with," and redesignated para. (2)-(5) as (1)-(4) respectively.


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1721, as 38 USCS § 3521.

Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

[§ 3522]  [§ 1722. Repealed]

The bracketed section number "3522" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.


§ 3523. Disapproval of enrollment in certain courses

(a) The Secretary shall not approve the enrollment of an eligible person in--
(1) any bartending course or personality development course;
(2) any sales or sales management course which does not provide specialized training within a specific vocational field;
(3) any type of course which the Secretary finds to be avocational or recreational in character (or the advertising for which the Secretary finds contains significant avocational or recreational themes) unless the eligible person submits justification showing that the course will be of bona fide use in the pursuit of the person's present or contemplated business or occupation; or
(4) any independent study program except an accredited independent study program (including open circuit television) leading to a standard college degree.

(b) The Secretary shall not approve the enrollment of an eligible person in any course of flight training other than one given by an educational institution of higher learning for credit toward a standard college degree the eligible person is seeking.

(c) The Secretary shall not approve the enrollment of an eligible person in any course to be pursued by radio.

(d) The Secretary shall not approve the enrollment of an eligible person in any course which is to be pursued as a part of such person's regular secondary school education (except as provided in section 3533 of this title [38 USCS § 3533]), but this subsection shall not prevent the enrollment of an eligible person in a course not leading to a standard college degree if the Secretary finds that such person has ended such person's secondary school education (by completion or otherwise) and that such course is a specialized
vocational course pursued for the purpose of qualifying in a bona fide vocational objective.

(e) An eligible person may not enroll in any course at an educational institution which is not located in a State or in the Republic of the Philippines, unless such course is pursued at an approved institution of higher learning and the course is approved by the Secretary. The Secretary, in the Secretary's discretion, may deny or discontinue educational assistance under this chapter [38 USCS §§ 3500 et seq.] in the case of any eligible person in such an institution if the Secretary determines that such enrollment is not in the best interest of the eligible person or the Federal Government.

Amendments:

1960. Act Sept. 15, 1960, in subsec. (c), substituted "open circuit television (except as herein provided)" for "television" and inserted "The Administrator may approve the enrollment of an eligible person in a course, to be pursued in residence, leading to a standard college degree which includes, as an integral part thereof, subjects offered through the medium of open circuit televised instruction, if the major portion of the course requires conventional classroom or laboratory attendance."

1962. Act July 25, 1962, in subsec. (c), inserted "Notwithstanding the first sentence of this subsection, enrollment in a foreign educational institution may be approved by the Administrator in the case of any eligible person, if (1) the subject to be taken by such person at such foreign educational institution are an integral part of and are fully creditable toward the satisfactory completion of an approved course in which such person is enrolled in an institution of higher learning (hereafter in this sentence referred to as his 'principal institution') which is located in a State or in the Republic of the Philippines, (2) the tuition and fees for attendance at such foreign educational institution are paid for by the principal institution, and (3) the principal institution agrees to assume the responsibility for submitting to the Veterans' Administration required enrollment certificates and monthly certifications of training as to attendance, conduct, and progress."

1970. Act March 26, 1970, substituted subsec. (a) for one which read:

"(a)(1) The Administrator shall not approve the enrollment of an eligible person in any bartending course, dancing course, or personality development course.

"(2) The Administrator shall not approve the enrollment of an eligible person--

"(A) in any photography course or entertainment course; or

"(B) in any music course--instrumental or vocal--public speaking course, or course in sports or athletics such as horseback riding, swimming, fishing, skiing, golf, baseball, tennis, bowling, sports officiating, or other sport or athletic courses, except courses of applied music, physical education, or public speaking which are offered by institutions of higher learning for credit as an integral part of a program leading to an educational objective; or

"(C) in any other type of course which the Administrator finds to be avocational or recreational in character; unless the eligible person submits justification showing that the course will be of bona fide use in the pursuit of his present or contemplated business or occupation."

1972. Act Oct. 24, 1972, substituted subsec. (c) for one which read: "The Administrator shall not approve the enrollment of an eligible person in any course of apprentice or other training on the job, any course of institutional on-farm training, any course to be pursued by correspondence, open circuit television (except as herein provided), or radio, or any course to be pursued at an educational institution not located in a State or in the Republic of the
Philippines. The Administrator may approve the enrollment of an eligible person in a course, to be pursued in residence, leading to a standard college degree which includes, as an integral part thereof, subjects offered through the medium of open circuit televised instruction, if the major portion of the course requires conventional classroom or laboratory attendance. Notwithstanding the first sentence of this subsection, enrollment in a foreign educational institution may be approved by the Administrator in the case of any eligible person, if (1) the subject to be taken by such person at such foreign educational institution are an integral part of and are fully creditable toward the satisfactory completion of an approved course in which such person is enrolled in an institution of higher learning (hereafter in this sentence referred to as his 'principal institution') which is located in a State or in the Republic of the Philippines, (2) the tuition and fees for attendance at such foreign educational institution are paid for by the principal institution, and (3) the principal institution agrees to assume the responsibility for submitting to the Veterans' Administration required enrollment certificates and monthly certifications of training as to attendance, conduct, and progress.; and, in subsec. (d), inserted "(except as provided in section 1733 of this title)".

1974. Act Dec. 3, 1974 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), substituted new subsec. (a)(2) for one which read: "any sales or sales management course which does not provide specialized training within a specific vocational field, unless the eligible person or the institution offering such course submits justification showing that at least one-half of the persons completing such course over the preceding two-year period have been employed in the sales or sales management field; or"; in subsec. (a)(3), inserted "(or the advertising for which he finds contains significant avocational or recreational themes)"; in subsec. (c), deleted "any course of institutional on-farm training," following "an eligible person in"; and in subsec. (d), substituted "not leading to a standard college degree" for "to be pursued below the college level".

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), in para. (2), deleted "or" following "active duty);"; in para. (3), substituted "the Administrator" for "he" following "advertising for which", substituted "the person's for "his", and substituted "; or" for a period. and added para. (4); in subsec. (c), substituted "the Administrator's" for "his" and substituted "the Administrator" for "he" preceding "finds"; and, in subsec. (d), substituted "such person's" for "his" wherever appearing.

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1) of such Act, which appears as 38 USCS § 3452 note), in subsec. (a), redesignated existing matter as para. (1), redesignated paras. (1)-(4) as subparas. (A)-(D), respectively, substituted new para. (1)(B) for one, as so redesignated, which read: "(B) any sales or sales management course which does not provide specialized training within a specific vocational field, or in any other course with a vocational objective, unless the eligible person or the institution offering such course submits justification showing that at least one-half of the persons who completed such course over the preceding two-year period, and who are not unavailable for employment, have been employed in the occupational category for which the course was designed to provide training (but in computing the number of persons who completed such course over any such two-year period, there shall not be included the number of persons who completed such course with assistance under this title while serving on active duty);", and added para. (2); substituted new subsec. (c) for one which read: "(c) The Administrator shall not approve the enrollment of an eligible person in any course to be pursued by correspondence (except as provided in section 1786 of this title), open circuit television (except as herein provided), or a radio, or any course to be pursued at an educational institution not located in a State or in the Republic of the Philippines (except as herein provided). The Administrator may approve the enrollment of an eligible person in a course, to be pursued in residence, leading to a standard college degree which includes, as an integral part thereof, subjects offered through the medium of open circuit televised instruction, if the major portion of the course requires conventional classroom or laboratory attendance. The Administrator may approve the enrollment at an educational institution which is not located in a State or in the Republic of
the Philippines if such program is pursued at an approved educational institution of higher learning. The Administrator in the Administrator's discretion may deny or discontinue the educational assistance under this chapter of any eligible person in a foreign educational institution if the Administrator finds that such enrollment is not in the best interest of the eligible person or the Government.; and added subsec. (e).

1982. Act Oct. 14, 1982 (effective 10/1/82 as provided by § 202(c) of such Act, which appears as 38 USCS § 3473 note), in subsec. (a), deleted "(1)" preceding "The", redesignated subpara. (A) as para. (1), added para. (2), deleted subpara. (B), which read: "any course with a vocational objective, unless the eligible person or the institution offering such course presents evidence satisfactory to the Administrator showing that at least one-half of the persons who completed such course over such period, and who are not unavailable for employment, attained employment for an average of ten hours a week in an occupational category for which the course was designed to provide training", redesignated former subparas. (C) and (D) as paras. (3) and (4) respectively, and deleted former para. (2), which read:

"(2)(A) For the purposes of clause (B) of paragraph (1) of this subsection, in computing the number of persons who discontinued or completed a course over any two-year period, there shall not be included in such number those persons who received assistance under this title for pursuing such course while serving on active duty.

"(B) The provisions of clause (B) of paragraph (1) of this subsection shall not apply in the case of a particular course offered by an educational institution in a particular year if the total number of eligible veterans (as defined in section 1652(a)(1) of this title) and eligible persons enrolled in the institution during the two-year period preceding such year did not exceed 35 percent of the total enrollment in such institution during such period and the course has met the requirements of such clause for any two-year period ending on or after the date of the enactment of this paragraph.

"(C) The Administrator may waive the requirements under clause (B) of paragraph (1) of this subsection if the Administrator determines, under regulations which the Administrator shall prescribe, that such requirements would work an undue administrative hardship on an educational institution because of the small proportion of eligible veterans (as defined in section 1652(a)(1) of this title) and eligible persons enrolled in such institution.".

1989. Act Dec. 18, 1989, in the entire section, substituted "Secretary" for "Administrator", wherever appearing; and in subsec. (e), substituted "Secretary's" for "Administrator's".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1723, as 38 USCS § 3523, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1992. Act Oct. 29, 1992, in subsec. (a), in para. (4), substituted "an accredited independent study program leading to a standard college degree." for "one leading to a standard college degree.".

1996. Act Oct. 9, 1996, in subsec. (a)(4), inserted "(including open circuit television)"; and, in subsec. (c), substituted "radio." for "radio or by open circuit television, except that the Secretary may approve the enrollment of an eligible person in a course, to be pursued in residence, leading to a standard college degree which includes, as an integral part thereof, subjects offered through open circuit television.".

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

§ 3524. Discontinuance for unsatisfactory progress
The Secretary shall discontinue the educational assistance allowance on behalf of an eligible person if, at any time, the Secretary finds that according to the regularly prescribed standards and practices of the educational institution such person is attending, the person's attendance, conduct, or progress is unsatisfactory. The Secretary may renew the payment of the educational assistance allowance only if the Secretary finds that--

(1) the eligible person will be resuming enrollment at the same educational institution in the same program of education and the educational institution has both approved such eligible person's reenrollment and certified it to the Department of Veterans Affairs;
or
(2) in the case of a proposed change of either educational institution or program of education by the eligible person--

(A) the cause of the unsatisfactory attendance, conduct, or progress has been removed;
(B) the program proposed to be pursued is suitable to the eligible person's aptitudes, interests, and abilities; and
(C) if a proposed change of program is involved, the change meets the requirements for approval under section 3691 of this title [38 USCS § 3691].

Amendments:

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693), in the introductory matter, substituted "such person" for "he", "the person's" for "his" and "the Administrator" for "he" following "if"; and in para. (2), substituted "the person's" for "his".

Such Act further (effective 12/1/76, as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), in the introductory matter, inserted "Unless the Administrator finds there are mitigating circumstances, progress will be considered unsatisfactory at any time an eligible person is not progressing at a rate that will permit such person to graduate within the approved length of the course based on the training time as certified to the Veterans' Administration.".

1977. Act Nov. 23, 1977 (effective 2/1/78, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), in the introductory matter, inserted ", or within such other length of time (exceeding such approved length) as the Administrator determines to be reasonable in accordance with regulations".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1) of such Act, which appears as 38 USCS § 3452 note), in the introductory matter, deleted "Unless the Administrator finds there are mitigating circumstances, progress will be considered unsatisfactory at any time an eligible person is not progressing at a rate that will permit such person to graduate within the approved length of the course based on the training time as certified to the Veterans' Administration, or within such other length of time (exceeding such approved length) as the Administrator determines to be reasonable in accordance with regulations." following "or progress is unsatisfactory.".

1989. Act Dec. 18, 1989, substituted paras. (1) and (2) for ones which read:

"(1) the cause of the unsatisfactory conduct or progress of the eligible person has been removed; and

"(2) the program which the eligible person now proposes to pursue (whether the same or revised) is suitable to the person's aptitudes, interests, and abilities.".

Such Act further, in the introductory matter, substituted "attendance, conduct," for "conduct", and "Secretary" for "Administrator", wherever appearing.
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1724, as 38 USCS § 3524, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:
Approval process study; authorization of appropriations; implementation of amendments to be suspended. Act Nov. 23, 1977, P. L. 95-202, Title III, § 305(b)(2)-(4), 91 Stat. 1443 (effective 11/23/77, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), provided:

"(2) The Administrator of Veterans' Affairs, in consultation with appropriate bodies, officials, persons, departments, and agencies, shall conduct a study to investigate (A) specific methods of improving the process by which postsecondary educational institutions and courses at such institutions are and continue to be approved for purposes of chapters 32, 34, 35, and 36 of title 38, United States Code [38 USCS §§ 3201, et seq., 3451 et seq., 3500 et seq., and 3670 et seq.]; and (B) in recognition of the importance of assuring that Federal assistance is made available to those eligible veterans and persons seriously pursuing and making satisfactory progress toward an educational or vocational objective under such chapters, the need for legislative or administrative action in regard to sections 1674 and 1724 of title 38, United States Code [now 38 USCS §§ 3474, 3524], and the regulations prescribed thereunder. A report of such study, together with such specific recommendations for administrative or legislative action as the Administrator deems appropriate, shall be submitted to the President and the Congress not later than September 30, 1979, except that the portion of the report of such study described in clause (B) of the preceding sentence shall be submitted not later than September 30, 1978.

"(3) For the purpose of carrying out paragraph (1) of this subsection, there are authorized to be appropriated $1,000,000.

"(4)(A) Until such time as the Administrator submits the report required under the second sentence of paragraph (2) of this subsection, the Administrator shall suspend implementation of the amendments to sections 1674 and 1724 of title 38, United States Code [now 38 USCS §§ 3474, 3524], made by sections 206 and 307; respectively, of Public Law 94-502, in the case of any accredited educational institution which submits to the Administrator its course catalog or bulletin and a certification that the policies and regulations described in clauses (6) and (7) of section 1776(b) [now 38 USCS § 3676(b)(6), (7)] are being enforced by such institution, unless the Administrator finds, pursuant to regulations which the Administrator shall prescribe, that such catalog or bulletin fails to state fully and clearly such policies and regulations.

"(B) The Administrator shall, where appropriate, bring to the attention of the Council on Postsecondary Accreditation and the appropriate accrediting and licensing bodies such catalogs, bulletins, and certifications submitted under subparagraph (A) of this paragraph which the Administrator believes may not be in compliance with the standards of such accrediting and licensing body."

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References
This section is referred to in 5 USCS § 5569; 10 USCS § 2184

Purpose of 38 USCS § 1724 [now 38 USCS § 3524] is to attempt to insure that enrolled veteran actually does something constructive while he is in school and attempts to insure that each veteran, instead of merely enjoying academic environment, makes definite progress toward
§ 3531. Educational assistance allowance
§ 3532. Computation of educational assistance allowance
§ 3533. Special assistance for the educationally disadvantaged
§ 3534. Apprenticeship or other on-job training; correspondence courses
§ 3535. Approval of courses
§ 3536. Specialized vocational training courses
§ 3537. Work-study allowance

§ 3531. Educational assistance allowance

(a) The Secretary shall, in accordance with the provisions of chapter 36 of this title [38 USCS §§ 3670 et seq.], pay to the parent or guardian of each eligible person who is pursuing a program of education under this chapter [38 USCS §§ 3500 et seq.], and who applies therefor on behalf of such eligible person, an educational assistance allowance to meet, in part, the expenses of the eligible person's subsistence, tuition, fees, supplies, books, equipment, and other educational costs.

(b) The educational assistance allowance of an eligible person pursuing a program of education at an educational institution shall be paid as provided in chapter 36 of this title [38 USCS §§ 3670 et seq.].

Amendments:

1966. Act March 3, 1966, substituted subsec. (c), (d), and (e), for subsec. (c), which read:

"(c) No educational assistance allowance shall be paid on behalf of an eligible person for any period until the Administrator shall have received--"

"(1) from the eligible person (A) in the case of an eligible person enrolled in a course which leads to a standard college degree, a certification that he was actually enrolled in and pursuing the course as approved by the Administrator, or (B) in the case of an
eligible person enrolled in a course which does not lead to a standard college degree, a certification as to actual attendance during such period; and

"(2) from the educational institution a certification, or an endorsement on the eligible person's certificate, that he was enrolled in and pursuing a course of education during such period.

Educational assistance allowances shall, insofar as practicable, be paid within twenty days after receipt by the Administrator of the certifications required by this subsection."

1972. Act Oct. 24, 1972, in subsec. (a), inserted ", in accordance with the provisions of section 1780 of this title," deleted subsecs. (b), (c), and (e), which read:

"(b) The educational assistance allowance on behalf of an eligible person shall be paid, as provided in section 1732 of this title, only for the period of his enrollment as approved by the Administrator, but no allowance shall be paid--

"(1) on behalf of any person enrolled in a course which leads to a standard college degree for any period when such person is not pursuing his course in accordance with the regularly established policies and regulations of the educational institution and the requirements of this chapter; or

"(2) on behalf of any person enrolled in a course which does not lead to a standard college degree for any day of absence in excess of thirty days in a twelve-month period, not counting as absences weekends or legal holidays established by Federal or State law (or in the case of the Republic of the Philippines, Philippine law) during which the institution is not regularly in session."

"(c) The Administrator may, pursuant to such regulations as he may prescribe, determine enrollment in, pursuit of, and attendance at, any program of education or course by an eligible person for any period for which an educational assistance allowance is paid on behalf of such eligible person under this chapter for pursuing such program or course."

"(e) Educational assistance allowances shall be paid as soon as practicable after the Administrator is assured of the eligible person's enrollment in and pursuit of the program of education for the period for which such allowance is to be paid."; and redesignated subsec. (d) as subsec. (b).

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), substituted "chapter 36" for "section 1780"; and in subsec. (b), in para. (1), substituted "the person's" for "his" and in para. (2), substituted "the person" for "he".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1) of such Act, which appears as 38 USCS § 3452 note), substituted new subsec. (b) for one which read:

"(b) No educational assistance allowance shall be paid on behalf of an eligible person enrolled in a course in an educational institution which does not lead to a standard college degree for any period until the Administrator shall have received--

"(1) from the eligible person a certification as to the person's actual attendance during such period; and

"(2) from the educational institution, a certification, or an endorsement on the eligible person's certificate, that the person was enrolled in and pursuing a course of education during such period."


§ 3532. Computation of educational assistance allowance

(a) (1) The educational assistance allowance on behalf of an eligible person who is pursuing a program of education consisting of institutional courses shall be paid at the monthly rate of $788 for full-time, $592 for three-quarter-time, or $394 for half-time pursuit.

(2) The educational assistance allowance on behalf of an eligible person pursuing a program of education on less than a half-time basis shall be paid at the rate of the lesser of--

(A) the established charges for tuition and fees that the educational institution involved requires similarly circumstanced nonveterans enrolled in the same program to pay; or

(B) $788 per month for a full-time course.

(b) The educational assistance allowance to be paid on behalf of an eligible person who is pursuing a full-time program of education which consists of institutional courses and alternate phases of training in a business or industrial establishment with the training in the business or industrial establishment being strictly supplemental to the institutional portion, shall be computed at the rate of $788 per month.

(c) (1) An eligible person who is enrolled in an educational institution for a "farm cooperative" program consisting of institutional agricultural courses prescheduled to fall within forty-four weeks of any period of twelve consecutive months and who pursues such program on--

(A) a full-time basis (a minimum of ten clock hours per week or four hundred and forty clock hours in such year prescheduled to provide not less than eighty clock hours in any three-month period),

(B) a three-quarter-time basis (a minimum of seven clock hours per week), or

(C) a half-time basis (a minimum of five clock hours per week),

shall be eligible to receive an educational assistance allowance at the appropriate rate provided in paragraph (2) of this subsection, if such eligible person is concurrently
engaged in agricultural employment which is relevant to such institutional agricultural courses as determined under standards prescribed by the Secretary. In computing the foregoing clock hour requirements there shall be included the time involved in field trips and individual and group instruction sponsored and conducted by the educational institution through a duly authorized instructor of such institution in which the person is enrolled.

(2) The monthly educational assistance allowance to be paid on behalf of an eligible person pursuing a farm cooperative program under this chapter [38 USCS §§ 3500 et seq.] shall be $636 for full-time, $477 for three-quarter-time, or $319 for half-time pursuit.

(d) If a program of education is pursued by an eligible person at an institution located in the Republic of the Philippines, the educational assistance allowance computed for such person under this section shall be paid at the rate of $0.50 for each dollar.

(e) In the case of an eligible person who is pursuing a program of education under this chapter [38 USCS §§ 3500 et seq.] while incarcerated in a Federal, State, or local penal institution for conviction of a felony, the educational assistance allowance shall be paid in the same manner prescribed in section 3482(g) of this title [38 USCS § 3482(g)] for incarcerated veterans, except that the references therein to the monthly educational assistance allowance prescribed for a veteran with no dependents shall be deemed to refer to the applicable allowance payable to an eligible person under corresponding provisions of this chapter [38 USCS §§ 3500 et seq.] or chapter 36 of this title [38 USCS §§ 3670 et seq.], as determined by the Secretary.

(f) (1) Subject to paragraph (3), the amount of educational assistance payable under this chapter for a licensing or certification test described in section 3501(a)(5) of this title [38 USCS § 3501(a)(5)] is the lesser of $2,000 or the fee charged for the test.

(2) The number of months of entitlement charged in the case of any individual for such licensing or certification test is equal to the number (including any fraction) determined by dividing the total amount paid to such individual for such test by the full-time monthly institutional rate of the educational assistance allowance which, except for paragraph (1), such individual would otherwise be paid under this chapter [38 USCS §§ 3500 et seq.].

(3) In no event shall payment of educational assistance under this subsection for such a test exceed the amount of the individual's available entitlement under this chapter [38 USCS §§ 3500 et seq.].

(g) (1) Subject to paragraph (3), the amount of educational assistance payable under this chapter for a national test for admission or national test providing an opportunity for course credit at institutions of higher learning described in section 3501(a)(5) of this title [38 USCS § 3501(a)(5)] is the amount of the fee charged for the test.

(2) The number of months of entitlement charged in the case of any individual for a test described in paragraph (1) is equal to the number (including any fraction) determined by dividing the total amount of educational assistance paid such individual for such test by the full-time monthly institutional rate of educational assistance, except for paragraph (1), such individual would otherwise be paid under this chapter [38 USCS §§ 3500 et seq.].
(3) In no event shall payment of educational assistance under this subsection for a test described in paragraph (1) exceed the amount of the individual's available entitlement under this chapter [38 USCS §§ 3500 et seq.].

Amendments:

1965. Act Sept. 30, 1965 (effective as provided by § 4 of such Act, which appears as a note to this section), in subsec. (a), substituted "$130", "$95", and "$60" for "$110", "$80", and "$50", respectively; and in subsec. (b), substituted "$105" for "$90".

1970. Act March 26, 1970, § 104(a), (b) (effective 2/1/70, as provided by § 301 of such Act, which appears as 38 USCS § 3482 note), substituted subsec. (a) for one which read: "The educational assistance allowance on behalf of an eligible person who is pursuing a program of education consisting of institutional courses shall be computed at the rate of (1) $130 per month if pursued on a full-time basis, (2) $95 per month if pursued on a three-quarters time basis, and (3) $60 per month if pursued on a half-time basis."; in subsec. (b), substituted "$141" for "$105".

Act March 26, 1970, § 210, substituted subsec. (c) for one which read: "No educational assistance allowance shall be paid on behalf of an eligible person for any period during which he is enrolled in and pursuing an institutional course on a less than half-time basis, or any course described in subsection (b), on a less than full-time basis."

1972. Act Oct. 24, 1972 (effective as provided by § 601(a) of such Act, which appears as 38 USCS § 3482 note), in subsec. (a), substituted para. (1) for one which read: "The educational assistance allowance on behalf of an eligible person who is pursuing a program of education consisting of institutional courses shall be computed at the rate of (A) $175 per month if pursued on a full-time basis, (B) $128 per month if pursued on a three-quarter-time basis, and (C) $81 per month if pursued on a half-time basis." and, in para. (2), substituted "$220" for "$175"; and, in subsec. (b), substituted "$177" for "$141".

1974. Act Dec. 3, 1974, § 103(1)-(3) (effective 9/1/74, as provided by § 501 of such Act, which appears as 38 USCS § 3482 note), in subsec. (a), substituted para. (1) for one which read: "The educational assistance allowance on behalf of an eligible person who is pursuing a program of education consisting of institutional courses shall be computed at the rate of (A) $220 per month if pursued on a full-time basis, (B) $165 per month if pursued on a three-quarter-time basis, and (C) $110 per month if pursued on a half-time basis." and, in para. (2), substituted "prescribed in section 1682(b)(2) of this title for less-than-half-time pursuit of an institutional program by an eligible veteran." for "of (A) the established charges for tuition and fees which the institution requires other individuals enrolled in the same program to pay, or (B) $220 per month for a full-time course, whichever is the lesser."; and, in subsec. (b), substituted "$209" for "$177".

Act Dec. 3, 1974, § 208 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), redesignated subsec. (c) as subsec. (d); and added new subsec. (c).

1975. Act Jan. 2, 1975 (effective 1/1/75, as provided by § 206 of such Act, which appears as 38 USCS § 3482 note), in subsec. (b), substituted "$217" for "$209".

1976. Act Oct. 15, 1976 (effective 10/1/76, as provided by § 703(a) of such Act, which appears as 38 USCS § 3693 note), in subsec. (b), substituted "$235" for "$217"; added subsec. (c)(3).

1977. Act Nov. 23, 1977 (effective 10/1/77, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), in subsec. (b), substituted "$251" for "$235".

1980. Act Oct. 17, 1980, §§ 202(1), 330, 602(b) (effective 10/1/80, as provided by § 802(b)(1), (c)(1), (f)(1) of such Act, which appear as 38 USCS §§ 3482, 3452, 5314 notes, respectively), in subsec. (b), substituted "$264" for "$251"; added subsec. (c)(4); and added subsec. (e).
Act Oct. 17, 1980, § 212(1) (effective 1/1/81, as provided by § 802(b)(2) of such Act, which appears as 38 USCS § 3482 note), in subsec. (b), as amended by § 202(1) of Act Oct. 17, 1980, substituted "$276" for "$264".

1984. Act Oct. 24, 1984 (effective 10/1/78, as provided by § 205 of such Act, which appears as 38 USCS § 3108 note), in subsec. (b), substituted "$304" for "$276".

1989. Act Dec. 18, 1989 (effective 1/1/90, as provided by § 403(c) of such Act, which appears as a note to this section), in subsec. (a), in para. (1), substituted "paid at the monthly rate of $404 for full-time, $304 for three-quarter-time, or $202 for half-time pursuit." for "computed at the rate prescribed in section 1682(a)(1) of this title for full-time, three-quarter-time, or half-time pursuit, as appropriate, of an institutional program by an eligible veteran with no dependents."; in para. (2), substituted "paid at the rate of (A) the established charges for tuition and fees that the educational institution involved requires similarly circumstanced nonveterans enrolled in the same program to pay, or (B) $404 per month for a full-time course, whichever is the lesser." for "computed at the rate prescribed in section 1682(b)(2) of this title for less-than-half-time pursuit of an institutional program by an eligible veteran.;" in subsec. (b), substituted "$327" for "$304"; in subsec. (c), in para. (2), substituted "$327 for full-time, $245 for three-quarter-time, and $163 for half-time pursuit." for "computed at the rate prescribed in section 1682(c)(2) of this title for full-time, three-quarter-time, or half-time pursuit, as appropriate, of a farm cooperative program by an eligible veteran with no dependents."; substituted para. (3) for one which read: "The monthly educational assistance allowance to be paid on behalf of an eligible person pursuing an independent study program which leads to a standard college degree shall be computed at the rate prescribed in section 1682(e) of this title."., in para. (4), substituted "paragraph (3) of this subsection" for "section 1632(e) of this title"; and in subsec. (e), inserted ", except that the references therein to the monthly educational assistance allowance prescribed for a veteran with no dependents shall be deemed to refer to the applicable allowance payable to an eligible person under corresponding provisions of this chapter or chapter 36 of this title, as determined by the Secretary of Veterans Affairs".

Such Act further, in subsec. (c)(1), in the concluding matter, substituted "Secretary" for "Administrator".

1991. Act March 22, 1991, in subsecs. (c)(3) and (e), substituted "Secretary" for "Secretary of Veterans Affairs".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1732, as 38 USCS § 3532, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1992. Act Oct. 29, 1992 (applicable to enrollments in courses beginning on or after 7/1/93, as provided by § 316(c) of such Act, which appears as a note to this section), in subsec. (c), deleted paras. (3) and (4), which read:

"(3) The monthly educational assistance allowance to be paid on behalf of an eligible person pursuing an independent study program which leads to a standard college degree shall be computed at the rate provided in subsection (a)(2) of this section for less than half-time but more than quarter-time pursuit. If the entire training is to be pursued by independent study, the amount of the eligible person's entitlement to educational assistance under this chapter shall be charged in accordance with the rate at which such person is pursuing the independent study program but at not more than the rate at which such entitlement is charged for pursuit of such program on less than a half-time basis. In any case in which independent study is combined with resident training, the educational assistance allowance shall be paid at the applicable institutional rate based on the total training time determined by adding the number of semester hours (or the equivalent thereof) of resident training to the number of semester hours (or the equivalent thereof) of independent study that do not exceed the number of semester hours (or the equivalent thereof) required for the less than half-time, institutional rate, as determined by the
Secretary, for resident training. An eligible person's entitlement shall be charged for a combination of independent study and resident training on the basis of the applicable monthly training time rate as determined under section 3688 of this title.

"(4) The monthly educational assistance allowance to be paid on behalf of an eligible person pursuing a course in part by open circuit television shall be computed in the same manner that such allowance is computed under paragraph (3) of this subsection for an independent study program."

1994. Act Nov. 2, 1994 (applicable to payments made after 12/31/94, as provided by § 507(c) of such Act, which appears as 38 USCS § 107 note), in subsec. (d), substituted "the rate of" for "a rate in Phillipine pesos equivalent to".


1998. Act June 9, 1998 (effective on 10/1/98 and applicable with respect to educational assistance allowances paid for months after 9/98, as provided by § 8210(e) of such Act, which appears as a note to this section), as amended July 22, 1998 (effective simultaneously with the enactment of, and as if included in, Act June 9, 1998, as provided by § 9016 of Act July 22, 1998, which appears as 23 USCS § 101 note), in subsec. (a), in para. (1), substituted "$485" for "$404", substituted "$365" for "$304", and substituted "$242" for "$202" and, in para. (2), substituted "$485" for "$404"; in subsec. (b), substituted "$485" for "$404"; and, in subsec. (c), in para. (2), substituted "$392" for "$327", substituted "$294" for "$245", and substituted "$196" for "$163".


2000. Act Nov. 1, 2000 (effective and applicable as provided by § 111(e) of such Act, which appears as a note to this section), in subsec. (a), in para. (1), substituted "$588" for "$485", substituted "$441" for "$365", and substituted "$294" for "$242" and, in para. (2), substituted "$588" for "$485"; in subsec. (b), substituted "$588" for "$485"; and, in subsec. (c)(2), substituted "$475" for "$392", substituted "$356" for "$294", and substituted "$238" for "$196".

Such Act further (effective and applicable as provided by § 122(d) of such Act, which appears as 38 USCS § 3032 note) added subsec. (f).

2001. Act Dec. 27, 2001 (effective and applicable as provided by § 102(e) of such Act, which appears as a note to this section), in subsec. (a), in para. (1), substituted "$670" for "$588", substituted "$503" for "$441", and substituted "$335" for "$294", and, in para. (2), substituted "$670" for "$588", in subsec. (b), substituted "$670" for "$588"; and, in subsec. (c)(2), substituted "$541" for "$475", substituted "$406" for "$356", and substituted "$271" for "$238".

2003. Act Dec. 16, 2003 (effective 7/1/2004 and applicable to educational assistance allowances payable under 38 USCS §§ 3500 et seq. and 3687(b)(2) for months beginning on or after that date, as provided by § 302(e) of such Act, which appears as a note to this section), in subsec. (a), in para. (1), substituted "at the monthly rate of $788 for full-time, $592 for three-quarter-time, or $394 for half-time pursuit." for "at the monthly rate of $670 for full-time, $503 for three-quarter-time, or $335 for half-time pursuit." and, in para. (2), substituted "at the rate of the lesser of--

"(A) the established charges for tuition and fees that the educational institution involved requires similarly circumstanced nonveterans enrolled in the same program to pay; or

"(B) $788 per month for a full-time course."

for "at the rate of (A) the established charges for tuition and fees that the educational institution involved requires similarly circumstanced nonveterans enrolled in the same
program to pay, or (B) $670 per month for a full-time course, whichever is the lesser."; in subsec. (b), substituted "$788" for "$670"; and, in subsec. (c)(2), substituted "shall be $636 for full-time, $477 for three-quarter-time, or $319 for half-time pursuit." for "shall be $541 for full-time, $406 for three-quarter-time, and $271 for half-time pursuit."


Other provisions:

Effective date of amendments made by §§ 1, 2 of Act Sept. 30, 1965. Act Sept. 30, 1965, P. L. 89-222, § 4, 79 Stat. 896, provided: "The amendments made by the first and second sections of this Act [amending this section and 38 USCS § 3542] shall take effect on the first day of the second calendar month following the date of enactment of this Act."


Effective date and application of June 9, 1998 amendments. Act June 9, 1998, P. L. 105-178, Title VIII, Subtitle B, § 8210(e), as added July 22, 1998, P. L. 105-206, Title IX, § 9014(b), 112 Stat. 866, provides: "The amendments made by this section [amending 38 USCS §§ 3532(a), (b), (c)(2), 3534(b), 3542(a), and 3687(b)(2)] shall take effect on October 1, 1998, and shall apply with respect to educational assistance allowances paid for months after September 1998."

Effective date and application of Nov. 1, 2000 amendments. Act Nov. 1, 2000, P. L. 106-419, Title I, Subtitle B, § 111(e), provides: "The amendments made by subsections (a) through (d) [amending 38 USCS §§ 3532(a), (b), (c)(2), 3534(b), 3542(a), and 3687(b)(2)] shall take effect on November 1, 2000, and shall apply with respect to educational assistance allowances paid under chapter 35 of title 38, United States Code [38 USCS §§ 3500 et seq.], for months after October 2000."

Effective date and application of Dec. 27, 2001 amendments. Act Dec. 27, 2001, P. L. 107-103, Title I, § 102(e), provides: "The amendments made by this section [amending 38 USCS §§ 3532(a), (b), (c)(2), 3534(b), 3542(a), and 3687(b)(2)] shall take effect as of January 1, 2002, and shall apply with respect to educational assistance allowances payable under chapter 35 and section 3687(b)(2) of title 38, United States Code [38 USCS §§ 3500 et seq. and § 3687(b)(2)], for months beginning on or after that date."

Effective date and applicability of Dec. 16, 2003 amendments. Act Dec. 16, 2003, P. L. 108-183, Title III, § 302(e), 117 Stat. 2659, provides: "The amendments made by this section [amending 38 USCS §§ 3532(a)-(c), 3534(b), 3542(a), and 3687(b)(2)] shall take effect on July 1, 2004, and shall apply with respect to educational assistance allowances payable under chapter 35 and section 3687(b)(2) of title 38, United States Code [38 USCS §§ 3500 et seq. and § 3687(b)(2)], for months beginning on or after that date."

Code of Federal Regulations

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References

This section is referred to in 38 USCS §§ 3565, 3680

Research Guide

Am Jur:
§ 3533. Special assistance for the educationally disadvantaged

(a) (1) Any eligible person shall be entitled to the assistance provided an eligible veteran under section 3491(a) [38 USCS § 3491(a)] (if pursued in a State) of this title and be paid an educational assistance allowance therefor in the manner prescribed by section 3491(b) of this title [38 USCS § 3491(b)], except that the corresponding rate provisions of this chapter [38 USCS §§ 3500 et seq.] shall apply, as determined by the Secretary, to such pursuit by an eligible person.

(2) Educational assistance under this chapter [38 USCS §§ 3500 et seq.] for the first five months of full-time pursuit of a program (or the equivalent thereof in part-time educational assistance) consisting of such course or courses shall be provided without charge to entitlement.

(b) Any eligible person shall, without charge to any entitlement such person may have under section 3511 of this title [38 USCS § 3511], be entitled to the benefits provided an eligible veteran under section 3492 of this title [38 USCS § 3492].

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), substituted "spouse or surviving spouse" for "wife or widow" and substituted "such spouse" for "she"; and in subsec. (b), substituted "such person" for "he".

1984. Act March 2, 1984, in subsec. (a), inserted "(with no dependents)" and deleted "and be paid an educational assistance allowance under the provisions of section 1732(a) of this title" following "of this title" the second time it appears.

1988. Act Nov. 18, 1988 (effective 8/15/89, as provided by § 106(d) of such Act, which appears as 38 USCS § 3034 note) substituted subsec. (a) for one which read: "Any eligible spouse or surviving spouse shall, without charge to any entitlement such spouse may have under section 1711 of this title, be entitled to the benefits provided an eligible veteran (with no dependents) under section 1691 (if pursued in a State) of this title".

1989. Act Dec. 18, 1989 (effective 1/1/90 as provided by § 403(c) of such Act, which appears as 38 USCS § 3532 note), in subsec. (a)(1), substituted "assistance provided an eligible veteran under section 1691(a) (if pursued in a State) of this title and be paid an educational assistance allowance therefor in the manner prescribed by section 1691(b) of this title, except that the corresponding rate provisions of this chapter shall apply, as determined by the Secretary of Veterans Affairs, to such pursuit by an eligible person." for "benefits provided an eligible veteran (with no dependents) under section 1691 (if pursued in a State) of this title.".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1733, as 38 USCS § 3533, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:

Termination of eligibility. For termination of eligibility period for a wife or widow, or an eligible person 8 years from Oct. 24, 1972, see note containing Act Oct. 24, 1972, P. L. 92-540, Title VI, § 604, 86 Stat. 1099, located at 38 USCS § 3512.
§ 3534. Apprenticeship or other on-job training; correspondence courses

(a) Any eligible person shall be entitled to pursue, in a State, a program of apprenticeship or other on-job training and be paid a training assistance allowance as provided in section 3687 of this title [38 USCS § 3687].

(b) Any eligible spouse or surviving spouse shall be entitled to pursue a program of education exclusively by correspondence and be paid an educational assistance allowance as provided in section 3686 (other than subsection (a)(2)) of this title [38 USCS § 3686] and the period of such spouse's entitlement shall be charged with one month for each $788 which is paid to the spouse as an educational assistance allowance for such course.

Amendments:

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (b), substituted "spouse or surviving spouse" for "wife or widow".

1989. Act Dec. 18, 1989 (effective 1/1/90, as provided by § 403(c) of such Act, which appears as 38 USCS § 3532 note), in subsec. (b), substituted "1786 (other than subsection (a)(2)) of this title and the period of such spouse's entitlement shall be charged with one month for each $404 which is paid to the spouse as an educational assistance allowance for such course" for "1786 of this title".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1734, as 38 USCS § 3534, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1998. Act June 9, 1998 (effective on 10/1/98 and applicable with respect to educational assistance allowances paid for months after 9/98, as provided by § 8210(e) of such Act, which appears as 38 USCS § 3532 note), as amended July 22, 1998 (effective simultaneously with the enactment of, and as if included in, Act June 9, 1998, as provided by § 9016 of Act July 22, 1998, which appears as 23 USCS § 101 note), in subsec. (b), substituted "$485" for "$404".


2000. Act Nov. 1, 2000 (effective and applicable as provided by § 111(e) of such Act, which appears as 38 USCS § 3532 note), in subsec. (b), substituted "$588" for "$485".

2001. Act Dec. 27, 2001 (effective and applicable as provided by § 102(e) of such Act, which appears as 38 USCS § 3532 note), in subsec. (b), substituted "$670" for "$588".
2003. Act Dec. 16, 2003 (effective 7/1/2004 and applicable to educational assistance allowances payable under 38 USCS §§ 3500 et seq. and 3687(b)(2) for months beginning on or after that date, as provided by § 302(e) of such Act, which appears as 38 USCS § 3532 note), in subsec. (b), substituted "$788" for "$670".

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 137

§ 3535. Approval of courses

An eligible person shall receive the benefits of this chapter [38 USCS §§ 3500 et seq.] while enrolled in a course of education offered by an educational institution only if such course (1) is approved in accordance with the provisions of subchapter I of chapter 36 of this title [38 USCS §§ 3670 et seq.], or (2) is approved for the enrollment of the particular individual under the provisions of section 3536 of this title [38 USCS § 3536].

Amendments:
1963. Act Sept. 23, 1963, in subsec. (a), substituted "Until the date for the expiration of all education and training under chapter 33 of this title, and" for "An", and inserted "or subchapter VII of this chapter"; in subsec. (b), inserted "or section 1778"; and deleted subsec. (c) which read: "After the date for the expiration of all education and training under chapter 33 of this title, the Administrator shall be responsible for the approval of any additional courses for the purposes of this chapter. In approving such a course, the criteria of sections 1653 and 1654 of this title shall be applicable to approvals under this subsection and the Administrator may utilize the services of State educational agencies in connection therewith.".

1966. Act March 3, 1966, substituted new section for one which read:
"(a) Until the date for the expiration of all education and training under chapter 33 of this title, and eligible person shall receive the benefits of this subchapter while enrolled in a course of education offered by an educational institution only if such course (1) is approved in accordance with the provisions of this section or subchapter VII of this chapter, or (2) is approved for the enrollment of the particular individual under the provisions of section 1737 of this title.

"(b) Any course offered by an educational institution (as defined in this chapter) shall be considered approved for the purposes of this chapter if it is approved under either section 1653 or section 1654 of this title before the date for the expiration of all education and training under chapter 33 of this title, and has not been disapproved under section 1656 or section 1778 of this title."


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1735, as 38 USCS § 3535, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 137
§ 3536. Specialized vocational training courses

The Secretary may approve a specialized course of vocational training leading to a predetermined vocational objective for the enrollment of an eligible person under this subchapter [38 USCS §§ 3531 et seq.] if the Secretary finds that such course, either alone or when combined with other courses, constitutes a program of education which is suitable for that person and is required because of a mental or physical handicap.

Amendments:

1963. Act Sept. 23, 1963, substituted "The" for "Notwithstanding the provisions of subsections (b) and (c) of section 1735 of this title, the".


1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), substituted "the Administrator" for "he" preceding "finds".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1736, as 38 USCS § 3536.

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References
This section is referred to in 38 USCS §§ 3512, 3535, 3672

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 137

§ 3537. Work-study allowance

(a) Subject to subsection (b) of this section, the Secretary shall utilize, in connection with the activities described in section 3485(a) of this title [38 USCS § 3485(a)], the services of any eligible person who is pursuing, in a State, at least a three-quarter-time program of education (other than a course of special restorative training) and shall pay to such person an additional educational assistance allowance (hereinafter in this section referred to as "work-study allowance") in return for such eligible person's agreement to perform such services. The amount of the work-study allowance shall be determined in accordance with section 3485(a) of this title [38 USCS § 3485(a)].

(b) The Secretary's utilization of, and payment of a work-study allowance for, the services of an eligible person pursuant to subsection (a) of this section shall be subject to the same requirements, terms, and conditions as are set out in section 3485 of this title [38 USCS § 3485] with regard to individuals pursuing at least three-quarter-time programs of education referred to in subsection (b) of such section.

Explanatory notes:
Effective date of section:
Act Dec. 18, 1989, P. L. 101-237, Title IV, § 406(b), 103 Stat. 2082, provides: "The amendments made by this section [adding this section and amending the chapter analysis] shall take effect on May 1, 1990."

Amendments:

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 137

§ 3538. [§ 1738. Repealed]
The bracketed section number "3538" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

This section (Act Nov. 23, 1977, P. L. 95-202, Title II, § 201(b), 91 Stat. 1437) was repealed by Act Nov. 18, 1988, P. L. 100-689, Title I, Part B, § 124(a), 102 Stat. 4174. The section related to accelerated payment of educational assistance allowances.

SUBCHAPTER V. SPECIAL RESTORATIVE TRAINING

§ 3540. Purpose
§ 3541. Entitlement to special restorative training
§ 3542. Special training allowance
§ 3543. Special administrative provisions

§ 3540. Purpose
The purpose of special restorative training is to overcome, or lessen, the effects of a manifest physical or mental disability which would handicap an eligible person (as defined in subparagraphs (A), (B), and (D) of section 3501(a)(1) of this title [38 USCS § 3501(a)(1)]) in the pursuit of a program of education.

Amendments:
1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1) of such Act, which appears as 38 USCS § 3452 note), inserted "(as defined in section 1701(a)(1)(A) of this title)".


2001. Act Dec. 27, 2001, substituted "subparagraphs (A), (B), and (D) of section 3501(a)(1) of this title" for "section 3501(a)(1)(A) of this title".

Code of Federal Regulations
Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18
§ 3541. Entitlement to special restorative training

(a) The Secretary at the request of an eligible person is authorized--
   (1) to determine whether such person is in need of special restorative training; and
   (2) where need is found to exist, to prescribe a course which is suitable to accomplish
   the purposes of this chapter [38 USCS §§ 3500 et seq.].

Such a course, at the discretion of the Secretary, may contain elements that would
contribute toward an ultimate objective of a program of education.

(b) The total period of educational assistance under this subchapter [38 USCS §§ 3540 et seq.] and other subchapters of this chapter [38 USCS §§ 3500 et seq.] may not exceed the amount of entitlement as established in section 3511 of this title [38 USCS § 3511], except that the Secretary may extend such period in the case of any person if the Secretary finds that additional assistance is necessary to accomplish the purpose of special restorative training as stated in subsection (a) of this section.

Amendments:

1964. Act July 7, 1964, substituted subsec. (b) for one which read: "(b) In no event shall the total period of educational assistance under this subchapter and other subchapters of this chapter exceed the amount of entitlement as established in section 1711 of this title.".

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (b), substituted "the Administrator" for "he" preceding "finds".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1741, as 38 USCS § 3541, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

2001. Act Dec. 27, 2001, in subsec. (a), in the introductory matter, deleted "of the parent or guardian" following "request".

Other provisions:
§ 3542. Special training allowance

(a) While the eligible person is enrolled in and pursuing a full-time course of special restorative training, the eligible person shall be entitled to receive a special training allowance computed at the basic rate of $788 per month. If the charges for tuition and fees applicable to any such course are more than $247 per calendar month, the basic monthly allowance may be increased by the amount that such charges exceed $247 a month, upon election by the eligible person to have such person's period of entitlement reduced by one day for each such increased amount of allowance that is equal to one-thirtieth of the full-time basic monthly rate of special training allowance.

(b) No payments of a special training allowance shall be made for the same period for which the payment of an educational assistance allowance is made or for any period during which the training is pursued on less than a full-time basis.

(c) Full-time training for the purpose of this section shall be determined by the Secretary with respect to the capacities of the individual trainee.

Amendments:

1965. Act Sept. 30, 1965 (effective as provided by § 4 of such Act, which appears as 38 USCS § 3532 note), in subsec. (a), substituted "$130", "$41", "$41", and "$4.25" for "$110", "$35", "$35", and "$3.60", respectively.

1970. Act March 26, 1970 (effective 2/1/70, as provided by § 301 of such Act, which appears as 38 USCS § 3482 note), substituted subsec. (a) for one which read: "(a) While the eligible person is enrolled in and pursuing a full-time course of special restorative training, the parent or guardian shall be entitled to receive on his behalf a special training allowance computed at the basic rate of $130 per month. If the charges for tuition and fees applicable to any such course are more than $41 per calendar month the basic monthly allowance may be increased by the amount that such charges exceed $41 a month, upon election by the parent or guardian of the eligible person to have such person's period of entitlement reduced by one day for each $4.25 that the special training allowance paid exceeds the basic monthly allowance.".

1972. Act Oct. 24, 1972 (effective 10/1/72, as provided by § 601(a) of such Act, which appears as 38 USCS § 3482 note), substituted subsec. (a) for one which read: "(a) While the eligible person is enrolled in and pursuing a full-time course of special restorative training, the parent or guardian shall be entitled to receive on his behalf a special training allowance computed at the basic rate of $175 per month. If the charges for tuition and fees applicable to any such course are more than $55 per calendar month the basic monthly allowance may be
increased by the amount that such charges exceed $55 a month, upon election by the parent or guardian of the eligible person to have such person's period of entitlement reduced by one day for each $6.80 that the special training allowance paid exceeds the basic monthly allowance."

1974. Act Dec. 3, 1974 (effective 9/1/74, as provided by § 501 of such Act, which appears as 38 USCS § 3482 note), substituted subsec. (a) for one which read: "(a) While the eligible person is enrolled in and pursuing a full-time course of special restorative training, the parent or guardian shall be entitled to receive on his behalf a special training allowance computed at the basic rate of $220 per month. If the charges for tuition and fees applicable to any such course are more than $69 per calendar month, the basic monthly allowance may be increased by the amount that such charges exceed $69 a month, upon election by the parent or guardian of the eligible person to have such person's period of entitlement reduced by one day for each $7.35 that the special training allowance paid exceeds the basic monthly allowance."

1975. Act Jan. 2, 1975 (effective 1/1/75, as provided by § 206 of such Act, which appears as 38 USCS § 3482 note), substituted subsec. (a) for one which read: "(a) While the eligible person is enrolled in and pursuing a full-time course of special restorative training, the parent or guardian shall be entitled to receive on behalf of such person a special training allowance computed at the basic rate of $260 per month. If the charges for tuition and fees applicable to any such course are more than $82 per calendar month, the basic monthly allowance may be increased by the amount that such charges exceed $82 a month, upon election by the parent or guardian of the eligible person to have such person's period of entitlement reduced by one day for each $8.69 that the special training allowance paid exceeds the basic monthly allowance."

1976. Act Oct. 15, 1976 (effective 10/1/76, as provided by § 703(a) of such Act, which appears as 38 USCS § 3693 note), substituted subsec. (a) for one which read: "(a) While the eligible person is enrolled in and pursuing a full-time course of special restorative training, the parent or guardian shall be entitled to receive on behalf of such person a special training allowance computed at the basic rate of $270 per month. If the charges for tuition and fees applicable to any such course are more than $85 per calendar month, the basic monthly allowance may be increased by the amount that such charges exceed $85 a month, upon election by the parent or guardian of the eligible person to have such person's period of entitlement reduced by one day for each $9.02 that the special training allowance paid exceeds the basic monthly allowance."


1984. Act Oct. 24, 1984 (effective 10/1/78, as provided by § 205 of such Act, which appears as 38 USCS § 3108 note), in subsec. (a), substituted "$376" for "$342", "$119" for "$108" in both places it appears, and "$12.58" for "$11.44".

1989. Act Dec. 18, 1989 (effective 1/1/90, as provided by § 403(c) of such Act, which appears as 38 USCS § 3532 note), in subsec. (a), substituted "$404" and "$13.46" for "$376" and "$12.58", respectively, and substituted "$127" for "$119" in two places.

Such Act further, in subsec. (c), substituted "Secretary" for "Administrator".
§ 3543. Special administrative provisions

(a) In carrying out the Secretary's responsibilities under this chapter [38 USCS §§ 3500 et seq.] the Secretary may by agreement arrange with public or private educational institutions or others to provide training arrangements as may be suitable and necessary to accomplish the purposes of this subchapter [38 USCS §§ 3540 et seq.]. In any instance where the Secretary finds that a customary tuition charge is not applicable, the Secretary may agree on the fair and reasonable amounts which may be charged for the training provided to the eligible person.
(b) The Secretary shall make such rules and regulations as the Secretary may deem necessary in order to promote good conduct on the part of the persons who are following courses of special restorative training and otherwise to carry out the purposes of this chapter [38 USCS §§ 3500 et seq.].

(c) In a case in which the Secretary authorizes training under section 3541(a) of this title [38 USCS § 3541(a)] on behalf of an eligible person, the parent or guardian shall be entitled--

(1) to receive on behalf of the eligible person the special training allowance provided for under section 3542(a) of this title [38 USCS § 3542(a)];
(2) to elect an increase in the basic monthly allowance provided for under such section; and
(3) to agree with the Secretary on the fair and reasonable amounts which may be charged under subsection (a).

Amendments:

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), substituted "the Administrator's" for "his" and substituted "the Administrator" for "he" preceding "may agree"; in subsec. (b), substituted "the Administrator" for "he" preceding "may deem".

1989. Act Dec. 18, 1989, in subsec. (a), substituted "Secretary's" for "Administrator's" and "Secretary" for "Administrator" wherever appearing; and, in subsec. (b), substituted "Secretary" for "Administrator".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1743, as 38 USCS § 3543.

2001. Act Dec. 27, 2001, in subsec. (a), substituted "for the training provided to the eligible person" for "the parent or guardian for the training provided to an eligible person"; and added subsec. (c)

Code of Federal Regulations
Department of Veterans Affairs-Per diem for nursing home care of veterans in State homes, 38 CFR Part 51
Department of Veterans Affairs-Forms, 38 CFR Part 58

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 137

SUBCHAPTER VI. MISCELLANEOUS PROVISIONS

§ 3561. Authority and duties of Secretary
§ 3562. Nonduplication of benefits
§ 3563. Notification of eligibility
§ 3564. Annual adjustment of amounts of educational assistance

§ 3561. Authority and duties of Secretary

(a) The Secretary may provide the educational and vocational counseling authorized under section 3520 of this title [38 USCS § 3520], and may provide additional counseling
if the Secretary deems it to be necessary to accomplish the purposes of this chapter [38 USCS §§ 3500 et seq.].

(b) Where any provision of this chapter [38 USCS §§ 3500 et seq.] authorizes or requires any function, power, or duty to be exercised by a State, or by any officer or agency thereof, such function, power, or duty shall, with respect to the Republic of the Philippines, be exercised by the Secretary.

Amendments:

1966. Act March 3, 1966 (effective 3/3/66, as provided by § 12(a) of such Act), substituted new section for one which read:

"(a) Payments under this chapter shall be subject to audit and review by the General Accounting Office, as provided by the Budget and Accounting Act of 1921, and the Budget and Accounting Procedures Act of 1950.

"(b) The Administrator may provide the educational and vocational counseling required under section 1720 of this title, and may provide or require additional counseling if he deems it to be necessary to accomplish the purposes of this chapter.

"(c) In carrying out his functions under this chapter, the Administrator may utilize the facilities and services of any other Federal department or agency. Any such utilization shall be pursuant to proper agreement with the Federal department or agency concerned; and payment to cover the cost thereof shall be made either in advance or by way of reimbursement, as may be provided in such agreement.

"(d) Where any provision of this chapter authorizes or requires any function, power, or duty to be exercised by a State, or by any officer or agency thereof, such function, power, or duty shall, with respect to the Republic of the Philippines, be exercised by the Administrator.”.

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), substituted "the Administrator" for "he" preceding "deems".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1) of such Act, which appears as 38 USCS § 3452 note), in subsec. (a), substituted "authorized" for "required", and deleted "or require" preceding "additional counseling".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1761, as 38 USCS § 3561, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Code of Federal Regulations

Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18

Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a

Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871
§ 3562. Nonduplication of benefits

The commencement of a program of education or special restorative training under this chapter [38 USCS §§ 3500 et seq.] shall be a bar (1) to subsequent payments of compensation, dependency and indemnity compensation, or pension based on the death of a parent to an eligible person over the age of eighteen by reason of pursuing a course in an educational institution, or (2) to increased rates, or additional amounts, of compensation, dependency and indemnity compensation, or pension because of such a person whether eligibility is based upon the death or upon the total permanent disability of the parent.

Amendments:

1964. Act July 7, 1964, in subsec. (a), inserted "whether eligibility is based upon the death or upon the total permanent disability of the parent".

1966. Act March 3, 1966 (effective 3/3/66, as provided by § 12(a) of such Act, which appears as 38 USCS § 3693 note), deleted "(a)" preceding "The commencement" and deleted subsec. (b) which read: "(b) No educational assistance allowance or special training allowance shall be paid on behalf of any eligible person under this chapter for any period during which such person is enrolled in and pursuing a course of education or training paid for by the United States under any provision of law other than this chapter, where the payment of an allowance would constitute a duplication of benefits paid from the Federal Treasury to the eligible person or to his parent or guardian in his behalf.".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1762, as 38 USCS § 3562.

§ 3563. Notification of eligibility

The Secretary shall notify the parent or guardian of each eligible person defined in section 3501(a)(1)(A) of this title [38 USCS § 3501(a)(1)(A)] of the educational assistance available to such person under this chapter [38 USCS §§ 3500 et seq.]. Such notification shall be provided not later than the month in which such eligible person attains such person's thirteenth birthday or as soon thereafter as feasible.

Explanatory notes:

A prior § 1763 (Act Sept. 2, 1958, P. L. 85-857, § 1, 72 Stat. 1201) was repealed by Act March 3, 1966, P. L. 89-358, § 3(a)(3), 80 Stat. 20, effective March 3, 1966, as provided by § 12(a) of such Act. This section provided for control by agencies of the United States. For similar provisions, see 38 USCS § 3682.

Amendments:

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), substituted "such person's" for "his".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1763, as 38 USCS § 3563, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:
§ 3564. Annual adjustment of amounts of educational assistance

(a) With respect to any fiscal year, the Secretary shall provide a percentage increase in the rates payable under sections 3532, 3534(b), and 3542(a) of this title [38 USCS §§ 3532, 3534(b), and 3542(a)] equal to the percentage by which--

(1) the Consumer Price Index (all items, United States city average) for the 12-month period ending on the June 30 preceding the beginning of the fiscal year for which the increase is made, exceeds

(2) such Consumer Price Index for the 12-month period preceding the 12-month period described in paragraph (1).

(b) Any increase under subsection (a) in a rate with respect to a fiscal year after fiscal year 2004 and before fiscal year 2014 shall be rounded down to the next lower whole dollar amount. Any such increase with respect to a fiscal year after fiscal year 2013 shall be rounded to the nearest whole dollar amount.

Effective date of section:

This section took effect on October 1, 2001, as provided by § 111(f)(3) of Act Nov. 1, 2000, P. L. 106-419, which appears as a note to this section.

Amendments:

2003. Act Dec. 16, 2003, designated the existing provisions as subsec. (a), and, in such subsection, in the introductory matter, deleted "(rounded to the nearest dollar)" following "increase"; and added subsec. (b).

Other provisions:

Effective date of 38 USCS §§ 3564 and 3687(d). Act Nov. 1, 2000, P. L. 106-419, Title I, Subtitle B, § 111(f)(3), 114 Stat. 1831; June 5, 2001, P. L. 107-14, § 8(b)(1), 115 Stat. 36 (effective as of 11/1/00, and as if included in Act Nov. 1, 2000 as originally enacted, as provided by § 8(b) of such Act), provides: "Sections 3564 and 3687(d) of title 38, United States Code, as added by this subsection, shall take effect on October 1, 2001."

SUBCHAPTER VII. PHILIPPINE COMMONWEALTH ARMY AND PHILIPPINE SCOUTS

§ 3565. Children of certain Philippine veterans

§ 3566. Definitions

[§§ 3567, 3568] [§§ 1767, 1768. Repealed]

§ 3565. Children of certain Philippine veterans

(a) Basic eligibility. The term "eligible person" as used in section 3501(a)(1) of this title [38 USCS § 3501(a)(1)] includes the children of those Commonwealth Army veterans and "New" Philippine Scouts who meet the requirements of service-connected disability or death, based on service as defined in section 3566 of this title [38 USCS § 3566].
(b) Administrative provisions. The provisions of this chapter [38 USCS §§ 3500 et seq.] and chapter 36 [38 USCS §§ 3670 et seq.] shall apply to the educational assistance for children of Commonwealth Army veterans and "New" Philippine Scouts, except that--

(1) educational assistance allowances authorized by section 3532 of this title [38 USCS § 3532] and the special training allowance authorized by section 3542 of this title [38 USCS § 3542] shall be paid the rate of $0.50 for each dollar, and

(2) any reference to a State approving agency shall be deemed to refer to the Secretary.

(c) Delimiting dates. In the case of any individual who is an eligible person solely by virtue of subsection (a) of this section, and who is above the age of seventeen years and below the age of twenty-three years on September 30, 1966, the period referred to in section 3512 of this title [38 USCS § 3512] shall not end until the expiration of the five-year period which begins on September 30, 1966.

Explanatory notes:


Amendments:

1969. Act June 11, 1969, substituted new subsec. (c) for one which read: "In the case of any individual who is an 'eligible person' solely by virtue of subsection (a) of this section, and who is above the age of seventeen years and below the age of twenty-three years on the date of enactment of this section, the period referred to in section 1712 of this title shall not end until the expiration of the five-year period which begins on the date of enactment of such section."

1982. Act Oct. 12, 1982, in subsec. (a), inserted "of this title" following "section 1766".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1765, as 38 USCS § 3565, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1994. Act Nov. 2, 1994 (applicable to payments made after 12/31/94, as provided by § 507(c) of such Act, which appears as 38 USCS § 107 note), in subsec. (b)(1), substituted "the rate of" for "a rate in Philippine pesos equivalent to".

2006. Act June 15, 2006, in subsecs. (a)-(c), inserted the subsection headings, which headings formerly appeared as centered headings preceding such subsections.

Other provisions:

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3
§ 3566. Definitions

(a) The term "Commonwealth Army veterans" means persons who served before July 1, 1946, in the organized military forces of the Government of the Philippines, while such forces were in the service of the Armed Forces pursuant to the military order of the President dated July 26, 1941, including among such military forces organized guerrilla forces under commanders appointed, designated, or subsequently recognized by the Commander-in-Chief, Southwest Pacific Area, or other competent authority in the Army of the United States, and who were discharged or released from such service under conditions other than dishonorable.

(b) The term "New Philippine Scouts" means Philippine Scouts who served under section 14 of the Armed Forces Voluntary Recruitment Act of 1945, and who were discharged or released from such service under conditions other than dishonorable.

References in text:

Explanatory notes:

Amendments:

Cross References
This section is referred to in 38 USCS §§ 101, 3565

[§§ 3567, 3568] [§§ 1767, 1768. Repealed]

The bracketed section numbers "3567" and "3568" were inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.
CHAPTER 36. ADMINISTRATION OF EDUCATIONAL BENEFITS

SUBCHAPTER I. STATE APPROVING AGENCIES
SUBCHAPTER II. MISCELLANEOUS PROVISIONS
SUBCHAPTER III. EDUCATION LOANS [REPEALED]

Amendments:

"CHAPTER 36. ADMINISTRATION OF EDUCATIONAL BENEFITS"

"SUBCHAPTER I. STATE APPROVING AGENCIES"

"1770. Scope of approval."
"1771. Designation."
"1772. Approval of courses."
"1773. Cooperation."
"1774. Reimbursement of expenses."
"1775. Approval of accredited courses."
"1776. Approval of nonaccredited courses."
"1777. Notice of approval of courses."
"1778. Disapproval of courses."

"SUBCHAPTER II. MISCELLANEOUS PROVISIONS"

"1781. Nonduplication of benefits."
"1782. Control by agencies of the United States."
"1783. Conflicting interests."
"1784. Reports by institutions."
"1785. Overpayments to eligible persons or veterans."
"1786. Examination of records."
"1787. False or misleading statements."
"1788. Advisory committee."
"1789. Institutions listed by Attorney General."
"1790. Use of other Federal agencies."

"SUBCHAPTER I. STATE APPROVING AGENCIES"

for heading in Chapter 35 which read: "SUBCHAPTER VII. STATE APPROVING AGENCIES".
1967. Act Aug. 31, 1967, P. L. 90-77, Title III, §§ 304(e), 308(b), 81 Stat. 188, amended the analysis of this chapter by substituting items 1777-1779 for former items 1777 and 1778 which read:

"1777. Notice of approval of courses.

"1778. Disapproval of courses."); and substituted new item 1784 for one which read: "1784. Reports by institutions.".


1972. Act Oct. 24, 1972, P. L. 92-540, Title IV, § 406, 86 Stat. 1091, amended the analysis of this chapter by adding item 1780 and substituting items 1786-1795 for former items 1786-1791 which read:

"1786. Examination of records.

"1787. False or misleading statements.

"1788. Advisory committee.

"1789. Institutions listed by Attorney General.

"1790. Use of other Federal agencies.

"1791. Limitation on period of assistance under two or more programs.");

1974. Act Dec. 3, 1974, P. L. 93-508, Title II, § 212(b), Title III, § 301(b), 83 Stat. 1586, 1591, amended the analysis of this chapter by adding item 1796, the subchapter III heading, and items 1798 and 1799.


Act Nov. 18, 1988, P. L. 100-689, Title I, Part B, § 124(c)(3), 102 Stat. 4175, amended the analysis of this chapter by substituting "SUBCHAPTER III. EDUCATION LOANS" for "SUBCHAPTER III. EDUCATION LOANS TO ELIGIBLE VETERANS AND ELIGIBLE PERSONS".

Act Nov. 18, 1988, P. L. 100-687, Div B, Title XIII, § 1302(b), 102 Stat. 4128, amended the analysis of this chapter by adding item 1797.


Act Aug. 6, 1991, P. L. 102-83, § 5(b)(1), 105 Stat. 406, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


2003. Act Dec. 16, 2003, P. L. 108-183, Title III, § 306(g), 117 Stat. 2661, amended the analysis of this chapter by deleting the subchapter III HEADING and items 3698 and 3699, which read:

"SUBCHAPTER III. EDUCATION LOANS"

"3698. Eligibility for loans; amount and conditions of loans; interest rate on loans."

"3699. Revolving fund; insurance."

SUBCHAPTER I. STATE APPROVING AGENCIES

§ 3670. Scope of approval
§ 3671. Designation
§ 3672. Approval of courses
§ 3673. Cooperation
§ 3674. Reimbursement of expenses
§ 3674A. Evaluations of agency performance; qualifications and performance of agency personnel
§ 3675. Approval of accredited courses
§ 3676. Approval of nonaccredited courses
§ 3677. Approval of training on the job
§ 3678. Notice of approval of courses
§ 3679. Disapproval of courses

§ 3670. Scope of approval

(a) A course approved under and for the purposes of this chapter [38 USCS §§ 3670 et seq.] shall be deemed approved for the purposes of chapters 34 and 35 of this title [38 USCS §§ 3451 et seq. and 3500 et seq.].

(b) Any course approved under chapter 33 of this title, prior to February 1, 1965, under subchapter VII of chapter 35 of this title, prior to March 3, 1966, and not disapproved under section 3483 [38 USCS § 3483], section 3456 [38 USCS § 3456] (as in effect prior to February 1, 1965), or section 3679 of this title [38 USCS § 3679], shall be deemed approved for the purposes of this chapter [38 USCS §§ 3670 et seq.].

References in text:


"Subchapter VII of chapter 35 of this title, prior to the March 3, 1966", referred to in subsec. (b), is Act Sept. 23, 1963, P. L. 88-126, § 1, 77 Stat. 158, which was classified to 38 USC
§ 3671. Designation

(a) Unless otherwise established by the law of the State concerned, the chief executive of each State is requested to create or designate a State department or agency as the "State approving agency" for such State for the purposes of this chapter and chapters 34 and 35 of this title [38 USCS §§ 3670 et seq., 3451 et seq., and 3500 et seq.].

(b) (1) If any State fails or declines to create or designate a State approving agency, or fails to enter into an agreement under section 3674(a) [38 USCS § 3674(a)], the provisions of this chapter [38 USCS §§ 3670 et seq.] which refer to the State approving agency shall, with respect to such State, be deemed to refer to the Secretary.

(2) In the case of courses subject to approval by the Secretary under section 3672 of this title [38 USCS § 3672], the provisions of this chapter [38 USCS §§ 3670 et seq.] which refer to a State approving agency shall be deemed to refer to the Secretary.

Amendments:

1966. Act March 3, 1966 (effective 3/3/66, as provided by § 12(a) of such Act), in subsec. (a), substituted "chapters 34 and 35 of this title" for "this chapter after the date for the expiration of all education and training provided in chapter 33 of this title. Such agency may be the agency designated or created in accordance with section 1641 of this title".

1972. Act Oct. 24, 1972, in subsec. (a), inserted "this chapter and".

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), substituted "such" for "his".
§ 3672. Approval of courses

(a) An eligible person or veteran shall receive the benefits of this chapter and chapters 34 and 35 of this title [38 USCS §§ 3670 et seq., 3451 et seq., and 3500 et seq.] while enrolled in a course of education offered by an educational institution only if (1) such course is approved as provided in this chapter and chapters 34 and 35 of this title [38 USCS §§ 3670 et seq., 3451 et seq., and 3500 et seq.] by the State approving agency for the State where such educational institution is located, or by the Secretary, or (2) such course is approved (A) for the enrollment of the particular individual under the provisions of section 3536 of this title [38 USCS § 3536] or (B) for special restorative training under subchapter V of chapter 35 of this title [38 USCS §§ 3540 et seq.]. Approval of courses by State approving agencies shall be in accordance with the provisions of this chapter and chapters 34 and 35 of this title [38 USCS §§ 3670 et seq., 3451 et seq., and 3500 et seq.] and such other regulations and policies as the State approving agency may adopt. Each State approving agency shall furnish the Secretary with a current list of educational institutions specifying courses which it has approved, and, in addition to such list, it shall furnish such other information to the Secretary as it and the Secretary may determine to be necessary to carry out the purposes of this chapter and chapters 34 and 35 of this title [38 USCS §§ 3670 et seq., 3451 et seq., and 3500 et seq.]. Each State approving agency shall notify the Secretary of the disapproval of any course previously approved and shall set forth the reasons for such disapproval.

(b) The Secretary shall be responsible for the approval of courses of education offered by any agency of the Federal Government authorized under other laws to supervise such education. The Secretary may approve any course in any other educational institution in accordance with the provisions of this chapter and chapters 34 and 35 of this title [38 USCS §§ 3670 et seq., 3451 et seq., and 3500 et seq.].

(c) (1) In the case of programs of apprenticeship where--

(A) the apprenticeship standards have been approved by the Secretary of Labor pursuant to section 2 of the Act of August 16, 1937 (popularly known as the "National Apprenticeship Act") (29 U.S.C. 50a), as a national apprenticeship program for operation in more than one State, and

(B) the training establishment is a carrier directly engaged in interstate commerce which provides such training in more than one State, the Secretary shall act as a "State approving agency" as such term is used in section 3687(a)(1) of this title [38 USCS § 3687(a)(1)] and shall be responsible for the approval of all such programs.
(2) The period of a program of apprenticeship may be determined based upon a specific period of time (commonly referred to as a "time-based program"), based upon the demonstration of successful mastery of skills (commonly referred to as a "competency-based program"), or based upon a combination thereof.

(3)

(A) In the case of a competency-based program of apprenticeship, State approving agencies shall determine the period for which payment may be made for such a program under chapters 30 and 35 of this title [38 USCS §§ 3001 et seq. and 3500 et seq.] and chapter 1606 of title 10 [10 USCS §§ 16131 et seq.]. In determining the period of such a program, State approving agencies shall take into consideration the approximate term of the program recommended in registered apprenticeship program standards recognized by the Secretary of Labor.

(B) The sponsor of a competency-based program of apprenticeship shall provide notice to the State approving agency involved of any such standards that may apply to the program and the proposed approximate period of training under the program.

(4) The sponsor of a competency-based program of apprenticeship shall notify the Secretary upon the successful completion of a program of apprenticeship by an individual under chapter 30 or 35 of this title [38 USCS §§ 3001 et seq. or 3500 et seq.], or chapter 1606 of title 10 [10 USCS §§ 16131 et seq.], as the case may be.

(d) (1) Pursuant to regulations prescribed by the Secretary in consultation with the Secretary of Labor, the Secretary and State approving agencies shall actively promote the development of apprenticeship and on-the-job training programs for the purposes of sections 3677 and 3687 of this title [38 USCS §§ 3677 and 3687] and shall utilize the services of disabled veterans' outreach program specialists under section 4103A of this title [38 USCS § 4103A] to promote the development of such programs. The Secretary of Labor shall provide assistance and services to the Secretary, and to State approving agencies, to increase the use of apprenticeships.

(2) In conjunction with outreach services provided by the Secretary under chapter 77 of this title [38 USCS §§ 7701 et seq.] for education and training benefits, each State approving agency shall conduct outreach programs and provide outreach services to eligible persons and veterans about education and training benefits available under applicable Federal and State law.

(e) A program of education exclusively by correspondence, and the correspondence portion of a combination correspondence-residence course leading to a vocational objective, that is offered by an educational institution (as defined in section 3452(c) of this title [38 USCS § 3452(c)]) may be approved only if (1) the educational institution is accredited by an entity recognized by the Secretary of Education, and (2) at least 50 percent of those pursuing such a program or course require six months or more to complete the program or course.

Amendments:

1966. Act March 3, 1966 (effective 3/3/66, as provided by § 12(a) of such Act), in subsec. (a), substituted "eligible person or veteran" for "eligible person", substituted "chapters 34 and 35" for "this chapter" following "benefits of", "provided in", "provisions of", and "purposes of", and
substituted "under subchapter V of chapter 35 of this title" for "under subchapter V of this chapter"; in subsec. (b), substituted "chapters 34 and 35" for "this chapter".

Such Act further, purported to purported to substitute "chapters 34 and 35" for "this chapter" in the fourth sentence of subsec. (a) of this section. However, such amendment could not be executed because such amendment had already been executed.

1970. Act March 26, 1970, added subsec. (c)

1972. Act Oct. 24, 1972, in subsec. (a), inserted "this chapter and" wherever appearing, and substituted "1736" for "1737"; in subsec. (b), inserted "this chapter and"; and in subsec. (c), concluding matter, substituted "1787(a)(1)" for "1683(a)(1)".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(e) of such Act, which appears as 38 USCS § 4101 note), added subsec. (d).

1982. Act Oct. 12, 1982, in subssecs. (a) and (b), inserted "of this title" following "34 and 35" each place it appears; and, in subsec. (c)(1), substituted "section 2 of the Act of August 16, 1937 (popularly known as the 'National Apprenticeship Act') (29 U.S.C. 50a)," for "section 50a of title 29".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1772, as 38 USCS § 3672, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1994. Act Nov. 2, 1994 (applicable to programs and courses commencing more than 90 days after the date of enactment, as provided by § 605(b) of such Act, which appears as a note to this section) added subsec. (e).


2004. Act Dec. 10, 2004, in subsec. (c), designated the existing provisions as para. (1), redesignated former paras. (1) and (2) as subparas. (A) and (B), respectively, and, in subpara. (A) as so redesignated, inserted "apprenticeship" before "standards", and added new paras. (2)-(4); and, in subsec. (d)(1), substituted "of apprenticeship and on the job training programs" for "of programs of training on the job (including programs of apprenticeship)", and added the sentence beginning "The Secretary of Labor . . .".

Other provisions:

Application and construction of the Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Application of Nov. 2, 1994 amendments. Act Nov. 2, 1994, P. L. 103-446, Title VI, § 605(b), 108 Stat. 4672, provides: "The amendments made by subsection (a) [amending 38 USCS §§ 3672, 3675, 3680, and 3686] shall apply with respect to programs of education exclusively by correspondence and to correspondence-residence courses commencing more than 90 days after the date of the enactment of this Act."

Cross References

This section is referred to in 38 USCS § 3671, 3675

Veteran was not entitled to educational benefits for real estate courses where school had not applied either to state's approving agency or directly to VA for approval of its real estate courses. Piotrowski v Brown (1996) 9 Vet App 215

§ 3673. Cooperation

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(a) The Secretary and each State approving agency shall take cognizance of the fact that
definite duties, functions and responsibilities are conferred upon the Secretary and each
State approving agency under the educational programs established under this chapter
and chapters 34 and 35 of this title [38 USCS §§ 3670 et seq., 3451 et seq., and 3500 et
seq.]. To assure that such programs are effectively and efficiently administered, the
cooperation of the Secretary and the State approving agencies is essential. It is necessary
to establish an exchange of information pertaining to activities of educational institutions,
and particular attention should be given to the enforcement of approval standards,
enforcement of enrollment restrictions, and fraudulent and other criminal activities on the
part of persons connected with educational institutions in which eligible persons or
veterans are enrolled under this chapter and chapters 34 and 35 of this title [38 USCS §§
3670 et seq., 3451 et seq., and 3500 et seq.].

(b) The Secretary will furnish the State approving agencies with copies of such
Department of Veterans Affairs informational material as may aid them in carrying out
chapters 34 and 35 of this title [38 USCS §§ 3451 et seq. and 3500 et seq.].

Amendments:
1966. Act March 3, 1966 (effective 3/3/66, as provided by § 12(a) of such Act), in subsec. (a),
substituted "chapters 34 and 35" for "this chapter" wherever appearing and substituted
"eligible persons or veterans" for "eligible persons"; and in subsec. (b), substituted "chapters
34 and 35" for "this chapter".
1982. Act Oct. 12, 1982, in subsecs. (a) and (b), inserted "of this title" each place it appears.
1989. Act Dec. 18, 1989, substituted "Secretary" for "Administrator", wherever appearing; and
in subsec. (b), substituted "Department of Veterans Affairs" for "Veterans' Administration".
1991, Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1773, as 38 USCS §
3673.

Other provisions:
Application and construction of the Oct. 12, 1982 amendment of this section. For
provisions as to the application and construction of the Oct. 12, 1982 amendment of this
section, see § 5 of such Act, which appears as 10 USCS § 101 note.

§ 3674. Reimbursement of expenses

(a) (1) Subject to paragraphs (2) through (4) of this subsection, the Secretary is
authorized to enter into contracts or agreements with State and local agencies to pay such
State and local agencies for reasonable and necessary expenses of salary and travel
incurred by employees of such agencies and an allowance for administrative expenses in
accordance with the formula contained in subsection (b) of this section in (A) rendering
necessary services in ascertaining the qualifications of educational institutions for
furnishing courses of education to eligible persons or veterans under this chapter and
chapters 30 through 35 of this title and chapter 106 of title 10 [38 USCS §§ 3001 et seq.
through 3500 et seq. and 10 USCS §§ 2131 et seq.], and in the supervision of such
educational institutions, and (B) furnishing, at the request of the Secretary, any other
services in connection with such chapters. Each such contract or agreement shall be
conditioned upon compliance with the standards and provisions of such chapters. The
Secretary may also reimburse such agencies for work performed by their subcontractors where such work has a direct relationship to the requirements of such chapters, and has had the prior approval of the Secretary.

(2) (A) The Secretary shall make payments to State and local agencies, out of amounts available for the payment of readjustment benefits, for the reasonable and necessary expenses of salary and travel incurred by employees of such agencies in carrying out contracts or agreements entered into under this section, for expenses approved by the Secretary that are incurred in carrying out activities described in section 3674A(a)(3) of this title [38 USCS § 3674A(a)(3)] (except for administrative overhead expenses allocated to such activities), and for the allowance for administrative expenses described in subsection (b).

(B) The Secretary shall make such a payment to an agency within a reasonable time after the agency has submitted a report pursuant to paragraph (3) of this subsection.

(C) Subject to paragraph (4) of this subsection, the amount of any such payment made to an agency for any period shall be equal to the amount of the reasonable and necessary expenses of salary and travel certified by such agency for such period in accordance with paragraph (3) of this subsection plus the allowance for administrative expenses described in subsection (b) and the amount of expenses approved by the Secretary that are incurred in carrying out activities described in section 3674A(a)(3) of this title [38 USCS § 3674A(a)(3)] for such period (except for administrative overhead expenses allocated to such activities).

(3) Each State and local agency with which a contract or agreement is entered into under this section shall submit to the Secretary on a monthly or quarterly basis, as determined by the agency, a report containing a certification of the reasonable and necessary expenses incurred for salary and travel by such agency under such contract or agreement for the period covered by the report. The report shall be submitted in the form and manner required by the Secretary.

(4) The total amount made available under this section for any fiscal year may not exceed $13,000,000 or, for each of fiscal years 2001 and 2002, $14,000,000, for fiscal year 2003, $14,000,000, for fiscal year 2004, $18,000,000, for fiscal year 2005, $18,000,000, for fiscal year 2006, $19,000,000, and for fiscal year 2007, $19,000,000. For any fiscal year in which the total amount that would be made available under this section would exceed the amount applicable to that fiscal year under the preceding sentence except for the provisions of this paragraph, the Secretary shall provide that each agency shall receive the same percentage of the amount applicable to that fiscal year under the preceding sentence as the agency would have received of the total amount that would have been made available without the limitation of this paragraph.

(b) The allowance for administrative expenses incurred pursuant to subsection (a) of this section shall be paid in accordance with the following formula:

<table>
<thead>
<tr>
<th>Total salary cost reimbursable under this section</th>
<th>Allowable for administrative expense</th>
</tr>
</thead>
<tbody>
<tr>
<td>$5,000 or less</td>
<td>$693</td>
</tr>
<tr>
<td>Over $5,00 but not $5,000</td>
<td></td>
</tr>
</tbody>
</table>

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(c) Each State and local agency with which the Secretary contracts or enters into an agreement under subsection (a) of this section shall report to the Secretary periodically, but not less often than annually, as determined by the Secretary, on the activities in the preceding twelve months (or the period which has elapsed since the last report under this subsection was submitted) carried out under such contract or agreement. Each such report shall describe, in such detail as the Secretary shall prescribe, services performed and determinations made in connection with ascertaining the qualifications of educational institutions in connection with this chapter and chapters 32, 34, and 35 of this title [38 USCS §§ 3670 et seq., 3201 et seq., 3450 et seq., and 3500 et seq.] and in supervising such institutions.

Amendments:

1966. Act March 3, 1966 (effective 3/3/66, as provided by § 12(a) of such Act), substituted "chapters 34 and 35" for "this chapter" wherever appearing; substituted "eligible persons or veterans" for "eligible persons"; and purported to substitute "eligible person or veteran" for "eligible person"; however, such amendment could not be executed because the words "eligible person" did not appear in the section.

1968. Act Oct. 23, 1968 (effective as provided by § 6(b) of such Act, which appears as a note to this section), designated existing matter as subsec. (a); in subsec. (a), as so designated, inserted "and an allowance for administrative expenses in accordance with the formula contained in subsection (b) of this section"; and added subsec. (b).

1972. Act Oct. 24, 1972, in subsec. (a), inserted "this chapter and"; and substituted new subsec. (b) for one which read:

"(b) The allowance for administrative expenses incurred pursuant to subsection (a) of this section shall be paid in accordance with the following formula:

"Total salary cost reimbursable Allowable for administrative expense
under this section

$5,000 or less ......................... $250.
Over $5,00 but not exceeding $10,000 ...... $450.
Over $10,000 but not exceeding $35,000 ... $450 for the first $10,000, plus

$400 for each additional $5,000 or fraction thereof.

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Over $35,000 but not exceeding $40,000 ... $2,625.
Over $40,000 but not exceeding $75,000 ... $2,625 for the first $40,000, plus
$350 for each additional $5,000 or fraction thereof.
Over $75,000 but not exceeding $80,000 ... $5,225.
Over $80,000 ......................... $5,225 for the first $80,000, plus
$300 for each additional $5,000 or fraction thereof."

1974. Act Dec. 3, 1974 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), substituted new subsec. (b) for one which read:

"(b) The allowance for administrative expenses incurred pursuant to subsection (a) of this section shall be paid in accordance with the following formula:

"Total salary cost reimbursable Allowable for administrative expense
under this section

$5,000 or less ....................... $500.
Over $5,00 but not exceeding $10,000 ... $900.
Over $10,000 but not exceeding $35,000 ... $900 for the first $10,000, plus
$800 for each additional $5,000 or fraction thereof.
Over $35,000 but not exceeding $40,000 ... $5,250.
Over $40,000 but not exceeding $75,000 ... $5,250 for the first $40,000, plus
$700 for each additional $5,000 or fraction thereof.
Over $75,000 but not exceeding $80,000 ... $10,450.
Over $80,000 ......................... $10,450 for the first $80,000, plus
$600 for each additional $5,000 or fraction thereof.""

1976. Act Oct. 15, 1976 (effective 10/1/76, as provided by § 703(a) of such Act), in subsec. (a), inserted "The Administrator may also reimburse such agencies for work performed by their subcontractors where such work has a direct relationship to the requirements of chapter 32, 34, 35, or 36 of this title, and has had the prior approval of the Administrator."; and substituted new subsec. (b) for one which read:

"(b) The allowance for administrative expenses incurred pursuant to subsection (a) of this section shall be paid in accordance with the following formula:

"Total salary cost reimbursable Allowable for administrative expense
under this section

$5,000 or less ....................... $550.
Over $5,00 but not exceeding $10,000 ... $1,000.
Over $10,000 but not exceeding $35,000 ... $1,000 for the first $10,000, plus
$925 for each additional $5,000 or fraction thereof.
Over $35,000 but not exceeding $40,000 ... $6,050.
Over $40,000 but not exceeding $75,000 ... $6,050 for the first $40,000, plus
$800 for each additional $5,000 or fraction thereof.

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Over $75,000 but not exceeding $80,000 ... $12,000.
Over $80,000 ......................... $12,000 for the first $80,000, plus
$700 for each additional $5,000 or fraction thereof."

1977. Act Nov. 23, 1977 (effective 2/1/78, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), substituted new subsec. (b) for one which read:

"(b) The allowance for administrative expenses incurred pursuant to subsection (a) of this section shall be paid in accordance with the following formula:

"Total salary cost reimbursable Allowable for administrative expense

under this section

$5,000 or less ......................... $600.
Over $5,00 but not exceeding $10,000 ..... $1,080 for the first $10,000, plus
$1,00 for each additional $5,000 or fraction thereof.
Over $10,000 but not exceeding $35,000 ... $12,960.
Over $10,000 but not exceeding $35,000 ... $12,960 for the first $35,000, plus
$755 for each additional $5,000 or fraction thereof."

and added subsec. (c).

1980. Act Oct. 17, 1980, § 203(1) (effective 10/1/80, as provided by § 802(b)(1) of such Act, which appears as 38 USCS § 3482), substituted new subsec. (b) for one which read:

"(b) The allowance for administrative expenses incurred pursuant to subsection (a) of this section shall be paid in accordance with the following formula:

"Total salary cost reimbursable Allowable for administrative expense

under this section

$5,000 or less ......................... $630.
Over $5,00 but not exceeding $10,000 ..... $1,134 for the first $10,000, plus
$1,050 for each additional $5,000 or fraction thereof.
Over $10,000 but not exceeding $35,000 ... $6,862.
Over $10,000 but not exceeding $35,000 ... $6,862 for the first $35,000, plus
$908 for each additional $5,000 or fraction thereof.
Over $35,000 but not exceeding $40,000 ... $13,608.
Over $35,000 but not exceeding $40,000 ... $13,608 for the first $40,000, plus
$13,608 for each additional $5,000 or fraction thereof."
Act Oct. 17, 1980, § 213(1) (effective 1/1/81, as provided by § 802(b)(2) of such Act, which appears as 38 USCS § 3482 note), substituted subsec. (b) for former subsec. (b), as amended by § 203(1) of Act Oct. 17, 1980, which read:

"(b) The allowance for administrative expenses incurred pursuant to subsection (a) of this section shall be paid in accordance with the following formula:

<table>
<thead>
<tr>
<th>Total salary cost reimbursable under this section</th>
<th>Allowable for administrative expense</th>
</tr>
</thead>
<tbody>
<tr>
<td>$5,000 or less</td>
<td>$662.</td>
</tr>
<tr>
<td>Over $5,00 but not exceeding $10,000</td>
<td>$1,191 for the first $10,000, plus  $1,103 for each additional $5,000 or fraction thereof.</td>
</tr>
<tr>
<td>Over $10,000 but not exceeding $35,000</td>
<td>$1,191 for the first $35,000, plus  $953 for each additional $5,000 or fraction thereof.</td>
</tr>
<tr>
<td>Over $35,000 but not exceeding $40,000</td>
<td>$7,205 for the first $40,000, plus  $833 for each additional $5,000 or fraction thereof.</td>
</tr>
<tr>
<td>Over $40,000 but not exceeding $75,000</td>
<td>$7,205 for the first $75,000, plus  $14,288 for the first $80,000, plus  $833 for each additional $5,000 or fraction thereof.</td>
</tr>
<tr>
<td>Over $75,000 but not exceeding $80,000</td>
<td>$14,288 for the first $80,000, plus  $833 for each additional $5,000 or fraction thereof.</td>
</tr>
</tbody>
</table>

1982. Act Oct. 12, 1982, in subsec. (a), inserted "of this title" following "34 and 35" each place it appears.

1988. Act May 20, 1988 (effective on enactment as provided by § 16(a), of such Act, except as provided by § 16(b)(1)(D), which appear as 38 USCS § 3104 note), in subsec. (a), designated the existing provisions as para. (1) and, in para. (1) as so designated, inserted "Subject to paragraphs (2) through (4) of this subsection,". substituted "the" for "The", "(A)" for "(1)", and "(B)" for "(2)", substituted "chapters 30 through 35 of this title and chapters 106 and 107 of title 10" for "chapters 34 and 35 of this title", substituted "such chapters" for "chapters 34 and 35 of this title" following "connection with" and "provisions of", and substituted "such chapters" for "chapter 32, 34, 35, or 36 of this title", and added paras. (2)-(4).

1989. Act Dec. 18, 1989, in subsec. (a)(2), in subpara. (A), substituted "section, for expenses approved by the Secretary that are incurred in carrying out activities described in section 1774A(a)(4) of this title (except for administrative overhead expenses allocated to such activities), and for" for "section and for", and in subpara. (C), inserted "and the amount of expenses approved by the Secretary that are incurred in carrying out activities described in section 1774A(a)(4) of this title for such period (except for administrative overhead expenses allocated to such activities)".

Such Act further, in subsecs. (a) and (c), substituted "Secretary" for "Administrator" wherever appearing.


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1774, as 38 USCS § 3674, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).
1994. Act Nov. 2, 1994 (applicable with respect to services provided after 9/30/94, as provided by § 606(a)(2) of such Act, which appears as a note to this section), in subsec. (a)(4), substituted "$13,000,000" for "$12,000,000" wherever appearing.

Such Act further, in subsec. (a)(3), deleted the designation for subpara. (A), and deleted subpara. (B), which read:

"(B) The Secretary shall transmit a report to the Congress on a quarterly basis which summarizes--

"(i) the amounts for which certifications were made by State and local agencies in the reports submitted under subparagraph (A) of this paragraph with respect to the quarter for which the report is made; and

"(ii) the amounts of the payments made by the Secretary for such quarter with respect to such certifications and with respect to administrative expenses.".

2000. Act Nov. 1, 2000, in subsec. (a)(4), inserted "or, for each of fiscal years 2001 and 2002, $14,000,000", and substituted "the amount applicable to that fiscal year under the preceding sentence" for "$13,000,000" in two places.


2002. Act Dec. 6, 2002, in subsec. (a)(4), inserted ", for fiscal year 2003, $14,000,000, for fiscal year 2004, $18,000,000, for fiscal year 2005, $18,000,000, for fiscal year 2006, $19,000,000, and for fiscal year 2007, $19,000,000".

Other provisions:


Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Payment to State or local agency; reimbursement. Act May 20, 1988, P. L. 100-323, § 13(a)(2), 102 Stat. 572, effective on enactment, as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note, provides: "If any payment is made to State or local approving agencies with respect to activities carried out under subchapter I of chapter 36 of title 38, United States Code [38 USCS §§ 3670 et seq.], for fiscal year 1988 before the date of the enactment of this Act and from an account other than the account used for payment of readjustment benefits, the account from which such payment was made shall be reimbursed from the account used for payment of readjustment benefits.".

Application of Nov. 2, 1994 amendments. Act Nov. 2, 1994, P. L. 103-446, Title VI, § 606(a)(2), 108 Stat. 4672, provides: "The amendments made by subsection (a) [amending subsec. (a)(4) of this section] shall apply with respect to services provided under such section after September 30, 1994.".

Cross References

This section is referred to in 38 USCS §§ 3671, 3674A, 3683
§ 3674A. Evaluations of agency performance; qualifications and performance of agency personnel

(a) The Secretary shall--

(1) (A) conduct, in conjunction with State approving agencies, an annual evaluation of each State approving agency on the basis of standards developed by the Secretary in conjunction with the State approving agencies, and (B) provide each such agency an opportunity to comment on the evaluation;

(2) take into account the results of annual evaluations carried out under paragraph (1) when negotiating the terms and conditions of a contract or agreement under section 3674 of this title [38 USCS § 3674];

(3) cooperate with State approving agencies in developing and implementing a uniform national curriculum, to the extent practicable, for training new employees and for continuing the training of employees of such agencies, and sponsor, with the agencies, such training and continuation of training; and

(4) prescribe prototype qualification and performance standards, developed in conjunction with State approving agencies, for use by such agencies in the development of qualification and performance standards for State approving agency personnel carrying out approval responsibilities under a contract or agreement entered into under section 3674(a) [38 USCS § 3674(a)].

(b) (1) Each State approving agency carrying out a contract or agreement with the Secretary under section 3674(a) of this title [38 USCS § 3674(a)] shall--

(A) apply qualification and performance standards based on the standards developed under subsection (a)(4); and

(B) make available to any person, upon request, the criteria used to carry out its functions under a contract or agreement entered into under section 3674(a) of this title [38 USCS § 3674(a)].

(2) In developing and applying standards described in subsection (a)(4), the State approving agency may take into consideration the State's merit system requirements and other local requirements and conditions.

(3) The Secretary shall provide assistance in developing such standards to a State approving agency that requests it.

Effective date of section:

This section became effective on enactment, pursuant to § 16(a) of Act May 20, 1987, P. L. 100-323, which appears as 38 USCS § 3104 note.

Amendments:


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1774, as 38 USCS § 3674, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1994. Act Nov. 2, 1994, in subsec. (a), deleted para. (3), which read: "(3) supervise functionally the provision of course-approval services by State approving agencies under this subchapter;", and redesignated paras. (4) and (5) as paras. (3) and (4), respectively; and, in subsec. (b), substituted "subsection (a)(4)" for "subsection (a)(5) of this section" wherever appearing and inserted "of this title" following "section 3674(a)" wherever appearing.
1998. Act Nov. 11, 1998, in subsec. (b)(1), in the introductory matter, deleted "after the 18-month period beginning on the date of the enactment of this section" following "of this title".


Other provisions:

Implementation of section. Act May 20, 1988, P. L. 100-323, § 13(b)(2), 102 Stat. 573, effective on enactment, as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note, provides:

"For purposes of implementing the amendments made by paragraph (1)--

"(A) the Administrator of Veterans' Affairs shall, within 120 days after the date of the enactment of this Act, publish prototype standards developed under section 1774A(a)(5) [now § 3674A(a)(5)] of title 38, United States Code, as added by paragraph (1);

"(B) each State approving agency shall, within 1 year after the Administrator has published prototype standards under subparagraph (A), submit to the Administrator of Veterans' Affairs a copy of the standards to be implemented by such agency under section 1774A(b)(1)(A) [now § 3674A(b)(1)(A)] of such title; and

"(C) the Administrator may, within 30 days after receiving such standards from an agency, provide comments to the agency, especially with regard to whether the State's standards are consistent with the prototype standards developed by the Administrator under section 1774A(a)(5) [now § 3674A(a)(5)] of such title.".

Nonapplicability of standards to person remaining in same position. Act May 20, 1988, P. L. 100-323, § 13(b)(3), 102 Stat. 573, effective on enactment as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note, provides: "None of the qualification standards implemented pursuant to the amendments made by paragraph (1) [note to this section] shall apply to any person employed by a State approving agency on the date of the enactment of this Act as long as such person remains in the position in which the person is employed on such date.".

Cross References

This section is referred to in 38 USCS §§ 3674, 3682

§ 3675. Approval of accredited courses

(a) (1) A State approving agency may approve the courses offered by an educational institution when--

(A) such courses have been accredited and approved by a nationally recognized accrediting agency or association;

(B) such courses are conducted under the Act of February 23, 1917 (20 U.S.C. 11 et seq.);

(C) such courses are accepted by the State department of education for credit for a teacher's certificate or a teacher's degree; or

(D) such courses are approved by the State as meeting the requirement of regulations prescribed by the Secretary of Health and Human Services under sections 1819(f)(2)(A)(i) and 1919(f)(2)(A)(i) of the Social Security Act (42 U.S.C. 1395i-3(f)(2)(A)(i) and 1396r(f)(2)(A)(i))

(2) (A) For the purposes of this chapter [38 USC §§ 3670 et seq.], the Secretary of Education shall publish a list of nationally recognized accrediting agencies and
associations which the Secretary determines to be reliable authority as to the quality of training offered by an educational institution.

(B) Except as provided in section 3672(e) of this title [38 USCS § 3672(e)], a State approving agency may utilize the accreditation of any accrediting association or agency listed pursuant to subparagraph (A) of this paragraph for approval of courses specifically accredited and approved by such accrediting association or agency.

(3) (A) An educational institution shall submit an application for approval of courses to the appropriate State approving agency. In making application for approval, the institution (other than an elementary school or secondary school) shall transmit to the State approving agency copies of its catalog or bulletin which must be certified as true and correct in content and policy by an authorized representative of the institution.

(B) Each catalog or bulletin transmitted by an institution under subparagraph (A) of this paragraph shall--

(i) state with specificity the requirements of the institution with respect to graduation;
(ii) include the information required under paragraphs (6) and (7) of section 3676(b) of this title [38 USCS § 3676(b)]; and
(iii) include any attendance standards of the institution, if the institution has and enforces such standards.

(b) As a condition of approval under this section, the State approving agency must find the following:

(1) The educational institution keeps adequate records, as prescribed by the State approving agency, to show the progress and grades of the eligible person or veteran and to show that satisfactory standards relating to progress and conduct are enforced.
(2) The educational institution maintains a written record of the previous education and training of the eligible person or veteran that clearly indicates that appropriate credit has been given by the educational institution for previous education and training, with the training period shortened proportionately.
(3) The educational institution and its approved courses meet the criteria of paragraphs (1), (2), and (3) of section 3676(c) of this title [38 USCS § 3676(c)].

(c) (1) A State approving agency may approve the entrepreneurship courses offered by a qualified provider of entrepreneurship courses.

(2) For purposes of this subsection, the term "entrepreneurship course" means a non-degree, non-credit course of business education that enables or assists a person to start or enhance a small business concern (as defined pursuant to section 3(a) of the Small Business Act (15 U.S.C. 632(a))).

(3) Subsection (a) and paragraphs (1) and (2) of subsection (b) shall not apply to--

(A) an entrepreneurship course offered by a qualified provider of entrepreneurship courses; and
(B) a qualified provider of entrepreneurship courses by reason of such provider offering one or more entrepreneurship courses.

(4) Notwithstanding paragraph (3), a qualified provider of entrepreneurship courses shall maintain such records as the Secretary determines to be necessary to comply
with reporting requirements that apply under section 3684(a)(1) of this title [38 USCS § 3684(a)(1)] with respect to eligible persons and veterans enrolled in an entrepreneurship course offered by the provider.

Amendments:

1966. Act March 3, 1966 (effective 3/3/66, as provided by § 12(a) of such Act), in subsec. (b), substituted "eligible person or veteran" for "eligible person" wherever appearing.

1976. Act Oct. 15, 1976, § 513(a)(2) (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), concluding matter, substituted "the Commissioner" for "he" preceding "determines".

Such Act further, in § 504 (effective 12/1/76, as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), concluding matter, inserted "which must be certified as true and correct in content and policy by an authorized representative of the school. The catalog or bulletin must specifically state its progress requirements for graduation and must include as a minimum the information required by sections 1776(b)(6) and (7) of this title.;” and in subsec. (b), inserted "and must include as a minimum (except for attendance) the requirements set forth in section 1776(c)(7) of this title".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(h) of such Act, which appears as 38 USCS § 3452 note), in subsec. (a), substituted "Secretary" for "Commissioner" wherever appearing.


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1775, as 38 USCS § 3675, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1992. Act Oct. 29, 1992, in subsec. (a), redesignated the existing provisions as para. (1) of such subsection, redesignated former paras. (1)-(3) as subparas. (A)-(C), respectively, and deleted the concluding matter which read: "For the purposes of this chapter the Secretary of Education shall publish a list of nationally recognized accrediting agencies and associations which the Secretary determines to be reliable authority as to the quality of training offered by an educational institution and the State approving agencies may, upon concurrence, utilize the accreditation of such accrediting associations or agencies for approval of the courses specifically accredited and approved by such accrediting association or agency. In making application for approval, the institution shall transmit to the State approving agency copies of its catalog or bulletin which must be certified as true and correct in content and policy by an authorized representative of the school. The catalog or bulletin must specifically state its progress requirements for graduation and must include as a minimum the information required by sections 3676(b)(6) and (7) of this title.".

Such Act further, in subsec. (a), in para. (1) as redesignated, in subpara. (B) as redesignated, substituted "the Act of February 23, 1917 (20 U.S.C. 11 et seq.);" for "sections 11-28 of title 20; or", in subpara. (C) as redesignated, substituted "; or" for a concluding period, and added subpara. (D), and added new paras. (2) and (3).

1994. Act Nov. 2, 1994 (applicable to programs and courses commencing more than 90 days after the date of enactment, as provided by § 605(b) of such Act, which appears as 38 USCS § 3672 note), in subsec. (a)(2)(B), substituted "Except as provided in section 3672(e) of this title, a State" for "A State".

1996. Act Oct. 9, 1996 substituted subsec. (b) for one which read: "(b) As a condition to approval under this section, the State approving agency must find that adequate records are kept by the educational institution to show the progress of each eligible person or veteran and must include as a minimum (except for attendance) the requirements set forth in section 3676(c)(7) of this title. The State approving agency must also find that the educational institution maintains a written record of the previous education and training of the eligible
person or veteran and clearly indicates that appropriate credit has been given by the institution for previous education and training, with the training period shortened proportionately and the eligible person or veteran and the Secretary so notified."

2003. Act Dec. 16, 2003 (applicable as provided by § 305(f) of such Act, which appears as 38 USCS § 3452 note), added subsec. (c).

2004. Act Dec. 10, 2004 (effective as if included in the enactment of Act Dec. 16, 2003, as provided by § 110(c)(2) of Act Dec. 10, 2004, which appears as a note to this section), in subsec. (c), added para. (4).

Other provisions:


Code of Federal Regulations

Office of Postsecondary Education, Department of Education-Secretary's recognition procedures for State agencies, 34 CFR Part 603

Cross References

This section is referred to in 38 USCS §§ 3452, 3501, 3676

38 USCS § 1775 [now 38 USCS § 3675] does not apply to educational institutions which are candidates for accreditation until such time as they are fully accredited. VA GCO 14-76

§ 3676. Approval of nonaccredited courses

(a) No course of education which has not been approved by a State approving agency pursuant to section 3675 of this title [38 USCS § 3675], which is offered by a public or private, profit or nonprofit, educational institution shall be approved for the purposes of this chapter [38 USCS §§ 3670 et seq.] unless the educational institution offering such course submits to the appropriate State approving agency a written application for approval of such course in accordance with the provisions of this chapter [38 USCS §§ 3670 et seq.].

(b) Such application shall be accompanied by not less than two copies of the current catalog or bulletin which is certified as true and correct in content and policy by an authorized owner or official and includes the following:

(1) Identifying data, such as volume number and date of publication;
(2) Names of the institution and its governing body, officials and faculty;
(3) A calendar of the institution showing legal holidays, beginning and ending date of each quarter, term, or semester, and other important dates;
(4) Institution policy and regulations on enrollment with respect to enrollment dates and specific entrance requirements for each course;
(5) Institution policy and regulations relative to leave, absences, class cuts, makeup work, tardiness and interruptions for unsatisfactory attendance;
(6) Institution policy and regulations relative to standards of progress required of the student by the institution (this policy will define the grading system of the institution, the minimum grades considered satisfactory, conditions for interruption for unsatisfactory grades or progress and a description of the probationary period, if any,
allowed by the institution, and conditions of reentrace for those students dismissed for unsatisfactory progress. A statement will be made regarding progress records kept by the institution and furnished the student);  
(7) Institution policy and regulations relating to student conduct and conditions for dismissal for unsatisfactory conduct;  
(8) Detailed schedules of fees, charges for tuition, books, supplies, tools, student activities, laboratory fees, service charges, rentals, deposits, and all other charges;  
(9) Policy and regulations of the institution relative to the refund of the unused portion of tuition, fees, and other charges in the event the student does not enter the course or withdraws or is discontinued therefrom;  
(10) A description of the available space, facilities, and equipment;  
(11) A course outline for each course for which approval is requested, showing subjects or units in the course, type of work or skill to be learned, and approximate time and clock hours to be spent on each subject or unit; and  
(12) Policy and regulations of the institution relative to granting credit for previous educational training.

(c) The appropriate State approving agency may approve the application of such institution when the institution and its nonaccredited courses are found upon investigation to have met the following criteria:  
(1) The courses, curriculum, and instruction are consistent in quality, content, and length with similar courses in public schools and other private schools in the State, with recognized accepted standards.  
(2) There is in the institution adequate space, equipment, instructional material, and instructor personnel to provide training of good quality.  
(3) Educational and experience qualifications of directors, administrators, and instructors are adequate.  
(4) The institution maintains a written record of the previous education and training of the eligible person and clearly indicates that appropriate credit has been given by the institution for previous education and training, with the training period shortened proportionately and the eligible person and the Secretary so notified.  
(5) A copy of the course outline, schedule of tuition, fees, and other charges, regulations pertaining to absence, grading policy, and rules of operation and conduct will be furnished the eligible person upon enrollment.  
(6) Upon completion of training, the eligible person is given a certificate by the institution indicating the approved course and indicating that training was satisfactorily completed.  
(7) Adequate records as prescribed by the State approving agency are kept to show attendance and progress or grades, and satisfactory standards relating to attendance, progress, and conduct are enforced.  
(8) The institution complies with all local, city, county, municipal, State, and Federal regulations, such as fire codes, building and sanitation codes. The State approving agency may require such evidence of compliance as is deemed necessary.  
(9) The institution is financially sound and capable of fulfilling its commitments for training.  
(10) The institution does not utilize advertising of any type which is erroneous or misleading, either by actual statement, omission, or intimation. The institution shall
not be deemed to have met this requirement until the State approving agency (A) has ascertained from the Federal Trade Commission whether the Commission has issued an order to the institution to cease and desist from any act or practice, and (B) has, if such an order has been issued, given due weight to that fact.

(11) The institution does not exceed its enrollment limitations as established by the State approving agency.

(12) The institution's administrators, directors, owners, and instructors are of good reputation and character.

(13) The institution has and maintains a policy for the refund of the unused portion of tuition, fees, and other charges in the event the eligible person fails to enter the course or withdraws or is discontinued therefrom at any time prior to completion and such policy must provide that the amount charged to the eligible person for tuition, fees, and other charges for a portion of the course shall not exceed the approximate pro rata portion of the total charges for tuition, fees, and other charges that the length of the completed portion of the course bears to its total length.

(14) Such additional criteria as may be deemed necessary by the State approving agency.

(d) The Secretary may waive, in whole or in part, the requirements of subsection (c)(13) of this section in the case of an educational institution which--

(1) is a college, university, or similar institution offering postsecondary level academic instruction that leads to an associate or higher degree,

(2) is operated by an agency of a State or of a unit of local government,

(3) is located within such State or, in the case of an institution operated by an agency of a unit of local government, within the boundaries of the area over which such unit has taxing jurisdiction, and

(4) is a candidate for accreditation by a regional accrediting association,

if the Secretary determines, pursuant to regulations which the Secretary shall prescribe, that such requirements would work an undue administrative hardship because the total amount of tuition, fees, and other charges at such institution is nominal.

(e) Notwithstanding any other provision of this title, a course of education shall not be approved under this section if it is to be pursued in whole or in part by independent study.

Amendments:

1966. Act March 3, 1966 (effective 3/3/66, as provided by § 12(a) of such Act), in subsec. (a), deleted "1653 or" preceding "1775 of".

1981. Act Oct. 17, 1981 (effective 10/17/81, as provided by § 701(b)(1) of such Act, which appears as 38 USCS § 1114 note) added subsec. (d).


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1776, as 38 USCS § 3676, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


Cross References
§ 3677. Approval of training on the job

(a) Any State approving agency may approve a program of training on the job (other than a program of apprenticeship) only when it finds that the job which is the objective of the training is one in which progression and appointment to the next higher classification are based upon skills learned through organized and supervised training on the job and not on such factors as length of service and normal turnover, and that the provisions of subsections (b) and (c) of this section are met.

(b) (1) The training establishment offering training which is desired to be approved for the purposes of this chapter [38 USCS §§ 3670 et seq.] must submit to the appropriate State approving agency a written application for approval which, in addition to furnishing such information as is required by the State approving agency, contains a certification that--

(A) the wages to be paid the eligible veteran or person (i) upon entrance into training, are not less than wages paid nonveterans in the same training position and are at least 50 per centum of the wages paid for the job for which the veteran or person is to be trained, and (ii) such wages will be increased in regular periodic increments until, not later than the last full month of the training period, they will be at least 85 per centum of the wages paid for the job for which such eligible veteran or person is being trained; and

(B) there is reasonable certainty that the job for which the eligible veteran or person is to be trained will be available to the veteran or person at the end of the training period.

(2) The requirement under paragraph (1)(A)(ii) shall not apply with respect to a training establishment operated by the United States or by a State or local government.

(c) As a condition for approving a program of training on the job (other than a program of apprenticeship) the State approving agency must find upon investigation that the following criteria are met:

(1) The training content of the course is adequate to qualify the eligible veteran or person for appointment to the job for which the veteran or person is to be trained.

(2) The job customarily requires full-time training for a period of not less than six months and not more than two years.

(3) The length of the training period is not longer than that customarily required by the training establishments in the community to provide an eligible veteran or person with the required skills, arrange for the acquiring of job knowledge, technical information, and other facts which the eligible veteran or person will need to learn in order to become competent on the job for which the veteran or person is being trained.

(4) Provision is made for related instruction for the individual eligible veteran or person who may need it.

(5) There is in the training establishment adequate space, equipment, instructional material, and instructor personnel to provide satisfactory training on the job.
(6) Adequate records are kept to show the progress made by each eligible veteran or person toward such veteran's or person's job objective.

(7) No course of training will be considered bona fide if given to an eligible veteran or person who is already qualified by training and experience for the job.

(8) A signed copy of the training agreement for each eligible veteran or person, including the training program and wage scale as approved by the State approving agency, is provided to the veteran or person and to the Secretary and the State approving agency by the employer.

(9) That the course meets such other criteria as may be established by the State approving agency.

(d) (1) The Secretary may conduct a pilot program under which the Secretary operates a program of training on the job under this section for a period (notwithstanding subsection (c)(2)) of up to three years in duration to train employees of the Department to become qualified adjudicators of claims for compensation, dependency and indemnity compensation, and pension.

(2) (A) Not later than three years after the implementation of the pilot project, the Secretary shall submit to Congress an initial report on the pilot project. The report shall include an assessment of the usefulness of the program in recruiting and retaining of personnel of the Department as well as an assessment of the value of the program as a training program.

(B) Not later than 18 months after the date on which the initial report under subparagraph (A) is submitted, the Secretary shall submit to Congress a final report on the pilot project. The final report shall include recommendations of the Secretary with respect to continuation of the pilot project and with respect to expansion of the types of claims for which the extended period of on the job training is available to train such employees.

Effective date of section:

Act Aug. 31, 1967, P. L. 90-77, Title IV, § 405(a), 81 Stat. 191, provided that this section is effective on the first day of the first calendar month which begins more than 10 days after enactment.

Amendments:


1972. Act Oct. 24, 1972, in subsec. (b), in paras. (1) and (2), inserted "or person" wherever appearing; and in subsec. (c), in paras. (1), (3), (4), (6), (7) and (8), inserted "or person" wherever appearing.

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (b), in para. (1), substituted "the veteran or person" for "he", in para. (2), substituted "the veteran or person" for "him"; and in subsec. (c), in paras. (1) and (3), substituted "the veteran or person" for "he", and in para. (6), substituted "such veteran's or person's" for "his".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1777, as 38 USCS § 3677.

1998. Act Nov. 11, 1998 (applicable as provided by § 205(b) of such Act, which appears as a note to this section), in subsec. (b), designated the existing provisions as para. (1),
redesignated former paras. (1) and (2) as subparas. (A) and (B), respectively, and, in subpara. (A) as redesignated, redesignated cls. (A) and (B) as cls. (i) and (ii), respectively, and added para. (2).


Other provisions:

Application of Nov. 11, 1998 amendments. Act Nov. 11, 1998, P. L. 105-368, Title II, Subtitle A, § 205(b), 112 Stat. 3327, provides: “The amendments made by subsection (a) [amending subsec. (b) of this section] shall apply with respect to approval of programs of training on the job under section 3677 of title 38, United States Code, on or after October 1, 1998.”.

Cross References

This section is referred to in 38 USCS §§ 3672, 3687

1. Generally

2. Purpose

1. Generally

Contract between veteran and his employer, whereby veteran, accepted by employer for on-the-job training, agreed that for one year after employment's termination, he would not engage in employer's type of business within specified territory which covered practically entire state, in part of which territory employer was not at time doing business and merely anticipated conducting business in future, was contrary to purpose of Servicemen's Readjustment Act [former 38 USCS §§ 693 et seq.] and unenforceable. Orkin Exterminating Co. v Dewberry (1949) 204 Ga 794, 51 SE2d 669 (ovrld in part by Barry v Stanco Communications Products, Inc. (1979) 243 Ga 68, 252 SE2d 491, 1979-1 CCH Trade Cases ¶ 62715)

2. Purpose

Predecessor to 38 USCS § 3677 was intended to furnish veterans on-the-job training in order to speedily provide for their employment in gainful occupation, to reduce problem of unemployment among returning veterans, and to assure veterans, provided with on-the-job training, of reasonable certainty of using that training in gainful occupation; law was not intended as mere dole to veterans. Orkin Exterminating Co. v Dewberry (1949) 204 Ga 794, 51 SE2d 669 (ovrld in part by Barry v Stanco Communications Products, Inc. (1979) 243 Ga 68, 252 SE2d 491, 1979-1 CCH Trade Cases ¶ 62715)

§ 3678. Notice of approval of courses

The State approving agency, upon determining that an educational institution has complied with all the requirements of this chapter [38 USCS §§ 3670 et seq.], will issue a letter to such institution setting forth the courses which have been approved for the purposes of this chapter [38 USCS §§ 3670 et seq.], and will furnish an official copy of such letter and any subsequent amendments to the Secretary. The letter of approval shall be accompanied by a copy of the catalog or bulletin of the institution, as approved by the State approving agency, and shall contain the following information:

(1) date of letter and effective date of approval of courses;
(2) proper address and name of each educational institution;
(3) authority for approval and conditions of approval, referring specifically to the approved catalog or bulletin published by the educational institution;
(4) name of each course approved;
(5) where applicable, enrollment limitations such as maximum numbers authorized and student-teacher ratio;
(6) signature of responsible official of State approving agency; and
(7) such other fair and reasonable provisions as are considered necessary by the appropriate State approving agency.

Amendments:

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act), redesignated this section as § 1778; it formerly appeared as § 1777.


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1778, as 38 USCS § 3678.

§ 3679. Disapproval of courses

(a) Any course approved for the purposes of this chapter [38 USCS §§ 3670 et seq.] which fails to meet any of the requirements of this chapter [38 USCS §§ 3670 et seq.] shall be immediately disapproved by the appropriate State approving agency. An educational institution which has its courses disapproved by a State approving agency will be notified of such disapproval by a certified or registered letter of notification and a return receipt secured.

(b) Each State approving agency shall notify the Secretary of each course which it has disapproved under this section. The Secretary shall notify the State approving agency of the Secretary's disapproval of any educational institution under chapter 31 of this title [38 USCS §§ 3100 et seq.]

Amendments:

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act), redesignated this section as § 1779; it formerly appeared as § 1778.

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act), in subsec. (b), substituted "the Administrator's" for "his".


Cross References

This section is referred to in 38 USCS § 3670

SUBCHAPTER II. MISCELLANEOUS PROVISIONS

§ 3680. Payment of educational assistance or subsistence allowances
§ 3680A. Disapproval of enrollment in certain courses
§ 3681. Limitations on educational assistance
§ 3682. Control by agencies of the United States
§ 3683. Conflicting interests
§ 3684. Reports by veterans, eligible persons, and institutions; reporting fee
§ 3684A. Procedures relating to computer matching program
§ 3685. Overpayments to eligible persons or veterans
§ 3686. Correspondence courses
§ 3687. Apprenticeship or other on-job training
§ 3688. Measurement of courses
§ 3689. Approval requirements for licensing and certification testing
§ 3690. Overcharges by educational institutions; discontinuance of allowances; examination of records; false or misleading statements
§ 3691. Change of program
§ 3692. Advisory committee
§ 3693. Compliance surveys
§ 3694. Use of other Federal agencies
§ 3695. Limitation on period of assistance under two or more programs
§ 3696. Limitation on certain advertising, sales, and enrollment practices
§ 3697. Funding of contract educational and vocational counseling
§ 3697A. Educational and vocational counseling

§ 3680. Payment of educational assistance or subsistence allowances

(a) Period for which payment may be made. Payment of educational assistance or subsistence allowances to eligible veterans or eligible persons pursuing a program of education or training, other than a program by correspondence, in an educational institution under chapter 31, 34, or 35 of this title [38 USCS §§ 3100 et seq., 3451 et seq., or 3500 et seq.] shall be paid as provided in this section and, as applicable, in section 3108, 3482, 3491 or 3532 of this title [38 USCS § 3108, 3482, 3491 or 3532]. Such payments shall be paid only for the period of such veterans' or persons' enrollment in, and pursuit of, such program, but no amount shall be paid--

(1) to any eligible veteran or eligible person for any period when such veteran or person is not pursuing such veteran's or person's course in accordance with the regularly established policies and regulations of the educational institution, with the provisions of such regulations as may be prescribed by the Secretary pursuant to subsection (g) of this section, and with the requirements of this chapter or of chapter 34 or 35 of this title [38 USCS §§ 3670 et seq., 3451 et seq., or 3500 et seq.], but payment may be made for an actual period of pursuit of one or more unit subjects pursued for a period of time shorter than the enrollment period at the educational institution;

(2) to any eligible veteran or person for auditing a course; or

(3) to any eligible veteran or person for a course for which the grade assigned is not used in computing the requirements for graduation including a course from which the student withdraws unless--

(A) the eligible veteran or person withdraws because he or she is ordered to active duty; or

(B) the Secretary finds there are mitigating circumstances, except that, in the first instance of withdrawal (without regard to withdrawals described in subclause (A) of this clause) by the eligible veteran or person from a course or courses with respect to which the veteran or person has been paid assistance under this title,
mitigating circumstances shall be considered to exist with respect to courses totaling not more than six semester hours or the equivalent thereof. Notwithstanding the foregoing, the Secretary may, subject to such regulations as the Secretary shall prescribe, continue to pay allowances to eligible veterans and eligible persons enrolled in courses set forth in clause (1) of this subsection--

(A) during periods when the schools are temporarily closed under an established policy based upon an Executive order of the President or due to an emergency situation;
(B) during periods between consecutive school terms where such veterans or persons transfer from one approved educational institution to another approved educational institution for the purpose of enrolling in and pursuing a similar course at the second institution if the period between such consecutive terms does not exceed 30 days; or
(C) during periods between school terms where the educational institution certifies the enrollment of the eligible veteran or eligible person on an individual term basis if (i) the period between those terms does not exceed eight weeks, and (ii) both the terms preceding and following the period are not shorter in length than the period.

(b) **Correspondence training certifications.** No educational assistance allowance shall be paid to an eligible veteran or spouse or surviving spouse enrolled in and pursuing a program of education exclusively by correspondence until the Secretary shall have received--

(1) from the eligible veteran or spouse or surviving spouse a certificate as to the number of lessons actually completed by the veteran or spouse or surviving spouse and serviced by the educational institution; and
(2) from the training establishment a certification or an endorsement on the veteran's or spouse's or surviving spouse's certificate, as to the number of lessons completed by the veteran or spouse or surviving spouse and serviced by the institution.

(c) **Apprenticeship and other on-job training.** No training assistance allowance shall be paid to an eligible veteran or eligible person enrolled in and pursuing a program of apprenticeship or other on-job training until the Secretary shall have received--

(1) from such veteran or person a certification as to such veteran's or person's actual attendance during such period; and
(2) from the training establishment a certification, or an endorsement on the veteran's or person's certificate, that such veteran or person was enrolled in and pursuing a program of apprenticeship or other on-job training during such period.

(d) **Advance payment of initial educational assistance or subsistence allowance.**

(1) The educational assistance or subsistence allowance advance payment provided for in this subsection is based upon a finding by the Congress that eligible veterans and eligible persons may need additional funds at the beginning of a school term to meet the expenses of books, travel, deposits, and payment for living quarters, the initial installment of tuition, and the other special expenses which are concentrated at the beginning of a school term.
(2) Subject to the provisions of this subsection, and under regulations which the Secretary shall prescribe, an eligible veteran or eligible person shall be paid an
educational assistance allowance or subsistence allowance, as appropriate, advance payment. Such advance payment shall be made in an amount equivalent to the allowance for the month or fraction thereof in which pursuit of the program will commence, plus the allowance for the succeeding month. In the case of a person on active duty, who is pursuing a program of education, the advance payment shall be in a lump sum based upon the amount payable for the entire quarter, semester, or term, as applicable. In no event shall an advance payment be made under this subsection to a veteran or person intending to pursue a program of education on less than a half-time basis. An advance payment may not be made under this subsection to any veteran or person unless the veteran or person requests such payment and the Secretary finds that the educational institution at which such veteran or person is accepted or enrolled has agreed to, and can satisfactorily, carry out the provisions of paragraphs 4(B) and (C) and (5) of this subsection. The application for advance payment, to be made on a form prescribed by the Secretary, shall--

(A) in the case if an initial enrollment of a veteran or person in an educational institution, contain information showing that the veteran or person (i) is eligible for educational benefits, (ii) has been accepted by the institution, and (iii) has notified the institution of such veteran's or person's intention to attend that institution; and

(B) in the case of a re-enrollment of a veteran or person, contain information showing that the veteran or person (i) is eligible to continue such veteran's or person's program of education or training and (ii) intends to re-enroll in the same institution,

and, in either case, shall also state the number of semester or clock-hours to be pursued by such veteran or person.

(3) For purposes of the Secretary's determination whether any veteran or person is eligible for an advance payment under this section, the information submitted by the institution, the veteran or person, shall establish such veteran's or person's eligibility unless there is evidence in such veteran's or person's file in the processing office establishing that the veteran or person is not eligible for such advance payment.

(4) The advance payment authorized by paragraph (2) of this subsection shall, in the case of an eligible veteran or eligible person, be (A) drawn in favor of the veteran or person; (B) mailed to the educational institution listed on the application form for temporary care and delivery to the veteran or person by such institution; and (C) delivered to the veteran or person upon such veteran's or person's registration at such institution, but in no event shall such delivery be made earlier than thirty days before the program of education is to commence.

(5) Upon delivery of the advance payment pursuant to paragraph (4) of this subsection, the institution shall submit to the Secretary a certification of such delivery. If such delivery is not effected within thirty days after commencement of the program of education in question, such institution shall return such payment to the Secretary forthwith.

(e) Recovery of erroneous payments.

(1) Subject to paragraph (2), if an eligible veteran or eligible person fails to enroll in or pursue a course for which an educational assistance or subsistence allowance advance payment is made, the amount of such payment and any amount of
subsequent payments which, in whole or in part, are due to erroneous information required to be furnished under subsection (d)(2) of this section shall become an overpayment and shall constitute a liability of such veteran or person to the United States and may be recovered, unless waived pursuant to section 5302 of this title [38 USCS § 5302], from any benefit otherwise due such veteran or person under any law administered by the Department of Veterans Affairs or may be recovered in the same manner as any other debt due the United States.

(2) Paragraph (1) shall not apply to the recovery of an overpayment of an educational allowance or subsistence allowance advance payment to an eligible veteran or eligible person who fails to enroll in or pursue a course of education for which the payment is made if such failure is due to the death of the veteran or person.

(f) **Payments for less than half-time training.** Payment of educational assistance allowance in the case of any eligible veteran or eligible person pursuing a program of education on less than a half-time basis shall be made in an amount computed for the entire quarter, semester, or term not later than the last day of the month immediately following the month in which certification is received from the educational institution that such veteran or person has enrolled in and is pursuing a program at such institution. Such lump sum payment shall be computed at the rate provided in section 3482(b) or 3532(a)(2) of this title [38 USCS § 3482(b) or 3532(a)(2)], as applicable.

(g) **Determination of enrollment, pursuit, and attendance.**

(1) The Secretary may, pursuant to regulations which the Secretary shall prescribe, determine and define with respect to an eligible veteran and eligible person the following:
   
   (A) Enrollment in a course or program of education or training.
   
   (B) Pursuit of a course or program of education or training.
   
   (C) Attendance at a course or program of education or training.

(2) The Secretary may withhold payment of benefits to an eligible veteran or eligible person until the Secretary receives such proof as the Secretary may require of enrollment in and satisfactory pursuit of a program of education by the eligible veteran or eligible person. The Secretary shall adjust the payment withheld, when necessary, on the basis of the proof the Secretary receives.

(3) In the case of an individual other than an individual described in paragraph (4), the Secretary may accept the individual's monthly certification of enrollment in and satisfactory pursuit of a program of education as sufficient proof of the certified matters.

(4) In the case of an individual who has received an accelerated payment of basic educational assistance under section 3014A of this title [38 USCS § 3014A] during an enrollment period for a program of education, the Secretary may accept the individual's certification of enrollment in and satisfactory pursuit of the program of education as sufficient proof of the certified matters if the certification is submitted after the enrollment period has ended.

**Amendments:**

1974. Act Dec. 3, 1974 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), in subsec. (a)(2), inserted "(or customary vacation periods connected therewith)".

1976. Act Oct. 15, 1976, § 505 (effective 12/1/76, as provided by § 703(c) of such Act), in subsec. (a), in para. (1), deleted "or" following "of this title;", in para. (2), substituted a semicolon for the concluding period, and added paras. (3)-(5).

Act Oct. 15, 1976, §§ 506, 513(a)(5), (6), (11), (12), (effective 10/15/76, as provided by § 703(b) of such Act), in subsec. (a), in para. (1), substituted "such veteran's or person's" for "his", and substituted "Notwithstanding the foregoing, the Administrator may, subject to such regulations as the Administrator shall prescribe, continue to pay allowances to eligible veterans and eligible persons enrolled in courses set forth in clause (1) or (2) of this subsection-" and paras. (A)-(C) for concluding matter which read: "Notwithstanding the foregoing, the Administrator may, subject to such regulations as he shall prescribe, continue to pay allowances to eligible veterans and eligible persons enrolled in courses set forth in clause (1) or (2) of this subsection during periods when the schools are temporarily closed under an established policy based upon an Executive order of the President or due to an emergency situation, and such periods shall not be counted as absences for the purposes of clause (2);"; in subsec. (b), in the introductory matter and paras. (1) and (2), substituted "spouse or surviving spouse" for "wife or widow" wherever appearing, and in para. (2), substituted "spouse's or surviving spouse's" for "wife's or widow's"; in subsec. (c)(1), substituted "such veteran's or person's" for "his"; in subsec. (d), in para. (2)(A), (B), substituted "such veteran's or person's" for "his", in para. (4), substituted "such veteran's or person's" for "his" wherever appearing and substituted "the veteran or person" for "he" preceding "is not", and in para. (5), substituted "such veteran's or person's" for "his"; in subsec. (f) (prior to redesignation as subsec. (e) by Act Oct. 15, 1976, § 513(a)(10)), substituted "such veteran or person" for "him"; and in subsec. (h) (prior to redesignation as subsec. (g) by Act Oct. 15, 1976, § 513(a)(10)), substituted "the Administrator" for "he", and substituted "the veteran or person" for "he".

Act Oct. 15, 1976, § 513(a)(7)-(10) (effective as provided by § 513(b) of such Act, which appears as a note to this section), in subsec. (d)(1), inserted "may"; in subsec. (d)(2), introductory matter, inserted "An advance payment may not be made under this subsection to any veteran or person unless the veteran or person requests such payment and the Administrator finds that the educational institution at which such veteran or person is accepted or enrolled has agreed to, and can satisfactorily, carry out the provisions of paragraphs 5(B) and (C) and (6) of this subsection.;"; deleted subsec. (e) and the heading thereto which read:

"Prepayment of Subsequent Educational Assistance or Subsistence Allowance"

"(e) Except as provided in subsection (g) of this section, subsequent payments of educational assistance or subsistence allowance to an eligible veteran or eligible person shall be prepaid each month, subject to such reports and proof of enrollment in and satisfactory pursuit of such programs as the Administrator may require. The Administrator may withhold the final payment for a period of enrollment until such proof is received and the amount of the final payment appropriately adjusted.;" redesignated subsecs. (f)-(h) as subsecs. (e)-(g), respectively; and in subsec. (g), as so redesignated, inserted "Subject to such reports and proof as the Administrator may require to show an eligible veteran's or eligible person's enrollment in and satisfactory pursuit of such person's program, the Administrator is authorized to withhold the final payment of benefits to such person until the required proof is received and the amount of the final payment is appropriately adjusted.".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1), (f)(1) of such Act, which appear as 38 USCS §§ 3452, 5314 notes, respectively), in subsec. (a), in the preliminary matter, inserted "in, and pursuit of, such program", in para. (1), substituted "institution, with the provisions of such regulations as may be prescribed by the Administrator pursuant to subsection (g) of this section, and with the requirements of this chapter or of
chapter 34 or 35 of this title, but payment may be made for an actual period of pursuit of one or more unit subjects pursued for a period of time shorter than the enrollment period at the educational institution" for "institution and the requirements of this chapter or of chapter 34 or 35 of this title", in para. (2), inserted "and periods (not to exceed five days in any twelve-month period) when the institution is not in session because of teacher conferences or teacher training sessions", in para. (4), deleted "or" following "circumstances;", in para. (5), substituted ", or" for ",", and added para. (6); in subsec. (d), in para. (2), preliminary matter, deleted "(other than under subchapter VI of chapter 34)" following "pursuing a program of education", and substituted "paragraphs 4(B) and (C) and (5)" for "paragraphs 5(B) and (C) and (6)"; deleted para. (3) which read:

"(3) Subject to the provisions of this subsection, and under regulations which the Administrator shall prescribe, a person eligible for education or training under the provisions of subchapter VI of chapter 34 of this title shall be entitled to a lump-sum educational assistance allowance advance payment. Such advance payment shall in no event be made earlier than thirty days prior to the date on which pursuit of the person's program of education or training is to commence. The application for the advance payment, to be made on a form prescribed by the Administrator, shall, in addition to the information prescribed in paragraph (2)(A), specify--

"(A) that the program to be pursued has been approved;

"(B) the anticipated cost and the number of Carnegie, clock, or semester hours to be pursued; and

"(C) where the program to be pursued is other than a high school credit course, the need of the person to pursue the course or courses to be taken."

redesignated paras. (4)-(6), as paras. (3)-(5), respectively, in para. (4), as so redesignated, substituted "paragraph (2)" for "paragraphs (2) and (3)"; in para. (5), as so redesignated, substituted "paragraph (4)" for "paragraph (5)"; in subsec. (e), deleted "and (3)" following "subsection (d)(2)"; in subsec. (f), deleted "(except as provided by subsection (d)(3) of this section)" following "half-time basis"; and in subsec. (g), inserted "and define".

1981. Act Aug. 13, 1981 (effective as provided by § 2006 of such Act, which appears as 38 USCS § 3231 note), in subsec. (a), introductory matter, deleted "or a program of flight training" after "correspondence".

1982. Act Oct. 12, 1982, in subsec. (a), in the introductory matter, substituted "1508" for "1504", in para. (5), substituted "than 6" for "the 6", and, in cls. (A)-(C), inserted "of this subsection" following "(2)", each place it appears.

Act Oct. 14, 1982, in subsec. (a), in the introductory matter, purported to substitute "section 1508" for "section 1504" which amendment was previously made by Act Oct. 12, 1982 (see the 1982 Amendments notes to this section); in para. (4), inserted "or" following the concluding semicolon, in para. (5), substituted a period for "; or" following "institution", and deleted para. (6), which read: "to any eligible veteran or person incarcerated in a Federal, State, or local prison or jail for any course (A) to the extent the tuition and fees of the veteran or person are paid under any Federal program (other than a program administered by the Administrator) or under any State or local program, or (B) for which there are no tuition and fees.".

1986. Act Oct. 28, 1986, in subsec. (a), in para. (1), inserted ", or a course that meets the requirements of section 1788(a)(7) of this title," and in para. (2) inserted "courses that meet the requirements of section 1788(a)(7) of this title and"; in subsec. (d)(2), substituted "person" for "serviceman" following "case of a"; and in subsec. (f), substituted "not later than the last day of" for "during".

1988. Act Nov. 18, 1988 (applicable as provided by § 121(b) of such Act, which appears as a note to this section), in subsec. (a)(4), inserted ", except that, in the first instance of
withdrawal by an eligible veteran or person from a course or courses with respect to which such veteran or person has been paid assistance under this title, mitigating circumstances shall be considered to exist with respect to courses totaling not more than six semester hours or the equivalent thereof.

1989. Act Dec. 18, 1989, in subsec. (a), in para. (1), deleted "enrolled in a course which leads to a standard college degree, or a course that meets the requirements of section 1788(a)(7) of this title," following "eligible person", deleted para. (2) which read: "to any eligible veteran or eligible person enrolled in a course which does not lead to a standard college degree (excluding courses that meet the requirements of section 1788(a)(7) of this title and programs of apprenticeship and programs of other on-job training authorized by section 1787 of this title) for any day of absence in excess of thirty days in a twelve-month period, not counting as absences weekends or legal holidays (or customary vacation periods connected therewith) established by Federal or State law (or in the case of the Republic of the Philippines, Philippine law) during which the institution is not regularly in session and periods (not to exceed five days in any twelve-month period) when the institution is not in session because of teacher conferences or teacher training sessions;", redesignated paras. (3)-(5) as paras. (2)-(5), respectively, in the intervening matter, substituted "set forth in clause (1)" for "set forth in clause (1) or (2)" in subpara. (A), deleted ", and such periods shall not be counted as absences for the purposes of clause (2) of this subsection" following "situation", in subpara. (B), deleted ", but such periods shall be counted as absences for the purposes of clause (2) of this subsection" following "30 days", and in subpara. (C), deleted ", but such periods shall be counted as absences for the purposes of clause (2) of this subsection" following "30 days", and in subsec. (g), substituted "the Secretary may withhold payment of benefits to such eligible veteran or eligible person until the required proof is received and the amount of the payment is appropriately adjusted. The Secretary may accept such veteran's or person's monthly certification of enrollment in and satisfactory pursuit of such veteran's or person's program as sufficient proof of the certified matters." for "the Administrator is authorized to withhold the final payment of benefits to such person until the required proof is received and the amount of the final payment is appropriately adjusted."

Such Act further, substituted "Secretary" for "Administrator", "Secretary's" for "Administrator's", and "Department of Veterans Affairs" for "Veterans' Administration", wherever appearing, throughout the entire section.

1991. Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1780, as 38 USCS § 3680, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Act Oct. 10, 1991 (effective 8/1/90 as provided by § 6(b) of such Act, which appears as a note to this section) substituted subsec. (a)(3) for one which read: "to any eligible veteran or person for a course for which the grade assigned is not used in computing the requirements for graduation including a course from which the student withdraws unless the Administrator finds there are mitigating circumstances, except that, in the first instance of withdrawal by an eligible veteran or person from a course or courses with respect to which such veteran or person has been paid assistance under this title, mitigating circumstances shall be considered to exist with respect to courses totaling not more than six semester hours or the equivalent thereof; or".

1992. Act Oct. 29, 1992, in subsec. (e), designated the existing provisions as para. (1), in such paragraph as so designated, substituted "Subject to paragraph (2), if" for "If" and deleted a comma following "eligible person", and added para. (2).

1994. Act Nov. 2, 1994 (applicable to programs and courses commencing more than 90 days after the date of enactment, as provided by § 605(b) of such Act, which appears as 38 USCS § 3672 note), in subsec. (a), in para. (2), inserted "or" following the concluding semicolon, in
para. (3), substituted a period for "; or" following "equivalent thereof", deleted para. (4), which read: "(4) to any eligible veteran or person for pursuit of a program of education exclusively by correspondence as authorized under section 3686 of this title or for the pursuit of a correspondence portion of a combination correspondence-residence course leading to a vocational objective where the normal period of time required to complete such correspondence course or portion is less than 6 months. A certification as to the normal period of time required to complete the course must be made to the Secretary by the educational institution.", and, in subpara. (C) of the concluding paragraph, substituted "one full" for "1 full".

2000. Act Nov. 1, 2000 (applicable as provided by § 121(b) of such Act, which appears as a note to this section), in subsec. (a), in the undesignated paragraph following para. (3), substituted subpara. (C) for one which read: "(C) during periods between a semester, term, or quarter where the educational institution certifies the enrollment of the eligible veteran or eligible person on an individual semester, term, or quarter basis if the interval between such periods does not exceed one full calendar month."

2001. Act Dec. 27, 2001 (effective 10/1/2002, and applicable with respect to enrollments in courses or programs of education or training beginning on or after that date, as provided by § 104(c) of such Act, which appears as 38 USCS § 3014A note), substituted subsec. (g) for one which read:

"Determination of Enrollment, Pursuit, and Attendance

"(g) The Secretary may, pursuant to regulations which the Secretary shall prescribe, determine and define enrollment in, pursuit of, and attendance at, any program of education or training or course by an eligible veteran or eligible person for any period for which the veteran or person receives an educational assistance or subsistence allowance under this chapter for pursuing such program or course. Subject to such reports and proof as the Secretary may require to show an eligible veteran's or eligible person's enrollment in and satisfactory pursuit of such person's program, the Secretary may withhold payment of benefits to such eligible veteran or eligible person until the required proof is received and the amount of the payment is appropriately adjusted. The Secretary may accept such veteran's or person's monthly certification of enrollment in and satisfactory pursuit of such veteran's or person's program as sufficient proof of the certified matters."

2006. Act June , 2006, in subsecs. (a)-(g), inserted the subsection headings, which headings formerly appeared as centered headings preceding such subsections.

Other provisions:

Effective dates of provisions of this section. Act Oct. 24, 1972, P. L. 92-540, Title VI, § 603, 86 Stat. 1099, provided:

"(a) The prepayment provisions of subsection (e) of section 1780 of title 38, United States Code (as added by section 201 of this Act) [former subsec. (e) of this section], shall become effective on November 1, 1972.

"(b) The advance payment provisions of section 1780 of title 38, United States Code (as added by section 201 of this Act), shall become effective on August 1, 1973, or at such time prior thereto as the Administrator of Veterans' Affairs shall specify in a certification filed with the Committees on Veterans' Affairs of the Congress."

Study of tuition assistance allowance program abuses. Act Dec. 3, 1974, P. L. 93-508, Title I, § 105, 88 Stat. 1581 (effective 9/1/74, as provided by § 501 of such Act), provided:

"(a) The Administrator shall carry out directly a thorough study and investigation of the administrative difficulties and opportunities or abuse that would be occasioned by enactment of some form of variable tuition assistance allowance program, with reference to such difficulties and abuses experienced by the Veterans' Administration after the end of World War II in carrying out the provisions of Veterans' Regulation Numbered 1(a), relating to the
payment of tuition and related expenses for veterans of World War II pursuing a program of education or training under the Servicemen's Readjustment Act of 1944 [58 Stat. 284], and to any such difficulties and abuses presently being experienced by the Veterans' Administration in carrying out existing tuition assistance programs under title 38, United States Code, including chapter 31 [38 USCS §§ 3100 et seq.] vocational rehabilitation, correspondence courses, flight training and PREP, and of ways in which any such difficulties and abuses could be avoided or minimized through legislative or administrative action so as to ensure an expeditious, orderly, and effective implementation of any tuition assistance allowance program.

"(b) In carrying out the study and investigation required by subsection (a), the Administrator shall consult with and solicit the views and suggestions of interested veterans' organizations, educational groups and associations, persons receiving assistance under chapters 31, 34, 35 and 36 of title 38, United States Code [38 USCS §§ 3100 et seq., 3451 et seq., 3500 et seq., and 3670 et seq.], other Federal departments and agencies, and other interested parties.

"(c) The Administrator shall report to the Congress and the President not later than one year after the date of enactment of this Act on the results of the study and investigation carried out under this section, including any recommendations for legislative or administrative action.”.

Application and effective date of amendments made by § 513(a)(7)-(10) of Act Oct. 15, 1976. Act Oct. 15, 1976, P. L. 94-502, Title V, § 513(b), 90 Stat. 2404, provided: "The amendments made by paragraphs (7), (8), (9), and (10) of subsection (a) shall take effect June 1, 1977, and shall apply with respect to educational assistance allowances and subsistence allowances paid under title 38, United States Code, for months after May 1977.

Payment of educational benefits to veterans and dependents when schools are temporarily closed to conserve energy. Ex. Or. No. 12020 of Nov. 8, 1977, 42 Fed. Reg. 58509, provided:

"Section 1. Whenever an educational institution submits evidence which satisfies the Administrator of Veterans' Affairs that energy consumption will be abnormally high during the winter months or that available energy supplies will be inadequate to meet the needs of the school, and that, in the interest of energy conservation, the institution plans to close between semesters or terms for a period not to exceed 45 days, the Administrator may continue to pay monthly educational assistance benefits to veterans and eligible persons enrolled in such schools. Such authority may be exercised only once during any 12-month period with respect to any educational institution.

"Sec. 2. The Administrator shall advise veterans and other eligible persons of the effect of accepting educational assistance benefits under the provisions of Section 1 of this Order [this note] on their period of entitlement.”.

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USC § 101 note.

Application of amendment made to subsec. (a)(4) by Act Nov. 18, 1988. Act Nov. 18, 1988, P. L. 100-689, Title I, Part B, § 121(b), 102 Stat. 4173, provides: "The amendment made by subsection (a) [amending subsec. (a)(4) of this section] shall apply so as to require that mitigating circumstances be considered to exist only with respect to withdrawals from a course or courses being pursued with assistance under title 38, United States Code, that occur on or after June 1, 1989.”.

Application of Nov. 1, 2000 amendment. Act Nov. 1, 2000, P. L. 106-419, Title I, Subtitle C, § 121(b), 114 Stat. 1833, provides: "The amendment made by subsection (a) [amending subsec. (a) of this section] shall apply with respect to payments of educational assistance under title 38, United States Code, for months beginning on or after the date of the enactment of this Act.”.

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

Cross References
This section is referred to in 38 USCS §§ 3034, 3108, 3684, 3698, 5113

Research Guide
Am Jur:
45A Am Jur 2d, Job Discrimination §§ 21-26, 40-104
45B Am Jur 2d, Job Discrimination § 760
77 Am Jur 2d, Veterans and Veterans' Laws § 135
1. Generally
2. Recovery of overpayments, generally
  3. -Erroneous payments
  4. -Termination of course prior to completion

1. Generally
38 USCS § 1780 [now 38 USCS § 3680] provides United States right of recovery against veterans who received benefits and then failed to earn grades which count towards graduation; government may seek reimbursement of educational benefits, and recovery of overpayments does not violate due process where recipient is informed of overpayments and right to seek waiver, but fails to seek waiver within 2 year limitations. United States v Brandon (1986, CA4 NC) 781 F.2d 1051

2. Recovery of overpayments, generally
Veteran's Administration [now Department of Veterans Affairs] may recover, as overpayments, payments made to veteran who did not receive passing grades in courses for which he had received monthly advance educational assistance benefits. United States v Brandon (1986, CA4 NC) 781 F.2d 1051

   Failure or dropping out of course is not equivalent to obtaining original educational aid through "erroneous information," under 38 USCS § 1780 [now 38 USCS § 3680] provision for recovery from veterans of payments based upon erroneous information furnished to Administrator [now Secretary], nor may recovery of educational assistance already paid be based upon prospective language of § 1780 [now 38 USCS § 3680] prohibiting payment for course from which student withdraws. United States v Brandon (1984, WD NC) 584 F Supp 803

   Section 1780 [now section 3680] was intended to allow United States to recover funds disbursed to veterans for classes when no academic credit was achieved, in absence of mitigating circumstances. United States v Garrahan (1985, ND Fla) 614 F Supp 152

3. -Erroneous payments
Veteran is required to reimburse government for erroneous overpayment of educational benefits by Veterans Administration [now Department of Veterans Affairs] under 38 USCS § 1780(e) [now 38 USCS § 3680(e)] where he received payment for period during which he completed no courses because of illness but failed to avail himself of right granted by § 1780(3) [now § 3680(3)] to apply for waiver of indebtedness pursuant to § 3102 [now § 5302], since reimbursement requirement applies regardless of whether overpayment results from fault of veteran or not. United States v Kirby (1981, ND Ga) 522 F Supp 424

   38 USCS § 1780 [now 38 USCS § 3680] confers no authority on government to recover erroneous overpayments of educational assistance to veteran not paid as advances. United States v Steinberg (1982, DC Mass) 553 F Supp 152
4. - Termination of course prior to completion

United States was entitled to recover overpayment of Veteran's Administration [now Department of Veterans Affairs] educational benefits where veteran terminates his course prior to its completion and receives non-punitive grades; termination related back to first day of school term resulting in overpayment for entire term. United States v Duchene (1985, SD Iowa) 624 F Supp 177

§ 3680A. Disapproval of enrollment in certain courses

(a) The Secretary shall not approve the enrollment of an eligible veteran in--

(1) any bartending course or personality development course;
(2) any sales or sales management course which does not provide specialized training within a specific vocational field;
(3) any type of course which the Secretary finds to be avocational or recreational in character (or the advertising for which the Secretary finds contains significant avocational or recreational themes) unless the veteran submits justification showing that the course will be of bona fide use in the pursuit of the veteran's present or contemplated business or occupation; or
(4) any independent study program except an accredited independent study program (including open circuit television) leading (A) to a standard college degree, or (B) to a certificate that reflects educational attainment offered by an institution of higher learning.

(b) Except to the extent otherwise specifically provided in this title or chapter 106 of title 10 [10 USCS §§ 2131 et seq.], the Secretary shall not approve the enrollment of an eligible veteran in any course of flight training other than one given by an educational institution of higher learning for credit toward a standard college degree the eligible veteran is seeking.

(c) The Secretary shall not approve the enrollment of an eligible veteran in any course to be pursued by radio.

(d) (1) Except as provided in paragraph (2) of this subsection, the Secretary shall not approve the enrollment of any eligible veteran, not already enrolled, in any course for any period during which the Secretary finds that more than 85 percent of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs under this title or under chapter 106 of title 10 [10 USCS §§ 2131 et seq.]. The Secretary may waive the requirements of this subsection, in whole or in part, if the Secretary determines, pursuant to regulations which the Secretary shall prescribe, it to be in the interest of the eligible veteran and the Federal Government. The provisions of this subsection shall not apply to any course offered by an educational institution if the total number of veterans and persons receiving assistance under this chapter [38 USCS §§ 3670 et seq.] or chapter 30, 31, 32, or 35 of this title [38 USCS §§ 3001 et seq., 3100 et seq., 3201 et seq., or 3500 et seq.] or under chapter 106 of title 10 [10 USCS § 2131 et seq.] who are enrolled in such institution equals 35 percent or less, or such other percent as the Secretary prescribes in regulations, of the total student enrollment at such institution (computed separately for the main campus and any branch or extension of such institution), except that the Secretary may apply the provisions of this subsection with respect to any course...
in which the Secretary has reason to believe that the enrollment of such veterans and persons may be in excess of 85 percent of the total student enrollment in such course.

(2) Paragraph (1) of this subsection does not apply with respect to the enrollment of a veteran--

(A) in a course offered pursuant to section 3019, 3034(a)(3), 3234, or 3241(a)(2) of this title [38 USCS § 3019, 3034(a)(3), 3234, or 3241(a)(2)];
(B) in a farm cooperative training course; or
(C) in a course described in subsection (g).

(e) The Secretary may not approve the enrollment of an eligible veteran in a course not leading to a standard college degree offered by a proprietary profit or proprietary nonprofit educational institution if--

(1) the educational institution has been operating for less than two years;
(2) the course is offered at a branch of the educational institution and the branch has been operating for less than two years; or
(3) following either a change in ownership or a complete move outside its original general locality, the educational institution does not retain substantially the same faculty, student body, and courses as before the change in ownership or the move outside the general locality (as determined in accordance with regulations the Secretary shall prescribe) unless the educational institution following such change or move has been in operation for at least two years.

(f) The Secretary may not approve the enrollment of an eligible veteran in a course as a part of a program of education offered by an educational institution if the course is provided under contract by another educational institution or entity and--

(1) the Secretary would be barred under subsection (e) from approving the enrollment of an eligible veteran in the course of the educational institution or entity providing the course under contract; or
(2) the educational institution or entity providing the course under contract has not obtained approval for the course under this chapter [38 USCS §§ 3670 et seq.].

(g) Notwithstanding subsections (e) and (f)(1), the Secretary may approve the enrollment of an eligible veteran in a course approved under this chapter if the course is offered by an educational institution under contract with the Department of Defense or the Department of Homeland Security and is given on or immediately adjacent to a military base, Coast Guard station, National Guard facility, or facility of the Selected Reserve.

Amendments:

1996. Act Oct. 9, 1996, in subsec. (c), substituted "radio," for "radio or by open circuit television, except that the Secretary may approve the enrollment of an eligible veteran in a course, to be pursued in residence, leading to a standard college degree which includes, as an integral part thereof, subjects offered through open circuit television."; in subsec. (d)(2)(C), substituted "subsection (g)" for "3689(b)(6) of this title"; and added subssecs. (e)-(g).

1997. Act Nov. 21, 1997, in subsec. (a)(4), inserted "(including open circuit television)"; and, in subsec. (g), substituted "subsections (e) and (f)(1)" for "subsections (e) and (f)".

1998. Act Nov. 11, 1998, in subsec. (d)(2)(C), deleted "section" preceding "subsection (g)."
**2001.** Act Dec. 27, 2001 (applicable as provided by § 111(b) of such Act, which appears as a note to this section), in subsec. (a)(4), inserted "(A)" and ", or (B) to a certificate that reflects educational attainment offered by an institution of higher learning".

**2002.** Act Nov. 25, 2002 (effective on 3/1/2003 pursuant to § 1704(g) of such Act, which appears as 10 USCS § 101 note), in subsec. (g), substituted "of Homeland Security" for "of Transportation".

**Other provisions:**

**Applicability of section.** Act Oct. 29, 1992, P. L. 102-568, § 313(b), which appears as 10 USCS § 2136 note, provides that this section is not applicable to any person receiving educational assistance for pursuit of an independent study program in which the person was enrolled on Oct. 29, 1992, for as long as such person is continuously thereafter so enrolled and meets the requirements of eligibility for such assistance for the pursuit of such program under Title 10 or Title 38, USCS, in effect on that date.

**Application of Dec. 27, 2001 amendments.** Act Dec. 27, 2001, P. L. 107-103, Title I, § 111(b), provides: "The amendments made by subsection (a) [amending subsec. (a)(4) of this section] shall apply to enrollments in independent study courses beginning on or after the date of the enactment of this Act.".

**Cross References**

This section is referred to in 10 USCS § 16136; 38 USCS §§ 3034, 3241

**Research Guide**

*Am Jur:*

77 Am Jur 2d, Veterans and Veterans' Laws §§ 131, 133

1. Generally

2. Constitutionality

3. Closed-circuit television courses

1. Generally

Regulation by Administrator [now Secretary] requiring finding of "complete justification," means "convincing evidence"; hence, decision by Administrator that evidence submitted was not convincing was final and was not subject to review by court. Slocumb v Gray (1949, App DC) 86 US App DC 5, 179 F.2d 31

Benefits are to be paid to those veterans who were properly enrolled prior to first day school was put on notice that its employment justification was invalid. VA GCO 6-77

2. Constitutionality

As to two requirements of federal statutory provisions governing veterans' educational assistance program (38 USCS §§ 1651 et seq. [now 38 USCS §§ 3451 et seq.])--both of which may be waived by Administrator of Veterans Administration [now Department of Veterans Affairs] --under which veterans' educational benefits are not available if course in which veteran enrolls is (1) course in which more than 85 percent of students are receiving veterans' educational benefits or financial assistance from any federal agency (38 USCS § 1673 [now 38 USCS § 3680A]) or (2) course which has been offered for less than two years (38 USCS § 1789 [now 38 USCS § 3689]), substantial constitutional questions are not raised as to claim that restrictions violate substantive due process by interfering with freedom of educational choice, or claim that restrictions violate procedural due process by not affording affected veterans hearing on question whether restrictions should be applied or waived; 38 USCS § 1673 [now 38 USCS § 3473] or 38 USCS § 1789 [now 38 USCS § 3689] do not violate principle of equal protection under due process clause of Fifth Amendment on ground that other federal educational assistance programs do not contain such course limitations, since (1) requirements are valid...
exercises on Congress’ power, it not being irrational for Congress to conclude that restricting benefits to established courses that have attracted substantial number of students whose educations are not being subsidized by federal government would be useful in accomplishing objectives of preventing waste of benefits on educational programs of little value and of preventing charlatans from obtaining veterans' education money, and (2) such otherwise reasonable restrictions are not made irrational because of their absence from other federal financial assistance programs, in view of (a) restrictions having been imposed in direct response to problems experienced in administration of veterans’ benefits programs, (b) there being no indication that identical abuses had not been encountered in other federal grant programs, and (c) there being no requirement under Constitution that Congress detect and correct abuses in administration of all related programs before acting to combat those experienced in one. Cleland v National College of Business (1978) 435 US 213, 55 L Ed 2d 225, 98 S Ct 1024

Fact that federal statutory provisions under which veterans' benefits are not generally available if course in which veteran enrolls is one in which more than 85 percent of students are receiving educational benefits from Veterans Administration or any federal agency (38 USCS § 1673 [now 38 USCS § 3680A]), or if course is one which has been offered for less than two years (38 USCS § 1789 [now 38 USCS § 3689]) may deprive those veterans living in areas where there are no programs which satisfy such statutory requirements of opportunity to take full advantage of benefits made available to veterans is not sufficient basis for United States Supreme Court to exercise greater judicial oversight, since undisputed importance of education will not alone cause court to depart from usual standard for reviewing social and economic legislation for purposes of equal protection. Cleland v National College of Business (1978) 435 US 213, 55 L Ed 2d 225, 98 S Ct 1024

Provisions of 38 USCS § 1673(d) [now 38 USCS § 3680A(d)] are not unconstitutional as being in violation of Fifth Amendment (USCS Constitution, Amendment 5), in that unequal application of provisions of such section are not totally lacking in rational justification or patently arbitrary, nor were veterans denied due process of law in the promulgation of 1976 amendment to 38 USCS § 1673 [now 38 USCS § 3680A]; interest of veteran in veteran's benefits is such interest as is entitled to constitutional protection, but where both procedural and substantive due process are provided, court will not void legislation simply because it is faulty legislation. Fielder v Cleland (1977, ED Mich) 433 F Supp 115, affd without op (1978, CA6 Mich) 577 F.2d 740

Provisions of 38 USCS § 1673(d) [now 38 USCS § 3680A(d)] are not unconstitutional as denying equal protection to veterans seeking to enter saturated classes, in which ratio of veterans to nonveterans exceeds 85-15 limitation, when compared with those veterans seeking to enroll in not-yet saturated courses, and those nonveteran, but government-funded students, who are not burdened by 85-15 limitation expressed in 38 USCS § 1673(d) [now 38 USCS § 3680A(d)]; legislative goal of allowing free market mechanism to prove worth of course offered, by requiring course to respond to general dictates of open market as well as to those with available federal moneys to spend, is valid, rational goal, and while 85-15 rule may be imperfect, it is not unconstitutional. Rolle v Cleland (1977, DC RI) 435 F Supp 260

3. Closed-circuit television courses

38 USCS § 1673(c) [now 38 USCS § 3680A(c)] does not bar payment for courses pursued by open circuit television in connection with residential program, even if majority of subjects are being pursued by television, as long as payments per credit hour for television courses are less than payments received per residential credit hour. VA GCO 11-79

§ 3681. Limitations on educational assistance

(a) No educational assistance allowance granted under chapter 30, 34, 35, or 36 of this title [38 USCS §§ 3001 et seq., 3451 et seq., 3500 et seq., or 3670 et seq.] or 106 or 107 of title 10 [10 USCS §§ 2131 et seq. or 2141 et seq.], or subsistence allowance granted under chapter 31 of this title [38 USCS §§ 3100 et seq.] shall be paid to any eligible person (1) who is on active duty and is pursuing a course of education which is being
paid for by the Armed Forces (or by the Department of Health and Human Services in the case of the Public Health Service); or (2) who is attending a course of education or training paid for under chapter 41 of title 5 [5 USCS §§ 4101 et seq.].

(b) No person may receive benefits concurrently under two or more of the provisions of law listed below:

1. Chapters 30, 31, 32, 34, 35, and 36 of this title [38 USCS §§ 3001 et seq., 3100 et seq., 3201 et seq., 3451 et seq., 3500 et seq., and 3670 et seq.].
2. Chapters 106 and 107 of title 10 [10 USCS §§ 2131 et seq. and 2141 et seq.].
5. The Omnibus Diplomatic Security and Antiterrorism Act of 1986 (Public Law 99-399) [22 USCS §§ 4801 et seq.].

Explanatory notes:

Provisions similar to those contained in this section were contained in former 38 USC §§ 1632(h)(1), 1762 prior to repeal by Act March 3, 1966, P. L. 89-358, §§ 3(a)(2), 4(a), 80 Stat. 23.

Effective date of section:


Amendments:

1970. Act March 26, 1970, substituted new catchline and section for ones which read:
"§ 1781. Nonduplication of benefits

"No educational assistance allowance or special training allowance shall be paid on behalf of any eligible person or veteran under chapter 34 or 35 of this title for any period during which such person or veteran is enrolled in and pursuing a program of education or course paid for by the United States under any provision of law other than such chapters, where the payment of an allowance would constitute a duplication of benefits paid from the Federal Treasury to the eligible person or veteran or to his parent or guardian in his behalf.".

1972. Act Oct. 24, 1972, substituted "granted under chapter 34, 35, or 36" for "or special training allowance granted under chapter 34 or 35".

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note) substituted "such person" for "him".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(a)(6), (h) of such Act, which appear as a note to this section and to 38 USCS § 3452, respectively), inserted ", or subsistence allowance granted under chapter 31," and substituted "Department of Health and Human Services" for "Department of Health, Education, and Welfare".


1984. Act March 2, 1984 designated the existing provisions as subsec. (a); and added subsec. (b).

Act Oct. 19, 1984, in subsec. (a), inserted "30," substituted "36 of this title or 106 or 107 of title 10," for "36," and deleted a comma following "chapter 31"; and in subsec. (b)(1), inserted "30."


1992. Act Oct. 29, 1992, in subsec. (a), deleted "and whose full salary is being paid to such person while so training" following "paid for under chapter 41 of title 5".

Other provisions:


Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

1. Generally
2. Apprenticeship and job training programs
3. Health profession programs

1. Generally

Service Academy graduates were entitled to educational assistance under § 207 of law entitled Refunds for Certain Service Academy Graduates (38 USCS § 3222 note) even though they previously received tuition benefits from Navy. Tallman v Brown (1997, CA FC) 105 F.3d 613

2. Apprenticeship and job training programs

38 USCS § 1781 [now 38 USCS § 3681] does not apply to programs of apprenticeship and other on-the-job training given by agency of United States where some or all of period on which benefits payments are based consist of related instruction for which government pays tuition. VA GCO 9-77

3. Health profession programs

Participants in Health Professions Scholarship Program may be paid GI Bill educational assistance benefits while enrolled in such program in inactive status. VA GCO 10-74

§ 3682. Control by agencies of the United States

Except as provided in section 3674A of this title [38 USCS § 3674A], no department, agency, or officer of the United States, in carrying out this chapter [38 USCS §§ 3670 et seq.], shall exercise any supervision or control, whatsoever, over any State approving agency, or State educational agency, or any educational institution. Nothing in this section shall be deemed to prevent any department, agency, or officer of the United States from exercising any supervision or control which such department, agency, or officer is authorized by law to exercise over any Federal educational institution or to prevent the furnishing of education under this chapter or chapter 34 or 35 of this title [38 USCS §§
3670 et seq. or 3451 et seq. or 3500 et seq.] in any institution over which supervision or control is exercised by such other department, agency, or officer under authority of law.

Explanatory notes:
Provisions similar to those contained in this section were contained in former 38 USC 1663, 1763, prior to repeal by Act March 3, 1966, P. L. 89-358, § 4(a), 80 Stat. 23.

Effective date of section:

Amendments:
1972. Act Oct. 24, 1972, inserted "this chapter or".
1988. Act May 20, 1988 (effective on enactment as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note) substituted "Except as provided in section 1774A, no" for "No".
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1782, as 38 USCS § 3682, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1. Generally
2. Regulations
3. Subpoenas

1. Generally
Statutory framework in 38 USCS § 1782 [now 38 USCS § 3682] for Veterans Administration [now Department of Veterans Affairs] supervision for approval of courses and mechanics of payment of educational assistance to students creates no substantive rights for students participating in such programs. Rivera Carbana v Cruz (1984, DC Puerto Rico) 588 F Supp 80
Veterans Administration [now Department of Veterans Affairs] has authority to independently determine that courses or subjects approved by state approval agency which constitute veteran's program of education lead to professional, vocational or educational objective no benefits may be paid if such programs do not, unless they may properly form basis of different program of education and veteran meets all criteria for appropriate change of program. VA GCO 12-83

2. Regulations
Veterans Administration [now Department of Veterans Affairs] regulations promulgated pursuant to 38 USCS § 1785 [now 38 USCS § 3685], requiring that school must notify agency within 30 days of student's change of status in order to avoid potential liability for overpayments made to ineligible students, do not violate prohibition found in 38 USCS § 1782 [now 38 USCS § 3682] against any agency of United States exercising any supervision or control over state educational institution. Colorado v VA (1977, DC Colo) 430 F Supp 551, affd (1979, CA10 Colo) 602 F.2d 926, cert den (1980) 444 US 1014, 62 L Ed 2d 643, 100 S Ct 663

3. Subpoenas
Provision prohibiting agency or its officers from exercising any administration or control over any educational or training institution does not preclude Administrator [now Secretary] from issuing subpoenas. General Trades School, Inc. v United States (1954, CA8 Mo) 212 F.2d 656

§ 3683. Conflicting interests
(a) Every officer or employee of the Department of Veterans Affairs who has, while such an officer or employee, owned any interest in, or received any wages, salary, dividends,
profits, gratuities, or services from any educational institution operated for profit in which an eligible person or veteran was pursuing a program of education or course under this chapter or chapter 34 or 35 of this title [38 USCS §§ 3670 et seq. or 3451 et seq. or 3500 et seq.] shall be immediately dismissed from such officer's or employee's office or employment.

(b) If the Secretary finds that any person who is an officer or employee of a State approving agency has, while such person was such an officer or employee, owned any interest in, or received any wages, salary, dividends, profits, gratuities, or services from, an educational institution operated for profit in which an eligible person or veteran was pursuing a program of education or course under this chapter or chapter 34 or 35 of this title [38 USCS §§ 3670 et seq. or 3451 et seq. or 3500 et seq.], the Secretary shall discontinue making payments under section 3674 of this title [38 USCS § 3674] to such State approving agency unless such agency shall, without delay, take such steps as may be necessary to terminate the employment of such person and such payments shall not be resumed while such person is an officer or employee of the State approving agency, or State department of veterans' affairs or State department of education.

(c) A State approving agency shall not approve any course offered by an educational institution operated for profit, and, if any such course has been approved, shall disapprove each such course, if it finds that any officer or employee of the Department of Veterans Affairs or the State approving agency owns an interest in, or receives any wages, salary, dividends, profits, gratuities, or services from, such institution.

(d) The Secretary may, after reasonable notice and public hearings, waive in writing the application of this section in the case of any officer or employee of the Department of Veterans Affairs or of a State approving agency, if the Secretary finds that no detriment will result to the United States or to eligible persons or veterans by reasons of such interest or connection of such officer or employee.

Explanatory notes:

Provisions similar to those contained in this section were contained in former 38 USC 1664, 1764 prior to repeal by Act March 3, 1966, P. L. 89-358, §§ 3(a)(3), 4(a), 80 Stat. 23.

Effective date of section:


Amendments:

1972. Act Oct. 24, 1972, in subsecs. (a) and (b), inserted "this chapter or".

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), substituted "such officer's or employee's" for "his"; in subsec. (b), substituted "such person" for "he" and substituted "the Administrator" for "he" preceding "shall discontinue"; and in subsec. (d), substituted "the Administrator" for "he" preceding "finds".


1989. Act Dec. 18, 1989, in subsecs. (a), (c) and (d), substituted "Department of Veterans Affairs" for "Veterans' Administration"; and in subsecs. (b) and (d), substituted "Secretary" for "Administrator", wherever appearing.
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1783, as 38 USCS § 3683, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Code of Federal Regulations

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

§ 3684. Reports by veterans, eligible persons, and institutions; reporting fee

(a) (1) Except as provided in paragraph (2) of this subsection, the veteran or eligible person and the educational institution offering a course in which such veteran or eligible person is enrolled under chapter 31, 34, [35], or 36 of this title [38 USCS §§ 3100 et seq., 3451 et seq., 3500 et seq., or 3670 et seq.] shall, without delay, report to the Secretary, in the form prescribed by the Secretary, such enrollment and any interruption or termination of the education of each such veteran or eligible person. The date of such interruption or termination will be the last date of pursuit, or, in the case of correspondence training, the last date a lesson was serviced by a school.

(2) (A) In the case of a program of independent study pursued on less than a half-time basis in an educational institution, the Secretary may approve a delay by the educational institution in reporting the enrollment or reenrollment of an eligible veteran or eligible person until the end of the term, quarter, or semester if the educational institution requests the delay and the Secretary determines that it is not feasible for the educational institution to monitor interruption or termination of the veteran's or eligible person's pursuit of such program.

(B) An educational institution which, pursuant to subparagraph (A) of this paragraph, is delaying the reporting of the enrollment or reenrollment of a veteran shall provide the veteran with notice of the delay at the time that the veteran enrolls or reenrolls.

(3) (A) Subject to subparagraph (B) of this paragraph, an educational institution offering courses on a term, quarter, or semester basis may certify the enrollment of a veteran who is not on active duty, or of an eligible person, in such courses for more than one term, quarter, or semester at a time, but not for a period extending beyond the end of a school year (including the summer enrollment period).

(B) Subparagraph (A) of this paragraph shall not apply with respect to any term, quarter, or semester for which the veteran or eligible person is enrolled on a less than half-time basis and shall not be construed as restricting the Secretary from requiring that an educational institution, in reporting an enrollment for more than one term, quarter, or semester, specify the dates of any intervals within or between any such terms, quarters, or semesters.

(b) The Secretary, prior to making payment of a reporting fee to an educational institution, as provided for in subsection (c) of this section, shall require such institution to certify that it has exercised reasonable diligence in determining whether such institution or any course offered by such institution approved for the enrollment of veterans or eligible
persons meets all of the applicable requirements of chapters 31, 34, 35, and 36 of this title [38 USCS §§ 3100 et seq., 3451 et seq., 3500 et seq., and 3670 et seq.] and that it will, without delay, report any failure to meet any such requirement to the Secretary.

(c) The Secretary may pay to any educational institution, or to the sponsor of a program of apprenticeship, furnishing education or training under either this chapter or chapter 31, 34 or 35 of this title [38 USCS §§ 3670 et seq. or 3100 et seq., 3451 et seq., or 3500 et seq.] a reporting fee which will be in lieu of any other compensation or reimbursement for reports or certifications which such educational institution or joint apprenticeship training committee is required to submit to the Secretary by law or regulation. Such reporting fee shall be computed for each calendar year by multiplying $7 by the number of eligible veterans or eligible persons enrolled under this chapter or chapter 31, 34 or 35 of this title [38 USCS §§ 3670 et seq. or 3100 et seq., 3451 et seq., or 3500 et seq.] or $11 in the case of those eligible veterans and eligible persons whose educational assistance checks are directed in care of each institution for temporary custody and delivery and are delivered at the time of registration as provided under section 3680(d)(4) of this title [38 USCS § 3680(d)(4)], during the calendar year. The reporting fee shall be paid to such educational institution or joint apprenticeship training committee as soon as feasible after the end of the calendar year for which it is applicable. No reporting fee payable to an educational institution under this subsection shall be subject to offset by the Secretary against any liability of such institution for any overpayment for which such institution may be administratively determined to be liable under section 3685 of this title [38 USCS § 3685] unless such liability is not contested by such institution or has been upheld by a final decree of a court of appropriate jurisdiction. The reporting fee payable under this subsection shall be paid from amounts appropriated for readjustment benefits.

**Explanatory notes:**

The comma in subsec. (a)(1) has been enclosed in brackets to indicate the probable intent of Congress to delete such punctuation.

Provisions similar to those contained in this section were contained in former 38 USC §§ 1665(a), 1765(a) prior to repeal by Act March 3, 1966, P. L. 89-358, §§ 3(a)(3), 4(a), 80 Stat. 23.

**Effective date of section:**


**Amendments:**

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in the section catchline, inserted "; reporting fee"; designated existing matter as subsec. (a); and added subsec. (b).

1972. Act Oct. 24, 1972, in subsecs. (a) and (b), substituted "34, 35, or 36" for "34 or 35"; in subsec. (b), inserted "or eligible persons", and substituted "or eligible persons enrolled under chapters 34, 35, and 36 of this title, or $4 in the case of those eligible veterans and eligible persons whose educational assistance checks are directed in care of each institution for temporary custody and delivery and are delivered at the time of registration as provided under section 1780(d)(5) of this title" for "enrolled under chapter 34 of this title, plus the number of eligible persons enrolled under chapter 35 of this title".
1974. Act Dec. 3, 1974 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), substituted new subsec. (b) for one which read: "The Administrator may pay to any educational institution furnishing education under either chapter 34, 35, or 36 of this title, a reporting fee which will be in lieu of any other compensation or reimbursement for reports or certifications which such educational institution is required to report to him by law or regulation. Such reporting fee shall be computed for each calendar year by multiplying $3 by the number of eligible veterans or eligible persons or eligible persons enrolled under chapters 34, 35, and 36 of this title, or $4 in the case of those eligible veterans and eligible persons whose educational assistance checks are directed in care of each institution for temporary custody and delivery and are delivered at the time of registration as provided under section 1780(d)(5) of this title, on October 31 of that year; except that the Administrator may, where it is established by the educational institution that eligible veteran plus eligible person enrollment on such date varies more than 15 per centum from the peak eligible veteran plus eligible person enrollment in such institution during such calendar year, establish such other date as representative of the peak enrollment as may be justified for that institution. The reporting fee shall be paid to the educational institution as soon as feasible after the end of the calendar year for which it is applicable.".

1976. Act Oct. 15, 1976, § 513(a)(17) (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), substituted "the Administrator" for "him" following "by"; and in subsec. (b), substituted "the Administrator" for "him" following "to".

Act Oct. 15, 1976, § 507 (effective 12/1/76, as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), inserted "The date of interruption or termination will be the last date of pursuit or, in the case of correspondence training, the last date a lesson was serviced by the school.".

Act Oct. 15, 1976, § 508 (effective 10/1/76, as provided by § 703(a) of such Act, which appears as 38 USCS § 3693 note), in subsec. (b), substituted "$5" and "$6" for "$3" and "$4", respectively.

1977. Act Nov. 23, 1977, § 304(a)(1)(A) (effective 10/1/77, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), in subsec. (b), substituted "$7" and "$11" for "$5" and "$6", respectively.

Act Nov. 23, 1977, § 304(a)(1)(B) (effective 11/23/77, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), in subsec. (b), inserted "No reporting fee payable to an educational institution under this subsection shall be subject to offset by the Administrator against any liability of such institution for any overpayment for which such institution may be administratively determined to be liable under section 1785 of this title unless such liability is not contested by such institution or has been upheld by a final decree of a court of appropriate jurisdiction.".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1), (f)(1) of such Act, which appears as 38 USCS §§ 3452, 5314 notes, respectively), substituted new catchline for one which read: "Reports by institutions; reporting fee"; substituted new subsec. (a) for one which read: "(a) Educational institutions shall, without delay, report to the Administrator in the form prescribed by the Administrator, the enrollment, interruption, and termination of the education of each eligible person or veteran enrolled therein under chapter 34, 35, or 36. The date of interruption or termination will be the last date of pursuit or, in the case of correspondence training, the last date a lesson was serviced by the school."; redesignated subsec. (b) as subsec. (c); added new subsec. (b); in subsec. (c), as so redesignated, substituted "1780(d)(4)" for "1780(d)(5)".

1982. Act Oct. 12, 1982, in subsec. (c), substituted "percent" for "per centum".

1986. Act Oct. 28, 1986, in subsec. (a), substituted "(a)(1) Except as provided in paragraph (2) of this subsection, the" for "(a) The", and added paras. (2) and (3).

1989. Act Dec. 18, 1989 (effective 1/1/90 as provided by § 416(b) of such Act, which appears as a note to this section), in subsec. (a)(1), substituted "chapter 31, 34" for "chapter 34"; in
subsec. (b), substituted "chapters 31, 34" for "chapters 34"; and in subsec. (c), substituted "chapter 31, 34," for "chapter 34". Such act further, substituted "Secretary" for "Administrator", wherever appearing, in the entire section.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1784, as 38 USCS § 3684, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1998. Act Nov. 11, 1998 (applicable with respect to calendar years beginning after 12/31/98, as provided by § 201(c) of such Act, which appears as a note to this section), in subsec. (c), substituted "during the calendar year." for "on October 31 of that year; except that the Secretary may, where it is established by such educational institution or joint apprenticeship training committee that eligible veteran plus eligible person enrollment on such date varies more than 15 percent from the peak eligible veteran enrollment plus eligible person enrollment in such educational institution or joint apprenticeship training committee during such calendar year, establish such other date as representative of the peak enrollment as may be justified for such educational institution or joint apprenticeship training committee." and added the sentence beginning: "The reporting fee payable . . . ."

2000. Act Nov. 1, 2000, in subsec. (c), substituted "calendar" for "calender" following "during the".

2004. Act Dec. 10, 2004, in subsec. (c), substituted "or to the sponsor of a program of apprenticeship" for "or to any joint apprenticeship training committee acting as a training establishment".

Other provisions:

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.


Application of Nov. 11, 1998 amendments. Act Nov. 11, 1998, P. L. 105-368, Title II, Subtitle A, § 201(c), 112 Stat. 3326, provides: "The amendments made by this section [amending subsec. (c) of this section] shall apply with respect to calendar years beginning after December 31, 1998."

Cross References

This section is referred to in 38 USCS §§ 3685, 3698

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 130

1. Generally

2. Reports, generally

3. -Fees

1. Generally

Requirement of "without delay" under 38 USCS § 1784(a) [now 38 USCS § 3684(a)] is met if, within 30 days from date of veteran's reduction or termination of training or reduction in course load, educational institution reports fact to administrator. VA GCO 2-77

2. Reports, generally
38 USCS § 1784 [now 38 USCS § 3684] requirement that college keep track of any student it has certified to government as being eligible to receive educational benefits and report interruption or termination of education of such persons does not violate principle of academic freedom. United States v Reinhardt College (1983, ND Ga) 597 F Supp 522

3. -Fees

Congress intended that allowance be paid to schools per month for each month in which required report or certification is furnished with respect to enrolled veteran, and for purposes of such allowance, there is no distinction based on correspondence versus resident courses. Central Technical Institute v United States (1960) 151 Ct Cl 693, 284 F.2d 377

§ 3684A. Procedures relating to computer matching program

(a) (1) Notwithstanding section 552a(p) of title 5 [5 USCS § 552a(p)] and subject to paragraph (2) of this subsection, the Secretary may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under an educational assistance program provided for in chapter 30 or 32 of this title [38 USCS §§ 3001 et seq. or 3201 et seq.] or in chapter 106 of title 10 [10 USCS §§ 2131 et seq.] in the case of any individual, or take other adverse action against such individual, based on information produced by a matching program with the Department of Defense.

(2) The Secretary may not take any action referred to in paragraph (1) of this subsection until--

(A) the individual concerned has been provided a written notice containing a statement of the findings of the Secretary based on the matching program, a description of the proposed action, and notice of the individual's right to contest such findings within 10 days after the date of the notice; and

(B) the 10-day period referred to in subparagraph (A) of this paragraph has expired.

(3) In computing the 10-day period referred to in paragraph (2) of this subsection, Saturdays, Sundays, and Federal holidays shall be excluded.

(b) For the purposes of subsection (q) of section 552a of title 5 [5 USCS § 552a], compliance with the provisions of subsection (a) of this section shall be considered compliance with the provisions of subsection (p) of such section 552a.

(c) For purposes of this section, the term "matching program" has the same meaning provided in section 552a(a)(8) of title 5 [5 USCS § 552a(a)(8)].

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1784A, as 38 USCS § 3684A.

Research Guide

Federal Procedure:


Am Jur:

37A Am Jur 2d, Freedom of Information Acts § 399

77 Am Jur 2d, Veterans and Veterans' Laws §§ 130, 135
§ 3685. Overpayments to eligible persons or veterans

(a) Whenever the Secretary finds that an overpayment has been made to a veteran or eligible person, the amount of such overpayment shall constitute a liability of such veteran or eligible person to the United States.

(b) Whenever the Secretary finds that an overpayment has been made to a veteran or eligible person as the result of (1) the willful or negligent failure of an educational institution to report, as required under this chapter or chapter 34 or 35 of this title [38 USCS §§ 3670 et seq. or 3451 et seq. or 3500 et seq.], to the Department of Veterans Affairs excessive absences from a course, or discontinuance or interruption of a course by the veteran or eligible person, or (2) the willful or negligent false certification by an educational institution, the amount of such overpayment shall constitute a liability of the educational institution to the United States.

(c) Any overpayment referred to in subsection (a) or (b) of this section may be recovered, except as otherwise provided in the last sentence of section 3684(c) of this title [38 USCS § 3684(c)], in the same manner as any other debt due the United States.

(d) Any overpayment referred to in subsection (a) or (b) of this section may be waived as to a veteran or eligible person as provided in section 5302 of this title [38 USCS § 5302]. Waiver of any such overpayment as to a veteran or eligible person shall in no way release any educational institution from liability under subsection (b) of this section.

(e) (1) Any amount collected from a veteran or eligible person pursuant to this section shall be reimbursed to the educational institution which is liable pursuant to subsection (b) of this section to the extent that collection was made from the educational institution.

(2) Nothing in this section or any other provision of this title shall be construed as (A) precluding the imposition of any civil or criminal liability under this title or any other law, or (B) requiring any institution of higher learning to maintain daily attendance records for any course leading to a standard college degree.

Explanatory notes:

Provisions similar to those contained in this section were contained in former 38 USC 1666, 1766 prior to repeal by Act March 3, 1966, P. L. 89-358, §§ 3(a)(3), 4(a), 80 Stat. 23.

Effective date of section:


Amendments:

1972. Act Oct. 24, 1972, inserted "this chapter or".

1977. Act Nov. 23, 1977 (effective 11/23/77, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), inserted ", except as otherwise provided in section 1784(b) of this title," and inserted "Nothing in this section or any other provision of this title shall be construed as requiring any institution of higher learning to maintain daily attendance records for any course leading to a standard college degree."

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1) of such Act, which appears as 38 USCS § 3452 note), substituted new section for one which read: "Whenever the Administrator finds that an overpayment has been made to an eligible person or veteran
as the result of (1) the willful or negligent failure of an educational institution to report, as required by this chapter or chapter 34 or 35 of this title and applicable regulations, to the Veterans' Administration excessive absences from a course, or discontinuance or interruption of a course by the eligible person or veteran, or (2) false certification by an educational institution, the amount of such overpayment shall constitute a liability of such institution, and may be recovered, except as otherwise provided in section 1784(b) of this title, in the same manner as any other debt due the United States. Any amount so collected shall be reimbursed if the overpayment is recovered from the eligible person or veteran. This section shall not preclude the imposition of any civil or criminal liability under this or any other law. Nothing in this section or any other provision of this title shall be construed as requiring any institution of higher learning to maintain daily attendance records for any course leading to a standard college degree."

1989. Act Dec. 18, 1989, in subsecs. (a) and (b), substituted "Secretary" for "Administrator"; and in subsec. (b), substituted "Department of Veterans Affairs" for "Veterans' Administration".

1991. Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1785, as 38 USCS § 3685, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Cross References
This section is referred to in 38 USCS § 3684

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 135
1. Generally
2. Constitutionality
3. Right to recovery of overpayments
4. Administrative procedure
5. Withholding of benefits from veterans
6. Offset of fees against liability of institution
7. Time limitations on recovery

1. Generally
Provision of 38 USCS § 1785 [now 38 USCS § 3685] allowing recoupment by United States of overpayments resulting from negligence of state educational institutions is not unconstitutional violation of doctrine of intergovernmental immunity. Colorado v VA (1977, DC Colo) 430 F Supp 551, affd (1979, CA10 Colo) 602 F.2d 926, cert den (1980) 444 US 1014, 62 L Ed 2d 643, 100 S Ct 663

2. Constitutionality
Veterans Administration [now Department of Veterans Affairs] regulations promulgated pursuant to 38 USCS § 1785 [now 38 USCS § 3685], requiring that school must notify agency within 30 days of student's change of status in order to avoid potential liability for overpayments made to ineligible students, did not violate prohibition found in 38 USCS § 1782 [now 38 USCS § 3682] against any agency of United States exercising any supervision or control over state educational institution. Colorado v VA (1977, DC Colo) 430 F Supp 551, affd (1979, CA10 Colo) 602 F.2d 926, cert den (1980) 444 US 1014, 62 L Ed 2d 643, 100 S Ct 663

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3. Right to recovery of overpayments

Government may not recover erroneous overpayments of education allowance absent finding of institutional failure to report veteran's discontinuance or of false certification. United States v Steinberg (1982, DC Mass) 553 F Supp 184

United States is entitled to recover overpayment of Veteran's Administration [now Department of Veterans Affairs] educational benefits where veteran terminates his course prior to its completion and receives non-punitive grades; termination relates back to first day of school term resulting in overpayment for entire term. United States v Duchene (1985, SD Iowa) 624 F Supp 177

Veterans already enrolled in education or training institution upon determination that institution falsely certified maintenance of 85 to 15 percent ratio required under former 38 USC § 931 and thereby disenrolled pursuant to former 38 USC § 966, whose education and training allowances for periods prior to disenrollment had not yet been paid, were not subject to overpayments since prohibition in former § 931 extended only to veterans not already enrolled, and former § 966 did not direct that disenrollment was retrospective in operation; institution was not liable under former § 976, respecting payments made subsequent to date of finding of failure to maintain proper ratio, since such payments to veterans did not constitute "overpayments . . . to a veteran" for purposes of former § 976, and no liability exists under first sentence of former § 978 since such section applied only where person to whom payment was to be made had submitted false or misleading claim. 1953 ADVA 934

4. Administrative procedure

There is no clear indication within 38 USCS § 1785 [now 38 USCS § 3685] that adversary hearing with the use of record is required for recovery of overpayments and, therefore, hearing procedures of Administrative Procedure Act (5 USCS § 554) are not applicable. Colorado v Veterans Admin. (1979, CA10 Colo) 602 F.2d 926, cert den (1980) 444 US 1014, 62 L Ed 2d 643, 100 S Ct 663

5. Withholding of benefits from veterans

It is proper for Veterans’ Administration [now Department of Veterans Affairs] to withhold benefits for overpayments from individuals who reentered was training, notwithstanding that full amount of overpayment had already been collected from educational institution, since congressional intent was to have veteran reimburse school. VA GCO 10-77

6. Offset of fees against liability of institution

Veterans' Administration [now Department of Veterans Affairs] may offset reporting fees due institution against its liability for overpayment. VA GCO 8-79

7. Time limitations on recovery

Cause of action under 28 USCS § 1785 by federal government to recover from college overpayments of veterans' benefits resulting from college's improper failure to properly report changes in status of students certified as eligible for benefits, as required by 38 USCS § 1784 [now 38 USCS § 3684], is contractual in nature, since colleges are paid fee for required reports, and suit is governed by 28 USCS § 2415(a) 6-year statute of limitations applicable to contract actions. United States v Reinhardt College (1983, ND Ga) 597 F Supp 522

§ 3686. Correspondence courses

(a) (1) Each eligible veteran (as defined in section 3452(a)(1) and (2) of this title [38 USCS § 3452(a)(1) and (2)]) and each eligible spouse or surviving spouse (as defined in section 3501(a)(1)(B), (C), or (D) of this title [ USCS § 3501(a)(1)(B), (C), or (D)]) who enters into an enrollment agreement to pursue a program of education exclusively by correspondence shall be paid an educational assistance allowance computed at the rate of 55 percent of the established charge which the institution requires nonveterans to pay for
the course or courses pursued by the eligible veteran or spouse or surviving spouse. The term "established charge" as used herein means the charge for the course or courses determined on the basis of the lowest extended time payment plan offered by the institution and approved by the appropriate State approving agency or the actual cost to the veteran or spouse or surviving spouse, whichever is the lesser. Such allowance shall be paid quarterly on a pro rata basis for the lessons completed by the veteran or spouse or surviving spouse and serviced by the institution.

(2) The period of entitlement of any veteran or spouse or surviving spouse who is pursuing any program of education exclusively by correspondence shall be charged with one month for each $376 which is paid to the veteran or spouse or surviving spouse as an educational assistance allowance for such course.

(3) Notwithstanding any other provision of law unless enacted in express limitation of this paragraph, funds in the Department of Veterans Affairs readjustment benefits account shall be available for payments under paragraph (1) of this subsection for pursuit of a program of education exclusively by correspondence in which the veteran or spouse or surviving spouse enrolls after September 30, 1981.

(b) The enrollment agreement shall fully disclose the obligation of both the institution and the veteran or spouse or surviving spouse and shall prominently display the provisions for affirmance, termination, refunds, and the conditions under which payment of the allowance is made by the Secretary to the veteran or spouse or surviving spouse. A copy of the enrollment agreement shall be furnished to each such veteran or spouse or surviving spouse at the time such veteran or spouse or surviving spouse signs such agreement. No such agreement shall be effective unless such veteran or spouse or surviving spouse shall, after the expiration of ten days after the enrollment agreement is signed, have signed and submitted to the Secretary a written statement, with a signed copy to the institution, specifically affirming the enrollment agreement. In the event the veteran or spouse or surviving spouse at any time notifies the institution of such veteran's or spouse's intention not to affirm the agreement in accordance with the preceding sentence, the institution, without imposing any penalty or charging any fee shall promptly make a full refund of all amounts paid.

(c) In the event a veteran or spouse or surviving spouse elects to terminate his enrollment under an affirmed enrollment agreement, the institution may charge the veteran or spouse or surviving spouse a registration or similar fee not in excess of 10 percent of the tuition for the course, or $50, whichever is less. Where the veteran or spouse or surviving spouse elects to terminate the agreement after completion of one or more but less than 25 percent of the total number of lessons comprising the course, the institution may retain such registration or similar fee plus 25 percent of the tuition for the course. Where the veteran or spouse or surviving spouse elects to terminate the agreement after completion of 25 percent but less than 50 percent of the lessons comprising the course, the institution may retain the full registration or similar fee plus 50 percent of the course tuition. If 50 percent or more of the lessons are completed, no refund of tuition is required.

Effective date of section:

Amendments:

1974. Act Dec. 3, 1974 (effective 9/1/74, as provided by § 501 of such Act, which appears as 38 USCS § 3482 note), in subsec. (a)(2), substituted "$260" for "$220".

1975. Act Jan. 2, 1975 (effective 1/1/75, as provided by § 206 of such Act, which appears as 38 USCS § 3482 note), in subsec. (a)(2), substituted "$270" for "$260".

1976. Act Oct. 15, 1976, § 513(a)(18) (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsecs. (a)-(c), purported to substitute "spouse or surviving spouse" for "wife and widow" wherever appearing; however "spouse or surviving spouse" was substituted for "wife or widow" wherever appearing in this section, as the probable intent of Congress; and in subsecs. (b) and (c), substituted "such veteran's or spouse's" for "his".

Act Oct. 15, 1976, § 501(1) (effective 10/1/76, as provided by § 703(a) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a)(2), substituted "$292" for "$270".

1977. Act Nov. 23, 1977 (effective 10/1/77, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), in subsec. (a)(2), substituted "$311" for "$292".

1980. Act Oct. 17, 1980, § 604 (effective as provided by § 802(f) of such Act, which appears as 38 USCS § 3482 note), in subsec. (a)(1), substituted "70 percent" for "90 per centum".

Such Act further, in § 203(2) (effective 10/1/80, as provided by § 802(b)(1) of such Act, which appears as 38 USCS § 3482 note), in subsec. (a)(2), substituted "$327" for "$311".

Such Act further, in § 213(2) (effective 1/1/81, as provided by § 802(b)(2) of such Act, which appears as 38 USCS § 3482 note), in subsec. (a)(2), as amended by § 203(2) of Act Oct. 17, 1980, substituted "$342" for "$327".

1981. Act Aug. 13, 1981 (effective as provided by § 2004(b) of such Act), in subsec. (a)(1), substituted "55 percent" for "70 percent".

1982. Act May 4, 1982 (effective 10/1/81, as provided by § 5(b) of such Act, which appears as a note to this section), added subsec. (a)(3). Act Oct. 12, 1982, in subsec. (c), substituted "percent" for "per centum" each place it appears.

1984. Act Oct. 24, 1984 (effective 10/1/78, as provided by § 205 of such Act, which appears as 38 USCS § 1508 note), in subsec. (a)(2), substituted "$376" for "$342".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1786, as 38 USCS § 3686, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1994. Act Nov. 2, 1994 (applicable to programs and courses commencing more than 90 days after the date of enactment, as provided by § 605(b) of such Act, which appears as 38 USCS § 3672 note), in subsec. (c), deleted "(other than one subject to the provisions of section 3676 of this title)" preceding "may charge the veteran or spouse".

Other provisions:


"(a) The provisions of section 1786 of title 38, United States Code (as added by section 316 of this Act) [this section], which apply to programs of education exclusively by correspondence, shall, as to those wives and widows made eligible for such training by that section, become effective January 1, 1973, and, as to eligible veterans, shall apply only to those enrollment agreements which are entered into on or after January 1, 1973.
“(b) Notwithstanding the provisions of subsection (a) of this section, any enrollment agreement entered into by an eligible veteran prior to January 1, 1973, shall continue to be subject to the provisions of section 1682(c) of title 38, United States Code, prior to its repeal by section 303 of this Act [former 38 USCS § 1682(c)].”. 

**Termination of eligibility period.** For termination of the eligibility period for a wife, widow, or eligible person eight years from Oct. 24, 1972, see note containing Act Oct. 24, 1972, P. L. 92-540, Title VI, § 604, 86 Stat. 1099, located at 38 USCS § 1712.

**Effective date and application of amendment made by § 604 of Act Oct. 17, 1980.** Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(f), 94 Stat. 2218, located at 38 USCS § 5314 note, provided that the amendment made to this section by § 604 of Act Oct. 17, 1980 is effective on Oct. 1, 1980, except that the amendment shall not apply to any person receiving educational assistance under chapter 34 or 35 of title 38 [38 USCS §§ 3451 et seq. or 3500 et seq.], on Sept. 1, 1980, for the pursuit of a program of education, as defined in 38 USCS § 3452(b), in which such person is enrolled on that date, for as long as such person continuously thereafter is so enrolled and meets the requirements of eligibility for such assistance for the pursuit of such program under the provisions of such chapter and chapter 36 of such title [38 USCS §§ 3670 et seq.] as in effect on that date.


**Application and construction of the Oct. 12, 1982 amendment of this section.** Act Oct. 12, 1982, P. L. 97-174, § 5(b), 96 Stat. 75, provides: "The amendment made by subsection (a) of this section [amending this section] shall take effect as of October 1, 1981.”.

**Cross References**
This section is referred to in 10 USCS § 16136; 38 USCS §§ 3034, 3484, 3534

**Research Guide**

Am Jur:

45A Am Jur 2d, Job Discrimination §§ 40-104

§ 3687. **Apprenticeship or other on-job training**

(a) An eligible veteran (as defined in section 3452(a)(1) of this title [38 USCS § 3452(a)(1)]) or an eligible person (as defined in section 3501(a) of this title [38 USCS § 3501(a)]) shall be paid a training assistance allowance as prescribed by subsection (b) of this section while pursuing a full-time--

(1) program of apprenticeship approved by a State approving agency as meeting the standards of apprenticeship published by the Secretary of Labor pursuant to section 2 of the Act of August 16, 1937 (popularly known as the "National Apprenticeship Act") (29 U.S.C. 50a) or

(2) program of other on-job training approved under provisions of section 3677 of this title [38 USCS § 3677], subject to the conditions and limitations of chapters 34 and 35 of this title [38 USCS §§ 3451 et seq. and 3500 et seq.] with respect to educational assistance.

(b) (1) The monthly training assistance allowance of an eligible veteran pursuing a program described under subsection (a) shall be as follows:
(2) The monthly training assistance allowance of an eligible person pursuing a program described under subsection (a) shall be $574 for the first six months, $429 for the second six months, $285 for the third six months, and $144 for the fourth and any succeeding six-month period of training.

(3) In any month in which an eligible veteran or person pursuing a program of apprenticeship or a program of other on-job training fails to complete one hundred and twenty hours of training in such month, the monthly training assistance allowance set forth in subsection (b)(1) or (2) of this section, as applicable, shall be reduced proportionately in the proportion that the number of hours worked bears to one hundred and twenty hours rounded off to the nearest eight hours.

(c) For the purpose of this chapter [38 USCS §§ 3670 et seq.], the terms "program of apprenticeship" and "program of other on-job training" shall have the same meaning as "program of education"; and the term "training assistance allowance" shall have the same meaning as "educational assistance allowance" as set forth in chapters 34 and 35 of this title [38 USCS §§ 3451 et seq. and 3500 et seq.].

(d) With respect to any fiscal year, the Secretary shall provide a percentage increase (rounded to the nearest dollar) in the rates payable under subsection (b)(2) equal to the percentage by which--

(1) the Consumer Price Index (all items, United States city average) for the 12-month period ending on the June 30 preceding the beginning of the fiscal year for which the increase is made, exceeds

(2) such Consumer Price Index for the 12-month period preceding the 12-month period described in paragraph (1).

(e) (1) For each month that an individual (as defined in paragraph (3)) is paid a training assistance allowance under subsection (a), the entitlement of the individual shall be charged at a percentage rate (rounded to the nearest percent) that is equal to the ratio of--

(A) the training assistance allowance for the month involved, to

(B) the monthly educational assistance allowance otherwise payable for full-time enrollment in an educational institution.

(2) For any month in which an individual fails to complete 120 hours of training, the entitlement otherwise chargeable under paragraph (1) shall be reduced in the same
proportion as the monthly training assistance allowance payable is reduced under subsection (b)(3).

(3) In this section, the term "individual" means--
   (A) an eligible veteran who is entitled to monthly educational assistance
       allowances payable under section 3015(e) of this title [38 USCS § 3015(e)], or
   (B) an eligible person who is entitled to monthly educational assistance
       allowances payable under section 3532(a) of this title [38 USCS § 3532(a)],
   as the case may be.

Explanatory notes:

Similar provisions were contained in former 38 USC § 1683 prior to repeal by Act Oct. 24,

Amendments:

1974. Act Dec. 3, 1974 (effective 9/1/74, as provided by § 501 of such Act, which appears as
38 USCS § 3482 note), in subsec. (b)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Periods of training dependents</td>
<td>One</td>
<td>Two</td>
<td>More than two dependents</td>
<td></td>
</tr>
<tr>
<td>First 6 months</td>
<td>$160</td>
<td>$179</td>
<td>$196</td>
<td>$8</td>
</tr>
<tr>
<td>Second 6 months</td>
<td>120</td>
<td>139</td>
<td>156</td>
<td>8</td>
</tr>
<tr>
<td>Third 6 months</td>
<td>80</td>
<td>99</td>
<td>116</td>
<td>8</td>
</tr>
<tr>
<td>Fourth and any succeeding 6-month periods</td>
<td>40</td>
<td>59</td>
<td>76</td>
<td>8</td>
</tr>
</tbody>
</table>

and substituted new subsec. (b)(2) for one which read: "The monthly training assistance
allowance of an eligible person pursuing a program described under subsection (a) shall be
(A) $160 during the first six-month period, (B) $120 during the second six-month period, (C)
$80 during the third six-month period, and (D) $40 during the fourth and any succeeding
six-month period."

1975. Act Jan. 2, 1975 (effective 1/1/75, as provided by § 206 of such Act, which appears as
38 USCS § 3482 note), in subsec. (b)(1), substituted new table for one which read:

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Periods of training dependents</td>
<td>One</td>
<td>Two</td>
<td>More than two dependents</td>
<td></td>
</tr>
<tr>
<td>First 6 months</td>
<td>$189</td>
<td>$212</td>
<td>$232</td>
<td>$9</td>
</tr>
</tbody>
</table>
Second 6 months .......... 142 164 184 9
Third 6 months .......... 95 117 137 9
Fourth and any
succeeding 6-month
periods ................. 47 70 90

1976. Act Oct. 15, 1976 (effective 10/1/76, as provided by § 703(a) of such Act, which
appears as 38 USCS § 3693 note), in subsec. (b)(1), substituted new table for one which
read:

<table>
<thead>
<tr>
<th>Periods of</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>training</td>
<td>No</td>
<td>One</td>
<td>Two</td>
<td>More than two dependents</td>
<td></td>
</tr>
</tbody>
</table>

The amount in column IV, plus the following for each dependent in excess of two:

- First 6 months .......... $196 $220 $240 $10
- Second 6 months ............ 147 171 191 10
- Third 6 months ............. 98 122 142 10
- Fourth and any
  succeeding 6-month
  periods ................... 49 73 93

1977. Act Nov. 23, 1977 (effective 10/1/77, as provided by § 501 of such Act, which
appears as 38 USCS § 101 note), in subsec. (b)(1), substituted new table for one which
read:

<table>
<thead>
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<th>Periods of</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>training</td>
<td>No</td>
<td>One</td>
<td>Two</td>
<td>More than two dependents</td>
<td></td>
</tr>
</tbody>
</table>

The amount in column IV, plus the following for each dependent in excess of two:

- First 6 months .......... $189 $212 $232 $9
- Second 6 months ............ 142 164 184 9
- Third 6 months ............. 95 117 137 9
- Fourth and any
  succeeding 6-month
  periods ................... 47 70 90

1980. Act Oct. 17, 1980, § 203(3) (effective 10/1/80, as provided by § 802(b)(1) of such Act, which
appears as 38 USCS § 3482 note), in subsec. (b)(1) substituted new table for one which
read:

<table>
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<th>Periods of</th>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
<th>Column IV</th>
<th>Column V</th>
</tr>
</thead>
<tbody>
<tr>
<td>training</td>
<td>No</td>
<td>One</td>
<td>Two</td>
<td>More than two dependents</td>
<td></td>
</tr>
</tbody>
</table>

The amount in
The amount in column IV, plus the following for each dependent in excess of two:

<table>
<thead>
<tr>
<th>Periods of training</th>
<th>No dependents</th>
<th>One dependent</th>
<th>Two dependents</th>
<th>More than two dependents</th>
</tr>
</thead>
<tbody>
<tr>
<td>First 6 months</td>
<td>$237</td>
<td>$267</td>
<td>$291</td>
<td>$13</td>
</tr>
<tr>
<td>Second 6 months</td>
<td>177</td>
<td>207</td>
<td>232</td>
<td>13</td>
</tr>
<tr>
<td>Third 6 months</td>
<td>119</td>
<td>148</td>
<td>172</td>
<td>13</td>
</tr>
<tr>
<td>Fourth and any</td>
<td>59</td>
<td>88</td>
<td>113</td>
<td>13</td>
</tr>
<tr>
<td>succeeding 6-month</td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>periods</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


1984. Act Oct. 24, 1984 (effective 10/1/78, as provided by § 205 of such Act, which appears as 28 USCS § 1508 note), in subsec. (b)(1), substituted the table for one which read:

<table>
<thead>
<tr>
<th>Periods of training</th>
<th>No dependents</th>
<th>One dependent</th>
<th>Two dependents</th>
<th>More than two dependents</th>
</tr>
</thead>
<tbody>
<tr>
<td>First 6 months</td>
<td>$249</td>
<td>$279</td>
<td>$305</td>
<td>$13</td>
</tr>
<tr>
<td>Second 6 months</td>
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<td>13</td>
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<tr>
<td>Fourth and any</td>
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<td></td>
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13".

1989. Act Dec. 18, 1989 (effective 1/1/90, as provided by § 403(c) of such Act, which appears as 38 USCS § 3532 note), in subsec. (b)(2), substituted "$294 for the first six months, $220 for the second six months, $146 for the third six months, and $73 for the fourth and any succeeding six-month periods of training." for "computed at the rate prescribed in paragraph (1) of this subsection for an eligible veteran with no dependents pursuing such a course."

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1787, as 38 USCS § 3687, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1998. Act June 9, 1998 (effective on 10/1/98 and applicable with respect to educational assistance allowances paid for months after 9/98, as provided by § 8210(e) of such Act, which appears as a note to this section), as amended July 22, 1998 (effective simultaneously with the enactment of, and as if included in, Act June 9, 1998, as provided by § 9016 of Act July 22, 1998, which appears as 23 USCS § 101 note), in subsec. (b)(2), substituted "$353", substituted "$294", substituted "$264" for "$220", substituted "$175" for "$146", and substituted "$73" for "$88".


2000. Act Nov. 1, 2000 (effective and applicable as provided by § 111(e) of such Act, which appears as 38 USCS § 3532 note), in subsec. (b)(2), substituted "$428" for "$353", substituted "$320" for "$264", substituted "$212" for "$175", and substituted "$107" for "$88".

Such Act further (effective 10/1/01, as provided by § 111(f)(3) of such Act, which appears as 38 USCS § 3564 note), added subsec. (d).

2001. Act Dec. 27, 2001 (effective and applicable as provided by § 102(e) of such Act, which appears as 38 USCS § 3532 note), in subsec. (b)(2), substituted "$488" for "$428", substituted "$365" for "$320", substituted "$242" for "$212", and substituted "$122" for "$107".

2003. Act Dec. 16, 2003 (effective 7/1/2004 and applicable to educational assistance allowances payable under 38 USCS §§ 3500 et seq. and 3687(b)(2) for months beginning on or after that date, as provided by § 302(e) of such Act, which appears as 38 USCS § 3532 note), in subsec. (b)(2), substituted "shall be $574 for the first six months, $429 for the second six months, $285 for the third six months, and $144 for the fourth and any succeeding six-month period of training." for "shall be $488 for the first six months, $365 for the second six months, $242 for the third six months, and $122 for the fourth and any succeeding six-month periods of training."

2004. Act Dec. 10, 2004 (applicable to months beginning after 9/30/2005, as provided by § 102(b) of such Act, which appears as a note to this section), added subsec. (e).

Other provisions:

Effective date and application of Oct. 24, 1972 amendments. Act Oct. 24, 1972, P. L. 92-540, Title VI, § 601(a), 86 Stat. 1099, which appears as 38 USCS § 3102 note, provided that the rate increases provided by the provisions of this section, as amended by Act Oct. 24, 1972, shall become effective Oct. 1, 1972; except, for those veterans and eligible persons in training on Oct. 24, 1972, the effective date shall be the date of the commencement of the current enrollment period, but not earlier than Sept. 1, 1972.

Termination of eligibility. For termination of eligibility period for a wife, widow, or eligible person eight years from Oct. 24, 1972, see note containing Act Oct. 24, 1972, P. L. 92-540, Title VI, § 604, 86 Stat. 1099, located at 38 USCS § 3512.
Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.


Increase in benefit for individuals pursuing apprenticeship or on-job training; survivors and dependents educational assistance. Act Dec. 10, 2004, P. L. 108-454, Title I, § 103(c), 118 Stat. 3601, provides:

"(1) For months beginning on or after October 1, 2005, and before January 1, 2008, subsection (b)(2) of section 3687 of title 38, United States Code, shall be applied as if-

"(A) the reference to '§574 for the first six months' were a reference to '§650 for the first six months';

"(B) the reference to '§429 for the second six months' were a reference to '§507 for the second six months'; and

"(C) the reference to '§285 for the third six months' were a reference to '§366 for the third six months'.

"(2) Subsection (d) of such section 3687 shall not apply with respect to the provisions of paragraph (1) for months occurring during fiscal year 2006.

"(3) For months beginning on or after January 1, 2008, the Secretary shall carry out subsection (b)(2) of such section 3687 as if paragraphs (1) and (2) were not enacted into law."

Cross References
This section is referred to in 10 USCS § 16136; 29 USCS 1721: 38 USCS §§ 3002, 3034, 3116, 3202, 3241, 3482, 3484, 3534, 3672, 4102A, 4103A

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§ 3688. Measurement of courses
(a) For the purposes of this chapter and chapters 34 and 35 of this title [38 USCS §§ 3670 et seq. and 3451 et seq. and 3500 et seq.].--

(1) an institutional trade or technical course offered on a clock-hour basis, not leading to a standard college degree involving shop practice as an integral part thereof, shall be considered a full-time course when a minimum of 22 hours per week of attendance (excluding supervised study) is required, with no more than 21/2 hours of rest periods per week allowed;

(2) an institutional course offered on a clock-hour basis, not leading to a standard college degree in which theoretical or classroom instruction predominates shall be considered a full-time course when a minimum of 18 hours per week net of instruction (excluding supervised study but which may include customary intervals not to exceed 10 minutes between hours of instruction) is required;

(3) an academic high school course requiring sixteen units for a full course shall be considered a full-time course when (A) a minimum of four units per year is required
for (B) an individual is pursuing a program of education leading to an accredited high school diploma at a rate which, if continued, would result in receipt of such a diploma in four ordinary school years. For the purpose of subclause (A) of this clause, a unit is defined to be not less than one hundred and twenty sixty-minute hours or their equivalent of study in any subject in one academic year;

(4) an institutional undergraduate course offered by a college or university on a standard quarter- or semester-hour basis, other than a course pursued as part of a program of education beyond the baccalaureate level, shall be considered a full-time course when a minimum of fourteen semester hours per semester or the equivalent thereof (including such hours for which no credit is granted but which are required to be taken to correct an educational deficiency and which the educational institution considers to be quarter or semester hours for other administrative purposes), for which credit is granted toward a standard college degree, is required, except that where such college or university certifies, upon the request of the Secretary, that (A) full-time tuition is charged to all undergraduate students carrying a minimum of less than fourteen semester hours or the equivalent thereof, or (B) all undergraduate students carrying a minimum of less than fourteen such semester hours or the equivalent thereof, are considered to be pursuing a full-time course for other administrative purposes, then such an institutional undergraduate course offered by such college or university with such minimum number of such semester hours shall be considered a full-time course, but in the event such minimum number of semester hours is less than twelve semester hours or the equivalent thereof, then twelve semester hours or the equivalent thereof shall be considered a full-time course;

(5) a program of apprenticeship or a program of other on-job training shall be considered a full-time program when the eligible veteran or person is required to work the number of hours constituting the standard workweek of the training establishment, but a workweek of less than thirty hours shall not be considered to constitute full-time training unless a lesser number of hours has been established as the standard workweek for the particular establishment through bona fide collective bargaining;

(6) an institutional course offered as part of a program of education, not leading to a standard college degree under section 3034(a)(3), 3241(a)(2), or 3533(a) of this title [38 USCS § 3034(a)(3), 3241(a)(2), or 3533(a)] shall be considered a full-time course on the basis of measurement criteria provided in clause (2), (3), or (4) of this subsection as determined by the educational institution; and

(7) an institutional course not leading to a standard college degree offered by an educational institution on a standard quarter- or semester-hour basis shall be measured as full time on the same basis as provided in paragraph (4) of this subsection, but if the educational institution offering the course is not an institution of higher learning, then in no event shall such course be considered full time when it requires less than the minimum weekly hours of attendance required for full time by paragraph (1) or (2) of this subsection, as appropriate.

(b) The Secretary shall define part-time training in the case of the types of courses referred to in subsection (a), and shall define full-time and part-time training in the case of all other types of courses pursued under this chapter, chapter 30, 32, or 35 of this title.
[38 USCS §§ 3001 et seq. or 3201 et seq. or 3500 et seq.], or chapter 106 of title 10 [10 USCS §§ 2131 et seq.].

Explanatory notes:
Provisions similar to those contained in this section were contained in former 38 USC §§ 1684 and 1733, prior to their general revision by Act Oct. 24, 1972, P.L. 92-540, Title III, §§ 304, 311, 86 Stat. 1081, 1084.

A former § 1788 was redesignated as § 1792 by Act Oct. 24, 1972, P.L. 92-540, Title III, § 316(2), 86 Stat. 1086.

Amendments:
1974. Act Dec. 3, 1974 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), in subsec. (a), in paras. (1) and (2), substituted ", not leading to a standard college degree," for "below the college level", in para. (6), substituted "not leading to a standard college degree" for "below the college level", and added the concluding matter.

1976. Act Oct. 15, 1976 (effective 12/1/76, as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a)(1), substituted ", but if such course is approved pursuant to section 1775 of this title, then 27 hours per week of attendance, with no more than 2 1/2 hours of rest period per week allowed and excluding supervised study, shall be considered full time;" for ";"; and in subsec. (a)(2), substituted ", but if such course is approved pursuant to section 1775 of this title, then 22 hours per week net of instruction (excluding supervised study), which may include customary intervals not to exceed ten minutes between hours of instruction, shall be considered full time;" for ";".

1977. Act Nov. 23, 1977 (effective 2/1/78, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), in subsec. (a)(1), inserted "and not more than 5 hours of supervised study" and substituted "22" for "27"; and in subsec. (a)(2), inserted "and not more than 5 hours of supervised study" and substituted "18" for "22".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1), (f)(1) of such Act, which appears as 38 USCS §§ 3452, 5314 notes, respectively), in subsec. (a), in para. (1), inserted "(a)(1)", in para. (2), inserted "(a)(1)", in para. (4), substituted "in residence on a standard" for "on a" and inserted "per semester", and in para. (6), deleted "or 1696(a)(2)" following "1691(a)(2)" and added subsecs. (c) and (d).


1986. Act Oct. 28, 1986, in subsec. (a), in para. (5), deleted "and" following "bargaining:"; in para. (6), substituted "; and" for the concluding period, and added para. (7); in subsec. (c) deleted "(4)" following "(a)"; and added subsec. (e).

1988. Act May 20, 1988 (applicable as provided by § 321(b) of such Act, which appears as a note to this section), in subsec. (a), in the concluding matter, in cl. (B), and in subsec. (c), inserted "(or two 50-minute periods)".

1989. Act Dec. 18, 1989, in subsec. (a), in the concluding matter, in cl. (C) and in subsec. (c), inserted "(or three 50-minute periods)".

Such Act further, substituted subsec. (e) for one which read:
"(e) For the purpose of determining whether a course--

"(1) which is offered by an institution of higher learning, and

"(2) for which such institution requires one or more unit courses or subjects for which credit is granted toward a standard college degree

will, during the semester (or quarter or other applicable portion of the academic year) when such unit course or subject is being pursued, be considered full time under clause (1) or (2) of
subsection (a) of this section, each of the numbers of hours specified in such clause shall be deemed to be reduced, during such semester (or other portion of the academic year), by the percentage described in the following sentence and rounded as the Administrator may prescribe. Such percentage is the percentage that the number of semester hours (or the equivalent thereof) represented by such unit course or subject is of the number of semester hours (or the equivalent thereof) which, under clause (4) of such subsection, constitutes a full-time institutional undergraduate course at such institution.

Such Act further, in subsecs. (a)(4) and (b), substituted "Secretary" for "Administrator".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1788, as 38 USCS § 3688, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1992. Act Oct. 29, 1992 (applicable to enrollments in courses beginning on or after 7/1/93, as provided by § 316(c) of such Act, which appears as 38 USCS § 3532 note), in subsec. (a), in para. (1), substituted "22 hours per week of attendance (excluding supervised study) is required, with no more than 21/2 hours of rest periods per week allowed" for "thirty hours per week of attendance is required with no more than two and one-half hours of rest periods and not more than 5 hours of supervised study per week allowed, but if such course is approved pursuant to section 3675(a)(1) of this title, then 22 hours per week of attendance, with no more than 21/2 hours of rest period per week allowed and excluding supervised study, shall be considered full time", in para. (2), substituted "18 hours per week net of instruction (excluding supervised study but which may include customary intervals not to exceed 10 minutes between hours of instruction) is required" for "twenty-five hours per week net of instruction and not more than 5 hours of supervised study (which may include customary intervals not to exceed ten minutes between hours of instruction) is required, but if such course is approved pursuant to section 3675(a)(1) of this title, then 18 hours per week net of instruction (excluding supervised study), which may include customary intervals not to exceed ten minutes between hours of instruction, shall be considered full time", in para. (4), deleted "in residence" following "by a college or university" and inserted "other than a course pursued as part of a program of education beyond the baccalaureate level,". in para. (6), substituted "3034(a)(3), 3241(a)(2) or 3533(a)" for "3491(a)(2)", and substituted para. (7) for former para. (7) and concluding matter which read:

"(7) an institutional course not leading to a standard college degree, offered by a fully accredited institution of higher learning in residence on a standard quarter- or semester-hour basis, shall be measured as full time on the same basis as provided in clause (4) of this subsection if (A) such course is approved pursuant to section 3675 of this title, and (B) a majority of the total credits required for the course is derived from unit courses or subjects offered by the institution as part of a course, so approved, leading to a standard college degree.

"Notwithstanding the provisions of clause (1) or (2) of this subsection, an educational institution offering courses not leading to a standard college degree may measure such courses on a quarter- or semester-hour basis (with full time measured on the same basis as provided by clause (4) of this subsection); but (A) the academic portions of such courses must require outside preparation and be measured on not less than one quarter or one semester hour for each fifty minutes net of instruction per week or quarter or semester; (B) the laboratory portions of such courses must be measured on not less than one quarter or one semester hour for each two hours (or two 50-minute periods) of attendance per week per quarter or semester; and (C) the shop portions of such courses must be measured on not less than one quarter or one semester hour for each three hours (or three 50-minute periods) of attendance per week per quarter or semester. In no event shall such course be considered a full-time course when less than twenty-two hours per week of attendance is required."

Such Act further (applicable as above), in subsec. (b), substituted "30, 32," for "34"; and deleted subsecs. (c), (d) and (e), which read:
"(c) For the purposes of subsection (a) of this section, the term 'in residence on a standard quarter- or semester-hour basis' means a study at a site or campus of a college or university, or off-campus at an official resident center, requiring pursuit of regularly scheduled weekly class instruction at the rate of one standard class session per week throughout the quarter or semester for one quarter or one semester hour of credit. For the purposes of the preceding sentence, the term 'standard class session' means one hour (or fifty-minute period) of academic instruction, two hours (or two 50-minute periods) of laboratory instruction, or three hours (or three 50-minute periods) of workshop training.

"(d) Notwithstanding any other provision of this title, an institutional undergraduate course leading to a standard college degree offered by a college or university in residence shall be considered to be a full-time course if--

"(1) the educational institution offering such course considers such course to be a full-time course and treats such course as a full-time course for all purposes, including (A) payment of tuition and fees, (B) the awarding of academic credit for the purpose of meeting graduation requirements, and (C) the transfer of such credits to an undergraduate course meeting the criteria set forth in subsection (a)(4) of this section;

"(2) less than 50 percent of the persons enrolled in such course are receiving educational assistance under this title;

"(3) such course would qualify as a full-time course under subsection (a)(4) of this section, except that it does not meet the requirements of such subsection with respect to weekly class instruction; and

"(4) the course requires--

"(A) pursuit of standard class sessions for each credit at a rate not less frequent than every two weeks; and

"(B) monthly pursuit of a total number of standard class sessions equal to that number of standard class sessions which, during the same period of time, is required for a course qualifying as a full-time course under subsection (a)(4) of this section.

"(e)(1) For the purpose of measuring clock hours of attendance or net of instruction under clause (1) or (2), respectively, of subsection (a) of this section for a course--

"(A) which is offered by an institution of higher learning, and

"(B) for which the institution requires one or more unit courses or subjects for which credit is granted toward a standard college degree pursued in residence on a standard quarter- or semester-hour basis,

the number of credit hours (semester or quarter hours) represented by such unit courses or subjects shall, during the semester, quarter, or other applicable portion of the academic year when pursued, be converted to equivalent clock hours, determined as prescribed in paragraph (2) of this subsection. Such equivalent clock hours then shall be combined with actual weekly clock hours of training concurrently pursued, if any, to determine the total clock hours of enrollment.

"(2) For the purpose of determining the clock-hour equivalency described in paragraph (1) of this subsection, the total number of credit hours being pursued will be multiplied by the factor resulting from dividing the number of clock hours which constitute full time under clause (1) or (2) of subsection (a) of this section, as appropriate, by the number of semester hours (or the equivalent thereof) which, under clause (4) of such subsection, constitutes a full-time institutional undergraduate course at such institution.".
1994. Act Nov. 2, 1994, in subsec. (a)(6), inserted a comma following "3241(a)(2)"; and, in subsec. (b), substituted "this chapter," for "this chapter or" and inserted ", or chapter 106 of title 10".

Other provisions:

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Application of Act May 20, 1988 amendments. Act May 20, 1988, P. L. 100-322, Title III, Part C, § 321(b), 102 Stat. 535, provides: "The amendments made by subsection (a) [amending subsecs. (a) and (c) of this section] shall apply to any enrollment or reenrollment commencing on or after the date of enactment of this Act.".

Cross References

This section is referred to in 38 USCS §§ 3482, 3532, 3680

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45A Am Jur 2d, Job Discrimination §§ 40-104

Administrator of Veterans Administration [now Secretary of Veterans Affairs] correctly established regulations requiring veterans to be enrolled in course of study which scheduled at least 12 standard classroom sessions per week in order to qualify for full-time educational assistance benefits since Administrator [now Secretary] congressional parameters of full-time study, but rather explained what Congress meant by term "semester hour" in 38 USCS § 1788(a)(4) [now 38 USCS § 3688(a)(4)]. Wayne State University v Cleland (1978, CA6 Mich) 590 F.2d 627

Veteran’s Administration [now Department of Veterans Affairs] had statutory authority to mandate twelve semester hour minimum for all undergraduate students who seek to obtain full-time benefits and to define "semester hour" as one hour (or 50 minutes) in classroom per week for standard semester. Merged Area X (Education) v Cleland (1979, CA8 Iowa) 604 F.2d 1075; Evergreen State College v Cleland (1980, CA9 Wash) 621 F.2d 1002

Veteran was not entitled to educational benefits for enrollment period between August 31, 1992 and October 23, 1992, since commencing date of award was one year before VA received enrollment certification from university which occurred subsequent to enrollment period; and veteran was not entitled to benefits at full-time rate for courses taken in summer of 1993 since, under law in effect at that time, courses could not be considered full-time. Taylor v West (1998) 11 Vet App 436

§ 3689. Approval requirements for licensing and certification testing

(a) In general.

(1) No payment may be made for a licensing or certification test described in section 3452(b) or 3501(a)(5) of this title [38 USCS § 3452(b) or 3501(a)(5)] unless the Secretary determines that the requirements of this section have been met with respect to such test and the organization or entity offering the test. The requirements of approval for tests and organizations or entities offering tests shall be in accordance with the provisions of this chapter and chapters 30, 32, 34, and 35 of this title [38 USCS §§ 3670 et seq., 3001 et seq., 3201 et seq., 3451 et seq., and 3500 et seq.] and with regulations prescribed by the Secretary to carry out this section.
(2) To the extent that the Secretary determines practicable, State approving agencies may, in lieu of the Secretary, approve licensing and certification tests, and organizations and entities offering such tests, under this section.

(b) Requirements for tests.
(1) Subject to paragraph (2), a licensing or certification test is approved for purposes of this section only if--
   (A) the test is required under Federal, State, or local law or regulation for an individual to enter into, maintain, or advance in employment in a predetermined and identified vocation or profession; or
   (B) the Secretary determines that the test is generally accepted, in accordance with relevant government, business, or industry standards, employment policies, or hiring practices, as attesting to a level of knowledge or skill required to qualify to enter into, maintain, or advance in employment in a predetermined and identified vocation or profession.
(2) A licensing or certification test offered by a State, or a political subdivision of a State, is deemed approved by the Secretary for purposes of this section.

(c) Requirements for organizations or entities offering tests.
(1) Each organization or entity that is not an entity of the United States, a State, or political subdivision of a State, that offers a licensing or certification test for which payment may be made under chapter 30, 32, 34, or 35 of this title [38 USCS §§ 3001 et seq., 3201 et seq., 3451 et seq., or 3500 et seq.] and that meets the following requirements, shall be approved by the Secretary to offer such test:
   (A) The organization or entity certifies to the Secretary that the licensing or certification test offered by the organization or entity is generally accepted, in accordance with relevant government, business, or industry standards, employment policies, or hiring practices, as attesting to a level of knowledge or skill required to qualify to enter into, maintain, or advance in employment in a predetermined and identified vocation or profession.
   (B) The organization or entity is licensed, chartered, or incorporated in a State and has offered such test, or a test to certify or license in a similar or related occupation, for a minimum of two years before the date on which the organization or entity first submits to the Secretary an application for approval under this section.
   (C) The organization or entity employs, or consults with, individuals with expertise or substantial experience with respect to all areas of knowledge or skill that are measured by the test and that are required for the license or certificate issued.
   (D) The organization or entity has no direct financial interest in--
      (i) the outcome of the test; or
      (ii) organizations that provide the education or training of candidates for licenses or certificates required for vocations or professions.
   (E) The organization or entity maintains appropriate records with respect to all candidates who take the test for a period prescribed by the Secretary, but in no case for a period of less than three years.
(F) (i) The organization or entity promptly issues notice of the results of the test to the candidate for the license or certificate.

(ii) The organization or entity has in place a process to review complaints submitted against the organization or entity with respect to the test or the process for obtaining a license or certificate required for vocations or professions.

(G) The organization or entity furnishes to the Secretary such information with respect to the test as the Secretary requires to determine whether payment may be made for the test under chapter 30, 32, 34, or 35 of this title [38 USCS §§ 3001 et seq., 3201 et seq., 3451 et seq., or 3500 et seq.], including personal identifying information, fee payment, and test results. Such information shall be furnished in the form prescribed by the Secretary.

(H) The organization or entity furnishes to the Secretary the following information:

(i) A description of the licensing or certification test offered by the organization or entity, including the purpose of the test, the vocational, professional, governmental, and other entities that recognize the test, and the license or certificate issued upon successful completion of the test.

(ii) The requirements to take the test, including the amount of the fee charged for the test and any prerequisite education, training, skills, or other certification.

(iii) The period for which the license or certificate awarded upon successful completion of the test is valid, and the requirements for maintaining or renewing the license or certificate.

(I) Upon request of the Secretary, the organization or entity furnishes such information to the Secretary that the Secretary determines necessary to perform an assessment of--

(i) the test conducted by the organization or entity as compared to the level of knowledge or skills that a license or certificate attests; and

(ii) the applicability of the test over such periods of time as the Secretary determines appropriate.

(2) With respect to each organization or entity that is an entity of the United States, a State, or political subdivision of a State, that offers a licensing or certification test for which payment may be made under chapters 30, 32, 34, or 35 of this title [38 USCS §§ 3001 et seq., 3201 et seq., 3451 et seq., or 3500 et seq.], the following provisions of paragraph (1) shall apply to the entity: subparagraphs (E), (F), (G), and (H).

(d) Administration. Except as otherwise specifically provided in this section or chapter 30, 32, 34, or 35 of this title [38 USCS §§ 3001 et seq., 3201 et seq., 3451 et seq., or 3500 et seq.], in implementing this section and making payment under any such chapter for a licensing or certification test, the test is deemed to be a "course" and the organization or entity that offers such test is deemed to be an "institution" or "educational institution", respectively, as those terms are applied under and for purposes of sections 3671, 3673, 3674, 3678, 3679, 3681, 3682, 3683, 3685, 3690, and 3696 of this title [38 USCS §§ 3671, 3673, 3674, 3678, 3679, 3681, 3682, 3683, 3685, 3690, and 3696].

(e) Professional Certification and Licensure Advisory Committee.
(1) There is established within the Department a committee to be known as the Professional Certification and Licensure Advisory Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall advise the Secretary with respect to the requirements of organizations or entities offering licensing and certification tests to individuals for which payment for such tests may be made under chapter 30, 32, 34, or 35 of this title [38 USCS §§ 3001 et seq., 3201 et seq., 3451 et seq., or 3500 et seq.], and such other related issues as the Committee determines to be appropriate.

(3) (A) The Secretary shall appoint seven individuals with expertise in matters relating to licensing and certification tests to serve as members of the Committee.

(B) The Secretary of Labor and the Secretary of Defense shall serve as ex officio members of the Committee.

(C) A vacancy in the Committee shall be filled in the manner in which the original appointment was made.

(4) (A) The Secretary shall appoint the chairman of the Committee.

(B) The Committee shall meet at the call of the chairman.


Explanatory notes:


Effective date of section:

This section took effect on March 1, 2001, pursuant to § 122(d) of Act Nov. 1, 2000, P. L. 106-419, which appears as 38 USCS § 3032 note.

Amendments:

2002. Act Dec. 6, 2002, in subsec. (c)(1)(B), substituted "such test, or a test to certify or license in a similar or related occupation," for "the test".

Other provisions:

Applicability of section. This section applies with respect to licensing and certification tests approved by the Secretary of Veterans Affairs on or after March 1, 2001, pursuant to § 122(d) of Act Nov. 1, 2000, P. L. 106-419, which appears as 38 USCS § 3032 note.

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45A Am Jur 2d, Job Discrimination §§ 40-104

§ 3690. Overcharges by educational institutions; discontinuance of allowances; examination of records; false or misleading statements
(a) Overcharges by educational institutions. If the Secretary finds that an educational institution has--

(1) charged or received from any eligible veteran or eligible person pursuing a program of education under this chapter or chapter 34 or 35 of this title [38 USCS §§ 3670 et seq. or 3451 et seq. or 3500 et seq.] any amount for any course in excess of the charges for tuition and fees which such institution requires similarly circumstanced nonveterans not receiving assistance under such chapters who are enrolled in the same course to pay, or

(2) instituted, after October 24, 1972, a policy or practice with respect to the payment of tuition, fees, or other charges in the case of eligible veterans and the Secretary finds that the effect of such policy or practice substantially denies to veterans the benefits of the advance allowances under such section.

the Secretary may disapprove such educational institution for the enrollment of any eligible veteran or eligible person not already enrolled therein under this chapter or chapter 31, 34, or 35 of this title [38 USCS §§ 3670 et seq. or 3101 et seq., 3451 et seq., or 3500 et seq.].

(b) Discontinuance of allowances.

(1) The Secretary may discontinue the educational assistance allowance of any eligible veteran or eligible person if the Secretary finds that the program of education or any course in which the veteran or person is enrolled fails to meet any of the requirements of this chapter or chapter 34 or 35 of this title [38 USCS §§ 3670 et seq. or 3451 et seq. or 3500 et seq.], or if the Secretary finds that the educational institution offering such program or course has violated any provision of this chapter or chapter 34 or 35 of this title [38 USCS §§ 3670 et seq. or 3451 et seq. or 3500 et seq.], or fails to meet any of the requirements of such chapters.

(2) Except as provided in paragraph (3) of this subsection, any action by the Secretary under paragraph (1) of this subsection to discontinue (including to suspend) assistance provided to any eligible veteran or eligible person under this chapter [38 USCS §§ 3670 et seq.] or chapter 31, 32, 34, or 35 of this title [38 USCS §§ 3101 et seq., 3201 et seq., 3451 et seq., or 3500 et seq.] shall be based upon evidence that the veteran or eligible person is not or was not entitled to such assistance. Whenever the Secretary so discontinues any such assistance, the Secretary shall concurrently provide written notice to such veteran or person of such discontinuance and that such veteran or person is entitled thereafter to a statement of the reasons for such action and an opportunity to be heard thereon.

(3) (A) The Secretary may suspend educational assistance to eligible veterans and eligible persons already enrolled, and may disapprove the enrollment or reenrollment of any eligible veteran or eligible person, in any course as to which the Secretary has evidence showing a substantial pattern of eligible veterans or eligible persons, or both, who are receiving such assistance by virtue of their enrollment in such course but who are not entitled to such assistance because (i) the course approval requirements of this chapter are not being met, or (ii) the educational institution offering such course has violated one or more of the recordkeeping or reporting requirements of this chapter [38 USCS §§ 3670 et seq.] or chapter 30, 32, 34, or 35 of this title [38 USCS §§ 3001 et seq., 3201 et seq., 3451 et seq., or 3500 et seq.].
(B) Action may be taken under subparagraph (A) of this paragraph only after--
(i) the Secretary provides to the State approving agency concerned and the educational institution concerned written notice of any such failure to meet such approval requirements and any such violation of such recordkeeping or reporting requirements;
(ii) such institution refuses to take corrective action or does not within 60 days after such notice (or within such longer period as the Secretary determines is reasonable and appropriate) take corrective action; and
(iii) the Secretary, not less than 30 days before taking action under such subparagraph, provides to each eligible veteran and eligible person already enrolled in such course written notice of the Secretary's intent to take such action (and the reasons therefor) unless such corrective action is taken within such 60 days (or within such longer period as the Secretary has determined is reasonable and appropriate), and of the date on which the Secretary intends to take action under such subparagraph.

c) Examination of records. Notwithstanding any other provision of law, the records and accounts of educational institutions pertaining to eligible veterans or eligible persons who received educational assistance under this chapter [38 USCS §§ 3670 et seq.] or chapter 31, 32, 34, or 35 of this title [38 USCS §§ 3100 et seq., 3201 et seq., 3451 et seq., or 3500 et seq.] as well as the records of other students which the Secretary determines necessary to ascertain institutional compliance with the requirements of such chapters, shall be available for examination by duly authorized representatives of the Government.

d) False or misleading statements. Whenever the Secretary finds that an educational institution has willfully submitted a false or misleading claim, or that a veteran or person, with the complicity of an educational institution, has submitted such a claim, the Secretary shall make a complete report of the facts of the case to the appropriate State approving agency and, where deemed advisable, to the Attorney General of the United States for appropriate action.

Explanatory notes:

Provisions similar to those contained in subsec. (a) of this section were contained in former 38 USCS §§ 1685 and 1734, prior to their general amendment by Act Oct. 24, 1972, P. L. 92-540, Title II, § 203, Title III, § 313, 86 Stat. 1079, 1084.

Provisions similar to those contained in subsec. (b) of this section were contained in former 38 USCS 1687, 1736 prior to their repeal by Act Oct. 24, 1972, P. L. 92-540, Title IV, §§ 401(6), 402(2), 86 Stat. 1090.

Provisions similar to those contained in subsec. (c) of this section were contained in former 38 USCS § 1786 prior to its general revision by Act Oct. 24, 1972, P. L. 92-540, Title III, § 316(1), 86 Stat. 1084.

Provisions similar to those contained in subsec. (d) of this section were contained in former 38 USCS § 1787 prior to its general revision by Act Oct. 24, 1972, P. L. 92-540, Title III, § 316(1), 86 Stat. 1084.
A former § 1790 was redesignated as § 1794 by Act Oct. 24, 1972, P. L. 92-540, Title III, § 316(2), 86 Stat. 1088.

Amendments:

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), concluding matter, substituted "the Administrator" for "he"; in subsec. (b), substituted "the Administrator" for "he" preceding "finds" wherever appearing; substituted new subsec. (c) for one which read: "The records and accounts of educational institutions pertaining to eligible veterans or eligible persons who received educational assistance under this chapter or chapter 31, 34, or 35 of this title shall be available for examination by duly authorized representatives of the Government."; and in subsec. (d), substituted "the Administrator" for "he" preceding "shall make".

1977. Act Nov. 23, 1977 (effective 11/23/77, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), in subsec. (b), designated existing matter as para. (1), and added para. (2).

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(h) of such Act, which appears as 38 USCS § 3452 note), in subsec. (b)(2), substituted "for" for "therefor".

1982. Act Oct. 12, 1982, in subsec. (a), in para. (2), substituted "October 24, 1972" for "after the effective date of section 1780 of this title", and, in the concluding matter, deleted a comma following "35"; and, in subsec. (b)(1), inserted "of this title" preceding ", or fails".

Act Oct. 14, 1982, in subsec. (b), in para. (2), substituted "Except as provided in paragraph (3) of this subsection, any "for "Any", and added para. (3).

1989. Act Dec. 18, 1989, in subsec. (a)(2), deleted "and prepayment" following "the advance"; and in subsec. (b)(3), in subpara. (A), inserted "30", in subpara. (B), substituted "(B)" for "(B)(i)"; and redesignated subitems (I)-(III) as cls. (i)-(iii), respectively.

Such Act further, in subsec. (a), in the introductory matter, in para. (2) and in the concluding matter, substituted "Secretary" for "Administrator"; in subsec. (b), in paras. (1) and (2), substituted "Secretary" for "Administrator" wherever appearing, and in para. (3), in subpara. (A), in the introductory matter, substituted "Secretary" for "Administrator", wherever appearing, and in subpara. (B), in cls. (i)-(iii), as redesignated, substituted "Secretary" for "Administrator", wherever appearing, and in cl. (iii), as redesignated, substituted "Secretary's" for "Administrator's"; and in subsecs. (c) and (d), substituted "Secretary" for "Administrator", wherever appearing.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1790, as 38 USCS § 3690.

2006. Act June , 2006, in subsecs. (a)-(d), inserted the subsection headings, which headings formerly appeared as centered headings preceding such subsections.

Other provisions:

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Research Guide

Am Jur:

45A Am Jur 2d, Job Discrimination §§ 40-104

1. Generally

2. Notice to veteran

1. Generally
Owner of traffic educational institute was not entitled to enjoin officials of Veterans' Administration [now Department of Veterans Affairs] district office from making known to General Accounting Office that institute had been overpaid for tuition furnished veterans as disclosed by audit conducted by employees of General Accounting Office, since finding disclosed by audit was conclusive on all departments. Burkley v United States (1950, CA7 Ill) 185 F.2d 267

2. Notice to veteran

Notice of veteran's rights may not be given to him or her on date later than effective date of suspension, nor may effective date of suspension precede date notice is given to veteran. VA GCO 24-79

§ 3691. Change of program

(a) Except as provided in subsections (b) and (c) of this section, each eligible veteran and eligible person may make not more than one change of program of education, but an eligible veteran or eligible person whose program has been interrupted or discontinued due to the veteran's or person's own misconduct, the veteran's or person's own neglect, the veteran's or person's own lack of application shall not be entitled to any such change.

(b) The Secretary, in accordance with procedures that the Secretary may establish, may approve a change other than a change under subsection (a) of this section (or an initial change in the case of a veteran or person not eligible to make a change under subsection (a)) in program if the Secretary finds that--

(1) the program of education which the eligible veteran or eligible person proposes to pursue is suitable to the veteran's or person's aptitudes, interests, and abilities; and
(2) in any instance where the eligible veteran or eligible person has interrupted, or failed to progress in, the veteran's or person's program due to the veteran's or person's own misconduct, the veteran's or person's own neglect, or the veteran's or person's own lack of application, there exists a reasonable likelihood with respect to the program which the eligible veteran or eligible person proposes to pursue that there will not be a recurrence of such an interruption or failure to progress.

(c) The Secretary may also approve additional changes in program if the Secretary finds such changes are necessitated by circumstances beyond the control of the eligible veteran or eligible person.

(d) For the purposes of this section, the term "change of program of education" shall not be deemed to include a change by a veteran or eligible person from the pursuit of one program to the pursuit of another program if--

(1) the veteran or eligible person has successfully completed the former program;
(2) the program leads to a vocational, educational, or professional objective in the same general field as the former program;
(3) the former program is a prerequisite to, or generally required for, pursuit of the subsequent program; or
(4) in the case of a change from the pursuit of a subsequent program to the pursuit of a former program, the veteran or eligible person resumes pursuit of the former program without loss of credit or standing in the former program.

Explanatory notes:
Provisions similar to those contained in this section were contained in former 38 USC 1672, 1722, prior to repeal by Act Oct. 24, 1972, P. L. 92-540, Title IV, §§ 401(6), 402(2), 86 Stat. 1090.

Amendments:

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), substituted "the veteran's or person's" for "his" wherever appearing; in subsec. (b), in the preliminary matter, substituted "the Administrator" for "he" and in paras. (1) and (2), substituted "the veteran's or person's" for "his" wherever appearing; and in subsec. (c), substituted "the Administrator" for "he".

1989. Act Dec. 18, 1989, in subsecs. (b) and (c), substituted "Secretary" for "Administrator", wherever appearing.

1990. Act Aug. 15, 1990 (effective 6/1/91 as provided by § 208(a) of such Act, which appears as a note to this section), in subsec. (b), in the introductory matter, substituted "The Secretary, in accordance with procedures that the Secretary may establish, may approve a change other than a change under subsection (a) of this section" for "The Secretary may approve one additional change".


1992. Act Oct. 29, 1992 substituted subsec. (d) for one which read: "(d) As used in this section the term 'change of program of education' shall not be deemed to include a change from the pursuit of one program to pursuit of another where the first program is prerequisite to, or generally required for, entrance into pursuit of the second."

Other provisions:


Cross References

This section is referred to in 38 USCS §§ 3474, 3524

Research Guide

Am Jur:

45A Am Jur 2d, Job Discrimination §§ 40-104
77 Am Jur 2d, Veterans and Veterans' Laws §§ 134, 136

Request for third change of program to pursue computer programming course at another school did not constitute change of program under more liberal statute enacted during pendency of appeal because it was in same general field of study as previous programs, but amendment did not help appellant since it precluded effective date earlier than its effective date. DeSousa v Gober (1997) 10 Vet App 461

§ 3692. Advisory committee

(a) There shall be a Veterans' Advisory Committee on Education formed by the Secretary which shall be composed of persons who are eminent in their respective fields of education, labor, and management and of representatives of institutions and establishments furnishing education to eligible veterans or persons enrolled under chapter 30, 32, or 35 of this title [38 USCS §§ 3001 et seq., 3201 et seq., or 3500 et seq.] and chapter 1606 of title 10 [10 USCS §§ 16131 et seq.]. The committee shall also, to the
maximum extent practicable, include veterans representative of World War II, the Korean conflict era, the post-Korean conflict era, the Vietnam era, the post-Vietnam era, and the Persian Gulf War. The Assistant Secretary of Education for Postsecondary Education (or such other comparable official of the Department of Education as the Secretary of Education may designate) and the Assistant Secretary of Labor for Veterans' Employment and Training shall be ex officio members of the advisory committee.

(b) The Secretary shall consult with and seek the advice of the committee from time to time with respect to the administration of this chapter [38 USCS §§ 3670 et seq], chapters 30, 32, and 35 of this title [38 USCS §§ 3001 et seq., 3201 et seq., and 3500 et seq.], and chapter 1606 of title 10 [10 USCS §§ 16131 et seq.]. The committee may make such reports and recommendations as it considers desirable to the Secretary and the Congress.

(c) The committee shall remain in existence until December 31, 2009.

Explanatory notes:

Similar provisions were contained in 38 USC § 1662, prior to repeal by Act March 3, 1966, P. L. 89-358, § 4(a), 80 Stat. 23.

Amendments:

1972. Act Oct. 24, 1972, redesignated this section, which formerly appeared as § 1788, as § 1792; and inserted "The Committee shall also include veterans representative of World War II, the Korean conflict era, the post-Korean conflict era, and the Vietnam era."

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(c)(1) of such Act, which appears as 38 USCS § 3452 note), substituted the text of this section for text which read: "There shall be an advisory committee formed by the Administrator which shall be composed of persons who are eminent in their respective fields of education, labor, and management, and of representatives of the various types of institutions and establishments furnishing vocational rehabilitation under chapter 31 of this title or education to eligible persons or veterans enrolled under chapter 34 or 35 of this title. The Committee shall also include veterans representative of World War II, the Korean conflict era, the post-Korean conflict era, and the Vietnam era. The Commissioner of Education and the Administrator, Manpower Administration, Department of Labor, shall be ex officio members of the advisory committee. The Administrator shall advise and consult with the committee from time to time with respect to the administration of this chapter and chapters 31, 34, and 35 of this title, and the committee may make such reports and recommendations as it deems desirable to the Administrator and to the Congress."


1989. Act Dec. 18, 1989, in subsecs. (a) and (b), substituted "Secretary" for "Administrator", wherever appearing.


Act June 13, 1991, in subsec. (a), inserted "and Training".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1792, as 38 USCS § 3692.

1994. Act Nov. 2, 1994, in subsec. (a), deleted "34," preceding "or 35" and inserted "and chapter 106 of title 10"; in subsec. (b), substituted "this chapter, chapter 30, 32, and 35 of this title, and chapter 106 of title 10" for "this chapter and chapters 30, 32, 34, and 35 of this title"; and, in subsec. (c), substituted "December 31, 2003" for "December 31, 1994".


Other provisions:

Termination of advisory committees, boards and councils, in existence on Jan. 5, 1973. Act Oct. 6, 1972, P. L. 92-463, §§ 3(2) and 14, 86 Stat. 770, 776 (effective 1/5/73, as provided by § 15 of such Act), which is classified as 5 USCS Appx, provides that the advisory committees in existence on Jan. 5, 1973, are to terminate not later than the expiration of the two-year period following Jan. 5, 1973, unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a board established by the Congress, its duration is otherwise provided for by law.

Study of operation of post-Korean conflict programs of educational assistance. Act Oct. 24, 1972, P. L. 92-540, Title IV, § 413, 86 Stat. 1093, provided for a comparative study of the operation of the post-Korean conflict program of educational assistance with similar prior programs available to veterans of World War II and the Korean conflict, the results of such study and recommendations for improvement to be transmitted to the President and Congress within 6 months of Oct. 24, 1972.

Study of educational assistance programs for veterans, survivors, and dependents; submission to Congress and President by Sept. 30, 1979. Act Nov. 23, 1977, P. L. 95-202, Title III, § 304(b), 91 Stat. 1442, provided that the Administrator of Veterans' Affairs, in consultation with the Advisory Committee formed pursuant to this section, conduct a study respecting the operation of the programs of educational assistance carried out under 38 USCS §§ 3670 et seq. and 3451 et seq. and that a report concerning such study be submitted to the Congress not later than Sept. 30, 1979.

Commission to assess veterans’ education policy. Act Oct. 28, 1986, P. L. 99-576, Title III, Part A, § 320, 100 Stat. 3275, as amended May 20, 1988, P. L. 100-323, § 14, 102 Stat. 574, effective on enactment as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note, provides:

"(a) Establishment and members. (1) There is established a Commission on Veterans’ Education Policy (hereafter in this section referred to as the 'Commission').

"(2)(A) The Commission shall consist of 11 members, 10 of whom shall be appointed, not later than March 1, 1987, by the Administrator of Veterans’ Affairs in consultation with the chairmen and the ranking minority members of the Committees on Veterans’ Affairs of the Senate and of the House of Representatives (hereafter in this section referred to as ‘the Committees’), and one of whom shall be the chairman of the Advisory Committee on Education established under section 1792 [now § 3692] of title 38, United States Code (as amended by section 304).

"(B) The members of the Commission--

"(i) shall be broadly representative of entities engaged in providing education and training and of veterans’ service organizations; and

"(ii) shall be selected on the basis of their knowledge of and experience in education and training policy and the implementation of such policy with respect to programs of assistance administered by the Veterans’ Administration.
“(3) The Administrator of Veterans’ Affairs, the ex officio members of the Advisory Committee on Education referred to in paragraph (2)(A), the Assistant Secretary of Defense for Force Management and Personnel, and the chairmen and ranking minority members of the Committees (or, in the case of any such individual, a designee of any such individual) shall be ex officio, nonvoting members of the Commission.”.

“(4)(A) The Administrator shall designate a member from among the voting members of the Commission to chair the Commission.

“(B) The chairman of the Commission, with the concurrence of the Commission, shall appoint an executive director, who shall be the chief executive officer of the Commission and shall perform such duties as are prescribed by the Commission.

“(C) The Administrator shall furnish the Commission with such professional, technical, and clerical staff and services and administrative support as the Commission determines necessary for the Commission to carry out the provisions of this section effectively.

“(b) First report. (1) Not later than 18 months after the date on which at least 8 members of the Commission have been appointed, the Commission shall submit a report on the Commission's findings and recommendations on the matters described in paragraph (2) of this subsection to the Administrator and the Committees.

“(2) The report required by paragraph (1) shall include the Commission's findings, views, and recommendations on the following matters:

“(A) The need for distinctions between certificate-granting courses and degree-granting courses.

“(B) The measurement of courses for the purposes of payment of educational assistance benefits.

“(C) The vocational value of courses offered through home study.

“(D) The role of innovative and nontraditional programs of education and the manner in which such programs should be treated for purposes of payment of educational assistance benefits by the Veterans' Administration, including courses that result in the achievement of continuing education units.

“(E) Such other matters relating to administration of chapters 30, 31, 32, 34, 35, and 36 of title 38, United States Code [38 USCS §§ 3001 et seq., 3100 et seq., 3201 et seq., 3451 et seq., 3500 et seq., and 3670 et seq.], by the Veterans' Administration as (i) the Commission considers appropriate or necessary, or (ii) are suggested by the Administrator or, concurrently, by the chairmen and ranking minority members of the Committees.

“(c) Interim and final reports. (1) Not later than 6 months after the date on which the report is submitted under subsection (b), the Administrator shall submit an interim report to the Committees. The interim report shall contain--

“(A) the Administrator's views on the desirability, feasibility, and cost of implementing each of the Commission's recommendations, and the actions taken or planned with respect to the implementation of such recommendations;

“(B)(i) the Administrator's views on any legislation or regulations proposed by the Commission,

(ii) the Administrator's views on the need for any alternative or additional legislation or regulations to implement the Commission's recommendations, (iii)
the Administrator's recommendations for any such alternative or additional legislation, (iv) the proposed text of any regulations referred to in subclause (i) or (ii) which the Administrator considers necessary and the proposed text of any legislation referred to in such subclause which is recommended by the Administrator, and (v) a cost estimate for the implementation of any regulations and legislation referred to in such subclause; and

"(C) any other proposals that the Administrator considers appropriate in light of the Commission's report.

"(2) Not later than 90 days after the date on which the Administrator's interim report is submitted under paragraph (1), the Commission shall submit a report to the Administrator and the Committees containing the Commission's views on the Administrator's interim report.

"(3) Not later than two years after the date on which the Commission's report is submitted under subsection (b), the Administrator shall submit a final report to the Committees. The final report shall include the actions taken with respect to the recommendations of the Commission and any further recommendations the Administrator considers appropriate.

"(d) Termination. The Commission shall terminate 90 days after the date on which the Administrator submits the final report required by subsection (c)(3)."

Cross References
This section is referred to in 10 USCS § 16136; 38 USCS § 306

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 124

§ 3693. Compliance surveys

(a) Except as provided in subsection (b) of this section, the Secretary shall conduct an annual compliance survey of each institution offering one or more courses approved for the enrollment of eligible veterans or persons if at least 300 veterans or persons are enrolled in such course or courses under provisions of this title or if any such course does not lead to a standard college degree. Such compliance survey shall be designed to ensure that the institution and approved courses are in compliance with all applicable provisions of chapters 30 through 36 of this title [38 USCS §§ 3001 et seq. through §§ 3670 et seq.]. The Secretary shall assign at least one education compliance specialist to work on compliance surveys in any year for each 40 compliance surveys required to be made under this section for such year.

(b) The Secretary may waive the requirement in subsection (a) of this section for an annual compliance survey with respect to an institution if the Secretary determines, based on the institution's demonstrated record of compliance with all the applicable provisions of chapters 30 through 36 of this title [38 USCS §§ 3001 et seq. through §§ 3670 et seq.], that the waiver would be appropriate and in the best interest of the United States Government.

Effective date of section:
Act Oct. 15, 1976, P. L. 94-502, § 703(b), 90 Stat. 2406, provided that this section is effective on October 15, 1976

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Amendments:

1988. Act May 20, 1988 substituted this section for one which read: "The Administrator shall conduct an annual compliance survey of each institution offering one or more courses approved for the enrollment of eligible veterans or persons where at least 300 veterans or persons are enrolled under provisions of this title or where the course does not lead to a standard college degree. Such compliance survey shall assure that the institution and approved courses are in compliance with all applicable provisions of chapters 31, 34, 35, and 36 of this title. The Administrator shall assign at least one education compliance specialist to work on compliance surveys in any year for each 40 compliance surveys required to be made under this section."

1989. Act Dec. 18, 1989, in subsecs. (a) and (b), substituted “Secretary” for "Administrator", wherever appearing.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1793, as 38 USCS § 3693.

§ 3694. Use of other Federal agencies

(a) In general. In carrying out the Secretary's functions under this chapter or chapter 34 or 35 of this title [38 USCS §§ 3670 et seq. or 3451 et seq. or 3500 et seq.], the Secretary may utilize the facilities and services of any other Federal department or agency. Any such utilization shall be pursuant to proper agreement with the Federal department or agency concerned; and payment to cover the cost thereof shall be made either in advance or by way of reimbursement, as may be provided in such agreement.

(b) Coordination of information among the Departments of Veterans Affairs, Defense, and Labor with respect to on-job training. At the time of a servicemember's discharge or release from active duty service, the Secretary of Defense shall furnish to the Secretary such pertinent information concerning each registered apprenticeship pursued by the servicemember during the period of active duty service of the servicemember. The Secretary, in conjunction with the Secretary of Labor, shall encourage and assist States and private organizations to give credit to servicemen for the registered apprenticeship program so pursued in the case of any related apprenticeship program the servicemember may pursue as a civilian.

Explanatory notes:

Provisions similar to those contained in this section were contained in former 38 USC 1644, 1761(c), prior to repeal by Act March 3, 1966, P. L. 89-358, § 4(a), 80 Stat. 23.

Effective date of section:


Amendments:

1972. Act Oct. 24, 1972, redesignated this section as § 1794; it formerly appeared as § 1790.

1976. Act Oct. 15, 1976 (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), substituted "the Administrator's" for "his".


2004. Act Dec. 10, 2004, designated the existing provisions as subsec. (a) and inserted the subsection heading; and added subsec. (b).

Cross References
This section is referred to in 38 USCS § 3696

§ 3695. Limitation on period of assistance under two or more programs

(a) The aggregate period for which any person may receive assistance under two or more of the provisions of law listed below may not exceed 48 months (or the part-time equivalent thereof):

1. Parts VII or VIII, Veterans Regulation numbered 1(a), as amended.
2. Title II of the Veterans' Readjustment Assistance Act of 1952.
3. The War Orphans' Educational Assistance Act of 1956,
4. Chapters 30, 32, 34, 35, and 36 of this title [38 USCS §§ 3001 et seq., 3201 et seq., 3451 et seq., 3500 et seq., and 3670 et seq.], and the former chapter 33.
5. Chapters 107, 1606, 1607, and 1611 of title 10 [10 USCS §§ 2141 et seq., 16131 et seq., 16161 et seq., and 16401].
8. The Omnibus Diplomatic Security and Antiterrorism Act of 1986 (Public Law 99-399) [22 USCS §§ 4801 et seq.].

(b) No person may receive assistance under chapter 31 of this title [38 USCS §§ 3100 et seq.] in combination with assistance under any of the provisions of law cited in subsection (a) of this section in excess of 48 months (or the part-time equivalent thereof) unless the Secretary determines that additional months of benefits under chapter 31 of this title [38 USCS §§ 3100 et seq.] are necessary to accomplish the purposes of a rehabilitation program (as defined in section 3101(5) of this title [38 USCS § 3101(5)]) in the individual case.

References in text:

"Parts VII or VIII, Veterans Regulation numbered 1(a)", referred to in para. (1), were added to Veterans Regulation numbered 1(a) in Chapter 12A of former Title 38 by Acts March 24, 1943, ch 22, § 2, 57 Stat. 43 and June 22, 1944, ch 268, Title II, § 400(b) 58 Stat. 287, and were repealed by Act Sept. 2, 1958, P. L. 85-857, § 14(67), 72 Stat. 1272.

"Title II of the Veterans' Readjustment Assistance Act of 1952", referred to in para. (2), was Act July 16, 1952, ch 875, Title II, 66 Stat. 663, as amended, which was generally classified to former 38 USC §§ 911 et seq. prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(101), 72 Stat. 1268. For similar provisions, see Chapter 34 (38 USCS §§ 3451 et seq.).

The "War Orphans' Educational Assistance Act of 1956", referred to in para. (3), was Act June 29, 1956, ch 476, 70 Stat. 441, as amended, which was generally classified to former 38 USC §§ 1031 et seq. prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(113), 72 Stat. 1274. For similar provisions, see Chapter 35 (38 USCS §§ 3500 et seq.).

The "former chapter 33", referred to in para. (4), was Act Sept. 2, 1958, P. L. 85-857, § 1, 72 Stat. 1174, as amended, which was classified to former 38 USC §§ 1601 et seq. prior to repeal by Act March 3, 1966, P. L. 89-858, 4(a), 80 Stat. 23.

Effective date of section:

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Act Oct. 23, 1968, P. L. 90-631, § 6(a), 82 Stat. 1335, provided that this section is effective on the first day of the second calendar month which begins after Oct. 23, 1968.

Amendments:

1972. Act Oct. 24, 1972, redesignated this section, which formerly appeared as § 1791, as § 1795; and in para. (4), substituted "chapters 31, 34, 35, and 36" for "Chapters 31, 34, and 35".

1980. Act Oct. 13, 1980 (effective 10/1/80, as provided by § 802(a)(6) of such Act, which appears as 38 USCS § 3681 note), designated existing matter as subsec. (a); in subsec. (a), as so designated, substituted new para. (4) for one which read: "Chapters 31, 34, 35, and 36 of this title, and the former chapter 33", and in the concluding matter, deleted ", but this section shall not be deemed to limit the period for which assistance may be received under chapter 31 alone" following "thereof"; and added subsec. (b).

1984. Act March 2, 1984 substituted subsec. (a) for one which read:

"(a) The aggregate period for which any person may receive assistance under two or more of the laws listed below--

"(1) parts VII or VIII, Veterans Regulation numbered 1(a), as amended;

"(2) title II of the Veterans' Readjustment Assistance Act of 1952;

"(3) the War Orphans' Educational Assistance Act of 1956;

"(4) chapters 32, 34, 35, and 36 of this title and the former chapter 33; may not exceed forty-eight months (or the part-time equivalent thereof)."

Such Act further, in subsec. (b), substituted "subsection (a)" for "clauses (1), (2), (3), and (4)" and "48" for "forty-eight"..


1989. Act Dec. 18, 1989, in subsec. (a), added para. (8); and in subsec. (b), substituted "Secretary" for "Administrator".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1795, as 38 USCS § 3695, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


Act Dec. 28, 2001, purported to amend subsec. (a)(5) by substituting "1611" for "1610"; however, because of a prior amendment, this amendment could not be executed.


Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References
This section is referred to in 10 USCS § 16131; 38 USCS §§ 3013, 3231, 3511

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 129

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Limitation on entitlement under various programs for assistance to veterans, contained in 38 USCS § 1795 [now 38 USCS § 3695], is constitutional and recipients whose benefits are limited are not denied due process or equal protection of laws. Burke v United States (1973, CA9 Cal) 480 F.2d 279, cert den (1973) 414 US 913, 38 L Ed 2d 152, 94 S Ct 258

Plain language of 38 USCS § 3695(a)(4), (5) prohibited any award of education benefits to veteran beyond stated maximum aggregate period, and statute did not provide for waiver of limitation or exception for veteran's non-continuous periods of both active and reserve service. Davenport v Principi (2002) 16 Vet App 522, 2002 US App Vet Claims LEXIS 997

§ 3696. Limitation on certain advertising, sales, and enrollment practices

(a) The Secretary shall not approve the enrollment of an eligible veteran or eligible person in any course offered by an institution which utilizes advertising, sales, or enrollment practices of any type which are erroneous, deceptive, or misleading either by actual statement, omission, or intimation.

(b) To ensure compliance with this section, any institution offering courses approved for the enrollment of eligible persons or veterans shall maintain a complete record of all advertising, sales, or enrollment materials (and copies thereof) utilized by or on behalf of the institution during the preceding 12-month period. Such record shall be available for inspection by the State approving agency or the Secretary. Such materials shall include but are not limited to any direct mail pieces, brochures, printed literature used by sales persons, films, video tapes, and audio tapes disseminated through broadcast media, material disseminated through print media, tear sheets, leaflets, handbills, fliers, and any sales or recruitment manuals used to instruct sales personnel, agents, or representatives of such institution.

(c) The Secretary shall, pursuant to section 3694 of this title [38 USCS § 3694], enter into an agreement with the Federal Trade Commission to utilize, where appropriate, its services and facilities, consistent with its available resources, in carrying out investigations and making the Secretary's determinations under subsection (a) of this section. Such agreement shall provide that cases arising under subsection (a) of this section or any similar matters with respect to any of the requirements of this chapter or chapters 34 and 35 of this title [38 USCS §§ 3670 et seq. or 3451 et seq. or 3500 et seq.] shall be referred to the Federal Trade Commission which in its discretion will conduct an investigation and make preliminary findings. The findings and results of any such investigations shall be referred to the Secretary who shall take appropriate action in such cases within ninety days after such referral.

Effective date of section:

Amendments:
1976. Act Oct. 15, 1976 (effective 12/1/76, as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), redesignated subsecs. (b) and (c) as subsecs. (c) and (d), respectively; and added a new subsec. (b).

Such Act further (effective 10/15/76, as provided by § 703(b) of such Act, which appears as 38 USCS § 3693 note), in subsec. (c), as redesignated by Act Oct. 15, 1976, § 512, substituted "the Administrator's" for "his".
§ 3697. Funding of contract educational and vocational counseling

(a) Subject to subsection (b) of this section, educational or vocational counseling services obtained by the Department of Veterans Affairs by contract and provided to an individual under section 3697A of this title [38 USCS § 3697A] or to an individual applying for or receiving benefits under section 524 [38 USCS § 524] or chapter 30, 32, 34, or 35 of this title [38 USCS §§ 3001 et seq., 3201 et seq., 3451 et seq., or 3500 et seq.] or chapter 106 of Title 10 [10 USCS §§ 2131 et seq.], shall be paid for out of funds appropriated, or otherwise available, to the Department of Veterans Affairs for payment of readjustment benefits.

(b) Payments under this section shall not exceed $6,000,000 in any fiscal year.

Amendments:


1991. Act March 22, 1991, in subsec. (a), inserted "under section 1797A of this title or to an individual".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1797, as 38 USCS § 3697, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1994. Act Nov. 2, 1994 (effective 10/1/94, as provided by § 609(b) of such Act, which appears as a note to this section), in subsec. (b), substituted "$6,000,000" for "$5,000,000".

Other provisions:

Effective date of amendment made by Act Nov. 2, 1994. Act Nov. 2, 1994, P. L. 103-446, Title VI, § 609(b), 108 Stat. 4673, provides: "The amendment made by subsection (a) [amending subsec. (b) of this section] shall take effect on October 1, 1994.".
§ 3697A. Educational and vocational counseling

(a) The Secretary shall make available to an individual described in subsection (b) of this section, upon such individual's request, counseling services, including such educational and vocational counseling and guidance, testing, and other assistance as the Secretary determines necessary to aid the individual in selecting--

(1) an educational or training objective and an educational institution or training establishment appropriate for the attainment of such objective; or

(2) an employment objective that would be likely to provide such individual with satisfactory employment opportunities in the light of the individual's personal circumstances.

(b) For the purposes of this section, the term "individual" means an individual who--

(1) is eligible for educational assistance under chapter 30, 31, or 32 of this title [38 USCS §§ 3001 et seq., 3100 et seq., or 3201 et seq.] or chapter 106 or 107 of title 10 [10 USCS §§ 2131 et seq. or 2141 et seq.];

(2) was discharged or released from active duty under conditions other than dishonorable if not more than one year has elapsed since the date of such last discharge or release from active duty; or

(3) is serving on active duty in any State with the Armed Forces and is within 180 days of the estimated date of such individual's discharge or release from active duty under conditions other than dishonorable, including those who are making a determination of whether to continue as members of the Armed Forces.

(c) In any case in which the Secretary has rated the individual as being incompetent, the counseling services described in subsection (a) of this section shall be required to be provided to the individual before the selection of a program of education or training.

(d) At such intervals as the Secretary determines necessary, the Secretary shall make available information concerning the need for general education and for trained personnel in the various crafts, trades, and professions. Facilities of other Federal agencies collecting such information shall be utilized to the extent the Secretary determines practicable.

(e) The Secretary shall take appropriate steps (including individual notification where feasible) to acquaint all individuals described in subsection (b) of this section with the availability and advantages of counseling services under this section.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1797A, as 38 USCS § 3697A.

Cross References

This section is referred to in 38 USCS § 3697

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Am Jur:
45A Am Jur 2d, Job Discrimination §§ 21-26, 40-104
45B Am Jur 2d, Job Discrimination § 760
77 Am Jur 2d, Veterans and Veterans’ Laws § 125

SUBCHAPTER III. EDUCATION LOANS [REPEALED]

[§§ 3698, 3699. Repealed]

This subchapter (38 USCS §§ 3698 et seq.) was repealed by Act Dec. 16, 2003, P. L. 108-183, Title III, § 306(e), 117 Stat. 2661, effective 90 days after enactment, as provided by § 306(h)(2) of such Act, which appears as 38 USCS § 3485 note.

[§§ 3698, 3699. Repealed]


Other provisions:

Termination of loan program; discharge of liabilities; termination of loan fund. Act Dec. 16, 2003, P. L. 108-183, Title III, § 306(a)-(c), 117 Stat. 2661, provide:

"(a) Termination of program. The Secretary of Veterans Affairs may not make a loan under subchapter III of chapter 36 of title 38, United States Code [former 38 USCS §§ 3698 et seq.], after the date of the enactment of this Act.

"(b) Discharge of liabilities. Effective as of the date of the transfer of funds under subsection (c)--

"(1) any liability on an education loan under subchapter III of chapter 36 of title 38, United States Code [former 38 USCS §§ 3698 et seq.], that is outstanding as of such date shall be deemed discharged; and

"(2) the right of the United States to recover an overpayment declared under section 3698(e)(1) of such title that is outstanding as of such date shall be deemed waived.

"(c) Termination of loan fund.(1) Effective as of the day before the date of the repeal under this section of subchapter III of chapter 36 of title 38, United States Code [former 38 USCS §§ 3698 et seq.], all monies in the revolving fund of the Treasury known as the 'Department of Veterans Affairs Education Loan Fund' shall be transferred to the Department of Veterans Affairs Readjustment Benefits Account, and the revolving fund shall be closed.
“(2) Any monies transferred to the Department of Veterans Affairs Readjustment Benefits Account under paragraph (1) shall be merged with amounts in that account and shall be available for the same purposes, and subject to the same conditions and limitations, as amounts in that account.”

CHAPTER 37.  HOUSING AND SMALL BUSINESS LOANS

SUBCHAPTER I. GENERAL
SUBCHAPTER II. LOANS
SUBCHAPTER III. ADMINISTRATIVE PROVISIONS
SUBCHAPTER IV. SMALL BUSINESS LOANS
SUBCHAPTER V. DIRECT HOUSING LOANS FOR NATIVE AMERICAN VETERANS
SUBCHAPTER VI. [TRANSFERRED]

Explanatory notes:
The bracketed section numbers "3715", "3716", "3717", "3717A", "3718", and "3719" were inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

Amendments:
1960. Act July 14, 1960, P. L. 86-665, §§ 6(b), 7(b), 74 Stat. 532, 533, amended the analysis of this chapter by adding item 1806, and substituting items 1824 and 1825 for former item 1824 which read: "1824. Waiver of discharge requirements for hospitalized persons."


1974. Act Dec. 31, 1974, P. L. 93-569, § 7(b), (c), 88 Stat. 1866 (effective 12/31/74, as provided by § 10 of such Act), substituted new chapter heading for one which read: "CHAPTER 37. HOME, FARM, AND BUSINESS LOANS"; and deleted items 1812-1814 and 1822 which read: "1812. Purchase of farms and farm equipment."

"1813. Purchase of business property."

"1814. Loans to refinance delinquent indebtedness." and

"1822. Recovery of damages.".


1979. Act Nov. 28, 1979, P. L. 96-128, Title IV, § 401(b), 93 Stat. 987, amended the analysis of this chapter by adding item 1828.


1988. Act May 20, 1988, P. L. 100-322, Title IV, Part B, § 415(e), 102 Stat. 552, amended the analysis of this chapter by substituting item 1803 for one which read: "1803. Basic provisions relating to loan guaranty and insurance.", deleting item 1807 which read: "1807. Service after July 25, 1947, and prior to June 27, 1950.", and substituting the items in subchapter II for ones which read:

"1810. Purchase or construction of homes.
"1811. Direct loans to veterans.
"[1812-1814. Repealed]
"1815. Insurance of loans.
"1816. Procedure on default.
"1817. Release from liability under guaranty.
"1817A. Assumptions; release from liability.
"1819. Loans to purchase manufactured homes and lots."

Such Act further amended the analysis of this chapter by substituting item 1832 for one which read: "1832. Furnishing information to real estate professionals to facilitate the disposition of properties.", and adding item 1833.


Act Aug. 6, 1991, P. L. 102-83, § 5(b)(1), 105 Stat. 406, revised the analysis of this chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


1998. Act Nov. 11, 1998, P. L. 105-368, Title VI, §§ 601(b), 602(e)(3)(C), 112 Stat. 3345, 3347, amended the analysis of this chapter, by adding item 3722, deleting item 3723, which read: "3723. Direct loan revolving fund.", deleting item 3724, which read: "3724. Loan Guaranty Revolving Fund.", deleting item 3725, which read: "3725. Guaranty and Indemnity Fund.", substituting item 3734 for one which read: "3734. Annual submission of information on the Loan Guaranty Revolving Fund and the Guaranty and Indemnity Fund.", substituting item 3763 for one which read: "3763. Housing loan program account.", and adding the Subchapter VI heading and items 3771-3775.

2001. Act Dec. 21, 2001, P. L. 107-95, § 5(g)(2), 115 Stat. 918, amended the analysis of this chapter by deleting item 3735, which read: "3735. Housing assistance for homeless veterans.", and deleting the Subchapter VI heading and items 3771-3775, which read:

"SUBCHAPTER VI. LOAN GUARANTEE FOR MULTIFAMILY TRANSITIONAL HOUSING FOR HOMELESS VETERANS

"3771. Definitions.
"3772. General authority.
"3773. Requirements.
"3774. Default.
"3775. Audit.".


2006. Act June 15, 2006, P. L. 109-233, Title I, §§ 103(f)(4), 104(c), 120 Stat. 401, 402, amended the analysis of this chapter by substituting the Subchapter V heading and items 3761 and 3762 for ones which read:

"SUBCHAPTER V. NATIVE AMERICAN VETERAN HOUSING LOAN PILOT PROGRAM

"3761. Pilot program.
"3762. Direct housing loans to Native American veterans."; and substituting items 3764 and 3765 for former item 3764, which read: "3764. Definitions.".

SUBCHAPTER I. GENERAL

§ 3701. Definitions
§ 3702. Basic entitlement
§ 3703. Basic provisions relating to loan guaranty and insurance
§ 3704. Restrictions on loans
§ 3705. Warranties
§ 3706. Escrow of deposits and downpayments
§ 3707. Adjustable rate mortgages
§ 3707A. Hybrid adjustable rate mortgages
§ 3708. Authority to buy down interest rates: pilot program

§ 3701. Definitions
(a) For the purpose of this chapter [38 USCS §§ 3701 et seq.], the term "housing loan" means a loan for any of the purposes specified by sections 3710(a) and 3712(a)(1) of this title [38 USCS §§ 3710(a) and 3712(a)(1)].

(b) For the purposes of housing loans under this chapter [38 USCS §§ 3701 et seq.],--

1. The term "World War II" (A) means the period beginning on September 16, 1940, and ending on July 25, 1947, and (B) includes, in the case of any veteran who enlisted or reenlisted in a Regular component of the Armed Forces after October 6, 1945, and before October 7, 1946, the period of the first such enlistment or reenlistment.

2. The term "veteran" includes the surviving spouse of any veteran (including a person who died in the active military, naval, or air service) who died from a service-connected disability, but only if such surviving spouse is not eligible for benefits under this chapter [38 USCS §§ 3701 et seq.] on the basis of the spouse's own active duty. The active duty or service in the Selected Reserve of the deceased spouse shall be deemed to have been active duty or service in the Selected Reserve by such surviving spouse for the purposes of this chapter [38 USCS §§ 3701 et seq.].

3. The term "veteran" also includes, for purposes of home loans, the spouse of any member of the Armed Forces serving on active duty who is listed, pursuant to section 556 of title 37, United States Code [37 USCS § 556], and regulations issued thereunder, by the Secretary concerned in one or more of the following categories and has been so listed for a total of more than ninety days: (A) missing in action, (B) captured in line of duty by a hostile force, or (C) forcibly detained or interned in line of duty by a foreign government or power. The active duty of the member shall be deemed to have been active duty by such spouse for the purposes of this chapter [38 USCS §§ 3701 et seq.]. The loan eligibility of such spouse under this paragraph shall be limited to one loan guaranteed or made for the acquisition of a home, and entitlement to such loan shall terminate automatically, if not used, upon receipt by such spouse of official notice that the member is no longer listed in one of the categories specified in the first sentence of this paragraph.

4. The term "veteran" also includes an individual serving on active duty.

5. (A) The term "veteran" also includes an individual who is not otherwise eligible for the benefits of this chapter [38 USCS §§ 3701 et seq.] and (i) who has completed a total service of at least 6 years in the Selected Reserve and, following the completion of such service, was discharged from service with an honorable discharge, was placed on the retired list, was transferred to the Standby Reserve or an element of the Ready Reserve other than the Selected Reserve after service in the Selected Reserve characterized by the Secretary concerned as honorable service, or continues serving in the Selected Reserve, or (ii) who was discharged or released from the Selected Reserve before completing 6 years of service because of a service-connected disability.

(B) The term "Selected Reserve" means the Selected Reserve of the Ready Reserve of any of the reserve components (including the Army National Guard of the United States and the Air National Guard of the United States) of the Armed Forces, as required to be maintained under section 10143(a) of title 10 [10 USCS § 10143(a)].
(c) Benefits shall not be afforded under this chapter [38 USCS §§ 3701 et seq.] to any individual on account of service as a commissioned officer of the National Oceanic and Atmospheric Administration (or predecessor entity), or of the Regular or Reserve Corps of the Public Health Service, unless such service would have qualified such individual for benefits under title III of the Servicemen's Readjustment Act of 1944.

References in text:

"Title III of the Servicemen's Readjustment Act of 1944", referred to in this section, is title III of Act June 22, 1944, ch 268, 58 Stat. 284, as amended, which was classified to former 38 USCS 693g-693i and repealed by Act Sept. 2, 1958, P. L. 85-857, § 14(87), 72 Stat. 1273, in the general revision of Title 38. For similar provisions see tables preceding 38 USCS § 101.

Amendments:


1976. Act June 30, 1976 (effective as provided by § 9 of such Act, which appears as a note to this section), in subsec. (a)(2), substituted "surviving spouse" for "widow" wherever appearing, substituted "the spouse's own" for "her own" and substituted "the spouse" for "her husband"; in subsec. (a)(3), substituted "spouse" for "wife" preceding "of any member", "for the purposes", "under this paragraph", and "of official notice", and substituted "the spouse" for "her husband" preceding "shall be deemed" and "is no longer listed".

1981. Act Nov. 3, 1981 (effective 180 days after enactment on Nov. 3, 1981, as provided by § 305 of such Act, which appears 3 USCS § 3741 note), redesignated former subsecs. (a) and (b) as subsecs. (b) and (c), and added subsec. (a), in subsec. (b), as redesignated, substituted "housing loans under this chapter-" for "this chapter-"; and, in subsec. (c) as redesignated, substituted "National Oceanic and Atmospheric Administration (or predecessor entity)" for "Coast and Geodetic Survey".

1982. Act Oct. 12, 1982, in subsec. (b)(3), substituted "member shall be deemed" for "spouse shall be deemed", and substituted "member is no longer listed" for "spouse is no longer listed".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1801, as 38 USCS § 3701, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


1994. Act Nov. 2, 1994, in subsec. (b), in para. (2), substituted "deceased spouse shall" for "spouse shall" and inserted "or service in the Selected Reserve" in two places, and, in para. (5), inserted "(i)" and ", or (ii) who was discharged or released from the Selected Reserve before completing 6 years of service because of a service-connected disability".

1996. Act Feb. 10, 1996 (effective as if included in Act Oct. 5, 1995, P. L. 103-337, as enacted on Oct. 5, 1994, as provided by § 1501(f)(3) of Act Feb. 10, 1996, which appears as 10 USCS § 113 note), in subsec. (b)(5)(B), substituted "section 10143(a) of title 10" for "section 268(b) of title 10".

Other provisions:

“(a) Except as provided in subsection (b), the provisions of this Act [enacting 38 USCS § 3707 and 12 USCS § 1709-1a, and amending 38 USCS §§ 3701, 3706, 3710, 3711, 3715-3720, 3723-3727] shall become effective on the date of enactment.

“(b) Sections 2 and 3 [enacting 38 USCS § 3707 and amending 38 USCS § 3711] shall become effective on October 1, 1976. Section 5 [amending 38 USCS § 3719] shall become effective on July 1, 1976.”.

Authority of the Administrator to promulgate regulations. For the authority and effective date for the Administrator of Veterans's Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Ban on lead water pipes, solder, and flux in VA and HUD insured or assisted property. For provisions as to the ban of lead water pipes, solder, and flux in VA and HUD insured or assisted property, see Act June 19, 1986, P. L. 99-339, Title I, § 109(c), 100 Stat. 652, which appears as 42 USCS § 300g-6 note.

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Loan guaranty, 38 CFR Part 36
Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

Cross References
This section is referred to in 38 USCS §§ 3702, 3729, 5302

Research Guide
Federal Procedure:
4B Fed Proc L Ed, Banking and Financing §§ 8:1848, 1849, 1851, 1857, 1858
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:4, 284, 308

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 113, 115, 121, 161

Law Review Articles:
Benefits for Conscientious Objectors. 19 Catholic Lawyer 62, Winter 1973
1. Generally
2. Purpose
3. Surviving spouse

1. Generally
38 USCS §§ 1801 et seq. [now 38 USCS §§ 3701 et seq.] does not impose a legal duty upon the Veterans Administration [now Department of Veterans Affairs] to undertake loan servicing of guaranteed loans. Rank v Nimmo (1982, CA9 Cal) 677 F.2d 692, cert den (1982) 459 US 907, 74 L Ed 2d 168, 103 S Ct 210

Where plaintiffs, who sought temporary restraining orders and temporary injunctions restraining defendants from executing any administrative offset against them, had been involved in class action resulting in consent decree that did not provide protection from such offsets and 31
USCS § 3711(g)(9) required that such debts be administratively offset, injunctions and temporary restraining orders were denied. Bradshaw v Veneman (2004, DC Dist Col) 338 F Supp 2d 139

2. Purpose

Policy of predecessor to 38 USCS §§ 3701 et seq. was to enable veterans to obtain loans and to obtain them with least risk of loss upon foreclosure, to both veteran and Veterans' Administration [now Department of Veterans Affairs] as guarantor of his indebtedness. United States v Shimer (1961) 367 US 374, 6 L Ed 2d 908, 81 S Ct 1554

3. Surviving spouse

Unremarried widow of person who served in the military or naval forces of government allied with United States in World War II was not, by virtue of his service, eligible for benefits under former 38 USC § 694. 1950 ADVA 851

Unremarried widow of veteran who died in action on July 13, 1950 was eligible for her own guaranty benefits under former 38 USC § 694 since veteran met basic requirements. 1951 ADVA 864

Unremarried widow of eligible veteran, who died as result of service-connected injuries, was not entitled to benefits under § 500a of Servicemen's Readjustment Act of 1944 (38 USCS § 1801 [now 38 USCS § 3701]) since widow was eligible for such benefits by reason of her own military service. 1951 ADVA 880

Acquisition of guaranteed loan by wife of serviceman missing in action under 38 USCS § 1801(a)(3) [now 38 USCS § 3701(a)(3)] did not bar use of any subsequent entitlement to which she became eligible as widow for such former serviceman. VA GCO 6-74

§ 3702. Basic entitlement

cxxx Discussion and Analysis in the Veterans Benefits Manual

(a) (1) The veterans described in paragraph (2) of this subsection are eligible for the housing loan benefits of this chapter [38 USCS §§ 3701 et seq.]. In the case of any veteran who served on active duty during two or more of the periods specified in paragraph (2), for which eligibility for the housing loan benefits under this chapter [38 USCS §§ 3701 et seq.] may be granted, entitlement derived from service during the most recent such period (A) shall cancel any unused entitlement derived from service during any earlier such period, and (B) shall be reduced by the amount by which entitlement from service during any earlier such period has been used to obtain a direct, guaranteed, or insured housing loan--

(i) on real property which the veteran owns at the time of application; or

(ii) as to which the Secretary has incurred actual liability or loss, unless in the event of loss or the incurrence and payment of such liability by the Secretary the resulting indebtedness of the veteran to the United States has been paid in full.

(2) The veterans referred to in the first sentence of paragraph (1) of this subsection are the following:

(A) Each veteran who served on active duty at any time during World War II, the Korean conflict, or the Vietnam era and whose total service was for 90 days or more.

(B) Each veteran who after September 15, 1940, was discharged or released from a period of active duty for a service-connected disability.

(C) Each veteran, other than a veteran described in clause (A) or (B) of this paragraph, who--
(i) served after July 25, 1947, for a period of more than 180 days and was
    discharged or released therefrom under conditions other than dishonorable; or

(ii) has served more than 180 days in active duty status and continues on
    active duty without a break therein.

(D) Each veteran who served on active duty for 90 days or more at any time
during the Persian Gulf War, other than a veteran ineligible for benefits under this
title by reason of section 5303A(b) of this title [38 USCS § 5303A(b)].

(E) Each veteran described in section 3701(b)(5) of this title [38 USCS §
    3701(b)(5)].

(3) Any unused entitlement of World War II or Korean conflict veterans which
    expired under provisions of law in effect before October 23, 1970, is hereby restored
    and shall not expire until used.

(4) A veteran's entitlement under this chapter [38 USCS §§ 3701 et seq.] shall not be
    reduced by any entitlement used by the veteran's spouse which was based upon the
    provisions of paragraph (3) of section 3701(b) of this title [38 USCS § 3701(b)].

(b) In computing the aggregate amount of guaranty or insurance housing loan entitlement
    available to a veteran under this chapter [38 USCS §§ 3701 et seq.], the Secretary may
    exclude the amount of guaranty or insurance housing loan entitlement used for any
    guaranteed, insured, or direct loan under the following circumstances:

    (1) (A) The property which secured the loan has been disposed of by the veteran or
        has been destroyed by fire or other natural hazard; and

        (B) the loan has been repaid in full, or the Secretary has been released from
            liability as to the loan, or if the Secretary has suffered a loss on such loan, the loss
            has been paid in full.

    (2) A veteran-transferee has agreed to assume the outstanding balance on the loan and
        consented to the use of the veteran transferee's entitlement, to the extent that the
        entitlement of the veteran-transferor had been used originally, in place of the
        veteran-transferor's for the guaranteed, insured, or direct loan, and the
        veteran-transferee otherwise meets the requirements of this chapter [38 USCS §§
        3701 et seq.].

    (3) (A) The loan has been repaid in full; and

        (B) the loan for which the veteran seeks to use entitlement under this chapter [38
            USCS §§ 3701 et seq.] is secured by the same property which secured the loan
            referred to in subparagraph (A) of this paragraph.

    (4) In a case not covered by paragraph (1) or (2)--

        (A) the loan has been repaid in full and, if the Secretary has suffered a loss on the
            loan, the loss has been paid in full; or

        (B) the Secretary has been released from liability as to the loan and, if the
            Secretary has suffered a loss on the loan, the loss has been paid in full.

The Secretary may, in any case involving circumstances the Secretary deems appropriate,
waive one or more of the conditions prescribed in paragraph (1). The authority of the
Secretary under this subsection to exclude an amount of guaranty or insurance housing
loan entitlement previously used by a veteran may be exercised only once for that veteran
under the authority of paragraph (4).
(c) An honorable discharge shall be deemed to be a certificate of eligibility to apply for a guaranteed loan. Any veteran who does not have a discharge certificate, or who received a discharge other than honorable, may apply to the Secretary for a certificate of eligibility. Upon making a loan guaranteed or insured under this chapter [38 USCS §§ 3701 et seq.], the lender shall forthwith transmit to the Secretary a report thereon in such detail as the Secretary may, from time to time, prescribe. Where the loan is guaranteed, the Secretary shall provide the lender with a loan guaranty certificate or other evidence of the guaranty. The Secretary shall also endorse on the veteran's discharge, or eligibility certificate, the amount and type of guaranty used, and the amount, if any, remaining. Nothing in this chapter [38 USCS §§ 3701 et seq.] shall preclude the assignment of any guaranteed loan or the security therefor.

(d) Housing loans will be automatically guaranteed under this chapter [38 USCS §§ 3701 et seq.] only if made (1) by any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union, or mortgage and loan company, that is subject to examination and supervision by an agency of the United States or of any State, (2) by any State, or (3) by any lender approved by the Secretary pursuant to standards established by the Secretary. Any housing loan proposed to be made to a veteran pursuant to this chapter [38 USCS §§ 3701 et seq.] by any lender not of a class specified in the preceding sentence may be guaranteed by the Secretary if the Secretary finds that it is in accord otherwise with the provisions of this chapter [38 USCS §§ 3701 et seq.].

(e) The Secretary may at any time upon thirty days' notice require housing loans to be made by any lender or class of lenders to be submitted to the Secretary for prior approval. No guaranty or insurance liability shall exist with respect to any such loan unless evidence of guaranty or insurance is issued by the Secretary.

(f) Any housing loan at least 20 percent of which is guaranteed under this chapter [38 USCS §§ 3701 et seq.] may be made by any national bank or Federal savings and loan association, or by any bank, trust company, building and loan association, or insurance company, organized or authorized to do business in the District of Columbia. Any such loan may be so made without regard to the limitations and restrictions of any other law relating to--

(1) ratio of amount of loan to the value of the property;
(2) maturity of loan;
(3) requirement for mortgage or other security;
(4) dignity of lien; or
(5) percentage of assets which may be invested in real estate loans.

Amendments:

1959. Act June 30, 1959, in subsec. (d), deleted "or" preceding "(2)" and inserted ", or (3) by any Federal Housing Administration approved mortgagee designated by the Federal Housing Commissioner as a certified agent and which is acceptable to the Administrator".

1961. Act July 6, 1961, in subsec. (b), substituted the concluding matter for matter which read: "Entitlement restored under this subsection may be used at any time before February 1, 1965."
1967. Act May 25, 1967, in subsec. (d), substituted "mortgagee approved by the Secretary of Housing and Urban Development and designated by him" for "Federal Housing Administration approved mortgagee designated by the Federal Housing Commissioner".

Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in subsec. (b), in the concluding matter, substituted "July 26, 1970" for "July 26, 1967".

1970. Act Oct. 23, 1970, in subsec. (b), deleted the concluding matter which read: "Entitlement restored under this subsection may be used by a World War II veteran at any time before July 26, 1970, and by a Korean conflict veteran at any time before February 1, 1975."


1974. Act Dec. 31, 1974 (effective as provided by § 10 of such Act, which appears as a note to this section), substituted subsec. (b) for one which read:

"(b) In computing the aggregate amount of guaranty or insurance entitlement available to a veteran under this chapter--

"(1) the Administrator may exclude the initial use of the veteran's entitlement for any loan with respect to which the security has been (A) taken (by condemnation or otherwise) by the United States or any State, or by any local government agency for public use, (B) destroyed by fire or other natural hazard, or (C) disposed of because of other compelling reasons devoid of fault on the part of the veteran; and

"(2) the Administrator shall exclude the amount of guaranty or insurance entitlement previously used for any guaranteed or insured home loan which has been repaid in full, and with respect to which the real property which served as security for the loan has been disposed of because the veteran, while on active duty, was transferred by the service department with which he was serving;"

and in subsec. (d), substituted "(3) by any lender approved by the Administrator pursuant to standards established by him." for "(3) by any mortgagee approved by the Secretary of Housing and Urban Development and designated by him as a certified agent and which is acceptable to the Administrator.".

1976. Act June 30, 1976 (effective 6/30/76, as provided by § 9(a) of such Act, which appears as 38 USCS § 3701 note), in subsec. (b), in para. (3), substituted "the veteran-transferee's" for "his" preceding "entitlement", and in the concluding matter, substituted "the Administrator" for "he"; in subsec. (c), substituted "The Administrator" for "He" preceding "shall"; in subsec. (d), substituted "the Administrator" for "he" preceding "finds"; and substituted "the Administrator for "him" following "submitted to"; and in subsec. (g), substituted "the veteran's spouse" for "his wife".

1978. Act Oct. 18, 1978 (effective as provided by § 108 of such Act, which appears as a note to this section), in subsec. (a), substituted "World War II, the Korean conflict, or the Vietnam era" for "World War II or the Korean conflict" wherever appearing, and substituted "In the case of any veteran who served on active duty during two or more of the periods specified in the preceding sentence, or in section 1818 of this title, for which eligibility for the benefits under this chapter may be granted, entitlement derived from service during the most recent such period (1) shall cancel any unused entitlement derived from service during any earlier such period, and (2) shall be reduced by the amount by which entitlement from service during any earlier such period has" for "Entitlement derived from service during the Korean conflict (1) shall cancel any unused entitlement derived from service during World War II, and (2) shall be reduced by the amount by which entitlement from service during World War II, has"; and in subsec. (b), redesignated para. (1) as para. (1)(A), redesignated para. (2) as para.
(1)(B), redesignated para. (3) as para. (2), and in the concluding matter, substituted "clause (1) of the preceding sentence" for "clauses (1) and (2) above".

1981. Act Nov. 3, 1981 (effective 180 days after enactment on Nov. 3, 1981, as provided by § 305 of such Act, which appears as 38 USCS § 3741 note) in subsec. (a), inserted "housing loan" preceding "benefits", wherever appearing, and inserted "housing" following "insured"; in subsec. (b), inserted "housing loan", wherever appearing; in subsec. (d), substituted "Housing loans" for "Loans" and inserted "housing" following "Any"; and in subsecs. (e) and (f), inserted "housing".


1984. Act March 2, 1984, in subsec. (b)(2), substituted "a" for "an immediate" preceding "veteran-transferee has agreed".

1988. Act May 20, 1988, in subsec. (a), designated the existing provisions as para. (1), and in para. (1), as so designated, substituted the sentence beginning "The veterans described . . ." for one which read: "Each veteran who served on active duty at any time during World War II, the Korean conflict, or the Vietnam era and whose total service was for ninety days or more, or who was discharged or released from a period of active duty, any part of which occurred during World War II, the Korean conflict, or the Vietnam era for a service-connected disability, shall be eligible for the housing loan benefits of this chapter.", substituted "in paragraph (2)" for "in the preceding sentence, or in section 1818 of this title", redesignated paras. (1) and (2) as subparas. (A) and (B) respectively, redesignated subparas. (A) and (B) as cls. (i) and (ii) respectively, and added new paras. (2) and (3); and redesignated subsec. (g) as subsec. (a)(4), and in subsec. (a)(4), as so redesignated, substituted "1801(b)" for "1801(a)".

1989. Act Dec. 15, 1989, in subsec. (b), in para. (1)(B), deleted "or" following "full;", in para. (2), substituted "; or" for the concluding period, and added para. (3).

Such Act further, substituted "Secretary" for "Administrator", wherever appearing, in the entire section.


Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1802, as 38 USCS § 3702, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


1994. Act Nov. 2, 1994, in subsec. (a)(2)(E), substituted "For the period beginning on October 28, 1992, and ending on October 27, 1999," for "For the 7-year period beginning on the date of enactment of this subparagraph,"; and, in subsec. (b), in the introductory matter, substituted "loan under the following circumstances:" for "loan, if--", in para. (1), substituted "The property" for "the property" and substituted a period for a semicolon following "paid in full", in para. (2), substituted "A veteran-transferee" for "a veteran-transferee" and substituted a period for "; or" following "this chapter", in para. (3)(A), substituted "The loan" for "the loan", added para. (4), and, in the concluding matter, substituted "paragraph (1)" for "clause (1) of the preceding sentence" and added the sentence beginning "The authority of the Secretary . . .".

1998. Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 602(f) of such Act, which appears as 38 USCS § 2106 note), in subsec. (a)(2)(E), substituted "September 30, 2003," for "October 27, 1999,".


Other provisions:

Effective dates of Act Dec. 31, 1974. Act Dec. 31, 1974, P. L. 93-569, § 10, 88 Stat. 1867, provided: "The provisions of this Act [amending 38 USCS §§ 2102, 3702, 3703, 3704, 3710, 3711, 3715, 3718, and 3719, and 12 USCS § 1757; repealing 38 USCS §§ 3712, 3714, 3722] shall become effective on the date of enactment except that the amendments made by sections 2(a)(3) [probably amendment to subsec. (b)(3) of this section] and 2(b) [amending subsec. (d)(3) of this section] and sections 3(2) and 3(4) [amending 38 USCS § 3710] shall become effective ninety days after such date of enactment."


"(a) Except as provided in subsection (b) of this section, the amendments made by this title [amending this section and 38 USCS §§ 2102, 3703, 3710, 3711, 3715, 3718, and 3719] shall take effect on October 1, 1978.

"(b) The amendment made by clause (1) of section 104 of this title [amending 38 USCS § 3710(a)(6)] shall take effect on July 1, 1979, except with respect to the authority to prescribe regulations for the implementation of such amendment, which shall be effective on the date of the enactment of this Act."

Authority of the Administrator to promulgate regulations. For the authority and effective date for the Administrator of Veterans's Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Clarification of references. Act May 20, 1988, P. L. 100-322, Title IV, Part B, § 415(c)(7), 102 Stat. 552, provides: "Any reference, in effect on the date of the enactment of this Act, in any law, rule, or regulation to any of the sections, or parts thereof, which are redesignated or transferred by this section [amending generally 38 USCS §§ 3701 et seq.] shall be construed to refer to the section, or part thereof, as redesignated or transferred by this section [amending generally 38 USCS §§ 3701 et seq.]."

Technical nature of May 20, 1988 amendments. Act May 20, 1988, P. L. 100-322, Title IV, Part B, § 415(f), 102 Stat. 553, provides: "The status of any veteran with respect to benefits under chapter 37 of title 38, United States Code [38 USCS §§ 3701 et seq.], shall not be affected by the amendments made by, or other provisions of, this section [amending generally 38 USCS §§ 3701 et seq.]."

Repeal of provision relating to report concerning mortgage loans pursuant to Oct. 28, 1992 amendments. Act Oct. 28, 1992, P. L. 102-547, § 2(c), 106 Stat. 3634, which formerly appeared as a note to this section, was repealed by Act Feb. 13, 1996, P. L. 104-110, Title II, § 201(b), 110 Stat. 770. Such note related to an annual report to the Committees on Veterans' Affairs of the Senate and House of Representatives by the Secretary of Veterans Affairs dealing with veterans receiving mortgage loans guaranteed by the Secretary.

Code of Federal Regulations

Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Department of Veterans Affairs-Loan guaranty, 38 CFR Part 36
Cross References

This section is referred to in 12 USCS § 1715z-13a; 38 USCS §§ 3703, 3710, 3712, 3714, 3731, 3744, 5102

Research Guide

Federal Procedure:


Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws §§ 114, 115, 161

1. Generally
2. Purpose
3. Persons entitled to benefits
4. Lenders eligible for loan guaranty
5. Scope of guaranty
6. Use of benefits for ineligible person
7. False claim actions

1. Generally

Classification of veterans is entirely constitutional. Valley Nat'l Bank v Glover (1945) 62 Ariz 538, 159 P2d 292

2. Purpose

Policy of Servicemen's Readjustment Act (predecessor to 38 USCS §§ 3701 et seq.) was to enable veterans to obtain loans and to obtain them with least risk of loss, to both veteran and Veterans Administration [now Department of Veterans Affairs], upon foreclosure. United States v Shimer (1961) 367 US 374, 6 L Ed 2d 908, 81 S Ct 1554

Servicemen's Readjustment Act (predecessor to 38 USCS §§ 3701 et seq.) was designed in part to protect veterans from payment of excessive prices for purchase or construction of homes and from terms of payment not bearing proper relation to their present and anticipated income and expenses. Young v Hampton (1951) 36 Cal 2d 799, 228 P2d 1, 19 ALR2d 830

3. Persons entitled to benefits

Period of service under former 38 USC § 694 did not include time lost by reason of unauthorized absence for which service person had forfeited pay. 1944 ADVA 613

For purposes of Servicemen's Readjustment Act of 1944 (38 USCS §§ 1801 et seq. [now 38 USCS §§ 3701 et seq.]), honorable discharge of enlisted man to accept commission or of member of reserve to accept commission in regular establishment was sufficient to entitle such individual to certificate of eligibility for loan guaranties. 1946 ADVA 725

Service person not entitled to separation under point or length of service system, but otherwise eligible to be completely separated from active service, was so separated for purposes of benefits administered by Veterans' Administration [now Department of Veterans Affairs] where department would have released him had he so requested at time he accepted commission or affected other change in status. 1947 ADVA 771

Case of veteran discharged honorably from Canadian armed forces in 1942 to accept commission in American forces was similar to that of service person in Administrator's [now Secretary's] decision No. 725 who was discharged to accept commission or change in status prior to eligibility for discharge under point or length of service system; thus, Canadian service did not qualify as separate period of service for benefits purposes, and discharge under dishonorable
conditions from United States armed forces barred benefits based upon Canadian services.  
1948 ADVA 782

Veteran who served less than 90 days during World War II and was discharged from active military or naval service for disability considered to have incurred in such service was entitled to benefits under former 38 USC § 694. 1951 ADVA 874

Veteran who acquired loan guaranty entitlement for active duty in both World War II and Korean conflict was eligible to use his subsisting entitlement to loan assistance benefits for longest period of time afforded by his service in either conflict; such privilege applied not only where veteran had made no previous use of World War II entitlement, but also where Korean entitlement had either been reduced or saved from reduction on account of used World War II entitlement pursuant to 38 USCS § 1802 [now 38 USCS § 3702]. 1961 ADVA 978

Veteran was not entitled to loan guaranty in amount of his full eligibility since VA's acceptance of deed in lieu of foreclosure from veteran's assignees extinguished portion veteran had originally received; veteran did not have property interest in restoration of his expended entitlement since there was no evidence that assignee-veteran ever agreed to substitute his entitlement for plaintiff's, and his right to redeem was transferred to assignees with interest in underlying property and exercised when they conveyed property to VA in lieu of foreclosure. Wells v Brown (1996) 9 Vet App 293, affd without op (1997, CA FC) 114 F.3d 1207, reported in full (1997, CA FC) 1997 US App LEXIS 13412 and cert den (1998) 522 US 1045, 139 L Ed 2d 632, 118 S Ct 685

4. Lenders eligible for loan guaranty

Lenders supervised and qualified under former 38 USC § 694 we not eligible for automatic insurance; however, lender who complied with applicable provisions and regulations was entitled as legal right to issuance of certificate of guaranty or insurance credit. 1945 ADVA 767

Lending organization otherwise deemed qualified for loan guaranties under former 38 USC § 694 but which was not, by reason of Federal, state, territorial, or District of Columbia law, subject to examination and supervision by agency thereof, was not entitled to such loan guaranties without prior approval of Administrator [now Secretary] of Veterans Affairs. 1946 ADVA 692

Lender that belongs to Federal Home Loan Bank is eligible for loan guaranties so long as it is subject to inspection and regulation as member of bank or pursuant to other Federal or state law. 1946 ADVA 708

Mortgage loan company which qualified as affiliate of national bank or of other bank, so long as such other bank belonged to Federal Reserve System, was within class described by former 38 USC § 694, and was accordingly entitled to make loans which were automatically guaranteed. 1946 ADVA 709

All federally-chartered credit unions qualify under 38 USCS § 1802 [now 38 USCS § 3702] to process loans for automatic guaranty; state-chartered credit unions may qualify if subject to both examination and supervision by state agency under 38 USCS § 1802(d)(1) [now 38 USCS § 3702(d)(1)], or if not subject to examination and supervision, under 38 USCS § 1802(d)(3) [now 38 USCS § 3702(d)(3)]. VA GCO 25-75

5. Scope of guaranty

Expenses customarily connected with placing and initially servicing loan are includable as part of obligation upon which Administrator's [now Secretary's] guaranty of such loan is to be based. 1944 ADVA 591

Value of interest owned by veteran and spouse in property to be encumbered is basis for extent of guaranty and is not to be limited to value of such interest owned by veteran exclusive of value particularly attributable to spouse's interest where such interest was acquired by virtue of relationship. 1945 ADVA 619

6. Use of benefits for ineligible person
Veteran who bought real estate as tenant in common with other veteran, acquiring one-half undivided interest in property, was not entitled to apply unused balance of his benefits to cover his copurchaser's half of loan, where copurchaser had already used all but small amount of his guaranty privilege. Gowanda Co-op. Sav. & Loan Asso. v Gray (1950, CA2 NY) 183 F.2d 367

Agreement by veteran purchasing property under loan guaranty to hold property in trust for person ineligible for loan guaranty was invalid, even though supported by consideration. Glosser v Powers (1952) 209 Ga 149, 71 SE2d 230; Dunn v Dunn (1956, 2d Dept) 1 App Div 2d 888, 149 NYS2d 351

Veteran's oral agreement to take title to house in his own name and to hold title in trust for relative who furnished money for obtaining and preserving property, thereby securing lower interest rate, longer term, and other advantages, was invalid to extent that agreement attempted to obtain benefits for relative to which only veterans were entitled, even though veteran lived in house with relative. Perkins v Hilton (1952) 329 Mass 291, 107 NE2d 822, 33 ALR2d 1281

Although remedy of constructive trust was not available to person ineligible for loan guaranty, who made agreement with eligible veteran for veteran to take title in his name and reconvey property after loan guaranty, equitable lien would be impressed upon property in favor of nonveteran, limited to money paid by him out of his own funds at closing and thereafter in reduction of principal of mortgage indebtedness, to extent to which moneys expended by him for permanent improvements enhanced value of property. Badami v Badami (1968, 2d Dept) 29 App Div 2d 645, 286 NYS2d 590

Where in order to receive for his mother benefits which were his under "G. I. Bill of Rights" veteran used his mother's money to purchase house and made oral trust to convey to her later, agreement was illegal as fraud although veteran lived in house purchased, and in suit by veteran's trustee in bankruptcy mother was not allowed credit for payments made by her before veteran conveyed to her but was allowed credit for payments made after conveyance. Perkins v Hilton (1952) 329 Mass 291, 107 NE2d 822, 33 ALR2d 1281

Where title to home was taken in name of veteran merely as means of financing purchase, and veteran did not occupy it for number of years, constructive trust in favor of veteran's stepfather, who, with his wife until her death occupied it, made payments on mortgage, and capital improvements, would not be imposed, but stepfather was entitled to lien for such expenditures. Towner v Berg (1958, 3d Dept) 5 App Div 2d 481, 172 NYS2d 258

7. False claim actions

Gratuitous payment of 4 percent of amount of guaranty previously provided for provided adequate basis for false claim action against dealer who knew at time transaction was closed that veteran did not intend to occupy house bought pursuant to guaranteed loan. United States v De Witt (1959, CA5 Tex) 265 F.2d 393, cert den (1959) 361 US 866, 4 L Ed 2d 105, 80 S Ct 121

Dealer who completed transaction knowing that veteran did not intend to live in house purchased with guaranteed mortgage funds could be found guilty of making false claim against United States. United States v De Witt (1959, CA5 Tex) 265 F.2d 393, cert den (1959) 361 US 866, 4 L Ed 2d 105, 80 S Ct 121

"Non-supervised" lenders have no duty to verify accuracy of information supplied by veterans and real estate brokers before passing information on to Veterans Administration [now Department of Veterans Affairs] in application for loan guarantee under this act; consequently lender's knowledge of falsity of statements in application, such knowledge being necessary for liability under False Claims Act [31 USCS §§ 231 et seq.], cannot be established by mere failure to so verify. United States v Ekelman & Assoc., Inc. (1976, CA6 Mich) 532 F.2d 545, 35 ALR Fed 794 (superseded by statute as stated in United States v Macomb Contracting Corp. (1988, MD Tenn) 1988 US Dist LEXIS 17608) and (superseded by statute as stated in United States v Murphy (1991, CA6 Tenn) 937 F.2d 1032, 37 CCF ¶ 76123, 1991-1 CCH Trade Cases ¶ 69482)

Defendants charged with making false statements in application for home loan guaranty of eligible ex-service man were not entitled to dismissal on ground that charge did not set forth or allege commission of offense. United States v Oakland (1948, DC La) 81 F Supp 343

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Real estate broker, who represented both seller and buyer, was not guilty of filing false claim, where buyer alone signed certificate representing that consideration paid was not in excess of appraised value, if evidence failed to show that broker acted as attorney for parties; presence of seller at meetings where purchaser signed false certificate stating that price paid for property was not in excess of appraised value did not make him guilty of filing a false claim, if evidence failed to show he knew about requirement. United States v Mignon (1952, DC Pa) 103 F Supp 20

§ 3703. Basic provisions relating to loan guaranty and insurance

(a) (1) (A) Any loan to a veteran eligible for benefits under this chapter [38 USCS §§ 3701 et seq.], if made for any of the purposes specified in section 3710 of this title [38 USCS § 3710] and in compliance with the provisions of this chapter [38 USCS §§ 3701 et seq.], is automatically guaranteed by the United States in an amount not to exceed the lesser of--

(i) (I) in the case of any loan of not more than $45,000, 50 percent of the loan;
   (II) in the case of any loan of more than $45,000, but not more than $56,250, $22,500;
   (III) except as provided in subclause (IV) of this clause, in the case of any loan of more than $56,250, the lesser of $36,000 or 40 percent of the loan; or
   (IV) in the case of any loan of more than $144,000 for a purpose specified in clause (1), (2), (3), (6), or (8) of section 3710(a) of this title [38 USCS § 3710(a)], the lesser of the maximum guaranty amount (as defined in subparagraph (C)) or 25 percent of the loan; or
   (ii) the maximum amount of guaranty entitlement available to the veteran as specified in subparagraph (B) of this paragraph.

(B) The maximum amount of guaranty entitlement available to a veteran for purposes specified in section 3710 of this title [38 USCS § 3710] shall be $36,000, or in the case of a loan described in subparagraph (A)(i)(IV) of this paragraph, the maximum guaranty amount (as defined in subparagraph (C)), reduced by the amount of entitlement previously used by the veteran under this chapter [38 USCS §§ 3701 et seq.] and not restored as a result of the exclusion in section 3702(b) of this title [38 USCS § 3702(b)].

(C) In this paragraph, the term "maximum guaranty amount" means the dollar amount that is equal to 25 percent of the Freddie Mac conforming loan limit limitation determined under section 305(a)(2) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2)) for a single-family residence, as adjusted for the year involved.

(2) (A) Any housing loan which might be guaranteed under the provisions of this chapter [38 USCS §§ 3701 et seq.], when made or purchased by any financial institution subject to examination and supervision by an agency of the United States or of any State may, in lieu of such guaranty, be insured by the Secretary under an agreement whereby the Secretary will reimburse any such institution for losses incurred on such loan up to 15 per centum of the aggregate of loans so made or purchased by it.
(B) Loans insured under this section shall be made on such other terms, conditions, and restrictions as the Secretary may prescribe within the limitations set forth in this chapter [38 USCS §§ 3701 et seq.].

(b) The liability of the United States under any guaranty, within the limitations of this chapter [38 USCS §§ 3701 et seq.], shall decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the obligation.

(c) (1) Loans guaranteed or insured under this chapter [38 USCS §§ 3701 et seq.] shall be payable upon such terms and conditions as may be agreed upon by the parties thereto, subject to the provisions of this chapter [38 USCS §§ 3701 et seq.] and regulations of the Secretary issued pursuant to this chapter [38 USCS §§ 3701 et seq.], and shall bear interest not in excess of such rate as the Secretary may from time to time find the loan market demands, except that in establishing the rate of interest that shall be applicable to such loans, the Secretary shall consult with the Secretary of Housing and Urban Development regarding the rate of interest applicable to home loans insured under section 203(b) of the National Housing Act (12 U.S.C. 1709(b)).

(2) The provisions of the Servicemen's Readjustment Act of 1944 which were in effect before April 1, 1958, with respect to the interest chargeable on loans made or guaranteed under such Act shall, notwithstanding the provisions of paragraph (1) of this subsection, continue to be applicable--

(A) to any loan made or guaranteed before April 1, 1958; and
(B) to any loan with respect to which a commitment to guarantee was entered into by the Secretary before April 1, 1958.

(3) This section shall not be construed to prohibit a veteran from paying to a lender any reasonable discount required by such lender, when the proceeds from the loan are to be used--

(A) to refinance indebtedness pursuant to clause (5), (8), or 9(b)(i) of section 3710(a) of this title or section 3712(a)(1)(F) of this title [38 USCS § 3710(a) or 3712(a)(1)(F)];
(B) to repair, alter, or improve a farm residence or other dwelling pursuant to clauses (4) and (7) of section 3710(a) of this title [38 USCS § 3710(a)];
(C) to construct a dwelling or farm residence on land already owned or to be acquired by the veteran except where the land is directly or indirectly acquired from a builder or developer who has contracted to construct such dwelling for the veteran;
(D) to purchase a dwelling from a class of sellers which the Secretary determines are legally precluded under all circumstances from paying such a discount if the best interest of the veteran would be so served; or
(E) to refinance indebtedness and purchase a manufactured-home lot pursuant to section 3710(a)(9)(B)(ii) or 3712(a)(1)(G) of this title [38 USCS § 3710(a)(9)(B)(ii) or 3712(a)(1)(G)], but only with respect to that portion of the loan used to refinance such indebtedness.

(4) (A) In guaranteeing or insuring loans under this chapter [38 USCS §§ 3701 et seq.], the Secretary may elect whether to require that such loans bear interest at a rate that is--

(i) agreed upon by the veteran and the mortgagee; or
(ii) established under paragraph (1).

The Secretary may, from time to time, change the election under this subparagraph.

(B) Any veteran, under a loan described in subparagraph (A)(i), may pay reasonable discount points in connection with the loan. Except in the case of a loan for the purpose specified in section 3710(a)(8), 3710(b)(7), or 3712(a)(1)(F) of this title [38 USCS § 3710(a)(8), 3710(b)(7), or 3712(a)(1)(F)], discount points may not be financed as part of the principal amount of a loan guaranteed or insured under this chapter [38 USCS §§ 3701 et seq.].

(C) Not later than 10 days after an election under subparagraph (A), the Secretary shall transmit to the Committees on Veterans' Affairs of the Senate and House of Representatives a notification of the election, together with an explanation of the reasons therefor.

(d) (1) The maturity of any housing loan shall not be more than thirty years and thirty-two days.

(2) (A) Any loan for a term of more than five years shall be amortized in accordance with established procedure.

(B) The Secretary may guarantee loans with provisions for various rates of amortization corresponding to anticipated variations in family income. With respect to any loan guaranteed under this subparagraph--

(i) the initial principal amount of the loan may not exceed the reasonable value of the property as of the time the loan is made; and

(ii) the principal amount of the loan thereafter (including the amount of all interest to be deferred and added to principal) may not at any time be scheduled to exceed the projected value of the property.

(C) For the purposes of subparagraph (B) of this paragraph, the projected value of the property shall be calculated by the Secretary by increasing the reasonable value of the property as of the time the loan is made at a rate not in excess of 2.5 percent per year, but in no event may the projected value of the property for the purposes of such subparagraph exceed 115 percent of such reasonable value. A loan made for a purpose other than the acquisition of a single-family dwelling unit may not be guaranteed under such subparagraph.

(3) Any real estate housing loan (other than for repairs, alterations, or improvements) shall be secured by a first lien on the realty. In determining whether a loan for the purchase or construction of a home is so secured, the Secretary may disregard a superior lien created by a duly recorded covenant running with the realty in favor of a private entity to secure an obligation to such entity for the homeowner's share of the costs of the management, operation, or maintenance of property, services or programs within and for the benefit of the development or community in which the veteran's realty is located, if the Secretary determines that the interests of the veteran borrower and of the Government will not be prejudiced by the operation of such covenant. In respect to any such superior lien to be created after June 6, 1969, the Secretary's determination must have been made prior to the recordation of the covenant.

(e) (1) Except as provided in paragraph (2) of this subsection, an individual who pays a fee under section 3729 of this title [38 USCS § 3729], or who is exempted under section
3729(c) of this title [38 USCS § 3729(c)] from paying such fee, with respect to a housing loan guaranteed or insured under this chapter that is closed after December 31, 1989, shall have no liability to the Secretary with respect to the loan for any loss resulting from any default of such individual except in the case of fraud, misrepresentation, or bad faith by such individual in obtaining the loan or in connection with the loan default.

(2) The exemption from liability provided by paragraph (1) of this subsection shall not apply to--

(A) an individual from whom a fee is collected (or who is exempted from such fee) under section 3729(b)(2)(I) of this title [38 USCS § 3729(b)(2)(I)]; or

(B) a loan made for any purpose specified in section 3712 of this title [38 USCS § 3712].

(f) The application for or obtaining of a loan made, insured, or guaranteed under this chapter [38 USCS §§ 3701 et seq.] shall not be subject to reporting requirements applicable to requests for, or receipts of, Federal contracts, grants, loans, loan guarantees, loan insurance, or cooperative agreements except to the extent that such requirements are provided for in, or by the Secretary pursuant to, this title.

References in text:
The "Servicemen's Readjustment Act of 1944", referred to in subsec. (c)(2), is Act June 22, 1944, ch 268, 58 Stat. 284, as amended, which was generally classified to former 38 USC 693-697g prior to repeal by Act Sept. 2, 1958, P. L. 85-857, § 14(87), 72 Stat. 1273, in the general revision of Title 38. For similar provisions, see tables preceding 38 USCS § 101.

Amendments:
1959. Act June 30, 1959, in subsec. (c)(1), deleted ", but the rate of interest so prescribed by the Administrator shall not exceed at any time the rate of interest (exclusive of premium charges for insurance, and service charges if any), established by the Federal Housing Commissioner under section 203(b)(5) of the National Housing Act, less one-half of 1 per centum per annum" following "loan market demands", and substituted "51/4 per centum per annum" for "4 3/4 per centum per annum".


1961. Act July 6, 1961, substituted new subsec. (a) for one which read:

"(a)(1) Any loan made to a World War II veteran, if made before July 26, 1962 (or, in the case of a veteran described in section 1801(a)(1)(B) of this title, before the expiration of fifteen years after World War II is deemed to have ended with respect to him), or to a Korean conflict veteran, if made before February 1, 1965, for any of the purposes, and in compliance with the provisions, specified in this chapter, is automatically guaranteed by the United States in an amount not more than 60 per centum of the loan if the loan is made for any of the purposes specified in section 1810 of this title and not more than 50 per centum of the loan if the loan is for any of the purposes specified in section 1812, 1813, or 1814 of this title.

"(2) If a loan report or an application for loan guaranty relating to a loan under this chapter to a World War II veteran whose entitlement would otherwise expire on July 25, 1962, has been received by the Administrator before July 26, 1962, such loan may be guaranteed or insured under the provisions of this chapter after such date.".

1966. Act March 3, 1966 (effective 3/3/66, as provided by § 12(a) of such Act), in subsec. (c)(1), substituted "may from time to time find the loan market demands; except that such rate shall in no event exceed that in effect under the provisions of section 203(b)(5) of the
National Housing Act. for ", with the approval of the Secretary of the Treasury, may from time
to time find the loan market demands; except that such rate shall in no event exceed 51/4 per
centum per annum.

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which
appears as 38 USCS § 101 note), in subsec. (a)(3)(A), in clauses (i) and (ii), substituted "July
25, 1970" for "July 25, 1967".

1969. Act June 6, 1969, in subsec. (d), substituted para. (3) for one which read: "(3) Any
real-estate loan (other than for repairs, alterations, or improvements) shall be secured by a
first lien on the realty. Any non-real-estate loan (other than for working or other capital,
merchandise, goodwill, and other intangible assets) shall be secured by personality to the
extent legal and practicable."

1970. Act Oct. 23, 1970, substituted subsec. (a) for one which read:
"(a)(1) Any loan to a World War II or Korean conflict veteran, if made within the applicable
period prescribed in paragraph (3) of this subsection for any of the purposes, and in
compliance with the provisions, specified in this chapter is automatically guaranteed by the
United States in an amount not more than 60 per centum of the loan if the loan is made for
any of the purposes specified in section 1810 of this title and not more than 50 per centum of
the loan if the loan is for any of the purposes specified in section 1812, 1813, or 1814 of this
title.

"(2) If a loan report or an application for loan guaranty relating to a loan under this
chapter is received by the Administrator before the date of the expiration of the veteran's
entitlement, the loan may be guaranteed or insured under the provisions of this chapter
after such date.

"(3)(A) A World War II veteran's entitlement to the benefits of this chapter will expire as
follows:

"(i) ten years from the date of discharge or release from the last period of active
duty of the veteran, any part of which occurred during World War II, plus an
additional period equal to one year for each three months of active duty
performed by the veteran during World War II, except that entitlement shall not
continue in any case after July 25, 1970, nor shall entitlement expire in any case
prior to July 25, 1962; or

"(ii) on July 25, 1970, for a veteran discharged or released for a
service-connected disability from a period of active duty, any part of which
occurred during World War II.

"(B) A Korean conflict veteran's entitlement to the benefits of this chapter will expire as
follows:

"(i) ten years from the date of discharge or release from the last period of active
duty of the veteran, any part of which occurred during the Korean conflict, plus an
additional period equal to one year for each three months of active duty
performed by the veteran during the Korean conflict, except that entitlement shall not
continue in any case after January 31, 1975, nor shall entitlement expire in any case
prior to January 31, 1965; or

"(ii) on January 31, 1975, for a veteran discharged or released for a
service-connected disability from a period of active duty, any part of which
occurred during the Korean conflict.;

in subsec. (b), substituted "1810, 1811, and 1819" for "1810 and 1811"; and in subsec. (d)(1),
inserted "except as provided in section 1819 of this title".
1973. Act July 26, 1973, in subsec. (c)(1), substituted ", except that in establishing the rate of interest that shall be applicable to such loans, the Administrator shall consult with the Secretary of Housing and Urban Development regarding the rate of interest the Secretary considers necessary to meet the mortgage market for home loans insured under section 203(b) of the National Housing Act, and, to the maximum extent practicable, carry out a coordinated policy on interest rates on loans insured under such section 203(b) and on loans guaranteed or insured under this chapter." for "; except that such rate shall in no event exceed that in effect under the provisions of section 203(b)(5) of the National Housing Act.".

1974. Act Dec. 31, 1974 (effective 12/31/74, as provided by § 10 of such Act, which appears as 38 USCS § 3702 note), in subsec. (a)(1), deleted ", and not more than 50 per centum of the loan if the loan is for any of the purposes specified in section 1812, 1813, or 1814 of this title" following "of this title"; in subsec. (b), deleted "Except as provided in sections 1810, 1811, and 1819 of this title, the aggregate amount guaranteed shall not be more than $2,000 in the case of non-real-estate loans, nor $4,000 in the case of real-estate loans, or a prorated portion thereof on loans of both types or combination thereof," preceding "The liability"; in subsec. (c), added para. (3); and, in subsec. (d), substituted para. (1) for one which read: "(1) The maturity of any non-real-estate loan shall not be more than ten years except as provided in section 1819 of this title. The maturity of any real-estate loan (other than a loan on farm realty) shall not be more than thirty years, and in the case of a loan on farm realty, shall not be more than forty years.", and, in para. (3), deleted "Any non-real-estate loan (other than for working or other capital, merchandise, goodwill, and other intangible assets) shall be secured by personally to the extent legal and practicable." following "of the covenant.".

1976. Act June 30, 1976 (effective 6/30/76, as provided by § 9(a) of such Act, which appears as 38 USCS § 3701 note), in subsec. (d)(3), substituted "the Administrator" for "he" preceding "determines".

1978. Act Oct. 18, 1978 (effective 10/1/78, as provided by § 108(a) of such Act, which appears as 38 USCS § 3702 note), in subsec. (a)(1), substituted "veteran eligible for benefits under this chapter" for "World War II or Korean conflict veteran"; in subsec. (c)(1), inserted "In establishing rates of interest under this paragraph for one or more of the purposes described in clauses (4) and (7) of section 1810(a) of this title, the Administrator may establish a rate or rates higher than the rate specified for other purposes under such section, but any such rate may not exceed such rate as the Administrator may from time to time find the loan market demands for loans for such purposes.", and in subsec. (c)(3)(B), substituted "clauses (4) and (7) of section 1810(a) of this title" for "section 1810(a)(4)".

1980. Act Oct. 7, 1980 (effective 10/7/80, as provided by § 601(d) of such Act, which appears as 38 USCS § 1114 note), in subsec. (c)(3)(A), substituted "clause (5) or (8) of section 1810(a) of this title or section 1819(a)(1)(F) of this title" for "section 1810(a)(5)".

1981. Act Oct. 17, 1981 (effective 10/17/81, as provided by § 701(b)(1) of such Act, which appears as 38 USCS § 1114 note), in subsec. (d)(2), designated existing provisions as subpara. (A) and added subparas. (B) and (C).

Act Nov. 3, 1981 (effective 180 days after enactment on Nov. 3, 1981, as provided by § 305 of such Act, which appears as 38 USCS § 3741 note), in subsec. (d), in paras. (1) and (3), inserted "housing".


Act Oct. 14, 1982, in subsec. (c)(3), in the introductory matter, substituted "used:-" for "used:.", in subpara. (C), deleted "or" following "veteran;", in subpara. (D), substituted "; or" for the concluding period, and added subpara. (E).

1987. Act Dec. 21, 1987 (applicable as provided by § 3(d) of such Act, which appears as a note to this section), in subsec. (a), substituted para. (1) for one which read: "Any loan to a veteran eligible for benefits under this chapter, if made for any of the purposes, and in compliance with the provisions, specified in this chapter is automatically guaranteed by the United States in an amount not more than 60 percent of the loan if the loan is made for any of the purposes specified in section 1810 of this title."

1988. Act Feb. 29, 1988 (applicable as provided by § 3(a) of such Act, which appears as a note to this section), substituted subsec. (a)(1) for one which read: "Any loan to a veteran eligible for benefits under this chapter, if made for any of the purposes specified in section 1810 of this title and in compliance with the provisions of this chapter, is automatically guaranteed by the United States in an amount not to exceed--

"(A) in the case of any loan of not more than $45,000, 50 percent of the loan; or

"(B) in the case of any loan of more than $45,000, 40 percent of the loan or $36,000, whichever is less, except that the amount of such guaranty for any such loan shall not be less than $22,500;

reduced by the amount of entitlement previously used by the veteran under this chapter and not restored as a result of the exclusion in section 1802(b) of this title."

Act May 20, 1988 substituted the section catchline for one which read: "§ 1803. Basic provisions relating to loan guaranty"; in subsec. (a), in para. (1), in subpara. (A)(ii), inserted "as specified in subparagraph (B) of this paragraph", in subpara. (B), substituted "for purposes specified in section 1810 of this title" for "under section 1810 of this chapter", and deleted para. (2) which read: "Any unused entitlement of World War II or Korean conflict veterans which expired under provisions of law in effect before October 23, 1970 is hereby restored and shall not expire until used."

Such Act further redesignated 38 USCS § 1815(a) and (b) as subsec. (a)(2)(A) and (B) of this section respectively; in subsec. (c)(3), in subpara. (A), substituted "section 1812" for "section 1819", and in subpara. (E), substituted "or 1812" for "or 1819".


Such Act further (effective and applicable as provided by § 306(b) of such Act, which appears as a note to this section), in subsec. (a)(1), in subpara. (A)(i), in subcl. (I), deleted "or" following "loan;", substituted subcl. (II) for one which read: "in the case of any loan of more than $45,000, the lesser of $36,000 or 40 percent of the loan, except that the amount of such guaranty for any such loan shall not be less than $22,500; or", added subcls. (III) and (IV), and in subpara. (B), substituted "$36,000, or in the case of a loan described in subparagraph (A)(i)(IV) of this paragraph, $46,000," for "$36,000".

Such Act further, substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing, in the entire section.

Such Act further, in subsec. (c)(1), inserted "of Housing and Urban Development" following "interest the Secretary".

1991. Act June 13, 1991, in subsec. (a)(1)(A)(i), in subcl. (III), inserted "except as provided in subclause (IV) of this clause," and deleted "but not more than $144,000," before "the lesser", and, in subcl. (IV), substituted "(6), or (8)" for "or (6)"; and added subsec. (f).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1803, as 38 USCS § 3703, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1992. Act Oct. 28, 1992, in subsec. (c), in para. (1), substituted "applicable to" for "the Secretary of Housing and Urban Development considers necessary to meet the mortgage market for", substituted the concluding period for ", and, to the maximum extent practicable, carry out a coordinated policy on interest rates on loans insured under such section 203(b)
and on loans guaranteed or insured under this chapter [38 USCS §§ 3701 et seq.]. In establishing rates of interest under this paragraph for one or more of the purposes described in clauses (4) and (7) of section 3710(a) of this title, the Secretary may establish a rate or rates higher than the rate specified for other purposes under such section, but any such rate may not exceed such rate as the Secretary may from time to time find the loan market demands for loans for such purposes."


1994. Act Oct. 13, 1994 (effective and applicable as provided by § 8 of such Act, which appears as 38 USCS § 4301 note), in subsec. (a)(1), in paras. (A)(i)(IV) and (B), substituted "$50,750" for "$46,000".


1998. Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 602(f) of such Act, which appears as 38 USCS § 2106 note), in subsec. (e)(1), substituted "3729(c)" for "3729(c)(1)".

2001. Act Dec. 27, 2001, in subsec. (a)(1), in subparas. (A)(i)(IV) and (B), substituted "$60,000" for "$50,750".

2002. Act Dec. 6, 2002 (effective as if included in the enactment of § 402 of Act Nov. 1, 2000, as provided by § 308(f)(2) of Act Dec. 6, 2002, which appears as a note to this section), in subsec. (e)(2)(A), substituted "3729(b)(2)(I)" for "3729(b)".

2004. Act Dec. 10, 2004, in subsec. (a)(1), in subparas. (A)(i)(IV) and (B), substituted "the maximum guaranty amount (as defined in subparagraph (C))" for "$60,000", and added subpara. (C).

Other provisions:


Section 405(a) of Act Aug. 31, 1967, provided that this note is effective on the first day of the first calendar month which begins more than 10 days after Aug. 31, 1967.

Authority of the Administrator to promulgate regulations. For the authority and effective date for the Administrator of Veterans's Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Application of § 3 of Act Dec. 21, 1987 amendments. Act Dec. 21, 1987, P. L. 100-198, § 3(d), 101 Stat. 1316, provides: "The amendments made by this section [amending 38 USCS §§ 3703(a)(1), 3711(d)(2)(A), and 3719(c)(3), (4), and repealing 38 USCS §§ 1310(c)] shall apply to loans which are closed on or after February 1, 1988, except that they shall not apply to any loan for which a guaranty commitment is made on or before December 31, 1987."

Effective date and application of Dec. 18, 1989 amendments of subsec. (a)(1). Act Dec. 18, 1989, P. L. 101-237, Title III, § 306(b), 103 Stat. 2074, provides: "The amendments made by subsection (a) [amending subsec. (a)(1) of this section] shall take effect on the date of the enactment of this Act and shall apply only with respect to loans closed after such date."
Repeal of provision relating to report concerning mortgage loans. Act Oct. 28, 1992, P. L. 102-547, § 10(b), 106 Stat. 3643; Nov. 2, 1994, P. L. 103-446, Title XII, § 1202(d), 108 Stat. 4689, which formerly appeared as a note to this section, was repealed by Act Feb. 13, 1996, P. L. 104-110, Title II, § 201(b), 110 Stat. 770. Such note related to an annual report to the Committees on Veterans' Affairs of the Senate and House of Representatives by the Secretary of Veterans Affairs dealing with veterans receiving mortgage loans guaranteed by the Secretary.


Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Loan guaranty, 38 CFR Part 36
Department of Veterans Affairs-Governmentwide debarment and suspension (nonprocurement) and governmentwide requirements for drug-free workplace (grants), 38 CFR Part 44

Cross References
This section is referred to in 12 USCS § 1715u; 38 USCS §§ 3710, 3712, 3732, 3762

Research Guide
Federal Procedure:
4B Fed Proc L Ed, Banking and Financing §§ 8:1841, 1843, 1848, 1849, 1851, 1857, 1858

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 113, 121, 161

Law Review Articles:
Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002
Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002
Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002
Fernandez. The need for the expansion of military reservists' rights in furtherance of the total force policy: a comparison of the USERRA and ADA. 14 St Thomas L Rev 859, Summer 2002

1. Generally
2. Purpose
3. Relationship with state laws
4. Terms and conditions of loan
5. Grounds for denial of guaranty
6. Liability on default

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Administrator [now Secretary] of Veterans Affairs, by simply guaranteeing loan, does not also warrant homeowner's house. Potnick v United States (1973, ND Miss) 356 F Supp 395

2. Purpose

Congress intended guaranty provisions of Servicemen's Readjustment Act of 1944 (predecessor to 38 USCS §§ 3701 et seq.), 58 Stat 284, as amended, to operate as substantial equivalent of down payment in same amount by veteran on purchase price, in order to induce prospective mortgagee-creditors to provide 100 per cent financing for veteran's home. United States v Shimer (1961) 367 US 374, 6 L Ed 2d 908, 81 S Ct 1554

3. Relationship with state laws

State law releasing veteran from liability to mortgagee when mortgagee fails to follow state procedures for securing deficiency judgment is inapplicable to prevent United States from recovering from veteran amounts paid under guaranty, where Veterans' Administration [now Department of Veterans Affairs] regulation provides that such payments shall constitute debt owing to United States by veteran; regulations providing that Administrator [now Secretary] may specify, in advance of foreclosure sale, minimum amount which shall be credited on mortgage debt, which gives foreclosing mortgagee who purchases property at foreclosure sale option of selling property to Veterans Administration [now Department] for specified amount, constitute valid exercise of rulemaking authority given to Administrator [now Secretary] and operate to displace state statute governing mortgagee's purchase at foreclosure sale. United States v Shimer (1961) 367 US 374, 6 L Ed 2d 908, 81 S Ct 1554

VA's lending program does not preempt established, nondiscriminatory state law, where loan is considered to be first lien, since properties acquired under program remain subject to state power to tax. United States v Marion County (1993, MD Fla) 826 F Supp 1400, 7 FLW Fed D 110

Hail insurance premiums provided for by state statute were in fact taxes, but under applicable regulation did not preclude Administrator [now Secretary] of Veterans Affairs from approving application for loan guaranty despite provisions giving state first lien on property. 1945 ADVA 627

4. Terms and conditions of loan

Bank which accepts guaranty of its loan by Veterans Administration [now Department of Veterans Affairs] cannot urge invalidity of Administration's [now Department's] regulation, since 38 USCS § 1803 [now 38 USCS § 3703] makes terms and conditions of loan subject to such regulations. Mt. Vernon Co-op. Bank v Gleason (1966, DC Mass) 250 F Supp 952, affd (1966, CA1 Mass) 367 F.2d 289

Loan, for which ultimate maturity is more than 5 years from date veteran acquires property or becomes liable on indebtedness, is not eligible for guaranty under Servicemen's Readjustment Act of 1944 (38 USCS §§ 1801 et seq. [now 38 USCS §§ 3701 et seq.]) as amortized loan if language of note or other evidence of indebtedness requires repayment in installments which are not approximately equal throughout remaining life of loan, including ultimate maturity date thereof, or are not sufficient to pay entire amount of loan. 1945 ADVA 631

5. Grounds for denial of guaranty

Application for loan guaranty is not to be denied because veteran provides security to lender consisting of property not subject of purchase with loan proceeds. 1945 ADVA 621

Application for guaranty under provisions of Servicemen's Readjustment Act of 1944 (38 USCS §§ 1801 et seq. [now 38 USCS § 3701]), is not to be denied because indebtedness is not evidenced by instrument separate from that creating encumbrance; also, it is immaterial whether instrument submitted is negotiable since it is assignable, and assignability is sufficient to meet requirements of regulations with respect to exercising certain options when claim is made. 1945 ADVA 623

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6. Liability on default

Under Veterans Administration [now Department of Veterans Affairs] home loan guaranty program, agency is not obligated to take foreclosure-avoidance measures nor does such duty arise from statements promulgated through information circulars and booklets provided by agency to advise veterans and lenders of procedures. Rank v Nimmo (1982, CA9 Cal) 677 F.2d 692, cert den (1982) 459 US 907, 74 L Ed 2d 168, 103 S Ct 210

When default occurs, liability on guaranty or on insurance of loan made to eligible veteran and to one or more ineligible borrowers is determined as if obligation were several and amount thereof for which veteran assumed liability were only his proportionate part of entire debt, notwithstanding that in fact it is joint and several obligation as between debtors and creditors. 1947 ADVA 757

§ 3704. Restrictions on loans

(a) No loan for the purchase or construction of residential property shall be financed through the assistance of this chapter [38 USCS §§ 3701 et seq.] unless the property meets or exceeds minimum requirements for planning, construction, and general acceptability prescribed by the Secretary; however, this subsection shall not apply to a loan for the purchase of residential property on which construction is fully completed more than one year before such loan is made.

(b) Subject to notice and opportunity for a hearing, the Secretary may refuse to appraise any dwelling or housing project owned, sponsored, or to be constructed by any person identified with housing previously sold to veterans under this chapter [38 USCS §§ 3701 et seq.] as to which substantial deficiencies have been discovered, or as to which there has been a failure or indicated inability to discharge contractual liabilities to veterans, or as to which it is ascertained that the type of contract of sale or the methods or practices pursued in relation to the marketing of such properties were unfair or unduly prejudicial to veteran purchasers. The Secretary may also refuse to appraise any dwelling or housing project owned, sponsored, or to be constructed by any person refused the benefits of participation under the National Housing Act pursuant to a determination of the Secretary of Housing and Urban Development.

(c) (1) Except as provided in paragraph (2) of this subsection, no loan for the purchase or construction of residential property shall be financed through the assistance of this chapter [38 USCS §§ 3701 et seq.] unless the veteran applicant, at the time that the veteran applies for the loan, and also at the time that the loan is closed, certifies in such form as the Secretary may require, that the veteran intends to occupy the property as the veteran's home. Except as provided in paragraph (2) of this subsection, no loan for the repair, alteration, or improvement of residential property shall be financed through the assistance of the provisions of this chapter [38 USCS §§ 3701 et seq.] unless the veteran applicant, at the time that the veteran applies to the lender for the loan, and also at the time that the loan is closed, certifies, in such form as may be required by the Secretary, that the veteran occupies the property as the veteran's home. Notwithstanding the foregoing provisions of this subsection, in the case of a loan automatically guaranteed under this chapter [38 USCS §§ 3701 et seq.], the veteran shall be required to make the certification only at the time the loan is closed. For the purposes of this chapter [38 USCS §§ 3701 et seq.] the requirement that the veteran recipient of a guaranteed or direct home loan must occupy or intend to occupy the property as the veteran's home means that the
veteran as of the date of the veteran's certification actually lives in the property personally as the veteran's residence or actually intends upon completion of the loan and acquisition of the dwelling unit to move into the property personally within a reasonable time and to utilize such property as the veteran's residence. Notwithstanding the foregoing requirements of this subsection, the provisions for certification by the veteran at the time the veteran applies for the loan and at the time the loan is closed shall be considered to be satisfied if the Secretary finds that (1) in the case of a loan for repair, alteration, or improvement the veteran in fact did occupy the property at such times, or (2) in the case of a loan for construction or purchase the veteran intended to occupy the property as the veteran's home at such times and the veteran did in fact so occupy it when, or within a reasonable time after, the loan was closed.

(2) In any case in which a veteran is in active duty status as a member of the Armed Forces and is unable to occupy a property because of such status, the occupancy requirements of--

(A) paragraph (1) of this subsection;
(B) paragraphs (1) through (5) and paragraph (7) of section 3710(a) of this title [38 USCS § 3710(a)];
(C) section 3712(a)(5)(A)(i) of this title [38 USCS § 3712(a)(5)(A)(i)]; and
(D) section 3712(e)(5) of this title [38 USCS § 3712(e)(5)];

shall be considered to be satisfied if the spouse of the veteran occupies the property as the spouse's home and the spouse makes the certification required by paragraph (1) of this subsection.

(d) Subject to notice and opportunity for a hearing, whenever the Secretary finds with respect to guaranteed or insured loans that any lender or holder has failed to maintain adequate loan accounting records, or to demonstrate proper ability to service loans adequately or to exercise proper credit judgment or has willfully or negligently engaged in practices otherwise detrimental to the interest of veterans or of the Government, the Secretary may refuse either temporarily or permanently to guarantee or insure any loans made by such lender or holder and may bar such lender or holder from acquiring loans guaranteed or insured under this chapter [38 USCS §§ 3701 et seq.]; however, the Secretary shall not refuse to pay a guaranty or insurance claim on loans theretofore entered into in good faith between a veteran and such lender. The Secretary may also refuse either temporarily or permanently to guarantee or insure any loans made by a lender or holder refused the benefits of participation under the National Housing Act pursuant to a determination of the Secretary of Housing and Urban Development.

(e) Any housing loan which is financed through the assistance of this chapter and to which section 3714 of this chapter [38 USCS § 3714] applies shall include a provision that the loan is immediately due and payable upon transfer of the property securing such loan to any transferee unless the acceptability of the assumption of the loan is established pursuant to such section 3714.

(f) A loan for the purchase or construction of new residential property, the construction of which began after the energy efficiency standards under section 109 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12709), as amended by section 101(c) of the Energy Policy Act of 1992, take effect, may not be financed through
the assistance of this chapter unless the new residential property is constructed in compliance with such standards.

References in text:

"The National Housing Act", referred to in subsecs. (b) and (d), is Act June 27, 1934, ch 847, 48 Stat. 1246, as amended, which is generally classified to 12 USCS §§ 1701 et seq. For full classification of this Act, consult USCS Tables volumes.

Amendments:

1959. Act June 30, 1959, in subsec. (b), inserted "The Administrator may also refuse to appraise any dwelling or housing project owned, sponsored, or to be constructed by any person refused the benefits of participation under the National Housing Act pursuant to a determination of the Federal Housing Commissioner under section 512 of that Act.", and in subsec. (d), inserted "The Administrator may also refuse either temporarily or permanently to guarantee or insure any loans made by a lender or holder refused the benefits of participation under the National Housing Act pursuant to a determination of the Federal Housing Commissioner under section 512 of that Act.".

1960. Act July 14, 1960, in subsec. (c), inserted "Notwithstanding the foregoing requirements of this subsection, the provisions for certification by the veteran at the time he applies for the loan and at the time the loan is closed shall be considered to be satisfied if the Administrator finds that (1) in the case of a loan for repair, alteration, or improvement the veteran in fact did occupy the property at such times, or (2) in the case of a loan for construction or purchase the veteran intended to occupy the property as his home at such times and he did in fact so occupy it when, or within a reasonable time after, the loan was closed.".


1967. Act May 25, 1967, in subsecs. (b), (d) and (e), substituted "Secretary of Housing and Urban Development" for "Federal Housing Commissioner".

1970. Act Oct. 23, 1970, in subsec. (b), substituted "Subject to notice and opportunity for a hearing, the" for "The"; and in subsec. (d), substituted "Subject to notice and opportunity for a hearing, whenever" for "Whenever".

1974. Act Dec. 31, 1974 (effective 12/31/74, as provided by § 10 of such Act, which appears as 38 USCS § 3702 note), in subsec. (b), deleted "under section 512 of that Act" following "Urban Development"; in subsec. (c), inserted "Notwithstanding the foregoing provisions of this subsection, in the case of a loan automatically guaranteed under this chapter, the veteran shall be required to make the certification only at the time the loan is closed."; and in subsec. (d), deleted "under section 512 of that Act" following "Urban Development".

1976. Act June 30, 1976 (effective 6/30/76, as provided by § 9(a) of such Act, which appears as 38 USCS § 3701 note), in subsec. (c), substituted "the veteran" for "he" preceding "applies" wherever appearing and preceding "intends", "occupies", and "did in fact", and substituted "the veteran's" for "his" wherever appearing; and in subsec. (d), substituted "the Administrator" for "he" preceding "may refuse".


1987. Act Dec. 21, 1987 (applicable as provided by § 8(c) of such Act, which appears as a note to this section), in subsec. (c), substituted "(1) Except as provided in paragraph (2) of this subsection, no" for "No", substituted "Except as provided in paragraph (2) of this subsection, no loan" for "No loan", and added para. (2).

Such Act further added subsec. (f).
1988. Act May 20, 1988, in subsec. (c)(2), in subparas. (C) and (D), substituted "section 1812" for "section 1819"; and in subsec. (f), substituted "section 1814" for "1817A" wherever appearing.

1989. Act Dec. 18, 1989, in subsec. (a), substituted "Secretary" for "Administrator"; and in subsecs. (b), (c)(1), and (d), substituted "Secretary" for "Administrator", wherever appearing.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1804, as 38 USCS § 3704, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


1994. Act Nov. 2, 1994, deleted subsec. (e), which read: "(e) No loan for the purchase or construction of new residential property (other than property served by a water and sewerage system approved by the Secretary of Housing and Urban Development pursuant to title X of the National Housing Act (12 U.S.C. 1749aa et seq.)) shall be financed through the assistance of this chapter, except pursuant to a commitment made prior to August 10, 1965, if such property is not served by a public or adequate community water and sewerage system and is located in an area where the appropriate local officials certify that the establishment of such systems is economically feasible. For purposes of this subsection, the economic feasibility of establishing public or adequate community water and sewerage systems shall be determined without regard to whether such establishment is authorized by law or is subject to approval by one or more local governments or public bodies."; and redesignated subsecs. (f) and (g) as subsecs. (e) and (f), respectively.

Other provisions:
Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Application of amendments made by Act Dec. 21, 1987. Act Dec. 21, 1987, P. L. 100-198, § 8(c), 101 Stat. 1320, provides: "The amendments made by this section [amending subsec. (c) of this section and 38 USCS §§ 3710(a) and 3719(a)(5) and (e)(5)] shall apply with respect to loans made more than 30 days after the date of the enactment of this Act."

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Loan guaranty, 38 CFR Part 36

Cross References
This section is referred to in 38 USCS §§ 3706, 3710, 3711, 3712, 3762

Research Guide
Federal Procedure:
4B Fed Proc L Ed, Banking and Financing §§ 8:1842, 1848, 1849, 1851, 1857, 1858, 1862, 1863

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 113, 115, 161

Regulations issued by Administrator [now Secretary] within his authority have force and effect of law. Gowanda Co-op. Sav. & Loan Asso. v Gray (1950, CA2 NY) 183 F.2d 367

In implementing 38 USCS § 1804(d) [now 38 USCS § 3704(d)], VA Pamphlet 26-7, Department of Veterans' Benefits [now Department of Veterans Affairs] Circular and internal VA manuals do not require that Veterans' Administration [now Department] and private lenders

§ 3705. Warranties

(a) The Secretary shall require that in connection with any property upon which there is located a dwelling designed principally for not more than a four-family residence and which is appraised for guaranty or insurance before the beginning of construction, the seller or builder, and such other person as may be required by the Secretary to become warrantor, shall deliver to the purchaser or owner of such property a warranty that the dwelling is constructed in substantial conformity with the plans and specifications (including any amendments thereof, or changes and variations therein, which have been approved in writing by the Secretary) on which the Secretary based the Secretary’s valuation of the dwelling. The Secretary shall deliver to the builder, seller, or other warrantor the Secretary’s written approval (which shall be conclusive evidence of such appraisal) of any amendment of, or change or variation in, such plans and specifications which the Secretary deems to be a substantial amendment thereof, or change or variation therein, and shall file a copy of such written approval with such plans and specifications. Such warranty shall apply only with respect to such instances of substantial nonconformity to such approved plans and specifications (including any amendments thereof, or changes or variations therein, which have been approved in writing, as provided in this section, by the Secretary) as to which the purchaser or home owner has given written notice to the warrantor within one year from the date of conveyance of title to, or initial occupancy of, the dwelling, whichever first occurs. Such warranty shall be in addition to, and not in derogation of, all other rights and privileges which such purchaser or owner may have under any other law or instrument. The provisions of this section shall apply to any such property covered by a mortgage insured or guaranteed by the Secretary on and after October 1, 1954, unless such mortgage is insured or guaranteed pursuant to a commitment therefor made before October 1, 1954.

(b) The Secretary shall permit copies of the plans and specifications (including written approvals of any amendments thereof, or changes or variations therein, as provided in this section) for dwellings in connection with which warranties are required by subsection (a) of this section to be made available in their appropriate local offices for inspection or for copying by any purchaser, home owner, or warrantor during such hours or periods of time as the Secretary may determine to be reasonable.

Amendments:

1976. Act June 30, 1976 (effective 6/30/76, as provided by § 9(a) of such Act, which appears as 38 USCS § 3701 note), in subsec. (a), substituted "the Administrator's" for "his" wherever appearing.


1991. Act June 13, 1991, as amended by Act Nov. 2, 1994 (effective as of 6/13/91, and as if included in the enactment of Public Law 102-54, as provided by § 1202(a) of such Act), in subsec. (a), substituted "appraised" for "approved" and "appraisal)" for "approval)".
§ 3706. Escrow of deposits and downpayments

(a) Any deposit or downpayment made by an eligible veteran in connection with the purchase of proposed or newly constructed and previously unoccupied residential property in a project on which the Secretary has issued a Certificate of Reasonable Value, which purchase is to be financed with a loan guaranteed, insured, or made under the provisions of this chapter [38 USCS §§ 3701 et seq.], shall be deposited forthwith by the seller, or the agent of the seller, receiving such deposit or payment, in a trust account to safeguard such deposit or payment from the claims of creditors of the seller. The failure of the seller or the seller’s agent to create such trust account and to maintain it until the deposit or payment has been disbursed for the benefit of the veteran purchaser at settlement or, if the transaction does not materialize, is otherwise disposed of in accordance with the terms of the contract, may constitute an unfair marketing practice within the meaning of section 3704(b) of this title [38 USCS § 3704(b)].

(b) If an eligible veteran contracts for the construction of a property in a project on which the Secretary has issued a Certificate of Reasonable Value and such construction is to be financed with the assistance of a construction loan to be guaranteed, insured, or made under the provisions of this chapter [38 USCS §§ 3701 et seq.], it may be considered an unfair marketing practice under section 3704(b) of this title [38 USCS § 3704(b)] if any deposit or downpayment of the veteran is not maintained in a special trust account by the recipient until it is either (1) applied on behalf of the veteran to the cost of the land or to the cost of construction or (2), if the transaction does not materialize, is otherwise disposed of in accordance with the terms of the contract.
§ 3707. Adjustable rate mortgages

(a) The Secretary shall carry out a demonstration project under this section during fiscal years 1993 through 2008 for the purpose of guaranteeing loans in a manner similar to the manner in which the Secretary of Housing and Urban Development insures adjustable rate mortgages under section 251 of the National Housing Act [12 USCS § 1715z-16].

(b) Interest rate adjustment provisions of a mortgage guaranteed under this section shall--

(1) correspond to a specified national interest rate index approved by the Secretary, information on which is readily accessible to mortgagors from generally available published sources;

(2) be made by adjusting the monthly payment on an annual basis;

(3) be limited, with respect to any single annual interest rate adjustment, to a maximum increase or decrease of 1 percentage point; and

(4) be limited, over the term of the mortgage, to a maximum increase of 5 percentage points above the initial contract interest rate.

(c) The Secretary shall promulgate underwriting standards for loans guaranteed under this section, taking into account--

(1) the status of the interest rate index referred to in subsection (b)(1) and available at the time an underwriting decision is made, regardless of the actual initial rate offered by the lender;

(2) the maximum and likely amounts of increases in mortgage payments that the loans would require;

(3) the underwriting standards applicable to adjustable rate mortgages insured under title II of the National Housing Act; and
(4) such other factors as the Secretary finds appropriate.

d) The Secretary shall require that the mortgagee make available to the mortgagor, at the
time of loan application, a written explanation of the features of the adjustable rate
mortgage, including a hypothetical payment schedule that displays the maximum
potential increases in monthly payments to the mortgagor over the first five years of the
mortgage term.

References in text:

"Title II of the National Housing Act", referred to in this section, is Title II of Act June 27, 1934,
ch 847, 48 Stat. 1247, which appears generally as 12 USCS § 1707 et seq. For full
classification of such Title, consult USCS Tables volumes.

Explanatory notes:

L. 97-72, Title III, § 303(d), 95 Stat. 1060) was repealed by Act May 20, 1988, P. L. 100-322,
Title IV, Part B, § 415(a)(4), 102 Stat. 550. Such section provided for service after July 25,
1947, and prior to June 27, 1950. (The bracketed section number "3707" was inserted to
preserve numerical continuity following general renumbering of Title 38, USCS, by Act Aug. 6,

Amendments:

the loan was closed" following "annual basis".

for "during fiscal years 1993, 1994, and 1995".

Other provisions:

L. 102-547, § 3(b), 106 Stat. 3635, which formerly appeared as a note to this section, was
related to a report to the Committees on Veterans' Affairs of the Senate and House of
Representatives by the Secretary of Veterans Affairs dealing with veterans receiving
mortgage loans guaranteed by the Secretary.

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3
Department of Veterans Affairs-Loan guaranty, 38 CFR Part 36

Research Guide

Federal Procedure:
4B Fed Proc L Ed, Banking and Financing §§ 8:1848, 1849, 1851, 1857, 1858

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 115, 161

§ 3707A. Hybrid adjustable rate mortgages

(a) The Secretary shall carry out a demonstration project under this section during fiscal
years 2004 through 2008 for the purpose of guaranteeing loans in a manner similar to the
manner in which the Secretary of Housing and Urban Development insures adjustable
rate mortgages under section 251 of the National Housing Act [12 USCS § 1715z-16] in accordance with the provisions of this section with respect to hybrid adjustable rate mortgages described in subsection (b).

(b) Adjustable rate mortgages that are guaranteed under this section shall be adjustable rate mortgages (commonly referred to as "hybrid adjustable rate mortgages") having interest rate adjustment provisions that--

1. specify an initial rate of interest that is fixed for a period of not less than the first three years of the mortgage term;
2. provide for an initial adjustment in the rate of interest by the mortgagee at the end of the period described in paragraph (1); and
3. comply in such initial adjustment, and any subsequent adjustment, with subsection (c).

(c) Interest rate adjustment provisions of a mortgage guaranteed under this section shall--

1. correspond to a specified national interest rate index approved by the Secretary, information on which is readily accessible to mortgagors from generally available published sources;
2. be made by adjusting the monthly payment on an annual basis;
3. in the case of the initial contract interest rate adjustment--
   A. if the initial contract interest rate remained fixed for less than 5 years, be limited to a maximum increase or decrease of 1 percentage point; or
   B. if the initial contract interest rate remained fixed for 5 years or more, be limited to a maximum increase or decrease of such percentage point or points as the Secretary may prescribe;
4. in the case of any single annual interest rate adjustment after the initial contract interest rate adjustment, be limited to a maximum increase or decrease of such percentage points as the Secretary may prescribe; and
5. be limited, over the term of the mortgage, to a maximum increase of such number of percentage points as the Secretary shall prescribe for purposes of this section.

(d) The Secretary shall promulgate underwriting standards for loans guaranteed under this section, taking into account--

1. the status of the interest rate index referred to in subsection (c)(1) and available at the time an underwriting decision is made, regardless of the actual initial rate offered by the lender;
2. the maximum and likely amounts of increases in mortgage payments that the loans would require;
3. the underwriting standards applicable to adjustable rate mortgages insured under title II of the National Housing Act [12 USCS §§ 1707 et seq.]; and
4. such other factors as the Secretary finds appropriate.

(e) The Secretary shall require that the mortgagee make available to the mortgagor, at the time of loan application, a written explanation of the features of the adjustable rate mortgage, including a hypothetical payment schedule that displays the maximum potential increases in monthly payments to the mortgagor over the first five years of the mortgage term.
Amendments:

2004. Act Dec. 10, 2004, in subsec. (a), substituted "during fiscal years 2004 through 2008" for "during fiscal years 2004 and 2005"; and, in subsec. (c), redesignated para. (4) as para. (5), substituted paras. (3) and (4) for former para. (3), which read: "(3) be limited, with respect to any single annual interest rate adjustment, to a maximum increase or decrease of 1 percentage point; and", and, in para. (5) as redesignated, substituted "such number of percentage points as the Secretary shall prescribe for purposes of this section." for "5 percentage points above the initial contract interest rate."

2006. Act June 15, 2006, in subsec. (c)(4), substituted "such percentage points as the Secretary may prescribe" for "1 percentage point".

Other provisions:

Dec. 10, 2004 amendments; no effect on guarantee of loans under hybrid adjustable rate mortgage demonstration project. Act Dec. 10, 2004, P. L. 108-454, Title IV, § 405(c), 118 Stat. 3616, provides: "The amendments made by this section [amending this section] shall not be construed to affect the force or validity of any guarantee of a loan made by the Secretary of Veterans Affairs under the demonstration project for the guarantee of hybrid adjustable rate mortgages under section 3707A of title 38, United States Code, as in effect on the day before the date of the enactment of this Act."

§ 3708. Authority to buy down interest rates: pilot program

(a) In order to enable the purchase of housing in areas where the supply of suitable military housing is inadequate, the Secretary may conduct a pilot program under which the Secretary may make periodic or lump sum assistance payments on behalf of an eligible veteran for the purpose of buying down the interest rate on a loan to that veteran that is guaranteed under this chapter [38 USCS §§ 3701 et seq.] for a purpose described in paragraph (1), (6), or (10) of section 3710(a) of this title [38 USCS § 3710(a)].

(b) An individual is an eligible veteran for the purposes of this section if--

(1) the individual is a veteran, as defined in section 3701(b)(4) of this title [38 USCS § 3701(b)(4)];

(2) the individual submits an application for a loan guaranteed under this chapter [38 USCS §§ 3701 et seq.] within one year of an assignment of the individual to duty at a military installation in the United States designated by the Secretary of Defense as a housing shortage area;

(3) at the time the loan referred to in subsection (a) is made, the individual is an enlisted member, warrant officer, or an officer (other than a warrant officer) at a pay grade of O-3 or below;

(4) the individual has not previously used any of the individual's entitlement to housing loan benefits under this chapter [38 USCS §§ 3701 et seq.]; and

(5) the individual receives comprehensive prepurchase counseling from the Secretary (or the designee of the Secretary) before making application for a loan guaranteed under this chapter [38 USCS §§ 3701 et seq.].

(c) Loans with respect to which the Secretary may exercise the buy down authority under subsection (a) shall--

(1) provide for a buy down period of not more than three years in duration;

(2) specify the maximum and likely amounts of increases in mortgage payments that the loans would require; and
(3) be subject to such other terms and conditions as the Secretary may prescribe by regulation.

(d) The Secretary shall promulgate underwriting standards for loans for which the interest rate assistance payments may be made under subsection (a). Such standards shall be based on the interest rate for the second year of the loan.

(e) The Secretary or lender shall provide comprehensive prepurchase counseling to eligible veterans explaining the features of interest rate buy downs under subsection (a), including a hypothetical payment schedule that displays the increases in monthly payments to the mortgagor over the first five years of the mortgage term. For the purposes of this subsection, the Secretary may assign personnel to military installations referred to in subsection (b)(2).

(f) There is authorized to be appropriated $3,000,000 annually to carry out this section.

(g) The Secretary may not guarantee a loan under this chapter [38 USCS §§ 3701 et seq.] after September 30, 1998, on which the Secretary is obligated to make payments under this section.

Other provisions:


"(1) Reimbursement for buy down costs. The Secretary of Defense shall reimburse the Secretary of Veterans Affairs for amounts paid by the Secretary of Veterans Affairs to mortgagees under section 3708 of title 38, United States Code, as added by subsection (b).

"(2) Designation of housing shortage areas. For purposes of section 3708 of title 38, United States Code, the Secretary of Defense may designate as a housing shortage area a military installation in the United States at which the Secretary determines there is a shortage of suitable housing to meet the military family needs of members of the Armed Forces and the dependents of such members.

"(3) Report. Not later than March 30, 1998, the Secretary shall submit to Congress a report regarding the effectiveness of the authority provided in section 3708 of title 38, United States Code, in ensuring that members of the Armed Forces and their dependents have access to suitable housing. The report shall include the recommendations of the Secretary regarding whether the authority provided in this subsection should be extended beyond the date specified in paragraph (5).

"(4) Earmark. Of the amount provided in section 2405(a)(11)(B) [unclassified], $10,000,000 for fiscal year 1996 shall be available to carry out this subsection.

"(5) Sunset. This subsection shall not apply with respect to housing loans guaranteed after September 30, 1998, for which assistance payments are paid under section 3708 of title 38, United States Code.".

Research Guide

Federal Procedure:
4B Fed Proc L Ed, Banking and Financing §§ 8:1848, 1849, 1851, 1857, 1858

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 115
§ 3710. Purchase or construction of homes

(a) Except as provided in section 3704(c)(2) of this title [38 USCS § 3704(c)(2)], any loan to a veteran, if made pursuant to the provisions of this chapter [38 USCS §§ 3701 et seq.], is automatically guaranteed if such loan is for one or more of the following purposes:

(1) To purchase or construct a dwelling to be owned and occupied by the veteran as a home.
(2) To purchase a farm on which there is a farm residence to be owned and occupied by the veteran as the veteran's home.
(3) To construct on land owned by the veteran a farm residence to be occupied by the veteran as the veteran's home.
(4) To repair, alter, or improve a farm residence or other dwelling owned by the veteran and occupied by the veteran as the veteran's home.
(5) To refinance existing mortgage loans or other liens which are secured of record on a dwelling or farm residence owned and occupied by the veteran as the veteran's home.
(6) To purchase a one-family residential unit in a condominium housing development or project, if such development or project is approved by the Secretary under criteria which the Secretary shall prescribe in regulations.
(7) To improve a dwelling or farm residence owned by the veteran and occupied by the veteran as the veteran's home through energy efficiency improvements, as provided in subsection (d).
(8) To refinance in accordance with subsection (e) of this section an existing loan guaranteed, insured, or made under this chapter [38 USCS §§ 3701 et seq.].
(9) (A) (i) To purchase a manufactured home to be permanently affixed to a lot that is owned by the veteran.
(ii) To purchase a manufactured home and a lot to which the home will be permanently affixed.
(B) (i) To refinance, in accordance with the terms and conditions applicable under the provisions of subsection (e) of this section (other than paragraph (1)(E) of such subsection) to the guaranty of a loan for the purpose specified in clause (8) of this subsection, an existing loan guaranteed, insured, or made under this chapter.
chapter [38 USCS §§ 3701 et seq.] that is secured by a manufactured home permanently affixed to a lot that is owned by the veteran.

(ii) To refinance, in accordance with section 3712(a)(5) of this title [38 USCS § 3712(a)(5)], an existing loan that was made for the purchase of, and that is secured by, a manufactured home that is permanently affixed to a lot and to purchase the lot to which the manufactured home is affixed.

(10) To purchase a dwelling to be owned and occupied by the veteran as a home and make energy efficiency improvements, as provided in subsection (d).

(11) To refinance in accordance with subsection (e) an existing loan guaranteed, insured, or made under this chapter [38 USCS §§ 3701 et seq.], and to improve the dwelling securing such loan through energy efficiency improvements, as provided in subsection (d).

If there is an indebtedness which is secured by a lien against land owned by the veteran, the proceeds of a loan guaranteed under this section or made under section 3711 of this title [38 USCS § 3711] for construction of a dwelling or farm residence on such land may be used also to liquidate such lien, but only if the reasonable value of the land is equal to or greater than the amount of the lien.

(b) No loan may be guaranteed under this section or made under section 3711 of this title [38 USCS § 3711] unless--

(1) the proceeds of such loan will be used to pay for the property purchased, constructed, or improved;

(2) the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and expenses;

(3) the veteran is a satisfactory credit risk, as determined in accordance with the credit underwriting standards established pursuant to subsection (g) of this section;

(4) the nature and condition of the property is such as to be suitable for dwelling purposes;

(5) except in the case of a loan described in clause (7) or (8) of this subsection, the loan to be paid by the veteran for such property or for the cost of construction, repairs, or alterations, does not exceed the reasonable value thereof as determined pursuant to section 3731 of this title [38 USCS § 3731]; and,

(6) if the loan is for repair, alteration, or improvement of property, such repair, alteration, or improvement substantially protects or improves the basic livability or utility of such property;

(7) in the case of a loan (other than a loan made for a purpose specified in subsection (a)(8) of this section) that is made to refinance--

(A) a construction loan, 

(B) an installment land sales contract, or

(C) a loan assumed by the veteran that provides for a lower interest rate than the loan being refinanced, the amount of the loan to be guaranteed or made does not exceed the lesser of--

(i) the reasonable value of the dwelling or farm residence securing the loan, as determined pursuant to section 3731 of this title [38 USCS § 3731]; or
(ii) the sum of the outstanding balance on the loan to be refinanced and the closing costs (including discounts) actually paid by the veteran, as specified by the Secretary in regulations; and

(8) in the case of a loan to refinance a loan (other than a loan or installment sales contract described in clause (7) of this subsection or a loan made for a purpose specified in subsection (a)(8) of this section), the amount of the loan to be guaranteed or made does not exceed 90 percent of the reasonable value of the dwelling or farm residence securing the loan, as determined pursuant to section 3731 of this title [38 USCS § 3731].

(c) [Repealed]

(d) (1) The Secretary shall carry out a program to demonstrate the feasibility of guaranteeing loans for the acquisition of an existing dwelling and the cost of making energy efficiency improvements to the dwelling or for energy efficiency improvements to a dwelling owned and occupied by a veteran. A loan may be guaranteed under this subsection only if it meets the requirements of this chapter [38 USCS §§ 3701 et seq.], except as those requirements are modified by this subsection.

(2) The cost of energy efficiency measures that may be financed by a loan guaranteed under this section may not exceed the greater of--

(A) the cost of the energy efficiency improvements, up to $3,000; or

(B) $6,000, if the increase in the monthly payment for principal and interest does not exceed the likely reduction in monthly utility costs resulting from the energy efficiency improvements.

(3) Notwithstanding the provisions of section 3703(a)(1)(A) of this title [38 USCS § 3703(a)(1)(A)], any loan guaranteed under this subsection shall be guaranteed in an amount equal to the sum of--

(A) the guaranty that would be provided under those provisions for the dwelling without the energy efficiency improvements; and

(B) an amount that bears the same relation to the cost of the energy efficiency improvements as the guaranty referred to in subparagraph (A) bears to the amount of the loan minus the cost of such improvements.

(4) The amount of the veteran's entitlement, calculated in accordance with section 3703(a)(1)(B) of this title [38 USCS § 3703(a)(1)(B)], shall not be affected by the amount of the guaranty referred to in paragraph (3)(B).

(5) The Secretary shall take appropriate actions to notify eligible veterans, participating lenders, and interested realtors of the availability of loan guarantees under this subsection and the procedures and requirements that apply to the obtaining of such guarantees.

(6) For the purposes of this subsection:

(A) The term "energy efficiency improvement" includes a solar heating system, a solar heating and cooling system, or a combined solar heating and cooling system, and the application of a residential energy conservation measure.

(B) The term "solar heating" has the meaning given such term in section 3(1) of the Solar Heating and Cooling Demonstration Act of 1974 (42 U.S.C. 5502(1)) and, in addition, includes a passive system based on conductive, convective, or radiant energy transfer.
(C) The terms "solar heating and cooling" and "combined solar heating and cooling" have the meaning given such terms in section 3(2) of the Solar Heating and Cooling Demonstration Act of 1974 (42 U.S.C. 5502(2)) and, in addition, include a passive system based on conductive, convective, or radiant energy transfer.

(D) The term "passive system" includes window and skylight glazing, thermal floors, walls, and roofs, movable insulation panels (when in conjunction with glazing), portions of a residential structure that serve as solar furnaces so as to add heat to the structure, double-pane window insulation, and such other energy-related components as are determined by the Secretary to enhance the natural transfer of energy for the purpose of heating or heating and cooling a residence.

(E) The term "residential energy conservation measure" means--
(i) caulking and weatherstripping of all exterior doors and windows;
(ii) furnace efficiency modifications limited to--
(I) replacement burners, boilers, or furnaces designed to reduce the firing rate or to achieve a reduction in the amount of fuel consumed as a result of increased combustion efficiency,
(II) devices for modifying flue openings which will increase the efficiency of the heating system, and
(III) electrical or mechanical furnace ignition systems which replace standing gas pilot lights;
(iii) clock thermostats;
(iv) ceiling, attic, wall, and floor insulation;
(v) water heater insulation;
(vi) storm windows and doors;
(vii) heat pumps; and
(viii) such other energy conservation measures as the Secretary may identify for the purposes of this subparagraph.

(e) (1) For a loan to be guaranteed for the purpose specified in subsection (a)(8) or for the purpose specified in subsection (a)(11) of this section--
(A) the interest rate of the loan must be less than the interest rate of the loan being refinanced or, in a case in which the loan is a fixed rate loan and the loan being refinanced is an adjustable rate loan, the loan bears interest at a rate that is agreed upon by the veteran and the mortgagee;
(B) the loan must be secured by the same dwelling or farm residence as was the loan being refinanced;
(C) the amount of the loan may not exceed--
(i) an amount equal to the sum of the balance of the loan being refinanced and such closing costs (including any discount permitted pursuant to section 3703(c)(3)(A) of this title [38 USCS § 3703(c)(3)(A)]) as may be authorized by the Secretary (under regulations which the Secretary shall prescribe) to be included in the loan; or
(ii) in the case of a loan for the purpose specified in subsection (a)(11), an amount equal to the sum of the amount referred to with respect to the loan under clause (i) and the amount specified under subsection (d)(2);
(D) notwithstanding section 3703(a)(1) of this title [38 USCS § 3703(a)(1)], the amount of the guaranty of the loan may not exceed the greater of (i) the original guaranty amount of the loan being refinanced, or (ii) 25 percent of the loan; 
(E) the term of the loan may not exceed the original term of the loan being refinanced by more than 10 years; and 
(F) the veteran must own the dwelling or farm residence securing the loan and--
   (i) must occupy such dwelling or residence as such veteran's home; 
   (ii) must have previously occupied such dwelling or residence as such veteran's home and must certify, in such form as the Secretary shall require, that the veteran has previously so occupied such dwelling or residence; or 
   (iii) in any case in which a veteran is in active duty status as a member of the Armed Forces and is unable to occupy such residence or dwelling as a home because of such status, the spouse of the veteran must occupy, or must have previously occupied, such dwelling or residence as such spouse's home and must certify such occupancy in such form as the Secretary shall require. 

(2) A loan to a veteran may be guaranteed by the Secretary under this chapter [38 USCS §§ 3701 et seq.] for the purpose specified in clause (8) of subsection (a) of this section without regard to the amount of outstanding guaranty entitlement available for use by such veteran, and the amount of such veteran's guaranty entitlement shall not be charged as a result of any guaranty provided for such purpose. For purposes of section 3702(b) of this title [38 USCS § 3702(b)], such loan shall be deemed to have been obtained with the guaranty entitlement used to obtain the loan being refinanced. 

(3) If a veteran is deceased and if such veteran's surviving spouse was a co-obligor under an existing loan guaranteed, insured, or made under this chapter [38 USCS §§ 3701 et seq.], such surviving spouse shall, only for the purpose specified in subsection (a)(8) of this section, be deemed to be a veteran eligible for benefits under this chapter [38 USCS §§ 3701 et seq.].

(f) (1) For a loan to be guaranteed for the purpose specified in subclause (A)(ii) or (B)(ii) of subsection (a)(9) of this section, the purchase of (or the refinancing of a loan secured by) the manufactured home and the lot for that home shall be considered as one loan and must comply with such criteria as may be prescribed by the Secretary in regulations. 

(2) A loan may not be guaranteed for the purposes of subsection (a)(9) of this section unless the manufactured home purchased, upon being permanently affixed to the lot, is considered to be real property under the laws of the State where the lot is located.

(g) (1) For the purposes of this subsection, the term "veteran", when used with respect to a loan guaranteed or to be guaranteed under this chapter [38 USCS §§ 3701 et seq.], includes the veteran's spouse if the spouse is jointly liable with the veteran under the loan. 

(2) For the purpose of determining whether a veteran meets the standards referred to in subsection (b)(3) of this section and section 3712(e)(2) of this title [38 USCS § 3712(e)(2)], the Secretary shall prescribe regulations which establish--
   (A) credit underwriting standards to be used in evaluating loans to be guaranteed under this chapter [38 USCS §§ 3701 et seq.]; and 
   (B) standards to be used by lenders in obtaining credit information and processing loans to be guaranteed under this chapter [38 USCS §§ 3701 et seq.].
(3) In the regulations prescribed under paragraph (2) of this subsection, the Secretary shall establish standards that include--
   (A) debt-to-income ratios to apply in the case of the veteran applying for the loan;
   (B) criteria for evaluating the reliability and stability of the income of the veteran applying for the loan; and
   (C) procedures for ascertaining the monthly income required by the veteran to meet the anticipated loan payment terms.

If the procedures described in clause (C) of this paragraph include standards for evaluating residual income, the Secretary shall, in establishing such standards, give appropriate consideration to State statistics (in States as to which the Secretary determines that such statistics are reliable) pertinent to residual income and the cost of living in the State in question rather than in a larger region.

(4) (A) Any lender making a loan under this chapter [38 USCS §§ 3701 et seq.] shall certify, in such form as the Secretary shall prescribe, that the lender has complied with the credit information and loan processing standards established under paragraph (2)(B) of this subsection, and that, to the best of the lender's knowledge and belief, the loan meets the underwriting standards established under paragraph (2)(A) of this subsection.

   (B) Any lender who knowingly and willfully makes a false certification under subparagraph (A) of this paragraph shall be liable to the United States Government for a civil penalty equal to two times the amount of the Secretary's loss on the loan involved or to another appropriate amount, not to exceed $10,000, whichever is greater. All determinations necessary to carry out this subparagraph shall be made by the Secretary.

(5) Pursuant to regulations prescribed to carry out this paragraph, the Secretary may, in extraordinary situations, waive the application of the credit underwriting standards established under paragraph (2) of this subsection when the Secretary determines, considering the totality of circumstances, that the veteran is a satisfactory credit risk.

Amendments:

1968. Act May 7, 1968, in subsec. (b), substituted new para. (5) for one which read: "the price paid or to be paid by the veteran for such property, or for the cost of construction, repairs, or alterations, does not exceed the reasonable value thereof as determined by the Administrator; and"; and added the concluding matter; and in subsec. (c), substituted "$12,500" for "$7,500".


1974. Act Dec. 31, 1974, § 3(1), (3) (effective 12/31/74, as provided by § 10 of such Act, which appears as 38 USCS § 3702 note), in subsec. (a)(5), deleted "Nothing is this chapter shall preclude a veteran from paying to a lender any discount required by such lender in connection with such refinancing." following "as his home."; and in subsec. (c), substituted "$17,500" for "$12,500".

Act Dec. 31, 1974, § 3(2), (4) (effective 90 days after Dec. 31, 1974, as provided by § 10 of such Act, which appears as 38 USCS § 3702 note), added subsec. (a)(6) and deleted subsec. (d) which read: "(d) Nothing in this chapter shall be deemed to preclude the guaranty of a loan to an eligible veteran to purchase a one-family residential unit to be owned and occupied by him as a home in a condominium housing development or project as to which the Secretary of Housing and Urban Development has issued, under section 234 of the National Housing Act, as amended (12 U.S.C. 1715y), evidence of insurance on at least one loan for the purchase of a one-family unit. The Administrator shall guarantee loans to veterans on
such residential units when such loans meet those requirements of this chapter which he shall, by regulation, determine to be applicable to such loans."

1976. Act June 30, 1976 (effective 6/30/76, as provided by § 9(a) of such Act, which appears as 38 USCS § 3701 note), in subsec. (a), in para. (1), substituted "the veteran" for "him", in para. (2), substituted "the veteran" and "the veteran's" for "him" and "his", respectively, in paras. (3) and (4), substituted "the veteran" for "him" wherever appearing and substituted "the veteran's" for "his", in para. (5), substituted "the veteran" and "the veteran's" for "him" and "his", respectively, and in para. (6), substituted "the Administrator" for "he" preceding "shall prescribe".

1978. Act Oct. 18, 1978, § 104(1) (effective 7/1/79, as provided by § 108(b) of such Act, which appears as 38 USCS § 3702 note), substituted new subsec. (a)(6) for one which read: "(6) To purchase a one-family residential unit in a new condominium housing development or project, or in a structure built and sold as a condominium, provided such development, project or structure is approved by the Administrator under such criteria as he shall prescribe."

Act Oct. 18, 1978, §§ 104(2), (3), 105(a) (effective 10/1/78, as provided by § 108(a) of such Act, which appears as 38 USCS § 3702 note), added subsec. (a)(7); in subsec. (c), substituted "$25,000" for "$17,000"; and added subsec. (d).

1980. Act Oct. 7, 1980, § 401 (effective 10/7/80, as provided by § 601(d) of such Act, which appears as 38 USCS § 1114 note), added subsec. (a)(8) and (e).


1986. Act Oct. 28, 1986, in subsec. (b)(3), inserted "", as determined in accordance with the credit underwriting standards established pursuant to subsection (g) of this section", and added subsec. (g).

1987. Act Dec. 21, 1987 (applicable as provided by § 3(d) of such Act, which appears as 38 USCS § 3703 note) deleted subsec. (c), which read: "(c) The amount of guaranty entitlement available to a veteran under this section shall not be more than $27,500 less such entitlement as may have been used previously under this section and other sections of this chapter.".

Such Act further, in subsec. (b), in para. (5), substituted "pursuant to section 1831 of this title" for "by the Administrator", and deleted the concluding matter of subsec. (b), which read: "After the reasonable value of any property, construction, repairs, or alterations is determined under paragraph (5), the Administrator shall, as soon as possible thereafter, notify the veteran concerned of such determination.".

Such Act further (applicable as provided by § 7(d) of such Act, which appears as a note to this section), in subsec. (e)(1), in subpara. (B), deleted "and such dwelling or residence must be owned and occupied by the veteran as such veteran's home" following "refinanced", in subpara. (D), deleted "and" following the semicolon, in subpara. (E), substituted "by more than 10 years; and" for the concluding period, and added subpara. (F); and added subsec. (h).

Such Act further (applicable as provided by § 8(c) of such Act, which appears as 38 USCS § 1804 note), in subsec. (a), substituted "Except as provided in section 1804(c)(2) of this title, any" for "Any".

Such Act further, in subsec. (g)(3), added the concluding matter.

1989. Act Dec. 18, 1989, in subsec. (b), in para. (5), inserted "except in the case of a loan described in clause (7) or (8) of this subsection," and deleted "and," following "title;", in para. (6), substituted a semicolon for the concluding period, and added paras. (7) and (8); and repealed subsec. (h) which read: "The amount of a loan guaranteed for the purpose specified in subsection (a)(5) of this section may not exceed the amount equal to 90 percent of the appraised value of the dwelling or farm residence which will secure the loan, as determined by the Administrator.".

Such Act further, substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing, in the entire section.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1810, as 38 USCS § 3710, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and, in subsec. (e)(2), substituted "Secretary" for "Veterans' Administration".

1992. Act Oct. 28, 1992, in subsec. (a), substituted para. (7) for one which read: "To improve a dwelling or farm residence owned by the veteran and occupied by the veteran as the veteran's home through the installation of a solar heating system, a solar heating and cooling system, or a combined solar heating and cooling system or through the application of a residential energy conservation measure." and added para. (10); substituted subsec. (d) for one which read:

"(d) For the purposes of subsection (a)(7) of this section:

"(1) The term 'solar heating' has the meaning given such term in section 3(1) of the Solar Heating and Cooling Demonstration Act of 1974 (42 U.S.C. 5502(1)) and, in addition, includes a passive system based on conductive, convective, or radiant energy transfer.

"(2) The terms 'solar heating and cooling' and 'combined solar heating and cooling' have the meaning given such terms in section 3(2) of the Solar Heating and Cooling Demonstration Act of 1974 (42 U.S.C. 5502(2)) and, in addition, include a passive system based on conductive, convective, or radiant energy transfer.

"(3) The term 'passive system' includes window and skylight glazing, thermal floors, walls, and roofs, movable insulation panels (when in conjunction with glazing), portions of a residential structure that serve as solar furnaces so as to add heat to the structure, double-pane window insulation, and such other energy-related components as are determined by the Secretary to enhance the natural transfer of energy for the purpose of heating or heating and cooling a residence.

"(4) The term 'residential energy conservation measure' means--

"(A) caulkling and weatherstripping of all exterior doors and windows;

"(B) furnace efficiency modifications limited to--

"(i) replacement burners, boilers, or furnaces designed to reduce the firing rate or to achieve a reduction in the amount of fuel consumed as a result of increased combustion efficiency,

"(ii) devices for modifying flue openings which will increase the efficiency of the heating system, and

"(iii) electrical or mechanical furnace ignition systems which replace standing gas pilot lights;

"(C) clock thermostats;

"(D) ceiling, attic, wall, and floor insulation;
“(E) water heater insulation;

“(F) storm windows and doors;

“(G) heat pumps; and

“(H) such other energy conservation measures as the Secretary may identify for the purposes of this clause.”;

and, in subsec. (e)(1), substituted subpara. (D) for one which read: “the amount of the guaranty of the loan may not exceed the original guaranty amount of the loan being refinanced.”.

1994. Act Nov. 2, 1994, in subsec. (a), added para. (11); and, in subsec. (e)(1), in the introductory matter, inserted "or for the purpose specified in subsection (a)(11)", in subpara. (A), inserted "or, in a case in which the loan is a fixed rate loan and the loan being refinanced is an adjustable rate loan, the loan bears interest at a rate that is agreed upon by the veteran and the mortgagee", and, in subpara. (C), substituted "may not exceed--

(i) an amount equal to the sum of the balance of the loan being refinanced and such closing costs (including any discount permitted pursuant to section 3703(c)(3)(A) of this title) as may be authorized by the Secretary (under regulations which the Secretary shall prescribe) to be included in the loan; or

(ii) in the case of a loan for the purpose specified in subsection (a)(11), an amount equal to the sum of the amount referred to with respect to the loan under clause (i) and the amount specified under subsection (d)(2);"

for "may not exceed an amount equal to the sum of the balance of the loan being refinanced and such closing costs (including any discount permitted pursuant to section 3703(c)(3)(A) of this title) as may be authorized by the Secretary, under regulations which the Secretary shall prescribe, to be included in such loan;".


Other provisions:


“(1) The amendments made by subsections (a) [amending subsec. (e) of this section] and (b) [amending 38 USCS § 3719(a)(4)(A) of this section] shall apply to loans made more than 30 days after the date of the enactment of this Act.

“(2) The amendment made by subsection (c) of this section [adding subsec. (h) of this section] shall apply to loans for which commitments are made more than 60 days after the date of the enactment of this Act.”.

Repeal of provision relating to reports concerning mortgage loans. Act Oct. 28, 1992, P. L. 102-547, § 9(c), 106 Stat. 3642, which formerly appeared as a note to this section, was repealed by Act Feb. 13, 1996, P. L. 104-110, Title II, § 201(b), 110 Stat. 770. Such note related to an annual report to the Committees on Veterans’ Affairs of the Senate and House of Representatives by the Secretary of Veterans Affairs dealing with veterans receiving mortgage loans guaranteed by the Secretary.

Code of Federal Regulations

Department of Veterans Affairs-Loan guaranty, 38 CFR Part 36

Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871
Cross References
This section is referred to in 38 USCS §§ 3701, 3703, 3704, 3711-3714, 3732, 3733

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 115

Annotations:
Validity and effect of side agreement affecting cost of property covered by veteran's loan under Servicemen's Readjustment Act. 19 ALR2d 836

Construction of clause in building contract that structure will comply with regulations, plans, or standards of the Federal Housing Administration or the Veterans' Administration. 67 ALR2d 1017

1. Generally
2. Purpose
3. Agency authority, generally
4. Scope of guaranty
5. False statements and certificates
6. Contracts, generally
   7. Ancillary agreements
8. Miscellaneous

1. Generally
Loan association, which failed to give 30 days notice to Veterans' Administration [now Department of Veterans Affairs] after completion of loan, and also failed to furnish Veterans' Administration [now Department of Veterans Affairs] with statement setting forth full name of veteran, amount and terms of loan, and legal description and appraisal, did not have contract of guaranty with Veterans' Administration [now Department of Veterans Affairs]. Hartford Acci. & Indem. Co. v Schwartz (1946, DC NY) 89 F Supp 83

Duty and burden rests upon veteran to procure fire insurance on residence undergoing construction under GI loan plan. Graddon v Knight (1950) 99 Cal App 2d 700, 222 P2d 329

2. Purpose
Congress intended guaranty provisions of 38 USCS § 1810 [now 38 USCS § 3710] to operate as substantial equivalent of downpayments in same amount by veteran on purchase price of home, in order to induce 100 percent financing for veteran's home. United States v Shimer (1961) 367 US 374, 6 L Ed 2d 908, 81 S Ct 1554

Provision of 38 USCS § 1810 [now 38 USCS § 3710] limiting loan to reasonable value of property was enacted to protect borrower from acquiring property at exorbitant price. Sattler v Van Natta (1953) 120 Cal App 2d 349, 260 P2d 982

3. Agency authority, generally
Only property over which Veterans' Administration [now Department of Veterans Affairs] has right and interest to control price is that property on which purchaser will execute mortgage to secure loan, amount of which loan must be approved by Administration [now Department]. Hansel v De Salle (1959, La App, Orleans) 115 So 2d 867

4. Scope of guaranty
Loan guaranty for purchase or construction includes any land purchased for construction of dwelling. Karrell v United States (1950, CA9 Cal) 181 F.2d 981, cert den (1950) 340 US 891, 95 L Ed 646, 71 S Ct 206

Where regulation of administrator [now Secretary] provided that maximum guarantee on joint obligation of veterans would be treated as though obligations were several, and two veterans borrowed $8,500 from plaintiff association to finance purchase of real estate as joint tenant, veteran who had only $250 left on his guaranty was entitled only to guaranty in that amount, and other veteran who had not used his guaranty was entitled only to guaranty of 50 percent of his share, to wit: $2,150. Gowanda Co-op. Sav. & Loan Asso. v Gray (1950, CA2 NY) 183 F.2d 367

5. False statements and certificates

Defendants were properly convicted under conspiracy statutes where it appeared that they joined in scheme to defraud United States government by misrepresenting price of home sold to veteran in order to obtain government guarantee of mortgage loan. Heald v United States (1949, CA10 Colo) 175 F.2d 878, cert den (1949) 338 US 859, 94 L Ed 526, 70 S Ct 101 and cert den (1949) 338 US 859, 94 L Ed 526, 70 S Ct 102

Where defendant was indicted for making false affidavit concerning amount of sale price of lot and house to veteran for purpose of securing GI loan, such indictment charged offense. Young v United States (1949, CA9 Cal) 178 F.2d 78, cert den (1950) 339 US 913, 94 L Ed 1339, 70 S Ct 573

Where defendant was convicted of making false reports to government in procurement of GI loans to six veterans, restitution to veterans as condition for suspension of sentence should be based on difference between fair appraisal value and amount actually charged veteran. Karrell v United States (1950, CA9 Cal) 181 F.2d 981, cert den (1950) 340 US 891, 95 L Ed 646, 71 S Ct 206

Defendant, who furnished funds for down payment by veterans in order that they might file application for loan, and upon completion of loan paid veterans stipulated amount out of proceeds, was liable for making of false affidavits and applications even though veterans voluntarily filed papers. Turner v United States (1953, CA9 Cal) 202 F.2d 523

6. Contracts, generally

So long as reasonable normal value of contract is determinable, contract between vendor and veteran contemplating that no deed shall be delivered to veteran conveying home or other property purchased until all or stated portion of purchase price shall have been paid by installments extending over period of years, not exceeding 20 years, such purchase contract is eligible for loan guaranties, upon general conditions that would be substantially applicable if transaction evidenced by contract were evidenced by deed, mortgage, and note secured by mortgage. 1945 ADVA 640

Contract contrary to Servicemen's Readjustment Act violates basic public policy and is unenforceable. Rosenblum v Corodas (1953) 119 Cal App 2d 802, 260 P2d 151; Sattler v Van Natta (1953) 120 Cal App 2d 349, 260 P2d 982

Written contract signed by contractor and sent to veteran certifying maximum complete cost supersedes all oral agreements and other verbal stipulations. Higby v Hooper (1950) 124 Mont 331, 221 P2d 1043

7. -Ancillary agreements

Where contractor and veteran made "side" agreement providing for cost-plus contract, after Veterans' Administration [now Department of Veterans Affairs] and bank had approved fixed-fee contract, contractor could not enforce cost-plus contract. Young v Hampton (1951) 36 Cal 2d 799, 228 P2d 1, 19 ALR2d 830

Where plaintiff arranged for GI loan and "builder's contract" with defendant was made calling for fixed construction cost to be paid contractor and on same day they by letter agreed to cost-plus contract, which was illegal, obligation of note and trust deed given to contract or on
account thereof was reduced. Pitts v Highland Constr. Co. (1953) 115 Cal App 2d 206, 252 P2d 14

Veteran's consideration, in form of promissory note for additional sum above appraisal value of house, was illegal and such note was unenforceable. Sattler v Van Natta (1953) 120 Cal App 2d 349, 260 P2d 982

Vendor who was ignorant of violation of predecessor to 38 USCS § 3710 and acted in good faith was entitled to enforce promissory note and deed of trust securing note, representing difference between appraised value and purchase price, against veteran who was aware of violation at time note was executed. Lewis v Wainscott (1954) 124 Cal App 2d 345, 268 P2d 835

Under predecessor to 38 USCS § 3710, side agreement increasing cost beyond appraisal value was invalid and unenforceable, regardless of fact that neither party to agreement was aware of illegality. Cole v Ames (1957, 2nd Dist) 155 Cal App 2d 8, 317 P2d 662

Where Veterans' Administration [now Department of Veterans Affairs] consented to loan not in excess of $8,370 on certain house to be built for veteran but building expenses were $10,475 and veteran by oral contract agreed to pay balance of $2,271.50 directly to contractor, oral agreement was unenforceable. Bamber v Mayeux (1957) 232 La 42, 93 So 2d 687

Side agreement covering well, pump, tank, and pipe located on lot purchased by veteran is valid where appraisal was done only on house and lot, and price of such additional property was not inflated. Voorhies v Hance (1955, La App 1st Cir) 79 So 2d 615

Side agreement whereby veteran agreed to pay cost of street improvements was not invalid merely because not reflected in deed from seller to purchaser, where Veterans' Administration [now Department of Veterans Affairs] had appraised property as it was prior to improvements and had not been consulted about including such costs in purchase price, and there was no showing that Veterans' Administration [now Department of Veterans Affairs] would have refused to increase appraisal to include such cost if request to do so had been made. Hansel v De Salle (1959, La App, Orleans) 115 So 2d 867

Contractor could not recover sum in excess of maximum amount recited in letter delivered to lender, which letter certified that complete cost of home would not exceed certain sum and formed basis on which loan was approved by loan company and guaranteed by government. Higby v Hooper (1950) 124 Mont 331, 221 P2d 1043

Promissory note given by veteran for additional sum above appraisal value was based on illegal consideration and note was unenforceable. Veino v Bedell (1954) 99 NH 274, 109 A2d 555

Reasonable value limitation of 38 USCS § 1810 [now 38 USCS § 3710] relates merely to conditions upon which government will guaranty loan to veteran in first instance, not to validity of effect of contract entered into between veteran and third persons, and side agreement in connection with veteran's housing loan is enforceable against parties to agreement. Bryant v Stablein (1947) 28 Wash 2d 739, 184 P2d 45

Agreement between veteran and seller, to effect that purchase price of one property would be reduced to amount at which Veterans' Administration [now Department of Veterans Affairs] had appraised it, so that veteran could get guaranteed loan, in consideration for which veteran would also buy adjoining property, did not violate predecessor to 38 USCS § 3710. Ewing v Ford (1948) 31 Wash 2d 126, 195 P2d 650

8. Miscellaneous

No congressional purpose in enacting loan legislation was impaired by upholding terms of individually negotiated Deed of Trust which departed from form usually employed by Veterans' Administration [now Department of Veterans Affairs] notwithstanding fact that effect under facts was to bar deficiency judgment by United States. United States v Stewart (1975, CA9 Wash) 523 F.2d 1070

§ 3711. Direct loans to veterans
(a) The Congress finds that housing credit for purposes specified in section 3710 or 3712 of this title [38 USCS § 3710 or 3712] is not and has not been generally available to veterans living in rural areas, or in small cities and towns not near large metropolitan areas. It is therefore the purpose of this section to provide housing credit for veterans living in such rural areas and such small cities and towns.

(b) Whenever the Secretary finds that private capital is not generally available in any rural area or small city or town for the financing of loans guaranteed for purposes specified in section 3710 or 3712 of this title [38 USCS § 3710 or 3712], the Secretary shall designate such rural area or small city or town as a "housing credit shortage area". The Secretary shall, with respect to any such area, make, or enter into commitments to make, to any veteran eligible under this title, a loan for any or all of the purposes described in section 3710(a) or 3712 of this title [38 USCS § 3710(a) or 3712] (other than the refinancing of a loan under section 3710(a)(8) or 3712(a)(1)(F) [38 USCS § 3710(a)(8) or 3712(a)(1)(F)]).

(c) No loan may be made under this section to a veteran unless the veteran shows to the satisfaction of the Secretary that--

1. the veteran is unable to obtain from a private lender in such housing credit shortage area, at an interest rate not in excess of the rate authorized for guaranteed home loans or manufactured home loans, as appropriate, a loan for such purpose for which the veteran is qualified under section 3710 or 3712 of this title [38 USCS § 3710 or 3712], as appropriate; and
2. the veteran is unable to obtain a loan for such purpose from the Secretary of Agriculture under title III of the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) or title V of the Housing Act of 1949 (42 U.S.C. 1471 et seq.).

(d) (1) Loans made under this section shall bear interest at a rate determined by the Secretary, not to exceed the rate authorized for guaranteed home loans or manufactured home loans, as appropriate, and shall be subject to such requirements or limitations prescribed for loans guaranteed under this title as may be applicable.

2. (A) Except for any loan made under this chapter [38 USCS §§ 3701 et seq.] for the purposes described in section 3712 of this title [38 USCS § 3712], the original principal amount of any loan made under this section shall not exceed an amount which bears the same ratio to $33,000 as the amount of guaranty to which the veteran is entitled under section 3710 of this title [38 USCS § 3710] at the time the loan is made bears to $36,000; and the guaranty entitlement of any veteran who heretofore or hereafter has been granted a loan under this section shall be charged with an amount which bears the same ratio to $36,000 as the amount of the loan bears to $33,000.

(B) The original principal amount of any loan made under this section for the purposes described in section 3712 of this title [38 USCS § 3712] shall not exceed the amount that bears the same ratio to $33,000 as the amount of guaranty to which the veteran is entitled under such section at the time the loan is made bears to $20,000. The amount of the guaranty entitlement for purposes specified in section 3710 of this title [38 USCS § 3710] of any veteran who is granted a loan under this section, or who before October 18, 1978, was granted a loan under this section, shall be charged with the amount that bears the same ratio to $20,000 as the amount of the loan bears to $33,000.
(3) No veteran may obtain loans under this section aggregating more than $33,000.

(e) Loans made under this section shall be repaid in monthly installments, except that in the case of any such loan made for any of the purposes described in paragraphs (2), (3), or (4) of section 3710(a) of this title [38 USCS § 3710(a)], the Secretary may provide that such loan shall be repaid in quarterly, semiannual, or annual installments.

(f) In connection with any loan under this section, the Secretary may make advances in cash to pay taxes and assessments on the real estate, to provide for repairs, alterations, and improvements, and to meet the incidental expenses of the transaction. The Secretary shall determine the expenses incident to origination of loans made under this section, which expenses, or a reasonable flat allowance in lieu thereof, shall be paid by the veteran in addition to the loan closing costs.

(g) The Secretary may sell, and shall offer for sale, to any person or entity approved for such purpose by the Secretary, any loan made under this section at a price which the Secretary determines to be reasonable under the conditions prevailing in the mortgage market when the agreement to sell the loan is made; and shall guarantee any loan thus sold subject to the same conditions, terms, and limitations which would be applicable were the loan guaranteed for purposes specified in section 3710 or 3712 of this title [38 USCS § 3710 or 3712], as appropriate.

(h) The Secretary may exempt dwellings constructed through assistance provided by this section from the minimum land planning and subdivision requirements prescribed pursuant to subsection (a) of section 3704 of this title [38 USCS § 3704], and with respect to such dwellings may prescribe special minimum land planning and subdivision requirements which shall be in keeping with the general housing facilities in the locality but shall require that such dwellings meet minimum requirements of structural soundness and general acceptability.

(i) The Secretary is authorized, without regard to the provisions of subsections (a), (b), and (c) of this section, to make or enter into a commitment to make a loan to any veteran to assist the veteran in acquiring a specially adapted housing unit authorized under chapter 21 of this title [38 USCS §§ 2101 et seq.], if the veteran is determined to be eligible for the benefits of such chapter 21, and is eligible for loan guaranty benefits under this chapter [38 USCS §§ 3701 et seq.].

(j) (1) If any builder or sponsor proposes to construct one or more dwellings in a housing credit shortage area, or in any area for a veteran who is determined to be eligible for assistance in acquiring a specially adapted housing unit under chapter 21 of this title [38 §§ 2101 et seq.], the Secretary may enter into commitment with such builder or sponsor, under which funds available for loans under this section will be reserved for a period not in excess of three months, or such longer period as the Secretary may authorize to meet the needs in any particular case, for the purpose of making loans to veterans to purchase such dwellings. Such commitment may not be assigned or transferred except with the written approval of the Secretary. The Secretary shall not enter into any such commitment unless such builder or sponsor pays a nonrefundable commitment fee to the Secretary in an amount determined by the Secretary, not to exceed 2 percent of the funds reserved for such builder or sponsor.
(2) Whenever the Secretary finds that a dwelling with respect to which funds are being reserved under this subsection has been sold, or contracted to be sold, to a veteran eligible for a direct loan under this section, the Secretary shall enter into a commitment to make the veteran a loan for the purchase of such dwelling. With respect to any loan made to an eligible veteran under this subsection, the Secretary may make advances during the construction of the dwelling, up to a maximum in advances of (A) the cost of the land plus (B) 80 percent of the value of the construction in place.

(k) Without regard to any other provision of this chapter [38 USCS §§ 3701 et seq.], the Secretary may take or cause to be taken such action as in the Secretary's judgment may be necessary or appropriate for or in connection with the custody, management, protection, and realization or sale of investments under this section, may determine the Secretary's necessary expenses and expenditures, and the manner in which the same shall be incurred, allowed and paid, may make such rules, regulations, and orders as the Secretary may deem necessary or appropriate for carrying out the Secretary's functions under this section and, except as otherwise expressly provided in this chapter [38 USCS §§ 3701 et seq.], may employ, utilize, compensate, and, to the extent not inconsistent with the Secretary's basic responsibilities under this chapter [38 USCS §§ 3701 et seq.], delegate any of the Secretary's functions under this section to such persons and such corporate or other agencies, including agencies of the United States, as the Secretary may designate.

Amendments:


1961. Act July 6, 1961, in subsec. (d), in paras. (2) and (3), substituted "$15,000" for "$13,500" wherever appearing; and substituted new subsec. (h) for one which read: "No loan may be made under this section after July 25, 1962, except pursuant to commitments issued by the Administrator before that date.".

1964. Act Aug. 4, 1964, substituted new subsec. (g) for one which read: "The Administrator may sell, and shall offer for sale, to any person or entity approved for such purpose by him, any loan made under this section at a price not less than par; that is, the unpaid balance plus accrued interest, and shall guarantee any loan thus sold subject to the same conditions, terms, and limitations which would be applicable were the loan guaranteed under section 1810 of this title."

1966. Act March 3, 1966 (effective 3/3/66, as provided by § 12(a) of such Act), in subsec. (d), in paras. (2) and (3), substituted "$17,500" for "$15,000" wherever appearing.

1967. Act Aug. 31, 1967 (effective 10/1/67, as provided by § 405(a) of such Act, which appears as 38 USCS § 101 note), in subsec. (d), in par. (2), inserted "; except that the Administrator may increase the $17,500 limitations specified in this paragraph to an amount not to exceed $25,000 where he finds that cost levels so require", and in par. (3), inserted "; except that the Administrator may increase such aggregate amount to an amount not to exceed $25,000 where he finds that cost levels so require".


1969. Act June 6, 1969, in subsec. (d), in paras. (2) and (3), substituted "$21,000" for "$17,500" wherever appearing.
1970. Act Oct. 23, 1970, in subsecs. (a) and (b), substituted "1810 or 1819" for "1810"; in subsec. (b), substituted "He shall, with respect to any such area, make, or enter into commitments to make, to any veteran eligible under this title, a loan for any or all of the purposes described in section 1810(a) or 1819 of this title." for "He shall make, or enter into commitments to make, to any veteran eligible under this title, a loan for any or all of the purposes listed in section 1810(a) in such area."; in subsec. (c)(1), inserted "or mobile home loans, as appropriate" and substituted "1810 or 1819 of this title, as appropriate" for "1810 of this title"; in subsec. (d), in para. (1), inserted "or mobile home loans, as appropriate", in para. (2), substituted "(A) Except for any loan made under this chapter for the purposes described in section 1819 of this title, the" for "The", and added para. (2)(B); in subsec. (g), substituted "1810 or 1819 of this title, as appropriate" for "1810 of this title"; and substituted new subsecs. (h)-(j) for ones which read:

"(h) No loan may be made under this section to any veteran after the expiration of his entitlement pursuant to section 1803(a)(3) of this title except pursuant to a commitment issued by the Administrator before such entitlement expires.

"(i)(1) If any builder or sponsor purposes to construct one or more dwellings in a housing credit shortage area, the Administrator may enter into commitment with such builder or sponsor, under which funds available for loans under this section will be reserved for a period not in excess of three months, or such longer period as the Administrator may authorize to meet the needs in any particular case, for the purpose of making loans to veterans to purchase such dwellings. Such commitment may not be assigned or transferred except with the written approval of the Administrator. The Administrator shall not enter into any such commitment unless such builder or sponsor pays a nonrefundable commitment fee to the Administrator in an amount determined by the Administrator, not to exceed 2 per centum of the funds reserved for such builder or sponsor.

"(2) Whenever the Administrator finds that a dwelling with respect to which funds are being reserved under this subsection has been sold, or contracted to be sold, to a veteran eligible for a direct loan under this section, the Administrator shall enter into a commitment to make the veteran a loan for the purchase of such dwelling. With respect to any loan made to an eligible veteran under this subsection, the Administrator may make advances during the construction of the dwelling, up to a maximum in advances of (A) the cost of the land plus (B) 80 per centum of the value of the construction in place.

"(3) After the Administrator has entered into a commitment to make a veteran a loan under this subsection, he may refer the proposed loan to the Voluntary Home Mortgage Credit Committee, in order to afford a private lender the opportunity to acquire such loan subject to guaranty as provided in subsection (g) of this section. If, before the expiration of sixty days after the loan made to the veteran by the Administrator is fully disbursed, a private lender agrees to purchase such loan, all or any part of the commitment fee paid to the Administrator with respect to such loan may be paid to such private lender when such loan is so purchased. If a private lender has not purchased or agreed to purchase such loan before the expiration of sixty days after the loan made by the Administrator is fully disbursed, the commitment fee paid with respect to such loan shall become a part of the special deposit account referred to in subsection (c) of section 1823 of this title. If a loan is not made to a veteran for the purchase of a dwelling, the commitment fee paid with respect to such dwelling shall become a part of such special deposit account.

"(4) The Administrator may exempt dwellings constructed through assistance provided by this subsection from the minimum land planning and subdivision requirements prescribed pursuant to subsection (a) of section 1804 of this title, and with respect to such dwellings may prescribe special minimum land planning and subdivision requirements which shall be in keeping with the general housing facilities in the locality but shall require that such dwellings meet minimum requirements of structural soundness and general acceptability.
"(j)(1) The Administrator shall commence the processing of any application for a loan under this section upon the receipt of such application, and shall continue such processing notwithstanding the fact that the assistance of the Voluntary Home Mortgage Credit Committee has been requested by the Administrator for the purpose of ascertaining whether or not such loan can be placed with a private lender.

"(2) If the assistance of such Committee has been requested by the Administrator in connection with any such application, and the Administrator is not notified by such Committee within twenty working days after such assistance has been requested that it has been successful in enabling the applicant to place such loan with a private lender or expects to do so within ten additional working days, the Administrator shall proceed forthwith to complete any part of the processing of such application remaining unfinished, and to grant or deny the application in accordance with the provisions of this section.

"(3) As used in this subsection, the term 'working days' means calendar days exclusive of Saturdays, Sundays, and legal holidays.".

1971. Act Aug. 5, 1971, substituted new subsec. (g) for one which read: "The Administrator may sell, and shall offer for sale, to any person or entity approved for such purpose by him, any loan made under this section at a price which he determines to be reasonable but not less than 98 per centum of the unpaid principal balance, plus the full amount of accrued interest, except that if loans are offered to an investor in a package or block of two or more loans no sale shall be made at less than 98 per centum of the aggregate unpaid principal balance of the loans included in such package or block, plus the full amount of accrued interest; and the Administrator shall guarantee any loan thus sold subject to the same conditions, terms, and limitations which would be applicable were the loan guaranteed under section 1810 or 1819 of this title, as appropriate.".

1974. Act Dec. 31, 1974 (effective 12/31/74, as provided by § 10 of such Act, which appears as 38 USCS § 3702 note), in subsec. (d)(2)(A), substituted "$17,500" for "$12,500" wherever appearing.

1976. Act June 30, 1976 (effective 6/30/76, as provided by § 9(a) of such Act, which appears as 38 USCS § 3701 note), in subsec. (b), substituted "the Administrator" for "he" preceding "shall designate" and substituted "The Administrator" for "He" preceding "shall, with respect"; in subsec. (c), in paras. (1) and (2), substituted "the veteran" for "he"; in subsec. (g), substituted "the Administrator" for "him" following "by" and substituted "the Administrator" for "he" preceding "determines"; and in subsec. (k), substituted "the Administrator's" for "his" wherever appearing and substituted "the Administrator" for "he" preceding "may deem" and "may designate".

Such Act further (effective 10/1/76, as provided by § 9(b) of such Act, which appears as 38 USCS § 3701 note), in subsec. (d), in para. (2)(A), substituted "$33,000." for "$32,000." and substituted "$33,000." for "$21,000; except that the Administrator may increase the $21,000 limitations specified in this paragraph to an amount not to exceed $25,000 where he finds that cost levels so require."., and in para. (3), substituted "$33,000." for "$21,000; except that the Administrator may increase such aggregate amount to an amount not to exceed $25,000 where he finds that cost levels require.".

1978. Act Oct. 18, 1978 (effective 10/1/78, as provided by § 108(a) of such Act, which appears as 38 USCS § 3702 note), in subsec. (d)(2), in subpara. (A), substituted "$25,000." for "$17,500" wherever appearing, and in subpara. (B), substituted "that bears the same ratio to $33,000 as the amount of guaranty to which the veteran is entitled under such section at the time the loan is made bears to $17,500. The amount of the guaranty entitlement under section 1810(c) of this title of any veteran who is granted a loan under this section, or who before the date of the enactment of the Veterans' Housing Benefits Act of 1978 was granted a loan under this section, shall be charged with the amount that bears the same ratio to $17,500 as the amount of the loan bears to $33,000." for "specified by the Administrator pursuant to subsection (d) of such section.".

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1980. Act Oct. 7, 1980 (effective 10/7/80, as provided by § 601(d) of such Act, which appears as 38 USCS § 1114 note), in subsec. (b), inserted "(other than the refinancing of a loan under section 1810(a)(8) or 1819(a)(1)(F))".

Such Act further (effective 10/1/80, as provided by § 602(b) of such Act, which appears as 38 USCS § 1114 note), in subsec. (d)(2), in subpara. (A), substituted "$27,500" for "$25,000" wherever appearing, and in subpara. (B), substituted "$20,000" for "$17,500" wherever appearing.


Act Oct. 14, 1982, in subsecs. (c)(1) and (d)(1), substituted "manufactured home" for "mobile home".

1987. Act Dec. 21, 1987 (applicable as provided by § 3(d) of such Act, which appears as 38 USCS § 3703 note), in subsec. (d)(2)(A), substituted "$36,000" for "$27,500" in two places.

1988. Act May 20, 1988, in subsecs. (a) and (b), substituted "for purposes specified in section 1810 or" for "under section 1810 or" and "1812" for "1819" wherever appearing; in subsec. (c)(1), substituted "1812" for "1819"; in subsec. (d)(2), in subpara. (A), substituted "section 1812" for "section 1819", in subpara. (B), substituted "section 1812" for "section 1819", and "for purposes specified in section 1810" for "under section 1810(c)"; and in subsec. (g), substituted "for purposes specified in section 1810 or 1812" for "under section 1710 or 1819".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1811, as 38 USCS § 3711, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1998. Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 602(f) of such Act, which appears as 38 USCS § 2106 note), in subsec. (k), deleted "and section 3723 of this title" preceding "and, except" and preceding "to such persons".

Other provisions:

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Code of Federal Regulations

Department of Veterans Affairs-Loan guaranty, 38 CFR Part 36

Cross References

This section is referred to in 38 USCS §§ 3710, 3712, 3723, 3725, 3729, 3732

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 115

Where plaintiffs, who sought temporary restraining orders and temporary injunctions restraining defendants from executing any administrative offset against them, had been involved in class action resulting in consent decree that did not provide protection from such offsets and 31
USCS § 3711(g)(9) required that such debts be administratively offset, injunctions and temporary restraining orders were denied. Bradshaw v Veneman (2004, DC Dist Col) 338 F Supp 2d 139

Direct loan may properly be made to veteran whose dwelling is not located in area designated as housing credit shortage area for purposes of financing remodeling of home where such remodeling is also being financed by specially adapted housing grant under 38 USCS § 802 [now 38 USCS § 2102]. VA GCO 3-76

§ 3712. Loans to purchase manufactured homes and lots

(a) (1) Notwithstanding any other provision of this chapter [38 USCS §§ 3701 et seq.], any loan to a veteran eligible for the housing loan benefits of this chapter [38 USCS §§ 3701 et seq.], if made pursuant to the provisions of this section, may be guaranteed if such loan is for one of the following purposes:

(A) To purchase a lot on which to place a manufactured home already owned by the veteran.
(B) To purchase a single-wide manufactured home.
(C) To purchase a single-wide manufactured home and a lot on which to place such home.
(D) To purchase a double-wide manufactured home.
(E) To purchase a double-wide manufactured home and a lot on which to place such home.
(F) To refinance in accordance with paragraph (4) of this subsection an existing loan guaranteed, insured, or made under this section.
(G) To refinance in accordance with paragraph (5) of this subsection an existing loan that was made for the purchase of, and that is secured by, a manufactured home and to purchase a lot on which such manufactured home is or will be placed.

(2) A loan for any of the purposes described in paragraph (1) of this subsection (other than the refinancing under clause (F) of such paragraph of an existing loan) may include an amount determined by the Secretary to be appropriate to cover the cost of necessary preparation of a lot already owned or to be acquired by the veteran, including the costs of installing utility connections and sanitary facilities, of paving, and of constructing a suitable pad for the manufactured home.

(3) Any loan made for the purposes described in clause (C), (E), or (G) of paragraph (1) of this subsection shall be considered as part of one loan. The transaction may be evidenced by a single loan instrument or by separate loan instruments for (A) that portion of the loan which finances the purchase of the manufactured home, and (B) that portion of the loan which finances the purchase of the lot and the necessary preparation of such lot.

(4) (A) For a loan to be guaranteed for the purpose specified in clause (F) of paragraph (1) of this subsection--

(i) the interest rate of the loan must be less than the interest rate of the loan being refinanced;
(ii) the loan must be secured by the same manufactured home or manufactured-home lot, or manufactured home and manufactured-home lot, as was the loan being refinanced;
(iii) the amount of the loan may not exceed an amount equal to the sum of the balance of the loan being refinanced and such closing costs (including any
discount permitted pursuant to section 3703(c)(3)(A) of this title [38 USCS § 3703(c)(3)(A)] as may be authorized by the Secretary, under regulations which the Secretary shall prescribe, to be included in such loan;
(iv) notwithstanding section 3703(a)(1) of this title [38 USCS § 3703(a)(1)],
the amount of the guaranty of the loan may not exceed the greater of (I) the original guaranty amount of the loan being refinanced, or (II) 25 percent of the
loan;
(v) the term of the loan may not exceed the original term of the loan being
refinanced;
(vi) the veteran must own the manufactured home, or the manufactured-home
lot, or the manufactured home and the manufactured-home lot, securing the
loan and--

(I) must occupy the home, a manufactured home on the lot, or the home
and the lot, securing the loan;
(II) must have previously occupied the home, a manufactured home on the
lot, or the home and the lot, securing the loan as the veteran's home and
must certify, in such form as the Secretary shall require, that the veteran
has previously so occupied the home (or such a home on the lot); or
(III) in any case in which a veteran is in active duty status as a member of
the Armed Forces and is unable to occupy the home, a manufactured home
on the lot, or the home and the lot, as a home because of such status, the
spouse of the veteran must occupy, or must have previously occupied, the
manufactured home on the lot, or the home and the lot, as such spouse's
home and must certify such occupancy in such form as the Secretary shall
require.
(B) A loan to a veteran may be guaranteed by the Secretary under this chapter [38
USCS §§ 3701 et seq.] for the purpose specified in clause (F) of paragraph (1) of
this subsection without regard to the amount of outstanding guaranty entitlement
available for use by such veteran, and the amount of such veteran's guaranty
entitlement shall not be charged as a result of any guaranty provided for such
purpose. For purposes of section 3702(b) of this title [38 USCS § 3702(b)], such
loan shall be deemed to have been obtained with the guaranty entitlement used to
obtain the loan being refinanced.
(C) If a veteran is deceased and if such veteran's surviving spouse was a
co-obligor under an existing loan previously guaranteed, insured, or made for
purposes specified in this section, such surviving spouse shall, only for the
purpose specified in clause (F) of paragraph (1) of this subsection, be deemed to
be a veteran eligible for benefits under this chapter [38 USCS §§ 3701 et seq.].
(5) (A) For a loan to be guaranteed for the purpose specified in paragraph (1)(G) of
this subsection or section 3710(a)(9)(B)(ii) of this title [38 USCS § 3710(a)(9)(B)(ii)]--

(i) the loan must be secured by the same manufactured home as was the loan
being refinanced and such manufactured home must be owned and occupied
by the veteran (except as provided in section 3704(c)(2) of this title [38 USCS
§ 3704(c)(2)]) as such veteran's home; and
(ii) the amount of the loan may not exceed an amount equal to the sum of--
(I) the purchase price of the lot,
(II) the amount (if any) determined by the Secretary to be appropriate under paragraph (2) of this subsection to cover the cost of necessary preparation of such lot,
(III) the balance of the loan being refinanced, and
(IV) such closing costs (including any discount permitted pursuant to section 3703(c)(3)(E) of this title [38 USCS § 3703(c)(3)(E)]) as may be authorized by the Secretary, under regulations which the Secretary shall prescribe, to be included in such loan.

(B) When a loan is made to a veteran for the purpose specified in paragraph (1)(G) of this subsection or section 3710(a)(9)(B)(ii) of this title [38 USCS § 3710(a)(9)(B)(ii)] and the loan being refinanced was guaranteed, insured, or made under this section, the portion of the loan made for the purpose of refinancing such loan may be guaranteed by the Secretary under this chapter [38 USCS §§ 3701 et seq.] without regard to the amount of outstanding guaranty entitlement available for use by such veteran, and the amount of such veteran's guaranty entitlement shall not be charged as a result of any guaranty provided for such portion of such loan. For the purposes of section 3702(b) of this title [38 USCS § 3702(b)], such portion of such loan shall be deemed to have been obtained with the guaranty entitlement used to obtain the loan being refinanced.

(b) (1) Use of entitlement for purposes specified in this section for the purchase of a manufactured home unit shall preclude the use of remaining entitlement for the purchase of an additional manufactured home unit until the unit which secured the loan has been disposed of by the veteran or has been destroyed by fire or other natural hazard.

(2) The Secretary shall restore entitlement to all housing loan benefits under this chapter [38 USCS §§ 3701 et seq.] for the veteran when the conditions prescribed in section 3702(b) of this title [38 USCS § 3702(b)] have been met.

(c) (1) Loans for any of the purposes authorized by subsection (a) of this section shall be submitted to the Secretary for approval prior to the closing of the loan, except that the Secretary may exempt any lender of a class listed in section 3702(d) of this title [38 USCS § 3702(d)] from compliance with such prior approval requirement if the Secretary determines that the experience of such lender or class of lenders in manufactured home financing warrants such exemption.

(2) Upon determining that a loan submitted for prior approval is eligible for guaranty for purposes specified in this section, the Secretary shall issue a commitment to guarantee such loan and shall thereafter guarantee the loan when made if such loan qualifies therefor in all respects.

(3) (A) The Secretary's guaranty may not exceed the lesser of (i) the lesser of $20,000 or 40 percent of the loan, or (ii) the maximum amount of the guaranty entitlement available to the veteran as specified in paragraph (4) of this subsection.

(B) A claim under the Secretary's guaranty shall, at the election of the holder of a loan, be made by the filing of an accounting with the Secretary--

(i) within a reasonable time after the receipt by such holder of an appraisal by the Secretary of the value of the security for the loan; or

(ii) after liquidation of the security for the loan.

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(C) If the holder of a loan applies for payment of a claim under clause (i) of subparagraph (B) of this paragraph, the amount of such claim payable by the Secretary shall be the lesser of--
   (i) the amount equal to the excess, if any, of the total indebtedness over the amount of the appraisal referred to in such clause; or
   (ii) the amount equal to the guaranty under this section.
(D) If the holder of a loan files for payment of a claim under clause (ii) of subparagraph (B) of this paragraph, the amount of such claim payable by the Secretary shall be the lesser of--
   (i) the amount equal to the excess, if any, of the total indebtedness over the greater of the value of the property securing the loan, as determined by the Secretary, or the amount of the liquidation or resale proceeds; or
   (ii) the amount equal to the guaranty under this section.
(E) In any accounting filed pursuant to subparagraph (B)(ii) of this paragraph, the Secretary shall permit to be included therein accrued unpaid interest from the date of the first uncured default to such cutoff date as the Secretary may establish, and the Secretary shall allow the holder of the loan to charge against the liquidation or resale proceeds accrued interest from the cutoff date established to such further date as the Secretary may determine and such costs and expenses as the Secretary determines to be reasonable and proper.
(F) The liability of the United States under the guaranty provided for by this paragraph shall decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the obligation.
(4) The maximum amount of guaranty entitlement available to a veteran for purposes specified in this section shall be $20,000 reduced by the amount of any such entitlement previously used by the veteran. Use of entitlement for purposes specified in section 3710 or 3711 of this title [38 USCS § 3710 or 3711] shall reduce entitlement available for use under this section to the same extent that entitlement available for purposes specified in such section 3710 [38 USCS § 3710] is reduced below $20,000.
(5) The amount of any loan guaranteed for purposes specified in this section shall not exceed an amount equal to 95 percent of the purchase price of the property securing the loan.
(d) (1) The maturity of any loan guaranteed for purposes specified in this section shall not be more than--
   (A) fifteen years and thirty-two days, in the case of a loan for the purchase of a lot;
   (B) twenty years and thirty-two days, in the case of a loan for the purchase of--
      (i) a single-wide manufactured home; or
      (ii) a single-wide manufactured home and a lot;
   (C) twenty-three years and thirty-two days, in the case of a loan for the purchase of a double-wide manufactured home; or
   (D) twenty-five years and thirty-two days, in the case of a loan for the purchase of a double-wide manufactured home and a lot.
(2) Nothing in paragraph (1) of this subsection shall preclude the Secretary, under regulations which the Secretary shall prescribe, from consenting to necessary
advances for the protection of the security or the holder's lien, to a reasonable extension of the term of such loan, or to a reasonable reamortization of such loan.

(e) No loan shall be guaranteed for purposes specified in this section unless--

(1) the loan is repayable in approximately equal monthly installments;
(2) the terms of repayment bear a proper relationship to the veteran's present and anticipated income and expenses, and the veteran is a satisfactory credit risk, as determined in accordance with the regulations prescribed under section 3710(g) of this title [38 USCS § 3710(g)] and taking into account the purpose of this program to make available lower cost housing to low and lower income veterans, especially those who have been recently discharged or released from active military, naval, or air service, who may not have previously established credit ratings;
(3) the loan is secured by a first lien on the manufactured home purchased with the proceeds of the loan and on any lot acquired or improved with the proceeds of the loan;
(4) the amount of the loan to be paid by the veteran is not in excess of the amount determined to be reasonable, based upon--

(A) with respect to any portion of the loan to purchase a new manufactured home, such cost factors as the Secretary considers proper to take into account;
(B) with respect to any portion of the loan to purchase a used manufactured home, the reasonable value of the property, as determined by the Secretary;
(C) with respect to any portion of the loan to purchase a lot, the reasonable value of such lot, as determined by the Secretary; and
(D) with respect to any portion of the loan to cover the cost of necessary site preparation, an appropriate amount, as determined by the Secretary;
(5) the veteran certifies, in such form as the Secretary shall prescribe, that the veteran will personally occupy the property as the veteran's home; except that the requirement of this clause shall not apply (A) in the case of a guaranteed loan that is for the purpose described in paragraph (1)(F) of subsection (a), or (B) in the case described in section 3704(c)(2) [38 USCS § 3704(c)(2)];
(6) the manufactured home is or will be placed on a site which meets specifications which the Secretary shall establish by regulation; and
(7) the interest rate to be charged on the loan does not exceed the permissible rate established by the Secretary.

(f) The Secretary shall establish such rate of interest for manufactured home loans and manufactured home lot loans as the Secretary's determines to be necessary in order to assure a reasonable supply of manufactured home loan financing for veterans for purposes specified in this section.

(g) The Secretary shall promulgate such regulations as the Secretary determines to be necessary or appropriate in order to fully implement the provisions of this section, and such regulations may specify which provisions in other sections of this chapter [38 USCS §§ 3701 et seq.] the Secretary determines should be applicable to loans guaranteed or made for purposes specified in this section. The Secretary shall have such powers and responsibilities in respect to matters arising under this section as the Secretary has in respect to loans made or guaranteed or under other sections of this chapter [38 USCS §§ 3701 et seq.].
(h) (1) No loan for the purchase of a manufactured home shall be guaranteed for purposes specified in this section unless the manufactured home and lot, if any, meet or exceed standards for planning, construction, and general acceptability as prescribed by the Secretary and no loan for the purchase of a lot on which to place a manufactured home owned by a veteran shall be guaranteed under this section unless the lot meets such standards prescribed for manufactured home lots. Such standards shall be designed to encourage the maintenance and development of sites for manufactured homes which will be attractive residential areas and which will be free from, and not substantially contribute to, adverse scenic or environmental conditions.

(2) Any manufactured housing unit properly displaying a certification of conformity to all applicable Federal manufactured home construction and safety standards pursuant to section 616 of the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5415) shall be deemed to meet the standards required by paragraph (1).

(i) The Secretary shall require the manufacturer to become a warrantor of any new manufactured home which is approved for purchase with financing through the assistance of this chapter [38 USCS §§ 3701 et seq.] and to furnish to the purchaser a written warranty in such form as the Secretary shall require. Such warranty shall include (1) a specific statement that the manufactured home meets the standards prescribed by the Secretary pursuant to the provisions of subsection (h) of this section; and (2) a provision that the warrantor's liability to the purchaser or owner is limited under the warranty to instances of substantial nonconformity to such standards which become evident within one year from date of purchase and as to which the purchaser or owner gives written notice to the warrantor not later than ten days after the end of the warranty period. The warranty prescribed herein shall be in addition to, and not in derogation of, all other rights and privileges which such purchaser or owner may have under any other law or instrument and shall so provide in the warranty document.

(j) Subject to notice and opportunity for a hearing, the Secretary is authorized to deny guaranteed or direct loan financing in the case of--

(1) manufactured homes constructed by a manufacturer who fails or is unable to discharge the manufacturer's obligations under the warranty;

(2) manufactured homes which are determined by the Secretary not to conform to the standards provided for in subsection (h); or

(3) a manufacturer of manufactured homes who has engaged in procedures or practices determined by the Secretary to be unfair or prejudicial to veterans or the Government.

(k) Subject to notice and opportunity for a hearing, the Secretary may refuse to approve as acceptable any site in a manufactured home park or subdivision owned or operated by any person whose rental or sale methods, procedures, requirements, or practices are determined by the Secretary to be unfair or prejudicial to veterans renting or purchasing such sites. The Secretary may also refuse to guarantee or make direct loans for veterans to purchase manufactured homes offered for sale by any dealer if substantial deficiencies have been discovered in such homes, or if the Secretary determines that there has been a failure or indicated inability of the dealer to discharge contractual liabilities to veterans, or that the type of contract of sale or methods, procedures, or practices pursued by the
dealer in the marketing of such properties have been unfair or prejudicial to veteran purchasers.

(l) The provisions of sections 3704(d) and 3721 of this title [38 USCS §§ 3704(d) and 3721] shall be fully applicable to lenders making guaranteed manufactured home loans and manufactured home lot loans and holders of such loans.

**Explanatory notes:**
A prior § 1812 (Act Sept. 2, 1958, P. L. 85-857, § 1, 72 Stat. 1210) was repealed by Act Dec. 31, 1974, P. L. 93-569, § 7(a), 88 Stat. 1866. Such section provided for automatically guaranteed loans to a veteran for the purpose of purchasing farms and farm equipment.

**Effective date of section:**

**Amendments:**
1974. Act Dec. 31, 1974 (effective 12/31/74, as provided by § 10 of such Act, which appears as 38 USCS § 3701 note), in subsec. (a), inserted "or the mobile home lot loan guaranty benefit, or both," wherever appearing, and deleted "mobile home" following "this chapter until the"; in subsec. (b), designated existing matter as para. (1), redesignated clauses (1) and (2) as clauses (A) and (B), respectively, and added para. (2); in subsec. (c)(1), redesignated clauses (1) and (2) as clauses (A) and (B), respectively, and substituted "or for the purchase of a used mobile home which meets or exceeds minimum requirements for construction, design, and general acceptability prescribed by the Administrator, or the loan is for the purpose of purchasing a lot on which to place a mobile home previously purchased by the veteran, whether or not such mobile home was purchased with a loan guaranteed, insured or made by another Federal agency, and" for "or for the purchase of a used mobile home which is the security for a prior loan guaranteed or made under this section or for a loan guaranteed, insured or made by another Federal agency, and" in subsec. (d), substituted "In the case of any lot on which to place a mobile home, whether or not the mobile home was financed with assistance under this section, and in the case of necessary site preparation, the loan amount for such purposes may not exceed the reasonable value of such lot or an amount appropriate to cover the cost of necessary site preparation or both, as determined by the Administrator." for "In the case of any lot on which to place a mobile home financed through the assistance of this section and in the case of necessary site preparation, the loan amount shall not be increased by an amount in excess of the reasonable value of such lot or an amount appropriate to cover the cost of necessary site preparation or both, as determined by the Administrator."; in subsec. (d)(2), substituted subparas. (A)-(H) for subparas. (A)-(C) which read:

"(A) $10,000 for twelve years and thirty-two days in the case of a loan covering the purchase of a mobile home only, and such additional amount as is determined by the Administrator to be appropriate to cover the cost of necessary site preparation where the veteran owns the lot, or

"(B) $15,000 (but not to exceed $10,000 for the mobile home) for fifteen years and thirty-two days in the case of a loan covering the purchase of a mobile home and an undeveloped lot on which to place such home, and such additional amount as is determined by the Administrator to be appropriate to cover the cost of necessary site preparation, or

"(C) $17,500 (but not to exceed $10,000 for the mobile home) for fifteen years and thirty-two days in the case of a loan covering the purchase of a mobile home and a suitably developed lot on which to place such home.";
substituted new subsec. (e)(3) for one which read: "the loan is secured by a first lien on the mobile home and any lot acquired or improved with the proceeds of the loan;"; in subsec. (f), inserted "and mobile home lot loans"; in subsec. (i), inserted "and no loan for the purchase of a lot on which to place a mobile home owned by a veteran shall be guaranteed under this section unless the lot meets such standards prescribed for mobile home lots"; in subsec. (n), inserted "and mobile home lot loans"; and deleted subsec. (o) which read: "(o) No loans shall be guaranteed or made by the Administrator under the provisions of this section on and after July 1, 1975, except pursuant to commitments issued prior to such date."

1976. Act June 30, 1976 (effective 6/30/76, as provided by § 9(a) of such Act, which appears as 38 USCS § 3701 note), in subsec. (c), in para. (1), substituted "the Administrator" for "he" preceding "determines", and in para. (3), substituted "the Administrator" for "he" preceding "shall allow", "may determine", and "determines"; in subsec. (d), in para. (1), substituted "the Administrator's" for "his", and in para. (3), substituted "the Administrator" for "he" preceding "shall prescribe"; in subsec. (e), in para. (4), substituted "subsection" for "subparagraph", and in para. (5), substituted "the veteran" for "he" following "that", and substituted "the veteran's" for "his"; in subsec. (f), substituted "the Administrator" for "he" preceding "determines"; in subsec. (h), substituted "the Administrator" for "he" preceding "determines to", "determines should", and "has"; in subsec. (k), substituted "the manufacturer's" for "his"; and in subsec. (l), substituted "the Administrator" for "he" preceding "determines".

Such Act further (effective 7/1/76, as provided by § 9(b) of such Act, which appears as 38 USCS § 3701 note), in subsec. (c)(3), substituted "50 percent" for "30 per centum".

1978. Act Oct. 18, 1978 (effective 10/1/78, as provided by § 108(a) of such Act, which appears as 38 USCS § 3702 note), substituted new subsecs. (a) and (b) for ones which read:

"(a) Notwithstanding any other provision of this chapter, any veteran eligible for loan guaranty benefits under this chapter who has maximum home loan guaranty entitlement available for use shall be eligible for the mobile home loan guaranty benefit or the mobile home lot loan guaranty benefit, or both, under this section. Use of the mobile home loan guaranty benefit or the mobile home lot loan guaranty benefit, or both, provided by this section shall preclude the use of any home loan guaranty entitlement under any other section of this chapter until the loan guaranteed under this section has been paid in full.

"(b)(1) Subject to the limitations in subsection (d) of this section, a loan to purchase a mobile home under this section may include (or be augmented by a separate loan for) (A) an amount to finance the acquisition of a lot on which to place such home, and (B) an additional amount to pay expenses reasonably necessary for the appropriate preparation of such a lot, including, but not limited to, the installation of utility connections, sanitary facilities and paving, and the construction of a suitable pad.

"(2) Subject to the limitations in subsection (d) of this section, a loan may be made to purchase a lot on which to place a mobile home if the veteran already has such a home. Such a loan may include an amount sufficient to pay expenses reasonably necessary for the appropriate preparation of such a lot, including, but not limited to, the installation of utility connections, sanitary facilities, and paving, and the construction of a suitable pad."

in subsec. (c), substituted new para. (1) for one which read: "(1) Any loan to a veteran eligible under subsection (a) shall be guaranteed by the Administrator if (A) the loan is for the purpose of purchasing a new mobile home or for the purchase of a used mobile home which meets or exceeds minimum requirements for construction, design, and general acceptability prescribed by the Administrator, or the loan is for the purpose of purchasing a lot on which to place a mobile home previously purchased by the veteran, whether or not such mobile home was purchased with a loan guaranteed, insured or made by another Federal agency, and (B) the loan complies in all other respects with the requirements of this section. Loans for such purpose (including those which will also finance the acquisition of a lot or site preparation as authorized by subsection (b) of this section) shall be submitted to the Administrator for
approval prior to loan closing except that the Administrator may exempt any lender of a class listed in section 1802(d) of this title from compliance with such prior approval requirement if the Administrator determines that the experience of such lender or class of lenders in mobile home financing warrants such exemption.\textquotedblright, in para. (3), substituted \textquotedblright"The Administrator's guaranty may not exceed the lesser of 50 per centum of the loan amount or the maximum loan guaranty entitlement available, not to exceed $17,500. Payment of a claim under such guaranty shall be made only after liquidation of the security for the loan and the filing of an accounting with the Administrator.\textquotedblright\textquoteright\textquotedblright\textquotedblright\textquotedblright, for \textquotedblright"The Administrator's guaranty shall not exceed 50 percent of the loan, including any amount for lot acquisition and site preparation, and payment of such guaranty shall be made only after liquidation of the security for the loan and the filing of an accounting with the Administrator.\textquotedblright\textquotedblright, and added para. (4); substituted new subsec. (d) for one which read: 

\textbf{(d)(1)} The Administrator shall establish a loan maximum for each type of loan authorized by this section. In the case of a new mobile home, the Administrator may establish a maximum loan amount based on the manufacturer's invoice cost to the dealer and such other cost factors as the Administrator considers proper to take into account. In the case of a used mobile home, the Administrator shall establish a maximum loan amount based on the Administrator's determination of the reasonable value of the property. In the case of any lot on which to place a mobile home, whether or not the mobile home was financed with assistance under this section, and in the case of necessary site preparation, the loan amount for such purposes may not exceed the reasonable value of such lot or an amount appropriate to cover the cost of necessary site preparation or both, as determined by the Administrator.

\textbf{(2) The maximum permissible loan amounts and the term for which the loans are made shall not exceed--}

\textbf{(A)} $12,500 for twelve years and thirty-two days in the case of a loan covering the purchase of a single-wide mobile home only and such additional amount as is determined by the Administrator to be appropriate to cover the cost of necessary site preparation where the veteran owns the lot, or

\textbf{(B)} $20,000 for twenty years and thirty-two days in the case of a loan covering the purchase of a double-wide mobile home only and such additional amount as is determined by the Administrator to be appropriate to cover the cost of necessary site preparation where the veteran owns the lot, or

\textbf{(C)} $20,000 (but not to exceed $12,500 for the mobile home) for fifteen years and thirty-two days in the case of a loan covering the purchase of a single-wide mobile home and an undeveloped lot on which to place such home, which includes such amount as is determined by the Administrator to be appropriate to cover the cost of necessary site preparation, or

\textbf{(D)} $27,500 (but not to exceed $20,000 for the mobile home) for twenty years and thirty-two days in the case of a loan covering the purchase of a double-wide mobile home and an undeveloped lot on which to place such home, which includes such amount as is determined by the Administrator to be appropriate to cover the cost of necessary site preparation, or

\textbf{(E)} $20,000 (but not to exceed $12,500 for the mobile home) for fifteen years and thirty-two days in the case of a loan covering the purchase of a single-wide mobile home and a suitably developed lot on which to place such home, or

\textbf{(F)} $27,500 (but not to exceed $20,000 for the mobile home) for twenty years and thirty-two days in the case of a loan covering the purchase of a double-wide mobile home and a suitably developed lot on which to place such home, or
"(G) $7,500 for twelve years and thirty-two days in the case of a loan covering the purchase of only an undeveloped lot on which to place a mobile home owned by the veteran, which includes such amount as is determined by the Administrator to be appropriate to cover the cost of necessary site preparation, or

"(H) $7,500 for twelve years and thirty-two days in the case of a loan covering the purchase of a suitably developed lot on which to place a mobile home owned by the veteran.

"(3) Such limitations set forth in paragraph (2) of this subsection on the amount and term of any loan shall not be deemed to preclude the Administrator, under regulations which the Administrator shall prescribe, from consenting to necessary advances for the protection of the security or the holder's lien, or to a reasonable extension of the term or reamortization of such loan.";

in subsec. (e), substituted para. (4) for one which read: "(4) the amount of the loan, subject to the maximums established in subsection (d) of this section, is not in excess of the maximum amount prescribed by the Administrator;"; deleted subsec. (g) which read: "(g) Entitlement to the loan guaranty benefit used under this section shall be restored a single time for any veteran by the Administrator provided the first loan has been repaid in full."; redesignated subsecs. (h)-(n) as subsecs. (g)-(m), respectively; in subsec. (h), as so redesignated, designated existing matter as para. (1), in para. (1), as so designated, deleted "For the purpose of assuring compliance with such standards, the Administrator shall from time to time inspect the manufacturing process of mobile homes to be sold to veterans and conduct random onsite inspections of mobile homes purchased with assistance under this chapter." following "environmental conditions."; and added para. (2); in subsecs. (i) and (j), as so redesignated, substituted "subsection (h)" for "subsection (i)"; and in subsec. (l), as so redesignated, substituted "subsection (h)" for "subsection (i)" and substituted "subsection (i)" for "subsection (j)".

1980. Act Oct. 7, 1980, § 401(b) (effective 10/7/80, as provided by § 601(d) of such Act, which appears as 38 USCS § 1114 note), added subsec. (a)(1)(F) and (a)(4).

Such Act further (effective 10/1/80, as provided by § 601(b) of such Act, which appears as 38 USCS § 1114 note), in subsec. (c), in paras. (3) and (4), substituted "$20,000" for "$17,500" wherever appearing.

1981. Act Oct. 17, 1981 (effective on enactment on 10/17/81, as provided by § 701(b)(1) of such Act, which appears as 38 USCS § 1114 note), in subsec. (d), substituted para. (1) for one which read:

"(1) The maturity of any loan guaranteed under this section shall not be more than--

"(A) fifteen years and thirty-two days, in the case of a loan for the purchase of--

"(i) a lot;

"(ii) a single-wide mobile home; or

"(iii) a single-wide mobile home and a lot; or

"(B) twenty years and thirty-two days, in the case of a loan for the purchase of--

"(i) a double-wide mobile home; or

"(ii) a double-wide mobile home and a lot.".

Act Nov. 3, 1981 (effective 180 days after enactment on Nov. 3, 1981, as provided by § 305 of such Act, which appears as 38 USCS § 3741 note), in subsec. (a)(1), introductory matter, inserted "housing loan"; and in subsec. (b)(2), substituted "housing loan" for "loan guaranty".

Act Oct. 14, 1982 substituted this catchline for one which read: "§ 1819. Loans to purchase mobile homes and mobile home lots", in subsec. (a), in para. (1), in subparas. (A)-(E), substituted "manufactured home" for "mobile home", and added subpara. (G), in para. (2), inserted "(other than the refinancing under clause (F) of such paragraph of an existing loan)", and substituted "manufactured home" for "mobile home", in para. (3), substituted "(C), (E), or (G)" for "(C) or (E)" and substituted "manufactured home" for "mobile home", in para. (4)(A)(ii), substituted "manufactured home" for "mobile home" and "manufactured-home" for "mobile-home", wherever appearing, and added para. (5); and in subsecs. (b)(1), (c)(1), (d)(1)(B)-(D), (e)(3), (4)(A), (B), (6), (f), (h)-(k), and (m), substituted "manufactured home" for "mobile home", wherever appearing.


1986. Act Oct. 28, 1986, in subsec. (e)(2), inserted "as determined in accordance with the regulations prescribed under section 1810(g) of this title".

1987. Act Dec. 21, 1987 (applicable as provided by § 3(d) of such Act, which appears as 38 USCS § 3703 note), in subsec. (c), in para. (3), substituted the sentence beginning "The Administrator's guaranty . . ." for "The Administrator's guaranty may not exceed the lesser of 50 per centum of the loan amount or the maximum loan guaranty entitlement available, not to exceed $20,000."

Such Act further (applicable as provided by § 7(d)(1) of such Act, which appears as 38 USCS § 3710 note), in subsec. (a)(4)(A), in cl. (ii), deleted "and such manufactured home (or a manufactured home on such lot) must be owned and occupied by the veteran as such veteran's home" following "refinanced", in cl. (iv), deleted "and" following the semicolon, in cl. (v), substituted a semicolon for the concluding period, and added cl. (vi).

Such Act further (applicable as provided by § 8(c) of such Act, which appears as 38 USCS § 3704 note), in subsec. (a)(5)(A)(i), inserted "(except as provided in section 1804(c)(2) of this title)"; and in subsec. (e)(5), inserted "; except that the requirement of this clause shall not apply (A) in the case of a guaranteed loan that is for the purpose described in paragraph (1)(F) of subsection (a), or (B) in the case described in section 1804(c)(2)".

1988. Act Feb. 29, 1988 (applicable as provided by § 3(c) of such Act, which appears as 38 USCS § 3703 note), in subsec. (c), in para. (3), substituted the sentence, beginning "The Administrator's guaranty . . ." for one which read: "The Administrator's guaranty may not exceed 40 percent of the loan, or $20,000, whichever is less, reduced by the amount of entitlement previously used by the veteran under this chapter and not restored as a result of the exclusion in section 1802(b) of this title.

Such Act further (applicable as provided by § 1804(c)(2) of this title); and in subsec. (e)(5), inserted "; except that the requirement of this clause shall not apply (A) in the case of a guaranteed loan that is for the purpose described in paragraph (1)(F) of subsection (a), or (B) in the case described in section 1804(c)(2)".

1990. Act Nov. 5, 1990 (applicable as provided by § 8031(b) of such Act, which appears as a note to this section), in subsec. (c), substituted para. (3) for one which read: "The Secretary's guaranty may not exceed the lesser of (A) the lesser of $20,000 or 40 percent of the loan, or (B) the maximum amount of guaranty entitlement available to the veteran as specified in paragraph (4) of this subsection. Payment of a claim under such guaranty shall be made only after liquidation of the security for the loan and the filing of an accounting with the Secretary. In any such accounting the Secretary shall permit to be included therein accrued unpaid interest from the date of the first uncured default to such cutoff date as the Secretary may establish, and the Secretary shall allow the holder of the loan to charge against the liquidation or resale proceeds, accrued interest from the cutoff date established, to such further date as the Secretary may determine and such costs and expenses as the Secretary determines to be reasonable and proper. The liability of the United States under the guaranty provided for by this section shall decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the obligation."


1992. Act Oct. 28, 1992, in subsec. (a)(4)(A), substituted cl. (iv) for one which read: "the amount of the guaranty of the loan may not exceed the original guaranty amount of the loan being refinanced;".

1994. Act Nov. 2, 1994, in subsec. (c)(3), in subpara. (D), inserted "of" following "subparagraph (B)", and, in subpara. (E), substituted "of this paragraph" for "of this subsection".

Such Act further, in subsec. (h), substituted para. (2) for one which read:

"(2)(A) For the purpose of assuring compliance with the standards prescribed under paragraph (1) of this subsection, the Secretary shall from time to time inspect the manufacturing process of manufacturers of manufactured homes sold to veterans utilizing assistance under this chapter. For the purpose stated in the preceding sentence and for the additional purpose of monitoring safety factors involved in the installation of manufactured homes purchased through the utilization of assistance under this chapter, the Secretary shall from time to time conduct random onsite inspections of manufactured homes purchased through the utilization of such assistance.

"(B) The Secretary of Veterans Affairs may, with the agreement of the Secretary of Housing and Urban Development, delegate to the Secretary of Housing and Urban Development the duty of the Secretary of Veterans Affairs under subparagraph (A) of this paragraph to inspect the manufacturing process of manufacturers of manufactured homes, but any such delegation shall be subject to an agreement that the Secretary of Housing and Urban Development, upon the request of the Secretary of Veterans Affairs, shall promptly provide the Secretary of Veterans Affairs with the complete results of any inspection made by the Secretary of Housing and Urban Development pursuant to such delegation. The Secretary of Veterans Affairs shall have the right to withdraw any delegation under the preceding sentence at any time and in whole or in part.".

Such Act further, in subsec. (j), substituted "in the case of--
(1) manufactured homes constructed by a manufacturer who fails or is unable to discharge the manufacturer's obligations under the warranty;

(2) manufactured homes which are determined by the Secretary not to conform to the standards provided for in subsection (h); or

(3) a manufacturer of manufactured homes who has engaged in procedures or practices determined by the Secretary to be unfair or prejudicial to veterans or the Government.

for "in the case of manufactured homes constructed by any manufacturer who refuses to permit the inspections provided for in subsection (h) of this section; or in the case of manufactured homes which are determined by the Secretary not to conform to the aforesaid standards; or where the manufacturer of manufactured homes fails or is unable to discharge the manufacturer's obligations under the warranty."

Such Act further, in subsec. (l), deleted "the results of inspections required by subsection (h) of this section," following "including" and "of this section," following "subsection (i)"; and, in subsec. (m), substituted "sections 3704(d) and 3721 of this title" for "section 3704(d) and section 3721 of this chapter".

1995. Act Dec. 21, 1995 repealed subsec. (l), which read: "The Secretary's annual report to Congress shall include a report on operations under this section, including experience with compliance with the warranty required by subsection (i) and the experience regarding defaults and foreclosures."; and redesignated subsec. (m) as subsec. (l).

Other provisions:

Authority of the Administrator to promulgate regulations. For the authority and effective date for the Administrator of Veterans' Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Application of 1990 amendment of subsec. (c)(3). Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle D, § 8031(b), 104 Stat. 1388-348, provides: "The amendment made by this section [amending subsec. (c)(3) of this section] shall apply to claims filed with the Secretary of Veterans Affairs on or after the date of the enactment of this Act.".

Code of Federal Regulations
Department of Veterans Affairs-Loan guaranty, 38 CFR Part 36

Cross References
This section is referred to in 38 USCS §§ 3701, 3703, 3704, 3710, 3711, 3724, 3725, 3729, 3762

Research Guide
Federal Procedure:
4B Fed Proc L Ed, Banking and Financing §§ 8:1859, 1864

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 115

§ 3713. Release from liability under guaranty

Discussion and Analysis in the Veterans Benefits Manual
(a) Whenever any veteran disposes of residential property securing a guaranteed, insured, or direct housing loan obtained by the veteran, the Secretary, upon application made by such veteran and by the transferee incident to such disposal, shall issue to such veteran in connection with such disposal a release relieving the veteran of all further liability to the Secretary on account of such loan (including liability for any loss resulting from any default of the transferee or any subsequent purchaser of such property) if the Secretary has determined, after such investigation as the Secretary may deem appropriate, that (1) the loan is current, and (2) the purchaser of such property from such veteran (A) is obligated by contract to purchase such property and to assume full liability for the repayment of the balance of the loan remaining unpaid, and has assumed by contract all of the obligations of the veteran under the terms of the instruments creating and securing the loan, and (B) qualifies from a credit standpoint, to the same extent as if the transferee were a veteran eligible for purposes specified in section 3710 of this title [38 USCS § 3710], for a guaranteed or insured or direct loan in an amount equal to the unpaid balance of the obligation for which the transferee has assumed liability.

(b) If any veteran disposes of residential property securing a guaranteed, insured, or direct housing loan obtained by the veteran under this chapter [38 USCS §§ 3701 et seq.] without receiving a release from liability with respect to such loan under subsection (a), and a default subsequently occurs which results in liability of the veteran to the Secretary on account of the loan, the Secretary may relieve the veteran of such liability if the Secretary determines, after such investigation as the Secretary deems appropriate, that the property was disposed of by the veteran in such a manner, and subject to such conditions, that the Secretary would have issued the veteran a release from liability under subsection (a) with respect to the loan if the veteran had made application therefor incident to such disposal. Failure of a transferee to assume by contract all of the liabilities of the original veteran-borrower shall bar such release of liability only in cases in which no acceptable transferee, either immediate or remote, is legally liable to the Secretary for the indebtedness of the original veteran-borrower arising from termination of the loan. The failure of a veteran to qualify for release from liability under this subsection does not preclude relief from being granted under section 5302(b) of this title, if the veteran is eligible for relief under that section.

(c) This section shall apply only to loans for which commitments are made before March 1, 1988.

Explanatory notes:

A prior § 1813 (Act Sept. 2, 1958, P. L. 85-857, § 1, 72 Stat. 1211) was repealed by Act Dec. 31, 1974, P. L. 93-569, § 7(a), 88 Stat. 1866. Such section provided for automatically guaranteed loans made to a veteran if made for the purpose of purchasing business property.

Amendments:

1972. Act June 30, 1972 (effective 6/30/72, as provided by § 301(c) of such Act, which appears as a note to this section), designated existing matter as subsec. (a); and added subsec. (b).

1976. Act June 30, 1976 (effective 6/30/76, as provided by § 9(a) of such Act, which appears as 38 USCS § 3701 note), in subsec. (a), substituted "the veteran" for "him" following "by" and "relieving", substituted "the Administrator" for "he" preceding "may deem", substituted "is obligated" for "has obligated himself", and substituted "the transferee" for "he" preceding
“were” and “has assumed”; and in subsec. (b), substituted “the veteran” for “him” preceding “under this chapter”, and substituted “the Administrator” for “he” preceding “determines” and “deems”.

1981. Act Nov. 3, 1981 (effective 180 days after enactment on Nov. 3, 1981, as provided by § 305 of such Act, which appears as 38 USCS § 3741 note), in subsecs. (a) and (b), inserted “housing”.


1988. Act May 20, 1988 redesignated 38 USCS § 1817 as this section (38 USCS § 1813); and in subsec. (a), as so redesignated, substituted “for purposes specified in section 1810” for “under section 1810”.

1989. Act Dec. 18, 1989, in subsecs. (a) and (b), substituted “Secretary” for “Administrator”, wherever appearing.

1991. Act May 7, 1991, § 402(d)(1), amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1813, as 38 USCS § 3713, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1994. Act Nov. 2, 1994, in subsec. (b), substituted “section 5302(b) of this title, if the veteran is eligible for relief under that section” for “subsection 5302(b) of this title, if eligible thereunder”.

Other provisions:

Authority of the Administrator to promulgate regulations. For the authority and effective date for the Administrator of Veterans’ Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

Code of Federal Regulations
Department of Veterans Affairs-Loan guaranty, 38 CFR Part 36

Research Guide

Federal Procedure:
4B Fed Proc L Ed, Banking and Financing § 8:1858

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 117
1. Generally
2. Release under particular circumstances
3. Miscellaneous

1. Generally

Only Veterans Administration [now Department of Veterans Affairs] has power to grant release from liability under guaranteed loan and absent such release from Veterans Administration [now Department], veteran-borrower remains under obligation to indemnify Veterans Administration [now Department] for amounts paid under guaranty. Davis v National Homes Acceptance Corp. (1981, ND Ala) 523 F Supp 477

2. Release under particular circumstances

Veteran may be released from all personal liability resulting from VA guaranteed loan when property securing loan is transferred upon divorce to veteran's spouse who assumes total
responsibility for loan, provided (1) divorce is final and absolute and no appeal will be taken, (2) entire estate has become vested in spouse, (3) loan is current, (4) Veterans Administration [now Department of Veterans Affairs] income and credit requirements can be met by spouse and (5) no property settlement exists which would make veteran liable as between parties. VA GCO 1-78

Statute clearly requires Veterans' Administration [now Department of Veterans Affairs] to look at situation as it existed at time of transfer when deciding whether veteran would have been entitled to release had he applied for one incident to disposal of property subject to guarantee; hence decision that veteran was not entitled to waiver because transferee who assumed defaulted during first 12 months and was therefore not considered satisfactory risk was erroneous. Travelstead v Derwinski (1991) 1 Vet App 344, affd (1992, CA) 978 F.2d 1244, 93 Daily Journal DAR 1163

3. Miscellaneous

Board erred in failing to make determination on veteran's claim contesting legitimacy of asserted indebtedness, contending that Ro, as well as lender, failed to provide him with adequate notice of default and foreclosure sale. Carlson v Derwinski (1992) 2 Vet App 144

Remand was required for BVA to readjudicate matter regarding retroactive release from liability by applying correct statutory standard to facts of case regarding creditworthiness of transferees to determine whether release from liability would have been granted had veteran applied for one at time of transfer of property to subsequent purchaser. Elkins v Derwinski (1992) 2 Vet App 422

§ 3714. Assumptions; release from liability

(a) (1) Except as provided in subsection (f) of this section, if a veteran or any other person disposes of residential property securing a loan guaranteed, insured, or made under this chapter [38 USCS §§ 3701 et seq.] and the veteran or other person notifies the holder of the loan in writing before the property is disposed of, the veteran or other person, as the case may be, shall be relieved of all further liability to the Secretary with respect to the loan (including liability for any loss resulting from any default of the purchaser or any subsequent owner of the property) and the application for assumption shall be approved if the holder determines that--

(A) the loan is current; and

(B) the purchaser of the property from such veteran or other person--

(i) is obligated by contract to purchase such property and to assume full liability for the repayment of the balance of the loan remaining unpaid and has assumed by contract all of the obligations of the veteran under the terms of the instruments creating and securing the loan; and

(ii) qualifies from a credit standpoint, to the same extent as if the purchaser were a veteran eligible under section 3710 of this title [38 USCS § 3710], for a guaranteed or insured or direct loan in an amount equal to the unpaid balance of the obligation for which the purchaser is to assume liability.

(2) For the purposes of paragraph (1), paragraph (3), and paragraph (4)(C)(ii) of this subsection, the Secretary shall be considered to be the holder of the loan if the actual holder is not an approved lender described in section 3702 [38 USCS § 3702].

(3) If the holder of the loan determines that the loan is not current or that the purchaser of the property does not meet the requirements of paragraph (1)(B) of this subsection, the holder shall--

(A) notify the transferor and the Secretary of such determination; and
(B) notify the transferor that the transferor may appeal the determination to the Secretary.

(4) (A) Upon the appeal of the transferor after a determination described in paragraph (3) is made, the Secretary shall, in a timely manner, review and make a determination (or a redetermination in any case in which the Secretary made the determination described in such paragraph) with respect to whether the loan is current and whether the purchaser of the property meets the requirements of paragraph (1)(B) of this subsection. The Secretary shall transmit, in writing, a notice of the nature of such determination to the transferor and the holder and shall inform them of the action that shall or may be taken under subparagraph (B) of this paragraph as a result of the determination of the Secretary.

(B) (i) If the Secretary determines under subparagraph (A) of this paragraph that the loan is current and that the purchaser meets the requirements of paragraph (1)(B) of this subsection, the holder shall approve the assumption of the loan, and the transferor shall be relieved of all liability to the Secretary with respect to such loan.

(ii) If the Secretary determines under subparagraph (A) of this paragraph that the purchaser does not meet the requirements of paragraph (1)(B) of this subsection, the Secretary may direct the holder to approve the assumption of the loan if--

(I) the Secretary determines that the transferor of the property is unable to make payments on the loan and has made reasonable efforts to find a buyer who meets the requirements of paragraph (1)(B) of this subsection and that, as a result, the proposed transfer is in the best interests of the Department and the transferor;

(II) the transferor has requested, within 15 days after receiving the notice referred to in subparagraph (A) of this paragraph, that the Secretary approve the assumption; and

(III) the transferor will, upon assumption of the loan by the purchaser, be secondarily liable on the loan.

(C) If--

(i) the loan is not approved for assumption under subparagraph (B) of this paragraph or paragraph (1) of this subsection; or

(ii) no appeal is made by the transferor under subparagraph (A) of this paragraph within 30 days after the holder informs the transferor of its determination under paragraph (3) of this subsection,

the holder may demand immediate, full payment of the principal, and all interest earned thereon, of such loan if the transferor disposes of the property.

(b) If a person disposes of residential property described in subsection (a)(1) of this section and the person fails to notify the holder of the loan before the property is disposed of, the holder, upon learning of such action by the person, may demand immediate and full payment of the principal, interest, and all other amounts owing under the terms of the loan.
(c) (1) In any case in which the holder of a loan described in subsection (a)(1) of this section has knowledge of a person's disposing of residential property securing the loan, the holder shall notify the Secretary of such action.

(2) If the holder fails to notify the Secretary in such a case, the holder shall be liable to the Secretary for any damage sustained by the Secretary as a result of the holder's failure, as determined at the time the Secretary is required to make payments in accordance with any insurance or guaranty provided by the Secretary with respect to the loan concerned.

(d) With respect to a loan guaranteed, insured, or made under this chapter, the Secretary shall provide, by regulation, that at least one instrument evidencing either the loan or the mortgage or deed of trust therefor, shall conspicuously contain, in such form as the Secretary shall specify, a notice in substantially the following form: "This loan is not assumable without the approval of the Department of Veterans Affairs or its authorized agent".

(e) The Secretary shall establish in regulations a reasonable amount as the maximum amount that a lender may charge for processing an application for a creditworthiness determination and assumption of a loan pursuant to this section. Such regulations shall establish requirements for the timely processing of applications for acceptance of assumptions.

(f) (1) This section shall apply--

(A) in the case of loans other than loans to finance the purchase of real property described in section 3733(a)(1) of this title [38 USCS § 3733(a)(1)], only to loans for which commitments are made on or after March 1, 1988; and

(B) in the case of loans to finance the purchase of such property, only to loans which are closed after January 1, 1989.

(2) This section shall not apply to a loan which the Secretary has sold without recourse.

Explanatory notes:


Amendments:


Act Nov. 18, 1988, in subsec. (a)(1), in the introductory matter, substituted "Except as provided in subsection (f) of this section, if" for "If" and substituted "loan guaranteed, insured, or made" for "guaranteed, insured, or direct housing loan obtained by a veteran"; and substituted subsec. (f) for one which read: "This section shall apply only to loans for which commitments are made on or after March 1, 1988.


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1814, as 38 USCS § 3714, amended the references in this section to reflect the redesignations made by § 5(a) of
such Act (see Table III preceding 38 USCS § 101), and, in subsec. (d), substituted "Department of Veterans Affairs" for "Veterans' Administration".

Such Act further, in subsec. (a)(4)(B)(ii)(I), substituted "Department" for "Veterans' Administration".


2001. Act Dec. 27, 2001, substituted subsec. (d) for one which read: "(d) The Secretary shall provide that the mortgage or deed of trust and any other instrument evidencing the loan entered into by a person with respect to a loan guaranteed, insured, or made under this chapter shall contain provisions, in such form as the Secretary shall specify, implementing the requirements of this section, and shall bear in conspicuous position in capital letters on the first page of the document in type at least 2 and 1/2 times larger than the regular type on such page the following: 'This loan is not assumable without the approval of the Department of Veterans Affairs or its authorized agent.' ".

Code of Federal Regulations
Department of Veterans Affairs-Loan guaranty, 38 CFR Part 36

Cross References
This section is referred to in 38 USCS §§ 3704, 3729

Research Guide
Federal Procedure:
4B Fed Proc L Ed, Banking and Financing § 8:1858

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 117

[§ 3715] [§ 1815. Transferred]
The bracketed section number "3715" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.


[§ 3716] [§ 1816. Transferred]
The bracketed section number "3716" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

This section (Act Sept. 2, 1958, P. L. 85-857, § 1, 72 Stat. 1212; Aug. 10, 1965, P. L. 89-117, Title I, § 107(f), 79 Stat. 460; June 30, 1976, P. L. 94-324, § 7(17), 90 Stat. 722.) was amended and subsecs. (a)-(c) were transferred to 38 USCS § 1832(a)-(c), respectively, and subsecs. (d)-(f) were transferred to 38 USCS § 1833(a)-(c), respectively, by Act May 20, 1988, P. L. 100-322, Title IV, Part B, § 415(b)(1), 102 Stat. 550.

[§ 3717] [§ 1817. Transferred]
The bracketed section number "3717" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.


[§ 3717A]  [§ 1817A. Transferred]
The bracketed section number "3717A" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

This section was redesignated and transferred to 38 USCS § 1814 by Act May 20, 1988, P. L. 100-322, Title IV, Part B, § 415(b)(2)(B), 102 Stat. 550.

[§ 3718]  [§ 1818. Repealed]
The bracketed section number "3718" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.


[§ 3719]  [§ 1819. Transferred]
The bracketed section number "3719" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.


SUBCHAPTER III. ADMINISTRATIVE PROVISIONS

§ 3720. Powers of Secretary
§ 3721. Incontestability
§ 3722. Veterans Housing Benefit Program Fund
[§§ 3723-3725. Repealed]
§ 3726. Withholding of payments, benefits, etc.
§ 3727. Expenditures to correct or compensate for structural defects in mortgaged homes
§ 3728. Exemption from State anti-usury provisions.
§ 3729. Loan fee
§ 3730. Use of attorneys in court
§ 3731. Appraisals
§ 3720. **Powers of Secretary**

(a) Notwithstanding the provisions of any other law, with respect to matters arising by reason of this chapter [38 USCS §§ 3701 et seq.], the Secretary may--

(1) sue and be sued in the Secretary's official capacity in any court of competent jurisdiction, State or Federal, but nothing in this clause shall be construed as authorizing garnishment or attachment against the Secretary, the Department of Veterans Affairs, or any of its employees;

(2) subject to specific limitations in this chapter [38 USCS §§ 3701 et seq.], consent to the modification, with respect to rate of interest, time of payment of principal or interest or any portion thereof, security or other provisions of any note, contract, mortgage or other instrument securing a loan which has been guaranteed, insured, made or acquired under this chapter [38 USCS §§ 3701 et seq.];

(3) pay, or compromise, any claim on, or arising because of, any such guaranty or insurance;

(4) pay, compromise, waive or release any right, title, claim, lien or demand, however acquired, including any equity or any right of redemption;

(5) purchase at any sale, public or private, upon such terms and for such prices as the Secretary determines to be reasonable, and take title to, property, real, personal or mixed; and similarly sell, at public or private sale, exchange, assign, convey, or otherwise dispose of any such property; and

(6) complete, administer, operate, obtain and pay for insurance on, and maintain, renovate, repair, modernize, lease, or otherwise deal with any property acquired or held pursuant to this chapter [38 USCS §§ 3701 et seq.]. The acquisition of any such property shall not deprive any State or political subdivision thereof of its civil or criminal jurisdiction of, on, or over such property (including power to tax) or impair the rights under the State or local law of any persons on such property. Without regard to section 3302(b) of title 31 [31 USCS § 3302(b)] or any other provision of law not expressly in limitation of this paragraph, the Secretary may permit brokers utilized by the Secretary in connection with such properties to deduct from rental collections amounts covering authorized fees, costs, and expenses incurred in connection with the management, repair, sale, or lease of any such properties and remit the net balances to the Secretary.

(b) The powers granted by this section may be exercised by the Secretary without regard to any other provision of law not enacted expressly in limitation of this section, which otherwise would govern the expenditure of public-funds, except that title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) shall apply to any contract for services or supplies on account of any property acquired pursuant to this section.
(c) The financial transactions of the Secretary incident to, or arising out of, the guaranty or insurance of loans pursuant to this chapter [38 USCS §§ 3701 et seq.], and the acquisition, management, and disposition of property, real, personal, or mixed, incident to such activities and pursuant to this section, shall be final and conclusive upon all officers of the Government.

(d) The right to redeem provided for by section 2410(c) of title 28 [28 USCS § 2410(c)] shall not arise in any case in which the subordinate lien or interest of the United States derives from a guaranteed or insured loan.

(e) [Deleted]

(f) Whenever loss, destruction, or damage to any residential property securing loans guaranteed, insured, made, or acquired by the Secretary under this chapter [38 USCS §§ 3701 et seq.] occurs as the result of a major disaster as determined by the President under the Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), the Secretary shall (1) provide counseling and such other service to the owner of such property as may be feasible and shall inform such owner concerning the disaster assistance available from other Federal agencies and from State or local agencies, and (2) pursuant to subsection (a)(2) of this section, extend on an individual case basis such forbearance or indulgence to such owner as the Secretary determines to be warranted by the facts of the case and the circumstances of such owner.

(g) The Secretary shall, at the request of the Secretary of Housing and Urban Development and without reimbursement, certify to such Secretary whether an applicant for assistance under any law administered by the Department of Housing and Urban Development is a veteran.

(h) (1) The Secretary may, upon such terms and conditions as the Secretary considers appropriate, issue or approve the issuance of, and guarantee the timely payment of principal and interest on, certificates or other securities evidencing an interest in a pool of mortgage loans made in connection with the sale of properties acquired under this chapter [38 USCS §§ 3701 et seq.].

(2) The Secretary may not under this subsection guarantee the payment of principal and interest on certificates or other securities issued or approved after December 31, 2011.

References in text:
The "Disaster Relief and Emergency Assistance Act", referred to in this section, is Act May 22, 1974, P. L. 93-288, 88 Stat. 143, also known as the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which appears generally as 42 USCS §§ 5121 et seq. For full classification of such Act, consult USCS Tables volumes.

Amendments:
1963. Act Oct. 17, 1963, in subsec. (a)(4), inserted "and the authority to waive or release claims may include partial or total waiver of payment by the veteran, or his spouse, following default and loss of the property where the Administrator determines that the default arose out of compelling reasons without fault on the part of the veteran or that collection of the indebtedness would otherwise work a severe hardship upon the veteran;".

1966. Act Oct. 4, 1966, in subsec. (a)(6), inserted "Without regard to section 3617, Revised Statutes (31 U.S.C. 484), or any other provision of law not expressly in limitation of this paragraph, the Administrator may permit brokers utilized by him in connection with such properties to deduct from rental collections amounts covering authorized fees, costs, and expenses incurred in connection with the management, repair, sale, or lease of any such properties and remit the net balances to the Administrator.".

Act Nov. 6, 1966 (effective as provided by § 14 of such Act), added subsec. (f).

1968. Act Aug. 1, 1968 (effective as provided by § 808 of such Act, which appears as 12 USCS § 1716b note), in subsec. (e)(1), substituted "Government National" for "Federal National" wherever appearing.

1970. Act Dec. 31, 1970 (effective as of 4/1/70, as provided by § 304 of such Act), substituted subsec. (a)(2) for one which read: "(2) subject to specific limitations in this chapter, consent to the modification, with respect to rate of interest, time of payment of principal or interest or any portion thereof, security or other provisions of any note, contract, mortgage or other instrument securing a loan which has been guaranteed or insured under this chapter;" and substituted subsec. (f) for one which read: "(f) The Administrator is authorized to refinance any loan made, or acquired by the Veterans' Administration when he finds such refinancing necessary because of the loss, destruction, or damage to property securing such loan as the result of a major disaster as determined by the President pursuant to the Act entitled 'An Act to authorize Federal assistance to States and local governments in major disasters, and for other purposes', approved September 30, 1950, as amended (42 U.S.C. 1855-1855g). The interest rate on any loan refinanced under this subsection may be reduced to a rate not less than (i) a rate determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturity of such loan, adjusted to the nearest one-eighth of 1 per centum, less (ii) not to exceed 2 per centum per annum, and the term thereof may be extended for such period as will provide a maturity of not to exceed forty years; except that the Administrator may authorize a suspension in the payment of principal and interest charges on, and an additional extension in the maturity of, any such loan for a period not to exceed five years if he determines that such action is necessary to avoid severe financial hardship.".

1972. Act June 30, 1972 (effective 6/30/72, as provided by § 301(a) of such Act, which appears as 38 USCS § 3713 note), in subsec. (a)(4), deleted "and the authority to waive or release claims may include partial or total waiver of payment by the veteran, or his spouse, following default and loss of the property where the Administrator determines that the default arose out of compelling reasons without fault on the part of the veteran or that collection of the indebtedness would otherwise work a severe hardship;" following "right of redemption;".

1974. Act May 22, 1974 (effective 4/1/74, as provided by § 605 of such Act which appears as 42 USCS § 5121 note), in subsec. (f), substituted "the Disaster Relief Act of 1974" for "the Disaster Assistance Act of 1970".

1976. Act June 30, 1976 (effective 6/30/76, as provided by § 9(a) of such Act, which appears as 38 USCS § 3701 note), in subsec. (a), in para. (1), substituted "the Administrator's" for "his", in para. (5), substituted "the Administrator" for "he", and in para. (6), substituted "the Administrator" for "him" following "by"; and in subsec. (e), in para. (1), substituted "the Administrator" for "he" preceding "determines" and "shall periodically", substituted "the Administrator" for "him" following "set aside by", and substituted "the Administrator's" for "his" wherever appearing and in para. (2), substituted "the Administrator" for "he" preceding "determines".

1977. Act Oct. 3, 1977 (effective as provided by § 403(b) of such Act, which appears as a note to this section), in subsec. (a)(1), inserted ", but nothing in this clause shall be construed as authorizing garnishment or attachment against the Administrator, the Veterans' Administration, or any of its employees".

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1983. Act Nov. 21, 1983, in subsec. (a)(6), deleted a comma following "title 31"; and, in subsec. (b), substituted "section 3709 of the Revised Statutes (41 U.S.C. 5)" for "section 5 of title 41".

1986. Act Oct. 28, 1986, in subsec. (b), substituted "the amount prescribed in clause (1) of the first sentence of such section" for "$1,000".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1820, as 38 USCS § 3720, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


1998. Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 602(f) of such Act, which appears as 38 USCS § 2106 note) deleted subsec. (e), which read:

"(e)(1) The Secretary is authorized from time to time, as the Secretary determines advisable, to set aside first mortgage loans, and installment sale contracts, owned and held by the Secretary under this chapter as the basis for the sale of participation certificates as herein provided. For this purpose the Secretary may enter into agreements, including trust agreements, with the Government National Mortgage Association, and any other Federal agency, under which the Association as fiduciary may sell certificates of participation based on principal and interest collections to be received by the Secretary and the Association or any other such agency on first mortgage loans and installment sale contracts comprising mortgage pools established by them. The agreement may provide for substitution or withdrawal of mortgage loans, or installment sale contracts, or for substitution of cash for mortgages in the pool. The agreement shall provide that the Governmental National Mortgage Association shall promptly pay to the Secretary the entire proceeds of any sale of certificates of participation to the extent such certificates are based on mortgages, including installment sale contracts, set aside by the Secretary and the Secretary shall periodically pay the Association, as fiduciary, such funds as are required for interest and principal due on outstanding certificates of participation to the extent of the pro rata amount allocated to the Secretary pursuant to the agreement. The agreement shall also provide that the Secretary shall retain ownership of mortgage loans and installment sale contracts set aside by the Secretary pursuant to the agreement unless transfer of ownership to the fiduciary is required in the event of default or probable default in the payment of participation certificates. The Secretary is authorized to purchase outstanding certificates of participation to the extent of the amount of the Secretary's commitment to the fiduciary on participations.

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outstanding and to pay the Secretary's proper share of the costs and expenses incurred by the Government National Mortgage Association as fiduciary pursuant to the agreement.

"(2) The Secretary shall proportionately allocate and deposit the entire proceeds received from the sale of participations into the funds established pursuant to sections 3723 and 3724 of this chapter, as determined on an estimated basis, and the amounts so deposited shall be available for the purposes of the funds. The Secretary may nevertheless make such allocations of that part of the proceeds of participation sales representing anticipated interest collections on mortgage loans, including installment sale contracts, on other than an estimated proportionate basis if determined necessary to assure payment of interest on advances theretofore made to the Secretary by the Secretary of the Treasury for direct loan purposes. The Secretary shall set aside and maintain necessary reserves in the funds established pursuant to sections 3723 and 3724 of this chapter to be used for meeting commitments pursuant to this subsection and, as the Secretary determines to be necessary, for meeting interest payments on advances by the Secretary of the Treasury for direct loan purposes."

Such Act further (applicable with respect to contracts entered into under this section after the end of the 60-day period beginning on enactment, as provided by § 604(b) of such Act, which appears as a note to this section), in subsec. (b), substituted "except that title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) shall apply to any contract for services or supplies on account of any property acquired pursuant to this section" for "however, section 3709 of the Revised Statutes (41 U.S.C. 5) shall apply to any contract for services or supplies on account of any property acquired pursuant to this section if the amount of such contract exceeds the amount prescribed in clause (1) of the first sentence of such section.".


Redesignation:

Section 602(l) of Title VI of Act May 22, 1974, P. L. 93-288, which amended this section, was redesignated § 702(l) of Title VII of such Act by Act Oct. 5, 1994, P. L. 103-337, Div C, Title XXXIV, Subtitle B, § 3411(a)(1), (2), 108 Stat. 3100.

Other provisions:

Waiver of indebtedness; report to Congress. Act Oct. 17, 1963, P. L. 88-151, § 2, 77 Stat. 271, provided: "The Administrator of Veterans' Affairs shall submit to the Committee on Labor and Public Welfare of the Senate and the Committee on Veterans' Affairs of the House of Representatives, not later than December 31 of each year, a written report concerning each case in which a waiver of indebtedness has been made under the authority of the amendment made by the first section of this Act. Such report shall include, together with such other information as the Administrator deems appropriate, the name and address of each person with respect to which a waiver of indebtedness has been made and the total amount of such waiver."

Administration of trusts by Federal National Mortgage Association. Act May 24, 1966, P. L. 89-429, § 6(a), 80 Stat. 167, located at 12 USCS § 1717 note, provided that provision for participation sales and administration of trusts by the Federal National Mortgage Association shall not be construed as a repeal or modification of the provisions of subsec. (e) of this section respecting the authority of the Administrator of Veterans' Affairs.

Application of Nov. 6, 1966 amendment. Act Nov. 6, 1966, P. L. 89-769, § 14, 80 Stat. 1321, provided that the amendment made to this section by Act Nov. 6, 1966, is applicable with respect to any major disaster occurring after Oct. 3, 1964.
Effective date of amendment made by § 403(a) of Act Oct. 3, 1977. Act Oct. 3, 1977, P. L. 95-117, Title IV, § 403(b), 91 Stat. 1066, provided: "The amendment made by subsection (a) of this section [amending this section] shall be effective on the date of enactment of this Act."

Housing solar energy and weatherization study. Act Nov. 23, 1977, P. L. 95-202, Title III, § 311, 91 Stat. 1449 (effective on the first day of the first month beginning 60 days after 11/23/77, as provided by § 501 of such Act), provided: "In accordance with the national policy to conserve energy and promote the maximum utilization of solar energy, the Administrator of Veterans' Affairs, in consultation with the Secretary of Energy and the Secretary of Housing and Urban Development, shall conduct a study to determine the most effective specific methods of using the programs carried out under, or amending the provisions of, chapter 37 of title 38, United States Code [38 USCS §§ 3701 et seq.], in order to aid and encourage present and prospective veteran homeowners to install in their homes solar heating, solar heating and cooling, or combined solar heating and cooling, and to apply residential energy conservation measures. The report of such study shall include a description of plans for administrative action to carry out such national policy as well as such recommendations for legislative action as the Administrator deems appropriate, and shall be submitted to the President and the Congress not later than March 1, 1978."

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.


"(a) Homeless program.(1) To assist homeless veterans and their families acquire shelter, the Secretary of Veterans Affairs may enter into agreements described in paragraph (2) of this subsection with--

"(A) nonprofit organizations, with preference being given to any organization named in, or approved by the Secretary of Veterans Affairs under, section 3402 [now section 5902] of title 38, United States Code; or

"(B) any State, as defined in section 101(20) of such title, or any political subdivision thereof.

"(2) To carry out paragraph (1) of this subsection, the Secretary of Veterans Affairs may enter into agreements to sell real property, and improvements thereon, acquired by the Secretary of Veterans Affairs as the result of a default on a loan made or guaranteed under chapter 37 of title 38, United States Code [38 USCS §§ 3701 et seq.]. Such sale shall be for such consideration as the Secretary of Veterans Affairs determines is in the best interests of homeless veterans and the Federal Government.

"(3) The Secretary of Veterans Affairs may enter into an agreement under paragraph (1) only if--

"(A) the Secretary of Veterans Affairs determines that such an action will not adversely affect the ability of the Department of Veterans Affairs--

"(i) to fulfill its statutory missions with respect to the Department of Veterans Affairs loan guaranty program and the short- and long-term solvency of the Loan Guaranty Revolving Fund under such chapter 37; or

"(ii) to carry out other functions and administer other programs authorized by law;

"(B) the entity to which the property is sold agrees to (i) utilize the property solely as a shelter primarily for homeless veterans and their families, (ii) comply with all zoning laws relating to the property, (iii) make no use of the property that is not compatible with the area where the property is located, and (iv) take such other actions as the
Secretary of Veterans Affairs determines are necessary or appropriate in the best interests of homeless veterans and the Federal Government; and

"(C) the Secretary of Veterans Affairs determines that there is no significant likelihood of the property being sold for a price sufficient to reduce the liability of the Department of Veterans Affairs or the veteran who had defaulted on the loan guaranteed under such chapter 37.

"(4) Any agreement, deed, or other instrument executed by the Secretary of Veterans Affairs under this subsection shall be on such terms and conditions as the Secretary of Veterans Affairs determines to be appropriate and necessary to carry out the purpose of such agreement.

"(b) Job training program. (1) To assist veterans to obtain training pursuant to the Veterans’ Job Training Act (29 U.S.C. 1721 note), the Secretary of Veterans Affairs may convey to persons described in paragraph (2) of this subsection real property and improvements described in subsection (a)(2) of this section for an amount not less than 75 percent of the fair market value of such real property and improvements.

"(2) The Secretary of Veterans Affairs may convey such property to persons who enter into an agreement with the Secretary of Veterans Affairs to--

"(A) use veterans in a program of job training under the Veterans’ Job Training Act in the rehabilitation of residences on such real property; and

"(B) provide a priority to veterans in the sale of such rehabilitated residences.

"(3) The Secretary of Veterans Affairs may include appropriate enforcement provisions in any agreement described in paragraph (2), including provision for reasonable liquidated damages.

"(4) The Secretary of Veterans Affairs shall reduce the amount of any liability that a veteran has with respect to any property conveyed under this section by an amount equal to the reduction in the sale price of the property below the fair market value of the property.

"(c) Termination. The authority provided in subsections (a) and (b) shall terminate on October 1, 1990.

"(d) Report. The Administrator of Veterans’ Affairs shall, by March 1, 1990, transmit to the Congress a report of the activities carried out, through December 31, 1989, under this section.”.

Applicability of amendment made by § 604(a) of Act Nov. 11, 1998. Act Nov. 11, 1998, P. L. 105-368, Title VI, § 604(b), 112 Stat. 3348, provides: “The amendment made by subsection (a) [amending subsec. (b) of this section] shall apply with respect to contracts entered into under section 3720 of title 38, United States Code, after the end of the 60-day period beginning on the date of the enactment of this Act.”.

Code of Federal Regulations
Department of Veterans Affairs-General provisions, 38 CFR Part 1
Department of Veterans Affairs-Loan guaranty, 38 CFR Part 36
Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

Cross References
This section is referred to in 28 USCS § 2410, 38 USCS §§ 3733, 5701

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Research Guide

Federal Procedure:
7A Fed Proc L Ed, Court of Federal Claims § 19:88

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 120
1. Generally
2. Governing law
3. Actions and remedies against government, generally
   4. -Administrative relief
   5. -Garnishment
   6. -Interest
7. Right of recovery of government, generally
   8. -Waiver of debt

1. Generally
Internal Veterans’ Administration [now Department of Veterans Affairs] publications establishing policies, procedures and practices in connection with carrying out powers granted under 38 USCS § 1820 [now 38 USCS § 3720] are not judicially enforceable, since they are for use of agency employees only, have not been published in Federal Register, and are not adopted with procedural requirements for rulemaking. Gatter v Nimmo (1982, CA3 Pa) 672 F.2d 343

Statute stipulating that service of process may be had in certain matters upon Veterans’ Administrator [now Secretary of Veterans Affairs] does not make valid service which is bad upon assistant, without proof that authority had been conferred upon said assistant to accept such service. Whipple v Fuller (1952, Sup) 109 NYS2d 62

2. Governing law
Federal law, not state law, is applicable to questions of federal rights and liabilities involving vendee account loan program of the Veterans Administration [now Department of Veterans Affairs]. United States v Wells (1968, CA5 Fla) 403 F.2d 596

State law requirement that indemnor be notified of foreclosure proceedings as prerequisite to obtaining deficiency judgment against indemnor did not apply to VA regulations governing foreclosure of VA-financed property since indemnity is independent right arising under federal law, but due process requires that indemnor be given notice of foreclosure proceedings; however, absence of notice of foreclosure hearing in present case and failure to give more than 5 days notice of foreclosure sale was of no substantive significance since indemnor took no action before sale nor took post-sale action available to him. Boley v Brown (1993, CA4 NC) 10 F.3d 218

3. Actions and remedies against government, generally
Waiver of sovereign immunity of Veterans Administration [now Department of Veterans Affairs] is contained in sue and be sued provision of 38 USCS § 1820 [now 38 USCS § 3720]; agency may be held liable for damages for torts of its agents, whether authorized or not. Baker v F & F Inv. Co. (1973, CA7 Ill) 489 F.2d 829 (superseded by statute as stated in Davis-Warren Auctioneers, J.V. v FDIC (2000, CA10 Colo) 215 F.3d 1159, 2000 Colo J C A R 3601)

4. -Administrative relief
The "sue and be sued" provision of 38 USCS § 1820 [now 38 USCS § 3720] does not entitle homeowners to seek in federal court discretionary administrative relief available under 38 USCS § 1827 [now 38 USCS § 3727]. Potnick v United States (1973, ND Miss) 356 F Supp 395

5. -Garnishment
Prior to 1977 amendment expressly exempting Veteran's Administration [now Department of Veterans Affairs] from garnishments, doctrine of sovereign immunity precluded execution of garnishment against Veteran's Administration [now Department of Veterans Affairs] arising from state court judgment against Administration [now Department] employee; legislative history of 38 USCS § 1820 [now 38 USCS § 3720] indicates congressional intent that Administration [now Department] should not be subject to garnishments. May Dept Stores Co. v Smith (1978, CA8 Mo) 572 F.2d 1275, cert den (1978) 439 US 837, 58 L Ed 2d 134, 99 S Ct 124

Administrator [now Secretary] is under no obligation to answer garnishment upon employee's wages, and garnishment will be quashed, as under provisions of 38 USCS § 1820(a)(1) [now 38 USCS § 3720(a)(1)], Administrator [now Secretary] has only limited capacity to sue and be sued. De Paul Community Health Center, etc. v Campbell (1977, ED Mo) 445 F Supp 484

6. -Interest

Sovereign immunity does not bar award of interest on sums recoverable from Veterans Administrator [now Secretary of Veterans Affairs] on home-loan mortgages which Veterans Administration [now Department of Veterans Affairs] has guaranteed. New York Guardian Mortgagee Corp. v Cleland (1979, SD NY) 473 F Supp 422

7. Right of recovery of government, generally

Veterans Administration [now Department of Veterans Affairs] has right to seek indemnity from defaulting mortgage under 38 USCS § 1820(a)(6) [now 38 USCS § 3720(a)(6)], despite state statute barring deficiency judgments against principal debtors by creditors or guarantors, because nothing in § 1820(a)(6) [now 38 USCS § 3720(a)(6)] indicates intent by Congress to adopt state anti-deficiency laws as federal law. Jones v Turnage (1988, ND Cal) 699 F Supp 795, affd without op (1990, CA9 Cal) 914 F.2d 1496, cert den (1991) 499 US 920, 113 L Ed 2d 243, 111 S Ct 1309

Administrator [now Secretary] of Veterans Affairs has authority under 38 USCS § 1820(a)(1) [now 38 USCS § 3720(a)(1)] to sue in state court to recover possession of real property from assignee of individuals who purchased property on installment contract for sale of real estate, and under same provision, may be sued on counterclaim without necessity of cause being removed to Federal District Court. Administrator of Veterans' Affairs v Family Bible Study Church, Inc. (1982, Dist Ct) 114 Misc 2d 615, 452 NYS2d 150

8. -Waiver of debt

No government official is authorized to forgive debt due United States, but recovery from benefits otherwise payable to veteran or other person is subject to whole or partial waiver in accordance with equitable considerations found in former 38 USC § 453; release, whole or partial waiver of claim for such indebtedness, and compromise of claim or suit are authorized under former 38 USC § 694 of Servicemen's Readjustment Act of 1944 (38 USCS §§ 1801 et seq.). 1949 ADVA 825

Veterans' Administration [now Department of Veterans Affairs] is not authorized to grant general waiver of debt simply because of hardship and present inability of veteran to pay, and right to grant waiver where recovery of debt would be against equity and good conscience does not give Administration [now Department] power to grant general waiver permanently negating government's opportunity to recover without considering veteran's fault in creation of indebtedness and general equitable rules; Administration [now Department] is to consider whether whole or partial recovery would defeat purposes of veterans' benefits otherwise payable or would be against equity and good conscience. 1951 ADVA 887

§ 3721. Incontestability

Any evidence of guaranty or insurance issued by the Secretary shall be conclusive evidence of the eligibility of the loan for guaranty or insurance under the provisions of this chapter [38 USCS §§ 3701 et seq.] and of the amount of such guaranty or insurance.
Nothing in this section shall preclude the Secretary from establishing, as against the original lender, defenses based on fraud or material misrepresentation. The Secretary shall not, by reason of anything contained in this section, be barred from establishing, by regulations in force at the date of such issuance or disbursement, whichever is the earlier, partial defenses to the amount payable on the guaranty or insurance.

Amendments:


Cross References

This section is referred to in 38 USCS § 3712

Research Guide

Federal Procedure:

4B Fed Proc L Ed, Banking and Financing § 8:1847

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 113
1. Generally
2. Forgery

1. Generally

Regulation denying liability on the government's part on account of a loan guaranty in a case where any of the documents involved are forged in not inconsistent with 38 USCS § 1821 [now 38 USCS § 3721] and valid. Mt. Vernon Cooperative Bank v Gleason (1966, CA1 Mass) 367 F.2d 289

2. Forgery

Assignee of mortgage guaranteed by Veterans' Administration [now Department of Veterans Affairs] cannot recover under guaranty if mortgagor's signature on critical documents was forged, notwithstanding provisions of 38 USCS § 1821 [now 38 USCS § 3721] making guaranty conclusive evidence of loan's eligibility for guaranty and of amount of guaranty. Carter v Crown Hosiery Mills, Inc. (1980, CA4 NC) 618 F.2d 96, 22 BNA FEP Cas 1818, cert den (1980) 447 US 924, 65 L Ed 2d 1117, 100 S Ct 3017, 22 BNA FEP Cas 1832

Veterans Administration [now Department of Veterans Affairs] is estopped from asserting defense of forgery against assignee of foreclosed mortgage where agency was aware of possibility that veteran's wife's signatures on note and mortgage were forgeries at time of sheriff's sale but never informed assignee. Home Sav. & Loan Ass'n v Nimmo (1982, CA10 Okla) 695 F.2d 1251, vacated, remanded (1984) 467 US 1223, 81 L Ed 2d 870, 104 S Ct 2673, reh den (1984) 468 US 1224, 82 L Ed 2d 916, 105 S Ct 21

§ 3722. Veterans Housing Benefit Program Fund

(a) There is hereby established in the Treasury of the United States a fund known as the Veterans Housing Benefit Program Fund (hereinafter in this section referred to as the "Fund").
(b) The Fund shall be available to the Secretary, without fiscal year limitation, for all housing loan operations under this chapter, other than administrative expenses, consistent with the Federal Credit Reform Act of 1990.

(c) There shall be deposited into the Fund the following, which shall constitute the assets of the Fund:

1. Any amount appropriated to the Fund.
2. Amounts paid into the Fund under section 3729 of this title [38 USCS § 3729] or any other provision of law or regulation established by the Secretary imposing fees on persons or other entities participating in the housing loan programs under this chapter [38 USCS §§ 3701 et seq.].
3. All other amounts received by the Secretary on or after October 1, 1998, incident to housing loan operations under this chapter [38 USCS §§ 3701 et seq.], including:
   A. collections of principal and interest on housing loans made by the Secretary under this chapter [38 USCS §§ 3701 et seq.];
   B. proceeds from the sale, rental, use, or other disposition of property acquired under this chapter [38 USCS §§ 3701 et seq.];
   C. proceeds from the sale of loans pursuant to sections 3720(h) and 3733(a)(3) of this title [38 USCS §§ 3720(h) and 3733(a)(3)]; and
   D. penalties collected pursuant to section 3710(g)(4)(B) of this title [38 USCS § 3710(g)(4)(B)].

(d) Amounts deposited into the Fund under paragraphs (2) and (3) of subsection (c) shall be deposited in the appropriate financing or liquidating account of the Fund.

(e) For purposes of this section, the term "housing loan" shall not include a loan made pursuant to subchapter V of this chapter [38 USCS §§ 3761 et seq.].

References in text:

The "Federal Credit Reform Act of 1990", referred to in this section, is Title V of Act July 12, 1974, P. L. 93-344, as added by Act Nov. 5, 1990, P. L. 101-508, Title XIII, § 13201(a), 104 Stat. 1388-609, which appears generally as 2 USCS §§ 661 et seq. For full classification of such Act, consult USCS Tables volumes.

Explanatory notes:


Effective date of section:

This section took effect on Oct. 1, 1998, pursuant to § 602(f) of Act Nov. 11, 1998, P. L. 105-368, which appears as 38 USCS § 2106 note.

Amendments:


Other provisions:
**Transfers of amounts into Veterans Housing Benefit Program Fund.** Act Nov. 11, 1998, P. L. 105-368, Title VI, § 602(b), 112 Stat. 3346 (effective on Oct. 1, 1998, as provided by § 602(f) of such Act, which appears as 38 USCS § 2106 note), provides:

"All amounts in the following funds are hereby transferred to the Veterans Housing Benefit Program Fund:

"(1) The Direct Loan Revolving Fund, as such fund was continued under section 3723 of title 38, United States Code (as such section was in effect on the day before the effective date of this title).

"(2) The Department of Veterans Affairs Loan Guaranty Revolving Fund, as established by section 3724 of such title (as such section was in effect on the day before the effective date of this title).

"(3) The Guaranty and Indemnity Fund, as established by section 3725 of such title (as such section was in effect on the day before the effective date of this title).".

**§§ 3723-3725. Repealed**


**§ 3726. Withholding of payments, benefits, etc.**

(a) No officer, employee, department, or agency of the United States shall set off against, or otherwise withhold from, any veteran or the surviving spouse of any veteran any payments (other than benefit payments under any law administered by the Department of Veterans Affairs) which such veteran or surviving spouse would otherwise be entitled to receive because of any liability to the Secretary allegedly arising out of any loan made to, assumed by, or guaranteed or insured on account of, such veteran or surviving spouse under this chapter [38 USCS §§ 3701 et seq.], unless the Secretary provides such veteran or surviving spouse with notice by certified mail with return receipt requested of the authority of the Secretary to waive the payment of indebtedness under section 5302(b) of this title [38 USCS § 5302(b)].
(b) If the Secretary does not waive the entire amount of the liability, the Secretary shall then determine whether the veteran or surviving spouse should be released from liability under section 3713(b) of this title [38 USCS § 3713(b)].

(c) If the Secretary determines that the veteran or surviving spouse should not be released from liability, the Secretary shall notify the veteran or surviving spouse of that determination and provide a notice of the procedure for appealing that determination, unless the Secretary has previously made such determination and notified the veteran or surviving spouse of the procedure for appealing the determination.

Effective date of section:


Amendments:

1976. Act June 30, 1976 (effective 6/30/76, as provided by § 9(a) of such Act, which appears as 38 USCS § 3701 note), in subsec. (a), substituted "the Administrator" for "he" preceding "first"; and in subsec. (b), substituted "surviving spouse" for "widow" wherever appearing.

1981. Act Oct. 17, 1981 (effective 10/17/80, as provided by § 701(b)(3) of such Act, which appears as 38 USCS § 1114 note) deleted subsec. (a), which read: "The Administrator shall not, unless the Administrator first obtains the consent in writing of an individual, set off against, or otherwise withhold from, such individual any benefits payable to such individual under any law administered by the Veterans' Administration because of liability allegedly arising out of any loan made to, assumed by, or guaranteed or insured on account of, such individual under this chapter.", and deleted "(b)" preceding "No officer".

1989. Act Dec. 18, 1989, substituted "Secretary" and "Department of Veterans Affairs" for "Administrator" and "Veterans' Administration", respectively, wherever appearing.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1826, as 38 USCS § 3726.

1997. Act Aug. 5, 1997 (applicable as provided by § 8033(b) of such Act, which appears as a note to this section), designated the existing provisions as subsec. (a), and, in such subsection, substituted "unless the Secretary provides such veteran or surviving spouse with notice by certified mail with return receipt requested of the authority of the Secretary to waive the payment of indebtedness under section 5302(b) of this title." for "unless (1) there is first received the consent in writing of such veteran or surviving spouse, as the case may be, or (2) such liability and the amount thereof was determined by a court of competent jurisdiction in a proceeding to which such veteran or surviving spouse was a party.; and added subsecs. (b) and (c).

Other provisions:

Application of Aug. 5, 1997 amendments. Aug. 5, 1997, P. L. 105-33, Title VIII, Subtitle C, § 803(c), 111 Stat. 669, provides: "The amendments made by this section [amending 38 USCS §§ 3726 and 5302(b)] shall apply with respect to any indebtedness to the United States arising pursuant to chapter 37 of title 38, United States Code [38 USCS §§ 3701 et seq.], before, on, or after the date of enactment of this Act."

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 113
§ 3727. Expenditures to correct or compensate for structural defects in mortgaged homes

(a) The Secretary is authorized, with respect to any property improved by a one-to-four-family dwelling inspected during construction by the Department of Veterans Affairs or the Federal Housing Administration which the Secretary finds to have structural defects seriously affecting the livability of the property, to make expenditures for (1) correcting such defects, (2) paying the claims of the owner of the property arising from such defects, or (3) acquiring title to the property; except that such authority of the Secretary shall exist only (A) if the owner requests assistance under this section not later than four years (or such shorter time as the Secretary may prescribe) after the mortgage loan was made, guaranteed, or insured, and (B) if the property is encumbered by a mortgage which is made, guaranteed, or insured under this chapter [38 USCS §§ 3701 et seq.] after May 7, 1968.

(b) The Secretary shall by regulation prescribe the terms and conditions under which expenditures and payments may be made under the provisions of this section, and the Secretary's decisions regarding such expenditures or payments, and the terms and conditions under which the same are approved or disapproved, shall be final and conclusive, and shall not be subject to judicial review.

(c) The Secretary is authorized to make expenditures for the purposes of this section from the fund established pursuant to section 3722 of this title [38 USCS § 3722].

Amendments:

1976. Act June 30, 1976 (effective 6/30/76, as provided by § 9(a) of such Act, which appears as 38 USCS § 3701 note), in subsec. (a), substituted "the Administrator for "he" preceding "finds"; and in subsec. (b), substituted "the Administrator's" for "his".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1827, as 38 USCS § 3727, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


Such Act further (effective on 10/1/98, as provided by § 602(f) of such Act, which appears as 38 USCS § 2106 note), in subsec. (c), substituted "fund established pursuant to section 3722 of this title" for "funds established pursuant to sections 3723 and 3724 of this title, as applicable".

Research Guide

Am Jur:

35 Am Jur 2d, Federal Torts Claims Act § 46
77 Am Jur 2d, Veterans and Veterans' Laws § 120

1. Generally
2. Purpose
3. Remedies
1. Generally

Plaintiff, in action against defendants and Veterans Administration [now Department of Veterans Affairs] alleging faulty workmanship done on home purchased from defendants and inspected by agency, did not state claim upon which relief could be granted since 38 USCS § 1827 [now 38 USCS § 3727] is not applicable to other than new construction and since language in 38 USCS § 1827(b) [now 38 USCS § 3727(b)] precludes judicial review. Stanley v Veterans Administration (1978, ED Pa) 454 F Supp 9

2. Purpose

Fundamental purpose of 38 USCS § 1827 [now 38 USCS § 3727] is to authorize Administrator [now Secretary] to correct substantial defects in inspected home before foreclosure occurs and agency is faced with burden of recouping loss on ordinarily unmarketable structure; agency, by 38 USCS § 1827 [now 38 USCS § 3707], is given authority similar to that provided by § 518 of National Housing Act (12 USCS § 1715u) authorizing Administrator [now Secretary], in his discretion, to extend aid to distressed homeowners who discover defects in property purchased with Guaranteed Loan after relying on agency construction standards. Potnick v United States (1973, ND Miss) 356 F Supp 395

3. Remedies

Sole remedy for houseowner complaining of structural defects in house purchased with Veterans' Administration [now Department of Veterans Affairs] Guaranteed Loan is to seek discretionary aid of Administrator's [now Secretary's] office under 38 USCS § 1827 [now 38 USCS § 3727] and he is not entitled to seek relief in federal court under "sue and be sued" provision of 38 USCS § 1820 [now 38 USCS § 3720]. Potnick v United States (1973, ND Miss) 356 F Supp 395

§ 3728. Exemption from State anti-usury provisions.

If, under any law of the United States, loans and mortgages insured under title I or title II of the National Housing Act are exempt from the application of the provisions of any State constitution or law (1) limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved by lenders, (2) restricting the manner of calculating such interest (including prohibition of the charging of interest on interest), or (3) requiring a minimum amortization of principal, then loans guaranteed or insured under this chapter [38 USCS §§ 3701 et seq.] are also exempt from the application of such provisions.

References in text:

"The National Housing Act", referred to in this section, is Act June 27, 1934, ch 847, 48 Stat. 1246, as amended. Titles I and II of the Act are generally classified to 12 USCS §§ 1702 et seq. and 1707 et seq., respectively. For full classification of these Titles, consult USCS Tables volumes.

Effective date of section:

Act Nov. 28, 1979, P. L. 96-128, Title VI, § 601(b), 93 Stat. 988, provided that this section is effective on Nov. 28, 1979.

Amendments:

1981. Act Oct. 17, 1981 (effective on enactment on 10/17/81, as provided by § 701(b)(1) of such Act, which appears as 38 USCS § 1114 note), inserted "(1)" and "(2) restricting the manner of calculating such interest (including prohibition of the charging of interest on interest), or (3) requiring a minimum amortization of principal,".

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 113

1. Generally

2. Mobile home financing contracts

1. Generally

Arkansas constitutional amendment concerning maximum legal rate of interest did not override FHA/VA pre-emption provisions since it specifically stated that its provisions were not intended nor should they be deemed to supersede or otherwise invalidate any provisions of federal law applicable to loans or interest rates including loans secured by residential real property. Burris v First Financial Corp. (1991, CA8 Ark) 928 F.2d 797, cert den (1991) 502 US 867, 116 L Ed 2d 155, 112 S Ct 195

2. Mobile home financing contracts

State override federal pre-emption statutes (12 USCS § 1735f-7a, and 38 USCS § 1828 [now 38 USCS § 3728]), that allow exemption from state usury laws for mobile home financing contracts, when state amended its own usury limit on mobile home transactions even though state amendments did not refer to either of the federal usury pre-emption statutes nor to loans insured by the FHA and VA, since state which re-enacts or raises its usury limit on particular class of loans overrides FHA, and VA usury pre-emption statutes for that type of loan in absence of statement to the contrary. Doyle v Southern Guaranty Corp. (1986, CA11 Ga) 795 F.2d 907

Lender who complies with 12 USCS § 1735f-7 and 38 USCS § 1828 [now 38 USCS § 3728], federal statutes exempting lenders from state usury laws on mobile home retail installment contracts, need not also comply with Depository Institutions Deregulation and Monetary Control Act (12 USCS § 1735f-7a) in order to exempt itself from state usury limits, notwithstanding that DIDMCA encompasses federal mobile home loans and overlaps with federal state usury exemption statutes since dual coverage does not nullify preemptions as applied to mobile home loans. Doyle v Southern Guaranty Corp. (1986, CA11 Ga) 795 F.2d 907

Interest charged installment buyers of mobile homes through program for veterans was not usurious under 38 USCS § 1828 [now 38 USCS § 3728], where state constitutional limitation on interest rates cited by buyers specified that it did not "supersede or otherwise invalidate" interest rates under federal programs. Burris v First Financial Corp. (1990, ED Ark) 733 F Supp 1270, affd (1991, CA8 Ark) 928 F.2d 797, cert den (1991) 502 US 867, 116 L Ed 2d 155, 112 S Ct 195

§ 3729. Loan fee

(a) Requirement of fee.

(1) Except as provided in subsection (c), a fee shall be collected from each person obtaining a housing loan guaranteed, insured, or made under this chapter [38 USCS §§ 3701 et seq.], and each person assuming a loan to which section 3714 of this title [38 USCS § 3714] applies. No such loan may be guaranteed, insured, made, or assumed until the fee payable under this section has been remitted to the Secretary.

(2) The fee may be included in the loan and paid from the proceeds thereof.

(b) Determination of fee.

(1) The amount of the fee shall be determined from the loan fee table in paragraph (2). The fee is expressed as a percentage of the total amount of the loan guaranteed,
insured, or made, or, in the case of a loan assumption, the unpaid principal balance of the loan on the date of the transfer of the property.

(2) The loan fee table referred to in paragraph (1) is as follows:

<table>
<thead>
<tr>
<th>Type of loan</th>
<th>Active duty veteran</th>
<th>Reservist</th>
<th>Other obligor</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A)(i) Initial loan described in section 3710(a) to purchase or construct a dwelling with 0-down, or any other initial loan described in section 3710(a) other than with 5-down or 10-down (closed before January 1, 2004)</td>
<td>2.00</td>
<td>2.75</td>
<td>NA</td>
</tr>
<tr>
<td>(A)(ii) Initial loan described in section 3710(a) to purchase or construct a dwelling with 0-down, or any other initial loan described in section 3710(a) other than with 5-down or 10-down (closed on or after January 1, 2004, and before October 1, 2004)</td>
<td>2.20</td>
<td>2.40</td>
<td>NA</td>
</tr>
<tr>
<td>(A)(iii) Initial loan described in section 3710(a) to purchase or construct a dwelling with 0-down, or any other initial loan described in section 3710(a) other than with 5-down or 10-down (closed on or after October 1, 2004, and before October 1, 2011)</td>
<td>2.15</td>
<td>2.40</td>
<td>NA</td>
</tr>
<tr>
<td>(A)(iv) Initial loan described in section 3710(a) to purchase or construct a dwelling with 0-down, or any other initial loan described in section 3710(a) other than with 5-down or 10-down (closed on or after October 1, 2011)</td>
<td>1.40</td>
<td>2.65</td>
<td>NA</td>
</tr>
<tr>
<td>(B)(i) Subsequent loan described in section 3710(a) to purchase or construct a dwelling with 0-down, or any other subsequent loan described in section 3710(a)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Category</td>
<td>Description</td>
<td>Rate 1</td>
<td>Rate 2</td>
</tr>
<tr>
<td>----------</td>
<td>-------------</td>
<td>--------</td>
<td>--------</td>
</tr>
<tr>
<td>(B)(ii)</td>
<td>Subsequent loan to purchase or construct a dwelling with 0-down, or any other subsequent loan described in section 3710(a) closed on or after January 1, 2004, and before October 1, 2011</td>
<td>3.00</td>
<td>3.00</td>
</tr>
<tr>
<td>(B)(iii)</td>
<td>Subsequent loan to purchase or construct a dwelling with 0-down, or any other subsequent loan described in section 3710(a) closed on or after October 1, 2011 and before October 1, 2013</td>
<td>3.30</td>
<td>3.30</td>
</tr>
<tr>
<td>(B)(iv)</td>
<td>Subsequent loan to purchase or construct a dwelling with 0-down, or any other subsequent loan described in section 3710(a) closed on or after October 1, 2013</td>
<td>2.15</td>
<td>2.15</td>
</tr>
<tr>
<td>(C)(i)</td>
<td>Loan described in section 3710(a) to purchase or construct a dwelling with 5-down closed before October 1, 2011</td>
<td>1.50</td>
<td>1.75</td>
</tr>
<tr>
<td>(C)(ii)</td>
<td>Loan described in section 3710(a) to purchase or construct a dwelling with 5-down closed on or after October 1, 2011</td>
<td>0.75</td>
<td>1.00</td>
</tr>
<tr>
<td>(D)(i)</td>
<td>Initial loan described in section 3710(a) to purchase or construct a dwelling with 10-down closed before October 1, 2011</td>
<td>1.25</td>
<td>1.50</td>
</tr>
<tr>
<td>(D)(ii)</td>
<td>Initial loan described in section 3710(a) to purchase or construct a dwelling with 10-down closed on or after October 1, 2011</td>
<td>0.50</td>
<td>0.75</td>
</tr>
</tbody>
</table>
(E) Interest rate reduction refinancing loan ............ 0.50 0.50 NA
(F) Direct loan under section 3711 ............. 1.00 1.00 NA
(G) Manufactured home loan under section 3712 (other than an interest rate reduction refinancing loan) ............. 1.00 1.00 NA
(H) Loan to Native American veteran under section 3762 (other than an interest rate reduction refinancing loan) 1.25 1.25 NA
(I) Loan assumption under section 3714 ............. 0.50 0.50 0.50
(J) Loan under section 3733(a) .................. 2.25 2.25 2.25.

(3) Any reference to a section in the "Type of loan" column in the loan fee table in paragraph (2) refers to a section of this title.

(4) For the purposes of paragraph (2):

(A) The term "active duty veteran" means any veteran eligible for the benefits of this chapter [38 USCS §§ 3701 et seq.] other than a Reservist.
(B) The term "Reservist" means a veteran described in section 3701(b)(5)(A) of this title [38 USCS § 3701(b)(5)(A)] who is eligible under section 3702(a)(2)(E) of this title [38 USCS § 3702(a)(2)(E)].
(C) The term "other obligor" means a person who is not a veteran, as defined in section 101 of this title [38 USCS § 101] or other provision of this chapter [38 USCS §§ 3701 et seq.].
(D) The term "initial loan" means a loan to a veteran guaranteed under section 3710 [38 USCS § 3710] or made under section 3711 of this title [38 USCS § 3711] if the veteran has never obtained a loan guaranteed under section 3710 [38 USCS § 3710] or made under section 3711 of this title [38 USCS § 3711].
(E) The term "subsequent loan" means a loan to a veteran, other than an interest rate reduction refinancing loan, guaranteed under section 3710 [38 USCS § 3710] or made under section 3711 of this title [38 USCS § 3711] if the veteran has previously obtained a loan guaranteed under section 3710 [38 USCS § 3710] or made under section 3711 of this title [38 USCS § 3711].
(F) The term "interest rate reduction refinancing loan" means a loan described in section 3710(a)(8), 3710(a)(9)(B)(i), 3710(a)(11), 3712(a)(1)(F), or 3762(h) of this title [38 USCS § 3710(a)(8), 3710(a)(9)(B)(i), 3710(a)(11), 3712(a)(1)(F), or 3762(h)].
(G) The term "0-down" means a downpayment, if any, of less than 5 percent of the total purchase price or construction cost of the dwelling.
(H) The term "5-down" means a downpayment of at least 5 percent or more, but less than 10 percent, of the total purchase price or construction cost of the dwelling.

(I) The term "10-down" means a downpayment of 10 percent or more of the total purchase price or construction cost of the dwelling.

(c) Waiver of fee.

(1) A fee may not be collected under this section from a veteran who is receiving compensation (or who, but for the receipt of retirement pay, would be entitled to receive compensation) or from a surviving spouse of any veteran (including a person who died in the active military, naval, or air service) who died from a service-connected disability.

(2) A veteran who is rated eligible to receive compensation as a result of a pre-discharge disability examination and rating shall be treated as receiving compensation for purposes of this subsection as of the date on which the veteran is rated eligible to receive compensation as a result of the pre-discharge disability examination and rating without regard to whether an effective date of the award of compensation is established as of that date.

Amendments:

1984. Act July 18, 1984 (effective as provided by § 2511(c) of such Act, which appears as a note to this section), in subsec. (a), inserted "and from each person obtaining a loan from the Administrator to finance the purchase of real property from the Administrator," and deleted "one-half of" preceding "one percent" and "to the veteran" following "in the loan"; deleted subsec. (c) which read: "Fees collected under this section shall be deposited into the Treasury of the United States as miscellaneous receipts."; redesignated subsec. (d) as subsec. (c) and in subsec. (c), as redesignated, substituted "September 30, 1987" for "September 30, 1985".

1987. Act Dec. 21, 1987, in subsec. (b), substituted "of any veteran (including a person who died in the active military, naval, or air service) who died from a service-connected disability" for "described in section 1801(b)(2) of this title"; and, in subsec. (c), substituted "1989" for "1987"; and added subsec. (d).

Act Dec. 22, 1987, in subsec. (c), purported to substitute "1989" for "1987", but such amendment could not be executed because Act Dec. 21, 1987 had already made the same amendment.

1988. Act May 20, 1988, is subsec. (d), substituted "section 1814" for "section 1817A".

1989. Act Dec. 18, 1989 (effective 1/1/90 as provided by § 303(b) of such Act, which appears as a note to this section), substituted this section for one which read:

"(a) Except as provided in subsection (b) of this section, a fee shall be collected from each veteran obtaining a housing loan guaranteed, made, or insured under this chapter, and from each person obtaining a loan from the Administrator to finance the purchase of real property from the Administrator, and no such loan may be guaranteed, made, or insured under this chapter until the fee payable with respect to such loan has been remitted to the Administrator. The amount of the fee shall be one percent of the total loan amount. The amount of the fee may be included in the loan and paid from the proceeds thereof.

"(b) A fee may not be collected under this section from a veteran who is receiving compensation (or who but for the receipt of retirement pay would be entitled to receive compensation) or from a surviving spouse of any veteran (including a person who died in the active military, naval, or air service) who died from a service-connected disability."
"(c) A fee may not be collected under this section with respect to any loan closed after September 30, 1989.

"(d) Except as provided in subsection (b) of this section, a fee shall be collected from a person assuming a loan to which section 1814 of this chapter applies. The amount of the fee shall be equal to one-half of one percent of the balance of such loan on the date of the transfer of the property."

Such Act further purported to amend subsec. (a) by substituting "Secretary" for "Administrator" wherever appearing; however, because of a prior amendment, this amendment could not be executed.

Act Dec. 19, 1989 purported to amend subsec. (c) by substituting "September 30, 1990" for "September 30, 1989"; however, because of a prior amendment, this amendment could not be executed.

1990. Act Nov. 5, 1990, in subsec. (a)(2), substituted "Except as provided in paragraph (6) of this subsection, the amount" for "The amount", and, added para. (6).

1991. Act June 13, 1991, in subsec. (a), deleted paras. (3) and (4), which read:

"(3) Except as provided in paragraph (4) of this subsection, there shall be credited to the Guaranty and Indemnity Fund (in addition to the amount required to be credited to such Fund under section 1825(c)(2)(A) or (B) of this title), on behalf of a veteran who has made a downpayment described in paragraph (2)(C) of this subsection, an amount equal to 0.25 percent of the total loan amount for the fiscal year in which the loan is closed and for the following fiscal year.

"(4) Credits to the Guaranty and Indemnity Fund under paragraph (3) of this subsection with respect to loans guaranteed or insured under this chapter that are closed during fiscal year 1990 shall be made in October 1990 and October 1991."

and redesignated para. (5) as para. (3); and, in subsec. (c)(2), substituted "clause (A) or (B) of paragraph (2) of section 1825(c) of this title or paragraph (3) of that section" for "section 1825(c)(2) (A) or (B) of this title and subsection (a)(3) of this section".

Act Aug. 10, 1993, in subsec. (a), in para. (2), in the introductory matter, substituted "paragraphs (4) and (5)" for "paragraph (6)", added new paras. (4) and (5), and deleted para. (6), which read: "(6) With respect to each loan closed during the period beginning on November 1, 1990, and ending on September 30, 1991, each amount specified in paragraph (2) of this subsection shall be increased by 0.625 percent of the total loan amount."

1994. Act Nov. 2, 1994, in subsec. (a)(2)(E), inserted "3712(a)(1)(F), or 3762(h) for "or 3712(a)(1)(F)".

1996. Act Oct. 9, 1996, in subsec. (a)(2)(E), substituted "3712(a)(1)(F), or 3762(h) for "or 3712(a)(1)(F)".

1997. Act Aug. 5, 1997, in subsec. (a), in para. (2), in subpara. (A), deleted "or 3733(a) following "3711", in subpara. (D)(iii)(II), deleted "and" after the concluding semicolon, in subpara. (E), substituted ";" and "for a concluding period, and added subsec. (F), in para. (4), substituted "October 1, 2002" for "October 1, 1998" and substituted "(E), or (F)" for "or (E)" and, in para. (5)(C), substituted "October 1, 2002" for "October 1, 1998".

1998. Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 602(f) of such Act, which appears as 38 USCS § 2106 note), in subsec. (a), in para. (1), substituted "(c)" for "(c)("
and, in para. (4), designated the existing provisions as subpara. (A) and, in such subparagraph, substituted "With respect to a loan closed during the period specified in subparagraph (B)" for "With respect to a loan closed after September 30, 1993, and before October 1, 2002," and added subpara. (B); and, in subsec. (c), deleted the paragraph designator "(1)" preceding "A fee" and deleted paras. (2) and (3), which read:

"(2) There shall be credited to the Guaranty and Indemnity Fund (in addition to the amount required to be credited to such Fund under clause (A) or (B) of paragraph (2) of section 3725(c) of this title or paragraph (3) of that section), on behalf of a veteran or surviving spouse described in paragraph (1) of this subsection, an amount equal to the fee that, except for paragraph (1) of this subsection, would be collected from such veteran or surviving spouse.

"(3) Credits to the Guaranty and Indemnity Fund under paragraph (2) of this subsection with respect to loans guaranteed, insured, or made under this chapter that are closed during fiscal year 1990 shall be made in October 1990."

2000. Act Nov. 1, 2000, as amended by Act June 5, 2001 (effective as of 11/1/00, and as if included in Act Nov. 1, 2000 as originally enacted, as provided by § 8(b) of the 2001 Act), substituted the text of this section for text which read:

"(a)(1) Except as provided in subsection (c) of this section, a fee shall be collected from each veteran obtaining a housing loan guaranteed, insured, or made under this chapter, and from each person obtaining a loan under section 3733(a) of this title, and no such loan may be guaranteed, insured, or made under this chapter until the fee payable under this section has been remitted to the Secretary.

"(2) Except as provided in paragraphs (4) and (5) of this of subsection, the amount of such fee shall be 1.25 percent of the total loan amount, except that--

"(A) in the case of a loan made under section 3711 of this title or for any purpose specified in section 3712 (other than section 3712(a)(1)(F)) of this title, the amount of such fee shall be one percent of the total loan amount;

"(B) in the case of a guaranteed or insured loan for a purchase (except for a purchase referred to in section 3712(a) of this title), or for construction, with respect to which the veteran has made a downpayment of 5 percent or more, but less than 10 percent, of the total purchase price or construction cost, the amount of such fee shall be 0.75 percent of the total loan amount;

"(C) in the case of a guaranteed or insured loan for a purchase (except for a purchase referred to in section 3712(a) of this title), or for construction, with respect to which the veteran has made a downpayment of 10 percent or more of the total purchase price or construction cost, the amount of such fee shall be 0.50 percent of the total loan amount;

"(D) in the case of a loan made to, or guaranteed or insured on behalf of, a veteran described in section 3701(b)(5) of this title under this chapter, the amount of such fee shall be--

"(i) two percent of the total loan amount;

"(ii) in the case of a loan for any purpose specified in section 3712 of this title, one percent of such amount; or

"(iii) in the case of a loan for a purchase (other than a purchase referred to in section 3712 of this title) or for construction with respect to which the veteran has made a downpayment of 5 percent or more of the total purchase price or construction cost--
“(I) 1.50 percent of the total loan amount if such downpayment is less than 10 percent of such price or cost; or

“(II) 1.25 percent of the total loan amount if such downpayment is 10 percent or more of such price or cost;

“(E) in the case of a loan guaranteed under section 3710(a)(8), 3710(a)(9)(B)(i), 3710(a)(11), 3712(a)(1)(F), or 3762(h) of this title, the amount of such fee shall be 0.5 percent of the total loan amount; and

“(F) in the case of a loan made under section 3733(a) of this title, the amount of such fee shall be 2.25 percent of the total loan amount.

“(3) The amount of the fee to be collected under paragraph (1) of this subsection may be included in the loan and paid from the proceeds thereof.

“(4)(A) With respect to a loan closed during the period specified in subparagraph (B) for which a fee is collected under paragraph (1), the amount of such fee, as computed under paragraph (2), shall be increased by 0.75 percent of the total loan amount other than in the case of a loan described in subparagraph (A), (D)(ii), (E), or (F) of paragraph (2).

“(B) The specified period for purposes of subparagraph (A) is the period beginning on October 1, 1993, and ending on September 30, 2002, except that in the case of a loan described in subparagraph (D) of paragraph (2), such period ends on September 30, 2003.

“(5)(A) Except as provided in subparagraph (B) of this paragraph, notwithstanding paragraphs (2) and (4) of this subsection, after a veteran has obtained an initial loan pursuant to section 3710 of this title, the amount of such fee with respect to any additional loan obtained under this chapter by such veteran shall be 3 percent of the total loan amount.

“(B) Subparagraph (A) of this paragraph does not apply with respect to (i) a loan obtained by a veteran with a downpayment described in paragraph (2)(B), (2)(C), or (2)(D)(iii) of this subsection, and (ii) loans described in paragraph (2)(E) of this subsection.

“(C) This paragraph applies with respect to a loan closed after September 30, 1993, and before October 1, 2002.

“(b) Except as provided in subsection (c) of this section, a fee shall be collected from a person assuming a loan to which section 3714 of this title applies. The amount of the fee shall be equal to 0.50 percent of the balance of the loan on the date of the transfer of the property.

“(c) A fee may not be collected under this section from a veteran who is receiving compensation (or who but for the receipt of retirement pay would be entitled to receive compensation) or from a surviving spouse of any veteran (including a person who died in the active military, naval, or air service) who died from a service-connected disability.”.

2001. Act June 5, 2001 (effective as of 11/1/00, and as if included in Act Nov. 1, 2000 as originally enacted, as provided by § 8(b) of such Act), amended § 402(b) of Act Nov. 1, 2000, which amended this section.


2003. Act Dec. 16, 2003 (effective January 1, 2004, as provided by § 405 of such Act), in subsec. (b), substituted para. (2) for one which read:
"(2) The loan fee table referred to in paragraph (1) is as follows:

<table>
<thead>
<tr>
<th>Type of loan</th>
<th>Active duty</th>
<th>Reservist</th>
<th>Other obligor</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A)(i) Initial loan described in section 3710(a) to purchase or construct a dwelling with 0-down, or any other initial loan described in section 3710(a) other than with 5-down or 10-down (closed before October 1, 2011)</td>
<td>2.00</td>
<td>2.75</td>
<td>NA</td>
</tr>
<tr>
<td>(A)(ii) Initial loan described in section 3710(a) to purchase or construct a dwelling with 0-down, or any other initial loan described in section 3710(a) other than with 5-down or 10-down (closed on or after October 1, 2011)</td>
<td>1.25</td>
<td>2.00</td>
<td>NA</td>
</tr>
<tr>
<td>(B)(i) Subsequent loan described in section 3710(a) to purchase or construct a dwelling with 0-down, or any other subsequent loan described in section 3710(a) (closed before October 1, 2011)</td>
<td>3.00</td>
<td>3.00</td>
<td>NA</td>
</tr>
<tr>
<td>(B)(ii) Subsequent loan described in section 3710(a) to purchase or construct a dwelling with 0-down, or any other subsequent loan described in section 3710(a) (closed on or after October 1, 2011)</td>
<td>1.25</td>
<td>2.00</td>
<td>NA</td>
</tr>
<tr>
<td>(C)(i) Loan described in section 3710(a) to purchase or construct a dwelling with 5-down (closed before October 1, 2011)</td>
<td>1.50</td>
<td>2.25</td>
<td>NA</td>
</tr>
<tr>
<td>(C)(ii) Loan described in section 3710(a) to purchase or construct a dwelling with 5-down (closed on or after October 1, 2011)</td>
<td>0.75</td>
<td>1.50</td>
<td>NA</td>
</tr>
<tr>
<td>(D)(i) Initial loan described in section 3710(a) to purchase or construct a dwelling with 10-down (closed before October 1, 2011)</td>
<td>1.25</td>
<td>2.00</td>
<td>NA</td>
</tr>
<tr>
<td>(D)(ii) Initial loan described in section 3710(a) to purchase or construct a dwelling with 10-down (closed on or after October 1, 2011)</td>
<td>0.50</td>
<td>1.25</td>
<td>NA</td>
</tr>
<tr>
<td>(E) Interest rate reduction refinancing loan</td>
<td>0.50</td>
<td>0.50</td>
<td>NA</td>
</tr>
<tr>
<td>(F) Direct loan under section 3711</td>
<td>1.00</td>
<td>1.00</td>
<td>NA</td>
</tr>
<tr>
<td>(G) Manufactured home loan under section 3712 (other than an interest rate reduction refinancing loan)</td>
<td>1.00</td>
<td>1.00</td>
<td>NA</td>
</tr>
<tr>
<td>(H) Loan to Native American veteran under section 3762 (other than an interest rate reduction refinancing loan)</td>
<td>1.00</td>
<td>1.00</td>
<td>NA</td>
</tr>
</tbody>
</table>

Other provisions:


**Application of amendments made by § 2511 of Act July 18, 1984.** Act July 18, 1984, P. L. 98-369, Division B, Title V, Part B, § 2511(c), 98 Stat. 1117, provided:

"(1) The amendments made by subsection (a)(1) [amending subsec. (a) of this section] shall apply with respect to loans closed after the end of the 30-day period beginning on the date of the enactment of this Act.

"(2) The amendments made by subsections (a)(2) and (b) [deleting subsec. (c) of this section and amending 42 USCS § 3724(c)] shall apply with respect to loans closed on or after the date of the enactment of this Act.

"(3) The amendment made by subsection (a)(3) [redesignating subsec. (d) of this section as subsec. (c) and amending it shall take effect on the date of the enactment of this Act."

**Home loan origination fee.** Act Oct. 28, 1986, P. L. 99-576, Title IV, Part A, § 409, 100 Stat. 3283, provides: "It is the sense of the Congress that the Veterans' Administration loan origination fee should not be increased above its present level of one percent of the amount of the loan guaranteed."

**Interim extension of collection of fees.** Act Oct. 16, 1987, P. L. 100-136, § 1(b), 101 Stat. 813; provides: "Notwithstanding subsection (c) of section 1829 of such title [subsec. (c) of this section], fees may be collected under such section with respect to loans closed through November 15, 1987."

**Extension of Department of Veterans Affairs home-loan fee.** Act Oct. 6, 1989, P. L. 101-110, § 2, 103 Stat. 682 (effective Oct. 1, 1989, as provided by § 3(a) of such Act, which appears as 38 USCS § 8133 note), provided: "Notwithstanding the provisions of subsection (c) of section 1829 of title 38, United States Code [this section], fees may be collected under such section with respect to loans closed before December 1, 1989."


**Fee collection through 1989.** Act Dec. 18, 1989, P. L. 101-237, Title III, § 303(c), 103 Stat. 2073, (effective 1/1/90 as provided by § 303(b) of such Act, which appears as a note to this section), provided: "Notwithstanding any other provision of law, the Secretary of Veterans Affairs shall collect fees under section 1829 of title 38, United States Code, through December 31, 1989."

**Ratification.** For provisions as to ratification of actions taken by the Secretary of Veterans Affairs in carrying out provisions of this section, see § 604 of Act Dec. 18, 1989, P. L. 101-237, Title VI, 103 Stat. 2097, which appears as 38 USCS § 1720B note.

"(a) In general. For the period described in subsection (b), the Secretary of Veterans Affairs shall apply section 3729(b)(2)(I) of title 38, United States Code, by substituting '1.00' for '0.50' each place it appears.

"(b) Period described. The period referred to in subsection (a) is the period that begins on the date that is 7 days after the date of the enactment of this Act and ends on September 30, 2003."


Temporary increase in certain housing loan fees. Act June 15, 2006, P. L. 109-233, Title I, §101(f), 120 Stat. 399, provides: "For a subsequent loan described in subsection (a) of section 3710 of title 38, United States Code, to purchase or construct a dwelling with 0-down or any other subsequent loan described in that subsection, other than a loan with 5-down or 10-down, that is closed during fiscal year 2007, the Secretary of Veterans Affairs shall apply section 3729(b)(2) of such title by substituting '3.35' for '3.30'."

Code of Federal Regulations

Department of Veterans Affairs-Loan guaranty, 38 CFR Part 36

Cross References

This section is referred to in 38 USCS §§ 3703, 3724, 3725, 3733-3735

§ 3730. Use of attorneys in court

(a) The Secretary shall authorize attorneys employed by the Department of Veterans Affairs to exercise the right of the United States to bring suit in court to foreclose a loan made or acquired by the Secretary under this chapter [38 USCS §§ 3701 et seq.] and to recover possession of any property acquired by the Secretary under this chapter [38 USCS §§ 3701 et seq.]. The Secretary may acquire the services of attorneys, other than those who are employees of the Department of Veterans Affairs, to exercise that right. The activities of attorneys in bringing suit under this section shall be subject to the direction and supervision of the Attorney General and to such terms and conditions as the Attorney General may prescribe.

(b) Nothing in this section derogates from the authority of the Attorney General under sections 516 and 519 of title 28 [28 USCS §§ 516 and 519] to direct and supervise all litigation to which the United States or an agency or officer of the United States is a party.

Effective date of section:

Act July 18, 1984, P. L. 98-369, Division B, Title V, Part B, § 2512(c)(3), 98 Stat. 1120, which appears as a note to this section, provided that this section take effect on July 18, 1984.

Amendments:


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1830, as 38 USCS § 3730.
§ 3731. Appraisals

(a) The Secretary shall--

(1) subject to subsection (b)(2) and in consultation with appropriate representatives of institutions which are regularly engaged in making housing loans, prescribe uniform qualifications for appraisers, including the successful completion of a written test, submission of a sample appraisal, certification of an appropriate number of years of experience as an appraiser, and submission of recommendations from other appraisers:

(2) use such qualifications in determining whether to approve an appraiser to make appraisals of the reasonable value of any property, construction, repairs, or alterations for the purposes of this chapter [38 USCS §§ 3701 et seq.]; and

(3) in consultation with local representatives of institutions described in clause (1) of this subsection, develop and maintain lists of appraisers who are approved under clause (2) of this subsection to make appraisals for the purposes of this chapter [38 USCS §§ 3701 et seq.].

(b) (1) The Secretary shall select appraisers from a list required by subsection (a)(3) of this section on a rotating basis to make appraisals for the purposes of this chapter [38 USCS §§ 3701 et seq.].

(2) If uniform qualifications become applicable for appraisers who perform appraisals for or in connection with the Federal Government, the qualifications required by subsection (a)(1) of this section may be more stringent than such uniform qualifications, but the Secretary may use no written test in determining the qualifications of appraisers other than the test prescribed to implement such uniform qualifications.

(c) Except as provided in subsection (f) of this section, the appraiser shall forward an appraisal report to the Secretary for review. Upon receipt of such report, the Secretary shall determine the reasonable value of the property, construction, repairs, or alterations for purposes of this chapter [38 USCS §§ 3701 et seq.], and notify the veteran of such determination. Upon request, the Secretary shall furnish a copy of the appraisal made of
property for the purposes of this chapter [38 USCS §§ 3701 et seq.] to the lender proposing to make the loan which is to be secured by such property and is to be guaranteed under this chapter [38 USCS §§ 3701 et seq.].

(d) If a lender (other than a lender authorized under subsection (f) of this section to determine reasonable value--

(1) has proposed to make a loan to be guaranteed under this chapter [38 USCS §§ 3701 et seq.],
(2) has been furnished a certificate of reasonable value of any property or of any construction, repairs, or alterations of property which is to be the security for such loan, and
(3) within a reasonable period prescribed by the Secretary, has furnished to the Secretary an additional appraisal of the reasonable value of such property, construction, repairs, or alterations which was made by an appraiser selected by the lender from the list required by subsection (a)(3) of this section,
the Secretary shall consider both the initial appraisal and the additional appraisal and shall, if appropriate, issue a revised certificate of reasonable value of such property, construction, repairs, or alterations.

(e) (1) In no case may a veteran be required to pay all or any portion of the cost of the additional appraisal described in subsection (d)(3) of this section.
(2) If a veteran, within a reasonable period prescribed by the Secretary, has furnished to the Secretary an additional appraisal of the reasonable value of such property, construction, repairs, or alterations which was made by an appraiser selected by the veteran from the list required by subsection (a)(3) of this section, the Secretary shall consider such appraisal, along with other appraisals furnished to the Secretary, and shall, if appropriate, issue a revised certificate of reasonable value of such property, construction, repairs, or alterations.

(f) (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, the Secretary may, in accordance with standards and procedures established in regulations prescribed by the Secretary, authorize a lender to determine the reasonable value of property for the purposes of this chapter [38 USCS §§ 3701 et seq.] if the lender is authorized to make loans which are automatically guaranteed under section 3702(d) of this title [38 USCS § 3702(d)]. In such a case, the appraiser selected by the Secretary pursuant to subsection (b) of this section shall submit the appraisal report directly to the lender for review, and the lender shall, as soon as possible thereafter, furnish a copy of the appraisal to the veteran who is applying for the loan concerned and to the Secretary.
(2) In exercising the authority provided in paragraph (1) of this subsection, the Secretary shall assign a sufficient number of personnel to carry out an appraisal-review system to monitor, on at least a random-sampling basis, the making of appraisals by appraisers and the effectiveness and the efficiency of the determination of reasonable value of property by lenders.
(3) [Deleted]
(4) Not later than April 30 of each year following a year in which the Secretary authorizes lenders to determine reasonable value of property under this subsection, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and
the House of Representatives a report relating to the exercise of that authority during
the year in which the authority was exercised.
(5) A report submitted pursuant to paragraph (4) of this subsection shall include, for
the period covered by each report--
(A) the number and value of loans made by lenders exercising the authority of this
subsection;
(B) the number and value of such loans reviewed by the appraisal-review
monitors referred to in paragraph (2) of this subsection;
(C) the number and value of loans made under this subsection of which the
Secretary received notification of default;
(D) the amount of guaranty paid by the Secretary to such lenders by reason of
defaults on loans as to which reasonable value was determined under this
subsection; and
(E) such recommendations as the Secretary considers appropriate to improve the
exercise of the authority provided for in this subsection and to protect the interests
of the United States.

Amendments:
1987. Act Dec. 21, 1987, in subsec. (a)(1), inserted "subject to subsection (b)(2) and" and ",
including the successful completion of a written test, submission of a sample appraisal,
certification of an appropriate number of years of experience as an appraiser, and submission
of recommendations from other appraisers"; in subsec. (b), designated the existing provisions
as para. (1) and added para. (2); in subsec. (c), substituted "Except as provided in subsection
(f) of this section, the appraiser shall forward an appraisal report to the Administrator for
review. Upon receipt of such report, the Administrator shall determine the reasonable value of
the property, construction, repairs, or alterations for purposes of this chapter, and notify the
veteran of such determination. Upon request, the Administrator shall" for "The Administrator
shall, upon request,"; in subsec. (d), inserted "(other than a lender authorized under
subsection (f) of this section to determine reasonable value)"; and added subsec. (f).
the entire section.
"October 1, 1990", and added paras. (4) and (5).
Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1831, as 38 USCS § 3731,
and amended the references in this section to reflect the redesignations made by § 5(a) of
such Act (see Table III preceding 38 USCS § 101).
in this subsection shall terminate on December 31, 1995.".

Cross References
This section is referred to in 38 USCS § 3710, 3762

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 113, 120

§ 3732. Procedure on default
(a) (1) In the event of default in the payment of any loan guaranteed under this chapter [38 USCS §§ 3701 et seq.], the holder of the obligation shall notify the Secretary of such default. Upon receipt of such notice, the Secretary may, subject to subsection (c) of this section, pay to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed. Except as provided in section 3703(e) of this title [38 USCS § 3703(e)], if the Secretary makes such a payment, the Secretary shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty.

(2) Before suit or foreclosure the holder of the obligation shall notify the Secretary of the default, and within thirty days thereafter the Secretary may, at the Secretary's option, pay the holder of the obligation the unpaid balance of the obligation plus accrued interest and receive an assignment of the loan and security. Nothing in this section shall preclude any forbearance for the benefit of the veteran as may be agreed upon by the parties to the loan and approved by the Secretary.

(3) The Secretary may establish the date, not later than the date of judgment and decree of foreclosure or sale, upon which accrual of interest or charges shall cease.

(4) (A) Upon receiving a notice pursuant to paragraph (1) of this subsection, the Secretary shall--

(i) provide the veteran with information and, to the extent feasible, counseling regarding--

(I) alternatives to foreclosure, as appropriate in light of the veteran's particular circumstances, including possible methods of curing the default, conveyance of the property to the Secretary by means of a deed in lieu of foreclosure, and the actions authorized by paragraph (2) of this subsection; and

(II) what the Department of Veterans Affairs' and the veteran's liabilities would be with respect to the loan in the event of foreclosure; and

(ii) advise the veteran regarding the availability of such counseling; except with respect to loans made by a lender which the Secretary has determined has a demonstrated record of consistently providing timely and accurate information to veterans with respect to such matters.

(B) The Secretary shall, to the extent of the availability of appropriations, ensure that sufficient personnel are available to administer subparagraph (A) of this paragraph effectively and efficiently.

(5) In the event of default in the payment of any loan guaranteed or insured under this chapter [38 USCS §§ 3701 et seq.] in which a partial payment has been tendered by the veteran concerned and refused by the holder, the holder of the obligation shall notify the Secretary as soon as such payment has been refused. The Secretary may require that any such notification include a statement of the circumstances of the default, the amount tendered, the amount of the indebtedness on the date of the tender, and the reasons for the holder's refusal.

(b) With respect to any loan made under section 3711 [38 USCS § 3711] which has not been sold as provided in subsection (g) of such section, if the Secretary finds, after there has been a default in the payment of any installment of principal or interest owing on such loan, that the default was due to the fact that the veteran who is obligated under the loan has become unemployed as the result of the closing (in whole or in part) of a Federal
installation, the Secretary shall (1) extend the time for curing the default to such time as
the Secretary determines is necessary and desirable to enable such veteran to complete
payments on such loan, including an extension of time beyond the stated maturity thereof,
or (2) modify the terms of such loan for the purpose of changing the amortization
provisions thereof by recasting, over the remaining term of the loan, or over such longer
period as the Secretary may determine, the total unpaid amount then due with the
modification to become effective currently or upon the termination of an agreed-upon
extension of the period for curing the default.

(c) (1) For purposes of this subsection--
   (A) The term "defaulted loan" means a loan that is guaranteed under this chapter
   [38 USCS §§ 3701 et seq.], that was made for a purpose described in section
   3710(a) of this title [38 USCS § 3710(a)], and that is in default.
   (B) The term "liquidation sale" means a judicial sale or other disposition of real
   property to liquidate a defaulted loan that is secured by such property.
   (C) The term "net value", with respect to real property, means the amount equal to
   (i) the fair market value of the property, minus (ii) the total of the amounts which
   the Secretary estimates the Secretary would incur (if the Secretary were to acquire
   and dispose of the property) for property taxes, assessments, liens, property
   maintenance, property improvement, administration, resale (including losses
   sustained on the resale of the property), and other costs resulting from the
   acquisition and disposition of the property, excluding any amount attributed to the
cost to the Government of borrowing funds.
   (D) Except as provided in subparagraph (D) of paragraph (10) of this subsection,
   the term "total indebtedness", with respect to a defaulted loan, means the amount
   equal to the total of (i) the unpaid principal of the loan, (ii) the interest on the loan
   as of the date applicable under paragraph (10) of this subsection, and (iii) such
   reasonably necessary and proper charges (as specified in the loan instrument and
   permitted by regulations prescribed by the Secretary to implement this subsection)
   associated with liquidation of the loan, including advances for taxes, insurance,
   and maintenance or repair of the real property securing the loan.

   (2) (A) Except as provided in subparagraph (B) of this paragraph, this subsection
   applies to any case in which the holder of a defaulted loan undertakes to liquidate the
   loan by means of a liquidation sale.
   (B) This subsection does not apply to a case in which the Secretary proceeds
   under subsection (a)(2) of this section.

   (3) (A) Before carrying out a liquidation sale of real property securing a defaulted
   loan, the holder of the loan shall notify the Secretary of the proposed sale. Such
   notice shall be provided in accordance with regulations prescribed by the Secretary to
   implement this subsection.
   (B) After receiving a notice described in subparagraph (A) of this paragraph, the
   Secretary shall determine the net value of the property securing the loan and the
   amount of the total indebtedness under the loan and shall notify the holder of the
   loan of the determination of such net value.

   (4) A case referred to in paragraphs (5), (6), and (7) of this subsection as being
   described in this paragraph is a case in which the net value of the property securing a
defaulted loan exceeds the amount of the total indebtedness under the loan minus the amount guaranteed under this chapter [38 USCS §§ 3701 et seq.].

(5) In a case described in paragraph (4) of this subsection, if the holder of the defaulted loan acquires the property securing the loan at a liquidation sale for an amount that does not exceed the lesser of the net value of the property or the total indebtedness under the loan--

(A) the holder shall have the option to convey the property to the United States in return for payment by the Secretary of an amount equal to the lesser of such net value or total indebtedness; and

(B) the liability of the United States under the loan guaranty under this chapter [18 USCS §§ 3701 et seq.] shall be limited to the amount of such total indebtedness minus the net value of the property.

(6) In a case described in paragraph (4) of this subsection, if the holder of the defaulted loan does not acquire the property securing the loan at the liquidation sale, the liability of the United States under the loan guaranty under this chapter [38 USCS §§ 3701 et seq.] shall be limited to the amount equal to (A) the amount of such total indebtedness, minus (B) the amount realized by the holder incident to the sale or the net value of the property, whichever is greater.

(7) In a case described in paragraph (4) of this subsection, if the holder of the defaulted loan acquires the property securing the loan at the liquidation sale for an amount that exceeds the lesser of the total indebtedness under the loan or the net value and--

(A) (i) the amount was the minimum amount for which, under applicable State law, the property was permitted to be sold at the liquidation sale, the holder shall have the option to convey the property to the United States in return for payment by the Secretary of an amount equal to the lesser of the amount for which the holder acquired the property or the total indebtedness under the loan; or

(ii) there was no minimum amount for which the property had to be sold at the liquidation sale under applicable State law, the holder shall have the option to convey the property to the United States in return for payment by the Secretary of an amount equal to the lesser of such net value or total indebtedness; and

(B) the liability of the United States under the loan guaranty under this chapter [38 USCS §§ 3701 et seq.] is as provided in paragraph (6) of this subsection.

(8) If the net value of the property securing a defaulted loan is not greater than the amount of the total indebtedness under the loan minus the amount guaranteed under this chapter [38 USCS §§ 3701 et seq.]--

(A) the Secretary may not accept conveyance of the property from the holder of the loan; and

(B) the liability of the United States under the loan guaranty shall be limited to the amount of the total indebtedness under the loan minus the amount realized by the holder of the loan incident to the sale at a liquidation sale of the property.

(9) In no event may the liability of the United States under a guaranteed loan exceed the amount guaranteed with respect to that loan under section 3703(b) of this title [38 USCS § 3703(b)]. All determinations under this subsection of net value and total indebtedness shall be made by the Secretary.
(A) Except as provided in subparagraphs (B) and (C) of this paragraph, the date referred to in paragraph (1)(D)(ii) of this subsection shall be the date of the liquidation sale of the property securing the loan or such earlier date following the expiration of a reasonable period of time for such sale to occur as the Secretary may specify pursuant to regulations prescribed by the Secretary to implement this subsection.

(B) (i) Subject to division (ii) of this subparagraph, in any case in which there is a substantial delay in such sale caused by the holder of the loan exercising forebearance at the request of the Secretary, the date referred to in paragraph (1)(D)(ii) of this subsection shall be such date, on or after the date on which forebearance was requested and prior to the date of such sale, as the Secretary specifies pursuant to regulations which the Secretary shall prescribe to implement this paragraph.

(ii) The Secretary may specify a date under subdivision (i) of this subparagraph only if, based on the use of a date so specified for the purposes of such paragraph (1)(D)(ii), the Secretary is authorized, under paragraph (5)(A) or (7)(A) of this subsection, to accept conveyance of the property.

(C) In any case in which there is an excessive delay in such liquidation sale caused--

(i) by the Department of Veterans Affairs (including any delay caused by its failure to provide bidding instructions in a timely fashion); or

(ii) by a voluntary case commenced under title 11, United States Code (relating to bankruptcy);

the date referred to in paragraph (1)(D)(ii) of this subsection shall be a date, earlier than the date of such liquidation sale, which the Secretary specifies pursuant to regulations which the Secretary shall prescribe to implement this paragraph.

(D) For the purpose of determining the liability of the United States under a loan guaranty under paragraphs (5)(B), (6), (7)(B), and (8)(B), the amount of the total indebtedness with respect to such loan guaranty shall include, in any case in which there was an excessive delay caused by the Department of Veterans Affairs in the liquidation sale of the property securing such loan, any interest which had accrued as of the date of such sale and which would not be included, except for this subparagraph, in the calculation of such total indebtedness as a result of the specification of an earlier date under subparagraph (C)(i) of this paragraph.

(11) This subsection shall apply to loans closed before October 1, 2012.

Amendments:

1965. Act Aug. 10, 1965, designated existing matter as subsec. (a); and added subsec. (b).

1976. Act June 30, 1976 (effective 6/30/76, as provided by § 9(a) of such Act, which appears as 38 USCS § 3701 note), in subsec. (a), substituted "the Administrator's" for "his"; and in subsec. (b), substituted "the Administrator" for "he" preceding "shall", "determines" and "may determine".

1984. Act July 18, 1984 (effective 10/1/84, as provided in § 2612(c)(1) of such Act, which appears as a note to this section), designated the provisions of subsec. (a) as paras. (1), (2), and (3), in para. (1), as redesignated, substituted "Administrator of such default. Upon receipt
of such notice, the Administrator may, subject to subsection (c) of this section, "for "Administrator who shall thereupon", and "guaranteed. If the Administrator makes such a payment, the Administrator shall" for "guaranteed, and shall"; and added subsecs. (c) and (d).

1987. Act Dec. 21, 1987 (effective 3/1/88, as provided by § 4(b) of such Act, which appears as a note to this section) added subsec. (a)(4).

Such Act further (applicable as provided by § 5(c) of such Act, which appears as a note to this section), in subsec. (c), in para. (1), in subpara. (D), substituted "Except as provided in subparagraph (D) of paragraph (10) of this subsection, the" for "The", in cl. (ii), substituted "applicable under (10) of this subsection, and" for "of the liquidation sale of the property securing the loan (or such earlier date following the expiration of a reasonable period of time for such sale to occur as the Administrator may specify pursuant to regulations prescribed by the Administrator to implement this subsection), and", in cl. (iii), substituted "regulations prescribed by the Administrator to implement this subsection" for "such regulations", and added paras. (10) and (11).

1988. Act May 20, 1988, as amended by § 14(g)(1) of Act June 13, 1991, P. L. 102-54, substituted the section catchline for one which read: "1832. Furnishing information to real estate professionals to facilitate the disposition of properties"; redesignated former subsecs. (a) and (b) as subsec. (d), paras. (1) and (2), respectively and further redesignated such subsec. (d) as 38 USCS § 1833(d); redesignated 38 USCS § 1816(a)-(c) as subsecs. (a)-(c) of this section; and in subsec. (a)(4)(A)(i)(I), as redesignated, substituted "paragraph (2) of this subsection" for "section 1816(a)(2) of this title"; and in subsec. (c)(10), in subpara. (A), as redesignated, inserted "(5)(A)".

1989. Act Dec. 18, 1989, in subsec. (a), in para. (1), substituted "Except as provided in section 1803(e) of this title, if" for "If", and added para. (5); and in subsec. (c)(1)(C)(ii), inserted ", excluding any amount attributed to the cost to the Government of borrowing funds".

Such Act further (effective 10/1/89 as provided by § 308(b)(2) of such Act, which appears as a note to this section), in subsec. (c)(11), substituted "October 1, 1991" for "October 1, 1989".

Such Act further, substituted "Secretary" for "Administrator", "Secretary's" for "Administrator's", "Department of Veterans Affairs" for "Veterans' Administration", and "Department of Veterans Affairs" " for "Veterans' Administration's", wherever appearing, in the entire section.


Such Act further amended the directory language of § 415(b)(5)(C) of Act May 20, 1988, P. L. 100-322, without affecting the text of this section.

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1832, as 38 USCS § 3732, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1993. Act Aug. 10, 1993 (effective Oct. 1, 1993, as provided by § 12006(b) of such Act, which appears as a note to this section), in subsec. (c), in para. (1)(C), substituted "resale (including losses sustained on the resale of the property)," for "resale," and, in para. (11), substituted "shall apply to loans closed before October 1, 1998." for "shall cease to have effect on December 31, 1992.".

1994. Act Nov. 2, 1994, in subsec. (c)(6), deleted "either" following "defaulted loan", substituted "sale, the" for "sale or acquires the property at such sale for an amount that exceeds the lesser of the net value of the property or the total indebtedness under the loan--
(A) the Secretary may not accept conveyance of the property except as provided in paragraph (7) of this subsection; and

(B) the",

and substituted "(A)" and "(B)" for "(i)" and "(ii)" respectively.

Such Act further, in subsec. (c)(7), in the introductory matter, deleted "that was the minimum amount for which, under applicable State law, the property was permitted to be sold at the liquidation sale" following "net value and", in subpara. (A), designated the existing language as cl. (i), in cl. (i) as so designated, substituted "the amount was the minimum amount for which, under applicable State law, the property was permitted to be sold at the liquidation sale, the holder shall have the option to convey the property to the United States in return for payment by the Secretary of an amount equal to" for "the Secretary may accept conveyance of the property to the United States for a price not exceeding" and substituted "or" for "and" following the concluding semicolon, and added cl. (ii), and, in subpara. (B), substituted "paragraph (6)" for "paragraph (6)(B)".


2000. Act Nov. 1, 2000, in subsec. (c)(11), substituted "October 1, 2008" for "October 1, 2002".


2006. Act June 15, 2006, in subsec. (c)(10)(D), substituted "paragraphs (5)(B), (6), (7)(B), and (8)(B)" for "clause (B) of paragraphs (5), (6), (7), and (8) of this subsection".

Other provisions:


Interim extension of formula for acquiring property. Act Oct. 16, 1987, P. L. 100-136, § 1(a), 101 Stat. 813, provides: "Notwithstanding section 2512(c) of the Deficit Reduction Act of 1984 (Public Law 98-369 [amending this section]), the provisions of section 1816(c) of title 38, United States Code [now subsec. (c) of this section; see the 1988 Amendment note to this section], shall continue in effect through November 15, 1987."


Application of 1987 amendments made to subsec. (c). Act Dec. 21, 1987, P. L. 100-198, § 5(c), 101 Stat. 1317, provides: "The amendments made by subsection (a) [amending subsec. (c) of this section] shall apply to defaults which occur more than 60 days after the date of the enactment of this Act."


"In applying the provisions of this title [this note, amending this section and 38 USCS § 1829(c)] and the provisions of the Veterans' Home Loan Program Improvements and Property Rehabilitation Act of 1987 [38 USCS § 101 note; for full classification, consult USCS Tables volumes] which make the same amendments as the provisions of this title--
"(1) the identical provisions of title 38, United States Code, amended by the provisions of this title [this note, amending this section and 38 USCS § 3729(c)] and the provisions of such Act [38 USCS § 101 note; for full classification, consult USCS Tables volumes] shall be treated as having been amended only once; and

"(2) in executing to title 38, United States Code, the amendments made by this title [this note, amending this section and 38 USCS § 3729(c)] and by such Act [38 USCS § 101 note; for full classification, consult USCS Tables volumes], such amendments shall be executed so as to appear only once in the law.".


Definition of "net value" for purposes of subsec. (c)(4)-(10). Act Oct. 6, 1992, P. L. 102-389, Title I, 106 Stat. 1574, provides: "Notwithstanding the provisions of 38 U.S.C. 3732(c)(1)(C) and (c)(11) or any other law, with respect to any loan guaranteed for any purpose specified in 38 U.S.C. 3710 which was closed before October 1, 1993, the term 'net value' for purposes of paragraphs (4) through (10) of 38 U.S.C. 3732[c] shall mean 'the amount equal to (i) the fair market value of the property, minus (ii) the total of the amounts which the Secretary estimates the Secretary would incur (if the Secretary were to acquire and dispose of the property) for property taxes, assessments, liens, property maintenance, property improvement, administration, resale (including losses sustained on the resale of the property), and other costs resulting from the acquisition and disposition of the property, excluding any amount attributed to the cost of the Government of borrowing funds'.".

Research Guide

Federal Procedure:
4B Fed Proc L Ed, Banking and Financing §§ 8:1848-1851, 1857

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 121
1. Generally
2. Rights of government on default, generally
   3. -Indemnification
   4. -Subrogation
   5. -Setoff against benefits
6. Determination of amount guaranteed
7. Recovery of interest on indebtedness
8. Notice of default and foreclosure to veteran
9. Miscellaneous

1. Generally
   Regulations adopted by Veterans' Administrator [now Secretary of Veterans Affairs], which provided that in case of guaranteed mortgage Veterans' Administrator [now Secretary of Veterans Affairs] could specify in advance of foreclosure sale minimum amount which must be credited on mortgage debt, giving foreclosing mortgagee who purchases property at foreclosure sale for specified minimum or lower price option of selling property to agency for specified minimum, were valid exercise of statutory rule-making authority given to Administrator by § 504 of the Servicemen's Readjustment Act of 1944 58 Stat 284, 293, as amended, and were reasonable accommodation of twin statutory purposes of (1) making federal guaranty substantial equivalent of down payment, and (2) protecting both agency and veteran from unnecessary loss on foreclosure sale. United States v Shimer (1961) 367 US 374, 6 L Ed 2d 908, 81 S Ct 1554
2. Rights of government on default, generally

Veterans' Administration [now Department of Veterans Affairs] was not entitled to reduce indebtedness to plaintiff mortgage lender by larger amount mistakenly bid by plaintiff at first foreclosure sale which was later voided for mistake, instead of by smaller amount successfully bid by plaintiff at later valid sale, where (1) mistake resulted in part from failure of agency to comply with its own established procedures, upon which plaintiff relied; (2) agency derived benefits from second sale; and (3) agency suffered no harm or prejudice through correction of initial error. Mortgage Assocs. v Cleland (1981, CA7 Ill) 653 F.2d 1144

Foreclosure of guaranteed mortgage and sale of mortgaged property under execution did not bar action by United States to recover from veteran amounts which government was required to pay to lender. United States v Henderson (1953, DC Iowa) 121 F Supp 343

In asserting debt against veteran who had sold property to third party who then defaulted on assumed home loan, Board was required to make determination on validity of asserted debt and question of validity of asserted debt, when challenged, was issue that must be determined by Board in deciding on waiver-of-indebtedness application. Schaper v Derwinski (1991) 1 Vet App 430, app dismd (1994, Vet App) 1994 US Vet App LEXIS 199

3. Indemnification

Servicemen's Readjustment Act of 1944 (predecessor to 38 USCS §§ 3701 et seq.), as amended, gave direct right of indemnity, independent of subrogation rights, to Veterans' Administration [now Department of Veterans Affairs] against veteran, upon proper payment by Veterans' Administration [now Department of Veterans Affairs] of its obligations as guarantor of mortgage loan of veteran. United States v Shimer (1961) 367 US 374, 6 L Ed 2d 908, 81 S Ct 1554

Amount owing by veteran to United States was fixed by trustee sale of mortgaged property, and fact that it maintained loss by later selling property was immaterial. McKnight v United States (1958, CA9 Cal) 259 F.2d 540

Although VA had no subrogation rights against veterans who defaulted on their VA-guaranteed home loans because lenders failed to secure deficiency judgments under state law to preserve rights against veterans to which VA could later be subrogated, VA had independent contractual right of indemnity against veterans for amount of guarantee paid to lenders since indemnification right is governed entirely by federal law and unaffected by state deficiency judgment requirements. Dixon v United States (1995, CA10 Okla) 68 F.3d 1253, CCH Bankr L Rptr ¶ 76679, cert den (1996) 517 US 1167, 134 L Ed 2d 665, 116 S Ct 1566

Notwithstanding state laws limiting creditor's proceeds to amount received in foreclosure sale and notwithstanding that mortgagee could not obtain collectible personal judgment against veteran, United States was entitled to indemnification from veteran for amounts paid pursuant to guaranty of such veteran's debt. 1945 ADVA 625

Veteran was liable to indemnify Administrator for loan guaranty proceeds for which Administrator [now Secretary] is liable to third party purchaser of loan. 1951 ADVA 886

4. Subrogation

Administration [now Department] may enforce deficiency judgments against veterans for loan guaranty payments made to mortgage lenders following nonjudicial foreclosure of Minnesota real estate pursuant to rights to indemnity and subrogation under 38 USCS § 1832 [now 38 USCS § 3732] when the Administration [now Department] has made a good faith effort to provide reasonable personal notice to the veteran prior to the foreclosure sale. Vail v Derwinski (1991, CA8 Minn) 946 F.2d 589, reh, en banc, den (1992, CA8 Minn) 956 F.2d 812, summary judgment den, remanded (1994, DC Minn) 841 F Supp 909, affd (1994, CA8 Minn) 39 F.3d 208, cert den (1995) 515 US 1102, 132 L Ed 2d 254, 115 S Ct 2245

Upon payment by Veterans' Administration [now Department] of claim under guaranty, Government was at once subrogated to right of holder of obligation but only to extent of guaranty

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5. Setoff against benefits

Amounts paid pursuant to loan guaranty and not recouped from property pledged were recoverable from veteran's pension or insurance payments, unless Administrator [now Secretary] in his discretion determined that veteran was not at fault and that such recovery would defeat purposes of such benefits otherwise payable or would be inequitable; however, benefits payable to veteran's widow or dependents from pension or from any insurance payable to beneficiary after death are not subject to recovery. 1944 ADVA 607

Administrator [now Secretary] was entitled to offset benefits otherwise payable to unremarried widow of serviceman killed in action in World War II and her minor children against proceeds paid on loan guaranteed under Servicemen's Readjustment Act of 1944 (38 USCS §§ 1801 et seq. [now 38 USCS §§ 3701 et seq.]), but benefits payable to minor children in their own right were not subject to offset for amounts paid on guaranty. 1953 ADVA 925

Agency's withholding benefits to collect debt incurred by it when purchaser from veteran defaulted did not violate equity and good conscience where veteran had failed to secure release from liability upon selling home. Branham v Derwinski (1990) 1 Vet App 93

6. Determination of amount guaranteed

Absent irregularity or fraud material to rights of Government, method of computing amount payable under loan guaranty certificate issued pursuant to Servicemen's Readjustment Act of 1944 (38 USCS §§ 1801 et seq. [now 38 USCS §§ 3701 et seq.]) was same whether claim was made before or after foreclosure sale of encumbered property securing guaranteed loan, and was equal to amount due as percentage of loan guaranty reduced by proceeds of foreclosure sale. 1946 ADVA 690

7. Recovery of interest on indebtedness

Obligor on loan guaranteed or insured under Servicemen's Readjustment Act of 1944 (38 USCS §§ 1801 et seq. [now 38 USCS §§ 3701 et seq.]) was liable to Administrator [now Secretary] for payment of interest on indebtedness resulting from payment of guaranty or insurance claim, and liability included interest which accrued against obligor after payment of claim as well as interest which accrued on original guaranteed debt and which therefore constituted part of amount paid on claim. 1949 ADVA 825

Holder of insured loan in default was entitled to deduct amount equal to interest on unpaid indebtedness for period between cut-off date and date of receipt of payments from or on behalf of debtor received subsequent to cut-off date and before payment of insurance claim upon such loan. 1950 ADVA 839

Agency's obligation to acquire property held by lender who held defaulted loan was purely statutory, not contractual one entitling lender to seek interest under Prompt Payment Act (31 USCS §§ 3901-3907). New York Guardian Mortg. Corp. v United States (1990, CA) 916 F.2d 1558

8. Notice of default and foreclosure to veteran

Veterans' challenge to Veterans Administration's exercise of indemnity rights after foreclosure on property based on veterans' failure to pay VA mortgages is dismissed, where VA followed state nonjudicial foreclosure procedure, and provided veterans with general notice that mortgage was in default and that foreclosure was possible, without providing specific notice of time and place of foreclosure because VA notices and regulations are sufficient to satisfy due process rights of veterans. Vail v Brown (1994, DC Minn) 841 F Supp 909, affd (1994, CA8 Minn) 39 F.3d 208, cert den (1995) 515 US 1102, 132 L Ed 2d 254, 115 S Ct 2245

Veteran's loan guarantee indebtedness was valid, notwithstanding veteran's claim that he did not receive notice of transferee's default and subsequent foreclosure, since record demonstrated that VA followed appropriate guidelines to notify appellant of default and impending foreclosure;
letter was addressed to appellant's correct address and was not returned undelivered and contained requisite information. East v Brown (1995) 8 Vet App 34

9. Miscellaneous

In suit by homeowner of guaranteed home loan against Veterans Administration [now Department] and private lender for relief against foreclosure of home loan, under former 38 USCS § 1816, when veteran borrower is in default on his guaranteed home loan, agency could refund to lender unpaid balance of obligation and receive assignment of loan and security thus putting agency in position to grant forbearance to borrower; refusal by VA to take such action in case at bar did not constitute abuse of discretion. Rank v Nimmo (1982, CA9 Cal) 677 F.2d 692, cert den (1982) 459 US 907, 74 L Ed 2d 168, 103 S Ct 210

Mortgagor had no right of action in federal court against Veterans Administration [now Department of Veterans Affairs] to enforce duties relative to insured home mortgage; thus, action brought by mortgagors to defend against foreclosure actions brought against them and their residences for being in default on mortgage must be dismissed where mortgagors alleged agency failed to monitor properly lenders' servicing of their mortgage loans prior to foreclosure and failed to provide supplemental servicing of loans by offering mortgagors opportunity to refund and assign their mortgages to agency, thus avoiding foreclosure following default. First Family Mortg. Corp. v Earnest (1988, CA6 Ohio) 851 F.2d 843

Indebtedness of veteran arising from default upon loan guaranteed by United States was subject to bankruptcy, assuming proper procedure was followed, and withholding of other benefits due veteran by Veterans' Administration [now Department of Veterans Affairs] to satisfy such claim was in effect legal set off prohibited by bankruptcy laws. 1950 ADVA 850-A

VA was under no obligation to provide counseling to veteran before foreclosure pursuant to 38 USCS § 3732(a)(4) since effective date of § 3732 was prospectively set for one year after date of foreclosure on veteran's house, and argument that duty to counsel applies retroactively is without merit because duty to assist applies to development of evidence and only attaches once claim has been well grounded; in months preceding foreclosure, veteran had no claim, much less well grounded claim, for debt waiver or other VA benefit. Berotti v West (1998) 11 Vet App 194

§ 3733. Property management

(a) (1) Of the number of purchases made during any fiscal year of real property acquired by the Secretary as the result of a default on a loan guaranteed under this chapter [38 USCS §§ 3701 et seq.] for a purpose described in section 3710(a) of this title [38 USCS § 3710(a)], not more than 65 percent, nor less than 50 percent, of such purchases may be financed by a loan made by the Secretary. The maximum percentage stated in the preceding sentence may be increased to 80 percent for any fiscal year if the Secretary determines that such an increase is necessary in order to maintain the effective functioning of the loan guaranty program.

(2) After September 30, 1990, the percentage limitations described in paragraph (1) of this subsection shall have no effect.

(3) The Secretary may, beginning on October 1, 1990, sell any note evidencing a loan referred to in paragraph (1)--

(A) with recourse; or

(B) without recourse, but only if the amount received is equal to an amount which is not less than the unpaid balance of such loan.

(4) (A) Except as provided in subparagraph (B), the amount of a loan made by the Secretary to finance the purchase of real property from the Secretary described in paragraph (1) may not exceed an amount equal to 95 percent of the purchase price of such real property.
(B) (i) The Secretary may waive the provisions of subparagraph (A) in the case of any loan described in paragraph (5).

(ii) A loan described in subparagraph (A) may, to the extent the Secretary determines to be necessary in order to market competitively the property involved, exceed 95 percent of the purchase price.

(5) The Secretary may include, as part of a loan to finance a purchase of real property from the Secretary described in paragraph (1), an amount to be used only for the purpose of rehabilitating such property. Such amount may not exceed the amount necessary to rehabilitate the property to a habitable state, and payments shall be made available periodically as such rehabilitation is completed.

(6) The Secretary shall make a loan to finance the sale of real property described in paragraph (1) at an interest rate that is lower than the prevailing mortgage market interest rate in areas where, and to the extent, the Secretary determines, in light of prevailing conditions in the real estate market involved, that such lower interest rate is necessary in order to market the property competitively and is in the interest of the long-term stability and solvency of the Veterans Housing Benefit Program Fund established by section 3722(a) of this title [38 USCS § 3722(a)].

(7) During the period that begins on December 16, 2003 and ends on September 30, 2013, the Secretary shall carry out the provisions of this subsection as if--

(A) the references in the first sentence of paragraph (1) to "65 percent" and "may be financed" were references to "85 percent" and "shall be financed", respectively;

(B) the second sentence of paragraph (1) were repealed; and

(C) the reference in paragraph (2) to "September 30, 1990," were a reference to "September 30, 2013,".

(b) The Secretary may not make a loan to finance a purchase of property acquired by the Secretary as a result of a default on a loan guaranteed under this chapter unless the purchaser meets the credit underwriting standards established under section 3710(g)(2)(A) of this title [38 USCS § 3710(g)(2)(A)].

(c) (1) The Secretary shall identify and compile information on common factors which the Secretary finds contribute to foreclosures on loans guaranteed under this chapter [38 USCS §§ 3701 et seq.].

(2) The Secretary shall include a summary of the information compiled, and the Secretary's findings, under paragraph (1) in the annual report submitted to the Congress under section 529 of this title [38 USCS § 529]. As part of such summary and findings, the Secretary shall provide a separate analysis of the factors which contribute to foreclosures of loans which have been assumed.

(d) (1) The Secretary shall furnish to real estate brokers and other real estate sales professionals information on the availability of real property for disposition under this chapter and the procedures used by the Department of Veterans Affairs to dispose of such property.

(2) For the purpose of facilitating the most expeditious sale, at the highest possible price, of real property acquired by the Secretary as the result of a default on a loan guaranteed, insured, or made under this chapter, the Secretary shall list all such
property with real estate brokers under such arrangements as the Secretary determines to be most appropriate and cost effective.

(e) [Deleted]

Amendments:

1984. Act July 18, 1984 (effective 10/1/1984, as provided by § 2512(c) of such Act, which appears as 38 USCS § 3732 note), added subsec. (d).


1987. Act Oct. 16, 1987 substituted subsec. (d)(3) for one which read: "Notes securing such loans may be sold with recourse only to the extent that the Administrator determines that selling such notes with recourse is necessary in order to maintain the effective functioning of the loan guaranty program under this chapter.".

Act Dec. 21, 1987 (effective 10/1/87, as provided by § 6(a)(2) of such Act, in subsec. (d)(1), substituted "not more than 65 percent, nor less than 50 percent," for "not more than 75 percent, nor less than 60 percent,"

Such Act further (applicable as provided by § 6(b)(2) of such Act, which appears as a note to this section), in subsec. (d), added paras. (4)-(6).

Act Dec. 22, 1987, purported to amend subsec. (d)(1) of § 1816 by substituting "not more than 65 percent, nor less than 50 percent," for "not more than 75 percent nor less than 60 percent,". However, such amendment could not be executed as it was already effected by Act Dec. 21, 1987, P. L. 100-198.

Such Act further amended subsec. (d) of § 1816, by redesignating para. (3) as para. (2)(C), in para. (2)(C) as so redesignated, in the introductory matter, substituted "Beginning on October 1, 1989, the Administrator may sell any note evidencing" for "The Administrator may sell any note securing", redesignated cls. (A) and (B) as cls. (i) and (ii), respectively, and added a new para. (3).

Act Dec. 18, 1989, in subsec. (a)(6), substituted "December 31" for "October 1".

Such Act further, substituted "Secretary" for "Administrator", and "Department of Veterans Affairs" for "Veterans' Administration", wherever appearing, in the entire section.

Act Dec. 19, 1989, in subsec. (a)(3), in the introductory matter of subparas. (A), (B), and (C), substituted "October 1, 1990" for "October 1, 1989".

Section 5003(a) of such Act (applicable as provided by § 5003(b) of such Act, which appears as a note to this section) purported to add a subsec. (e), but such amendment was not executed because such subsec. (e) was identical to that added by Act Dec. 18, 1989.

1991. Act June 13, 1991, in subsec. (a), substituted paras. (2) and (3) for ones which read:
"(2) In carrying out paragraph (1) of this subsection, the Secretary, to the maximum extent consistent with that paragraph and with maintaining the effective functioning of the loan guaranty program under this chapter shall minimize the number of loans made by the Secretary to finance purchases of real property from the Secretary described in that paragraph.

"(3)(A) Before October 1, 1990, notes evidencing such loans may be sold with or without recourse as determined by the Secretary, with respect to specific proposed sales of such notes, to be in the best interest of the effective functioning of the loan guaranty program under this chapter, taking into consideration the comparative cost-effectiveness of each type of sale. In comparing the cost-effectiveness of conducting a proposed sale of such notes with recourse or without recourse, the Secretary shall, based on available estimates regarding likely market conditions and other pertinent factors as of the time of the sale, determine and consider--

"(i) the average amount by which the selling price for such notes sold with recourse would exceed the selling price for such notes if sold without recourse; and

"(ii) the total cost of selling such notes with recourse, including--

"(I) any estimated discount or premium;

"(II) the projected cost, based on Department of Veterans Affairs experience with the sale of notes evidencing vendee loans with recourse and the quality of the loans evidenced by the notes to be sold, of repurchasing defaulted notes;

"(III) the total servicing cost with respect to repurchased notes, including the costs of taxes and insurance, collecting monthly payments, servicing delinquent accounts, and terminating insoluble loans;

"(IV) the costs of managing and disposing of properties acquired as the result of defaults on such notes;

"(V) the loss or gain on resale of such properties; and

"(VI) any other cost determined appropriate by the Secretary.

"(B) Not later than 60 days after making any sale described in subparagraph (A) of this paragraph occurring before October 1, 1990, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report describing--

"(i) the application of the provisions of such subparagraph, and each of the determinations required thereunder, in the case of such sale;

"(ii) the results of the sale in comparison to the anticipated results; and

"(iii) actions taken by the Secretary to facilitate the marketing of the notes involved.

"(C) Beginning on October 1, 1990, the Secretary may sell any note evidencing such a loan--

"(i) with recourse; or

"(ii) without recourse but only if the amount received is equal to an amount which is not less than the unpaid balance of such loan.".
Such Act further, in subsec. (a), deleted para. (6), which read: "This subsection shall cease to have effect on December 31, 1990.", and redesignated para. (7) as new para. (6).

Such Act further, amended the directory language of Act May 20, 1988, P. L. 100-322, § 415(b)(5)(C).

Such Act further, purported to delete a subsec. (e) added by § 5003(a) of Act Dec. 19, 1989; however, the amendment was not executed since the addition of such subsec. (e) had not been executed. See the 1989 Amendment notes.

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1833, as 38 USCS § 3733, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101); and, in subsec. (c), in para. (2), substituted "section 529" for "section 214".

1992. Act May 20, 1992, in subsec. (e), in the introductory matter, inserted ", and the amount received from the sale of securities under section 3720(h) of this title,".

1998. Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 602(f) of such Act, which appears as 38 USCS § 2106 note), in subsec. (a)(6), substituted "Veterans Housing Benefit Program Fund established by section 3722(a)" for "Department of Veterans Affairs Loan Guaranty Revolving Fund established by section 3724(a)"; and deleted subsec. (e), which read:

"(e) Notwithstanding any other provision of law, the amount received from the sale of any note evidencing a loan secured by real property described in subsection (a)(1) of this section, and the amount received from the sale of securities under section 3720(h) of this title, shall be credited, without any reduction and for the fiscal year in which the amount is received, as offsetting collections of--

"(1) the revolving fund for which a fee under section 3729 of this title was collected (or was exempted from being collected) at the time of the original guaranty of the loan that was secured by the same property; or

"(2) in any case in which there was no requirement of (or exemption from) a fee at the time of the original guaranty of the loan that was secured by the same property, the Loan Guaranty Revolving Fund; and

the total so credited to any revolving fund for a fiscal year shall offset outlays attributed to such revolving fund during such fiscal year.".

2003. Act Dec. 16, 2003, in subsec. (a), in para. (4), in subpara. (A), deleted "of this paragraph" following "subparagraph (B)", and deleted "of this subsection" following "paragraph (1)", and, in subpara. (B), in cl. (i), deleted "of this paragraph" following "subparagraph (A)", and deleted "of this subsection" following "paragraph (5)", and, in cl. (ii), deleted "of this paragraph" following "subparagraph (A)", in paras. (5) and (6), deleted "of this subsection" following "paragraph (1)", and added para. (7); and, in subsec. (c)(2), deleted "of this subsection" following "paragraph (1)".


Other provisions:
Application of subsec. (d)(4)-(6). Act Dec. 21, 1987, P. L. 100-198, § 6(b)(2), 101 Stat. 1318, provides: "The amendment made by this subsection [adding subsec. (d)(4)-(6) of this section] shall apply to loans made more than 30 days after the date of the enactment of this Act."

Report to Congress. Act Dec. 21, 1987, P. L. 100-198, § 6(c), 101 Stat. 1319, provides: "The Administrator of Veterans' Affairs shall, by March 1, 1990, transmit to the Congress a report of the activities carried out, through December 31, 1989, under paragraphs (4) and (5)
of section 1816(d) of title 38, United States Code [now subsec. (d) of this section; see the 1988 Amendments note to this section], as added by subsection (b) of this section.".


"In applying the provisions of this title [this note, amending this section and 38 USCS § 3729(c)] and the provisions of the Veterans' Home Loan Program Improvements and Property Rehabilitation Act of 1987 [38 USCS § 101 note; for full classification, consult USCS Tables volumes] which make the same amendments as the provisions of this title--

"(1) the identical provisions of title 38, United States Code, amended by the provisions of this title [this note, amending this section and 38 USCS § 3729(c)] and the provisions of such Act [38 USCS § 101 note; for full classification, consult USCS Tables volumes] shall be treated as having been amended only once; and

"(2) in executing to title 38, United States Code, the amendments made by this title [this note, amending this section and 38 USCS § 3729(c)] and by such Act [38 USCS § 101 note; for full classification, consult USCS Tables volumes], such amendments shall be executed so as to appear only once in the law.".


"If, before the date and time of the enactment of this Act, no provision of law has been enacted amending section 1833 [now § 3733] of title 38, United States Code, by adding a new subsection (e) with a text substantively identical to the text of the new subsection (e) added to such section 1833 [now § 3733] by subsection (a)(3) of this section, the provisions of subsection (a)(1) of this section amending subsection (a)(3) of such section 1833 [now § 3733] shall not take effect.".

Subsection (a)(1) of § 305 of the Act provides:

"in subsection (a)(3) [of 38 USCS § 3733]--

"Section 1833 [now § 3733] is amended--

"(A) in subparagraph (A), by striking out 'Before October 1, 1990,' and inserting in lieu thereof 'Subject to subparagraph (C) of this paragraph,';

"(B) in subparagraph (B), by striking out 'occurring before October 1, 1990'; and

"(C) in subparagraph (C), by striking out 'October 1, 1989,' and inserting in lieu thereof 'October 1, 1989.' ".

Application of subsec. (e) as added by Act Dec. 18, 1989, Act Dec. 18, 1989, P. L. 101-237, Title III, § 305(b)(2), 103 Stat. 2074, provides: "Subsection (e) of section 1833 [now § 3733] of such title 38, as added by subsection (a)(3), shall apply with respect to amounts referred to in such subsection (e) received after September 30, 1989.".

Application of subsec. (e) as added by Act Dec. 19, 1989. Act Dec. 19, 1989, P. L. 101-239, Title V, § 5003(b), 103 Stat. 2137, provides: "Subsection (e) of section 1833 [now § 3733] of title 38, United States Code, as added by subsection (a), shall apply with respect to amounts referred to in such subsection (e) received on or after October 1, 1989.". [Subsec. (a) of Act Dec. 19, 1989, P. L. 101-239, Title V, § 5003, 103 Stat. 2137, was not executed, since it made the same amendment as that made by Act Dec. 18, 1989, P. L. 101-237, Title III, § 305(a)(3), 103 Stat. 2074. (See the 1989 Amendment notes to this section.)]
Cross References
This section is referred to in 38 USCS §§ 3714, 3729, 3735

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Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 121
Nonjudicial foreclosure sale of VA-owned home by homeowners association owed past-due fees is void, where federal law governs determination of whether title to land owned by U.S. has passed to another party under Property and Supremacy Clauses, because purpose of VA Home Loan Guaranty Program is to permit otherwise ineligible veterans to own homes, policy under 38 USCS § 3733(d) is to sell acquired properties for highest price as quickly as possible and to return funds to Veterans Housing Benefit Program Fund, and permitting foreclosure due to unnoticed, unpaid association fees would run counter to federal law. Yunis v United States (2000, CD Cal) 118 F Supp 2d 1024

§ 3734. Annual submission of information on the Veterans Housing Benefit Program Fund and housing programs

(a) In the documents providing detailed information on the budget for the Department of Veterans Affairs that the Secretary submits to the Congress in conjunction with the President's budget submission for each fiscal year pursuant to section 1105 of title 31 [31 USCS § 1105], the Secretary shall include--
(1) a description of the operations of the Veterans Housing Benefit Program Fund during the fiscal year preceding the fiscal year in which such budget is submitted; and
(2) the needs of such fund, if any, for appropriations for--
(A) the fiscal year in which the budget is submitted; and
(B) the fiscal year for which the budget is submitted.

(b) The matters submitted under subsection (a) of this section shall include, with respect to the fund referred to in subsection (a), the following:
(1) Information and financial data on the operations of the fund during the fiscal year before the fiscal year in which such matters are submitted and estimated financial data and related information on the operation of the fund for--
(A) the fiscal year of the submission; and
(B) the fiscal year following the fiscal year of the submission.
(2) Estimates of the amount of revenues derived by the fund in the fiscal year preceding the fiscal year of the submission, in the fiscal year of the submission, and in the fiscal year following the fiscal year of the submission from each of the following sources:
(A) Fees collected under section 3729(a) of this title [38 USCS § 3729(a)] for each category of loan guaranteed, insured, or made under this chapter or collected under section 3729(b) of this title [38 USCS § 3729(b)] for assumed loans.
(B) Investment income.
(C) Sales of foreclosed properties.
(D) Loan asset sales.
(E) Each additional source of revenue.
(F), (G) [Redesignated]
(3) Information, for each fiscal year referred to in paragraph (2) of this subsection, regarding the types of dispositions made and anticipated to be made of defaults on loans guaranteed, insured, or made under this chapter, including the cost to the fund, and the numbers, of such types of dispositions.

(c) The information submitted under subsection (a) shall include a statement that summarizes the financial activity of each of the housing programs operated under this chapter [38 USCS §§ 3701 et seq.]. The statement shall be presented in a form that is simple, concise, and readily understandable, and shall not include references to financing accounts, liquidating accounts, or program accounts.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1833, as 38 USCS § 3733, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1998. Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 602(f) of such Act, which appears as 38 USCS § 2106 note) substituted the section heading for one which read: "§ 3734. Annual submission of information on the Loan Guaranty Revolving Fund and the Guaranty and Indemnity Fund"; in subsec. (a), in para. (1), substituted "Veterans Housing Benefit Program Fund" for "Loan Guaranty Revolving Fund and the Guaranty and Indemnity Fund" and substituted "fund," for "funds,\"; in subsec. (b), in the introductory matter, substituted "the fund" for "each fund", in para. (2), deleted subpara. (B), which read: "(B) Federal Government contributions made under clauses (A) and (B) of section 3725(c)(2) of this title\"., redesignated subparas. (C)-(G) as subparas. (B)-(F), respectively, and, in subpara. (B) as redesignated, substituted "section 3729(a)(3)" for "subsections (a)(3) and (c)(2) of section 3729 of this title\"; and added subsec. (c).


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[§ 3735. Transferred]

This section, relating to housing assistance for homeless veterans, was transferred to Subchapter V of Chapter 20 of this Title and redesignated 38 USCS § 2041 by Act Dec. 21, 2001, P. L. 107-95, § 5(c), 115 Stat. 918.

§ 3736. Reporting requirements

The annual report required by section 529 of this title [38 USCS § 529] shall include a discussion of the activities under this chapter [38 USCS §§ 3701 et seq.]. Beginning with the report submitted at the close of fiscal year 1996, and every second year thereafter, this discussion shall include information regarding the following:

1) Loans made to veterans whose only qualifying service was in the Selected Reserve.
(2) Interest rates and discount points which were negotiated between the lender and the veteran pursuant to section 3703(c)(4)(A)(i) of this title [38 USCS § 3703(c)(4)(A)(i)].
(3) The determination of reasonable value by lenders pursuant to section 3731(f) of this title [38 USCS § 3731(f)].
(4) Loans that include funds for energy efficiency improvements pursuant to section 3710(a)(10) of this title [38 USCS § 3710(a)(10)].
(5) Direct loans to Native American veterans made pursuant to subchapter V of this chapter [38 USCS §§ 3761 et seq.].

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SUBCHAPTER IV. SMALL BUSINESS LOANS

§ 3741. Definitions
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§ 3741. Definitions

For the purposes of this subchapter [38 USCS §§ 3741 et seq.]--

(1) The term "disabled veteran" means (A) a veteran who is entitled to compensation under laws administered by the Secretary for a disability rated at 30 percent or more, or (B) a veteran whose discharge or release from active duty was for a disability incurred or aggravated in line of duty.

(2) The term "veteran of the Vietnam era" means a person (A) who served on active duty for a period of more than 180 days, any part of which occurred during the Vietnam era, and who was discharged or released from active duty for a service-connected disability, or (B) who was discharged or released from active duty for a service-connected disability if any part of such active duty was performed during the Vietnam era.

Effective date of section:
Act Nov. 3, 1981, P. L. 97-72, Title III, § 305, 95 Stat. 1060, which appears as an Other provisions note to this section, provides that this section is effective 180 days after enactment.

Amendments:
1986. Act Oct. 28, 1986, in para. (1), substituted "percent" for "per centum"; and in para. (2) substituted "180 days" for "one hundred and eighty days".


Such Act further, in para. (1), substituted "administered by the Secretary" for "administered by the Veterans' Administration".

Short titles:
Act Nov. 3, 1981, P. L. 97-72, Title III, § 301, 95 Stat. 1055, provided that this title [which appears generally as 38 USCS §§ 3741 et seq.; for full classification of such Title, consult USCS Tables volumes] may be cited as the Veterans' Small Business Loan Act of 1981".

Other provisions:
Authorization of appropriations for establishment of program. Act Nov. 3, 1981, P. L. 97-72, Title III, § 304, 95 Stat. 1060, provided: "There is authorized to be appropriated a total of $750,000 for fiscal years 1982 through 1986 for use by the Administrator of Veterans' Affairs for expenses incidental to the establishment of the small business loan program authorized by subchapter IV of chapter 37 of title 38, United States Code (as added by section 302) [38 USCS §§ 3741 et seq.]".

Effective date of amendments made by Act Nov. 3, 1981; effective date of Administrator's authority to promulgate regulations. Act Nov. 3, 1981, P. L. 97-72, Title III, § 305, 95 Stat. 1060, provided: "The amendments made by this title [adding 38 USCS §§ 3741 et seq., generally; for full classification of such Title, consult USCS Tables volumes] shall take effect at the end of the one-hundred-and-eighty-day period beginning on the date of the enactment of this Act, except that the authority of the Administrator of Veterans' Affairs to promulgate regulations under subchapter IV of chapter 37 of title 38, United States Code (as added by section 302) [38 USCS §§ 3741 et seq.], shall take effect on such date of enactment.".

Code of Federal Regulations
Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

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§ 3742. Small business loan program

(a) (1) Subject to subsection (b) of this section, the Secretary may provide financial assistance to veterans' small business concerns for the purpose of (A) financing plant construction, conversion, or expansion (including the acquisition of land), (B) financing the acquisition of equipment, facilities, machinery, supplies, or materials, or (C) supplying such concerns with working capital.

(2) Subject to paragraph (3)(A) of this subsection, financial assistance under this section may be provided in the form of (A) loan guaranties, or (B) direct loans.

(3) The Secretary shall specify in regulations the criteria to be met for a business concern to qualify as a veterans' small business concern for the purposes of this subchapter [38 USCS §§ 3741 et seq.]. Such regulations shall include requirements--
(A) that at least 51 percent of a business concern must be owned by individuals who are veterans of the Vietnam era or disabled veterans in order for such concern to qualify for a loan guaranty and that at least 51 percent of a business concern must be owned by disabled veterans in order for such concern to qualify for a direct loan; and

(B) that the management and daily business operations of the concern must be directed by one or more of the veterans whose ownership interest is part of the majority ownership for the purposes of meeting the requirement in clause (A) of this paragraph.

(b) The availability of financial assistance under subsection (a) of this section is subject to the following limitations:

(1) The Secretary may not make a direct loan under this section unless the veterans' small business concern applying for the loan shows to the satisfaction of the Secretary that the concern is unable to obtain a loan guaranteed by the Department under this section or made or guaranteed by the Small Business Administration.

(2) The Secretary may not guarantee a loan under this section if the loan bears a rate of interest in excess of the maximum rate of interest prescribed under section 3745 of this title [38 USCS § 3745].

(3) The Secretary may not make or guarantee a loan under this section for an amount in excess of $200,000.

(4) The original liability of the Secretary on any loan guaranteed under this section may not exceed 90 percent of the amount of the loan, and such liability shall decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the loan, but such liability may not exceed the amount of the original guaranty.

(c) Each loan made or guaranteed under this subchapter [38 USCS §§ 3741 et seq.] shall be of such sound value, taking into account the creditworthiness of the veterans' small business concern (and the individual owners) applying for such loan, or so secured as reasonably to assure payment.

(d) (1) Except as provided in paragraph (2) of this subsection, the Secretary may not make or guarantee a loan under this subchapter [38 USCS §§ 3741 et seq.] to a veterans' small business concern in which an ownership interest is held by a veteran who also has an ownership interest in another small business concern if such ownership interest was considered in qualifying that other concern for an outstanding loan made or guaranteed under this subchapter [38 USCS §§ 3741 et seq.] or the Small Business Act (15 U.S.C. 631 et seq.).

(2) Paragraph (1) of this subsection shall not apply if 51 percent or more of the business concern seeking a direct or guaranteed loan under this subchapter [38 USCS §§ 3741 et seq.] is owned by veterans of the Vietnam era or disabled veterans without including the ownership interest of the veteran whose ownership interest in another small business concern was previously considered in qualifying that other concern for an outstanding guaranteed or direct business loan under this subchapter [38 USCS §§ 3741 et seq.] or the Small Business Act (15 U.S.C. 631 et seq.).

(e) (1) In order to protect the interest of the United States, upon application by a veterans' small business concern which is the recipient of a loan guaranteed under this subchapter
[38 USCS §§ 3741 et seq.], the Secretary (subject to the provisions of this subsection) may undertake the veterans' small business concern's obligation to make payments under such loan or, if the loan was a direct loan made by the Secretary, may suspend such obligation. While such payments are being made by the Secretary pursuant to the undertaking of such obligation or while such obligation is suspended, no such payment with respect to the loan may be required from the concern.

(2) The Secretary may undertake or suspend a veterans' small business concern's obligation under this subsection only if--

(A) such undertaking or suspension of the obligation is, in the judgment of the Secretary, necessary to protect the interest of the United States;
(B) with the undertaking or suspension of the obligation, the small business concern would, in the judgment of the Secretary, become or remain a viable small business entity; and
(C) the small business concern executes an agreement in writing satisfactory to the Secretary as provided by paragraph (4) of this subsection.

(3) The period of time for which the Secretary undertakes or suspends the obligation on a loan under this subsection may not exceed five years. The Secretary may extend the maturity of any loan on which the Secretary undertakes or suspends the obligation under this subsection for a corresponding period of time.

(4) (A) Before the Secretary may undertake or suspend a veterans' small business concern's obligation under this subsection, the Secretary shall require the small business concern to execute an agreement to repay the aggregate amount of the payments which were required under the loan during the period for which the obligation was undertaken or suspended--

(i) by periodic payments not less in amount or less frequently falling due than those which were due under the loan during such period,
(ii) pursuant to a repayment schedule agreed upon by the Secretary and the small business concern, or
(iii) by a combination of the method of payments described in clauses (i) and (ii) of this subparagraph.

(B) In addition to requiring the small business concern to execute the agreement described in subparagraph (A) of this paragraph, the Secretary shall, before the undertaking or suspension of the obligation, take such action and require the small business concern to take such action as the Secretary considers appropriate in the circumstances, including the provision of such security as the Secretary considers necessary or appropriate, to assure that the rights and interests of the United States and any lender will be safeguarded adequately during and after the period in which such obligation is so undertaken or suspended.

References in text:
"The Small Business Act", referred to in this section, is Act July 18, 1958, P. L. 85-536, 72 Stat. 384, which appears generally as 15 USCS §§ 631 et seq. For full classification of such Act, consult USCS Tables volumes.

Effective date of section:
Act Nov. 3, 1981, P. L. 97-72, Title III, § 305, 95 Stat. 1060, which appears as 38 USCS § 3741 note, provided that this section is effective 180 days after enactment on Nov. 3, 1981.
Amendments:


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1842, as 38 USCS § 3742, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further, in subsec. (b)(1), substituted "Department" for "Veterans' Administration".

Other provisions:

Authority of the Secretary to promulgate regulations. For the authority and effective date for the Secretary of Veterans' Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

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§ 3743. Liability on loans

Each individual who has an ownership interest in a veterans' small business concern that is provided a direct loan under this subchapter [38 USCS §§ 3741 et seq.], or that obtains a loan guaranteed under this subchapter [38 USCS §§ 3741 et seq.], shall execute a note or other document evidencing the direct or guaranteed business loan, and such individuals shall be jointly and severally liable to the United States for the amount of such direct loan or, in the case of a guaranteed loan, for any amount paid by the Secretary on account of such loan.

Effective date of section:

Act Nov. 3, 1981, P. L. 97-72, Title III, § 305, 95 Stat. 1060, which appears as 38 USCS § 3741 note, provided that this section is effective 180 days after enactment on Nov. 3, 1981.

Amendments:


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1843, as 38 USCS § 3743.

Other provisions:

Authority of the Secretary to promulgate regulations. For the authority and effective date for the Secretary of Veterans' Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

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§ 3744. Approval of loans by the Secretary
(a) Except as provided in subsection (b) of this section, a loan may not be guaranteed under this subchapter [38 USCS §§ 3741 et seq.] unless, before the closing of the loan, it is submitted to the Secretary for approval and the Secretary grants approval.

(b) The Secretary may exempt any lender of a class of lenders listed in section 3702(d) of this title [38 USCS § 3702(d)] from the prior approval requirement in subsection (a) of this section if the Secretary determines that the experience of such lender or class of lenders warrants such exemption.

(c) The Secretary may at any time upon thirty days' notice require loans to be made by any lender or class of lenders under this subchapter [38 USCS §§ 3741 et seq.] to be submitted to the Secretary for prior approval. No guaranty shall exist with respect to any such loan unless evidence of the guaranty is issued by the Secretary.

Effective date of section:
Act Nov. 3, 1981, P. L. 97-72, Title III, § 305, 95 Stat. 1060, which appears as 38 USCS § 3741 note, provided that this section is effective 180 days after enactment on Nov. 3, 1981.

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1844, as 38 USCS § 3744, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:
Authority of the Secretary to promulgate regulations. For the authority and effective date for the Secretary of Veterans's Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

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§ 3745. Interest on loans

(a) Loans guaranteed under this subchapter [38 USCS §§ 3741 et seq.] shall bear interest not in excess of such rate as the Secretary may from time to time find the loan market demands. In establishing the rate of interest that shall be applicable to such loans, the Secretary shall consult with the Administrator of the Small Business Administration.

(b) The rate of interest on any direct loan made by the Secretary under this subchapter [38 USCS §§ 3741 et seq.] may not exceed the maximum rate in effect under subsection (a) of this section at the time the direct loan is made.

Effective date of section:
Act Nov. 3, 1981, P. L. 97-72, Title III, § 305, 95 Stat. 1060, which appears as 38 USCS § 3741 note, provided that this section is effective 180 days after enactment on Nov. 3, 1981.

Amendments:

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1845, as 38 USCS § 3745; in subsec. (a), substituted "Secretary" for "Administrator".

1994. Act Nov. 2, 1994, in subsec. (a), substituted "Administrator" for "Secretary" following "consult with the".

Other provisions:

Authority of the Secretary to promulgate regulations. For the authority and effective date for the Secretary of Veterans' Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

Cross References

This section is referred to in 38 USCS § 3742

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 119

§ 3746. Maturity of loans

The maturity of a loan made or guaranteed under this subchapter [38 USCS §§ 3741 et seq.] that is used in whole or in part for the construction, conversion, or expansion of facilities or for acquisition of real property may not exceed twenty years plus such additional reasonable time as the Secretary may determine, at the time the loan is made, is required to complete the construction, acquisition, or expansion of such facilities. The maturity of any other loan made or guaranteed under this subchapter [38 USCS §§ 3741 et seq.] may not exceed ten years.

Effective date of section:

Act Nov. 3, 1981, P. L. 97-72, Title III, § 305, 95 Stat. 1060, which appears as 38 USCS § 3741 note, provided that this section is effective 180 days after enactment on Nov. 3, 1981.

Amendments:


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1846, as 38 USCS § 3746.

Other provisions:

Authority of the Secretary to promulgate regulations. For the authority and effective date for the Secretary of Veterans's Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 119

§ 3747. Eligible financial institutions
The Secretary may not guarantee under this subchapter [38 USCS §§ 3741 et seq.] a loan made by an entity not subject to examination and supervision by an agency of the United States or of a State.

Effective date of section:
Act Nov. 3, 1981, P. L. 97-72, Title III, § 305, 95 Stat. 1060, which appears as 38 USCS § 3741 note, provided that this section is effective 180 days after enactment on Nov. 3, 1981.

Amendments:

Other provisions:
Authority of the Secretary to promulgate regulations. For the authority and effective date for the Secretary of Veterans' Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

§ 3748. Preference for disabled veterans

In the extension of financial assistance under this subchapter [38 USCS §§ 3741 et seq.], the Secretary shall give preference, first, to veterans' small business concerns in which disabled veterans who have successfully completed a vocational rehabilitation program for self-employment in a small business enterprise under chapter 31 of this title [38 USCS §§ 3100 et seq.] have a significant ownership interest, and, second, to veterans' small business concerns in which other disabled veterans have a significant ownership interest.

Effective date of section:
Act Nov. 3, 1981, P. L. 97-72, Title III, § 305, 95 Stat. 1060, which appears as 38 USCS § 3741 note, provided that this section is effective 180 days after enactment on Nov. 3, 1981.

Amendments:

Other provisions:
Authority of the Secretary to promulgate regulations. For the authority and effective date for the Secretary of Veterans's Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 119

§ 3749. Revolving fund
(a) There is established in the Treasury a revolving fund to be known as the "Department of Veterans Affairs Small Business Loan Revolving Fund" (hereinafter in this section referred to as the "fund").

(b) Amounts in the fund shall be available to the Secretary without fiscal year limitation for all loan guaranty and direct loan operations under this subchapter [38 USCS §§ 3741 et seq.] other than administrative expenses and may not be used for any other purpose.

(c) (1) There is authorized to be appropriated to the fund a total of $25,000,000.
   (2) There shall be deposited into the fund all amounts received by the Secretary derived from loan operations under this subchapter [38 USCS §§ 3741 et seq.], including all collection of principal and interest and the proceeds from the use of property held or of property sold.

(d) The Secretary shall determine annually whether there has developed in the fund a surplus which, in the Secretary's judgment, is more than necessary to meet the needs of the fund. Any such surplus shall immediately be transferred into the general fund of the Treasury.

(e) Not later than two years after the termination of the authority of the Secretary to make new commitments for financial assistance under this subchapter [38 USCS §§ 3741 et seq.], the Secretary shall transfer into the general fund of the Treasury all amounts in the fund except those that the Secretary determines may be required for the liquidation of obligations under this subchapter [38 USCS §§ 3741 et seq.]. All amounts received thereafter derived from loan operations under this subchapter [38 USCS §§ 3741 et seq.], except so much thereof as the Secretary may determine to be necessary for liquidating outstanding obligations under this subchapter [38 USCS §§ 3741 et seq.], shall also be so deposited.

Effective date of section:
Act Nov. 3, 1981, P. L. 97-72, Title III, § 305, 95 Stat. 1060, which appears as 38 USCS § 3741 note, provided that this section is effective 180 days after enactment on Nov. 3, 1981.

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1849, as 38 USCS § 3749; and, in subsec. (a), substituted "Department of Veterans Affairs" for "Veterans' Administration".

Other provisions:
Authority of the Secretary to promulgate regulations. For the authority and effective date for the Secretary of Veterans' Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

Research Guide
Am Jur:
§ 3750. Incorporation of other provisions by the Secretary

The Secretary may provide that the provisions of sections of other subchapters of this chapter [38 USCS §§ 3701 et seq.] that are not otherwise applicable to loans made or guaranteed under this subchapter [38 USCS §§ 3741 et seq.] shall be applicable to loans made or guaranteed under this subchapter [38 USCS §§ 3741 et seq.]. The Secretary shall exercise authority under the preceding sentence by regulations prescribed after publication in the Federal Register and a period of not less than thirty days for public comment.

Effective date of section:
Act Nov. 3, 1981, P. L. 97-72, Title III, § 305, 95 Stat. 1060, which appears as 38 USCS § 3741 note, provided that this section is effective 180 days after enactment on Nov. 3, 1981.

Amendments:

Other provisions:
Authority of the Secretary to promulgate regulations. For the authority and effective date for the Secretary of Veterans' Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

§ 3751. Termination of program

The Secretary may not make commitments for financial assistance under this subchapter [38 USCS §§ 3741 et seq.] after September 30, 1986.

Effective date of section:
Act Nov. 3, 1981, P. L. 97-72, Title III, § 305, 95 Stat. 1060, which appears as 38 USCS § 3741 note, provided that this section is effective 180 days after enactment on Nov. 3, 1981.

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1851, as 38 USCS § 3751.

Other provisions:
Authority of the Secretary to promulgate regulations. For the authority and effective date for the Secretary of Veterans's Affairs to promulgate regulations under 38 USCS §§ 3741 et seq., see § 305 of Act Nov. 3, 1981, which appears as 38 USCS § 3741 note.

SUBCHAPTER V. DIRECT HOUSING LOANS FOR NATIVE AMERICAN VETERANS

§ 3761. Direct housing loans to Native American veterans; program authority
§ 3762. Direct housing loans to Native American veterans; program administration
§ 3761. Direct housing loans to Native American veterans; program authority

(a) The Secretary shall make direct housing loans to Native American veterans. The purpose of such loans is to permit such veterans to purchase, construct, or improve dwellings on trust land. The Secretary shall make such loans in accordance with the provisions of this subchapter [38 USCS §§ 3761 et seq.].

(b) The Secretary shall, to the extent practicable, make direct housing loans to Native American veterans who are located in a variety of geographic areas and in areas experiencing a variety of economic circumstances.

(c) [Deleted]

Amendments:


2006. Act June 15, 2006, substituted the section heading for one which read: "$§ 3761. Pilot program"; in subsec. (a), deleted "establish and implement a pilot program under which the Secretary may" preceding "make direct housing" and substituted "shall make such loans" for "shall establish and implement the pilot program"; in subsec. (b), substituted "The" for "In carrying out the pilot program under this subchapter, the"; and deleted subsec. (c), which read: "(c) No loans may be made under this subchapter after December 31, 2008.".

Other provisions:

Repeal of provisions relating to consultation with Advisory Committee on Native-American Veterans. Act Oct. 28, 1992, P. L. 102-547, § 8(b), 106 Stat. 3640, which formerly appeared as a note to this section, was repealed by Act June 15, 2006, P. L. 109-233, Title I, § 103(c)(2), 120 Stat. 400. It required the Secretary of Veterans Affairs to consider the views and recommendations, if any, of the Advisory Committee on Native-American Veterans in carrying out the direct housing loan pilot program.

Repeal of provision relating to annual reports. Act Oct. 28, 1992, P. L. 102-547, § 8(d), 106 Stat. 3640, which formerly appeared as a note to this section, was repealed by Act Feb. 13, 1996, P. L. 104-110, Title II, § 201(b), 110 Stat. 770. Such note related to an annual report to the Committees on Veterans' Affairs of the Senate and House of Representatives by the Secretary of Veterans Affairs dealing with implementation of a Native American veterans direct housing loan pilot program.

subchapter V of chapter 37 of title 38, United States Code [38 USCS §§ 3761 et seq.] (as added by subsection (a)), may be incurred only to the extent that appropriations of budget authority to cover the anticipated cost, as defined in section 502 of the Congressional Budget Act of 1974 [2 USCS § 661a], for such loans are made in advance. There is authorized to be appropriated for such purpose $5,000,000 for fiscal year 1993, which amount shall remain available without fiscal year limitation."

**Code of Federal Regulations**

Department of Veterans Affairs-Loan guaranty and vocational rehabilitation and counseling programs, 48 CFR Part 871

§ 3762. Direct housing loans to Native American veterans; program administration

(a) The Secretary may make a direct housing loan to a Native American veteran under this subchapter [38 USCS §§ 3761 et seq.] if--

(1) (A) the Secretary has entered into a memorandum of understanding with respect to such loans with the tribal organization that has jurisdiction over the veteran; or

(B) the tribal organization that has jurisdiction over the veteran has entered into a memorandum of understanding with any department or agency of the United States with respect to direct housing loans to Native Americans that the Secretary determines substantially complies with the requirements of subsection (b); and

(2) the memorandum is in effect when the loan is made.

(b) (1) Subject to paragraph (2), the Secretary shall ensure that each memorandum of understanding that the Secretary enters into with a tribal organization shall provide for the following:

(A) That each Native American veteran who is under the jurisdiction of the tribal organization and to whom the Secretary makes a direct loan under this subchapter [38 USCS §§ 3761 et seq.]--

(i) holds, possesses, or purchases using the proceeds of the loan a meaningful interest in a lot or dwelling (or both) that is located on trust land; and

(ii) will purchase, construct, or improve (as the case may be) a dwelling on the lot using the proceeds of the loan.

(B) That each such Native American veteran will convey to the Secretary by an appropriate instrument the interest referred to in subparagraph (A) as security for a direct housing loan under this subchapter [38 USCS §§ 3761 et seq.].

(C) That the tribal organization and each such Native American veteran will permit the Secretary to enter upon the trust land of that organization or veteran for the purposes of carrying out such actions as the Secretary determines are necessary--

(i) to evaluate the advisability of the loan; and

(ii) to monitor any purchase, construction, or improvements carried out using the proceeds of the loan.

(D) That the tribal organization has established standards and procedures that apply to the foreclosure of the interest conveyed by a Native American veteran pursuant to subparagraph (B), including--

(i) procedures for foreclosing the interest; and
(ii) procedures for the resale of the lot or the dwelling (or both) purchased, constructed, or improved using the proceeds of the loan.

(E) That the tribal organization agrees to such other terms and conditions with respect to the making of direct loans to Native American veterans under the jurisdiction of the tribal organization as the Secretary may require in order to ensure that loans under this subchapter [38 USCS §§ 3761 et seq.] are made in a responsible and prudent manner.

(2) The Secretary may not enter into a memorandum of understanding with a tribal organization under this subsection unless the Secretary determines that the memorandum provides for such standards and procedures as are necessary for the reasonable protection of the financial interests of the United States.

(c) (1) (A) Except as provided in subparagraph (B), the principal amount of any direct housing loan made to a Native American veteran under this section may not exceed $80,000.

(B) (i) Subject to clause (ii), the Secretary may make loans exceeding the amount specified in subparagraph (A) in a geographic area if the Secretary determines that housing costs in the area are significantly higher than average housing costs nationwide. The amount of such increase shall be the amount that the Secretary determines is necessary in order to make direct housing loans under this subchapter [38 USCS §§ 3761 et seq.] to Native American veterans who are located in a variety of geographic areas and in geographic areas experiencing a variety of economic conditions.

(ii) The amount of a loan made by the Secretary under this subchapter [38 USCS §§ 3761 et seq.] may not exceed the maximum loan amount authorized for loans guaranteed under section 3703(a)(1)(C) of this title [38 USCS § 3703(a)(1)(C)].

(2) Loans made under this section shall bear interest at a rate determined by the Secretary, which rate may not exceed the appropriate rate authorized for guaranteed loans under section 3703(c)(1) or section 3712(f) of this title [38 USCS § 3703(c)(1) or 3712(f)], and shall be subject to such requirements or limitations prescribed for loans guaranteed under this title as the Secretary may prescribe.

(3) Notwithstanding section 3704(a) of this title [38 USCS § 3704(a)], the Secretary shall establish minimum requirements for planning, construction, improvement, and general acceptability relating to any direct loan made under this section.

(d) (1) The Secretary shall establish credit underwriting standards to be used in evaluating loans made under this subchapter [38 USCS §§ 3761 et seq.]. In establishing such standards, the Secretary shall take into account the purpose of this program to make available housing to Native American veterans living on trust lands.

(2) The Secretary shall determine the reasonable value of the interest in property that will serve as security for a loan made under this section and shall establish procedures for appraisals upon which the Secretary may base such determinations. The procedures shall incorporate generally the relevant requirements of section 3731 of this title [38 USCS § 3731], unless the Secretary determines that such requirements are impracticable to implement in a geographic area, on particular trust lands, or under circumstances specified by the Secretary.
(e) Loans made under this section shall be repaid in monthly installments.

(f) In connection with any loan under this section, the Secretary may make advances in cash to provide for repairs, alterations, and improvements and to meet incidental expenses of the loan transaction. The Secretary shall determine the amount of any expenses incident to the origination of loans made under this section, which expenses, or a reasonable flat allowance in lieu thereof, shall be paid by the veteran in addition to the loan closing costs.

(g) Without regard to any provision of this chapter (other than a provision of this section), the Secretary may--

(1) take any action that the Secretary determines to be necessary with respect to the custody, management, protection, and realization or sale of investments under this section;
(2) determine any necessary expenses and expenditures and the manner in which such expenses and expenditures shall be incurred, allowed, and paid;
(3) make such rules, regulations, and orders as the Secretary considers necessary for carrying out the Secretary's functions under this section; and
(4) in a manner consistent with the provisions of this chapter [38 USCS §§ 3701 et seq.] and with the Secretary's functions under this subchapter [38 USCS §§ 3761 et seq.], employ, utilize, and compensate any persons, organizations, or departments or agencies (including departments and agencies of the United States) designated by the Secretary to carry out such functions.

(h) (1) The Secretary may make direct loans to Native American veterans in order to enable such veterans to refinance existing loans made under this section.

(2) (A) The Secretary may not make a loan under this subsection unless the loan meets the requirements set forth in subparagraphs (B), (C), and (E) of paragraph (1) of section 3710(e) of this title [38 USCS § 3710(e)].

(B) The Secretary may not make a loan under this subsection unless the loan will bear an interest rate at least one percentage point less than the interest rate borne by the loan being refinanced.

(C) Paragraphs (2) and (3) of such section 3710(e) [38 USCS § 3710(e)] shall apply to any loan made under this subsection, except that for the purposes of this subsection the reference to subsection (a)(8) of section 3710 of this title [38 USCS § 3710] in such paragraphs (2) and (3) shall be deemed to be a reference to this subsection.

(i) (1) The Secretary shall, in consultation with tribal organizations (including the National Congress of American Indians and the National American Indian Housing Council), carry out an outreach program to inform and educate Native American veterans of the availability of direct housing loans for Native American veterans who live on trust lands.

(2) Activities under the outreach program shall include the following:

(A) Attending conferences and conventions conducted by the National Congress of American Indians in order to work with the National Congress in providing information and training to tribal organizations and Native American veterans regarding the availability of housing benefits under this subchapter [38 USCS §§
3761 et seq.] and in assisting such organizations and veterans with respect to such housing benefits.

(B) Attending conferences and conventions conducted by the National American Indian Housing Council in order to work with the Housing Council in providing information and training to tribal organizations and tribal housing entities regarding the availability of such benefits.

(C) Attending conferences and conventions conducted by the Department of Hawaiian Homelands in order to work with the Department of Hawaiian Homelands in providing information and training to tribal housing entities in Hawaii regarding the availability of such benefits.

(D) Producing and disseminating information to tribal governments, tribal veterans service organizations, and tribal organizations regarding the availability of such benefits.

(E) Assisting tribal organizations and Native American veterans with respect to such benefits.

(F) Outstationing loan guarantee specialists in tribal facilities on a part-time basis if requested by the tribal government.

(j) The Secretary shall include as part of the annual benefits report of the Veterans Benefits Administration information concerning the cost and number of loans provided under this subchapter [38 USCS §§ 3761 et seq.] for the fiscal year covered by the report.

Amendments:

1996. Act Oct. 9, 1996 redesignated subsec. (h) as subsec. (i); and added new subsec. (h).

1997. Act Nov. 21, 1997, in subsec. (i), designated the existing provisions as para. (1), in para. (1) as so designated, inserted ", in consultation with tribal organizations (including the National Congress of American Indians and the National American Indian Housing Council),", deleted "tribal organizations and" following "inform and educate", and added para. (2); and added subsec. (j).

2001. Act Dec. 27, 2001, in subsec. (a)(1), designated the existing provisions as subpara. (A) and, in such subparagraph, substituted "or" for "and", and added subpara. (B); and, in subsec. (j), in the introductory matter, substituted "2006" for "2002".

2006. Act June 15, 2006, substituted the section heading for one which read: "§ 3762. Direct housing loans to Native American veterans"; in subsec. (a), in the introductory matter, inserted "under this subchapter"; in subsec. (b)(1)(E), substituted "loans under this subchapter are made" for "the pilot program established under this subchapter is implemented"; in subsec. (c)(1), in subpara. (A), inserted "veteran" and, in subpara. (B), designated the existing provisions as cl. (i) and, in such clause as so designated, substituted "Subject to clause (ii), the" for "The", and substituted "make direct housing loans under this subchapter" for "carry out the pilot program under this subchapter in a manner that demonstrates the advisability of making direct housing loans", and added cl. (ii); in subsec. (i), in para. (1), deleted "the pilot program provided for under this subchapter and" preceding "the availability", and, in para. (2), in subpara. (A), substituted "under this subchapter and in assisting such organizations and veterans with respect to such housing benefits" for "under the pilot program and in assisting such organizations and veterans in participating in the pilot program", and, in subpara. (E), substituted "with respect to such benefits" for "in participating in the pilot program"; and substituted subsec. (j) for one which read:

"(j) Not later than February 1 of each year through 2006, the Secretary shall transmit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report
relating to the implementation of the pilot program under this subchapter during the fiscal year preceding the date of the report. Each such report shall include the following:

“(1) The Secretary’s exercise during such fiscal year of the authority provided under subsection (c)(1)(B) to make loans exceeding the maximum loan amount.

“(2) The appraisals performed for the Secretary during such fiscal year under the authority of subsection (d)(2), including a description of--

“(A) the manner in which such appraisals were performed;

“(B) the qualifications of the appraisers who performed such appraisals; and

“(C) the actions taken by the Secretary with respect to such appraisals to protect the interests of veterans and the United States.

“(3) The outreach activities undertaken under subsection (i) during such fiscal year, including--

“(A) a description of such activities on a region-by-region basis; and

“(B) an assessment of the effectiveness of such activities in encouraging the participation of Native American veterans in the pilot program.

“(4) The pool of Native American veterans who are eligible for participation in the pilot program, including--

“(A) a description and analysis of the pool, including income demographics;

“(B) a description and assessment of the impediments, if any, to full participation in the pilot program of the Native American veterans in the pool; and

“(C) the impact of low-cost housing programs operated by the Department of Housing and Urban Development and other Federal or State agencies on the demand for direct loans under this section.

“(5) The Secretary’s recommendations, if any, for additional legislation regarding the pilot program.”.

§ 3763. Native American Veteran Housing Loan Program Account

(a) There is hereby established in the Treasury of the United States an account known as the "Native American Veteran Housing Loan Program Account" (hereinafter in this subchapter [38 USCS §§ 3761 et seq.] referred to as the "Account").

(b) The Account shall be available to the Secretary to carry out all operations relating to the making of direct housing loans to Native American veterans under this subchapter [38 USCS §§ 3761 et seq.], including any administrative expenses relating to the making of such loans. Amounts in the Account shall be available without fiscal year limitation.

Amendments:

1998. Act Nov. 11, 1998 (effective on 10/1/98, as provided by § 602(f) of such Act, which appears as 38 USCS § 2106 note) substituted the section heading for one which read: "§ 3763. Housing loan program account".


§ 3764. Qualified non-Native American veterans
(a) **Treatment of non-Native American veterans.** Subject to the succeeding provisions of this section, for purposes of this subchapter [38 USCS §§ 3761 et seq.]-

(1) a qualified non-Native American veteran is deemed to be a Native American veteran; and

(2) for purposes of applicability to a non-Native American veteran, any reference in this subchapter [38 USCS §§ 3761 et seq.] to the jurisdiction of a tribal organization over a Native American veteran is deemed to be a reference to jurisdiction of a tribal organization over the Native American spouse of the qualified non-Native American veteran.

(b) **Use of loan.** In making direct loans under this subchapter [38 USCS §§ 3761 et seq.] to a qualified non-Native American veteran by reason of eligibility under subsection (a), the Secretary shall ensure that the tribal organization permits, and the qualified non-Native American veteran actually holds, possesses, or purchases, using the proceeds of the loan, jointly with the Native American spouse of the qualified non-Native American veteran, a meaningful interest in the lot, dwelling, or both, that is located on trust land.

(c) **Restrictions imposed by tribal organizations.** Nothing in subsection (b) shall be construed as precluding a tribal organization from imposing reasonable restrictions on the right of the qualified non-Native American veteran to convey, assign, or otherwise dispose of such interest in the lot or dwelling, or both, if such restrictions are designed to ensure the continuation in trust status of the lot or dwelling, or both. Such requirements may include the termination of the interest of the qualified non-Native American veteran in the lot or dwelling, or both, upon the dissolution of the marriage of the qualified non-Native American veteran to the Native American spouse.

**Explanatory notes:**

A prior 38 USCS § 3764 was redesignated 38 USCS § 3765.

§ 3765. **Definitions**

For the purposes of this subchapter [38 USCS §§ 3761 et seq.]-

(1) The term "trust land" means any land that--
   (A) is held in trust by the United States for Native Americans;
   (B) is subject to restrictions on alienation imposed by the United States on Indian lands (including native Hawaiian homelands);
   (C) is owned by a Regional Corporation or a Village Corporation, as such terms are defined in section 3(g) and 3(j) of the Alaska Native Claims Settlement Act, respectively (43 U.S.C. 1602(g), (j)); or
   (D) is on any island in the Pacific Ocean if such land is, by cultural tradition, communally-owned land, as determined by the Secretary.

(2) The term "Native American veteran" means any veteran who is a Native American.

(3) The term "Native American" means--
   (A) an Indian, as defined in section 4(d) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(d));
(B) a native Hawaiian, as that term is defined in section 201(a)(7) of the Hawaiian Homes Commission Act, 1920 (Public Law 67-34; 42 Stat. 108);
(C) an Alaska Native, within the meaning provided for the term "Native" in section 3(b) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(b)); and
(D) a Pacific Islander, within the meaning of the Native American Programs Act of 1974 (42 U.S.C. 2991 et seq.).

(4) The term "tribal organization" shall have the meaning given such term in section 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(l)) and shall include the Department of Hawaiian Homelands, in the case of native Hawaiians, and such other organizations as the Secretary may prescribe.

(5) The term "qualified non-Native American veteran" means a veteran who--
(A) is the spouse of a Native American, but
(B) is not a Native American.

References in text:
"Section 201(a)(7) of the Hawaiian Homes Commission Act, 1920 (Public Law 67-34; 42 Stat. 108)" referred to in this section, is § 201(a)(7) of Act July 9, 1921, ch 42, which is classified to 48 USCS § 692. Such section has been omitted from the Code as obsolete.

Explanatory notes:
This section formerly appeared as 38 USCS § 3764.

Amendments:
2006. Act June 15, 2006, redesignated this section, enacted as 38 USCS § 3764, as 38 USCS § 3765; and added para. (5).

CHAPTER 39. AUTOMOBILES AND ADAPTIVE EQUIPMENT FOR CERTAIN DISABLED VETERANS AND MEMBERS OF THE ARMED FORCES

§ 3901. Definitions
§ 3902. Assistance for providing automobile and adaptive equipment
§ 3903. Limitations on assistance; special training courses
§ 3904. Research and development
[§ 3905] [1905. Omitted]

Explanatory notes:
The bracketed section number "3905" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.

Amendments:
"CHAPTER 39. AUTOMOBILES FOR DISABLED VETERANS
"Sec.
"1901. Veterans eligible for assistance.
"1902. Limitation on types of assistance furnished and veterans otherwise entitled.
"1903. Limitation on amounts paid by United States.
"1904. Prohibition against duplication of benefits.
"1905. Applications.".
1974. Act Dec. 22, 1974, P. L. 93-538, §§ 4(c), 5(b), 88 Stat. 1737 (effective on the first day of the second calendar month following Dec. 22, 1974, as provided by § 6 of such Act), substituted item 1903 for one which read: "1903. Limitations on assistance."); and added item 1904.
1976. Act Oct. 21, 1976, P. L. 94-581, Title II, § 205(b)(1), 90 Stat. 2858 (effective 10/21/76, as provided by § 211 of such Act), substituted new item 1904 for one which read: "Research and development; coordination with other Federal programs.".
1991. Act Aug. 6, 1991, P. L. 102-83, § 5(b)(1), 105 Stat. 406, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

§ 3901. Definitions
cxxxii Discussion and Analysis in the Veterans Benefits Manual

For purposes of this chapter [38 USCS §§ 3901 et seq.]

(1) The term "eligible person" means--
(A) any veteran entitled to compensation under chapter 11 of this title [38 USCS §§ 1101 et seq.] for any of the disabilities described in subclause (i), (ii), or (iii) below, if the disability is the result of any injury incurred or disease contracted in or aggravated by active military, naval, or air service:
   (i) The loss or permanent loss of use of one or both feet;
   (ii) The loss or permanent loss of use of one or both hands;
   (iii) The permanent impairment of vision of both eyes of the following status: central visual acuity of 20/200 or less in the better eye, with corrective glasses, or central visual acuity of more than 20/200 if there is a field defect in which the peripheral field has contracted to such an extent that the widest diameter of visual

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field subtends an angular distance no greater than twenty degrees in the better eye; or

(B) any member of the Armed Forces serving on active duty who is suffering from any disability described in subclause (i), (ii), or (iii) of clause (A) of this paragraph if such disability is the result of an injury incurred or disease contracted in or aggravated by active military, naval, or air service.

(2) The term "adaptive equipment" includes, but is not limited to, power steering, power brakes, power window lifts, power seats, and special equipment necessary to assist the eligible person into and out of the automobile or other conveyance. Such term also includes (A) air-conditioning equipment when such equipment is necessary to the health and safety of the veteran and to the safety of others, regardless of whether the automobile or other conveyance is to be operated by the eligible person or is to be operated for such person by another person; and (B) any modification of the size of the interior space of the automobile or other conveyance if needed because of the physical condition of such person in order for such person to enter or operate the vehicle.

Amendments:

1974. Act Dec. 22, 1974 (effective as provided by § 6 of such Act, which appears as a note to this section), in para. (1), in subpara. (A), introductory matter, substituted "World War II or thereafter:" for "World War II or the Korean conflict; or if the disability is the result of an injury incurred or disease contracted in or aggravated by active military, naval, or air service performed after January 31, 1955, and the injury was incurred or the disease was contracted in line of duty as a direct result of the performance of military duty;", in subpara. (B), substituted "World War II or thereafter." for "World War II, the Korean conflict, or the Vietnam era; or if such disability is the result of an injury incurred or disease contracted in or aggravated by any other active military, naval, or air service performed after January 31, 1955, and the injury was incurred or the disease was contracted in line of duty as a direct result of the performance of military duty;"; and substituted new para. (2) for one which read: "(2) The term 'World War II' includes, in the case of any eligible person, any period of continuous service performed by him after December 31, 1946, and before July 26, 1947, if such period began before January 1, 1947.".

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in (1), in subpara. (A), introductory matter, substituted "on or after September 16, 1940" for "during World War II or thereafter", and in subpara. (B), substituted "on or after September 16, 1940" for "during World War II or thereafter".

1977. Act Oct. 3, 1977 (effective 10/1/77, as provided by § 1(b) of such Act, which appears as a note to this section), in para. (1), in subpara. (A), introductory matter, deleted "on or after September 16, 1940" following "or air service", and in subpara. (B), deleted "on or after September 16, 1940" following "or air service".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1901, as 38 USCS § 3901.

Short titles:

Act Jan. 11, 1971, P. L. 91-666, § 1, 84 Stat. 1998, provided: "This Act [38 USCS §§ 3901 et seq.] may be cited as the 'Disabled Veterans' and Servicemen's Automobile Assistance Act of 1970'.".

Other provisions:

amending 38 USCS §§ 3901, 3902, 3903] shall become effective on the first day of the second calendar month following the date of enactment [enacted Dec. 22, 1974], except that clause (3) of section 3 [amending 38 USCS § 3902(c)(2)] shall take effect on January 11, 1971..


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  1. Eligible persons
  2. Adaptive equipment

1. Eligible persons

  Veteran was entitled to automobile under former 38 USC § 252 where injury initially occurred in service prior to World War II, but ultimate condition required amputation occurred or culminated after beginning of such war. 1947 ADVA 743

  Loss of use of extremities, resulting from treatment of service-connected hemorrhoids which were incurred in active service during World War II, was a result of disability incurred during World War II for purposes of former 38 USC § 252, and veteran was entitled to be furnished automobile under such provision. 1947 ADVA 744

  Persons whose service consisted of service in organized military forces of Commonwealth of Philippines who were ordered into service of United States Armed Forces pursuant to military order of President of United States dated July 26, 1941 were not entitled to automobiles or other conveyances under applicable benefits laws, even though such persons were entitled to compensation, under laws administered by Veterans' Administration [now Department], for loss or loss of use of one or both legs, at or above ankle, incurred in services in World War II. 1947 ADVA 749

  National guardsman injured during period of encampment for authorized instruction, that is, during period of training duty as distinguished from active military service, under circumstances which otherwise entitled him to benefits, was not entitled to automobile or other conveyance under provisions of former 38 USC § 252a, notwithstanding his disability met physical criteria for entitlement under such section. 1952 ADVA 915

  Veteran, blind in one eye when he entered service and thereafter suffering service incurred or aggravated disability to his other eye, was entitled to assistance in securing conveyance, if no deduction was to be made for disability which existed when he entered service in determining compensation evaluation for his bilateral visual acuity; visual disability which existed at time of entering service was not to be deducted from valuation of bilateral visual acuity if bilateral vision amounted to total disability. 1952 ADVA 903

2. Adaptive equipment

  Tool bar lister, planting attachment, row cultivator, and two-way mounted plow were includible in purchase price of tractor to be paid by Administrator [now Secretary] pursuant to former 38 USC § 252. 1947 ADVA 734

  Board erred by interpreting General Counsel opinion to bar section 1151 beneficiary from eligibility for either special housing adaption grant or grant for acquiring automobile and adaptive equipment as result of disability caused by VA medical care, as well as in failing to look to language of sections 3901 and 3902 in determine appellants's entitlement to such benefits and was thus deficient in terms of adequate statement of reasons or bases; GC opinion did not examine chapter 39 statutory provisions or provide any basis for determining that eligibility under

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§ 3902. Assistance for providing automobile and adaptive equipment

(a) The Secretary, under regulations which the Secretary shall prescribe, shall provide or assist in providing an automobile or other conveyance to each eligible person by paying the total purchase price of the automobile or other conveyance (including all State, local, and other taxes) or $11,000, whichever is the lesser, to the seller from whom the eligible person is purchasing under a sales agreement between the seller and the eligible person.

(b) (1) The Secretary, under regulations which the Secretary shall prescribe, shall provide each eligible person the adaptive equipment deemed necessary to insure that the eligible person will be able to operate the automobile or other conveyance in a manner consistent with such person's own safety and the safety of others and so as to satisfy the applicable standards of licensure established by the State of such person's residency or other proper licensing authority.

   (2) In the case of any veteran (other than a person eligible for assistance under paragraph (1) of this subsection) who is entitled to compensation for ankylosis of one or both knees, or one or both hips, the Secretary, under the terms and conditions set forth in subsections (a), (c), and (d) of section 3903 of this title [38 USCS § 3903] and under regulations which the Secretary shall prescribe, shall provide such adaptive equipment to overcome the disability resulting from such ankylosis as (A) is necessary to meet the applicable standards of licensure established by the State of such veteran's residency or other proper licensing authority for the operation of such veteran's automobile or other conveyance by such veteran, and (B) is determined to be necessary by the Under Secretary for Health for the safe operation of such automobile or other conveyance by such veteran.

(c) In accordance with regulations which the Secretary shall prescribe, the Secretary shall (1) repair, replace, or reinstall adaptive equipment deemed necessary for the operation of an automobile or other conveyance acquired in accordance with the provisions of this chapter [38 USCS §§ 3901 et seq.], and (2) provide, repair, replace, or reinstall such adaptive equipment for any automobile or other conveyance which an eligible person may previously or subsequently have acquired.

(d) If an eligible person cannot qualify to operate an automobile or other conveyance, the Secretary shall provide or assist in providing an automobile or other conveyance to such person, as provided in subsection (a) of this section, if the automobile or other conveyance is to be operated for the eligible person by another person.

Amendments:

1974. Act Dec. 22, 1974 (effective 2/1/75, as provided by § 6 of such Act, which appears as 38 USCS § 3901 note), in subsec. (a), inserted "(including all State, local, and other taxes)" and substituted "$3,300," for "$2,800,"

Such Act further (effective 1/11/71, as provided by § 6 of such Act), in subsec. (c), inserted "previously or".
1978. Act Oct. 18, 1978 (effective 10/1/78, as provided by § 401(a) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "$3,800" for "$3,300".

1981. Act Oct. 17, 1981 (effective 10/1/81, as provided by § 701(a) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "the Administrator" for "he" and "$4,400" for "$3,800"; in subsec. (b), designated existing provisions as para. (1), in para. (1) as so designated, substituted "the Administrator" for "he" and "such person's" for "his" wherever appearing, and added para. (2); and in subsec. (c), substituted "the Administrator" for "he" following "which".

1984. Act Oct. 24, 1984 (effective 1/1/85, as provided by § 305(c)(1) of such Act, which appears as 38 USCS § 3903 note), in subsec. (a), substituted "$5,000" for "$4,400".

1988. Act May 20, 1988 (effective 6/1/1988, as provided by § 304, which appears as 38 USCS § 2102 note), substituted subsec. (a) for one which read: "The Administrator, under regulations which the Administrator shall prescribe, shall provide or assist in providing an automobile or other conveyance to each eligible person by paying the total purchase price of the automobile or other conveyance (including all State, local, and other taxes) or $5,000, whichever is the lesser, to the seller from whom the eligible person is purchasing under a sales agreement between the seller and the eligible person."

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1902, as 38 USCS § 3902, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Secretary" for "Administrator" wherever appearing.


1998. Act June 9, 1998 (applicable with respect to assistance furnished on or after 10/1/98, as provided by § 8205(b) of such Act, which appears as a note to this section), in subsec. (a), substituted "$8,000" for "$5,500".

2001. Act Dec. 27, 2001, in subsec. (a), substituted "$9,000" for "$8,000".

2003. Act Dec. 16, 2003 (applicable with respect to assistance furnished on or after enactment, as provided by § 402(c) of such Act, which appears as 38 USCS § 2102 note), in subsec. (a), substituted "$11,000" for "$9,000".

Other provisions:

Application of June 9, 1998 amendment. Act June 9, 1998, P. L. 105-178, Title VIII, Subtitle B, § 8205(b), 112 Stat. 494, provides: "The amendment made by subsection (a) [amending subsec. (a) of this section] shall apply with respect to assistance furnished under section 3902 of such title on or after October 1, 1998.".

Cross References

This section is referred to in 38 USCS § 3903

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Veteran's widow was not entitled to receive automobile purchase assistance as accrued benefit to which veteran was entitled before his death, since record did not show that certificate of eligibility was ever issued or that veteran entered into sales agreement to purchase automobile between time his eligibility was established and his death; 38 USCS § 5121 accrued benefits are paid to veteran's surviving spouse, children, or dependent parent, or person who bore expense of last sickness and burial, while automobile purchase assistance payment is made to seller of automobile. Gillis v West (1998) 11 Vet App 441
Board erred by interpreting General Counsel opinion to bar section 1151 beneficiary from eligibility for either special housing adaption grant or grant for acquiring automobile and adaptive equipment as result of disability caused by VA medical care, as well as in failing to look to language of sections 3901 and 3902 in determine appellants's entitlement to such benefits and was thus deficient in terms of adequate statement of reasons or bases; GC opinion did not examine chapter 39 statutory provisions or provide any basis for determining that eligibility under it is condition on veteran's having service-connected condition. Kilpatrick v Principi (2002) 16 Vet App 1, 2002 US App Vet Claims LEXIS 79, affd (2003, CA FC) 327 F.3d 1375

§ 3903. Limitations on assistance; special training courses

Discussion and Analysis in the Veterans Benefits Manual

(a) No eligible person shall be entitled to receive more than one automobile or other conveyance under the provisions of this chapter [38 USCS §§ 3901 et seq.], and no payment shall be made under this chapter [38 USCS §§ 3901 et seq.] for the repair, maintenance, or replacement of an automobile or other conveyance.

(b) Except as provided in subsection (d) of section 3902 of this title [38 USCS § 3902], no eligible person shall be provided an automobile or other conveyance under this chapter [38 USCS §§ 3901 et seq.] until it is established to the satisfaction of the Secretary, in accordance with regulations the Secretary shall prescribe, that the eligible person will be able to operate the automobile or other conveyance in a manner consistent with such person's own safety and the safety of others and will satisfy the applicable standards of licensure to operate the automobile or other conveyance established by the State of such person's residency or other proper licensing authority.

(c) (1) An eligible person shall not be entitled to adaptive equipment under this chapter [38 USCS §§ 3901 et seq.] for more than two automobiles or other conveyances at any one time or (except as provided in paragraph (2) of this subsection) during any four-year period.

(2) In a case in which the four-year limitation in paragraph (1) of this subsection precludes an eligible person from being entitled to adaptive equipment under this chapter [38 USCS §§ 3901 et seq.], if the Secretary determines that, due to circumstances beyond the control of such person, one of the automobiles or other conveyances for which adaptive equipment was provided to such person during the applicable four-year period is no longer available for the use of such person, the Secretary may provide adaptive equipment to such person for an additional automobile or other conveyance during such period. Provision of adaptive equipment under this paragraph is within the discretion of the Secretary. Any action to provide adaptive equipment under this paragraph shall be made pursuant to regulations which the Secretary shall prescribe.

(d) Adaptive equipment shall not be provided under this chapter [38 USCS §§ 3901 et seq.] unless it conforms to minimum standards of safety and quality prescribed by the Secretary.

(e) (1) The Secretary shall provide, directly or by contract, for the conduct of special driver training courses at every hospital and, where appropriate, at regional offices and other medical facilities, of the Department to instruct such eligible person to operate the type of automobile or other conveyance such person wishes to obtain with assistance.
under this chapter [38 USCS §§ 3901 et seq.], and may make such courses available to any veteran, eligible for care under chapter 17 of this title [38 USCS §§ 1701 et seq.] or member of the Armed Forces, who is determined by the Secretary to need the special training provided in such courses even though such veteran or member is not eligible for the assistance provided under this chapter [38 USCS §§ 3901 et seq.].

(2) The Secretary is authorized to obtain insurance on automobiles and other conveyances used in conducting the special driver training courses provided under this subsection and to obtain, at Government expense, personal liability and property damage insurance for all persons taking such courses without regard to whether such persons are taking the course on an in-patient or out-patient basis.

(3) Notwithstanding any other provision of law, the Secretary may obtain, by purchase, lease, gift, or otherwise, any automobile, motor vehicle, or other conveyance deemed necessary to carry out the purposes of this subsection, and may sell, assign, transfer, or convey any such automobile, vehicle, or conveyance to which the Department obtains title for such price and upon such terms as the Secretary deems appropriate; and any proceeds received from any such disposition shall be credited to the applicable Department appropriation.

Amendments:

1974. Act Dec. 22, 1974 (effective 2/1/75, as provided by § 6 of such Act, which appears as 38 USCS § 3901 note), in the the section heading, inserted "; special training courses"; and added subsec. (e).

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111), in subsec. (e), in para. (1), deleted "or member of the Armed Forces" following "any veteran" and inserted "or member of the Armed Forces" following "title", and added para. (3).

1981. Act Oct. 17, 1981 (effective 10/1/81, as provided by § 701(a) of such Act, which appears as 38 USCS § 1114 note), in subsec. (b), substituted "the Administrator" for "he" preceding "shall prescribe" and substituted "such person's" for "his", wherever appearing.

1984. Act Oct. 24, 1984 (effective 1/1/85, as provided by § 305(c)(1) of such Act, which appears as a note to this section), substituted subsec. (c) for one which read: "An eligible person shall not be entitled to adaptive equipment under this chapter for more than one automobile or other conveyance at any one time."

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1903, as 38 USCS § 3903, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.


Other provisions:


"(c)(1) The amendments made by this section [amending this section and 42 USCS § 3902] shall take effect on January 1, 1985.

"(2) In the case of a person who during the four-year period ending on December 31, 1984, was provided adaptive equipment under chapter 39 of title 38, United States Code
[38 USCS §§ 3902 et seq.], for an automobile or other conveyance and who has such automobile or other conveyance available for use on the date of the enactment of this Act, the first four-year period applicable to such person under subsection (c) of section 1903 of such title [subsec. (c) of this section] (as amended by subsection (a)) shall begin on the most recent date before January 1, 1985, on which such person was provided such equipment."

Cross References
This section is referred to in 38 USCS §§ 3902, 3904

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§ 3904. Research and development

(a) In carrying out medical and prosthetic research under section 7303 of this title [38 USCS § 7303], the Secretary, through the Under Secretary for Health, shall provide for special emphasis on the research and development of adaptive equipment and adapted conveyances (including vans) meeting standards of safety and quality prescribed under subsection (d) of section 3903 [38 USCS § 3903], including support for the production and distribution of devices and conveyances so developed.

(b) In carrying out subsection (a) of this section, the Secretary, through the Under Secretary for Health, shall consult and cooperate with the Secretary of Health and Human Services and the Secretary of Education, in connection with programs carried out under section 204(b)(3) of the Rehabilitation Act of 1973 [29 USCS § 764(b)(3)] (relating to the establishment and support of Rehabilitation Engineering Research Centers).

Explanatory notes:

Effective date of section:
Act Dec. 22, 1974, P. L. 93-538, § 6, 88 Stat. 1737, provided that this section is effective on the first day of the second calendar month following Dec. 22, 1974.

Amendments:
1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), substituted new catchline for one which read: "Research and development; coordination with other Federal programs"; and in subsec. (a), substituted "medical and prosthetic research" for "prosthetic and orthopedic appliance research under section 216 and medical research".

1978. Act Nov. 6, 1978, in subsec. (b), substituted "and section 204(b)(2)" for "section 202(b)(2)" and deleted ", and section 405 of such Act (relating to the Secretarial responsibilities for planning, analysis, promoting utilization of scientific advances, and information clearinghouse activities)" following "Research Centers)".

substituted "section 204(b)(2) of the Rehabilitation Act of 1973 (29 U.S.C. 762(b)(2))" for "section 3(b) of the Rehabilitation Act of 1973 (Public Law 93-112; 87 Stat. 357) (relating to the development and support, and the stimulation of the development and utilization, including production and distribution of new and existing devices, of innovative methods of applying advanced medical technology, scientific achievement, and psychological and social knowledge to solve rehabilitation problems), and section 204(b)(2) of such Act".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 1904, as 38 USCS § 3904, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Secretary" for "Administrator" wherever appearing.


1998. Act Aug. 7, 1998 (effective on enactment, as provided by § 507 of such Act, which appears as 20 USCS § 9201 note), in subsec. (b), substituted "section 204(b)(3) of the Rehabilitation Act of 1973 (relating to the establishment and support of Rehabilitation Engineering Research Centers)" for "section 204(b)(2) of the Rehabilitation Act of 1973 (29 U.S.C. 762(b)(2)) (relating to the establishment and support of Rehabilitation Engineering Research Centers)".

Other provisions:

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section (see the Amendments note to this section), see § 5 of such Act, which appears as 10 USCS § 101 note.

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[§ 3905] [1905. Omitted]

The bracketed section number "3905" was inserted to preserve numerical continuity following the section number redesignations made by Act Aug. 6, 1991, P. L. 102-83, § 5(a), 105 Stat. 406.


CHAPTER 41. JOB COUNSELING, TRAINING, AND PLACEMENT SERVICE FOR VETERANS

§ 4100. Findings
§ 4101. Definitions
§ 4102. Purpose
§ 4102A. Assistant Secretary of Labor for Veterans' Employment and Training; program functions; Regional Administrators
§ 4103. Directors and Assistant Directors for Veterans' Employment and Training; additional Federal personnel
§ 4103A. Disabled veterans' outreach program

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§ 4104. Local veterans' employment representatives
[§ 4104A. Repealed]
§ 4105. Cooperation of Federal agencies
§ 4106. Estimate of funds for administration; authorization of appropriations
§ 4107. Administrative controls; annual report
§ 4108. Cooperation and coordination
§ 4109. National Veterans' Employment and Training Services Institute
§ 4110. Advisory Committee on Veterans Employment, Training, and Employer Outreach
§ 4110A. Special unemployment study
§ 4110B. Coordination and nonduplication
[§ 4111. Repealed]
§ 4112. Performance incentive awards for quality employment, training, and placement services
§ 4113. Outstationing of Transition Assistance Program personnel
[§§ 4114-4119. Repealed]
[§ 4120. Transferred]
[§ 4121. Repealed]
[§ 4122. Repealed]
[§ 4123. Repealed]
[§ 4124. Repealed]
[§ 4131. Transferred]
[§ 4132. Transferred]
[§ 4133. Transferred]
[§ 4134. Transferred]
[§ 4141. Transferred]
[§ 4142. Transferred]
[§ 4151. Repealed]
[§ 4152. Repealed]
[§§ 4161-4168. Transferred]

Amendments:
1962. Act Sept. 19, 1962, P. L. 87-675, § 1(b), 76 Stat. 558, substituted the chapter analysis, including items 2001-2005 for one which read:

"SUBCHAPTER I. UNEMPLOYMENT COMPENSATION

"Sec.
"2004. Information.
"2006. Regulations.
"2009. Terminations.

"SUBCHAPTER II. EMPLOYMENT SERVICE FOR VETERANS

"2010. Purpose.

"2011. Assignment of veterans' employment representative.

"2012. Employees of local offices.


"2014. Estimate of funds for administration.

1966. Act March 3, 1966, P. L. 89-358, § 6(a), 80 Stat. 27, substituted the chapter heading for one which read: "CHAPTER 41. UNEMPLOYMENT BENEFITS FOR VETERANS".

1972. Act Oct. 24, 1972, P. L. 92-540, Title V, § 502(a), 86 Stat. 1094, substituted the chapter heading and analysis for ones which read:

"CHAPTER 41. JOB COUNSELING AND EMPLOYMENT PLACEMENT SERVICE FOR VETERANS

"Sec.


"2003. Employees of local offices.


Act Aug. 6, 1991, P. L. 102-83, § 5(b)(1), 105 Stat. 406, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

§ 4100. Findings

The Congress makes the following findings:

(1) As long as unemployment and underemployment continue as serious problems among disabled veterans and Vietnam-era veterans, alleviating unemployment and underemployment among such veterans is a national responsibility.

(2) Because of the special nature of employment and training needs of such veterans and the national responsibility to meet those needs, policies and programs to increase opportunities for such veterans to obtain employment, job training, counseling, and job placement services and assistance in securing advancement in employment should be effectively and vigorously implemented by the Secretary of Labor and such implementation should be accomplished through the Assistant Secretary of Labor for Veterans' Employment and Training.

Amendments:

1988. Act May 20, 1988 (effective on enactment as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note), in para. (2), inserted "and Training".


Other provisions:


"(a) Requirement for program. During the three-year period beginning on January 1, 1990, the Secretary of Labor (hereafter in this section referred to as the 'Secretary'), in conjunction with the Secretary of Veterans Affairs and the Secretary of Defense, shall conduct a pilot program to furnish employment and training information and services to members of the Armed Forces within 180 days before such members are separated from the Armed Forces.
“(b) Areas to be covered by the program. The Secretary shall conduct the pilot program in at least five, but not more than ten, geographically dispersed States in which the Secretary determines that employment and training services to eligible veterans will not be unduly limited by the provision of such services to members of the Armed Forces under the pilot program.

“(c) Utilization of specific personnel. The Secretary shall utilize disabled veterans’ outreach program specialists or local veterans’ employment representatives to the maximum extent feasible to furnish employment and training information and services under the pilot program.


“(a) Establishment of Committee. There is established within the Department of Labor a committee to be known as the President’s National Hire Veterans Committee (hereinafter in this section referred to as the ‘Committee’).

“(b) Duties. The Committee shall establish and carry out a national program to do the following:

“(1) To furnish information to employers with respect to the training and skills of veterans and disabled veterans, and the advantages afforded employers by hiring veterans with such training and skills.

“(2) To facilitate employment of veterans and disabled veterans through participation in America’s Career Kit national labor exchange, and other means.

“(c) Membership.(1) The Secretary of Labor shall appoint 15 individuals to serve as members of the Committee, of whom one shall be appointed from among representatives nominated by each organization described in subparagraph (A) and of whom eight shall be appointed from among representatives nominated by organizations described in subparagraph (B).

"(A) Organizations described in this subparagraph are the following:


"(ii) The National Committee for Employer Support of the Guard and Reserve.

"(iii) Veterans’ service organizations that have a national employment program.

"(iv) State employment security agencies.

"(v) One-stop career centers.

"(vi) State departments of veterans affairs.

"(vii) Military service organizations.

"(B) Organizations described in this subparagraph are such businesses, small businesses, industries, companies in the private sector that furnish placement services, civic groups, workforce investment boards, and labor unions as the Secretary of Labor determines appropriate.

“(2) The following shall be ex officio, nonvoting members of the Committee:

"(A) The Secretary of Veterans Affairs.

"(B) The Secretary of Defense.

"(C) The Assistant Secretary of Labor for Veterans’ Employment and Training.

"(D) The Administrator of the Small Business Administration.
(E) The Postmaster General.

(F) The Director of the Office of Personnel Management.

(3) A vacancy in the Committee shall be filled in the manner in which the original appointment was made.

(d) Administrative matters. (1) The Committee shall meet not less frequently than once each calendar quarter.

(2) The Secretary of Labor shall appoint the chairman of the Committee.

(3) (A) Members of the Committee shall serve without compensation.

(B) Members of the Committee shall be allowed reasonable and necessary travel expenses, including per diem in lieu of subsistence, at rates authorized for persons serving intermittently in the Government service in accordance with the provisions of subchapter I of chapter 57 of title 5 [5 USCS §§ 5701 et seq.] while away from their homes or regular places of business in the performance of the responsibilities of the Committee.

(4) The Secretary of Labor shall provide staff and administrative support to the Committee to assist it in carrying out its duties under this section. The Secretary shall assure positions on the staff of the Committee include positions that are filled by individuals that are now, or have ever been, employed as one of the following:

(A) Staff of the Assistant Secretary of Labor for Veterans' Employment and Training under section 4102A of title 38, United States Code as in effect on the date of the enactment of this Act.

(B) Directors for Veterans' Employment and Training under section 4103 of such title as in effect on such date.

(C) Assistant Director for Veterans' Employment and Training under such section as in effect on such date.

(D) Disabled veterans' outreach program specialists under section 4103A of such title as in effect on such date.

(E) Local veterans' employment representatives under section 4104 of such title as in effect on such date.

(5) Upon request of the Committee, the head of any Federal department or agency may detail, on a nonreimbursable basis, any of the personnel of that department or agency to the Committee to assist it in carrying out its duties.

(6) The Committee may contract with and compensate government and private agencies or persons to furnish information to employers under subsection (b)(1) without regard to section 3709 of the Revised Statutes (41 U.S.C. 5).

(e) Report. Not later than December 31, 2003, 2004, and 2005, the Secretary of Labor shall submit to Congress a report on the activities of the Committee under this section during the previous fiscal year, and shall include in such report data with respect to placement and retention of veterans in jobs attributable to the activities of the Committee.

(f) Termination. The Committee shall terminate 60 days after submitting the report that is due on December 31, 2005.

(g) Authorization of appropriations. There are authorized to be appropriated to the Secretary of Labor from the employment security administration account (established in section 901 of
the Social Security Act (42 U.S.C. 1101)) in the Unemployment Trust Fund $3,000,000 for each of fiscal years 2003 through 2005 to carry out this section.


“(a) Study. The Comptroller General of the United States shall conduct a study on the implementation by the Secretary of Labor of the provisions of this Act during the program years that begin during fiscal years 2003 and 2004. The study shall include an assessment of the modifications under sections 2 through 5 of this Act [for full classification, consult USCS Tables volumes] of the provisions of title 38, United States Code, and an evaluation of the impact of those modifications, and of the actions of the President's National Hire Veterans Committee under section 6 of this Act [note to this section], to the provision of employment, training, and placement services provided to veterans under that title.

“(b) Report. Not later than 6 months after the conclusion of the program year that begins during fiscal year 2004, the Comptroller General shall submit to Congress a report on the study conducted under subsection (a). The report shall include such recommendations as the Comptroller General determines appropriate, including recommendations for legislation or administrative action.”

**Code of Federal Regulations**

Employment and Training Administration, Department of Labor-Administrative procedure, 20 CFR Part 601

Employment and Training Administration, Department of Labor-Establishment and functioning of State employment services, 20 CFR Part 652

Employment and Training Administration, Department of Labor-Services of the employment service system, 20 CFR Part 653

Employment and Training Administration, Department of Labor-Administrative provisions governing the Job Service System, 20 CFR Part 658

Office of the Assistant Secretary for Veterans' Employment and Training, Department of-Services for veterans, 20 CFR Part 1001

**Research Guide**

- **Am Jur:**
  - 77 Am Jur 2d, Veterans and Veterans' Laws § 99

- **Forms:**

§ 4101. Definitions

For the purposes of this chapter [38 USCS §§ 4101 et seq.]

(1) The term "special disabled veteran" has the same meaning provided in section 4211(1) of this title [38 USCS § 4211(1)].

(2) The term "veteran of the Vietnam era" has the same meaning provided in section 4211(2) of this title [38 USCS § 4211(2)].

(3) The term "disabled veteran" has the same meaning provided in section 4211(3) of this title [38 USCS § 4211(3)].
(4) The term "eligible veteran" has the same meaning provided in section 4211(4) of this title [38 USCS § 4211(4)].

(5) The term "eligible person" means--
   (A) the spouse of any person who died of a service-connected disability,
   (B) the spouse of any member of the Armed Forces serving on active duty who, at the
time of application for assistance under this chapter [38 USCS §§ 4101 et seq.], is
listed, pursuant to section 556 of title 37 [37 USCS § 556] and regulations issued
thereunder, by the Secretary concerned in one or more of the following categories and
has been so listed for a total of more than ninety days: (i) missing in action, (ii)
captured in line of duty by a hostile force, or (iii) forcibly detained or interned in line
of duty by a foreign government or power, or
   (C) the spouse of any person who has a total disability permanent in nature resulting
from a service-connected disability or the spouse of a veteran who died while a
disability so evaluated was in existence.

(6) The term "State" means each of the several States of the United States, the District of
Columbia, and the Commonwealth of Puerto Rico, and may include, to the extent
determined necessary and feasible, Guam, American Samoa, the Virgin Islands, the
Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific
Islands.

(7) The term "employment service delivery system" means a service delivery system at
which or through which labor exchange services, including employment, training, and
placement services, are offered in accordance with the Wagner-Peyser Act.

(8) The term "Secretary" means the Secretary of Labor.

(9) The term "intensive services" means local employment and training services of the
type described in section 134(d)(3) of the Workforce Investment Act of 1998 [29 USCS §
2864(d)(3)].

References in text:
The "Wagner-Peyser Act", referred to in this section, is Act June 6, 1933, ch 49, which
appears generally as 29 USCS §§ 49 et seq. For full classification of such Act, consult USCS
Tables volumes.

Explanatory notes:
Title I, § 101, 80 Stat. 1368; Aug. 2, 1973, P. L. 93-82, Title II, § 201, 87 Stat. 187; Oct. 21,
1976, P. L. 94-581, Title II, §§ 205(a), 209(a)(1), (3), 210(c)(1), 90 Stat. 2857, 2860, 2863;
100-687, Div B, Title XV, § 1506(a), 102 Stat. 4135) was repealed by Act May 7, 1991, P. L.
102-40, Title IV, § 401(a)(3), 105 Stat. 210. Such section provided for the functions of the
Department of Medicine and Surgery.

of Chapter 41, was repealed by Act Sept. 19, 1962, P. L. 87-675, § 1(a), 76 Stat. 558. It
related to compensation for veterans under state agreements.

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Amendments:


1966. Act March 3, 1966 (effective 3/3/66, as provided by § 12(a) of such Act), inserted "or of service after January 31, 1955"

1972. Act Oct. 24, 1972 (effective 90 days after enactment as provided by § 601(b) of such Act, which appears as a note to this section), substituted this section for one which read:

"§ 2001. Purpose

"The Congress declares as its intent and purpose that there shall be an effective job counseling and employment placement service for veterans of any war or of service after January 31, 1955, and that, to this end, policies shall be promulgated and administered, so as to provide for them the maximum of job opportunity in the field of gainful employment."

1974. Act Dec. 3, 1974 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), redesignated para. (2) as para. (3); and added new para. (2).

1980. Act Oct. 17, 1980, § 503 (effective 10/1/1980 as provided by § 802(e) of such Act, which appears as a note to this section), substituted new para. (1) for one which read: "(1) The term 'eligible veteran' means a person who served in the active military, naval, or air service and who was discharged or released therefrom with other than a dishonorable discharge."; redesignated paras. (2) and (3) as paras. (5) and (6), respectively; and added new paras. (2), (3), and (4).

Act Oct. 17, 1980, § 801(h) (effective 10/1/1980, as provided by § 802(h) of such Act, which appears as a note to this section), substituted in para. (5), as redesignated by § 503 of Act Oct. 17, 1980, in the introductory matter, substituted "The" for "the"; and in para. (6), as redesignated by § 503 of Act Oct. 17, 1980, inserted "the Commonwealth of the Northern Marianas Islands."

1988. Act May 20, 1988 (effective on enactment as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note) added paras. (7) and (8).

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 2001, as 38 USCS § 4101, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

2002. Act Nov. 7, 2002 (effective on enactment, as provided by § 5(c)(2) of such Act, which appears as a note to this section), substituted para. (7) for one which read: "(7) The term 'local employment service office' means a service delivery point which has an intrinsic management structure and at which employment services are offered in accordance with the Wagner-Peyser Act."

Such Act further (effective on enactment, as provided by § 5(a)(2) of such Act, which appears as a note to this section), added para. (9).

Other provisions:

Savings provisions. Act Sept. 19, 1962, P. L. 87-675, § 1(e), 76 Stat. 559, provided:

"Claims for benefits under sections 2001 through 2009 of chapter 41 of title 38, United States Code [former 38 USC 2001-2009], for any benefit week beginning before January 31, 1960, which claims are pending on the date these sections are repealed [repealed Sept. 19, 1962], shall be adjudicated in the same manner and with the same effect as if the sections had not been repealed. For the purpose of administering the program with respect to such claims, all functions, powers, and duties conferred upon the Secretary of Labor by sections 2001 through 2009 are continued in effect, and all rules and regulations established by the Secretary of Labor pursuant to these sections, and in effect when the sections are repealed, shall remain in full force and effect until modified or suspended.".

Employment assistance and services for veterans ineligible for assistance under this chapter. Act Oct. 17, 1980, P. L. 96-466, Title V, § 512, 94 Stat. 2207 (effective 10/1/80, as provided by § 802(e) of such Act); Oct. 21, 1998, P. L. 105-277, Div A, § 101(f) [Title VIII, Subtitle IV, § 405(d)(28), (f)(20)], 112 Stat. 2681-424, 2681-432 (effective as provided by § 405(g) of Subtitle IV of Title VIII of § 101(f) of Division A of such Act, which appears as 5 USCS § 3502 note), provides: "The Secretary of Labor shall assure that any veteran who is made ineligible for employment assistance under chapter 41 of title 38, United States Code [38 USCS §§ 4101 et seq.], by virtue of the provisions made by section 503(1) of this Act shall be provided with the employment assistance and services made available under the provisions of the Act entitled 'An Act to provide for the establishment of a national employment system and for cooperation with the States in the promotion of such system, and for other purposes', approved June 6, 1933 (commonly referred to as the 'Wagner-Peyser Act'), (29 U.S.C. 49-49k), title I of the Workforce Investment Act of 1998 [29 USCS §§ 2801 et seq. generally; for full classification, consult USCS Tables volumes] and other applicable provisions of law."

Termination of Trust Territory of the Pacific Islands. For termination of Trust Territory of the Pacific Islands, see note preceding 48 USCS §§ 1681.


Effective date of amendments made by § 5(c) of Act Nov. 7, 2002. Act Nov. 7, 2002, P. L. 107-288, § 5(c)(2), 116 Stat. 2045, provides: "The amendments made by paragraph (1) [amending para. (7) of this section] shall take effect on the date of the enactment of this Act."

Code of Federal Regulations

Employment and Training Administration, Department of Labor-Administrative procedure, 20 CFR Part 601
Employment and Training Administration, Department of Labor-Establishment and functioning of State employment services, 20 CFR Part 652
Employment and Training Administration, Department of Labor-Services of the employment service system, 20 CFR Part 653
Employment and Training Administration, Department of Labor-Administrative provisions governing the Job Service System, 20 CFR Part 658

Research Guide

Law Review Articles:
Benefits for Conscientious Objectors. 19 Catholic Lawyer 62, Winter 1973

§ 4102. Purpose

Discussion and Analysis in the Veterans Benefits Manual

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The Congress declares as its intent and purpose that there shall be an effective (1) job and job training intensive services program, (2) employment placement service program, and (3) job training placement service program for eligible veterans and eligible persons and that, to this end policies and regulations shall be promulgated and administered by an Assistant Secretary of Labor for Veterans' Employment and Training, established by section 4102A of this title [38 USCS § 4102A], through a Veterans' Employment and Training Service within the Department of Labor, so as to provide such veterans and persons the maximum of employment and training opportunities, with priority given to the needs of disabled veterans and veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized through existing programs, coordination and merger of programs and implementation of new programs, including programs carried out by the Veterans' Employment and Training Service to implement all efforts to ease the transition of servicemembers to civilian careers that are consistent with, or an outgrowth of, the military experience of the servicemembers.

Explanatory notes:


Provisions similar to those contained in this section were contained in former 38 USCS § 2001 prior to the general amendment of this chapter by Act Oct. 24, 1972, P. L. 92-540, Title V, § 502, 86 Stat. 1094.


Amendments:


1972. Act Oct. 24, 1972 (effective 90 days after 10/24/72, as provided by § 601(b) of such Act, which appears as 38 USCS § 4101 note), substituted this section for one which read:

"§ 2002. Assignment of veterans' employment representative

"The Secretary of Labor shall assign to each of the States a veterans' employment representative, who shall be a veteran of any war or of service after January 31, 1955, who at the time of appointment shall have been a bona fide resident of the State for at least two years, and who shall be appointed in accordance with the civil-service laws, and whose compensation shall be fixed in accordance with the Classification Act of 1949. Each such veterans' employment representative shall be attached to the staff of the public employment service in the State to which he has been assigned. He shall be administratively responsible to the Secretary of Labor, for the execution of the Secretary's veterans' placement policies through the public employment service in the State. In cooperation with the public employment service staff in the State, he shall--"
“(1) be functionally responsible for the supervision of the registration of veterans of any war or of service after January 31, 1955, in local employment offices for suitable types of employment and for placement of veterans of any war or of service after January 31, 1955, in employment;

“(2) assist in securing and maintaining current information as to the various types of available employment in public works and private industry or business;

“(3) promote the interests of employers in employing veterans of any war or of service after January 31, 1955;

“(4) maintain regular contact with employers and veterans' organizations with a view of keeping employers advised of veterans of any war or of service after January 31, 1955, available for employment and veterans of any war or of service after January 31, 1955, advised of opportunities for employment; and

“(5) assist in every possible way in improving working conditions and the advancement of employment of veterans of any war or of service after January 31, 1955.”.

1974. Act Dec. 3, 1974 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), inserted “and eligible persons” and “and persons”.

1976. Act Oct. 15, 1976 (effective 12/1/76, as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), inserted “by a Deputy Assistant Secretary of Labor for Veterans' Employment, established by section 2002A of this title.”.

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(e) of such Act, which appears as 38 USCS § 4101 note), deleted “Deputy” preceding “Assistant Secretary”.

1982. Act Oct. 14, 1982 inserted “and regulations” and inserted “, with priority given to the needs of disabled veterans and veterans of the Vietnam era”.

1983. Act Nov. 21, 1983, substituted “an” for “a” following “administered by”.

1988. Act May 20, 1988 (effective on enactment as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note) inserted “and Training” in two places.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 2002, as 38 USCS § 4102, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

2002. Act Nov. 7, 2002 (effective on enactment, as provided by § 5(a)(2) of such Act, which appears as 38 USCS § 4101 note), substituted “job and job training intensive services program,” for “job and job training counseling service program.”.

Such Act further (effective on enactment, as provided by § 5(b)(2) of such Act, which appears as a note to this section), substituted “and veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized" for "and veterans of the Vietnam era", and substituted ", including programs carried out by the Veterans' Employment and Training Service to implement all efforts to ease the transition of servicemembers to civilian careers that are consistent with, or an outgrowth of, the military experience of the servicemembers." for a concluding period.

Other provisions:

§ 4102A. Assistant Secretary of Labor for Veterans' Employment and Training; program functions; Regional Administrators

(a) Establishment of position of Assistant Secretary of Labor for Veterans' Employment and Training.

(1) There is established within the Department of Labor an Assistant Secretary of Labor for Veterans' Employment and Training, appointed by the President by and with the advice and consent of the Senate, who shall formulate and implement all departmental policies and procedures to carry out (A) the purposes of this chapter, chapter 42, and chapter 43 of this title [38 USCS §§ 4100 et seq., 4201 et seq., 4301 et seq.], and (B) all other Department of Labor employment, unemployment, and training programs to the extent they affect veterans.

(2) The employees of the Department of Labor administering chapter 43 of this title [38 USCS §§ 4301 et seq.] shall be administratively and functionally responsible to the Assistant Secretary of Labor for Veterans' Employment and Training.

(3) (A) There shall be within the Department of Labor a Deputy Assistant Secretary of Labor for Veterans' Employment and Training. The Deputy Assistant Secretary shall perform such functions as the Assistant Secretary of Labor for Veterans' Employment and Training prescribes.

(B) No individual may be appointed as a Deputy Assistant Secretary of Labor for Veterans' Employment and Training unless the individual has at least five years of service in a management position as an employee of the Federal civil service or comparable service in a management position in the Armed Forces. For purposes of determining such service of an individual, there shall be excluded any service described in subparagraphs (A), (B), and (C) of section 308(d)(2) of this title [38 USCS § 308(d)(2)].

(b) Program functions. The Secretary shall carry out the following functions:

(1) Except as expressly provided otherwise, carry out all provisions of this chapter and chapter 43 of this title [38 USCS §§ 4100 et seq., 4301 et seq.] through the Assistant Secretary of Labor for Veterans' Employment and Training and administer through such Assistant Secretary all programs under the jurisdiction of the Secretary for the provision of employment and training services designed to meet the needs of all veterans and persons eligible for services furnished under this chapter [38 USCS §§ 4100 et seq.].

(2) In order to make maximum use of available resources in meeting such needs, encourage all such programs, and all grantees and contractors under such programs to
enter into cooperative arrangements with private industry and business concerns (including small business concerns owned by veterans or disabled veterans), educational institutions, trade associations, and labor unions.

(3) Ensure that maximum effectiveness and efficiency are achieved in providing services and assistance to eligible veterans under all such programs by coordinating and consulting with the Secretary of Veterans Affairs with respect to (A) programs conducted under other provisions of this title, with particular emphasis on coordination of such programs with readjustment counseling activities carried out under section 1712A of this title [38 USCS § 1712A], apprenticeship or other on-the-job training programs carried out under section 3687 of this title [38 USCS § 3687], and rehabilitation and training activities carried out under chapter 31 of this title [38 USCS §§ 3100 et seq.] and (B) determinations covering veteran population in a State.

(4) Ensure that employment, training, and placement activities are carried out in coordination and cooperation with appropriate State public employment service officials.

(5) Subject to subsection (c), make available for use in each State by grant or contract such funds as may be necessary to support--

(A) disabled veterans' outreach program specialists appointed under section 4103A(a)(1) of this title [38 USCS § 4103A(a)(1)],

(B) local veterans' employment representatives assigned under section 4104(b) of this title [38 USCS § 4104(b)], and

(C) the reasonable expenses of such specialists and representatives described in subparagraphs (A) and (B), respectively, for training, travel, supplies, and other business expenses, including travel expenses and per diem for attendance at the National Veterans' Employment and Training Services Institute established under section 4109 of this title [38 USCS § 4109].

(6) Monitor and supervise on a continuing basis the distribution and use of funds provided for use in the States under paragraph (5).

(7) Establish, and update as appropriate, a comprehensive performance accountability system (as described in subsection (f)) and carry out annual performance reviews of veterans employment, training, and placement services provided through employment service delivery systems, including through disabled veterans' outreach program specialists and through local veterans' employment representatives in States receiving grants, contracts, or awards under this chapter [38 USCS §§ 4100 et seq.].

(8) With advice and assistance from the Advisory Committee on Veterans Employment and Training, and Employer Outreach established under section 4110 of this title [38 USCS § 4110], furnish information to employers (through meetings in person with hiring executives of corporations and otherwise) with respect to the training and skills of veterans and disabled veterans, and the advantages afforded employers by hiring veterans with such training and skills, and to facilitate employment of veterans and disabled veterans through participation in labor exchanges (Internet-based and otherwise), and other means.

(3) **Conditions for receipt of funds.**

(1) The distribution and use of funds under subsection (b)(5) in order to carry out sections 4103A(a) and 4104(a) of this title [38 USCS §§ 4103A(a) and 4104(a)] shall
be subject to the continuing supervision and monitoring of the Secretary and shall not be governed by the provisions of any other law, or any regulations prescribed thereunder, that are inconsistent with this section or section 4103A or 4104 of this title [38 USCS § 4103A or 4104].

(2) (A) A State shall submit to the Secretary an application for a grant or contract under subsection (b)(5). The application shall contain the following information:

(i) A plan that describes the manner in which the State shall furnish employment, training, and placement services required under this chapter [38 USCS §§ 4100 et seq.] for the program year, including a description of--

(I) duties assigned by the State to disabled veterans' outreach program specialists and local veterans' employment representatives consistent with the requirements of sections 4103A and 4104 of this title [38 USCS §§ 4103A and 4104];

(II) the manner in which such specialists and representatives are integrated in the employment service delivery systems in the State; and

(III) the program of performance incentive awards described in section 4112 of this title [38 USCS § 4112] in the State for the program year.

(ii) The veteran population to be served.

(iii) Such additional information as the Secretary may require to make a determination with respect to awarding a grant or contract to the State.

(B) (i) Subject to the succeeding provisions of this subparagraph, of the amount available under subsection (b)(5) for a fiscal year, the Secretary shall make available to each State with an application approved by the Secretary an amount of funding in proportion to the number of veterans seeking employment using such criteria as the Secretary may establish in regulation, including civilian labor force and unemployment data, for the State on an annual basis. The proportion of funding shall reflect the ratio of--

(I) the total number of veterans residing in the State that are seeking employment; to

(II) the total number of veterans seeking employment in all States.

(ii) The Secretary shall phase in over the three fiscal-year period that begins on October 1, 2003, the manner in which amounts are made available to States under subsection (b)(5) and this subsection, as amended by the Jobs for Veterans Act.

(iii) In carrying out this paragraph, the Secretary may establish minimum funding levels and hold-harmless criteria for States.

(3) (A) (i) As a condition of a grant or contract under this section for a program year, in the case of a State that the Secretary determines has an entered-employment rate for veterans that is deficient for the preceding program year, the State shall develop a corrective action plan to improve that rate for veterans in the State.

(ii) The State shall submit the corrective action plan to the Secretary for approval, and if approved, shall expeditiously implement the plan.

(iii) If the Secretary does not approve a corrective action plan submitted by the State under clause (i), the Secretary shall take such steps as may be necessary to implement corrective actions in the State to improve the entered-employment rate for veterans in that State.
(B) To carry out subparagraph (A), the Secretary shall establish in regulations a uniform national threshold entered-employment rate for veterans for a program year by which determinations of deficiency may be made under subparagraph (A).

(C) In making a determination with respect to a deficiency under subparagraph (A), the Secretary shall take into account the applicable annual unemployment data for the State and consider other factors, such as prevailing economic conditions, that affect performance of individuals providing employment, training, and placement services in the State.

(4) In determining the terms and conditions of a grant or contract under which funds are made available to a State in order to carry out section 4103A or 4104 of this title [38 USCS § 4103A or 4104], the Secretary shall take into account--

(A) the results of reviews, carried out pursuant to subsection (b)(7), of the performance of the employment, training, and placement service delivery system in the State, and

(B) the monitoring carried out under this section.

(5) Each grant or contract by which funds are made available to a State shall contain a provision requiring the recipient of the funds--

(A) to comply with the provisions of this chapter [38 USCS §§ 4100 et seq.]; and

(B) on an annual basis, to notify the Secretary of, and provide supporting rationale for, each nonveteran who is employed as a disabled veterans' outreach program specialist and local veterans' employment representative for a period in excess of 6 months.

(6) Each State shall coordinate employment, training, and placement services furnished to veterans and eligible persons under this chapter [38 USCS §§ 4100 et seq.] with such services furnished with respect to such veterans and persons under the Workforce Investment Act of 1998 and the Wagner-Peyser Act.

(7) Of the amount of a grant or contract under which funds are made available to a State in order to carry out section 4103A or 4104 of this title [38 USCS § 4103A or 4104] for any program year, one percent shall be for the purposes of making cash awards under the program of performance incentive awards described in section 4112 of this title [38 USCS § 4112] in the State.

(d) Participation in other federally funded job training programs. The Assistant Secretary of Labor for Veterans' Employment and Training shall promote and monitor participation of qualified veterans and eligible persons in employment and training opportunities under title I of the Workforce Investment Act of 1998 and other federally funded employment and training programs.

(e) Regional Administrators.

(1) The Secretary shall assign to each region for which the Secretary operates a regional office a representative of the Veterans' Employment and Training Service to serve as the Regional Administrator for Veterans' Employment and Training in such region.

(2) Each such Regional Administrator shall carry out such duties as the Secretary may require to promote veterans employment and reemployment within the region that the Administrator serves.

(f) Establishment of performance standards and outcomes measures.
(1) The Assistant Secretary of Labor for Veterans' Employment and Training shall establish and implement a comprehensive performance accountability system to measure the performance of employment service delivery systems, including disabled veterans' outreach program specialists and local veterans' employment representatives providing employment, training, and placement services under this chapter [38 USCS §§ 4100 et seq.] in a State to provide accountability of that State to the Secretary for purposes of subsection (c).

(2) Such standards and measures shall--
(A) be consistent with State performance measures applicable under section 136(b) of the Workforce Investment Act of 1998 [29 USCS § 2871(b)]; and
(B) be appropriately weighted to provide special consideration for placement of (i) veterans requiring intensive services (as defined in section 4101(9) of this title [38 USCS § 4101(9)]), such as special disabled veterans and disabled veterans, and (ii) veterans who enroll in readjustment counseling under section 1712A of this title [38 USCS § 1712A].

(g) Authority to provide technical assistance to States. The Secretary may provide such technical assistance as the Secretary determines appropriate to any State that the Secretary determines has, or may have, an entered-employment rate in the State that is deficient, as determined under subsection (c)(3) with respect to a program year, including assistance in the development of a corrective action plan under that subsection.

References in text:
The "Wagner-Peyser Act", referred to in this section, is Act June 6, 1933, ch 49, which appears generally as 29 USCS §§ 49 et seq. For full classification of such Act, consult USCS Tables volumes.

The "Workforce Investment Act of 1998", referred to in this section, is Act Aug. 7, 1998, P. L. 105-220, which appears generally as 20 USCS §§ 9201 et seq. and 29 USCS §§ 2801 et seq. For full classification of such Act, consult USCS Tables volumes.

"Title I of the Workforce Investment Act of 1998", referred to in this section, is Title I of Act Aug. 7, 1998, P. L. 105-220, which appears generally as 29 USCS §§ 2801 et seq. For full classification of such Title, consult USCS Tables volumes.

Effective date of section:
Act Oct. 15, 1976, P. L. 94-502, Title VII, § 703(c), 90 Stat. 2406, provided that this section is effective on December 1, 1976.

Amendments:
1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(e) of such Act, which appears as 38 USCS § 4101 note), in the catchline, deleted "Deputy" preceding "Assistant Secretary"; and in the section, deleted "Deputy" preceding "Assistant Secretary".
1983. Act Nov. 21, 1983, substituted "an" for "a" following "Labor".
1988. Act May 20, 1988 (effective on enactment as provided by § 16(a) of such Act, except as provided by § 16(b)(1)(A) of such Act, which appears as 38 USCS § 3104 note) substituted the section heading for one which read: "§ 2002A. Assistant Secretary of Labor for Veterans' Employment"; designated the existing provisions as subsec. (a), in subsec. (a)
as so designated, inserted "and Training" in two places and substituted "Secretary" for "Secretary of Labor"; and added subsecs. (b)-(e).


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 2000A, as 38 USCS § 4102A, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and substituted "Secretary" for "Administrator" wherever appearing.

1994. Act Nov. 2, 1994, in subsec. (a), designated the existing provisions as para. (1), in para. (1) as so designated, substituted "(A)" and "(B)" for "(1)" and "(2)", respectively, and added para. (2).

Such Act further, in subsec. (e), substituted "Regional Administrator" for "Regional Secretary" wherever appearing.


1998. Act Oct. 21, 1998 (effective on enactment as provided by § 405(g)(1) of Subtitle IV of Title VIII of § 101(f) of Division A of such Act, which appears as 5 USCS § 3502 note), in subsec. (d), substituted "the Job Training Partnership Act and title I of the Workforce Investment Act of 1998" for "the Job Training Partnership Act".

Act Oct. 21, 1998 (effective on 7/1/2000, as provided by § 405(g)(2)(B) of Subtitle VIII of Title IV of § 101(f) of Division A of such Act, which appears as 5 USCS § 3502 note), in subsec. (d), deleted "the Job Training Partnership Act and" preceding "title I".

Act Nov. 11, 1998, in subsec. (e)(1), substituted the sentence beginning "A person may not be assigned . . . ." for "Each Regional Administrator appointed after the date of the enactment of the Veterans' Benefits Improvements Act of 1996 shall be a veteran.".

2002. Act Nov. 7, 2002 (effective and applicable as provided by § 4(a)(4) of such Act, which appears as a note to this section), substituted this section for one which read:

"§ 4102A. Assistant Secretary of Labor for Veterans' Employment and Training; Regional Administrators

"(a)(1) There is established within the Department of Labor an Assistant Secretary of Labor for Veterans' Employment and Training appointed by the President by and with the advice and consent of the Senate, who shall be the principal advisor to the Secretary with respect to the formulation and implementation of all departmental policies and procedures to carry out (A) the purposes of this chapter, chapter 42, and chapter 43 of this title, and (B) all other Department of Labor employment, unemployment, and training programs to the extent they affect veterans. The employees of the Department of Labor administering chapter 43 of this title shall be administratively and functionally responsible to the Assistant Secretary of Labor for Veterans' Employment and Training.

"(2) There shall be within the Department of Labor a Deputy Assistant Secretary of Labor for Veterans' Employment and Training. The Deputy Assistant Secretary shall perform such functions as the Assistant Secretary of Labor for Veterans' Employment and Training prescribes. The Deputy Assistant Secretary shall be a veteran.

"(b) The Secretary shall--

"(1) except as expressly provided otherwise, carry out all provisions of this chapter and chapter 43 of this title through the Assistant Secretary of Labor for Veterans' Employment and Training and administer through such Assistant Secretary all programs under the jurisdiction of the Secretary for the provision of employment and training services designed to meet the needs of disabled veterans, veterans of the Vietnam era, and all other eligible veterans and eligible persons;
“(2) in order to make maximum use of available resources in meeting such needs, encourage all such programs and all grantees under such programs to enter into cooperative arrangements with private industry and business concerns (including small business concerns), educational institutions, trade associations, and labor unions;

“(3) ensure that maximum effectiveness and efficiency are achieved in providing services and assistance to eligible veterans under all such programs by coordinating and consulting with the Secretary of Veterans Affairs with respect to (A) programs conducted under other provisions of this title, with particular emphasis on coordination of such programs with readjustment counseling activities carried out under section 1712A of this title, apprenticeship or other on-the-job training programs carried out under section 3687 of this title, and rehabilitation and training activities carried out under chapter 31 of this title, and (B) the Veterans' Job Training Act (29 U.S.C. 1721 note);

“(4) ensure that job placement activities are carried out in coordination and cooperation with appropriate State public employment service officials;

“(5) subject to subsection (c)(2) of this section, make available for use in each State, directly or by grant or contract, such funds as may be necessary (A) to support (i) disabled veterans' outreach program specialists appointed under section 4103A(a)(1) of this title, and (ii) local veterans' employment representatives assigned under section 4104(b) of this title, and (B) to support the reasonable expenses of such specialists and representatives for training, travel, supplies, and fringe benefits, including travel expenses and per diem for attendance at the National Veterans' Employment and Training Services Institute established under section 4109 of this title;

“(6) monitor and supervise on a continuing basis the distribution and use of funds provided for use in the States under paragraph (5) of this subsection; and

“(7) monitor the appointment of disabled veterans’ outreach specialists and the assignment of local veterans’ employment representatives in order to ensure compliance with the provisions of sections 4103A(a)(1) and 4104(a)(4), respectively, of this title.

“(c)(1) The distribution and use of funds under subsection (b)(5) of this section in order to carry out sections 4103A(a) and 4104(a) of this title shall be subject to the continuing supervision and monitoring of the Secretary and shall not be governed by the provisions of any other law, or any regulations prescribed thereunder, that are inconsistent with this section or section 4103A or 4104 of this title.

“(2) In determining the terms and conditions of a grant or contract under which funds are made available in a State in order to carry out section 4103A or 4104 of this title, the Secretary shall take into account (A) the results of the evaluations, carried out pursuant to section 4103(c)(15) of this title, of the performance of local employment offices in the State, and (B) the monitoring carried out under this section.

“(3) Each grant or contract by which funds are made available in a State shall contain a provision requiring the recipient of the funds to comply with the provisions of this chapter.

“(d) The Assistant Secretary of Labor for Veterans' Employment and Training shall promote and monitor participation of qualified veterans and eligible persons in employment and training opportunities under title I of the Workforce Investment Act of 1998 and other federally funded employment and training programs.

“(e)(1) The Secretary shall assign to each region for which the Secretary operates a regional office a representative of the Veterans' Employment and Training Service to serve as the Regional Administrator for Veterans' Employment and Training in such region. A person may not be assigned after October 9, 1996, as such a Regional Administrator unless the person is a veteran.
“(2) Each such Regional Administrator shall be responsible for--

“(A) ensuring the promotion, operation, and implementation of all veterans' employment and training programs and services within the region;

“(B) monitoring compliance with section 4212 of this title with respect to veterans’ employment under Federal contracts within the region;

“(C) protecting and advancing veterans’ reemployment rights within the region; and

“(D) coordinating, monitoring, and providing technical assistance on veterans’ employment and training programs with respect to all entities receiving funds under grants from or contracts with the Department of Labor within the region.”.

2003. Act Dec. 16, 2003 (effective as if included in the enactment of § 4(a) of Act Nov. 7, 2002, P. L. 107-288, as provided by § 708(b)(1)(B) of the 2003 Act, which appears as a note to this section), in subsec. (c)(2)(B)(ii), substituted "October 1, 2003" for "October 1, 2002".

Such Act further, in subsec. (f)(1), substituted "May 7, 2003," for "6 months after the date of the enactment of this section, ".

2006. Act June 15, 2006, in subsec. (b), added para. (8); in subsec. (c)(7), substituted "Of" for "With respect to program years beginning during or after fiscal year 2004, one percent of" and substituted "for any program year, one percent" for "for the program year"; and, in subsec. (f)(1), substituted "The" for "By not later than May 7, 2003, the".

Other provisions:

Transition provisions. Act Oct. 17, 1980, P. L. 96-466, Title V, § 504(b), (c), 94 Stat. 2203 (effective 10/1/80, as provided by § 802(e) of such Act), provided:

"(b) Any reference in any law, regulation, directive, or other document to the Deputy Assistant Secretary of Labor for Veterans’ Employment shall be deemed to be a reference to the Assistant Secretary of Labor for Veterans’ Employment.

"(c) Notwithstanding any other provision of law, the position of Deputy Assistant Secretary of Labor for Veterans’ Employment, as constituted on the day before the date of the enactment of this section, shall remain in existence until a person has been appointed to and has qualified for the position of Assistant Secretary of Labor for Veterans’ Employment (established by the amendments made by subsection (a) [amending 38 USCS prec. § 4101 and 38 USCS §§ 4102 and 4102A]).".

Effective date and applicability of Nov. 7, 2002 amendments. Act Nov. 7, 2002, P. L. 107-288, § 4(a)(4), 116 Stat. 2042, provides: "The amendments made by this subsection [amending 38 USCS §§ 4102A, 4103, 4107(b), and the chapter analysis preceding 38 USCS § 4100, and repealing 38 USCS § 4104A] shall take effect on the date of the enactment of this Act, and apply for program and fiscal years under chapter 41 of title 38, United States Code [38 USCS §§ 4100 et seq.], beginning on or after such date."


Cross References

Assistant Secretaries of Labor, generally 29 USCS § 553

Administration by Assistant Secretary for Veterans’ Employment and Training of employment programs for veterans under Job Training Partnership Act 29 USCS § 1721

This section is referred to in 38 USCS §§ 4102, 4103A, 4104, 4106, 4107

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§ 4103. Directors and Assistant Directors for Veterans' Employment and Training; additional Federal personnel

(a) Directors and Assistant Directors.
(1) The Secretary shall assign to each State a representative of the Veterans' Employment and Training Service to serve as the Director for Veterans' Employment and Training, and shall assign full-time Federal clerical or other support personnel to each such Director.
(2) Each Director for Veterans' Employment and Training for a State shall, at the time of appointment, have been a bona fide resident of the State for at least two years.
(3) Full-time Federal clerical or other support personnel assigned to Directors for Veterans' Employment and Training shall be appointed in accordance with the provisions of title 5 governing appointments in the competitive service and shall be paid in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5 [5 USCS §§ 5101 et seq. and 5331 et seq.].

(b) Additional Federal personnel. The Secretary may also assign as supervisory personnel such representatives of the Veterans' Employment and Training Service as the Secretary determines appropriate to carry out the employment, training, and placement services required under this chapter [38 USCS § 4100 et seq.], including Assistant Directors for Veterans' Employment and Training.

References in text:
The "provisions of title 5 governing appointment in the competitive service", referred to in this section, appear generally as 5 USCS §§ 2101 et seq.

Explanatory notes:

Provisions similar to those contained in this section were contained in former 38 USCS § 2002 prior to the general amendment of this chapter by Act Oct. 24, 1972, P. L. 92-540, Title V, § 502, 86 Stat. 1094.


Amendments:

1966. Act March 3, 1966 (effective 3/3/66, as provided by § 12(a) of such Act), inserted "or of service after January 31, 1955"

1972. Act Oct. 24, 1972 (effective 90 days after 10/24/72, as provided by § 601(b) of such Act, which appears as 38 USCS § 4101 note), substituted this section for one which read:

"§ 2003. Employees of local offices

"Where deemed necessary by the Secretary of Labor, there shall be assigned by the administrative head of the employment service in the State one or more employees, preferably veterans of any war or of service after January 31, 1955, of the staffs of local employment service offices, whose services shall be primarily devoted to discharging the duties prescribed for the veterans' employment representative."

1974. Act Dec. 3, 1974 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), in the introductory matter, substituted "250,000 veterans and eligible persons" for "250,000 veterans" and substituted "veterans' and eligible persons' " for "veterans’"; in paras. (1) and (2), inserted "and eligible persons" wherever appearing; in para. (3), inserted "or an eligible person’s"; in para. (4), inserted "and eligible persons' and "and persons"; and in paras. (5) and (6), inserted "and eligible persons" wherever appearing.

1976. Act Oct. 15, 1976 (effective 12/1/76, as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), in the introductory matter, substituted "the Secretary" for "he" preceding "shall determine", inserted "or by prime sponsors under the Comprehensive Employment and Training Act", and substituted "such representative's" for "his"; in para. (5), deleted "and" following "employment and training;"; redesignated para. (6) as para. (7); and added new para. (6).

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(e), (h) of such Act), in the introductory matter, inserted "(and shall assign full-time clerical support to each such representative)", deleted ", United States Code," following "provisions of title 5", inserted "system" following "public employment service" wherever appearing, and substituted "employment" for "manpower" preceding "and training programs"; and in para. (6), inserted ", disabled veterans, and veterans of the Vietnam era".


Such Act further substituted the catchline for one which read: "§ 2003. Assignment of veterans' employment representative"; and substituted subsecs. (a), (b), and the provisions of subsec. (c) preceding para. (1) for provisions which read: "The Secretary of Labor shall assign to each State a representative of the Veterans' Employment Service to serve as the veterans' employment representative (and shall assign full-time clerical support to each such representative), and shall further assign to each State one assistant veterans' employment representative per each 250,000 veterans and eligible persons of the State veterans population, and such additional assistant veterans' employment representatives as the Secretary shall determine, based on the data collected pursuant to section 2007 of this title, to be necessary to assist the veterans' employment representative to carry out effectively in that State the purposes of this chapter. Each veterans' employment representative and assistant veterans' employment representative shall be an eligible veteran who at the time of appointment shall have been a bona fide resident of the State for at least two years and who shall be appointed in accordance with the provisions of title 5 governing appointments in the competitive service, and shall be paid in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates. Each such veterans' employment representative and assistant veterans' employment representative shall be attached to the staff of the public employment service system in the State to which they have been assigned. They shall be administratively responsible to the Secretary of Labor for the execution of the Secretary's veterans' and eligible persons'
counseling and placement policies through the public employment service and in cooperation with employment and training programs administered by the Secretary or by prime sponsors under the Comprehensive Employment and Training Act in the State. In cooperation with the public employment service system staff and the staffs of each such other program in the State, the veterans' employment representative and such representative's assistants shall--

and, in subsec. (c), substituted para. (6) for one which read: "promote the participation of veterans in Comprehensive Employment and Training Act programs and monitor the implementation and operation of Comprehensive Employment and Training Act programs to assure that eligible veterans, disabled veterans, and veterans of the Vietnam era receive special consideration when required; and", in para. (7), substituted a semicolon for the concluding period, and added paras. (8)-(12).

1988. Act May 20, 1988 (effective on enactment as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note) substituted the section heading for one which read: "§ 2003. State and Assistant State Directors for Veterans' Employment"; in subsec. (a), substituted "Secretary" for "Secretary of Labor" preceding "shall assign", deleted "State" preceding "Director" and inserted "and Training" wherever appearing: in subsec. (b)(1), deleted "State" preceding "Director" and inserted "and Training" wherever appearing, designated the existing provisions as subpara. (A), in subpara. (A) as so designated, redesignated cls. (A) and (B) as cls. (i) and (ii) and, in cl. (i) as redesignated, substituted ", except as provided in subparagraph (B) of this paragraph, be a qualified veteran" for "be an eligible veteran", and added subpara. (B), and in para. (2), inserted "and Training" and deleted "State" preceding "Director" wherever appearing; and, in subsec. (c), in the introductory matter, deleted "State" and inserted "and Training" wherever appearing.

Such Act further (effective on the 60th day after enactment, as provided by § 16(b)(2) of such Act, which appears as 38 USCS § 1504 note), in subsec. (c), in paras. (2) and (10), substituted "Department of Veterans Affairs" for "Veterans' Administration".

1989. Act Dec. 18, 1989, in subsec. (c), in paras. (2) and (10), substituted "Department of Veterans Affairs" for "Veterans' Administration".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 2003, as 38 USCS § 4103, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

1994. Act Nov. 2, 1994, in subsec. (c)(2), substituted "subchapter II of chapter 77" for "subchapter IV of chapter 3".

1996. Act Oct. 9, 1996, in subsec. (a), substituted "full-time Federal clerical or other support personnel" for "full-time Federal clerical support" and substituted "Full-time Federal clerical or other support personnel" for "Full-time Federal clerical support personnel".

2002. Act Nov. 7, 2002 (effective and applicable as provided by § 4(a)(4) of such Act, which appears as 38 USCS § 4102A note), substituted this section for one which read:

"§ 4103. Directors and Assistant Directors for Veterans' Employment and Training

"(a) The Secretary shall assign to each State a representative of the Veterans' Employment Service to serve as the Director for Veterans' Employment and Training, and shall assign full-time Federal clerical or other support personnel to each such Director. The Secretary shall also assign to each State one Assistant Director for Veterans' Employment and Training per each 250,000 veterans and eligible persons of the State veterans population and such additional Assistant Directors for Veterans' Employment and Training as the Secretary shall determine, based on the data collected pursuant to section 4107 of this title, to be necessary to assist the Director for Veterans' Employment and Training to carry out effectively in that..."
State the purposes of this chapter. Full-time Federal clerical or other support personnel assigned to Directors for Veterans' Employment and Training shall be appointed in accordance with the provisions of title 5 governing appointments in the competitive service and shall be paid in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5.

"(b)(1)(A) Each Director for Veterans' Employment and Training and Assistant Director for Veterans' Employment and Training (i) shall, except as provided in subparagraph (B) of this paragraph, be a qualified veteran who at the time of appointment has been a bona fide resident of the State for at least two years, and (ii) shall be appointed in accordance with the provisions of title 5 governing appointments in the competitive service and shall be paid in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5.

"(B) If, in appointing a Director or Assistant Director for any State under this section, the Secretary determines that there is no qualified veteran available who meets the residency requirement in subparagraph (A)(i), the Secretary may appoint as such Director or Assistant Director any qualified veteran.

"(2) Each Director for Veterans' Employment and Training and Assistant Director for Veterans' Employment and Training shall be attached to the public employment service system of the State to which they are assigned. They shall be administratively responsible to the Secretary for the execution of the veterans' and eligible persons' counseling and placement policies of the Secretary through the public employment service system and in cooperation with other employment and training programs administered by the Secretary, by grantees of Federal or federally funded employment and training programs in the State, or directly by the State.

"(c) In cooperation with the staff of the public employment service system and the staffs of each such other program in the State, the Director for Veterans' Employment and Training and Assistant Directors for Veterans' Employment and Training shall--

"(1)(A) functionally supervise the provision of services to eligible veterans and eligible persons by such system and such program and their staffs, and (B) be functionally responsible for the supervision of the registration of eligible veterans and eligible persons in local employment offices for suitable types of employment and training and for counseling and placement of eligible veterans and eligible persons in employment and job training programs, including the program conducted under the Veterans' Job Training Act (Public Law 98-77; 29 U.S.C. 1721 note);

"(2) engage of job development and job advancement activities for eligible veterans and eligible persons, including maximum coordination with appropriate officials of the Department of Veterans Affairs in that agency's carrying out of its responsibilities under subchapter II of chapter 77 of this title and in the conduct of job affairs, job marts, and other special programs to match eligible veterans and eligible persons with appropriate job and job training opportunities and otherwise to promote the employment of eligible veterans and eligible persons;

"(3) assist in securing and maintaining current information as to the various types of available employment and training opportunities, including maximum use of electronic data processing and telecommunications systems and the matching of an eligible veteran's or an eligible person's particular qualifications with an available job or on-job training or apprenticeship opportunity which is commensurate with those qualifications;

"(4) promote the interest of employers and labor unions in employing eligible veterans and eligible persons and in conducting on-job training and apprenticeship programs for such veterans and persons;
“(5) maintain regular contact with employers, labor unions, training programs and veterans’ organizations with a view to keeping them advised of eligible veterans and eligible persons available for employment and training and to keeping eligible veterans and eligible persons advised of opportunities for employment and training;

“(6) promote and facilitate the participation of veterans in Federal and federally funded employment and training programs and directly monitor the implementation and operation of such programs to ensure that eligible veterans, veterans of the Vietnam era, disabled veterans, and eligible persons receive such priority or other special consideration in the provision of services as is required by law or regulation;

“(7) assist in every possible way in improving working conditions and the advancement of employment of eligible veterans and eligible persons;

“(8) supervise the listing of jobs and subsequent referrals of qualified veterans as required by section 4212 of this title;

“(9) be responsible for ensuring that complaints of discrimination filed under such section are resolved in a timely fashion;

“(10) working closely with appropriate Department of Veterans Affairs personnel engaged in providing counseling or rehabilitation services under chapter 31 of this title, cooperate with employers to identify disabled veterans who have completed or are participating in a vocational rehabilitation training program under such chapter and who are in need of employment;

“(11) cooperate with the staff of programs operated under section 1712A of this title in identifying and assisting veterans who have readjustment problems and who may need employment placement assistance or vocational training assistance;

“(12) when requested by a Federal or State agency or a private employer, assist such agency or employer in identifying and acquiring prosthetic and sensory aids and devices which tend to enhance the employability of disabled veterans;

“(13) monitor the implementation of Federal laws requiring veterans preference in employment and job advancement opportunities within the Federal Government and report to the Office of Personnel Management or other appropriate agency, for enforcement or other remedial action, any evidence of failure to provide such preference or to provide priority or other special consideration in the provision of services to veterans as is required by law or regulation;

“(14) monitor, through disabled veterans’ outreach program specialists and local veterans’ employment representatives, the listing of vacant positions with State employment agencies by Federal agencies, and report to the Office of Personnel Management or other appropriate agency, for enforcement or other remedial action, any evidence of failure to provide priority or other special consideration in the provision of services to veterans as is required by law or regulation; and

“(15)(A) not less frequently than annually, conduct, subject to subclause (B) of this clause, an evaluation at each local employment office of the services provided to eligible veterans and eligible persons and make recommendations for corrective action as appropriate; and

“(B) carry out such evaluations in the following order of priority: (I) offices that demonstrated less than satisfactory performance during either of the two previous program years, (II) offices with the largest number of veterans registered during the previous program year, and (III) other offices as resources permit.”.
Other provisions:

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Cross References

This section is referred to in 38 USCS §§ 4102A, 4103A; 42 USCS § 1712A

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 102

§ 4103A. Disabled veterans' outreach program

(a) Requirement for employment by States of a sufficient number of specialists.

(1) Subject to approval by the Secretary, a State shall employ such full- or part-time disabled veterans' outreach program specialists as the State determines appropriate and efficient to carry out intensive services under this chapter [38 USCS §§ 4100 et seq.] to meet the employment needs of eligible veterans with the following priority in the provision of services:

(A) Special disabled veterans.

(B) Other disabled veterans.

(C) Other eligible veterans in accordance with priorities determined by the Secretary taking into account applicable rates of unemployment and the employment emphases set forth in chapter 42 of this title [38 USCS §§ 4201 et seq.].

(2) In the provision of services in accordance with this subsection, maximum emphasis in meeting the employment needs of veterans shall be placed on assisting economically or educationally disadvantaged veterans.

(b) Requirement for qualified veterans.

A State shall, to the maximum extent practicable, employ qualified veterans to carry out the services referred to in subsection (a). Preference shall be given in the appointment of such specialists to qualified disabled veterans.

Effective date of section:

Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(e), 94 Stat. 2218, provided that this section is effective on Oct. 1, 1980.

Amendments:

1982. Act Oct. 14, 1982, in subsec. (a), in para. (1), inserted ", acting through the Assistant Secretary for Veterans' Employment," and substituted "available for use in" for "available to", in para. (2), substituted "provided for use in" for "provided to", in para. (3), inserted ", acting through the Assistant Secretary of Labor for Veterans' Employment," and substituted "available for use in" for "available to", and added para. (5); in subsec. (b)(2), inserted the sentence beginning "The Secretary, after consulting . . . " and substituted "section 612A" for "section 621A"; in subsec. (c), in para. (4), substituted "appropriate grantees under other Federal and federally funded employment and training programs" for "prime sponsors under the Comprehensive Employment and Training Act", and added para. (8); deleted subsec. (d), which read: "Persons serving as staff in the disabled veterans outreach program conducted
under title III of the Comprehensive Employment and Training Act on the date of enactment of this section shall be appointed as disabled veterans' outreach program specialists in the State in which such individual is so serving, unless the Secretary for good cause shown determines that such individual is not qualified for such appointment.; redesignated former subsec. (e) as subsec. (d); and in subsec. (d) as redesignated, added the sentence beginning "The Secretary shall monitor . . ."

1988. Act May 20, 1988 (effective on enactment as provided by § 16(a) of such Act and applicable for all of fiscal year 1988 and subsequent fiscal years, as provided by § 16(b)(1) of such Act, which appears as 38 USCS § 3104 note), in subsec. (a), deleted para. (1), which read: "The Secretary of Labor, acting through the Assistant Secretary for Veterans' Employment, shall make available for use in each State, directly or by grant or contract, such funds as may be necessary to support a disabled veterans' outreach program designated to meet the employment needs of veterans, especially disabled veterans of the Vietnam era.);
redesignated former para. (2) as para. (1), in para. (1) as redesignated, substituted the sentence beginning "The amount of funds . . ." for "Funds provided for use in a State under this subsection shall be sufficient to support the appointment of one disabled veterans' outreach program specialist for each 5,300 veterans of the Vietnam era and disabled veterans residing in such State." and inserted "qualified" before "veteran" in two places and before "disabled" in three places, deleted para. (3), which read: "(3) The Secretary, acting through the Assistant Secretary of Labor for Veterans' Employment, shall also make available for use in the States such funds, in addition to those made available to carry out paragraphs (1) and (2) of this subsection, as may be necessary to support the reasonable expenses of such specialists for training, travel, supplies, and fringe benefits."
and deleted para. (5), which read: "(5) The distribution and use of funds provided for use in States under this section shall be subject to the continuing supervision and monitoring of the Assistant Secretary for Veterans' Employment and shall not be governed by the provisions of any other law, or any regulations prescribed thereunder, that are inconsistent with this section."

Such Act further (effective and applicable as above), in subsec. (a), redesignated former para. (4) as para. (2) and, in para. (2) as redesignated, deleted "paragraph (2) of" preceding "this subsection".

Such Act further (effective on enactment as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note), in subsec. (b)(2), deleted "State" preceding "Director" and inserted "and Training"; and deleted subsec. (d), which read: "The Secretary of Labor shall administer the program provided for by this section through the Assistant Secretary of Labor for Veterans' Employment. The Secretary shall monitor the appointment of disabled veterans' outreach program specialists to ensure compliance with the provisions of subsection (a)(2) of this section with respect to the employment of such specialists."

Such Act further (effective on the 60th day after enactment, as provided by § 16(b)(2) of such Act, which appears as 38 USCS § 3104 note), in subsec. (c), in para. (4), inserted "(including part C of title IV of the Job Training Partnership Act (29 U.S.C. 1501 et seq.))", in para. (6), inserted "(including the program conducted under the Veterans' Job Training Act (Public Law 98-77; 29 U.S.C. 1721 note))" and added paras. (9) and (10).

1989. Act Dec. 18, 1989, in subsecs. (b)(2) and (c)(2), substituted "Secretary of Veterans Affairs" for "Administrator", wherever appearing; and in subsec. (b)(2) and subsec. (c), in paras. (3) and (8), substituted "Department of Veterans Affairs" for "Veterans' Administration".

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 2003A, as 38 USCS § 4103A, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101); and, in subsec. (b), in para. (2), substituted "section 7723" for "section 242".

1992. Act Oct. 29, 1992, in subsec. (a), in para. (1), substituted "specialist for each 6,900 veterans residing in such State who are either veterans of the Vietnam era, veterans who first entered on active duty as a member of the Armed Forces after May 7, 1975, or disabled veterans." for "specialist for each 5,300 veterans of the Vietnam era and disabled veterans".
residing in such State.

1994. Act Nov. 2, 1994, in subsec. (a)(1), substituted "services to disabled veterans of the Vietnam era who are participating in or have completed a program of vocational rehabilitation under chapter 31 of this title."

1998. Act Oct. 21, 1998 (effective on enactment as provided by § 405(g)(1) of Subtitle IV of Title VIII of § 101(f) of Division A of such Act, which appears as 5 USCS § 3502 note), in subsec. (c)(4), substituted "including part C of title IV of the Job Training Partnership Act and title I of the Workforce Investment Act of 1998" for "including part C of title IV of the Job Training Partnership Act (29 U.S.C. 1501 et seq.)"

Act Oct. 21, 1998 (effective on 7/1/2000, as provided by § 405(g)(2)(B) of Subtitle VIII of Title IV of § 101(f) of Division A of such Act, which appears as 5 USCS § 3502 note), in subsec. (c)(4), deleted "part C of title IV of the Job Training Partnership Act and" preceding "title I".

Act Nov. 11, 1998, in subsec. (a)(1), substituted "for each 7,400 veterans who are between the ages of 20 and 64 residing in such State." for "for each 6,900 veterans residing in such State who are either veterans of the Vietnam era, veterans who first entered on active duty as a member of the Armed Forces after May 7, 1975, or disabled veterans.", deleted "of the Vietnam era" following "to qualified disabled veterans", and deleted "If the Secretary finds that a qualified disabled veteran of the Vietnam era is not available for any such appointment, preference for such appointment shall be given to other qualified disabled veterans." preceding "If the Secretary finds"


2002. Act Nov. 7, 2002 (effective and applicable as provided by § 4(b)(3) of such Act, which appears as a note to this section), substituted the text of this section for text which read:

"(a)(1) The amount of funds made available for use in a State under section 4102A(b)(5)(A)(i) of this title shall be sufficient to support the appointment of one disabled veterans' outreach program specialist for each 7,400 veterans who are between the ages of 20 and 64 residing in such State. Each such specialist shall be a qualified veteran. Preference shall be given in the appointment of such specialists to qualified disabled veterans. If the Secretary finds that no qualified disabled veteran is available for such appointment, such appointment may be given to any qualified veteran. Each such specialist shall be compensated at rates comparable to those paid other professionals performing essentially similar duties in the State government of the State concerned.

"(2) Specialists appointed pursuant to this subsection shall be in addition to and shall not supplant employees assigned to local employment service offices pursuant to section 4104 of this title.

"(b)(1) Pursuant to regulations prescribed by the Secretary of Labor, disabled veterans' outreach program specialists shall be assigned only those duties directly related to meeting the employment needs of eligible veterans, with priority for the provision of services in the following order:

"(A) Services to special disabled veterans.

"(B) Services to other disabled veterans.

"(C) Services to other eligible veterans in accordance with priorities determined by the Secretary taking into account applicable rates of unemployment and the employment emphases set forth in chapter 42 of this title.
In the provision of services in accordance with this paragraph, maximum emphasis in meeting the employment needs of veterans shall be placed on assisting economically or educationally disadvantaged veterans.

"(2) Not more than three-fourths of the disabled veterans' outreach program specialists in each State shall be stationed at local employment service offices in such State. The Secretary, after consulting the Secretary of Veterans Affairs and the Director for Veterans' Employment and Training assigned to a State under section 4103 of this title, may waive the limitation in the preceding sentence for that State so long as the percentage of all disabled veterans' outreach program specialists that are stationed at local employment service offices in all States does not exceed 80 percent. Specialists not so stationed shall be stationed at centers established by the Department of Veterans Affairs to provide a program of readjustment counseling pursuant to section 1712A of this title, veterans assistance offices established by the Department of Veterans Affairs pursuant to section 7723 of this title, and such other sites as may be determined to be appropriate in accordance with regulations prescribed by the Secretary after consultation with the Secretary of Veterans Affairs.

"(c) Each disabled veterans' outreach program specialist shall carry out the following functions for the purpose of providing services to eligible veterans in accordance with the priorities set forth in subsection (b) of this section:

"(1) Development of job and job training opportunities for such veterans through contacts with employers, especially small- and medium-size private sector employers.

"(2) Pursuant to regulations prescribed by the Secretary after consultation with the Secretary of Veterans Affairs, promotion and development of apprenticeship and other on-job training positions pursuant to section 3787 of this title.

"(3) The carrying out of outreach activities to locate such veterans through contacts with local veterans organizations, the Department of Veterans Affairs, the State employment service agency and local employment service offices, and community-based organizations.

"(4) Provision of appropriate assistance to community-based groups and organizations and appropriate grantees under other Federal and federally funded employment and training programs including title I of the Workforce Investment Act of 1998 in providing services to such veterans.

"(5) Provision of appropriate assistance to local employment service office employees with responsibility for veterans in carrying out their responsibilities pursuant to this chapter.

"(6) Consultation and coordination with other appropriate representatives of Federal, State, and local programs (including the program conducted under the Veterans' Job Training Act (Public Law 98-77; 29 U.S.C. 1721 note)) for the purpose of developing maximum linkages to promote employment opportunities for and provide maximum employment assistance to such veterans.

"(7) The carrying out of such other duties as will promote the development of entry-level and career job opportunities for such veterans.

"(8) Development of outreach programs in cooperation with appropriate Department of Veterans Affairs personnel engaged in providing counseling or rehabilitation services under chapter 31 of this title, with educational institutions, and with employers in order to ensure maximum assistance to disabled veterans who have completed or are participating in a vocational rehabilitation program under such chapter.
“(9) Provision of vocational guidance or vocational counseling services, or both, to veterans with respect to veterans' selection of and changes in vocations and veterans' vocational adjustment.


“(11) Coordination of employment services with training assistance provided to veterans by entities receiving funds under section 2021 of this title.”.

Other provisions:

Application of Nov. 11, 1998 amendments. Act Nov. 11, 1998, P. L. 105-368, Title X, § 1004(b), 112 Stat. 3364, provides: "The amendments made by this section [amending subsec. (a)(1) of this section] shall apply with respect to appointments of disabled veterans' outreach program specialists under section 4103A of title 38, United States Code, on or after the date of the enactment of this Act.”.

Effective date and applicability of Nov. 7, 2002 amendments. Act Nov. 7, 2002, P. L. 107-288, § 4(b)(3), 116 Stat. 2044, provides: "The amendments made by this subsection [amending 38 USCS §§ 4103A, 4104] shall take effect on the date of the enactment of this Act, and apply for program years under chapter 41 of title 38, United States Code [38 USCS §§ 4100 et seq.], beginning on or after such date.”.

Cross References

Employment programs for disabled veterans under Job Training Partnership Act 29 USCS § 1721

This section is referred to in 29 USCS § 1721; 38 USCS §§ 3117, 3672, 4102A, 4104A, 4106, 4107

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 103

If two qualified, disabled veterans apply for DVOP (disabled veteran outreach program) job, and one is Vietnam-era veteran, but other is not, 38 USCS § 4103A plainly affords Vietnam-era veteran priority in hiring. Appeal of New Hampshire Dep't of Empl. Sec. (1996) 140 NH 703, 672 A2d 697, 11 BNA IER Cas 1140

§ 4104. Local veterans' employment representatives

(a) Requirement for employment by States of a sufficient number of representatives. Subject to approval by the Secretary, a State shall employ such full- and part-time local veterans' employment representatives as the State determines appropriate and efficient to carry out employment, training, and placement services under this chapter [38 USCS §§ 4100 et seq.].

(b) Principal duties. As principal duties, local veterans' employment representatives shall--

(1) conduct outreach to employers in the area to assist veterans in gaining employment, including conducting seminars for employers and, in conjunction with employers, conducting job search workshops and establishing job search groups; and

(2) facilitate employment, training, and placement services furnished to veterans in a State under the applicable State employment service delivery systems.

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(c) Requirement for qualified veterans and eligible persons. A State shall, to the maximum extent practicable, employ qualified veterans or eligible persons to carry out the services referred to in subsection (a). Preference shall be accorded in the following order:
   (1) To qualified service-connected disabled veterans.
   (2) If no veteran described in paragraph (1) is available, to qualified eligible veterans.
   (3) If no veteran described in paragraph (1) or (2) is available, then to qualified eligible persons.

(d) Reporting. Each local veterans' employment representative shall be administratively responsible to the manager of the employment service delivery system and shall provide reports, not less frequently than quarterly, to the manager of such office and to the Director for Veterans' Employment and Training for the State regarding compliance with Federal law and regulations with respect to special services and priorities for eligible veterans and eligible persons.

Explanatory notes:


Amendments:

1966. Act March 3, 1966 (effective 3/3/66, as provided by § 12(a) of such Act), inserted "or of service after January 31, 1955"

1972. Act Oct. 24, 1972 (effective 90 days after 10/24/72, as provided by § 601(b) of such Act, which appears as 38 USCS § 4101 note), substituted this section for one which read:

"§ 2004. Cooperation of Federal agencies

"All Federal agencies shall furnish the Secretary such records, statistics, or information as may be deemed necessary or appropriate in administering the provisions of this chapter, and shall otherwise cooperate with the Secretary in providing continuous employment opportunities for veterans of any war, or of service after January 31, 1955."

1976. Act Oct. 15, 1976 (effective 12/1/76, as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), inserted "or eligible persons", and substituted "such representative's" for "his".

1988. Act May 20, 1988 (effective on enactment as provided by § 16(a) of such Act, and applicable as provided by § 16(b)(1) of such Act, which appears as 38 USCS § 3104 note) substituted this section for one which read:

"§ 2004. Employees of local offices

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"Except as may be determined by the Secretary of Labor based on a demonstrated lack of need for such services, there shall be assigned by the administrative head of the employment service in each State one or more employees, preferably eligible veterans or eligible persons, on the staffs of local employment services offices, whose services shall be fully devoted to discharging the duties prescribed for the veterans' employment representative and such representative's assistants."

1989. Act Dec. 18, 1989, in subsec. (b)(7), substituted "Department of Veterans Affairs" for "Veterans' Administration".

1991. Act March 22, 1991, in subsec. (a), in para. (1), in the introductory matter, substituted "appointment" for "assignment" in two places, in subpara. (C), substituted "appointment" for "assignment"; and, in para. (4), substituted "appointment" for "assigning"; and deleted subsec. (d), which read: "(d) Local veterans' employment representatives shall be assigned, in accordance with this section, by the administrative head of the employment service in each State after consultation with the Director for Veterans' Employment and Training.".

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 2004, as 38 USCS § 4104, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

2001. Act June 5, 2001, in subsec. (a), in para. (1), in the introductory matter, substituted "For any fiscal year," for "Beginning with fiscal year 1988,\n" in subpara. (B), substituted "subparagraph" for "clause", and, in subpara. (C), substituted "subparagraphs" for "clauses", and, in para. (4), deleted "on or after July 1988" following "representatives"; and, in subsec. (b), in the introductory matter, substituted "shall perform the following functions:" for "shall--", in paras. (1)-(10), capitalized the initial letter of the first word and substituted the concluding period for a semicolon, in para. (11), capitalized the initial letter of the first word and substituted the concluding period for ";", and in para. (12), capitalized the initial letter of the first word.

Act Dec. 21, 2001, purported to amend subsec. (b) by deleting "and" at the end of para. (11); however, because of prior amendments, this amendment could not be executed.

Such Act further, in para. (12), substituted "; and" for a concluding period, and added para. (13).

2002. Act Nov. 7, 2002 (effective and applicable as provided by § 4(b)(3) of such Act, which appears as 38 USCS § 4103A note), substituted the text of this section for text which read:

"(a)(1) For any fiscal year, the total of the amount of funds made available for use in the States under section 4102A(b)(5)(A)(ii) of this title shall be sufficient to support the appointment of 1,600 full-time local veterans' employment representatives and the States' administrative expenses associated with the appointment of that number of such representatives and shall be allocated to the several States so that each State receives funding sufficient to support--

"(A) the number of such representatives who were assigned in such State on January 1, 1987, for which funds were provided under this chapter, plus one additional such representative;

"(B) the percentage of the 1,600 such representatives for which funding is not provided under subparagraph (A) of this paragraph which is equal to the average of (i) the percentage of all veterans residing in the United States who reside in such State, (ii) the percentage of the total of all eligible veterans and eligible persons registered for assistance with local employment service offices in the United States who are registered for assistance with local employment service offices in such State, and (iii) the percentage of all full-service local employment service offices in the United States which are located in such State; and
"(C) the State's administrative expenses associated with the appointment of the number of such representatives for which funding is allocated to the State under subparagraphs (A) and (B) of this paragraph.

"(2)(A) The local veterans' employment representatives allocated to a State pursuant to paragraph (1) of this subsection shall be assigned by the administrative head of the employment service in the State, after consultation with the Director for Veterans' Employment and Training for the State, so that as nearly as practical (i) one full-time representative is assigned to each local employment service office at which at least 1,100 eligible veterans and eligible persons are registered for assistance, (ii) one additional full-time representative is assigned to each local employment service office for each 1,500 eligible veterans and eligible persons above 1,100 who are registered at such office for assistance, and (iii) one half-time representative is assigned to each local employment service office at which at least 350 but less than 1,100 eligible veterans and eligible persons are registered for assistance.

"(B) In the case of a service delivery point (other than a local employment service office described in subparagraph (A) of this paragraph) at which employment services are offered under the Wagner-Peyser Act, the head of such service delivery point shall be responsible for ensuring compliance with the provisions of this title providing for priority services for veterans and priority referral of veterans to Federal contractors.

"(3) For the purposes of this subsection, an individual shall be considered to be registered for assistance with a local employment service office during a program year if the individual--

"(A) registered, or renewed such individual's registration, for assistance with the office during that program year; or

"(B) so registered or renewed such individual's registration during a previous program year and, in accordance with regulations which the Secretary shall prescribe, is counted as still being registered for administrative purposes.

"(4) In the appointment of local veterans' employment representatives, preference shall be given to qualified eligible veterans or eligible persons. Preference shall be accorded first to qualified service-connected disabled veterans; then, if no such disabled veteran is available, to qualified eligible veterans; and, if no such eligible veteran is available, then to qualified eligible persons.

"(b) Local veterans' employment representatives shall perform the following functions:

"(1) Functionally supervise the providing of services to eligible veterans and eligible persons by the local employment service staff.

"(2) Maintain regular contact with community leaders, employers, labor unions, training programs, and veterans' organizations for the purpose of (A) keeping them advised of eligible veterans and eligible persons available for employment and training, and (B) keeping eligible veterans and eligible persons advised of opportunities for employment and training.

"(3) Provide directly, or facilitate the provision of, labor exchange services by local employment service staff to eligible veterans and eligible persons, including intake and assessment, counseling, testing, job-search assistance, and referral and placement.

"(4) Encourage employers and labor unions to employ eligible veterans and eligible persons and conduct on-the-job training and apprenticeship programs for such veterans and persons.
“(5) Promote and monitor the participation of veterans in federally funded employment and training programs, monitor the listing of vacant positions with State employment agencies by Federal agencies, and report to the Director for Veterans’ Employment and Training for the State concerned any evidence of failure to provide priority or other special consideration in the provision of services to veterans as is required by law or regulation.

“(6) Monitor the listing of jobs and subsequent referrals of qualified veterans as required by section 4212 of this title.

“(7) Work closely with appropriate Department of Veterans Affairs personnel engaged in providing counseling or rehabilitation services under chapter 31 of this title, and cooperate with employers in identifying disabled veterans who have completed or are participating in a vocational rehabilitation training program under such chapter and who are in need of employment.

“(8) Refer eligible veterans and eligible persons to training, supportive services, and educational opportunities, as appropriate.

“(9) Assist, through automated data processing, in securing and maintaining current information regarding available employment and training opportunities.

“(10) Cooperate with the staff of programs operated under section 1712A of this title in identifying and assisting veterans who have readjustment problems and who may need services available at the local employment service office.

“(11) When requested by a Federal or State agency, a private employer, or a service-connected disabled veteran, assist such agency, employer, or veteran in identifying and acquiring prosthetic and sensory aids and devices needed to enhance the employability of disabled veterans.

“(12) Facilitate the provision of guidance or counseling services, or both, to veterans who, pursuant to section 5(b)(3) of the Veterans’ Job Training Act (29 U.S.C. 1721 note), are certified as eligible for participation under such Act; and

“(13) coordinate employment services with training assistance provided to veterans by entities receiving funds under section 2021 of this title.

“(c) Each local veterans’ employment representative shall be administratively responsible to the manager of the local employment service office and shall provide reports, not less frequently than quarterly, to the manager of such office and to the Director for Veterans’ Employment and Training for the State regarding compliance with Federal law and regulations with respect to special services and priorities for eligible veterans and eligible persons.”.

Other provisions:


“(a) Authority to conduct pilot program. In order to assess the effects on the timeliness and quality of services to veterans resulting from re-focusing the staff resources of local veterans’ employment representatives, the Secretary of Labor may conduct a pilot program under which the primary responsibilities of local veterans’ employment representatives will be case management and the provision and facilitation of direct employment and training services to veterans.

“(b) Authorities under Chapter 41. To implement the pilot program, the Secretary of Labor may suspend or limit application of those provisions of chapter 41 of title 38, United States
Code [38 USCS §§ 4101 et seq.] (other than subsections (b)(1) and (c) of section 4104) that pertain to the Local Veterans' Employment Representative Program in States designated by the Secretary under subsection (d), except that the Secretary may use the authority of such chapter, as the Secretary may determine, in conjunction with the authority of this section, to carry out the pilot program. The Secretary may collect such data as the Secretary considers necessary for assessment of the pilot program. The Secretary shall measure and evaluate on a continuing basis the effectiveness of the pilot program in achieving its stated goals in general, and in achieving such goals in relation to their cost, their effect on related programs, and their structure and mechanisms for delivery of services.

"(c) Targeted veterans. Within the pilot program, eligible veterans who are among groups most in need of intensive services, including disabled veterans, economically disadvantaged veterans, and veterans separated within the previous four years from active military, naval, or air service shall be given priority for service by local veterans' employment representatives. Priority for the provision of service shall be given first to disabled veterans and then to the other categories of veterans most in need of intensive services in accordance with priorities determined by the Secretary of Labor in consultation with appropriate State labor authorities.

"(d) States designated. The pilot program shall be limited to not more than five States to be designated by the Secretary of Labor.

"(e) Reports to Congress.(1) Not later than one year after the date of the enactment of this Act, the Secretary of Labor shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives an interim report describing in detail the development and implementation of the pilot program on a State by State basis.

"(2) Not later than 120 days after the expiration of this section under subsection (h), the Secretary of Labor shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a final report evaluating the results of the pilot program and make recommendations based on the evaluation, which may include legislative recommendations.

"(f) Definitions. For the purposes of this section:

"(1) The term 'veteran' has the meaning given such term by section 101(2) of title 38, United States Code.

"(2) The term 'disabled veteran' has the meaning given such term by section 4211(3) of such title.

"(3) The term 'active military, naval, or air service' has the meaning given such term by section 101(24) of such title.

"(g) Allocation of funds. Any amount otherwise available for fiscal year 1997, 1998, or 1999 to carry out section 4102A(b)(5) of title 38, United States Code, with respect to a State designated by the Secretary of Labor pursuant to subsection (d) shall be available to carry out the pilot program during that fiscal year with respect to that State.

"(h) Expiration date. The authority to carry out the pilot program under this section shall expire on October 1, 1999.".

Cross References
This section is referred to in 5 USCS § 5948; 38 USCS §§ 4102A, 4103A, 4104A, 4106, 4107

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 104
[§ 4104A. Repealed]


Other provisions:

Performance standards. Act May 20, 1988, P. L. 100-323, § 4(a)(2), 102 Stat. 563, effective on the 60th day after enactment, as provided by § 16(b)(2) of such Act, which appears as 38 USCS § 3104 note, provides: "Each State employment agency (A) shall develop and promulgate standards under section 2004A [now § 4104A] of title 38, United States Code, as added by paragraph (1) of this subsection, as soon as feasible, and in doing so (B) shall submit proposed standards to the Director for Veterans' Employment and Training for the State not later than 12 months after the date on which the Secretary provides the agency with prototype standards under subsection (a)(3)(A) of such section, and (C) shall adopt final standards not later than 90 days after submitting the proposed standards to the Director for Veterans' Employment and Training for comment under subsection (a)(3)(B)(ii) of such section."

§ 4105. Cooperation of Federal agencies

(a) All Federal agencies shall furnish the Secretary such records, statistics, or information as the Secretary may deem necessary or appropriate in administering the provisions of this chapter [38 USCS §§ 4100 et seq.], and shall otherwise cooperate with the Secretary in providing continuous employment and training opportunities for eligible veterans and eligible persons.

(b) For the purpose of assisting the Secretary and the Secretary of Veterans Affairs in identifying employers with potential job training opportunities under the Veterans' Job Training Act (Public Law 98-77; 29 U.S.C. 1721 note) and otherwise in order to carry out this chapter [38 USCS §§ 4100 et seq.], the Secretary of Defense shall, on the 15th day of each month, provide the Secretary and the Secretary of Veterans Affairs with updated information regarding any list maintained by the Secretary of Defense of employers participating in the National Committee for Employer Support of the Guard and Reserve.

Explanatory notes:


Provisions similar to those contained in this section were contained in former 38 USCS § 2004 prior to the general amendment of this chapter by Act Oct. 24, 1972, P. L. 92-540, Title V, § 502, 86 Stat. 1094.

Amendments:

1962. Act Sept. 19, 1962, redesignated this section, which formerly appeared as § 2014 in Subchapter II of Chapter 41, as § 2005 and substituted "chapter" for "subchapter".

1972. Act Oct. 24, 1972 (effective 90 days after 10/24/72, as provided by § 601(b) of such Act, which appears as 38 USCS § 4101 note), substituted new catchline and section for ones which read:

"§ 2005. Estimate of funds for administration

The Secretary shall estimate the funds necessary for the proper and efficient administration of this chapter; such estimated sums shall include the annual amounts necessary for salaries, rents, printing and binding, travel and communications. Sums thus estimated shall be included as a special item in the annual budget of the Bureau of Employment Security. Any funds appropriated pursuant to this special item as contained in the budget of the Bureau of Employment Security shall not be available for any purpose other than that for which they were appropriated, except with the approval of the Secretary."

1974. Act Dec. 3, 1974 (as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), inserted "and eligible persons".

1976. Act Oct. 15, 1976 (as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), substituted "the Secretary" for "he" preceding "may deem".

1988. Act May 20, 1988 (effective on enactment as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note) substituted "Secretary" for "Secretary of Labor" preceding "such records". Such Act further (effective on the 60th day after enactment, as provided by § 16(b)(2) of such Act, which appears as 38 USCS § 3104 note) designated the existing provisions as subsec. (a); and added subsec. (b).


2006. Act June 15, 2006, in subsec. (b), substituted "shall, on the 15th day of each month, provide the Secretary and the Secretary of Veterans Affairs with updated information regarding" for "shall provide, not more than 30 days after the date of the enactment of this subsection, the Secretary and the Secretary of Veterans Affairs with", and deleted "and shall provide, on the 15th day of each month thereafter, updated information regarding the list" following "Reserve".

Research Guide

Am Jur:

37 Am Jur 2d, Fraud and Deceit § 11
77 Am Jur 2d, Veterans and Veterans' Laws § 99

§ 4106. Estimate of funds for administration; authorization of appropriations

(a) The Secretary shall estimate the funds necessary for the proper and efficient administration of this chapter [38 USCS §§ 4100 et seq.] and chapters 42 and 43 of this title [38 USCS §§ 4211 et seq. and [4321] 2021 et seq.]. Such estimated sums shall include the annual amounts necessary for salaries, rents, printing and binding, travel, and communications. Sums thus estimated shall be included as a special item in the annual
budget for the Department of Labor. Estimated funds necessary for proper intensive services, placement, and training services to eligible veterans and eligible persons provided by the various State public employment service agencies shall each be separately identified in the budgets of those agencies as approved by the Department of Labor. Funds estimated pursuant to the first sentence of this subsection shall include amounts necessary in all of the States for the purposes specified in paragraph (5) of section 4102A(b) of this title [38 USCS § 4102A(b)] and to fund the National Veterans' Employment and Training Services Institute under section 4109 of this title [38 USCS § 4109] and shall be approved by the Secretary only if the level of funding proposed is in compliance with such sections. Each budget submission with respect to such funds shall include a separate listing of the amount for the National Veterans' Employment and Training Services Institute together with information demonstrating the compliance of such budget submission with the funding requirements specified in the preceding sentence.

(b) There are authorized to be appropriated such sums as may be necessary for the proper and efficient administration of this chapter [38 USCS §§ 4100 et seq.].

(c) In the event that the regular appropriations Act making appropriations for administrative expenses for the Department of Labor with respect to any fiscal year does not specify an amount for the purposes specified in subsection (b) of this section for that fiscal year, then of the amounts appropriated in such Act there shall be available only for the purposes specified in subsection (b) of this section such amount as was set forth in the budget estimate submitted pursuant to subsection (a) of this section.

(d) Any funds made available pursuant to subsections (b) and (c) of this section shall not be available for any purpose other than those specified in such subsections.

Explanatory notes:

Provisions similar to those contained in this section were contained in former 38 USCS § 2005 prior to the general amendment of this chapter by Act Oct. 24, 1972, P. L. 92-540, Title V, § 502, 86 Stat. 1094.


Effective date of section:
Act Oct. 24, 1972, P. L. 92-540, Title VI, § 601(b), 86 Stat. 1099, provided that this section is effective 90 days after Oct. 24, 1972.

Amendments:
1974. Act Dec. 3, 1974 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), in subsec. (a), substituted "eligible veterans and eligible persons" for "veterans".

1976. Act Oct. 15, 1976 (effective 12/1/76, as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), inserted "each".

1982. Act Oct. 14, 1982, in subsec. (a), inserted "and chapters 42 and 43 of this title" and added the sentences beginning "Funds estimated . . .", "Each budget submission . . ." and "The Secretary shall carry . . .", and, in subsec. (d), inserted ", upon the recommendation of the Assistant Secretary of Labor for Veterans' Employment,"

1988. Act May 20, 1988 (effective on enactment as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note), in subsec. (a), substituted "in all of the States for the purposes specified in paragraph (5) of section 2002A(b) of this title and to fund the National Veterans' Employment and Training Services Institute under section 2009" for "to fund the disabled veterans' outreach program under section 2003A", substituted "such sections" for "such section", and substituted the sentence beginning "Each budget submission . . ." for "Each budget submission with respect to such funds shall include a separate listing of the proposed number, by State, for disabled veterans outreach program specialists appointed under such section. The Secretary shall carry out this subsection through the Assistant Secretary for Veterans' Employment", and, in subsec. (d), deleted ", except with the approval of the Secretary of Labor, upon the recommendation of the Assistant Secretary of Labor for Veterans' Employment, based on a demonstrated lack of need for such funds for such purposes." following "subsections".

Such Act further (effective on enactment as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note) in subsec. (a), substituted "Secretary" for "Secretary of Labor" in two places.

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 2006, as 38 USCS § 4106, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

2002. Act Nov. 7, 2002 (effective on enactment and applicable to budget submissions beginning with fiscal year 2004, as provided by § 4(d)(2) of such Act, which appears as a note to this section), in subsec. (a), substituted the sentence beginning "Each budget submission . . ." for "Each budget submission with respect to such funds shall include separate listings of the amount for the National Veterans' Employment and Training Services Institute and of the proposed numbers, by State, of disabled veterans' outreach program specialists appointed under section 4103A of this title and local veterans' employment representatives assigned under section 4104 of this title, together with information demonstrating the compliance of such budget submission with the funding requirements specified in the preceding sentence.".

Such Act further (effective on enactment, as provided by § 5(a)(2) of such Act, which appears as 38 USCS § 4101 note), in subsec. (a), substituted "proper intensive services" for "proper counseling".

Other provisions:

Effective date and applicability of amendment made by § 4(d)(1) of Act Nov. 7, 2002. Act Nov. 7, 2002, P. L. 107-288, § 4(d)(2), 116 Stat. 2044, provides: "The amendment made by paragraph (1) [amending subsec. (a) of this section] shall take effect on the date of the enactment of this Act, and apply to budget submissions for fiscal year 2004 and each subsequent fiscal year.".

Cross References

This section is referred to in 38 USCS § 4107
§ 4107. Administrative controls; annual report

(a) The Secretary shall establish administrative controls for the following purposes:

(1) To insure that each eligible veteran, especially veterans of the Vietnam era and disabled veterans and each eligible person, who requests assistance under this chapter [38 USCS §§ 4100 et seq.] shall promptly be placed in a satisfactory job or job training opportunity or receive some other specific form of assistance designed to enhance such veterans' and eligible person's employment prospects substantially, such as individual job development or intensive services.

(2) To determine whether or not the employment agencies in each State have committed the necessary staff to insure that the provisions of this chapter [38 USCS §§ 4100 et seq.], are carried out; and to arrange for necessary corrective action where staff resources have been determined by the Secretary to be inadequate.

(b) The Secretary shall apply performance standards established under section 4102A(f) of this title [38 USCS § 4102A(f)] for determining compliance by the State public employment service agencies with the provisions of this chapter [38 USCS §§ 4100 et seq.] and chapter 42 of this title [38 USCS §§ 4211 et seq.]. Not later than February 1 of each year, the Secretary shall report to the Committees on Veterans' Affairs of the Senate and the House of Representatives on the performance of States and organizations and entities carrying out employment, training, and placement services under this chapter [38 USCS §§ 4100 et seq.], as measured under subsection (b)(7) of section 4102A of this title [38 USCS § 4102A]. In the case of a State that the Secretary determines has not met the minimum standard of performance (established by the Secretary under subsection (f) of such section), the Secretary shall include an analysis of the extent and reasons for the State's failure to meet that minimum standard, together with the State's plan for corrective action during the succeeding year.

(c) Not later than February 1 of each year, the Secretary shall report to the Committees on Veterans' Affairs of the Senate and the House of Representatives on the success during the preceding program year of the Department of Labor and its affiliated State employment service agencies in carrying out the provisions of this chapter and programs for the provision of employment and training services to meet the needs of eligible veterans and eligible persons. The report shall include--

(1) specification, by State and by age group, of the numbers of eligible veterans, disabled veterans, special disabled veterans, eligible persons, recently separated veterans (as defined in section 4211(6) of this title [38 USCS § 4211(6)]), and servicemembers transitioning to civilian careers who registered for assistance with, or who are identified as veterans by, the public employment service system and, for each of such categories, the numbers referred to and placed in permanent and other jobs, the numbers referred to and placed in jobs and job training programs supported by the
Federal Government, the number who received intensive services, and the number who received some, and the number who received no, reportable service; (2) a comparison of the rate of entered employment (as determined in a manner consistent with State performance measures applicable under section 136(b) of the Workforce Investment Act of 1998 [29 USCS § 2871(b)]) for each of the categories of veterans and persons described in clause (1) of this subsection with such rate of entered employment (as so determined) for nonveterans of the same age groups registered for assistance with the public employment system in each State; (3) any determination made by the Secretary during the preceding fiscal year under section 4106 of this title [38 USCS § 4106] or subsection (a)(2) of this section and a statement of the reasons for such determination; (4) a report on activities carried out during the preceding program year under section 4212(d) of this title [38 USCS § 4212(d)]; (5) a report on the operation during the preceding program year of programs for the provision of employment and training services designed to meet the needs of eligible veterans and eligible persons, including an evaluation of the effectiveness of such programs during such program year in meeting the requirements of section 4102A(b) of this title [38 USCS § 4102A(b)], the efficiency with which services were provided through such programs during such year, and such recommendations for further legislative action relating to veterans' employment and training as the Secretary considers appropriate; and (6) a report on the operation during the preceding program year of the program of performance incentive awards for quality employment services under section 4112 of this title [38 USCS § 4112].

Explanatory notes:


558. It contained definitions of Korean conflict veterans, unemployment compensation, and State.

Effective date of section:
Act Oct. 24, 1972, P. L. 92-540, Title VI, § 601(b), 86 Stat. 1099, provided that this section is effective 90 days after Oct. 24, 1972.

Amendments:

1974. Act Dec. 3, 1974 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), in subsec. (a)(1), inserted "and each eligible person"; redesignated subsec. (b) as subsec. (c); added new subsec. (b); and in subsec. (c), as so redesignated, substituted "other eligible veterans, and eligible persons" for "and other eligible veterans".

1976. Act Oct. 15, 1976 (effective 12/1/76, as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a)(1), substituted "such veteran's and eligible person's" for "his"; and in subsec. (c), inserted "and public service employment" and substituted ", 2006, or 2007(a)” for “or 2006”.

1977. Act Nov. 23, 1977 (effective 11/23/77, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), in subsec. (c), purported to substitute “2004” for “2001”; however, such amendment could not be executed as “2001” did not appear in the text of subsec. (c).

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(e) of such Act, which appears as 38 USCS § 4101 note), in subsec. (a)(1), substituted "veterans of the Vietnam era and disabled veterans" for "those veterans who have been recently discharged or released from active duty"; and in subsec. (c), substituted "The report shall include, by State, specification of the numbers of eligible veterans, veterans of the Vietnam era, disabled veterans, special disabled veterans, and eligible persons who registered for assistance with the public employment service system and, of each of such categories, the number referred to jobs, the number placed in permanent jobs as defined by the Secretary, the number referred to and the number placed in employment and job training programs supported by the Federal Government, the number counseled, and the number who received some reportable service." for "The report shall include, by State, the number of recently discharged or released eligible veterans, veterans with service-connected disabilities, other eligible veterans, and eligible persons who requested assistance through the public employment service and, of these, the number placed in suitable employment or job training opportunities or who were otherwise assisted, with separate reference to occupational training and public service employment under appropriate Federal law.".


1988. Act May 20, 1988 (effective on enactment as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note) in subsec. (a), in the introductory matter and in para. (2), and in subsec. (b), substituted "Secretary" for "Secretary of Labor" wherever appearing; and substituted subsec. (c) for one which read: "The Secretary of Labor shall report annually to the Congress on the success of the Department of Labor and its affiliated State employment service agencies in carrying out the provisions of this chapter. The report shall include, by State, specification of the numbers of eligible veterans, veterans of the Vietnam era, disabled veterans, special disabled veterans, and eligible persons who registered for assistance with the public employment service system and, of each of such categories, the number referred to jobs, the number placed in permanent jobs as defined by the Secretary, the number referred to and the number placed in employment and job training programs supported by the Federal Government, the number counseled, and the number who received some reportable service.".

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1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 2007, as 38 USCS § 4107, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

2002. Act Nov. 7, 2002 (effective on enactment and applicable as provided by § 4(a)(4) of such Act, which appears as 38 USCS § 4102A note), in subsec. (b), substituted "The Secretary shall apply performance standards established under section 4102A(f) of this title" for "The Secretary shall establish definitive performance standards".

Such Act further, in subsec. (c)(5), deleted "(including the need for any changes in the formulas governing the appointment of disabled veterans' outreach program specialists under section 4103A(a)(2) of this title and the assignment of local veterans' employment representatives under section 4104(b) of this title and the allocation of funds for the support of such specialists and representatives)" following "legislative action".

Such Act further (effective on enactment, as provided by § 5(a)(2) of such Act, which appears as 38 USCS § 4101 note), in subsec. (a)(1), substituted "intensive services" for "employment counseling services"; and, in subsec. (c)(1), substituted "the number who received intensive services" for "the number counseled".

Such Act further (applicable to program years beginning on or after 7/1/2003, as provided by § 5(d)(2) of such Act, which appears as a note to this section), in subsec. (b), substituted the sentences beginning "Not later than February 1 . . ." and "In the case of a State . . ." for "A full report as to the extent and reasons for any noncompliance by any such State agency during any fiscal year, together with the agency's plan for corrective action during the succeeding year, shall be included in the annual report of the Secretary required by subsection (c) of this section."; and, in subsec. (c), in para. (1), deleted "veterans of the Vietnam era" following "eligible veterans," and substituted "eligible persons, recently separated veterans (as defined in section 4211(6) of this title), and servicemembers transitioning to civilian careers who registered for assistance with, or who are identified as veterans by," for "eligible persons who registered for assistance with", in para. (2), substituted "the rate of entered employment (as determined in a manner consistent with State performance measures applicable under section 136(b) of the Workforce Investment Act of 1998)" for "the job placement rate" and substituted "such rate of entered employment (as so determined)" for "the job placement rate", in para. (4), substituted "section 4212(d)" for "sections 4103A and 4104", and deleted "and" following the concluding semicolon, in para. (5), substituted "; and" for a concluding period, and added para. (6).

Other provisions:

Requirement for Bureau of Labor Statistics to publish certain unemployment information annually. Act Oct. 17, 1980, P. L. 96-466, Title V, § 513, 94 Stat. 2207 (effective 10/1/80, as provided by § 802(e) of such Act), provided:

"(a) When the Commissioner of the Bureau of Labor Statistics publishes annual labor-market statistics relating specifically to veterans who served in the Armed Forces during the Vietnam era, the Commissioner shall also publish separate labor-market statistics on the same subject matter which apply only to veterans who served in the Vietnam theatre of operations. When the Commissioner of the Bureau of Labor Statistics publishes labor-market statistics which relate specifically to veterans who served in the Armed Forces during the Vietnam era in addition to those statistics published on an annual basis to which the preceding sentence applies, the Commissioner shall also, if feasible, publish separate labor-market statistics on the same subject matter which apply only to veterans who served in the Vietnam theatre of operations.

"(b) For the purposes of this section, veterans who during the Vietnam era served in Vietnam, in air missions over Vietnam, or in naval missions in the waters adjacent to Vietnam shall be considered to be veterans who served in the Vietnam theatre of operations.".
Application of amendments made by § 5(d)(1) of Act Nov. 7, 2002. Act Nov. 7, 2002, P. L. 107-288, § 5(d)(2), 116 Stat. 2046, provides: "The amendments made by paragraph (1) [amending subsecs. (b) and (c) of this section] shall apply to reports for program years beginning on or after July 1, 2003."

Cross References
This section is referred to in 38 USCS §§ 4103, 4212

Research Guide
Am Jur:
45A Am Jur 2d, Job Discrimination §§ 21-26, 40-104
45B Am Jur 2d, Job Discrimination § 760
77 Am Jur 2d, Veterans and Veterans' Laws § 99

§ 4108. Cooperation and coordination

(a) In carrying out the Secretary's responsibilities under this chapter [38 USCS §§ 4100 et seq.], the Secretary shall from time to time consult with the Secretary of Veterans Affairs and keep the Secretary of Veterans Affairs fully advised of activities carried out and all data gathered pursuant to this chapter to insure maximum cooperation and coordination between the Department of Labor and the Department of Veterans Affairs.

(b) The Secretary of Veterans Affairs shall provide to appropriate employment service offices and Department of Labor offices, as designated by the Secretary, on a monthly or more frequent basis, the name and address of each employer located in the areas served by such offices that offer a program of job training which has been approved by the Secretary of Veterans Affairs under section 7 of the Veterans' Job Training Act (29 U.S.C. 1721 note).

Explanatory notes:


Effective date of section:
Act Oct. 24, 1972, P. L. 92-540, Title VI, § 601(b), 86 Stat. 1099, provided that this section is effective 90 days after Oct. 24, 1972.

Amendments:
§ 4109. National Veterans' Employment and Training Services Institute

(a) In order to provide for such training as the Secretary considers necessary and appropriate for the efficient and effective provision of employment, job-training, intensive services, placement, job-search, and related services to veterans, the Secretary shall establish and make available such funds as may be necessary to operate a National Veterans' Employment and Training Services Institute for the training of disabled veterans' outreach program specialists, local veterans' employment representatives, Directors for Veterans' Employment and Training, and Assistant Directors for Veterans' Employment and Training, Regional Administrators for Veterans' Employment and Training, and such other personnel involved in the provision of employment, job-training, intensive services, placement, or related services to veterans as the Secretary considers appropriate, including travel expenses and per diem for attendance at the Institute.

(b) In implementing this section, the Secretary shall, as the Secretary considers appropriate, provide, out of program funds designated for the Institute, training for Veterans' Employment and Training Service personnel, including travel expenses and per diem to attend the Institute.

(c) (1) Nothing in this section shall be construed as preventing the Institute to enter into contracts or agreements with departments or agencies of the United States or of a State, or with other organizations, to carry out training of personnel of such departments, agencies, or organizations in the provision of services referred to in subsection (a).

(2) All proceeds collected by the Institute under a contract or agreement referred to in paragraph (1) shall be applied to the applicable appropriation.

Explanatory notes:


Amendments:

1988. Act May 20, 1988 (effective on the 60th day after enactment, as provided by § 16(b)(2) of such Act, which appears as 38 USCS § 3104 note) substituted this section for one which read:

"§ 2009. National veterans' employment and training programs

"(a) The Secretary of Labor shall--

"(1) administer through the Assistant Secretary of Labor for Veterans' Employment all national programs under the jurisdiction of the Secretary for the provision of employment and training services designed to meet the needs of disabled veterans and veterans of the Vietnam era;

"(2) in order to make maximum use of available resources, encourage all such national programs and all grantees under such programs to enter into cooperative arrangements with private industry and business concerns (including small business concerns), educational institutions, trade associations, and labor unions;

"(3) ensure that maximum effectiveness and efficiency are achieved in providing services and assistance to such veterans under all such national programs by coordinating and consulting with the Administrator with respect to programs conducted under other provisions of this title, with particular emphasis on coordination of such national programs with readjustment counseling activities carried out under section 612A of this title, apprenticeship or other on-job training programs carried out under section 1787 of this title, and rehabilitation and training activities carried out under chapter 31 of this title, and

"(4) ensure that job placement activities are carried out in coordination and cooperation with appropriate State public employment service officials.

"(b) Not later than February 1 of each year, the Secretary of Labor shall submit to the Committees on Veterans' Affairs of the House of Representatives and the Senate a report on the operation during the preceding fiscal year of national programs for the provisions of employment and training services designed to meet the needs of veterans described in subsection (a) of this section. Each such report shall include an evaluation of the effectiveness of such programs during such fiscal year in meeting the goals established in such subsection, the efficiency with which services were provided under such programs during such year, and such recommendation for further legislative action relating to veterans' employment as the Secretary considers appropriate.".


2002. Act Nov. 7, 2002 (effective on enactment, as provided by § 5(a)(2) of such Act, which appears as 38 USCS § 4101 note), in subsec. (a), substituted "intensive services," for "counseling," in two places.

Such Act further added subsec. (c).

Cross References
§ 4110. Advisory Committee on Veterans Employment, Training, and Employer Outreach

(a) (1) There is hereby established within the Department of Labor an advisory committee to be known as the Advisory Committee on Veterans Employment, Training, and Employer Outreach.

(2) The advisory committee shall--
   (A) assess the employment and training needs of veterans and their integration into the workforce;
   (B) determine the extent to which the programs and activities of the Department of Labor are meeting such needs;
   (C) assist the Assistant Secretary of Labor for Veterans' Employment and Training in carrying out outreach activities to employers with respect to the training and skills of veterans and the advantages afforded employers by hiring veterans;
   (D) make recommendations to the Secretary, through the Assistant Secretary of Labor for Veterans' Employment and Training, with respect to outreach activities and the employment and training of veterans; and
   (E) carry out such other activities that are necessary to make the reports and recommendations referred to in subsection (f) of this section.

(b) The Secretary of Labor shall, on a regular basis, consult with and seek the advice of the advisory committee with respect to the matters referred to in subsection (a)(2) of this section.

(c) (1) The Secretary of Labor shall appoint at least 12, but no more than 15, individuals to serve as members of the advisory committee as follows:
   (A) Six individuals, one each from among representatives nominated by each of the following organizations:
      (ii) The Business Roundtable.
      (iii) The National Association of State Workforce Agencies.
      (iv) The United States Chamber of Commerce.
      (vi) A nationally recognized labor union or organization.
   (B) Not more than five individuals from among representatives nominated by veterans service organizations that have a national employment program.
   (C) Not more than five individuals who are recognized authorities in the fields of business, employment, training, rehabilitation, or labor and who are not employees of the Department of Labor.

(2) A vacancy in the advisory committee shall be filled in the manner in which the original appointment was made.
(d) The following, or their representatives, shall be ex officio, nonvoting members of the advisory committee:

(1) The Secretary of Veterans Affairs.
(2) The Secretary of Defense.
(3) The Director of the Office of Personnel Management.
(4) The Assistant Secretary of Labor for Veterans Employment and Training.
(5) The Assistant Secretary of Labor for Employment and Training.
(6) The Administrator of the Small Business Administration.
(7) [Redesignated]
(8) [Deleted]
(9) [Redesignated]
(10)-(12) [Deleted]

(e) (1) The advisory committee shall meet at least quarterly.
(2) The Secretary of Labor shall appoint the chairman of the advisory committee who shall serve in that position for no more than 2 consecutive years.
(3) (A) Members of the advisory committee shall serve without compensation.
   (B) Members of the advisory committee shall be allowed reasonable and necessary travel expenses, including per diem in lieu of subsistence, at rates authorized for persons serving intermittently in the Government service in accordance with the provisions of subchapter I of chapter 57 of title 5 [5 USCS §§ 5701 et seq.] while away from their homes or regular places of business in the performance of the responsibilities of the advisory committee.
(4) The Secretary of Labor shall provide staff and administrative support to the advisory committee through the Veterans Employment and Training Service.

(f) (1) Not later than December 31 of each year, the advisory committee shall submit to the Secretary and to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the employment and training needs of veterans, with special emphasis on disabled veterans, for the previous fiscal year. Each such report shall contain--
   (A) an assessment of the employment and training needs of veterans and their integration into the workforce;
   (B) an assessment of the outreach activities carried out by the Secretary of Labor to employers with respect to the training and skills of veterans and the advantages afforded employers by hiring veterans;
   (C) an evaluation of the extent to which the programs and activities of the Department of Labor are meeting such needs;
   (D) a description of the activities of the advisory committee during that fiscal year;
   (E) a description of activities that the advisory committee proposes to undertake in the succeeding fiscal year; and
   (F) any recommendations for legislation, administrative action, and other action that the advisory committee considers appropriate.
(2) In addition to the annual reports made under paragraph (1), the advisory committee may make recommendations to the Secretary of Labor with respect to the
employment and training needs of veterans at such times and in such manner as the advisory committee determines appropriate.

(g) Within 60 days after receiving each annual report referred to in subsection (f)(1), the Secretary of Labor shall transmit to Congress a copy of the report together with any comments concerning the report that the Secretary considers appropriate.

(h) The advisory committee shall continue until terminated by law.

Explanatory notes:


A prior section 2010 contained in Subchapter II of former Chapter 41 was transferred to 38 USCS § 2001 by Act Sept. 19, 1962, P. L. 87-675, § 1(a), 76 Stat. 558.

Amendments:

1988. Act May 20, 1988 (effective on enactment as provided by § 16(a) of such Act, which appears as 38 USCS § 3104 note), in subsec. (b), in the introductory matter, substituted "Notwithstanding section 2002A(b) of this title, the" for "The" and "Secretary" for "Secretary of Labor" and inserted "and Training".

Such Act further (effective on the 60th day after enactment, as provided by § 16(b)(2) of such Act, which appears as 38 USCS § 3104 note), in subsec. (b)(1), redesignated subparas. (D), (E), and (F) as subparas. (E), (F), and (G), respectively, added a new subpara. (D), in subparas. (F) and (G) as redesignated, deleted "and" following the concluding semicolon, and added subparas. (H) and (I).


1991. Act March 22, 1991 substituted this heading and section for ones which read:

"§ 2010. Secretary of Labor's Committee on Veterans' Employment

"(a) There is established within the Department of Labor an advisory committee to be known as the 'Secretary's Committee on Veterans' Employment'. The committee shall meet at least quarterly for the purpose of bringing to the attention of the Secretary problems and issues relating to veterans' employment.

"(b) Notwithstanding section 2002A(b) of this title, the committee shall be chaired by the Secretary. The Assistant Secretary of Labor for Veterans' Employment and Training shall serve as vice chairman of the committee. The committee shall include--

"("(1) representatives of--

"("(A) the Secretary of Veterans Affairs;

"("(B) the Secretary of Defense;

"("(C) the Secretary of Health and Human Services;

"("(D) the Secretary of Education;

"("(E) the Director of the Office of Personnel Management;

"("(F) the Chairman of the Equal Employment Opportunity Commission;
"(G) the Administrator of the Small Business Administration;

"(H) the Postmaster General; and

"(I) any other agency of the Federal Government which has had its request to have a representative on the committee approved by the Secretary; and

"(2) a representative of each of the chartered veterans' organizations having a national employment program.

(c) Members of the committee shall serve without compensation or other reimbursement for their service on the committee.

Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 2010, as 38 USCS § 4110, and substituted "Secretary" for "Administrator" wherever appearing.

1992. Act Oct. 29, 1992, in subsec. (c), in para. (1), in subpara. (A), deleted "are chartered by Federal law and" following "veterans' organizations that".

1994. Act Nov. 2, 1994, in subsec (c)(1), substituted "shall appoint" for "shall, within 90 days after the date of the enactment of this section, appoint"; in subsec. (d)(9), substituted "Administrator of the Small Business Administration" for "Secretary of the Small Business Administration"; and, in subsec. (e)(3)(B), deleted ", United States Code," following "title 5" and substituted "the advisory committee" for "the Board".

2006. Act June 15, 2006, substituted the section heading for one which read: "§ 4110. Advisory Committee on Veterans Employment and Training"; in subsec. (a), in para. (1), substituted "Advisory Committee on Veterans Employment, Training, and Employer Outreach" for "Advisory Committee on Veterans Employment and Training"; in para. (2), in subpara. (A), inserted "and their integration into the workforce", in subpara. (B), deleted "and" after the concluding semicolon, redesignated subpara. (C) as subpara. (E), and inserted new subparas. (C) and (D); in subsec. (c), substituted para. (1) for one which read:

"(1) The Secretary of Labor shall appoint at least 12, but no more than 18, individuals to serve as members of the advisory committee consisting of--

"(A) representatives nominated by veterans' organizations that have a national employment program; and

"(B) not more than 6 individuals who are recognized authorities in the fields of business, employment, training, rehabilitation, or labor and who are not employees of the Department of Labor.";

in subsec. (d), deleted paras. (3) and (4), which read:

"(3) The Secretary of Health and Human Services."

"(4) The Secretary of Education.",
deleted para. (8), which read: "(8) The Chairman of the Equal Employment Opportunity Commission.", and deleted paras. (10)-(12), which read:

"(10) The Postmaster General.

"(11) The Director of the United States Employment Service.

"(12) Representatives of--

"(A) other Federal departments and agencies requesting a representative on the advisory committee; and
"(B) nationally based organizations with a significant involvement in veterans employment and training programs, as determined necessary and appropriate by the Secretary of Labor."

and redesignated paras. (5), (6), (7), and (9) as paras. (3), (4), (5), and (6), respectively; in subsec. (f)(1), in the introductory matter, substituted the sentence beginning "Not later than December 31 of each year . . ." for "Not later than July 1 of each year, the advisory committee shall submit to the Secretary of Labor a report on the employment and training needs of veterans. . .", in subpara. (A), inserted "and their integration into the workforce", in subpara. (B), deleted "and" following the concluding semicolon, redesignated subparas. (B) and (C) as subparas. (C) and (F), respectively, and inserted new subparas. (B), (D) and (E).

Other provisions:

Termination of advisory committees, boards and councils, established after Jan. 5, 1973. Act Oct. 6, 1972, P. L. 92-463, §§ 3(2) and 14, 86 Stat. 770, 776 (effective 1/5/73, as provided by § 15 of such Act), which is classified as 5 USCS Appx, provides that advisory committees established after Jan. 5, 1973, are to terminate not later than the expiration of the two-year period beginning on the date of establishment unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a board established by the Congress, its duration is otherwise provided for by law.

Termination of reporting requirements. For termination, effective May 15, 2000, of provisions of subsec. (g) of this section relating to periodic reports to Congress, see § 3003 of Act Dec. 21, 1995, P. L. 104-66, which appears as 31 USCS § 1113 note. See also page 125 of House Document No. 103-7.

References to Advisory Committee. Act June 15, 2006, P. L. 109-233, Title II, § 202(a)(4), 120 Stat. 403, provides: "Any reference to the Advisory Committee established under section 4110 of such title [Title 38, USCS] in any law, regulation, map, document, record, or other paper of the United States shall be considered to be a reference to the Advisory Committee on Veterans Employment, Training, and Employer Outreach."

Research Guide

Am Jur:  
77 Am Jur 2d, Veterans and Veterans' Laws § 105

Annotations:  
Existence of pendent jurisdiction of federal court over state claim when joined with claim arising under laws, treaties, or Constitution of United States.  75 ALR Fed 600

VA doctor's claims under Title 38 and Administrative Procedure Act (APA) (5 USCS §§ 701 et seq.) are dismissed, because (1) 38 USCS §§ 7421 et seq. are not applicable since case was filed before new regulations implementing those sections were promulgated, (2) judicial review of actions taken pursuant to 38 USCS § 4110 is available only under APA, and (3) doctor did not exhaust available administrative remedies to create final agency action. Gregor v Derwinski (1996, WD NY) 911 F Supp 643, 75 BNA FEP Cas 797 (criticized in Natale v Town of Darien (1998, DC Conn) 1998 US Dist LEXIS 2356) and (criticized in Buckley v City of Syracuse (1998, ND NY) 28 F Supp 2d 87) and (criticized in Mustafa v Neb. Dep't of Corr. Servs. (2002, DC Neb) 196 F Supp 2d 945)

§ 4110A. Special unemployment study

(a) (1) The Secretary, through the Bureau of Labor Statistics, shall conduct a study every two years of unemployment among each of the following categories of veterans:  
(A) Special disabled veterans.
(B) Veterans of the Vietnam era who served in the Vietnam theater of operations during the Vietnam era.
(C) Veterans who served on active duty during the Vietnam era who did not serve in the Vietnam theater of operations.
(D) Veterans who served on active duty after the Vietnam era.
(E) Veterans discharged or released from active duty within four years of the applicable study.
(2) Within each of the categories of veterans specified in paragraph (1), the Secretary shall include a separate category for women who are veterans.
(3) [Redesignated]

(b) The Secretary shall promptly submit to Congress a report on the results of each study under subsection (a).

Effective date of section:
Act May 20, 1988, P. L. 100-323, § 16(b)(2), 102 Stat. 575, which appears as 38 USCS § 3104 note, provides that this section is effective on the 60th day after enactment.

Amendments:
1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 2010A, as 38 USCS § 4110A.
1994. Act Nov. 2, 1994, substituted subsec. (a) for one which read: "(a) The Secretary, through the Bureau of Labor Statistics, shall conduct, on a biennial basis, studies of unemployment among special disabled veterans and among veterans who served in the Vietnam Theater of Operations during the Vietnam era and promptly report to the Congress on the results of such studies.".
1998. Act Nov. 11, 1998 deleted subsec. (b), which read: "(b) The first study under this section shall be completed not later than 180 days after the date of the enactment of this section."; redesignated subsec. (a)(3) as subsec. (b) and, in such subsection as redesignated, substituted "subsection (a)" for "paragraph (1)".

Other provisions:
Termination of reporting requirements. For termination, effective May 15, 2000, of provisions of subsec. (b) of this section relating to periodic reports to Congress, see § 3003 of Act Dec. 21, 1995, P. L. 104-66, which appears as 31 USCS § 1113 note. See also page 125 of House Document No. 103-7.

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 99

§ 4110B. Coordination and nonduplication

In carrying out this chapter [38 USCS §§ 4100 et seq.], the Secretary shall require that an appropriate administrative entity in each State enter into an agreement with the Secretary regarding the implementation of the Workforce Investment Act of 1998 that includes the description and information described in paragraphs (8) and (14) of section 112(b) of the Workforce Investment Act of 1998 (29 U.S.C. 2822(b)).

References in text:

Effective date of section:
This section took effect on August 7, 1998, pursuant to § 507 of Act Aug. 7, 1998, P. L. 105-220, which appears as 20 USCS § 9201 note.

Amendments:

[§ 4111. Repealed]
This section (Act Nov. 30, 1999, P. L. 106-117, Title IX, § 901(a), 113 Stat. 1586) was repealed by Act Dec. 21, 2001, P. L. 107-95, § 5(e)(3), 115 Stat. 918. It related to reintegration programs for homeless veterans. For similar provisions, see 38 USCS § 2021.


§ 4112. Performance incentive awards for quality employment, training, and placement services

(a) Criteria for performance incentive awards.
(1) For purposes of carrying out a program of performance incentive awards under section 4102A(c)(2)(A)(i)(III) of this title [38 USCS § 4102A(c)(2)(A)(i)(III)], the Secretary, acting through the Assistant Secretary of Labor for Veterans’ Employment and Training, shall establish criteria for performance incentive awards programs to be administered by States to--
(A) encourage the improvement and modernization of employment, training, and placement services provided under this chapter; and
(B) recognize eligible employees for excellence in the provision of such services or for having made demonstrable improvements in the provision of such services.
(2) The Secretary shall establish such criteria in consultation with representatives of States, political subdivisions of States, and other providers of employment, training, and placement services under the Workforce Investment Act of 1998 consistent with the performance measures established under section 4102A(b)(7) of this title [38 USCS § 4102A(b)(7)].

(b) Form of awards. Under the criteria established by the Secretary for performance incentive awards to be administered by States, an award under such criteria may be a cash award or such other nonfinancial awards as the Secretary may specify.

(c) Relationship of award to grant program and employee compensation.
Performance incentive cash awards under this section--
(1) shall be made from amounts allocated from the grant or contract amount for a State for a program year under section 4102A(c)(7) of this title [38 USCS § 4102A(c)(7)]; and
(2) is in addition to the regular pay of the recipient.
(d) **Eligible employee defined.** In this section, the term "eligible employee" means any of the following:

1. A disabled veterans' outreach program specialist.
2. A local veterans' employment representative.
3. An individual providing employment, training, and placement services to veterans under the Workforce Investment Act of 1998 or through an employment service delivery system (as defined in section 4101(7) of this title [38 USCS § 4101(7)]).

**References in text:**

The "Workforce Investment Act of 1998", referred to in this section, is Act Aug. 7, 1998, P. L. 105-220, which appears generally as 20 USCS §§ 9201 et seq. and 29 USCS §§ 2801 et seq. For full classification of such Act, consult USCS Tables volumes.

**Explanatory notes:**


§ 4113. **Outstationing of Transition Assistance Program personnel**

(a) **Stationing of TAP personnel at overseas military installations.**

1. The Secretary--
   
   (A) shall station employees of the Veterans' Employment and Training Service, or contractors under subsection (c), at each veterans assistance office described in paragraph (2); and
   
   (B) may station such employees or contractors at such other military installations outside the United States as the Secretary, after consultation with the Secretary of Defense, determines to be appropriate or desirable to carry out the purposes of this chapter.

2. Veterans assistance offices referred to in paragraph (1)(A) are those offices that are established by the Secretary of Veterans Affairs on military installations pursuant to the second sentence of section 6304(a) of this title [38 USCS § 6304(a)].

(b) **Functions.** Employees (or contractors) stationed at military installations pursuant to subsection (a) shall provide, in person, counseling, assistance in identifying employment and training opportunities, help in obtaining such employment and training, and other related information and services to members of the Armed Forces who are being separated from active duty, and the spouses of such members, under the Transition Assistance Program and Disabled Transition Assistance Program established in section 1144 of title 10 [10 USCS § 1144].

(c) **Authority to contract with private entities.** The Secretary, consistent with section 1144 of title 10 [10 USCS § 1144], may enter into contracts with public or private entities to provide, in person, some or all of the counseling, assistance, information and services under the Transition Assistance Program required under subsection (a).
Explanatory notes:


Amendments:

2006. Act June 15, 2006, in subsec. (a)(2), substituted "section 6304(a)" for "section 7723(a)".

Other provisions:

Deadline for implementation. Act Dec. 16, 2003, P. L. 108-183, Title III, § 309(b), 117 Stat. 2663, provides: "Not later than 90 days after the date of the enactment of this Act, the Secretary of Labor shall implement section 4113 of title 38, United States Code, as added by subsection (a), and shall have employees of the Veterans' Employment and Training Service, or contractors, to carry out that section at the military installations involved by such date."

[§§ 4114-4119. Repealed]


[§ 4120. Transferred]

This section (Act May 20, 1988, P. L. 100-322, Title II, Part B, § 212(a)(1), 102 Stat. 514), as in effect on the day before the date of enactment of Act May 7, 1991, P. L. 102-40, was redesignated 38 USCS § 7458 by § 401(c)(4) of such Act.
§ 4121. Repealed

§ 4122. Repealed

§ 4123. Repealed

§ 4124. Repealed

§ 4131. Transferred

§ 4132. Transferred

§ 4133. Transferred

§ 4134. Transferred

§ 4141. Transferred
CHAPTER 42. EMPLOYMENT AND TRAINING OF VETERANS

[§§ 4201-4210. Transferred]
§ 4211. Definitions
§ 4212. Veterans' employment emphasis under Federal contracts
§ 4213. Eligibility requirements for veterans under Federal employment and training programs
§ 4214. Employment within the Federal Government
§ 4215. Priority of service for veterans in Department of Labor job training programs

Amendments:
1972. Act Oct. 24, 1972, P. L. 92-540, Title V, § 503(a), 86 Stat. 1097 (effective 90 days after 10/24/72, as provided by § 601(b) of such Act) added the chapter heading and chapter analysis.


1991. Act March 22, 1991, P. L. 102-16, § 9(c)(1), 105 Stat. 55, applicable as provided by § 9(d) of such Act, which appears as 38 USCS § 2014 note, amended the chapter heading by deleting "DISABLED AND VIETNAM ERA" preceding "VETERANS".

Act Aug. 6, 1991, P. L. 102-83, § 5(b)(1), 105 Stat. 406, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


[§§ 4201-4210. Transferred]


§ 4211. Definitions

As used in this chapter [38 USCS §§ 4211 et seq.]--

(1) The term "special disabled veteran" means--
(A) a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary for a disability (i) rated at 30 percent or more, or (ii) rated at 10 or 20 percent in the case of a veteran who has been determined under section 3106 of this title [38 USCS § 3106] to have a serious employment handicap; or
(B) a person who was discharged or released from active duty because of service-connected disability.

(2) The term "veteran of the Vietnam era" means an eligible veteran any part of whose active military, naval, or air service was during the Vietnam era.

(3) The term "disabled veteran" means (A) a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under
laws administered by the Secretary, or (B) a person who was discharged or released from active duty because of a service-connected disability.

(4) The term "eligible veteran" means a person who--
   (A) served on active duty for a period of more than 180 days and was discharged or released therefrom with other than a dishonorable discharge;
   (B) was discharged or released from active duty because of a service-connected disability; or
   (C) as a member of a reserve component under an order to active duty pursuant to section 12301(a), (d), or (g), 12302, or 12304 of title 10 [10 USCS § 12301(a), (d), or (g), 12302, or 12304], served on active duty during a period of war or in a campaign or expedition for which a campaign badge is authorized and was discharged or released from such duty with other than a dishonorable discharge.

(5) The term "department or agency" means any agency of the Federal Government or the District of Columbia, including any Executive agency as defined in section 105 of title 5 [5 USCS § 105] and the United States Postal Service and the Postal Rate Commission, and the term "department, agency, or instrumentality in the executive branch" includes the United States Postal Service and the Postal Rate Commission.

(6) The term "recently separated veteran" means any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty.

Explanatory notes:

Effective date of section:
Act Oct. 24, 1972, P. L. 92-540, Title VI, § 601(b), 86 Stat. 1099, provided that this section is effective 90 days after Oct. 24, 1972.

Amendments:
1976. Act Oct. 15, 1976 (effective 12/1/76, as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), in para. (2), substituted "the person's" for "his".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(e) of such Act, which appears as 38 USCS § 4101 note), substituted new section for one which read:

"As used in this chapter--"

"(1) The term 'disabled veteran' means a person entitled to disability compensation under laws administered by the Veterans' Administration for a disability rated at 30 per centum or more, or a person whose discharge or release from active duty was for a disability incurred or aggravated in line of duty.

"(2) The term 'veteran of the Vietnam era' means a person (A) who (i) served on active duty for a period of more than 180 days, any part of which occurred during the Vietnam era, and was discharged or released therefrom with other than a dishonorable discharge, or (ii) was discharged or released from active duty for a service-connected disability if any part of such active duty was performed during the Vietnam era, and (B) who was so discharged or released within the 48 months preceding the person's application for employment covered under this chapter."
“(3) The term 'department and agency' means any department or agency of the Federal Government or any federally owned corporation.”.

1982. Act Oct. 14, 1982, in paras. (1) and (3), inserted "(or who but for the receipt of military retired pay would be entitled to compensation)"; and, in para. (5), inserted "and the United States Postal Service and the Postal Rate Commission, and the term 'department, agency, or instrumentality in the executive branch' includes the United States Postal Service and the Postal Rate Commission".

1984. Act March 2, 1984 substituted para. (1) for one which read: "The term 'special disabled veteran' means (A) a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Veterans' Administration for a disability rated at 30 percent or more, or (B) a person who was discharged or released from active duty because of a service-connected disability.”.

1989. Act Dec. 18, 1989 (effective 1/1/90 as provided by § 407(c) of such Act, which appears as a note to this section), in para. (2)(B), inserted "except for purposes of section 2014 of this title".

Act June 13, 1991, in para. (2)(B), inserted a comma before "except for".
Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 2111, as 38 USCS § 4211, and amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).
Such Act further, in paras. (1)(A) and (3), substituted "administered by the Secretary" for "administered by the Veterans' Administration".
Act Oct. 10, 1991 substituted para. (4) for one which read: "The term 'eligible veteran' means a person who (A) served on active duty for a period of more than 180 days and was discharged or released therefrom with other than a dishonorable discharge, or (B) was discharged or released from active duty because of a service-connected disability.”.

1992. Act Oct. 29, 1992, in para. (2), substituted "The term" for "(A) Subject to subparagraph (B) of this paragraph, the term", and deleted subpara. (B), which read: "(B) No veteran may be considered to be a veteran of the Vietnam era under this paragraph after December 31, 1994, except for purposes of section 4214 of this title.".

1996. Act Feb. 10, 1996 (effective as if included in Act Oct. 5, 1995, P. L. 103-337, as enacted on Oct. 5, 1994, as provided by § 1501(f)(3) of Act Feb. 10, 1996, which appears as 10 USCS § 113 note), in para. (4)(C), substituted "section 12301(a), (d), or (g), 12302, or 12304 of title 10" for "section 672 (a), (d), or (g), 673, or 673b of title 10".


2002. Act Nov. 7, 2002 (applicable to contracts entered into on or after 12/1/2003, as provided by § 2(b)(3) of such Act, which appears as a note to this section), in para. (6), substituted "three-year period" for "one-year period".

Other provisions:


Application of Nov. 7, 2002 amendments. Act Nov. 7, 2002, P. L. 107-288, § 2(b)(3), 116 Stat. 2036, provides: "The amendments made by this subsection [amending 38 USCS §§ 4211(6) and 4212] shall apply with respect to contracts entered into on or after the first day of the first month that begins 12 months after the date of the enactment of this Act.".

Code of Federal Regulations

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§ 4212. Veterans' employment emphasis under Federal contracts

(a) (1) Any contract in the amount of $100,000 or more entered into by any department or agency of the United States for the procurement of personal property and nonpersonal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States take affirmative action to employ and advance in employment qualified covered veterans. This section applies to any subcontract in the amount of $100,000 or more entered into by a prime contractor in carrying out any such contract.

(2) In addition to requiring affirmative action to employ such qualified covered veterans under such contracts and subcontracts and in order to promote the implementation of such requirement, the Secretary of Labor shall prescribe regulations requiring that--

(A) each such contractor for each such contract shall immediately list all of its employment openings with the appropriate employment service delivery system (as defined in section 4101(7) of this title [38 USCS § 4101(7)]), and may also list such openings with one-stop career centers under the Workforce Investment Act of 1998, other appropriate service delivery points, or America's Job Bank (or any additional or subsequent national electronic job bank established by the Department of Labor), except that the contractor may exclude openings for executive and senior management positions and positions which are to be filled from within the contractor's organization and positions lasting three days or less;

(B) each such employment service delivery system shall give such qualified covered veterans priority in referral to such employment openings; and

(C) each such employment service delivery system shall provide a list of such employment openings to States, political subdivisions of States, or any private entities or organizations under contract to carry out employment, training, and placement services under chapter 41 of this title [38 USCS §§ 4100 et seq.].

(3) In this section:
(A) The term "covered veteran" means any of the following veterans:
   (i) Disabled veterans.
   (ii) Veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized.
   (iii) Veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order No. 12985 (61 Fed. Reg. 1209) [10 USCS prec § 1121 note].
   (iv) Recently separated veterans.

(B) The term "qualified", with respect to an employment position, means having the ability to perform the essential functions of the position with or without reasonable accommodation for an individual with a disability.

(b) If any veteran covered by the first sentence of subsection (a) believes any contractor of the United States has failed to comply or refuses to comply with the provisions of the contractor's contract relating to the employment of veterans, the veteran may file a complaint with the Secretary of Labor, who shall promptly investigate such complaint and take appropriate action in accordance with the terms of the contract and applicable laws and regulations.

(c) The Secretary of Labor shall include as part of the annual report required by section 4107(c) of this title [38 USCS § 4107(c)] the number of complaints filed pursuant to subsection (b) of this section, the actions taken thereon and the resolutions thereof. Such report shall also include the number of contractors listing employment openings, the nature, types, and number of positions listed and the number of veterans receiving priority pursuant to subsection (a)(2)(B).

(d) (1) Each contractor to whom subsection (a) applies shall, in accordance with regulations which the Secretary of Labor shall prescribe, report at least annually to the Secretary of Labor on--
   (A) the number of employees in the workforce of such contractor, by job category and hiring location, and the number of such employees, by job category and hiring location, who are qualified covered veterans;
   (B) the total number of new employees hired by the contractor during the period covered by the report and the number of such employees who are qualified covered veterans; and
   (C) the maximum number and the minimum number of employees of such contractor during the period covered by the report.

(2) The Secretary of Labor shall ensure that the administration of the reporting requirement under paragraph (1) is coordinated with respect to any requirement for the contractor to make any other report to the Secretary of Labor.

References in text:
The "Workforce Investment Act of 1998", referred to in this section, is Act Aug. 7, 1998, P. L. 105-220, which appears generally as 20 USCS §§ 9201 et seq. and 29 USCS §§ 2801 et seq. For full classification of such Act, consult USCS Tables volumes.

Explanatory notes:

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A prior § 2012, contained in Subchapter II of former Chapter 41, was transferred to 38 USCS § 2003 by Act Sept. 19, 1962, P. L. 87-675, § 1(a), 76 Stat. 558.

Effective date of section:
Act Oct. 24, 1972, P. L. 92-540, Title VI, § 601(b), 86 Stat. 1099, provided that this section is effective 90 days after Oct. 24, 1972.

Amendments:
1974. Act Dec. 3, 1974 (effective 12/3/74, as provided by § 503 of such Act, which appears as 38 USCS § 3452 note), in subsec. (a), inserted "in the amount of $10,000 or more", deleted ", in employing persons to carry out such contract," following "a provision requiring that", substituted "take affirmative action to employ and advance in employment" for "give special emphasis to the employment of", and substituted "in addition to requiring affirmative action to employ such veterans under such contracts and subcontracts and in order to promote the implementation of such requirement, the" for "The"; and in subsec. (b), substituted "the employment of" for "giving special emphasis in employment to".

1976. Act Oct. 15, 1976 (effective 12/1/76, as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), in subsec. (b), substituted "the contractor's" for "his"; and added subsec. (c).

1978. Act Oct. 26, 1978, in subsec. (b), inserted ", or if any veteran who is entitled to disability compensation under the laws administered by the Veterans' Administration believes that any such contractor has discriminated against such veteran because such veteran is a handicapped individual within the meaning of section 7(6) of the Rehabilitation Act of 1973 (29 U.S.C. 706(6))".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(e), (h) of such Act, in subsec. (a), inserted "special", and substituted "which" for "within 60 days after the date of enactment of this section, which regulations"; and substituted new subsec. (b) for one which read: "(b) If any disabled veteran or veteran of the Vietnam era believes any contractor has failed or refuses to comply with the provisions of the contractor's contract with the United States, relating to the employment of veterans, or if any veteran who is entitled to disability compensation under the laws administered by the Veterans' Administration believes that any such contractor has discriminated against such veteran because such veteran is a handicapped individual within the meaning of section 7(6) of the Rehabilitation Act of 1973 (29 U.S.C. 706(6)), such veteran may file a complaint with the Veterans' Employment Service of the Department of Labor. Such complaint shall be promptly referred to the Secretary who shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant consistent with the terms of such contract and the laws and regulations applicable thereto.".


1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 2012, as 38 USCS § 4212, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and, in subsecs. (c) and (d), substituted "Secretary of Labor" for "Secretary" wherever appearing.

1994. Act Nov. 2, 1994, in subsec. (a), substituted "all of its employment openings except that the contractor may exclude openings for executive and top management positions, positions which are to be filled from within the contractor's organization, and positions lasting three days or less," for "all of its suitable employment openings.".

1998. Act Oct. 31, 1998, in subsec. (a), substituted "$25,000" for "$10,000" and substituted "special disabled veterans, veterans of the Vietnam era, and any other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized" for "special disabled veterans and veterans of the Vietnam era"; in subsec. (b), substituted "veteran covered by the first sentence of subsection (a)" for "special disabled
veteran or veteran of the Vietnam era”; and, in subsec. (d)(1), in subpara. (A), substituted "special disabled veterans, veterans of the Vietnam era, or other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized" for "veterans of the Vietnam era or special disabled veterans" and deleted "and" after the concluding semicolon, in subpara. (B), substituted "special disabled veterans, veterans of the Vietnam era, or other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized" for "veterans of the Vietnam era or special disabled veterans" and substituted "; and" for a concluding period, and added subpara. (C).

2000. Act Nov. 1, 2000, in subsecs. (a) and (d)(1)(A) and (B), inserted "recently separated veterans,"

2002. Act Nov. 7, 2002 (applicable with respect to contracts entered into on or after 12/1/2003, as provided by § 2(b)(3) of such Act, which appears as 38 USCS § 4211 note), substituted subsec. (a) for one which read: "(a) Any contract in the amount of $25,000 or more entered into by any department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified special disabled veterans, veterans of the Vietnam era, recently separated veterans, and any other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized. The provisions of this section shall apply to any subcontract entered into by a prime contractor in carrying out any contract for the procurement of personal property and non-personal services (including construction) for the United States. In addition to requiring affirmative action to employ such veterans under such contracts and subcontracts and in order to promote the implementation of such requirement, the President shall implement the provisions of this section by promulgating regulations which shall require that (1) each such contractor undertake in such contract to list immediately with the appropriate local employment service office all of its employment openings except that the contractor may exclude openings for executive and top management positions, positions which are to be filled from within the contractor's organization, and positions lasting three days or less, and (2) each such local office shall give such veterans priority in referral to such employment openings."; in subsec. (c), deleted "suitable" preceding "employment", and substituted "subsection (a)(2)(B)" for "subsection (a)(2) of this section"; and, in subsec. (d), in para. (1), in the introductory matter, deleted "of this section" following "subsection (a)", and substituted subparas. (A) and (B) for ones which read:

"(A) the number of employees in the work force of such contractor, by job category and hiring location, who are special disabled veterans, veterans of the Vietnam era, recently separated veterans, or other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized;

"(B) the total number of new employees hired by the contractor during the period covered by the report and the number of such employees who are special disabled veterans, veterans of the Vietnam era, recently separated veterans, or other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized; and",

and, in para. (2), deleted "of this subsection" following "paragraph (1)".

Other provisions:


On June 16, 1971, I issued Executive Order No. 11598 to facilitate the employment of returning veterans by requiring Federal agencies and Federal contractors and their subcontractors to list employment openings with the employment service systems. Section

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503 of the Vietnam Era Veterans' Readjustment Assistance Act of 1972 (Public Law 92-540; 86 Stat. 1097) added a new section 2012 [now section 4212] to Title 38 of the United States Code which, in effect, provides statutory authority to extend the program developed under that order with respect to Government contractors and their subcontractors.

NOW, THEREFORE, by virtue of the authority vested in me by section 301 of Title 3 of the United States Code and as President of the United States, it is hereby ordered as follows:

Section 1. The Secretary of Labor shall issue rules and regulations requiring each department and agency of the executive branch of the Federal Government to list suitable employment openings with the appropriate office of the State Employment Service or the United States Employment Service. This section shall not be construed as requiring the employment of individuals referred by such office or as superseding any requirements of the Civil Service Laws. Rules, regulations, and orders to implement this section shall be developed in consultation with the Civil Service Commission.

Sec. 2. The Secretary of Labor is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, the authority of the President under Section 2012 [now section 4212] of Title 38 of the United States Code.

Sec. 3. The Secretary of Labor shall gather information on the effectiveness of the program established under this order and Section 2012 [now section 4212] of Title 38 of the United States Code and of the extent to which the employment service system is fulfilling the employment needs of veterans. The Secretary of Labor shall, from time to time, report to the President concerning his evaluation of the effectiveness of this order along with his recommendations for further action which the Secretary believes to be appropriate.

Sec. 4. Appropriate departments and agencies shall, in consultation with the Secretary of Labor, issue such amendments or additions to procurement rules and regulations as may be necessary to carry out the purposes of this order and Section 2012 [now section 4212] of Title 38 of the United States Code. Except as otherwise provided by law, all executive departments and agencies are directed to cooperate with the Secretary of Labor, to furnish the Secretary of Labor with such information and assistance as he may require in the performance of his functions under this order, and to comply with rules, regulations, and orders of the Secretary.

Sec. 5. Executive Order No. 11598 of June 16, 1971, is hereby superseded.

Secretary to prescribe regulations. Act Oct. 14, 1982, P. L. 97-306, Title III, § 310(b), 96 Stat. 1442, provides: "Within 90 days after the date of the enactment of this Act, the Secretary of Labor shall prescribe regulations under subsection (d) of section 2012 of Title 38, United States Code [subsec. (d) of this section], as added by the amendment made by subsection (a).".

Code of Federal Regulations

Employment and Training Administration, Department of Labor-Administrative provisions governing the Job Service System, 20 CFR Part 658


Cross References

This section is referred to in 29 USCS § 1755; 38 USCS §§ 3116, 4102A, 4103, 4104
Research Guide

Federal Procedure:
21 Fed Proc L Ed, Job Discrimination §§ 50:474, 477, 486, 498, 547, 584

Am Jur:
45A Am Jur 2d, Job Discrimination §§ 21-26, 40-104, 168-213, 390, 528-599
45B Am Jur 2d, Job Discrimination §§ 760, 1365, 1369, 1374, 1675, 1747
77 Am Jur 2d, Veterans and Veterans' Laws § 96

Annotations:
Availability of private right of action under § 503 of Rehabilitation Act of 1973 (29 USCS § 793), providing that certain federal contracts must contain provision requiring affirmative action to employ qualified handicapped individuals. 60 ALR Fed 329

Employee's inability to work particular hours due to disability as grounds for termination or refusal of employment, notwithstanding federal statute or regulation requiring employer to make reasonable accommodation of disability. 116 ALR Fed 485

Law Review Articles:
Choper. The Constitutionality of Affirmative Action: Views from the Supreme Court. 70 Kentucky L J 1, 1981-82

1. Generally
2. Application
3. Complaints
4. Private right of action
5. Judicial review
6. Miscellaneous

1. Generally
While there is no obligation to make unreasonable efforts to accommodate handicapped employees under 38 USCS § 2012 [now 38 USCS § 4212], more than "evenhanded approach" is required; to determine whether federal contractor has violated 38 USCS § 2012 [now 38 USCS § 4212] consideration should be given whether handicapped individual is qualified to perform job in question despite existence of handicap and, if not, whether employee could with reasonable employer accommodation perform that job or some other job for same employer, whether requirements stated in official job description match those actually required to perform job, size of contractor, number of employees in job category which handicapped individual seeks to enter, and whether contractor's overall work-force is expanding or shrinking in numbers. OFCCP Policy Directive 80-34, Sep. 30, 1980

Discrimination in employment practices against handicapped veterans includes discrimination in hiring, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeships. OFCCP Order No. 720a1, April 5, 1982

2. Application
For purposes of federal contract compliance laws, University of North Carolina system is single state agency and non-contracting campuses therefore must submit to compliance reviews regardless of whether they are direct participants in any federal contract. Board of Governors of University of North Carolina v United States Dep't of Labor (1990, CA4 NC) 917 F.2d 812, 1 AD Cas 1704, 54 BNA FEP Cas 136, 135 BNA LRRM 2760, 36 CCF ¶ 75959, 55 CCH EPD ¶
Where 11 of 16 campuses in state university system had received federal contracts, campuses that did not enter contracts with federal government were nonetheless subject to affirmative action requirements of 29 USC § 793 and Vietnam Era Veterans Readjustment Assistance Act of 1974 (38 USC § 4212), since university system was single state agency of which non-contracting campuses were merely constituent parts. Board of Governors of University of North Carolina v United States Dep't of Labor (1990, CA4 NC) 917 F.2d 812, 1 AD Cas 1704, 54 BNA FEP Cas 136, 135 BNA LRRM 2760, 36 CCF ¶ 75959, 55 CCH EPD ¶ 40370, cert den (1991) 500 US 916, 114 L Ed 2d 100, 111 S Ct 2013, 55 BNA FEP Cas 1104, 56 CCH EPD ¶ 40801

Department of Labor's order canceling future government contracting with all University of North Carolina constituent institutions for failure of some institutions to comply with regulations implementing employment laws was not erroneous; both 29 USC § 793(a) and 38 USC § 2012 [now 38 USC § 4212], requiring affirmative action to employ handicapped and Vietnam veterans, apply to "parties contracting" with U.S., and for purposes of such laws the University of North Carolina system constitutes a single, unified state agency, and campuses which have not entered contracts with the federal government must, nonetheless, submit to compliance review. Board of Governors of University of North Carolina v United States Dep't of Labor (1990, CA4 NC) 917 F.2d 812, 1 AD Cas 1704, 54 BNA FEP Cas 136, 135 BNA LRRM 2760, 36 CCF ¶ 75959, 55 CCH EPD ¶ 40370, cert den (1991) 500 US 916, 114 L Ed 2d 100, 111 S Ct 2013, 55 BNA FEP Cas 1104, 56 CCH EPD ¶ 40801

Plaintiff's employer, fire department, was not party to federal procurement contract so as to make provisions of Vietnam Era Veterans' Readjustment Assistance Act applicable to it; grant agreements are not procurement contracts, including that with Federal Emergency Management Agency, whose purpose was to carry out public purpose authorized by federal statute, not to procure property or services for direct benefit of U.S. government, and separate employment relationship between government and employees in event of catastrophe does not change FEMA agreement into procurement contract. Partridge v Reich (1998, CA9 Nev) 141 F.3d 920, 98 CDOS 2500, 98 Daily Journal DAR 3459, 157 BNA LRRM 3005

Secretary of Labor does not have jurisdiction under 38 USC § 2012 [now 38 USC § 4212] to hear complaint that state division of employment security does not comply with provisions of Vietnam Era Veterans Readjustment Assistance Act (§§ 2011 et seq. [now §§ 4211 et seq.]), since agreements between state agency and Department of Labor constitute grants rather than contracts within meaning of § 2012 [now § 4212]. Hammond v Donovan (1982, WD Mo) 538 F Supp 1106, 113 BNA LRRM 3599, 30 CCF ¶ 70266, 30 CCH EPD ¶ 33012

Complaints must be filed with Office of Federal Contract Compliance Programs within 180 days of date of alleged violation unless time for filing is extended for good cause shown; date of filing is date complaint is first received in writing by office, and request for complaint form of verbal notice of intent to file complaint is not sufficient to establish filing date; filing or processing of grievance under collective bargaining agreement does not extend filing period; date of alleged violation is date complainant knew or reasonably should have known of alleged discriminatory act or violation. OFCCP Order No. 630a5, March 10, 1983

3. Complaints

Where veteran's complaint alleged that his employer violated § 2012 [now 4212] by refusing to rehire him after he had voluntarily quit, allegation that employer tried to intimidate him from taking his complaint to Department of Labor was irrelevant to determination whether denial of complaint was abuse of discretion, since alleged intimidation came after refusal to rehire. Clementson v Donovan (1985, DC Hawaii) 608 F Supp 152, 121 BNA LRRM 3118, 36 CCH EPD ¶ 35061, 102 CCH LC ¶ 11429, affd (1986, CA9 Hawaii) 806 F.2d 1402, 124 BNA LRRM 2422, 33 CCF ¶ 74923, 42 CCH EPD ¶ 36792

4. Private right of action
Under 38 USCS § 2012 [now 38 USCS § 4212], Vietnam veteran did not have private right of action against private government contractor for failing to comply with hiring provisions of § 2012 [now § 4212], since review of legislative intent indicates Congress intended that enforcement and supervision of affirmative action hiring policy of § 2012 [now § 4212] is left to Department of Labor to which veteran could forward a complaint. Barron v Nightingale Roofing, Inc. (1988, CA1 Me) 842 F.2d 20, 127 BNA LRRM 2996, 34 CCF ¶ 75462, 46 CCH EPD ¶ 37895

Vietnam Era Veterans' Readjustment Assistance Act does not expressly provide for private actions; veterans who believe themselves to be victims of discrimination may complain to labor secretary, who enforces act administratively. Harris v Adams (1989, CA6 Mich) 873 F.2d 929, 1 AD Cas 1475, 49 BNA FEP Cas 1304, 131 BNA LRRM 2405, 50 CCH EPD ¶ 38973

Scope of 38 USCS § 2012 [now 38 USCS § 4212], as it existed prior to amendment of December 3, 1974, was limited to assuring listing of job openings with state employment agencies and to preference of certain veterans in referrals by those agencies, and it imposed no duties and created no rights with respect to employer's decision to hire or not to hire; thus, disabled veteran could not maintain action under 38 USCS § 2012 [now 38 USCS § 4212], as it read prior to amendment by act December 3, 1974, against prospective employer for failure to be hired due to service-connected disability. Wood v Diamond State Tel. Co. (1977, DC Del) 440 F Supp 1003, 18 BNA FEP Cas 647, 16 CCH EPD ¶ 8154

There is no private right of action for violation of 38 USCS § 2012 [now 38 USCS § 4212]. Butler v McDonnell-Douglas Saudi Arabia Corp. (1981, SD Ohio) 93 FRD 384, 110 BNA LRRM 2048

There is no private right of action under 38 USCS § 2012 [now 38 USCS § 4212], nor may state claim be maintained under third-party beneficiary theory. Stephens v Roadway Express Co. (1982, ND Ga) 37 BNA FEP Cas 1104, 119 BNA LRRM 2312, 29 CCH EPD ¶ 32941, 95 CCH LC ¶ 13893

38 USCS § 2012 [now 38 USCS § 4212] establishes no private cause of action and provides no authority for aggrieved veterans to file suit in federal court, but is designed to provide remedy, through Department of Labor, against contractors who discriminate against such veterans or that fail to comply with affirmative action provision embodied therein. De Leon Cruz v Loubriel (1982, DC Puerto Rico) 539 F Supp 250

University employee's claims against employer must be denied summarily, to extent they are based on noncompliance with university's conciliation agreement settling its alleged violations of 38 USCS § 4212, because (1) evidence that he served in military only until July 1964 leaves him outside definition of "Vietnam era veteran," and (2) § 4212 does not provide vehicle to assert violation of agreement, and neither do 42 USCS §§ 1983 or 1985. Brace v Ohio State Univ. (1994, SD Ohio) 866 F Supp 1069


Vietnam War veteran not hired to work as laborer on federal highway construction project has Vietnam Era Veterans Readjustment Assistance Act claim denied summarily, where it appears from language of statute that Congress intended persons protected under this statute to file complaint with Labor Secretary, because there is no private right of action under 38 USCS § 4212. Ledbetter v Koss Constr. Co. (1997, DC Kan) 981 F Supp 1394, affd without op (1998, CA10 Kan) 153 F.3d 727, reported in full (1998, CA10 Kan) 1998 US App LEXIS 17006

Complaint alleging violation of 38 USCS § 4212 is dismissed with prejudice, where veteran was terminated for alleged poor job performance on March 1, 1994 and claims he was discriminated against on basis of veteran status, even if such discrimination could be shown, because Congress chose not to create private right of action by which veterans may sue employers. Phillips v Merchants Ins. Group (1998, ND NY) 990 F Supp 99, 161 BNA LRRM 2254
5. Judicial review

In absence of abandonment of statutory responsibility, Secretary of Labor's decision to forego enforcement action under § 2012 [now § 4212] against federal contractor who failed to rehire disabled Vietnam Veteran who had resigned his position and then reapplied for same position was immune from judicial review since enforcement decision is within agency discretion. Clementson v Brock (1986, CA Hawaii) 806 F.2d 1402, 124 BNA LRRM 2422, 33 CCF ¶ 74923, 42 CCH EPD ¶ 36792

Record before court in veteran's suit seeking review of adverse determination by Department of Labor on his complaint asserting that employer violated § 2012 [now § 4212] was sufficient to support summary judgment notwithstanding that administrative record was not before court, where written complaints, agency's summary of evidence, and agency's recommended findings and reasons therefor were before court. Clementson v Donovan (1985, DC Hawaii) 608 F Supp 152, 121 BNA LRRM 3118, 36 CCH EPD ¶ 35061, 102 CCH LC ¶ 11429, affd (1986, CA9 Hawaii) 806 F.2d 1402, 124 BNA LRRM 2422, 33 CCF ¶ 74923, 42 CCH EPD ¶ 36792

Review of Secretary of Labor's decision to forego further legal action on disabled Vietnam era veteran's complaint alleging that his employer's failure to rehire him after he voluntarily quit his position violated employer's affirmative action obligation under § 2012 [now § 4212] is not de novo; such decision is to be reviewed under limited standard of abuse of discretion. Clementson v Donovan (1985, DC Hawaii) 608 F Supp 152, 121 BNA LRRM 3118, 36 CCH EPD ¶ 35061, 102 CCH LC ¶ 11429, affd (1986, CA9 Hawaii) 806 F.2d 1402, 124 BNA LRRM 2422, 33 CCF ¶ 74923, 42 CCH EPD ¶ 36792

Decision of Office of Federal Contract Compliance Program that employer had not violated its affirmative action obligation under § 2012 [now § 4212] did not fall within category of agency actions which, under 5 USCS § 701(a), are actions committed to agency discretion by law and not subject to judicial review. Clementson v Donovan (1985, DC Hawaii) 608 F Supp 152, 121 BNA LRRM 3118, 36 CCH EPD ¶ 35061, 102 CCH LC ¶ 11429, affd (1986, CA9 Hawaii) 806 F.2d 1402, 124 BNA LRRM 2422, 33 CCF ¶ 74923, 42 CCH EPD ¶ 36792

Disappointed applicant's court challenge to his disqualification from preapprenticeship training program on basis of low test score was dismissed, where federal agency concluded there was insufficient evidence that federal contractor violated Vietnam Era Veterans' Readjustment Assistance Act, because agency's decision to forego enforcement action under § 2012 [now § 4212] is immune from judicial review. Harris v McLaughlin (1989, ND Ohio) 732 F Supp 780, 133 BNA LRRM 2978

6. Miscellaneous

Department of Labor's decision adverse to disabled Vietnam era veteran who claimed that his employer's failure to rehire him after he voluntarily quit violated § 2012 [now § 4212] was not arbitrary and capricious on ground of failure to consider whether employer had duty to transfer veteran to another job, where tenor of veteran's complaint was employer's refusal to rehire him for his old position, nor was failure to consider whether his service-induced ulcer made him tense and contributed to his turbulent relationship with his supervisor which in turn led to his quit or discharge arbitrary, where claim was not raised before agency and chain of causation was entirely too attenuated to require judicial relief. Clementson v Donovan (1985, DC Hawaii) 608 F Supp 152, 121 BNA LRRM 3118, 36 CCH EPD ¶ 35061, 102 CCH LC ¶ 11429, affd (1986, CA9 Hawaii) 806 F.2d 1402, 124 BNA LRRM 2422, 33 CCF ¶ 74923, 42 CCH EPD ¶ 36792

Where only evidence before Office of Federal Contract Compliance showed that reason for veteran's quit or discharge was personality dispute with supervisor, fact that employer did not have valid affirmative action program in place was not grounds for setting aside summary judgment in favor of employer in veteran's action for review of adverse Department of Labor decision on his complaint alleging that employer violated § 2012 [now § 4212] by failing to rehire him after he quit. Clementson v Donovan (1985, DC Hawaii) 608 F Supp 152, 121 BNA LRRM 3118, 36 CCH EPD ¶ 35061, 102 CCH LC ¶ 11429, affd (1986, CA9 Hawaii) 806 F.2d 1402, 124 BNA LRRM 2422, 33 CCF ¶ 74923, 42 CCH EPD ¶ 36792

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§ 4213. Eligibility requirements for veterans under Federal employment and training programs

(a) Amounts and periods of time specified in subsection (b) shall be disregarded in determining eligibility under any of the following:
   (1) Any public service employment program.
   (2) Any emergency employment program.
   (3) Any job training program assisted under the Economic Opportunity Act of 1964.
   (4) Any employment or training program carried out under title I of the Workforce Investment Act of 1998 (29 U.S.C. 2801 et seq.).
   (5) Any other employment or training (or related) program financed in whole or in part with Federal funds.

(b) Subsection (a) applies with respect to the following amounts and periods of time:
   (1) Any amount received as pay or allowances by any person while serving on active duty.
   (2) Any period of time during which such person served on active duty.
   (3) Any amount received under chapters 11, 13, 30, 31, 32, and 36 of this title [38 USCS §§ 1101 et seq., 1301 et seq., 3001 et seq., 3100 et seq., 3201 et seq., 3670 et seq.] by an eligible veteran.
   (4) Any amount received by an eligible person under chapters 13 and 35 of this title [38 USCS §§ 1301 et seq., 3500 et seq.].
   (5) Any amount received by an eligible member under chapter 106 of title 10 [10 USCS §§ 2131 et seq.].

References in text:
The "Economic Opportunity Act of 1964", referred to in this section, is Act Aug. 20, 1964, P. L. 88-452, which is generally classified to 42 USCS §§ 2701 et seq. For full classification of such Act, consult USCS Tables volumes.

"Title I of the Workforce Investment Act of 1998", referred to in this section, is Title I of Act Aug. 7, 1998, P. L. 105-220, which appears generally as 29 USCS §§ 2801 et seq. For full classification of such Title, consult USCS Tables volumes.

Explanatory notes:
A prior § 2013, contained in Subchapter II of former Chapter 41, was transferred to 38 USCS § 2004 [now 38 USCS § 4104] by Act Sept. 19, 1962, P. L. 87-675, § 1(a), 76 Stat. 558.

Effective date of section:
Act Oct. 24, 1972, P. L. 92-540, Title VI, § 601(b), 86 Stat. 1099, provided that this section is effective 90 days after Oct. 24, 1972.

Amendments:
1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(h) of such Act, which appears as 38 USCS § 3452 note), substituted new catchline for one which read: "§ 2013. Eligibility requirements for veterans under certain Federal manpower training programs"; substituted "an eligible veteran" for "a veteran (as defined in section 101(2) of this title) who..."
served on active duty for a period of more than 180 days or was discharged or released from active duty for a service-connected disability"; and substituted "any employment or training program assisted under the Comprehensive Employment and Training Act, or any other employment or" for "any manpower training program assisted under the Manpower Development and Training Act of 1962, or any other manpower".


Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 2013, as 38 USCS § 4213.

1994. Act Nov. 2, 1994 substituted "chapters 11, 13, 30, 31, 35, and 36 of this title by an eligible veteran," for "chapters 11, 13, 31, 34, 35, and 36 of this title by an eligible veteran and" and "eligibility under" for "the needs or qualifications of participants in"; and inserted "and any amounts received by an eligible person under chapter 106 of title 10,".

1998. Act Oct. 21, 1998 (effective on enactment as provided by § 405(g)(1) of Subtitle IV of Title VIII of § 101(f) of Division A of such Act, which appears as 5 USCS § 3502 note), substituted "program carried out under the Job Training Partnership Act or title I of the Workforce Investment Act of 1998," for "program assisted under the Job Training Partnership Act (29 U.S.C. 1501 et seq.).".

Act Oct. 21, 1998 (effective on 7/1/2000, as provided by § 405(g)(2)(B) of Subtitle VIII of Title IV of § 101(f) of Division A of such Act, which appears as 5 USCS § 3502 note), deleted "the Job Training Partnership Act or" preceding "title I".

2000. Act Nov. 1, 2000 substituted the text of this section for text which read: "Any (1) amounts received as pay or allowances by any person while serving on active duty, (2) period of time during which such person served on such active duty, and (3) amounts received under chapters 11, 13, 30, 31, 35, and 36 of this title by an eligible veteran, any amounts received by an eligible person under chapters 13 and 35 of such title, and any amounts received by an eligible person under chapter 106 of title 10, shall be disregarded in determining eligibility under any public service employment program, any emergency employment program, any job training program assisted under the Economic Opportunity Act of 1964, any employment or training program carried out under title I of the Workforce Investment Act of 1998, or any other employment or training (or related) program financed in whole or in part with Federal funds.".

Code of Federal Regulations
Employment and Training Administration, Department of Labor-Administrative provisions governing the Job Service System, 20 CFR Part 658

Research Guide

Am Jur:
45A Am Jur 2d, Job Discrimination §§ 21-26, 40-104
45B Am Jur 2d, Job Discrimination § 760
77 Am Jur 2d, Veterans and Veterans' Laws § 107

38 USCS § 2013 [now 38 USCS § 4213] requires state agency to disregard employee's period of military service and to carry forward period of his pre-enlistment employment in determining his qualifications for trade readjustment allowance benefits under Trade Act of 1974 (19 USCS §§ 2271 et seq.) Hulet v Review Bd. of Indiana Employment Sec. Div. (1980, Ind App) 412 NE2d 289, 105 BNA LRRM 3377

§ 4214. Employment within the Federal Government
(a) (1) The United States has an obligation to assist veterans of the Armed Forces in readjusting to civilian life. The Federal Government is also continuously concerned with building an effective work force, and veterans constitute a uniquely qualified recruiting source. It is, therefore, the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for qualified covered veterans (as defined in paragraph (2)(B)) who are qualified for such employment and advancement.

(2) In this section:

(A) The term "agency" has the meaning given the term "department or agency" in section 4211(5) of this title [38 USCS § 4211(5)].

(B) The term "qualified covered veteran" means a veteran described in section 4212(a)(3) of this title [38 USCS § 4212(a)(3)].

(b) (1) To further the policy stated in subsection (a) of this section, veterans referred to in paragraph (2) of this subsection shall be eligible, in accordance with regulations which the Office of Personnel Management shall prescribe, for veterans recruitment appointments, and for subsequent career-conditional appointments, under the terms and conditions specified in Executive Order Numbered 11521 (March 26, 1970) [5 USCS § 3302 note], except that--

(A) such an appointment may be made up to and including the level GS-11 or its equivalent;

(B) a veteran shall be eligible for such an appointment without regard to the number of years of education completed by such veteran;

(C) a veteran who is entitled to disability compensation under the laws administered by the Department of Veterans Affairs or whose discharge or release from active duty was for a disability incurred or aggravated in line of duty shall be given a preference for such an appointment over other veterans;

(D) a veteran receiving such an appointment shall--

(i) in the case of a veteran with less than 15 years of education, receive training or education; and

(ii) upon successful completion of the prescribed probationary period, acquire a competitive status; and

(E) a veteran given an appointment under the authority of this subsection whose employment under the appointment is terminated within one year after the date of such appointment shall have the same right to appeal that termination to the Merit Systems Protection Board as a career or career-conditional employee has during the first year of employment.

(2) This subsection applies to qualified covered veterans.

(3) A qualified covered veteran may receive such an appointment at any time.

(c) Each agency shall include in its affirmative action plan for the hiring, placement, and advancement of handicapped individuals in such agency as required by section 501(b) of the Rehabilitation Act of 1973 (29 U.S.C. 791(b)) a separate specification of plans (in accordance with regulations which the Office of Personnel Management shall prescribe in consultation with the Secretary, the Secretary of Labor, and the Secretary of Health and Human Services, consistent with the purposes, provisions, and priorities of such Act)
to promote and carry out such affirmative action with respect to disabled veterans in order to achieve the purpose of this section.

(d) The Office of Personnel Management shall be responsible for the review and evaluation of the implementation of this section and the activities of each agency to carry out the purpose and provisions of this section. The Office shall periodically obtain (on at least an annual basis) information on the implementation of this section by each agency and on the activities of each agency to carry out the purpose and provisions of this section. The information obtained shall include specification of the use and extent of appointments made by each agency under subsection (b) of this section and the results of the plans required under subsection (c) of this section.

(e) (1) The Office of Personnel Management shall submit to the Congress annually a report on activities carried out under this section. Each such report shall include the following information with respect to each agency:

(A) The number of appointments made under subsection (b) of this section since the last such report and the grade levels in which such appointments were made.
(B) The number of individuals receiving appointments under such subsection whose appointments were converted to career or career-conditional appointments, or whose employment under such an appointment has terminated, since the last such report, together with a complete listing of categories of causes of appointment terminations and the number of such individuals whose employment has terminated falling into each such category.
(C) The number of such terminations since the last such report that were initiated by the agency involved and the number of such terminations since the last such report that were initiated by the individual involved.
(D) A description of the education and training programs in which individuals appointed under such subsection are participating at the time of such report.

(2) Information shown for an agency under clauses (A) through (D) of paragraph (1) of this subsection--

(A) shall be shown for all veterans; and
(B) shall be shown separately (i) for veterans who are entitled to disability compensation under the laws administered by the Secretary whose discharge or release from active duty was for a disability incurred or aggravated in line of duty, and (ii) for other veterans.

(f) Notwithstanding section 4211 of this title [38 USCS § 4211], the terms "veteran" and "disabled veteran" as used in subsection (a) of this section shall have the meaning provided for under generally applicable civil service law and regulations.

(g) To further the policy stated in subsection (a) of this section, the Secretary may give preference to qualified covered veterans for employment in the Department as veterans' benefits counselors and veterans' claims examiners and in positions to provide the outreach services required under section 6303 of this title [38 USCS § 6303], to serve as veterans' representatives at certain educational institutions as provided in section 6305 of this title [38 USCS § 6305], or to provide readjustment counseling under section 1712A of this title [38 USCS § 1712A].
References in text:
The "civil service law", referred to in subsec. (f) generally appears as 5 USCS §§ 1101 et seq. and 3301 et seq.

Explanatory notes:

Effective date of section:

Amendments:
1977. Act Nov. 23, 1977 (effective 11/23/77, as provided by § 501 of such Act, which appears as 38 USCS § 101 note), in subsec. (b), inserted "The Chairman of the Civil Service Commission shall submit to the President and the Congress, not later than six months after the date of enactment of the GI Bill Improvement Act of 1977, a report on the need for the continuation after June 30, 1978, of the authority for veterans readjustment appointments contained in this subsection.".

1978. Act Oct. 26, 1978, substituted subsec. (b) for one which read: "(b) To further this policy, veterans of the Vietnam era shall be eligible, in accordance with regulations which the Civil Service Commission shall prescribe, for veterans readjustment appointments up to and including the level GS-5, as specified in subchapter II of chapter 51 of title 5, and subsequent career-conditional appointments, under the terms and conditions specified in Executive Order Numbered 11521 (March 26, 1970), except that in applying the one-year period of eligibility specified in section 2(a) of such order to a veteran or disabled veteran who enrolls, within one year following separation from the Armed Forces or following release from hospitalization or treatment immediately following separation from the Armed Forces, in a program of education (as defined in section 1652 of this title) on more than a half-time basis (as defined in section 1788 of this title), the time spent in such program of education (including customary periods of vacation and permissible absences) shall not be counted. The eligibility of such a veteran for a readjustment appointment shall continue for not less than six months after such veteran first ceases to be enrolled therein on more than a half-time basis. No veterans readjustment appointment may be made under authority of this subsection after June 30, 1978. The Chairman of the Civil Service Commission shall submit to the President and the Congress, not later than six months after the date of enactment of the GI Bill Improvement Act of 1977, a report on the need for the continuation after June 30, 1978, of the authority for veterans readjustment appointments contained in this subsection."); in subsec. (d), substituted "of this section" for "thereof" following "subsection (c)", inserted "Each report under the preceding sentence shall include in the specification of the use and extent of appointments made under subsection (a) the following information (shown for all veterans and separately for veterans described in subsection (b)(1)(C) of this section and other veterans);"., and added paras. (1)-(4); and in subsec. (f), inserted "subsection (a) of".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(e), (h) of such Act), in subsec. (b), in the introductory matter, substituted "Office of Personnel Management" for "Civil Service Commission", deleted para. (2) which read: "(2) In this subsection, the term 'veteran of the Vietnam era' has the meaning given such term in section 2011(2)(A) of this title ", and redesignated para. (3) as para. (2); in subsec. (c), substituted "the Rehabilitation Act of 1973 (29 U.S.C. 791(b))" for "Public Law 93-112 (87 Stat. 391)" and substituted "Office of Personnel Management" for "Civil Service Commission"; in subsec. (d), introductory matter, substituted "Office of Personnel Management" for "Civil Service Commission" and substituted "Office" for "Commission"; in subsec. (e), substituted "Office of Personnel Management" for "Civil Service Commission", substituted "Office" for "Commission" and substituted "the

1981. Act Nov. 3, 1981 (effective 10/1/81, as provided by § 207(3) of such Act, which appears as a note to this section), in subsec. (b)(2), substituted "1984" for "1981".


1984. Act Oct. 24, 1984, in subsec. (a), designated the existing provisions as para. (1), and added para. (2); in subsec. (b), in para. (1), in subpara. (A), substituted "GS-9" for "GS-7", in subpara. (B), deleted "and" following the concluding semicolon, in subpara. (C), substituted ";" and "for a concluding period, and added subpara. (D), in para. (2), substituted "September 30, 1986" for "September 30, 1984"; in subsec. (c), substituted "agency" for "department, agency, and instrumentality in the executive branch" and substituted "such agency" for "such department, agency, or instrumentality"; and substituted subsec. (d) and (e) for ones which read:

"(d) The Office of Personnel Management shall be responsible for the review and evaluation of the implementation of this section and the activities of each such department, agency, and instrumentality to carry out the purpose and provisions of this section. The Office shall periodically obtain and publish (on at least a semiannual basis) reports on such implementation and activities from each such department, agency, and instrumentality, including specification of the use and extent of appointments made under subsection (b) of this section and the results of the plans required under subsection (c) of this section. Each report under the preceding sentence shall include in the specification of the use and extent of appointments made under subsection (b) of this section the following information (shown for all veterans and separately for veterans described in subsection (b)(1)(C) of this section and other veterans):

"(1) The number of appointments made under such subsection since the last such report and the grade levels in which such appointments were made.

"(2) The number of individuals receiving appointments under such subsection whose appointments were converted to career conditional appointments, or whose employment under such an appointment has terminated, since the last such report, together with a complete listing of categories of causes of appointment terminations and the number of such individuals whose employment has terminated falling into each such category.

"(3) The number of such terminations since the last such report that were initiated by the department, agency, or instrumentality involved and the number of such terminations since the last such report that were initiated by the individual involved.

"(4) A description of the education and training programs in which individuals appointed under such subsection are participating at the time of such report.

"(e) The Office of Personnel Management shall submit to the Congress annually a report on activities carried out under this section, except that, with respect to subsection (c) of this section, the Office may include a report of such activities separately in the report required to be submitted by section 501(d) of the Rehabilitation Act of 1973 (29 U.S.C 791(d)), regarding the employment of handicapped individuals by each department, agency, and instrumentality."


1989. Act Dec. 18, 1989 (effective 1/1/90 as provided by § 407(c) of such Act, which appears as 38 USCS § 4211 note), in subsec. (a)(1), substituted "certain veterans of the Vietnam era and veterans of the post-Vietnam era who are qualified for such employment and advancement" for "qualified disabled veterans and veterans of the Vietnam era", in subsec.
(b), in para. (1), in the introductory matter, substituted "veterans referred to in paragraph (2) of this subsection" for "veterans of the Vietnam era", in subpara. (A), inserted "or in the case of a veteran referred to in paragraph (2)(A) of this subsection, the level of GS-11 or its equivalent", substituted subpara. (B) for one which read: "a veteran of the Vietnam era shall be eligible for such an appointment without any time limitations with respect to eligibility for such an appointment", in subpara. (C), inserted "referred to in paragraph (2) of this subsection" and deleted "and" following "veteran;", in subpara. (D), substituted ";" ; and "for the concluding period, added subparas. (E) and (F), redesignated para. (2) as para. (4), in para. (4), as redesignated, substituted "1993" for "1989", and added paras. (2) and (3).

1991. Act March 22, 1991 (applicable as provided by § 9(d) of such Act, which appears as a note to this section), in subsec. (a)(1), substituted "The United States has an obligation to assist veterans of the Armed Forces in readjusting to civilian life since veterans, by virtue of their military service, have lost opportunities to pursue education and training oriented toward civilian careers. The Federal Government is also continuously concerned with building an effective work force, and veterans constitute a major recruiting source. It is, therefore, the policy of the United States" for "It is the policy of the United States and substituted "disabled veterans and certain veterans of the Vietnam era and of the post-Vietnam era who are qualified for such employment and advancement." for "certain veterans of the Vietnam era and veterans of the post-Vietnam era who are qualified for such employment and advancement.""); in subsec. (b)(1), in subpara. (A), substituted "up to and including the level GS-11 or its equivalent;" for "up to and including the level GS-9 or its equivalent or in the case of a veteran referred to in paragraph (2)(A) of this subsection, the level of GS-11 or its equivalent;" and substituted subparas. (B)-(D) for former subparas. (B) and (C), which read:

"(B) a veteran referred to in paragraph (2) of this subsection shall be eligible for such an appointment during (i) the four-year period beginning on the date of the veteran's last discharge or release from active duty, or (ii) the two-year period beginning on the date of the enactment of the Veterans Education and Employment Amendments of 1989, whichever ends later;

"(C) a veteran of the Vietnam era referred to in paragraph (2) of this subsection who is entitled to disability compensation under the laws administered by the Veterans' Administration or whose discharge or release from active duty was for a disability incurred or aggravated in line of duty shall be eligible for such an appointment without regard to the number of years of education completed by such veteran;".

Such Act further (applicable as above), in subsec. (b)(1), redesignated former subpara. (D) as subpara. (E), in such subpara. (E), substituted a period for ";", and deleted subparas. (E) and (F), which read:

"(E) the requirement of an educational or training program for a veteran receiving such an appointment shall not apply if the veteran has 15 years or more of education; and

"(F) in the case of a veteran who is not a disabled veteran, the veteran may not have completed more than 16 years of education at the time of the veteran's appointment.".

Such Act further (applicable as above), in subsec. (b), in para. (2), substituted subpara. (B) for one which read: "(B) a veteran who served on active duty after the Vietnam era.", substituted para. (3) for one which read "(3) For purposes of paragraph (1)(B)(i) of this subsection, the last discharge or release from a period of active duty shall not include any discharge or release from a period of active duty of less than 90 days of continuous service unless the individual involved is discharged or released for a service-connected disability, for a medical condition which preexisted such service and which the Secretary determines is not service connected, for hardship, or as a result of a reduction in force as described in section 1411(a)(1)(A)(ii)(III) of this title. ", and deleted para. (4) which read (4) No veterans readjustment appointment may be made under authority of this subsection after December 31, 1993.".
Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 2014, as 38 USCS § 4214, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and, in subsec. (g), substituted "section 7722" for "section 241" and "section 7724" for "section 243".

Such Act further substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Act Oct. 10, 1991, in subsec. (b)(2)(A), substituted cl. (i) for one which read: "has a service-connected disability".

1992. Act Oct. 29, 1992, in subsec. (b), in para. (2), substituted subpara. (A) for one which read:

"(A) a veteran of the Vietnam era who--

"(i) is entitled to disability compensation under the laws administered by the Secretary or whose discharge or release from active duty was for a disability incurred or aggravated in line of duty; or

"(ii) during such era, served on active duty in the Armed Forces in a campaign or expedition for which a campaign badge has been authorized; and"

and, in para. (3), in subpara. (A)(ii), substituted "December 31, 1995" for "December 31, 1993" and, in subpara. (B)(ii), substituted "December 31" for "December 18".

2002. Act Nov. 7, 2002 (applicable as provided by § 2(c)(4) of such Act, which appears as a note to this section), in subsec. (a), in para. (1), substituted "life." for "life since veterans, by virtue of their military service, have lost opportunities to pursue education and training oriented toward civilian careers.", substituted "uniquely qualified" for "major", and substituted "qualified covered veterans (as defined in paragraph (2)(B))" for "disabled veterans and certain veterans of the Vietnam era and of the post-Vietnam era", and substituted para. (2) for one which read: "(2) For the purposes of this section, the term 'agency' means a department, agency, or instrumentality in the executive branch."; in subsec. (b), in para. (1), in the introductory matter, substituted "recruitment" for "readjustment", in para. (2), substituted "to qualified covered veterans." for "to--

"(A) a veteran of the Vietnam era; and

"(B) veterans who first became a member of the Armed Forces or first entered on active duty as a member of the Armed Forces after May 7, 1975, and were discharged or released from active duty under conditions other than dishonorable.",

and substituted para. (3) for one which read:

"(3)(A) Except as provided in subparagraph (C) of this paragraph, a veteran of the Vietnam era may receive an appointment under this section only during the period ending--

"(i) 10 years after the date of the veteran's last discharge or release from active duty; or

"(ii) December 31, 1995, whichever is later.

"(B) Except as provided in subparagraph (C) of this paragraph, a veteran described in paragraph (2)(B) of this subsection may receive such an appointment only within the 10-year period following the later of--

"(i) the date of the veteran's last discharge or release from active duty; or

"(C) The limitations of subparagraphs (A) and (B) of this paragraph shall not apply to a veteran who has a service-connected disability rated at 30 percent or more.

"(D) For purposes of clause (i) of subparagraphs (A) and (B) of this paragraph, the last discharge or release from active duty shall not include any discharge or release from active duty of less than ninety days of continuous service unless the individual involved is discharged or released for a service-connected disability, for a medical condition which preexisted such service and which the Secretary determines is not service connected, for hardship, or as a result of a reduction in force described in section 3011(a)(1)(A)(ii)(III) of this title or of an involuntary separation described in section 3018A(a)(1)."

in subsec. (e)(2)(B), deleted "of the Vietnam era" preceding "who are entitled"; and, in subsec. (g), substituted "qualified covered veterans" for "qualified special disabled veterans and qualified veterans of the Vietnam era", and substituted "under section 1712A of this title." for "under section 1712A of this title to veterans of the Vietnam era.".

2006. Act June 15, 2006, in subsec. (g), substituted "section 6303" for "section 7722" and substituted "section 6305" for "section 7724".

Other provisions:

Information to be included in reports. Act Oct. 13, 1978, P. L. 95-454, Title III, § 307(b)(2), 92 Stat. 1147 (effective 90 days after 10/13/78, as provided by § 907 of that Act); amended Act Aug. 6, 1991, P. L. 102-83, § 5(c)(2), 105 Stat. 406, provided: "the Director of the Office of Personnel Management shall include in the reports required by section 4214(d) of title 38, United States Code [subsec. (d) of this section], the same type of information regarding the use of the authority provided in section 3112 of title 5, United States Code, (as added by paragraph (1) of this subsection), as it required by such section 2014 [this section] with respect to the use of the authority to make veterans readjustment appointments.".

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of this Oct. 12, 1982 amendment of the section, see § 5 of such Act, which appears as 10 USCS § 101 note.


Termination of reporting requirements. For termination, effective May 15, 2000, of provisions of subsec. (e) of this section relating to periodic reports to Congress, see § 3003 of Act Dec. 21, 1995, P. L. 104-66, which appears as 31 USCS § 1113 note. See also page 188 of House Document No. 103-7.

Application of Nov. 7, 2002 amendments. Act Nov. 7, 2002, P. L. 107-288, § 2(c)(4), 116 Stat. 2036, provides: "The amendments made by this subsection [amending this section] shall apply to qualified covered veterans without regard to any limitation relating to the date of the veteran's last discharge or release from active duty that may have otherwise applied under section 4214(b)(3) as in effect on the date before the date of the enactment of this Act.".

Code of Federal Regulations

Office of Personnel Management-Veterans recruitment appointments, 5 CFR Part 307
Employment and Training Administration, Department of Labor-Administrative provisions governing the Job Service System, 20 CFR Part 658

Research Guide

Am Jur:
45A Am Jur 2d, Job Discrimination §§ 21-26, 40-104
45B Am Jur 2d, Job Discrimination § 760
77 Am Jur 2d, Veterans and Veterans' Laws §§ 95, 100

Law Review Articles:
Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002
Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002
Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002

1. Generally
2. Appointment
3. Promotion
4. Removal
5. Private right of action

1. Generally
Office of Personnel Management has authority to regulate veterans readjustment appointments, which are subject to OPM investigation, and appointees must meet suitability standards; in order to render this authority meaningful and to enforce suitability standards, OPM must be able to direct action, including directing employee's removal, when violation is found. Logan v OPM (1988, MSPB) 38 MSPR 615

Agency did not violate veteran's preference rights since both appellant and selectee were in same preference category under 38 USCS § 4214. Whitney v Dep't of the Army (2002, MSPB) 92 MSPR 423

2. Appointment
Postal employee was not veterans readjustment appointment (VRA) under 38 USCS § 4214, even though she was eligible for VRA status, and was, thus, not exempted from requirement that she complete one year of current continuous service before she was eligible to appeal her termination to Merit System Protection Board, where she was hired by Postal Service from hiring worksheet. Howard v Henderson (2000, MD Ala) 112 F Supp 2d 1276

Arbitrator's award that agency violated 38 USCS § 2014 by failing to select one of grievants who were disabled Viet Nam veterans was erroneous since statute does not require selection of disabled veterans for positions for which they are as qualified as other candidates. AFGE, Local 12 & Dept. of Labor (1991) 38 FLRA No. 126

3. Promotion
Navy electrician's handicap discrimination claim must fail, even though he was passed over for promotion to WG-10 twice and could not get shipboard experience due to 10 period disability of his left knee, because evidence showed that lack of shipboard experience did not preclude WG-10 promotion, and that training, experience, and monetary awards, rather than Navy's lack of "affirmative action" to promote employees with disabilities, were factors that led to electrician's

Although 38 USCS § 4214(a)(1) declares that promotion of employment and job advancement opportunities of certain veterans is policy of United States, such is not sufficient basis on which to find waiver of sovereign immunity; thus, statute does not create private right of action for any alleged failure to adhere to such policy. Cook v Helfer (1996, DC Mass) 153 BNA LRRM 2155, 69 CCH EPD ¶ 44488, 133 CCH LC ¶ 11806

Pursuant to OPM regulations, 45-year-old federal employee's veteran status made him ineligible for noncompetitive promotion; therefore, fact that student intern's position was noncompetitively converted to full-time position that had not been offered to employee did not establish prima facie case of age discrimination under 29 USCS § 633a, part of Age Discrimination in Employment Act. Whitman v Mineta (2005, DC Alaska) 382 F Supp 2d 1130

4. Removal

Board lacked jurisdiction of removal appeal of temporary employees who thought their appointments were Veterans Readjustment Act appointments pursuant to provision for VRA appointee to receive protected position within competitive service of federal employment after two years' service, since SF-50 forms with which they were hired plainly stated that positions were temporary and they must have known they were receiving fewer benefits—notably health care—than employees in competitive service. Anderson v Merit Sys. Protection Bd. (1993, CA FC) 12 F.3d 1069, 145 BNA LRRM 2008, cert den (1994) 512 US 1204, 129 L Ed 2d 809, 114 S Ct 2673, 146 BNA LRRM 2640

Removal of employee who understated his level of education, thereby qualifying for appointment under Veterans Readjustment Assistance Act of 1974 (38 USCS § 2014 [now 38 USCS § 4214]), was not warranted where removal action was not commenced for period of 2 years subsequent to employee notifying agency that he had more education than permitted by VRA, and further where agency converted employee to competitive position and later promoted him within competitive service, such that employee had completed his probationary period and had been performing satisfactorily in competitive service for 2 years when agency removed him. Perry v VA (1987, MSPB) 32 MSPR 81

Veteran, appointed under Veterans' Administration Programs Extension Act of 1978 (92 Stat. 1820), who was discharged as result of veteran's failure to disclose prior arrest and conviction for carrying concealed weapon, convictions for driving with expired vehicle license, and court martial, after completion of more than one year of employment and promotion to employee entitled to procedural protections, including administrative review of removal under 5 USCS §§ 7511 et seq; appointment obtained through fraud or misrepresentation is not nullity which is voidable at option of agency. Devine v Sutermeister (1983, CA) 724 F.2d 1558, 116 BNA LRRM 2495 (superseded by statute as stated in Bloomer v HHS (1992, CA) 966 F.2d 1436, 92 Daily Journal DAR 8073)

5. Private right of action

Since 38 USCS § 4214 does not waive federal government's sovereign immunity, federal employee cannot maintain action for money damages against federal employer thereunder; further, there is no private right of action under 38 USCS § 4214. Antol v Perry (1996, CA3 Pa) 82 F.3d 1291, 16 ADD 653, 5 AD Cas 769, 70 BNA FEP Cas 993

Act's express requirement that federal agency include affirmative action plan for disabled veterans in its Rehabilitation Act affirmative action plan does not purport to waive sovereign immunity or to create express cause of action, hence veteran cannot maintain action for money damages against agency under Act. Antol v Perry (1996, CA3 Pa) 82 F.3d 1291, 16 ADD 653, 5 AD Cas 769, 70 BNA FEP Cas 993

Court of Appeals did not read Rehabilitation Act as extending its private remedy to rights contained in Vietnam Era Veterans' Readjustment Assistance Act; therefore, no private remedy existed for plaintiff employee on his challenge to enforce defendant federal agency's hiring and
retention policy for disabled veterans. Seay v TVA (2003, CA6 Tenn) 339 F.3d 454, 92 BNA FEP Cas 577, 2003 FED App 275P

Contractual employment relationship with U.S. was not established by plaintiff, who received veterans' readjustment appointment to excepted civil service position with U.S. Customs Service, since employment was based on appointment under statutory authority of 38 USCS § 2014 [now 38 USCS § 4214] and 5 USCS §§ 3301 and 3302; thus, plaintiff could not maintain suit in Claims Court regarding unlawful removal from employment under claim sounding in contract. Fahy v United States (1988) 14 Cl Ct 470, affd without op (1988, CA) 864 F.2d 148, cert den (1989) 491 US 909, 105 L Ed 2d 705, 109 S Ct 3197


Vietnam veteran denied promotion by Navy to position of WG-10 Electrician states cause of action under 38 USCS § 4214(c), where he alleges Navy discriminated on basis of his handicap, because § 4214(c), by incorporating 29 USCS § 791(b), establishes private right of action. Blizzard v Dalton (1995, ED Va) 876 F Supp 95, 8 ADD 695, 4 AD Cas 514, 148 BNA LRRM 2909 (criticized in Madden v Runyon (1995, ED Pa) 899 F Supp 217, 12 ADD 106, 4 AD Cas 1544) and judgment entered (1995, ED Va) 905 F Supp 331, 13 ADD 999, 67 CCH EPD ¶ 43879

There is no private right of action under 38 USCS § 4214. Ledbetter v City of Topeka (2000, DC Kan) 112 F Supp 2d 1239, 80 CCH EPD ¶ 40655, 48 FR Serv 3d 212, affd (2003, CA10 Kan) 61 Fed Appx 574

38 USCS § 4214 does not provide employee with private cause of action. Fizer-Jordan v Ziglar (2003, ED Mich) 242 F Supp 2d 474, 172 BNA LRRM 2189

§ 4215. Priority of service for veterans in Department of Labor job training programs

(a) Definitions. In this section:
(1) The term "covered person" means any of the following individuals:
   (A) A veteran.
   (B) The spouse of any of the following individuals:
   (i) Any veteran who died of a service-connected disability.
   (ii) Any member of the Armed Forces serving on active duty who, at the time of application for assistance under this section, is listed, pursuant to section 556 of title 37 [37 USCS § 556] and regulations issued thereunder, by the Secretary concerned in one or more of the following categories and has been so listed for a total of more than 90 days: (I) missing in action, (II) captured in line of duty by a hostile force, or (III) forcibly detained or interned in line of duty by a foreign government or power.
   (iii) Any veteran who has a total disability resulting from a service-connected disability.
   (iv) Any veteran who died while a disability so evaluated was in existence.
(2) The term "qualified job training program" means any workforce preparation, development, or delivery program or service that is directly funded, in whole or in part, by the Department of Labor and includes the following:
(A) Any such program or service that uses technology to assist individuals to access workforce development programs (such as job and training opportunities, labor market information, career assessment tools, and related support services).

(B) Any such program or service under the public employment service system, one-stop career centers, the Workforce Investment Act of 1998, a demonstration or other temporary program, and those programs implemented by States or local service providers based on Federal block grants administered by the Department of Labor.

(C) Any such program or service that is a workforce development program targeted to specific groups.

(3) The term "priority of service" means, with respect to any qualified job training program, that a covered person shall be given priority over nonveterans for the receipt of employment, training, and placement services provided under that program, notwithstanding any other provision of law.

(b) Entitlement to priority of service.

(1) A covered person is entitled to priority of service under any qualified job training program if the person otherwise meets the eligibility requirements for participation in such program.

(2) The Secretary of Labor may establish priorities among covered persons for purposes of this section to take into account the needs of disabled veterans and special disabled veterans, and such other factors as the Secretary determines appropriate.

(c) Administration of programs at State and local Levels.

An entity of a State or a political subdivision of the State that administers or delivers services under a qualified job training program shall--

(1) provide information and priority of service to covered persons regarding benefits and services that may be obtained through other entities or service providers; and

(2) ensure that each covered person who applies to or who is assisted by such a program is informed of the employment-related rights and benefits to which the person is entitled under this section.

(d) Addition to annual report.

In the annual report required under section 4107(c) of this title [38 USCS § 4107(c)] for the program year beginning in 2003 and each subsequent program year, the Secretary of Labor shall evaluate whether covered persons are receiving priority of service and are being fully served by qualified job training programs, and whether the representation of veterans in such programs is in proportion to the incidence of representation of veterans in the labor market, including within groups that the Secretary may designate for priority under such programs, if any.

References in text:

The "Workforce Investment Act of 1998", referred to in this section, is Act Aug. 7, 1998, P. L. 105-220, which appears generally as 20 USCS §§ 9201 et seq. and 29 USCS §§ 2801 et seq. For full classification of such Act, consult USCS Tables volumes.

Other provisions:

Requirement to promptly establish one-stop employment services. Act Nov. 7, 2002, P. L. 107-288, § 4(c), 116 Stat. 2044, provides: "By not later than 18 months after the date of the enactment of this Act, the Secretary of Labor shall provide one-stop services and assistance
to covered persons electronically by means of the Internet, as defined in section 231(e)(3) of
the Communications Act of 1934 [47 USCS § 231(e)(3)], and such other electronic means to
enhance the delivery of such services and assistance.".

CHAPTER 43. EMPLOYMENT AND REEMPLOYMENT
RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

SUBCHAPTER I. GENERAL
SUBCHAPTER II. EMPLOYMENT AND REEMPLOYMENT RIGHTS AND
LIMITATIONS; PROHIBITIONS
SUBCHAPTER III. PROCEDURES FOR ASSISTANCE, ENFORCEMENT, AND
INVESTIGATION
SUBCHAPTER IV. MISCELLANEOUS PROVISIONS

Explanatory notes:
Chapter 43 was amended generally by Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3176
(effective with respect to reemployments initiated on or after the first day after the 60-day
period beginning Oct. 13, 1994), and is shown herein as having been added by Act Oct. 13,
1994, P. L. 103-353, without reference to prior amendments. Former chapter 43 "Veterans'
Reemployment Rights" (§§ 4301-4307), as in effect on the day before Oct. 13, 1994, set out
below, continues to apply to reemployments initiated before the end of the 60-day period
beginning Oct. 13, 1994, as provided by § 8 of such Act, which appears as 38 USCS § 4301
note. Former chapter 43, as so in effect, read as follows:

"CHAPTER 43. VETERANS' REEMPLOYMENT RIGHTS

§ 4301. Right to reemployment of inducted persons; benefits protected

"(a) In the case of any person who is inducted into the Armed Forces of the United States
under the Military Selective Service Act (or under any prior or subsequent corresponding law)
for training and service and who leaves a position (other than a temporary position) in the
employ of any employer in order to perform such training and service, and (1) receives a
certificate described in section 9(a) of the Military Selective Service Act [50 USCS Appx. §
459(a)] (relating to the satisfactory completion of military service), and (2) makes application
for reemployment within ninety days after such person is relieved from such training and
service or from hospitalization continuing after discharge for a period of not more than one
year--

"(A) if such position was in the employ of the United States Government, its territories, or
possessions, or political subdivisions thereof, or the District of Columbia, such person
shall--

"(i) if still qualified to perform the duties of such position or able to become requalified
with reasonable efforts by the employer, be restored to such position or to a position
of like seniority, status, and pay; or

"(ii) if not qualified to perform the duties of such position or able to become requalified
with reasonable efforts by the employer, by reason of disability sustained during such
service, but qualified to perform the duties of any other position in the employ of the
employer, be offered employment and, if such person so requests, be employed in
such other position the duties of which such person is qualified to perform as will
provide such person like seniority, status, and pay, or the nearest approximation
thereof consistent with the circumstances in such person's case;

"(B) if such position was in the employ of a State, or political subdivision thereof, or a
private employer, such person shall--
"(i) if still qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or

"(ii) if not qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, by reason of disability sustained during such service, be offered employment and, if such person so requests, be employed by such employer or the employer's successor in interest in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Nothing in this chapter shall excuse noncompliance with any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter.

"(b)(1)(A) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

"(B) In the case of employer-offered health insurance, an exclusion or waiting period may not be imposed in connection with coverage of a health or physical condition of a person entitled to participate in that insurance under subparagraph (A), or a health or physical condition of any other person who is covered by the insurance by reason of the coverage of such person, if--

"(i) the condition arose before or during that person's period of training or service in the Armed Forces;

"(ii) an exclusion or waiting period would not have been imposed for the condition during a period of coverage resulting from participation by such person in the insurance; and

"(iii) the condition of such person has not been determined by the Secretary to be service-connected.

"(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

"(3) Any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.
"(c) The rights granted by subsections (a) and (b) of this section to persons who left the employ of a State or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections.


"§ 4302. Enforcement procedures

"If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 4321(a) [4301(a)], (b)(1), or (b)(3), or 4324 [4304] of this title, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to the benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed a necessary party respondent. No State statute of limitations shall apply to any proceedings under this chapter.


"§ 4303. Reemployment by the United States, territory, possession, or the District of Columbia

"(a) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 4321(a) [4301(a)] and who was employed, immediately before entering the Armed Forces, by any agency in the executive branch of the Government or by any territory or possession, or political subdivision thereof, or by the District of Columbia, shall be so restored or reemployed by such agency or the successor to its functions, or by such territory, possession, political subdivision, or the District of Columbia. In any case in which, upon appeal of any person who was employed, immediately before entering the Armed Forces, by any agency in the executive branch of the Government or by the District of Columbia, the Director of the Office of Personnel Management finds that--

"(1) such agency is no longer in existence and its functions have not been transferred to any other agency; or

"(2) for any reason it is not feasible for such person to be restored to employment by such agency or by the District of Columbia;

the Director shall determine whether or not there is a position in any other agency in the executive branch of the Government or in the government of the District of Columbia for which such person is qualified and which is either vacant or held by a person having a
temporary appointment thereto. In any case in which the Director determines that there is such a position, such person shall be offered employment and, if such person so requests, be employed in such position by the agency in which such position exists or by the government of the District of Columbia, as the case may be. The Director is authorized and directed to issue regulations giving full force and effect to the provisions of this section insofar as they relate to persons entitled to be restored to or employed in positions in the executive branch of the Government or in the government of the District of Columbia, including persons entitled to be reemployed under the last sentence of subsection (b) of this section. The agencies in the executive branch of the Government and the government of the District of Columbia shall comply with such rules, regulations, and orders issued by the Director pursuant to this subsection. The Director is authorized and directed when the Director finds, upon appeal of the person concerned, that any agency in the executive branch of the Government or the government of the District of Columbia has failed or refuses to comply with the provisions of this section, to issue an order specifically requiring such agency or the government of the District of Columbia to comply with such provisions and to compensate such person for any loss of salary or wages suffered by reason of failure to comply with such provisions, less any amounts received by such person through other employment, unemployment compensation, or readjustment allowances. Any such compensation ordered to be paid by the Director shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions, and shall be paid by the head of the agency concerned or by the government of the District of Columbia out of appropriations currently available for salary and expenses of such agency or government, and such appropriations shall be available for such purpose. As used in this chapter, the term 'agency in the executive branch of the Government' means any department, independent establishment, agency, or corporation in the executive branch of the United States Government (including the United States Postal Service and the Postal Rate Commission).

"(b) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 4321(a) [4301(a)] of this title, and who was employed, immediately before entering the Armed Forces, in the legislative branch of the Government, shall be so restored or employed by the officer who appointed such person to the position which such person held immediately before entering the Armed Forces. In any case in which it is not possible for any such person to be restored to or employed in a position in the legislative branch of the Government and such person is otherwise eligible to acquire a status for transfer to a position in the competitive service in accordance with section 3304(c) of title 5, the Director of the Office of Personnel Management shall, upon appeal of such person, determine whether or not there is a position in the executive branch of the Government for which such person is qualified and which is either vacant or held by a person having a temporary appointment thereto. In any case in which the Director determines that there is such a position, such person shall be offered employment and, if such person so requests, be employed in such position by the agency in which such position exists.

"(c) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 4321(a) [4301(a)] of this title and who was employed, immediately before entering the Armed Forces, in the judicial branch of the Government, shall be so restored or reemployed by the officer who appointed such person to the position which such person held immediately before entering the Armed Forces.


"§ 4304. Rights of persons who enlist or are called to active duty; Reserves

"(a) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enlists in the Armed Forces of the United States (other than in a Reserve component) shall be entitled upon release from service under honorable conditions to all of the reemployment rights and other benefits provided for by this chapter in the case of
persons inducted under the provisions of the Military Selective Service Act [50 USCS Appx. §§ 451 et seq.; for full classification of such Act, consult USCS Tables volumes] (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such person's service performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any service, additional or otherwise, performed by such person after August 1, 1961, does not exceed five years, and if the service in excess of four years after August 1, 1961, is at the request and for the convenience of the Federal Government (plus in each case any period of additional service imposed pursuant to law).

"(b)(1) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enters upon active duty (other than for the purpose of determining physical fitness and other than for training), whether or not voluntarily, in the Armed Forces of the United States or the Public Health Service in response to an order or call to active duty shall, upon such person's relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided for by this chapter in the case of persons inducted under the provisions of the Military Selective Service Act [50 USCS Appx. §§ 451 et seq.; for full classification of such Act, consult USCS Tables volumes] (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such active duty performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any such active duty, additional or otherwise, performed after August 1, 1961, does not exceed four years (plus in each case any additional period in which such person was unable to obtain orders relieving such person from active duty).

"(2) Any member of a Reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a Reserve component to active duty shall have the service limitation governing eligibility for reemployment rights under subsection (b)(1) of this section extended by such member's period of such active duty, but not to exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a Reserve component. With respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended, the provisions of this subsection shall apply only when such additional active duty is at the request and for the convenience of the Federal Government.

"(c) Any member of a Reserve component of the Armed Forces of the United States who is ordered to an initial period of active duty for training of not less than twelve consecutive weeks shall, upon application for reemployment within thirty-one days after (1) such member's release from such active duty for training after satisfactory service, or (2) such member's discharge from hospitalization incident to such active duty for training, or one year after such member's scheduled release from such training, whichever is earlier, be entitled to all reemployment rights and benefits provided by this chapter for persons inducted under the provisions of the Military Selective Service Act [50 USCS Appx. §§ 451 et seq.; for full classification of such Act, consult USCS Tables volumes] (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), except that (A) any person restored to or employed in a position in accordance with the provisions of this subsection shall not be discharged from such position without cause within six months after that restoration, and (B) no reemployment rights granted by this subsection shall entitle any person to retention, preference, or displacement rights over any veteran with a superior claim under those provisions of title 5 relating to veterans and other preference eligibles.

"(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 4321(a) [4301(a)] shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such
employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If such an employee is hospitalized incident to active duty for training or inactive duty training, such employee shall be required to report for work at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after such employee's release from active duty for training or inactive duty training, whichever is earlier. If an employee covered by this subsection is not qualified to perform the duties of such employee's position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer or such employer's successor in interest, such employee shall be offered employment and, if such person so requests, be employed by that employer or such employer's successor in interest in such other position the duties of which such employee is qualified to perform as will provide such employee like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such employee's case.

"(e) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 4321(a) [4301(a)] shall be considered as having been on leave of absence during the period required to report for the purpose of being inducted into, entering, or determining, by a preinduction or other examination, physical fitness to enter the Armed Forces. Upon such employee's rejection, upon completion of such employee's preinduction or other examination, or upon such employee's discharge from hospitalization incident to such rejection or examination, such employee shall be permitted to return to such employee's position in accordance with the provisions of subsection (d) of this section.

"(f) For the purposes of subsections (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under section 316, 502, 503, 504, or 505 of title 32 is considered active duty for training. For the purposes of subsection (d) of this section, inactive duty training performed by that member under section 502 of title 32 or section 206, 301, 309 [repealed with respect to administrative functions performed after Sept. 30, 1980, by Act Nov. 9, 1979, P. L. 96-107], 402, or 1002 of title 37 is considered inactive duty training.

"(g) Any member of a Reserve component of the Armed Forces of the United States who is ordered to active duty (other than for training) under section 673b of title 10, United States Code, whether or not voluntarily, shall be entitled to all reemployment rights and benefits provided under subsection (c) of this section for persons ordered to an initial period of active duty for training of not less than twelve consecutive weeks; and shall have the service limitation governing eligibility for reemployment rights under subsections (a) and (b)(1) of this section extended by the period of such active duty, including any period of extension of active duty under section 673b of title 10.

"§ 4305. Assistance in obtaining reemployment

"The Secretary of Labor, through the Office of Veterans' Reemployment Rights, shall render aid in the replacement in their former positions or reemployment of persons who have satisfactorily completed any period of active duty in the Armed Forces or the Public Health Service. In rendering such aid, the Secretary shall use existing Federal and State agencies engaged in similar or related activities and shall utilize the assistance of volunteers.


"§ 4306. Prior rights for reemployment

"In any case in which two or more persons who are entitled to be restored to or employed in a position under the provisions of this chapter or of any other law relating to similar reemployment benefits left the same position in order to enter the Armed Forces, the person who left such position first shall have the prior right to be restored thereto or reemployed on the basis thereof, without prejudice to the reemployment rights of the other person or persons to be restored or reemployed.


[§ 4307. Repealed]


Amendments:


Act Oct. 13, 1994, P. L. 103-353, § 2(a), 108 Stat. 3149, substituted the chapter heading and analysis for ones which read:

"CHAPTER 43. VETERANS' REEMPLOYMENT RIGHTS"

"Section"

"4301. Right to reemployment of inducted persons; benefits protected.

"4302. Enforcement procedures.

"4303. Reemployment by the United States, territory, possession, or the District of Columbia.

"4304. Rights of persons who enlist or are called to active duty; Reserves.

"4305. Assistance in obtaining reemployment.

"4306. Prior rights for reemployment.

"[4307. Repealed]"


Research Guide

Am Jur:
70A Am Jur 2d, Social Security and Medicare § 226

SUBCHAPTER I. GENERAL

§ 4301. Purposes; sense of Congress
(a) The purposes of this chapter [38 USCS §§ 4301 et seq.] are--
   (1) to encourage noncareer service in the uniformed services by eliminating or
       minimizing the disadvantages to civilian careers and employment which can result
       from such service;
   (2) to minimize the disruption to the lives of persons performing service in the
       uniformed services as well as to their employers, their fellow employees, and their
       communities, by providing for the prompt reemployment of such persons upon their
       completion of such service; and
   (3) to prohibit discrimination against persons because of their service in the
       uniformed services.

(b) It is the sense of Congress that the Federal Government should be a model employer
    in carrying out the provisions of this chapter [38 USCS §§ 4301 et seq.].

Explanatory notes:

Another prior § 4301 was redesignated as 38 USCS § 7601.

Effective date of section:
This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as a note to this section.

Amendments:
Act Oct. 9, 1996 (effective as of 10/13/94 as provided by § 313(a) of such Act, which appears as a note to this section), in subsec. (a)(2), deleted "under honorable conditions" following "such service".

Other provisions:


"(a) Reemployment.(1) Except as otherwise provided in this Act [for full classification, consult USCS Tables volumes], the amendments made by this Act [for full classification, consult USCS Tables volumes] shall be effective with respect to reemployments initiated on or after the first day after the 60-day period beginning on the date of enactment of this Act.

"(2) The provisions of chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], in effect on the day before such date of enactment, shall continue to apply to reemployments initiated before the end of such 60-day period.

"(3) In determining the number of years of service that may not be exceeded in an employee-employer relationship with respect to which a person seeks reemployment under chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], as in effect before or after the date of enactment of this Act, there shall be included all years of service without regard to whether the periods of service occurred before or after such date of enactment unless the period of service is exempted by the chapter 43 [38 USCS §§ 4301 et seq.] that is applicable, as provided in paragraphs (1) and (2), to the reemployment concerned. Any service begun up to 60 days after the date of the enactment of this Act, which is served up to 60 days after the date of the enactment of this Act pursuant to orders issued under section 502(f) of title 32, United States Code, shall be considered under chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], as in effect on the day before such date of enactment. Any service pursuant to orders issued under such section 502(f) served after 60 days after the date of the enactment of this Act, regardless of when begun, shall be considered under the amendments made by this Act [for full classification, consult USCS Tables volumes].

"(4) A person who initiates reemployment under chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], during or after the 60-day period beginning on the date of enactment of this Act and whose reemployment is made in connection with a period of service in the uniformed services that was initiated before the end of such 60-day period shall be deemed to have satisfied the notification requirement of section 4312(a)(1) of title 38, United States Code, as provided in the amendments made by this Act, if the person complied with any applicable notice requirement under chapter 43, United States Code [38 USCS §§ 4301 et seq.], as in effect on the day before the date of enactment of this Act.

"(b) Discrimination. The provisions of section 4311 of title 38, United States Code, as provided in the amendments made by this Act, and the provisions of subchapter III of chapter 43 of such title [38 USCS §§ 4321 et seq.], as provided in the amendments made by this Act [for full classification, consult USCS Tables volumes], that are necessary for the implementation of such section 4311 shall become effective on the date of enactment of this Act.

"(c) Insurance.(1) The provisions of section 4316 of title 38, United States Code, as provided in the amendments made by this Act, concerning insurance coverage (other than health) shall become effective with respect to furloughs or leaves of absence initiated on or after the date of enactment of this Act.

"(2) With respect to the provisions of section 4317 of title 38, United States Code, as provided in the amendments made by this Act, a person serving a period of service in
the uniformed services on the date of enactment of this Act, or a family member or personal representative of such person, may, after the date of enactment of this Act, elect to reinstate or continue a health plan as provided in such section 4317. If such an election is made, the health plan shall remain in effect for the remaining portion of the 18-month period that began on the date of such person's separation from civilian employment or the period of the person's service in the uniformed service, whichever is the period of lesser duration.

"(d) Disability.(1) Section 4313(a)(3) of chapter 43 of title 38, United States Code, as provided in the amendments made by this Act, shall apply to reemploysments initiated on or after August 1, 1990.

"(2) Effective as of August 1, 1990, section 4307 of title 38, United States Code (as in effect on the date of enactment of this Act), is repealed, and the table of sections at the beginning of chapter 43 of such title (as in effect on the date of enactment of this Act) is amended by striking out the item relating to section 4307.

"(e) Investigations and subpoenas. The provisions of section 4326 of title 38, United States Code, as provided in the amendments made by this Act, shall become effective on the date of enactment of this Act and apply to any matter pending with the Secretary of Labor under section 4305 of title 38, United States Code, as of that date.

"(f) Previous actions. Except as otherwise provided, the amendments made by this Act [for full classification, consult USCS Tables volumes] do not affect reemploysments that were initiated, rights, benefits, and duties that matured, penalties that were incurred, and proceedings that begin before the end of the 60-day period referred to in subsection (a).

"(g) Rights and benefits relative to notice of intent not to return. Section 4316(b)(2) of title 38, United States Code, as added by the amendments made by this Act, applies only to the rights and benefits provided in section 4316(b)(1)(B) and does not apply to any other right or benefit of a person under chapter 43 of title 38, United States Code. Such section shall apply only to persons who leave a position of employment for service in the uniformed services more than 60 days after the date of enactment of this Act.

"(h) Employer pension benefit plans.(1) Nothing in this Act [for full classification, consult USCS Tables volumes] shall be construed to relieve an employer of an obligation to provide contributions to a pension plan (or provide pension benefits), or to relieve the obligation of a pension plan to provide pension benefits, which is required by the provisions of chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], in effect on the day before this Act takes effect.

"(2) If any employee pension benefit plan is not in compliance with section 4318 of such title or paragraph (1) of this subsection on the date of enactment of this Act, such plan shall have two years to come into compliance with such section and paragraph.

"(i) Definition. For the purposes of this section, the term 'service in the uniformed services' shall have the meaning given such term in section 4303(13) of title 38, United States Code, as provided in the amendments made by this Act."


"(a) In general. Except as provided in subsection (b), the amendments made by this subtitle [for full classification, consult USCS Tables volumes] shall take effect as of October 13, 1994.

"(b) Reorganized Title 10 references. The amendments made by clause (i), and subclauses (I), (III), and (IV) of clause (ii), of section 311(4)(B) [amending 38 USCS § 4312(c)(3), (4)(A), (C), and (E)] shall take effect as of December 1, 1994."

Demonstration project for referral of USERRA claims against Federal agencies to the Office of Special Counsel. Act Dec. 10, 2004, P. L. 108-454, Title II, Subtitle A, § 204, 118 Stat. 3606, provides:
“(a) Establishment of project. The Secretary of Labor and the Office of Special Counsel shall carry out a demonstration project under which certain claims against Federal executive agencies under the Uniformed Services Employment and Reemployment Rights Act [Act Oct. 13, 1994, P. L. 103-353 (38 USCS §§ 4301 generally; for full classification, consult USCS Tables volumes)] under chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], are referred to, or otherwise received by, the Office of Special Counsel for assistance, including investigation and resolution of the claim as well as enforcement of rights with respect to the claim.

“(b) Referral of all prohibited personnel action claims to the Office of Special Counsel.(1) Under the demonstration project, the Office of Special Counsel shall receive and investigate all claims under the Uniformed Services Employment and Reemployment Rights Act [Act Oct. 13, 1994, P. L. 103-353 (38 USCS §§ 4301 generally; for full classification, consult USCS Tables volumes)] with respect to Federal executive agencies in cases where the Office of Special Counsel has jurisdiction over related claims pursuant to section 1212 of title 5, United States Code.

“(2) For purposes of paragraph (1), a related claim is a claim involving the same Federal executive agency and the same or similar factual allegations or legal issues as those being pursued under a claim under the Uniformed Services Employment and Reemployment Rights Act [Act Oct. 13, 1994, P. L. 103-353 (38 USCS §§ 4301 generally; for full classification, consult USCS Tables volumes)].

“(c) Referral of other claims against Federal executive agencies.(1) Under the demonstration project, the Secretary-

“(A) shall refer to the Office of Special Counsel all claims described in paragraph (2) made during the period of the demonstration project; and

“(B) may refer any claim described in paragraph (2) filed before the demonstration project that is pending before the Secretary at the beginning of the demonstration project.

“(2) A claim referred to in paragraph (1) is a claim under chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], against a Federal executive agency by a claimant with a social security account number with an odd number as its terminal digit, or, in the case of a claim that does not contain a social security account number, a case number assigned to the claim with an odd number as its terminal digit.

“(d) Administration of demonstration project.(1) The Office of Special Counsel shall administer the demonstration project. The Secretary shall cooperate with the Office of Special Counsel in carrying out the demonstration project.

“(2) In the case of any claim referred, or otherwise received by, to the Office of Special Counsel under the demonstration project, any reference to the ‘Secretary’ in sections 4321, 4322, and 4326 of title 38, United States Code, is deemed a reference to the ‘Office of Special Counsel’.

“(3) In the case of any claim referred to, or otherwise received by, the Office of Special Counsel under the demonstration project, the Office of Special Counsel shall retain administrative jurisdiction over the claim.

“(e) Period of project. The demonstration project shall be carried out during the period beginning on the date that is 60 days after the date of the enactment of this Act, and ending on September 30, 2007.

“(f) Evaluations and report.(1) The Comptroller General of the United States shall conduct periodic evaluations of the demonstration project under this section.
"(2) Not later than April 1, 2007, the Comptroller General shall submit to Congress a report on the evaluations conducted under paragraph (1). The report shall include the following information and recommendations:

"(A) A description of the operation and results of the demonstration program, including-

"(i) the number of claims described in subsection (c) referred to, or otherwise received by, the Office of Special Counsel, and the number of such claims referred to the Secretary of Labor; and

"(ii) for each Federal executive agency, the number of claims resolved, the type of corrective action obtained, the period of time for final resolution of the claim, and the results obtained.

"(B) An assessment of whether referral to the office of special counsel of claims under the demonstration project-

"(i) improved services to servicemembers and veterans; or

"(ii) significantly reduced or eliminated duplication of effort and unintended delays in resolving meritorious claims of those servicemembers and veterans.

"(C) An assessment of the feasibility and advisability of referring all claims under chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], against Federal executive agencies to the Office of Special Counsel for investigation and resolution.

"(D) Such other recommendations for administrative action or legislation as the Comptroller General determines appropriate.

"(g) Definitions. In this section:

"(1) The term 'Office of Special Counsel' means the Office of Special Counsel established by section 1211 of title 5, United States Code.

"(2) The term 'Secretary' means the Secretary of Labor.

"(3) The term 'Federal executive agency' has the meaning given that term in section 4303(5) of title 38, United States Code.".

Code of Federal Regulations
Office of Personnel Management-Excepted service, 5 CFR Part 213
Office of Personnel Management-Restoration to duty from uniformed service or compensable injury, 5 CFR Part 353

Cross References
This section is referred to in 10 USCS § 706

Research Guide

Federal Procedure:
16 Moore's Federal Practice (Matthew Bender 3d ed.), ch 105, Other Subject Matter Jurisdiction Statutes § 105.45
18 Moore's Federal Practice (Matthew Bender 3d ed.), ch 133, Intersystem Preclusion § 133.42
23 Moore's Federal Practice (Matthew Bender 3d ed.), ch 540, Veterans, Seamen, and Military Cases § 540.02
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:77

Am Jur:
32 Am Jur 2d, Federal Courts § 173
45A Am Jur 2d, Job Discrimination §§ 21-26, 40-104
45B Am Jur 2d, Job Discrimination § 760
48 Am Jur 2d, Labor and Labor Relations § 704

Forms:
10B Am Jur Legal Forms 2d (2001), Labor and Labor Relations § 159:535

Annotations:
What constitutes denial of "incidents or advantages of employment" under 38 USCS § 2021(b)(3) which may not be denied employee because of obligation as member of reserve component of Armed Forces. 51 ALR Fed 893
Applicability of doctrine of laches to bar veterans' re-employment claims where there is delay by government officials and agencies in rendering veterans' re-employment aid pursuant to 38 USCS § 2025. 53 ALR Fed 451
When does sale or reorganization exempt business from re-employment requirements of military veterans' re-employment laws (38 USCS §§ 2021 et seq.). 63 ALR Fed 132
Applicability, to fringe benefits, of Vietnam Era Veterans' Readjustment Assistance Act provision establishing veterans' reemployment rights (38 USCS § 2021). 83 ALR Fed 908
Sufficiency of veteran's application for re-employment under 38 USCS §§ 2021 et seq. 103 ALR Fed 575
Re-employment of discharged servicemen. 29 ALR2d 1279
Rights of non-civil service public employees, with respect to discharge or dismissal, under state veterans' tenure statutes. 58 ALR2d 960

Law Review Articles:
Haggart. Veterans' Re-employment Right and the "Escalator Principle." 51 Boston U L Rev 539, Fall 1971
Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002

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Gisonny; Lindgren; Shultz. New law expands veterans' employment rights. 20 Empl Rel LJ 641, Spring 1995

Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002

Re-employment Rights for Veterans. 80 Harvard L Rev 142, 1966

Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002

Ennis. Rights and obligations of employees entering active military service. 41 Lab L J 780, November 1990

Ingold; Dunlap. When Johnny (Joanny) comes marching home: job security for the returning service member under the Veterans' Reemployment Rights Act. 132 Mil L Rev 175, Spring 1991


Fernandez. The need for the expansion of military reservists' rights in furtherance of the total force policy: a comparison of the USERRA and ADA. 14 St Thomas L Rev 859, Summer 2002

1. Generally

2. Purpose

3. Construction, generally

4. -Amendments

5. Application, generally

6. -Reserve and national guard personnel

7. -Local government employees

1. Generally

Principle underlying legislation protecting re-employment rights of veterans is that one who is called to colors is not to be penalized on his return by reason of his absence from his civilian job. Tilton v Missouri P. R. Co. (1964) 376 US 169, 11 L Ed 2d 590, 84 S Ct 595, 55 BNA LRRM 2369, 48 CCH LC ¶ 18747

It would be going beyond intended Congressional purpose if veteran were given right to demand greater privileges upon his return than he would have had he not gone into service. McCarthy v M & M Transp. Co. (1947, CA1 Mass) 160 F.2d 322, 19 BNA LRRM 2327, 12 CCH LC ¶ 63613

Predecessor to statute merely guaranteed returning serviceman seniority rights he would have had had he not entered service; it did not create or vest in veteran additional rights beyond what he would have had he not gone into service. McKinney v Missouri-Kansas-Texas R. Co. (1956, CA10 Okla) 240 F.2d 8, 39 BNA LRRM 2312, 31 CCH LC ¶ 70418, affd (1958) 357 US 265, 2 L Ed 2d 1305, 78 S Ct 1222, 35 CCH LC ¶ 71613

If employer has sufficient cause to terminate employee veteran or reservist at time he leaves for active service or training, VRRA does not require employer to reinstate employee before employer terminates him for cause; employer could have terminated employee for his receipt of sexually explicit materials at office since his boss had policy against having sexually explicit materials in office and court found that employer knew that his actions were not within reasonably and ordinarily accepted standards of personal conduct expected of employees in public district attorney's office. Jordan v Jones (1996, CA5 Tex) 84 F.3d 729, 152 BNA LRRM 2657, 133 CCH LC ¶ 11800, cert den (1996) 519 US 976, 136 L Ed 2d 325, 117 S Ct 412

Because military reservist and National Guard employee plaintiffs took position before magistrate judge that four-year residual statute of limitations of 28 USCS § 1658 applied to their Uniform Services Employment and Reemployment Rights Act claims, and court rendered
judgment to that effect, plaintiffs waived any claim to relief beyond four years prior to date on which their complaint was filed and court of appeals would not consider their argument that no statute of limitations applied to their USERRA claims. Rogers v City of San Antonio (2004, CA5 Tex) 392 F.3d 758, 176 BNA LRRM 2129, 85 CCH EPD ¶ 41800

Principal who sued members of school board, alleging they violated Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 USCS § 4301 et seq., when they terminated her employment, was not entitled to recover damages under 42 USCS § 1983 for violations of USERRA, and Court of Appeals dismissed member's appeal from district court's ruling that they did not have qualified immunity from liability because appeal was moot. Morris-Hayes v Bd. of Educ. (2005, CA2 NY) 423 F.3d 153, 178 BNA LRRM 2001, 86 CCH EPD ¶ 42089, 151 CCH LC ¶ 10561, 151 CCH LC ¶ 60076

Former employee was not entitled to full federal retirement benefits where he did not have valid civil service reemployment rights following his service in Air National Guard. Moravec v OPM (2004, CA FC) 393 F.3d 1263

Defendant was entitled to judgment on pleadings on plaintiff's state public policy claim for wrongful discharge because Uniformed Services Employment and Reemployment Rights Act (USERRA) provided its own adequate remedy, which foreclosed need for separate public policy tort claim; USERRA's provision for compensatory damages served to make plaintiff whole and, even without punitive damages, USERRA's provision for liquidated damages operated to punish defendant. Schmauch v Honda of Am. Mfg., Inc. (2003, SD Ohio) 311 F Supp 2d 631

2. Purpose

Predecessor to statute manifested Congressional purpose to provide as nearly as possible that persons called to served in Armed Forces should resume their old employment without any loss because of such service. Accardi v Pennsylvania R. Co. (1966) 383 US 225, 15 L Ed 2d 717, 86 S Ct 768, 1 EBC 1016, 61 BNA LRRM 2385, 53 CCH LC ¶ 11073

Protecting veterans from loss of rewards for continuous employment with same employer when break in employment resulted from response to country’s military needs was purpose of predecessor statute, which provided that employee who left employment to enter military is to be restored, upon his return, to former position or position of like seniority, status, and pay. Alabama Power Co. v Davis (1977) 431 US 581, 52 L Ed 2d 595, 97 S Ct 2002, 1 EBC 1158, 95 BNA LRRM 2569, 81 CCH LC ¶ 13255

Primary purpose of Congress is to preserve for veterans upon return from service employment status they occupied at time they left for service to give them right to receive back same position they occupied at time they entered military service of their country or position of like seniority, status, and pay. Meehan v National Supply Co. (1947, CA10 Okla) 160 F.2d 346, 12 CCH LC ¶ 63645; Arkansas Oak Flooring Co. v Louisiana & A. R. Co. (1948, CA5 La) 166 F.2d 98, cert den (1948) 334 US 828, 92 L Ed 1756, 68 S Ct 1338

Prediscessor to statute was intended to provide for rehabilitation of returning veteran so that he might be equipped to enter highly competitive world of job finding without handicap of long absence from work and to provide for his financial stability for period of at least one year following discharge from service. John S. Doane Co. v Martin (1947, CA1 Mass) 164 F.2d 537, 20 BNA LRRM 2445, 13 CCH LC ¶ 63917; Cummings v Hubbell (1948, DC Pa) 76 F Supp 453, 22 BNA LRRM 2109, 15 CCH LC ¶ 64562; Marque v Stern (1950, DC Pa) 88 F Supp 306, 25 BNA LRRM 2375

Clearly expressed intention of Congress is twofold: first, to protect veteran by insuring him re-employment, and second, to give employer leeway in adjusting to dislocations caused by departure of men in great numbers to fill armed services. Bova v General Mills, Inc. (1949, CA6 Ohio) 173 F.2d 138, 23 BNA LRRM 2351, 16 CCH LC ¶ 64954

Former section 8 of Title 50 Appx did not impose penalty on employer who wrongfully denied reinstatement to veteran, but its primary purpose was to aid veteran who, until he had been reinstated, was unable to re-establish himself as wage earner in his proper field of endeavor.
Object of predecessor to statute was to make it possible for persons whose skills had been blunted by war service to regain them by actual usage in course of regular employment and to provide stabilized income for veteran during period of readjustment.  Dacey v Bethlehem Steel Co. (1946, DC Mass) 66 F Supp 161, 18 BNA LRRM 2060, 11 CCH LC ¶ 63177

Predecessor statute was designed to protect rights of veteran which he had at time of his entry into service and to preserve them for one year after his restoration thereto.  Grubbs v Ingalls Iron Works Co. (1946, DC Ala) 66 F Supp 550, 18 BNA LRRM 2184, 11 CCH LC ¶ 63266

It was purpose of predecessor statute to restore to anyone who had left his employment in order to enter military service same status which he had prior to enlistment or induction.  Parbilla v Velarde (1946, DC Puerto Rico) 67 F Supp 260, 18 BNA LRRM 2448, 11 CCH LC ¶ 63348

Purpose of guarantee of year's employment to returning serviceman is to return him to his position so that he might be rehabilitated by chance to do things which he had left when he entered his country's defense activities; another purpose is that while in service he should be able to render best he has for his country unworried by spectre of no payment during first year after he returns to civilian life.  Niemiec v Seattle Rainier Baseball Club, Inc. (1946, DC Wash) 67 F Supp 705, 18 BNA LRRM 2189, 11 CCH LC ¶ 63258

Object of re-employment provision is to restore soldier to position he left without any greater setback in private pursuit or career of returning soldier than is unavoidable.  Hoyer v United Dressed Beef Co. (1946, DC Cal) 67 F Supp 730, 18 BNA LRRM 2180, 11 CCH LC ¶ 63271

Predecessor statute was intended to protect veteran from loss of ground in his employment by reason of his service in armed forces, by requiring the employer to restore veteran to his former position, or to position of like seniority, status, and pay; and, in so doing, to consider veteran's time spent in armed forces as time spent in his employment.  Daniels v Barfield (1947, DC Pa) 71 F Supp 884, 19 BNA LRRM 2576

It was intent of Congress that veterans should suffer no detriment with reference to their employment by having left their jobs to serve their country.  Mouell v United Mine Workers (1948, DC W Va) 81 F Supp 151, 23 BNA LRRM 2001, 15 CCH LC ¶ 64845

By providing for one year of re-employment free from threat of arbitrary dismissal, veteran is enabled to regain his proficiency in old job, to become acquainted with any new methods which may have come into use and otherwise equip himself to compete on equal footing with those who remained behind.  Mouell v United Mine Workers (1948, DC W Va) 81 F Supp 151, 23 BNA LRRM 2001, 15 CCH LC ¶ 64845

Purpose of former Veterans' Reemployment Rights Act was to avoid penalizing veteran on his return from service by reason of his absence from his civilian job.  Beard v Norfolk & W. R. Co. (1980, WD Va) 484 F Supp 758, 105 BNA LRRM 3001, 88 CCH LC ¶ 11835

3. Construction, generally

Predecessor to 38 USCS §§ 2021 et seq., providing for protection of discharged veterans on return to civilian employment, was to be construed as liberal for benefit of veteran as interplay of separate provisions permitted.  Fishgold v Sullivan Drydock & Repair Corp. (1946) 328 US 275, 90 L Ed 1230, 66 S Ct 1105, 18 BNA LRRM 2075, 11 CCH LC ¶ 51232, 167 ALR 110;  Kay v General Cable Corp. (1944, CA3 NJ) 144 F.2d 653, 15 BNA LRRM 523, 10 CCH LC ¶ 62887;  Levine v Berman (1947, CA7 Ill) 161 F.2d 386, 20 BNA LRRM 2102, 12 CCH LC ¶ 63746, cert den (1947) 332 US 792, 92 L Ed 374, 68 S Ct 102, 20 BNA LRRM 2677;  King v Southwestern Greyhound Lines, Inc. (1948, CA10 Okla) 169 F.2d 497, 22 BNA LRRM 2404, 15 CCH LC ¶ 64685, cert den (1948) 335 US 891, 93 L Ed 428, 69 S Ct 245, 23 BNA LRRM 2137

Various provisions for re-employment of returning veterans should be given liberal construction in favor of veteran applicant for re-employment as long as violence is not done to language of statute.  Tilton v Missouri P. R. Co. (1964) 376 US 169, 11 L Ed 2d 590, 84 S Ct 595, 55 BNA LRRM 2369, 48 CCH LC ¶ 18747
Service acts are to be liberally construed. Smith v Missouri Pacific Transp. Co. (1963, CA8 Ark) 313 F.2d 676, 52 BNA LRRM 2547, 46 CCH LC ¶ 18071 (ovrd in part as stated in Paisley v City of Minneapolis (1996, CA8 Minn) 79 F.3d 722, 151 BNA LRRM 2948, 132 CCH LC ¶ 11702) and (criticized in Wrigglesworth v Brumbaugh (2000, WD Mich) 121 F Supp 2d 1126, 166 BNA LRRM 2560)

Uniformed Services Employment and Reemployment Rights Act requires employee to show irreparable harm to obtain preliminary injunctive relief; employee’s claim that termination would have resulted in deterioration of his skills as physician was not irreparable harm and, likewise, lost income, damaged reputation, and inability to find another job was not irreparable harms. Bedrossian v Northwestern Mem. Hosp. (2005, CA7 Ill) 409 F.3d 840, 177 BNA LRRM 2471, 151 CCH LC ¶ 10491

Historical development of former 38 USCS § 4301 shows that Congress intended it to be interpreted broadly in favor of those returning from military service. Nichols v Department of Veterans Affairs (1993, CA FC) 11 F.3d 160, 94 Daily Journal DAR 3809, 144 BNA LRRM 2952

To support claim of discrimination under Uniformed Services Employment and Reemployment Rights Act of 1994, 38 USCS §§ 4301-4333, it must be shown that employee’s military service was “substantial or motivating factor” in employment action. Crawford v DOT (2004, CA FC) 373 F.3d 1155

Predecessor statute was liberally construed to effectuate its important purposes of policy to assure employees of opportunity to resume compensated job which they have left to serve their country in time of war. McClayton v W. B. Cassell Co. (1946, DC Md) 66 F Supp 165, 18 BNA LRRM 2096, 11 CCH LC ¶ 63195

Predecessor statute must be liberally construed to effect its purpose of protecting veteran so that he will not be penalized on his return by reason of his absence from his civilian job, and so that he might gain by his service for his country advantage which law withheld from those who stayed behind. Freeman v Gateway Baking Co. (1946, DC Ark) 68 F Supp 383, 11 CCH LC ¶ 63340

Predecessor statute was liberally construed for benefit of veteran; words must be given their natural, ordinary, and familiar meaning unless Congress has definitely indicated words should be construed otherwise; plain, obvious, and rational meanings are always to be preferred to any curious, narrow, and strained construction; nature of disputed relationship should be considered in light of purpose which Congress intended to accomplish. Bozar v Central Pennsylvania Quarry, Stripping & Constr. Co. (1947, DC Pa) 73 F Supp 803, 20 BNA LRRM 2663, 13 CCH LC ¶ 64077

Construction must not be carried to point where it would do violence to statute. Woods v Glen Alden Coal Co. (1947, DC Pa) 73 F Supp 871, 20 BNA LRRM 2681, 13 CCH LC ¶ 64089

Courts were not permitted to go beyond expressed intention of Congress and read into predecessor to statute provisions that Congress failed to include even though it appeared that existing provisions were not broad enough to protect every veteran and require his reinstatement in position that he held when he entered armed services. Hudspeth v Standard Oil Co. (1947, DC Ark) 74 F Supp 123, 20 BNA LRRM 2624, 13 CCH LC ¶ 64023, affd (1948, CA8 Ark) 170 F.2d 418, 23 BNA LRRM 2055, 15 CCH LC ¶ 64810

There is nothing to show that Congress meant to discriminate in any manner between persons enlisting for first or second time. Nunn v Humphrey (1948, DC Pa) 79 F Supp 8

It would be anomalous for predecessor to statute to be interpreted so as to give veteran alternative rights against successive employers. In re United States ex rel. Obum (1948, DC NY) 82 F Supp 36, affd (1948, CA2 NY) 170 F.2d 1009, revd on other grounds (1949) 336 US 806, 93 L Ed 1054, 69 S Ct 921

Re-employment statutes are to be liberally construed for benefit of those who left their employment and homes to serve their country. Hall v Chicago & E. I. R. Co. (1964, ND Ill) 240 F Supp 797, 59 BNA LRRM 2819, 51 CCH LC ¶ 19686

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Predecessor statute should be liberally construed for benefit of veterans who leave private employment to serve country in hour of great need and no practice of employers or collective bargaining agreements between employers and unions will satisfy denial of service adjustment benefits which Congress secured for veterans. Cohn v Union P. R. Co. (1977, DC Neb) 427 F Supp 717, 94 BNA LRRM 2828, 81 CCH LC ¶ 13115, affd (1978, CA8 Neb) 572 F.2d 650, 97 BNA LRRM 3134, 83 CCH LC ¶ 10467, cert den (1978) 439 US 836, 58 L Ed 2d 132, 99 S Ct 120, 99 BNA LRRM 2600, 84 CCH LC ¶ 10875

Town must reinstate former police officer at rank of patrolman, pay scale of P-18 and step 4 and, once reinstated, he is to be compensated at whatever rate patrolman of his pay scale and step is currently receiving, where he resigned to join U.S. Army Reserve and now seeks reemployment after serving 3-year term, because 38 USCS § 4301(a)(B)(i) requires reinstatement to former position or position "of like seniority, status, and pay," and seniority means seniority he would have if he had kept his position continuously. Lapine v Town of Wellesley (2001, DC Mass) 167 F Supp 2d 132, 170 BNA LRRM 2623, 143 CCH LC ¶ 11057, affd (2002, CA1 Mass) 304 F.3d 90, 170 BNA LRRM 2965, 83 CCH EPD ¶ 41172, 146 CCH LC ¶ 10095

District court's determination, that city was liable to employees under Uniform Services Employment and Reemployment Rights Act, 38 USCS § 4301 et seq., and that four year statute of limitations under 28 USCS § 1658 applied to claims, was subject to interlocutory appeal pursuant to 28 USCS § 1292(b) because resolution of determinations would assist in ultimate resolution of case before individualized damage determinations were made by court. Rogers v City of San Antonio (2003, WD Tex) 172 BNA LRRM 2249

Former police chief could not rely on Illinois Service Men's Employment Tenure Act (SMETA), 330 Ill. Comp. Stat. Ann. 60/1 et seq., to establish property interest in his position as police chief; Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 USCS §§ 4301 et seq., preempted state law in area and provided police chief with his only basis for recovering against Village that terminated his employment less than one year after chief returned from active duty in military. Ferguson v Walker (2005, CD Ill) 397 F Supp 2d 964

Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 USCS §§ 4301 et seq., provides its own comprehensive enforcement mechanism, which cannot be bypassed by alleging constitutional violation in suit directly under 42 USCS § 1983; thus, former police chief's § 1983 claim that he had property interest in his position as police chief was subsumed by his USERRA claims. Ferguson v Walker (2005, CD Ill) 397 F Supp 2d 964

Re-employment rights of veteran should be construed as liberally as possible. Republic Life Ins. Co. v Dobson (1950) 204 Okla 5, 226 P2d 402, 27 BNA LRRM 2319, 19 CCH LC ¶ 66122

4. -Amendments

Administrative constructions of predecessor to statute was not to be considered as having been adopted by Congress in amending and extending statute without making any change in provisions, where different administrative construction had been given statute by other federal agency. Fishgold v Sullivan Drydock & Repair Corp. (1946) 328 US 275, 90 L Ed 1230, 66 S Ct 1105, 18 BNA LRRM 2075, 11 CCH LC ¶ 51232, 167 ALR 110

Before 1986 amendments, degree to which predecessor statute permitted employer to condition hiring on nonparticipation in reserves was not clearly established, so that town officials enjoyed qualified immunity based on their actions pursuant to department policy prior to such amendments; however 1986 amendment made clear that employer could not refuse to hire individual because of his or her participation in reserves or National Guard so that, to extent town policy prohibiting reserve participation continued after 1986, town officials were not protected by qualified immunity. Boyle v Burke (1991, CA1 NH) 925 F.2d 497, 136 BNA LRRM 2514, 118 CCH LC ¶ 10550

5. Application, generally

Eleventh Amendment immunity does not bar suit for compensatory damages against states under Veterans' Reemployment Rights Act, since Congress, acting pursuant to its war powers,
Employee's resignation letter rendered him unqualified for reinstatement under Veterans' Reemployment Rights Act, since both content and tone of 8-page letter precluded harmonious future relations with co-workers and managers; letter reflected disgust and contempt for employer, and antipathy towards Japan and Japanese culture and language which would inevitably be disruptive in light of large number of Japanese co-workers. Preda v Nissho Iwai Am. Corp. (1997, CA2 NY) 128 F.3d 789, 75 BNA FEP Cas 371, 156 BNA LRRM 2857, 72 CCH EPD ¶ 45071

Employee was not required to reemploy plaintiff after his National Guard service since it did not employ him prior to his assumption of full-time Guard duties; defendant and plaintiff's prior employer were both wholly owned subsidiaries of parent corporation, but they were nevertheless separate entities. Knowles v Citicorp Mortg. (1998, CA8 Mo) 142 F.3d 1082, 158 BNA LRRM 2076, 135 CCH LC ¶ 10153

Employee must be veteran to be entitled to benefits arising from re-employment. Sanders v Chicago, R. I. & P. R. Co. (1951, DC Okla) 97 F Supp 927

Reemployment rights under Viet Nam Era Veterans Readjustment Assistance Act was applicable to state employee who left his job to volunteer for active duty in Vietnam and who later sought reemployment even though both events occurred before adoption of statute. Witter v Pennsylvania Nat'l Guard (1978, ED Pa) 462 F Supp 299, 100 BNA LRRM 2834, 85 CCH LC ¶ 11185


Summary judgment cannot be granted on police officer's claim under Veterans' Reemployment Rights Act (38 USCS §§ 4301 et seq.), where his letter of resignation to police chief complained about conditions of department and did not clearly state that military job was reason for resignation, because trial is necessary to determine whether officer resigned his position with police department in order to enter military and whether he, after entering military, made choice to forsake his career with police department and build career in military. Lapine v Town of Wellesley (1997, DC Mass) 970 F Supp 55, 156 BNA LRRM 2589, findings of fact/conclusions of law, in part (2001, DC Mass) 167 BNA LRRM 2139, 143 CCH LC ¶ 11056, findings of fact/conclusions of law (2001, DC Mass) 167 F Supp 2d 132, 170 BNA LRRM 2623, 143 CCH LC ¶ 11057, affd (2002, CA1 Mass) 304 F.3d 90, 170 BNA LRRM 2965, 83 CCH EPD ¶ 41172, 146 CCH LC ¶ 10095

Former employee's action against State Accident Insurance Fund Corporation alleging discrimination under Uniformed Services Employment and Reemployment Rights Act (38 USCS §§ 4301 et seq.) is dismissed, because Corporation is state entity entitled to Eleventh Amendment immunity, and jurisdiction is lacking in absence of either state consent or congressional abrogation of state's immunity. Forster v SAIF Corp. (1998, DC Or) 23 F Supp 2d 1196, 159 BNA LRRM 2830

As matter of law, National Guard member was promptly reemployed under Uniformed Services Employment and Reemployment Rights Act, 38 USCS § 4311 et seq., standards; he was offered position four business days after his attorney sent demand letter to employer and he actually returned to work within seven business days of demand letter; more importantly, member returned to work on first day that he indicated that he was available for work. Vander Wal v Sykes Enters. (2005, DC ND) 377 F Supp 2d 738, 177 BNA LRRM 2915

While there were no definitive guidelines establishing what constituted "prompt reemployment" under Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 USCS § 4311 et seq., National Guard member's return to work within seven business days of completion of his job application form did not present factual basis to support
contention that he was not promptly reemployed under USERRA. Vander Wal v Sykes Enters. (2005, DC ND) 377 F Supp 2d 738, 177 BNA LRRM 2915

Although there is not time limit for filing appeal claiming violation of rights guaranteed by chapter 43 of title 38, Board's authority is limited to enforcing rights as they existed at time claim accrued, hence appellant was not entitled to relief for denial of employment benefits based on his prior service in uniformed services since Veterans' Reemployment Rights Act was in effect at time his action accrued and provided no such protection. Fernandez v Dep't of Army (1999, MSPB) 84 MSPR 550, affd (2000, CA FC) 234 F.3d 553, 165 BNA LRRM 2844, reh den (2001, CA FC) 2001 US App LEXIS 3033

Administrative judge failed to inform appellant of Uniformed Services Employment and Reemployment Rights Act burdens of proof or different methods of proving claim under Act or determine method appellant wished to use to support his claim of discrimination, requiring remand. Schoch v Dep't of the Army (2001, MSPB) 91 MSPR 134

Employment rights under Uniformed Services Employment and Reemployment Rights Act (38 USCS §§ 4301 et seq.) do not extend to employees who leave their civilian employment to pursue military careers. OPM Case No. S000958 (7/30/99)

6. Reserve and national guard personnel

Predecessor statutes were applicable to ready reserves and national guardsmen. United States ex rel. Reilly v New England Teamsters & Trucking Industry Pension Fund (1984, CA2 Conn) 737 F.2d 1274, 5 EBC 1824, 116 BNA LRRM 3060, 101 CCH LC ¶ 11080

Reservist who was on active duty for other than training did not come within former § 2024 for purposes of retaining right to civilian reemployment protection. Graham v Office of Personnel Mgmt. (1997, CA FC) 125 F.3d 1454

Postal Service was required to inform employee who was adjunct of national guard of position on day shift that was newly created while he was on military duty since right to bid for and receive new position was incident or advantage of employment which was denied him solely because he was absent on military duty. Allen v United States Postal Serv. (1998, CA FC) 142 F.3d 1444, 158 BNA LRRM 2133

Merit Systems Protection Board erred in holding that Department of Justice acted permissibly in charging its employees military leave allowance for days on which they were not scheduled to work because 5 USCS § 6323(a)(1) could not be interpreted to require federal employees to expend military leave days for reserve training days on which they were not required to work; Department's pre-2000 practice of charging employees' military leave for non-workdays, which forced them to use other leave to complete reserve training, violated Uniformed Services Employment and Reemployment Act of 1994, 38 USCS §§ 4301-4333, by denying them benefit of employment based on their military service. Butterbaugh v DOJ (2003, CA FC) 336 F.3d 1332, on remand, remanded (2004, MSPB) 2004 MSPB LEXIS 827, on remand, dismd (2004, MSPB) 2004 MSPB LEXIS 2418

In action by former employee against his former employer alleging violation of Uniformed Services Employment and Reemployment Rights Act of 1994, 38 USCS § 4301 et seq., regarding reduction of his work hours and his ultimate termination, summary judgment was granted for employer under Fed. R. Civ. P. 56(c) where, although employee showed that his hours of employment could be considered benefit of his employment under 38 USCS § 4303(2), employee failed to satisfy his burden of showing that his military service was substantial or motivating factor for reduction of his hours because: (1) it was undisputed that employer always scheduled employee's hours in order to accommodate his military obligations and did not deny any request by employee for any leave of absence for military service, (2) employer fulfilled its burden of showing that it would have reduced employee's hours absent his military leave because it was undisputed that prom season was over and employer's business was quite slow, and (3) employee failed to satisfy his burden of showing that his military service was substantial or motivating factor for his termination because employer stated that ultimate decision to terminate employee was due to his confrontation with supervisor, and employee failed to show that stated
reason was pretextual. Clune v Desmond's Formal Wear, Inc. (2003, ND Ind) 172 BNA LRRM 3177

7. -Local government employees

If inductee is in the employ of any state or political subdivision thereof, it is sense of Congress that such inductee, upon his honorable discharge, should be restored to such position or position of like seniority. McLaughlin v Retherford (1944) 207 Ark 1094, 184 SW2d 461, 10 CCH LC ¶ 62860

Public policy of re-employment provisions to promote recruiting and expansion of military forces of United States, traditionally citizens army, by so-called voluntary enlistments as well as through operation of selective service system, relates to re-employment of employees of any state or political subdivision thereof. Hanebuth v Patton (1946) 115 Colo 166, 170 P2d 526

§ 4302. Relation to other law and plans or agreements

(a) Nothing in this chapter [38 USCS §§ 4301 et seq.] shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter [38 USCS §§ 4301 et seq.].

(b) This chapter [38 USCS §§ 4301 et seq.] supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter [38 USCS §§ 4301 et seq.], including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

Explanatory notes:

Another prior § 4302 was renumbered as 38 USCS § 7602.

Effective date of section:
This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:77, 84

Am Jur:
48 Am Jur 2d, Labor and Labor Relations § 704
77 Am Jur 2d, Veterans and Veterans' Laws § 82

Law Review Articles:
Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002

Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002

Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002

Fernandez. The need for the expansion of military reservists' rights in furtherance of the total force policy: a comparison of the USERRA and ADA. 14 St Thomas L Rev 859, Summer 2002

1. Generally

2. Relationship with other federal laws

3. Relationship with state or local laws, generally

4. Under particular circumstances

1. Generally

Provisions of predecessor statute were enacted pursuant to war powers of Congress [USCS Constitution, Article 1, § 8, cl 12], and were enforced against Commonwealth of Puerto Rico, even though Commonwealth enjoys sovereign immunity accorded to states under Constitution [USCS Constitution, Amendment 11]. Camacho v Public Service Com. (1978, DC Puerto Rico) 450 F Supp 231, 98 BNA LRRM 2653, 83 CCH LC ¶ 10620

2. Relationship with other federal laws

Former 50 Appx USCS § 459(b)-(h) granting re-employment rights to returning veterans did not take Veterans Administration [now Department of Veterans Affairs] decision to withdraw research grant given to medical doctor prior to his term of service out of nonreviewable discretionary exception in 5 USCS § 701(a). Kletschka v Driver (1969, CA2 NY) 411 F.2d 436

42 USCS § 1983 claim could not be based on alleged violation of former Veterans' Reemployment Rights Act since statute provided private judicial remedy for its violation. Grady v El Paso Community College (1992, CA5 Tex) 979 F.2d 1111

Principal who sued members of school board, alleging they violated Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 USCS § 4301 et seq., when they terminated her employment, was not entitled to recover damages under 42 USCS § 1983 for violations of USERRA, and Court of Appeals dismissed member's appeal from district court's ruling that they did not have qualified immunity from liability because appeal was moot. Morris-Hayes v Bd. of Educ. (2005, CA2 NY) 423 F.3d 153, 178 BNA LRRM 2001, 86 CCH EPD ¶ 42089, 151 CCH LC ¶ 10561, 151 CCH LC ¶ 60076


Eleventh Amendment bars state employee from suing state in federal court for violating USERRA (38 USCS §§ 4311 et seq.) Velasquez v Frapwell (1998, SD Ind) 994 F Supp 993, 157 BNA LRRM 2690, affd (1998, CA7 Ind) 160 F.3d 389, 159 BNA LRRM 2782, 74 CCH EPD ¶ 45585, vacated, in part (1999, CA7 Ind) 165 F.3d 593, 160 BNA LRRM 2319

Even though Federal Arbitration Act compelled judicial enforcement of arbitration provision pursuant to 9 USCS § 2, where employment agreement also provided that it would be subject to any and all rights that employee might have under Uniform Services Employment and Re-employment Rights Act (USERRA), there was no clear waiver of rights so that reservation preserved employee's right to bring discrimination and retaliation claims in judicial forum under 38
USCS § 4323(c) rather than submit matters to arbitration; further, 38 USCS § 4302(b) provided that USERRA superseded any contracts, including arbitration agreements, that reduced, limited, or eliminated any rights under USERRA where there was not express waiver of known statutory rights. Breletic v CACI, Inc. (2006, ND Ga) 413 F Supp 2d 1329, 87 CCH EPD ¶ 42235

3. Relationship with state or local laws, generally


Predecessor statute applied to any person who leaves position, other than temporary position, with United States Government, its political subdivisions, or state or its political subdivisions, for training and services in Armed Forces; thrust of statute was protection of re-employment rights of persons who have been inducted in Armed Forces; and, though states are free to establish additional rights or protections for state or local employees, other than those prescribed by statute, states are not free to impose restrictions on re-employment rights granted by statute. Peel v Florida Dep't of Transp. (1977, ND Fla) 443 F Supp 451, 95 BNA LRRM 2308, 81 CCH LC ¶ 13159, affd (1979, CA5 Fla) 600 F.2d 1070, 101 BNA LRRM 3126, 86 CCH LC ¶ 11460 (criticized in Chavez v Arte Publico Press (1995, CA5 Tex) 59 F.3d 539, 35 USPQ2d 1609)

4. -Under particular circumstances

City police department's policy restricting number of police officers eligible to serve as active reservists conflicted directly with language and purpose of predecessor statute. Kolkhorst v Tilghman (1990, CA4 Md) 897 F.2d 1282, 133 BNA LRRM 2807, 114 CCH LC ¶ 12028, cert den (1992) 502 US 1029, 116 L Ed 2d 771, 112 S Ct 865, 139 BNA LRRM 2168, 139 BNA LRRM 2352, 120 CCH LC ¶ 11064

State law which establishes formula for calculation of retirement benefits is preempted to extent it limits increase in pension benefits which veteran would have earned had he not been serving in military. Schell v Ohio State Highway Patrol (1982, SD Ohio) 112 BNA LRRM 2575, 95 CCH LC ¶ 13887

State regulation governing crediting of pension benefits as applied to returning veteran is preempted by statute and state must credit pension benefits to returning veteran for period during her service in Armed Forces. Mazak v Florida Dep't of Admin., Div. of Retirement (1983, ND Fla) 113 BNA LRRM 3217, 97 CCH LC ¶ 10083

State law limiting protected military leave to 6 months conflicted with and was therefore preempted by predecessor statute, which granted unlimited leave for Armed Forces training, even though 6-month provision was reasonable and even generous when compared to other states, because it is responsibility of Congress, rather than states or courts, to draw most appropriate balance between benefits to employee-reservists and costs to employers. Cronin v Police Dep't (1987, SD NY) 675 F Supp 847, 9 EBC 1468, 127 BNA LRRM 2461, 108 CCH LC ¶ 10329

Teacher seeking retirement credit in state public school retirement system for active duty period in state Air National Guard was entitled to all reemployment rights and benefits as returning military service person under predecessor statute, because statute preempted limiting feature of conflicting state law since Congress intended to protect and compensate military personnel, including reservists, and reemployment rights of military service personnel are to be liberally construed. Dailey v Public School Retirement System (1989, ED Mo) 707 F Supp 1087, 10 EBC 2207, 131 BNA LRRM 2189, 111 CCH LC ¶ 11126

Two teachers were entitled to order directing state teachers' retirement board and municipalities where they worked to count their periods of active military service toward retirement credit in state teachers' retirement system, irrespective of state statute which required that individual serve in wartime service in order to have his period of active military duty counted toward retirement credits. Cohen v Massachusetts Teachers' Retirement Bd. (1991, DC Mass) 13 EBC 2218, 139 BNA LRRM 2334, 120 CCH LC ¶ 11023

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§ 4303. Definitions

For the purposes of this chapter [38 USCS §§ 4301 et seq.]--

(1) The term "Attorney General" means the Attorney General of the United States or any person designated by the Attorney General to carry out a responsibility of the Attorney General under this chapter [38 USCS §§ 4301 et seq.].

(2) The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

(3) The term "employee" means any person employed by an employer. Such term includes any person who is a citizen, national, or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States, within the meaning of section 4319(c) of this title [38 USCS § 4319(c)].

(4) (A) Except as provided in subparagraphs (B) and (C), the term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including--

(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;
(ii) the Federal Government;
(iii) a State;
(iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and
(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311 [38 USCS § 4311].

(B) In the case of a National Guard technician employed under section 709 of title 32 [32 USCS § 709], the term "employer" means the adjutant general of the State in which the technician is employed.

(C) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318 [38 USCS § 4318].

(5) The term "Federal executive agency" includes the United States Postal Service, the Postal Rate Commission, any nonappropriated fund instrumentality of the United States, any Executive agency (as that term is defined in section 105 of title 5 [5 USCS § 105]) other than an agency referred to in section 2302(a)(2)(C)(ii) of title 5 [5 USCS § 2302(a)(2)(C)(ii)], and any military department (as that term is defined in section 102 of title 5 [5 USCS § 102]) with respect to the civilian employees of that department.

(6) The term "Federal Government" includes any Federal executive agency, the legislative branch of the United States, and the judicial branch of the United States.
(7) The term "health plan" means an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.

(8) The term "notice" means (with respect to subchapter II [38 USCS §§ 4311 et seq.]) any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service or by the uniformed service in which such service is to be performed.

(9) The term "qualified", with respect to an employment position, means having the ability to perform the essential tasks of the position.

(10) The term "reasonable efforts", in the case of actions required of an employer under this chapter [38 USCS §§ 4301 et seq.], means actions, including training provided by an employer, that do not place an undue hardship on the employer.

(11) Notwithstanding section 101 [38 USCS § 101], the term "Secretary" means the Secretary of Labor or any person designated by such Secretary to carry out an activity under this chapter [38 USCS §§ 4301 et seq.].

(12) The term "seniority" means longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.

(13) The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 [10 USCS § 12503] or section 115 of title 32 [32 USCS § 115].

(14) The term "State" means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof).

(15) The term "undue hardship", in the case of actions taken by an employer, means actions requiring significant difficulty or expense, when considered in light of:

(A) the nature and cost of the action needed under this chapter [38 USCS §§ 4301 et seq.];

(B) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.
(16) The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.

Explanatory notes:

Another prior § 4303 was renumbered as 38 USCS § 7603.

Effective date of section:
This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, which appears as 38 USCS § 4301 note.

Amendments:
1996. Act Oct. 9, 1996 (effective as of 10/13/94, as provided by § 313(a) of such Act, which appears as 38 USCS § 4301 note), in para. (16), inserted "national".

1998. Act Nov. 11, 1998 (applicable as provided by § 212(c) of such Act, which appears as a note to this section), in para. (3), added the sentence beginning "Such term includes . . .".

2000. Act Nov. 1, 2000 (effective 180 days after enactment, as provided by § 323(c) of such Act, which appears as a note to this section), as amended by Act June 5, 2001 (effective 11/1/00, as provided by § 8(b) of such Act), in para. (13), deleted "and" following "National Guard duty," and inserted ", and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32."


Such Act further (effective as of 11/1/00 and as if included in Act Nov. 1, 2000 as originally enacted, as provided by § 8(b) of such Act) amended the directory language of Act Nov. 1, 2000.

Other provisions:
Application of Nov. 11, 1998 amendments. Act Nov. 11, 1998, P. L. 105-368, Title II, Subtitle B, § 212(c), 112 Stat. 3331, provides: "The amendments made by this section [amending 38 USCS § 4303(3) and the chapter analysis preceding 38 USCS § 4301, and adding 38 USCS § 4319] shall apply only with respect to causes of action arising after the date of the enactment of this Act.".

Effective date of Nov. 1, 2000 amendments. Act Nov. 1, 2000, P. L. 106-419, Title III, Subtitle C, § 323(c), 114 Stat. 1856, provides: "The amendments made by subsections (a) and (b) [amending 38 USCS §§ 4303(13), 4316(e)] shall take effect 180 days after the date of the enactment of this Act.".

Cross References
This section is referred to in 2 USCS § 1316

Research Guide
Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:77

Am Jur:
45A Am Jur 2d, Job Discrimination §§ 36-39, 90
77 Am Jur 2d, Veterans and Veterans' Laws § 83

Law Review Articles:
Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002
Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002
Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002
Fernandez. The need for the expansion of military reservists' rights in furtherance of the total force policy: a comparison of the USERRA and ADA. 14 St Thomas L Rev 859, Summer 2002

1. Employee
   2. Corporate officers
   3. Union officers
   4. Professionals
   5. Independent contractors
   6. Sales representatives
   7. Miscellaneous

8. Other definitions

1. Employee
   Employees in superior positions and those whose services involve special skill, as well as ordinary laborers and mechanics, are in employ of another within meaning of predecessor to statute. Kay v General Cable Corp. (1944, CA3 NJ) 144 F.2d 653, 15 BNA LRRM 523, 10 CCH LC ¶ 62857
   Predecessor statute included relationship in which employee renders regular and continuing service to another. Wilson v Toledo Area Sheet Metal Joint Apprenticeship Committee (1977, CA6 Ohio) 560 F.2d 222, 96 BNA LRRM 2004, 82 CCH LC ¶ 10074

2. Corporate officers
   Director of company will not be regarded as "in the employ" of corporation and therefore has no re-employment rights. Trusteed Funds, Inc. v Dacey (1947, CA1 Mass) 160 F.2d 413, 19 BNA LRRM 2465, 12 CCH LC ¶ 63639
   Veteran was entitled to re-employment to position which was in purview of predecessor to statute where, prior to entering service, veteran held both elective office and, in separate capacity, employed office with corporation. John S. Doane Co. v Martin (1947, CA1 Mass) 164 F.2d 537, 20 BNA LRRM 2445, 13 CCH LC ¶ 63917
   Veteran who, prior to military service, was director and president of insurance company, was entitled to restoration over objection of board of directors that position was to be filled by election under charter and laws of state and courts were without authority to interfere; but since presidency is for one year which had passed, veteran could recover year's salary. Houghton v Texas State Life Ins. Co. (1948, CA5 Tex) 166 F.2d 848, 21 BNA LRRM 2432, 14 CCH LC ¶ 64357, cert den (1948) 335 US 822, 93 L Ed 376, 69 S Ct 44, 22 BNA LRRM 2564

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Vice-president of corporation whose duties were prescribed by bylaws thereof, and whose salary was fixed by directors, was not employee of corporation entitled to reinstatement. McClayton v W. B. Cassell Co. (1946, DC Md) 66 F Supp 165, 18 BNA LRRM 2096, 11 CCH LC ¶ 63195

3. -Union officers

Veteran who held only purely elective position to which he had no assurance of being re-elected was not entitled to benefits of predecessor statute. Mouell v United Mine Workers (1948, DC W Va) 81 F Supp 151, 23 BNA LRRM 2001, 15 CCH LC ¶ 64845

Veteran was not entitled to re-employment rights where, prior to entering service, veteran was elected to position by small group within union, was paid percentage basis from earnings of those electors alone, where his duties were assigned by such electors, and where defendant company had no control over him, did not pay him and could not discharge him. Mouell v United Mine Workers (1948, DC W Va) 81 F Supp 151, 23 BNA LRRM 2001, 15 CCH LC ¶ 64845

4. -Professionals

On application for re-employment veteran was not entitled under former 50 USCS Appx § 459(b)-(h) to demand that he be assigned to position higher than he formerly held when promotion to such position depended, not simply on seniority or some other form of automatic progression, but on exercise of discretion on part of employer. McKinney v Missouri K. T. R. Co. (1958) 357 US 265, 2 L Ed 2d 1305, 78 S Ct 1222, 42 BNA LRRM 2287, 35 CCH LC ¶ 71613

Professional people and those holding confidential relationships, such as attorney and client, are not exempted from re-employment rights. Clark v Housing Authority of Port Orchard (1946) 25 Wash 2d 419, 171 P2d 217

5. -Independent contractors

Independent contractor does not come within employee-employer relationship and is not entitled to re-employment rights. Brown v Luster (1947, CA9 Cal) 165 F.2d 181, 21 BNA LRRM 2229, 13 CCH LC ¶ 64209; King v Southwestern Greyhound Lines, Inc. (1948, CA10 Okla) 169 F.2d 497, 22 BNA LRRM 2404, 15 CCH LC ¶ 64685, cert den (1948) 335 US 891, 93 L Ed 428, 69 S Ct 245, 23 BNA LRRM 2137; Hudspeth v Esso Standard Oil Co. (1948, CA8 Ark) 170 F.2d 418, 23 BNA LRRM 2055, 15 CCH LC ¶ 64810; Plomb Tool Co. v Sanger (1951, CA9 Cal) 193 F.2d 260, 29 BNA LRRM 2296, 20 CCH LC ¶ 66688, cert den (1952) 343 US 919, 96 L Ed 1333, 72 S Ct 677, 29 BNA LRRM 2661; Brook v Winter Haven Golf Club, Inc. (1946, DC Fla) 69 F Supp 399, 19 BNA LRRM 2140, 12 CCH LC ¶ 63536; Rosenbaum v Ceco Steel Products Corp. (1947, DC Dist Col) 84 F Supp 954

Re-employment provisions of Selective Training and Service Act are construed liberally but do not impose liability where none existed before, and do not include independent contractors, as determined by usual tests and in addition lack of control or supervision, freedom to determine hours of work, to engage in other professional activity, and dependency upon one’s own initiative, judgment and energy for success. Brown v Luster (1947, CA9 Cal) 165 F.2d 181, 21 BNA LRRM 2229, 13 CCH LC ¶ 64209

Contract providing that veteran is independent contractor is not controlling as to establishment of that status since it is actual relationship of parties which controls. King v Southwestern Greyhound Lines, Inc. (1948, CA10 Okla) 169 F.2d 497, 22 BNA LRRM 2404, 15 CCH LC ¶ 64685, cert den (1948) 335 US 891, 93 L Ed 428, 69 S Ct 245, 23 BNA LRRM 2137

Commission agents of oil company were not entitled to reinstatement to positions upon honorable discharge from service where evidence showed that relationship of plaintiffs to defendant on and prior to date of their induction into armed forces of United States was that of independent contractors under bulk plant leases and consignment agreements. Hudspeth v Esso Standard Oil Co. (1948, CA8 Ark) 170 F.2d 418, 23 BNA LRRM 2055, 15 CCH LC ¶ 64810

Veteran is independent contractor rather than employee where facts surrounding veteran’s status prior to entering service fails to reveal any supervision, control and direction on part of employer that attach to employer-employee relationship. Plomb Tool Co. v Sanger (1951, CA9
Veteran was employee and not independent contractor where, prior to entering service, he was engaged in hauling rubbish for defendants and certain other individuals, where he furnished his own truck, gasoline, and repairs while defendants furnished brooms, containers and hand trucks for removal of said rubbish, where defendants at times directed veteran's work, where veteran employed assistant whom he paid out of his own earnings, and where, although defendants had 200 employees, privileges enjoyed by them were not extended to veteran. Karas v Klein (1947, DC Minn) 70 F Supp 469, 19 BNA LRRM 2559, 12 CCH LC ¶ 63656

Veteran was independent contractor rather than employee where relationship to alleged employer was based on contract under which veteran was made exclusive representative to solicit orders for company's products within given territory, where veteran was at same time exclusive representative for other manufacturers of similar products, where veteran received his only compensation from company in form of commission on selling price of sales, where company did not pay unemployment compensation on commissions of veteran, where veteran paid from his own resources wholesale merchandise broker's license tax on commissions, and where veteran did his own hiring of persons to assist him in his capacity as representative paying their wages and deducting federal taxes. Rosenbaum v Ceco Steel Products Corp. (1947, DC Dist Col) 84 F Supp 954

6. -Sales representatives

Furniture salesman whose activities met tests for independent contractor did not occupy position within re-employment provisions merely because contract under which he sold was is terminable at will of parties. Brown v Luster (1947, CA9 Cal) 165 F.2d 181, 21 BNA LRRM 2229, 13 CCH LC ¶ 64209

Where plaintiff, tool salesman, entered into contract to sell products of defendant on commission basis within specified territory, but contract provided for payment of expenses by plaintiff, and described plaintiff as an independent contractor, refusal of defendant to allow plaintiff to have his old territory upon completion of war service did not entitle plaintiff to damages under former 50 Appx USCS § 459(b)-(h). Plomb Tool Co. v Sanger (1951, CA9 Cal) 193 F.2d 260, 29 BNA LRRM 2296, 20 CCH LC ¶ 66688, cert den (1952) 343 US 919, 96 L Ed 1333, 72 S Ct 677, 29 BNA LRRM 2661

Court could properly find that veteran was commission salesman and employee within predecessor statute where contention that veteran was independent contractor was not immediately raised on veteran's application for re-employment. Travis v Schwartz Mfg. Co. (1954, CA7 Wis) 216 F.2d 448, 35 BNA LRRM 2191, 26 CCH LC ¶ 68775

Despite written agreement attempting to change relationship of veteran from employee to independent contractor, veteran remains employee where agreement provides that employer has complete control of activities of veteran where company retains right of any inventions made by veteran and retains right to terminate agreement at will, and where veteran is treated in every respect as any other salesman. Lee v Remington Rand, Inc. (1946, DC Cal) 68 F Supp 837, 18 BNA LRRM 2450, 11 CCH LC ¶ 63351

Typewriter salesman handling products of employer on commission basis is entitled to his former position where he was only independent contractor with respect to products purchased from his employer for resale. Lee v Remington Rand, Inc. (1946, DC Cal) 68 F Supp 837, 18 BNA LRRM 2450, 11 CCH LC ¶ 63351

Oil company was not required to reinstate consignment distributor, independent contractor, who severed his connection with company when inducted into United States Navy. Hudspeth v Standard Oil Co. (1947, DC Ark) 74 F Supp 123, 20 BNA LRRM 2624, 13 CCH LC ¶ 64023, affd (1948, CA8 Ark) 170 F.2d 418, 23 BNA LRRM 2055, 15 CCH LC ¶ 64810

Veteran, insurance salesman seeking to recover commissions on renewal premiums paid on insurance policies applications for which were taken by him after he had entered into contract with defendant company was not independent contractor where company retained right to control

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activities of veteran, where veteran was required to give exclusive service to company which service was required to be personal service rather than service of some person whom veteran might employ, and where veteran is subject to regulations of company. Republic Life Ins. Co. v Dobson (1950) 204 Okla 5, 226 P2d 402, 27 BNA LRRM 2319, 19 CCH LC ¶166122

7. -Miscellaneous
Veteran’s preservice duties of managing business, for which he was compensated solely by percentage of net proceeds, constituted employment for purposes of predecessor to statute. Williams v Dodds (1947, CA9 Ariz) 163 F.2d 724, 20 BNA LRRM 2622, 13 CCH LC ¶64027

Veteran was entitled to damages for employer's refusal to reinstate where he was employed by taxicab business according to employment agreement under which he was to manage business, receive fifty per cent of gross proceeds, less cost of gasoline and drivers wages, where owner of taxicab service exercised general supervision and control of business and had right to terminate agreement and discharge serviceman at any time. Williams v Dodds (1947, CA9 Ariz) 163 F.2d 724, 20 BNA LRRM 2622, 13 CCH LC ¶64027

Police detective's clothing allowance was "right and benefit" of employment to which returning veteran became entitled under 38 USCS § 4303 upon his reemployment after military service, even though he had received deputy uniforms and cleaning allowance when, after his return, county had employed him in that position pending resolution of his statutory claims. Wriggelsworth v Brumbaugh (2001, WD Mich) 129 F Supp 2d 1106, 168 BNA LRRM 2636, 143 CCH LC ¶10991

8. Other definitions
Former employer denied employee benefit of employment under 38 USCS § 4311(a) and within meaning of 38 USCS § 4303(2) when it transferred employee from stable position where he had opportunity to earn bonuses based on his own performance to "back and forth" position where he only could earn bonuses based on other employees' performance. Maxfield v Cintas Corp. No. 2 (2005, CA8 Ark) 427 F.3d 544, 96 BNA FEP Cas 1249, 178 BNA LRRM 2392, 87 CCH EPD &p&l42138, 151 CCH LC &p&l10562, reh den, reh, en banc, den (2005, CA8) 2005 US App LEXIS 27709


In action by former employee against his former employer alleging violation of Uniformed Services Employment and Reemployment Rights Act of 1994, 38 USCS § 4301 et seq., regarding reduction of his work hours and his ultimate termination, summary judgment was granted for employer under Fed. R. Civ. P. 56(c) where, although employee showed that his hours of employment could be considered benefit of his employment under 38 USCS § 4303(2), employee failed to satisfy his burden of showing that his military service was substantial or motivating factor for reduction of his hours because: (1) it was undisputed that employer always scheduled employee's hours in order to accommodate his military obligations and did not deny any request by employee for any leave of absence for military service; (2) employer fulfilled its burden of showing that it would have reduced employee's hours absent his military leave because it was undisputed that prom season was over and employer's business was quite slow; and (3) employee failed to satisfy his burden of showing that his military service was substantial or motivating factor for his termination because employer stated that ultimate decision to terminate employee was due to his confrontation with supervisor, and employee failed to show that stated reason was pretextual. Clune v Desmond's Formal Wear, Inc. (2003, ND Ind) 172 BNA LRRM 3177
Where employee's attendance improvement program (AIP) was extended due to military and Family and Medical Leave Act leave, and where employee was terminated for missing work for other reasons during AIP, summary judgment was inappropriate as to claim under Uniformed Services Employment and Reemployment Rights Act; reasonable jury could have found that extinguishment of AIP constituted "benefit of employment" and that employer affected materially adverse change in employee's terms and conditions of employment. Schmauch v Honda of Am. Mfg., Inc. (2003, SD Ohio) 295 F Supp 2d 823, 173 BNA LRRM 2927, 9 BNA WH Cas 2d 360, 149 CCH LC ¶ 34804

District court denied employer's motion to dismiss employee's claims that he was harassed and subjected to hostile work environment upon his return from military service because Uniform Services Employment and Reemployment Rights Act of 1994, 38 USCS § 4301 et seq., provided cause of action for harassment due to prior military service as long as employer's conduct was sufficiently pervasive to alter conditions of employment and create abusive working environment and employee was entitled to such "benefit of employment" by virtue of employer policy. Vickers v City of Memphis (2005, WD Tenn) 368 F Supp 2d 842

Montgomery GI Bill benefits accrue to former military personnel based on their military service in one of military departments, but since military departments are not "employers" under Uniformed Services Employment and Reemployment Rights Act, such benefits are not "benefit of employment" under Act. Johnson v Dep't of Veterans Affairs (2002, MSPB) 91 MSPR 405

Appellants were not denied "benefit of employment" under Uniformed Services Employment and Reemployment Rights Act, since benefit at issue, namely military leave under 5 USCS § 6323, is benefit available solely to employees who are performing active duty or engaging in field or coast defense training as member of Reserves or National Guard; benefit is not available to general population of federal employees. Butterbaugh v DOJ (2002, MSPB) 91 MSPR 490, revd, remanded (2003, CA FC) 336 F.3d 1332, on remand, remanded (2004, MSPB) 2004 MSPB LEXIS 827, on remand, dismd (2004, MSPB) 2004 MSPB LEXIS 2418

§ 4304. Character of service

A person's entitlement to the benefits of this chapter [38 USCS §§ 4301 et seq.] by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

(1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.

(2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.

(3) A dismissal of such person permitted under section 1161(a) of title 10 [10 USCS § 1161(a)].

(4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10 [10 USCS § 1161(b)].

Explanatory notes:


Another prior § 4304 was renumbered as 38 USCS § 7604.
Effective date of section:
This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

Cross References
This section is referred to in 2 USCS § 1316; 38 USCS § 4312

Research Guide

Am Jur:
45A Am Jur 2d, Job Discrimination §§ 36-39, 90
77 Am Jur 2d, Veterans and Veterans' Laws §§ 83, 85

Law Review Articles:
Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002
Gisonny; Lindgren; Shultz. New law expands veterans' employment rights. 20 Empl Rel LJ 641, Spring 1995
Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002
Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002
Fernandez. The need for the expansion of military reservists' rights in furtherance of the total force policy: a comparison of the USERRA and ADA. 14 St Thomas L Rev 859, Summer 2002

§ 4305. Omitted
This section (Act Dec. 3, 1974, P. L. 93-508, Title IV, § 404(a), 88 Stat. 1600; Oct. 29, 1992, P. L. 102-568, Title V, § 506(a), 106 Stat. 4340) was omitted in the general amendment of this chapter by Act Oct. 13, 1994, P. L. 103-353, § 2(a), 108 Stat. 3149 (effective and applicable as provided by § 8 of such Act, which appears as 38 USCS § 4301 note). Such section provided for assistance in obtaining reemployment of persons who have satisfactorily completed any period of active duty in the Armed Forces or the Public Health Service.

§ 4306. Omitted
This section (Act Dec. 3, 1974, P. L. 93-508, Title IV, § 404(a), 88 Stat. 1600; Oct. 29, 1992, P. L. 102-568, Title V, § 506(a), 106 Stat. 4340) was omitted in the general amendment of this chapter by Act Oct. 13, 1994, P. L. 103-353, § 2(a), 108 Stat. 3149 (effective and applicable as provided by § 8 of such Act, which appears as 38 USCS § 4301 note). Such section provided for prior rights for reemployment.

§ 4307. Repealed
SUBCHAPTER II. EMPLOYMENT AND REEMPLOYMENT
RIGHTS AND LIMITATIONS; PROHIBITIONS

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited
§ 4312. Reemployment rights of persons who serve in the uniformed services
§ 4313. Reemployment positions
§ 4314. Reemployment by the Federal Government
§ 4315. Reemployment by certain Federal agencies
§ 4316. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service
§ 4317. Health plans
§ 4318. Employee pension benefit plans
§ 4319. Employment and reemployment rights in foreign countries

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter [38 USCS §§ 4301 et seq.], (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter [38 USCS §§ 4301 et seq.], or (4) has exercised a right provided for in this chapter [38 USCS §§ 4301 et seq.]. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—
(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter [38 USCS §§ 4301 et seq.], (B) testimony or making of a statement in or in connection with any proceeding under this chapter [38 USCS §§ 4301 et seq.], (C) assistance or other participation in an investigation under this chapter [38 USCS §§ 4301 et seq.], or (D) exercise of a right provided for in this chapter [38 USCS §§ 4301 et seq.], is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence
of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title [38 USCS § 4312(d)(1)(C)].

Explanatory notes:

A prior § 4311 was redesignated as 38 USCS § 7611.

Effective date of section:

This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

Amendments:

1996. Act Oct. 9, 1996 (effective as of 10/13/94, as provided by § 313(a) of such Act, which appears as 38 USCS § 4301 note) substituted subsecs. (b)-(d) for former subsecs. (b) and (c), which read:

"(b) An employer shall be considered to have denied a person initial employment, reemployment, retention in employment, promotion, or a benefit of employment in violation of this section if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, performance of service, application for service, or obligation.

"(c)(1) An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter.

"(2) The prohibition in paragraph (1) shall apply with respect to a person regardless of whether that person has performed service in the uniformed services and shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C).".

Code of Federal Regulations

Office of Personnel Management-Excepted service, 5 CFR Part 213
Office of Personnel Management-Restoration to duty from uniformed service or compensable injury, 5 CFR Part 353

Cross References

This section is referred to in 2 USCS § 1316; 38 USCS § 4303

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Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:77

Am Jur:

45A Am Jur 2d, Job Discrimination §§ 21-26, 40-104, 452, 600
45B Am Jur 2d, Job Discrimination § 760
48 Am Jur 2d, Labor and Labor Relations § 704
77 Am Jur 2d, Veterans and Veterans' Laws § 84

Forms:

Annotations:
What constitutes denial of "incidents or advantages of employment" under 38 USCS § 2021(b)(3) which may not be denied employee because of obligation as member of reserve component of Armed Forces. 51 ALR Fed 893

Applicability of doctrine of laches to bar veterans' re-employment claims where there is delay by government officials and agencies in rendering veterans' re-employment aid pursuant to 38 USCS § 2025. 53 ALR Fed 451

When does sale or reorganization exempt business from re-employment requirements of military veterans' re-employment laws (38 USCS §§ 2021 et seq.). 63 ALR Fed 132

Applicability, to fringe benefits, of Vietnam Era Veterans' Readjustment Assistance Act provision establishing veterans' reemployment rights (38 USCS § 2021). 83 ALR Fed 908

 Sufficiency of veteran's application for re-employment under 38 USCS §§ 2021 et seq. 103 ALR Fed 575

Re-employment of discharged servicemen. 29 ALR2d 1279

Rights of non-civil service public employees, with respect to discharge or dismissal, under state veterans' tenure statutes. 58 ALR2d 960

Law Review Articles:


Haggart. Veterans' Re-employment Right and the "Escalator Principle." 51 Boston U L Rev 539, Fall 1971

Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002

Gisonny; Lindgren; Shultz. New law expands veterans' employment rights. 20 Empl Rel LJ 641, Spring 1995

Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002

Re-employment Rights for Veterans. 80 Harvard L Rev 142, 1966

Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002

Ennis. Rights and obligations of employees entering active military service. 41 Lab LJ 780, November 1990

Piscitelli. Veterans' employment rights: keeping in step with USERRA's legion of changes. 46 Lab LJ 387, July 1995

Ingold; Dunlap. When Johnny (Joanny) comes marching home: job security for the returning service member under the Veterans' Reemployment Rights Act. 132 Mil L Rev 175, Spring 1991

Fernandez. The need for the expansion of military reservists' rights in furtherance of the total force policy: a comparison of the USERRA and ADA. 14 St Thomas L Rev 859, Summer 2002

1. Generally

2. Jurisdiction

3. Discrimination under particular circumstances

1. Generally

Given Congress's clear statements as to its original intent in enacting Veterans' Reemployment Rights Act and its wish to have courts apply § 4311(b) in accordance with that intent to all cases regardless of their vintage, district court should not have employed sole-motivation analysis in entering summary judgment against reservist, but should have determined whether there was sufficient evidence from which rational jury could infer that plaintiff's status or conduct as reservist was substantial or motivating factor in his dismissal and, if so, whether as matter of law employer could have discharged him even if he had not been reservist. Gummo v Village of Depew (1996, CA2 NY) 75 F.3d 98, 151 BNA LRRM 2225, 67 CCH EPD ¶ 43880, 131 CCH LC ¶ 11477, cert den (1996) 517 US 1190, 134 L Ed 2d 780, 116 S Ct 1678, 152 BNA LRRM 2320

Amendment replacing sole cause standard with motivating factor standard for determining whether military reservists have been discriminated against in employment because of their reservist status cannot be applied retroactively; Congress expressly determined that amendments were prospective. Newport v Ford Motor Co. (1996, CA8 Mo) 91 F.3d 1164, 152 BNA LRRM 2961, 132 CCH LC ¶ 11634, reh, en banc, den (1996, CA8) 1996 US App LEXIS 23954

Uniformed Services Employment and Reemployment Act of 1994, 38 USCS §§ 4301-4333, was designed to protect servicemember's rights to employment and reemployment in civilian position, and did not impose tort liability on employer. Gordon v Wawa, Inc. (2004, CA3 NJ) 388 F.3d 78, 175 BNA LRRM 3206

Principal who sued members of school board, alleging they violated Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 USCS § 4301 et seq., when they terminated her employment, was not entitled to recover damages under 42 USCS § 1983 for violations of USERRA, and Court of Appeals dismissed member's appeal from district court's ruling that they did not have qualified immunity from liability because appeal was moot. Morris-Hayes v Bd. of Educ. (2005, CA2 NY) 423 F.3d 153, 178 BNA LRRM 2001, 86 CCH EPD ¶ 42089, 151 CCH LC ¶ 10561, 151 CCH LC ¶ 60076

Standard of proof which governs cases under Veterans' Reemployment Rights Act (38 USCS §§ 2021 et seq.) is set out in Uniformed Services Employment and Reemployment Rights Act (38 USCS § 4311(b)). Graham v Hall-McMillen Co. (1996, ND Miss) 925 F Supp 437, 152 BNA LRRM 2408, 131 CCH LC ¶ 11575

Job applicant's complaint failed to state claim under Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)-applicant asserted that he was veteran, however, he never claimed that decision not to hire him was motivated by his veteran status; thus, applicant's complaint did not assert claim under USERRA. Douris v Bucks County (2005, ED Pa) 16 AD Cas 790, app dismd (2005, CA3 Pa) 2005 US App LEXIS 17759

Although National Guard members alleged existence of conspiracy, they failed to name or identify any actor besides employer; as employer provided for "prompt reemployment" of both members, claim of conspiracy was moot. Vander Wal v Sykes Enters. (2005, DC ND) 377 F Supp 2d 738, 177 BNA LRRM 2915

Settlement agreement covering three EEO complaints did not waive appellant's right to pursue his USERRA discrimination claim regarding his removal with Board since it unambiguously resolved all existing EEO complaints and grievances and only waived appellant's
right to pursue his existing allegations through EEOC process. Vandesande v United States Postal Serv. (1997, MSPB) 76 MSPR 190

Where violation of Uniformed Services Employment and Reemployment Rights Act is raised as affirmative defense, administrative judge must inform appellant of burdens and methods of proof in petition for remedial action under Act; appellant bears initial burden of showing by preponderance of evidence that military service was substantial or motivating factor in agency's adverse decision, upon which agency must prove that action would have been taken despite protected status. Haynes v United States Postal Serv. (2001, MSPB) 89 MSPR 9

Veterans Employment Opportunities Act's prohibition against dual proceedings challenging same alleged violation of veterans' preference rules does not apply to Uniformed Services Employment and Reemployment Rights Act claim seeking redress for alleged discrimination on account of military service since it is not seeking redress for violation of veterans' preference rules. Leno v VA (2002, MSPB) 90 MSPR 614

Administrative judge must inform parties of shifting burdens of proof under Uniformed Services Employment and Reemployment Rights Act and failure to do so was prejudicial to parties' substantive rights in instant case since agency may have submitted evidence only in rebuttal, not in support of its burden to show that it would have made same selection for valid reason. Matz v Dep't of Veterans Affairs (2002, MSPB) 91 MSPR 265

Veteran's claim that his nonselection violated USERRA because his veterans' preference should have placed him ahead of other candidates did not constitute USERRA claim since USERRA does not provide that veterans will be treated better than non-veterans. Gaston v Corps (2005, MSPB) 100 MSPR 411

2. Jurisdiction

Where veteran claimed federal agency violated Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 USCS § 4311 et seq., allegations that agency did not hire him due to his military service, and that its reason-that he was not as qualified as selected individual-was pretext, were sufficient to confer jurisdiction of USERRA claim on U.S. Merit Systems Protection Board. Patterson v DOI (2005, CA FC) 424 F.3d 1151, 178 BNA LRRM 2009, 86 CCH EPD ¶ 42075, 151 CCH LC ¶ 10541

Court had subject matter jurisdiction over employee's claim under Uniformed Services Employment and Reemployment Rights Act, 38 USCS § 4311, because employee did have standing, case was not moot, and case was ripe; employee alleged sufficient casual connection between his injury (lost wages and benefits) and actions of employer, and that injury that could be redressed by favorable decision-i.e., if he prevailed, fact that employer ultimately rehired employee did not erase alleged harm suffered between date he reapplied and date he began working, and employee still had legally cognizable interest in outcome of litigation. Wal v Sykes Enters. (2004, DC ND) 327 F Supp 2d 1075, 175 BNA LRRM 2399

Appellant's allegation that agency removed his law enforcement commission and subjected him to hostile work environment, because of his prior military service, both gave Board jurisdiction over complaint since law enforcement commission falls well within USERRA's definition of benefit of employment, and expansive construction of definition led to conclusion that hostile environment claim also fell within term "benefit"; courts have consistently construed anti-discrimination statutes as proscribing harassment in workplace. Peterson v DOI (1996, MSPB) 71 MSPR 227

Uniformed Services Employment and Reemployment Rights Act gave Board jurisdiction to decide appellant's allegation that agency's termination action was discrimination on basis of his status as disabled veteran, notwithstanding that he was serving probationary period. Jasper v United States Postal Serv. (1997, MSPB) 73 MSPR 367 (ovrld in part by Fox v United States Postal Serv. (2001, MSPB) 88 MSPR 381)

Uniformed Services Employment and Reemployment Rights Act gave Board jurisdiction to decide appellant's allegation that agency's termination action was discriminatory of his status as
handicapped veteran, notwithstanding that he was serving probationary period. Wright v VA (1997, MSPB) 73 MSPR 453

Appellant failed to raise USERRA claim, for, although she indicated that she was veteran and was denied initial employment, she did not allege that agency’s refusal to hire her initially was based on her military service or her status as veteran. McBride v United States Postal Serv. (1998, MSPB) 78 MSPR 411

Appellant's allegations that he performed duty in uniformed service, that he was denied benefit of employment, and that benefit was denied on basis of his performance of duty in uniformed service were sufficient to support prima facie case of discrimination under USERRA, entitling him to jurisdictional hearing. Melvin v United States Postal Serv. (1998, MSPB) 79 MSPR 372, petition den, remanded (2000, MSPB) 86 MSPR 125

Postal Service employees who have not completed one year of current continuous service in same or similar positions qualify as "persons" under Uniformed Services Employment and Reemployment Act and thus are not excluded from filing appeals under that statute. Roberson v United States Postal Serv. (1998, MSPB) 77 MSPR 569

Appellant's allegations regarding his termination from employment, disparate treatment and veteran's status could be reasonably viewed as raising Uniformed Services Employment and Reemployment Rights Act claim based on his status as disabled veteran, and appellant thus should have been provided with adequate notice of requirements for establishing Board jurisdiction. Slentz v United States Postal Serv. (2002, MSPB) 92 MSPR 144

Board had jurisdiction of Uniformed Services Employment and Reemployment Rights Act appeal since it was not actually litigated in prior action and, although there was filing delay of over 20 months, there are no statutory or regulatory time limits for filing appeal under Act. Johnson v Dep’t of the Air Force (2002, MSPB) 92 MSPR 370

Board had jurisdiction over USERRA claim that appellant was denied initial employment based on his status as disabled veteran, notwithstanding that appellant did not allege that he was denied benefit of employment on basis of his previous performance of military duty. Kirkendall v Dep’t of the Army (2003, MSPB) 94 MSPR 70

3. Discrimination under particular circumstances

District court erred in deciding that 38 USCS § 4311(a), rather than 38 USCS § 4316(b)(1), part of Uniformed Services Employment and Reemployment Rights Act, (USERRA) must be applied to claims of National Guard and reservist city employees because § 4316(b)(1) was fully applicable to reservists’ short absences from civilian employment for weekend drills or two-week annual training, and district court mistakenly thought that Veterans Reemployment Rights Act, former 38 USCS § 2024(d), was precursor of USERRA § 4316(b)(1); however, USERRA § 4316(b)(1) had no true predecessor and dealt with different subject (non-seniority rights of persons absent for military service) from § 2024(d) (reemployment rights). Rogers v City of San Antonio (2004, CA5 Tex) 392 F.3d 758, 176 BNA LRRM 2129, 85 CCH EPD ¶ 41800

On appeal, military reservist and National Guard employees’ recovery was limited under Uniform Services Employment and Reemployment Rights Act, 38 USCS § 4316(b)(1), as they were to be treated equally to such non-seniority rights and benefits as non-military leave employees and district court erred in applying 38 USCS § 4311(a) rather than § 4316(b)(1) to employees' claims because USERRA did not grant escalator protection to service members’ non-seniority rights and benefits. Rogers v City of San Antonio (2004, CA5 Tex) 392 F.3d 758, 176 BNA LRRM 2129, 85 CCH EPD ¶ 41800

Company that interviewed activated reservist for employment position, along with 99 other employees from reservist's company, did not act with discriminatory intent when it did not hire reservist because company thought that reservist was looking for managerial position and did not have any manager positions available. Coffman v Chugach Support Servs. (2005, CA11 Fla) 411 F.3d 1231, 177 BNA LRRM 2449, 86 CCH EPD ¶ 41978, 151 CCH LC ¶ 10494, 18 FLW Fed C 650

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Former employer denied employee benefit of employment under 38 USCS § 4311(a) and within meaning of 38 USCS § 4303(2) when it transferred employee from stable position where he had opportunity to earn bonuses based on his own performance to "back and forth" position where he only could earn bonuses based on other employees' performance. Maxfield v Cintas Corp. No. 2 (2005, CA8 Ark) 427 F.3d 544, 96 BNA FEP Cas 1249, 178 BNA LRRM 2392, 87 CCH EPD &p&t42138, 151 CCH LC &p&t10562, reh den, reh, en banc, den (2005, CA8) 2005 US App LEXIS 27709

Summary judgment should not have been granted to former employer for employee's claim under 38 USCS § 4311(a) because there was question of fact whether employee's reserve status was motivating factor in his transfer where (1) transfer occurred day employee returned from military leave; and (2) discriminatory motive could be inferred from telephone call made by employee's supervisor to sergeant inquiring whether employee was present at military base and from fact that employee's supervisors traveled to military base while employee was on leave to discuss, in part, employee's sales deficit; moreover, employer's evidence concerning circumstances of employee's leave request was sufficient to create genuine issue of fact as to whether it would have terminated employee in any event. Maxfield v Cintas Corp. No. 2 (2005, CA8 Ark) 427 F.3d 544, 96 BNA FEP Cas 1249, 178 BNA LRRM 2392, 87 CCH EPD &p&t42138, 151 CCH LC &p&t10562, reh den, reh, en banc, den (2005, CA8) 2005 US App LEXIS 27709

Membership in U.S. Army Reserves was not benefit of employment with Secret Service so as to find that Secret Service's designating him "key employee" ineligible for being called up in national emergency or mobilization violated USERRA anti-discrimination provisions; USERRA cannot properly be read to convey affirmative right to serve in armed forces, rather prohibits discrimination by employers based on employee's military status. Thomsen v Department of the Treasury (1999, CA FC) 169 F.3d 1378

Employer's refusal to hire reservist was improper under predecessor to statute, where refusal was due to reservist's obligatory college attendance at time of application, because attendance was reserve "obligation" and thus improper basis for discriminating against even first-time applicant, notwithstanding that reservist initially requested college duty. Beattie v Trump Shuttle, Inc. (1991, DC Dist Col) 758 F Supp 30, 136 BNA LRRM 2668, 118 CCH LC ¶ 10738

Air national guard member is entitled to year of lost wages, less his earnings for that year, even though employer presented plenitude of evidence which would have justified terminating "troublemaker" employee for cause, because motivating factor behind his actual termination was company's forcing him to take vacation pay and time for his leave of absence due to military training, and his protestations of that policy. Graham v Hall-McMillen Co. (1996, ND Miss) 925 F Supp 437, 152 BNA LRRM 2408, 131 CCH LC ¶ 11575

Employer is denied summary dismissal of terminated mechanic's 38 USCS § 4311 claim, even though it contends that mechanic was properly terminated for altering his time cards and retaining overpayments in excess of $3,500, because mechanic points to evidence that employer (1) advertised for his position while he was on military leave and prior to investigation of time cards, (2) showed substantial hostility toward his military leave, and (3) suspended him immediately upon his return from leave. Mike v Ron Saxon Ford, Inc. (1997, DC Minn) 960 F Supp 1395

Employer's refusal to hire reservist was improper under predecessor to statute, where refusal was due to reservist's obligatory college attendance at time of application, because attendance was reserve "obligation" and thus improper basis for discriminating against even first-time applicant, notwithstanding that reservist initially requested college duty. Beattie v Trump Shuttle, Inc. (1991, DC Dist Col) 758 F Supp 30, 136 BNA LRRM 2668, 118 CCH LC ¶ 10738

Car dealership is denied summary dismissal of employment discrimination action pursuant to "mixed-motive" rule of 38 USCS § 4311(b), where salesman had to miss important sales event at dealership to attend mandatory physical examination for Army Reserves and was fired less than one week later, because dealership's evidence that salesman was unhappy and unsatisfactory employee might well prevail at trial, but it is insufficiently strong to establish as matter of law that his military service was not motivating factor in decision to terminate him. Robinson v Morris Moore Chevrolet-Buick (1997, ED Tex) 974 F Supp 571, 157 BNA LRRM 2732

Former optical lab technician's claim of violation of Uniform Services Employment and Reemployment Rights Act (38 USCS §§ 4301 et seq.) should go to jury, where only facts established are that (1) she was member of Army Reserves and was obligated to attend 2 weeks of military training in April, and (2) she was terminated March 10, same day she informed supervisor that she had joined Reserves, because jury must decide validity of employer's other
reasons for firing her and whether her military status was motivating factor. Kelley v Maine Eye Care Assocs., P.A. (1999, DC Me) 37 F Supp 2d 47, 161 BNA LRRM 2024, 76 CCH EPD ¶ 45985

In suit alleging wrongful employment termination in violation of 38 USCS § 4311(c)(1) based on employee's service in military reserves, "sole motivation" standard, rather than "motivating factor" test, applied in analyzing whether employer had based termination on military activities, given that cause of action accrued on date of termination, when time sole motivation standard had been in effect, and that Congress had expressly determined that statutory amendments that modified standard were prospective. Ryan v Berwick Indus., Inc. (1999, MD Pa) 40 F Supp 2d 250, 161 BNA LRRM 2678, 76 CCH EPD ¶ 45988

Both city, as police officer's direct employer, and its director of personnel, who had authority over hiring and firing for city, were subject to liability as "employer" under 38 USCS § 4311 definition of term, for alleged failure to promote officer as result of his affiliation with Army Reserve component and alleged retaliation for officer's exercising his statutory rights. Brandsasse v City of Suffolk, Va. (1999, ED Va) 72 F Supp 2d 608, 163 BNA LRRM 2099

Terminated supervisor's claim that employer violated 38 USCS § 4311 is denied summarily, where record shows he was fired solely for his violation of "no-dating" rule through his personal, sexual relationship with female hourly employee, because, aside from correlation in timing, he offers nothing but his own speculation to establish nexus between his military orders and his termination. Sanguinetti v UPS (2000, SD Fla) 114 F Supp 2d 1313, 79 CCH EPD ¶ 40275, 14 FLW Fed D 23, affd without op (2001, CA11 Fla) 254 F.3d 75

Where neutral employment policy provides that promotional exam must be administered only on particular date to all employees, it may constitute discrimination under 38 USCS § 4311 to refuse to allow veterans away on leave on date in question to take make-up exam upon their return from service. Fink v City of New York (2001, ED NY) 129 F Supp 2d 511, 166 BNA LRRM 2923, 80 CCH EPD ¶ 40592

Defendant could not be held liable for decision not to recommend plaintiff for certification as principal because plaintiff had not shown that his membership in United States Air Force Reserves was motivating factor in defendant's decision not to recommend him for certification, and defendant had shown that it would have made same decision in absence of consideration of plaintiff's military status; therefore defendant's decision did not violate plaintiff's rights under 38 USCS § 4311. Smith v Sch. Bd. (2002, MD Fla) 205 F Supp 2d 1308

City's exclusion of military leave from 27-hour cap on lost Fair Labor Standards Act (FLSA) overtime violated Uniform Services Employment and Reemployment Rights Act of 1994, 38 USCS § 4301 et seq., because when military reservist was forced to use vacation leave in same FLSA cycle as military leave he lost benefit of cap, thereby denying him same benefit otherwise available to non-reservist counterparts. Rogers v City of San Antonio (2002, WD Tex) 211 F Supp 2d 829, 170 BNA LRRM 2108, 83 CCH EPD ¶ 41209

City violated Uniform Services Employment and Reemployment Rights Act of 1994, 38 USCS § 4301 et seq., by denying military reservists opportunity to make up for any lost overtime or upgrading and/or training that would have been available to them had they not been on military leave. Rogers v City of San Antonio (2002, WD Tex) 211 F Supp 2d 829, 170 BNA LRRM 2108, 83 CCH EPD ¶ 41209

City is required by Uniform Services Employment and Reemployment Rights Act of 1994, 38 USCS § 4301 et seq., to allow absent military reservists to make up any opportunities for upgrading and/or training missed while on duty. Rogers v City of San Antonio (2002, WD Tex) 211 F Supp 2d 829, 170 BNA LRRM 2108, 83 CCH EPD ¶ 41209

City was liable under Uniform Services Employment and Reemployment Rights Act of 1994, 38 USCS § 4301 et seq., because it considered reservists' military status in offering to them "bonus day" or "perfect attendance" leaves only on reduced basis. Rogers v City of San Antonio (2002, WD Tex) 211 F Supp 2d 829, 170 BNA LRRM 2108, 83 CCH EPD ¶ 41209

Employer was not entitled to summary judgment on employee's claim of discrimination, brought pursuant to Uniformed Services Employment and Reemployment Act of 1994, because
reasonable jury could have found that employee's military status was motivating factor in decision to terminate employee and that employee's performance alone was not reason. Gillie-Harp v Cardinal Health, Inc. (2003, WD Wis) 249 F Supp 2d 1113, 171 BNA LRRM 2956

Where employee's attendance improvement program (AIP) was extended due to military and Family and Medical Leave Act leave, and where employee was terminated for missing work for other reasons during AIP, summary judgment was inappropriate as to claim under Uniformed Services Employment and Reemployment Rights Act; reasonable jury could have found that extinguishment of AIP constituted "benefit of employment" and that employer affected materially adverse change in employee's terms and conditions of employment. Schmauch v Honda of Am. Mfg., Inc. (2003, SD Ohio) 295 F Supp 2d 823, 173 BNA LRRM 2927, 9 BNA WH Cas 2d 360, 149 CCH LC ¶ 34804

Summary judgment was denied where employer sought judgment on employee's claims for retaliation and wrongful discharge where its reason for terminating employee for incident with customer was arguably pretextual-if he had been fired for attending National Guard duty. Mills v Earthgrains Baking Cos. (2004, ED Tenn) 175 BNA LRRM 2811

Employer was denied summary judgment on employee's claim of employment discrimination brought under Uniform Services Employment and Reemployment Rights Act where employee was demoted same day that employee informed employer that he was being called for military duty and employee submitted sufficient evidence that change in position significantly affected employee's employment status because loss of status associated with being removed from head coach position would limit coaching career options and advancement opportunities; furthermore, employee presented evidence that employee's military status played major role in decision to remove employee from head coach position. Harris v City of Montgomery (2004, MD Ala) 322 F Supp 2d 1319, 175 BNA LRRM 2070

Employee who was military reserve member successfully defeated employer's motion for summary judgment for denying employee merit increase based upon employee's military status where employee provided evidence of receiving favorable evaluation and then three days later, after informing employer of being called up for military duty, he was given completely revised and completely unsatisfactory evaluation, which resulted in denial of merit increase. Harris v City of Montgomery (2004, MD Ala) 322 F Supp 2d 1319, 175 BNA LRRM 2070

Employee stated cause of action because employee sufficiently alleged, pursuant to Uniformed Services Employment and Reemployment Rights Act, 38 USCS § 4311, that employer did not rehire him because of his membership in uniformed services; although employee's complaint did not specifically allege that he was member of uniformed service, he stated that he was ordered to active duty and stationed in Iraq. Wal v Sykes Enters. (2004, DC ND) 327 F Supp 2d 1075, 175 BNA LRRM 2399

Summary judgment was granted in favor of employer because undisputed facts that were presented established that employer was not aware of employee's military status at time that decision was made to terminate employee and employee could not establish that employee's military obligation was not motivating factor in adverse employment decision. Snowman v IMCO Recycling, Inc. (2004, ND Tex) 347 F Supp 2d 338, 176 BNA LRRM 2206

Where employee cited no evidence from which jury could reasonably have found that employee's military service was substantial or motivating factor in employer's employment decisions, including decision not to hire him as full-time test pilot, his employer was entitled to summary judgment on his discrimination claims under 38 USCS § 4311(a), part of Uniformed Services Employment and Reemployment Act (USERRA), 38 USCS § 4301 et seq.; both individuals hired for positions had prior or current military experience that employer considered as plus when hiring pilots and, in that regard, court agreed with employer that USERRA does not prohibit employer from weighing job-related skills that various applicants may have acquired in military service. Goico v Boeing Co. (2004, DC Kan) 347 F Supp 2d 955, 176 BNA LRRM 2228, judgment entered (2004, DC Kan) 347 F Supp 2d 986, motion for new trial denied, motion to strike den (2005, DC Kan) 2005 US Dist LEXIS 2768
Terminated employee made sufficient prima facie case that he was discriminated against because of his ongoing service in Army Reserve, pursuant to 38 USCS § 4311; reasonable jury could find that employer's zero-tolerance policy as applied to joking "threat" communicated to another employee was pretextual reason for termination of Reservist's employment. Warren v IBM (2005, SD NY) 358 F Supp 2d 301

District court denied employer's motion to dismiss employee's claims that he was harassed and subjected to hostile work environment upon his return from military service because Uniform Services Employment and Reemployment Rights Act of 1994, 38 USCS § 4301 et seq., provided cause of action for harassment due to prior military service. Vickers v City of Memphis (2005, WD Tenn) 368 F Supp 2d 842

Summary judgment was properly granted to several employers in case brought under Uniform Services Employment and Reemployment Rights Act, 38 USCS §§ 4301-33, because there was no hostile work environment based on comments made on last day of employment or fact that supervisor participated in unannounced conference call, requested better notice of military leave, and requested that employee train others to minimize disruptions during his absences; constructive discharge was not shown based on claims of unfair accusations, transfer without change in responsibility, title, or benefit, and lack of formal process related to request for leave. Figueroa Reyes v Hosp. San Pablo del Este (2005, DC Puerto Rico) 389 F Supp 2d 205

Appellant timely filed his USERRA appeal where statute does not impose time limit, and filing was within 180-day period set by interim regulations. Martir v Department of the Navy (1999, MSPB) 81 MSPR 421

Appellant's claim alleging discrimination on account of military service based on events pre-dating Uniformed Services Employment and Reemployment Rights Act failed to state claim upon which relief could be granted. Venters v United States Postal Serv. (1999, MSPB) 84 MSPR 34

Appellant's claim alleging discrimination on account of military service based on events pre-dating Uniformed Services Employment and Reemployment Rights Act failed to state claim upon which relief could be granted. Higgins v United States Postal Serv. (1999, MSPB) 84 MSPR 64, petition den, remanded (2000, MSPB) 86 MSPR 447

Claim of agency discrimination based on military-connected disability, such as appellant raised, is claim of disability discrimination, not claim covered by Uniformed Services Employment and Reemployment Rights Act. Ray v VA (1999, MSPB) 84 MSPR 108

Appellant made nonfrivolous allegation that he was not selected for position on basis of his obligation to perform military service and was thus entitled to jurisdictional hearing. Tindall v Dep't of Army (1999, MSPB) 84 MSPR 230, corrected (1999, MSPB) 1999 MSPB LEXIS 1547

Neither administrative judge nor agency's dismissal notice put appellant on notice of what was required to establish nonfrivolous allegation of discrimination under Uniformed Services Employment and Reemployment Rights Act, requiring remand to give appellant opportunity to establish Board jurisdiction over her claim. Riordan v United States Postal Serv. (1999, MSPB) 84 MSPR 410

Retired career officers in Navy Judge Advocate General Corps failed to show that their nonselection for civilian counsel to Commander position with agency because of discrimination based on their military service in violation of Uniformed Services Employment and Reemployment Rights Act; given appellants' experience and that of person ultimately selected, agency's stated reason of wanting individual with Office of General Counsel experience was not pretextual. Fahrenbacher v Dep't of the Navy (2000, MSPB) 85 MSPR 500, affd sub nom Sheehan v Dep't of the Navy (2001, CA FC) 240 F.3d 1009, 166 BNA LRRM 2526

Appellant established prima facie case of discrimination under Uniformed Services Employment and Reemployment Rights Act by alleging facts which, if proven, could establish that he was not reinstated because of his military service, hence he was entitled to jurisdictional hearing. Perkins v United States Postal Serv. (2000, MSPB) 85 MSPR 545
Right to reassignment in another location is benefit of employment for purposes of Uniformed Services Employment and Reemployment Rights Act, in light of legislative history and relevant court and Board decisions. Eberhart v United States Postal Serv. (2001, MSPB) 88 MSPR 398

Agency did not fulfill its obligations under Uniformed Services Employment and Reemployment Rights Act in reassigning appellant since new position was temporary assignment while his former assignment was permanent and agency failed to show that appellant could return to permanent position upon completion of temporary detail. Rogers v Dep't of the Army (2001, MSPB) 88 MSPR 610

Essence of appellant's claim was not that agency treated persons who did not perform uniformed service better than those who did, rather lack of animus against veterans generally and instead that agency's displeasure was directed at him personally, hence claims did not establish discrimination under Uniformed Services Employment and Reemployment Rights Act. Daniels v United States Postal Serv. (2001, MSPB) 88 MSPR 630, affd (2001, CA FC) 25 Fed Appx 970

Appellants failed to offer support for belief that agency harbored hostility toward his military service; even assuming such motivating factor, agency proved that it would have proposed appellant's removal for charged misconduct in absence of military service. Fahrenbacher v Department of Veterans Affairs (2001, MSPB) 89 MSPR 260

Appellant making Uniformed Services Employment and Reemployment Rights Act claim of discrimination should be advised of burden and methods of proof and provided opportunity to submit evidence and argument to meet them, requiring remand. Bloomer v United States Postal Serv. (2001, MSPB) 90 MSPR 324

Remand was required to advise appellant making Uniformed Services Employment and Reemployment Rights Act claim of discrimination of burden and methods of proof and provide opportunity to submit evidence and argument to meet them. Skellham v United States Postal Serv. (2001, MSPB) 90 MSPR 361

Appellant stated cognizable claim of discrimination under Uniformed Services Employment and Reemployment Rights Act because interview panel was skeptical and curious about his service-connected disability, suggesting some evidence of anti-veteran animus among panelists. Bagunas v United States Postal Serv. (2002, MSPB) 92 MSPR 5

Appellant failed to establish that his nonselection was due to his military status since agency found him ineligible because he did not have his college degree. Williams v Dep't of the Navy (2003, MSPB) 94 MSPR 206, affd (2004, CA FC) 89 Fed Appx 724

Agency did not violate USERRA by ruling that time appellant served as military cadet was not creditable for leave accrual purposes, since 10 USC'S ' 971(b) prevents service as cadet at Coast Guard Academy from being credited for any purpose. Crawford v DOT (2003, MSPB) 95 MSPR 44, affd (2004, CA FC) 373 F.3d 1155, 150 CCH LC ¶ 10386

§ 4312. Reemployment rights of persons who serve in the uniformed services

(a) Subject to subsections (b), (c), and (d) and to section 4304 [38 USCS § 4304], any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter [38 USCS §§ 4301 et seq.] if--

(1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;

(2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and
(3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).

(b) No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.

(c) Subsection (a) shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service--

(1) that is required, beyond five years, to complete an initial period of obligated service;
(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;
(3) performed as required pursuant to section 10147 of title 10 [10 USCS § 10147], under section 502(a) or 503 of title 32 [32 USCS § 502(a) or 503], or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or
(4) performed by a member of a uniformed service who is-
   (A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 [10 USCS § 688, 12301(a), 12301(g), 12302, 12304, or 12305] or under section 331, 332, 359, 360, 367, or 712 of title 14 [14 USCS § 331, 332, 359, 360, 367, or 712];
   (B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;
   (C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10 [10 USCS § 12304];
   (D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services; or
   (E) called into Federal service as a member of the National Guard under chapter 15 of title 10 [10 USCS §§ 331 et seq.] or under section 12406 of title 10 [10 USCS § 12406].

(d) (1) An employer is not required to reemploy a person under this chapter [38 USCS §§ 4301 et seq.] if--
   (A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;
(B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 [38 USCS § 4313], such employment would impose an undue hardship on the employer; or
(C) the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

(2) In any proceeding involving an issue of whether--
(A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,
(B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 [38 USCS § 4313] would impose an undue hardship on the employer, or
(C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period,

the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.

(e) (1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:
(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer--
(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or
(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.
(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).
(C) In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.
(D) In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.
(2) (A) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.

(B) Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.

(3) A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

(f) (1) A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that--

(A) the person's application is timely;
(B) the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and
(C) the person's entitlement to the benefits under this chapter [38 USCS §§ 4301 et seq.] has not been terminated pursuant to section 4304 [38 USCS § 4304].

(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.

(3) (A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter [38 USCS §§ 4301 et seq.] if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter [38 USCS §§ 4301 et seq.].

(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A) [38 USCS § 4318(a)(2)(A)].

(4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.
(g) The right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the provisions of title 5, United States Code, relating to veterans and other preference eligibles.

(h) In any determination of a person's entitlement to protection under this chapter [38 USCS §§ 4301 et seq.], the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter [38 USCS §§ 4301 et seq.] if the service does not exceed the limitations set forth in subsection (c) and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met.

Explanatory notes:
A prior § 4312 was redesignated as 38 USCS § 7612.

Effective date of section:
This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

Amendments:
1996. Act Oct. 9, 1996 (effective as of 10/13/94, as provided by § 313(a) of such Act, which appears as 38 USCS § 4301 note), in subsec. (a), substituted "whose absence from a position of employment is necessitated" for "who is absent from a position of employment"; in subsec. (c)(4), substituted subpara. (B) for one which read: "(B) ordered to or retained on active duty (other than for training) under any provision of law during a war or during a national emergency declared by the President or the Congress"; and, in subsec. (d)(2)(C), substituted "is for a brief, nonrecurrent period and there is no reasonable expectation" for "is brief or for a nonrecurrent period and without a reasonable expectation".

Such Act further (effective as of 12/1/94, as provided by § 313(b) of such Act, which appears as 38 USCS § 4301 note), in subsec. (c), in para. (3), substituted "section 10147" for "section 270" and, in para. (4), in subpara. (A), substituted "section 688, 12301(a), 12301(g), 12302, 12304, or 12305" for "section 672(a), 672(g), 673, 673b, 673c, or 688", in subpara. (C), substituted "section 12304" for "section 673b" and, in subpara. (E), substituted "section 12406" for "section 3500 or 8500".

Cross References
This section is referred to in 2 USCS § 1316; 38 USCS §§ 4311, 4313, 4314, 4317

Research Guide
Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:77

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 84, 85

Forms:
16A Fed Procedural Forms L Ed, Veterans and Veterans' Laws § 68:132

Annotations:

Law Review Articles:
Hazard. Employers’ obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002
Beasley. Protecting America’s reservists: application of state and federal law to reservists’ claims of unfair labor practices. 7 Ga BJ 10, February 2002
Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002
Piscitelli. Veterans’ employment rights: keeping in step with USERRA’s legion of changes. 46 Lab LJ 387, July 1995

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I. IN GENERAL

1. Generally

There was no merit to argument that veteran had to accept unconditional offer of re-employment before he could present claim for restoration to pre-active duty status. Stevens v Tennessee Valley Authority (1983, CA6) 699 F.2d 314, 112 BNA LRRM 2849, 96 CCH LC ¶ 14120


2. Leaves of absence

Determination by District Court that extended leave requested by National Guard officer did not meet rule of reasonableness acknowledged by officer to be applicable under statute was not clearly erroneous where, after obtaining original leave, officer did not inform employer for several weeks that he was seeking permission from military to extend training period; officer did not discuss with employer that it was unnecessary for him to complete entire training course in single year; and, after being informed by employer that leave would not be extended, officer did not undertake to discuss with employer the opportunities which were available to him but simply stated that he intended to continue his absence from his civilian duties. Lee v Pensacola (1981, CA5 Fla) 634 F.2d 886, 106 BNA LRRM 2329, 90 CCH LC ¶ 12523

Employer violated predecessor statute when it denied 1 year leave of absence to employee who was military reservist seeking training as licensed practical nurse to qualify for future military promotions where employee gave employer four month's notice of intended absence and there were no apparent nurses training alternatives; burden upon employer to hire and train replacement for employee seeking 1 year leave of absence was insufficient, alone, to overcome reasonableness of request. Gulf States Paper Corp. v Ingram (1987, CA11 Ala) 811 F.2d 1464, 124 BNA LRRM 2873, 106 CCH LC ¶ 12239

Reasonableness standard applies in evaluating employee's leave request and employer's response since application of reasonableness standard is consistent with Congress' joint resolution urging nation's employers to cooperate with Reserve Services scheme, and interpretation of statute that gave employees right to leave on demand for even substantial part of work year without consideration of legitimate needs of civilian employers for continuity and dependability among their work force would be counterproductive to spirit of joint resolution because it could deter hiring of members of Reserve Services. Eidukonis v Southeastern Pennsylvania Transp. Authority (1989, CA3 Pa) 873 F.2d 688, 131 BNA LRRM 2287, 111 CCH
Predecessor to statute must be construed as requiring employer to grant reservists leave of absence in order to participate in military training regardless of whether training is at initiative of reservist or at service’s initiative.  Green v Spartan Stores, Inc. (1982, WD Mich) 112 BNA LRRM 2099, 95 CCH LC ¶ 13847

Under rule evaluating employee's statutory re-employment rights on basis of reasonableness of employee's request for leave of absence, employee's request for 26-day "one-shot deal" voluntary training leave that would allegedly enhance his reserve career was reasonable notwithstanding that (1) he had just returned from 2-week active duty tour, (2) request came during "summer camp" season, (3) 30 to 50 percent of employer's employees were also reservists, and (4) employee's absence would further exacerbate already difficult situation in which management had been filling in for flight instructor reservists with complaints from union for so doing.  Bottger v Doss Aeronautical Services, Inc. (1985, MD Ala) 609 F Supp 583, 118 BNA LRRM 3353, 102 CCH LC ¶ 11393

Duration of military leave protected by predecessor statute is not limited to 90 days, where statutory language expressly grants leave "for period required to perform training in Armed Forces," because (1) in 1968 and again in 1974, Congress reviewed and acted upon Veteran's Reemployment Rights Act but left language of statute intact, and (2) when Department of Labor sought to change longstanding "unlimited" interpretation of statutory protections, Congress issued strong statement of its intent that protected leave period should not have arbitrary time limit.  Cronin v Police Dep't (1987, SD NY) 675 F Supp 847, 9 EBC 1468, 127 BNA LRRM 2461, 108 CCH LC ¶ 10329

Former sheriff's department employee who was granted three year leave of absence to serve on active duty for training with United States Army Reserve was granted reinstatement to position under statute, despite employer's assertion that employee resigned to enter military service, where (1) employee's reinstatement rights were based on applicability of Veterans Reemployment Rights Act, and not result of contractual agreement between parties, and (2) three year absence was not unreasonable.  Lemmon v County of Santa Cruz (1988, ND Cal) 686 F Supp 797, 130 BNA LRRM 2604, 111 CCH LC ¶ 10950

Public employer violated Veterans' Reemployment Rights Act (former 38 USCS §§ 2021 et seq.) when it terminated Army reservist's employment, even though reservist had not always been completely candid or prompt with notice to employer of his reservist activities, where employer had always approved of reservist's extended military leaves in past, because reservist acted in good faith in requesting 26-day extension of military leave to complete important military project but employer acted in bad faith by changing its military leave policy as it applied to reservist without warning and discharging him.  Eidukonis v Southeastern Pennsylvania Transp. Authority (1991, ED Pa) 757 F Supp 634, 137 BNA LRRM 2349, 120 CCH LC ¶ 11027

Evidence supported finding that reservist had not made reasonable request for leave where on Sunday, he left his leave request and note indicating that he had been called to reserve duty, when Monday was holiday, and thus gave his superiors no chance to disapprove his leave request, petitioner had opportunity to discuss possible reserve duty with his superiors and to request leave, and even admitted that he could have tried to contact them before departing.  Ellermets v Dep't of the Army (1990, CA) 916 F.2d 702

3. Training duty

Predecessor statute applied to National Guard or reservist's active or inactive duty for training, whether required or not.  Lee v Pensacola (1981, CA5 Fla) 634 F.2d 886, 106 BNA LRRM 2329, 90 CCH LC ¶ 12523

Veteran with active reserve obligation was protected from discharge from employment for attendance at reserve summer camps by predecessor statute, and, upon wrongful discharge from employment, was entitled to reinstatement.  Bankston v Stratton-Baldwin Co. (1977, SD Ala) 441 F Supp 247, 96 BNA LRRM 3292, 83 CCH LC ¶ 10304

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Laborer who, had 2-week period of military training been counted, would have had sufficient number of hours to remain in millwright apprentice program in layoff status rather than being laid off, and who would have achieved millwright status 17 months earlier but for hiatus in training program caused by his layoff, was entitled to recover difference in wages for 17-month period, employer having violated provisions of statute. Almond v United States Steel Corp. (1980, ED Pa) 499 F Supp 786, 105 BNA LRRM 2965, 89 CCH LC ¶ 12206

Fact that reservist could not complete initial 12-week training due to service-connected injury does not deprive reservist of rights under predecessor statute. Zeczycki v Trinity Memorial Hospital (1983, ED Wis) 113 BNA LRRM 2163, 97 CCH LC ¶ 10011

Employer is required to make allowances for reservists whose duties force them to miss time at work by providing them with leave of absence, and reservists must be re-employed after active duty; refusal to reinstate employee, or refusal to give employee leave of absence to fulfill reservist obligations, constitutes violation, despite fact that employee resigned in order to serve tour. Micalone v Long Island R. Co. (1983, SD NY) 582 F Supp 973, 115 BNA LRRM 2640, 99 CCH LC ¶ 10606, 99 CCH LC ¶ 10632

Veterans' Re-employment Rights Act applies to training duty whether required or not; employee is covered by re-employment provisions of Act regardless of whether he volunteers for active duty or is compelled to perform such duty. Bottger v Doss Aeronautical Services, Inc. (1985, MD Ala) 609 F Supp 583, 118 BNA LRRM 3353, 102 CCH LC ¶ 11393

Employer in Kansas City, Kansas had obligation under predecessor statute to allow employee who was member of Navy reserve time off from work in order to travel to Memphis, Tennessee to attend military reserve inactive training, including time off for traveling to training location in Memphis, notwithstanding contention that statute, although specifically allowing reservists time off from work to travel from place of training to place of employment, does not cover travel to place of training. Sawyer v Swift & Co. (1985, DC Kan) 610 F Supp 38, 118 BNA LRRM 3269, 102 CCH LC ¶ 11394, revd on other grounds (1988, CA10 Kan) 836 F.2d 1257, 127 BNA LRRM 2274, 108 CCH LC ¶ 10274

4. Effect of extension of term of service
Motor carrier's district supervisor who was commissioned army captain in 1942 and did not leave Army after World War II, in 1948 signed commitment for 3 years' additional active duty, executed voluntary commitments in 1951 and 1952 and was retired in 1953, after having been assigned logistical duties, including maintenance and management of heavy motorized equipment, could not be refused re-employment on grounds that he was not capable of doing his old civilian job nor on grounds that his successor was capable but veteran lost re-employment rights by voluntarily remaining in service after end of 4 years' initial service; re-enlistment was not entry into active duty because veteran was already on active duty; veteran lost his right to re-employment by voluntarily extending his period of military service beyond time when he would have been entitled to discharge. Smith v Missouri Pacific Transp. Co. (1963, CA8 Ark) 313 F.2d 676, 52 BNA LRRM 2547, 46 CCH LC ¶ 18071 (ovrd in part as stated in Paisley v City of Minneapolis (1996, CA8 Minn) 79 F.3d 722, 151 BNA LRRM 2948, 132 CCH LC ¶ 11702) and (criticized in Wrigglesworth v Brumbaugh (2000, WD Mich) 121 F Supp 2d 1126, 166 BNA LRRM 2560)

Veteran, who re-enlisted, was entitled to re-employment rights despite provision of union contract that granting of full seniority rights did not apply to second enlistments. Nunn v Humphrey (1948, DC Pa) 79 F Supp 8

Veteran was not barred from benefits merely because one week elapsed between discharge and re-enlistment where separation was result of inability of Army to handle re-enlistment expeditiously. Fessler v Reading Co. (1955, DC Pa) 138 F Supp 203, 29 CCH LC ¶ 69756

Fact that veteran requested extension of his tour of military duty for 89 additional days did not prevent him from seeking benefits of statute. Fletcher v Commissioner of Civil Service (1971, ED Tenn) 329 F Supp 1398
Under predecessor statute, orders for plaintiff, member of National Guard, to report for full-time training constituted "active duty for training in Armed Forces of the United States"; for purposes of statute, full-time training or full-time duty performed by member of National Guard under 32 USCS § 505, is considered active duty for training. Peel v Florida Dep't of Transp. (1977, ND Fla) 443 F Supp 451, 95 BNA LRRM 2038, 81 CCH LC ¶ 13159, aff'd (1979, CA5 Fla) 600 F.2d 1070, 101 BNA LRRM 3126, 86 CCH LC ¶ 11480 (criticized in Chavez v Arte Publico Press (1995, CA5 Tex) 59 F.3d 539, 35 USPQ2d 1609)

Employee's voluntary extension on active duty was irrelevant to determination of employee's re-employment rights where, but for employer's illegal refusal of employee's request for 26-day training leave, employee would not have resigned his employment, and, but for his resignation, he would not have extended his service on active duty. Bottger v Doss Aeronautical Services, Inc. (1985, MD Ala) 609 F Supp 583, 118 BNA LRRM 3353, 102 CCH LC ¶ 11393

5. Miscellaneous

Veteran's rights under predecessor statute were not violated because former employer failed to restore him to former position of refuse collector or similar position with same seniority and pay, notwithstanding that employer under statute was required to offer re-employment to veteran who had been laid off prior to entering active military service, since employer was required to return veteran to re-employment eligibility list of laid off personnel for period of time veteran would have been entitled to remain on list with other laid off employees, had he not entered military service, and period of remaining eligibility to which veteran was entitled expired before employer had available position. Colon v County of Shawnee (1987, CA10 Kan) 815 F.2d 594, 124 BNA LRRM 3213, 106 CCH LC ¶ 12323

Male reservist failed to adequately notify his employer that he would be unable to perform assigned overtime work because of make-up weekend reserve training drill, notwithstanding that reservist informed employer at grievance proceeding approximately one month earlier that make-up drill would occur on first nonholiday weekend in January, since reservist failed to give specific date or to remind employer from time that overtime list was put out until one hour prior to his commitment that he be unable to appear at his place of employment, and that reservist failed to inform anyone that his name should not have been on overtime list or that he could not work because of reserve duties. Sawyer v Swift & Co. (1988, CA10 Kan) 836 F.2d 1257, 127 BNA LRRM 2274, 108 CCH LC ¶ 10274

Pre-employment military service should not be counted toward four-year service limitation for eligibility for reemployment under former § 2024; four-year restriction was designed specifically to address employers' concerns about reemployment rights of indefinite duration and not to penalize veterans on basis of their pre-employment service. Sykes v Columbus & Greenville Ry. (1997, CA5 Miss) 117 F.3d 287, 155 BNA LRRM 2848, 134 CCH LC ¶ 10041

38 USCS § 101(24) should not be incorporated into Veterans' Reemployment Rights Act of 1974 (VRRA) to expand scope and application of VRRA: (1) even though courts construe veterans' statutes liberally, they cannot create rights out of whole cloth; (2) employer complies with VRRA when it rehires employee following his or her discharge from military service; and (3) VRRA does not purport to create additional reemployment rights after employee has been rehired and thereafter is granted disability leave, even if disability is related to his prior military service. Bowlds v GM Mfg. Div. of GMC (2005, CA7 Ind) 411 F.3d 808, 177 BNA LRRM 2529

Employer did not violate Veterans' Reemployment Rights Act of 1974 (VRRA) when it failed to immediately rehire employee, who had returned to work following his discharge from military service, had been placed on disability due to complications from Agent Orange exposure, and had subsequently been medically cleared to return to work: (1) employer met its obligations under VRRA when it rehired employee following his military discharge; (2) employer's VRRA obligations did not extend to employee's return to work following his subsequent disability leave; and (3) employer could not be held liable under former 38 USCS § 2022 for allegedly failing to properly credit employee's pension, because no VRRA violation had occurred. Bowlds v GM Mfg. Div. of GMC (2005, CA7 Ind) 411 F.3d 808, 177 BNA LRRM 2529

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Reservist's reemployment rights under predecessor statute did not lapse when reservist chose to convert status from special active duty for training to active duty status where reservist had originally volunteered for training status and converted to active duty status only after training status was terminated by Department of Army and reservist was faced with termination of his commission. Lemmon v County of Santa Cruz (1988, ND Cal) 686 F Supp 797, 130 BNA LRRM 2604, 111 CCH LC ¶ 10950

Reservist's claim under Veteran's Re-Employment Rights Act will not be dismissed summarily, where reservist was called to active duty in September 1990, released from active duty due to lost security clearance in October 1990, re-employed immediately by former employer, but then reduced to part-time status in December and terminated in January 1991, because issues of fact remain, pursuant to § 2024(b)(1) requirements that reservist (1) "must satisfactorily have performed military service," and (2) must have been fired "without cause." Garcia v Ecotech, Inc. (1992, MD La) 786 F Supp 571, 140 BNA LRRM 2866

Employment rights under Uniformed Services Employment and Reemployment Rights Act (38 USCS §§ 4301 et seq.) do not extend to employees who leave their civilian employment to pursue military careers. OPM Case No. S000958 (7/30/99)

II. NATURE OF CESSATION OF EMPLOYMENT

6. Generally

To be restored to his former position, burden is on employee to prove that he left his position which was permanent in its nature in order to perform military training and service in the armed forces. McCarthy v M & M Transp. Co. (1947, CA1 Mass) 160 F.2d 322, 19 BNA LRRM 2327, 12 CCH LC ¶ 63613

Fact that veteran continues to obtain some commissions from his preservice employment does not prevent finding that he left such employment to enter military service. Travis v Schwartz Mfg. Co. (1954, CA7 Wis) 216 F.2d 448, 35 BNA LRRM 2191, 26 CCH LC ¶ 68775

It makes no difference whether person resigns employment before induction or after induction or does not resign at all if he leaves employment for purpose of performing training and service in Armed Forces. Atkinson v United States (1946, DC Minn) 68 F Supp 99

No prior notice of leaving for military service is necessary, test being whether or not person was required to leave his employment to report for purpose of being inducted or determining by preinduction examination his physical fitness to enter Armed Forces and, where employee was so required by reason of induction order and reported for work following his rejection within period specified by statute, employee must be restored to former job. Fortenberry v Owen Bros. Packing Co. (1966, SD Miss) 267 F Supp 605, 65 BNA LRRM 2627, 55 CCH LC ¶ 11885, affd (1967, CA5 Miss) 378 F.2d 373, 65 BNA LRRM 2629, 55 CCH LC ¶ 11905

Veterans' Re-employment Rights Act applies to training duty whether required or not; employee is covered by re-employment provisions of Act regardless of whether he volunteers for active duty or is compelled to perform such duty. Bottger v Doss Aeronautical Services, Inc. (1985, MD Ala) 609 F Supp 583, 118 BNA LRRM 3353, 102 CCH LC ¶ 11393

Phrase "in order to perform" in former 38 USCS § 2021 meant that employee had to provide good evidence of his or her motive for leaving work. Preda v Nissho Iwai Am. Corp. (1996, SD NY) 152 BNA LRRM 2185, 134 CCH LC ¶ 10001, affd in part and vacated in part, remanded (1997, CA2 NY) 128 F.3d 789, 75 BNA FEP Cas 371, 156 BNA LRRM 2857, 72 CCH EPD ¶ 45071

7. Notice

Fact that employer had no notice that employee was leaving employment in order to enter military service does not amount to waiver of employee's rights under former 38 USCS § 2021 since no such notice was required. Adams v Mobile County Personnel Bd. (1982, SD Ala) 115 BNA LRRM 2936, 95 CCH LC ¶ 13886

8. Discharge

© 2006 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.
Veteran did not leave position to enter service and was not entitled to reinstatement where, on August 9, 1943, he was notified that he had been selected for training in armed services, was ordered to report to draft board for induction on September 3, at which time he was inducted into Army and was released from active duty until September 24, and where, during interim, he continued his work until September 7, at which time he was fired. McCarthy v M & M Transp. Co. (1947, CA1 Mass) 160 F.2d 322, 19 BNA LRRM 2327, 12 CCH LC ¶ 63613

Promotions were not temporary where carmen helpers were advanced to mechanics prior to their induction pursuant to contract. Spearmon v Thompson (1948, CA8 Ark) 167 F.2d 626, 22 BNA LRRM 2025, 14 CCH LC ¶ 64472, cert den (1948) 335 US 822, 93 L Ed 376, 69 S Ct 44, 22 BNA LRRM 2564 and cert den (1948) 335 US 886, 93 L Ed 424, 69 S Ct 238, 23 BNA LRRM 2119

Employer was liable for discharging foreman because he had asked for Saturday off to meet scheduled reserve unit drill. Cole v Swint (1992, CA5 Tex) 961 F.2d 58, 140 BNA LRRM 2447, 121 CCH LC ¶ 10174

Defendant sufficiently showed that plaintiff's discharge was attributable to his dishonesty and insubordination, not his reserve status, and plaintiff therefore was not entitled to relief under Veterans' Reemployment Rights Act. Gummo v Village of Depew (1998, CA2 NY) 159 F.3d 770, 159 BNA LRRM 2893, 136 CCH LC ¶ 10302

Two copilots who had been released from positions under terms which denoted finality insofar as intention of company was disclosed, and who then entered armed services, did not leave employment "in order to perform such training and service" as would have entitled them to reinstatement rights. Edwards v Capital Airlines, Inc. (1949, App DC) 84 US App DC 346, 176 F.2d 755, 23 BNA LRRM 2464, 25 BNA LRRM 2042, 16 CCH LC ¶ 65027, 17 CCH LC ¶ 65436, cert den (1949) 338 US 885, 94 L Ed 543, 70 S Ct 186, 25 BNA LRRM 2082

Postmaster General must "deem" veteran as having performed service for Post Office Department during period including April 6, 1968, when he left his career position after having been ordered for active duty, and to restore him to former position, if available, or to position of like seniority, status, and salary level, or to position to which he might have been promoted or reassigned while in military service where veteran's discharge from position as federal postal inspector in 1964 was wrongful and Court of Claims awarded him backpay for July 18, 1964 to May 15, 1968 but where Post Office Department made no offer by April 6, 1968, when serviceman entered military service, to reinstate serviceman to position from which he had been removed wrongfully. Fletcher v Commissioner of Civil Service (1971, ED Tenn) 329 F Supp 1398

Where employer delays until after employee is inducted before imposing discipline, discipline does not affect re-employment rights; to hold otherwise would be to permit employer to schedule grievance and arbitration proceedings after employee had reported for training and service. Gall v United States Steel Corp. (1984, WD Pa) 598 F Supp 769, 117 BNA LRRM 3397, 102 CCH LC ¶ 11335

Employer was not collaterally estopped from presenting evidence that employee was fired for insubordination or for not holding driver's license by state unemployment compensation referee's holding that employee was not fired for willful misconduct, where employee must prove he was fired for enlisting in the National Guard in order to prevail on § 2021 claim, since prior adjudication is void of facts relating to central concern of second action. Tuksbrey v Midwest Transit (1993, WD Pa) 822 F Supp 1192, 144 BNA LRRM 2723, 125 CCH LC ¶ 10762, subsequent app (1994, CA3 Pa) 37 F.3d 1489

Terminated employee made sufficient prima facie case that he was discriminated against because of his ongoing service in Army Reserve, pursuant to 38 USCS § 4311; reasonable jury could find that employer's zero-tolerance policy as applied to joking "threat" communicated to another employee was pretextual reason for termination of Reservist's employment; employee's reemployment claim under 38 USCS § 4312 was dismissed. Warren v IBM (2005, SD NY) 358 F Supp 2d 301
Employer violated 38 USCS §§ 4313(a)(2)(A) and 4316(c)(1) by reinstating reservist's employment upon his return from active duty with same title, pay, and benefits, but with greatly diminished job duties, and then discharging him approximately four months later without proving cause, given that timing of reservist's discharge and decisionmaking process that preceded it were not reasonable under circumstances. Duarte v Agilent Techs., Inc. (2005, DC Colo) 366 F Supp 2d 1039, 176 BNA LRRM 3226, 150 CCH LC ¶ 10467

9. Layoff

Veteran laid off by operation of seniority system, with right of recall in seniority order, and with right to accumulate seniority while laid off, has "position (other than temporary) in the employ" of company when he entered service and is entitled to seniority rights on return from service. Kelly v Ford Instrument Co. (1962, CA2 NY) 298 F.2d 399, 49 BNA LRRM 2461, 44 CCH LC ¶ 17371

Veteran was released from employment and was therefore unemployed and was not entitled to reinstatement rights where defendant company sent veteran, prior to entering service, letter stating "it is with regret that I must inform you that, due to your position in the seniority system of the company, it is necessary to place you on furlough until further notice." Barbee v Capital Airlines, Inc. (1951, App DC) 89 US App DC 335, 191 F.2d 507, 28 BNA LRRM 2431, 20 CCH LC ¶ 66471, cert den (1952) 342 US 908, 96 L Ed 680, 72 S Ct 302, 29 BNA LRRM 2285

A person who entered military service while on laid-off status from employer did not lose his right to reinstatement under former 50 USCS Appx § 459(b)-(h) when reached for recall during his military service. Hall v Chicago & E. I. R. Co. (1964, ND Ill) 240 F Supp 797, 59 BNA LRRM 2819, 51 CCH LC ¶ 19686

10. Resignation

Congress intended re-employment rights to apply to veteran who voluntarily quits his job to enlist or to make himself available for induction as well as to veteran who was compelled to quit his job because of induction in usual course. Boston & M. R. R. v Hayes (1947, CA1 Mass) 160 F.2d 325, 19 BNA LRRM 2434, 12 CCH LC ¶ 63634

Motive of veteran in leaving employment must be to enter Armed Forces to be eligible for reinstatement; evidence clearly showed veteran left employment to enter military service where, on same date veteran quit work, he went to U.S. Employment Office to find out about entering merchant marine, 1 week later he received enlistment papers and the following week signed enlistment papers and in interim he did not obtain nor seek other employment, where he had talked about his plans with wife, sister and fellow employees, together with local board and recruiting officers, and where defendant company never offered nor suggested any other explanation for veteran's leaving employment other than that he intended to enter service. Noble v International Nickel Co. (1948, DC W Va) 77 F Supp 352, 22 BNA LRRM 2066, 14 CCH LC ¶ 64552

11. -From deferred employment

Re-employment rights are granted to any person who resigns from his job as means of terminating his deferment, thereby making himself available for voluntary induction, provided that he does so for purpose of serving, is accepted, and then actually serves, in armed forces. Boston & M. R. R. v Hayes (1947, CA1 Mass) 160 F.2d 325, 19 BNA LRRM 2434, 12 CCH LC ¶ 63634

Veteran who was deferred from induction because he was engaged in work essential to war effort and who surrendered his position voluntarily in order to be eligible for active duty was entitled to re-employment rights upon discharge. Rudisill v Chesapeake & O. R. Co. (1948, CA4 Va) 167 F.2d 175, 21 BNA LRRM 2692, 14 CCH LC ¶ 64460

Re-employment benefits should be extended to veteran in deferred class who resigns his employment in order to become available for induction into armed forces. Atkinson v United States (1946, DC Minn) 68 F Supp 99
Employee who has been classified and deferred by draft board as essential civilian employee at employer's request but who resigns from employment to volunteer for induction does not forfeit statutory right to be restored on satisfactory completion of military service to position from which he resigned or to one of like seniority, status and pay. Thompson v Chesapeake & O. R. Co. (1947, DC W Va) 76 F Supp 304, 21 BNA LRRM 2358, 14 CCH LC ¶ 64367

12. -Compelled by conduct of employer

Resignation prior to entering upon active duty in military service does not preclude right to re-employment under Veterans' Re-employment Rights Act; employee's resignation to enter service is of even less relevance where employee, who was denied requested leave, resigned as a result of being faced with prospect of termination for taking unexcused absences. Bottger v Doss Aeronautical Services, Inc. (1985, MD Ala) 609 F Supp 583, 118 BNA LRRM 3353, 102 CCH LC ¶ 11393

Employee's voluntary extension on active duty was irrelevant to determination of employee's re-employment rights where, but for employer's illegal refusal of employee's request for 26-day training leave, employee would not have resigned his employment, and, but for his resignation, he would not have extended his service on active duty. Bottger v Doss Aeronautical Services, Inc. (1985, MD Ala) 609 F Supp 583, 118 BNA LRRM 3353, 102 CCH LC ¶ 11393

Returning veteran of National Guard reserves is entitled to statutory protection of Uniformed Services Employment and Re-employment Act (38 USCS §§ 4301 et seq.), where his resignation for "administrative purposes," solicited by employer, did not waive his statutory rights, because it is simply subterfuge to pretend, in this scenario, that resignation and collective bargaining agreement are legitimate, nondiscriminatory reasons for not reemploying returning veteran. Wrigglesworth v Brumbaugh (2000, WD Mich) 121 F Supp 2d 1126, 166 BNA LRRM 2560, summary judgment gr, injunction gr, judgment entered (2001, WD Mich) 129 F Supp 2d 1106, 168 BNA LRRM 2636, 143 CCH LC ¶ 10991

13. -Under particular circumstances

Former city police officer waived whatever reemployment rights he may have had when he resigned his position with police department in connection with his decision to voluntarily extend his active duty with National Guard; fact that resignation was difficult or even that it was precipitated by police department's refusal to extend his leave or to allow him to take promotional exam did not make his waiver equivocal. Paisley v City of Minneapolis (1996, CA8 Minn) 79 F.3d 722, 151 BNA LRRM 2948, 132 CCH LC ¶ 11702, reh, en banc, den (1996, CA8 Minn) 1996 US App LEXIS 11196 and cert den (1996) 519 US 929, 136 L Ed 2d 217, 117 S Ct 298, 153 BNA LRRM 2576 and (criticized in Wrigglesworth v Brumbaugh (2000, WD Mich) 121 F Supp 2d 1126, 166 BNA LRRM 2560)

Where federal employee left civilian service and served for 12 years in military before returning to civilian employment for 20 months, employee's military service was properly excluded in calculating employee's civilian retirement annuity since employee intended to abandon civilian career after first period of civilian service and to commence career service within military; employee withdrew civilian retirement contributions after first period of civilian service and applied for annuity even before separation from second period of civilian service, indicating that resumption of civilian service was intended to qualify employee for annuity rather than to pursue civilian career. Dowling v OPM (2004, CA FC) 393 F.3d 1260

Veteran is entitled to promotion and increase in pay where veteran, accomplished flyer, left employment to take 2 refresher courses to qualify him as instructor of flying cadets since resignation from employment was done with intention of entering military service. Atkinson v United States (1946, DC Minn) 68 F Supp 99

Veteran's motive for leaving job was to enter service where he left employment same day he received notice to report for preinduction physical examination and did not thereafter obtain or seek other employment but proceeded to get ready to leave by settling his business and visiting parents and where he was accepted 10 days after leaving employment and notified employer of his intentions to enter service and was advised by employer not to report for duty on his
Veteran had no reinstatement right where he applied for induction in Armed Forces on August 20, 1943, where he was put on October call because August quota was then filled, where he voluntarily resigned from defendant's employ on August 30, and where he began working for second employer on September 8, who was not informed of veteran's induction status; it would be anomalous for statute to be interpreted so as to give veteran alternative rights against successive employers; such circumstances are different from that of man who, knowing he is about to be inducted, leaves permanent employment with intent of taking short preservice vacation and then unexpectedly interrupts vacation to do odd task which both he and his casual employer treat as merely temporary employment. In re United States ex rel. Obum (1948, DC NY) 82 F Supp 36, affd (1948, CA2 NY) 170 F.2d 1009, revd on other grounds (1949) 336 US 806, 93 L Ed 1054, 69 S Ct 921

Veteran who, having resigned from employment, waits period of 6 months before entering armed services, during which period he accepts other employment, has not left position in order to perform military service and is not entitled to re-employment rights. Loker v Allied Bldg. Credits, Inc. (1948, DC Mo) 82 F Supp 143, 16 CCH LC ¶ 64911

Plaintiff was not entitled to reinstatement to police department under predecessor statute where he resigned from police department retroactively to date before entering military service, his resignation was in no way coerced by his employer, and he clearly and unequivocally intended permanent severance of his employment relationship with police department to pursue totally different career choice. Hilliard v New Jersey Army Nat'l Guard (1981, DC NJ) 527 F Supp 405, 108 BNA LRRM 2069, 91 CCH LC ¶ 12808

School board's policy of not reinstating teachers until first school day of succeeding 6-week school term following absences could not be applied to teacher returning from active duty military training, notwithstanding that policy has been evenly applied to minimize disruption of pupils' learning process. Griffin v Tunica County Schools (1982, ND Miss) 112 BNA LRRM 2167, 95 CCH LC ¶ 13844

Air National Guard officer who has voluntarily undertaken active duty assignment was deemed to be on military leave of absence from his employment as airline pilot and flight manager, and was entitled to reinstatement, with seniority and benefits accruing during leave, when he completed active duty, where (1) officer, while on paid vacation from civilian employment, notified airline that he was entering active military duty without suggesting that he was tendering resignation, (2) he did not conduct himself in way which categorically implied resignation, (3) he did not "quit" job and then join Air National Guard, and (4) his 48 month tour of duty is within length of time for military leave of absence provided in statute. Winders v People Express Airlines, Inc. (1984, DC NJ) 595 F Supp 1512, 5 EBC 2433, 117 BNA LRRM 3275, 102 CCH LC ¶ 11258, affd (1985, CA3 NJ) 770 F.2d 1078, 119 BNA LRRM 3071

Policemen's reinstatement right was not lost merely because he resigned before entering service rather than taking leave of absence as permitted by city charter. Borseth v Lansing (1953) 338 Mich 53, 61 NW2d 132

14. Miscellaneous

Employee did not either literally or substantially leave his position to perform naval services when as matter of fact he continued to hold position for at least seven months after his entry into naval service. McClayton v W. B. Cassell Co. (1946, DC Md) 66 F Supp 165, 18 BNA LRRM 2096, 11 CCH LC ¶ 63195

Employee who has been inducted, sworn and ordered to report within 3 weeks was entitled to protections of predecessor statute; employee is not without recourse because he has been inducted in armed force but has not yet reported for training. Gall v United States Steel Corp. (1984, WD Pa) 598 F Supp 769, 117 BNA LRRM 3397, 102 CCH LC ¶ 11335

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III. REEMPLOYMENT OF VETERAN

A. Application for Reemployment

15. Generally

Veteran who requests more from his employer than he is entitled to under predecessor statute does not lose his right to demand that to which he is justly entitled. Boston & M. R. R. v David (1948, CA1 NH) 167 F.2d 722, 22 BNA LRRM 2133, 14 CCH LC ¶ 64508

Failure to apply for re-employment within 90 days bars right. Brown v Nashville, C. & St. L. R. Co. (1955, CA6 Tenn) 221 F.2d 791, 28 CCH LC ¶ 69187

Dismissal of claim asserted on behalf of deceased reserve member against his civilian employer was affirmed because 38 USCS § 4312 did not impose eight-hour "rest period" right to reserve member and fact that employer allegedly ordered employee back to work in shorter period of time did not confer liability on employer under Uniformed Services Employment and Reemployment Rights Act of 1994, 38 USCS §§ 4301-4333. Gordon v Wawa, Inc. (2004, CA3 NJ) 388 F.3d 78, 175 BNA LRRM 3206

Former employee was not entitled to full federal retirement benefits where he did not have valid civil service reemployment rights following his service in Air National Guard. Moravec v OPM (2004, CA FC) 393 F.3d 1263

Requirements that former employee, after completion of his training and service, should receive certificate and that he possess qualifications to perform duties of his former position, and that he make application for re-employment within forty days [now 90 days] after being relieved from service, are conditions which former employee must meet. Bryan v Griffin (1946, DC Ky) 67 F Supp 714, 18 BNA LRRM 2326, 11 CCH LC ¶ 63337, affd (1948, CA6 Ky) 166 F.2d 748, 21 BNA LRRM 2566, 14 CCH LC ¶ 64397

Veteran is given ninety days to apply for his old position and, whatever his plans before applying, upon application within ninety days of discharge, he is entitled, providing all other requisites are met, to be reinstated in his old position. Troy v Mohawk Shop, Inc. (1946, DC Pa) 67 F Supp 721, 18 BNA LRRM 2297, 11 CCH LC ¶ 63306

Reservists are not subject to requirement of presenting certificate to employer at time of application for reinstatement. Micalone v Long Island R. Co. (1983, SD NY) 582 F Supp 973, 115 BNA LRRM 2640, 99 CCH LC ¶ 10606, 99 CCH LC ¶ 10632

Former employee was covered member of Uniform Services Employment and Reemployment Rights Act, 38 USCS § 4301 et seq., where he complied with service duration and notice provisions of statute, and he was thus entitled to reemployment with former employer as matter of law. Jordan v Air Prods. & Chems., Inc. (2002, CD Cal) 225 F Supp 2d 1206, 170 BNA LRRM 3153, 83 CCH EPD ¶ 41247, subsequent app (2005, CA9 Cal) 124 Fed Appx 537

16. Burden of proof

Returned veteran has burden of proof to show that he made demand for reinstatement to his old position within ninety days from his discharge. Cummings v Hubbell (1948, DC Pa) 76 F Supp 453, 22 BNA LRRM 2109, 15 CCH LC ¶ 64562

Where testimony for veteran reveals that he had, within 90 days of discharge, applied for re-employment, but testimony of employer shows conclusively that veteran had not made such application and had accepted employment elsewhere during that period, court accepts statements of employer as true and will deny judgment for veteran. Lacek v Peoples Laundry Co. (1950, DC Pa) 94 F Supp 399, 27 BNA LRRM 2113, 19 CCH LC ¶ 66076

Where employer fired employee immediately after employee returned from several weeks of service in U.S. Naval Reserve, even if employee did not offer proof of discrimination, employer

Viewing plain language of 38 USCS § 4312, and mindful of mandate to construe Uniform Services Employment and Reemployment Rights Act liberally for benefit of service persons, court found that § 4312 creates unqualified right to reemployment to those who satisfy service duration and notice requirements; this benefit is subject only to defenses enumerated in § 4312, i.e. reemployment is unreasonable, impossible or creates undue hardship; 38 USCS § 4312 neither contains nor implies proof of discrimination requirement. Jordan v Air Prods. & Chems., Inc. (2002, CD Cal) 225 F Supp 2d 1206, 170 BNA LRRM 3153, 83 CCH EPD ¶ 41247, subsequent app (2005, CA9 Cal) 124 Fed Appx 537

17. Computation of period

Under predecessor to statute, 90 day period in which to apply for re-employment begins to run on date of discharge. Cox v Boston Consol. Gas Co. (1947, CA1 Mass) 161 F.2d 680, 20 BNA LRRM 2199, 12 CCH LC ¶ 63797; Parlman v Delaware, L. & W. R. Co. (1947, CA3 NJ) 163 F.2d 726, 20 BNA LRRM 2587, 13 CCH LC ¶ 64030; Schreier v M. H. Fishman Co. (1948, CA3 NJ) 176 F.2d 722, 22 BNA LRRM 2285, 15 CCH LC ¶ 64629

Veteran's right to reinstatement matures at time he receives honorable discharge, not at time he receives certificate of service showing that he has served honorably and is being released to accept employment in essential industry; veteran who received certificate of honorable discharge on April 2, 1945, and applied for reinstatement on May 1, 1945, sufficiently complied with 90-day requirement although on July 28, 1943, he was transferred to enlisted reserve corps and given certificate of service that showed he had honorably served. Schreier v M. H. Fishman Co. (1948, CA3 NJ) 176 F.2d 722, 22 BNA LRRM 2285, 15 CCH LC ¶ 64629

Employer could not contend that application for re-employment was not timely where employee was released from service prior to his honorable discharge, since time for making such application stemmed from date of honorable discharge. Schreier v M. H. Fishman Co. (1948, CA3 NJ) 176 F.2d 722, 22 BNA LRRM 2285, 15 CCH LC ¶ 64629

Fact that veteran's certificate showing honorable military discharge was inadvertently not issued until after 90 days from discharge did not bar re-employment rights. Travis v Schwartz Mfg. Co. (1954, CA7 Wis) 216 F.2d 448, 35 BNA LRRM 2191, 26 CCH LC ¶ 68775

90-day period for making request for reemployment did not begin to run until actual discharge where, although plaintiff had been granted release from active military service, he was placed in reserve status in order to enter civilian employment in navy yard. Tipper v Northern P. R. Co. (1945, DC Wash) 62 F Supp 853, 17 BNA LRRM 526, 10 CCH LC ¶ 62866

Veteran did not voluntarily remove himself from protection of re-employment rights statute (former 50 USCS Appx § 459(b)-(h)) where his military service did not total more than four years after joining railroad's employment. Hall v Chicago & E. I. R. Co. (1964, ND Ill) 240 F Supp 797, 59 BNA LRRM 2819, 51 CCH LC ¶ 19686

Veteran was not entitled to reemployment with Postal Service under statute, where veteran left Postal Service to seek civil job rather than enter military and served more than 4 years before, and more than 5 years after, 1961, because veteran was outside statute's protection in either case. Thomas v Price (1989, SD Tex) 718 F Supp 598, affd without op (1991, CA5 Tex) 936 F.2d 569 and affd (1992, CA5 Tex) 975 F.2d 231, 19 UCCRS2d 335, reh den (1992, CA5) 1992 US App LEXIS 30193

Reservist who served more than 11 years active duty before seeking restoration to his civilian employment did not have restoration rights. Sheldon v Dep't of the Navy (1990, MSPB) 46 MSPR 88

18. Circumstances constituting discharge

Despite veteran's contention that discharge by War Department Circular providing for discharge of men over 39 years of age who intended to work in defense industry, even though in
terms unconditional, gave only nominal release from Army because, if at any time he should cease to be engaged in such essential activity, he would be promptly reinducted and that, therefore, 90-day period should be considered as commencing from time he was released from employment in defense industry, reinstatement was justifiably denied after 90-day period where veteran did not show that he was in any danger of reinduction had he terminated employment in defense industry. Cox v Boston Consol. Gas Co. (1947, CA1 Mass) 161 F.2d 680, 20 BNA LRRM 2199, 12 CCH LC ¶ 63797

Veteran who was discharged under provisions of War Department Circular Number, providing for discharge of enlisted man 38 years of age and over to accept employment in essential war industry and who, after accepting employment in essential industry, did not make application for reinstatement to his preservice position until 1 year thereafter, was not entitled to reinstatement; discharge under Circular Number was outright discharge and it could not be contended that 90-day period began to run when employment with defense industry expired. Parliman v Delaware, L. & W. R. Co. (1947, CA3 NJ) 163 F.2d 726, 20 BNA LRRM 2587, 13 CCH LC ¶ 64030

Refusal of reinstatement on ground that more than 90 days had elapsed was not justified where plaintiff applied for reinstatement within 90 days after discharge which was other than honorable and was refused on that account and thereafter obtained retroactive change of discharge to honorable, which process took more than 90 days. Robertson v Richmond, F. & P. R. Co. (1959, DC Va) 178 F Supp 734, 45 BNA LRRM 2478, 38 CCH LC ¶ 66022

19. Form and sufficiency of request, generally

Employer is estopped from denying veteran's compliance with statutory requirements where employer's answer duly admits application for re-employment within prescribed time and defendant's refusal to re-employ. United States ex rel. Stanley v Wimbish (1946, CA4 NC) 154 F.2d 773, 17 BNA LRRM 972, 11 CCH LC ¶ 63099

Application for re-employment is made within 90-day period where veteran was discharged December 27, 1944, but had been issued certificate of service and transferred to enlisted reserve corps "to accept employment in essential industry including agriculture" on December 2, 1943, and at such time made application for employment and where such application was of continuing nature. Van Doren v Van Doren Laundry Service, Inc. (1947, CA3 NJ) 162 F.2d 1007, 20 BNA LRRM 2351, 13 CCH LC ¶ 63910

Requirement that application for reinstatement be made within 90 days after discharge was complied with where doctor, while still in service, made 2 requests to hospital for reinstatement to his former position, although his communications during 90-day period after discharge from service apparently requested only that he be hired by hospital as second assistant resident in surgery, position to which he was not entitled under statute, such communications not suggesting that he was no longer interested in his former position as third assistant resident. Martin v Roosevelt Hospital (1970, CA2 NY) 426 F.2d 155, 74 BNA LRRM 2738, 62 CCH LC ¶ 10807

Veteran did not give former employer reasonable notice that he wanted his job back so as to be entitled to relief under Uniformed Services Employment and Reemployment Rights Act where he only contacted his former supervisor, who directed him to human resources department to update his employee form, but veteran never did so. McGuire v UPS (1998, CA7 Ill) 152 F.3d 673, 158 BNA LRRM 3085, 135 CCH LC ¶ 10219

Veteran sufficiently applied for reinstatement with former employer by inquiring about job and taking requisite physical examination; fact that veteran did not thereafter communicate with employer for 10 months did not relieve employer of obligation to contact veteran and offer reinstatement. Clayton v United Parcel Service (1982, WD Tenn) 113 BNA LRRM 3447, 95 CCH LC ¶ 13846

Reinstatement right of policemen was not lost where he talked about reinstatement to chief rather than formally applying to board where board considered informal application and rejected it on other grounds. Borseth v Lansing (1953) 338 Mich 53, 61 NW2d 132

20. -Request for leave of absence
Holding that, while request for leave of absence is application for reinstatement because it does not anticipate immediate work or at least work within forty-day [now 90 day] period and that it cannot be held to be application for re-employment is too narrow construction of statutory language. Grasso v Crowhurst (1946, CA3 NJ) 154 F.2d 208, 17 BNA LRRM 821, 10 CCH LC ¶ 63002, cert den (1946) 329 US 714, 91 L Ed 620, 67 S Ct 44, 18 BNA LRRM 2469

Veteran did not lose his right to reinstatement under predecessor to statute by not applying for reinstatement within statutory period, where veteran inquired about reinstatement following his discharge from service and, upon being told that he was eligible, asked for leave of absence because of family responsibility, whereupon employer, although refusing leave of absence, told veteran to come back when he ready to go to work. Angelovic v Lehigh Valley R. Co. (1950, CA3 Pa) 186 F.2d 37, 27 BNA LRRM 2192, 19 CCH LC ¶ 66121

21. -Inquiries

Veteran, who failed to inform former employer of veteran's status as veteran seeking re-employment is not entitled to reinstatement to former position plus backpay for employer's failure to rehire, since conduct of veteran did not constitute making "application for re-employment" within meaning of predecessor statute, but rather amounted to mere inquiry of employment possibility and did not put reasonable employer on notice that returning veteran sought re-employment, where during 90 day period following his honorary discharge he merely inquired at employer's guard shack for job application which he was refused because he was told company was not hiring and then made two unsuccessful inquiries to see or contact to personnel officials. Shadle v Superwood Corp. (1988, CA8 Ark) 858 F.2d 437, 129 BNA LRRM 2770, 110 CCH LC ¶ 10757, 103 ALR Fed 567, reh den, en banc (1988, CA8) 130 BNA LRRM 2072

Telephone call to former supervisor inquiring as to conditions at plant, after which veteran did nothing during 90 day period, did not amount to application for re-employment and rights are lost. Flynn v Ward Leonard Electric Co. (1950, SD NY) 18 CCH LC ¶ 65710

Petitioner was not entitled to reinstatement or to payment of damages for loss of wages, where he merely visited supervisor and inquired as to conditions in plant, but failed to file application. Lacek v Peoples Laundry Co. (1950, DC Pa) 94 F Supp 399, 27 BNA LRRM 2113, 19 CCH LC ¶ 66076

Employer is not liable under former 38 USCS § 2021 where veteran's discussion with employer regarding employment rights was merely inquiry and veteran did not intend to "apply" for work until and unless his attempt to gain admittance to college was not successful. Baron v United States Steel Corp. (1986, ND Ind) 649 F Supp 537, 125 BNA LRRM 2749, 106 CCH LC ¶ 12335

22. -Miscellaneous

Serviceman fulfills his duty to apply for reinstatement under predecessor statute by applying for reinstatement while still on active duty, although during period after discharge he simply requests to be hired for position to which he is not entitled. Martin v Roosevelt Hospital (1970, CA2 NY) 426 F.2d 155, 74 BNA LRRM 2738, 62 CCH LC ¶ 10807

Returned veteran who, when applying for reinstatement and restoration to his old job refuses offered work of like seniority and pay, and expresses willingness to wait until job of tool and die making is available, does not apply for his old position within meaning of Selective Training and Service Act. Inglot v Columbia Aircraft Products, Inc. (1946, DC NJ) 76 F Supp 599, 19 BNA LRRM 2139, affd (1948, CA3 NJ) 166 F.2d 433, 21 BNA LRRM 2382, 14 CCH LC ¶ 64361

Veteran who had been apprentice caster and applies for journeyman caster position, and shop workers who apply for apprentice caster position, do not comply with application requirements. Trischler v Universal Potteries, Inc. (1947, DC Ohio) 78 F Supp 609, affd (1948, CA6 Ohio) 171 F.2d 707, 23 BNA LRRM 2242, 16 CCH LC ¶ 64941

Returning veteran was not denied reemployment rights by state conservation department, where veteran never saw personnel director or filed written application, accepted higher-paying
out-of-town construction job for 9 months, and subsequently refused department's offer of work at state park 60 miles from his home, because veteran waived rights by never "making application" within meaning of statute, by accepting other job, and by refusing offer of position of like seniority, status and pay. Hayse v Tennessee Dep't of Conservation (1989, ED Tenn) 750 F Supp 298, 136 BNA LRRM 2178, 118 CCH LC ¶ 10624, affd without op (1990, CA6 Tenn) 915 F.2d 1571, 170 BNA LRRM 3024, reported in full (1990, CA6) 1990 US App LEXIS 17835

Agency failed to give appellant notice of his restoration rights and failure constituted good cause for appellant's late filing of restoration request; only notice relating to restoration rights provided by agency was memorandum in appellant's possession before his departure for military service which merely referred to many benefits and rights to which he was entitled and that he should be counseled by employee relations specialist, but there was no evidence that such counseling occurred. Ward v VA (1995, MSPB) 67 MSPR 425, appeal after remand, remanded on other grounds (1997, MSPB) 74 MSPR 171

B. Grounds for Refusal of Reemployment

1. Qualifications of Employee

23. Ability to perform duties of position

It is condition precedent for re-employment rights that veteran be qualified to perform duties of position to which he seeks re-employment; veteran is not entitled to re-employment where he does not show himself to be so qualified. Bryan v Griffin (1948, CA6 Ky) 166 F.2d 748, 21 BNA LRRM 2566, 14 CCH LC ¶ 64397; Wonnacott v Denver & R. G. W. R. Co. (1951, CA10 Utah) 187 F.2d 607, 27 BNA LRRM 2440, 19 CCH LC ¶ 66220; Barisoff v Hollywood Baseball Assn. (1947, DC Cal) 71 F Supp 493, 19 BNA LRRM 2479, 12 CCH LC ¶ 63686, affd (1948, CA9 Cal) 166 F.2d 1023, 22 BNA LRRM 2108, 14 CCH LC ¶ 64519

Re-employment rights are not available where journeyman mechanic is required to be able to read blueprints, do layout work and all classes of fabrication, and to direct fabrication on job and where, at time veteran was performing work of journeyman mechanic work being performed by one in that position was greatly curtailed because of mass production methods. Bryan v Griffin (1948, CA6 Ky) 166 F.2d 748, 21 BNA LRRM 2566, 14 CCH LC ¶ 64397

That incumbent foreman who would be displaced by plaintiff was more personally acceptable to defendant, or even more efficient or able in performance of his duties, was not legal cause for denying the plaintiff his rights under the law; capabilities of returning veteran must be determined by performance on job and not by employer's preconceived notion of his ability. Freeman v Gateway Baking Co. (1946, DC Ark) 68 F Supp 383, 11 CCH LC ¶ 63340

Veteran, former professional baseball player, was not entitled to reinstatement because professional baseball playing is different from ordinary activities, since regular employment of players is determined on basis of skill and ability to meet qualifications required of class and standard in league, which is to be determined by clubs who employ players, all of which is recognized by players in their application for employment and in their contract with club which expressly agrees that their services are terminable at any time at will of baseball club. Barisoff v Hollywood Baseball Assn. (1947, DC Cal) 71 F Supp 493, 19 BNA LRRM 2479, 12 CCH LC ¶ 63686, affd (1948, CA9 Cal) 166 F.2d 1023, 22 BNA LRRM 2108, 14 CCH LC ¶ 64519

Foreman of ship electrical department who had been discharged because employer has ceased shipbuilding operations for United States maritime commission was not entitled to job as foreman of electrical maintenance department where duties of such job were quite different from that which he had formerly held and where he was not competent to perform duties of such job. Kent v Todd Houston Shipbuilding Corp. (1947, DC Tex) 72 F Supp 506, 20 BNA LRRM 2273, 13 CCH LC ¶ 63902

Employer did not violate act where baseball pitcher after return from service was given contract in February, 1946, and was unconditionally released by club in May, 1946, because of inability to pitch. Sundra v St. Louis American League Baseball Club (1949, DC Mo) 87 F Supp 471, 25 BNA LRRM 2208
24. Conduct during military service

In action by veteran for restoration in employment of railroad, railroad could not introduce evidence relative to veteran's conduct while in military service; court may not go behind certificate of discharge as no such authority is given. Hall v Chicago & E. I. R. Co. (1964, ND Ill) 240 F Supp 797, 59 BNA LRRM 2819, 51 CCH LC ¶ 19686

Employer had not shown veteran to be disqualified for re-employment where, at time of assuming employment, veteran was found to be qualified and suited for employment but where, following discharge, he was refused re-employment because of attempted suicide while in Navy and where employer continued to refuse re-employment despite subsequent clinical evaluation that veteran had no psychological problems which would render him dangerous. McCoy v Olin Mathieson Chemical Corp. (1973, SD Ill) 360 F Supp 1336, 83 BNA LRRM 2970, 71 CCH LC ¶ 13874

25. Conduct during pre-service employment

Term "qualified" means something more than simply physically and mentally qualified and veteran is not qualified to resume position which he had prior to entering service where his services as director and vice president had been disruptive of company's best interests in past and had caused dissatisfaction among employees of company, where he had made irresponsible charges that company was headed for disaster and that its officers and directors had involved it in difficulties with Securities and Exchange Commission because of certain illegal activities, and where he had threatened to discredit certain directors and had intrigued to disrupt organization and to supplant president and general manager. Trusteed Funds, Inc. v Dacey (1947, CA1 Mass) 160 F.2d 413, 19 BNA LRRM 2465, 12 CCH LC ¶ 63639

Fact that stockholders and directors did not approve veteran's prior management and policies as director and president would not interfere with veteran's rights to reinstatement because board of directors may control management and policies and even change duties and authority of president. Houghton v Texas State Life Ins. Co. (1948, CA5 Tex) 166 F.2d 848, 21 BNA LRRM 2432, 14 CCH LC ¶ 64357, cert den (1948) 335 US 822, 93 L Ed 376, 69 S Ct 116, 81 BNA LRRM 2390

In action to compel re-employment of returned veteran to his position as manager of defendant's business, defense of mismanagement must be supported by facts of case. Anderson v Schouweiler (1945, DC Idaho) 63 F Supp 802, 10 CCH LC ¶ 62870

Reservist claiming rights under former 50 Appx USCS § 459(g)(4), whose employment performance as co-pilot did not meet standards of his employer, commercial airline, and who intentionally falsified application for employment with employer, was not entitled to reinstatement to his position of employment. Larsen v Air California (1970, CD Cal) 313 F Supp 218, 75 BNA LRRM 2156, 62 CCH LC ¶ 10897, affd (1972, CA9 Cal) 459 F.2d 52, 79 BNA LRRM 2767, 67 CCH LC ¶ 12493, cert den (1972) 409 US 895, 34 L Ed 2d 151, 93 S Ct 116, 81 BNA LRRM 2390, 69 CCH LC ¶ 13059, reh den (1972) 409 US 1051, 34 L Ed 2d 505, 93 S Ct 511

Reservist returning from active duty was not entitled to reinstatement to his job under statute, where reservist's job performance prior to his departure was lacking and he frequently brought weapons to work, prompting fear for safety of other employees, because reservist was terminated for reasons unrelated to his military service. Winfree v Morrison, Inc. (1990, ED Tenn) 762 F Supp 1310, 118 CCH LC ¶ 10599

Employer was not justified in refusing employment to physically able policemen for reasons based on work prior to military service or because he had withdrawn pension funds when entering service. Borseth v Lansing (1953) 338 Mich 53, 61 NW2d 132

26. Disability
Veteran was not entitled to recover for loss of wages between time of application and acceptance for re-employment two years later when delay was due to physical inability to perform duties of brakeman. Wonnacott v Denver & R. G. W. R. Co. (1951, CA10 Utah) 187 F.2d 607, 27 BNA LRRM 2440, 19 CCH LC ¶ 66220

Veteran was not entitled to re-employment rights where he had been examined several times by company's physician and found to be suffering from war neurosis which affected him in such way that physician advised company that veteran was not capable of holding down position of brakeman to which he seeks reinstatement. Wonnacott v Denver & R. G. W. R. Co. (1951, CA10 Utah) 187 F.2d 607, 27 BNA LRRM 2440, 19 CCH LC ¶ 66220

Refusal to reinstate honorably discharged serviceman because of heart ailment was improper, although decision of police commission was based on report of their official physician, where report of army surgeon who examined petitioner immediately prior to his discharge revealed no heart murmur or any other physical defect which would disqualify him and where testimony of two specialists in heart disease supported petitioner's contention that he was physically qualified to perform duties of guardsman in insular police force. Parbilla v Velarde (1946, DC Puerto Rico) 67 F Supp 260, 18 BNA LRRM 2448, 11 CCH LC ¶ 63348

Employer who refused to reemploy discharged veteran under former 50 USCS Appx § 459(b)-(h) who had timely applied for reemployment had burden of proving veteran's disqualification for reemployment and burden was not met where evidence showed that returning veteran, who had attempted suicide while in Navy, did not suffer any psychological problems which would render him dangerous as employee of explosives company. McCoy v Olin Mathieson Chemical Corp. (1973, SD Ill) 360 F Supp 1336, 83 BNA LRRM 2970, 71 CCH LC ¶ 13874

Plaintiff who intentionally concealed back condition, which was subject to further deterioration, from examining physician during his civilian pre-employment physical, was not entitled to veterans reemployment rights under former 50 USCS Appx § 459(b)-(h) upon discharge from armed forces. Greathouse v Babcock & Wilcox Co. (1974, ND Ohio) 381 F Supp 156, 86 BNA LRRM 3014, 74 CCH LC ¶ 10188

Returning disabled veteran who, as result of shrapnel wounds, was unqualified to perform his preservice job as brakeman, was entitled to be placed in clerical position at equivalent seniority status and pay even though new position covered by collective bargaining agreement in seniority system was different from that under which he was employed prior to military service. Armstrong v Baker (1975, ND W Va) 394 F Supp 1380, 89 BNA LRRM 2242, 77 CCH LC ¶ 10874 (superseded by statute as stated in Stevens v Tennessee Valley Auth. (1983, CA6 Tenn) 712 F.2d 1047, 118 BNA LRRM 3201)

Inductee who had been employed as city fireman was not entitled to restoration to such position upon his honorable discharge from military service, where he had not made application for such re-employment within 40 days [now 90 days] after his military discharge and where he also was physically disabled from discharging duties of fireman. McLaughlin v Retherford (1944) 207 Ark 1094, 184 SW2d 461, 10 CCH LC ¶ 62860

27. Disloyalty

Term "qualified", as used in predecessor to statute, means something more than physically and mentally qualified, and veteran's disloyalty to employer prior to entry into military service or his record as disruptive influence may be considered in determining veteran's qualification. Trusteed Funds, Inc. v Dacey (1947, CA1 Mass) 160 F.2d 413, 19 BNA LRRM 2465, 12 CCH LC ¶ 63639

Serviceman's disloyalty to corporate employer and interference with corporate operations while on furlough justified employer's refusal of reinstatement on grounds of unreasonableness. Green v Tho-Ro Products, Inc. (1956, CA3 NJ) 232 F.2d 172, 37 BNA LRRM 2842, 30 CCH LC ¶ 69884

28. Incompatibility
Term “qualified” means something more than simply physically and mentally qualified and veteran is not qualified to resume position which he had prior to entering service where his services as director and vice president had been disruptive of company's best interests in past and had caused dissatisfaction among employees of company, where he had made irresponsible charges that company was headed for disaster and that its officers and directors had involved it in difficulties with Securities and Exchange Commission because of certain illegal activities, and where he had threatened to discredit certain directors and had intrigued to disrupt organization and to supplant president and general manager. Trusteed Funds, Inc. v Dacey (1947, CA1 Mass) 160 F.2d 413, 19 BNA LRRM 2465, 12 CCH LC ¶ 63639

Employer is justified in refusing to reinstate veteran on grounds that his activities are disruptive of desired harmonious relations between employer and employees where, prior to induction but over a year after strike in which tort was allegedly committed, employee verified complaint for assault by employer, such complaint being served two months later while employee was in military service and where employee, while on military leave, visited employer's plant and informed large number of employees of his law suit against employer. United States v Mayo (1964, SD NY) 230 F Supp 85

29. Nature of military discharge

Serviceman discharged "under other than honorable conditions" is not entitled to re-employment rights under requirement making it applicable to one who "satisfactorily completes period of training in service;" agreement between employer and union for reinstatement of discharged servicemen upon presentation of certificate, as provided by law, or "other proper evidence of release" does not require reinstatement of serviceman discharged under other than honorable conditions. Anglo Canadian Shipping Co. v United States (1956, CA9) 238 F.2d 18

Plaintiff, who was refused employment because his certificate of discharge did not qualify him, and whereupon brought proceedings resulting in antedated honorable discharge, was entitled to re-employment under former 50 USCS Appx § 459(b)-(h) although he did not receive honorable discharge until expiration of ninety days. Robertson v Richmond, F. & P. R. Co. (1959, DC Va) 178 F Supp 734, 45 BNA LRRM 2478, 38 CCH LC ¶ 66022

Employee with less than honorable discharge from service has not satisfactorily completed service and is not entitled to re-employment. Browning v General Motors Corp., Fisher Body Div. (1974, SD Ohio) 387 F Supp 985, 89 BNA LRRM 2177, 77 CCH LC ¶ 10917

30. Miscellaneous

Veteran was entitled to reemployment where discharged inductee, within forty-day period [now 90 days], reported to his employer and requested time off to get himself in shape for work, employer did not refuse him such time off but turned him over to company doctor who convinced him that he was not fit for employment; that action was in derogation of his rights, and since he was actually qualified to perform duties of his old position he was entitled to reinstatement. Grasso v Crowhurst (1946, CA3 NJ) 154 F.2d 208, 17 BNA LRRM 821, 10 CCH LC ¶ 63002, cert den (1946) 329 US 714, 91 L Ed 620, 67 S Ct 44, 18 BNA LRRM 2469

Veteran was entitled to position of train dispatcher when he returned, because of his seniority; positions had been given to persons of less seniority while plaintiff was in service and he received no notice of vacancies at that time and could not "bid" for jobs until he returned. Morris v Chesapeake & O. R. Co. (1948, CA7 Ind) 171 F.2d 579, 23 BNA LRRM 2179, 15 CCH LC ¶ 64874, cert den (1949) 336 US 967, 93 L Ed 1118, 69 S Ct 938, 24 BNA LRRM 2027, reh den (1949) 337 US 927, 93 L Ed 1735, 69 S Ct 1167

It is no defense to action to compel veteran's re-employment that he has resorted to state court to obtain from his employer what he feels is due him for services performed prior to his induction into army. Anderson v Schouweiler (1945, DC Idaho) 63 F Supp 802, 10 CCH LC ¶ 62870

Under agreement providing that when permanent vacancy occurs in any occupation covered by agreement, employee with greatest length of continuous service on occupation immediately preceding vacant occupation must be offered promotion to vacancy, provided his ability to
perform work and his physical fitness are relatively equal to that of other employees in same line of promotion, and further providing that should such employee be unable to fill vacancy because of no fault of his own, next qualified employee in line must temporarily be assigned to vacancy pending return to work of first-mentioned employee, effect is to entitle veteran, who is physically fit and able to perform work, to first permanent vacancy in position of second-class repairman, in accordance with his seniority as first-class repairman helper; since petitioner was unable to fill such vacancy due to military absence, assignment of his immediate junior to vacancy was temporary, as in case of emergency, and veteran is entitled to receive credit for time worked by his junior on occupation; attempted exclusion of employees in military service from operation of agreement, entered into in their absence, is discriminatory and ineffective. Armstrong v Tennessee C., I. & R. Co. (1947, DC Ala) 73 F Supp 329, 20 BNA LRRM 2396, 13 CCH LC ¶ 63941

Plaintiff who was rejected by military was entitled to restoration to his former job and was not required by former 50 USCS Appx § 459(b)-(h) to explain why he was leaving when called to report for induction. Fortenberry v Owen Bros. Packing Co. (1966, SD Miss) 267 F Supp 605, 65 BNA LRRM 2627, 55 CCH LC ¶ 11885, affd (1967, CA5 Miss) 378 F.2d 373, 65 BNA LRRM 2629, 55 CCH LC ¶ 11905

Former employee's claim against former employer and president of company for violation of 38 USCS §§ 4301 et seq. is not denied summarily, where employee demonstrated (1) she was member of Army Reserves, (2) she was dismissed from her employment, and (3) employer threatened to fire her if she was not at work on day she was to report for military training, but where defendants claimed she was fired for job abandonment and insubordination, because conflict between employee's evidence establishing prima facie case and defendants' evidence of nondiscriminatory reasons creates issue of fact to be resolved by factfinder after trial. Novak v Mackintosh (1996, DC SD) 919 F Supp 870, 152 BNA LRRM 2420, 68 CCH EPD ¶ 44041, 131 CCH LC ¶ 11538, judgment entered (1996, DC SD) 937 F Supp 873, 155 BNA LRRM 2985, 132 CCH LC ¶ 11658

2. Change in Circumstances of Employer

31. Generally

Discharged veteran on his return to his former employment was entitled under provisions of Selective Training and Service Act of 1940 to his old position or its equivalent, even though at time of his application plant was closed down and no work was available, unless the private employer's circumstances had so changed as to make it impossible or unreasonable to restore him. Fishgold v Sullivan Drydock & Repair Corp. (1946) 328 US 275, 90 L Ed 1230, 66 S Ct 1105, 18 BNA LRRM 2075, 11 CCH LC ¶ 51232, 167 ALR 110

Provision in predecessor to statute excusing employer where reinstatement is impossible or unreasonable is intended to provide for cases where necessary reduction of employer's operating force or discontinuance of some particular department or activity would necessitate creation of useless job in order to re-employ veteran, but is not intended to include case where it would simply make for greater efficiency for company to retain workers who took veteran's place, rather than to rehire veteran. Kay v General Cable Corp. (1944, CA3 NJ) 144 F.2d 653, 15 BNA LRRM 523, 10 CCH LC ¶ 62857

Employer may avoid liability for failure to re-employ veteran where employer's circumstances have so changed as to make it impossible or unreasonable to employ returning veteran but term "unreasonable" means something more than inconvenient or undesirable. Levine v Berman (1947, CA7 Ill) 161 F.2d 386, 20 BNA LRRM 2102, 12 CCH LC ¶ 51232, cert den (1947) 332 US 792, 92 L Ed 374, 68 S Ct 102, 20 BNA LRRM 2677, Smith v Lestershire Spool & Mfg. Co. (1949, DC NY) 86 F Supp 703, 25 BNA LRRM 2074, 17 CCH LC ¶ 65448

Ultimate determination of whether reinstatement of veteran is impossible or unreasonable depends upon examination of particular facts in each case, with employer being under no obligation to reinstate veteran where these facts tend to evidence unreasonable situation with regard to re-employment. Meyers v Barenburg (1947, CA4 Md) 161 F.2d 850, 20 BNA LRRM
32. Obligation of employer, generally

Employer need not reinstate veteran where, prior to entering service, veteran was physician employed on part-time basis and, after discharge, there was no particular need for his reinstatement nor was existence of comparable position necessary; employer is not required to re-establish position for benefit of veteran where there is no longer need for particular type of position in company. Featherston v Jersey Cent. Power & Light Co. (1947, CA3 NJ) 161 F.2d 1000, 20 BNA LRRM 2135, 12 CCH LC ¶ 63777

Employer who, because of adverse economic conditions, discontinues veteran's position but offers him best jobs available, is not required to continue job of restored veteran purely because employee is veteran. Ruesterholtz v Titeflex, Inc. (1948, CA3 NJ) 166 F.2d 335, 21 BNA LRRM 2384, 14 CCH LC ¶ 64360

Employer's duty is to consider and offer like position rather than making bald refusal where employer feels that exact restoration to position held by veteran prior to entering service is impossible or unreasonable. Houghton v Texas State Life Ins. Co. (1948, CA5 Tex) 166 F.2d 848, 21 BNA LRRM 2432, 14 CCH LC ¶ 64357, cert den (1948) 335 US 822, 93 L Ed 376, 69 S Ct 44, 22 BNA LRRM 2564

Although predecessor statute was designed to protect rights of veterans and should be liberally construed, even most liberal construction cannot require creation of job for returned veteran. McFadden v Dienelt (1946, DC Cal) 68 F Supp 951, 19 BNA LRRM 2093, 11 CCH LC ¶ 63478

There is nothing which requires employer to seek other work or to do any other thing in order that it might have or continue to have position for returning veteran and employ him therein; search for position for employee or his restoration to position of higher or lower status, or higher or lower pay, or of different seniority, is not required as it would unduly disturb employer and his employees and disrupt his organization. Kent v Todd Houston Shipbuilding Corp. (1947, DC Tex) 72 F Supp 506, 20 BNA LRRM 2273, 13 CCH LC ¶ 63902

Creation of useless job for returning veteran is not contemplated. Gallant v Segal (1947, DC NH) 74 F Supp 78, 21 BNA LRRM 2227, 14 CCH LC ¶ 64225

Predecessor statute did not require employer to find veteran another job where, on date plaintiff entered military service she did not have position with company to return to after termination of her military service for reason that her craft, of string knitting, no longer existed in company because market for string knitting products had become nonexistent. Dyer v Holston Mfg. Co. (1964, ED Tenn) 237 F Supp 287, 59 BNA LRRM 2121, 51 CCH LC ¶ 19565

33. Abolition of position

Circumstances of employer had not so changed as to render "unreasonable" reinstatement of veteran where veteran, prior to entering service, was employed as salesman, and where, while veteran was in service, employer reorganized business so that job of salesman on active solicitation basis was done away with transferring those who had previously been employed as salesmen to home office in capacity of salesmen by means of indirect communications rather than personal contact, and where, although manner of sales had changed, sales function had not disappeared. Allyn v Abad (1948, CA3 NJ) 167 F.2d 901, 21 BNA LRRM 2437, 14 CCH LC ¶ 64377

Veteran was not entitled to reinstatement and back pay where his shift has been abolished and neither collective bargaining agreement nor custom required employer to transfer layed-off employees to other installations of company, even though veteran would probably have been transferred if he had been employed at time shift was laid off. Horton v United States Steel Corp. (1961, CA5 Ala) 286 F.2d 710, 47 BNA LRRM 2504, 41 CCH LC ¶ 16745
Employer was absolved from duty to reinstate veteran where veteran, prior to entering service, was sales manager of defendant employer and where, during veteran's absence, employer was changed from corporation to individual with arrangement with single purchaser whereby all goods manufactured by defendant employer were to be sold exclusively to such purchaser, abrogating need for sales manager position. Gallant v Segal (1947, DC NH) 74 F Supp 78, 21 BNA LRRM 2227, 14 CCH LC ¶ 64225

Abolition of one department, where employer still employs number of people, is no excuse for failure to re-employ veteran. Loeb v Kivo (1947, DC NY) 77 F Supp 523, 21 BNA LRRM 2331, 14 CCH LC ¶ 64267, affd (1948, CA2 NY) 169 F.2d 346, 22 BNA LRRM 2392, 15 CCH LC ¶ 64678, cert den (1948) 335 US 891, 93 L Ed 429, 69 S Ct 246, 23 BNA LRRM 2137

Although agency would have abolished returning veteran's position if he had been present when it reorganized, it was required to present evidence that there were no equivalent positions for which appellant was qualified and that position in which he was placed was next best available position. DePascale v Dep't of the Air Force (1993, MSPB) 59 MSPR 186

If position of government employee who was restored was abolished during one-year period after his return to duty civil service commission, under predecessor statute and applicable regulations, was required, if necessary in order to make reasonable offer of assignment to continuing position, that preference eligibles in subgroup having equal or greater retention be displaced. (1949) 41 Op Atty Gen 16

34. Change in requirements of position

It would be unreasonable for employer baseball club to re-employ returning veteran baseball player where club's standards had increased during veteran's absence and veteran was no longer capable of meeting new standards. Barisoff v Hollywood Baseball Asso. (1947, DC Cal) 71 F Supp 493, 19 BNA LRRM 2479, 12 CCH LC ¶ 63686, affd (1948, CA9 Cal) 166 F.2d 1023, 22 BNA LRRM 2108, 14 CCH LC ¶ 64519

Veteran baseball players were not entitled to redress for alleged violations by baseball club of their statutory re-employment rights as members of armed forces of United States where it appeared that when petitioners returned and sought re-employment with club, club's situation in league had changed, and class and standard of players had become greater and was recognized as better than when petitioners entered the military service, thereby making it impossible and unreasonable to require club to re-employ them. Barisoff v Hollywood Baseball Asso. (1947, DC Cal) 71 F Supp 493, 19 BNA LRRM 2479, 12 CCH LC ¶ 63686, affd (1948, CA9 Cal) 166 F.2d 1023, 22 BNA LRRM 2108, 14 CCH LC ¶ 64519

Circumstances of defendant employer had so changed since veteran's induction and prior to his discharge as to make it unreasonable for company to reinstate him where veteran had originally been exclusive sales agent within given territory for employer and, during time he was in service, employer created new type of representation, giving to his new office great deal more authority than was originally vested in veteran and also making important changes in methods used in selling type of contracts utilized for that purpose. Rosenbaum v Ceco Steel Products Corp. (1947, DC Dist Col) 84 F Supp 954

35. General economic conditions

Collecting attorney for physician, who at time of entering service was drawing salary and commission in 1942 for working on accounts totaling $32,000, was properly denied reinstatement on salary basis in 1945 where total amount of accounts has dropped to $6,000. Meyers v Barenburg (1947, CA4 Md) 161 F.2d 850, 20 BNA LRRM 2169, 12 CCH LC ¶ 63796

Adverse economic conditions constitute legitimate basis for making re-employment unreasonable. Ruesterholtz v Titeflex, Inc. (1948, CA3 NJ) 166 F.2d 335, 21 BNA LRRM 2384, 14 CCH LC ¶ 64360

Notwithstanding great decrease in work both in character and amount, foreman in machine repair department was entitled to be reinstated to his former salaried position where employer's circumstances had not so changed as to make it impossible or unreasonable to re-employ such
Returning veteran was not entitled to restoration to his job of electrician helper and compensation for loss of wages where, after his reinstatement on his return from service with the armed forces, he was laid off because of reduction in force. Maloney v Chicago, B. & Q. R. Co. (1947, DC Mo) 72 F Supp 124, 20 BNA LRRM 2171, 12 CCH LC ¶ 63834

Veteran had no right of re-employment where defendant employer was organized during war emergency solely to oversee shipyard and equipment owned by United States Maritime Commission and to construct ships for Commission and to do nothing else, and where, after end of war, when necessity for construction of ships ceased, defendant's work ended and veteran's former position as foreman of ship electrical department ceased; there was nothing which required defendant employer to seek other work of ship construction or to do any other thing in order that it might continue to have position for veteran and re-employ him therein. Kent v Todd Houston Shipbuilding Corp. (1947, DC Tex) 72 F Supp 506, 20 BNA LRRM 2273, 13 CCH LC ¶ 63902

Employer's contention that it had suffered post-war cutback in orders and was forced to reduce personnel laying off 26 skilled men, including veteran, and further contention that veteran was hired in wartime inflation which had subsided, was contradicted by facts that, when veteran was inducted in 1945, employer was hiring 107 persons and that when veteran applied for reinstatement in 1947, employer was hiring 170 persons. Smith v Lestershire Spool & Mfg. Co. (1949, DC NY) 86 F Supp 703, 25 BNA LRRM 2074, 17 CCH LC ¶ 65448

36. Change in operating methods or organization

It was not impossible nor unreasonable, due to change in circumstances, for employer to re-employ returning veteran to former position as rug salesman in particular territory at commission of 10 percent where territory which veteran had covered exclusively prior to entering service was now divided into 3 parts because of substantial increase in volume of sales with majority of salesmen's commissions cut to 7 1/2 percent. Levine v Berman (1947, CA7 Ill) 161 F.2d 386, 20 BNA LRRM 2102, 12 CCH LC ¶ 63746, cert den (1947) 332 US 792, 92 L Ed 374, 68 S Ct 102, 20 BNA LRRM 2677

Company's circumstances had not so changed as to make it impossible or unreasonable to re-employ veteran where, 4 months after veteran had qualified for re-employment, there was change in method of operation and during these 4 months employer has completely ignored lawful obligation to re-employ veteran except to write him that, if he would move to another town, it would put him to work, which letter also stated that employer no longer has type of work for which veteran qualified in town where he was residing, and where, when veteran reported for duty, he was told by employer that circumstances had changed further so that no more positions were open. Watkins Motor Lines, Inc. v De Galliford (1948, CA5 Ga) 167 F.2d 274, 22 BNA LRRM 2009, 14 CCH LC ¶ 64475

Employer had no duty to reinstate returning veteran where employer, due to age, was required to either close his business or bring in 2 brothers with new capital, which latter alternative occurred between time veteran was discharged and time he applied for re-employment; such change in structure of employer's business was not done intentionally for purpose of avoiding responsibility owed to veteran and, in fact, redistributed stock ownership in such way that employer's circumstances had so changed as to make it unreasonable to restore veteran to former position or position of like seniority, status, and pay. Gimpelson v Kaufman (1948, CA9 Cal) 167 F.2d 672, 22 BNA LRRM 2052, 14 CCH LC ¶ 64478

Outside salesman for wholesale grocery was entitled to restoration to his former position although his employer had changed his method of doing business and orders were taken over telephone from customers. Allyn v Abad (1948, CA3 NJ) 167 F.2d 901, 21 BNA LRRM 2437, 14 CCH LC ¶ 64377

It is no justification for refusing to reinstate veteran where employer's business has so increased from time veteran was inducted until time he applied for re-employment that there is no necessity for traveling salesman in position of type previously occupied by veteran; function of
selling is skill carried on although orders are taken at home office without necessity for visiting
customers or attempting to drum up trade as distinguished from those cases where there is
abandonment of sales by representatives and return to mail-order business or where entire
output of employer is sold exclusively to one buyer making salesmen totally unnecessary.  Loeb
v Kivo (1948, CA2 NY) 169 F.2d 346, 22 BNA LRRM 2392, 15 CCH LC ¶ 64678, cert den (1948)
335 US 891, 93 L Ed 429, 69 S Ct 246, 23 BNA LRRM 2137

Employer's circumstances had not so changed as to make it impossible or unreasonable to
reinstate veteran to her former position where veteran, prior to entering service, was permanently
employed as receptionist and switchboard operator in general office of hotel chain and where,
during veteran's absence in service, employer switched general office salary disbursing and
bookkeeping functions from one affiliated corporation to another in same hotel chain system,
without any other change in conduct, composition, ownership or control of such office.  Sullivan v
Milner Hotel Co. (1946, DC Mich) 66 F Supp 607, 18 BNA LRRM 2295, 11 CCH LC ¶ 63329

Restructure of copartnership into corporation does not amount to change in circumstances so
as to make it impossible or unreasonable to restore veteran to prewar position especially where
change is one of form rather than substance.  Karas v Klein (1947, DC Minn) 70 F Supp 469, 19
BNA LRRM 2559, 12 CCH LC ¶ 63656

Employer's circumstances had not so changed as to make it impossible or unreasonable to
re-employ veteran and restore him to original position and salary at $600 per month where, prior
to entering service, veteran had been employed as president and general manager of employer
and, at same time owned one-fourth of issued and outstanding stock of employer corporation,
where, throughout military service, veteran continued to hold office of president of employer
corporation, and where, during war, functions of general manager were divided among members
of executive committee with veteran's former position being held by 2 others who, in turn,
received raises in salary from $300 per month to $600 per month.  Parker v Maynard Boyce, Inc.
(1947, SD Cal) 74 F Supp 581, 18 BNA LRRM 2441

Employer's restoration of veteran to position with somewhat different duties, which was of
equivalent status although subject to closer supervision, fulfilled employer's duty under
predecessor statute where both positions involved teletype operations and employer had
changed operating methods substantially while veteran was in service.  McCormick v
Carnett-Partsnett Systems, Inc. (1975, MD Fla) 396 F Supp 251, 89 BNA LRRM 3016, 77 CCH
LC ¶ 11003

37. Loss of efficiency or economy in operation

Where doctor who had been employed by company as medical director and by health
association to give treatment for ills not connected with compensable injuries was not
re-employed by health association when his military service was terminated, fact that it might
make for greater efficiency to have same physician for both company and health association was
not such change in the company's circumstances as to make it unreasonable for company to
re-engage him.  Kay v General Cable Corp. (1944, CA3 NJ) 144 F.2d 653, 15 BNA LRRM 523,
10 CCH LC ¶ 62857

Employee should be restored to his position even though he has been temporarily replaced
by substitute who has been able, either by greater efficiency or more acceptable personality, to
make it desirable for employer to make change permanent one.  United States ex rel. Stanley v
Wimbish (1946, CA4 NC) 154 F.2d 773, 17 BNA LRRM 972, 11 CCH LC ¶ 63099

Defendant employer was not obligated to re-employ veteran where such re-employment
would be unreasonable but loss of efficiency or in economy of operation, in and of itself, did not
render re-employment "unreasonable."  Van Doren v Van Doren Laundry Service, Inc. (1947,
CA3 NJ) 162 F.2d 1007, 20 BNA LRRM 2351, 13 CCH LC ¶ 63910

Reinstatement is not rendered unreasonable or impossible by slight loss in efficiency or
economy of operation.  Allyn v Abad (1948, CA3 NJ) 167 F.2d 901, 21 BNA LRRM 2437, 14
CCH LC ¶ 64377
Mere fact that re-employment may involve some additional expense, and be less desirable or result in loss in efficiency, does not give rise to "changed circumstances" which would make it "impossible" or "unreasonable" to reinstate employee. Hoyer v United Dressed Beef Co. (1946, DC Cal) 67 F Supp 730, 18 BNA LRRM 2180, 11 CCH LC ¶ 63271

38. Former position filled by another

Fact that another employee was taken on in veteran's former position does not render it impossible or unreasonable for employer to reinstate veteran. Trusteed Funds, Inc. v Dacey (1947, CA1 Mass) 160 F.2d 413, 19 BNA LRRM 2465, 12 CCH LC ¶ 63639; Houghton v Texas State Life Ins. Co. (1948, CA5 Tex) 166 F.2d 848, 21 BNA LRRM 2432, 14 CCH LC ¶ 64357, cert den (1948) 335 US 822, 93 L Ed 376, 69 S Ct 44, 22 BNA LRRM 2564

Employer's circumstances at time of demotion of veteran had not so changed as to make it unreasonable to retain veteran at former position where job, to which veteran had been reinstated and from which he had been demoted, had changed in sense that, after his transfer, job was filled by female employee who could not and did not perform all functions which had been required of job previously. Foor v Torrington Co. (1948, CA7 Ind) 170 F.2d 487, 23 BNA LRRM 2100, 15 CCH LC ¶ 64823

Returning veteran's former position is not unavailable simply because it is occupied by another; returning veteran is not to be denied his rightful position because employer will be forced to displace another employee. Nichols v Department of Veterans Affairs (1993, CA FC) 11 F.3d 160, 94 Daily Journal DAR 3809, 144 BNA LRRM 2952

School district, state subdivision, was liable in damages under predecessor statute for failure to reinstate qualified teacher returning from military service; fact that position was filled by another teacher was immaterial. Schaller v Board of Education (1978, ND Ohio) 449 F Supp 30, 98 BNA LRRM 2320, 83 CCH LC ¶ 10558

39. Miscellaneous

Internecine warfare within corporate body was not recognized by predecessor statute as valid reason for refusing to reinstate veteran where family quarrel between veteran and employer, a small corporation organized by father of veteran and undergoing reorganization when veteran received discharge and applied for re-employment, were reasons given by employer for not reinstating veteran in pre-service position. Van Doren v Van Doren Laundry Service, Inc. (1947, CA3 NJ) 162 F.2d 1007, 20 BNA LRRM 2351, 13 CCH LC ¶ 63910

Employer fails to establish that there is no available position for which veteran is qualified at time of discharge from employment where it is shown that there is another job in different department which veteran had previously done on various occasions but for which he had not been given opportunity to try out to determine his capacity for it where veteran, upon discharge and re-employment for a period of 4 days, was notified that his services would not be needed after 5 additional days. Combustion Engineering Co. v Miller (1948, CA6 Tenn) 165 F.2d 372, 21 BNA LRRM 2224, 14 CCH LC ¶ 64224

Employer's circumstances had not so changed as to make it impossible or unreasonable to restore veteran's position where veteran had held position of journeyman mechanic prior to entering service and at time he sought reinstatement there were 21 such workers employed at employer's plant as compared with 15 or less in 1941, when employer secured Navy contract, and where some 16 of these were journeymen mechanics, so that more of these positions existed than at time when veteran was first employed. Bryan v Griffin (1948, CA6 Ky) 166 F.2d 748, 21 BNA LRRM 2566, 14 CCH LC ¶ 64397

Notwithstanding great decrease in work, both in character and amount, company's circumstances did not change so as to make it impossible or unreasonable to re-employ veteran. Burkhardt v Crucible Steel Co. (1946, DC NJ) 68 F Supp 802, 18 BNA LRRM 2423, 11 CCH LC ¶ 63385

Veteran could not be restored to former position where, prior to induction into armed forces veteran had sold intoxicating liquor at golf club in Polk County, Florida, receiving profits from sale...
thereof where intoxicating liquors, other than light wines and beers, could not be sold in Polk County except by incorporated clubs to its members, where license taken out by golf club for such sale was not transferable and where, if bar concessions were restored to veteran, sale by him would be unlawful and club officers and members would be parties to such unlawful enterprise; therefore, he could not be restored to his position as concessionaire at the golf club. Brook v Winter Haven Golf Club, Inc. (1946, DC Fla) 69 F Supp 399, 19 BNA LRRM 2140, 12 CCH LC ¶ 63536

Employer has no grounds for refusing reinstatement to returning veteran where employer moves its store from one location to another in same city, where old store at which veteran had worked for 11 years prior to entering service was no longer in existence, and where new store is physically larger in size than old one, requiring more help in handling greater quantity of merchandise and doing more business. Mihelich v F. W. Woolworth Co. (1946, DC Idaho) 69 F Supp 497, 19 BNA LRRM 2282, 12 CCH LC ¶ 63570

Provisions of predecessor statute did not require creation of useless position to accommodate returning veteran where employer, in good faith, attempted to act in conformity with statute; thus, where teacher entered Officers Training School without indication to school board that he might return, and, due to change in family circumstances, was honorably discharged from Air Force without accepting commission and sought re-employment in former teaching position, and school board, which had previously hired permanent teacher as replacement for veteran, offered veteran part-time position for present school year and full-time position for subsequent school year, it was "unreasonable" within meaning of former 38 USCS § 2021 to require school board to discharge replacement hired when veteran first entered service, or to require school board to create unnecessary position to accommodate veteran. Mowdy v Ada Board of Education (1977, ED Okla) 440 F Supp 1184, 97 BNA LRRM 2981, 83 CCH LC ¶ 10411

Sale of business in which veteran has been employed constitutes such change in employer's circumstances as to make reemployment "impossible or unreasonable." Anthony v Basic American Foods, Inc. (1984, ND Cal) 600 F Supp 352, 117 BNA LRRM 3099, 102 CCH LC ¶ 11250

School district violated former teacher's right to reemployment under predecessor statute, despite fact that immediate rehire would violate collective bargaining agreement and state law and despite district's alleged budget restrictions and full staff, because federal law preempted state and local provisions and district had ample notice of teacher's impending return and could have made necessary arrangements. Fitz v Board of Education (1985, ED Mich) 662 F Supp 1011, 124 BNA LRRM 3100, 105 CCH LC ¶ 12026, affd without op (1986, CA6 Mich) 802 F.2d 457, 125 BNA LRRM 2615

C. Reemployment by Successor in Interest

40. Generally

Right to re-employment does not survive death of employer. McFadden v Dienelt (1946, DC Cal) 68 F Supp 951, 19 BNA LRRM 2093, 11 CCH LC ¶ 63478

If successor employer has available in its company position of like seniority, status, and pay to that held by veteran under predecessor employer it is duty of successor to re-employ veteran. Tannenbaum v P. Ballentine & Sons (1947, DC NJ) 12 CCH LC ¶ 63808

41. Determination of status of employer

Successor employer was not obligated to re-employ veteran where original employer went out of business and successor did not take over original employer's property, equipment, and business. Kicinski v Constable Hook Shipyard, Inc. (1948, CA3 NJ) 168 F.2d 404, 22 BNA LRRM 2143, 15 CCH LC ¶ 64561

Federal district court erred in granting summary judgment for defendant employer corporation, in action brought by discharged veteran under former 50 Appx USCS § 459(b)-(h), on ground that defendant was not "successor in interest" of another corporation, since pleadings
40. Successors in Business

Contention that employer’s obligation applies to purchaser of industrial plant from actual pre-induction employer and that veteran who had been employed prior to his entry into service as assistant plant manager is entitled to rights of returned employee of such purchaser is without merit. Hastings v Reynolds Metals Co. (1947, CA7 Ill) 165 F.2d 484, 21 BNA LRRM 2049, 13 CCH LC ¶ 64117

Purchaser of industrial plants, but not of large portion of corporate assets, was not bound to re-employ veteran who was employee of vendor prior to induction, particularly as veteran waived re-employment rights by entering employment contract with purchaser while still on terminal leave, which contract was terminable at will of either party. Hastings v Reynolds Metals Co. (1947, CA7 Ill) 165 F.2d 484, 21 BNA LRRM 2049, 13 CCH LC ¶ 64117

Company purchasing part of business of former employer of the veteran did not assume obligation to hire the veteran on his return from service where former employer still remained in
Successor employer was not required to maintain in his employ those veterans who had been re-employed by predecessor employer and were still within first year of re-employment. Sullivan v West Co. (1946, DC Pa) 67 F Supp 177, 18 BNA LRRM 2307, 11 CCH LC ¶ 63303

Successor in interest was not justified in failing to re-employ veteran where there was substantial continuity of business operations, successor knew of plaintiff's claim for re-employment, no hardship defense was raised, and it appeared seller of business and successor agreed to deny veteran re-employment. Di Lauro v Riley's Tavern, Inc. (1948, ND Ohio) 14 CCH LC ¶ 64513


§ 4313. Reemployment positions

(a) Subject to subsection (b) (in the case of any employee) and sections 4314 and 4315 [38 USCS §§ 4314 and 4315] (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312 [38 USCS § 4312], upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:

(1) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for less than 91 days--
   (A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform; or
   (B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days--
   (A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or
   (B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service--
(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or
(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.

(4) In the case of a person who (A) is not qualified to be employed in (i) the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or (ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniformed services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and (B) cannot become qualified with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.

(b) (1) If two or more persons are entitled to reemployment under section 4312 [38 USCS § 4312] in the same position of employment and more than one of them has reported for such reemployment, the person who left the position first shall have the prior right to reemployment in that position.

(2) Any person entitled to reemployment under section 4312 [38 USCS § 4312] who is not reemployed in a position of employment by reason of paragraph (1) shall be entitled to be reemployed as follows:

(A) Except as provided in subparagraph (B), in any other position of employment referred to in subsection (a)(1) or (a)(2), as the case may be (in the order of priority set out in the applicable subsection), that provides a similar status and pay to a position of employment referred to in paragraph (1) of this subsection, consistent with the circumstances of such person's case, with full seniority.

(B) In the case of a person who has a disability incurred in, or aggravated during, a period of service in the uniformed services that requires reasonable efforts by the employer for the person to be able to perform the duties of the position of employment, in any other position referred to in subsection (a)(3) (in the order of priority set out in that subsection) that provides a similar status and pay to a position referred to in paragraph (1) of this subsection, consistent with circumstances of such person's case, with full seniority.

Explanatory notes:

A prior § 4313 was redesignated as 38 USCS § 7613.

Effective date of section:

This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

Amendments:

1996. Act Oct. 9, 1996 (effective as of 10/13/94, as provided by § 313(a) of such Act, which appears as 38 USCS § 4301 note), in subsec. (a)(4), substituted "uniformed services" for "uniform services" following "the service in the" and substituted "which is the nearest
approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which "for "of lesser status and pay which".

Cross References

This section is referred to in 2 USCS § 1316; 38 USCS § 4312, 4314, 4315

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:77

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws §§ 85, 86

Law Review Articles:


Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002

Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002

Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002

Piscitelli. Veterans' employment rights: keeping in step with USERRA's legion of changes. 46 Lab LJ 387, July 1995

1. Generally

2. Under particular circumstances

1. Generally

Veteran with greater seniority must be given preference where there are two veterans who are entitled to be re-employed in single position. Salerno v Phelps Dodge Copper Products Corp. (1947, DC NJ) 12 CCH LC ¶ 63635

2. Under particular circumstances

Company that was awarded government contract for base support services was not "successor" to servicemember's employer, who had held contract before company, and did not have re-employment obligation to servicemember when he returned from full time active duty as member of Army Reserves. Coffman v Chugach Support Servs. (2005, CA11 Fla) 411 F.3d 1231, 177 BNA LRRM 2449, 86 CCH EPD ¶ 41978, 151 CCH LC ¶ 10494, 18 FLW Fed C 650

Employer violated 38 USCS §§ 4313(a)(2)(A) and 4316(c)(1) by reinstating reservist's employment upon his return from active duty with same title, pay, and benefits, but with greatly diminished job duties, and then discharging him approximately four months later without proving cause, given that timing of reservist's discharge and decisionmaking process that preceded it were not reasonable under circumstances. Duarte v Agilent Techs., Inc. (2005, DC Colo) 366 F Supp 2d 1039, 176 BNA LRRM 3226, 150 CCH LC ¶ 10467

Agency failed to effect proper restoration of veteran who encumbered mail handler position prior to his military service but was unable, because of service-related disability, to step back onto same seniority escalator on which he was travelling prior to his entry into military and onset of his disability, where mail handler position to which he was assigned upon returning was not of like status to his former position and agency had not shown that it had reviewed all positions, irrespective of craft, in Knoxville facility and Knoxville commuting area, and agencywide to locate
§ 4314. Reemployment by the Federal Government

(a) Except as provided in subsections (b), (c), and (d), if a person is entitled to reemployment by the Federal Government under section 4312 [38 USCS § 4312], such person shall be reemployed in a position of employment as described in section 4313 [38 USCS § 4313].

(b) (1) If the Director of the Office of Personnel Management makes a determination described in paragraph (2) with respect to a person who was employed by a Federal executive agency at the time the person entered the service from which the person seeks reemployment under this section, the Director shall--

(A) identify a position of like seniority, status, and pay at another Federal executive agency that satisfies the requirements of section 4313 [38 USCS § 4313] and for which the person is qualified; and

(B) ensure that the person is offered such position.

(2) The Director shall carry out the duties referred to in subparagraphs (A) and (B) of paragraph (1) if the Director determines that--

(A) the Federal executive agency that employed the person referred to in such paragraph no longer exists and the functions of such agency have not been transferred to another Federal executive agency; or

(B) it is impossible or unreasonable for the agency to reemploy the person.

(c) If the employer of a person described in subsection (a) was, at the time such person entered the service from which such person seeks reemployment under this section, a part of the judicial branch or the legislative branch of the Federal Government, and such employer determines that it is impossible or unreasonable for such employer to reemploy such person, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).

(d) If the adjutant general of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32 [32 USCS § 709], such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).

Explanatory notes:
A prior § 4314 was redesignated as 38 USCS § 7614.

Effective date of section:
This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

Cross References
This section is referred to in 38 USCS § 4313

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Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:77

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 85

Law Review Articles:


Hazard. Employers’ obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002

Beasley. Protecting America’s reservists: application of state and federal law to reservists’ claims of unfair labor practices. 7 Ga BJ 10, February 2002

Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002

Piscitelli. Veterans’ employment rights: keeping in step with USERRA’s legion of changes. 46 Lab LJ 387, July 1995

Statute does not require agency to which appellant has returned to issue form placing appellant in "military leave of absence" status for period of appellant's active duty, but agency must consider him to have been on furlough or leave of absence during period of military leave, regardless of whether it issues form. Wakefield v United States Postal Serv. (1995, MSPB) 68 MSPR 639

§ 4315.  Reemployment by certain Federal agencies

(a) The head of each agency referred to in section 2302(a)(2)(C)(ii) of title 5 [5 USCS § 2302(a)(2)(C)(ii)] shall prescribe procedures for ensuring that the rights under this chapter [38 USCS §§ 4301 et seq.] apply to the employees of such agency.

(b) In prescribing procedures under subsection (a), the head of an agency referred to in that subsection shall ensure, to the maximum extent practicable, that the procedures of the agency for reemploying persons who serve in the uniformed services provide for the reemployment of such persons in the agency in a manner similar to the manner of reemployment described in section 4313 [38 USCS § 4313].

(c) (1) The procedures prescribed under subsection (a) shall designate an official at the agency who shall determine whether or not the reemployment of a person referred to in subsection (b) by the agency is impossible or unreasonable.

(2) Upon making a determination that the reemployment by the agency of a person referred to in subsection (b) is impossible or unreasonable, the official referred to in paragraph (1) shall notify the person and the Director of the Office of Personnel Management of such determination.

(3) A determination pursuant to this subsection shall not be subject to judicial review.

(4) The head of each agency referred to in subsection (a) shall submit to the Select Committee on Intelligence and the Committee on Veterans' Affairs of the Senate and the Permanent Select Committee on Intelligence and the Committee on Veterans' Affairs of the House of Representatives on an annual basis a report on the number of persons whose reemployment with the agency was determined under this subsection
to be impossible or unreasonable during the year preceding the report, including the reason for each such determination.

(d) (1) Except as provided in this section, nothing in this section, section 4313 [38 USCS § 4313], or section 4325 [38 USCS § 4325] shall be construed to exempt any agency referred to in subsection (a) from compliance with any other substantive provision of this chapter [38 USCS §§ 4301 et seq.].

(2) This section may not be construed--
   (A) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter [38 USCS §§ 4301 et seq.], alternative employment in the Federal Government under this chapter [38 USCS §§ 4301 et seq.], or information relating to the rights and obligations of employee and Federal agencies under this chapter [38 USCS §§ 4301 et seq.]; or
   (B) as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter [38 USCS §§ 4301 et seq.].

(e) The Director of the Office of Personnel Management shall ensure the offer of employment to a person in a position in a Federal executive agency on the basis described in subsection (b) if--
   (1) the person was an employee of an agency referred to in section 2302(a)(2)(C)(ii) of title 5 [5 USCS § 2302(a)(2)(C)(ii)] at the time the person entered the service from which the person seeks reemployment under this section;
   (2) the appropriate officer of the agency determines under subsection (c) that reemployment of the person by the agency is impossible or unreasonable; and
   (3) the person submits an application to the Director for an offer of employment under this subsection.

Explanatory notes:
A prior § 4315 was redesignated as 38 USCS § 7615.

Effective date of section:
This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

Cross References
This section is referred to in 38 USCS §§ 4313, 4325

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Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:77, 78

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 85

Law Review Articles:
§ 4316. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

(a) A person who is reemployed under this chapter [38 USCS §§ 4301 et seq.] is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

(b) (1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be--
   (A) deemed to be on furlough or leave of absence while performing such service; and
   (B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

(2) (A) Subject to subparagraph (B), a person who--
   (i) is absent from a position of employment by reason of service in the uniformed services, and
   (ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service, is not entitled to rights and benefits under paragraph (1)(B).
   (B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).

(3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to
any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.

(4) Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.

(5) The entitlement of a person to coverage under a health plan is provided for under section 4317 [38 USCS § 4317].

(6) The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318 [38 USCS § 4318].

(c) A person who is reemployed by an employer under this chapter [38 USCS §§ 4301 et seq.] shall not be discharged from such employment, except for cause--

(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or

(2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.

(d) Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.

(e) (1) An employer shall grant an employee who is a member of a reserve component an authorized leave of absence from a position of employment to allow that employee to perform funeral honors duty as authorized by section 12503 of title 10 [10 USCS § 12503] or section 115 of title 32 [32 USCS § 115].

(2) For purposes of section 4312(e)(1) of this title [38 USCS § 4312(e)(1)], an employee who takes an authorized leave of absence under paragraph (1) is deemed to have notified the employer of the employee's intent to return to such position of employment.

Explanatory notes:
A prior § 4316 was redesignated as 38 USCS § 7616.

Effective date of section:
This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, which appears as 38 USCS § 4301 note.

Amendments:
1996. Act Oct. 9, 1996 (effective as of 10/13/94, as provided by § 313(a) of such Act, which appears as 38 USCS § 4301 note), in subsec. (d), added the sentence beginning "No employer may require . . .".

2000. Act Nov. 1, 2000 (effective 180 days after enactment, as provided by § 323(c) of such Act, which appears as 38 USCS § 4303 note), added subsec. (e).

Cross References
This section is referred to in 2 USCS § 1316

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Federal Procedure:
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Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 87, 88

Forms:
16A Fed Procedural Forms L Ed, Veterans and Veterans' Laws §§ 68:130-133

Law Review Articles:
Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002
Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002
Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002
Piscitelli. Veterans' employment rights: keeping in step with USERRA's legion of changes. 46 Lab LJ 387, July 1995

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I. SENIORITY, STATUS, PAY AND BENEFITS OF REINSTATED EMPLOYEE

A. In General

1. Generally
   The "position" in his former employment to which, under the provisions of the Selective
   Training and Service Act of 1940, a discharged veteran was to be restored, was the "position"
   which he left, plus accumulated seniority. Fishgold v Sullivan Drydock & Repair Corp. (1946)
   328 US 275, 90 L Ed 1230, 66 S Ct 1105, 18 BNA LRRM 2075, 11 CCH LC ¶ 51232, 167 ALR
   110

   Veteran is entitled to his old position or its equivalent even though at time of his application
   for re-employment plant is closed down and no work is available. Fishgold v Sullivan Drydock &
   Repair Corp. (1946) 328 US 275, 90 L Ed 1230, 66 S Ct 1105, 18 BNA LRRM 2075, 11 CCH LC
   ¶ 51232, 167 ALR 110
Veteran has no right of action where employer refuses to re-employ him in identical position which he had previously held where employer offers veteran "position of like seniority, status, and pay." Feore v North Shore Bus Co. (1947, CA2 NY) 161 F.2d 552, 20 BNA LRRM 2132, 12 CCH LC ¶ 63760; The Paul Dana v Socony Vacuum Oil Co. (1947, CA2 NY) 165 F.2d 78; Bowen v Home Beneficial Life Ins. Co. (1950, CA4 Va) 183 F.2d 376, 26 BNA LRRM 2345, 18 CCH LC ¶ 65874; Major v Phillips-Jones Corp. (1951, CA2 NY) 192 F.2d 186, 29 BNA LRRM 2038, 20 CCH LC ¶ 66598, cert den (1952) 343 US 927, 96 L Ed 1338, 72 S Ct 760, 29 BNA LRRM 2723

Veteran has no right of action where employer denies reinstatement because particular preservice job is not available during period in question but offers veteran another job of like seniority, status, and pay which he is not willing to accept. Inglot v Columbia Aircraft Products, Inc. (1948, CA3 NJ) 166 F.2d 433, 21 BNA LRRM 2382, 14 CCH LC ¶ 64361

Employer who feels that exact restoration to position held by veteran prior to military service is impossible or unreasonable has duty to consider and offer another like position instead of making bald refusal. Houghton v Texas State Life Ins. Co. (1948, CA5 Tex) 166 F.2d 848, 21 BNA LRRM 2432, 14 CCH LC ¶ 64357, cert den (1948) 335 US 822, 93 L Ed 376, 69 S Ct 44, 22 BNA LRRM 2564

Veteran on his return is entitled to his old position or its equivalent even though at time of his application plant is closed down, for retooling, and no work is available and he is entitled to be recalled to work in accordance with his seniority; his position exists though no work is then available and slackening of work which causes him to be laid off by operation of seniority system is not removal, dismissal, or discharge from position in any normal sense. Boston & M. R. R. v David (1948, CA1 NH) 167 F.2d 722, 22 BNA LRRM 2133, 14 CCH LC ¶ 64508

Returning veteran is not entitled to precise position that he had held prior to induction. Bova v General Mills, Inc. (1949, CA6 Ohio) 173 F.2d 138, 23 BNA LRRM 2351, 16 CCH LC ¶ 64954; Morgan v Wheland Co. (1946, DC Tenn) 66 F Supp 439, 18 BNA LRRM 2105, 11 CCH LC ¶ 63273

Salary that reservist would have received during period of her military duty is not among "incidents or advantages of employment" protected by former 38 USCS § 2021(b)(3)). Perz v School City (1994, CA7 Ind) 24 F.3d 899, 146 BNA LRRM 2381, 128 CCH LC ¶ 11092, reh, en banc, den (1994, CA7 Ind) 1994 US App LEXIS 15126

"Position" means employee's relative standing in employment framework of business, based on seniority with respect to other personnel of firm by which he is employed; term does not refer to particular job but contemplates that veteran shall enjoy fruits of seniority which ripen in his absence. Freeman v Gateway Baking Co. (1946, DC Ark) 68 F Supp 383, 11 CCH LC ¶ 63340

In case of petition for remedial action under Uniformed Services Employment and Reemployment Rights Act, or where violation of Act is raised as affirmative defense, administrative judge must inform appellant of burdens of proof and different methods of proving claim under Act, to enable appellant to make reasoned decision on methods he wishes to use in supporting his claim, and AJ must then determine methods appellant wishes to use to support his claim. Fox v United States Postal Serv. (2001, MSPB) 88 MSPR 381

Predecessor to statute contemplated that employee whose position has been abolished must be restored to position of like seniority, status, and pay and that every effort must be made to accomplish this. (1941) 40 Op Atty Gen 152

2. Comparability of positions, generally

Employer's offer to place veteran in position which, while not identical to position held before entering service, was similar in seniority, status, and pay, discharged employer's obligation under predecessor to statute. Schwetzler v Midwest Dairy Products Corp. (1949, CA7 III) 174 F.2d 612, 24 BNA LRRM 2094, 16 CCH LC ¶ 65151; Bowen v Home Beneficial Life Ins. Co. (1950, CA4 Va) 183 F.2d 376, 26 BNA LRRM 2345, 18 CCH LC ¶ 65874; Major v Phillips-Jones Corp. (1951, CA2 NY) 192 F.2d 186, 29 BNA LRRM 2038, 20 CCH LC ¶ 66598, cert den (1952) 343 US 927, 96 L Ed 1338, 72 S Ct 760, 29 BNA LRRM 2723
Reassignment of state policeman, from shift working normal hours on weekdays to rotating shifts on weekends because of his absences due to reserve duties violated predecessor to statute. Carlson v New Hampshire Dept't of Safety (1979, CA1 NH) 609 F.2d 1024, 102 BNA LRRM 3038, 87 CCH LC ¶ 11763, cert den (1980) 446 US 913, 64 L Ed 2d 267, 100 S Ct 1844, 103 BNA LRRM 3174, 88 CCH LC ¶ 12004

Employer complied with predecessor to statute in restoring returning veteran to position with somewhat different duties which was equivalent status although subject to closer supervision where both positions involved teletype operations and employer had changed its operating methods substantially. McCormick v Carnett-Partsnett Systems, Inc. (1975, MD Fla) 396 F Supp 251, 89 BNA LRRM 3016, 77 CCH LC ¶ 11763, cert den (1980) 446 US 913, 64 L Ed 2d 267, 100 S Ct 1844, 103 BNA LRRM 3174, 88 CCH LC ¶ 12004

3. Managerial or supervisory positions

Veteran was not entitled to position as general traffic manager of all its plants where employer company did not have such position at time employee entered military service, such position being created after he had entered service. Meehan v National Supply Co. (1947, CA10 Okla) 160 F.2d 346, 12 CCH LC ¶ 63645

Position offered by employer was not of like seniority, status, and pay to that which was held prior to entering service where veteran had been director and vice-president of employer and new job requires that veteran start from scratch, recruiting sales force and building business in assigned region and denying to veteran percentage of all founding fee income of company which was attractive feature of original position. Trusteed Funds, Inc. v Dacey (1947, CA1 Mass) 160 F.2d 413, 19 BNA LRRM 2465, 12 CCH LC ¶ 63639

Offer by employer to re-employ veteran as salesman at $35 per week or, in alternative, to pay him $35 per week for not working, when at time sales manager's position called for salary of $6,500 per year was not in compliance with spirit and intent of predecessor to statute; offer of year's salary without working did not accord to veteran opportunity to reacquire skills and business habits which were purpose of predecessor to statute. John S. Doane Co. v Martin (1947, CA1 Mass) 164 F.2d 537, 20 BNA LRRM 2445, 13 CCH LC ¶ 63917

If employee was employed as sales manager by corporation prior to his entry into armed forces, offer of corporation to re-employ him as salesman at $35 per week, or in alternative to pay him $35 per week for not working, was not in compliance with spirit and intent of law; this was offer of position inferior to that which veteran had been employed and hence, not same position or position of like seniority and status and pay. John S. Doane Co. v Martin (1947, CA1 Mass) 164 F.2d 537, 20 BNA LRRM 2445, 13 CCH LC ¶ 63917

Employer's offer to re-employ veteran at $35 per week, or in alternative to pay him $35 per week for not working, was not in compliance with spirit and intent of law; this was offer of position inferior to that which veteran had been employed and hence, not same position or position of like seniority and status and pay. John S. Doane Co. v Martin (1947, CA1 Mass) 164 F.2d 537, 20 BNA LRRM 2445, 13 CCH LC ¶ 63917

Veteran who had been, prior to entering service, manager of employer's store with authority to hire and fire employees and to keep books and cash had not been restored to position of like seniority, status, and pay where, after initial refusal to re-employ at all and eventual re-employment only after action by Selective Service Board, veteran was re-employed as floor-manager, rather than store manager, without authority to keep books, without access to store records or cash and without authority to hire and fire employees. Troy v Mohawk Shop, Inc. (1946, DC Pa) 67 F Supp 721, 18 BNA LRRM 2297, 11 CCH LC ¶ 63306

Duty to re-employ was not met where veteran had been employed as bookkeeper and checker and was offered temporary employment as route driver. Hood v Lawrence (1955, DC NH) 138 F Supp 120, 31 CCH LC ¶ 70194

Podiatrist who occupied position of Chief of Podiatry and Director of Podiatry Service prior to his resignation from agency to enter active duty with Army was entitled to restoration to comparable position, not merely to position of podiatrist. Waidzunas v Department of Veterans Affairs (1993, MSPB) 56 MSPR 529
4. -Sales positions

Employer who, in good faith, offered veteran equivalent of preservice position complied with predecessor to statute where veteran, prior to induction, had been employed as salesman with headquarters at Youngstown, Ohio, and, following discharge, was offered position as salesman with headquarters at either Youngstown, Ohio, or New Castle, Pennsylvania, but with duties which included several undertakings not required in preservice job, or position as salesman with headquarters at Akron, Ohio, and where veteran refused both these offers. Bova v General Mills, Inc. (1949, CA6 Ohio) 173 F.2d 138, 23 BNA LRRM 2351, 16 CCH LC ¶ 64954

Veteran has no right of action where employer offered re-employment on sales route which is similar, though not identical, with sales route which veteran had held prior to entry into service where sales route offered afforded comparable opportunities as to seniority, status, and pay. Schwetzler v Midwest Dairy Products Corp. (1949, CA7 Ill) 174 F.2d 612, 24 BNA LRRM 2094, 16 CCH LC ¶ 65151

Insurance agent, who was on debit selling industrial and ordinary insurance, was not entitled to same debit upon his return from service, and company which gave him contract under which he could devote greater part of his time to selling of insurance rather than devoting part of his time to collection of premiums complied with law requiring employer to give veteran position of "like seniority, status, and pay." Bowen v Home Beneficial Life Ins. Co. (1950, CA4 Va) 183 F.2d 376, 26 BNA LRRM 2345, 18 CCH LC ¶ 65874

Employer complied with predecessor to statute where he offered veteran sales position comparable to that which he held previously to entering service, but in different territory, with guaranteed wage higher than that which he had previously been given. Major v Phillips-Jones Corp. (1951, CA2 NY) 192 F.2d 186, 29 BNA LRRM 2038, 20 CCH LC ¶ 66598, cert den (1952) 343 US 927, 96 L Ed 1338, 72 S Ct 760, 29 BNA LRRM 2723

5. -Other positions

Bus driver, offered position of seniority, status, and pay similar to his prewar job, among conditions of which were union contract and seniority and quarterly pick system, had had no right to complain when these same conditions were present in postwar job offered him. Feore v North Shore Bus Co. (1947, CA2 NY) 161 F.2d 552, 20 BNA LRRM 2132, 12 CCH LC ¶ 63760

Veteran's refusal of job as clean-up man, position greatly inferior in rank and pay to that held by him previously, did not affect his rights. Combustion Engineering Co. v Miller (1948, CA6 Tenn) 165 F.2d 372, 21 BNA LRRM 2224, 14 CCH LC ¶ 64224

Veteran railway telegrapher was not relegated to inferior position or "status" upon his return to employment, when he was required to work on night shift, instead of day shift he worked prior to entering army. Boone v Ft. Worth & D. R. Co. (1955, CA5 Tex) 223 F.2d 766, 36 BNA LRRM 2366, 28 CCH LC ¶ 69331

Where military veteran was fireman before entering military service, and, had he remained fireman, would have had opportunity to become switchman, railroad's refusal to make veteran switchman constituted failure under former 50 Appx USCS § 459(b)-(h) on its part to meet its duty to offer military veteran same job and benefits he would have had he not entered service. Wood v Southern Pacific Co. (1971, CA9 Cal) 447 F.2d 486, 78 BNA LRRM 2512, 66 CCH LC ¶ 12000

Status of position offered to returning veteran-staff chaplain-was not like that while he left-chief chaplain-since latter was one with clear responsibilities, including supervising and managing staff of chaplains whose regular duties well defined by precedent and guidelines, and was one invested with necessary authority to fulfill its responsibilities, while new position carried broad variety of nebulously defined responsibilities, had no staff to assist, and required veteran to report to and be supervised by incumbent in same position he formerly held. Nichols v Department of Veterans Affairs (1993, CA FC) 11 F.3d 160, 94 Daily Journal DAR 3809, 144 BNA LRRM 2952
To restore veteran to position as senior examiner, bureau of motor carriers, handling cases of less complexity than those he formerly handled would not constitute restoration to position of like seniority, status, and pay. Kephart v United States (1947) 109 Ct Cl 646, 74 F Supp 578

Veteran was entitled to be restored to position of receptionist and switchboard operator in hotel system general office or to position of like seniority, status and pay, in accordance with her request and to retain such position for one year thereafter, subject only to employer's right to discharge for cause. Sullivan v Milner Hotel Co. (1946, DC Mich) 66 F Supp 607, 18 BNA LRRM 2295, 11 CCH LC ¶ 63329

Employee of government printing office, employed as "estimator jacket preparer" at time of his entry into military service, could not compel public printer to place him in supervisory position of principal technical assistant, since position of principal technical assistant was in no manner comparable to position held by plaintiff, which was nonsupervisory one. Campbell v Deviny (1949, DC Dist Col) 81 F Supp 657, affd (1952, App DC) 90 US App DC 176, 194 F.2d 881, cert den (1952) 344 US 826, 97 L Ed 643, 73 S Ct 27

Appellant, who occupied mail handler position at time he was called to active military duty, was not properly restored by agency where his former position was not available to him because of physical limitations imposed by disability incurred while in military service, and agency offered him next best available position at same facility without determining that no equivalent positions existed there or in commuting area or that it searched nationwide either for position that would provide appellant with same seniority, status, and pay of his former mail handler position, or any other position within agency for which he was qualified that most closely approximated seniority, status, and pay to which he would otherwise be entitled. Heidel v United States Postal Serv. (1994, MSPB) 63 MSPR 669

Physician who alleged that he was improperly restored to duty because agency had not restored him to status of his former position made nonfrivolous allegation of improper restoration, entitling him to jurisdictional hearing, where agency's evidence established that he was receiving pay and benefits of physician position which he formerly occupied, but agency admitted it had placed him on administrative leave pending this review. Lei v Department of Veterans Affairs (1996, MSPB) 71 MSPR 91

6. Permissibility of reduction in compensation or benefits

Although veteran is entitled to be restored to same character of employment, including pay, which would have been his had he not entered service, employer has right to reduce pay or commission in same manner as though veteran had been in continuous employment, provided such reduction applies to all other position of same or similar nature. Levine v Berman (1949, CA7 Ill) 178 F.2d 440, 25 BNA LRRM 2210, 17 CCH LC ¶ 65534, cert den (1950) 339 US 982, 94 L Ed 1386, 70 S Ct 1024, 26 BNA LRRM 2261

Under predecessor to statute, employer did not have affirmative duty to accommodate employees with military reserve obligations by granting them rights and privileges not generally accorded to their fellow employees such as paying absent reserves for hours not worked, where employee's right to work was contingent upon his presence and ability to perform at regularly scheduled periods or to exchange scheduled working times with other employees. Monroe v Standard Oil Co. (1980, CA6 Ohio) 613 F.2d 641, 103 BNA LRRM 2317, 87 CCH LC ¶ 11801, affd (1981) 452 US 549, 69 L Ed 2d 226, 101 S Ct 2510, 107 BNA LRRM 2633, 91 CCH LC ¶ 12796 (superseded by statute as stated in Hansen v Town of Irondequito (1995, WD NY) 896 F Supp 110, 150 BNA LRRM 2508, 67 CCH EPD ¶ 43881, 130 CCH LC ¶ 11399) and (superseded by statute as stated in Gunmo v Village of Depew (1996, CA2 NY) 75 F.3d 98, 151 BNA LRRM 2225, 67 CCH EPD ¶ 43880, 131 CCH LC ¶ 11477) and (superseded by statute as stated in Newport v Ford Motor Co. (1996, CA8 Mo) 91 F.3d 1164, 152 BNA LRRM 2961, 132 CCH LC ¶ 11634) and (superseded by statute as stated in Key v Hearst Corp. (1997, SD NY) 963 F Supp 283, 156 BNA LRRM 2509, 71 CCH EPD ¶ 44819, 134 CCH LC ¶ 10014) and (superseded by statute as stated in Sheehan v Dep't of the Navy (2001, CA FC) 240 F.3d 1009, 166 BNA LRRM 2526) and (superseded by statute as stated in Rogers v City of San Antonio (2002, WD Tex) 211
Employer violated predecessor to statute by offering veteran restoration at only 80 percent of pay he would have been receiving except for military service. Ryan v Philadelphia (1983, ED Pa) 559 F Supp 783, 113 BNA LRRM 2258, 97 CCH LC ¶ 10040, affd without op (1984, CA3 Pa) 732 F.2d 147

Employer's practice of reassigning disabled employees which reduced service adjustment benefits was contrary to statute. Blake v Columbus (1984, SD Ohio) 605 F Supp 567, 118 BNA LRRM 3244, 102 CCH LC ¶ 11426

**B. Collective Bargaining Agreements**

7. Generally

No practice of employers or agreements between employers and unions can cut down service adjustments benefits which Congress has secured veteran. Fishgold v Sullivan Drydock & Repair Corp. (1946) 328 US 275, 90 L Ed 1230, 66 S Ct 1105, 18 BNA LRRM 2075, 11 CCH LC ¶ 51232, 167 ALR 110; Rudisill v Chesapeake & O. R. Co. (1948, CA4 Va) 167 F.2d 175, 21 BNA LRRM 2692, 14 CCH LC ¶ 64460; Nunn v Humphrey (1948, DC Pa) 79 F Supp 8

Employers and unions are not empowered by use of transparent labels and definitions to deprive veteran of substantial rights guaranteed by Selective Training and Service Act of 1940. Accardi v Pennsylvania R. Co. (1966) 383 US 225, 15 L Ed 2d 717, 86 S Ct 768, 1 EBC 1016, 61 BNA LRRM 2385, 53 CCH LC ¶ 11073

Collective bargaining agreements were best evidence of rights of returning veterans. Boston & M. R. R. v David (1948, CA1 NH) 167 F.2d 722, 22 BNA LRRM 2133, 14 CCH LC ¶ 64508

When collective bargaining conflicts with former Veterans' Reemployment Rights Act, provision of Act must prevail; to hold otherwise would allow companies and unions to bargain away, without consent of veterans, rights explicitly secured to veterans by Congress. Hembree v Georgia Power Co. (1981, CA5 Ga) 637 F.2d 423, 106 BNA LRRM 2535, 90 CCH LC ¶ 12579

No practice of employers or agreements between employers and unions can diminish service adjustment benefits which Congress secured for veterans under Vietnam Era Veterans Readjustment Act and particular contract interpretation cannot defeat veteran's statutory rights under VEVRA. Alber v Norfolk & W. R. Co. (1981, CA8 Mo) 654 F.2d 1271, 107 BNA LRRM 3233, 92 CCH LC ¶ 12929

Rights of veteran must be derived under his contract of employment, upon full consideration of all express and implied conditions thereof, under contract which inures to his benefit, such as collective bargaining agreement, and under laws and regulations which operate thereupon. Grubbs v Ingalls Iron Works Co. (1946, DC Ala) 66 F Supp 550, 18 BNA LRRM 2184, 11 CCH LC ¶ 63266

No practice of employers or agreements between employers and unions can cut down service adjustment benefits secured to veteran. Curtis v Railroad Perishable Inspection Agency (1947, DC Mass) 71 F Supp 153, 20 BNA LRRM 2038

Predecessor to statute did not sweep away seniority systems established by collective bargaining contracts but instead relied upon such contracts in order to secure veterans right which predecessor to statute guaranteed. Harrison v Seaboard A. L. R. Co. (1948, DC SC) 77 F Supp 511, 22 BNA LRRM 2157, 15 CCH LC ¶ 64600

Reemployment rights under former 38 USCS § 2021 did not depend upon what veteran's seniority was under applicable collective bargaining agreement, but rather, on what it would have been but for his military service. Chernoff v Pandick Press, Inc. (1976, SD NY) 419 F Supp 1192, 93 BNA LRRM 2422, 79 CCH LC ¶ 11723

Predecessor to statute was liberally construed for benefit of veterans who leave private employment to serve country in hour of great need and no practice of employers or collective
bargaining agreements between employers and unions will satisfy denial of service adjustment benefits which Congress secured for veterans. Cohn v Union P. R. Co. (1977, DC Neb) 427 F Supp 717, 94 BNA LRRM 2828, 81 CCH LC ¶ 13115, affd (1978, CA8 Neb) 572 F.2d 650, 97 BNA LRRM 3134, 83 CCH LC ¶ 10467, cert den (1978) 439 US 836, 58 L Ed 2d 132, 99 S Ct 120, 99 BNA LRRM 2600, 84 CCH LC ¶ 10875

Court will not grant specific performance of collective bargaining agreement's seniority provisions if such relief will nullify preferences given by Congress to returning veterans. International Union, United Auto., etc. v Elastic Stop Nut Corp. (1947) 140 NJ Eq 177, 53 A2d 339, 20 BNA LRRM 2455, 12 CCH LC ¶ 63798

8. Application of agreements, generally

Although predecessor to statute, regulating veteran's re-employment rights, did not itself create seniority system but accepted that set forth in applicable collective bargaining agreement, it required application of principles of that system in manner that would not deprive veteran of benefits, in terms of restoration to position and advancement in status, for which Congress had provided. McKinney v Missouri K. T. R. Co. (1958) 357 US 265, 2 L Ed 2d 1305, 78 S Ct 1222, 42 BNA LRRM 2287, 35 CCH LC ¶ 71613


It cannot be presumed that Congress, in failing to amend National Labor Relations Act, intended to permit concerted action of collective bargaining agency and employer to destroy or whittle down statutory right of veteran to restoration to security and seniority in his job. Bryant v Brotherhood R. Trainmen (1947, DC La) 74 F Supp 510, 21 BNA LRRM 2061, 13 CCH LC ¶ 64143

Veteran employed 3 months before induction was not entitled to seniority where 6 months' employment is required by union agreement before seniority begins. Meredith v Industrial Rayon Corp. (1949, DC Ohio) 117 F Supp 815

Petitioner, who was in the service on July 12, 1945, when employee in his classification was laid off, which lay-off continued until March 14, 1949, when petitioner was rehired, lost his seniority as of July 12, 1948, under terms of collective bargaining agreement extending seniority for a three-year period in event of lay-off. Carr v New York Shipbuilding Corp. (1952, DC NJ) 106 F Supp 711, 30 BNA LRRM 2511, 22 CCH LC ¶ 67141

Reinstated employee who entered service after working 89 days was not entitled to seniority from original employment date where collective bargaining agreement then effective provided for no seniority credit until after 3 months' employment. Venzel v National Tube Co. (1952, DC Ohio) 117 F Supp 385, affd (1953, CA6 Ohio) 209 F.2d 185, 33 BNA LRRM 2252, 24 CCH LC ¶ 68025, cert den (1954) 348 US 838, 99 L Ed 661, 75 S Ct 26, 34 BNA LRRM 2898

Employee, who at time of his induction in army was treated by his employer as being in temporary status because of collective bargaining agreement requiring new employees to serve 90 days on probation before establishing seniority rating, was entitled under former 50 USCS Appx § 459(b)-(h) to seniority credit for time spent in armed forces. Brickner v Johnson Motors (1969, ND Ill) 299 F Supp 1005, 71 BNA LRRM 2321, 60 CCH LC ¶ 10154, affd (1970, CA7 Ill) 425 F.2d 75, 74 BNA LRRM 2135, 62 CCH LC ¶ 10861

9. -Agreements executed during term of military service

Under predecessor to statute, discharged veteran who is restored to his former position in employ of private employer was given status of one who has been on furlough or leave of absence but was uninterruptedly member of working force, and in this way he was protected from being prejudiced by any change in terms of collective bargaining agreement because he was on furlough or leave of absence, but he was not favored on that ground as against his fellow
employees. Aeronautical Industrial Dist. Lodge v Campbell (1949) 337 US 521, 93 L Ed 1513, 69 S Ct 1287, 24 BNA LRRM 2173, 16 CCH LC ¶ 65206

Employee absent in war service was bound by nondiscriminatory arrangements made between bargaining unit and employer during his absence. Gauweiler v Elastic Stop Nut Corp. (1947, CA3 NJ) 162 F.2d 448, 20 BNA LRRM 2140, 12 CCH LC ¶ 63783; Koury v Elastic Stop Nut Corp. (1947, CA3 NJ) 162 F.2d 544, 20 BNA LRRM 2145, 12 CCH LC ¶ 63784; Di Maggio v Elastic Stop Nut Corp. (1947, CA3 NJ) 162 F.2d 546, 20 BNA LRRM 2146, 12 CCH LC ¶ 63785; Payne v Wright Aeronautical Corp. (1947, CA3 NJ) 162 F.2d 549, 20 BNA LRRM 2149, 12 CCH LC ¶ 63786

Upon return from service, veteran was entitled to seniority rating as permanent employee where, prior to entering service, veteran's position enjoyed no enforceable status but, during his absence in service, union agreement elevated position from seasonal to permanent status. United States ex rel. Unruh v North American Creameries, Inc. (1947, DC ND) 70 F Supp 36, 19 BNA LRRM 2341, 12 CCH LC ¶ 63594

Provisions of any union contract entered into between employer and union during veteran's absence which discriminate against veteran are void. Armstrong v Tennessee C., I. & R. Co. (1947, DC Ala) 73 F Supp 329, 20 BNA LRRM 2396, 13 CCH LC ¶ 63941

Returning veteran is bound by agreements made between union and employer during veteran's absence in military service. Cushiner v Ford Motor Co. (1950, DC Mich) 89 F Supp 491, 25 BNA LRRM 2385, 17 CCH LC ¶ 65616

10. -Closed-shop agreements

Agreement providing for closed-shop put into effect during veteran's absence in military service has no effect on veteran's right to re-employment after discharge from service. Curtis v Railroad Perishable Inspection Agency (1947, DC Mass) 71 F Supp 153, 20 BNA LRRM 2038

Fact that employer considered veteran, prior to entering service, to be "temporary" employee because veteran was not member of Local No. 830, with whom employer had "closed-shop" agreement, was not determinative where it is also shown that veteran was member of Local No. 107 of same union where veteran has alleged that he was employed by employer with assent of Local No. 830 because veteran could not obtain truck driver from Local No. 830 especially where veteran's employment with employer was not conditioned upon becoming member of Local No. 830 and that it was custom and practice of union to permit member of one of its local unions to work for employer under exclusive jurisdiction of another of its locals. Daniels v Barfield (1947, DC Pa) 71 F Supp 884, 19 BNA LRRM 2576

If, prior to veteran's induction into military service, employer obtained the union contract under which veteran would not be qualified to obtain job unless he was member of union, such agreement would not in any way discriminate against veteran where veteran left job, as truck driver, on nonunion contract which was to terminate within few months and, when he left, it was not certain where work under next contract would be located and veteran would be subject to transfer to new job wherever it was or free to quit and seek other employment; there is nothing which precludes employer from entering into closed-shop agreement with union. Bozar v Central Pennsylvania Quarry, Stripping & Constr. Co. (1947, DC Pa) 73 F Supp 803, 20 BNA LRRM 2663, 13 CCH LC ¶ 64077

11. -Preferences for union officers

Veteran was not entitled to greater benefits, based upon length of service with company, than those afforded to union officials under agreement negotiated while veteran was absent in service under which agreement union officials were given seniorities superior to that of union members, irrespective of actual seniority gained by length of service; if, during absence of some employees for purposes of military service, remaining employees get together and create union offices for themselves so that everyone has office and then proceed to provide top seniority for union officers, court would void such agreement as device simply to discriminate against absentee fighting men. Gauweiler v Elastic Stop Nut Corp. (1947, CA3 NJ) 162 F.2d 448, 20 BNA LRRM
Union section steward must be restored to position and veteran could not recover for loss of wages where union contract entered into while veteran was in service modified seniority provisions giving certain union officials higher seniority than anyone else. Di Maggio v Elastic Stop Nut Corp. (1947, CA3 NJ) 162 F.2d 544, 20 BNA LRRM 2145, 12 CCH LC ¶ 63784

Employee absent in war service was bound by collective bargaining agreement provided agreement did not discriminate as to veterans and returning veteran had no right to displace nonveteran union official of less actual seniority who had been given top seniority under agreement. Payne v Wright Aeronautical Corp. (1947, CA3 NJ) 162 F.2d 549, 20 BNA LRRM 2149, 12 CCH LC ¶ 63786

Seniority rights given veteran by predecessor to statute were not infringed where employer laid off veteran prior to laying off union chairman although chairman was junior to veteran in seniority where new collective bargaining agreements, made while veteran was in military service, provided that employees thereafter who served as union chairmen were entitled to be retained in case of layoffs regardless of their length of service in plant and where this agreement expressed honest desire for protection of interest of all members of union and was not skillful device of hostility to veterans. Bozar v Central Pennsylvania Quarry, Stripping & Constr. Co. (1947, DC Pa) 73 F Supp 803, 20 BNA LRRM 2663, 13 CCH LC ¶ 64077

12. Miscellaneous

Collective bargaining agreement whereby employer, in determining relative seniority of employment among its employees, allowed credit for pre-employment as well as post-employment military service was valid, as such agreement violated neither Selective Training and Service Act (50 USCS § 308) nor National Labor Relations Act (29 USCS §§ 141 et seq.). Ford Motor Co. v Huffman (1953) 345 US 330, 97 L Ed 1048, 73 S Ct 681, 31 BNA LRRM 2548, 23 CCH LC ¶ 67505

Provision in collective bargaining agreement allowing credit for pre-employment as well as post-employment military service did not violate predecessor to statute. Ford Motor Co. v Huffman (1953) 345 US 330, 97 L Ed 1048, 73 S Ct 681, 31 BNA LRRM 2548, 23 CCH LC ¶ 67505

Discrimination in collective bargaining agreement wholly unrelated to veteran's absence in service was not forbidden by predecessor to statute, and veteran was not statutorily entitled to have his seniority determined as of date of original employment where bargaining agreement provided otherwise. Britt v Trailmobile Co. (1950, CA6 Ohio) 179 F.2d 95, 25 BNA LRRM 2314, 17 CCH LC ¶ 65541, 25 ALR2d 1272, cert den (1950) 340 US 820, 95 L Ed 603, 71 S Ct 52

Under union contracts providing for promotion and seniority after 1,160 days as temporary employee, returned serviceman was not entitled to seniority over others completing required service before him, even though he would have completed service earlier but for military service. Diehl v Lehigh Valley R. Co. (1954, CA3 Pa) 211 F.2d 95, 33 BNA LRRM 2617, 25 CCH LC ¶ 68203, revd on other grounds (1955) 348 US 960, 99 L Ed 749, 75 S Ct 522, 35 BNA LRRM 2612

Agreement by railroad and union providing for seniority of laborers promoted to machinist helpers upon their return from service to date from first day of employment as machinist helper was valid. Gregory v Louisville & N. R. Co. (1950, DC Ky) 92 F Supp 770, 26 BNA LRRM 2628, 18 CCH LC ¶ 65985, affd (1951, CA6 Ky) 191 F.2d 856, 29 BNA LRRM 2022, 20 CCH LC ¶ 66577, cert den (1952) 343 US 903, 96 L Ed 1323, 72 S Ct 634, 29 BNA LRRM 2606

Employee who left job as trainee to enter service and completed training after reinstatement was entitled to credit for time in service in determining seniority even though union contract at time provided for credit on seniority of only one-half elapsed time between date of training and skilled classification; method of calculating seniority status of employees set forth in union contract, which method did not give full credit to time employee was in service, could not be
Veteran’s attaining position of Electrical Repairman Grade A must be readjusted for seniority and promotion purposes so that he will be considered to have been Motor Inspector Grade B as of Jan. 1, 1966, although for salary adjustment he is considered to have been promoted as of Feb. 2, 1966, date upon which he actually completed work required under provisions that existed when he departed from military service where veteran was reinstated in former position as Electrical Repairman Grade B upon completion of military service, but subsequent collective bargaining agreement abolished job of Electrical Repairman, replacing it with similar craft job of Motor Inspector, with provision that Electrical Repairman who had attained Grade A by Dec. 31, 1965, were slotted to become Motor Inspectors Grade B and that those who were in Grade B or C of Electrical Repairmen would become Motor Inspectors Grade C and where plaintiff, who had by Dec. 31, 1965, less than 1,040 hours of Electrical Repairman Grade B, was slotted in new craft job as Motor Inspector Grade C on Jan. 1, 1966, although his co-employees, who had not taken leave of absence for military service and who were equal or behind him in rank at time he entered military service, made Electrical Repairman Grade A during 1965 and were classified as Motor Inspectors Grade B on Jan. 1, 1966; intervention of new collective bargaining agreement cannot affect rights secured by Congress. Derkowski v Bethlehem Steel Corp. (1969, DC Md) 316 F Supp 310, 74 BNA LRRM 2561, 63 CCH LC ¶ 10978

It would be unwarranted frustration of Congressional intent to permit collective bargaining agreement, which provided that time spent on leave of absence for military service of 5 days or longer could not be counted as time worked in computing progression periods for progression wage increases, to prevail over Universal Military Training Act. Blair v Page Aircraft Maintenance, Inc. (1971, MD Ala) 336 F Supp 1011, 78 BNA LRRM 3054, 67 CCH LC ¶ 12257, revd on other grounds (1972, CA5 Ala) 467 F.2d 815, 81 BNA LRRM 2359, 81 BNA LRRM 2919, 69 CCH LC ¶ 13027, 70 CCH LC ¶ 13276 (superseded by statute as stated in Stevens v Tennessee Valley Auth. (1983, CA6 Tenn) 712 F.2d 1047, 118 BNA LRRM 3201)


Portion of collective bargaining agreement which provided that veterans who entered service of company prior to certain date would receive seniority credit to limited extent for time spent by them in military service, but provided that veterans who, prior to entry into service, were in employ of company were excepted from section for reasons that, under predecessor to statute, such veterans were guaranteed seniority credit for time of their military service was not against public policy but, on contrary, was in accord with accepted policy of state and nation. Haynes v United Chemical Workers (1950) 190 Tenn 165, 228 SW2d 101

C. Seniority Rights

1. In General

13. Generally

Statutory rights of returning veterans are subject to changes in conditions of their employment which have occurred in regular course during their absence in military service, where changes are not hostile devices discriminating against veterans. Ford Motor Co. v Huffman (1953) 345 US 330, 97 L Ed 1048, 73 S Ct 681, 31 BNA LRRM 2548, 23 CCH LC ¶ 67505

Although predecessor to statute did not itself create seniority system, it required application of principles of applicable system in manner that would not deprive veteran of benefits of restoration and advancement in status for which Congress has provided. McKinney v Missouri K.
T. R. Co. (1958) 357 US 265, 2 L Ed 2d 1305, 78 S Ct 1222, 42 BNA LRRM 2287, 35 CCH LC ¶ 71613

Veteran's seniority rights under predecessor to statute are not defeated by possibilities that work of particular type might not have been available, that veteran would not have worked satisfactorily during period of absence, that he might not have elected to accept higher position, or that sickness might have prevented him from continuing employment. Tilton v Missouri P. R. Co. (1964) 376 US 169, 11 L Ed 2d 590, 84 S Ct 578, 55 BNA LRRM 2374, 48 CCH LC ¶ 18748, reh den (1964) 376 US 966, 11 L Ed 2d 984, 84 S Ct 1121, 49 CCH LC ¶ 18844

Seniority provision under former 50 Appx USCS § 459(b)-(h) did not guarantee veteran increase in seniority, but was restricted to protecting veteran against loss of seniority. Selgrat v Field Enterprises, Inc. (1952, DC Ill) 105 F Supp 179, 30 BNA LRRM 2548

Veterans are to be given seniority rights only to extent that they would have had such rights if, instead of being in military service, they had been on job, and veterans are just as subject to seniority rules, including limitations on seniority based on time of company service, which prevail in their employment, as any other employee. Haynes v United Chemical Workers (1950) 190 Tenn 165, 228 SW2d 101

14. Construction of statute, generally

Predecessor to statute is not to be read as granting veteran increase in seniority over what he would have had if he had never entered Armed Forces. Fishgold v Sullivan Drydock & Repair Corp. (1946) 328 US 275, 90 L Ed 1230, 86 S Ct 768, 18 BNA LRRM 2075, 11 CCH LC ¶ 51232, 167 ALR 110; Hewitt v System Federation No. 152, etc. (1947, CA7 Ind) 161 F.2d 545, 20 BNA LRRM 2084, 12 CCH LC ¶ 63724; Gauweiler v Elastic Stop Nut Corp. (1947, CA3 NJ) 162 F.2d 448, 20 BNA LRRM 2140, 12 CCH LC ¶ 63783; Koury v Elastic Stop Nut Corp. (1947, CA3 NJ) 162 F.2d 544, 20 BNA LRRM 2145, 12 CCH LC ¶ 63784; Di Maggio v Elastic Stop Nut Corp. (1947, CA3 NJ) 162 F.2d 546, 20 BNA LRRM 2146, 12 CCH LC ¶ 63785

Since predecessor to statute used term "seniority" without definition, court must look to conventional uses of seniority system in process of collective bargaining. Aeronautical Industrial Dist. Lodge v Campbell (1949) 337 US 521, 93 L Ed 1513, 69 S Ct 1287, 24 BNA LRRM 2173, 16 CCH LC ¶ 65206

Term "seniority" as used in predecessor to statute was not to be limited by technical definition, but must be given meaning that was consonant with intention of Congress to preserve for returning veterans such rights and benefits which would have automatically accrued to them had they remained in private employment. Accardi v Pennsylvania R. Co. (1966) 383 US 225, 15 L Ed 2d 717, 86 S Ct 768, 1 EBC 1016, 61 BNA LRRM 2385, 53 CCH LC ¶ 11073

Underlying purpose of former provisions of Military Selective Service Act was to make certain that veteran did not lose seniority rights because of time spent in military service. Jackson v Beech Aircraft Corp. (1975, CA10 Kan) 517 F.2d 1322, 1 EBC 1116, 89 BNA LRRM 2642, 77 CCH LC ¶ 10937

By using such words as "temporary position" and "seniority," rights created by predecessor to statute are to be interpreted in relation to collective bargaining agreement, if one was in existence; seniority system was not created by the statute, but if there was one in collective bargaining agreement, then statute allowed veteran to step back at precise point he would have occupied had he kept his position continuously during war. Wright v Ford Motor Co. (1961, ED Mich) 196 F Supp 538, 48 BNA LRRM 2920, 43 CCH LC ¶ 17163; Fees v Bethlehem Steel Corp. (1971, WD Pa) 335 F Supp 487, 79 BNA LRRM 2408, 67 CCH LC ¶ 12343

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15. Limitation period

Veteran’s restored seniority standing under re-employment provisions ends with completion of first year of his re-employment and does not last as long as employment continues. Trailmobile Co. v Whirls (1947) 331 US 40, 91 L Ed 1328, 67 S Ct 982, 19 BNA LRRM 2531, 12 CCH LC ¶ 51247

Where mechanics brought action against employer to enforce their seniority rights, court had no power to “freeze” contractual rights of parties or of plaintiffs to their jobs as mechanics after statutory one year. Spearmon v Thompson (1949, CA8 Ark) 173 F.2d 452, 23 BNA LRRM 2472, 16 CCH LC ¶ 65028

16. Rights conferred by statute, generally

If, within statutory period, veteran was demoted, he would be discharged from such position; but guarantee against discharge did not on its face suggest grant of preference to veteran over and above that which was accorded by seniority of such position. Fishgold v Sullivan Drydock & Repair Corp. (1946) 328 US 275, 90 L Ed 1230, 66 S Ct 1105, 18 BNA LRRM 2075, 11 CCH LC ¶ 51232, 167 ALR 110

Upon reinstatement under predecessor to statute, veteran who had been employed by subsidiary company prior to induction was not entitled to any greater seniority rights than those accorded to all employees of subsidiary by bargaining agreement entered into by new owner, whereby all employees of subsidiary were given seniority dated as of time of corporate reorganization. Britt v Trailmobile Co. (1950, CA6 Ohio) 179 F.2d 569, 25 BNA LRRM 2314, 17 CCH LC ¶ 65541, 29 ALR2d 1272, cert den (1950) 340 US 820, 95 L Ed 603, 71 S Ct 52

Veteran’s seniority in position to which he was promoted shortly after return to work was retroactive to time when first of those who were junior to him in his old job classification were promoted to same position he held after his promotion. Foremsky v United States Steel Corp. (1968, WD Pa) 297 F Supp 1094, 71 BNA LRRM 2602, 35 CCH LC ¶ 71613

Under law of state, state civil service employee was entitled to seniority credit in state position for time spent for reservist training, such time being subject to provisions of statute. In re Fidek (1978) 76 NJ 340, 387 A2d 1185

17. -Rights between veterans as to positions

Treatment accorded returning veteran with regard to his rights of re-employment may be such as to discriminate between veteran and other returning servicemen or between veteran and other employees who did not enter service. Dougherty v General Motors Corp. (1949, CA3 NJ) 176 F.2d 561, 24 BNA LRRM 2369, 17 CCH LC ¶ 65298, cert den (1950) 338 US 956, 94 L Ed 590, 70 S Ct 494, 25 BNA LRRM 2395; Foster v General Motors Corp. (1951, CA7 Ind) 191 F.2d 907, 29 BNA LRRM 2006, 20 CCH LC ¶ 66564, cert den (1952) 343 US 906, 96 L Ed 1324, 72 S Ct 634, 29 BNA LRRM 2606, reh den (1952) 343 US 937, 96 L Ed 1344, 72 S Ct 768

Veteran with greater seniority must be given preference where there are two veterans who are entitled to be re-employed in single position. Salerno v Phelps Dodge Copper Products Corp. (1947, DC NJ) 12 CCH LC ¶ 63635

18. -Rights against nonveterans as to layoffs

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Veterans, who were on temporary upgraded list at time they were called to military service and who after returning completed sufficient number of hours to qualify for permanent list, were entitled to seniority on permanent list ahead of nonveterans who were junior to ones on temporary list but who had qualified for permanent list ahead of veterans during their absence in military service. Tilton v Missouri P. R. Co. (1964) 376 US 169, 11 L Ed 2d 590, 84 S Ct 595, 55 BNA LRRM 2369, 48 CCH LC ¶ 18747; Brooks v Missouri P. R. Co. (1964) 376 US 182, 11 L Ed 2d 599, 84 S Ct 578, 55 BNA LRRM 2374, 48 CCH LC ¶ 18748, reh den (1964) 376 US 966, 11 L Ed 2d 984, 84 S Ct 1121, 49 CCH LC ¶ 18844.

Veteran is not entitled to re-employment if in order to do so employer has to lay off employee with greater seniority than veteran. Sullivan v West Co. (1946, DC Pa) 67 F Supp 177, 18 BNA LRRM 2307, 11 CCH LC ¶ 63303.


In action under Vietnam Era Veterans' Readjustment Assistance Act of 1974, veterans who returned to former position with railroads as "Rule 154" carmen and who were entitled under collective bargaining agreement to retroactive seniority status for time spent in military service upon completing railroad's usual 1040-day waiting period required for journeyman status, were entitled to immediate credit against 1040-day requirement for time spent in military service with result that veterans had sufficient seniority to prevent layoff as opposed to nonveteran journeymen-carmen who were not laid off, where journeyman status was not dependent upon proficiency or employer discretion. Cohn v Union P. R. Co. (1977, DC Neb) 427 F Supp 717, 94 BNA LRRM 2828, 81 CCH LC ¶ 13115, affd (1978, CA8 Neb) 572 F.2d 650, 97 BNA LRRM 3134, 83 CCH LC ¶ 10467, cert den (1978) 439 US 836, 58 L Ed 2d 132, 99 S Ct 120, 99 BNA LRRM 2600, 84 CCH LC ¶ 10875.

19. Rights as to transfers and promotions

Under predecessor to statute, regulating veteran's re-employment rights, railroad employee who, prior to his induction into armed forces, was employed in position classified under applicable collective bargaining agreement in group 2, and who after his separation from military service was re-employed with group 1 seniority, and, after abolishment of that position, was reduced to group 2 position, was not entitled to claim seniority rights to group 1 position in place of nonemployee who had been assigned to that position after it had been "bulletined" while veteran was in service, where applicable collective bargaining agreement, although providing that returning employee may exercise seniority rights to any position bulletined during his leave of absence, made promotion from group 2 to group 1 depend, not only seniority, but also upon fitness and ability, and fact of actual employment in higher position did not enlarge veteran's rights under either collective bargaining agreement or statute; since employer was not obligated to give veteran higher position at all, when it did so it was not bound to give him seniority date earlier than that to which any employee similarly promoted would have been entitled, this date being date on which veteran's pay in group 1 position commenced, and not month earlier when position had first been bulletined. McKinney v Missouri K. T. R. Co. (1958) 357 US 265, 2 L Ed 2d 1305, 78 S Ct 1222, 42 BNA LRRM 2287, 35 CCH LC ¶ 71613.

Veteran who was employed as apprentice machinist in one city prior to service, resumed apprenticeship after discharge, and was transferred to another city, was entitled to seniority status in latter city where, but for military service, he probably would have achieved seniority status in latter city by virtue of continuous satisfactory employment. Brooks v Missouri P. R. Co. (1964) 376 US 182, 11 L Ed 2d 599, 84 S Ct 578, 55 BNA LRRM 2374, 48 CCH LC ¶ 18748, reh den (1964) 376 US 966, 11 L Ed 2d 984, 84 S Ct 1121, 49 CCH LC ¶ 18844.

On his return from service, veteran was not entitled to have his name placed on seniority list as carman helper before eight car cleaners who had been junior to him but had been promoted where collective bargaining agreements between railroad and its car cleaners and carman helpers provided for separate seniority rights among themselves, where there was no provision whereby employee classified as car cleaner might transfer and be classified as carman helper on...
basis of seniority rights and where, during period when plaintiff (car cleaner) was in army, eight
car cleaners who had been junior to him were promoted from classification of car cleaner to
carman helper.  Hewitt v System Federation No. 152, etc. (1947, CA7 Ind) 161 F.2d 545, 20
BNA LRRM 2084, 12 CCH LC ¶ 63724

Veteran, railroad employee, who had completed approximately one half of his apprenticeship
in Kentucky, and was transferred to Ohio, served two years in armed forces, was rehired and
completed his apprenticeship in Ohio, was entitled to seniority on the Ohio list as of the date he
would have completed his apprenticeship had he not served in armed forces.  McNichols v
Southern R. Co. (1961, ED Ky) 194 F Supp 148, 48 BNA LRRM 2088, 42 CCH LC ¶ 16962

20. -Miscellaneous

Veteran who is re-employed upon his release from army, but on certain days is laid off,
although other employees, not veterans, possessing same or similar skill as veteran are given
work on those days, is not deprived of any of his rights where preferred men have higher shop
seniority than veteran, no loss of seniority being charged against veteran for time he spent in
army.  Fishgold v Sullivan Drydock & Repair Corp. (1946) 328 US 275, 90 L Ed 1230, 66 S Ct
1105, 18 BNA LRRM 2075, 11 CCH LC ¶ 51232, 167 ALR 110

It was misconception to conclude simply because sheet-metal work was being done by
mechanics in employer's shops, even by mechanic junior to veteran on that work, that veteran
was entitled to re-employment where petitioner was not qualified for status of mechanic, his
permanent status being only that of sheet-metal worker's helper and where, under collective
bargaining agreement, seniority did not cross craft lines but was in status and furthermore where,
under agreement, veteran, as helper, had no right to be assigned to mechanic's work when
mechanics were available to do it, their superior status carrying with it superior rights to
employment; veteran was entitled to be given employment on sheet-metal work only when such
work became available to one in his status and his position and framework of seniority in
employer's shops; only if it should appear that some employee with same or inferior craft
qualifications or status as veteran and junior to him in seniority in that status has been given
sheet-metal work veteran have cause of action.  Boston & M. R. R. v David (1948, CA1
NH) 167 F.2d 722, 22 BNA LRRM 2133, 14 CCH LC ¶ 64508

There was no sound basis for contention that veteran was entitled to displace nonveteran in
position for which he sought employment where veteran had been in employ of company longer
than nonveteran and therefore had greater plant seniority but where nonveteran had worked
longer in particular department and therefore had greater departmental seniority and where
employer had agreed that, in absence of veterans' rights, departmental seniority took
precedence over plant seniority in matter of job rights and further admitted that had veteran not
been veteran he could not have "bumped" nonveteran.  Oil Workers International Union CIO v
Sinclair Refining Co. (1948, CA5 Tex) 171 F.2d 192, 23 BNA LRRM 2153, 15 CCH LC ¶ 64880

Plaintiff, who was crane operator at time he left for service was entitled to position of roughing
lathe helper with seniority over one appointed to that position during his absence, but was not
entitled to seniority over same party as lathe operator.  Lipscomb v Tennessee C., I. & R. Co.
(1951, CA5 Ala) 189 F.2d 708, 28 BNA LRRM 2223, 20 CCH LC ¶ 66396

Under rule that military service of veteran returning to position in private industry was counted
as service in plant so that veteran did not lose ground in seniority hierarchy by reason of absence,
rehired veterans subsequently displaced from skilled trade jobs in work force reduction were
entitled to reinstatement at higher seniority level where veterans, prior to leave of absence for
military service, had participated in skilled trade program, where only perquisite of participation in
skilled trade program for over four years was advanced seniority, where veterans had not
achieved advance seniority at time of military leave and where nonveteran workers, who
entered skilled trade programs after veterans, had achieved such seniority and had retained
skilled trade jobs after work force reduction.  United States ex rel. Adams v General Motors Corp.
(1975, CA6 Mich) 525 F.2d 161, 90 BNA LRRM 3132, 77 CCH LC ¶ 11161

Veteran was entitled to adjustment of seniority ranking in local police force due to time
spent in military service, since veteran proved with reasonable certainty that he would have
become police officer within 3 months of his 21st birthday, where evidence demonstrated that veteran was hired as police cadet before joining military, similarly situated police cadets who continued to serve as cadets entered officers training school within 3 months of their 21st birthday after serving one year probationary period, veteran would have served one year probationary period had he not left to join military, after military service veteran successfully completed officer's training program and was subsequently promoted to corporal. Schilz v Taylor (1987, CA6 Mich) 825 F.2d 944, 125 BNA LRRM 3461, 107 CCH LC ¶ 10011

District court erred in deciding that 38 USCS § 4311(a), rather than 38 USCS § 4316(b)(1), part of Uniformed Services Employment and Reemployment Rights Act, (USERRA) must be applied to claims of National Guard and reservist city employees because § 4316(b)(1) was fully applicable to reservists' short absences from civilian employment for weekend drills or two-week annual training, and district court mistakenly thought that Veterans Reemployment Rights Act, former 38 USCS § 2024(d), was precursor of USERRA § 4316(b)(1); however, USERRA § 4316(b)(1) had no true predecessor and dealt with different subject (non-seniority rights of persons absent for military service) from § 2024(d) (reemployment rights). Rogers v City of San Antonio (2004, CA5 Tex) 392 F.3d 758, 176 BNA LRRM 2129, 85 CCH EPD ¶ 41800

On appeal, military reservist and National Guard employees' recovery was limited under Uniform Services Employment and Reemployment Rights Act, 38 USCS § 4316(b)(1), as they were to be treated equally to such non-seniority rights and benefits as non-military leave employees and district court erred in applying 38 USCS § 4311(a) rather than § 4316(b)(1) to employees' claims because USERRA did not grant escalator protection to service members' non-seniority rights and benefits. Rogers v City of San Antonio (2004, CA5 Tex) 392 F.3d 758, 176 BNA LRRM 2129, 85 CCH EPD ¶ 41800

Seniority acquired by veterans as laborers prior to their induction could not be counted as seniority on machinists' helpers' seniority roster prior to veterans' actual promotion to positions as helpers where classification of laborer and that of machinist's helper in employer railroad's employment fell within separate crafts or classes and wages, rules, and working conditions of employee within each of such classifications, including seniority and seniority rights, were established and governed by completely separate and distinct collective bargaining agreements between employer and separate and distinct statutory collective bargaining representatives for each of separate crafts or classes within which such job classification fell; seniority in one class did not constitute seniority in another; great presumption or strong probability that veterans would have been promoted had they remained at work during period of military service did not entitle them to seniority in promoted position. Gregory v Louisville & N. R. Co. (1950, DC Ky) 92 F Supp 770, 26 BNA LRRM 2628, 18 CCH LC ¶ 65985, affd (1951, CA6 Ky) 191 F.2d 856, 29 BNA LRRM 2022, 20 CCH LC ¶ 66577, cert den (1952) 343 US 903, 96 L Ed 1323, 72 S Ct 634, 29 BNA LRRM 2606

Plaintiffs were not entitled under former 50 USCS Appx § 459(b)-(h) to seniority at first accorded them as laborers by railroad upon their promotion to helper classification following their return from military service. Poling v Baltimore & O. R. Co. (1958, DC W Va) 166 F Supp 710, 43 BNA LRRM 2030, 36 CCH LC ¶ 65019

Shift differential paid to workers in apprenticeship program to which veteran was denied entry in violation of statute was not based on seniority but on working of undesirable hours; hence veteran could not recover differential for period wrongfully denied entry, since he did not work under undesirable conditions. Bury v General Motors Corp. (1982, ND Ohio) 113 BNA LRRM 3036, 97 CCH LC ¶ 10080

2. Determination of Rights

21. Generally

Predecessor to statute, requiring that private employers reinstate their former employees who are honorably discharged veterans to their former position or to position of like seniority, status, and pay, and providing that such person "shall be so restored without loss of seniority," mean that for purpose of determining seniority, returning veteran is to be treated as though he had been
Veteran was fully restored to former "position" where he was permitted to take up seniority at precise point which he would have occupied had he kept his position continuously during war and where he was promptly placed by employer on roster of employees in veteran's old permanent rating of sheet-metal worker's helper with accumulated seniority therein even though operation of seniority system in effect in employer's shop required that veteran be placed on furlough instead of put to work. Boston & M. R. R. v David (1948, CA1 NH) 167 F.2d 722, 22 BNA LRRM 2133, 14 CCH LC ¶ 64008

Employer's refusal to credit veteran's time in military service toward achievement of company employment status, which would give veteran increased job security, constituted unlawful deprivation of veteran's opportunity to continue progression towards journeyman rating, based solely upon veteran's absence on military duty, since refusal to grant such status resulted in veteran being displaced by nonveteran employee with greater job security. United States ex rel. Adams v General Motors Corp. (1975, CA6 Mich) 525 F.2d 161, 90 BNA LRRM 3132, 77 CCH LC ¶ 11073

Under normal circumstances, upon completion of requisite period of training, veteran returning to his former employment was entitled under former 50 USCS Appx § 459(b)-(h) to adjustment of his seniority date. Derkowski v Bethlehem Steel Corp. (1969, DC Md) 316 F Supp 310, 74 BNA LRRM 2561, 63 CCH LC ¶ 10978

Burden of proof is upon veteran seeking reinstatement under predecessor to statute to establish date from which seniority should be determined; and, in action for reinstatement, promotion, and seniority in promoted position, where veteran did not sustain burden of proof as to when seniority in promoted position would have occurred, date of seniority would be date of reinstatement. Thomas v Pacific Northwest Bell Tel. Co. (1977, DC Or) 434 F Supp 741, 94 BNA LRRM 3153, 81 CCH LC ¶ 13136

Veterans on their return to employment enjoyed by them before they entered military service were to be given seniority rights only to extent that they would have had such rights if, instead of being in military service, they had been on job, and they were just as subject to seniority rules, including limitations on seniority based on time of company service, which prevailed in their employment, as were any other employees. Haynes v United Chemical Workers (1950) 190 Tenn 165, 228 SW2d 101

22. Seniority status, generally

In computing seniority to which veteran is entitled upon returning from service and being re-employed in his preservice position, veteran has right to be restored to same status which he would have occupied had his employment not be interrupted by military service; veteran does not step back on seniority escalator at point he stepped off, but steps back on at precise point he would have occupied had he kept his position continuously during war. Trusted Funds, Inc. v Dacey (1947, CA1 Mass) 160 F.2d 413, 19 BNA LRRM 2465; Hewitt v System Federation No. 152, etc. (1947, CA7 Ind) 161 F.2d 545, 20 BNA LRRM 2084; Gauweiler v Elastic Stop Nut Corp. (1947, CA3 NJ) 162 F.2d 448, 20 BNA LRRM 2140, 12 CCH LC ¶ 63783; Di Maggio v Elastic Stop Nut Corp. (1947, CA3 NJ) 162 F.2d 546, 20 BNA LRRM 2146, 12 CCH LC ¶ 63785; Arkansas Oak Flooring Co. v Louisiana & A. R. Co. (1948, CA5 La) 166 F.2d 98, cert den (1948) 334 US 828, 89 L Ed 1756, 68 S Ct 1338; Mentzel v Diamond (1948, CA3 NJ) 167 F.2d 299, 21 BNA LRRM 2521, 14 CCH LC ¶ 64395; Spearmon v Thompson (1948, CA8 Ark) 167 F.2d 626, 22 BNA LRRM 2025, 14 CCH LC ¶ 64472, cert den (1948) 335 US 886, 93 L Ed 424, 69 S Ct 238, 23 BNA LRRM 2119; Boston & M. R. R. v David (1948, CA1 NH) 167 F.2d 722, 22 BNA LRRM 2133, 14 CCH LC ¶ 64508; Conner v Pennsylvania R. Co. (1949, App DC) 85 US App DC 233, 177 F.2d 854, 24 BNA LRRM 2362, 25 BNA LRRM 2570, 16 CCH LC ¶ 65276, 18 CCH LC ¶ 65702, cert den (1950) 339 US 919, 94 L Ed 1343, 70 S Ct 622, 25 BNA LRRM 2570 and cert den (1950) 339 US 919, 94 L Ed 1343, 70 S Ct 624; Levine v
Veteran steps back upon escalator of employment as of time of his request for re-employment but if escalator moves down instead of up, veteran is required to accept that detriment precisely as employer is required to carry burden of increased salary if escalator turns upward. Schreier v M. H. Fishman Co. (1948, DC Ind) 75 F Supp 383, 11 CCH LC ¶ 63340; Armstrong v Tennessee C., I. & R. Co. (1947, DC Ala) 68 F Supp 383, 10 CCH LC ¶ 63340. Former 50 USCS Appx § 459(b)-(h) merely guaranteed returning serviceman seniority rights he would have had had he not entered service. It did not create or vest in veteran additional rights beyond what he would have had he not have gone into service; this is sometimes referred to as escalator principle, and it simply means that all his rights, including seniority, move on as though he had not left employ of the company. McKinney v Missouri-Kansas-Texas R. Co. (1956, CA10 Okla) 240 F.2d 8, 39 BNA LRRM 2312, 31 CCH LC ¶ 64874. Veteran had never got on "seniority escalator" where plaintiff was employed by his employer less than six months' period required by union agreement and was on probationary basis; he was not continued as employee within terms of agreement after his induction into military service so as to be entitled to seniority rights which entitled him to employment in preferred status upon his return to employer. Meredith v Industrial Rayon Corp. (1949, DC Ohio) 117 F Supp 815. Cases interpreting predecessors of statute, established what is known as "escalator principle" of veterans' reemployment rights, which provided that returning draftee did not step back on security escalator at point he stepped off, but stepped back on at precise point he would have occupied had he kept his position continuously during period of service; by enacting statute, Congress approved "escalator principle" and employer was not to deny returning draftee any seniority, promotions, changes in status, raises in pay, etc. which veteran would have automatically received had his employment not been interrupted by military service and statutes required that veteran receive those benefits which would have been his simply by virtue of continued employment; veteran was not required to show that he necessarily would have received any benefit in issue had he not been drafted, and it was sufficient to show that at time he left employment, it was reasonably certain that change of status would have occurred. Thomas v Pacific Northwest Bell Tel. Co. (1977, DC Or) 434 F Supp 741, 94 BNA LRRM 3153, 81 CCH LC ¶ 13136.

23. Employee serving probationary period

Even though pilot had completed only 7 of 12 months' probationary period provided for in collective bargaining agreement when he entered military service, he was entitled to have time spent in service included in determining his seniority where pay increases were based entirely on seniority. Moe v Eastern Air Lines, Inc. (1957, CA5 Fla) 246 F.2d 215, 40 BNA LRRM 2302. Copilot who entered military service while serving probationary period with airline was entitled to seniority rights, notwithstanding collective bargaining agreement to the contrary, where there was reasonable expectation that employment would be continuous. Moe v Eastern Air Lines,
Veteran who left job during probationary period was entitled to seniority status dating from time of entering into service despite company's unilateral prerogative to fire for no reason any probationary employee, power exercised as to one out of every 10 such employees, since this did not constitute sufficient "managerial discretion" so as to preclude returning veteran from establishing that his probationary status was dependent solely upon continuing employment, since such right, even though regularly exercised by company, was not affirmative discretionary factor in management's advancement selection criteria. Montgomery v Southern Electric Steel Co. (1969, CA5 Ala) 410 F.2d 611, 71 BNA LRRM 2174, 60 CCH LC ¶ 10027

Veteran who had, prior to entering service, been employed on probationary basis requiring that he spend at least 90 days in employ of defendant in order to obtain position entitling him to seniority, was not entitled, upon return from service, to be re-employed on basis of seniority which would have been obtained had he not been called to service. Johnson v Interstate Transit Lines (1946, DC Utah) 71 F Supp 882, 18 BNA LRRM 2090, 11 CCH LC ¶ 63202, affd (1947, CA10 Utah) 163 F.2d 125, 20 BNA LRRM 2483, 13 CCH LC ¶ 63960, 172 ALR 1242

Veteran returning from military service was entitled to seniority rights based upon position he held at printing company when he left employment with company to enter military service and veteran's seniority was to be computed from date prior to veteran's entry into military service, where, although veteran had not, prior to entering service, completed probationary period for position and company apparently had power to decline to promote any employee it found to be incompetent, company had never failed to promote person in veteran's position, and veteran's failure to satisfy requirement of probationary period was direct result of entry into military service; despite fact that collective bargaining agreement required veteran, when promoted to position he held prior to entering service, to register such promotion with union, fact that veteran did not so register was insufficient to defeat veteran's rights of re-employment. Chernoff v Pandick Press, Inc. (1976, SD NY) 419 F Supp 1192, 93 BNA LRRM 2422, 79 CCH LC ¶ 11723

24. -Employee serving apprenticeship

Returning veteran satisfactorily completing his interrupted training was entitled to seniority status he would have acquired by virtue of continued employment but for absence in military service. Tilton v Missouri P. R. Co. (1964) 376 US 169, 11 L Ed 2d 590, 84 S Ct 595, 55 BNA LRRM 2369, 48 CCH LC ¶ 18747

Veteran who, prior to his military service was employed by railroad as apprentice machinist in one city, and after his discharge from Armed Forces resumed his apprenticeship and was transferred to railroad shop located in another city, was entitled to seniority status in latter city where, but for his military service, he probably would have achieved, by virtue of continuous satisfactory employment, seniority status in latter city. Brooks v Missouri P. R. Co. (1964) 376 US 182, 11 L Ed 2d 599, 84 S Ct 578, 55 BNA LRRM 2374, 48 CCH LC ¶ 18748, reh den (1964) 376 US 966, 11 L Ed 2d 984, 84 S Ct 1121, 49 CCH LC ¶ 18844

Apprentice machinist who had not completed training upon induction was not entitled, upon completing training after release, to seniority from time he would have completed training if he had not been inducted. Addison v Tennessee C. I. & R. Co. (1953, CA5 Ala) 204 F.2d 340, 32 BNA LRRM 2112, 23 CCH LC ¶ 67601

Where at time of entry of plaintiffs into armed services they were required to serve as apprentices for period of four years and as apprentice helpers for three years, and during their armed service apprentice periods were reduced to three and two years, respectively, and, prior to their return from armed services, four and three year periods were restored, they were not entitled under former 50 USCS Appx § 459(b)-(h) to seniority on basis of three and two year terms of apprenticeship. Bostian v Seaboard A. L. R. Co. (1954, CA4 Va) 211 F.2d 867, 34 BNA LRRM 2047, 25 CCH LC ¶ 68341

Veteran who left employment as apprentice photoengraver to enter service and returned to complete apprenticeship after discharge was entitled to seniority over apprentices whose training...
started after veteran had entered military service. Mann v Crowell-Collier Publishing Co. (1956, CA6 Ohio) 239 F.2d 699, 39 BNA LRRM 2151, 31 CCH LC ¶ 70345

Plaintiff who, while employed as carman apprentice, left to enter army and shortly after his discharge was re-employed in same capacity with seniority as of his first employment, and upon completion of his four year apprenticeship was promoted to carman with seniority from that date, was not entitled under former 50 USCS Appx § 459(b)-(h) to seniority as carman as of date he would have completed apprenticeship had he not been in service, where promotion was not automatic but in discretion of employer. Jones v United States (1958, CA10 Okla) 258 F.2d 81

Airline pilot was entitled to seniority status he claimed where it appeared, as matter of foresight, that pilot trainees who successfully completed airline's training course were regularly advanced to flight officer status and where it appeared, as matter of hindsight, that pilot veteran would have probably completed his training in normal course had it not been interrupted by military service. Pomrenig v United Air Lines, Inc. (1971, CA7 Ill) 448 F.2d 609, 78 BNA LRRM 2241, 66 CCH LC ¶ 12039

Seniority date of veteran who was apprentice boilermaker when he left to perform military service and resumed apprenticeship after termination of service was properly determined by subtracting length of military service from date on which servicemen actually completed apprenticeship; predecessor to statute did not require that returning veteran, who had yet to complete apprenticeship before being entitled to retroactive seniority date, receive credit for days not actually worked, where such absences were unrelated to military service. Earls v Atchison, T. & S. F. Railway (1976, CA9 Cal) 532 F.2d 133, 91 BNA LRRM 2943, 78 CCH LC ¶ 11340

Veteran who, prior to entry into service, took union-sponsored apprenticeship qualification examination and was placed on list of qualified applicants for year in which examination was administered, and who entered service prior to being selected from list of qualified applicants, was not eligible for re-employment under provisions of predecessor to statute; provisions of statute included relationship in which employee rendered regular and continuing service to another and to equate applicant for apprenticeship position with individual rendering regular and continuing service to another would abuse language of predecessor to statute, as applicant was not subject to direction and control as to method and manner of performing his duties and in result to be accomplished. Wilson v Toledo Area Sheet Metal Joint Apprenticeship Committee (1977, CA6 Ohio) 560 F.2d 222, 96 BNA LRRM 2004, 82 CCH LC ¶ 10074

Apprentice machinist, who completed apprenticeship after return from service, was entitled to seniority retroactive to date when apprenticeship would have been completed if he had not entered service, despite collective bargaining provisions that apprentice did not accumulate seniority during apprenticeship. Norris v Robertshaw-Fulton Controls Co. (1957, DC Tenn) 150 F Supp 431, 32 CCH LC ¶ 70815

Veteran, railroad employee, who had completed approximately one half of his apprenticeship in Kentucky, and was transferred to Ohio, served two years in armed forces, was rehired and completed his apprenticeship in Ohio, was entitled to seniority under former 50 Appx USCS § 459(b)-(h) on the Ohio list as of date he would have completed his apprenticeship had he not served in armed forces. McNichols v Southern R. Co. (1961, ED Ky) 194 F Supp 148, 48 BNA LRRM 2088, 42 CCH LC ¶ 16962

Plaintiffs, former railroad firemen, were entitled to measure period of seniority as engineers beginning on date on which they contended they would have become engineers had it not been for military service where railroad's advancement of employees to engineer was not discretionary but rather was based on completion of training and examinations, where it was reasonably foreseeable that plaintiffs would have become engineers in normal course had it not been for military service, and where, after service, plaintiffs in fact completed training and exams and advanced to engineering status. McArthur v Norfolk & W. R. Co. (1975, SD III) 405 F Supp 158, 91 BNA LRRM 2370, 78 CCH LC ¶ 11211

25.-Miscellaneous

Veteran who returned to preservice employer's plant within 90 days of discharge but failed to make application for re-employment at that time, choosing instead to accept employment.

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elsewhere, was not entitled to rights afforded by predecessor to statute when he later became
re-employed by his preservice employer, including rights regarding seniority, and seniority was
therefore fixed as of date on which he actually was re-employed.  De Minico v Beggs & Cobb,
Inc. (1949, DC Mass) 16 CCH LC ¶ 65129

Veteran who was employed on May 24, 1945, and on June 19, 1945, resigned for purpose of
enlisting in Navy, but was rejected for failure to obtain parental consent, and who was later
inducted on April 16, 1946, was not entitled to seniority from original date of May 24, 1945, since
veteran had not actually been inducted into service when he first left his employment on May 19,
1945; veteran's seniority date was as of date he was re-employed after abortive attempt to enlist
on June 30, 1945.  Sanders v Chicago, R. I. & P. R. Co. (1951, DC Okla) 97 F Supp 927

D. Fringe Benefits

1. In General

26. Generally

Generally, presence of work requirement was strong evidence that employee benefit under
bargaining agreement was intended as form of compensation so as to make it benefit to which
returning veteran was not entitled under predecessor to statute, which insured returning veteran
right to be restored to his job with same levels of seniority, status, and pay that he would have
enjoyed if he had held job during his time in military service; where work requirement was so
insubstantial that it appeared plainly designed to measure time on payroll rather than hours on job,
statute required that benefit be granted to returning veterans, but where work requirement
constituted bona fide effort to compensate for work actually performed, fact that it correlated only
loosely with benefit was not enough to invoke statutory guarantee.  Foster v Dravo Corp. (1975)
420 US 92, 43 L Ed 2d 44, 95 S Ct 879, 1 EBC 1164, 88 BNA LRRM 2671, 76 CCH LC ¶ 10658

In addition to assuring veteran that he was entitled to demand his preservice job when
discharged from service, veteran was also entitled to protection of any employment benefits to
which nonveteran employees on furlough or leave of absence were entitled.  MacLaughlin v
Union Switch & Signal Co. (1948, CA3 Pa) 166 F.2d 46, 21 BNA LRRM 2327, 14 CCH LC ¶
64316

Returning veteran was entitled to benefits which automatically would have been accorded to
him if he had remained in continuous service of his employer; he was not entitled to benefits
which required more than continuous status, such as work requirement demanding actual
LRRM 2628, 83 CCH LC ¶ 10335

27. Purpose of statute

Predecessor to statute, providing that returning veterans be entitled to participate in
insurance or other benefits offered by employer pursuant to established rules and practices
relating to employees on furlough or leave of absence in effect with employer at time such person
was inducted into Armed Forces, was intended to add certain protections to veteran and not to
take away those which conferred upon veterans right to be reinstated without loss of seniority.
BNA LRRM 2385, 53 CCH LC ¶ 11073

Employer is not required by former 38 USCS § 2021(b)(3) to make work scheduling
accommodations for employee-reservists not made for other employees; former § 2021(b)(3) was
enacted for a limited purpose of protecting employee-reservist against discriminations in
discharge and promotion motivated solely by reserve status; Congress did not intend that
reservists be entitled to all "incidents or advantages of employment" accorded during their
absence to working employees conditioned upon actual performance on job.  Monroe v
CCH LC ¶ 12796 (superseded by statute as stated in Hansen v Town of Irondequoit (1995, WD
NY) 896 F Supp 110, 150 BNA LRRM 2508, 67 CCH EPD ¶ 43881, 130 CCH LC ¶ 11399) and
(superseded by statute as stated in Gummo v Village of Depew (1996, CA2 NY) 75 F.3d 98, 151

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BNA LRRM 2225, 67 CCH EPD ¶ 43880, 131 CCH LC ¶ 11477) and (superseded by statute as stated in Newport v Ford Motor Co. (1996, CA8 Mo) 91 F.3d 1164, 152 BNA LRRM 2961, 132 CCH LC ¶ 11634) and (superseded by statute as stated in Key v Hearst Corp. (1997, SD NY) 963 F Supp 283, 156 BNA LRRM 2509, 71 CCH EPD ¶ 44819, 134 CCH LC ¶ 10014) and (superseded by statute as stated in Sheehan v Dep't of the Navy (2001, CA FC) 240 F.3d 1009, 166 BNA LRRM 2526) and (superseded by statute as stated in Rogers v City of San Antonio (2002, WD Tex) 211 F Supp 2d 829, 170 BNA LRRM 2108, 83 CCH EPD ¶ 41209) and (superseded by statute as stated in Rogers v City of San Antonio (2003, WD Tex) 172 BNA LRRM 2240)

28. Construction of statute

In determining whether particular benefit was right of seniority secured to veteran by § 9 of the former Military Selective Service Act, which required that veteran returning to employment after having left to enter military be restored to his former position or "to a position of like seniority, status, and pay," private employment benefit would be considered a "perquisite of seniority" protected by § 9 if it would have accrued, with reasonable certainty, had veteran seeking benefit been continuously employed by private employer, and if it was in nature of regard for length of service; but if, on other hand, veteran's right to benefit at time he entered military was subject to significant contingency, or if benefit was in nature of short term compensation for services rendered, it was not aspect of seniority within coverage of § 9. Alabama Power Co. v Davis (1977) 431 US 581, 52 L Ed 2d 595, 97 S Ct 2002, 1 EBC 1158, 95 BNA LRRM 2569, 81 CCH LC ¶ 13255

Employer's supplemental unemployment benefits plan, which tied duration of benefits to employee's length of service prior to being laid off, must be regarded as perquisite of seniority to which veteran is entitled under former 38 USCS § 2021, entitling veteran to receive amount of benefits to which he would have been entitled had he been employed during his time in service. Coffy v Republic Steel Corp. (1980) 447 US 191, 65 L Ed 2d 53, 100 S Ct 2100, 2 EBC 2446, 104 BNA LRRM 2488, 88 CCH LC ¶ 12074

"Perquisites of seniority" constituted those seniority benefits which rewarded longevity rather than those which compensated for work actually performed. Smith v Industrial Employers & Distributors Asso. (1976, CA9 Cal) 546 F.2d 314, 1 EBC 1154, 93 BNA LRRM 3037, 94 BNA LRRM 2735, 79 CCH LC ¶ 11770, cert den (1977) 431 US 965, 53 L Ed 2d 1061, 97 S Ct 2921, 95 BNA LRRM 2642

Employer was required to make cash contributions to profit-sharing plan on behalf of returning veterans for years during their military service as "prerequisite of seniority" where it reasonably appeared such contributions would have been made on behalf of employees had they not entered military service. Raypole v Chemi-Trol Chemical Co. (1983, ND Ohio) 4 EBC 2204, 114 BNA LRRM 2449, 98 CCH LC ¶ 10490

Employee's right of ownership in stock of employer acquired under restricted stock purchase plan was prerequisite of seniority where, under terms of plan, longer one is employed by employer, more of shares become freed from restriction on transferability; predecessor to statute protecting right of re-employment without loss of seniority of person on military leave of absence applied to protect benefit of periodic release from restrictions. Winders v People Express Airlines, Inc. (1984, DC NJ) 595 F Supp 1512, 5 EBC 2433, 117 BNA LRRM 3275, 102 CCH LC ¶ 11258, affd (1985, CA3 NJ) 770 F.2d 1078, 119 BNA LRRM 3071

Life insurance benefits were not prerequisite of seniority entitled to protection under Vietnam Era Veterans' Readjustment Assistance Act of 1974 where, inter alia, insurance policy benefits were directly tied to employee's compensation for a particular year, and certain features of life insurance benefits appeared to be in nature of short-term compensation for services rendered. Petry v Delmarva Power & Light Co. (1986, DC Del) 631 F Supp 1532, 123 BNA LRRM 3189

2. Insurance Benefits

29. Life insurance
Widow was not entitled to have deceased husband's employer credit 2 weeks of earnings for time deceased spent in National Guard for purposes of determining life insurance death benefits since, inter alia, life insurance benefits were not perquisite of seniority entitled to protection under Vietnam Era Veterans' Readjustment Assistance Act of 1974, where, inter alia, insurance policy benefits were directly tied to employee's compensation for a particular year, and certain features of life insurance benefits appeared to be in nature of short-term compensation for services rendered. Petry v Delmarva Power & Light Co. (1986, DC Del) 631 F Supp 1532, 123 BNA LRRM 3189

30. Unemployment insurance

Maximum supplemental unemployment benefits plan whereby employee who has completed 2 years of continuous service prior to being laid off is entitled to receive one week of benefits for each credit unit he had accumulated, up to maximum of 52 credits, generally based on number of weeks he has worked any hours, cannot be denied to returning veteran who is reinstated in layoff status, notwithstanding provision in plan whereby returning veteran is credited upon reinstatement only with credit units actually accumulated by him prior to entry into service. Coffy v Republic Steel Corp. (1980) 447 US 191, 65 L Ed 2d 53, 100 S Ct 2100, 2 EBC 2446, 104 BNA LRRM 248, 88 CCH LC ¶ 12074

Supplemental unemployment benefit plan which granted credits to employees at rate of one unit per week of layoff which made no distinction between employee who worked one hour during week and one who worked 40 hours during week established "seniority rights" protected by former 50 USCS Appx § 459(b) and returning veteran was entitled to credits he would have earned while in military service. Hoffman v Bethlehem Steel Corp. (1973, CA3 Pa) 477 F.2d 860, 82 BNA LRRM 3066, 70 CCH LC ¶ 13562

Returning veterans are entitled to accrue credit units for unemployment benefits where they lost no seniority while in military service and are not required to perform actual work in order to receive benefits and collective bargaining agreement which expressly provides that employee is not entitled to accrue benefits while in military service is required to give way. Akers v General Motors Corp. (1974, CA7 Ind) 501 F.2d 1042, 86 BNA LRRM 3185, 74 CCH LC ¶ 10239

3. Vacation Benefits

31. Generally

Vacation rights which employee has earned and would have received as matter of course but for his induction are protected by predecessor to statute. MacLaughlin v Union Switch & Signal Co. (1948, CA3 Pa) 166 F.2d 46, 21 BNA LRRM 2327, 14 CCH LC ¶ 64316

Failure of railroad, in calculating employee's vacation benefits, to credit him for time spent in armed forces violated his seniority rights under former subsec. (c) of 50 USCS Appx § 459. Connecticut General Life Ins. Co. v Craton (1968, CA5 Fla) 405 F.2d 41, 69 BNA LRRM 2963, 59 CCH LC ¶ 13106

Intent of predecessor to statute was to place veterans in precise position with regard to vacation rights which they would have occupied had they kept their employment continuously during war. Conner v Pennsylvania R. Co. (1949, App DC) 85 US App DC 233, 177 F.2d 854, 24 BNA LRRM 2362, 25 BNA LRRM 2570, 16 CCH LC ¶ 65276, 18 CCH LC ¶ 65702, cert den (1950) 339 US 919, 94 L Ed 1343, 70 S Ct 622, 25 BNA LRRM 2570 and cert den (1950) 339 US 919, 94 L Ed 1343, 70 S Ct 624

Returned veterans were not entitled to vacation pay during the period they were in military services. Woods v Glen Alden Coal Co. (1947, DC Pa) 73 F Supp 871, 20 BNA LRRM 2681, 13 CCH LC ¶ 64089

32. Right to vacation benefits, generally

Term "other benefits" as used in predecessor statute did not include vacation pay. Eagar v Magma Copper Co. (1967) 389 US 323, 19 L Ed 2d 557, 88 S Ct 503, 66 BNA LRRM 2728, 56
Since vacation rights are not pay unless they are for work actually done, and since they are not merely a perquisite of seniority, they must fall under heading of "other benefits"; hence, veterans must be treated like nonveteran employees on furlough or leave of absence, and where nonveteran employees on leave of absence for more than half a year would not be entitled to vacation pay for that year, veterans would not be so entitled. Siaskiewicz v General Electric Co. (1948, CA2 NY) 166 F.2d 463, 21 BNA LRRM 2434, 14 CCH LC ¶ 64362

Although it is unlawful to attempt by contract to provide that veteran be deemed not to be "in the employ" of company while he is serving in army, it is not unlawful to deny him vacation, unless it is "established rule of the company" to give vacations to those who are on "leave of absence." Dwyer v Crosby Co. (1948, CA2 NY) 167 F.2d 567, 22 BNA LRRM 2044, 14 CCH LC ¶ 64487

Vacation pay did not come within term "other benefits" as used in predecessor statute, but vacation rights were protected under seniority provision. Connecticut General Life Ins. Co. v Craton (1968, CA5 Fla) 405 F.2d 41, 69 BNA LRRM 2963, 59 CCH LC ¶ 13106

Vacation rights were properly categorized as "other benefits", rather than as "seniority benefits", within the meaning of former 50 USCS Appx § 459(b)-(h) which required that returning servicemen be restored to their former positions without loss of seniority. Kasmeier v Chicago, R. I. & P. R. Co. (1971, CA10 Okla) 437 F.2d 151, 76 BNA LRRM 2363, 64 CCH LC ¶ 11489

Vacation pay was "perquisite of seniority" and seniority rights preserved for returning veteran rights and benefits which would have been automatically granted to him had he been retained in private employment rather than responding to call of military service. Locaynia v American Airlines, Inc. (1972, CA9 Cal) 457 F.2d 1253, 79 BNA LRRM 3036, 67 CCH LC ¶ 12537, cert den (1972) 409 US 982, 34 L Ed 2d 246, 93 S Ct 317, 81 BNA LRRM 2609, 69 CCH LC ¶ 13118

Length of vacation which was tied to substantial work requirement was not "seniority" right protected by Military Selective Service Act. Jackson v Beech Aircraft Corp. (1975, CA10 Kan) 517 F.2d 1322, 1 EBC 1116, 89 BNA LRRM 2642, 77 CCH LC ¶ 10937

Vacation rights have been classified as "other benefits" in which veteran is entitled to participate under Universal Military Training and Service Act § 459(c)(1). Dugger v Missouri P. R. Co. (1967, SD Tex) 276 F Supp 496, 73 BNA LRRM 2504, 57 CCH LC ¶ 12476, affd (1968, CA5 Tex) 403 F.2d 719, 71 BNA LRRM 2253, 60 CCH LC ¶ 10110, cert den (1969) 395 US 907, 23 L Ed 2d 222, 89 S Ct 1752, 71 BNA LRRM 2254

Employee is entitled to have amount of time spent in military service included in computation of vacation benefits where, under employment contract, vacation benefits are dependent upon years of "compensated service" rendered since such benefits come within term "seniority" in Universal Military Training and Service Act and are also within escalator principle contained within provision of Act that returning servicemen shall be restored to former position with such status as he would have enjoyed had he remained in such employment continuously. Saleck v Great N. R. Co. (1967, DC Minn) 277 F Supp 936, 67 BNA LRRM 2214, 57 CCH LC ¶ 12367

Vacation benefits were not "perquisite of seniority" which must be granted to employee upon return from military service; veteran was not entitled, under former Universal Military Training and Service Act [50 USCS Appendix § 459] to vacation pay for 1969 and 1970 where he left employment for military service prior to Dec. 31, 1968, and did not return until after Dec. 31, 1969, where controlling collective bargaining agreement stated that, for employee to be entitled to vacation benefits during year, he must have been on payroll on Dec. 31 of preceding year and where employer did not provide vacation benefits to employees on nonmilitary leave or furlough from employment. Connett v Automatic Electric Co. (1971, ND Ill) 323 F Supp 1373, 76 BNA LRRM 2287, 65 CCH LC ¶ 11592

Vacation pay was not perquisite of "seniority" status as term was used in former 50 USCS Appx § 459(c)(1) and (2); "seniority" did not include paid vacations not otherwise attached to seniority of nonveterans, and was not sufficient to satisfy bona fide work requirement of collective bargaining agreement applicable to all employees. Li Pani v Bohack Corp. (1973, ED NY) 368 F
Vacation rights might or might not be "perquisites of seniority" under former 50 USCS Appx § 459(b)-(h) depending entirely on how those rights were fashioned by applicable bargaining agreements; vacation benefits for plaintiffs were "perquisites of seniority" where bargaining agreement established no work requirement as condition to vacation entitlement and required only that employees be in "continuous service" of employer during preceding year and where, as matter of law, plaintiffs were in "continuous service" under provisions of 50 USCS Appx § 459(c)(2). United States ex rel. Aiello v Detroit Free Press, Inc. (1974, ED Mich) 397 F Supp 1401, 88 BNA LRRM 2098, 75 CCH LC ¶ 10347, reh den (1975, ED Mich) 90 BNA LRRM 2110 and revd on other grounds (1978, CA6 Mich) 570 F.2d 145, 97 BNA LRRM 2628, 83 CCH LC ¶ 10335

Plaintiff is entitled under statute to reimbursement for earned vacation time for which he was charged by police department employer while he was away on weekend drills fulfilling his National Guard responsibilities. Hilliard v New Jersey Army Nat'l Guard (1981, DC NJ) 527 F Supp 405, 108 BNA LRRM 2069, 91 CCH LC ¶ 12808

33. -Effect of employer work requirement

Under employment contracts providing that employee must receive vacation benefits during single calendar year computed on basis of service rendered during preceding calendar year in event of induction into armed forces, it is logical to interpret these contracts as providing that, in event of induction or enlistment, veteran will be entitled to claim those vacation rights which he had earned in his last year of service with the company at time when he resumes that service with company; statute tolls running of calendar year so as to keep veteran "in the same situation as if he had not gone to war." MacLaughlin v Union Switch & Signal Co. (1948, CA3 Pa) 166 F.2d 46, 21 BNA LRRM 2327, 14 CCH LC ¶ 64316

Where employment contract provided that if employees were engaged with continuity of service they must work a period of six months before receiving vacation for which they were eligible, and group of veterans had returned to their pre-service occupation during months of July, August, and September, making it impossible for them to complete work period of 6 months in that year, veterans were not entitled to vacation benefits greater than employees treated as nonveteran employees on furlough or leave of absence; to grant veterans such vacation pay would be to discriminate in favor of them as veterans and against nonveteran employees. Siaskiewicz v General Electric Co. (1948, CA2 NY) 166 F.2d 463, 21 BNA LRRM 2434, 14 CCH LC ¶ 64362; Brown v Watt Car & Wheel Co. (1950, CA6 Ohio) 182 F.2d 570, 26 BNA LRRM 2284, 18 CCH LC ¶ 65826, cert den (1950) 340 US 875, 95 L Ed 636, 71 S Ct 121, 27 BNA LRRM 2032; Monticue v Baltimore & O. R. Co. (1950, DC Ohio) 91 F Supp 561, 26 BNA LRRM 2407, 18 CCH LC ¶ 65926

Veteran who was in service during part of period comprised by years determining eligibility for vacation was not eligible to receive vacation benefits where requirement for vacation benefits was that employee must have been in employ of employer for given number of years just preceding his request for such benefit. Mentzel v Diamond (1948, CA3 NJ) 167 F.2d 299, 21 BNA LRRM 2521, 14 CCH LC ¶ 64395; Conner v Pennsylvania R. Co. (1949, App DC) 85 US App DC 233, 177 F.2d 854, 24 BNA LRRM 2362, 25 BNA LRRM 2570, 16 CCH LC ¶ 65276, 18 CCH LC ¶ 65702, cert den (1950) 339 US 919, 94 L Ed 1343, 70 S Ct 622, 25 BNA LRRM 2570 and cert den (1950) 339 US 919, 94 L Ed 1343, 70 S Ct 624; Brown v Watt Car & Wheel Co. (1950, CA6 Ohio) 182 F.2d 570, 26 BNA LRRM 2284, 18 CCH LC ¶ 65826, cert den (1950) 340 US 875, 95 L Ed 636, 71 S Ct 121, 27 BNA LRRM 2032

Veteran was not entitled to vacation benefits for year in which he is re-employed, where employer’s vacation plan provided that employee receive vacation benefits during calendar year computed on basis of service rendered during preceding calendar year, and returning veteran was in service during year previous to year in which he sought vacation benefits. Dougherty v General Motors Corp. (1949, CA3 NJ) 176 F.2d 561, 24 BNA LRRM 2369, 17 CCH LC ¶ 65298, cert den (1950) 338 US 956, 94 L Ed 590, 70 S Ct 494, 25 BNA LRRM 2395; Foster v General
Veteran was not entitled to two weeks vacation with pay, which was given as a result of union contract in April of 1945 to all employees with five years service, where veteran worked from 1941 to 1942 and after service returned to work in December, 1945. Brown v Watt Car & Wheel Co. (1950, CA6 Ohio) 182 F.2d 570, 26 BNA LRRM 2284, 18 CCH LC ¶ 65826, cert den (1950) 340 US 875, 95 L Ed 636, 71 S Ct 121, 27 BNA LRRM 2032

Allowing vacation credits only for work actually performed is not unreasonable where offered to returning veterans on same basis as to other employees returning from nonmilitary leaves. Austin v Sears, Roebuck & Co. (1974, CA9 Cal) 504 F.2d 1033, 1 EBC 1520, 87 BNA LRRM 2640, 75 CCH LC ¶ 10429

Veteran was not entitled to vacation pay where vacation benefits were based upon work actually done during previous year and no provision was made for vacation pay to be given employees on furlough or leave of absence and where veteran had been in armed services during year for which he sought vacation pay. Woods v Glen Alden Coal Co. (1947, DC Pa) 73 F Supp 871, 20 BNA LRRM 2681, 13 CCH LC ¶ 64089

Where test of vacation benefits is mere seniority, veteran is entitled to benefits, but where test is seniority plus added factor of work at some time during certain period, veteran is not entitled to benefits since time in service does not count where certain amount of work is required. Cushiner v Ford Motor Co. (1950, DC Mich) 89 F Supp 491, 25 BNA LRRM 2385, 17 CCH LC ¶ 65616

Veterans who fail to meet work requirements for vacation pay and holiday pay are not entitled to such benefits. Tuttle v U. S. Plywood Corp. (1968, DC Or) 293 F Supp 401, 70 BNA LRRM 3166, 59 CCH LC ¶ 13309

Whether the right to vacation benefits was categorized as "perquisite of seniority" or "other benefit", there was no obligation under former 50 USCS Appx § 459(b)-(h) to grant vacation benefits to returning veterans who had neither met single day work requirement nor minimum work requirement. Connett v Automatic Electric Co. (1971, ND Ill) 323 F Supp 1373, 76 BNA LRRM 2867, 65 CCH LC ¶ 11592

Returning veteran is not entitled to vacation benefits where work requirement is bona fide effort to compensate for work actually performed and related vacation benefits are not intended to accrue automatically. Kind v Penn Cent. Transp. Co. (1975, ED Pa) 391 F Supp 162, 88 BNA LRRM 3299, 76 CCH LC ¶ 10843

34. -Effect of collective bargaining agreement

Although returning veteran seeking vacation benefits provided under collective bargaining agreement, which agreement conditions earning of full vacation benefits in calendar year upon employee's working minimum of 25 weeks in such year, is not entitled to either (1) full vacation rights under predecessor to statute due to veteran's failure to meet bona fide work requirement in collective bargaining agreement, or (2) pro rata share of vacation benefits under statute alone for 7 and 13 week portions of calendar years in which he worked for his employer prior to and immediately after his service in military, or (3) pro rata vacation benefits as purely contractual matter under collective bargaining agreement provision allowing pro rata vacation rights to employees who are unable to accumulate minimum 25 weeks of employment because of layoffs, nevertheless returning veteran may be entitled to pro rata benefits under "other benefits" provision of predecessor to statute which states that returning veteran who is restored to position is considered as having been on furlough or leave of absence during his time of training and service, is to be restored without loss of seniority, and is to be entitled to participate in insurance or other benefits offered by employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with employer at time veteran was inducted into service when such provision is read in conjunction with collective-bargaining agreement provision giving pro rata vacation rights to employees who are unable to satisfy 25-week employment requirement because of layoffs, if layoff referred to in collective-bargaining
agreement includes furlough or leave of absence, or equivalent of either. Foster v Dravo Corp. (1975) 420 US 92, 43 L Ed 2d 44, 95 S Ct 879, 1 EBC 1164, 88 BNA LRRM 2671, 76 CCH LC ¶ 10658

Predecessor to statute, which insured returning veteran right to be restored to his job with same levels of seniority, status, and pay that he would have enjoyed if he had held his job during military service, should be applied with respect to employee vacation benefits only where it clearly appeared that vacations were intended to accrue automatically as function of continued association with company. Foster v Dravo Corp. (1975) 420 US 92, 43 L Ed 2d 44, 95 S Ct 879, 1 EBC 1164, 88 BNA LRRM 2671, 76 CCH LC ¶ 10658

In the absence of any showing that there is intended discrimination against veteran in favor of nonveteran, vacation pay provisions cannot be declared illegal as to veteran simply because their effect is to deny him vacation pay for year preceding his discharge and re-employment and court cannot, merely because contract unfortunately fails to include special provision for returning veterans, carve out exception for veteran; where, in union agreement, vacation benefits are computed on basis of graduated percentages of gross earnings of employee for preceding year and veteran, since he had been in service during preceding year, has no gross earnings as employee, company may therefore determine that stated percentage of zero is zero and veteran is entitled to nothing. Dougherty v General Motors Corp. (1949, CA3 NJ) 176 F.2d 561, 24 BNA LRRM 2369, 17 CCH LC ¶ 65298, cert den (1950) 338 US 956, 94 L Ed 590, 70 S Ct 494, 25 BNA LRRM 2395

Veteran is not entitled to count time spent in service in computing 5 year eligibility period necessary to obtain 2 week vacation where, in order to be entitled to 2 weeks' vacation with pay, collective bargaining agreement requires employee to have been in employ of company for a period of 5 years and nonveteran employees on furlough or leave of absence are not permitted, by rules and practices of employer, to count such time toward 5 years' continuous employment; although veteran is not to be discriminated against he is nevertheless not to be treated with any greater benevolence than is shown to nonveteran employees. Brown v Watt Car & Wheel Co. (1950, CA6 Ohio) 182 F.2d 570, 26 BNA LRRM 2284, 18 CCH LC ¶ 65826, cert den (1950) 340 US 875, 95 L Ed 636, 71 S Ct 121, 27 BNA LRRM 2032

Where contract of employment providing that gross earnings of employees for year 1945 were basis for determining amount of vacation pay to be received for year 1946, in contrast to previous collective bargaining agreements wherein gross earnings for current year were basis for determining amount of vacation pay for that year, applied with equal force to all employees who were on furlough or leave of absence whether veterans or nonveterans, it therefore did not violate predecessor statute despite contention that agreement was not reached in good faith and that it was made for purpose of discriminating against veterans in service. Foster v General Motors Corp. (1951, CA7 Ind) 191 F.2d 907, 29 BNA LRRM 2006, 20 CCH LC ¶ 66564, cert den (1952) 343 US 906, 96 L Ed 1324, 72 S Ct 634, 29 BNA LRRM 2606, reh den (1952) 343 US 937, 96 L Ed 1344, 72 S Ct 768

Veteran had no right to vacation pay for 1964 where veteran was denied vacation pay for 1964 for sole reason that he was not on defendant employer's active payroll at end of work year because of military service and where, under applicable collective bargaining agreement and employer's rules, employee on furlough or leave of absence for period that veteran was in service had no right to vacation pay. Hollman v Pratt & Whitney Aircraft (1970, CA5 Fla) 435 F.2d 983, 76 BNA LRRM 2197, 76 BNA LRRM 2688, 64 CCH LC ¶ 11356

Under former 50 USCS Appx § 459 denial of vacation benefits to employees for year they entered armed forces was improper even though union contract required employee to be on company's payroll on last day of year. Hollman v Pratt & Whitney Aircraft (1970, CA5 Fla) 435 F.2d 983, 76 BNA LRRM 2197, 76 BNA LRRM 2688, 64 CCH LC ¶ 11356

Returning veteran was not entitled to vacation benefits where collective bargaining agreement required that paid vacation benefits must be earned by actual work. Austin v Sears, Roebuck & Co. (1974, CA9 Cal) 504 F.2d 1033, 1 EBC 1520, 87 BNA LRRM 2640, 75 CCH LC ¶ 10429
Under predecessor to statute, veterans were not entitled to have time spent in military credited toward computation of vacation and sick leave benefits where prerequisite for such benefits under collective bargaining agreement was bona fide work requirement, nor were veterans entitled to have time spent in military counted toward accrual of such benefits by virtue of statute, which entitles returning servicemen to same treatment given employees on leave of absence, notwithstanding employer's policy of allowing employees on leave of absence to continue to acquire vacation and sick leave benefits, where maximum leave of absence entitlement on the contract was 8 weeks as opposed to 2 year military service period. Li Pani v Bohack Corp. (1976, CA2 NY) 546 F.2d 487, 94 BNA LRRM 2073, 79 CCH LC ¶ 11774

Returning veterans were not entitled to vacation benefits where collective bargaining agreement clearly specified that eligibility for vacation benefits was conditioned upon work requirement demanding actual performance on job. Aiello v Detroit Free Press, Inc. (1978, CA6 Mich) 570 F.2d 145, 97 BNA LRRM 2628, 83 CCH LC ¶ 10335

Veteran who was re-employed on January 7, 1946, was not entitled to vacation pay for such year where he had not worked 26 weeks prior to July 1, 1946, as required by union contract. Dwyer v Crosby Co. (1947, DC NY) 69 F Supp 384, 19 BNA LRRM 2167, 12 CCH LC ¶ 63556, affd (1948, CA2 NY) 167 F.2d 567, 22 BNA LRRM 2044, 14 CCH LC ¶ 64487

Returning veteran could recover vacation pay, for both year in which he entered military service and year which followed his discharge from it, where contract between labor union and employer provided that employees could take vacations only during current year of employment; claim for vacation pay for year of induction into service ignored provision in labor contract that vacations could be taken only during the current year; although predecessor to statute restored seniority rights to veteran it could not restore vacation which is impossible by passage of time. Porter v Kappie Motors, Inc. (1947, DC NY) 72 F Supp 28

Provision in collective bargaining contract requiring "work at some time" in each of preceding five years in order to qualify for two weeks vacation, was not discriminatory per se against veteran, if veteran was treated no differently than employees on leave or furlough. Cushiner v Ford Motor Co. (1950, DC Mich) 89 F Supp 491, 25 BNA LRRM 2385, 17 CCH LC ¶ 65616

Veteran was not entitled to have time spent in service used to compute vacation eligibility where employment contract provided that after employee had 5 years' seniority and has worked minimum of 160 days during each of the preceding 5 years he was eligible for 2 weeks' vacation and where no provision in agreement or established rules and practices of employer provided that time spent on furlough or leave of absence could be used to compute eligibility. Monticue v Baltimore & O. R. Co. (1950, DC Ohio) 91 F Supp 561, 26 BNA LRRM 2407, 18 CCH LC ¶ 65926

Veteran who entered military service in 1963 and returned to employment in September, 1965, and did not render 110 days of compensated service in 1965, was not entitled to paid vacation in 1965 or 1966 where labor agreement between employer and employees provided that employee who did not render 110 days of compensated service in preceding calendar year due to leave of absence would not be entitled to paid vacation in following year, since, under Universal Military Training and Service Act, employee was only entitled to participate in vacation benefits to extent that they were offered by employer pursuant to established rules and practices relating to employees on furlough or leave of absence and labor agreement represented employer's "established rules and practices" relating to employees on furlough or leave of absence. Dugger v Missouri P. R. Co. (1967, SD Tex) 276 F Supp 496, 73 BNA LRRM 2504, 57 CCH LC ¶ 12476, affd (1968, CA5 Tex) 403 F.2d 719, 71 BNA LRRM 2253, 60 CCH LC ¶ 10110, cert den (1969) 395 US 907, 23 L Ed 2d 222, 89 S Ct 1752, 71 BNA LRRM 2254

Veteran was entitled, in computation of benefits, to credit for period of military service as "compensated service" even though, by terms of collective bargaining agreement, employees could not count time on furlough or leave of absence as "compensated service," where, under collective bargaining agreement, vacation benefits were based upon number of years of continuous service in which employee rendered "compensated service," since vacation benefits were element of "seniority" to which escalator principle contained in Universal Military Training and Service Act was applicable, and they were not one of "other benefits" eligibility for which was
governed by rules and practice of employer regarding furlough or leave of absence. Barry v Smith (1968, DC Mass) 285 F Supp 801, 58 CCH LC ¶ 12793

Vacation eligibility was benefit to which veteran was not entitled if he had not fulfilled work requirement for eligibility; veteran was not entitled to vacation benefits for year 1968 where, on Nov. 19, 1968, veteran was reinstated in pre-service job but was placed on layoff status and in fact performed no work in 1968 and where under terms of collective bargaining agreement in force both at time of veteran's induction and return, certain eligibility factors had to be met and vacation pay was not automatic and where veteran failed to satisfy eligibility factor of having worked 6 consecutive months in preceding calendar year nor worked 6 of 12 months immediately preceding claimed vacation; in such case vacation benefit was not "perquisite of seniority" but "other benefit" under Selective Service Act of 1967. Fees v Bethlehem Steel Corp. (1971, WD Pa) 335 F Supp 487, 79 BNA LRRM 2408, 67 CCH LC ¶ 12343

Vacation rights might or might not be "perquisites of seniority" under former 50 USCS Appx § 459(b)-(h) depending entirely on how those rights were fashioned by applicable bargaining agreements; vacation benefits for plaintiffs were "perquisites of seniority" where bargaining agreement established no work requirement as condition to vacation entitlement and required only that employees be in "continuous service" of employer during preceding year and where, as matter of law, plaintiffs were in "continuous service" under provisions of 50 USCS Appx § 459(c)(2). United States ex rel. Aiello v Detroit Free Press, Inc. (1974, ED Mich) 397 F Supp 1401, 88 BNA LRRM 2098, 75 CCH LC ¶ 10347, reh den (1975, ED Mich) 90 BNA LRRM 2110 and revd on other grounds (1978, CA6 Mich) 570 F.2d 145, 97 BNA LRRM 2628, 83 CCH LC ¶ 10335

Returning veteran was not entitled to vacation benefits where work requirement under collective bargaining agreement was bona fide effort to compensate for work actually performed and related vacation benefits were not intended to accrue automatically. Kind v Penn Cent. Transp. Co. (1975, ED Pa) 391 F Supp 162, 88 BNA LRRM 3299, 76 CCH LC ¶ 10843

Returning veteran was entitled to pro rata vacation rights where collective bargaining agreement provided for such rights to those employees who were unable to accumulate minimum of 25 weeks because of lay-offs, which term included furlough or leave of absence under liberal construction. Foster v Dravo Corp. (1975, WD Pa) 395 F Supp 536, 89 BNA LRRM 2988, 77 CCH LC ¶ 10996

35. Allowance of credit for military service, generally

Veteran who has been re-employed was entitled to use time spent in service in computing total time spent in employ of defendant, so as to determine number of weeks vacation to which he might be entitled. Mentzel v Diamond (1948, CA3 NJ) 167 F.2d 299, 21 BNA LRRM 2521, 14 CCH LC ¶ 64395

By language of predecessor to statute, veteran who was restored to position was considered as having been on furlough or leave of absence and, absent agreement or custom showing that employee on furlough or leave of absence was entitled to have absent time considered in computing necessary time for vacation allowances, returning veteran was not entitled to have time spent in military service considered in the computation of vacation entitlement. Dwyer v Crosby Co. (1948, CA2 NY) 167 F.2d 567, 22 BNA LRRM 2044, 14 CCH LC ¶ 64487

Employee was entitled to have amount of time spent in military service included in computation of vacation benefits where, under employment contract, vacation benefits were dependent upon years of compensated service rendered, since such benefits came within term "seniority" and Universal Military Training and Service Act. Connecticut General Life Ins. Co. v Craton (1968, CA5 Fla) 405 F.2d 41, 69 BNA LRRM 2963, 59 CCH LC ¶ 13106

Re-employed veteran was entitled, under predecessor to statute, to use time spent in service in computing total time spent in employ of defendant for purpose of determining number of weeks' vacation to which he was entitled. Edwards v Clinchfield R. Co. (1969, CA6 Tenn) 408 F.2d 5, 70 BNA LRRM 2912, 59 CCH LC ¶ 13343
That returning veteran was to be treated as though he had been continuously employed during period spent in Armed Forces did not necessarily mean that employer was required to pay veteran for vacation during periods when he was not in its employ because of military service. Aiello v Detroit Free Press, Inc. (1978, CA6 Mich) 570 F.2d 145, 97 BNA LRRM 2628, 83 CCH LC ¶ 10335

Railroad employee who had spent time in military service and returned to his former employment was entitled under former 50 USCS Appx § 459(b)-(h) to vacation benefits that he would have been entitled to had he continued to work at that job since vacations were connected with seniority and seniority was protected under that section. Saleck v Great N. R. Co. (1967, DC Minn) 277 F Supp 936, 67 BNA LRRM 2214, 57 CCH LC ¶ 12367

Employer must count time employee spends in armed service as "compensated service" upon which vacation privileges are based. Kelly v Chicago, R. I. & P. R. Co. (1968, WD Okla) 293 F Supp 423, 70 BNA LRRM 3183, 59 CCH LC ¶ 13315

36. -Effect of collective bargaining agreement

On his discharge from service and return to work, veteran was entitled to all vacation rights which would have accrued to him had he not gone off to war where union agreement entered into while he was in service provided that employees should receive one week vacation after one year's work and two weeks after five years. Mentzel v Diamond (1948, CA3 NJ) 167 F.2d 299, 21 BNA LRRM 2521, 14 CCH LC ¶ 64395

Contention by returning employees that they were entitled to have their military service time counted towards accrual of vacation and sick leave benefits provided under collective bargaining agreement by virtue of statute was without merit where granting returning servicemen such rights would have effect of placing them in better position than other employees. Li Pani v Bohack Corp. (1976, CA2 NY) 546 F.2d 487, 94 BNA LRRM 2073, 79 CCH LC ¶ 11774

4. Other Particular Benefits

37. Severance pay

Under predecessor to statute, requiring that private employers reinstate their former employees who were honorably discharged veterans to their former position or to a position of like seniority and providing that such person "shall be restored without loss of seniority," years spent in Armed Forces were to be included in amount of separation allowances due to firemen under railroad-union agreement under which amount of such allowances was determined by length of "compensated service" with railroad. Accardi v Pennsylvania R. Co. (1966) 383 US 225, 15 L Ed 2d 717, 86 S Ct 768, 1 EBC 1016, 61 BNA LRRM 2385, 53 CCH LC ¶ 11073

Veterans are clearly not in position to demand more than employee on furlough or leave of absence and, where terms of contract between union and employer provide that, in computing severance pay, length of service of employee must be total years of full-time continuous employment and, further, that time spent on leave of absence must not count as service time in determining severance pay, it follows that time spent in armed forces is not includable in determining severance pay of veterans employed under such agreement. Seattle Star, Inc. v Randolph (1948, CA9 Wash) 168 F.2d 274, 22 BNA LRRM 2162, 14 CCH LC ¶ 64543

Severance pay was "perquisite of seniority", and not one of "other benefits" that only entitled veteran under former 50 USCS Appx § 459(b)-(h) to be treated as though he were on furlough or leave, and actual work time requirements could not justify failure to credit veterans' military time toward qualifying employment period for severance pay; right to credit for time spent in military service expressed real nature of severance pay, which was based essentially on employment for particular period of time, as inherently part of seniority, and guaranteed equal competitive status. Palmarozzo v Coca--Cola Bottling Co. (1973, CA2 NY) 490 F.2d 586, 85 BNA LRRM 2033, 72 CCH LC ¶ 14171, cert den (1974) 417 US 955, 41 L Ed 2d 673, 94 S Ct 3083, 86 BNA LRRM 2643, 74 CCH LC ¶ 10081, 75 CCH LC ¶ 10339

Returning serviceman was entitled to severance pay in lieu of reinstatement under former 50 USCS Appx § 459(b)-(h) even though award allowing severance pay had lapsed prior to his
return, since, had he not left for service, he could have quit his job and received severance pay. Taylor v Southern Pacific Co. (1969, ND Cal) 308 F Supp 606, 74 BNA LRRM 2189, 62 CCH LC ¶10845

Monthly displacement allowances which were computed by term of actual service are benefits in nature of rewards for length of service and were therefore governed by Readjustment Act. Brown v Consolidated Rail Corp. (1985, ND Ohio) 605 F Supp 629, 118 BNA LRRM 2894, 102 CCH LC ¶11437

38. Sick leave

Sick leave credits which were tied to substantial work requirement were not "seniority" rights protected by Military Selective Service Act. Jackson v Beech Aircraft Corp. (1975, CA10 Kan) 517 F.2d 1322, 1 EBC 1116, 89 BNA LRRM 2642, 77 CCH LC ¶10937

Veterans are not entitled to have time spent in military service credited toward computation of sick leave benefits where prerequisite for such benefits is bona fide work requirement. Li Pani v Bohack Corp. (1976, CA2 NY) 546 F.2d 487, 94 BNA LRRM 2073, 79 CCH LC ¶11774

FBI agent, who resigned to serve in Armed Forces and subsequently returned to agency, was not entitled to accrued sick leave benefits since such benefits were denied employees in nonpay status, either on military duty or on leave of absence, for entire year by 5 USCS § 6307 and pertinent regulations. Carman v United States (1979) 221 Ct Cl 165, 602 F.2d 946

Returning veterans were entitled to accrue sick leave privileges for period they were in military service where contract provided for sick leave privileges at rate of one working day per month so that accumulation was incidental to seniority. Nichols v Kansas City Power & Light Co. (1975, WD Mo) 391 F Supp 833, 88 BNA LRRM 2737, 88 BNA LRRM 3550, 76 CCH LC ¶10649, 76 CCH LC ¶10836

39. Miscellaneous

Predecessor to statute did not require that employers afford to returning veterans, as distinguished from nonveterans, any specific benefits in the nature of insurance; statute required only that participation by re-employed veterans in insurance programs offered by employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect at time veteran was inducted into armed forces must be same as nonveteran employees. Seattle Star, Inc. v Randolph (1948, CA9 Wash) 168 F.2d 274, 22 BNA LRRM 2162, 14 CCH LC ¶64543

Vietnam Era Veterans' Readjustment Assistance Act of 1974, did not require annual cash contributions by chemical company to company's profitsharing plan in trust on behalf of veterans for period of time they spent in military service, since true nature of company's profitsharing plan was short-term compensation for work performed, and since veterans' rights to contributions under plan were subject to significant contingency at time they entered military service. Raypole v Chemi-Trol Chemical Co. (1985, CA6 Ohio) 754 F.2d 169, 6 EBC 1058, 118 BNA LRRM 2984, 102 CCH LC ¶11372, 83 ALR Fed 893

National Guard member held entitled to holiday pay from employer for holidays which occurred while he participated in annual 2-week military training period notwithstanding that under collective bargaining agreement governing his employment National Guard member's absence did not meet specific exemptions from holiday pay prerequisites since exempting those on military leave establishes equality of treatment of National Guard members with those in other exempt categories whose work absence is involuntary; it was appropriate to review treatment of group of employees compensated and exempt from holiday pay work prerequisite, as opposed to measuring treatment of larger group of employees subject to work requirement. Waltermyer v Aluminum Co. of America (1986, CA3 Pa) 804 F.2d 821, 7 EBC 2493, 123 BNA LRRM 2990, 105 CCH LC ¶12060

Veterans were not entitled to paid absence allowance credit for year during which they were absent in military service where collective bargaining agreement stipulated that employee would be eligible for allowance provided he had one year's seniority as of his eligibility date and had
worked at least 13 pay periods during eligibility year since, under such agreement, paid-absence allowance was not prerequisite of seniority but was based upon actual performance of work during specified number of pay periods in eligibility year. Bradley v General Motors Corp. (1968, ED Mo) 283 F Supp 481, 68 BNA LRRM 2113, 57 CCH LC ¶ 12699

Predecessor to statute required that employer pay employee for holiday where holiday falls during time that employee is attending active duty in reserve. Kidder v Eastern Air Lines, Inc. (1978, SD Fla) 469 F Supp 1060, 100 BNA LRRM 2617, 85 CCH LC ¶ 10973; Hanning v Kaiser Aluminum & Chemical Corp. (1977, ED La) 95 BNA LRRM 2964, 82 CCH LC ¶ 10070

Where airline employee purchased stock in airline under plan authorizing airline to repurchase shares if employee left employ of airline, airline did not have right to repurchase shares purchased by employee who took military leave of absence and who was entitled to reinstatement upon completion of active duty. Winders v People Express Airlines, Inc. (1984, DC NJ) 595 F Supp 1512, 5 EBC 2433, 117 BNA LRRM 3275, 102 CCH LC ¶ 11258, affd (1985, CA3 NJ) 770 F.2d 1078, 119 BNA LRRM 3071

Right to reassignment in another location is benefit of employment for purposes of Uniformed Services Employment and Reemployment Rights Act, in light of legislative history and relevant court and Board decisions. Eberhart v United States Postal Serv. (2001, MSPB) 88 MSPR 398

Term "compensation" is broad enough to include partner's share in partnership profits derived from services performed by other partners. (1942) 40 Op Atty Gen 183

E. Promotions

40. Generally

Predecessor to statute did not sanction interfering with and disrupting usual, carefully adjusted relations among employees themselves regarding opportunities for advancement. McKinney v Missouri K. T. R. Co. (1958) 357 US 265, 2 L Ed 2d 1305, 78 S Ct 1222, 42 BNA LRRM 2287, 35 CCH LC ¶ 71613

Re-employed veteran who satisfactorily completes his interrupted training is entitled to enjoy seniority status which he would have acquired simply by virtue of continued employment but for his absence in military service, and is entitled to advancement which was reasonably certain to occur as matter of foresight, and which did in fact occur as matter of hindsight. Tilton v Missouri P. R. Co. (1964) 376 US 169, 11 L Ed 2d 590, 84 S Ct 595, 55 BNA LRRM 2369, 48 CCH LC ¶ 18747

Purpose of predecessor to statute was to preserve to those who entered military service full benefits of position which they occupied at time of entering service but such purpose does not justify strained construction of facts in order to give returning veteran higher position than one he occupied at time of entering service or new position created after he was in service. Meehan v National Supply Co. (1947, CA10 Okla) 160 F.2d 346, 12 CCH LC ¶ 63645

Where employee had no fixed or absolute right to promotion and where his right to promotion depended upon qualification over and above mere length of service, employer had fully complied with terms of Selective Training and Service Act when he restored veteran to same position or one of like seniority and pay which he held at time of his induction into service; in subsequently promoting employee, employer was not required to pay him more than wage or salary attached to his new rank at time he assumed it. Harvey v Braniff International Airways, Inc. (1947, CA5 Tex) 164 F.2d 521, 21 BNA LRRM 2081, 13 CCH LC ¶ 64159

Employee is entitled to his old job or equivalent job upon his release from armed services but is not entitled to advance to higher classification, in absence of some particular agreement of employment, during his service with armed forces. Special Service Co. v Delaney (1949, CA5 La) 172 F.2d 16, 23 BNA LRRM 2294, 16 CCH LC ¶ 64940

Inasmuch as veteran, at time of entry into service, had no fixed or absolute right to promotion to position of payroll clerk upon occurrence of vacancy in such position, and, inasmuch as right to promotion to such position did not depend solely upon length of continuous service in position of assistant payroll clerk, together with fact of established practice of employer not to consider any
of its salaried employees for promotion while they were on leave of absence, veteran was not entitled, upon being re-employed by employer following discharge from military service, to be employed in position of payroll clerk. Bond v Tennessee C., I. & R. Co. (1947, DC Ala) 73 F Supp 333, 20 BNA LRRM 2422, 13 CCH LC ¶ 63956

Veteran had no right to promotion upon returning from military service where, although employees with less seniority than veteran had been advanced to available openings during veteran’s absence in service, established practice of defendant at time veteran was inducted was that employee on furlough or leave of absence lost opportunity to fill vacancy which would have been his had he been on active duty. Trischler v Universal Pottery Inc., Ironton, Ohio (1947, DC Ohio) 78 F Supp 609, affd (1948, CA6 Ohio) 171 F.2d 707, 23 BNA LRRM 2424, 16 CCH LC ¶ 64941

If promotion depends on mere passage of time, it is seniority right to which returning veteran is entitled; however, if promotion depends on exercise of discretion on part of employer rather than mere passage of time, promotion is not guaranteed. Almond v United States Steel Corp. (1980, ED Pa) 499 F Supp 786, 105 BNA LRRM 2965, 89 CCH LC ¶ 12206

Returning veteran had no claim to any common-law right to promotion upon his reinstatement under predecessor to statute. Cutts v Tinning (1947) 81 Cal App 2d 423, 184 P2d 171

41. Standards and criteria for promotion, generally

Employer complies with terms of predecessor to statute when he restores veteran to same position or one of like seniority and pay which veteran held at time of entry into service and where employee has no fixed or absolute right to promotion and where his right to promotion depends upon qualifications over and above mere length of service; in subsequently promoting veteran, employer is not required to pay him more than wage or salary attached to his new rank at time he assumed it. Harvey v Braniff International Airways, Inc. (1947, CA5 Tex) 164 F.2d 521, 21 BNA LRRM 2412, 13 CCH LC ¶ 64159

Railroad fireman was not entitled to promotion to engineer as if he had never entered service and had passed all examination and qualified as engineer, where promotion from fireman to engineer did not result merely from seniority. Jefferson v Atlantic C. L. R. Co. (1962, CA5 Ga) 303 F.2d 522, 50 BNA LRRM 2412, 45 CCH LC ¶ 17660

Universal Military Training and Service Act only provided that returning serviceman be advanced to extent he would have been as matter of right had he not been called to active duty and this was referred to as “escalating seniority”; advancements or promotions based on employer discretion or on employee merit, as in passage or completion of prescribed set of conditions precedent, were not within category of advancements given as matter of right and thus, where veteran’s advancement from flight engineer status to copilot-pilot status demanded fulfillment of instrument certification and graduation from employer’s copilot school and veteran had fulfilled neither of these at time of recall to active duty, he was not entitled, upon return from service, to advancement to copilot-pilot seniority list in same status he would have occupied had he not been recalled and had he met employer’s requirements and qualifications. Stewart v American Airlines, Inc. (1968, ND Tex) 288 F Supp 160, 69 BNA LRRM 2974, 59 CCH LC ¶ 13061

If promotion depends on mere passage of time, it is seniority right to which returning veteran is entitled; however, if promotion depends on exercise of discretion on part of employer rather than mere passage of time, promotion is not guaranteed. Almond v United States Steel Corp. (1980, ED Pa) 499 F Supp 786, 105 BNA LRRM 2965, 89 CCH LC ¶ 12206

42. Ability and training

Predecessor to statute did not entitle veteran to demand assignment to position higher than that which he formerly held when promotion to such position, under applicable collective bargaining agreement, depended on fitness, ability, and exercise of managerial choice. McKinney v Missouri K. T. R. Co. (1958) 357 US 265, 2 L Ed 2d 1305, 78 S Ct 1222, 42 BNA LRRM 2287, 35 CCH LC ¶ 71613
While under predecessor to statute, veteran, upon returning from service, need not be considered for promotion or seniority purposes as if he had continued to work on job and returning veteran could not claim promotion that depended solely upon satisfactory completion of prerequisite period of employment training unless he first worked that period, nevertheless upon satisfactorily completing that period, he could insist upon seniority date reflecting delay caused by military service.  Tilton v Missouri P. R. Co. (1964) 376 US 169, 11 L Ed 2d 590, 84 S Ct 595, 55 BNA LRRM 2369, 48 CCH LC ¶ 10378

Trial court erred in concluding that veteran did not establish that he would have been promoted had he not gone into service, where he would have obtained training requisite to promotion merely by passage of time.  Brandt v Minneapolis, N. & S. R. Co. (1983, CA8 Minn) 714 F.2d 793, 113 BNA LRRM 3774, 98 CCH LC ¶ 10757

Court could not speculate that employee veteran, had he not entered military service, would as result of length of service alone have been promoted to higher job classification than that which was assigned to him upon reinstatement where differences in classification were based upon particular skill and ability and not merely upon length of service.  Polansky v Elastic Stop Nut Corp. (1948, DC NJ) 78 F Supp 74, 22 BNA LRRM 2223, 15 CCH LC ¶ 64563

Contention that veteran, immediately upon re-employment, was entitled to be made electrician and given seniority status on electrician's roster ahead of any employee who, having been junior to him on electricians' helpers' roster, was made electrician during his absence ignored rule which required that, before being assigned to higher position, it was necessary for veteran to demonstrate his qualifications therefor.  Little v Pennsylvania R. Co. (1951, DC Md) 95 F Supp 631, 27 BNA LRRM 2424, 19 CCH LC ¶ 66233

Returning veteran was not entitled to seniority in higher classification until after serving 4 years of training where 4 years of practical experience were required for advancement of carman helper to carman mechanic.  Sularz v Minneapolis, St. P. & S. S. M. R. Co. (1956, DC Minn) 148 F Supp 83, 39 BNA LRRM 2445, 31 CCH LC ¶ 70362, affd (1958, CA8 Minn) 259 F.2d 122, 44 BNA LRRM 2678, 36 CCH LC ¶ 65002

43. -Discretion of employer

Promotions and other changes in job classification are employer prerogatives and not matters of right gained by veteran solely because of amount of time spent by him in military service.  Meehan v National Supply Co. (1947, CA10 Okla) 160 F.2d 346, 12 CCH LC ¶ 63645; Harvey v Braniff International Airways, Inc. (1947, CA5 Tex) 164 F.2d 521, 21 BNA LRRM 2081, 13 CCH LC ¶ 64159; Boston & M. R. R. v David (1948, CA1 NH) 167 F.2d 722, 22 BNA LRRM 2133, 14 CCH LC ¶ 64508; Raulins v Memphis Union Station Co. (1948, CA6 Tenn) 168 F.2d 466, 22 BNA LRRM 2189, 14 CCH LC ¶ 64550; Oil Workers International Union CIO v Sinclair Refining Co. (1948, CA5 Tex) 171 F.2d 192, 23 BNA LRRM 2153, 15 CCH LC ¶ 64880; Hart v Knox County (1948, CA6 Tenn) 171 F.2d 45; Special Service Co. v Delaney (1949, CA5 La) 172 F.2d 16, 23 BNA LRRM 2294, 16 CCH LC ¶ 64940; Lipscomb v Tennessee C., & R. Co. (1951, CA5 Ala) 189 F.2d 709, 28 BNA LRRM 2223, 20 CCH LC ¶ 66396; Maloney v Chicago, B. & Q. R. Co. (1947, DC Mo) 72 F Supp 124, 20 BNA LRRM 2171, 12 CCH LC ¶ 63834; Bond v Tennessee C., I. & R. Co. (1947, DC Ala) 73 F Supp 333, 20 BNA LRRM 2422, 13 CCH LC ¶ 63956; Doyle v Amalgamated Asso. of Street, etc., Employees (1947, DC La) 76 F Supp 655, 20 BNA LRRM 2391, 13 CCH LC ¶ 63954, affd (1948, CA5 La) 168 F.2d 876, 22 BNA LRRM 2265, 15 CCH LC ¶ 64610; Trischler v Universal Pottery, Inc. (1947, DC Ohio) 78 F Supp 609, affd (1948, CA6 Ohio) 171 F.2d 707, 23 BNA LRRM 2242, 16 CCH LC ¶ 64941; Polansky v Elastic Stop Nut Corp. (1948, DC NJ) 78 F Supp 74, 22 BNA LRRM 2223, 15 CCH LC ¶ 64563; Zaversnik v Union P. R. Co. (1949, DC Wyo) 95 F Supp 209; Gregory v Louisville & N. R. Co. (1950, DC Ky) 92 F Supp 770, 26 BNA LRRM 2628, 18 CCH LC ¶ 65985, affd (1951, CA6 Ky) 191 F.2d 856, 29 BNA LRRM 2022, 20 CCH LC ¶ 66577, cert den (1952) 343 US 903, 96 L Ed 1323, 72 S Ct 634, 29 BNA LRRM 2606; Little v Pennsylvania R. Co. (1951, DC Md) 95 F Supp 631, 27 BNA LRRM 2424, 19 CCH LC ¶ 66233

Electrician helper, returning to job after military service, although entitled to credit for time in Army, was not automatically entitled to promotion to electrician where right of selection was left...
entirely to employer by contract. Poore v Louisville & N. R. Co. (1956, CA5 Ala) 235 F.2d 687, 38 BNA LRRM 2461, 30 CCH LC ¶ 70126

Plaintiff who, while employed as a carman apprentice, left to enter army and shortly after his discharge was re-employed in same capacity with seniority as of his first employment, upon completion of his four year apprenticeship was promoted to carman with seniority from that date, was not entitled to seniority as carman as of date he would have completed apprenticeship had he not been in service, where promotion was not automatic but in discretion of employer. Jones v United States (1958, CA10 Okla) 258 F.2d 81

Returning veteran was entitled to recover difference between salary for position in which he was re-employed and higher salary for position to which two men who were promoted during veteran's absence advance "in order of seniority," where, although under collective bargaining agreement employer could exercise discretion in making promotions, in actual practice promotion was virtually automatic and not result of employer's discretion and where there was no showing that men promoted had greater ability than veteran or that they were given tests which veteran could not have passed and no evidence that veteran's services had not continued satisfactorily before he entered military service. Power v Northern Illinois Gas Co. (1968, CA7 Ill) 388 F.2d 427, 67 BNA LRRM 2166, 57 CCH LC ¶ 12389

To be entitled to advancement upon return from military service, veteran must show with reasonable certainty that he would have enjoyed such advancement simply by virtue of continuous employment during absence; where advancement depends upon discretionary choice of employer, choice which was not exercised prior to departure, veteran is not entitled to advancement upon return from military service. Cox v International Longshoremen's Asso. (1972, SD Tex) 343 F Supp 1292, 80 BNA LRRM 2639, 68 CCH LC ¶ 12876, affd (1973, CA5 Tex) 476 F.2d 1287, 83 BNA LRRM 2290, 71 CCH LC ¶ 13687, cert den (1973) 414 US 1116, 38 L Ed 2d 743, 94 S Ct 849, 84 BNA LRRM 2961, 72 CCH LC ¶ 14214

On application for reemployment, veteran was not entitled to demand that he be assigned position higher than that to which he formerly held when promotion to such position depended, not simply on seniority or some other form of automatic progression but on exercise of discretion on part of employer; however, presence of broad management discretion concerning promotions could defeat veteran's re-employment case only where claimed advancement depended on employer's discretionary choice not exercised prior to entry into service. Chernoff v Pandick Press, Inc. (1976, SD NY) 419 F Supp 1192, 93 BNA LRRM 2422, 79 CCH LC ¶ 11723

44. -Seniority

Predecessor to statute gave veteran full benefit of whatever added rights he would have acquired had he remained in his position instead of being inducted into service; if seniority accumulated during time spent in service entitles veteran to better job classification then he had at time he entered service, it is duty of employer to give him better classification. Hewitt v System Federation No. 152, etc. (1947, CA7 Ind) 161 F.2d 545, 20 BNA LRRM 2084, 12 CCH LC ¶ 63724

Veterans who, before entering the service, were employed as electrician's helpers were not entitled to be re-employed after discharge in capacity of electricians, merely on basis that time spent in service should be used in computing seniority for promotion from electrician's helper to electrician, since seniority provided by collective bargaining agreement applied only within single job classification and did not apply with regard to promotions from one classification to another; while electrician's helper oldest in point of service was usually given preference in filing vacancies on electricians' roster particular qualifications required consideration; predecessor to statute guaranteed veterans their seniority in subdivision of electrical workers but did not guarantee promotions to vacancies occurring in subdivision of electricians. Raulins v Memphis Union Station Co. (1948, CA6 Tenn) 168 F.2d 466, 22 BNA LRRM 2189, 14 CCH LC ¶ 64550

It is duty of employer to give veteran better classification where seniority accumulated by veteran during time in service entitles him to better job classification than he had at time he left to enter service. Morris v Chesapeake & O. R. Co. (1948, CA7 Ind) 171 F.2d 579, 23 BNA LRRM 2179, 15 CCH LC ¶ 64874, cert den (1949) 336 US 967, 93 L Ed 1118, 69 S Ct 938, 24 BNA
Apprentice carman, reinstated on same job, who completed training and was promoted to carman with seniority as of date training was completed, was not entitled to seniority 2 years earlier because of 2 years spent in service, where promotion from carman apprentice to carman was not automatic but in discretion of employer. Jones v United States (1958, CA10 Okla) 258 F.2d 81

Veteran who returned to former position of railroad switchman after 1968 military discharge and who was thereafter given promotion to position of fireman in 1970, was entitled to pre-1970 seniority date for latter position, where veteran had initially been employed as locomotive fireman prior to 1964 termination under arbitration award, veteran was rehired in 1965 as switchman prior to 1966 induction into Armed Forces, and railroad conceded that veteran would have been given opportunity to transfer to fireman's position at time of railroad's 1966 canvass of employees with prior experience as firemen had he not been in military service at such time. Barrett v Grand Trunk W. R. Co. (1978, CA7 Ill) 581 F.2d 132, 99 BNA LRRM 2066, 84 CCH LC ¶ 10707, cert den (1979) 440 US 946, 59 L Ed 2d 634, 99 S Ct 1423, 100 BNA LRRM 2739, 85 CCH LC ¶ 11145

If seniority accumulated during time he is in service entitles veteran, as matter of contract, to better job classification than he had at time he left to enter service, it is duty of employer to give him better classification. Armstrong v Tennessee C., I. & R. Co. (1947, DC Ala) 73 F Supp 329, 20 BNA LRRM 2396, 13 CCH LC ¶ 63941

Veteran becoming eligible for promotion while on military service was entitled to seniority from date of eligibility for promotion rather than from date of return to work where employer had established practice of promoting from laborer to carman helper on basis of seniority. Wilson v Illinois C. R. Co. (1957, DC Ill) 147 F Supp 513, 39 BNA LRRM 2483, 31 CCH LC ¶ 70472

Plaintiffs were not entitled to seniority at first accorded them as laborers by railroad, upon their promotion to helper classification following their return from military service; returning veterans were entitled to seniority in new positions only after promotion to such position, even though others with less seniority had received promotions in serviceman's absence. Poling v Baltimore & O. R. Co. (1958, DC W Va) 166 F Supp 710, 43 BNA LRRM 2030, 36 CCH LC ¶ 65019

Returning veteran could assume that promotion would have been automatic if he had remained with employer rather than going into service, and was not entitled to additional compensation because of failure of promotion where ability as well as seniority was taken into consideration in making promotions. Palmquist v Buhl Sons Co. (1959, DC Mich) 179 F Supp 638, 45 BNA LRRM 2987, 39 CCH LC ¶ 66305

45. -Miscellaneous

Railroad employee in job classification of electrician's helper was entitled under former 50 USCS Appx § 459(b)-(h) to retain his seniority in that job category upon his return to work after military service, but was not entitled to automatic advancement to category of electrician under collective bargaining contract which provided that such advancement could take place only after fixed length of service in lower category and then only by selection by employer, so that fact that his military service added to his actual time worked may have totaled minimum length of service did not, of itself, give him right to promotion. Poore v Louisville & N. R. Co. (1956, CA5 Ala) 235 F.2d 687, 38 BNA LRRM 2461, 30 CCH LC ¶ 70126

Railroad employee in job classification of electrician's helper was entitled to retain his seniority in that job category upon his return to work after military service, but was not entitled to automatic advancement to category of electrician under collective bargaining contract which provided that such advancement could take place only after fixed length of service in lower category and then only by selection by employer, so that fact that his military service added to his actual time worked might have totaled minimum length of service did not, of itself, give him right
to promotion. Poore v Louisville & N. R. Co. (1956, CA5 Ala) 235 F.2d 687, 38 BNA LRRM 2461, 30 CCH LC ¶ 70126

Veteran could note claim that time spent in military service entitled him to advance seniority when such seniority could not be acquired if he had been on furlough or leave of absence where there was certain requirement of actual work service in order to qualify employee for advanced position. Zaversnik v Union P. R. Co. (1949, DC Wyo) 95 F Supp 209

Seniority rights of veterans would be defeated if court allowed employer railroad to make promotion from Rule 154 carmen to journeyman carmen contingent on work time rather than seniority where promotion was actually independent of any achievement of proficiency or employer discretion, journeyman carmen status was not contingent upon any test measuring proficiency, four-year period required was free from any formalized instruction or training, change in status did not result in change in duties or increase in wages, and attainment of journeyman status after four years was virtually automatic. Cohn v Union P. R. Co. (1977, DC Neb) 427 F Supp 717, 94 BNA LRRM 2828, 81 CCH LC ¶ 13115, affd (1978, CA8 Neb) 572 F.2d 650, 97 BNA LRRM 3134, 83 CCH LC ¶ 10467, cert den (1978) 439 US 836, 58 L Ed 2d 132, 99 S Ct 120, 99 BNA LRRM 2600, 84 CCH LC ¶ 10875

46. Probability of promotion, generally

It was not necessary, as a condition for insuring veteran's seniority rights under predecessor to statute, to establish absolute certainty, as matter of foresight when he entered military service, that all circumstances essential to obtaining advancement in status would later occur; his seniority rights were not defeated by possibilities that work of particular type might not have been available, that he would not have worked satisfactorily during period of his absence, that he might not have elected to accept higher position, or that sickness might have prevented him from continuing his employment. Tilton v Missouri P. R. Co. (1964) 376 US 169, 11 L Ed 2d 590, 84 S Ct 595, 55 BNA LRRM 2369, 48 CCH LC ¶ 18747

Veteran, whose preservice employment included right to bid for advertised dispatcher's position, was entitled under predecessor to statute to demand and receive seniority in dispatcher's position to which he would have been entitled had he been able to bid on that position during time he was in service, where 2 such vacancies had been filled by men junior to veteran on seniority roster during veteran's service. Morris v Chesapeake & O. R. Co. (1948, CA7 Ind) 171 F.2d 579, 23 BNA LRRM 2179, 15 CCH LC ¶ 64874, cert den (1949) 336 US 967, 93 L Ed 1118, 69 S Ct 938, 24 BNA LRRM 2027, reh den (1949) 337 US 927, 93 L Ed 1735, 69 S Ct 1167

Mere fact that management might have given veteran's work group different job options was insufficient to withhold opportunity to become switchman from veteran where, had veteran remained at job as fireman, he undeniably would have been given opportunity to become switchman and if veteran was denied same choice of jobs offered to his peers during his absence, he would be, in effect, penalized for having served his country in military service. Wood v Southern Pacific Co. (1971, CA9 Cal) 447 F.2d 486, 78 BNA LRRM 2512, 66 CCH LC ¶ 12000

Where it was predictable that airline pilot, except for interruption of military induction, would have completed his training program with class to which he was originally assigned and would have thereupon been immediately promoted to flight officer status and where in fact he did subsequently complete training program, he was entitled under former 50 USCS Appx § 459(b)-(h) to pilot's seniority number he would have obtained had he completed training program with class to which he was originally assigned. Pomrening v United Air Lines, Inc. (1971, CA7 Ill) 448 F.2d 609, 78 BNA LRRM 2241, 66 CCH LC ¶ 12039

Strong probability that veteran would have been promoted during period of his military service had he remained at work did not entitle him to seniority in promoted position. Gregory v Louisville & N. R. Co. (1950, DC Ky) 92 F Supp 770, 26 BNA LRRM 2628, 18 CCH LC ¶ 65985, affd (1951, CA6 Ky) 191 F.2d 856, 29 BNA LRRM 2022, 20 CCH LC ¶ 66577, cert den (1952) 343 US 903, 96 L Ed 1323, 72 S Ct 634, 29 BNA LRRM 2606

47. -Reasonable certainty

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Re-employed veteran who, upon returning from military service, satisfactorily completed his interrupted training was entitled to enjoy seniority status which he would have acquired by virtue of continued employment but for his absence in military service; this requirement was met if, as matter of foresight, it was reasonably certain that advancement would have occurred, and if, as matter of hindsight, it did in fact occur. Tilton v Missouri P. R. Co. (1964) 376 US 169, 11 L Ed 2d 590, 84 S Ct 595, 55 BNA LRRM 2369, 48 CCH LC ¶ 18747

It was necessary that employer treat defendant under former 50 USCS Appx § 459(b)-(h) as if he had been continuously working for that employer upon his return from service where it was reasonably certain that plaintiff’s advancement would have occurred during time he was in military service had he continued in defendant’s employ instead. Hatton v Tabard Press Corp. (1969, CA2 NY) 406 F.2d 593, 70 BNA LRRM 2519, 59 CCH LC ¶ 13281

Employer’s restructuring of positions, distributing veteran’s former duties between 2 other positions, one of which was more responsible and lucrative than former position, did not entitle veteran to new, more responsible position, since it was not reasonably certain that veteran would have been promoted to it. International Brotherhood of Teamsters, etc. v Helton (1969, CA5 Ala) 413 F.2d 1380, 71 BNA LRRM 3014, 60 CCH LC ¶ 10259

Fact that discretionary choice that would have given employee opportunity to transfer but for his military service, had not been exercised and might not have been foreseeable at time employee entered military service, did not affect veteran’s right to like status and position under predecessor to statute since statute required only that there be reasonable certainty that veteran would have enjoyed status he claimed but for his service. Barrett v Grand Trunk W. R. Co. (1978, CA7 Ill) 581 F.2d 132, 99 BNA LRRM 2066, 84 CCH LC ¶ 10707, cert den (1979) 440 US 946, 59 L Ed 2d 132, 99 S Ct 1423, 100 BNA LRRM 2739, 85 CCH LC ¶ 11145

Veteran who was draftsman at pay grade 5 when he entered military service was entitled to recover difference in pay between grade 5, in which he was re-employed, and grade 8 where, during time veteran was in service, two vacancies in grade 8 were filled by promoting men who were veteran’s juniors on roster where collective bargaining agreement provided that when vacancy in job title and grade was to be filled, employee senior in next lower rating on roster would be entitled to promotion if qualified by fitness and ability as determined by company, in view of fact that in 16 years there had been 105 promotions but no employee had been passed over for promotion in veteran’s division of company and in view of presumption that veteran would have remained in employ of company performing satisfactorily and would have taken requisite steps to assure himself of benefits of status; it was reasonably certain that promotion would have automatically accrued to veteran and, although bargaining agreement required that, for promotion, employer make determination of fitness and ability, veteran, as result of customary practices of his employer, might have acquired right to promotion. Burke v Boston Edison Co. (1968, DC Mass) 279 F Supp 853, 67 BNA LRRM 2535, 57 CCH LC ¶ 12452

Railway firemen rehired by employer after military discharge were entitled to computation of seniority from date seniority would have been achieved had advancement not been delayed by military service where achievement of seniority status as engineer depended upon completion of training course and passage of two examinations, where it was reasonably foreseeable that firemen would have advanced upon completion of training period, where firemen were advanced upon return from military service, and where employer does not exercise discretion in selection of firemen for advancement. McArthur v Norfolk & W. R. Co. (1975, SD Ill) 405 F Supp 158, 91 BNA LRRM 2370, 78 CCH LC ¶ 11211

48. -Virtual certainty

Veteran was entitled to recover salary for position to which other employees, who were promoted during his absence, advanced in order of seniority, although collective bargaining agreement left such promotions to employer’s discretion, where promotion was virtually automatic in actual practice and not result of employer’s discretion. Power v Northern Illinois Gas Co. (1968, CA7 Ill) 388 F.2d 427, 67 BNA LRRM 2166, 57 CCH LC ¶ 12389

Trial court erred in concluding that veteran could not be promoted because no vacancies existed once it determined promotion would have occurred automatically with passage of time

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Seniority rights of veterans would be defeated if court allowed employer railroad to make promotion from Rule 154 carmen to journeyman carmen contingent on work time rather than seniority where promotion was actually independent of any achievement of proficiency or employer discretion, journeyman carmen status was not contingent upon any test measuring proficiency, four-year period required was free from any formalized instruction or training, change in status did not result in change in duties or increase in wages, and attainment of journeyman status after four years was virtually automatic. Cohn v Union P. R. Co. (1977, DC Neb) 427 F Supp 717, 94 BNA LRRM 2828, 81 CCH LC ¶ 13115, affd (1978, CA8 Neb) 572 F.2d 650, 97 BNA LRRM 3134, 83 CCH LC ¶ 10467, cert den (1978) 439 US 836, 58 L Ed 2d 132, 99 S Ct 120, 99 BNA LRRM 2600, 84 CCH LC ¶ 10875

49. Miscellaneous

Returning veteran was not entitled to 2 years accrued vacation benefits where company had ruled that employees must work 25 weeks to earn vacation benefits, despite fact that, under rule, employee did not have to work any specified number of hours and no vacation time was allowed for work over 25 weeks, except for substantial overtime work, and veteran was not entitled to pro rata allowance vacation time for amounts of time he had worked during those 2 years where other employees would not receive pro rata vacation time. Foster v Dravo Corp. (1975) 420 US 92, 43 L Ed 2d 44, 95 S Ct 879, 1 EBC 1164, 88 BNA LRRM 2671, 76 CCH LC ¶ 10658

Plaintiffs, who had been employed as carmen helpers and had served some time as temporary carmen prior to entrance in service, were not entitled to rating as carmen upon their return under collective bargaining contract, which allowed carmen helpers who had served four years as temporary carmen to qualify as carmen. Zaversnik v Union P. R. Co. (1949, DC Wyo) 95 F Supp 209

Carmen helper upon return from service was entitled to be restored to position of carmen helper with accrued seniority for service time but was not entitled to be advanced to carman mechanics seniority roster, position to which he would have been promoted had he not been drafted. Sularz v Minneapolis, St. P. & S. S. M. R. Co. (1956, DC Minn) 148 F Supp 83, 39 BNA LRRM 2445, 31 CCH LC ¶ 70362, affd (1958, CA8 Minn) 259 F.2d 122, 44 BNA LRRM 2678, 36 CCH LC ¶ 65002

Employees in baggage department, as of date of entry into service, who were discharged from service and later applied for and obtained clerk's jobs upon qualifying therefor, were not entitled to seniority in clerk's jobs at earlier date on theory that if they had not entered service, they would sooner have qualified for clerk's jobs. Conseglio v Pennsylvania R. Co. (1962, SD NY) 211 F Supp 567, 51 BNA LRRM 2693, 46 CCH LC ¶ 17948

Merit System Protection Board erred in placing on veteran burden of discovering whether vacancy occurred during her military service to which she could have been considered for promotion, since employer was affirmatively obligated to consider her. Cobb v Prokop (1983, DC Mass) 557 F Supp 391

In action by veteran employee of police department seeking reversal of civil service commission's determination that his 4 years' military service, while away from employment, was not includible in 5 years' special investigative experience required for special investigator job classification, where special investigator classification entitled employee to higher salary than classification in which employee had been working for one and one-half years prior to entering Navy, veteran was not entitled to include time spent in military service toward eligibility for special investigator classification. Speyerer v New Orleans Civil Service Com. (1971, La App 4th Cir) 254 So 2d 635

F. Salary Increases

50. Generally
Employer who restores veteran to his former job at higher salary sustains no liability for damages from fact that veteran's bonus is less than before entering service due to changed conditions in employer's plant. Donner v Levine (1956, CA2 Conn) 232 F.2d 185, 37 BNA LRRM 2808, 30 CCH LC ¶ 69880

Veterans were entitled under former 50 Appx USCS § 459(b)-(h) to across-the-board wage increases awarded to their co-workers while they were in service, though rules and practice of employer and union were that persons on furlough or leave of absence did not accrue "consecutive working service." Borges v Art Steel Co. (1957, CA2 NY) 246 F.2d 735, 40 BNA LRRM 2397, 32 CCH LC ¶ 70825

Reemployed veteran is entitled to whatever emoluments or increases may have accompanied that position, when such increases are result of either general in-grade increase resulting from length of service and to which veteran would have been entitled had he been continuously employed, or where increase results from overall wage policy applicable to all employees or to employees of specified group of which veteran is part. Kay v General Cable Corp. (1946, DC NJ) 63 F Supp 791, 17 BNA LRRM 768, 10 CCH LC ¶ 62989

Returning veterans are entitled to be re-employed at wage rate they would have attained if they had remained if continuous employment during time spent in military service, where merit increases are virtually automatic in actual practice. Nichols v Kansas City Power & Light Co. (1975, WD Mo) 391 F Supp 833, 88 BNA LRRM 2737, 88 BNA LRRM 3550, 76 CCH LC ¶ 10649, 76 CCH LC ¶ 10836

Reservist denied reinstatement is entitled to recover backpay less whatever he earned during period of self-employment; absent evidence as to amount of pay raises reservist may have received had he been employed, court assumes that he would earn constant salary for period during which he was denied reinstatement. Micalone v Long Island R. Co. (1983, SD NY) 582 F Supp 973, 115 BNA LRRM 2640, 99 CCH LC ¶ 10606, 99 CCH LC ¶ 10632

Virgin Islands Government violated former 38 USCS §§ 4301 et seq. by failing to pay plaintiff appropriate salary when it reemployed him as legal counsel to Commissioner of Economic Development and Agriculture, even though executive orders under which raises were given to counsel's co-workers during his one and one-half years away on military active duty explicitly did not vest in any employee right to have salary adjusted, because even if governor purported to retain discretion concerning salary increases, he in fact increased salary of all individuals in plaintiff's classification, and it is violation of Act to withhold similar salary increase from returning veteran. Glasser v Government of the Virgin Islands (1994, DC VI) 30 VI 97, 853 F Supp 852, 130 CCH LC ¶ 11395, app den, reconsideration den (1995, DC VI) 130 CCH LC ¶ 11396

51. Basis for increases, generally

Veteran was not entitled to include his service in Army for purpose of determining his rate of pay where periodic pay raises were determined on basis of merit and proficiency at particular job and not on basis solely of seniority in particular position. Nevins v Curtiss-Wright Corp. (1949, CA6 Ohio) 172 F.2d 535, 23 BNA LRRM 2305, 16 CCH LC ¶ 64943

Employer violated predecessor to statute by refusing to credit reinstated veteran with time spent in military service for pay purposes, where pay increases were generally geared to number of years on job and annual reviews were confined to granting increases or discharging employees for unsatisfactory performance, since pay increases in such circumstances depended essentially upon continuing employment, not upon exercise of management discretion. Hatton v Tabard Press Corp. (1969, CA2 NY) 406 F.2d 593, 70 BNA LRRM 2519, 59 CCH LC ¶ 13281

Time spent in military service should have been considered in computing re-employed veterans' positions on teachers' salary schedule for teachers who served in teaching district before and after their military service, since it was undisputed that veterans would have advanced on salary schedule with reasonable certainty, and predominant nature of vertical advance on salary schedule was reward for continued future service as annual service increase, where once minimum teaching days requirement is met teachers are entitled to advancement on schedule regardless of their performance or whether they benefit from previous year's experience. Lang v
Great Falls School Dist. (1988, CA9 Mont) 842 F.2d 1046, 127 BNA LRRM 2916, 108 CCH LC ¶ 104117

Veteran, who had two years experience in newspaper writing upon entry into service, and who was paid an increased wage, pursuant to collective bargaining contract consummated in his absence, based on two years experience, was not entitled under former 50 USC Appx § 459(b)-(h) to wage for additional three years experience based on three years service in the army. Selgrat v Field Enterprises, Inc. (1952, DC Ill) 105 F Supp 179, 30 BNA LRRM 2548

Under contract providing for periodic increases for each year of experience on job, returned veteran was not entitled to pay increase based upon time spent in service. Brown v Denver Post, Inc. (1956, DC Colo) 145 F Supp 351, 39 BNA LRRM 2015, 31 CCH LC ¶ 70228

52. Seniority

Veteran was not entitled under predecessor to statute to have his time spent in service used in computing time necessary to make him entitled to pay increase under step-rate system, since such system differed from seniority in sense that it required actual experience rather than passage of time alone. Altgens v Associated Press (1951, CA5 Tex) 188 F.2d 727, 28 BNA LRRM 2022, 19 CCH LC ¶ 66318

Veteran’s time spent in service was to be included in determining veteran’s eligibility for pay increases based entirely on seniority. Moe v Eastern Air Lines, Inc. (1957, CA5 Fla) 246 F.2d 215, 40 BNA LRRM 2302, cert den (1958) 357 US 936, 2 L Ed 2d 1550, 78 S Ct 1380, 42 BNA LRRM 2354, reh den (1958) 358 US 858, 3 L Ed 2d 92, 79 S Ct 13

Army Reservist was entitled to reinstatement at pay rate of $7 per hour, because she would have received $0.50 raise had she been at job instead of serving in Desert Storm, and military personnel who return from active duty are entitled to seniority and salary increases to which they would have been entitled had they been continuously employed. Novak v Mackintosh (1996, DC SD) 937 F Supp 873, 155 BNA LRRM 2985, 132 CCH LC ¶ 11658

53. Step-rate system

Step-rate system under which employee was required to have given amount of experience before becoming entitled to increase did not correspond with seniority and differed from seniority in sense that such system required actual experience and not just passage of time alone; veteran was not entitled to have time spent in service used in computing time necessary to make him entitled to pay increase; step-rate system placed monetary value on on-the-job experience and seniority system did not require veteran to be placed in position that he could not have attained had he not had certain amount of experience. Altgens v Associated Press (1951, CA5 Tex) 188 F.2d 727, 28 BNA LRRM 2022, 19 CCH LC ¶ 66318

In step-rate system where veteran contended that because progress in step-rate system followed accomplishment of each period or step without examination or other test of efficiency and because resulting increases in pay were automatic with passage of time, veteran’s contention that step-rate system and seniority were synonymous was without merit where simple fact that progress in step-rate system was based solely on clerical experience or college training, where veteran had been given credit for every day spent in clerical work in military service; time otherwise spent in military service, however praiseworthy it might be, was not clerical experience. Huffman v Norfolk & W. R. Co. (1947, DC Va) 71 F Supp 564, 20 BNA LRRM 2209, 12 CCH LC ¶ 63765

Step-rate system of compensation was something separate and distinct from seniority which began when employee’s pay began and continued so long as he was in employment regardless of lay-off, vacation, and military service; step-rate system placed monetary value on experience and veterans are credited with seniority for time spent in military service, but no credit was given to step-rates by time spent in service; step-rates credit was given only by on-the-job-service. Brown v Denver Post, Inc. (1956, DC Colo) 145 F Supp 351, 39 BNA LRRM 2015, 31 CCH LC ¶ 70228
Under system dividing job rate into six steps of 4 cents per hour per step, step raises being granted every 6 months to those not dismissed, demoted, or transferred, on theory that productivity increased with time on job, returning veteran was entitled to rate he would have earned if he had stayed at job and received step raises. Alfarone v Fairchild Stratos Corp. (1963, ED NY) 218 F Supp 446, 53 BNA LRRM 2634, 47 CCH LC ¶ 18361

Employer violated predecessor to statute by reinstating returning veteran to his former position without granting step pay increases which veteran would have accrued under employer's salary increment plan under which pay raises were predicated on length of service. Adams v Indiana, Dep't of Mental Health, Richmond State Hospital (1983, SD Ind) 113 BNA LRRM 3021, 97 CCH LC ¶ 10015

54. Retroactive increases

Veteran would be penalized if he were denied equal pay for equal work merely because he was in armed forces on October 10, 1943, where retroactive pay increase was granted to employees by agreement between union and company under which eligibility or participation was limited to those employees in employ of company on October 10, 1943, and where veteran had been employee of company and entered armed services prior to October 10, 1943; it would be patent discrimination not to give retroactive wage increase to re-employed veterans. Flynn v Ward Leonard Electric Co. (1949, DC NY) 84 F Supp 399, 24 BNA LRRM 2245

Employees absent in military service have status only of employees on leave of absence and where retroactive pay increase is made effective only as to employees actively engaged in work on specified date and there is no showing that such date is fixed with purpose of discriminating against veteran, veteran is not entitled to retroactive pay. Flynn v Ward Leonard Electric Co. (1950, SD NY) 18 CCH LC ¶ 65710

Under agreement between union and company, entered into while veteran was absent in military service, wherein it was provided that all employees on active payroll as of May 16, 1943, were entitled to receive retroactive pay increases, veteran was not entitled to retroactive pay increase since agreement had equal application to all nonveterans employees of company who were on leave of absence and not on active payroll as of May 26, 1943. Zagaiski v Carboloy Co. (1950, DC Mich) 88 F Supp 162

G. Other Particular Matters

55. Job assignments

Opportunity to retain distinct job assignment is “incident or advantage of employment” guaranteed to reservists under predecessor to statute. Hawes v General Motors Corp. (1979, ND Ohio) 102 BNA LRRM 3041, 87 CCH LC ¶ 11713

56. Overtime

Employer was required to grant employee overtime work opportunities he missed by reason of his reserve service or pay him for unworked overtime since collective bargaining agreement to which employer was party provided that overtime opportunities would be distributed equally among employees. Carney v Cummins Engine Co. (1979, CA7 Ind) 602 F.2d 763, 102 BNA LRRM 2820, 86 CCH LC ¶ 11438, cert den (1980) 444 US 1073, 62 L Ed 2d 754, 100 S Ct 1018, 103 BNA LRRM 2668, 87 CCH LC ¶ 11824

Former subsec. (c)(3) of 50 USCS Appx § 459 entitled a reservist, who could not take advantage of overtime work because of his military duty, to be equated with a person who was able to work overtime and where the latter person drew overtime pay, unless he voluntarily selected not to exercise the opportunity, the reservist could not be marked up for overtime if he could not take advantage of it because of his military duty. Lott v Goodyear Aerospace Corp. (1975, ND Ohio) 395 F Supp 866, 89 BNA LRRM 3025, 77 CCH LC ¶ 10985

Right to work overtime and collect overtime premium pay may be characterized as entitlement contingent upon employee’s fulfilling bona fide work requirement rather than right which vests in employee by his continued association with employer; therefore, company does
not violate predecessor to statute by charging reservist's overtime equalization record for overtime that employee was unable to accept because of duty since collective bargaining agreement did not guarantee absolute opportunity to work overtime and collect overtime compensation but instead conditioned opportunity on employee's acceptance of overtime work opportunity at time it was offered; if company were required to refrain from charging employee record with opportunities to be offered during period of duty, employee whose attendance at drills caused him to decline overtime work would be given preferential treatment contrary to legislative purpose of insuring that all workers received equal treatment. Breeding v TRW, Inc., Ross Gear Div. (1979, MD Tenn) 477 F Supp 1177, 102 BNA LRRM 2542, 87 CCH LC ¶ 11597, 51 ALR Fed 882, affd without op (1981, CA6 Tenn) 665 F.2d 1043, 92 CCH LC ¶ 12972 and (criticized in Rogers v City of San Antonio (2002, WD Tex) 211 F Supp 2d 829, 170 BNA LRRM 2108, 83 CCH EPD ¶ 41209)

57. Schedules and hours

Employer is not required by to make work scheduling accommodations for employee-reservists not made for other employees; predecessor to statute was enacted for a limited purpose of protecting employee-reservist against discriminations in discharge and promotion motivated solely by reserve status; Congress did not intend that reservists be entitled to all "incidents or advantages of employment" accorded during their absence to working employees conditioned upon actual performance on job. Monroe v Standard Oil Co. (1981) 452 US 549, 69 L Ed 2d 226, 101 S Ct 2510, 107 BNA LRRM 2633, 91 CCH LC ¶ 12796 (superseded by statute as stated in Hansen v Town of Irondequoit (1995, WD NY) 896 F Supp 110, 150 BNA LRRM 2508, 67 CCH EPD ¶ 43881, 130 CCH LC ¶ 11399) and (superseded by statute as stated in Gummo v Village of Depew (1996, CA2 NY) 75 F.3d 98, 151 BNA LRRM 2225, 67 CCH EPD ¶ 43880, 131 CCH LC ¶ 11477) and (superseded by statute as stated in Newport v Ford Motor Co. (1996, CA8 Mo) 91 F.3d 1164, 152 BNA LRRM 2961, 132 CCH LC ¶ 11634) and (superseded by statute as stated in Key v Hearst Corp. (1997, SD NY) 963 F Supp 283, 156 BNA LRRM 2509, 71 CCH EPD ¶ 44819, 134 CCH LC ¶ 10014) and (superseded by statute as stated in Sheehan v Dep't of the Navy (2001, CA FC) 240 F.3d 1009, 166 BNA LRRM 2526) and (superseded by statute as stated in Rogers v City of San Antonio (2002, WD Tex) 211 F Supp 2d 829, 170 BNA LRRM 2108, 83 CCH EPD ¶ 41209) and (superseded by statute as stated in Rogers v City of San Antonio (2003, WD Tex) 172 BNA LRRM 2240)

Collective bargaining agreement which guaranteed 40 hours of work per week on condition that employee was not absent or tardy required employer to accommodate employee and provide guaranteed 40-hour work-week undiminished by employee's reserve obligation where employer concedes that it can accommodate employee's duty schedule. West v Safeway Stores, Inc. (1980, CA5 Tex) 609 F.2d 147, 103 BNA LRRM 2150, 87 CCH LC ¶ 11755

Employee has right to be scheduled to work 40 hours per week as incident or advantage of employment within meaning of predecessor to statute but statute does not impose on employer affirmative duty to accommodate employee's military reserve obligation by bestowing upon him rights and privileges not generally afforded fellow employees; employer need not alter rules to permit employee to work 40 hour week where there is no unconditional right to work 40 hours per week; predecessor to statute merely required that reservists be treated equally with fellow employees. Monroe v Standard Oil Co. (1980, CA6 Ohio) 613 F.2d 641, 103 BNA LRRM 2317, 87 CCH LC ¶ 11801, affd (1981) 452 US 549, 69 L Ed 2d 226, 101 S Ct 2510, 107 BNA LRRM 2633, 91 CCH LC ¶ 12796 (superseded by statute as stated in Hansen v Town of Irondequoit (1995, WD NY) 896 F Supp 110, 150 BNA LRRM 2508, 67 CCH EPD ¶ 43881, 130 CCH LC ¶ 11399) and (superseded by statute as stated in Gummo v Village of Depew (1996, CA2 NY) 75 F.3d 98, 151 BNA LRRM 2225, 67 CCH EPD ¶ 43880, 131 CCH LC ¶ 11477) and (superseded by statute as stated in Newport v Ford Motor Co. (1996, CA8 Mo) 91 F.3d 1164, 152 BNA LRRM 2961, 132 CCH LC ¶ 11634) and (superseded by statute as stated in Key v Hearst Corp. (1997, SD NY) 963 F Supp 283, 156 BNA LRRM 2509, 71 CCH EPD ¶ 44819, 134 CCH LC ¶ 10014) and (superseded by statute as stated in Sheehan v Dep't of the Navy (2001, CA FC) 240 F.3d 1009, 166 BNA LRRM 2526) and (superseded by statute as stated in Rogers v City of San Antonio (2002, WD Tex) 211 F Supp 2d 829, 170 BNA LRRM 2108, 83 CCH EPD ¶ 41209) and
Directive requiring state correctional officers to change their pass days (days off) to correspond with their military reservist obligations, although it violated collective bargaining agreement, did not violate Act; directive did not reduce plaintiffs' compensation, or affect their promotion or pension rights or opportunity to earn overtime pay, and, although plaintiffs lost privilege of working 24 hours and being paid for 40, directive did not penalize them or treat them differently than other non-reservist correction officers. Rumsey v New York State Dep't of Correctional Servs. (1994, CA2 NY) 19 F.3d 83, 145 BNA LRRM 2780, 128 CCH LC ¶ 11107, cert den (1994) 513 US 875, 130 L Ed 2d 132, 115 S Ct 202, 147 BNA LRRM 2448, 129 CCH LC ¶ 11193 and cert den (1994, US) 147 BNA LRRM 2448

State does not violate predecessor to statute by providing that days off and shift assignments of employees in National Guard and Reserves may be revised to avoid military drills during working hours. Rumsey v New York State Dep't of Correctional Services (1983, ND NY) 569 F Supp 358, 114 BNA LRRM 2045, 98 CCH LC ¶ 10492, vacated on other grounds (1984, ND NY) 580 F Supp 1052

Employer in Kansas City, Kansas had obligation under predecessor to statute to allow employee who was member of Navy reserve time off from work in order to travel to Memphis, Tennessee to attend military reserve inactive training, including time off for traveling to training location in Memphis, notwithstanding contention that statute, although allowing reservists time off from work to travel from place of training to place of employment, did not cover travel to place of training. Sawyer v Swift & Co. (1985, DC Kan) 610 F Supp 38, 118 BNA LRRM 3269, 102 CCH LC ¶ 11394, revd on other grounds (1988, CA10 Kan) 836 F.2d 1257, 127 BNA LRRM 2274, 108 CCH LC ¶ 10274

II. WAIVER OF REEMPLOYMENT RIGHTS

58. Generally

For veteran to waive re-employment rights it must be shown that he aware of rights he gave up and that he fully intended to abandon them. Loeb v Kivo (1948, CA2 NY) 169 F.2d 346, 22 BNA LRRM 2392, 15 CCH LC ¶ 64678, cert den (1948) 335 US 891, 93 L Ed 429, 69 S Ct 246, 23 BNA LRRM 2137

Waiver by veteran of his or her statutory rights under former Veterans' Reemployment Rights Act must be clearly and unequivocally indicated. Ryan v Rush-Presbyterian-St. Luke's Medical Ctr. (1994, CA7 Ill) 15 F.3d 697, 145 BNA LRRM 2401, 127 CCH LC ¶ 10989

Waiver of re-employment rights must be clearly established. Niemiec v Seattle Rainier Baseball Club, Inc. (1946, DC Wash) 67 F Supp 705, 18 BNA LRRM 2189, 11 CCH LC ¶ 63258

It is rule of law that when someone is held to have waived legal rights, waiver must be clearly established and preparer of contract waiving benefits of re-employment rights must specifically and in letters large enough not to be overlooked by veteran state that he is waiving statutory rights. Niemiec v Seattle Rainier Baseball Club, Inc. (1946, DC Wash) 67 F Supp 705, 18 BNA LRRM 2189, 11 CCH LC ¶ 63258

59. Acceptance of different position

Veteran does not disqualify himself by accepting other employment after being refused reinstatement in his preservice position. Loeb v Kivo (1948, CA2 NY) 169 F.2d 346, 22 BNA LRRM 2392, 15 CCH LC ¶ 64678, cert den (1948) 335 US 891, 93 L Ed 429, 69 S Ct 246, 23 BNA LRRM 2137

Plaintiff did not waive right to reinstatement by employer to pre-military service position pursuant to former 50 Appx USCS § 459(b) by failing to specify particular position in application or by accepting another job with same employer and remaining for seven months during which time plaintiff's father-in-law held position, in light of plaintiff's repeated requests for position, employer's rejection of requests, and employer's breach of written agreement to reinstate plaintiff.
O'Mara v Petersen Sand & Gravel Co. (1974, CA7 Ill) 498 F.2d 896, 86 BNA LRRM 2702, 74 CCH LC ¶ 10107

Under predecessor to statute, veteran waived rights where he was employed in defendant's temporary shipbuilding division upon entrance in service and, upon return, accepted position in permanent business organization of defendant where he worked for three years. Walsh v Chicago Bridge & Iron Co. (1949, DC Ill) 90 F Supp 322 (superseded by statute as stated in Stevens v Tennessee Valley Auth. (1983, CA6 Tenn) 712 F.2d 1047, 118 BNA LRRM 3201)

Party who claimed benefits under former 50 Appx USCS § 459(b)-(h) never sought to return to position he had when inducted into military service, but returned under separate and distinct contract of employment to perform work of distinctly different nature at very substantial increase in pay was not entitled to benefits when discharged from his employment within one year of his return from service. Rix v Turnbull-Novak, Inc. (1958, DC Mo) 159 F Supp 199, 42 BNA LRRM 2416, 34 CCH LC ¶ 71542, affd (1958, CA8 Mo) 260 F.2d 785, 43 BNA LRRM 2116, 36 CCH LC ¶ 65009

Veteran's acceptance of position other than that which he held prior to induction did not constitute waiver of his right to be restored to original employment, where evidence did not support conclusion that veteran was aware of rights and fully intended to surrender them. Rix v Turnbull-Novak, Inc. (1958, CA8 Mo) 260 F.2d 785, 43 BNA LRRM 2116, 36 CCH LC ¶ 65009

60. Application for different position

Assuming that veteran is entitled to re-employment in some position, veteran does not necessarily lose all rights merely because, in applying for re-employment, he couples such application with demand for higher position he erroneously believes to be his due. Trusted Funds, Inc. v Dacey (1947, CA1 Mass) 160 F.2d 413, 19 BNA LRRM 2465, 12 CCH LC ¶ 63639

Although veteran, in applying for re-employment, requests higher position in employer's organization than one to which he is entitled veteran does not lose re-employment rights where employer is not misled in any way or prejudiced in its defense, especially where veteran erroneously believed that higher position was due him. Boston & M. R. R. v David (1948, CA1 NH) 167 F.2d 722, 22 BNA LRRM 2133, 14 CCH LC ¶ 64508

Veteran did not waive rights to prior position by negotiating contract for higher position; veteran waived no rights where he entered into contract with employer granting him higher position of assistant manager of branch architectural firm at $700 per month rather than take pre-service position of inspector at $500 per month and where, within 45 days after re-employment at higher position, owner of firm died and branch at which veteran had become assistant manager was sold. Rix v Turnbull-Novak, Inc. (1958, CA8 Mo) 260 F.2d 785, 43 BNA LRRM 2116, 36 CCH LC ¶ 65009

61. Arbitration

Veteran waives cause of action under former Act by consenting to arbitration of re-employment rights under contract providing that there should be no appeal from arbitrator's decision and that arbitrator's decision should be final and binding on union, members, employees, and employer. Wright v Ford Motor Co. (1961, ED Mich) 196 F Supp 538, 48 BNA LRRM 2920, 43 CCH LC ¶ 17163

62. Delay

Fact that employer heard nothing from veteran between time he declined re-employment with less pay and less seniority than that which he would have had he remained in employer's employ during war, which was October 25, 1945, to August, 1946, when employer received letter from office of United States Attorney, did not amount to abandonment or waiver of veteran's employment rights. Thompson v Chesapeake & O. R. Co. (1947, DC W Va) 76 F Supp 304, 21 BNA LRRM 2358, 14 CCH LC ¶ 64367
Mere delay which is not accompanied by conduct tantamount to abandonment of rights created by predecessor to statute does not defeat veteran's rights. Coon v Liebmann Breweries, Inc. (1949, DC NJ) 86 F Supp 333, 24 BNA LRRM 2514, 17 CCH LC ¶ 65330

63. Refusal of position offered
Veteran did not waive rights by quitting in protest against employer's insistence on treating employee as "new-hire" upon re-employment. Hanna v American Motors Corp. (1977, CA7 Wis) 557 F.2d 118, 95 BNA LRRM 2806, 14 CCH EPD ¶ 7657, 81 CCH LC ¶ 13293

Plaintiff was not required to accept position that did not approximate former position as apprentice electrician in pay, status, and seniority and his refusal to accept position that did not fully comply with predecessor to statute should not be held against his reemployment rights. Hembree v Georgia Power Co. (1981, CA5 Ga) 637 F.2d 423, 106 BNA LRRM 2535, 90 CCH LC ¶ 12579

Employee does not waive her rights under former Veterans' Reemployment Rights Act by refusing to accept inferior position. Ryan v Rush-Presbyterian-St. Luke's Medical Ctr. (1994, CA7 Ill) 15 F.3d 697, 145 BNA LRRM 2401, 127 CCH LC ¶ 10989

Navy reservist did not waive her rights under former VRRA by refusing to accept inferior position when she returned after leave for active duty. Ryan v Rush-Presbyterian-St. Luke's Medical Ctr. (1994, CA7 Ill) 15 F.3d 697, 145 BNA LRRM 2401, 127 CCH LC ¶ 10989

Veteran did not waive re-employment rights where, prior to entering service, he had been on salary basis and following discharge salary position was no longer in existence, where employer offered nonsalaried position upon condition that veteran fully acknowledge that employer was performing his full duty toward him, and where veteran refused to accept such offer, being fearful that character of waiver which was required of him would interfere with his rights as returning veteran. Burkhardt v Crucible Steel Co. (1946, DC NJ) 68 F Supp 802, 18 BNA LRRM 2423, 11 CCH LC ¶ 63385

Veteran's refusal to accept temporary position not approximating premilitary job was not waiver of rights to re-employment. Chaltry v Ollie's Idea, Inc. (1982, WD Mich) 546 F Supp 44, 113 BNA LRRM 3702, 95 CCH LC ¶ 13749, 63 ALR Fed 120

Veteran waived re-employment rights where, within 3 months following veteran's discharge, defendant offered to immediately restore him to position which he had before entering service and where veteran refuses to accept such position. Tsang v Kan (1947) 78 Cal App 2d 275, 177 P2d 630, 20 BNA LRRM 2348

64. Miscellaneous
Veteran was not barred from reemployment rights where veteran sought reinstatement to his prewar job, manager of firm represented that company had no obligation to rehire him in view of changed circumstances of business and where, on this basis, veteran was induced to sign contract; whether fraudulently or mistakenly misled, veteran was not barred from relief. Loeb v Kivo (1948, CA2 NY) 169 F.2d 346, 22 BNA LRRM 2392, 15 CCH LC ¶ 64678, cert den (1948) 335 US 891, 93 L Ed 429, 69 S Ct 246, 23 BNA LRRM 2137

III. DISCHARGE OF REINSTATED EMPLOYEE
A. In General

65. Generally
Successor in interest to original employer of veteran should be able to discharge veteran without cause since Congress never intended that rights granted veteran should extend to purchaser of industrial property by whom veteran had never been in fact employed especially where veteran waives rights of re-employment under terms of contract with such successor in interest. Hastings v Reynolds Metals Co. (1947, CA7 Ill) 165 F.2d 484, 21 BNA LRRM 2049, 13 CCH LC ¶ 64117
Offer on part of employer to reinstate veteran who had been employed since release from service and subsequently discharged was not admission that discharge was not for cause. Saccavino v Churchward & Co. (1946, DC Conn) 11 CCH LC ¶ 63336

District Court found that term "period of service" in 38 USCS § 4316(c), refers to consecutive days of duty before reemployment; statute provides extra protection from discharge for those who are absent from work for extended, isolated periods of time; employee's claim under § 4316(c) in instant case was dismissed. Warren v IBM (2005, SD NY) 358 F Supp 2d 301

66. Construction of statute, generally

Congress did not intend that availability of man with greater skills who could turn out more work would justify discharging returning veteran within one year. Paredez v Pillsbury Co. (1966, CD Cal) 259 F Supp 493, 63 BNA LRRM 2322, 54 CCH LC ¶ 11582

67. -Discharge

Word "discharge", as used in predecessor statute, normally means termination of employment relationship or loss of position, and demotion without cause is tantamount to discharge. Fishgold v Sullivan Drydock & Repair Corp. (1946) 328 US 275, 90 L Ed 1230, 66 SCt 1105, 18 BNA LRRM 2075, 11 CCH LC ¶ 51232, 167 ALR 110

"Discharge" presumptively means that veteran's employer no longer needs or desires veteran's services and that all contractual relations between veteran and his employer are at end. Droste v Nash-Kelvinator Corp. (1946, DC Mich) 64 F Supp 716, 17 BNA LRRM 760, 10 CCH LC ¶ 62947

Plaintiff who upon return from military service continued in employ of corporation in same position and at same salary could not complain that animosity encountered upon his return, forcing him to resign, was violation of his rights under former 50 USCS Appx § 459(b)-(h). Koury v Bonnie-Frances Lingerie Co. (1965, La App 4th Cir) 175 So 2d 372

68. -Cause

"Cause" need not be legal cause but can be such cause as fair-minded person may act upon and where dismissal is not arbitrarily taken with purpose of avoiding statute, it is not "without cause". Keserich v Carnegie--Illinois Steel Corp. (1947, CA7 Ind) 163 F.2d 889, 20 BNA LRRM 2679, 13 CCH LC ¶ 64048

Word "cause" does not mean "legal cause"; cause justifying discharge of re-employed veteran need not necessarily be cause which would furnish employee with cause of action against employer because of dismissal or discharge but neither may the cause be mere excuse or arbitrary action on part of employer to avoid impact of statute and test which must be applied is whether or not discharge by employer is "reasonable one within the circumstances." Kemp v John Chatillon & Sons, Inc. (1948, CA3 NJ) 169 F.2d 203, 22 BNA LRRM 2289, 15 CCH LC ¶ 64624

"Cause" contemplates something more than sheer arbitrariness and it must be based upon reason; ground for discharge that does not violate any law when applied to unprotected employee, such as fact that employer may simply dislike employee, does not constitute sufficient cause under statute and employer must go further than asserting his subjective feelings and must be prepared to show that veteran has been discharged for some cause based upon some objective standards. Carter v United States (1968, App DC) 132 US App DC 303, 407 F.2d 1238, 9 ALR Fed 205

To hold that term "cause" cannot result from change in employer's situation, as in complete abandonment of type of work in which employee had been engaged, would be to give term too narrow meaning. Bernstein v Mincow (1946, SD NY) 11 CCH LC ¶ 63441

Words "without cause" mean absence of any legal ground or excuse in performance of person's work, which would warrant his being laid off; it implies that only "cause" which would warrant discharge would be lack of skill, competence, diligence, or loyalty in performance of
Term "cause" does not have to be legal cause but rather such cause as fair-minded person might act upon and where discharge is not arbitrary it is not "without cause". Hoyer v United Dressed Beef Co. (1946, DC Cal) 67 F Supp 730, 18 BNA LRRM 2180, 11 CCH LC ¶ 63271

Discharge, if not arbitrary with purpose of avoiding statute, is not "without cause" and need not be legal cause. Sundra v St. Louis American League Baseball Club (1949, DC Mo) 87 F Supp 471, 25 BNA LRRM 2208

"Cause" does not mean legal cause but such cause as fair-minded person may act upon when not arbitrarily taken as excuse to avoid statute. Cavanagh v Pinkerton's Nat'l Detective Agency, Inc. (1961, DC Mass) 198 F Supp 50, 48 BNA LRRM 3126, 43 CCH LC ¶ 17185

Although "cause" as used in 38 USCS § 4316(c) is not defined in Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), to be consistent with USERRA's stated purpose to encourage service in armed services by eliminating or minimizing disadvantages members of armed services experience in their civilian careers and employment as result of their military services, 38 USCS § 4301(a)(1), term "cause" must be construed and applied narrowly. Duarte v Agilent Techs., Inc. (2005, DC Colo) 366 F Supp 2d 1039, 176 BNA LRRM 3226, 150 CCH LC ¶ 10467

Requirement in former 38 USCS § 2021 that returning veteran not be discharged "without cause" does not preclude agency from demoting individual who has been promoted to supervisory or managerial position for not satisfactorily completing probationary period under 5 USCS § 3321; cause need not be legal cause, but may not be mere excuse or arbitrary action to avoid statutory restoration requirement. Hawkins v Department of Treasury (1992, MSPB) 52 MSPR 686

69. Application of statute, generally

Veteran was protected under former 50 Appx USCS § 459(b)-(h) from discharge only for one year after restoration, and after expiration of that period there was nothing which prevented employer from discharging him, with or without cause. Travis v Schwartz Mfg. Co. (1954, CA7 Wis) 216 F.2d 448, 35 BNA LRRM 2191, 26 CCH LC ¶ 68775

Veteran’s right to seniority by virtue of Selective Training and Service Act for his restoration to former employment without loss of seniority and protecting him from discharge without cause within one year after such restoration did not extend beyond expiration of first year of his re-employment. Zaversnik v Union P. R. Co. (1949, DC Wyo) 95 F Supp 209

70. -Demotion

Guarantee of predecessor to statute that discharged veteran returning to position of former employment not be discharged from such position without cause within one year after restoration is applicable to demotions. Fishgold v Sullivan Drydock & Repair Corp. (1946) 328 US 275, 90 L Ed 1230, 66 S Ct 1105, 18 BNA LRRM 2075, 11 CCH LC ¶ 51232, 167 ALR 110

It is crystal clear that demotion is equivalent of discharge and reasonable interpretation of effect of transferring person to position paying less money is that it is demotion. Foor v Torrington Co. (1948, CA7 Ind) 170 F.2d 487, 23 BNA LRRM 2100, 15 CCH LC ¶ 64823

Unless employer is justified in firing re-employed veteran, it is not justified in demoting him in order to replace him with somewhat better workmen during one year period. Skiffington v Sage-Allen & Co. (1948, DC Conn) 15 CCH LC ¶ 64625

Demotion without cause is tantamount to discharge. Paredez v Pillsbury Co. (1966, CA 10) 259 F Supp 493, 63 BNA LRRM 2322, 54 CCH LC ¶ 11582

71. -Layoff

Provisions of Selective Training and Service Act of 1940 for return of discharged veteran to his former civilian employment without loss of seniority and with immunity from discharge therefrom without cause for period of 12 months did not protect him from layoffs while
non-veterans with higher seniority were continued at work. Fishgold v Sullivan Drydock & Repair Corp. (1946) 328 US 275, 90 L Ed 1230, 66 S Ct 1105, 18 BNA LRRM 2075, 11 CCH LC ¶ 51232, 167 ALR 110

Guaranty of predecessor to statute that discharged veteran returning to his position in his former employment "shall not be discharged from such position without cause within one year after such restoration" covers demotions but does not protect veteran from layoffs. Fishgold v Sullivan Drydock & Repair Corp. (1946) 328 US 275, 90 L Ed 1230, 66 S Ct 1105, 18 BNA LRRM 2075, 11 CCH LC ¶ 51232, 167 ALR 110

Furlough for more than thirty days without pay, of government employee with veteran's preference, was within provision of predecessor to statute that trainee restored to his old position shall not be discharged therefrom without cause within one year after such prescribing that trainee restored to his old position not be discharged therefrom without cause within one year after such restoration. Hilton v Sullivan (1948) 334 US 323, 92 L Ed 1416, 68 S Ct 1020, 15 CCH LC ¶ 64557

Returning veteran laid off by operation of seniority system and put on waiting list for reassignment was not considered to have been discharged. Ford Motor Co. v Huffman (1953) 345 US 330, 97 L Ed 1048, 73 S Ct 681, 31 BNA LRRM 2548, 23 CCH LC ¶ 67505; Combustion Engineering Co. v Miller (1948, CA6 Tenn) 165 F.2d 372, 21 BNA LRRM 2224, 14 CCH LC ¶ 64224; Droste v Nash-Kelvinator Corp. (1946, DC Mich) 64 F Supp 716, 17 BNA LRRM 760, 10 CCH LC ¶ 62947; Lord Mfg. Co. v Nemenz (1946, DC Pa) 65 F Supp 711, 18 BNA LRRM 2011, 11 CCH LC ¶ 63122

Veterans employed in positions which were temporary are excluded from benefits which they seek to enjoy, and employer was within its rights in laying them off within year after their reinstatement because of changing circumstances due to termination of war production. Gualtieri v Sperry Gyroscope Co. (1946, DC NY) 67 F Supp 219, 18 BNA LRRM 2202, 11 CCH LC ¶ 63282

72. -Transfer

Transfer is demotion equivalent to discharge and is without cause where, although transfer was made in good faith for purpose of assisting employer in meeting production demands, it is not prompted by any behavior on part of veteran and is not result of change of economic situation making it unreasonable to retain veteran in former position. Foor v Torrington Co. (1948, CA7 Ind) 170 F.2d 487, 23 BNA LRRM 2100, 15 CCH LC ¶ 64823

Veteran's resignation is "equivalent to voluntary relinquishment of his status as an employee" rather than discharge, where veteran's employer attempts to transfer him to another one of employer's offices into similar position which would not have affected veteran's status, seniority, or pay and which attempted transfer caused veteran to resign. Cohen v Schaulsky (1947, DC NJ) 13 CCH LC ¶ 64026

Resignation induced by transfer to position of reduced status, when such transfer is made or attempted without justification, is equivalent to discharge. Skiffington v Sage-Allen & Co. (1948, DC Conn) 15 CCH LC ¶ 64625

73. -Discharge pursuant to collective bargaining agreement

Discharge of veteran for failure to join union in plant subject to closed-shop provisions of contract between union and employer was not discharged "without cause"; if employer had insisted upon retaining veteran in employment it would have breached terms of contract with union and, moreover, would have run substantial risk of disrupting labor relations which might reasonably have precipitated strike. Kemp v John Chatillon & Sons, Inc. (1948, CA3 NJ) 169 F.2d 203, 22 BNA LRRM 2289, 15 CCH LC ¶ 64624

Employer was not liable in damages for discharging veterans 30 days after restoration to former jobs on ground that they were not members of union, which had entered into closed shop agreement with employer pending election to determine representative, where union had
represented that it represents majority of employees. Iob v Los Angeles Brewing Co. (1950, CA9 Cal) 183 F.2d 398, 26 BNA LRRM 2401, 18 CCH LC ¶ 65869

Discharge pursuant to terms of collective bargaining agreement was not without cause where agreement provided that any brakeman who had actually worked as brakeman for period of time less than 528 days must be examined for promotion to conductor and that any employee who refused to take any of 3 such examinations must be discharged and where veteran fell within terms of agreement and refused to take examination; labor agreement did not conflict with veteran's rights where such agreement was uniformly effective as to all employees whether actually at work, in military service, or on furlough or leave of absence and where such agreement was entered into as result of normal bargaining process, in good faith, and without intention or purpose to discriminate against veterans. Fries v Pennsylvania R. Co. (1952, CA7 Ind) 195 F.2d 445, 29 BNA LRRM 2689, 21 CCH LC ¶ 66853

Employer complies with Act where returned veteran, formerly nonunion truck driver, refused to accept position as nonunion truck driver, in another town where job where he worked had been completed, and where he refused to join union to qualify for other work employer had available. Bozar v Central Pennsylvania Quarry, Stripping & Constr. Co. (1947, DC Pa) 73 F Supp 803, 20 BNA LRRM 2663, 13 CCH LC ¶ 64077

Refusal to join union with whom veteran's employer had closed-shop contract was cause for discharge even where veteran was member or probationary member of different union prior to entering service, which union was succeeded by another union after veteran's discharge from service and re-employment. Jensen v Baker (1949, SD Cal) 16 CCH LC ¶ 65264

74. -Seniority rights

One year period of protection against discharge under predecessor statute is also applicable to seniority rights. Trailmobile Co. v Whirls (1947) 331 US 40, 91 L Ed 1328, 67 S Ct 982, 19 BNA LRRM 2531, 12 CCH LC ¶ 51247

Expiration of one year of re-employment does not terminate veteran's rights to seniority to which he is entitled by virtue of statutory treatment of him as though he had remained continuously in civilian employment and does not open door to discrimination against him as veteran; seniority is, of course, subject to advantages and limitations applicable to other employees. Oakley v Louisville & N. R. Co. (1949) 338 US 278, 94 L Ed 87, 70 S Ct 119, 25 BNA LRRM 2038, 17 CCH LC ¶ 65409

Veteran's seniority status under predecessor to statute, providing that he shall be restored to his former position "without loss of seniority," continues beyond first year after such restoration, within which employer is prohibited by same provision from discharging him without cause. Accardi v Pennsylvania R. Co. (1966) 383 US 225, 15 L Ed 2d 717, 86 S Ct 768, 1 EBC 1016, 61 BNA LRRM 2385, 53 CCH LC ¶ 11073

75. -Miscellaneous

In action to enforce re-employment rights, courts have no power to "freeze contractual rights" of parties or veterans to their jobs after statutory one year period. Spearmon v Thompson (1949, CA8 Ark) 173 F.2d 452, 23 BNA LRRM 2472, 16 CCH LC ¶ 65028

Discharge is for cause where veteran is permanently laid off and where employer continues to respect veteran's seniority rights and stands ready to recall veteran should veteran's position reopen. Maloney v Chicago, B. & Q. R. Co. (1947, DC Mo) 72 F Supp 124, 20 BNA LRRM 2171, 12 CCH LC ¶ 63834; Mikczynski v North American Aviation, Inc. (1947, SD Cal) 12 CCH LC ¶ 63814

Veteran has right of action where he was laid off 3 years after re-employment because he was not restored to proper seniority and re-employed despite one year limitation on protections provided by statute. Rader v Northwest Exterminating Co. (1954, DC NY) 120 F Supp 244, 34 BNA LRRM 2001, 25 CCH LC ¶ 68333

If position of government employee who was restored was abolished during one-year period after his return to duty civil service commission, under former 50 USCS Appx § 459(b)-(h) and

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applicable regulations, must require, if necessary in order to make reasonable offer of assignment to continuing position, that preference eligibles in subgroup having equal or greater retention be displaced.  
(1949) 41 Op Atty Gen 16

76. Waiver of rights
Veteran waived rights under predecessor to statute and re-employment rights were to be governed by terms of contract where veteran, who had been plant manager, director and president of father's corporation prior to entering service, which corporation was sold while veteran was in service, contracted with purchaser of father's corporation for employment at salary of $500 per month and where veteran was discharged apparently without cause after 45 days of re-employment under terms of employment contract which provided that either party could terminate contract at any time without cause.  
Hastings v Reynolds Metals Co. (1947, CA7 Ill) 165 F.2d 484, 21 BNA LRRM 2049, 13 CCH LC ¶ 64117

Baseball player veteran, discharged by employer after one month of spring training on ground that he was unable to comply with and meet accepted standards of performance, professional skill, proficiency, and stamina required of player on baseball club, did not waive rights by signing contract, upon return from military service, which provided "this contract may be terminated at any time by the Club or by any assignee by giving official release notice to the player"; although veteran could waive benefits of statute by entering into contract, veteran had to sign contract as it was presented to him or face choice of playing no baseball at all and baseball club had, under rules of organized baseball, no choice but to tender him contract as it was written or face fine and suspension from baseball league and, contrary to termination provision of contract, contract also provided that its terms were subject to legislation respecting military service. 
Niemiec v Seattle Rainier Baseball Club, Inc. (1946, DC Wash) 67 F Supp 705, 18 BNA LRRM 2189, 11 CCH LC ¶ 63258

B. Grounds For Discharge

1. Conduct of Employee

77. Generally
Ultimate criterion by which court judges whether employer discharged veteran for cause is same one generally applied where employment contract is terminated by employer because of employee misconduct and reasonableness of such discharge is determined by asking whether it was fair to discharge veteran because of his conduct and by asking whether veteran had notice, express or fairly implied, that such conduct would be grounds for discharge.  

Words "without cause" refer to absence of any legal ground or excuse in performance of veteran's work which would warrant his being laid off and only "cause" which would warrant discharge of veteran would be lack of skill, competence, diligence or loyalty in performance of one's duties.  
Hoyer v United Dressed Beef Co. (1946, DC Cal) 67 F Supp 730, 18 BNA LRRM 2180, 11 CCH LC ¶ 63271

No different standard of conduct is prescribed for veteran than is prescribed for nonveteran and veteran's rights to retain former position for period of one year after restoration is based upon compliance with reasonable and ordinarily accepted standards of personal conduct and performance of duty expected of all employees.  
Manowitz v Einhorn Wholesale Grocery (1946, DC NY) 68 F Supp 907, 12 CCH LC ¶ 63507

Veteran may be discharged for cause.  
Pelot v Schott (1947, DC Pa) 70 F Supp 981, 19 BNA LRRM 2481, 12 CCH LC ¶ 63663

"Cause" may result from failure of veteran to comply with reasonable and ordinarily accepted standards of personal conduct in performance of duty expected of all employees.  
Koons v Lebanon Steel Foundry (1950, DC Pa) 92 F Supp 914, 26 BNA LRRM 2633, 18 CCH LC ¶ 66002

"Cause" may result from series of irritations, petty in themselves, but cumulatively "more straw than the reasonable backs of the assistant managers could bear" and petty annoyances.
must not be tested by "artificial piece by piece analysis" but are to be weighed as totality.
Cavanagh v Pinkerton's Nat'l Detective Agency, Inc. (1961, DC Mass) 198 F Supp 50, 48 BNA LRRM 3126, 43 CCH LC ¶ 17185

78. Absences or tardiness

District court did not err in concluding that air carrier's motivation for firing veteran was his own irresponsible conduct, whatever his military status, in refusing to show up for work when scheduled, then making up excuse for his absence, and flaunting his lack of responsibility by getting drunk at firm's Christmas party when he was supposedly too sick to work. Pignato v American Trans Air (1994, CA7 Ill) 14 F.3d 342, 145 BNA LRRM 2269, 127 CCH LC ¶ 11005, cert den (1994) 512 US 1205, 129 L Ed 2d 810, 114 S Ct 2675, 146 BNA LRRM 2640

Unexplained lateness and absence from employment without notifying employer warranted employer in discharging veteran within one year after reinstatement; where veteran, on resuming position, was late every day during first week of employment and during second week appeared for only one work day, he did not need required standards and consequently could be discharged. Manowitz v Einhorn Wholesale Grocery (1946, DC NY) 68 F Supp 907, 12 CCH LC ¶ 63507

Returning veteran's unauthorized absences and frequent tardiness in reporting for work is sufficient cause for discharge. Coley v Buildings Equipment & Supply Corp. (1949, ED Va) 16 CCH LC ¶ 65205

National Guard reservist was not required to allege that he is "still qualified" to perform duties of previous employment in order to state claim under statute, where reservist sought but was denied 2-week leave for military training and then was terminated for unexcused absence from work, because "still qualified" language concerns only those plaintiffs returning from active military service after induction and is not pleading requirement for reservists who are less likely to return disabled. Fann v Modlin (1988, ED NC) 687 F Supp 218, 128 BNA LRRM 2279, 108 CCH LC ¶ 10335

79. Fraudulent employment application

Veteran was discharged for cause where veteran, in application for employment, failed to answer completely questions regarding past employment and in fact intentionally deleted reference to past employment with 2 commercial airlines, one of which had discharged veteran after 5 weeks of employment, and where present employer would not have employed veteran had it known about veteran's past employment record; discharge was in good faith and for cause where veteran intentionally falsified employment application. Larsen v Air California (1970, CD Cal) 313 F Supp 218, 75 BNA LRRM 2156, 62 CCH LC ¶ 10897, affd (1972, CA9 Cal) 459 F.2d 52, 79 BNA LRRM 2767, 67 CCH LC ¶ 12493, cert den (1972) 409 US 895, 34 L Ed 2d 151, 93 S Ct 116, 81 BNA LRRM 2390, 69 CCH LC ¶ 13059, reh den (1972) 409 US 1051, 34 L Ed 2d 505, 93 S Ct 511

Employer rebutted presumption that veteran was qualified for position he held at time he was inducted into armed services where returning serviceman had falsified medical records to conceal back condition which would have prevented his original employment and where his physical condition had further deteriorated. Greathouse v Babcock & Wilcox Co. (1974, ND Ohio) 381 F Supp 156, 86 BNA LRRM 3014, 74 CCH LC ¶ 10188

80. Improper time or expense records

Veteran was discharged for cause where timecards of veteran had been tampered with and, despite lack of direct testimony to effect that veteran was guilty party, there was nevertheless strong circumstantial evidence that he was guilty of tampering with his timecards. Dunkerley v Wright Aeronautical Corp. (1946, DC NJ) 12 CCH LC ¶ 63597

Discharge was for cause where re-employed veteran submitted "padded" time and expense reports. Cavanagh v Pinkerton's Nat'l Detective Agency, Inc. (1961, DC Mass) 196 F Supp 50, 48 BNA LRRM 3126, 43 CCH LC ¶ 17185

81. Insubordination
Employer's discharge of veteran re-employed as floor craneman in steel works was for cause where employer cited cumulative effect of veteran's past record of violations of company's safety rules, cited specific infraction by veteran of safety regulation in causing or allowing crane which he was operating to collide with another crane which incident caused great danger to veteran's fellow employees and to employer's property and where employer cited veteran's belligerent attitude in refusing to co-operate in subsequent investigation of such incident conducted by committee of fellow employees. Batton v Tennessee Coal, Iron & R. Co. (1946, ND Ala) 12 CCH LC ¶ 63517

Veteran's insubordination, disobedience to valid orders, and other undesirable character traits affecting job performance were valid reasons for discharging veteran re-employed under predecessor to statute. Basham v Virginia Brewing Co. (1946, DC Va) 66 F Supp 718, 18 BNA LRRM 2217, 11 CCH LC ¶ 63295; Pelot v Schott (1947, DC Pa) 70 F Supp 981, 19 BNA LRRM 2481, 12 CCH LC ¶ 63663; Daniels v Barfield (1948, DC Pa) 77 F Supp 283, 22 BNA LRRM 2029, 14 CCH LC ¶ 64459; Cavanagh v Pinkerton's Nat'l Detective Agency, Inc. (1961, DC Mass) 198 F Supp 50, 48 BNA LRRM 3126, 43 CCH LC ¶ 17185

Discharge was for cause where, although veteran employed by brewery sold and delivered beer in his own territory without complaint, he performed other duties grudgingly and only under threat of discharge, using loud, profane and vulgar language in front of defendant's customers and on one occasion refusing to deliver beer sold by another salesman who was out sick. Basham v Virginia Brewing Co. (1946, DC Va) 66 F Supp 718, 18 BNA LRRM 2217, 11 CCH LC ¶ 63295

Veteran was discharged with cause where he had refused to follow orders, had been impertinent and disrespectful to superiors, had caused damage to machines at work by carelessness and neglect and where his general attitude and demeanor was one of dissatisfaction which resulted in detrimental effect upon morale of other employees. Ronzo v Allied Latex Corp. (1947, DC NJ) 12 CCH LC ¶ 63807

Willful disobedience to employer's orders and directions, especially where it causes accident or damage, is ground for discharge with cause; where veteran disobeyed instructions given him as to manner in which he should drive truck which was assigned to him with result that second truck belonging to employer was damaged, discharge was for reasonable cause. Pelot v Schott (1947, DC Pa) 70 F Supp 981, 19 BNA LRRM 2481, 12 CCH LC ¶ 63663

Discharge was without good cause where veteran, who had been employed by defendant for 7 years prior to entering military service, was discharged for insubordination and basis for charge of insubordination was that veteran was not running his district office properly and had not sent into home office satisfactory amount of remittances and that, when criticized by division manager at open meeting of district managers, veteran defended himself. Pylant v Life Ins. Co. (1948, ND Fla) 15 CCH LC ¶ 64841

Discharge was not without cause where, on number of occasions, veteran had been rude to important customer of employer and where his conduct, throughout his employment, was bad, troublemaking, and discourteous to employer's customers resulting in complaints to employer and union officials of veteran's insubordination. Daniels v Barfield (1948, DC Pa) 77 F Supp 283, 22 BNA LRRM 2029, 14 CCH LC ¶ 64459

Discharge was for cause where it was based upon veteran's lack of loyalty and co-operation, tardiness and unauthorized absences from work, especially in view of probable role of veteran in fomenting unrest among fellow employees regarding new manager. Coley v Buildings Equipment & Supply Corp. (1949, ED Va) 16 CCH LC ¶ 65205

Technician's allegation of discrimination under Vietnam Era Veterans' Readjustment Assistance Act was denied, where technician was suspended and eventually terminated after making numerous complaints concerning his treatment as reservist, because evidence showed only tenuous connection between supervisors' actions and technician's status as reservist, but direct causal relationship between technician's severe insubordination and attitude problem and his justified termination. Britt v Georgia Power Co. (1987, ND Ga) 677 F Supp 1169, 127 BNA LRRM 3192, 109 CCH LC ¶ 10622
82. Intoxication

Drunkeness on job was valid reason for discharge of re-employed veteran under predecessor to statute. Manowitz v Einhorn Wholesale Grocery (1946, DC NY) 68 F Supp 907, 12 CCH LC ¶ 63507

Predecessor to statute did not require employer to continue employment where employee persisted, after repeated warnings, in course of conduct unacceptable to employer and discharge was for cause where on numerous occasions during 4 month period veteran failed to report for work and on numerous other occasions was unable to perform duties due to intoxication which resulted in numerous breakdowns, damage, and destruction of portions of employer's plant and machinery. Desrochers v St. Marys Kraft Corp. (1947, SD Ga) 13 CCH LC ¶ 64068

83. Neglect of duties

Veteran's neglect of assigned duties and refusal to perform assigned tasks were sufficient to justify discharge under predecessor to statute. Keserich v Carnegie--Illinois Steel Corp. (1947, CA7 Ind) 163 F.2d 889, 20 BNA LRRM 2679, 13 CCH LC ¶ 64048; Koons v Lebanon Steel Foundry (1950, DC Pa) 92 F Supp 914, 26 BNA LRRM 2633, 18 CCH LC ¶ 66002

Employer had cause for discharging veteran where veteran, as assistant loading foreman in steel mill yard, was requested to remain in plant during strike but left plant and was unable to return to plant through picket lines; employer had right to look for performance of whatever lawful and reasonable tasks were assigned to nonunion foreman to protect and preserve employer's property. Keserich v Carnegie--Illinois Steel Corp. (1947, CA7 Ind) 163 F.2d 889, 20 BNA LRRM 2679, 13 CCH LC ¶ 64048

Veteran's conduct in employment as welder justified employer's discharge where veteran habitually failed to occupy his time with other tasks when his primary duties were not needed; conduct which consists in failure without proper excuse to attend to reasonable and generally prevailing work demands of management and which thus tends to impair proper discipline and efficiency of place of employment is "cause" for discharge. Saccavino v Churchward & Co. (1946, DC Conn) 11 CCH LC ¶ 63336

Veteran who held position as mixer in employer's plant was discharged for cause where veteran caused damage to machines in employer's plant by carelessness and neglect of work. Ronzo v Allied Latex Corp. (1947, DC NJ) 12 CCH LC ¶ 63807

Discharge was for cause where veteran has been found dozing or sleeping while at controls of airliner carrying passengers and where fellow employees had complained that veteran's attitude and personality created disturbing effect on fellow crew members. Larsen v Air California (1970, CD Cal) 313 F Supp 218, 75 BNA LRRM 2156, 62 CCH LC ¶ 10897, affd (1972, CA9 Cal) 459 F.2d 52, 79 BNA LRRM 2767, 67 CCH LC ¶ 12493, cert den (1972) 409 US 895, 34 L Ed 2d 151, 93 S Ct 116, 81 BNA LRRM 2390, 69 CCH LC ¶ 13059, reh den (1972) 409 US 1051, 34 L Ed 2d 505, 93 S Ct 511

84. Outside activities or employment

Doctor employed by company as medical director was entitled to restoration to his position upon termination of his military service, although he also maintained his own office outside plant where he received his private patients but where he was also required to receive and treat such employees as company might send him. Kay v General Cable Corp. (1944, CA3 NJ) 144 F.2d 653, 15 BNA LRRM 523, 10 CCH LC ¶ 62857

Veteran's off duty activities could constitute cause for discharge under predecessor to statute, where such activities were inimical to employer's interests. Gottschalk v Railway Express Agency, Inc. (1948, CA3 NJ) 166 F.2d 1004, 21 BNA LRRM 2414, 14 CCH LC ¶ 64371

Discharge of employer's attorney was for cause where attorney's spare time activities as attorney for certain city policemen included arranging questionable employment with defendant employer resulting in much adverse publicity for defendant with harmful effect on its relations with other employees since veteran placed himself in position of serving 2 masters and of choosing to use his position and influence with defendant to benefit private client at defendant's expense and
of violating loyalty and duty owed by veteran to defendant. Gottschalk v Railway Express Agency, Inc. (1948, CA3 NJ) 166 F.2d 1004, 21 BNA LRRM 2414, 14 CCH LC ¶ 64371

Veteran discharged from his job with Federal Bureau of Investigation within first year after restoration of job was entitled to trial under former 50 USCS Appx § 459(b)-(h) on question of whether his conduct in engaging in heterosexual petting and sleeping with woman without engaging in sexual intercourse was understood by average employee of bureau as being outside standards of personal conduct to which they must adhere or be discharged. Carter v United States (1968, App DC) 132 US App DC 303, 407 F.2d 1238, 9 ALR Fed 205

Veteran’s servicing of his own peanut-vending machines on evenings and weekends did not interfere with his work during regular hours as drycleaning route salesman and collector and did not justify discharge for cause on ground that his spare time activities conflicted with employer’s interests. Watkins v Glenn (1950, WD Ky) 88 F Supp 70, 50-1 USTC ¶ 9196, 38 AFTR 1392

85. Theft

Discharge was without cause where employer accused veteran of stealing 5 cases of beer during delivery as truck driver and veteran denied theft and refused to pay for missing items; not only was evidence insufficient to justify assumption that veteran had taken beer, but it was significant that employer was willing to retain veteran if he would pay for beer, thus creating presumption that employer would employ dishonest employee who had made restitution but that it would not retain veteran, who insisted on his innocence, even though by paying a comparatively small amount of money he could have been retained in his job. Mannato v Dutch Sales Co. (1948, DC NJ) 14 CCH LC ¶ 64418

Theft by veteran or veteran’s dishonesty was valid cause for discharge under predecessor to statute. Cavanagh v Pinkerton’s Nat'l Detective Agency, Inc. (1961, DC Mass) 198 F Supp 50, 48 BNA LRRM 3126, 43 CCH LC ¶ 17185; Larsen v Air California (1970, CD Cal) 313 F Supp 218, 75 BNA LRRM 2156, 62 CCH LC ¶ 10897, affd (1972, CA9 Cal) 459 F.2d 52, 79 BNA LRRM 2767, 67 CCH LC ¶ 12493, cert den (1972) 409 US 895, 34 L Ed 2d 151, 93 S Ct 116, 81 BNA LRRM 2390, 69 CCH LC ¶ 13059, reh den (1972) 409 US 1051, 34 L Ed 2d 505, 93 S Ct 511

86. Union activities

Employer was justified in discharging veteran and discharge was for cause where veteran disobeyed employer’s orders not to solicit for union membership during working hours. Mitchell v Greeneville Laundry Co. (1947, ED Tenn) 13 CCH LC ¶ 63918

Veteran’s unauthorized activities on behalf of union, on company time and on company property, justified discharge of veteran under predecessor to statute; discharge was for cause where veteran was union member in closed-shop company and, during working hours, solicited fellow employees to join different union disturbing and annoying other employees and interfering with their work, resorting to intimidation and threats. Azzerone v W. B. Coon Co. (1947, DC NY) 73 F Supp 869, 20 BNA LRRM 2613, 13 CCH LC ¶ 64044

87. Miscellaneous

Even if Naval reservist’s reserve status played a role in his termination from employment, there was sufficient other nonpretextual reasons irrelevant to his military status to support termination, where reservist had disciplinary problems predating his joining reserve unit by nearly 2 years and reservist had pattern of absenteeism starting shortly after his employment began. Sawyer v Swift & Co. (1988, CA10 Kan) 836 F.2d 1257, 127 BNA LRRM 2274, 108 CCH LC ¶ 10274

Employer’s discharge of rehired veteran was for just cause where veteran made comments to two coworkers to effect that he would or could sabotage audit reports and work papers in effort to embarrass his supervisor; veteran occupied important position in state government and one demanding trustworthiness. Hillman v Arkansas Highway & Transp. Dept (1994, CA8 Ark) 39 F.3d 197, 147 BNA LRRM 2723, 65 CCH EPD ¶ 43395, 129 CCH LC ¶ 11209

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Veteran, having deserted post of duty because of grievance between himself and employer relating to premium pay and under such circumstances as to cause complete shutdown of his department and slowing down of other departments could be discharged for cause. Koons v Lebanon Steel Foundry (1950, DC Pa) 92 F Supp 914, 26 BNA LRRM 2633, 18 CCH LC ¶ 66002

Detective agency justifiably discharged veteran who padded report of time spent, falsely advised prospective customers that agents had machine guns and leg irons, wrongfully stored property and engaged in hard words and uncomfortable jostling when directed to remove it, talked instead of checking tickets, and was guilty of unseemly conduct and general insubordination. Cavanagh v Pinkerton's Nat'l Detective Agency, Inc. (1961, DC Mass) 198 F Supp 50, 48 BNA LRRM 3126, 43 CCH LC ¶ 17185

Predecessor to statute did not require court to disregard aspects of basic employment relationship which would make continued or renewed employment unreasonable; reservist's dismissal from sheriff's department within six months was for cause where he failed to answer time checks, used profane language, was repeatedly found reading on duty, refused to perform patrol duty without backup unit, failed to wear required uniform, and generally had poor attitude. Henry v Anderson County, Tennessee Office of Sheriff (1981, ED Tenn) 522 F Supp 1112, 108 BNA LRRM 2646, 92 CCH LC ¶ 13105

Probationary police officer states no valid claim under former 38 USCS § 4301(b)(3), even though decision to terminate him was made several days after he informed police department of his order to report for active military duty, because officer had already been placed on "disciplinary hold pending termination" prior to receiving order due to numerous disciplinary violations, and there is no other evidence to support his contention that he was terminated because of his military leave. Kitsakos v Brown (1994, SD NY) 848 F Supp 459, 148 BNA LRRM 2702, 127 CCH LC ¶ 11031

2. Qualifications of Employee

88. Generally

Veteran may become unqualified to perform duties of his previous position where such position has substantially changed due to technological advances. Bryan v Griffin (1948, CA6 Ky) 166 F.2d 748, 21 BNA LRRM 2566, 14 CCH LC ¶ 64397

Veteran's inability, gross inefficiency, or incompetence was valid cause for discharge under predecessor to statute. Sundra v St. Louis American League Baseball Club (1949, DC Mo) 87 F Supp 471, 25 BNA LRRM 2208; Larsen v Air California (1970, CD Cal) 313 F Supp 218, 75 BNA LRRM 2156, 62 CCH LC ¶ 10897, affd (1972, CA9 Cal) 459 F.2d 52, 79 BNA LRRM 2767, 67 CCH LC ¶ 12493, cert den (1972) 409 US 895, 34 L Ed 2d 151, 93 S Ct 116, 81 BNA LRRM 2390, 69 CCH LC ¶ 13059, reh den (1972) 409 US 1051, 34 L Ed 2d 505, 93 S Ct 511

89. Competence

Professional baseball player rehired after military service was discharged without cause where he had not been given adequate opportunity to prove himself upon joining team especially where veteran had been chosen outstanding second baseman of league in 1941 and, since re-employment in 1946, he had played 5 games, 3 of which were won by his team, and veteran had made but one error in those 5 games. Niemiec v Seattle Rainier Baseball Club, Inc. (1946, DC Wash) 67 F Supp 705, 18 BNA LRRM 2189, 11 CCH LC ¶ 63258

Discharge was without cause where veteran, re-employed as hog buyer for defendant meat packer, was discharged for not purchasing as many hogs as he did prior to entering service where such failure was due to shrunken market caused by war conditions and restrictions and not due to lack of skill on part of veteran. Hoyer v United Dressed Beef Co. (1946, DC Cal) 67 F Supp 730, 18 BNA LRRM 2180, 11 CCH LC ¶ 63271

Unless employer was justified in firing veteran, it was not permitted to demote him in order to replace him with better workman; demotion was without cause where veteran was transferred from outside selling job to in-store job at same rate of pay subsequent to one month illness in which veteran's replacement proved to be much better salesman and where veteran's outside
work was reasonably satisfactory with relatively minor complaints. Skiffington v Sage-Allen & Co. (1948, DC Conn) 15 CCH LC ¶ 64625

Baseball player was discharged for cause where his services are terminated one week after opening of regular season after re-employment after 3 years military service; status of professional baseball player is unlike that of other employees because position of player is continuously open to personal competition and business can only live through patronage of public which constantly demands that highest in skill and ability be furnished and therefore player's status as employee is always subject to jeopardy of competition. Juelich v Syracuse Baseball Club, Inc. (1948, ND NY) 15 CCH LC ¶ 64689

Employer was neither responsible nor liable to veteran where veteran's services were not satisfactory to employer and where services of veteran were terminated by mutual agreement between employer and veteran. Braschler v S. H. Kress, Inc. (1948, WD Wash) 15 CCH LC ¶ 64738

Mere fact that veteran lacked confidence to perform duties of position to which he had been promoted did not warrant his complete discharge where veteran, upon re-employment, performed his duties so satisfactorily that he was promoted to higher position from which he was discharged for allowing too many errors; if veteran was not qualified to perform duties of position to which he was promoted, he was at least entitled to hold position for which he was qualified and which he had held prior to his induction into military service. O'Neill v American Stores Co. (1949, DC NJ) 17 CCH LC ¶ 65573

Veteran baseball player's discharge was for cause resulting from his lack of skill in ability to pitch in major leagues and was not mere excuse or arbitrary action to avoid provisions of predecessor to statute where, after 2 years military service, player was re-employed until 2 months after opening season began at which time he was discharged and where there was ample evidence that veteran was not as good as when he was inducted into service. Sundra v St. Louis American League Baseball Club (1949, DC Mo) 87 F Supp 471, 25 BNA LRRM 2208

Employer had just cause to terminate employee under 38 USCS § 2021(b)(1), where employer restored employee to flight engineer position on different aircraft at his request after he returned from active military service, and employer terminated employee on grounds that employee failed to perform at level to qualify as flight engineer, and senior official submitted 2 affidavits outlining reasons for employee's discharge, including employee's failure of aircraft training program and extreme nature of his incompetence. Couture v Evergreen Int'l Airlines (1996, DC Del) 950 F Supp 614, 154 BNA LRRM 2582

90. Efficiency

Veteran was discharged for cause under predecessor to statute where cumulative weight of 15 separate charges against veteran based upon inefficiency outweighed veteran's contention that discharge was due to animosity caused by forced dismissal of employee who had held veteran's position during veteran's absence. Sells v United States (1959) 146 Ct Cl 1 (superseded by statute as stated in Lovshin v Dep't of the Navy (1985, CA) 767 F.2d 826)

Availability of more efficient and skilled worker would not warrant company's removal of employee who had been properly restored to his preinduction job, under former 50 USCS Appx § 459(b)-(h), and employee discharged under such circumstances would be entitled to recover difference between wages he received during year and amount he would have received had he maintained his position for entire year. Paredez v Pillsbury Co. (1966, CD Cal) 259 F Supp 493, 63 BNA LRRM 2322, 54 CCH LC ¶ 11582

91. Physical capacity

Veteran was discharged for cause where employment as stockman was terminated because of physical disability to perform duties and because of unsatisfactory performance of them. Braschler v S. H. Kress, Inc. (1948, WD Wash) 15 CCH LC ¶ 64738

3. Other Particular Matters
92. Change in circumstances of employer

Employer's lack of work was not good cause for discharge of veteran re-employed under predecessor to statute. Combustion Engineering Co. v Miller (1948, CA6 Tenn) 165 F.2d 372, 21 BNA LRRM 2224, 14 CCH LC ¶ 64224

93. -Adverse economic conditions

Adverse economic conditions constituted legitimate basis for discharging re-employed veteran where re-employed veteran was released after strike and change in employer's economic status. Ruesterholtz v Titeflex, Inc. (1948, CA3 NJ) 166 F.2d 335, 21 BNA LRRM 2384, 14 CCH LC ¶ 64360

Adverse economic conditions justified discharge for cause where, during war, 98 percent of total production of employer was devoted to war materials employing more than 4,000 employees in 11 plants and where, since end of war, employer's work force dwindled to 500 persons and only one plant enjoyed any appreciable degree of activity and where, after strike, employer rehired only 225 employees. Ruesterholtz v Titeflex, Inc. (1948, CA3 NJ) 166 F.2d 335, 21 BNA LRRM 2384, 14 CCH LC ¶ 64360

Although cause for discharge could arise from severe adverse economic conditions, which necessitated retrenchment and dissolution in good faith of existing jobs, such was not the case where veteran's job remained after his transfer from it to one of lower-paying category and was filled by female employee having less seniority than veteran despite testimony that employer believed position to which veteran had been restored following discharge and from which he had been transferred was materially changed because woman replacement could not and did not perform all functions which had been required of job previously. Foor v Torrington Co. (1948, CA7 Ind) 170 F.2d 487, 23 BNA LRRM 2100, 15 CCH LC ¶ 64823

Change in circumstances of employer so as to make it impossible or unreasonable for him to continue veteran in employment was sufficient cause for discharging veteran, even though there was no claim that veteran's work had been unsatisfactory; change in circumstances was substantiated where employer averaged $279,00 in years 1943 through 1945 but would average $189,000 in year of veteran's discharge and where employer made profit in 1943 and 1944 but would suffer losses in 1945 and 1946, and where, in 1943, employer operated 18 stores but was, during year of discharge, operating only 9 stores. Bernstein v Mincow (1946, SD NY) 11 CCH LC ¶ 63441

Discharge for cause was justified by economic reasons where employer, which had been organized in 1941 as war emergency project solely for purpose of constructing ships for United States Maritime Commission, such activity being defendant's sole and only activity, ceased building ships; statute did not require employer to seek other work or ship construction or do any other thing in order that it might have or continue to have position in which it could employ veteran. Kent v Todd Houston Shipbuilding Corp. (1947, DC Tex) 72 F Supp 506, 20 BNA LRRM 2273, 13 CCH LC ¶ 63902

Former police chief was terminated for "cause" under 38 USCS § 4316(c)(1) less than one year after returning from active military duty where evidence established that his termination was based on severe budgetary constraints that small village that had employed him was facing. Ferguson v Walker (2005, CD Ill) 397 F Supp 2d 964

94. Miscellaneous

Judgment awarding licensed practical nurse lost wages and prejudgment interest because she was discharged from her employment due to her membership in National Guard was affirmed since sufficient evidence supported finding of improper termination, where before termination, nurse's supervisor expressed view that women had no place in military and that military women were promiscuous or homosexual, supervisor also questioned nurse about her National Guard affiliation and duties, and refused to give nurse explanation for her termination, while subsequent explanations for nurse's termination were either pretextual or post hoc rationalizations of supervisor's action. Weber v Logan County Home for Aged (1986, CA8 ND) 804 F.2d 1058, 123 BNA LRRM 3002
Judicially created requirement for termination for cause under predecessor statute providing that employer give sufficient notice of termination to reservist is satisfied when reservist's 15 minute notice of three week leave of absence was so blatantly detrimental to employer that reservist had to know such notice would trigger employer's subsequent decision to demote or to terminate reservist. Burkart v Post-Browning, Inc. (1988, CA6 Ohio) 859 F.2d 1245, 129 BNA LRRM 2679, 110 CCH LC ¶ 10770 (superseded by statute as stated in Gummo v Village of Depew (1996, CA2 NY) 75 F.3d 98, 151 BNA LRRM 2225, 67 CCH EPD ¶ 43880, 131 CCH LC ¶ 11477)

National Guard reservist was not discharged from employment in violation of predecessor to statute, since reservist was terminated for cause when reservist deliberately disregarded needs of employer by giving only 15 minutes notice prior to impending three-week leave, where reservist could have easily avoided short notice notwithstanding that reservist could not get appointment to see relevant company official where reservist could have informed his immediate supervisor, or sent written notice to official. Burkart v Post-Browning, Inc. (1988, CA6 Ohio) 859 F.2d 1245, 129 BNA LRRM 2679, 110 CCH LC ¶ 10770 (superseded by statute as stated in Gummo v Village of Depew (1996, CA2 NY) 75 F.3d 98, 151 BNA LRRM 2225, 67 CCH EPD ¶ 43880, 131 CCH LC ¶ 11477)

Veteran with active reserve obligation is protected from discharge from employment for attendance at reserve summer camps by statute, and, upon wrongful discharge from employment, is entitled to reinstatement. Bankston v Stratton-Baldwin Co. (1977, SD Ala) 441 F Supp 247, 96 BNA LRRM 3292, 83 CCH LC ¶ 10304

Physician who served as reservist in Desert Shield/Desert Storm is entitled to reinstatement and back wages pursuant to former 38 USCS § 2021(b)(1)(A), where hospital staff had used pretext to suspend physician without pay from his position as administrator of state hospital during his absence, because state failed to carry its burden of showing proper cause for suspending physician. Simmons v Didario (1992, ED Pa) 796 F Supp 166, 144 BNA LRRM 2852

Employer violated 38 USCS §§ 4313(a)(2)(A) and 4316(c)(1) by reinstating reservist's employment upon his return from active duty with same title, pay, and benefits, but with greatly diminished job duties, and then discharging him approximately four months later without proving cause, given that timing of reservist's discharge and decisionmaking process that preceded it were not reasonable under circumstances. Duarte v Agilent Techs., Inc. (2005, DC Colo) 366 F Supp 2d 1039, 176 BNA LRRM 3226, 150 CCH LC ¶ 10467

§ 4317. Health plans
(a) (1) In any case in which a person (or the person's dependents) has coverage under a health plan in connection with the person's position of employment, including a group health plan (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1167(1)]), and such person is absent from such position of employment by reason of service in the uniformed services, or such person becomes eligible for medical and dental care under chapter 55 of title 10 [10 USCS §§ 1071 et seq.] by reason of subsection (d) of section 1074 of that title [10 USCS § 1074], the plan shall provide that the person may elect to continue such coverage as provided in this subsection. The maximum period of coverage of a person and the person's dependents under such an election shall be the lesser of--
(A) the 24-month period beginning on the date on which the person's absence begins; or
(B) the day after the date on which the person fails to apply for or return to a position of employment, as determined under section 4312(e) [38 USCS § 4312(e)].
(2) A person who elects to continue health-plan coverage under this paragraph may be required to pay not more than 102 percent of the full premium under the plan (determined in the same manner as the applicable premium under section 4980B(f)(4) of the Internal Revenue Code of 1986 [26 USCS § 4980B(f)(4)]) associated with such coverage for the employer's other employees, except that in the case of a person who performs service in the uniformed services for less than 31 days, such person may not be required to pay more than the employee share, if any, for such coverage.

(3) In the case of a health plan that is a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1002(37)], any liability under the plan for employer contributions and benefits arising under this paragraph shall be allocated--
   (A) by the plan in such manner as the plan sponsor shall provide; or
   (B) if the sponsor does not provide--
      (i) to the last employer employing the person before the period served by the person in the uniformed services, or
      (ii) if such last employer is no longer functional, to the plan.

(b) (1) Except as provided in paragraph (2), in the case of a person whose coverage under a health plan was terminated by reason of service in the uniformed services, or by reason of the person's having become eligible for medical and dental care under chapter 55 of title 10 [10 USCS §§ 1071 et seq.] by reason of subsection (d) of section 1074 of that title [10 USCS § 1074], an exclusion or waiting period may not be imposed in connection with the reinstatement of such coverage upon reemployment under this chapter [38 USCS §§ 4301 et seq.] if an exclusion or waiting period would not have been imposed under a health plan had coverage of such person by such plan not been terminated as a result of such service or eligibility. This paragraph applies to the person who is reemployed and to any individual who is covered by such plan by reason of the reinstatement of the coverage of such person.

(2) Paragraph (1) shall not apply to the coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services.

(3) In the case of a person whose coverage under a health plan is terminated by reason of the person having become eligible for medical and dental care under chapter 55 of title 10 [10 USCS §§ 1071 et seq.] by reason of subsection (d) of section 1074 of that title [10 USCS § 1074] but who subsequently does not commence a period of active duty under the order to active duty that established such eligibility because the order is canceled before such active duty commences, the provisions of paragraph (1) relating to any exclusion or waiting period in connection with the reinstatement of coverage under a health plan shall apply to such person's continued employment, upon the termination of such eligibility for medical and dental care under chapter 55 of title 10 [10 USCS §§ 1071 et seq.] that is incident to the cancellation of such order, in the same manner as if the person had become reemployed upon such termination of eligibility.

Explanatory notes:

A prior § 4317 was redesignated as 38 USCS § 7617.

Effective date of section:
This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, which appears as 38 USCS § 4301 note.

Amendments:

1996. Act Oct. 9, 1996 (effective as of 10/13/94, as provided by § 313(a) of such Act, which appears as 38 USCS § 4301 note), in subsec. (a), substituted "(1) In" for "(1)(A) Subject to paragraphs (2) and (3), in", redesignated cls. (i) and (ii) of former subpara. (A) as subparas. (A) and (B), respectively, redesignated subpara. (B) as para. (2), redesignated subpara. (C) as para. (3) and, in such paragraph as redesignated, redesignated cls. (i) and (ii) as subparas. (A) and (B), respectively, and redesignated subcls. (i) and (ii) as cls. (i) and (ii), respectively.

2004. Act Dec. 10, 2004 (applicable to elections made under this section on or after enactment, as provided by § 201(b) of such Act, which appears as a note to this section), in subsec. (a)(1)(A), substituted "24-month period" for "18-month period".

2006. Act June 15, 2006, in subsec. (a)(1), inserted "or such person becomes eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title,"; and, in subsec. (b), in para. (1), inserted "or by reason of the person's having become eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title," and "or eligibility", and added para. (3).

Other provisions:


Cross References

This section is referred to in 2 USCS § 1316; 38 USCS § 4316

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:77

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 87

Law Review Articles:


Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002

Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002

Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002

Piscitelli. Veterans' employment rights: keeping in step with USERRA's legion of changes. 46 Lab LJ 387, July 1995

Seniority, status, pay, and vacation rights granted National Guard reservists while on leave of absence for training by former subsec. (g)(4) of 50 Appx USCS § 459 did not include "Welfare Fund" benefits, including hospitalization, granted employee under collective bargaining agreement and dependent on working specified number of hours during qualifying period.
Returning veteran was entitled to coverage under group medical insurance policy immediately upon his return to employment, despite provision in medical coverage contract which required both returning veterans and nonveterans returning from furloughs to undergo waiting period without coverage until first day of calendar month following return to employment, where veteran would have enjoyed such coverage without interruption but for leaving position for military service.  Dufner v Penn Cent. Transp. Co. (1974, ED Pa) 374 F Supp 979, 85 BNA LRRM 2847, 73 CCH LC ¶ 14408

§ 4318. Employee pension benefit plans

(a) (1) (A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1002(2), (33)]) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter [38 USCS §§ 4301 et seq.] shall be determined under this section.

(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter [38 USCS §§ 4301 et seq.] shall be those rights provided in section 8432b of title 5 [5 USCS § 8432b]. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter [38 USCS §§ 4301 et seq.].

(2) (A) A person reemployed under this chapter [38 USCS §§ 4301 et seq.] shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter [38 USCS §§ 4301 et seq.], be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

(b) (1) An employer reemploying a person under this chapter [38 USCS §§ 4301 et seq.] shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 [29 USCS § 1145] or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income
Security Act of 1974 [29 USCS § 1002(37)], any liability of the plan described in this paragraph shall be allocated--

(A) by the plan in such manner as the sponsor maintaining the plan shall provide;

or

(B) if the sponsor does not provide--

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(2) A person reemployed under this chapter [38 USCS §§ 4301 et seq.] shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986 [26 USCS § 402(g)(3)]) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed-

(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or

(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

(c) Any employer who reemploys a person under this chapter [38 USCS §§ 4301 et seq.] and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1002(37)], under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter [38 USCS §§ 4301 et seq.], shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.

Explanatory notes:

A prior § 4318 was redesignated as 38 USCS § 7618.

Effective date of section:

This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

Amendments:
1996. Act Oct. 9, 1996 (effective as of 10/13/94, as provided by § 313(a) of such Act, which appears as 38 USCS § 4301 note), in subsec. (b)(2), substituted "services, such payment period" for "services."

Cross References
This section is referred to in 2 USCS § 1316; 38 USCS §§ 4303, 4312, 4316

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:77

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 87

Law Review Articles:
Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002
Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002
Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002
Piscitelli. Veterans' employment rights: keeping in step with USERRA's legion of changes. 46 Lab LJ 387, July 1995

1. Generally
2. Credit for time in military service
3. Miscellaneous

1. Generally
Retirement benefits and eligibility for longevity pay, which were tied to substantial work requirement, were not "seniority" rights protected by Military Selective Service Act. Jackson v Beech Aircraft Corp. (1975, CA10 Kan) 517 F.2d 1322, 1 EBC 1116, 89 BNA LRRM 2642, 77 CCH LC ¶ 10937

Pensions established pursuant to collective bargaining agreement were "perquisites of seniority" within meaning of statute so as to permit veteran to include time he spent in armed services in computing amount of his pension. Smith v Industrial Employers & Distributors Asso. (1976, CA9 Cal) 546 F.2d 314, 1 EBC 1154, 93 BNA LRRM 3037, 94 BNA LRRM 2735, 79 CCH LC ¶ 11770, cert den (1977) 431 US 965, 53 L Ed 2d 1061, 97 S Ct 2921, 95 BNA LRRM 2642

Retroactive application of former Veterans Reemployment Act was warranted to grant veteran right to purchase retirement credits for peacetime military service prior to effective date of 1974 amendments to statute. Von Allmen v Connecticut Teachers Retirement Board (1979, CA2 Conn) 613 F.2d 356, 103 BNA LRRM 2025, 87 CCH LC ¶ 11720


Pension rights are protectible seniority rights under statute. Gall v United States Steel Corp. (1984, WD Pa) 598 F Supp 769, 117 BNA LRRM 3397, 102 CCH LC ¶ 11335
2. Credit for time in military service

Veteran was entitled to continuous service credit for entire length of his military service for purposes of determining whether his pension vested where pension agreement between employer and union required employee to accumulate 10 years continuous service before pension vests; but for purposes of computing amount of his pension, veteran was entitled to continuous service credit only for portion of military service which coincided with open hostilities during Korean War. Litwicki v Pittsburgh Plate Glass Industries, Inc. (1974, CA3 Pa) 505 F.2d 189, 1 EBC 1516, 87 BNA LRRM 3213, 75 CCH LC ¶ 10521

Under statute pension rights are perquisites of seniority, so that employee was entitled to credit for 15 months spent on training and in hospital with national guard in calculation of employee's eligibility for pension. United States ex rel. Reilly v New England Teamsters & Trucking Industry Pension Fund (1984, CA2 Conn) 737 F.2d 1274, 5 EBC 1824, 116 BNA LRRM 3060, 101 CCH LC ¶ 11080

World War II veteran's rights to pension benefits with private employer could not accrue until he retired; hence he was entitled to have his 8 years in military, which occurred in between 2 periods of employment with private employer, credited to his existing pension. Leonard v United Air Lines, Inc. (1992, CA7 Ill) 972 F.2d 155, 15 EBC 2345, 141 BNA LRRM 2054, 122 CCH LC ¶ 10327

Veteran was entitled to credit all time spent in military service toward vesting of rights in pension plan and in computation of pension payments under plan where, under employer's policy, each employee ordinarily received one year of credited service for each calendar year in which he worked 1700 or more compensated hours, where employee working less than 1700 compensated hours for calendar year would receive pro rata credit to nearest tenth of year and where vesting under plan occurred after 10 years; true nature of pension payment was reward for length of service rather than compensation for services performed and existence of "compensated hours" work requirement did not change essential nature of pension benefits. Beckley v Lipe-Rollway Corp. (1978, ND NY) 448 F Supp 563, 98 BNA LRRM 2087, 83 CCH LC ¶ 10547


Before veteran was entitled under statute to have his period of military service included in his credited employment service for pension benefits, where he did not join plan until after returning from military service, he must show that benefit of membership would have accrued with "reasonable certainty" had he been continuously employed rather than entering service, i.e., that he would have elected to join pension plan at earlier date, but for absence due to military service; allegation that veteran joined plan at first available time after returning from military service was sufficient to state claim that but for military service he would have joined at earlier date and employer could not defeat claim by relying on veteran's lack of pre-service interest in plan. Letson v Liberty Mut. Ins. Co. (1981, ND Ga) 523 F Supp 1221, 2 EBC 1970, 108 BNA LRRM 3067, 92 CCH LC ¶ 12994, 9 Fed Rules Evid Serv 746

National guardsman was entitled to have counted towards time credited for pension benefits period he was on extended active duty due to injuries received during encampment. United States ex rel. Reilly v New England Teamsters & Trucking Industry Pension Fund (1983, DC Conn) 115 BNA LRRM 3557, 98 CCH LC ¶ 10493, affd (1984, CA2 Conn) 737 F.2d 1274, 5 EBC 1824, 116 BNA LRRM 3060, 101 CCH LC ¶ 11080

3. Miscellaneous

City could not deny employee reservist's right to full retirement in 1990 after 15 years on police force, where city claimed part of employee's 13-month military training leave in 1985-86 was not protected under statute so that he would not qualify for full retirement as having last 5 years of continuous employment, because statute provides reservist shall return from leave "with
such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purposes.” Cronin v Police Dep't (1987, SD NY) 675 F Supp 847, 9 EBC 1468, 127 BNA LRRM 2461, 108 CCH LC ¶ 10329

§ 4319. Employment and reemployment rights in foreign countries

(a) Liability of controlling United States employer of foreign entity. If an employer controls an entity that is incorporated or otherwise organized in a foreign country, any denial of employment, reemployment, or benefit by such entity shall be presumed to be by such employer.

(b) Inapplicability to foreign employer. This subchapter [38 USCS §§ 4311 et seq.] does not apply to foreign operations of an employer that is a foreign person not controlled by an United States employer.

(c) Determination of controlling employer. For the purpose of this section, the determination of whether an employer controls an entity shall be based upon the interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity.

(d) Exemption. Notwithstanding any other provision of this subchapter [38 USCS §§ 4311 et seq.], an employer, or an entity controlled by an employer, shall be exempt from compliance with any of sections 4311 through 4318 of this title [38 USCS §§ 4311 through 4318] with respect to an employee in a workplace in a foreign country, if compliance with that section would cause such employer, or such entity controlled by an employer, to violate the law of the foreign country in which the workplace is located.

Other provisions:

Application of section. Pursuant to § 212(c) of Act Nov. 11, 1998, P. L. 105-368, which appears as 38 USCS § 4303 note, this section shall apply only with respect to causes of action arising after Nov. 11, 1998.

Research Guide

Law Review Articles:

Piscitelli. Veterans’ employment rights: keeping in step with USERRA's legion of changes. 46 Lab LJ 387, July 1995

SUBCHAPTER III. PROCEDURES FOR ASSISTANCE, ENFORCEMENT, AND INVESTIGATION

§ 4321. Assistance in obtaining reemployment or other employment rights or benefits
§ 4322. Enforcement of employment or reemployment rights
§ 4323. Enforcement of rights with respect to a State or private employer
§ 4324. Enforcement of rights with respect to Federal executive agencies
§ 4325. Enforcement of rights with respect to certain Federal agencies
§ 4326. Conduct of investigation; subpoenas

§ 4321. Assistance in obtaining reemployment or other employment rights or benefits
The Secretary (through the Veterans' Employment and Training Service) shall provide assistance to any person with respect to the employment and reemployment rights and benefits to which such person is entitled under this chapter [38 USCS §§ 4301 et seq.]. In providing such assistance, the Secretary may request the assistance of existing Federal and State agencies engaged in similar or related activities and utilize the assistance of volunteers.

Explanatory notes:
A prior § 4321 was redesignated as 38 USCS § 7621.

Effective date of section:
This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

Code of Federal Regulations
Office of Personnel Management-Excepted service, 5 CFR Part 213
Office of Personnel Management-Restoration to duty from uniformed service or compensable injury, 5 CFR Part 353

Research Guide
Am Jur:
45A Am Jur 2d, Job Discrimination §§ 21-26, 40-104
45B Am Jur 2d, Job Discrimination § 760
48 Am Jur 2d, Labor and Labor Relations § 704
77 Am Jur 2d, Veterans and Veterans' Laws §§ 108, 111

Forms:
14 Rabkin & Johnson, Current Legal Forms, § 12A.39, Collective Bargaining

Annotations:
Applicability of doctrine of laches to bar veterans' re-employment claims where there is delay by government officials and agencies in rendering veterans' re-employment aid pursuant to 38 USCS § 2025. 53 ALR Fed 451

Sufficiency of veteran's application for re-employment under 38 USCS §§ 2021 et seq. 103 ALR Fed 575

Law Review Articles:
Haggart. Veterans' Re-employment Right and the "Escalator Principle." 51 Boston U L Rev 539, Fall 1971
Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002
Gisonny; Lindgren; Shultz. New law expands veterans' employment rights. 20 Empl Rel LJ 641, Spring 1995

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Veteran's reemployment rights limits protectible former position to position in civilian employment, and does not include military assignment; hence full-time National Guard employees who were called to active duty were not entitled to reemployment in drug interdiction positions. Tirado-Acosta v Puerto Rico Nat'l Guard (1997, CA1 Puerto Rico) 118 F.3d 852, 155 BNA LRRM 2798, 134 CCH LC ¶ 10004

§ 4322. Enforcement of employment or reemployment rights

(a) A person who claims that--

(1) such person is entitled under this chapter [38 USCS §§ 4301 et seq.] to employment or reemployment rights or benefits with respect to employment by an employer; and

(2) (A) such employer has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter [38 USCS §§ 4301 et seq.]; or

(B) in the case that the employer is a Federal executive agency, such employer or the Office of Personnel Management has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter [38 USCS §§ 4301 et seq.], may file a complaint with the Secretary in accordance with subsection (b), and the Secretary shall investigate such complaint.

(b) Such complaint shall be in writing, be in such form as the Secretary may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis for the complaint.

(c) The Secretary shall, upon request, provide technical assistance to a potential claimant with respect to a complaint under this subsection, and when appropriate, to such claimant's employer.

(d) The Secretary shall investigate each complaint submitted pursuant to subsection (a). If the Secretary determines as a result of the investigation that the action alleged in such complaint occurred, the Secretary shall attempt to resolve the complaint by making reasonable efforts to ensure that the person or entity named in the complaint complies with the provisions of this chapter [38 USCS §§ 4301 et seq.].
(e) If the efforts of the Secretary with respect to any complaint filed under subsection (a) do not resolve the complaint, the Secretary shall notify the person who submitted the complaint of--

(1) the results of the Secretary's investigation; and
(2) the complainant's entitlement to proceed under the enforcement of rights provisions provided under section 4323 [38 USCS § 4323] (in the case of a person submitting a complaint against a State or private employer) or section 4324 [38 USCS § 4324] (in the case of a person submitting a complaint against a Federal executive agency or the Office of Personnel Management).

(f) This subchapter [38 USCS §§ 4321 et seq.] does not apply to any action relating to benefits to be provided under the Thrift Savings Plan under title 5.

Explanatory notes:
A prior § 4322 was redesignated as 38 USCS § 7622.

Effective date of section:
This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

Amendments:
1996. Act Oct. 9, 1996 (effective as of 10/13/94, as provided by § 313(a) of such Act, which appears as 38 USCS § 4301 note), in subsec. (d), inserted "attempt to"; and, in subsec. (e), in the introductory matter, substituted "with respect to any complaint filed under subsection (a) do not resolve the complaint," for "with respect to a complaint under subsection (d) are unsuccessful," and, in para. (2), inserted "or the Office of Personnel Management".

Cross References
This section is referred to in 38 USCS §§ 4323, 4324, 4325

Research Guide

Federal Procedure:
16 Fed Proc L Ed, Government Officers and Employees § 40:588
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:79, 81, 82, 96

Am Jur:
45A Am Jur 2d, Job Discrimination § 22
77 Am Jur 2d, Veterans and Veterans' Laws §§ 108, 111

Law Review Articles:
Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002
Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002
Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002
Language of statute suggests that Board may consider general claim by employee that employer denied him rights guaranteed under Uniformed Services Employment and Reemployment Rights Act, and that conclusion is bolstered by Act's legislative history which shows that Congress intended it to be broadly construed and strictly enforced. Duncan v United States Postal Serv. (1997, MSPB) 73 MSPR 86 (ovrd in part by Fox v United States Postal Serv. (2001, MSPB) 88 MSPR 381)

§ 4323. Enforcement of rights with respect to a State or private employer

(a) Action for relief.

(1) A person who receives from the Secretary a notification pursuant to section 4322(e) of this title [38 USCS § 4322(e)] of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter [38 USCS §§ 4301 et seq.] for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

(2) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person--

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title [38 USCS § 4322(a)];

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

(b) Jurisdiction.

(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

(c) Venue.

(1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.
(d) **Remedies.**

(1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter [38 USCS §§ 4301 et seq.].

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter [38 USCS §§ 4301 et seq.].

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter [38 USCS §§ 4301 et seq.] was willful.

(2) (A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter [38 USCS §§ 4301 et seq.].

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) **Equity powers.** The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter [38 USCS §§ 4301 et seq.].

(f) **Standing.** An action under this chapter [38 USCS §§ 4301 et seq.] may be initiated only by a person claiming rights or benefits under this chapter [38 USCS §§ 4301 et seq.] under subsection (a) or by the United States under subsection (a)(1).

(g) **Respondent.** In any action under this chapter [38 USCS §§ 4301 et seq.], only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

(h) **Fees, court costs.**

(1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter [38 USCS §§ 4301 et seq.].

(2) In any action or proceeding to enforce a provision of this chapter [38 USCS §§ 4301 et seq.] by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

(i) **Inapplicability of State statute of limitations.** No State statute of limitations shall apply to any proceeding under this chapter [38 USCS §§ 4301 et seq.].
(j) **Definition.** In this section, the term "private employer" includes a political subdivision of a State.

**Explanatory notes:**

A prior § 4323 was redesignated 38 USCS § 7623.

**Amendments:**

**1996.** Act Oct. 9, 1996 (effective 10/13/94, as provided by § 313(a) of such Act, which appears as 38 USCS § 4301 note), in subsec. (a), in para. (1), deleted "of an unsuccessful effort to resolve a complaint" following "4322(e)", and, in para. (2)(A), substituted "under section 4322(a)" for "regarding the complaint under section 4322(c)".

**1998.** Act Nov. 11, 1998 (applicable as provided by § 211(b) of such Act, which appears as a note to this section) substituted this section for one which read:

"§ 4323. Enforcement of rights with respect to a State or private employer

"(a)(1) A person who receives from the Secretary a notification pursuant to section 4322(e) relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for appropriate relief for such person in an appropriate United States district court.

"(2) A person may commence an action for relief with respect to a complaint if that person-

"(A) has chosen not to apply to the Secretary for assistance under section 4322(a);

"(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

"(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

"(b) In the case of an action against a State as an employer, the appropriate district court is the court for any district in which the State exercises any authority or carries out any function. In the case of a private employer the appropriate district court is the district court for any district in which the private employer of the person maintains a place of business.

"(c)(1)(A) The district courts of the United States shall have jurisdiction, upon the filing of a complaint, motion, petition, or other appropriate pleading by or on behalf of the person claiming a right or benefit under this chapter--

"(i) to require the employer to comply with the provisions of this chapter;

"(ii) to require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter; and

"(iii) to require the employer to pay the person an amount equal to the amount referred to in clause (ii) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

"(B) Any compensation under clauses (ii) and (iii) of subparagraph (A) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for in this chapter.
"(2)(A) No fees or court costs shall be charged or taxed against any person claiming rights under this chapter.

"(B) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

"(3) The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.

"(4) An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter, not by an employer, prospective employer, or other entity with obligations under this chapter.

"(5) In any such action, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

"(6) No State statute of limitations shall apply to any proceeding under this chapter.

"(7) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section."

Other provisions:

Application of section. Act Nov. 11, 1998, P. L. 105-368, Title II, Subtitle B, § 211(b), 112 Stat. 3330, provides:

"(1) Section 4323 of title 38, United States Code, as amended by subsection (a), shall apply to actions commenced under chapter 43 of such title [38 USCS §§ 4301 et seq.] on or after the date of the enactment of this Act, and shall apply to actions commenced under such chapter before the date of the enactment of this Act that are not final on the date of the enactment of this Act, without regard to when the cause of action accrued.

"(2) In the case of any such action against a State (as an employer) in which a person, on the day before the date of the enactment of this Act, is represented by the Attorney General under section 4323(a)(1) of such title as in effect on such day, the court shall upon motion of the Attorney General, substitute the United States as the plaintiff in the action pursuant to such section as amended by subsection (a)."

Cross References

This section is referred to in 2 USCS § 1316; 38 USCS §§ 4322, 4332

Research Guide

Federal Procedure:

23 Moore's Federal Practice (Matthew Bender 3d ed.), ch 540, Veterans, Seamen, and Military Cases § 540.02
21A Fed Proc L Ed, Job Discrimination §§ 50:1125, 1151, 1196, 1207, 1286, 1291
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:82, 84-87, 92-94

Am Jur:

45A Am Jur 2d, Job Discrimination § 22
77 Am Jur 2d, Veterans and Veterans' Laws §§ 108, 110-112

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I. IN GENERAL

1. Generally

   One who brings an action to enforce a veteran's re-employment right under predecessor to statute sues not simply as employee under collective bargaining agreement but as veteran asserting special rights bestowed upon him in furtherance of federal policy to protect those who have served in Armed Forces. McKinney v Missouri K. T. R. Co. (1958) 357 US 265, 2 L Ed 2d 1305, 78 S Ct 1222, 42 BNA LRRM 2287, 35 CCH LC ¶ 71613

   Under re-employment provision discharged soldier who is refused re-employment by his former employer can maintain action in federal district court to recover compensation he would have earned if he had been re-employed in accordance with law when first making application therefor. Hall v Union Light, Heat & Power Co. (1944, DC Ky) 53 F Supp 817, 14 BNA LRRM 563, 10 CCH LC ¶ 62858

   Whether or not veteran attempting to be reinstated to his position with executive branch agency has cause of action in federal district court, veteran must first appeal to Director of Office of Personnel Management. Lei v Brown (1995, ED Pa) 8 ADD 887, 4 AD Cas 845, 149 BNA LRRM 2829
Congress did not intend 38 USCS § 2021(b)(3) to require mandatory reinstatement. Graham v Hall-McMillen Co. (1996, ND Miss) 925 F Supp 437, 152 BNA LRRM 2408, 131 CCH LC ¶ 11575

Re-employment provisions are not applicable to suits for damages. Tsang v Kan (1947) 78 Cal App 2d 275, 177 P2d 630, 20 BNA LRRM 2348

2. Application to states and subdivisions


Polygraph examiner's failure-to-promote claim against state police department must fail, even though rights secured by Uniformed Services Employment and Reemployment Rights Act (USERRA) (38 USCS §§ 4301 et seq.) are expressly made enforceable against state as employer in appropriate U.S. District Court by § 4323, where USERRA was not enacted pursuant to Fourteenth Amendment but pursuant to War Powers Clause, because Supreme Court has now made it clear that Congress has authority to abrogate states' Eleventh Amendment immunity only when it legislates pursuant to § 5 of Fourteenth Amendment. Palmatier v Michigan Dep't of State Police (1997, WD Mich) 981 F Supp 529, 156 BNA LRRM 2765, 134 CCH LC ¶ 10021

Eleventh Amendment bars state employee from suing state in federal court for violating USERRA (38 USCS §§ 4311 et seq.) Velasquez v Frapwell (1998, SD Ind) 994 F Supp 993, 157 BNA LRRM 2690, affd (1998, CA7 Ind) 160 F.3d 389, 159 BNA LRRM 2782, 74 CCH EPD ¶ 45585, vacated, in part (1999, CA7 Ind) 165 F.3d 593, 160 BNA LRRM 2319

Eleventh Amendment bars former employee's claim that state university violated Uniformed Services Employment and Reemployment Rights Act (38 USCS §§ 4311 et seq.) by terminating his employment based upon his service in National Guard, where university is state entity and Indiana has not waived its immunity from suit in federal court, even though Congress clearly intended to abrogate states' sovereign immunity in 38 USCS § 4323(b), because Congress (1) did not act pursuant to its enforcement powers under § 5 of Fourteenth Amendment, and (2) may not abrogate states' sovereign immunity when exercising its Article I powers, including its war powers. Velasquez v Frapwell (1998, SD Ind) 994 F Supp 993, 157 BNA LRRM 2690, affd (1998, CA7 Ind) 160 F.3d 389, 159 BNA LRRM 2782, 74 CCH EPD ¶ 45585, vacated, in part (1999, CA7 Ind) 165 F.3d 593, 160 BNA LRRM 2319

3. Effect upon state law


4. Miscellaneous

Likelihood of injury to non-veteran government employee furloughed because of curtailment of activities from civil service regulation giving higher priority for retention in government employ...
to veterans of World War II for one year period after return to duty was not too remote to justify
his attack on its validity, notwithstanding priority over him had likewise been given to veteran's
preference employees with "good" or higher efficiency rating, where it could not be said that all
members of first group would be able to qualify as members of second. Hilton v Sullivan (1948)
334 US 323, 92 L Ed 1416, 68 S Ct 1020, 15 CCH LC ¶ 64557

Employer's contention that veteran was independent contractor rather than employee must
be raised at time veteran applied to court for relief. Travis v Schwartz Mfg. Co. (1954, CA7 Wis)
216 F.2d 448, 35 BNA LRRM 2191, 26 CCH LC ¶ 68775

Although 38 USCS § 4323 does not supersede Federal Arbitration Act, 9 USCS §§ 1-16, it
does supersede otherwise valid and enforceable arbitration agreements that impose arbitration
as prerequisite for obtaining substantive relief for claims brought under Uniformed Services
Employment and Reemployment Rights Act of 1994 (USERRA). 38 USCS §§ 4301-4334; because Congress does not provide for arbitration as means to obtain rights granted in USERRA,
38 USCS § 4302(b) requires that arbitration agreement, which requires plaintiff to seek relief in
arbitral forum, be superseded because such agreement improperly imposes additional
prerequisite to exercise of plaintiff's rights under USERRA. Lopez v Dillard's, Inc. (2005, DC Kan)
382 F Supp 2d 1245

II. REMEDIES

A. In General

5. Generally

Employee can either sue his employer to be restored to his former position, or for loss of
wages and benefits, or for both. Kent v Todd Houston Shipbuilding Corp. (1947, DC Tex) 72 F
Supp 506, 20 BNA LRRM 2273, 13 CCH LC ¶ 63902

Veteran does not have alternative rights against successive employers. In re United States
ex rel. Obum (1948, DC NY) 82 F Supp 36, affd (1948, CA2 NY) 170 F.2d 1009, revd on other
grounds (1949) 336 US 806, 93 L Ed 1054, 69 S Ct 921

Veteran who was refused re-employment could sue under former 50 USCS Appx § 459(b)-(h)
for either damages or reinstatement or both. Steffen v Farmers Elevator Service Co. (1952, DC
Iowa) 109 F Supp 16, 31 BNA LRRM 2228, 22 CCH LC ¶ 67313

Actions under statute are equitable, and remedies are to be fashioned to provide uniform
results and provide veteran with complete relief. Bunnell v New England Teamsters & Trucking
11988, affd (1981, CA1 Mass) 655 F.2d 451, 2 EBC 1654, 107 BNA LRRM 3286, 92 CCH LC ¶
12933, cert den (1982) 455 US 908, 71 L Ed 2d 446, 102 S Ct 1253, 109 BNA LRRM 2304, 92
CCH LC ¶ 13200

6. Election

Right of veteran to sue in United States district court, free of costs and with United States
attorney as his counsel, does not deprive him of right to sue in state courts, but he cannot sue in
federal court after identical issues between same parties have been adjudicated against him in
state court. Tsang v Kan (1949, CA9 Cal) 173 F.2d 204, 23 BNA LRRM 2394, 16 CCH LC ¶
64979, cert den (1949) 337 US 939, 93 L Ed 1744, 69 S Ct 1515, 24 BNA LRRM 2189

7. Exhaustion of administrative remedies

Before bringing suit under predecessor to statute to enforce his claim to re-employment rights
as a veteran, a railroad employee was not obliged to pursue remedies possibly available under
the grievance procedure set forth in the applicable collective bargaining agreement or before
the National Railway Adjustment Board. McKinney v Missouri K. T. R. Co. (1958) 357 US 265, 2
L Ed 2d 1305, 78 S Ct 1222, 42 BNA LRRM 2287, 35 CCH LC ¶ 71613

It was not mandatory that veteran proceed under settlement machinery provided, but if
veteran so chose he could proceed by petition or he could proceed by motion, petition, or other
appropriate pleading specifically to require an employer to comply with statute; where veteran sought assistance in obtaining reinstatement to employment, every possible effort to effect settlement of his claim should be exhausted before resort to court action was had. Kay v General Cable Corp. (1946, DC NJ) 63 F Supp 791, 17 BNA LRRM 768, 10 CCH LC ¶ 62989

8. Declaratory relief

Declaratory judgment was not warranted where complaint did not allege that plaintiff was threatened with loss of employment as result of denial of seniority which he claimed or that other employees wrongfully asserted seniority superior to his or claim right to employment which belonged to him. Johnson v Interstate Transit Lines (1947, CA10 Utah) 163 F.2d 125, 20 BNA LRRM 2483, 13 CCH LC ¶ 63960, 172 ALR 1242

Since re-employment benefits are reserved exclusively to returned veterans, action for declaratory judgment regarding seniority status of returned servicemen employees of corporation, brought by corporation against union representing employees of such corporation, must be dismissed, since court had no jurisdiction over subject matter of action. Trailmobile Co. v International Union, etc. (1946, DC Ohio) 67 F Supp 53, 18 BNA LRRM 2166, 11 CCH LC ¶ 63251, affd (1947, CA6 Ohio) 162 F.2d 720, 20 BNA LRRM 2677, 13 CCH LC ¶ 64080

9. Injunctive relief

Injunction compelling reinstatement for 10 months was not excessive as statutory provision that veteran shall not be discharged without cause within one year after restoration creates period which runs from date of order and not from date of veteran's military discharge or application for reinstatement. O'Mara v Petersen Sand & Gravel Co. (1974, CA7 Ill) 498 F.2d 896, 86 BNA LRRM 2702, 74 CCH LC ¶ 10107

Uniformed Services Employment and Reemployment Rights Act and False Claims Act both required employee to show irreparable harm to obtain preliminary injunctive relief; employee's claim that termination would have resulted in deterioration of his skills as physician was not irreparable harm and, likewise, lost income, damaged reputation, and inability to find another job was not irreparable harm were not irreparable harms. Bedrossian v Northwestern Mem. Hosp. (2005, CA7 Ill) 409 F.3d 840, 177 BNA LRRM 2471, 151 CCH LC ¶ 10491

Court may enjoin union from interfering with seniority status of veteran. Riggle v Cincinnati Union Terminal (1947, DC Ohio) 71 F Supp 456, 19 BNA LRRM 2579, 12 CCH LC ¶ 63681

B. Damages

1. In General

10. Right to recovery of damages, generally

Veteran does not necessarily lose all his rights merely because in applying for re-employment he couples such application with demand for something he erroneously believes to be his due; if employer then makes him offer of re-employment which is in full compliance with employer's obligation, and veteran rejects offer, this forecloses any claim for interim damages for so long as veteran stands on such rejection. Trusted Funds, Inc. v Dacey (1947, CA1 Mass) 160 F.2d 413, 19 BNA LRRM 2465, 12 CCH LC ¶ 63639

Veteran was not entitled to compensation where plaintiff, bus driver, was offered position at top of "extra list" pending next quarterly pick of runs, which he refused, where such position was similar to his prewar job and where he did not allege or prove that he availed himself of privileges extended to him under union contract or that such contract was less favorable to him than practice in force when he entered military service. Feore v North Shore Bus Co. (1947, CA2 NY) 161 F.2d 552, 20 BNA LRRM 2132, 12 CCH LC ¶ 63760

Veteran could not recover for loss of wages where employee was inducted in Navy October 9, 1943, on June 19, 1944, new labor contract was negotiated by employer and union, which modified seniority provisions giving certain union officials higher seniority than anyone else; on discharge from service, veteran was re-employed in his former position on December 18, 1945;
on January 18, 1946, section steward, junior in service to veteran, but senior under contract, was laid off; veteran was laid off March 1, 1946; and section steward was restored to his job after arbitration under contract. Gauweiler v Elastic Stop Nut Corp. (1947, CA3 NJ) 162 F.2d 448, 20 BNA LRRM 2140, 12 CCH LC ¶ 63783; Koury v Elastic Stop Nut Corp. (1947, CA3 NJ) 162 F.2d 544, 20 BNA LRRM 2145, 12 CCH LC ¶ 63784; Di Maggio v Elastic Stop Nut Corp. (1947, CA3 NJ) 162 F.2d 546, 20 BNA LRRM 2146, 12 CCH LC ¶ 63785; Payne v Wright Aeronautical Corp. (1947, CA3 NJ) 162 F.2d 549, 20 BNA LRRM 2149, 12 CCH LC ¶ 63786

Veteran was not entitled to damages where he was restored to former job at higher salary even though bonus was less than before entering service due to changed conditions in plant. Donner v Levine (1956, CA2 Conn) 232 F.2d 185, 37 BNA LRRM 2808, 30 CCH LC ¶ 69880

Employer did not violate Veterans' Reemployment Rights Act of 1974 (VRRA) when it failed to immediately rehire employee, who had returned to work following his discharge from military service, had been placed on disability due to complications from Agent Orange exposure, and had subsequently been medically cleared to return to work: (1) employer met its obligations under VRRA when it rehired employee following his military discharge; (2) employer's VRRA obligations did not extend to employee's return to work following his subsequent disability leave; and (3) employer could not be held liable under former 38 USCS § 2022 for allegedly failing to properly credit employee's pension, because no VRRA violation had occurred. Bowlds v GM Mfg. Div. of GMC (2005, CA7 Ind) 411 F.3d 808, 177 BNA LRRM 2529

Damages will not be awarded where there is no showing that veteran actually suffered monetary loss by not having been re-employed, since damages are not held to follow as matter of course upon employer's failure or refusal to re-employ veteran. Williams v Walnut Park Plaza, Inc. (1946, DC Pa) 68 F Supp 957, 18 BNA LRRM 2380, 11 CCH LC ¶ 63356

Returned veteran was not entitled to re-employment or compensation for refusal to re-employ when position held prior to induction was temporary job. The Trillora II (1947, DC SC) 76 F Supp 50

Veteran was entitled to no compensation where veteran's services were not satisfactory to employer and where services of veteran were terminated by mutual agreement between employer and veteran. Braschler v S. H. Kress, Inc. (1948, WD Wash) 15 CCH LC ¶ 64738

If, following discharge, veteran earned and received wages or other compensation in excess of amount he would have received from employer who was alleged to have wrongfully refused employment, veteran sustained no damage. United States v Mayo (1964, SD NY) 230 F Supp 85

Award of damages was proper remedy under predecessor to statute where school district, state subdivision, failed to employ qualified teacher who returned from military service. Schaller v Board of Education (1978, ND Ohio) 449 F Supp 30, 98 BNA LRRM 2320, 83 CCH LC ¶ 10558

Individual who was denied pension benefits in violation of predecessor to statute requiring re-employment at like seniority, status, and pay of person who has left "other than temporary" position to serve in Armed Forces was entitled to damages notwithstanding contention that, since he worked 4 more years after his initial request for pension was denied and earned substantially more during such period than he would have received if retired, he sustained no compensable economic loss. Akers v Arnett (1983, SD Tex) 597 F Supp 557, 115 BNA LRRM 2893, 99 CCH LC ¶ 10677, affd (1984, CA5 Tex) 748 F.2d 283, 118 BNA LRRM 3034

Employee was not entitled to liquidated damages under 38 USCS § 4323(d)(1)(C) because his employer did not willfully violate Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) in reemploying and subsequently terminating him; although employer's actions constituted violations of USERRA's provisions, they were based on exercise of business judgment in response to financial hardship that did not warrant finding of willful conduct. Duarte v Agilent Techs., Inc. (2005, DC Colo) 366 F Supp 2d 1039, 176 BNA LRRM 3226, 150 CCH LC ¶ 10467
There is little authority interpreting Uniformed Services Employment and Reemployment Rights Act of 1994’s liquidated damages provision, but other federal statutes, most notably Age Discrimination in Employment Act (ADEA), contain similar provisions and corresponding case law is helpful on this issue; term "willful" under ADEA has been construed as meaning that employer engaged in conduct known to be prohibited or engaged in conduct with reckless disregard of its prohibition. Duarte v Agilent Techs., Inc. (2005, DC Colo) 366 F Supp 2d 1039, 176 BNA LRRM 3226, 150 CCH LC ¶ 10467

11. -Incidental damages

In action under former 50 USCS Appx § 459(b)-(h) to compel reinstatement to pre-military service position, veteran was not precluded from compensatory damages for period of employer's refusal to rehire him, for lost overtime, and for loss due to change of employment, by subsequently having accepted, after intercession of Department of Labor, another job with employer at same salary. O'Mara v Petersen Sand & Gravel Co. (1974, CA7 Ill) 498 F.2d 896, 86 BNA LRRM 2702, 74 CCH LC ¶ 10107

Court can grant incidental damages in suit by veteran for reinstatement to old employment. Steffen v Farmers Elevator Service Co. (1952, DC Iowa) 109 F Supp 16, 31 BNA LRRM 2228, 22 CCH LC ¶ 67313

In action by veteran by former employer for wrongful termination, court's power to award compensation is limited to any loss of wages or benefits resulting from wrongful termination and court has no power to award damages for mental anguish, loss of reputation, loss of credit and for being forced into bankruptcy. Randall v Giant Food Markets, Inc. (1974, ED Tenn) 390 F Supp 1064, 89 BNA LRRM 2580, 77 CCH LC ¶ 10987

12. -Interest

Although as general rule, assessment of prejudgment interest is discretionary, trial court does not have unbridled discretion to deny such award; employer's good faith attempt to comply with former Veterans' Reemployment Rights Act is not defense to assessment of prejudgment interest and where it is clear veteran was deprived of re-employment rights created by Congress, it is abuse of discretion to deny veteran prejudgment interest. Hembree v Georgia Power Co. (1981, CA5 Ga) 637 F.2d 423, 106 BNA LRRM 2535, 90 CCH LC ¶ 12579

Trial judge abused discretion by denying prejudgment interest in action under former 38 USCS §§ 2021 et seq. without considering policy of making whole returning veteran. Hanna v American Motors Corp. (1984, CA7 Wis) 724 F.2d 1300, 115 BNA LRRM 2393, 33 CCH EPD ¶ 34055, 99 CCH LC ¶ 10681, amd on other grounds (1984, CA7 Wis) 115 BNA LRRM 2543 and cert den (1984) 467 US 1241, 82 L Ed 2d 821, 104 S Ct 3512, 116 BNA LRRM 2632, 34 CCH EPD ¶ 34425

States found to have violated former Veterans' Reemployment Rights Act and held liable for backpay and other damages may also be charged with prejudgment interest on award consistent with Eleventh Amendment. Reopell v Massachusetts (1991, CA1 Mass) 936 F.2d 12, 137 BNA LRRM 2666, 119 CCH LC ¶ 10793, cert den (1991) 502 US 1004, 116 L Ed 2d 655, 112 S Ct 3512, 116 BNA LRRM 2632, 34 CCH EPD ¶ 34425

States found to have violated former Veterans' Reemployment Rights Act and held liable for backpay and other damages may also be charged with prejudgment interest on award consistent with Eleventh Amendment. Reopell v Massachusetts (1991, CA1 Mass) 936 F.2d 12, 137 BNA LRRM 2666, 119 CCH LC ¶ 10793, cert den (1991) 502 US 1004, 116 L Ed 2d 655, 112 S Ct 367, 138 BNA LRRM 2976, 120 CCH LC ¶ 11012

Allowance of prejudgment interest is not appropriate where employee would be put in better financial position than if he had been continuously employed and received lost wages in lump sum. Chernoff v Pandick Press, Inc. (1977, SD NY) 440 F Supp 822, 96 BNA LRRM 3078, 82 CCH LC ¶ 10196 (criticized in Fink v City of New York (2001, ED NY) 129 F Supp 2d 511, 166 BNA LRRM 2923, 80 CCH EPD ¶ 40592)

Veteran is not entitled to prejudgment interest where employer acts mistakenly but in good faith. Chernoff v Pandick Press, Inc. (1977, SD NY) 440 F Supp 822, 96 BNA LRRM 3078, 82 CCH LC ¶ 10196 (criticized in Fink v City of New York (2001, ED NY) 129 F Supp 2d 511, 166 BNA LRRM 2923, 80 CCH EPD ¶ 40592)
Veteran is entitled to prejudgment interest on damages awarded for failure of employer to reinstate him, not as penalty against employer but to compensate veteran fully for loss. Bury v General Motors Corp. (1982, ND Ohio) 113 BNA LRRM 3036, 97 CCH LC ¶ 10080

In order to effectuate purposes of former 38 USCS §§ 2021 et seq. to restore plaintiffs to position they would have been in if they had received all monthly displacement allowances to which they were entitled, plaintiffs entitled as result of District Court's earlier summary judgment to displacement allowances were also entitled to prejudgment interest, where there were no extraordinary circumstances or justification for withholding such interest. Brown v Consolidated Rail Corp. (1985, ND Ohio) 614 F Supp 289

In determining amount of prejudgment interest to be awarded to plaintiffs who were held to have been entitled to monthly displacement allowances, state law interest rate governed, and state law also controlled question whether judgment entered before date of statutory rate increase should earn interest at new rate from effective date of statute. Brown v Consolidated Rail Corp. (1985, ND Ohio) 614 F Supp 289

Employee who court determined was discharged because of administrator's animosity toward her because of her service in National Guard and not for misconduct as a licensed practical nurse in a nursing home, termination occurring 24 hours after inquiry of military obligations, could only be fully compensated by award of prejudgment interest in addition to allowable damages. Weber v Logan County Home for Aged (1985, DC ND) 623 F Supp 711, 120 BNA LRRM 2485, 103 CCH LC ¶ 11536, affd (1986, CA8 ND) 804 F.2d 1058, 123 BNA LRRM 3002

Only way that wronged party can be made whole is to award him prejudgment interest. Graham v Hall-McMillen Co. (1996, ND Miss) 925 F Supp 437, 152 BNA LRRM 2408, 131 CCH LC ¶ 11575

13. Miscellaneous

Licensed practical nurse unlawfully discharged due to administrator's animosity toward her because of service in military was entitled to, (1) interest paid or due on loans used to cover living expenses from date of discharge, (2) backpay in amount equal to salary as acting temporary director of nurses accrued until registered nurse came on duty, (3) backpay for wages accrued in amount of salary received upon resuming regular duties after director of nurses retained, along with interest on all amounts due. Weber v Logan County Home for Aged (1985, DC ND) 623 F Supp 711, 120 BNA LRRM 2485, 103 CCH LC ¶ 11536, affd (1986, CA8 ND) 804 F.2d 1058, 123 BNA LRRM 3002

Veteran denied reemployment as assistant manager at fast food restaurant could not recover punitive damages, where employer failing to reemploy veteran was required to "compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action" under former 38 USCS § 4302, because statutory language facially suggested that punitive damages were not warranted, and case law indirectly supported that proposition. Wallace v Hardee's of Oxford (1994, MD Ala) 860 F Supp 806

Puerto Rico Air National Guard member's $2 million punitive damages claim is unwarranted, even if he could prove that his termination from civilian job was due to discrimination on basis of his military status, because only remedies authorized by 38 USCS § 4323 are reinstatement and lost wages and benefits. Barreto v ITT World Directories, Inc. (1999, DC Puerto Rico) 62 F Supp 2d 387, 162 BNA LRRM 2842, 77 CCH EPD ¶ 46260

2. Measure of Damages

14. Generally

Plaintiffs who were entitled to recover monthly displacement allowances properly calculated their damages by reference to earnings of similarly-situated employee. Brown v Consolidated Rail Corp. (1985, ND Ohio) 614 F Supp 289

15. Refusal of reemployment, generally
Unjustified refusal of employer to re-employ veteran during any part of one year period subsequent to discharge from Army entitles veteran to compensation in the amount he would have received during one year if he had been re-employed. Heller v Inter--Boro Sav. & Loan Asso. (1948, CA3 NJ) 166 F.2d 83, 21 BNA LRRM 2383, 14 CCH LC ¶ 64324

Congress laid down no yardstick by which to measure damages recoverable by person who has been wrongfully refused restoration to former position; right to recovery as well as extent of recovery must be determined by ordinary rules controlling in any other kind of action where damages are sought as result of wrongful act of other party. Levine v Berman (1949, CA7 Ill) 178 F.2d 440, 25 BNA LRRM 2210, 17 CCH LC ¶ 65534, 14 CCH LC ¶ 64324, cert den (1950) 339 US 982, 94 L Ed 1386, 70 S Ct 1024, 26 BNA LRRM 2261

Damages representing one year of earnings are properly awarded where reinstatement is denied because of ill feeling between parties. Travis v Schwartz Mfg. Co. (1954, CA7 Wis) 216 F.2d 448, 35 BNA LRRM 2191, 26 CCH LC ¶ 68775

Veteran was entitled to recover amount equal to wages which he would have earned had he been reinstated in position of second regular foreman on date that he made application for reinstatement and worked as such until present time, less whatever amounts he had received as wages from incidental employment during such period, and for costs where employer refused to reinstate veteran as second regular foreman because incumbent foreman who would be displaced was more personally acceptable to employer. Freeman v Gateway Baking Co. (1946, DC Ark) 68 F Supp 383, 11 CCH LC ¶ 63340

Veteran was entitled to be reinstated in his position as manager in new store and to such earnings as audit report showed he would have earned had he been reinstated in his former employment as it existed at time of entering service where employer refused to reinstate veteran, former manager of old store which no longer existed, in position of manager of new store and assigned him to store in another city. Mihelich v F. W. Woolworth Co. (1946, DC Idaho) 69 F Supp 497, 19 BNA LRRM 2282, 12 CCH LC ¶ 63570

Where navy veteran brought suit in federal district court to secure restoration to his former job as truck driver and to recover amount of money by which he alleged he had been underpaid during his tenure of employment with defendants, both prior to and subsequent to his service in the navy, cause of action for recovery of wages, not arising under statute, was properly dismissed on motion of defendant, but defendants' motion to dismiss other cause of action must be denied. Daniels v Barfield (1947, DC Pa) 71 F Supp 884, 19 BNA LRRM 2576

Veteran, who was wrongfully refused re-employment, was entitled to be paid as damages wages he would have earned in former position had he been re-employed with proper seniority rights by employer on date that he applied for re-employment, less what he had otherwise earned in interim. Nunn v Humphrey (1948, DC Pa) 79 F Supp 8

Veteran, unlawfully refused reinstatement, was entitled to damages based upon pay rate for his job, from date of application to date when veteran refused work in different location, computed on basis of number of days when other employees did work which could have been done by veteran. Dame v C. A. Batson Co. (1957, DC Mass) 157 F Supp 862, 42 BNA LRRM 2626, 33 CCH LC ¶ 71161

Court limited amount of recovery of damages for failure to reinstate employee under former 50 USCS Appx § 459(b)-(h) to amount he would have received between time he was entitled to reemployment and time when he left area with no further interest in seeking reemployment from his former employer. Fortenberry v Owen Bros. Packing Co. (1966, SD Miss) 267 F Supp 605, 65 BNA LRRM 2627, 55 CCH LC ¶ 11885, affd (1967, CA5 Miss) 378 F.2d 373, 65 BNA LRRM 2629, 55 CCH LC ¶ 11905

Employer had not shown veteran to be disqualified for re-employment and veteran was entitled to damages measured by difference between actual earnings received from other employers and earnings which he would have received from defendant had he been re-employed following discharge from military service where, at time of assuming employment, veteran was found to be qualified and suited for employment but where, following discharge, he was refused re-employment because of attempted suicide while in Navy and where employer continued to
refuse re-employment despite subsequent clinical evaluation that veteran has no psychological problems which would render him dangerous. McCoy v Olin Mathieson Chemical Corp. (1973, SD Ill) 360 F Supp 1336, 83 BNA LRRM 2970, 71 CCH LC ¶ 13874

Measure of damages for veteran whom employer wrongfully refuses to reemploy does not include lost overtime where amount of overtime is too speculative to compute. Bury v General Motors Corp. (1982, ND Ohio) 113 BNA LRRM 3036, 97 CCH LC ¶ 10080

16. -Time period for measurement of damages

Veteran entitled to re-employment is entitled to damages for wages he would have earned in that employment from date of application to date on which he is in fact employed, less amount of actual earnings in other employment during that interval. Boston & M. R. R. v Bentubo (1947, CA1 Mass) 160 F.2d 326, 19 BNA LRRM 2435, 12 CCH LC ¶ 63631

It is proper to measure veteran's damages from date on which he originally applied for reinstatement. Boston & M. R. R. v Bentubo (1947, CA1 Mass) 160 F.2d 326, 19 BNA LRRM 2435, 12 CCH LC ¶ 63631; Special Service Co. v Delaney (1949, CA5 La) 172 F.2d 16, 23 BNA LRRM 2294, 16 CCH LC ¶ 64940; Donaldson v Tennessee Coal, Iron & R. Co. (1946, DC Ala) 68 F Supp 681, 18 BNA LRRM 2465, 11 CCH LC ¶ 63405; Lee v Remington Rand, Inc. (1946, DC Cal) 68 F Supp 837, 18 BNA LRRM 2450, 11 CCH LC ¶ 63351; Mihelich v F. W. Woolworth Co. (1946, DC Idaho) 69 F Supp 497, 19 BNA LRRM 2282, 12 CCH LC ¶ 63570; Parker v Maynard Boyce, Inc. (1947, SD Cal) 74 F Supp 581, 18 BNA LRRM 2441; Nunn v Humphrey (1948, DC Pa) 79 F Supp 8; Guinther v Scala (1946, DC NJ) 11 CCH LC ¶ 63380

Veteran who was entitled to reinstatement was also entitled to compensation, with interest thereon, from date of honorable discharge. Van Doren v Van Doren Laundry Service, Inc. (1947, CA3 NJ) 162 F.2d 1007, 20 BNA LRRM 2351, 13 CCH LC ¶ 63910

Veteran entitled to re-employment is entitled to recover compensation for period beginning with time he made application for re-employment up to time company finally offered to reinstate him, at rate consistent with wages paid in like position, less proper deductions. Special Service Co. v Delaney (1949, CA5 La) 172 F.2d 16, 23 BNA LRRM 2294, 16 CCH LC ¶ 64940

Veteran who has been refused re-employment in his preservice position and has found employment elsewhere and no longer desires to be re-employed in prior position is entitled to be compensated for period beginning with application for re-employment up to date on which he obtained other position. Guinther v Scala (1946, DC NJ) 11 CCH LC ¶ 63380; McAllister v American Transformer Co. (1946, DC NJ) 11 CCH LC ¶ 63393

Commencement of suit in July, 1945, was unreasonable delay where original application for reinstatement was made on or about October 1, 1944 and no compensation was due petitioner for such period and obligation of his employer for accrued compensation dated from July 1945. Dacey v Bethlehem Steel Co. (1946, DC Mass) 66 F Supp 161, 18 BNA LRRM 2060, 11 CCH LC ¶ 63177

Veteran entitled to reinstatement should be awarded compensation limited to period of unemployment commencing with institution of action for reason that delay in enforcing rights was in no manner fault of employer. Karas v Klein (1947, DC Minn) 70 F Supp 469, 19 BNA LRRM 2559, 12 CCH LC ¶ 63656

Returning veteran entitled to re-employment, where employer has wrongfully refused re-employment, is entitled to receive compensation which he would have earned if re-employed in old position, but only for period between institution of action and time of decision, less what veteran has earned during interim. Thompson v Chesapeake & O. R. Co. (1947, DC W Va) 76 F Supp 304, 21 BNA LRRM 2358, 14 CCH LC ¶ 64367

Veteran entitled to reinstatement was entitled to compensation for period beginning with commencement of action to date of reinstatement but, because of undue delay in bringing action, was not entitled to damages from date of application for reinstatement. Noble v International Nickel Co. (1948, DC W Va) 77 F Supp 352, 22 BNA LRRM 2066, 14 CCH LC ¶ 64552

Because of unreasonable delay of 18 months before filing action for reinstatement against pre-service employer, veteran should be allowed compensation only from date of commencing
action, less what veteran had earned during interim in other employment. Anglin v Chesapeake & O. R. Co. (1948, DC W Va) 77 F Supp 359, 22 BNA LRRM 2138, 14 CCH LC ¶ 64528

Under predecessor to statute veteran who delays filing suit for reinstatement can recover damages only for period beginning after date on which suit is commenced. Walsh v Chicago Bridge & Iron Co. (1949, DC III) 90 F Supp 322 (superseded by statute as stated in Stevens v Tennessee Valley Auth. (1983, CA6 Tenn) 712 F.2d 1047, 118 BNA LRRM 3201)

Employer failing to re-employ veteran is entitled to reasonable time to adjust affairs upon receiving application; thus, damages should be awarded from 2 weeks after application. Hood v Lawrence (1955, DC NH) 138 F Supp 120, 31 CCH LC ¶ 70194

Under predecessor to statute veteran’s claim for back wages, where delay is not unreasonable and has been caused in large part by negotiations with employer, is not limited to period subsequent to institution of action but encompasses entire period from application for re-employment until reinstatement. Armstrong v Baker (1975, ND W Va) 394 F Supp 1380, 89 BNA LRRM 2242, 77 CCH LC ¶ 10874 (superseded by statute as stated in Stevens v Tennessee Valley Auth. (1983, CA6 Tenn) 712 F.2d 1047, 118 BNA LRRM 3201)

Magistrate, who decided limited issue of damages by consent of parties, found that four year statute of limitations in 28 USCS § 1658, which was created by Congress for new federal causes of action not having their own limitations periods, applied to employees’ Uniform Services Employment and Reemployment Rights Act of 1994, 38 USCS § 4301 et seq. (USERRA), claims for employment discrimination; therefore employees’ partial motion for summary judgment was granted. Rogers v City of San Antonio (2003, WD Tex) 172 BNA LRRM 2240, affd in part and revd in part, remanded (2004, CA5 Tex) 392 F.3d 758, 176 BNA LRRM 2129, 85 CCH EPD ¶ 41800

17. -Miscellaneous

Veteran was entitled to be compensated for his loss of wages for twenty-two working days of eight hours each, from February 25, 1946 to March 26, 1946, inclusive at regular rate of pay, based on forty hour week, less legal deductions for state and federal taxes, where veteran, formerly employed as pipe fitter helper, was discharged from Navy on December 17, 1945, on February 19, 1946, he made application to company for restoration and reinstatement to his former position, where period of five days from February 19, 1946 to February 23, 1946, inclusive, was reasonable time for company to reinstate him in his former position or position of like seniority, status, and pay and where company failed to do so until March 26, 1946. Donaldson v Tennessee Coal, Iron & R. Co. (1946, DC Ala) 68 F Supp 681, 18 BNA LRRM 2465, 11 CCH LC ¶ 63405

Veteran was entitled to damages of $500 per month for each month until restored to job where, during period that typewriter salesman was prevented from resuming his former position, he would have earned average of $500.00 per month as commissions. Lee v Remington Rand, Inc. (1946, DC Cal) 68 F Supp 837, 18 BNA LRRM 2450, 11 CCH LC ¶ 63351

Former general manager of advertising corporation, who received salary of $300 per month prior to entering armed forces, and whose application for re-employment in his former position was refused and rejected, was entitled to be compensated for his loss of wages in sum of $600 per month, where present general manager was receiving $600 per month and there had been general increase in rate of pay received by all employees of corporation. Parker v Maynard Boyce, Inc. (1947, SD Cal) 74 F Supp 581, 18 BNA LRRM 2441

Veteran entitled to reinstatement was entitled to compensation fixed as of year following discharge from Armed Forces and where average weekly earnings for veteran in year following discharge would have been $28 per week yearly total should be awarded based on this figure, with reduction made for earnings gained in other employment during that time. Smith v Lestershire Spool & Mfg. Co. (1949, DC NY) 86 F Supp 703, 25 BNA LRRM 2074, 17 CCH LC ¶ 65448

18. Reinstatement in improper position
Veteran’s damages for not having been properly reinstated in position to which he was entitled could be determined by reference to other employee’s earnings, less whatever veteran had earned on own during interim, where, during veteran’s absence in service, fellow employee who had occupied position similar to that of veteran’s when latter was inducted, was advanced in salary to figure considerably greater than that which was offered veteran upon his return from service; fact that veteran’s earnings thus became greatly increased over prewar earnings did not matter since veteran was entitled to share in war-fostered prosperity of employer. Loeb v Kivo (1948, CA2 NY) 169 F.2d 346, 22 BNA LRRM 2392, 15 CCH LC ¶ 64678, cert den (1948) 335 US 891, 93 L Ed 429, 69 S Ct 246, 23 BNA LRRM 2137

Plaintiff, who had been reinstated to lower paying position, was entitled under former 50 USCS Appx § 459(b)-(h) to recover as damages difference between pay he would have made during normal work week in higher-paying position and normal work week pay of lower-paying position, without any deduction for overtime pay he earned in latter position, which overtime he would not have received in higher-paying position. Helton v Mercury Freight Lines, Inc. (1971, CA5 Ala) 444 F.2d 365, 77 BNA LRRM 2356, 65 CCH LC ¶ 11755

Returning veteran who was entitled to be reinstated in position of seniority greater than that to which he has actually been reinstated was entitled to difference between what he did earn and what he might have earned if his right of seniority had been recognized and if he had been restored to job he was entitled to. Williams v Sinclair Refining Co. (1947, DC Tex) 74 F Supp 139, 21 BNA LRRM 2148, 14 CCH LC ¶ 6221, revd on other grounds (1948, CA5 Tex) 171 F.2d 192, 23 BNA LRRM 2153, 15 CCH LC ¶ 64880

Returning veteran whose employer denied him seniority to which he was entitled under former 38 USCS § 2021, was entitled to recover base pay and overtime pay for those periods of time he was laid off from work, based upon amount of base pay and overtime pay earned by person having seniority to which veteran was entitled, overtime pay being based upon veteran’s demonstrated willingness to accept overtime pay during periods when he was not laid off, and amount of overtime work available. Chernoff v Pandick Press, Inc. (1977, SD NY) 440 F Supp 822, 96 BNA LRRM 3078, 82 CCH LC ¶ 10196 (criticized in Fink v City of New York (2001, ED NY) 129 F Supp 2d 511, 166 BNA LRRM 2923, 80 CCH EPD ¶ 40592)

Veteran reinstated in wrong position is entitled to pay for vacation and absences to which he would have been entitled had he been placed in right position. Bury v General Motors Corp. (1982, ND Ohio) 113 BNA LRRM 3036, 97 CCH LC ¶ 10080

19. Wrongful discharge following reinstatement

Re-employed veteran discharged without cause within year of his re-employment is entitled to recover amount of wages and value of other benefits lost during remainder of employment year following discharge. Britt v Trailmobile Co. (1950, CA6 Ohio) 179 F.2d 569, 25 BNA LRRM 2314, 17 CCH LC ¶ 65541, 29 ALR2d 1272, cert den (1950) 340 US 820, 95 L Ed 603, 71 S Ct 52

Veteran, wrongfully discharged from service on July 21, 1945, and released from position due to reduction in force on June 30, 1946, until restored to duty on February 8, 1949, was entitled to recover pay during period of removal less amounts earned in other employment. Green v United States (1953) 124 Ct Cl 186, 109 F Supp 720

Veteran is entitled to compensation from his discharge, less credit for what he has received in other employment, and is further entitled to have his contract reinstated where he is discharged without cause. Niemiec v Seattle Rainier Baseball Club, Inc. (1946, DC Wash) 67 F Supp 705, 18 BNA LRRM 2189, 11 CCH LC ¶ 63258

Veteran was entitled to judgment in amount of $1,200 plus costs where veteran was discharged without cause and as result thereof suffered loss of wages in amount of $1,288, less amount earned by him during period of unemployment and where, although veteran was unable to fix with certainty amount earned by him, it was estimated that it did not exceed $88. Coon v Liebmann Breweries, Inc. (1949, DC NJ) 86 F Supp 333, 24 BNA LRRM 2514, 17 CCH LC ¶ 65330
Veteran was entitled to recover difference between wages he received during year and amount he would have received had he operated machine at original job for entire year where demotion of veteran was tantamount to discharge without cause. Paredez v Pillsbury Co. (1966, CD Cal) 259 F Supp 493, 63 BNA LRRM 2322, 54 CCH LC ¶ 11582

Veteran who was wrongfully discharged from employment as salesman as result of veteran's active reserve obligation, was entitled under statute to recover lost wages and commissions, based upon demonstrated and projected sales growth of territories in which veteran sold on commission plus salary, less amounts included in veteran's compensation as expenses, and less amounts earned in subsequently-obtained positions, and veteran was further entitled to recompense for medical expenses which would have been covered by former employer's medical insurance, had veteran not been wrongfully discharged. Bankston v Stratton-Baldwin Co. (1977, SD Ala) 441 F Supp 247, 96 BNA LRRM 3292, 83 CCH LC ¶ 10304

3. Mitigation of Damages

20. Generally

Veteran owes corporation duty to mitigate damages. John S. Doane Co. v Martin (1947, CA1 Mass) 164 F.2d 537, 20 BNA LRRM 2445, 13 CCH LC ¶ 63917

It is duty of veteran to seek other employment in effort to mitigate damages when he has been refused reinstatement. Loeb v Kivo (1948, CA2 NY) 169 F.2d 346, 22 BNA LRRM 2392, 15 CCH LC ¶ 64678, cert den (1948) 335 US 891, 93 L Ed 429, 69 S Ct 246, 23 BNA LRRM 2137

Trial court abused discretion in reducing award of lost wages to veteran under predecessor to statute based on veteran's alleged failure to mitigate damages where employer failed to introduce evidence that veteran might have found comparable work. Hanna v American Motors Corp. (1984, CA7 Wis) 724 F.2d 1300, 115 BNA LRRM 2393, 33 CCH EPD ¶ 34055, 99 CCH LC ¶ 10681, and on other grounds (1984, CA7 Wis) 115 BNA LRRM 2543 and cert den (1984) 467 US 1241, 82 L Ed 2d 821, 104 S Ct 3512, 116 BNA LRRM 2632, 34 CCH EPD ¶ 34425

Duty which rests upon discharged veteran to mitigate damages is fulfilled when he makes bona fide effort to obtain employment upon substantially same hourly basis as that which governs his employment with former employer. MacKnight v Twin Cities Broadcasting Corp. (1947, DC Minn) 13 CCH LC ¶ 64067

Veteran refused position with former seniority, but offered position as new man, is not required to accept position offered in mitigation of damages for wrongful refusal to restore him to former position. Fessler v Reading Co. (1955, DC Pa) 138 F Supp 203, 29 CCH LC ¶ 69756

Plaintiff's failure to adequately seek and obtain similar or comparable employment after his discharge by defendant was failure to properly mitigate his damages under former 50 USCS Appx § 459(b)-(h). Larsen v Air California (1970, CD Cal) 313 F Supp 218, 75 BNA LRRM 2156, 62 CCH LC ¶ 10897, aff'd (1972, CA9 Cal) 459 F.2d 52, 79 BNA LRRM 2767, 67 CCH LC ¶ 12493, cert den (1972) 409 US 895, 34 L Ed 2d 151, 93 S Ct 116, 81 BNA LRRM 2390, 69 CCH LC ¶ 13059, reh den (1972) 409 US 1051, 34 L Ed 2d 505, 93 S Ct 511

Municipal employer which wrongfully failed to rehire veteran pursuant to statute failed to show that veteran did not mitigate damages by exercising reasonable diligence in seeking comparable work where employer could only introduce copies of 7 want ads for work available during period of veteran's unemployment, none of which was comparable to position wrongfully denied, and veteran showed that he checked want ads, applied at Job Services Office and took two public employment examinations. Thomas v Juneau (1986, DC Alaska) 638 F Supp 303, 122 BNA LRRM 3160, 104 CCH LC ¶ 11924

Burden is on defendant to prove plaintiff's failure to mitigate damages. Graham v Hall-McMillen Co. (1996, ND Miss) 925 F Supp 437, 152 BNA LRRM 2408, 131 CCH LC ¶ 11575

21. Credits against damages, generally
In fixing amount of damages for discharge without cause, credit must be given for amounts earned during year and for approximate amount representing unemployment compensation received by veteran. Mannato v Dutch Sales Co. (1948, DC NJ) 14 CCH LC ¶ 64418

Damages will be mitigated by employee's other earned income during layoff periods and unemployment compensation payments. Chernoff v Pandick Press, Inc. (1977, SD NY) 440 F Supp 822, 96 BNA LRRM 3078, 82 CCH LC ¶ 10196 (criticized in Fink v City of New York (2001, ED NY) 129 F Supp 2d 511, 166 BNA LRRM 2923, 80 CCH EPD ¶ 40592)

22. -Actual earnings

Since it is intent of Congress only to make returning veterans whole, not redress public injury, district court's discretionary authority to award damages includes authority to reduce amount of damages claimed where veteran has received earnings from other employment. Boston & M. R. R. v Bentubo (1947, CA1 Mass) 160 F.2d 326, 19 BNA LRRM 2435, 12 CCH LC ¶ 63631

Award of damages for wrongful refusal to reemploy veteran, in amount of $6500, would be reduced by $3000, amount veteran might have earned with reasonable effort in period in question. John S. Doane Co. v Martin (1947, CA1 Mass) 164 F.2d 537, 20 BNA LRRM 2445, 13 CCH LC ¶ 63917

Employer is entitled to credit for earnings made by petitioner from date suit is commenced to date of reinstatement. Dacey v Bethlehem Steel Co. (1946, DC Mass) 66 F Supp 161, 18 BNA LRRM 2060, 11 CCH LC ¶ 63177

Court, in awarding damages less mitigation, would deduct regular daytime earnings from wages but would not also subtract nighttime earnings where veteran, denied re-employment rights, worked for another employer for regular 40-hour week during day and also worked 9 hours part-time at night for still another employer. MacKnight v Twin Cities Broadcasting Corp. (1947, DC Minn) 13 CCH LC ¶ 64067

In absence of any provision for subrogation and in absence of any obligation for veteran to repay government, payment of unemployment allowances must be construed as gratuity from third party in no way effecting employer's liability and employer is not entitled to credit for sum of amount paid to veteran under Unemployment Readjustment Allowance Act. Allyn v Abad (1948, DC NJ) 81 F Supp 140, 23 BNA LRRM 2117, 16 CCH LC ¶ 64976

23. -Readjustment allowance

Since readjustment allowance of veteran does not constitute earnings in other employment, employer is not entitled to credit such sum against loss of wages caused by its unlawful actions. Troy v Mohawk Shop, Inc. (1946, DC Pa) 67 F Supp 721, 18 BNA LRRM 2297, 11 CCH LC ¶ 63306

Readjustment allowance paid to returning veteran by United States does not constitute earnings in another employment and employer is not entitled to have payments made under such allowance credited against loss of wages caused by its unlawful actions. Hoyer v United Dressed Beef Co. (1946, DC Cal) 67 F Supp 730, 18 BNA LRRM 2180, 11 CCH LC ¶ 63271

24. -Subsistence allowance

Employer was not entitled to credit against damages awarded to veteran for improper denial of re-employment for money paid to veteran by United States for subsistence allowance while veteran was attending trade school where veteran had no other earnings during period covered by damages. Noble v International Nickel Co. (1948, DC W Va) 77 F Supp 352, 22 BNA LRRM 2066, 14 CCH LC ¶ 64552

25. -Unemployment compensation

In fixing amount of damages for discharge without cause, credit must be given for amounts earned during year and for approximate amount representing unemployment compensation received by veteran. Mannato v Dutch Sales Co. (1948, DC NJ) 14 CCH LC ¶ 64418
Damages will be mitigated by employee's other earned income during layoff periods and unemployment compensation payments. Chernoff v Pandick Press, Inc. (1977, SD NY) 440 F Supp 822, 96 BNA LRRM 3078, 82 CCH LC ¶ 10196 (criticized in Fink v City of New York (2001, ED NY) 129 F Supp 2d 511, 166 BNA LRRM 2923, 80 CCH EPD ¶ 40592)

III. PRACTICE AND PROCEDURE

A. In General

26. Generally

Employer is estopped from denying veteran's compliance with statutory requirements where employer's answer duly admits application for re-employment within prescribed time and defendant's refusal to re-employ. United States ex rel. Stanley v Wimbish (1946, CA4 NC) 154 F.2d 773, 17 BNA LRRM 972, 11 CCH LC ¶ 63099

Right of veteran to award of damages is not matter of law and right but rests solely within discretion of trial court where veteran is refused reemployment. Levine v Berman (1949, CA7 Ill) 178 F.2d 440, 25 BNA LRRM 2210, 17 CCH LC ¶ 65534, cert den (1950) 339 US 982, 94 L Ed 1386, 70 S Ct 1024, 26 BNA LRRM 2261

District court abused its discretion in denying, without hearing, motion by veteran under former 50 USCS Appx § 459(b)-(h) for damages resulting from lost wages due to employer's unlawful action in refusing reinstatement to pre-military service position. O'Mara v Petersen Sand & Gravel Co. (1974, CA7 Ill) 498 F.2d 896, 86 BNA LRRM 2702, 74 CCH LC ¶ 10107

27. Right to trial by jury

Use of jury in cause of action for reinstatement to employment and compensation for lost wages under former Veterans Reemployment Rights Act was error. Troy v Hampton (1985, CA4 Va) 756 F.2d 1000, 118 BNA LRRM 2996, 102 CCH LC ¶ 11384, 1 FR Serv 3d 1470, cert den (1985) 474 US 864, 88 L Ed 2d 151, 106 S Ct 182, 120 BNA LRRM 2728, 103 CCH LC ¶ 11552

Veteran who returned to job as FBI clerk was entitled to jury trial on issue of whether his conduct in sleeping in same bedroom and in same bed with girlfriend, although not having sexual relations with her, was something that average FBI clerical employee should and did know violates "ordinarily expected standards of personal conduct" required of them, breach of which was cause for discharge. Carter v United States (1968, App DC) 132 US App DC 303, 407 F.2d 1238, 9 ALR Fed 205

Proceeding in which veteran asked for order directing re-employment in same position or equivalent in which he was employed prior to enlistment in Army was not suit at common law within Seventh Amendment which limits right of trial by jury to "suits at common law" and veteran was therefore not entitled to trial by jury. Streititz v Surrey Classics, Inc. (1946, DC NY) 7 FRD 101

Although veteran is not entitled to jury trial with regard to issue of reinstatement, he is nevertheless entitled to have jury decide questions relating strictly to legal issues, such as specific issue of compensation. Murray v Henry Rosenfeld, Inc. (1946, SD NY) 11 CCH LC ¶ 63119

Action brought under re-employment provisions of Selective Service Act of 1940 raised issues and defenses which were equitable in nature and therefore not triable to jury. Conrocode v Ohio Bell Tel. Co. (1951, DC Ohio) 11 FRD 303

Veteran who sought declaration as to right to re-employment under former 50 USCS Appx § 459(b)-(h) and for damages for refusal of re-employment was entitled to trial by jury. Steffen v Farmers Elevator Service Co. (1952, DC Iowa) 109 F Supp 16, 31 BNA LRRM 2228, 22 CCH LC ¶ 67313

Suit brought pursuant to predecessor to statute for back wages allegedly due was to be determined by court without intervention of jury. Mowdy v Ada, Bd. of Education (1977, ED Okla) 76 FRD 436, 96 BNA LRRM 2905, 82 CCH LC ¶ 10181, 24 FR Serv 2d 717
Suit brought under predecessor to statute by veteran for restoration of lost seniority status and back pay was suit for equitable remedy of restitution and for equitable claim of reinstatement, and was triable by court and not by jury. Cox v Kansas City (1977, WD Mo) 76 FRD 459, 96 BNA LRRM 3297, 82 CCH LC ¶ 10197, 24 FR Serv 2d 920

There is no right to jury trial under statute. Pomon v General Dynamics Corp. (1983, DC RI) 574 F Supp 147, 115 BNA LRRM 2494, 102 CCH LC ¶ 11306

28. Application of res judicata and collateral estoppel

Right of veteran to sue in United States district court, free of costs and with United States attorney as his counsel, did not deprive him of right to sue in state courts, but he could not sue in federal court after identical issues between same parties had been adjudicated against him in state court. Tsang v Kan (1949, CA9 Cal) 173 F.2d 204, 23 BNA LRRM 2394, 16 CCH LC ¶ 64979, cert den (1949) 337 US 939, 93 L Ed 1744, 69 S Ct 1515, 24 BNA LRRM 2189

Declaratory judgment in action brought by parent corporation to determine seniority rights of veterans over nonveterans of subsidiary corporation was res judicata to action by veteran employees to determine their seniority, but it was not res judicata for alleged illegal discharges by parent corporation. Britt v Trailmobile Co. (1950, CA6 Ohio) 179 F.2d 569, 25 BNA LRRM 2314, 17 CCH LC ¶ 65541, 29 ALR2d 1272, cert den (1950) 340 US 820, 95 L Ed 603, 71 S Ct 52

Reservist was collaterally estopped from bringing action against employer who terminated him when he was called to active duty under statute where (1) state administrative body decided identical issues and reservist had full and fair opportunity to participate, even though decision was not reviewable, because nothing in text or legislative history of statute warrants conclusion that such decisions should not be given preclusive effect. Romano v Thunder Projects, Inc. (1988, ND NY) 696 F Supp 831, 130 BNA LRRM 2786, 113 CCH LC ¶ 11671

29. Costs and fees

Even though judgment went against veteran in his action to obtain re-employment as guaranteed by costs, costs were not be awarded against him. Salzman v London Coat of Boston, Inc. (1946, CA1 Mass) 156 F.2d 538, 18 BNA LRRM 2252, 11 CCH LC ¶ 63277, cert den (1946) 329 US 806, 91 L Ed 688, 67 S Ct 501, 19 BNA LRRM 2177

Court did not err in assessing costs against employer though court decided in favor of employer on question of damages, since action for damages was predicated on employer's wrongful refusal to reinstate veteran. Levine v Berman (1949, CA7 Ill) 178 F.2d 440, 25 BNA LRRM 2210, 17 CCH LC ¶ 65534, cert den (1950) 339 US 982, 94 L Ed 1386, 70 S Ct 1024, 26 BNA LRRM 2261

Veteran who unsuccessfully sought reinstatement to job was not entitled to attorney fees. Wimberly v Mission Broadcasting Co. (1975, CA10 Colo) 523 F.2d 1260, 90 BNA LRRM 3037, 77 CCH LC ¶ 11123

Rule 37(f) prohibits assessment of attorney's fees against United States as counsel for plaintiff pursuant to former § 2022 of Vietnam Era Veterans Readjustment and Assistance Act for plaintiff's failure to timely respond to defendant's request for production; attorney's fees will not be assessed against plaintiff personally where United States was responsible for delay. Hembree v Georgia Power Co. (1978, ND Ga) 26 FR Serv 2d 843

Veteran was authorized to proceed without prepayment of costs on appeal in effort to receive Vietnam-era veterans' assistance under predecessor to statute, because no-taxation-of-costs provision of predecessor to statute was intended to apply to all court proceedings. Campbell v Roach (1990, DC Md) 741 F Supp 566

Job applicant's motion for full benefits of former 38 USCS § 4302's "no taxation of costs" provision is granted with clarification, where applicant seeks benefits equal to 28 USCS § 1915's "in forma pauperis" status and automatic shifting of all his litigation expenses to defendant employer and U.S., because court must clarify its present view that only persons who U.S. Attorney believes have meritorious claims are entitled to benefit, and its understanding that "fees and court costs" include only items enumerated in 28 USCS § 1920, of which applicant is relieved.
but with which no one is taxed until conclusion of litigation. Newport v Michelin Aircraft Tire Corp. (1994, WD Mo) 851 F Supp 1406, 148 BNA LRRM 2491

Employment discrimination plaintiff is entitled to generous attorney's fee award at hourly rates of $275 per partner, $225 per senior associate, and $150 per junior associate, even though prevailing rates are only $200-250, $200, and $100 respectively, where case involved novel and difficult issues arising under new federal statute, because slightly higher rates are warranted by circumstances but requested rates of $350, $250, and $200 are just too far outside range of prevailing rates. Fink v City of New York (2001, ED NY) 154 F Supp 2d 403

B. Jurisdiction

30. Federal courts, generally

Action against insular police commission to obtain reinstatement in former position as insular policeman could not be maintained in district court of Puerto Rico. Insular Police Com. v Lopez (1947, CA1 Puerto Rico) 160 F.2d 673, 19 BNA LRRM 2573, 12 CCH LC ¶ 63665, cert den (1947) 331 US 855, 91 L Ed 1863, 67 S Ct 1743, 24 BNA LRRM 2613

Federal district court did not have jurisdiction of action to enforce re-employment rights of reserve officer in armed forces of United States discharged while he was on training duty, as sole jurisdiction of such action was vested in State courts, under former subsec. (g) of 50 USCS Appx § 459. Christner v Poudre Valley Co-op. Asso. (1956, CA10 Colo) 235 F.2d 946, 38 BNA LRRM 2371, 30 CCH LC ¶ 70119

Congress's amendment of Uniformed Services Employment and Reemployment Rights Act conferring jurisdiction only on state courts over suits against state employer prohibited federal court from assuming jurisdiction over such suit, and since Congress's intent to limit such suits was unmistakable jurisdiction did not survive under general federal question jurisdictional statute, 28 USCS § 1331. United States v Muhammad (1999, CA5 Tex) 165 F.3d 327 (criticized in In re Grand Jury Empaneling of the Special Grand Jury (1999, CA3 NJ) 171 F.3d 826) and cert den (1999) 526 US 1138, 143 L Ed 2d 1022, 119 S Ct 1795 and subsequent app (2003, CA9 Cal) 64 Fed Appx 629

Federal court for western district of Louisiana had jurisdiction of action brought by United States attorney for such district on behalf of residents of such district, veteran plaintiffs, to protect their rights thereunder relative to obtaining for them same seniority with brotherhood of railroad trainmen and Missouri Pacific Railroad Co. that they had at time that they went into armed forces of United States. Bryant v Brotherhood R. Trainmen (1947, DC La) 74 F Supp 510, 21 BNA LRRM 2061, 13 CCH LC ¶ 64143

Court had no power to exercise discretion in matter of jurisdiction and must deny employer's motion to have case removed from district court in district within which employer maintained business to district court in jurisdiction in which veteran resided. O'Connor v Yardley Golf Club (1947, DC Pa) 79 F Supp 264

Employer had no cause of action under statute and could not invoke federal jurisdiction thereunder to determine relative rights of employees under former Vietnam Era Veterans' Readjustment Assistance Act and under collective bargaining agreement. Minneapolis, N. & S. Railway v United Transp. Union (1980, DC Minn) 490 F Supp 335, 105 BNA LRRM 2525, 89 CCH LC ¶ 12198

Fact that Regional Rail Act (45 USCS § 777) addresses arbitration does not indicate intention to repeal or overlay rights and procedures contained in former § 2022. Brown v Consolidated Rail Corp. (1985, ND Ohio) 605 F Supp 629, 118 BNA LRRM 2894, 102 CCH LC ¶ 11437

31. -Amount of claim

Suit by employee arising out of wage increase while employee was in armed forces does not depend upon jurisdictional amount, since predecessor to statute contained its own jurisdictional requirements, and provided for no particular amount in controversy. Flynn v Ward Leonard Electric Co. (1949, DC NY) 84 F Supp 399, 24 BNA LRRM 2245
Predecessor to statute providing for reinstatement of reserve officers performing training duty does not give federal courts special jurisdiction and action for reinstatement cannot be maintained thereunder where less than jurisdictional amount is involved. Christner v Poudre Valley Co-operative Asso. (1955, DC Colo) 134 F Supp 115, 36 BNA LRRM 2688, 28 CCH LC ¶ 69447, affd (1956, CA10 Colo) 235 F.2d 946, 38 BNA LRRM 2371, 30 CCH LC ¶ 70119

32. -Subject matter of claim

Former employee who was discharged from service under other than honorable conditions was not entitled to re-employment rights under predecessor to statute and federal district court has jurisdiction to set aside award of railroad adjustment board, under 45 USCS § 153(p) ordering employer to return such former employee to service and pay retroactive compensation. Anglo Canadian Shipping Co. v United States (1956, CA9) 238 F.2d 18

District Court had subject matter jurisdiction under general federal question statute 28 USCS § 1331, to determine declaratory judgment brought under former 38 USCS § 2024 to determine whether employee's request for leave of absence from employment to seek training to qualify for future military promotions in military reserves. Gulf States Paper Corp. v Ingram (1987, CA11 Ala) 811 F.2d 1464, 124 BNA LRRM 2873, 106 CCH LC ¶ 12239

Court had jurisdiction to consider FBI agent's claim to accrued sick leave since claim to rightful promotion and accrued sick leave devolved from former 50 USCS Appx § 459, arose on account of same event, and shared basic facts. Carman v United States (1979) 221 Ct Cl 165, 602 F.2d 946

Since re-employment benefits were reserved exclusively to returned veterans, action for declaratory judgment regarding seniority status of returned servicemen employees of corporation, brought by corporation against union representing employees of such corporation, must be dismissed, since court had no jurisdiction over subject matter of action. Trailmobile Co. v International Union, etc. (1946, DC Ohio) 67 F Supp 53, 18 BNA LRRM 2166, 11 CCH LC ¶ 63251, affd (1947, CA6 Ohio) 162 F.2d 720, 20 BNA LRRM 2677, 13 CCH LC ¶ 64080

Court had jurisdiction over employee's discrimination claim brought under Uniform Services Employment and Reemployment Rights Act, 38 USCS § 4311, because under 38 USCS § 4323(b)(3), employer was municipality, not state, and, thus, municipality was considered private employer. Harris v City of Montgomery (2004, MD Ala) 322 F Supp 2d 1319, 175 BNA LRRM 2070

33. -Miscellaneous

Expiration of term of employment guaranteed by Selective Training and Service Act, at time of rendition of judgment in action by war veteran who had been laid off by his employer while non-veterans with higher seniority have been continued at work, for determination of his rights under Selective Training and Service Act, in which labor union, claiming that lay-off was warranted by its collective bargaining agreement with employer, was permitted to intervene, did not render moot issue thus raised, so as to require dismissal of union's appeal from judgment awarding to veteran compensation for lost pay. Fishgold v Sullivan Drydock & Repair Corp. (1946) 328 US 275, 90 L Ed 1230, 66 S Ct 1105, 18 BNA LRRM 2075, 11 CCH LC ¶ 51232, 167 ALR 110

Federal court did not have jurisdiction to hear case by non-veteran against veteran and his employer allegedly involving constitutionality of statute, since suit was not brought by veteran claiming any benefits under it and no other ground for federal court jurisdiction existed. Lindsey v Leewright (1948, CA5 Tex) 171 F.2d 542, 23 BNA LRRM 2155, 16 CCH LC ¶ 64896

District Court had jurisdiction over claim against multi-employer pension plan fund even though fund was not literally "employer" of returning veteran, since narrow reading of word "employer" as used in predecessor to statute was inconsistent with statute as whole. Imel v Laborers Pension Trust Fund (1990, CA9 Cal) 904 F.2d 1327, 12 EBC 1680, 134 BNA LRRM 2313, 115 CCH LC ¶ 10102, cert den (1990) 498 US 939, 112 L Ed 2d 308, 111 S Ct 343, 12 EBC 2784

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Court of Claims has jurisdiction of action by federal employee, who had already been restored to his former position, to recover difference in salary which improper civil service classification caused him to lose. Kephart v United States (1948) 109 Ct Cl 654, 75 F Supp 1020

Court had jurisdiction over National Guard member's Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 USCS 4301-4334, claim against her former employee because, even though claim was subject to otherwise valid arbitration agreement, arbitration agreement was superseded by 38 USCS § 4323; USERRA did not provide for arbitration as means to obtaining relief under USERRA, and, therefore, mandatory arbitration could not be imposed upon member pursuant to 9 USCS § 2 because doing so would impose additional prerequisite on exercise of member's USERRA rights in violation of 38 USCS § 4323(b). Lopez v Dillard's, Inc. (2005, DC Kan) 382 F Supp 2d 1245

34. State courts

Right accorded veteran to sue for re-employment or for compensation in United States District Court does not deprive veteran of right to sue in state court. Tsang v Kan (1949, CA9 Cal) 173 F.2d 204, 23 BNA LRRM 2394, 16 CCH LC ¶ 64979, cert den (1949) 337 US 939, 93 L Ed 1744, 69 S Ct 1515, 24 BNA LRRM 2189

35. Miscellaneous

Board lacked jurisdiction of restoration action against state national guard since regulations regarding restoration define agency in such way as to exclude state organization such as state national guard. Kostan v Ariz. Nat'l Guard (1990, MSPB) 45 MSPR 173, remanded (1990, CA) 925 F.2d 1478

Board lacks jurisdiction over restoration appeals by state National Guard technicians since such employer is not "agency". Sanford v Conn. Nat'l Guard (1990, MSPB) 45 MSPR 576, remanded (1991, MSPB) 1991 MSPB LEXIS 302

C. Parties

36. Generally

United States could by amendment be stricken out as plaintiff where action was brought in name of United States for veteran, so that complaint would stand in name of real party in interest if proceeding should properly be in name of veteran. United States ex rel. Deavers v Missouri, K. & T. R. Co. (1949, CA5 Tex) 171 F.2d 961, 23 BNA LRRM 2250, 16 CCH LC ¶ 64918, cert den (1949) 337 US 958, 93 L Ed 1757, 69 S Ct 1533, 24 BNA LRRM 2227

Veteran was not barred from bringing action under predecessor to statute against anyone other than immediate employer, since "necessary party" language allowed veteran to chose to sue others, such as union or pension fund, while it deprived employer of right to bring in such other parties or to dismiss action. Bunnell v New England Teamsters & Trucking Industry Pension Fund (1980, DC Mass) 486 F Supp 714, 107 BNA LRRM 3164, 88 CCH LC ¶ 11988, affd (1981, CA1 Mass) 655 F.2d 451, 2 EBC 1654, 107 BNA LRRM 3286, 92 CCH LC ¶ 12933, cert den (1982) 455 US 908, 71 L Ed 2d 446, 102 S Ct 1253, 109 BNA LRRM 2304, 92 CCH LC ¶ 13200

Individual claiming that his employment with airline had been terminated in violation of Vietnam Era Veterans' Readjustment Assistance Act of 1974, and that airline had violated Act by repurchasing his shares in airline for price he had paid rather than alleged market value, had standing to sue under Act notwithstanding that individual, who claimed that he had not resigned but had entered into military leave of absence when he returned to active duty with Air National Guard, was still on active duty and was not in position to demand reinstatement. Winders v People Express Airlines, Inc. (1984, DC NJ) 595 F Supp 1512, 5 EBC 2433, 117 BNA LRRM 3275, 102 CCH LC ¶ 11258, affd (1985, CA3 NJ) 770 F.2d 1078, 119 BNA LRRM 3071

37. Intervention

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In suit filed in behalf of student firemen against railroad for reinstatement, district court could grant permission to railroad to file counterclaim, and it could also allow intervention of interested parties.  Brotherhood of Locomotive F. & E. v United States (1950, CA5 Tex) 183 F.2d 65, 26 BNA LRRM 2292, 18 CCH LC ¶ 65847

38. Interpleader

In any action brought under former Veterans Reemployment Rights Act (38 USCS § 2021 et seq.), only employer was necessary party, and employer's interpleader actions against employee and union, or employer's cross-claim against union, could be dismissed.  Stewart v United States Steel Corp. (1984, ND Ind) 594 F Supp 180, 117 BNA LRRM 2101, 101 CCH LC ¶ 11138

39. Joinder

In action to compel recognition of seniority due returned veteran who, when taken into military service, had position with company as fireman, court could dismiss complaint because veteran refused, after order so requiring, to join as defendants with employing company other firemen who would be affected by giving veteran seniority status which he claimed.  United States ex rel. Deavers v Missouri, K. & T. R. Co. (1949, CA5 Tex) 171 F.2d 961, 23 BNA LRRM 2250, 16 CCH LC ¶ 64918, cert den (1949) 337 US 958, 93 L Ed 1757, 69 S Ct 1533, 24 BNA LRRM 2227

A controversy of kind described in former 50 USCS Appx § 459(b)-(h) was solely between the returned veteran and the former employer and no one else need be joined as a party litigant.  McKinney v Missouri-Kansas-Texas R. Co. (1956, CA10 Okla) 240 F.2d 8, 39 BNA LRRM 2312, 31 CCH LC ¶ 70418, affd (1958) 357 US 265, 2 L Ed 2d 1305, 78 S Ct 1222, 42 BNA LRRM 2287, 35 CCH LC ¶ 71613

Federal court has jurisdiction of subject matter and parties to action by checkweighman at coal mine against local union and officers thereof to compel compliance with statute, although coal loaders and machine men who elected him, indispensable parties, were not joined as respondents, since judgment rendered in case, whether for petitioner or for respondents, would not affect rights of any person who was not party and nothing else was required to enable court to proceed with case and to adjudicate rights of parties who were before it.  Mouell v United Mine Workers (1948, DC W Va) 81 F Supp 151, 23 BNA LRRM 2001, 15 CCH LC ¶ 64845

In action under former 50 USCS Appx § 459(b)-(h) by veteran to compel his employer to advance his position on seniority work roster where employer moved to have joined as necessary parties those employees who would be affected by changing plaintiff's seniority status and labor union, defendant's motion was denied since issue to be decided was solely between plaintiff and his employer and to join others in controversy would serve only to encumber proceedings and to militate against speedy disposition of veteran's claim.  Evancho v United States Steel Corp. (1963, ED Pa) 32 FRD 227, 52 BNA LRRM 2384, 46 CCH LC ¶ 18049, 6 FR Serv 2d 377

Defendant employer, in action brought under former 50 USCS Appx § 459(b)-(h) by returning veteran of armed services seeking advancement on the seniority in his job unit, could not use Rule 19 of the Federal Rules of Civil Procedure to compel the joinder, as defendants in the action, of the international union, the local union, and the other employees whose status would be affected if the plaintiff should prevail, and such result was prohibited in the instant case by virtue of the provisions of the statute.  Muir v United States Steel Corp. (1967, ED Pa) 41 FRD 428, 64 BNA LRRM 2435, 55 CCH LC ¶ 11742, 10 FR Serv 2d 500

Employer that refused to amend seniority date of reemployed veteran could not assert possible prejudice to third party employees who would be "bumped" down because of veteran's new seniority date to sustain its defense of laches as junior employees had no vested right to senior position which violated veteran's right under former 50 USCS Appx § 459(b)-(h).  Muscianese v United States Steel Corp. (1973, ED Pa) 354 F Supp 1394, 82 BNA LRRM 2922, 70 CCH LC ¶ 13342

D. Pleadings and Proof

40. Complaint

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Complaint stated cause of action within purview of Federal Rules of Civil Procedure where plaintiff alleged that he had been employed by defendant employer, that such employment had been terminated by reason of his induction into Armed Forces, and that upon discharge from service he had made effort to be restored to same employment but was denied this right by defendant. Weinrib v American Binder Co. (1946, DC NY) 5 FRD 514; Loker v Allied Bldg. Credits, Inc. (1947, DC Mo) 7 FRD 358, 20 BNA LRRM 2234, 13 CCH LC ¶ 63859

Although examination of complaint for re-employment with seniority did not disclose clear and unequivocal statement of plaintiff's seniority rights, it was conceivable that, under allegations of his complaint, plaintiff could, upon trial, establish case which would entitle him to advance from position of hostler helper to that of machinist helper, motion to dismiss for insufficiency of statement must therefore be overruled. Dodson v St. Louis-San Francisco R. Co. (1948, DC Mo) 81 F Supp 356, 23 BNA LRRM 2326

41. Burden of proof of employee

Veteran had burden to prove that he left position to enter service and was not entitled to reinstatement where he failed in such burden where, on August 9, 1943, he was notified that he had been selected for training in armed services, was ordered to report to draft board for induction on September 3, at which time he was inducted into Army and was released from active duty until September 24, and where, during interim, he continued his work until September 7, at which time he was fired. McCarthy v M & M Transp. Co. (1947, CA1 Mass) 160 F.2d 322, 19 BNA LRRM 2327, 12 CCH LC ¶ 63613

In order to establish a violation of former 50 USCS Appx § 459(b)-(h) veteran was required to show, in addition to knowledge, that there was purpose or motive to discriminate against him. Alvado v General Motors Corp. (1962, CA2 NY) 303 F.2d 718, 50 BNA LRRM 2292, 45 CCH LC ¶ 17642, cert den (1962) 371 US 925, 9 L Ed 2d 233, 83 S Ct 293, 51 BNA LRRM 2616, 46 CCH LC ¶ 17942, reh den (1963) 371 US 965, 9 L Ed 2d 513, 83 S Ct 540 and reh den (1963) 375 US 871, 11 L Ed 2d 101, 84 S Ct 27, 48 CCH LC ¶ 18528 and reh den (1964) 379 US 870, 13 L Ed 2d 76, 85 S Ct 12, 50 CCH LC ¶ 19259 and reh den (1966) 384 US 1028, 16 L Ed 2d 1047, 86 S Ct 1905, 53 CCH LC ¶ 11291 and reh den (1967) 387 US 915, 18 L Ed 2d 640, 87 S Ct 1682, 55 CCH LC ¶ 11919

Plaintiff in action brought under Vietnam Veterans Readjustment Act bears burden of proof throughout case: (1) plaintiff must first establish his prima facie case of intentional discrimination by offering evidence to raise inference that he was discharged or otherwise mistreated because he belonged to protected group, (2) once plaintiff has established prima facie case, burden of production shifts to defendant to articulate legitimate nondiscriminatory reason for employee's removal, and (3) plaintiff than has opportunity to demonstrate that defendant's articulated reason for terminating him is mere pretext for discrimination. Pignato v American Trans Air (1994, CA7 Ill) 14 F.3d 342, 145 BNA LRRM 2269, 127 CCH LC ¶ 11005, cert den (1994) 512 US 1205, 129 L Ed 2d 810, 114 S Ct 2675, 146 BNA LRRM 2640

Burden was on veteran to show that he has made demand for reinstatement within 90-day period following discharge. Cummings v Hubbell (1948, DC Pa) 76 F Supp 453, 22 BNA LRRM 2109, 15 CCH LC ¶ 64562

Veteran failed to establish loss by reason of discharge and failed to establish damages recoverable where, although veteran had been discharged without good cause, he was nevertheless self-employed during period following discharge by employer and drew income from that endeavor which was not less than that which he would have drawn from employment from which he was discharged. Watkins v Glenn (1950, WD Ky) 88 F Supp 70, 50-1 USTC ¶ 9196, 38 AFTR 1392

Burden of proof was upon veteran seeking reinstatement under statute to establish date from which seniority should be determined; and, in action for reinstatement, promotion, and seniority in promoted position, where veteran did not sustain burden of proof as to when seniority in promoted position would have occurred, date of seniority would be date of reinstatement. Thomas v Pacific Northwest Bell Tel. Co. (1977, DC Or) 434 F Supp 741, 94 BNA LRRM 3153, 81 CCH LC ¶ 13136
42. Burden of proof of employer

Employer failed to establish that there was no available position to which re-employed veteran was entitled at time he received separation notice where employer assigned "lack of work" as reason for dismissal and employer had burden of proving that there were no available positions to which veteran was entitled. Combustion Engineering Co. v Miller (1948, CA6 Tenn) 165 F.2d 372, 21 BNA LRRM 2224, 14 CCH LC ¶ 64224

Burden of proving defense that circumstances have so changed as to make it impossible or unreasonable for corporation to re-employ veteran is on corporate employer. Watkins Motor Lines, Inc. v De Galliford (1948, CA5 Ga) 167 F.2d 274, 22 BNA LRRM 2009, 14 CCH LC ¶ 64475

Trial court improperly concluded that employer met burden of proving affirmative defense of mitigation where evidence showed veteran made repeated and continuous effort to secure comparable work. Hanna v American Motors Corp. (1984, CA7 Wis) 724 F.2d 1300, 115 BNA LRRM 2393, 33 CCH EPD ¶ 34055, 99 CCH LC ¶ 10681, amd on other grounds (1984, CA7 Wis) 115 BNA LRRM 2543 and cert den (1984) 467 US 1241, 82 L Ed 2d 821, 104 S Ct 3512, 116 BNA LRRM 2632, 34 CCH EPD ¶ 34425

Plaintiff in action brought under Vietnam Veterans Readjustment Act bears burden of proof throughout case: (1) plaintiff must first establish his prima facie case of intentional discrimination by offering evidence to raise inference that he was discharged or otherwise mistreated because he belonged to protected group, (2) once plaintiff has established prima facie case, burden of production shifts to defendant to articulate legitimate nondiscriminatory reason for employee's removal, and (3) plaintiff than has opportunity to demonstrate that defendant's articulated reason for terminating him is mere pretext for discrimination. Pignato v American Trans Air (1994, CA7 Ill) 14 F.3d 342, 145 BNA LRRM 2269, 127 CCH LC ¶ 11005, cert den (1994) 512 US 1205, 129 L Ed 2d 810, 114 S Ct 2675, 146 BNA LRRM 2640

Burden of proving that discharge of veteran was for cause was on employer. Carter v United States (1968, App DC) 132 US App DC 303, 407 F.2d 1238, 9 ALR Fed 205

Burden must be placed upon employer to prove defense of discharge for cause by fair preponderance of evidence. O'Neill v American Stores Co. (1949, DC NJ) 17 CCH LC ¶ 65573

Burden is upon employer to prove that veteran is discharged with cause. Watkins v Glenn (1950, WD Ky) 88 F Supp 70, 50-1 USTC ¶ 9196, 38 AFTR 1392; Pylant v Life Ins. Co. (1948, ND Fla) 15 CCH LC ¶ 64841

In action brought by reservist alleging wrongful discharge within six months in violation of statute, burden of justifying discharge is on employer. Henry v Anderson County, Tennessee Office of Sheriff (1981, ED Tenn) 522 F Supp 1112, 108 BNA LRRM 2646, 92 CCH LC ¶ 13105

Once employee presents evidence that discharge from employment is due to his or her membership in the military, burden shifts to employer to prove that employee was discharged for good cause. Weber v Logan County Home for Aged (1985, DC ND) 623 F Supp 711, 120 BNA LRRM 2485, 103 CCH LC ¶ 11536, affd (1986, CA8 ND) 804 F.2d 1058, 123 BNA LRRM 3002

43. Presumptions

Great presumption or strong probability that veterans would have been promoted had they remained at work during period of military service did not entitle them to seniority in promoted position. Gregory v Louisville & N. R. Co. (1951, CA6 Ky) 191 F.2d 856, 29 BNA LRRM 2022, 20 CCH LC ¶ 66577, cert den (1952) 343 US 903, 96 L Ed 1323, 72 S Ct 634, 29 BNA LRRM 2606

Employer rebutted presumption that veteran was qualified for position he held at time he was inducted into armed services where returning serviceman had falsified medical records to conceal back condition which would have prevented his original employment and where his physical condition had further deteriorated. Greathouse v Babcock & Wilcox Co. (1974, ND Ohio) 381 F Supp 156, 86 BNA LRRM 3014, 74 CCH LC ¶ 10188

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44. Evidence

Exclusion of evidence of defendant's drunkenness while at work was in error since it was relevant to issue of qualifications of employee. John S. Doane Co. v Martin (1947, CA1 Mass) 164 F.2d 537, 20 BNA LRRM 2445, 13 CCH LC ¶ 63917

Offer on part of employer to reinstate veteran who had been employed since release from service and subsequently discharged was not admission that discharge was not for cause. Saccavino v Churchward & Co. (1946, DC Conn) 11 CCH LC ¶ 63336

There was no further duty on part of employer to show intent on part of veteran to defraud employer as condition precedent to employer's discharging veteran for good cause where re-employed veteran was discharged on basis of direct proof that veteran's time cards had been tampered with coupled with strong circumstantial evidence that veteran was guilty party. Dunkerley v Wright Aeronautical Corp. (1946, DC NJ) 12 CCH LC ¶ 63597

In action under former 50 USCS Appx § 459(b)-(h) by veteran to restoration in employment of railroad, railroad could not introduce evidence relative to veteran's conduct while in military service; court cannot go behind certificate of discharge as no such authority was given under that section. Hall v Chicago & E. I. R. Co. (1964, ND Ill) 240 F Supp 797, 59 BNA LRRM 2819, 51 CCH LC ¶ 19686

Court could not summarily direct employer to reinstate discharged veteran merely on showing that reinstatement has been refused. Green v Tho-Ro Products, Inc. (1954) 31 NJ Super 327, 106 A2d 756, 26 CCH LC ¶ 68578

45. Miscellaneous

Waiver of re-employment rights must be clearly established. Niemiec v Seattle Rainier Baseball Club, Inc. (1946, DC Wash) 67 F Supp 705, 18 BNA LRRM 2189, 11 CCH LC ¶ 63258

Where testimony for veteran revealed that he had, within 90 days of discharge, applied for re-employment, but testimony of employer showed conclusively that veteran had not made such application and had accepted employment elsewhere during that period, court accepts statements of employer as true and would deny judgment for veteran. Lacek v Peoples Laundry Co. (1950, DC Pa) 94 F Supp 399, 27 BNA LRRM 2113, 19 CCH LC ¶ 66076

Claim of plaintiff, alleging that upon his return from active duty employer refused to reemploy him in violation of Veterans' Reemployment Rights Act (38 USCS §§ 4301 et seq.), is not denied summarily, where employer offered former job to plaintiff but failed to confirm position after supervisor said he would get back to plaintiff, and where plaintiff repeatedly tried to contact supervisor, because material issue of fact exists as to whether plaintiff was ever truly offered restoration to his position as required by § 4301(a)(2)(B)(i). Wallace v Hardee's, Inc. (1995, MD Ala) 874 F Supp 374, 148 BNA LRRM 2587

Where employee's attendance improvement program (AIP) was extended due to military and Family and Medical Leave Act leave, and where employee was terminated for missing work for other reasons during AIP, summary judgment was inappropriate as to claim under Uniformed Services Employment and Reemployment Rights Act; there was genuine issue of material fact regarding whether employee suffered damages merely by reason of employer's extension of AIP. Schmauch v Honda of Am. Mfg., Inc. (2003, SD Ohio) 295 F Supp 2d 823, 173 BNA LRRM 2927, 9 BNA WH Cas 2d 360, 149 CCH LC ¶ 34804

Even though Federal Arbitration Act compelled judicial enforcement of arbitration provision pursuant to 9 USCS § 2, where employment agreement also provided that it would be subject to any and all rights that employee might have under Uniform Services Employment and Re-employment Rights Act (USERRA), there was no clear waiver of rights so that reservation preserved employee's right to bring discrimination and retaliation claims in judicial forum under 38 USCS § 4323(c) rather than submit matters to arbitration; further, 38 USCS § 4302(b) provided that USERRA superseded any contracts, including arbitration agreements, that reduced, limited, or eliminated any rights under USERRA where there was not express waiver of known statutory rights. Breletic v CACI, Inc. (2006, ND Ga) 413 F Supp 2d 1329, 87 CCH EPD ¶ 42235
E. Limitation of Actions

46. Generally

Provision of predecessor to statute that veteran restored to former position not be discharged without cause within one year of restoration did not establish one year statute of limitations so as to preclude veteran from entertaining complaint to enforce seniority rights. Oakley v Louisville & N. R. Co. (1949) 338 US 278, 94 L Ed 87, 70 S Ct 119, 25 BNA LRRM 2038, 17 CCH LC ¶ 65409

Statutory right to reemployment of returning veteran was contractual in nature and if doctrine of laches or statute of limitations was to apply at all, former 50 USC Appendix § 459(b)-(h), creating right to reemployment of returning veteran, should be considered part of veteran's employment contract. Muscianese v United States Steel Corp. (1973, ED Pa) 354 F Supp 1394, 82 BNA LRRM 2922, 70 CCH LC ¶ 13342

Veterans' Reemployment Rights Act, which contains no express statute of limitations and specifically bars use of state statutes of limitations, does not authorize borrowing statute of limitations from another federal law; court should focus solely on doctrine of laches in determining whether individual's claim is time barred. Wallace v Hardee's, Inc. (1995, MD Ala) 874 F Supp 374, 148 BNA LRRM 2587

47. Governing law

Predecessor to statute, barring applicability of state statutes of limitations to veterans' re-employment rights actions, did not mean that such statutes were applicable prior to enactment of statute. Hirschberg v Braniff Airways, Inc. (1975, ED NY) 404 F Supp 869, 90 BNA LRRM 3306, 78 CCH LC ¶ 11200


Use of state statute of limitations by analogy to claims under Vietnam Era Veterans' Readjustment Assistance Act of 1974 would thwart congressional intent that no state statute limit veteran's federal rights; thus burden remained on deceased employee's employer to show that widow's delay in alleging that employer failed to credit deceased with earnings for 2 weeks spent while on unpaid leave with National Guard in determining deceased's life insurance benefits was inexcusable and prejudicial to employer. Petry v Delmarva Power & Light Co. (1986, DC Del) 631 F Supp 1532, 123 BNA LRRM 3189

Veterans' Reemployment Rights Act, which contains no express statute of limitations and specifically bars use of state statutes of limitations, does not authorize borrowing statute of limitations from another federal law; court should focus solely on doctrine of laches in determining whether individual's claim is time barred. Wallace v Hardee's, Inc. (1995, MD Ala) 874 F Supp 374, 148 BNA LRRM 2587

48. Accrual of cause of action

Under predecessor to statute cause of action accrues when veteran demands and is refused re-instatement to position to which he believes himself entitled. Walsh v Chicago Bridge & Iron Co. (1949, DC Ill) 90 F Supp 322 (superseded by statute as stated in Stevens v Tennessee Valley Auth. (1983, CA6 Tenn) 712 F.2d 1047, 118 BNA LRRM 3201)


49. Delay in commencement of action, generally
Long delay in bringing suit not only deprives court of opportunity of rendering prompt aid to those entitled to it but places defendant employer at disadvantage in being lulled into false sense of security; such delay amounts to acquiescence by veteran to action of employer. Daniels v Barfield (1948, DC Pa) 77 F Supp 283, 22 BNA LRRM 2029, 14 CCH LC ¶64459

Veteran is not allowed to permit inordinate amount of time to elapse before initiating action; action will be barred where veteran waits too long after rights come into existence to maintain action upon them. Noble v International Nickel Co. (1948, DC W Va) 77 F Supp 352, 22 BNA LRRM 2066, 14 CCH LC ¶64552; Zaversnik v Union P. R. Co. (1949, DC Wyo) 95 F Supp 209

For defense of laches to be valid it must be sustained by certain established elements, namely, lack of diligence or inexcusable delay in prosecution of veteran's rights with resulting prejudice to or impairment of rights of defendant employer. Coon v Liebmann Breweries, Inc. (1949, DC NJ) 86 F Supp 333, 24 BNA LRRM 2514, 17 CCH LC ¶65330

State statute of limitations was only one element to be considered in determining whether length of delay was unreasonable and whether potential for prejudice was great. Blake v Columbus (1984, SD Ohio) 605 F Supp 567, 118 BNA LRRM 3244, 102 CCH LC ¶11426

Equitable doctrine of laches is applicable to claims made under Act; to prevail on laches defense, defendant must prove that plaintiff's delay in bringing suit is inexcusable, and that defendant was prejudiced by delay. Jordan v Kenton County Bd. of Educ. (1995, ED Ky) 154 BNA LRRM 2731

50. -Delay not attributable to plaintiff

Although it might be true that veterans waited from 2 to more than 3 years after their respective discharges from service to bring suit on claims for retroactive pay raises instituted during time they were in service, reason for delay was excusable where union had undertaken to act in behalf of veterans but had failed to prosecute action diligently so that it became necessary for veterans to bring suit themselves in which defendant employer had not shown prejudice by reason of lapse of time. Flynn v Ward Leonard Electric Co. (1949, DC NY) 84 F Supp 399, 24 BNA LRRM 2245

Delay of 14 months from discharge by employer before instituting suit, where such delay was not attributable to inexcusable neglect and where veteran sought assistance of Veterans' Administration [now Department of Veterans Affairs], was not barred. Coon v Liebmann Breweries, Inc. (1949, DC NJ) 86 F Supp 333, 24 BNA LRRM 2514, 17 CCH LC ¶65330

In action by reemployed veteran against employer claiming that employer had not given him full seniority adjustment to which, as veteran, he was entitled, since action was filed after lapse of 6-year state period of limitation applicable to action for damages, burden was on veteran to aver and prove circumstances making it inequitable to apply laches to his case; veteran successfully sustained such burden where delay in bringing action was largely due to misstatements by his employer and union about his seniority rights, and there was no showing that defendants have been prejudiced by delay. Whitmore v Norfolk & Western Ry. Co. (1969, ND Ohio) 73 BNA LRRM 2001

Veteran's action for restoration of seniority and back pay under former 50 USCS Appx §459(b)(h) was not barred by laches, despite lapse of 10 years, where veteran (1) sought advice of union representative upon learning of seniority position and was led to believe that filing grievance would be futile; (2) sought assistance of Department of Labor upon learning that similar claim had been upheld by federal court; (3) governing law throughout period was uncertain; and
(4) his employer, by its own actions, made substantial contribution to delay. Gruca v United States Steel Corp. (1973, ED Pa) 360 F Supp 38, 83 BNA LRRM 2906, 71 CCH LC ¶ 13804, revd on other grounds (1974, CA3 Pa) 495 F.2d 1252, 86 BNA LRRM 2171, 74 CCH LC ¶ 10056 (superseded by statute as stated in Stevens v Tennessee Valley Auth. (1983, CA6 Tenn) 712 F.2d 1047, 118 BNA LRRM 3201)

51. Delay attributable to government

Veteran was not guilty of laches and his claim was not barred where veteran applied for reinstatement within statutory period following discharge from service and employer rejected application upon veteran's refusal to work for price less than that paid him at time he was inducted and where veteran sought advice of one who was in charge of Veterans' Division [now Department of Veterans Affairs] who in turn investigated claim thoroughly, sending veteran to office of United States Attorney, whereupon suit was commenced. Karas v Klein (1947, DC Minn) 70 F Supp 469, 19 BNA LRRM 2559, 12 CCH LC ¶ 63656

Veteran who had delayed 20 months in filing suit has waited unreasonable time and was not entitled to compensation for that period, although he had taken matter up with local board for assistance as statute contemplated; veteran could not wait indefinitely with consent and acquiescence of local board and hold employer for damages in interim if such delay in enforcing veteran's rights was through no fault of employer. Noble v International Nickel Co. (1948, DC W Va) 77 F Supp 352, 22 BNA LRRM 2066, 14 CCH LC ¶ 64552

Three year delay from time reemployed veteran complained to Department of Labor of his employer's failure to give him proper seniority status and time government brought suit on veteran's behalf was not chargeable to veteran, where veteran neither acquiesced in delay nor abandoned his claim, and veteran complained to his employer of his seniority status at various times. Stinner v U.S. Steel Corp. (1974, WD Pa) 85 BNA LRRM 2567

In veteran's action under reemployment provisions of former Military Selective Service Act, as amended (50 USCS Appx § 459), where tender by veteran of prosecution of his case to government occurred at time when laches would not have barred his action, delay occasioned by government's handling of case would not be attributed to veteran. Barrett v Grand Truck Western Railroad Co. (1975, ND Ill) 89 BNA LRRM 2371, 76 CCH LC ¶ 10860

Action was not time barred where law in effect at time of rehiring prohibited application of state statutes of limitation and where delay in prosecution of claim was attributable to Department of Labor, Justice Department and US Attorney's office. Hirschberg v Braniff Airways, Inc. (1975, ED NY) 404 F Supp 869, 90 BNA LRRM 3306, 78 CCH LC ¶ 11200

In action by reemployed veterans against employer for wages lost because employer has failed to grant them their proper seniority status under predecessor to statute, 4-year delay in bringing action did not constitute laches, where time was devoted to investigation, negotiation, and preparation of suit on their behalf by Departments of Labor and Justice. Kelly v Owens-Illinois, Inc. (1976, ND Ind) 93 BNA LRRM 2568

Government agency's failure to notify veteran of her restoration rights, despite her numerous expressions of dissatisfaction about restoration decision, satisfied veteran's obligation to pursue with due diligence appeal of employment decision concerning her promotion consideration during military service absence and barred government from asserting laches as defense. Cobb v Prokop (1983, DC Mass) 557 F Supp 391

Former serviceman's suit against former employer under Vietnam Era Veterans' Readjustment Assistance Act of 1974 arising from refusal to rehire plaintiff was barred by laches, where, inter alia, suit was filed approximately 9 years after his discharge under other than honorable conditions and approximately 51/2 years after discharge was upgraded to honorable, and employer's witness to events surrounding plaintiff's alleged termination had died; delay of 11/2 to 2 years caused by government's investigation of claim could not be excused. Farries v Stanadyne/Chicago Div. (1985, ND Ind) 618 F Supp 1324, 120 BNA LRRM 2791, aff'd (1987, CA7 Ind) 832 F.2d 374, 126 BNA LRRM 2497, 107 CCH LC ¶ 10147, 9 FR Serv 3d 189

52. Prejudicial effect of delay

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Veteran’s action against former employer was barred under doctrine of laches where not commenced until more than 9 years after it accrued and more than 6 years after exhausting other courses of action, due to prejudice to employer arising from wages paid and promotions awarded to alternate employees. Lingenfelter v Keystone Consol. Industries, Inc. (1982, CA7 Ill) 691 F.2d 339, 111 BNA LRRM 2770, 97 CCH LC ¶ 10051

Doctrine of laches did not bar widow’s claim that deceased husband’s employer should have credited his account for 2 weeks of earnings while on unpaid leave in National Guard for purposes of determining life insurance benefits since employer failed to show it was prejudiced in any way by widow’s delay in asserting claim notwithstanding that employer’s insurance benefits coordinator and employee were both deceased and widow’s memory of receiving insurance benefits had faded since employer failed to show that any of these witnesses would testify to facts that could establish prejudice to employer. Petry v Delmarva Power & Light Co. (1986, DC Del) 631 F Supp 1532, 123 BNA LRRM 3189

53. -Circumstances warranting allowance of action

Veteran’s claim to retroactive seniority was not barred by laches where he had made claim within 30 days from discharge and consulted various federal officials before starting suit 4 months later. Norris v Robertshaw-Fulton Controls Co. (1957, DC Tenn) 150 F Supp 431, 32 CCH LC ¶ 70815

Veterans who took no action for more than 3 years after seniority dates were assigned to them are not barred by laches from asserting claims where defendant employer is not prejudiced. Conseglino v Pennsylvania R. Co. (1962, SD NY) 211 F Supp 567, 51 BNA LRRM 2693, 46 CCH LC ¶ 17948

Claim under former Veterans Reemployment Rights Act (38 USCS § 2221 et seq.), brought more than 5 years after cause of action accrued, was not time barred where veteran’s diligence in bringing claim to notice of his union grievance man and Department of Labor prevented application of doctrine of laches, and destruction of employer’s records did not prejudice employer. Stewart v United States Steel Corp. (1984, ND Ind) 594 F Supp 180, 117 BNA LRRM 2101, 101 CCH LC ¶ 11138

Reservist’s action seeking reinstatement under Veterans Reemployment Rights Act is not barred by laches where delay of two years and six months, which included one year of government investigation, from time county mailed its letter denying reemployment to filing of action is not unreasonable. Lemmon v County of Santa Cruz (1988, ND Cal) 686 F Supp 797, 130 BNA LRRM 2604, 111 CCH LC ¶ 10950

Delay of two and one-half years is not enough by itself to bar suit under Veterans’ Reemployment Rights Act through doctrine of laches. Wallace v Hardee’s, Inc. (1995, MD Ala) 874 F Supp 374, 148 BNA LRRM 2587

54. -Circumstances warranting dismissal of action

Veteran’s suit to recover alleged shortage in bonus payments is barred by laches where he had been reinstated and worked 3 years before leaving employer and bringing suit. Donner v Levine (1956, CA2 Conn) 232 F.2d 185, 37 BNA LRRM 2808, 30 CCH LC ¶ 69880

Delay of 17 years in bringing suit for reemployment plaintiff was thoroughly capable and records and witnesses had become unavailable amounted to laches and such suit was barred. Carmalt v General Motors Acceptance Corp. (1962, CA3 Pa) 302 F.2d 589, 50 BNA LRRM 2052, 44 CCH LC ¶ 17565

Veteran is guilty of laches under predecessor to statute so that his claim is barred where he waited more than 9 years after re-employment to enforce seniority rights. Gruca v United States Steel Corp. (1974, CA3 Pa) 495 F.2d 1252, 86 BNA LRRM 2171, 74 CCH LC ¶ 10056 (superseded by statute as stated in Stevens v Tennessee Valley Auth. (1983, CA6 Tenn) 712 F.2d 1047, 118 BNA LRRM 3201)

Veteran’s action for back pay was barred where veteran waited over 5 years before contacting Department of Labor, and Department’s further tardiness accrued against veteran who
sought its aid. Churma v United States Steel Corp. (1975, CA3 Pa) 514 F.2d 589, 88 BNA LRRM 3425, 76 CCH LC ¶ 10771

In suit brought by veterans against employer under predecessor to statute to recover for alleged violation of their reemployment rights, District Court did not abuse its discretion in dismissing complaint recovered for alleged violation of their reemployment rights with prejudice on basis of doctrine of laches, even though Department of Labor delayed processing of veteran's claims, where veterans voluntarily chose to rely upon services of Department rather than secure private counsel, employer was prejudiced by delay of unavailability of relevant testimony, delay by veterans caused prejudice to employer resulting from reliance upon Department's prior endorsement of employer's practice, and only minimal deprivation of statutory rights could have resulted from employer's practices.  Goodman v McDonnell Douglas Corp. (1979, CA8 Mo) 606 F.2d 800, 102 BNA LRRM 2441, 87 CCH LC ¶ 11583, 53 ALR Fed 436, cert den (1980) 446 US 913, 64 L Ed 2d 267, 100 S Ct 1844, 103 BNA LRRM 3175, 88 CCH LC ¶ 12004

Veteran's action against former employer for failure to reinstate veteran to former position was barred by laches, since veteran failed to diligently pursue claim for reinstatement under statute, where 8 years had elapsed since veteran was discharged from Air Force under conditions other than honorable, 6 years had elapsed since date that veteran's discharge was upgraded to honorable, and employer sustained substantial prejudice by delay as the employee who refused to rehire veteran had died prior to filing of suit, and amount of back wages to be paid to veteran was substantial.  Farries v Stanadyne/Chicago Div. (1987, CA7 Ind) 832 F.2d 374, 126 BNA LRRM 2497, 107 CCH LC ¶ 10147, 9 FR Serv 3d 189

Employer was not responsible for delay and would not be penalized because of it where veteran was discharged from service April 4, 1946, re-employed by defendant employer on April 22, 1946, continuing employment until November 5, 1946, at which time he was discharged and where veteran thereafter waited 6 months, until May, 1947, to demand reinstatement and further month before commencing action which did not seek reinstatement but solely sought money judgment for compensation for loss of wages between date of discharge from employment and date he was employed elsewhere; such delay by veteran was unreasonable and amounted to acquiescence in employer's conduct resulting in forfeiture of incidental right to demand compensation for loss of wages; delay further precluded court from determining, during period of protection accorded by statute, whether or not discharge was without cause and whether plaintiff was entitled to reinstatement and incidental compensation for loss of wages or benefits.  Azzerone v W. B. Coon Co. (1947, DC NY) 73 F Supp 869, 20 BNA LRRM 2613, 13 CCH LC ¶ 64044

Veteran was deemed to have abandoned claim and is barred by laches from asserting rights where, although claiming to have been informed by employer of employer's intention not to re-employ veteran and also to have been fully aware of rights, instead of immediately instituting suit, veteran took up residence and accepted employment in distant state and did not return or renew his request for re-employment for period of 9 months.  Cummings v Hubbell (1948, DC Pa) 76 F Supp 453, 22 BNA LRRM 2109, 15 CCH LC ¶ 64562

There was no obstacle which could be attributed to employer and veteran was guilty of laches in pursuing his remedies and claim would be denied where veteran was re-employed in December of 1945, objecting to his status at that time though agreeing to "be patient" and again objecting when he resumed work in August of 1946 but without real affirmative actions or objections; where veteran sought assistance of United States Attorney and suit was instituted on January 21, 1947, with little at that time to indicate that veteran had raised any determined objection or attempted any real effort to reach settlement with employer until institution of suit some 13 months after re-employment; and where there is nothing to indicate any effort on veteran's behalf to enlist aid of personnel division or to negotiate through any other of the means provided by employer.  Polansky v Elastic Stop Nut Corp. (1948, DC NJ) 78 F Supp 74, 22 BNA LRRM 2223, 15 CCH LC ¶ 64563

Veteran was barred from reinstatement and recovery because of delay in asserting his rights where veteran was denied re-employment by letter dated July 13, 1946, and made no attempt to assert any rights until April of 1947, and where suit was not instituted until August 11, 1948, more
than 2 years after employer's refusal to re-employ veteran, during which time veteran was
LRRM 2375

Suit for reinstatement and payment of damages was barred where suit was not instituted
until four years after discharge. Lacek v Peoples Laundry Co. (1950, DC Pa) 94 F Supp 399, 27
BNA LRRM 2113, 19 CCH LC ¶ 66076

Veteran who failed to bring action under predecessor statute until 8 years after first refusal of
reinstatement was barred by laches even though 2 of those years were spent in prison, where
reinstatement would prejudice employer with shop union. Hicks v United States Radiator Co.
(1955, DC Mich) 127 F Supp 429, 35 BNA LRRM 2374, 27 CCH LC ¶ 68981 (superseded by
statute as stated in Stevens v Tennessee Valley Auth. (1983, CA6 Tenn) 712 F.2d 1047, 118
BNA LRRM 3201)

In action by former employee of airline, who, after discharge from armed services, was
reemployed by defendant employer and after additional flight training was requested to resign
and did, veteran was guilty of inordinate and unexcused delay in prosecution of his action, where
at all times since leaving employment he had financial ability to prosecute litigation by private
attorney, delay in processing his claim by Department of Labor was acquiesced in by veteran,
and Labor's delay was substantially worsened by veteran's conduct. Smith v Continental
Airlines (1974, CD Cal) 86 BNA LRRM 2463

Action under predecessor statute was barred by laches where veteran did not exercise
statutory or contractual rights in 11 years prior to bringing action and delay was prejudicial to
former employer. Tennessee ex rel. Leech v Highland Memorial Cemetery, Inc. (1980, ED Tenn)
489 F Supp 65, 1980-2 CCH Trade Cases ¶ 63547

World War II veteran's claim under predecessor statute for reinstatement was barred by
laches due to 36-year delay in bringing suit. Troiani v Bethlehem Steel Corp. (1983, ED Pa) 570
F Supp 1140, 114 BNA LRRM 3124, 99 CCH LC ¶ 10644

§ 4324. Enforcement of rights with respect to Federal executive agencies

(a) (1) A person who receives from the Secretary a notification pursuant to section 4322(e)
[38 USCS § 4322(e)] may request that the Secretary refer the complaint for litigation
before the Merit Systems Protection Board. The Secretary shall refer the complaint to the
Office of Special Counsel established by section 1211 of title 5 [5 USCS § 1211].

(2) (A) If the Special Counsel is reasonably satisfied that the person on whose behalf
a complaint is referred under paragraph (1) is entitled to the rights or benefits sought,
the Special Counsel (upon the request of the person submitting the complaint) may
appear on behalf of, and act as attorney for, the person and initiate an action regarding
such complaint before the Merit Systems Protection Board.

(B) If the Special Counsel declines to initiate an action and represent a person
before the Merit Systems Protection Board under subparagraph (A), the Special
Counsel shall notify such person of that decision.

(b) A person may submit a complaint against a Federal executive agency or the Office
of Personnel Management under this subchapter [38 USCS §§ 4321 et seq.] directly to
the Merit Systems Protection Board if that person--

(1) has chosen not to apply to the Secretary for assistance under section 4322(a) [38
USCS § 4322(a)];
(2) has received a notification from the Secretary under section 4322(e) [38 USCS §
4322(e)];
(3) has chosen not to be represented before the Board by the Special Counsel pursuant
to subsection (a)(2)(A); or
(4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B).

(c) (1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter [38 USCS §§ 4301 et seq.] relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter [38 USCS §§ 4301 et seq.] and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d) (1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5 [5 USCS § 7703].

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.

Explanatory notes:
A prior § 4324 was redesignated as 38 USCS § 7624.

Effective date of section:
This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

Amendments:
1996. Act Oct. 9, 1996 (effective as of 10/13/94, as provided by § 313(a) of such Act, which appears as 38 USCS § 4301 note), in subsec. (a)(1), deleted "of an unsuccessful effort to resolve a complaint relating to a Federal executive agency following "4322(e)"; in subsec. (b), in the introductory matter, inserted "or the Office of Personnel Management" and, in para. (1), substituted "under section 4322(a)" for "regarding a complaint under section 4322(c)"; and, in subsec. (c)(2), inserted "or the Office of Personnel Management" and substituted "Office" for "employee".

1998. Act Nov. 11, 1998 (applicable to complaints filed with the Merit Systems Protection Board on or after 10/13/94, as provided by § 213(b) of such Act, which appears as a note to
this section), in subsec. (a)(1), inserted ", without regard as to whether the complaint accrued before, on, or after October 13, 1994".

Other provisions:

Application of Nov. 11, 1998 amendment. Act Nov. 11, 1998, P. L. 105-368, Title II, Subtitle B, § 213(b), 112 Stat. 3332, provides: "The amendment made by subsection (a) [amending subsec. (a)(1) of this section] shall apply to complaints filed with the Merit Systems Protection Board on or after October 13, 1994."

Cross References
This section is referred to in 38 USCS §§ 4322, 4332

Research Guide

Federal Procedure:
16 Fed Proc L Ed, Government Officers and Employees § 40:588
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:82, 95, 96, 100, 101

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 108, 111, 175

Forms:

Law Review Articles:
Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002
Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002
Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002
Fernandez. The need for the expansion of military reservists' rights in furtherance of the total force policy: a comparison of the USERRA and ADA. 14 St Thomas L Rev 859, Summer 2002

1. Generally
2. Immunity from suit
3. Compensation for refusal to reinstate

1. Generally

Board had jurisdiction under Uniformed Services Employment and Reemployment Rights Act of removal appeal, although appellant did not mention Act or allege discrimination against her on account of her Army Reserve duty, since she did assert that she served on reserve duty and while doing so missed her 30-day evaluation in connection with training program, and that when she returned from reserve duty, Postal Service failed to extend her training period or make up for two weeks she had lost while on reserve duty. Yates v MSPB (1998, CA FC) 145 F.3d 1480, 158 BNA LRRM 2720, on remand, remanded (1998, MSPB) 1998 MSPB LEXIS 1044

Merit Systems Protection Board erred in refusing to hold hearing on veteran's claim that he had been discriminated against in violation of Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 USCS § 4311, where its reasoning that 38 USCS §
4324 referred to USERRA claims as complaints rather than appeals, thereby making 5 USCS § 7701(a) inapplicable, defied common sense, Board's interpretation would have provided less procedural protection to veterans, and Board's interpretation contradicted its own regulations, which recognized that USERRA claims were appeals under 5 USCS § 7701. Kirkendall v Dep't of Army (2005, CA FC) 412 F.3d 1273, 177 BNA LRRM 2666


Board had jurisdiction of claim that appellant was entitled to restoration rights provided in former 38 USCS § 4304 since he was member of Massachusetts National Guard ordered to duty under 32 USCS §§ 502-505 as Reserve of armed forces or member of National Guard which gives Reservists and National Guardsmen who were federal employees same restoration rights that applied to other persons. Ward v VA (1994, MSPB) 63 MSPR 635, petition gr, appeal after remand, remanded on other grounds (1995, MSPB) 67 MSPR 425, appeal after remand, remanded on other grounds (1997, MSPB) 74 MSPR 171

Uniformed Services Employment and Reemployment Rights Act gave Board jurisdiction to decide appellant's allegation that agency's termination action was discrimination on basis of his status as disabled veteran, notwithstanding that he was serving probationary period. Jasper v United States Postal Serv. (1997, MSPB) 73 MSPR 367 (ovrld in part by Fox v United States Postal Serv. (2001, MSPB) 88 MSPR 381)

Uniformed Services Employment and Reemployment Rights Act gave Board jurisdiction to decide appellant's allegation that agency's termination action was discriminatory of his status as handicapped veteran, notwithstanding that he was serving probationary period. Wright v VA (1997, MSPB) 73 MSPR 453

Board had authority to adjudicate actions pre-Uniformed Services Employment and Reemployment Rights Act which arose under predecessor statute, Veterans' Reemployment Rights Act, however, as the prior existing law contained no provision upon which appellant could base claim of discrimination because of his veteran status, there was no complaint which Board could adjudicate. Williams v Department of the Army (1999, MSPB) 83 MSPR 109

Claim that agency discriminated against appellant on basis of his veteran's status when it refused to restore or reassign him occurred after Uniformed Services Employment and Reemployment Rights Act's enactment and fell within broad category of matters appealable to Board under Act. Harris v United States Postal Serv. (2000, MSPB) 85 MSPR 159

Board lacked jurisdiction under Uniformed Services Employment and Reemployment Rights Act over complaint against Tennessee Valley Authority since it is not executive department within scope of that jurisdiction. Hereford v TVA (2001, MSPB) 88 MSPR 201

Board's authority with regard to Uniformed Services Employment and Reemployment Rights Act complaints or appeals does not extend beyond complained-of discrimination because of military status, does not allow for decision on merits of underlying matter except to extent necessary to address appellant's military status discrimination claims, and thus does not include review of other claims of prohibited discrimination. Metzenbaum v DOJ (2001, MSPB) 89 MSPR 285, subsequent app (2004, MSPB) 96 MSPR 104, affd (2005, CA FC) 122 Fed Appx 476, reh den, reh, en banc, den (2005, CA FC) 2005 US App LEXIS 4398

2. Immunity from suit

Action by employee of government printing office against public printer and commissioners of United States civil service commission to compel public printer to place plaintiff in supervisory position of principal technical assistant in government printing office by virtue of rights claimed under predecessor statute, being in effect suit against United States, could not be maintained without its consent. Campbell v Deviny (1949, DC Dist Col) 81 F Supp 657, affd (1952, App DC) 90 US App DC 176, 194 F.2d 881, cert den (1952) 344 US 826, 97 L Ed 643, 73 S Ct 27

3. Compensation for refusal to reinstate
United States judge who resigned from his office to enter military service could not recover compensation from federal government for refusing to reinstate him after his discharge from army.


§ 4325. Enforcement of rights with respect to certain Federal agencies

(a) This section applies to any person who alleges that--
   (1) the reemployment of such person by an agency referred to in subsection (a) of section 4315 [38 USCS § 4315] was not in accordance with procedures for the reemployment of such person under subsection (b) of such section; or
   (2) the failure of such agency to reemploy the person under such section was otherwise wrongful.

(b) Any person referred to in subsection (a) may submit a claim relating to an allegation referred to in that subsection to the inspector general of the agency which is the subject of the allegation. The inspector general shall investigate and resolve the allegation pursuant to procedures prescribed by the head of the agency.

(c) In prescribing procedures for the investigation and resolution of allegations under subsection (b), the head of an agency shall ensure, to the maximum extent practicable, that the procedures are similar to the procedures for investigating and resolving complaints utilized by the Secretary under section 4322(d) [38 USCS § 4322(d)].

(d) This section may not be construed--
   (1) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter [38 USCS §§ 4301 et seq.] or information relating to the rights and obligations of employees and Federal agencies under this chapter [38 USCS §§ 4301 et seq.]; or
   (2) as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter [38 USCS §§ 4301 et seq.].

Explanatory notes:
A prior § 4325 was redesignated as 38 USCS § 7625.

Effective date of section:
This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

Amendments:
1996. Act Oct. 9, 1996 (effective as of 10/13/94, as provided by § 313(a) of such Act, which appears as 38 USCS § 4301 note), in subsec. (d)(1), deleted "alternative employment in the Federal Government under this chapter," preceding "or information" and substituted "employees" for "employee".

Cross References
This section is referred to in 38 USCS § 4315
§ 4326. Conduct of investigation; subpoenas

(a) In carrying out any investigation under this chapter [38 USCS §§ 4301 et seq.], the Secretary's duly authorized representatives shall, at all reasonable times, have reasonable access to and the right to interview persons with information relevant to the investigation and shall have reasonable access to, for purposes of examination, and the right to copy and receive, any documents of any person or employer that the Secretary considers relevant to the investigation.

(b) In carrying out any investigation under this chapter [38 USCS §§ 4301 et seq.], the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General may apply to any district court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the subpoena.

(c) Upon application, the district courts of the United States shall have jurisdiction to issue writs commanding any person or employer to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation under this chapter [38 USCS §§ 4301 et seq.] and the district courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court.

(d) Subsections (b) and (c) shall not apply to the legislative branch or the judicial branch of the United States.

Effective date of section:

This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.
Amendments:

1996. Act Oct. 9, 1996 (effective as of 10/13/94, as provided by § 313(a) of such Act, which appears as 38 USCS § 4301 note), in subsec. (a), inserted "have reasonable access to and the right to interview persons with information relevant to the investigation and shall".

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:83

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 108, 111

Law Review Articles:
Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002
Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002
Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002
Fernandez. The need for the expansion of military reservists' rights in furtherance of the total force policy: a comparison of the USERRA and ADA. 14 St Thomas L Rev 859, Summer 2002

SUBCHAPTER IV. MISCELLANEOUS PROVISIONS

§ 4331. Regulations
§ 4332. Reports
§ 4333. Outreach
§ 4334. Notice of rights and duties
[§§ 4335, 4336 Transferred]
[§§ 4351-4355 Transferred]
[§§ 5001-5016 Transferred]
[§§ 5021-5025 Transferred]
[§§ 5031-5037 Transferred]
[§§ 5051-5056 Transferred]
[§ 5057 Repealed]
[§ 5070 Transferred]
[§§ 5071-5074 Transferred]
[§§ 5081-5083 Transferred]
[§§ 5091-5093 Transferred]
[§ 5096 Transferred]

§ 4331. Regulations
(a) The Secretary (in consultation with the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter [38 USCS §§ 4301 et seq.] with
regard to the application of this chapter [38 USCS §§ 4301 et seq.] to States, local governments, and private employers.

(b) (1) The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter [38 USCS §§ 4301 et seq.] with regard to the application of this chapter [38 USCS §§ 4301 et seq.] to Federal executive agencies (other than the agencies referred to in paragraph (2)) as employers. Such regulations shall be consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights.

(2) The following entities may prescribe regulations to carry out the activities of such entities under this chapter [38 USCS §§ 4301 et seq.]:

(A) The Merit Systems Protection Board.

(B) The Office of Special Counsel.

(C) The agencies referred to in section 2302(a)(2)(C)(ii) of title 5 [5 USCS § 2302(a)(2)(C)(ii)].

Explanatory notes:

A prior § 4331 was redesignated as 38 USCS § 7631.

Effective date of section:

This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

Amendments:


Code of Federal Regulations

Office of Personnel Management-Excepted service, 5 CFR Part 213

Office of Personnel Management-Restoration to duty from uniformed service or compensable injury, 5 CFR Part 353

Merit Systems Protection Board-Practices and procedures for appeals under the Uniform Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act, 5 CFR Part 1208

Research Guide

Am Jur:

45A Am Jur 2d, Job Discrimination §§ 21-26, 40-104

45B Am Jur 2d, Job Discrimination § 760

48 Am Jur 2d, Labor and Labor Relations § 704

77 Am Jur 2d, Veterans and Veterans’ Laws § 82

Law Review Articles:


Gisonny; Lindgren; Shultz. New law expands veterans' employment rights. 20 Empl Rel LJ 641, Spring 1995
§ 4332. Reports

The Secretary shall, after consultation with the Attorney General and the Special Counsel referred to in section 4324(a)(1) [38 USCS § 4324(a)(1)] and no later than February 1, 2005, and annually thereafter, transmit to the Congress, a report containing the following matters for the fiscal year ending before such February 1:

1. The number of cases reviewed by the Department of Labor under this chapter [38 USCS §§ 4301 et seq.] during the fiscal year for which the report is made.
2. The number of cases referred to the Attorney General or the Special Counsel pursuant to section 4323 or 4324 [38 USCS § 4323 or 4324], respectively, during such fiscal year.
3. The number of complaints filed by the Attorney General pursuant to section 4323 [38 USCS § 4323] during such fiscal year.
4. The nature and status of each case reported on pursuant to paragraph (1), (2), or (3).
5. An indication of whether there are any apparent patterns of violation of the provisions of this chapter [38 USCS §§ 4301 et seq.], together with an explanation thereof.
6. Recommendations for administrative or legislative action that the Secretary, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter [38 USCS §§ 4301 et seq.], including any action that could be taken to encourage mediation, before claims are filed under this chapter [38 USCS §§ 4301 et seq.], between employers and persons seeking employment or reemployment.

Explanatory notes:

A prior § 4332 was redesignated as 38 USCS § 7632.

Effective date of section:

This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

 Amendments:


Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 82

Law Review Articles:

§ 4333. Outreach

The Secretary, the Secretary of Defense, and the Secretary of Veterans Affairs shall take such actions as such Secretaries determine are appropriate to inform persons entitled to rights and benefits under this chapter [38 USCS §§ 4301 et seq.] and employers of the rights, benefits, and obligations of such persons and such employers under this chapter [38 USCS §§ 4301 et seq.].

Effective date of section:
This section is effective and applicable as provided by § 8 of Act Oct. 13, 1994, P. L. 103-353, 108 Stat. 3175, which appears as 38 USCS § 4301 note.

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 82

Law Review Articles:
Fernandez. The need for the expansion of military reservists' rights in furtherance of the total force policy: a comparison of the USERRA and ADA. 14 St Thomas L Rev 859, Summer 2002

§ 4334. Notice of rights and duties

(a) Requirement to provide notice. Each employer shall provide to persons entitled to rights and benefits under this chapter [38 USCS §§ 4301 et seq.] a notice of the rights, benefits, and obligations of such persons and such employers under this chapter [38 USCS §§ 4301 et seq.]. The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.

(b) Content of notice. The Secretary shall provide to employers the text of the notice to be provided under this section.

Explanatory notes:
A prior § 4334 was transferred by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238, and appears as 38 USCS § 7634.

Other provisions:
"(1) Not later than the date that is 90 days after the date of the enactment of this Act, the Secretary of Labor shall make available to employers the notice required under section 4334 of title 38, United States Code, as added by subsection (a)."
"(2) The amendments made by this section [adding this section and amending the chapter analysis preceding 38 USCS § 4301] shall apply to employers under chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], on and after the first date referred to in paragraph (1)."

[§§ 4335, 4336 Transferred]
These sections (Act May 20, 1988, P. L. 100-322, Title II, Part B, § 216(b), 102 Stat. 529) were transferred by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238, and appear as 38 USCS §§ 7635 and 7636

[§§ 4351-4355 Transferred]

[§§ 5001-5016 Transferred]

[§§ 5021-5025 Transferred]

### §§ 5031-5037 Transferred


### §§ 5051-5056 Transferred


[§ 5057 Repealed]
This section (Act Nov. 7, 1966, P. L. 89-785, Title II, § 203, 80 Stat. 1376) was repealed by Act Oct. 28, 1986, P. L. 99-576, Title II, § 231(c)(2)(A), 100 Stat. 3264. Such section directed the Administrator to submit to Congress not more than sixty days after end of each fiscal year separate reports on activities carried out under 38 USCS §§ 5053 and 5054.

[§ 5070 Transferred]

[§§ 5071-5074 Transferred]

[§§ 5081-5083 Transferred]

[§§ 5091-5093 Transferred]

[§ 5096 Transferred]
PART IV. GENERAL ADMINISTRATIVE PROVISIONS

CHAPTER 51. CLAIMS, EFFECTIVE DATES, AND PAYMENTS
CHAPTER 53. SPECIAL PROVISIONS RELATING TO BENEFITS
CHAPTER 55. MINORS, INCOMPETENTS, AND OTHER WARDS
CHAPTER 57. RECORDS AND INVESTIGATIONS
CHAPTER 59. AGENTS AND ATTORNEYS
CHAPTER 61. PENAL AND FORFEITURE PROVISIONS
CHAPTER 63. OUTREACH ACTIVITIES

Amendments:


1991. Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(2), 105 Stat. 239, revised the analysis of this Part by amending the section numbers in accordance with the redesignations made by § 402(b) of such Act (see Table II preceding 38 USCS § 101), in item 51, substituting "5101" for "3001", in item 53, substituting "5301" for "3101", in item 55, substituting "5501" for "3201", in item 57, substituting "5701" for "3301", in item 59, substituting "5901" for "3401", and, in item 61, substituting "6101" for "3501".


CHAPTER 51. CLAIMS, EFFECTIVE DATES, AND PAYMENTS

SUBCHAPTER I. CLAIMS
SUBCHAPTER II. EFFECTIVE DATES
SUBCHAPTER III. PAYMENT OF BENEFITS

Explanatory notes:

Item 5121 does not conform to the section heading.

Amendments:


1988. Act Nov. 18, 1988, P. L. 100-687, Div A, Title I, § 103(a)(2), (c)(2), (3), 102 Stat. 4107, amended the chapter heading and the item for subchapter I by substituting "CLAIMS" for "APPLICATIONS" and amended the analysis of this chapter by adding items 3007, 3008, and 3009.

1991. Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239, revised the analysis of this chapter by amending the section numbers in accordance with the redesignations made by § 402(b) of such Act (see Table II preceding 38 USCS § 101).


2000. Act Oct. 30, 2000, P. L. 106-398, § 1, 114 Stat. 1654 (enacting into law § 1611(b) of H. R. 5408 (114 Stat. 1654A-360), as introduced on Oct. 6, 2000), amended the analysis of this chapter. However, pursuant to Act Nov. 1, 2000, P. L. 106-419, § 104(c)(2), 114 Stat. 1828, as of the enactment of Act Nov. 9, 2000, P. L. 106-475, the amendments made by § 1611 of H.R. 5408 shall be deemed for all purposes not to have taken effect and such § 1611 shall cease to be in effect.

Act Nov. 9, 2000, P. L. 106-475, § 6, 114 Stat. 2099, amended the analysis of this chapter by inserting item 5100, substituting items 5102, 5103, and 5103A for former items 5102 and 5103, which read:

"5102. Application forms furnished upon request.
"5103. Incomplete applications."

substituting item 5107 for one which read: "5107. Burden of proof; benefit of the doubt", and adding item 5126.


**SUBCHAPTER I. CLAIMS**

§ 5100. Definition of "claimant"
§ 5101. Claims and forms
§ 5102. Application forms furnished upon request; notice to claimants of incomplete applications
§ 5103. Notice to claimants of required information and evidence
§ 5103A. Duty to assist claimants
§ 5104. Decisions and notices of decisions
§ 5105. Joint applications for social security and dependency and indemnity compensation
§ 5106. Furnishing of information by other agencies
§ 5107. Claimant responsibility; benefit of the doubt
§ 5108. Reopening disallowed claims
§ 5109. Independent medical opinions
§ 5109A. Revision of decisions on grounds of clear and unmistakable error
§ 5109B. Expedited treatment of remanded claims

**Amendments:**


§ 5100. Definition of "claimant"
For purposes of this chapter [38 USCS §§ 5100 et seq.], the term "claimant" means any individual applying for, or submitting a claim for, any benefit under the laws administered by the Secretary.

Court of Appeals for Federal Circuit reviewed regulations promulgated by Department of Veterans Affairs pursuant to Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (codified in scattered sections of 38 USCS) and with exception of one regulation, 38 C.F.R. § 3.159(b)(1), which was inconsistent with VCAA, and therefore invalid, regulations regarding claims procedures under 38 C.F.R. §§ 3.156 and 1.159 were affirmed as regulations were not on their face arbitrary, capricious, and contrary to various statutory provisions. Paralyzed Veterans of Am. v Sec'y of Veterans Affairs (2003, CA FC) 345 F.3d 1334

Plain language of 38 USCS § 5100 requires that notice to Department of Veterans Affairs (VA) claimant pursuant to Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096, be provided "at time" that, or "immediately after," Secretary of Veterans Affairs receives complete or substantially complete application for VA-administered benefits. Pelegrini v Principi (2004) 18 Vet App 112, 2004 US App Vet Claims LEXIS 370

§ 5101. Claims and forms

(a) A specific claim in the form prescribed by the Secretary (or jointly with the Commissioner of Social Security, as prescribed by section 5105 of this title [38 USCS § 5105] must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary.

(b) (1) A claim by a surviving spouse or child for compensation or dependency and indemnity compensation shall also be considered to be a claim for death pension and accrued benefits, and a claim by a surviving spouse or child for death pension shall be considered to be a claim for death compensation (or dependency and indemnity compensation) and accrued benefits.

(2) A claim by a parent for compensation or dependency and indemnity compensation shall also be considered to be a claim for accrued benefits.

(c) (1) Any person who applies for or is in receipt of any compensation or pension benefit under laws administered by the Secretary shall, if requested by the Secretary, furnish the Secretary with the social security number of such person and the social security number of any dependent or beneficiary on whose behalf, or based upon whom, such person applies for or is in receipt of such benefit. A person is not required to furnish the Secretary with a social security number for any person to whom a social security number has not been assigned.

(2) The Secretary shall deny the application of or terminate the payment of compensation or pension to a person who fails to furnish the Secretary with a social security number required to be furnished pursuant to paragraph (1) of this subsection. The Secretary may thereafter reconsider the application or reinstate payment of compensation or pension, as the case may be, if such person furnishes the Secretary with such social security number.

(3) The costs of administering this subsection shall be paid for from amounts available to the Department of Veterans Affairs for the payment of compensation and pension.

Explanatory notes:
A prior § 5101 was transferred by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238, and appears as 38 USCS § 8301.

Amendments:


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3001, as 38 USCS § 5101, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, in subsec. (a), substituted "administered by the Secretary" for "administered by the Veterans' Administration" and substituted "Secretary" for "Administrator".


Other provisions:

Repeal of provision relating to expedited treatment of remanded claims. Act Nov. 2, 1994, P. L. 103-446, Title III, § 302, 108 Stat. 4658, which formerly appeared as a note to this section, was repealed by Act Dec. 16, 2003, P. L. 108-183, Title VII, § 707(c), 117 Stat. 2673. Such note provided for the expedited treatment of remanded claims. For similar provisions, see 38 USCS § 7112.


"Sec. 401. Establishment of commission.

"(a) Establishment of commission. There is hereby established a commission to be known as the Veterans' Claims Adjudication Commission (hereinafter in this title referred to as the 'commission').

"(b) Membership.(1) The commission shall be composed of nine members, appointed by the Secretary of Veterans Affairs as follows:

"(A) One member shall be appointed from among former officials of the Department of Veterans Affairs (or the Veterans' Administration).

"(B) Two members shall be appointed from among individuals in the private sector who have expertise in the adjudication of claims relating to insurance or similar benefits.

"(C) Two members shall be appointed from among individuals employed in the Federal Government (other than the Department of Veterans Affairs) who have expertise in the adjudication of claims for benefits under Federal law other than under laws administered by the Secretary of Veterans Affairs.

"(D) Two members shall be appointed from among individuals recommended to the Secretary by representatives of veterans service organizations.

"(E) One member shall be appointed based on a recommendation of the American Bar Association or a similar private organization from among individuals who have expertise in the field of administrative law.
“(F) One member shall be appointed from among current officials of the Department of Veterans Affairs.

“(2) The appointment of members of the commission under this subsection shall be made not later than February 1, 1995.

“(c) Period of appointment; vacancies. Members of the commission shall be appointed for the life of the commission. A vacancy in the commission shall not affect its powers, but shall be filled in the same manner as the original appointment.

“(d) Initial meeting. The commission shall hold its first meeting not later than 30 days after the date on which all members of the commission have been appointed.

“(e) Meetings. The commission shall meet at the call of the chairman.

“(f) Quorum. A majority of the members of the commission shall constitute a quorum, but a lesser number may hold hearings.

“(g) Chairman. The Secretary shall designate a member of the commission (other than the commission member who is a current official of the Department of Veterans Affairs) to be chairman of the commission.

“Sec. 402. Duties of the commission.

“(a) In general. The commission shall carry out a study of the Department of Veterans Affairs system for the disposition of claims for veterans benefits.

“(b) Purpose of study. The purpose of the study is to evaluate the Department of Veterans Affairs system for the disposition of claims for veterans benefits in order to determine the following:

“(1) The efficiency of current processes and procedures under the system for the adjudication, resolution, review, and final disposition of claims for veterans benefits, including the effect of judicial review on the system, and means of increasing the efficiency of the system.

“(2) Means of reducing the number of claims under the system for which final disposition is pending.

“(3) Means of enhancing the ability of the Department of Veterans Affairs to achieve final determination regarding claims under the system in a prompt and appropriate manner.

“(c) Contents of study. The study to be carried out by the commission under this section is a comprehensive evaluation and assessment of the Department of Veterans Affairs system for the disposition of claims for veterans benefits (as defined in section 406) and of the system for the delivery of such benefits, together with any related issues that the commission determines are relevant to the study. The study shall include an evaluation and assessment of the following:

“(1) The preparation and submission of claims by veterans under the system.

“(2) The processes and procedures under the system for the disposition of claims, including--

“(A) the scope and nature of the review undertaken with respect to a claim at each stage in the claims disposition process, including the role of hearings throughout the process;

“(B) the number, Federal employment grade, and experience and qualifications required of the persons undertaking such review at each such stage;

“(C) opportunities for the submittal of new evidence; and
"(D) the availability of alternative means of completing claims.

"(3) The effect on the system of the participation of attorneys, members of veterans service organizations, and other advocates on behalf of veterans.

"(4) The effect on the system of actions taken by the Secretary to modernize the information management system of the Department, including the use of electronic data management systems.

"(5) The effect on the system of any work performance standards used by the Secretary at regional offices of the Department and at the Board of Veterans' Appeals.

"(6) The extent of the implementation in the system of the recommendations of the Blue Ribbon Panel on Claims Processing submitted to the Committees on Veterans' Affairs of the Senate and House of Representatives on December 2, 1993, and the effect of such implementation on the system.

"(7) The effectiveness in improving the system of any pilot programs carried out by the Secretary at regional offices of the Department and of efforts by the Secretary to implement such programs throughout the system.

"(8) The effectiveness of the quality control practices and quality assurance practices under the system in achieving the goals of such practices.

"(d) Cooperation of Secretary. Upon the request of the chairman of the commission, the Secretary shall, within 30 days of such request, submit to the commission, and to the Committees on Veterans' Affairs of the Senate and House of Representatives, such information as the chairman shall determine is necessary for the commission to carry out the study required under this section.

"(e) Reports. (1) Not later than one year after the date of the enactment of this Act, the commission shall submit to the Secretary and to the Committees on Veterans' Affairs of the Senate and House of Representatives a preliminary report on the study required under subsection (c). The report shall contain the preliminary findings and conclusions of the commission with respect to the evaluation and assessment required under the study.

"(2) Not later than December 31, 1996, the commission shall submit to the Secretary and to such committees a report on such study. The report shall include the following:

"(A) The findings and conclusions of the commission, including its findings and conclusions with respect to the matters referred to in subsection (c).

"(B) The recommendations of the commission for means of improving the Department of Veterans Affairs system for the disposition of claims for veterans benefits.

"(C) Such other information and recommendations with respect to the system as the commission considers appropriate.

"Sec. 403. Powers of the commission.

"(a) Hearings. The commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the commission considers advisable to carry out the purposes of this title.

"(b) Information from Federal agencies. In addition to the information referred to in section 402(d), the commission may secure directly from any Federal department or agency such information as the commission considers necessary to carry out the provisions of this title. Upon request of the chairman of the commission, the head of such department or agency shall furnish such information to the commission.
“(c) Postal services. The commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal Government.

“(d) Gifts. The commission may accept, use, and dispose of gifts or donations of services or property.

“Sec. 404. Commission personnel matters.

“(a) Compensation of members. Each member of the commission who is not an officer or employee of the Federal Government shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which such member is engaged in the performance of the duties of the commission. All members of the commission who are officers or employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States.

“(b) Travel expenses. The members of the commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code [5 USCS §§ 5701 et seq.], while away from their homes or regular places of business in the performance of services for the commission.

“(c) Staff.(1) The chairman of the commission may, without regard to the civil service laws and regulations, appoint an executive director and such other personnel as may be necessary to enable the commission to perform its duties. The appointment of an executive director shall be subject to approval by the commission.

“(2) The chairman of the commission may fix the compensation of the executive director and other personnel without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code [5 USCS §§ 5101 et seq. and 5331 et seq.], relating to classification of positions and General Schedule pay rates, except that the rate of pay for the executive director and other personnel may not exceed the rate payable for level V of the Executive Schedule under section 5316 of such title.

“(d) Detail of government employees. Upon request of the chairman of the commission, the head of any Federal department or agency may detail, on a nonreimbursable basis, any personnel of the department or agency to the commission to assist it in carrying out its duties.

“(e) Procurement of temporary and intermittent services. The chairman of the commission may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, at rates for individuals which do not exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of such title.

“Sec. 405. Termination of the commission.

“The commission shall terminate 90 days after the date on which the commission submits its report under section 402(e)(2).


“For the purposes of this title:

“(1) The term 'Department of Veterans Affairs system for the disposition of claims for veterans benefits' means the processes and procedures of the Department of Veterans Affairs for the adjudication, resolution, review, and final disposition of claims for benefits under the laws administered by the Secretary.

“(2) The term 'Secretary' means the Secretary of Veterans Affairs.
“(3) The term ‘veterans service organizations’ means any organization approved by the Secretary under section 5902(a) of title 38, United States Code.

"Sec. 407. Funding.

"(a) Fiscal year 1995. From amounts appropriated to the Department of Veterans Affairs for fiscal year 1995 for the payment of compensation and pension, the amount of $400,000 is hereby made available for the activities of the commission under this title.

"(b) Availability. Any sums appropriated to the commission shall remain available until expended.


"(a) Authority. The Secretary of Veterans Affairs, acting through the Under Secretary for Benefits, may conduct a pilot program under this section under which examinations with respect to medical disability of applicants for benefits under laws administered by the Secretary that are carried out through the Under Secretary for Benefits may be made by persons other than employees of the Department of Veterans Affairs. Any such examination shall be performed pursuant to contracts entered into by the Under Secretary for Benefits with those persons.

"(b) Limitation. The Secretary may carry out the pilot program under this section through not more than 10 regional offices of the Department of Veterans Affairs.

"(c) Source of funds. Payments for contracts under the pilot program under this section shall be made from amounts available to the Secretary of Veterans Affairs for payment of compensation and pensions.

"(d) Report to Congress. Not later than three years after the date of the enactment of this Act, the Secretary shall submit to the Congress a report on the effect of the use of the authority provided by subsection (a) on the cost, timeliness, and thoroughness of medical disability examinations.

References to United States Court of Veterans Appeals. Pursuant to § 512(c) of Act Nov. 11, 1998, P. L. 105-368, which appears as 38 USCS § 7251 note, any reference in a law, regulation, document, paper, or other record of the United States to the United States Court of Veterans Appeals shall be deemed to be a reference to the United States Court of Appeals for Veterans Claims.


"(a) Authority. Using appropriated funds, other than funds available for compensation and pension, the Secretary of Veterans Affairs may provide for the conduct of examinations with respect to the medical disabilities of applicants for benefits under laws administered by the Secretary by persons other than Department of Veterans Affairs employees. The authority under this section is in addition to the authority provided in section 504(b) of the Veterans' Benefits Improvement Act of 1996 (Public Law 104-275; 38 U.S.C. 5101 note).

"(b) Performance by contract. Examinations under the authority provided in subsection (a) shall be conducted pursuant to contracts entered into and administered by the Under Secretary for Benefits.

"(c) Expiration. The authority in subsection (a) shall expire on December 31, 2009. No examination may be carried out under the authority provided in that subsection after that date.

"(d) Report. Not later than four years after the date of the enactment of this Act, the Secretary shall submit to Congress a report on the use of the authority provided in subsection (a). The Secretary shall include in the report an assessment of the effect of examinations under that
authority on the cost, timeliness, and thoroughness of examinations with respect to the medical disabilities of applicants for benefits under laws administered by the Secretary.

**Code of Federal Regulations**

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

**Cross References**

This section is referred to in 38 USCS § 5110

**Research Guide**

**Federal Procedure:**

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:102, 103, 113

**Am Jur:**

77 Am Jur 2d, Veterans and Veterans' Laws §§ 37, 148

1. Generally
2. Persons entitled to file claims
3. Filing date of claim
4. Effect of death of claimant

1. Generally

Statute requiring claimants to file claim in form prescribed by Secretary requires applicants to submit claim in particular format, containing specified information, and signed by claimant, as called for by blocks on application form; where claimant fails to provide critical elements of information requested and department returns form to claimant requesting completion, claimant will not have satisfied requirement of providing claim in form prescribed until he submits requested information. Fleshman v West (1998, CA FC) 138 F.3d 1429, cert den (1998) 525 US 947, 142 L Ed 2d 307, 119 S Ct 371

Court of Appeals for Federal Circuit reviewed regulations promulgated by Department of Veterans Affairs pursuant to Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (codified in scattered sections of 38 USCS) and with exception of one regulation, 38 C.F.R. § 3.159(b)(1), which was inconsistent with VCAA, and therefore invalid, regulations regarding claims procedures under 38 C.F.R. §§ 3.156 and 1.159 were affirmed as regulations were not on their face arbitrary, capricious, and contrary to various statutory provisions. Paralyzed Veterans of Am. v Sec'y of Veterans Affairs (2003, CA FC) 345 F.3d 1334

No benefits may be paid or furnished to any individual under laws regulating veterans' benefits unless claim is made on form prescribed by Veterans Administration [now Department of Veterans Affairs]; wife of adjudicated incompetent was not entitled to payment benefits she received as result of form and letter submitted without valid execution. Martin v Martin (1970, Dist Col App) 270 A2d 141

Since pursuant to 38 USCS § 5101 surviving spouse's VA Form 21-534 constituted claim for dependency and indemnity compensation and claim for pension, and claim for pension was incomplete, Secretary was obligated to notify claimant of evidence necessary to complete application,. Isenhart v Derwinski (1992) 3 Vet App 177

Phrase "expeditious treatment" in § 302 (38 USCS § 5101, note) of Veterans' Benefits Improvements Act of 1994 (VBIA), Pub. L. No. 103-446, 108 Stat. 4645 (1994), does not require that remanded cases be advanced on Board of Veterans' Appeals' docket pursuant to 38 USCS § 7107(a)(2) and 38 C.F.R. § 20.900(c); therefore, veteran was not entitled to writ of mandamus requiring Secretary of Veterans Affairs to advance veteran's disability benefits case on Board's docket. Dailey v Principi (2003) 17 Vet App 61, 2003 US App Vet Claims LEXIS 285


2. Persons entitled to file claims

Declaration for pension filed by feeble-minded widow under guardianship in her own name was valid. 1932 ADVA 101

Letter from rehabilitation official written on behalf of widow did not qualify as filing of pension request if no power of attorney was executed at time letter in question was written. 1934 ADVA 270

Under former 38 USC § 370, widow was entitled to complete pending claim of deceased veteran. 1938 ADVA 435

3. Filing date of claim

Claim executed by veteran on December 13, 1943 but forwarded to Veterans’ Administration [now Department of Veterans Affairs] subsequent to veteran's death is filed with Veterans’ Administration [now Department of Veterans Affairs] as of date of its execution. 1944 ADVA 566

4. Effect of death of claimant

38 USCS § 3001 [now 38 USCS § 5101] does not require a second claim to be filed after the death of a claimant. Devany v United States (1966, CA2 NY) 366 F.2d 807 (criticized in Seymour v Principi (2001, CA FC) 245 F.3d 1377)

Even if children of veteran's widow could be substituted as parties in appeal as to accrued benefits claim, their notice of widow's death was filed more than one year after her death and therefore untimely and widow's DIC application was filed more than 23 years after servicemember's death. Erro v Brown (1996) 8 Vet App 500

§ 5102. Application forms furnished upon request; notice to claimants of incomplete applications

cxxxviiiDiscussion and Analysis in the Veterans Benefits Manual

(a) Furnishing forms. Upon request made by any person claiming or applying for, or expressing an intent to claim or apply for, a benefit under the laws administered by the Secretary, the Secretary shall furnish such person, free of all expense, all instructions and forms necessary to apply for that benefit.

(b) Incomplete applications. If a claimant's application for a benefit under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant and the claimant's representative, if any, of the information necessary to complete the application.

(c) Time limitation.
(1) If information that a claimant and the claimant's representative, if any, are notified under subsection (b) is necessary to complete an application is not received by the Secretary within one year from the date such notice is sent, no benefit may be paid or furnished by reason of the claimant's application.

(2) This subsection shall not apply to any application or claim for Government life insurance benefits.

Explanatory notes:

A prior § 5102 was transferred by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238, and appears as 38 USCS § 8302.


Amendments:

2003. Act Dec. 16, 2003 (effective as if enacted on 11/9/2000, immediately after enactment of Act Nov. 9, 2000, P. L. 106-475, as provided by § 701(c) of the 2003 Act, which appears as a note to this section), added subsec. (c).

Other provisions:


Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:102, 103

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 148

Forms:


Court of Appeals for Federal Circuit reviewed regulations promulgated by Department of Veterans Affairs pursuant to Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (codified in scattered sections of 38 USCS) and with exception of one regulation, 38 C.F.R. § 3.159(b)(1), which was inconsistent with VCAA, and therefore invalid, regulations regarding claims procedures under 38 C.F.R. §§ 3.156 and 1.159 were affirmed as regulations were not on their face arbitrary, capricious, and contrary to various statutory provisions. Paralyzed Veterans of Am. v Sec'y of Veterans Affairs (2003, CA FC) 345 F.3d 1334


§ 5103. Notice to claimants of required information and evidence

Discussion and Analysis in the Veterans Benefits Manual
(a) **Required information and evidence.** Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title [38 USCS § 5103A] and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

(b) **Time limitation.**

   (1) In the case of information or evidence that the claimant is notified under subsection (a) is to be provided by the claimant, such information or evidence must be received by the Secretary within one year from the date such notice is sent.

   (2) This subsection shall not apply to any application or claim for Government life insurance benefits.

   (3) Nothing in paragraph (1) shall be construed to prohibit the Secretary from making a decision on a claim before the expiration of the period referred to in that subsection.

**Explanatory notes:**

A prior § 5103 was transferred by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238, and appears as 38 USCS § 8303.


Such section related to incomplete applications.

**Amendments:**


2003. Act Dec. 16, 2003 (effective as if enacted on 11/9/2000, immediately after enactment of Act Nov. 9, 2000, P. L. 106-475, as provided by § 701(c) of the 2003 Act, which appears 38 USCS § 5102 note), in subsec. (b), in para. (1), substituted "such information or evidence must be received by the Secretary within one year from the date such notice is sent" for "if such information or evidence is not received by the Secretary within one year from the date of such notification, no benefit may be paid or furnished by reason of the claimant's application", and added para. (3).

**Procedures for readjudication of certain claims; construction on providing renotification.** Act Dec. 16, 2003, P. L. 108-183, Title VII, § 701(d), (e), 117 Stat. 2670, provides:

"(d) Procedures for readjudication of certain claims. (1) The Secretary of Veterans Affairs shall readjudicate a claim of a qualified claimant if the request for such readjudication is received not later than the end of the one-year period that begins on the date of the enactment of this Act.

"(2) For purposes of this subsection, a claimant is qualified within the meaning of paragraph (1) if the claimant--

"(A) received notice under section 5103(a) of title 38, United States Code, requesting information or evidence to substantiate a claim;
“(B) did not submit such information or evidence within a year after the date such notice was sent;

“(C) did not file a timely appeal to the Board of Veterans’ Appeals or the United States Court of Appeals for Veterans Claims; and

“(D) submits such information or evidence during the one-year period referred to in paragraph (1).

“(3) If the decision of the Secretary on a readjudication under this subsection is in favor of the qualified claimant, the award of the grant shall take effect as if the prior decision by the Secretary on the claim had not been made.

“(4) Nothing in this subsection shall be construed to establish a duty on the part of the Secretary to identify or readjudicate any claim that--

“(A) is not submitted during the one-year period referred to in paragraph (1); or

“(B) has been the subject of a timely appeal to the Board of Veterans’ Appeals or the United States Court of Appeals for Veterans Claims.

“(e) Construction on providing renotification. Nothing in this section, or the amendments made by this section [amending 38 USCS §§ 5102 and 5103(b)], shall be construed to require the Secretary of Veterans Affairs--

“(1) to provide notice under section 5103(a) of such title with respect to a claim insofar as the Secretary has previously provided such notice; or

“(2) to provide for a special notice with respect to this section and the amendments made by this section [amending 38 USCS §§ 5102 and 5103(b)].”.

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:103, 251, 254, 286, 294

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 148, 150, 152

1. Applicability
2. -Retroactivity
3. Notice requirements
4. -Particular circumstances
5. Validity of regulations
6. Judicial review
7. -Waiver of notice issue
8. -Exhaustion of administrative remedies
9. -Nonprejudicial notice error
10. -Remand to Board of Veterans' Appeals
11. Miscellaneous

1. Applicability
Revised notice requirements in 38 USCS § 5103(a) and 8 C.F.R. § 3.159(b)(1) (2003), Department of Veterans Affairs' (VA) regulations implementing amended 38 USCS § 5103(a), apply to cases pending before VA on November 9, 2000, date of enactment of Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096, even if initial agency of original


Notice provisions under Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000), did not apply to veteran's request for waiver of indebtedness under 38 USCS § 5302 because: (1) waiver of overpayment was not claim for benefits under chapter 51 of title 38, USCS, but, rather, application for waiver of overcompensation under chapter 53, and VCAA notice provisions of 38 USCS § 5103(a) did not apply to chapter 53; and (2) 38 USCS § 5302(a) contained notice provision specific to request for waiver of overpayment and specific notice provisions of 38 USCS § 5302(a) superseded general VCAA notice provisions. Lueras v Principi (2004) 18 Vet App 435, 2004 US App Vet Claims LEXIS 651, subsequent app (2004, US) 2004 US App Vet Claims LEXIS 714


2. Retroactivity

Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, § 3(a), 114 Stat. 2096, 2096-2097, which enacted 38 USCS § 5103, does not apply retroactively to require that proceedings that were complete before Department of Veterans Affairs and were on appeal to Court of Appeals for Veterans Claims or Court of Appeals for Federal Circuit be remanded for readjudication under new statute. Bernklau v Principi (2002, CA FC) 291 F.3d 795 (ovrd in part as stated in Jones v Principi (2004) 18 Vet App 248, 2004 US App Vet Claims LEXIS 536)

Court of Appeals for Veterans Claims properly denied remand of veteran's claim to Board of Veterans Appeals for retroactive application of amended notice requirements of Veterans Claims Assistance Act set forth in 38 USCS §§ 5103, 5103A, because there was no expressed Congressional intent for retroactive application of provisions, and Karnas v. Derwinski, 1 Vet. App. 308 (1991) and Holliday v. Principi, 14 Vet. App. 280 (2001), were overruled to extent they indicated different result. Kuzma v Principi (2003, CA FC) 341 F.3d 1327, cert den (2004) 540 US 1182, 158 L Ed 2d 85, 124 S Ct 1421

Court of Appeals for Veterans Claims erred in remanding matter to Board of Veterans Appeals for compliance with enhanced notice and assistance requirements codified at 38 USCS § 5103(a) where veteran's appeal to Board was final before notice and assistance requirements were enacted and where Congress did not intend requirements to be applied retroactively. Hayslip v Principi (2004, CA FC) 364 F.3d 1321


3. Notice requirements

When veteran has made application to reopen claim and Secretary of Veterans' Affairs is on notice of evidence which may prove to be new and material but has not been submitted with application, Secretary has duty under § 5103 to inform claimant of evidence that is necessary to complete application. Quartuccio v Principi (2002) 16 Vet App 183, 2002 US App Vet Claims LEXIS 443

38 USCS § 5103(a) and 8 C.F.R. § 3.159(b)(1) provide that, before initial unfavorable AOJ decision is issued on claim, service-connection claimant must be given notice in accordance with

Words "upon receipt" in 38 USCS § 5103(a) mandate that notice precede initial unfavorable agency of original jurisdiction decision on service-connection claim, next major adjudication-process milestone after application is filed. Pelegrini v Principi (2004) 18 Vet App 112, 2004 US App Vet Claims LEXIS 370

4. -Particular circumstances


Board of Veterans' Appeals did not err in finding that Secretary of Veterans Affairs met his statutory duty to notify veterans' surviving spouse under 38 USCS § 5103 where (1) communications from Veterans Affairs as whole informed spouse regarding information and evidence necessary to substantiate claim; (2) spouse failed to submit evidence with regard to how she was prejudiced, pursuant to 38 USCS § 7261(b)(2), by Secretary's alleged failure to inform spouse about who should provide what information and evidence; (3) there was no indication that spouse had pertinent evidence in her possession that she did not provide; and (4) there was lack of actual prejudice from noncompliance with timing of notice. Mayfield v Nicholson (2005) 19 Vet App 103, 2005 US App Vet Claims LEXIS 197, reh, en banc, den (2005, US) 2005 US App Vet Claims LEXIS 304

38 USCS § 5103(a) requires Secretary of Veterans Affairs to notify 38 USCS § 1318 dependency and indemnity compensation (DIC) claimant of any information and evidence, not of record, that is "necessary to substantiate" § 1318 DIC claim; this includes information and evidence necessary to substantiate § 1318 DIC claim on basis that veteran was "hypothetically entitled to receive" disability compensation for service-connected disability that was rated totally disabling for at least 10 years prior to his death, pursuant to 38 USCS § 1318(b). Rodriguez v Nicholson (2005) 19 Vet App 275, 2005 US App Vet Claims LEXIS 523

Supplemental Statement of Case did not include notice of information or evidence necessary to substantiate 38 USCS § 1318 dependency and indemnity compensation (DIC) claim on basis that veteran was "entitled to receive," let alone "hypothetically entitled to receive," disability compensation for service-connected disability that was rated totally disabling for at least 10 years prior to his death, pursuant to 38 USCS § 1318(b); accordingly, Secretary of Veterans Affairs did not fulfill his 38 USCS § 5103(a) duty to notify appellant about what information or evidence was needed to substantiate her 38 USCS § 1318 DIC claim. Rodriguez v Nicholson (2005) 19 Vet App 275, 2005 US App Vet Claims LEXIS 523

Department of Veterans Affairs breached its 38 USCS § 5103(a) duty to notify appellant claimant as to information and evidence needed to substantiate her claim when it failed to advise her that Philippine Veterans Affairs Office document she had submitted was inadequate for purposes of showing qualifying service, and failed to notify her about what would constitute acceptable evidence of qualifying military service. Pelea v Nicholson (2005) 19 Vet App 296, 2005 US App Vet Claims LEXIS 537

5. Validity of regulations
38 C.F.R. § 19.9(a)(2)(ii) was invalid because it was contrary to 38 USCS § 5103(b), which provided claimant one year to submit evidence; however, 38 C.F.R. § 20.903 was not contrary to 38 USCS § 5103, and 38 C.F.R. § 20.1304’s requirement of good cause and ninety-day response period does not conflict with 38 USCS § 5103’s notice and time limitations. Disabled Am. Veterans v Sec’y of Veterans Affairs (2003, CA FC) 327 F.3d 1339

Court of Appeals for Federal Circuit reviewed regulations promulgated by Department of Veterans Affairs pursuant to Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (codified in scattered sections of 38 USCS) and with exception of one regulation, 38 C.F.R. § 3.159(b)(1), which was inconsistent with VCAA, and therefore invalid, regulations regarding claims procedures under 38 C.F.R. §§ 3.156 and 1.159 were affirmed as regulations were not on their face arbitrary, capricious, and contrary to various statutory provisions. Paralyzed Veterans of Am. v Sec’y of Veterans Affairs (2003, CA FC) 345 F.3d 1334

6. Judicial review

Veteran’s Court violated its statutory obligations under 38 USCS § 7261(b)(2) when it refused to consider whether difference between notice actually given to veteran and notice required by 38 USCS § 5103(a) prejudiced veteran; there was nothing that hinted that Congress intended to exempt § 5103(a) from general scheme. Conway v Principi (2004, CA FC) 353 F.3d 1369, on remand, remanded (2004, US) 2004 US App Vet Claims LEXIS 643

Where Board of Veterans’ Appeals (BVA) erred by failing to adequately discuss amended duty to notify in 38 USCS § 5103, BVA’s error was non-prejudicial under 38 USCS § 7261(b)(2) because brother's averment that he was brother of deceased veteran was uniquely within brother's knowledge, and under 38 USCS § 101(14) brother was ineligible for dependency and indemnity compensation as matter of law on basis of sibling relationship with veteran. Valiao v Principi (2003) 17 Vet App 229, 2003 US App Vet Claims LEXIS 612


Because veteran’s surviving spouse had received compliant notice, any Board of Veterans’ Affairs reasons-or-bases deficiency in discussion how 38 USCS § 5103(a)/38 C.F.R. § 3.159(b)(1) notice had been satisfied in case would of necessity be nonprejudicial to claimant pursuant to 38 USCS § 7261(b)(2); court's review was not hindered by any reasons-or-bases deficiency in Board decision, and remand under 38 USCS § 7104(a) and (d)(1) for reasons-or-bases error would be of no benefit to spouse and would therefore be pointless. Mayfield v Nicholson (2005) 19 Vet App 103, 2005 US App Vet Claims LEXIS 197, reh, en banc, den (2005, US) 2005 US App Vet Claims LEXIS 304

Veteran’s claim that Secretary of Veterans Affair failed to provide notice required by 38 USCS § 5103(a) failed to allege with specificity any particular inadequacy regarding Board's finding that adequate notice was provided; accordingly, U.S. Court of Appeals for Veterans Claims could not review this issue. Coker v Nicholson (2006) 19 Vet App 439, 2006 US App Vet Claims LEXIS 34

7. -Waiver of notice issue


8. -Exhaustion of administrative remedies

Appellant must exhaust all administrative remedies before bringing appeal to Court of Appeals for Veterans Claims, including error under 38 USCS § 5103, and Court will decline to exercise jurisdiction on issue of whether Secretary had duty to inform appellant what specific evidence should be submitted to well-ground claim where appellant and representative did not raise issue in notice of disagreement, in substantive appeal, or in presentation to Board, and

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9. Nonprejudicial notice error

Although appellant veteran did not receive notice required by Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096, 2096-97, benefit for damage to underwear was not permitted by law, 38 USCS § 1162, and because veteran had actual knowledge of what was required to receive clothing allowance and because she was not legally entitled to clothing allowance based on facts as averred by her, any notice error was nonprejudicial. Short Bear v Nicholson (2005) 19 Vet App 341, 2005 US App Vet Claims LEXIS 585

Where claimant for veterans benefits was not entitled to reimbursement for rental expenses incurred at community residential care facility based on express prohibition of such payments under 38 USCS § 1730(b)(3); any failure to give notice was nonprejudicial error. Beverly v Nicholson (2005) 19 Vet App 394, 2005 US App Vet Claims LEXIS 836

10. Remand to Board of Veterans' Appeals

Court of Appeals for Veterans Claims did not determine whether remand was warranted solely for compliance with Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, and amended notice requirements, because court remanded Board for readjudication when Board did not provide adequate reasons or bases for its findings, and court ordered Board to comply with requirements of VCAA. Fortuck v Principi (2003) 17 Vet App 173, 2003 US App Vet Claims LEXIS 519

11. Miscellaneous

Veteran was prevailing party for Equal Access to Justice Act, 28 USCS § 2412(d), purposes, where court had vacated and remanded Board of Veterans’ Appeals’ decision based on Secretary of Veterans Affairs’ concession that he failed to provide certain notice as required under 38 USCS § 5103(a). Apodackis v Nicholson (2005) 19 Vet App 91, 2005 US App Vet Claims LEXIS 96

§ 5103A. Duty to assist claimants

Duty to assist.

(1) The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary.

(2) The Secretary is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim.

(3) The Secretary may defer providing assistance under this section pending the submission by the claimant of essential information missing from the claimant's application.

Assistance in obtaining records.

(1) As part of the assistance provided under subsection (a), the Secretary shall make reasonable efforts to obtain relevant records (including private records) that the claimant adequately identifies to the Secretary and authorizes the Secretary to obtain.

(2) Whenever the Secretary, after making such reasonable efforts, is unable to obtain all of the relevant records sought, the Secretary shall notify the claimant that the Secretary is unable to obtain records with respect to the claim. Such a notification shall--
(A) identify the records the Secretary is unable to obtain;
(B) briefly explain the efforts that the Secretary made to obtain those records; and
(C) describe any further action to be taken by the Secretary with respect to the claim.

(3) Whenever the Secretary attempts to obtain records from a Federal department or agency under this subsection or subsection (c), the efforts to obtain those records shall continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile.

(c) Obtaining records for compensation claims. In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (b) shall include obtaining the following records if relevant to the claim:

(1) The claimant's service medical records and, if the claimant has furnished the Secretary information sufficient to locate such records, other relevant records pertaining to the claimant's active military, naval, or air service that are held or maintained by a governmental entity.

(2) Records of relevant medical treatment or examination of the claimant at Department health-care facilities or at the expense of the Department, if the claimant furnishes information sufficient to locate those records.

(3) Any other relevant records held by any Federal department or agency that the claimant adequately identifies and authorizes the Secretary to obtain.

(d) Medical examinations for compensation claims.

(1) In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim.

(2) The Secretary shall treat an examination or opinion as being necessary to make a decision on a claim for purposes of paragraph (1) if the evidence of record before the Secretary, taking into consideration all information and lay or medical evidence (including statements of the claimant)--

(A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and

(B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, or air service; but

(C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.

(e) Regulations. The Secretary shall prescribe regulations to carry out this section.

(f) Rule with respect to disallowed claims. Nothing in this section shall be construed to require the Secretary to reopen a claim that has been disallowed except when new and material evidence is presented or secured, as described in section 5108 of this title [38 USCS § 5108].

(g) Other assistance not precluded. Nothing in this section shall be construed as precluding the Secretary from providing such other assistance under subsection (a) to a claimant in substantiating a claim as the Secretary considers appropriate.".
Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:103, 104

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 150

1. Applicability

2. Duty to assist in obtaining evidence (38 USCS § 5103A(a))
   3. - Assistance in obtaining records (38 USCS § 5103A(b))
   4. --Obtaining records for compensation claims (38 USCS § 5103A(c))
   5. -Medical examinations and medical opinions for compensation claims (38 USCS § 5103A(d))

6. Regulations (38 USCS § 5103A(e))

7. Other assistance (38 USCS § 5103A(g))

8. Judicial review
   9. -Nonprejudicial error
   10. -Remand to Board of Veterans' Appeals

11. Miscellaneous

1. Applicability

Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, § 3(a), 114 Stat. 2096, 2096-2097, does not apply retroactively to require that proceedings that were complete before Department of Veterans Affairs and were on appeal to Court of Appeals for Veterans Claims or this court be remanded for readjudication under new statute. Bernklau v Principi (2002, CA FC) 291 F.3d 795 (ovrld in part as stated in Jones v Principi (2004) 18 Vet App 248, 2004 US App Vet Claims LEXIS 536)

Where proceeding was complete before agency, but was on appeal at time Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, § 3(a), 114 Stat. 2096, 2096-2097, was enacted, court found that case should not be remanded to Court of Appeals for Veterans Claims (or, in turn, Board of Veterans' Appeals) for further proceedings under § 3(a) of VCAA. Bernklau v Principi (2002, CA FC) 291 F.3d 795 (ovrld in part as stated in Jones v Principi (2004) 18 Vet App 248, 2004 US App Vet Claims LEXIS 536)

Court of Appeals for Veterans Claims properly denied remand of veteran's claim to Board of Veterans Appeals for retroactive application of amended notice requirements of Veterans Claims Assistance Act set forth in 38 USCS §§ 5103, 5103A, because there was no expressed Congressional intent for retroactive application of provisions. Kuzma v Principi (2003, CA FC) 341 F.3d 1327, cert den (2004) 540 US 1182, 158 L Ed 2d 85, 124 S Ct 1421


2. Duty to assist in obtaining evidence (38 USCS § 5103A(a))

With respect to claim for service connection for post-traumatic stress disorder, veteran was not advised adequately by VA as to types of information that may help to verify his claimed in-service stressors; in particular, VA failed to advise veteran that he could submit corroboration in form of “buddy statements” as to some of occurrences that he alleged were in-service stressors. Sizemore v Principi (2004) 18 Vet App 264, 2004 US App Vet Claims LEXIS 555

With respect to claim for disability compensation benefits based on asserted VA service connection hearing loss in connection with active-duty service in U.S. Coast Guard Merchant
Marine during World War II, which claim was denied on basis that claimant did not establish active-duty service for status as a "veteran", Department of Veterans Affairs erred under 38 USCS § 5103A because it did not make additional request seeking verification of service following submission of documents by veteran to regional office. Frasure v Principi (2004) 18 Vet App 379, 2004 US App Vet Claims LEXIS 581

Under plain language of 38 USCS § 5103A, Secretary of Veterans Affairs' duty-to-assist provisions apply in connection with claimant's attempt to establish entitlement to his or her claim for award of Veterans Administration benefits and not in connection with claimant's attempt to establish mental incapacity for purposes of tolling judicial-appeal period under 38 USCS § 7266(a) and obtaining Court of Veterans Appeals jurisdiction over appeal of Board of Veterans Appeals' decision. Jones v Principi (2004) 18 Vet App 500, 2004 US App Vet Claims LEXIS 719

3. -Assistance in obtaining records (38 USCS § 5103A(b))

With respect to claim for disability compensation benefits based on asserted VA service connection hearing loss in connection with active-duty service in U.S. Coast Guard Merchant Marine during World War II, which claim was denied on basis that claimant did not establish active-duty service for status as a "veteran", Department of Veterans Affairs erred under 38 USCS § 5103A because it did not make additional request seeking verification of service following submission of documents by veteran to regional office. Frasure v Principi (2004) 18 Vet App 379, 2004 US App Vet Claims LEXIS 581

Department of Veterans Affairs did not fail to comply with its duty under 38 USCS § 5103A to assist claimant because at no time during pendency of his claim before VA did claimant ever identify any additional medical records or quality-assurance reports, or request VA to provide them, or explain how they might be relevant to his claim. Loving v Nicholson (2005) 19 Vet App 96, 2005 US App Vet Claims LEXIS 131

4. --Obtaining records for compensation claims (38 USCS § 5103A(c))

With respect to claim for service connection for post-traumatic stress disorder, if veteran's assertion regarding deaths of unit members was that his knowledge of deaths was stressor, then VA had duty to assist veteran in attempting to verify deaths; if, however, the veteran's assertion was that he witnessed their deaths, then VA had obligation to attempt to verify deaths only if there was evidence that veteran was present when those deaths allegedly occurred. Sizemore v Principi (2004) 18 Vet App 264, 2004 US App Vet Claims LEXIS 555

With respect to claim for disability compensation benefits based on asserted VA service connection hearing loss in connection with active-duty service in U.S. Coast Guard Merchant Marine during World War II, which claim was denied on basis that claimant did not establish active-duty service for status as a "veteran", Department of Veterans Affairs erred under 38 USCS § 5103A because it did not make additional request seeking verification of service following submission of documents by veteran to regional office. Frasure v Principi (2004) 18 Vet App 379, 2004 US App Vet Claims LEXIS 581

Department of Veterans Affairs did not fail to comply with its duty under 38 USCS § 5103A to assist claimant because at no time during pendency of his claim before VA did claimant ever identify any additional medical records or quality-assurance reports, or request VA to provide them, or explain how they might be relevant to his claim. Loving v Nicholson (2005) 19 Vet App 96, 2005 US App Vet Claims LEXIS 131

5. -Medical examinations and medical opinions for compensation claims (38 USCS § 5103A(d))

Veteran had to show some causal connection between disability and military service, disability alone was not enough; Board of Veterans Appeals had no duty to obtain medical opinion absent evidence disability was service related. Wells v Principi (2003, CA FC) 326 F.3d 1381, reh den, reh, en banc, den (2003, CA FC) 2003 US App LEXIS 19512

Where veteran provided some evidence that hearing loss and tinnitus may have been service-related, Secretary of Veterans Affairs had duty to assist veteran in obtaining medical

Where record before Board of Veterans' Appeals contained: (1) veteran's statement that he experienced difficulty in breathing, easy fatigability, and recurring rapid heartbeat, (2) veteran's assertion that those symptoms were symptoms of his claimed disabilities and that he had experienced them since his separation from service, and (3) discharge examination report that included notation of tachycardia, which was abnormality of cardiovascular system, Board did not comply with 38 USCS § 7104(d)(1) in that it failed to support its conclusion that Department of Veterans Affairs was not required under 38 USCS § 5103A(d) to provide veteran with medical examination with respect to his claim for service connection for heart disease; matter was remanded so that Board could properly address whether record: (1) contained competent evidence that veteran had recurrent symptoms of heart disease, and (2) indicated that those symptoms might be associated with his active military service. Duenas v Principi (2004) 18 Vet App 512, 2004 US App Vet Claims LEXIS 798

6. Regulations (38 USCS § 5103A(e))

Regulations regarding claims procedures, 38 C.F.R. §§ 3.156 and 1.159, which were promulgated by Department of Veterans Affairs pursuant to Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, were valid, as they were not on their face arbitrary, capricious, and contrary to statutory provisions; however, 38 C.F.R. § 3.159(b)(1) was inconsistent with VCAA, and therefore invalid. Paralyzed Veterans of Am. v Sec'y of Veterans Affairs (2003, CA FC) 345 F.3d 1334

7. Other assistance (38 USCS § 5103A(g))

With respect to claim for disability compensation benefits based on asserted VA service connection hearing loss in connection with active-duty service in U.S. Coast Guard Merchant Marine during World War II, which claim was denied on basis that claimant did not establish active-duty service for status as a "veteran", Department of Veterans Affairs erred under 38 USCS § 5103A because it did not make additional request seeking verification of service following submission of documents by veteran to regional office. Frasure v Principi (2004) 18 Vet App 379, 2004 US App Vet Claims LEXIS 581

8. Judicial review

Williams test with respect to exception to finality requirement did not depend on whether Veterans Court's interpretation of 38 USCS § 5103A would be applied in Veterans Court's final decision, but whether there was substantial risk that this interpretation would not survive non-final order. Jones v Nicholson (2005, CA FC) 431 F.3d 1353


Court of Appeals for Veterans Claims did not determine whether remand was warranted solely for compliance with Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, and amended notice requirements, because court remanded Board for readjudication when Board did not provide adequate reasons or bases for its findings, and court ordered Board to comply with requirements of VCAA. Fortuck v Principi (2003) 17 Vet App 173, 2003 US App Vet Claims LEXIS 519

Under plain language of 38 USCS § 5103A, Secretary of Veterans Affairs' duty-to-assist provisions apply in connection with claimant's attempt to establish entitlement to his or her claim for award of Veterans Administration benefits and not in connection with claimant's attempt to establish mental incapacity for purposes of tolling judicial-appeal period under 38 USCS § 7266(a) and obtaining Court of Veterans Appeals jurisdiction over appeal of Board of Veterans Appeals' decision. Jones v Principi (2004) 18 Vet App 500, 2004 US App Vet Claims LEXIS 719

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9. -Nonprejudicial error

Although Board of Veterans' Appeals did not comply with 38 USCS § 7104(d)(1) when it failed to support its conclusion that Department of Veterans Affairs was not required under 38 USCS § 5103A(d) to provide veteran with medical examination with respect to veteran's claims for service connection for poor vision and hearing-loss disability, error was nonprejudicial under 38 USCS § 7261(b) because there was no evidence in record reflecting that veteran suffered event, injury, or disease in service that could be associated with those symptoms. Duenas v Principi (2004) 18 Vet App 512, 2004 US App Vet Claims LEXIS 798

10. -Remand to Board of Veterans' Appeals

11. Miscellaneous

Breach of duty to assist veteran does not vitiate finality of Veterans' Administration (VA) Regional Office's decision; Court of Appeals for Federal Circuit therefore overrules Hayre v. West, 188 F.3d 1327 (Fed. Cir. 1999) to extent that it created additional exception to rule of finality applicable to VA decisions by reason of "grave procedural error." Cook v Principi (2002, CA FC) 318 F.3d 1334, reh, en banc, den (2003, CA FC) 56 Fed Appx 496 and cert den (2003) 539 US 926, 156 L Ed 2d 603, 123 S Ct 2574

§ 5104. Decisions and notices of decisions

Discussion and Analysis in the Veterans Benefits Manual

(a) In the case of a decision by the Secretary under section 511 of this title [38 USCS § 511] affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of such decision. The notice shall include an explanation of the procedure for obtaining review of the decision.

(b) In any case where the Secretary denies a benefit sought, the notice required by subsection (a) shall also include (1) a statement of the reasons for the decision, and (2) a summary of the evidence considered by the Secretary.

Explanatory notes:

A prior § 5104 was transferred by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238, and appears as 38 USCS § 8304.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3004, as 38 USCS § 5104.

Act June 13, 1991 (effective immediately before enactment of Act May 7, 1991 as provided by § 14(d) of Act June 13, 1991) redesignated former subsec. (a)(1) as subsec. (a) and redesignated former subsec. (a)(2) as subsec. (b); and, in subsec. (b) as so redesignated, substituted "subsection (a)" for "paragraph (1) of this subsection", and substituted "(1)" and "(2)" for "(A)" and "(B)" respectively.

1994. Act Nov. 2, 1994, in subsec. (a), substituted "section 511" for "section 211(a)".

Other provisions:


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Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans’ Affairs §§ 79:155, 204

Am Jur:
77 Am Jur 2d, Veterans and Veterans’ Laws § 158


Notice that was issued by Board of Veterans’ Appeals informing veteran of his appeal rights for denial of benefits was not defective under 38 USCS § 5104(a) because it provided general outline of available procedures for obtaining review of final Board decision and was not required to advise him of postmark rule of 38 USCS § 7266. Mapu v Nicholson (2005, CA FC) 397 F.3d 1375


Section 5104’s general command to provide certain types of notices is given content as to BVA decisions by section 7104(e)’s more specific command to provide copies of BVA decisions by “mail,” and types of notice required by section 5104(a) must be mailed along with copy of BVA decision; so read, provisions are compatible and do not conflict. Thompson v Brown (1995) 8 Vet App 169

VA’s failure to attach statement of appellate rights to decision tolls time for filing notice of disagreement. In re Fee Agreement of Cox (1997) 10 Vet App 361, vacated, remanded (1998, CA FC) 149 F.3d 1360

Court of Appeals for Veteran Claims declined to hold that failure of compliance with 38 USCS § 5104(a) duty tolled running of 120-day judicial appeal period set forth in 38 USCS § 7266(a)(1) where veteran failed to keep Department of Veterans Affairs apprised of current address, and only question was whether veteran had timely appealed Board of Veterans’ Appeals’ decision denying earlier effective date for service-connected disability benefits. Davis v Principi (2003) 17 Vet App 29, 2003 US App Vet Claims LEXIS 167, subsequent app (2004, CA FC) 85 Fed Appx 771

Where court granted Secretary of Veterans Affairs’ motion to remand veteran’s appeal of decision of Board of Veterans’ Appeals based on enactment of Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000), and enactment of VCAA took place on same day that Board’s decision was issued, veteran, who had joined in Secretary’s remand motion, was not prevailing party for purposes of Equal Access to Justice Act, 28 USCS § 2412(d)(1)(A). White v Principi (2003) 17 Vet App 301, 2003 US App Vet Claims LEXIS 765

Court of Appeals for Veterans Claims declined to apply equitable tolling to untimely notice of appeal that veteran had improperly sent to Department of Veterans Affairs Office of General Counsel, where veteran had benefit of Notice of Appellate Rights, in accordance with 38 USCS § 5104, attached to copy of Board of Veterans’ Appeals decision that explicitly provided that filing copy of notice of appeal with OGC would not have protected his right to appeal with Court of Appeals for Veterans Claims. Reed v Principi (2003) 17 Vet App 380, 2003 US App Vet Claims LEXIS 924


District court was bound by Federal Circuit court’s definition of “due diligence,” and claimant’s actions, in timely filing statement of appeal with Board of Veterans’ Appeals (BVA) and asking BVA to forward statement to court, fell under equitable-tolling-doctrine umbrella; although
claimant's filing of Notice of Appeal, after BVA did not forward statement, was filed outside of appeal period, it was considered timely and court had jurisdiction to review appeal. Bobbitt v Principi (2004) 17 Vet App 547, 2004 US App Vet Claims LEXIS 193

Appellant did not file timely notice of appeal from decision of Board of Veterans' Appeals, and there was no evidence that tolling of time period in 38 USCS § 7266(a) and Ct. Vet. App. R. 4 was warranted, as appellant was fully advised of his right to appeal, in accordance with 38 USCS § 5104, appellant did not show that he had timely misfiled notice of appeal, and also did not show that appellant had mental illness that made him incapable of timely filing notice of appeal; therefore, appeal was dismissed. Tavares v Principi (2004) 18 Vet App 131, 2004 US App Vet Claims LEXIS 371

§ 5105. Joint applications for social security and dependency and indemnity compensation

(a) The Secretary and the Commissioner of Social Security shall jointly prescribe forms for use by survivors of members and former members of the uniformed services in filing application for benefits under chapter 13 of this title [38 USCS §§ 1301 et seq.] and title II of the Social Security Act (42 U.S.C. 401 et seq.). Each such form shall request information sufficient to constitute an application for benefits under both chapter 13 of this title [38 USCS §§ 1301 et seq.] and title II of the Social Security Act (42 U.S.C. 401 et seq.).

(b) When an application on such form is filed with either the Secretary or the Commissioner of Social Security, it shall be deemed to be an application for benefits under both chapter 13 of this title [38 USCS §§ 1301 et seq.] and title II of the Social Security Act (42 U.S.C. 401 et seq.). A copy of each such application filed with either the Secretary or the Commissioner, together with any additional information and supporting documents (or certifications thereof) which may have been received by the Secretary or the Commissioner with such application, and which may be needed by the other official in connection therewith, shall be transmitted by the Secretary or the Commissioner receiving the application to the other official. The preceding sentence shall not prevent the Secretary and the Commissioner of Social Security from requesting the applicant, or any other individual, to furnish such additional information as may be necessary for purposes of chapter 13 of this title [38 USCS §§ 1301 et seq.] and title II of the Social Security Act (42 U.S.C. 401 et seq.) respectively.

Explanatory notes:

A prior § 5105 was transferred by Act May 7, 1991, P. L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238, and appears as 38 USCS § 8305.

Amendments:


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3005, as 38 USCS § 5105.

Act Aug. 6, 1991 inserted the subsec. designator "(a)" at the beginning of the section, substituted "Secretary" for "Administrator" following "(a) The", substituted a period for ";", and ", substituted "(b) When an application on such a form is filed with either the Secretary" for
"when an application on such form has been filed with either the Administrator", substituted "filed with either Secretary" for "filed with the Administrator", substituted "received by that Secretary" for "received by the Administrator", substituted "needed by the other Secretary" for "needed by the Secretary", and substituted "by the Secretary receiving the application to the other Secretary." for "by the Administrator to the Secretary;".

Such Act further deleted "and a copy of each such application filed with the Secretary, together with any additional information and supporting documents (or certifications thereof) which may have been received by the Secretary with such form, and which may be needed by the Administrator in connection therewith, shall be transmitted by the Secretary to the Administrator." preceding "The preceding sentence" and substituted "the Secretary and the Secretary of Health and Human Services" for "the Secretary and the Administrator" following "shall not prevent".

1994. Act Aug. 15, 1994 (effective 3/31/95, as provided by § 110(a) of such Act, which appears as 42 USCS § 401 note), in subsec. (a), substituted "Commissioner of Social Security" for "Secretary of Human Services", wherever appearing; and, in subsec. (b), substituted "Commissioner of Social Security" for "Secretary of Human Services", wherever appearing, and substituted "A copy of each such application filed with either Secretary, together with any additional information and supporting documents (or certifications thereof) which may have been received by that Secretary with such application, and which may be needed by the other Secretary in connection therewith, shall be transmitted by the Secretary receiving the application to the other Secretary." for "A copy of each such application filed with either the Secretary or the Commissioner, together with any additional information and supporting documents (or certifications thereof) which may have been received by the Secretary or the Commissioner with such application, and which may be needed by the other official in connection therewith, shall be transmitted by the Secretary or the Commissioner receiving the application to the other official.".

Cross References
This section is referred to in 38 USCS § 5101; 42 USCS § 402

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Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:102, 114

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 148

Where widow of veteran sought earlier effective date for her claim of entitlement for award of dependency and indemnity compensation (DIC) benefits claiming that she applied for these benefits at same time she applied for Social Security Administration (SSA) lump-sum death payment (LSDP), court concluded that nothing in legislative history of 42 USCS § 402(o) suggested that it was meant to limit type of benefits for which Veterans Administration (VA) and SSA could have jointly prescribed applications in accordance with 38 USCS § 5105 (2002) (formerly 38 USCS § 3005 (1988)); in denying widow's claim for earlier effective date, Board of Veterans' Appeals' conclusion that LSDP benefits were intentionally excluded from 42 USCS § 402(o) was unsupported. Kay v Principi (2002) 16 Vet App 529, 2002 US App Vet Claims LEXIS 998

§ 5106. Furnishing of information by other agencies

The head of any Federal department or agency shall provide such information to the Secretary as the Secretary may request for purposes of determining eligibility for or amount of benefits, or verifying other information with respect thereto. The cost of
providing information to the Secretary under this section shall be borne by the department or agency providing the information.

Effective date of section:
Act Sept. 30, 1976, P. L. 94-432, Title IV, § 405(a), 90 Stat. 1373, provided that this section is effective on Sept. 30, 1976.

Amendments:
1986. Act Oct. 28, 1986 substituted "the Administrator" for "he" following "as".
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3006, as 38 USCS § 5106.
Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.
2000. Act Nov. 9, 2000, added the sentence beginning "The cost of providing . . .".

Cross References
This section is referred to in 38 USCS § 5107

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Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 29

§ 5107. Claimant responsibility; benefit of the doubt

(a) Claimant responsibility. Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.

(b) Benefit of the doubt. The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

Explanatory notes:
Section 1 of Act Oct. 30, 2000, P. L. 106-398, enacted into law § 1611(a) of H.R. 5408 (114 Stat. 1654A-359), as introduced on Oct. 6, 2000, which amended this section. However, pursuant to § 104(c)(2) of Act Nov. 1, 2000, P. L. 106-419, as of the enactment of Act Nov. 9, 2000, P. L. 106-475, the amendments made by § 1611 of H.R. 5408 shall be deemed for all purposes not to have taken effect and such § 1611 shall cease to be in effect.

Effective date of section:
This section took effect on September 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3007, as 38 USCS § 5107, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).
Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

2000. Act Nov. 9, 2000 (applicable as provided by § 7(a) of such Act which appears as a note to this section), substituted this section for one which read:

"§ 5107. Burden of proof; benefit of the doubt

"(a) Except when otherwise provided by the Secretary in accordance with the provisions of this title, a person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 5106 of this title.

"(b) When, after consideration of all evidence and material of record in a case before the Department with respect to benefits under laws administered by the Secretary, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. Nothing in this subsection shall be construed as shifting from the claimant to the Secretary the burden specified in subsection (a) of this section.".

Other provisions:

Applicability of Nov. 9, 2000 amendment. Act Nov. 9, 2000, P. L. 106-475, § 7, 114 Stat. 2099, provides:

"(a) In general. Except as specifically provided otherwise, the provisions of section 5107 of title 38, United States Code, as amended by section 4 of this Act, apply to any claim--

"(1) filed on or after the date of the enactment of this Act; or

"(2) filed before the date of the enactment of this Act and not final as of that date.

"(b) Rule for claims the denial of which became final after the Court of Appeals for Veterans Claims decision in the Morton Case.(1) In the case of a claim for benefits denied or dismissed as described in paragraph (2), the Secretary of Veterans Affairs shall, upon the request of the claimant or on the Secretary's own motion, order the claim readjudicated under chapter 51 of such title [38 USCS §§ 5100 et seq.], as amended by this Act, as if the denial or dismissal had not been made.

"(2) A denial or dismissal described in this paragraph is a denial or dismissal of a claim for a benefit under the laws administered by the Secretary of Veterans Affairs that--

"(A) became final during the period beginning on July 14, 1999, and ending on the date of the enactment of this Act; and

"(B) was issued by the Secretary of Veterans Affairs or a court because the claim was not well grounded (as that term was used in section 5107(a) of title 38, United States Code, as in effect during that period).

"(3) A claim may not be readjudicated under this subsection unless a request for readjudication is filed by the claimant, or a motion is made by the Secretary, not later than 2 years after the date of the enactment of this Act.

"(4) In the absence of a timely request of a claimant under paragraph (3), nothing in this Act shall be construed as establishing a duty on the part of the Secretary of Veterans Affairs to locate and readjudicate a claim described in this subsection.".
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Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:121, 122, 294, 398, 404

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 152, 153

I. IN GENERAL

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I. IN GENERAL

1. Generally

Application of presumption of regularity by Court of Appeals for Veterans Claims to show veteran's receipt of proper notice of appeal rights does not conflict with pro-veteran nature of veterans benefits adjudication system or language of 38 USCS § 5107(a) or (b). Butler v Principi (2001, CA FC) 244 F.3d 1337

Court of Appeals for Federal Circuit reviewed regulations promulgated by Department of Veterans Affairs pursuant to Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (codified in scattered sections of 38 USCS) and with exception of one regulation, 38 C.F.R. § 3.159(b)(1), which was inconsistent with VCAA, and therefore invalid, regulations regarding claims procedures under 38 C.F.R. §§ 3.156 and 1.159 were affirmed as regulations were not on their face arbitrary, capricious, and contrary to various statutory provisions. Paralyzed Veterans of Am. v Sec'y of Veterans Affairs (2003, CA FC) 345 F.3d 1334

Board erred in failing to seek SSA adjudication of veteran's disability claim since, although such decisions are not controlling for purposes of VA adjudications, they are pertinent to claims for VA benefits based on same disability. Sawchik v Principi (1992) 3 Vet App 337

Veteran's wife submitted evidence required to prove that she was lawful spouse of deceased veteran, thus attained status of claimant whom Board was required to assist. Sandoval v Brown (1994) 7 Vet App 7

Board did not err in denying appellant's service connection claim for pemphigus vulgaris since appellant relied on medical article which was too general and inconclusive to make link with service more than speculative. Sacks v West (1998) 11 Vet App 314

Where veteran's claim for total disability based on individual unemployability was reinstated on appeal but had never been adjudicated, matter was remanded to Department of Veterans Affairs for adjudication. Roberson v Principi (2003) 17 Vet App 135, 2003 US App Vet Claims LEXIS 402
Equipoise standard of 38 USCS § 5107(b) applies only to determinations of Secretary of Veterans Affairs, not determinations of Court of Appeals for Veterans Claims; therefore, it was not proper standard of review in determination of whether notice of appeal was timely filed with court under 38 USCS § 7266(a) and Ct. Vet. App. R. 4. Tavares v Principi (2004) 18 Vet App 131, 2004 US App Vet Claims LEXIS 371

2. Benefit of doubt doctrine

Benefit of doubt rule codified at 38 USCS § 5107 is inapplicable when preponderance of evidence is found to be against claimant. Ortiz v Principi (2001, CA FC) 274 F.3d 1361

"Preponderance of evidence" is proper evidentiary standard necessary to rebut 38 USCS § 105(a) presumption that injury was service-connected and to determine that peacetime disability was result of willful misconduct. Thomas v Nicholson (2005, CA FC) 423 F.3d 1279

As "preponderance of evidence" establishing willful misconduct was sufficient to rebut presumption of service-connection for peacetime disabilities under 38 USCS § 105(a), and veteran's willful misconduct in repeatedly failing to obey lawful order was proved under that standard, his claim for disability benefits was properly denied. Thomas v Nicholson (2005, CA FC) 423 F.3d 1279

Perhaps in most cases Board's decision on issues of material fact, and court's review of that decision, will be inextricably intertwined with determination whether veteran is entitled to benefit of doubt; where findings of material facts by Board are properly supported and reasoned and Board concludes that fair preponderance of evidence waived against veteran's claim, it would not be error for Board to deny veteran benefit of doubt, and such denial would not be subject to reversal as arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law because it was premised upon rational basis and supported by appropriate and relevant factors which were properly articulated. Gilbert v Derwinski (1990) 1 Vet App 49, mod (1991) 1 Vet App 61

Remand was required for reassessment of veteran's unemployability and if Board is unable to determine whether veteran's unemployability is caused by his non-service-connected disabilities or by his service-connected disabilities, then evidence may be so evenly balanced that benefit of doubt doctrine may apply. Fluharty v Derwinski (1992) 2 Vet App 409

Equipoise rule of statute applies to questions of service connection under regulation providing that service connection may be granted post-discharge when all evidence establishes that disease was incurred in service. Cosman v Principi (1992) 3 Vet App 503

Equipoise doctrine cannot take place of standard for reopening case since applying this benefit of doubt doctrine to reopening would require full credibility determination before matter is reopened, and all statute concerning reopening requires is that new and material evidence be presented or secured, not weighed. Martinez v Brown (1994) 6 Vet App 462

Widow of veteran was not entitled to benefit of doubt in review of her claim to entire proceeds of veteran's National Service Life Insurance policy since there were two claimants to proceeds. Elias v Brown (1997) 10 Vet App 259

Even if Board did not comply with three-step process for evaluating service-connection claims under § 1154 and instead leapt directly to step three without determining whether veteran had submitted lay or other evidence consistent with conditions, circumstances, and hardships of his service, there was clear and convincing evidence of nonincurrence during service to rebut steps one and two, so error was harmless. Velez v West (1998) 11 Vet App 148, app dismd (1998, CA FC) 178 F.3d 1308, vacated (1998, CA FC) 185 F.3d 878 and app dismd (1999, CA FC) 215 F.3d 1344

Combat veteran who has successfully established in-service occurrence or aggravation of injury pursuant to lighter evidentiary burden imposed on combat veterans must still submit sufficient evidence of causal nexus between that in-service event and his or her current disability in order to meet initial burden of submitting well-grounded claim. Wade v West (1998) 11 Vet App 302
Presumption of regularity of administrative process was not rebutted because of benefit of doubt doctrine under 38 USCS § 5107(b) where Board determined that preponderance of evidence was against claimant's assertion of nonreceipt of letter instructing her to complete claim form; benefit of doubt doctrine does not apply until consideration of all evidence and material of record, and does not come into play unless evidence of record is in equipoise Schoolman v West (1999) 12 Vet App 307, 1999 US App Vet Claims LEXIS 148


Veterans Claims Assistance Act of 2000 did not alter statutory benefit of doubt rule under 38 USC § 5107(b) and does not mandate discussion of all lay evidence before Board. Dela Cruz v Principi (2001) 15 Vet App 143, 2001 US App Vet Claims LEXIS 951, app dismd (2003, CA FC) 55 Fed Appx 541

Where two examinations reflected at-or-below-shoulder-level flexion measurements, one examination reflected above-shoulder-level flexion measurement, and it was unclear what private physician was measuring, finding, that veteran had arm motion above shoulder level based solely on flexion measurements, had no plausible basis in record; application of 38 USCS § 5107(b) equipoise standard in reaching any factual determination based on flexion was thus clearly erroneous under 38 USCS § 7261(a)(4). Mariano v Principi (2003) 17 Vet App 305, 2003 US App Vet Claims LEXIS 782

Where two examiners attributed veteran's limitation of movement of shoulder to service connected residual of gunshot wound, one examiner attributed limitation to arthritis or ambiguous etiology, and one examiner used flawed methodology, application of 38 USCS § 5107(b) equipoise standard in finding that limitation was due to arthritis was clearly erroneous under 38 USCS § 7261(a)(4). Mariano v Principi (2003) 17 Vet App 305, 2003 US App Vet Claims LEXIS 782

3. Remedies

Remand rather than reversal was proper remedy for BVA's failure to assist appellant by obtaining orthopedic examination and failing to articulate reasons or bases for rejecting chiropractors' opinions as speculative, where chiropractor's letter was unclear as to nature of appellant's condition and premised upon only one of appellant's varied statements, and thus insufficient to establish conclusively both nature of claimant's disability and its service connection. Smith v Brown (1994) 7 Vet App 255

When Board erroneously concludes that claim is well grounded and then proceeds to consider merits and disallows claim, appropriate remedy is to affirm rather than vacate BVA decision disallowing claim on merits. Edenfield v Brown (1995) 8 Vet App 384 (criticized in Dolotanora v Gober (1997, Vet App) 1997 US Vet App LEXIS 714)

4. Miscellaneous

38 C.F.R. § 3.304(f), which requires "credible supporting evidence" of occurrence of stressor in non-combat-related claims for service connection of post-traumatic stress disorder (PTSD), is not arbitrary, capricious, or contrary to law; § 3.304(f) does not conflict with 38 USCS §§ 1154(a) and 5107(b), because regulation does not alter Department of Veterans Affairs' obligation to review all evidence of record when determining service connection, nor does it preclude consideration of lay evidence. Nat'l Org. of Veterans' Advocates v Sec'y of Veterans Affairs (2003, CA FC) 330 F.3d 1345

BVA erred in denying veteran's claim for entitlement to service-connected disability compensation for upper-respiratory disorder solely on basis of one VA physical examination where that examination was difficult to decipher and was not conducted specifically for VA compensation purposes but in response to veteran's immediate physical discomfort. Bartow v Derwinski (1992) 2 Vet App 657, app dismd (1995, Vet App) 1995 US Vet App LEXIS 74
Board was required, in rating reduction case, to establish by preponderance of evidence that rating reduction was warranted, and it erred in requiring claimant to prove by preponderance of evidence that he was entitled to retain existing rating. Brown v Brown (1993) 5 Vet App 413, costs/fees proceeding, motion to strike den (1994, Vet App) 1994 US Vet App LEXIS 687

II. ASSISTANCE OF CLAIMANTS

5. Generally

Court of Veterans Appeals did not err in its interpretation of 38 USCS § 5107 in holding that DVA assistance in claim development is conditional upon submission of well ground claim; statute first requires that claimant has burden of submitting evidence to justify belief that claim is well grounded and then requires DVA to assist "such claimant" in developing facts pertinent to claim; well-grounded claim is not necessarily one which will ultimately be allowable, but one which is plausible, properly supported with evidence. Epps v Gober (1997, CA FC) 126 F.3d 1464, cert den (1998) 524 US 940, 118 S Ct 2348 and (superseded by statute as stated in Bernklau v Principi (2002, CA FC) 291 F.3d 795)

Evidence submitted by veteran claiming service-connection for residuals of injury to left scrotum, while insufficient to reopen his claim, was sufficient to trigger duty to assist. Ivey v Derwinski (1992) 2 Vet App 320

VA & BVA were under duty to assist veteran in developing facts pertinent to his unemployability claim for pension purposes since he submitted well-grounded claim of unemployability, consisting of evidence that he had continuously been rated as permanently and totally disabled by Social Security Administration retroactive to 1981, private medical records in which examining psychiatrists concluded that probabilities were great that veteran would continue to have difficulty in maintaining regular employment, and VA rehabilitation counselor's report concluding that there was poor prognosis for vocational change in the future. Masors v Derwinski (1992) 2 Vet App 181, motion gr, request den sub nom Masors v Brown (1995, Vet App) 1995 US Vet App LEXIS 754

Veteran's claim for psychiatric disability due to nonpsychotic brain syndrome was well-grounded because it was plausible and capable of substantiation by records of his treatment at mental health clinic, hence Secretary had duty to assist. Corbbrey v Derwinski (1992) 3 Vet App 266

Veteran failed to provide sufficient information to oblige VA to assist him in obtaining records of private medical treatment and failing to appear for VA disability examinations. Olson v Principi (1992) 3 Vet App 480

Secretary had not duty to assist veteran where record contained no request for records of veteran who allegedly suffered same disability, veteran made no counterdesignation or exception to record, and only record reference to other veteran was as perpetrator of alleged trick exposing appellant to carbon tetrachloride. Martin v Principi (1992) 3 Vet App 553, app dismd without op (1993, CA FC) 1 F.3d 1253, reported in full (1993, CA FC) 1993 US App LEXIS 35887 and cert den (1993) 510 US 954, 114 S Ct 407

VA was obligated to assist veteran with respect to claim for earlier effective date of benefits since liberal reading of issues raised should have prompted BVA to consider whether veteran was granted benefits pursuant to Former Prisoner of War Benefits Act. Dunson v Brown (1993) 4 Vet App 327

Board did not assist veteran in development claim of service-connected PTSD, rather kept returning to previously diagnosed schizophrenia. Ascherl v Brown (1993) 4 Vet App 371

While no duty to assist arises absent well-grounded claim, if Secretary as matter of policy volunteers assistance to establish well-groundedness, grave questions of due process can arise if there is apparent disparate treatment between claimants regarding such assistance. Grivois v Brown (1994) 6 Vet App 136

Failure to fulfill duty to assist cannot constitute clear and unmistakable error. Crippen v Brown (1996) 9 Vet App 412

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VA did not have heightened duty to assist appellant because he was mentally incompetent where he was judged to be competent at time his application for compensation of pension was filed. Steward v Brown (1996) 9 Vet App 458, op withdrawn, substituted op, on reconsideration (1997) 10 Vet App 15

Appellant's mental capacity at time of filing application for disability compensation does not trigger heightened duty to assist under statute or existing caselaw. Stewart v Brown (1997) 10 Vet App 15


6. Providing examination

Board had duty to assist with development of claim of mental disorder by ordering comprehensive psychiatric examination once veteran met statutory burden with report submitted by his private doctors. EF v Derwinski (1991) 1 Vet App 324

Duty to assist was breached by both RO and Board in not recognizing that medical examination had failed to included opinion as to whether there was any possible relationship between veterans' past back problems incurred in service and current back problems. Wilson v Derwinski (1991) 2 Vet App 16

Denial of increase in service-connected benefits to compensable rating for testicular atrophy, which occurred after appellant contracted mumps while in service, was erroneously denied due to lack of clinical evidence where denial was without benefit of physical examination which might have assisted determination of veteran's eligibility for benefits. Akles v Derwinski (1991) 1 Vet App 118

Agency breached its duty to assist veteran in developing his claim since record was incomplete on its face in that it lacked any notation of pain during movement and failed to properly record veteran's range of motion, and because veteran made reference to recent private medical examinations in his substantive appeal and had requested new medical examination be conducted; at minimum agency had duty to advise veteran to submit results of his private medical examination and make them part of record on appeal. Littke v Derwinski (1990) 1 Vet App 90

BVA did not breach its statutory duty to assist claimant by failing to provide second physical examination as requested since veteran had been provided physical several years earlier and had not challenged its adequacy nor submitted further evidence to support his claim of increase in his service-connected disability. Hohlt v Derwinski (1992) 2 Vet App 402

Veteran presented well-grounded claim for increased rating for service-connected disabilities, requiring Board to assist him rather than deny claim without even ordering contemporaneous examination. Balicat v Derwinski (1992) 3 Vet App 284

Once veteran raised issue that his stomach disorder was secondary to his service-connected disability, RO and Board breached their statutory duty to assist by neglecting to order a probative examination. James v Derwinski (1992) 3 Vet App 41

VA had no duty to assist veteran by undertaking an audiometric examination upon his discharge since veteran made no claim for defective hearing upon discharge, nor was VA on notice that veteran had any hearing problem. Shoop v Derwinski (1992) 3 Vet App 45

Board failed in its duty to assist veteran who presented well-grounded claim in not ordering examination to evaluate claimant's disability since earlier examination did not address effect of veteran's service-connected disabilities upon his employability. Ferazzoli v Brown (1993) 4 Vet App 152
Given unavailability of service medical records of veteran who submitted well-grounded claims for service-connected disability compensation, duty to assist included thorough and contemporaneous medical examination which takes into account records of prior medical treatment. Milostan v Brown (1993) 4 Vet App 250

When servicemember claimed that bilateral hammertoes condition was worse than originally rated and available evidence was too old for adequate evaluation of current condition, VA breached its duty to assist by refusing requested examination. Weggenmann v Brown (1993) 5 Vet App 281


Board breached its duty to assist veteran by not conducting examination to determine to what degree his functional impairment was attributable to PTSD where various VA and private physicians diagnosed veteran as having several neuropsychiatric disorders concurrently but none fully described degree of disability attributable to each disorder. Waddell v Brown (1993) 5 Vet App 454

Appellant presented medical evidence tending to show that his protective reaction sensation was lessened or totally compromised by service-connected injury in hand to which he suffered subsequent saw injury, hence VA had duty to assist, and where VA undertook no medical examination, its conclusion that there was no evidence that service-connected injury played significant role in subsequent injury was self-fulfilling prophecy. Schroeder v Brown (1994) 6 Vet App 220

Board should have ordered contemporaneous examination which specifically addressed issues of reconciling diagnoses and service connection where appellant reasonably raised issue of service-aggravation of his preexisting psychiatric disorder. Wisch v Brown (1995) 8 Vet App 139


VA did not fulfill its duty to assist appellant when he expressly complained of worsening ear problems and that he was having trouble wearing his hearing aid because of infection; where appellant complained of hearing loss two years after his last audiology examination, VA should have scheduled appellant for another examination. Snuffer v Gober (1997) 10 Vet App 400

VA failed in its duty to assist by not conducting contemporaneous audiology examination before issuing rating decision denying veteran compensable rating for bilateral hearing loss. Snuffer v Gober (1997) 10 Vet App 400

Fulfillment of statutory duty to assist includes conduct of thorough and contemporaneous medical examination, one which takes into account records of prior medical treatment, so that evaluation of claimed disability will be fully informed one, but VA's report of examination of claimant was inadequate and frustrated judicial review where it discussed claimant's left mandible pain but not whether that pain had resulted in ratable masticatory functional loss. Floyd v Brown (1996) 9 Vet App 88

Appellant was not entitled to another medical examination of his ears to support his well-grounded claim for service-connected otomycosis since testimony of both veteran and his wife related symptoms that were readily observable and centered upon matters within knowledge and personal observations of witnesses. Bruce v West (1998) 11 Vet App 405

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Because veteran has not presented competent evidence connecting any current disability to period of service and claim is not well grounded under 38 USCS § 5107, statutory duty to assist had not attached and VA's failure to conduct recommended x-ray examination could not have constituted prejudicial violation of 38 USCS § 5107(a). Brewer v West (1998) 11 Vet App 228

Because veteran has not submitted well grounded claim with regard to Agent Orange exposure and veteran’s conditions, duty to assist under 38 USCS § 5107 was not triggered and veteran was not entitled to VA medical examination under duty to assist. Chase v West (2000) 13 Vet App 413, 2000 US App Vet Claims LEXIS 292

7. Obtaining medical records and reports


Even if Board of Veteran's Affairs committed grave procedural error and violated its duty to assist under 38 USCS § 5107(a) by failing to request certain medical records in determining that veteran was not disabled, finality of its decision was not vitiated; judicially-created exception to rule of finality for such errors had been overruled and veteran did not assert either of exceptions set out in 38 USCS § 7105(c). Tetro v Principi (2003, CA FC) 314 F.3d 1310

VA failed to assist veteran in obtain his medical records where record indicated that veteran reported various treatments yet there was no evidence that VA attempted to obtain records. Sheed v Derwinski (1992) 2 Vet App 255

Board erred by failing to respond to veteran's repeated request for medical records of his treatment at facility in light of veteran's statement that x-rays of his arm were taken at that
facility and that physician there felt that something was wrong with veteran's right arm.
Schafrath v Derwinski (1991) 1 Vet App 589

Board should have sought to obtain records of stress test requested by veteran even though it claimed that pulmonary function tests performed during VA examination few months prior to that were adequate, since VA's statutory duty to assist includes duty to obtain pertinent medical records, especially those specifically requested by claimant, and there was no question that requested records were pertinent to veteran's claim for increased service-connected disability rating for chronic obstructive pulmonary disease. Leap v Derwinski (1992) 2 Vet App 404

Secretary failed to assist veteran when it failed to acquire medical records of which it had notice. Culver v Derwinski (1992) 3 Vet App 292

BVA failed in its statutory duty to assist veteran by not attempting to obtain medical records from a private physician who, according to veteran's wife, had diagnosed claimed diseases within one year of veteran's discharge from service. Collamore v Derwinski (1992) 2 Vet App 541

Board had duty to assist veteran in securing private medical records since it was possible that outpatient reports not previously secured could possibly establish service connection for back disorder. Grossman v Principi (1992) 3 Vet App 445


Given unavailability of service medical records of veteran who submitted well-grounded claims for service-connected disability compensation, duty to assist included thorough and contemporaneous medical examination which takes into account records of prior medical treatment. Milostan v Brown (1993) 4 Vet App 250

VA failed in its statutory duty to assist veteran by failing to obtain report of private physical examination which veteran requested VA to procure. Graves v Brown (1994) 6 Vet App 166

BVA did not breach its duty to assist by failing to obtain x-rays taken during appellant's predischarge physical where examination indicated no significant abnormalities with respect to x-rays, and appellant did not show relevance of x-rays nor was it readily apparent. Counts v Brown (1994) 6 Vet App 473, dismd without op (1995, CA FC) 66 F.3d 345, reported in full (1995, CA FC) 1995 US App LEXIS 25302 and cert den (1996) 516 US 1158, 116 S Ct 1041

Appellant had not demonstrated that Board of Veterans' Appeals committed error in denying as not well grounded under 38 USCS § 5107(a) claim for service connection where appellant submitted no medical evidence of nexus to service, and failure of VA to provide copy of examination report could not have conceivably prejudiced outcome of case since report contained no evidence of nexus. Anderson v West (1999) 12 Vet App 491, 1999 US App Vet Claims LEXIS 742

Secretary satisfied duty to assist surviving spouse's claim that veteran's death was service connected pursuant to 38 USCS § 5107(a) where Secretary obtained veteran's service medical records, military personnel records, findings of lung biopsy and other procedures, and submitted claim to pulmonary specialist for review. Dyment v West (1999) 13 Vet App 141, 1999 US App Vet Claims LEXIS 1273, affd (2002, CA FC) 287 F.3d 1377, reh den, reh, en banc, den (2002, CA FC) 43 Fed Appx 371

Veterans Benefits Administration letter providing that VA has immediate development obligation to request service medical records and records from VA medical centers prior to making determination as to whether claim is well grounded is enforceable in Court of Appeals for Veterans Claims against Secretary since provision is substantive in nature and authorized by 38 USCS § 5107(a). McCormick v Gober (2000) 14 Vet App 39, 2000 US App Vet Claims LEXIS 858

8. Obtaining SSA records
Board failed in its duty to assist on veteran's claim for individual unemployability in failing to obtain veteran's SSA records and failed to articulate reasons for concluding that records were not relevant to his claim. Martin v Principi (1992) 3 Vet App 468, substituted op, on reconsideration, remanded, in part (1993) 4 Vet App 136

VA breached its statutory duty to assist by failing to obtain veteran's SSA records of which it had notice. Lind v Principi (1992) 3 Vet App 493

Board breached its duty to assist when it did not obtain veteran's SSA records but based its conclusions only on SSA's final decision. Martin v Brown (1993) 4 Vet App 136

Since veteran's claim for non-service-connected pension was well grounded at time of Board of Veterans' Appeals decision, VA had duty to assist veteran under 38 USCS § 5107(a), and failure of Board to obtain Social Security Administration records pertaining to disability award vitiates finality of Board decision setting effective date of non-service-connected total and permanent disability. Tetro v West (2000) 13 Vet App 404, 2000 US App Vet Claims LEXIS 259, substituted op (2000) 14 Vet App 100, 2000 US App Vet Claims LEXIS 880, affd (2003, CA FC) 314 F.3d 1310

VA had duty to assist appellant under 38 USCS § 5107(a) in developing facts pertinent to his well-grounded pension claim, including obtaining all relevant Social Security Administration (SSA) records regarding his disability and employability; however, because of dearth of clear authority to guide Board in 1990 concerning procurement of SSA records, Board's failure to obtain SSA records was not error of such magnitude that it deprived appellant of fair opportunity to obtain benefit provided by law. Tetro v Gober (2000) 14 Vet App 100, 2000 US App Vet Claims LEXIS 880, affd (2003, CA FC) 314 F.3d 1310


9. Other particular assistance

Agency failed to assist widow who asserted service-connected death claim based on earlier service-connected cancer in developing evidence to support her claim under predecessor statute; taking Board's finding that no causal relationship had been shown between epidermoid carcinoma and glioblastoma multiforme at face value, it necessarily meant the claimant submitted well-grounded claim which was not "shown" by evidence because Secretary failed to provide requisite assistance. Murphy v Derwinski (1990) 1 Vet App 78 (ovrd as stated in Carpenito v Brown (1995) 7 Vet App 534)

Secretary's duty to assist at least encompasses responding to claimant's request for search of records already in claimant's files. Jolley v Derwinski (1990) 1 Vet App 37

Board failed to assist veteran in developing his claim through sources of evidence other than his lost service records, and failed to explain its reason for concluding that search for veteran's lost records had been properly terminated. Dixon v Derwinski (1992) 3 Vet App 261

Since evidence specified that veteran had no symptomatology within 40-year presumptive period, he had not submitted well-grounded claim and Secretary did not have duty to seek additional medical opinion. Harvey v Principi (1992) 3 Vet App 343

Under predecessor to statute BVA did not fulfill its duty to assist veteran in developing claim for service-connection for PTSD; although Environmental Support Group was unable to document all information veteran supplied related to his alleged combat experiences in Vietnam and alleged stressors he experienced during that period of service, it was able to verify some and informed VA that it required additional information, yet there was no evidence that VA ever requested additional information from veteran, who had volunteered to provide it if necessary. Zarycki v Brown (1993) 6 Vet App 91 (superseded by statute as stated in Cohen v Brown (1997) 10 Vet App 128)
Secretary of Veterans Affairs is not required by statute or regulation to conduct job market or employability survey to determine whether claimant is unemployable as result of service-connected disabilities, or to use experts to resolve issue of unemployability, hence failure to do so does not constitute breach of duty to assist. Gary v Brown (1994) 7 Vet App 229

Where Board ordered 1992 psychiatric examination of claimant and ordered RO to make appellant's claims folder available to examiner, Board's reliance upon 1990 examination conducted by psychiatry resident who did not have appellant's claims folder neither fulfilled VA's duty to assist nor constituted adequate predicate for either rating determination or BVA's decision. Bolton v Brown (1995) 8 Vet App 185

Since witnessing death of friend by incoming fire just moments after claimant waved to him constitutes sufficient stressor as matter of law for purposes of establishing service-connected post-traumatic stress disorder, duty to assist requires BVA to attempt to corroborate event by obtaining information regarding identity of servicemember killed in action while appellant was stationed at Vietnamese air base. Dizoglio v Brown (1996) 9 Vet App 163 (criticized in Moreau v Brown (1996) 9 Vet App 389)

Board failed to assist claimant in obtaining evidence from alternate sources where his service medical records had been destroyed, by failing to advise him to obtain other forms of evidence and what alternative forms of evidence would be appropriate. Smith v Brown (1996) 10 Vet App 44

Although Board was required to obtain military records of veteran claiming service connection for post-traumatic stress disorder, it was not required to do so with regard to hospital records whose existence it had not been appraised of. Sayre v Derwinski (1992) 2 Vet App 224

Secretary violated duty to assist under 38 USCS § 5107(a) where Board of Veterans' Appeals did not make effort to investigate disposition of Presidential Unit Citation (PUC) recommendation and confirmation of receipt of PUC by appellant's unit reasonably should have led to examination of command history to determine whether it provided corroboration for appellant's claim of having engaged in combat. Falk v West (1999) 12 Vet App 402, 1999 US App Vet Claims LEXIS 372

Cursory dismissal of possibility of existence of evidence beneficial to appellant's claim by doctor acting on behalf of Under Secretary of Health did not satisfy VA's duty to assist under 38 USCS § 5107(a) and VA had duty to inform appellant that she needed to submit studies she relied upon in support of claim, to attempt to obtain studies for doctor's consideration, or to provide specific citations to materials so VA could access them. Stone v Gober (2000) 14 Vet App 116, 2000 US App Vet Claims LEXIS 879

III. NECESSITY CLAIM BE WELL-GROUNDED

10. Generally

Court of Veterans Appeals did not err in its interpretation of 38 USCS § 5107 in holding that DVA assistance in claim development is conditional upon submission of well grounded claim; statute first requires that claimant has burden of submitting evidence to justify belief that claim is well grounded and then requires DVA to assist "such claimant" in developing facts pertinent to claim; well-grounded claim is not necessarily one which will ultimately be allowable, but one which is plausible, properly supported with evidence. Epps v Gober (1997, CA FC) 126 F.3d 1464, cert den (1998) 524 US 940, 141 L Ed 2d 718, 118 S Ct 2348 and (superseded by statute as stated in Bernklau v Principi (2002, CA FC) 291 F.3d 795)

Court of Appeals for Veterans Claims erred when it decided case based on whether appellant's claim was well grounded pursuant to 38 USCS § 5107(a) rather than addressing merits and contention regarding breach of duty to assist since regional office and Board deemed claim well grounded. Nolen v Gober (2000, CA FC) 222 F.3d 1356, on remand, remanded (2000) 14 Vet App 183, 2000 US App Vet Claims LEXIS 1052

Board erred in finding that servicemember's claim for secondary service connection for low back disorder was not well grounded where appellant offered plausible explanation, supported by sufficient evidence, as to why his back condition should be considered service connected; fact
that there might be other plausible explanations does not prevent appellant's claim from being well grounded since conclusive evidence is not needed for claim to be well grounded. Reiber v Brown (1995) 7 Vet App 513

Where determinative issue involves medical etiology or medical diagnosis, competent medical evidence that claim is plausible or possible is required in order for claim to be well grounded. Johnson v Brown (1996) 9 Vet App 7

It was legally imprecise, if not incorrect, for Board to purport to decide that appellant's clear-and-unmistakable error claim was not well grounded since determinative issue was not evidentiary but legal, i.e., whether appellant complied with legal requirements to plead CUE claim. Luallen v Brown (1995) 8 Vet App 92

Even assuming change in relevant law was brought about by judicial interpretation and that, prior to assumed change, appellant's claim would have been well grounded under 38 USCS § 5107(a) when it was filed, Court must give full retroactive to rule formulated in those decisions. Brewer v West (1998) 11 Vet App 228


Remand is required in order to provide Board of Veterans' Appeals with opportunity to readjudicate claim under Veterans Claims Assistance Act of 2000, which amended 38 USCS § 5107(a) to eliminate well-grounded requirement, where Board denied appellant's claim as not well-grounded and claim was not final as of date of enactment of Act. Hodges v Principi (2001) 15 Vet App 162, 2001 US App Vet Claims LEXIS 214

Remand is required for readjudication in light of enactment of Veterans Claims Assistance Act of 2000, which amended 38 USCS § 5107(a) to eliminate well-grounded requirement, where claim was held to not be well-grounded and claim was not final as of date of enactment of Act. Hodges v Principi (2001) 15 Vet App 162, 2001 US App Vet Claims LEXIS 214

11. Resolution of evidentiary issues

Loss of appellant's medical and dental records due to no fault of his own was not material to his appeal for purposes of his burden of proof, where he asserted that he had been having his teeth treated before he was drafted into service, and never asserted that extractions were due to damage to either of his jaws, that he applied for outpatient treatment within one year after his discharge, or that his dental condition resulted from combat wounds or service trauma. Woodson v Brown (1996, CA FC) 87 F.3d 1304

Where entitlement to increased rating is predicated on causal relationship between two different diseases, one of which is service-connected, claimant must provide medical evidence of causal relationship, and claim which fails to provide such evidence is not well grounded. Jones v Brown (1994) 7 Vet App 134

Where determinative issue in claim for benefits involves either medical etiology or medical diagnosis, competent medical evidence of nexus between current condition and in-service disease or condition is required to fulfill well-grounded-claim requirement of § 5107, and lay person is not competent to provide such medical evidence. Johnson v Brown (1995) 8 Vet App 423

VA did not fail to assist appellant in developing well-grounded claim for service connection for heart condition since hearing officer's decision, rating decision, and adjudication officer's letter all clearly and unequivocally informed appellant that his heart disorder claim was denied because there had been no medical evidence to support his conjectures. Epps v Brown (1996) 9 Vet App 341, affd (1997, CA FC) 126 F.3d 1464, cert den (1998) 524 US 940, 141 L Ed 2d 718, 118 S Ct 2348 and (superseded by statute as stated in Bernklau v Principi (2002, CA FC) 291 F.3d 795)

Where veteran's service records were missing and presumed destroyed by fire at National Personnel Records Center, mere conclusory statements regarding evaluation of evidence and consideration of benefit-of-doubt rule are insufficient; Board is required to consider and explain

Widow's claim that veteran's death was service connected was not well founded where only conceivable evidentiary support was speculative statement in physician's letter that veteran's death may or may not have been averted if medical personnel could have effectively intubated veteran, and medical records and death certificate directly attributed death to acute myocardial infarction. Tirpak v Derwinski (1992) 2 Vet App 609, motion gr, app dismd (1993, CA FC) 1993 US App LEXIS 31356

Veteran's medical records and personal testimony constituted sufficient evidence to indicate plausibility of his claim for individual unemployability, hence BVA erred in not having carried claim to full adjudication. Calabrese v Brown (1993) 4 Vet App 223

Where veteran has submitted well-grounded claim for total disability rating based on individual unemployability, Board may not reject claim without producing evidence, but has duty to supplement record by obtaining examination which includes opinion on what effect appellant's service-connected disability has on his ability to work. Friscia v Brown (1994) 7 Vet App 294

In denying service connection for pelvic inflammatory disease, Board erred in relying on its medical advisor's opinion (BMAO) without giving veteran or her representative notice and opportunity to submit evidence in rebuttal; if on remand any use is made of medical advisor's opinion, Board must give adequate statement of reasons for noncompliance with notice requirements, must explain why it requested medical advisor's opinion instead of remanding case to RO, must provide adequate statement of reasons as to how it has complied with memorandum providing generally that BMAOs should no longer be used in individual appeals, and if BMAO is used in readjudication of case Board must explain how new physical examination could be utilized in view of regulatory requirement that VA examiners view each disability in relation to its history. Williams v Brown (1995) 8 Vet App 133

For purposes of submitting well-grounded claim relating to exposure to toxic gases under regulation at 38 CFR § 3.316, Board must assume that lay testimony of exposure is true. Pearlman v West (1998) 11 Vet App 443

Board did not err in denying widow's claim for dependency and indemnity compensation since Board's determination that veteran's death was not connected to his exposure to radiation during military service was not erroneous; in response to appellant's evidence that veteran was diagnosed with radiogenic disease and had been exposed to radiation while in military service, advisory opinion was sought from Under Secretary of Health who concluded that it was highly unlikely veteran's colon cancer could be attributed to his exposure to ionizing radiation in service since he received no more than one rem of radiation at age 18 and did not develop his disease until approximately 35 years later. Hilkert v West (1999) 12 Vet App 145, affd (2000, CA FC) 232 F.3d 908

In order to be entitled to relaxed evidentiary thresholds inherent in concept of what constitutes well-grounded claim and what constitutes requisite new and material evidence to reopen previously disallowed claim which are applicable to veterans, claimant must first establish veteran status by preponderance of evidence standard common in civil and administrative litigation. Laruan v West (1998) 11 Vet App 80 (ovrld by D'Amico v West (2000, CA FC) 209 F.3d 1322) and (ovrld as stated in Harris v West (2000) 13 Vet App 509, 2000 US App Vet Claims LEXIS 453)

12. Particular claims as well-grounded

Veteran's claim for psychiatric disability due to nonpsychotic brain syndrome was well-grounded because it was plausible and capable of substantiation by records of his treatment at mental health clinic, hence Secretary had duty to assist. Corbbrey v Derwinski (1992) 3 Vet App 266
Veteran had well-grounded claim for service connection for Meniere's disease and thus agency had duty to assist him in developing claim where it had acknowledged that veteran suffered from dizziness, sensory hearing loss, nausea, and tinnitus. Connolly v Derwinski (1991) 1 Vet App 566

Veteran's widow submitted well-grounded claim of service connection for her husband's death, so as to impose duty on BVA to seek to obtain VA medical records of which it was apprised, where she presented evidence that veteran's service-connected anxiety reaction may have contributed to his hypertensive coronary artery disease and immediate cause of death, and that hypertension developed secondary to his anxiety. Hill v Derwinski (1992) 2 Vet App 570

Veteran submitted plausible and thus well-grounded claim for increased rating for service-connected residuals of maxillary fracture, triggering VA's duty to assist, where service connection was established in 1971, 1987 evidence indicated that condition caused some interference with either speech or masticatory function although not to compensable level, and veteran asserted in 1989 that condition had worsened. Proscelle v Derwinski (1992) 2 Vet App 629

Board breached its statutory duty to assist veteran in developing his claim for service connection for low-back disability and residuals of kidney injury where it had found that veteran had sustained kidney injuries and low back pain in jeep accident, thus implicitly acknowledging that veteran had presented plausible claim. Dalton v Derwinski (1992) 2 Vet App 634

Veteran submitted well-grounded claim that possible acute infarction necessitated emergency private hospitalization, triggering Secretary's duty to assist claimant. Whipp v Principi (1992) 3 Vet App 453

Private physician's "certificate" stating that appellant was treated by doctors for pulmonary tuberculosis shortly after his discharge from the military, coupled with statement of treatment, created plausible basis to believe that appellant's claim that he developed pulmonary tuberculosis either during or shortly after discharge from military service was capable of substantiation; appellant was not required to submit medical evidence of clinical activity. Salong v Brown (1994) 7 Vet App 130

Claim for service connection for headaches, as secondary to service-connected residual shrapnel wound of right-zygoma and left-maxillary areas, was well grounded because there was evidence both of injury incurred in service and current condition arising therefrom, i.e., shrapnel in veteran's cheek. Magana v Brown (1994) 7 Vet App 224

Claim for secondary service connection for diverticulosis of colon was well grounded where veteran submitted medical record in which physician noted complaints of intermittent cramping and diarrhea and sigmoidoscopy revealed generalized diverticulosis of descending and sigmoid colon, even if physician's letter was ambiguous as to whether he intended to refer to condition as symptom of PTSD. Kirwin v Brown (1995) 8 Vet App 148

Claim for service connection for heart disorder was well grounded where veteran submitted medical evidence of current heart disorder and Adams-Stokes syndrome and statement from physician linking current diagnosis of Adams-Stokes syndrome to symptoms documented in veteran's service records. Perry v Brown (1996) 9 Vet App 2

Although medical statements were couched in cautious terms, they provided competent evidence supporting veteran's claim that his current diagnosis of end-stage renal disease, secondary to chronic glomerulonephritis, was linked to hematuria he experienced in service. Watai v Brown (1996) 9 Vet App 441

Appellant presented well-grounded claim triggering duty to assist by presenting medical evidence tending to show that his service-connected arteriosclerosis obliterans from residuals of frozen feet resulted in moderate limitation of function of his feet and legs. Lynch v Brown (1996) 9 Vet App 456

Appellant's claim for hearing loss and diabetes, as related to incurrence or aggravation during active duty for training, were well grounded where record medical evidence indicated that appellant first showed hearing disability on level satisfying regulatory requirements during military
service examination, and first medical evidence of record to note presence of diabetes was during later military service examination when Diabinese was prescribed and, despite lack of service diagnosis, medical evidence indicated that Diabinese is not prescribed unless diabetes is present. Smith v Brown (1996) 9 Vet App 462

Appellant presented well-grounded claim for service connection for human immunodeficiency virus infection and for psychiatric disorder secondary to HIV infection; appellant had current diagnosis of HIV infection and offered basis to infer in-service contagion through his hospital duties. Saathoff v Gober (1997) 10 Vet App 326

Appellant's claim was well grounded and triggered duty to assist where he presented medical evidence that he currently suffered from left knee disability, that he was treated for bilateral knee pain in service, and that current knee condition might be linked to service. Hampton v Gober (1997) 10 Vet App 481

Veteran's claim for service connection for post-traumatic stress disorder (PTSD) was well grounded because he presented numerous current diagnoses of PTSD as well as medical opinions stating that his PTSD was incurred in service. Moreau v Brown (1996) 9 Vet App 389, affd (1997, CA FC) 124 F.3d 228


Vietnam veteran's notice of approval for SSA disability payments and his enrollment in Agent Orange Veteran Payment Program were insufficient to make his disability claims well grounded; neither document identified disability or disabilities for which veteran had been rated. Brock v Brown (1997) 10 Vet App 155, vacated, remanded (2000, CA FC) 12 Fed Appx 916

When claimant is awarded service connection for disability and subsequently appeals RO's initial assignment of rating for that disability, claim continues to be well grounded as long as rating schedule provides for higher rating and claim remains open. Shipwash v Brown (1995) 8 Vet App 218

Vietnam veteran's claim for service connection for post-traumatic stress disorder was well grounded where it included medical evidence of current diagnosis of PTSD, lay evidence of in-service stressor, and medical-nexus evidence linking his PTSD to his service. Gaines v West (1998) 11 Vet App 353

Widow presented well-grounded claim of deceased's veteran's exposure to mustard gas during active military service in form of husband's account of such exposure; for purposes of submitting well-grounded claim relating to exposure to toxic gases under regulation at 38 CFR § 3.316, Board must assume that lay testimony of exposure is true. Pearlman v West (1998) 11 Vet App 443

Veteran's claim for service connection for ankylosing spondylitis as secondary to service-connected bacillary dysentery was well grounded since he presented medial diagnosis of current disability, used medical service records to demonstrate in-service occurrence of bacillary dysentery, and presented treatise evidence to support his claim of genetic predisposition. Wallin v West (1998) 11 Vet App 509

Appellant's claim for service connection for bilateral knee disorder as secondary to service-connected pes planus was well grounded where physician's statements indicated that appellant suffered from crepitation in knees, letter from another physician indicated that appellant's history of pain in knees was probably related to his flat footed problems, and another physician opined that he was uncertain of etiology of knee or back pain unless it came from abnormal gait from appellant's foot problems. Evans v West (1998) 12 Vet App 22

Veteran's service connection claim for leg wounds due to land mine explosion was well grounded where veteran testified under oath that while under fire he had rolled into land mine that had exploded and that, although he no longer had shrapnel in his legs, he had scars from wounds; board used absence of service medical records reporting wounds to rebut veteran's presumed

Widow presented well-grounded claim for dependency and indemnity compensation since she presented evidence establishing that her husband died from hepatocellular carcinoma and that he had lived and worked among natives in Southeast Asia during his service in World War II, which was risk factor for this particular disease. Mattern v West (1999) 12 Vet App 222

Service-connection claim for post-traumatic stress disorder (PTSD) was well grounded where veteran provided medical evidence of current diagnosis of PTSD, lay evidence of sexual assault as noncombatant, in-service stressor, and medical-nexus evidence generally linking his PTSD to his service. Patton v West (1999) 12 Vet App 272, 1999 US App Vet Claims LEXIS 120

Claim for service connection for post-traumatic arthritis of knees was well grounded where veteran was prisoner of war for fourteen months and indicated that he had injured his back during that time, medical evidence demonstrated that he presently suffered from degenerative arthritis in his lumbar spine, and physician indicated that his lower back condition was accelerated by traumatic stress while in service. Greyzck v West (1999) 12 Vet App 288, 1999 US App Vet Claims LEXIS 121, dismd (1999, CA FC) 217 F.3d 853

Veteran's TDIU claim was well grounded under 38 USCS § 5107(a) because veteran's combined rating for three combat-incurred, service-connected disabilities was 60 percent and private physician found veteran was incapable of manual labor and later concluded veteran was totally disabled due to three service-connected disabilities. Colayong v West (1999) 12 Vet App 524, 1999 US App Vet Claims LEXIS 885

In determining whether claim is well grounded where proposed medical theory has scientific underpinnings, Board must presume credibility of scientific theory unless it is inherently incredible, and to extent Board determined veteran's claims for service connection for cancers of bladder, left kidney, prostate, and right lung as caused by non-ionizing radiation were not well grounded pursuant to 38 USCS § 5107(a), decision is reversed where veteran offered evidence cancers were caused by non-ionizing radiation emanating from naval radar equipment veteran manned, several articles were submitted documenting controversy surrounding non-ionizing radiation, and one study recorded statistically significant occurrence of primary malignant tumors in radiation-exposed rats when compared to control group. Rucker v Brown (1997) 10 Vet App 67

Veteran has submitted medical evidence of nexus between veteran's service and left-knee claim that is needed to well ground claim under 38 USCS § 5107(a) where diagnosis of bilateral post-traumatic arthritis of knees was made following physician's notation of only in-service traumatic events, VA x-ray examination indicated impression of post-traumatic knee condition, and only episodes of left-knee trauma in record on appeal occurred in service. Hodges v West (2000) 13 Vet App 287, 2000 US App Vet Claims LEXIS 15, op withdrawn, in part, remanded (2001) 15 Vet App 162, 2001 US App Vet Claims LEXIS 214

Post-traumatic stress disorder claim is well-grounded as matter of law under 38 USCS § 5107(a) where requirement of medical evidence of current disability is satisfied by VA medical examination that diagnosed veteran as having post-traumatic stress disorder in partial or complete remission; lay evidence of in-service stressor is satisfied by veteran's assertions of being under fire; and medical evidence of nexus between service and current disability is satisfied by VA counselor's letter linking veteran's current condition to his war experience. Harth v West (2000) 14 Vet App 1, 2000 US App Vet Claims LEXIS 705

13. Particular claims as not well-grounded

Claim for increased rating for PTSD was supported only by veteran's unsubstantiated fears of high fevers and of having incurred brain damage from treatment he received in service for his fever, hence did not trigger Secretary's duty to assist. Clarkson v Brown (1992) 4 Vet App 565

Veteran failed to submit well-grounded claim of service-connection for hypertension where he did not submit evidence that his current diastolic blood pressure readings and those during
service or within one year following service were “predominantly” over 100. Mallik v Brown (1993) 5 Vet App 345

Without any medical evidence that veteran's current left-knee and spinal disabilities resulted from VA surgery or treatment, veteran's claims were not well grounded. Contreras v Brown (1993) 5 Vet App 492

Claimant failed to present well-grounded claim of service connection for bilateral hearing loss disability where there was no medical evidence that his hearing loss was separate condition from his Meniere's disease and no record medical evidence that he suffered from hearing loss as result of his combat experience. Shogren v Brown (1994) 7 Vet App 14

Appellant's claims of service connection for Huntington's chorea and vascular headaches were not well grounded, since he failed to submit medical evidence linking either onset or aggravation of disability to his period in service. Dean v Brown (1995) 8 Vet App 449

Appellant failed to present sufficient medical evidence of nexus between in-service injury and his current cervical spine condition to establish well-grounded claim. Slater v Brown (1996) 9 Vet App 240

Appellant's claims for service connection for postoperative residuals of leg inguinal hernia repair were not well grounded where he presented no evidence that he currently suffered from hernia or of recurrence of hernia repaired in service. Chelte v Brown (1997) 10 Vet App 268

Appellant's claim for service connection for heart disease was not well grounded since his service medical records were devoid of any complaint of or treatment for cardiovascular disease and testimony of his wife, although she was nurse, did not constitute competent medical evidence since she gave no indication that she had special knowledge regarding cardiology or ever participated in his treatment. Black v Brown (1997) 10 Vet App 279, request den (1997, Vet App) 1997 US Vet App LEXIS 482 and dismd (1999, CA FC) 185 F.3d 884, reported in full (1999, CA FC) 1999 US App LEXIS 4323

Appellant's informed consent to radiation treatment for Hodgkin's disease did not establish that his claim of service connection for peptic ulcer was well grounded, since kinds of medical problems to be anticipated were not stated in informed consent with any specificity nor was there any mention of duration of whatever disability might occur, or of its expected onset. Martin v Gober (1997) 10 Vet App 394

Service connection claim of peptic ulcer disease was not well grounded where veteran's service medical records did not disclose either diagnoses of or treatment for peptic ulcer disease, and although he did receive radiation therapy in 1977-78 as part of his treatment for Hodgkin's disease and afterward developed some gastro-intestinal problem which was controlled with medication, medical notes did not identify problem as ulcer and no further problems were experienced during appellant's term of service nor in flight physical he took each year until his retirement, nor in his retirement physical in 1986; he was diagnosed with peptic ulcer for first time in 1989. Martin v Gober (1997) 10 Vet App 394

Claim of secondary service connection due to service-connected malaria for arthritis of multiple joints other than right hip was not well grounded where appellant presented no medical evidence, notwithstanding his showing of post-service continuity of symptomatology and noting during service with respect to both hip and back conditions. Savage v Gober (1997) 10 Vet App 488

Widow failed to present well-grounded claim of veteran's death from exposure to Agent Orange since it was only widow's and other lay persons testimony that provided nexus, and, as lay persons, they were not competent to render medical opinion. Carbino v Gober (1997) 10 Vet App 507, affd (1999, CA FC) 168 F.3d 32, 42 FR Serv 3d 1182

Veteran's claim that eye surgery at VA hospital resulted in his loss of vision in eye was not well-grounded where it was not accompanied by any supporting evidence and, given ophthalmologists' concerns regarding ill effects of delaying treatment of retinal detachment, would not disturb plausible basis in record for finding that veteran's loss of vision was caused by his delay in seeking treatment. Ross v Derwinski (1992) 3 Vet App 141
Surviving spouse failed to present well-grounded claim of service connection for cause of veteran's death where 1937 death certificate listed only coronary sclerosis as principal cause of death and anemia as contributory cause of death, and did not mention veteran's service-connected PTB and bronchitis or provide any other information regarding causation, and physician's letter written 15 years after veteran's death stating that veteran's death was aggravated by service-connected disability also stated that physician had no evidence that veteran had service-connected disability or was receiving compensation from VA, nor did it refer to any specific disability. Hanna v Brown (1994) 6 Vet App 507, app dism'd without op (1995, CA FC) 56 F.3d 82, reported in full (1995, CA FC) 1995 US App LEXIS 10749, reh, en banc, den (1995, CA FC) 1995 US App LEXIS 16626

Letters from veteran's mother and his two siblings that his father, who was physician, treated veteran for Crohn's disease from time he left service until father's death did not constitute requisite medical evidence of diagnosis of Crohn's disease or nexus to service to constitute well-grounded claim for service connection for Crohn's disease. Meyer v Brown (1996) 9 Vet App 425

Veteran did not submit well-grounded claim for service-connection for post-traumatic stress disorder; alleged stressor was appellant's combat experience in Vietnam, but record was absolutely clear that appellant had no service in Vietnam, much less saw combat there. Samuels v West (1998) 11 Vet App 433

Appellant's claim for service-connection of heart condition was not well grounded where he did not submit evidence of current heart condition or any other current disability. Hicks v West (1998) 12 Vet App 86

Because there was no evidence that appellant developed skin condition that would be presumptively service connected under 38 USCS § 1116, he did not submit well-grounded claim for presumptive service connection. McCartt v West (1999) 12 Vet App 164 (ovrld in part as stated in Stellard v Principi (2002, US) 2002 US App Vet Claims LEXIS 855)

Widow's claim for dependency and indemnity compensation was not well grounded because evidence of physician's statement that veteran's respiratory problems that contributed to his death "could" have been precipitated by his time in prisoner of war camp was too speculative to constitute medical nexus required. Bloom v West (1999) 12 Vet App 185, affd without op (2000, CA FC) 230 F.3d 1383

Board of Veterans' Appeals did not err in concluding claim for recognition as child of veteran on basis of permanent incapacity for self-support before reaching age of 18 years pursuant to 38 USCS § 1314 was not well-grounded under 38 USCS § 5107(a) since claim involves issues of medical causation requiring submission of medical evidence to establish claimant's condition of permanent incapacity is plausible or well-grounded and claimant did not present such evidence; although medical examination reports note treatment for skin conditions, allergic rhinitis, bronchitis, scoliosis, and existence of systolic murmur, and claimant's mother submitted letter reporting claimant had been provided with home teacher due to illness with headaches, record neither contains medical evidence describing claimant's illness nor nature and extent of claimed disability. Cumby v West (1999) 12 Vet App 363, 1999 US App Vet Claims LEXIS 252

Although claimant is service connected for post-traumatic stress disorder, claim for secondary service connection of leg injuries sustained in motorcycle accident is not well-grounded pursuant to 38 USCS § 5107(a) even though clinical psychologist opined that motorcycle accident was result of thrill-seeking behavior and that thrill-seeking behavior is indicated with post-traumatic stress disorder since claimant testified he was attempting to pass slow-moving vehicle, automobile turned sideways and caused claimant to swerve and lose control of motorcycle, and there is no indication claimant's behavior was reckless or even negligent; claimant's assertion that motorcycle accident was caused by thrill-seeking behavior is not well-grounded since claimant is not competent to render medical opinion and assertion is belied by testimony; and, although clinical psychologist is competent to render medical opinion, psychologist was not eyewitness to accident and opinion as to what caused accident is outside scope of competence. Jones v West (1999) 12 Vet App 383, 1999 US App Vet Claims LEXIS 311,
Decision of Board denying claim for service connection is affirmed as not well grounded under 38 USCS § 5107(a) even though veteran presented medical evidence of current disability and in-service incurrence as there is no medical evidence veteran's current condition is same condition or related to knee problems experienced while on active duty, and issue may not be satisfied by lay testimony. Clyburn v West (1999) 12 Vet App 296, 1999 US App Vet Claims LEXIS 147

Board erroneously found asbestosis claim to be well grounded under 38 USCS § 5107(a) where veteran asserted exposure to asbestos in service while being transported on Navy ships and while using asbestos ammunition belts to carry weapons which became too hot since veteran has not presented competent medical evidence of nexus relating current disability to service exposure and, at best, physicians' statements of record provide nexus only between asbestosis and post-service employment. Nolen v West (1999) 12 Vet App 347, 1999 US App Vet Claims LEXIS 240, vacated, remanded (2000, CA FC) 222 F.3d 1356, on remand, remanded (2000) 14 Vet App 183, 2000 US App Vet Claims LEXIS 1052

To extent Board determined veteran's claims for service connection for cancers of bladder, left kidney, prostate, and right lung as caused by ionizing radiation were not well grounded pursuant to 38 USCS § 5107(a), decision is affirmed since veteran's cancers were not among those listed in 38 USCS § 1112(c)(2)(A)-(M), veteran admitted to not participating in "radiation risk activity" under 38 USCS § 1112(c), and dose estimate from Defense Nuclear Agency concluding veteran had been at no risk of exposure to radiation provided plausible basis for Board’s finding cancers should not be service connected. Rucker v Brown (1997) 10 Vet App 67

Board's decision denying service connection for cause of veteran's death due to exposure to ionizing radiation is affirmed as there is no evidence to provide requisite medical nexus between veteran's death and military service, and family's assertion of medical causation cannot constitute evidence to render claim well grounded under 38 USCS § 5107(a). Wandel v West (1998) 11 Vet App 200

Veteran has not presented competent evidence connecting any current disability to period of service and claim is not well grounded under 38 USCS § 5107 where, even assuming veteran has submitted medical evidence of current disease, only evidence submitted that supports finding of nexus to service is veteran's own testimony and veteran has not provided evidence of continuity of symptomatic condition; evidence of nexus cannot be provided by lay testimony. Brewer v West (1998) 11 Vet App 228


Surviving spouse's claim for service connection of veteran's death due to lung cancer caused by in-service smoking or by nicotine addiction is not well-grounded under 38 USCS § 5107(a) where veteran was first diagnosed with lung cancer two months before his death in 1979, veteran quit smoking eight to ten years after discharge from service in 1960, there is no medical evidence veteran incurred lung cancer in service or that there exists etiological relationship between his lung cancer and in-service smoking, and veteran was never diagnosed with having incurred nicotine addiction in service. Davis v West (1999) 13 Vet App 178, 1999 US App Vet Claims LEXIS 1287, remanded (2001) 15 Vet App 163, 2001 US App Vet Claims LEXIS 1008

Appellant's claim for secondary service connection of arthritis in joints other than his hands and feet is not well grounded pursuant to 38 USCS § 5107(a) because there is no medical evidence of nexus between appellant's cold injuries and current arthritis apart from arthritis in hands and feet; since claim was not well grounded, duty to assist was not triggered and additional
action by Board to enforce its remand order for additional medical opinion with regard to etiology of appellant's arthritis was not required. Roberts v West (1999) 13 Vet App 185, 1999 US App Vet Claims LEXIS 1294

Board's decision to deny surviving spouse's claim for service connection of veteran's death must be affirmed since claim is not well grounded pursuant to 38 USCS § 5107 where claimant failed to provide any medical evidence which establishes relationship between veteran's service and death from heart disease and bone marrow cancer; claimant's unsubstantiated assertions that veteran's death was caused by exposure to herbicides is not supported by any medical evidence in record; and none of causes of veteran's death is on current list of diseases presumed to be related to exposure to herbicides. Hasty v West (1999) 13 Vet App 230, 1999 US App Vet Claims LEXIS 1353, op withdrawn by order of ct, remanded (2001) 16 Vet App 101, 2001 US App Vet Claims LEXIS 1156

Veteran's claim that low-back pain was caused by service-connected kidney stones is not well grounded under 38 USCS § 5107(a) even though spine examination report noted veteran's statement that low-back pain was related to kidney stones since statement appears in "history" section of report and appears to have been reiteration of veteran's reported history; examiner expressly diagnosed chronic low-back pain secondary to degenerative joint disease; and examiner made no findings to support assertion kidney stones caused or contributed to low-back pain. McQueen v West (1999) 13 Vet App 237, 1999 US App Vet Claims LEXIS 1373, vacated, remanded (2000, CA FC) 251 F.3d 171, reported in full (2000, CA FC) 2000 US App LEXIS 31875 and subsequent app (2001) 14 Vet App 300, 2001 US App Vet Claims LEXIS 186

Appellant has not submitted well-grounded claim pursuant to 38 USCS § 5107(a) even assuming appellant injured his back and suffered from rectal bleeding while on period of active duty for training in reserves since there is neither medical evidence of nexus between service and any present disability nor evidence that he became disabled during period of active duty for training. Harris v West (2000) 13 Vet App 509, 2000 US App Vet Claims LEXIS 453

§ 5108. Reopening disallowed claims

discussion and analysis in the veterans benefits manual

If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim.

Effective date of section:

This section is effective Sept. 1, 1989 as provided by Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(a), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3008, as 38 USCS § 5108.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator".

Cross References

This section is referred to in 38 USCS § 7104

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:104, 123, 287, 294

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws §§ 159, 166

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I. IN GENERAL

1. Generally

VA regulation changing evidentiary standard of proof for government to rebut burden-shifting presumption relating to presentation of evidence does not serve either as new and material evidence or as substantive change in law creating new cause of action. Routen v West (1998, CA FC) 142 F.3d 1434, cert den (1998) 525 US 962, 142 L Ed 2d 328, 119 S Ct 404

For purposes of reopening claims for award of veterans' benefits, Court of Veterans' Appeals impermissibly ignored definition of "material evidence" adopted by DVA as reasonable interpretation of otherwise ambiguous statutory term and, without sufficient justification or explanation, rewrote statute to incorporate definition of materiality from social security disability benefits scheme. Hodge v West (1998, CA FC) 155 F.3d 1356 (criticized in Paguyo v West (2000, US) 2000 US App Vet Claims LEXIS 200)

After Board has denied claim for benefits, regional office cannot consider or grant claim upon same factual basis unless requirement of new and material evidence has been satisfied. Dittrich v West (1998, CA FC) 163 F.3d 1349, cert den (1999) 526 US 1088, 143 L Ed 2d 653, 119 S Ct 1499

New and material evidence requirement of 38 USCS § 5108 applies to reopening of claim regardless of grounds on which claim was previously disallowed, including denial of veteran status, and any decisions of Court of Appeals for Veterans Claims to contrary are overruled. D'Amico v West (2000, CA FC) 209 F.3d 1322, remanded (2001) 14 Vet App 321, 2001 US App Vet Claims LEXIS 498

Under 38 USCS § 5108, only Department of Veterans Affairs has authority to reopen claim and Court of Appeals for Veterans Claims exceeded its statutory authority when it assumed appellant's claim to be reopened in order to make determination that reopened claim was not well grounded. Winters v Gober (2000, CA FC) 219 F.3d 1375 (criticized in Doe v United States (2005) 63 Fed Cl 798)

As used in 38 USCS § 5108, "Secretary" refers not only to regional office of Department of Veterans Affairs, but also to Board of Veterans' Appeals. Jackson v Principi (2001, CA FC) 265 F.3d 1366

Court of Appeals for Veterans Claims' rejection of finding of clear and unmistakable error as to veteran's claim was affirmed, although court misconstrued Department of Veterans Affairs duty
to fully and sympathetically develop claim, it was harmless error. Szemraj v Principi (2004, CA FC) 357 F.3d 1370

Two-step analysis for reopening claim for new and material evidence does not apply to claims for pension benefits; claims for service-connected benefits or compensation differ from claims for non-service-connected benefits or pension, and term "reopening," although occasionally used to refer to other types of claims, applies in strictest sense only to process of presenting new and material evidence to allow previously denied claim for service-connected benefits to be considered anew. Abernathy v Principi (1992) 3 Vet App 461

Mere allegation that regulation was misapplied or that veteran disagrees with Board's result is insufficient to reopen claim. Corpuz v Brown (1993) 4 Vet App 110 (ovrld as stated in Vencel v Principi (2004, US) 2004 US App Vet Claims LEXIS 290)


New and material evidence is not required to reopen claim of former POW for disease which is presumptively service connected under 38 USCS § 1112(b); all that is required is that former POW submit well-grounded claim. Roncevich v Brown (1994) 7 Vet App 192

Given statutory scheme in §§ 7104(b) and 5108, new and material evidence requirement is material legal issue which BVA has legal duty to address, regardless of whether RO adjudicated claim on merits and failed to apply new and material evidence standard, since, if BVA adjudicates claim on merits without resolving new and material evidence issue, its actions would violate its statutory mandate, and, similarly, once it finds no new and material evidence, it is bound by express statutory mandate not to consider merits of case. Barnett v Brown (1995) 8 Vet App 1, affd (1996, CA FC) 83 F.3d 1380

Where evidence supports service incurrence of injury Board may not, on one hand, deny claim for lack of medical evidence and later, when medical evidence is submitted, refuse to reopen claim due to lack of evidence of service incurrence. Molloy v Brown (1996) 9 Vet App 513

Rule applicable to claims to reopen as well as to § 5107's requirement of well-grounded claim is that competent medical evidence is required where determinative issue involves either medical etiology or medical diagnosis, but that lay testimony by itself may be sufficient where determinative issue does not require medical expertise. Allday v Brown (1995) 7 Vet App 517

Where reopening of veteran's claim due to new and material evidence would not have resulted in earlier effective date for veteran's award of rating of total disability based on individual unemployability (TDIU), and veteran's appeal was not predicated upon clear and unmistakable error (CUE), decision of Board of Veterans' Appeals (BVA) denying earlier effective date was affirmed. Leonard v Principi (2004) 17 Vet App 447, 2004 US App Vet Claims LEXIS 81, affd (2005, CA FC) 2005 US App LEXIS 7407

2. Remand

With respect to denial of petition to reopen claim for service connection for post-traumatic stress disorder, BVA did not adequately carry out Court's direction in remanding case—that it seek "recent 2507 exam" referred to in VA psychiatrist's 1989 statement—since it limited its instruction to seek only Form 2507 completed in 1989; psychiatrist could have been referring to exam dated before 1989. Booth v Brown (1995) 8 Vet App 109

Four of medical records obtained after BVA remand to RO were new in that they comprised first medical evidence of record which established that appellant complained of back pain in 1967, and since it was not clear whether BVA took these records into account when it concluded that new evidence, when considered with previous record evidence, presented reasonable probability that outcome of appellant's claim of service-connection for low back disorder would change, remand was required. Carroll v Brown (1995) 8 Vet App 128

Remand of decision denying service connection for knee disorder was required since it could not be determined from record whether claim was properly reopened. Wallace v Derwinski (1992) 2 Vet App 537

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3. Miscellaneous

CVA's affirmance of BVA's decision, declining to reopen benefits claim on ground that no new and material evidence had been proffered, involved factual determination or application of law to facts of particular case and thus was not within court's appellate jurisdiction. Barnett v Brown (1996, CA FC) 83 F.3d 1380

Any error by BVA's treating evidence as new and material was harmless in light of its ultimate denial of claim. Kushindana v Derwinski (1992) 3 Vet App 27

Although Board erred in proceeding to evaluate merits of veteran's claim without first ruling that evidence submitted as new and material, error was harmless since evidence, which was essentially cumulative of previously submitted evidence, did not change resolution of claim. Sanchez v Derwinski (1992) 2 Vet App 330


II. NEW AND MATERIAL EVIDENCE

A. In General

4. Generally

Misapplication of, or failure to apply, statutory or regulatory burden-shifting presumption does not constitute "new and material evidence" for purpose of reopening claim under 38 USCS § 5108. Routen v West (1998, CA FC) 142 F.3d 1434, cert den (1998) 525 US 962, 142 L Ed 2d 328, 119 S Ct 404

Court of Appeals for Federal Circuit reviewed regulations promulgated by Department of Veterans Affairs pursuant to Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (codified in scattered sections of 38 USCS) and with exception of one regulation, 38 C.F.R. § 3.159(b)(1), which was inconsistent with VCAA, and therefore invalid, regulations regarding claims procedures under 38 C.F.R. §§ 3.156 and 1.159 were affirmed as regulations were not on their face arbitrary, capricious, and contrary to various statutory provisions. Paralyzed Veterans of Am. v Sec'y of Veterans Affairs (2003, CA FC) 345 F.3d 1334

Board did not err in concluding that no new and material evidence was presented and therefore did not err in refusing to reopen claim for headache related benefits. Livingston v Derwinski (1990) 1 Vet App 34, dismd (1992, CA) 959 F.2d 224

Claimant for service connection for flat feet failed to submit new and material evidence sufficient to reopen claim. Saylock v Derwinski (1992) 3 Vet App 394

Duplicates of records previously before Board are not new, hence do not provide basis for reopening claim. Barbour v Principi (1992) 3 Vet App 476

Widow of veteran failed to present any new evidence to reopen her claim for pension benefits retroactive to earlier date. Arcala v Principi (1993) 4 Vet App 72

Evidence, while new, was not material to whether veteran's ulcer was present during service or during one-year presumptive period. Ingram v Brown (1993) 5 Vet App 5

To extent veteran's evidence was new, it was not material since it did not show existence of tuberculosis during applicable 3-year presumptive period. Wilson v Brown (1992) 5 Vet App 11

Although evidence regarding veteran's service-connection claim for residuals of jaw injury was new, none was material since none tended to disprove that veteran was engaged in willful misconduct at time of vehicle accident during which his jaw was broken and that, in doing so, he was not acting in line of duty. Chavarria v Brown (1993) 5 Vet App 468

Appellant did not submit new and material evidence to reopen claim of service connection for arthritis; evidence did not provide any new factual bases for considering his claim, some was not new, and some not material. Turpen v Gober (1997) 10 Vet App 536

New and material evidence determinations are generally reviewable for clear error rather than de novo. Elkins v West (1999) 12 Vet App 209

In order to be entitled to relaxed evidentiary thresholds inherent in concept of what constitutes well-grounded claim and what constitutes requisite new and material evidence to reopen previously disallowed claim which are applicable to veterans, claimant must first establish veteran status by preponderance of evidence standard common in civil and administrative litigation. Laruan v West (1998) 11 Vet App 80 (ovrld by D'Amico v West (2000, CA FC) 209 F.3d 1322) and (ovrld as stated in Harris v West (2000) 13 Vet App 509, 2000 US App Vet Claims LEXIS 453)

5. Analysis or rejection of evidence

Board erred in reviewing only new evidence in adjudicating reopened case and summarily rejecting new medical evidence as “not in accord with sound medical principles” without independent medical evidence of record to support that conclusion. Woods v Principi (1992) 3 Vet App 376

Board erred in assessing credibility of new evidence prior to reopening claim; in determining whether evidence is new and material, its credibility is to be presumed, but only for purpose of determining whether to reopen claim. Justus v Principi (1992) 3 Vet App 510

After finding that veteran's evidence of service-connected psychiatric disorder was new and material, Board erred in failing to include analysis of credibility or probative value of evidence; mere conclusory statement that evidence did not alter basis for its decision is neither helpful to veteran nor clear enough to permit effective judicial review, and not in compliance with statute. Triplette v Principi (1993) 4 Vet App 45

Even if Board erred in refusing to reopen claim for service connection for residuals of frostbite of feet, in effect it reopened claim by considering new evidence in context with all old evidence and reexamining old in light of new and giving plausible reason for rejecting new, i.e., fact that new medical opinion was based entirely on history provided by veteran. Guimond v Brown (1993) 6 Vet App 69

Equipose doctrine cannot take place of standard for reopening case since applying this benefit of doubt doctrine to reopening would require full credibility determination before matter is reopened, and all statute concerning reopening requires is that new and material evidence be presented or secured, not weighed. Martinez v Brown (1994) 6 Vet App 462

Strictly for purposes of determining whether new and material evidence has been presented, Board must presume that newly submitted evidence is credible, unless it is patently incredible. Duran v Brown (1994) 7 Vet App 216

In order to reopen claim, newly submitted evidence must be of sufficient weight or significance that there is reasonable probability that new evidence, when viewed in context of all evidence, both new and old, would change outcome. Wilkinson v Brown (1995) 8 Vet App 263

Proper standard of review of reopened claim is to view new and material evidence in conjunction with other evidence; there is no indication whatsoever that Congress intended that reopened claim could be allowed only when new and material evidence was of such significance that standing alone it might reasonably be found to dictate allowance of claim. Jones v Derwinski (1991) 1 Vet App 210

Board erred in failing to consider veteran’s reopened disability claim in light of all evidence, not just new evidence. Manio v Derwinski (1991) 1 Vet App 140

Board failed to follow proper procedure in analyzing whether evidence submitted to reopen claim is new and material; while it determined that additional evidence was not new and material, it nonetheless appeared to reconsider old evidence. Schleis v Principi (1992) 3 Vet App 415
In denying veteran's claim to reopen denial of service connection for psychiatric disorder on basis of new and material evidence that he was treated for psychosis while in service, Board failed to provide adequate reasons for concluding that evidence did not alter basis for its earlier decision. Triplette v Principi (1993) 4 Vet App 45

6. Causal relationship to service

Discharge summary submitted with request to reopen claim was not material because there was no reasonable possibility that it would change denial of service connection for veteran's psychiatric condition since it covered treatment provided subsequent to his discharge and provided no connection between his psychiatric condition and his military service other than history veteran himself furnished. Smith v Derwinski (1991) 1 Vet App 178

Although veteran submitted new evidence, it was not material to whether his back disability was incurred in or aggravated by service. Blanchard v Derwinski (1992) 3 Vet App 300

Veteran claiming service connection for multiple sclerosis did not present new evidence that was material to his claim where new evidence reflected ongoing treatment for current disabilities and did not bear on issue of incurrence of multiple sclerosis during service or presumptive period. Miller v Derwinski (1992) 2 Vet App 578

Evidence regarding claimant's ear defect and testicle disorder was not related to whether conditions were incurred or aggravated in service, hence was not new and material evidence sufficient to reopen claim. Laure v Principi (1992) 3 Vet App 395

New medical treatment records were not probative of service connection for psychiatric disorder since, although they demonstrated veteran suffered from symptoms, including hallucinations, they did not provide any diagnosis of psychiatric disorder or evidence that symptoms reported were related to service or psychiatric disorder present during service or one year thereafter. Sweat v Principi (1993) 4 Vet App 67

Veteran denied service connection for acquired psychiatric disorder failed to present new and material evidence warranting reopening since VA medical treatment records, while demonstrating that veteran suffered symptoms, did not provide any diagnosis of psychiatric disorder or any evidence that symptoms were related to veteran's service or to psychiatric disorder acquired in service. Sweat v Principi (1993) 4 Vet App 67

Evidence was not new and material where it all related to treatment of veteran's current back condition and did not establish etiological relationship between that and service-connected thigh disorder. Montgomery v Brown (1993) 4 Vet App 343

Veteran's evidence related to treatment of current condition and did not establish etiological relationship between that and his period of active military service, hence there was no evidence warranting reopening claim. Zo v Brown (1993) 4 Vet App 440

New medical evidence related to veteran's then-current physical state and were not relevant to whether he incurred his shrapnel wounds during period of recognized service, hence not material and claim should not have been reopened. Alcaide v Brown (1993) 5 Vet App 9

Veteran's statements that his psychiatric disorder and seizure disorder were causally related to in-service head injury were insufficient to reopen claim because they were lay assertions of medical causation, and medical records offered did not relate any then-current condition to service injury or condition. Fluker v Brown (1993) 5 Vet App 296

Chiropractor's report, though new, was not relevant to whether veteran's head and neck injuries were connected with motor vehicle accident which occurred while he was on active duty since it did not link accident and veteran's current disability of cervical spine. Cornele v Brown (1993) 6 Vet App 59, motion gr, app dismd (1994, CA FC) 1994 US App LEXIS 11288

Veteran failed to present new and material evidence for his claim for service connection for back condition; rather, majority of evidence submitted since 1950 Board decision actually supported denial of service connection, since it confirmed not only that veteran had polio prior to service, but that his recurrent back strain was attributable to residuals of that polio. Glynn v Brown (1994) 6 Vet App 523
Although records submitted were new, they were neither relevant to nor probative of whether appellant's current psychiatric condition was incurred in or aggravated by service; appellant was diagnosed with personality disorder in service, which is not recognized as compensable mental disability, and did not receive diagnosis of schizophrenia until more than 10 years after his active military service, and there was no medical opinion linking either schizophrenia or subsequent diagnosis of dementia to personality order that manifested itself during military service. Elkins v Brown (1995) 8 Vet App 391

Veteran failed to present new and material evidence to warrant reopening decision denying service connection for lung and ear disorders where many of new documents submitted were not material since they showed treatment for claimed disorders beginning more than 20 years after service but did not show any causal relationship to service, and other documents were not probative of claimed service connection. Spalding v Brown (1996) 10 Vet App 6

Veteran failed to provide new and material evidence to reopen service-connection claim for psoriasis; post-service medical records did not relate appellant's condition to service or contain indication that condition had worsened during service. Routen v Brown (1997) 10 Vet App 183, affd (1998, CA FC) 142 F.3d 1434, cert den (1998) 525 US 962, 142 L Ed 2d 328, 119 S Ct 404

Evidence appellant submitted was not relevant to and probative of whether his current hypertension was related to his service and thus fell short of changing outcome, hence was not material for purposes of reopening claim. Graves v Brown (1996) 8 Vet App 522

Veteran did not submit new and material evidence warranting reopening of his claim since, although it was new, none of it was material because none related his current condition to service, which was basis for Board's denial of claim. Hickson v West (1998) 11 Vet App 374, reconsideration gr, substituted op (1999) 12 Vet App 247, 1999 US App Vet Claims LEXIS 1, app dismd, motion gr (1999, CA FC) 215 F.3d 1346, reported in full (1999, CA FC) 1999 US App LEXIS 19998

B. Particular Evidence

7. Cumulative evidence

Veteran's evidence of lung disorder from asbestos exposure was cumulative of record evidence and did not justify reopening claim. Gowen v Derwinski (1992) 3 Vet App 286

BVA properly denied request to reopen claim since physician's second letter, while germane, was cumulative of other evidence on record. Hudson v Derwinski (1992) 3 Vet App 50

Veteran claiming service-connected disability compensation for brain damage failed to present new and material evidence justifying reopening of claim; some had been considered by Board and new magazine articles regarding brain damage from boxing were cumulative of considered evidence. Miller v Derwinski (1992) 3 Vet App 90

Board correctly determined that veteran did not submit new and material evidence to reopen decision denying service connection for back and skin disorders; only new evidence was veteran's testimony, which was cumulative. Evans v Derwinski (1992) 3 Vet App 193

Physician's statement that expanded upon earlier statement that had been considered was merely cumulative, and not new evidence. Villalobos v Principi (1992) 3 Vet App 450

Evidence submitted to reopen appellant's claim was cumulative or previously submitted evidence or immaterial. Morton v Principi (1992) 3 Vet App 508

Physician's second statement was not new and material where it was cumulative and fact that physician may have treated veteran at time closer to his release from service adding nothing to claim for service-connected hearing loss. Hill v Principi (1992) 3 Vet App 540

Veteran's personal hearing testimony and statements from relatives and acquaintances, although relevant, was cumulative, and new evidence of newspaper articles and documents was not relevant to veteran's claim that his mental illness was caused by stay in VA hospital. Baritsky v Principi (1993) 4 Vet App 41

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Physicians' letters were cumulative of earlier evidence, hence did not constitute new and material evidence for reopening claim. McGinnis v Brown (1993) 4 Vet App 239

Evidence submitted to reopen claim for service connection for seizure disorder was not new since it was cumulative of information previously considered by BVA. Person v Brown (1993) 5 Vet App 449

Appellant did not submit new evidence sufficient to reopen claim for service connection for duodenal ulcer, since proffered service medical records established same facts as record evidence and thus were cumulative. Dolan v Brown (1996) 9 Vet App 358, app dismd without op, motion gr (1997, CA FC) 119 F.3d 14, reported in full (1997, CA FC) 1997 US App LEXIS 16948

No new and material evidence was presented to reopen service-connection claim for lung disorder as residual of asbestos exposure; majority of medical reports were cumulative of record evidence and therefore not new, and no medical evidence related veteran's condition to military service, exposure to asbestos, or any other service-related factor. Ashford v Brown (1997) 10 Vet App 120

Veteran failed to provide new and material evidence to reopen claim for service connection for post-traumatic stress disorder since, although some of testimony, medical records and insurance documents were not previously in record, they were cumulative or record evidence at time of Board's disallowance of claim. Anglin v West (1998) 11 Vet App 361, affd (2000, CA FC) 203 F.3d 1343

Widow's lay testimony that veteran's cause of death was etiologically related to his hypertension that was caused by stress and anxiety from his eye condition was cumulative of her previous contentions considered by board, and medical opinion that veteran's severe chronic stress and hypertension may have contributed to his developing aneurysms and presence and acceleration of atherosclerotic disease was new but not material since it was too speculative to establish plausible claim. Bostain v West (1998) 11 Vet App 124

Board's determination that evidence was not new for purpose of reopening claim pursuant to 38 USCS § 5108, 38 USCS § 7104(b), and 38 USCS § 7105(c) is affirmed where, since last final disallowance, newly presented evidence was merely cumulative of other evidence previously presented and veteran's statements concerning claimed onset of disease was mere recitation of accounts made elsewhere Vargas-Gonzalez v West (1999) 12 Vet App 321, 1999 US App Vet Claims LEXIS 174

8. Physician's statement, opinion or letter

Physician's examination report, which addressed only veteran's present physical condition, not mental condition, was not probative of claim for service connection for neuropsychiatric disorder, hence was not material. Green v Brown (1993) 4 Vet App 382, reh, en banc, den (1993) 5 Vet App 83

New material evidence justifying reopening of claim included 1976 physician's statement noting longstanding history of degenerative arthritis involving knees and occasionally shoulders, 1988 physician's statement providing opinion that trauma veteran received in WWII was substantially involved in causing veteran's arthritis of knees, and 1988 VA examination which noted that veteran had had arthritis or pain and bursitis in shoulders, crepitance in right shoulder, generalized osteoarthritis of wrist, knees, ankles, lumbosacral spine, and theoretical possibility that generalized osteoarthritis might be traumatic in origin. Bailey v Derwinski (1991) 1 Vet App 441

Physician's statement that diagnosis of chronic prostatitis would not be made if there was not an earlier diagnosis or symptoms of prostatitis preceding it constituted new and material evidence relevant to veteran's claim for chronic prostatitis. Case v Derwinski (1992) 2 Vet App 592

Board did not err in denying request to reopen claim for service connection for veteran's heart diseases, since physician's statement that veteran's rheumatic heart disease may have predisposed veteran to diseases at issue was speculative. Simmons v Derwinski (1992) 3 Vet App 29
Veteran presented new and material evidence warranting reopening his claim for service connection for malaria and for seizure disorder secondary to malaria where he submitted letter from corpsman verifying that he treated veteran in field for malaria-like symptoms and neuropsychologists' opinions that veteran likely suffered from malaria while serving in Vietnam and that history of malaria was probably cause of his symptom complex. Mohr v Derwinski (1992) 3 Vet App 63

Physician's letter stating that veteran was exposed to significant noise trauma in Vietnam, diagnosing bilateral neurosensory hearing loss, and stating that it was quite possibly related to noise damage with secondary tinnitus, constituted new and material evidence since it was not duplicative of evidence in record at time of denial of claim and was likely to change outcome. Stoneking v Derwinski (1992) 3 Vet App 103

Statement by physician who personally observed veteran's condition immediately subsequent to separation from service and 43 years later that it was reasonable for veteran's disability to have been caused by his in-service injury was new and material evidence supporting reopening of claim. Budnik v Derwinski (1992) 3 Vet App 185

Widow claiming DIC benefits submitted material evidence to justify reopening claim for service connection for husband's death in form of physician's opinion which corroborated opinion by a first physician which had been rejected; corroborative nature of opinion rendered it material. Paller v Principi (1992) 3 Vet App 535


Physician's letter containing opinion that veteran had regional ileitis or Crohn's disease as far back as his time in service constituted new and material evidence for reopening claim. Hadsell v Brown (1993) 4 Vet App 208

Veteran claiming service-connected back disorder submitted new and material evidence warranting reopening claim where it consisted of treating physician's statement diagnosing veteran's back disorder and relating it to military trauma, cryptic SGO readout, and veteran's sworn testimony. Chipego v Brown (1993) 4 Vet App 102

Physician's statement that service-connected injury aggravated veteran's non-service connected arthritis was not material since it was not evidence that service-connected injury caused non-service connected condition, only aggravation of it. Stokes v Brown (1993) 4 Vet App 336

Veteran submitted new and material evidence to reopen claim for service connection for multiple sclerosis-report from VA psychiatrist diagnosing veteran with MS which psychiatrist found had first been manifested by euphoria in service and later by symptoms within sever-year presumption period, and report from VA neurologist that there was no doubt veteran had had MS since his separation from service. Bernard v Brown (1993) 4 Vet App 384

Physician's letter corroborating another physician's firm medical opinion that veteran's hearing loss was noise-induced as result of service was relevant and probative of service-connection issue and added significantly to probative value of all evidence in support of veteran's claim, thus warranting reopening claim. Ramirez v Brown (1993) 6 Vet App 6

Doctor's statement did not constitute material evidence since doctor relied upon veteran's account of his medical history and service background, recitations which had already been rejected. Reonal v Brown (1993) 5 Vet App 458

Physician's letters were not material since neither contained current diagnosis of psychiatric disorder, veteran was first seen by physician over 20 years after separation from service, and there was no indication physician formed his opinion on basis separate from veteran's recitation of his medical and service background, nor did physician discuss veteran's well-documented pre-service problems. Elkins v Brown (1993) 5 Vet App 474

Since only inference that could be drawn from appellant's 1953 service records is that appellant fell on his right shoulder, subsequent opinions by two examining physicians who were
aware of appellant's 1985 work injury and who based their opinions on contemporaneous x-ray evidence and physical examinations indicating old right shoulder injury unrelated to 1985 injury were new and material. Kightly v Brown (1994) 6 Vet App 200

Physician's letter stating his opinion, based on veteran's own recitation of events and well as his review of medical records and examination of veteran, that veteran's breathing difficulty had begun in service and that evidence clearly pointed to service connected disability was new because it was not cumulative of other evidence, and was material because it was relevant to issue at hand and created reasonable probability that it would change outcome. Curry v Brown (1994) 7 Vet App 553, dismd without op (1995, CA FC) 48 F.3d 1237, reported in full (1995, CA FC) 1995 US App LEXIS 10105 and cert den (1995) 514 US 1119, 115 L Ed 2d 870, 115 S Ct 1982

Appellant claiming service connection for multiple sclerosis submitted new and material evidence where it consisted of one physician's letter stating that appellant's symptoms were not caused by infectious mononucleosis as Board theorized, another physician's letter stating that psychiatric difficulties manifested by appellant during service and presumptive period were symptoms of MS, and medical treatises illustrated that disorders formerly unacceptable as causes were not accepted as causes for MS. Bielby v Brown (1994) 7 Vet App 260

Veteran submitted new and material evidence warranting reopening of claim for service connection for rheumatic heart disease where he provided physician's letter that stated that physician had reviewed veteran's service medical records and postservice medical records and concluded that veteran had onset of valvular heart disease following some type of condition while he was in service, that it was most likely rheumatic fever with subsequent mitral valve complications, and that it was not uncommon for cardiac problems to be discovered until much later. Sutton v Brown (1996) 9 Vet App 553

Physicians' letters were both new and material where one established that appellant reported history of rheumatic heart disease within one year after service and other reviewed all available information and concluded that appellant's conditions could well be related to his period of active service. Lee v Brown (1997) 10 Vet App 336

9. Medical records or reports, generally

Veteran claiming service connection for diabetes mellitus did not present new and material evidence; one medical record did not even mention diabetes, and other did not relate veteran's diabetes to veteran's wartime service. Captain v Principi (1992) 3 Vet App 341


Evidence of veteran's service medical records was not new since it had been considered by Board in its prior final decision, hence claim could not be reopened. St. Arbor v Derwinski (1992) 3 Vet App 81

Medical records evidencing treatment of veteran's current condition but which did not relate it to his World War II military service were not new and material for purposes of reopening claim. Smith v Derwinski (1992) 3 Vet App 205

Records of private medical treatment for depression did not constitute new and material evidence; none indicated veteran's disability was severe enough to preclude him from pursuing educational or training program during delimiting period. Heebner v Principi (1992) 3 Vet App 423

Medical reports detailing current state of veteran's lumbosacral-spine condition, but not its cause, did not constitute new and material evidence warranting reopening. Minshall v Brown (1993) 4 Vet App 195

Records which tended to show that veteran's eyesight was relatively normal prior to service were relevant and probative of whether veteran had preexisting eye disability and created
reasonable possibility of changing outcome of prior BVA decision, hence warranted reopening claim.  D’Amato v Brown (1993) 4 Vet App 481

Additional evidence in form of private medical records VA medical records warranted reopening claim for service connection for chronic acquired psychiatric disability.  King v Brown (1993) 4 Vet App 519

Veteran’s private childhood medical records and religious book were new but not relevant or probative of whether his psychiatric disorder was incurred or aggravated in service, hence not basis for reopening claim.  Warren v Brown (1993) 6 Vet App 4

Private and VA treatment records did not constitute competent medical evidence of relationship between appellant’s current arthritis of lumbar spine and his service, and therefore did not constitute new and material evidence to reopen his claim for service connection.  Hollifield v Brown (1996) 9 Vet App 469

10. -Examination reports

New material evidence justifying reopening of claim included 1976 physician’s statement noting longstanding history of degenerative arthritis involving knees and occasionally shoulders, 1988 physician’s statement providing opinion that trauma veteran received in WWII was substantially involved in causing veteran’s arthritis of knees, and 1988 VA examination which noted that veteran had had arthritis or pain and bursitis in shoulders, crepitance in right shoulder, generalized osteoarthritis of wrist, knees, ankles, lumbosacral spine, and theoretical possibility that generalized osteoarthritis might be traumatic in origin.  Bailey v Derwinski (1991) 1 Vet App 441

Report of 19-year-old medical examination constituted new and material evidence warranting reopening veteran’s claim since it had not been previously before Board and stated probably causal connection between his then-present condition and his condition in service.  Tozian v Derwinski (1992) 3 Vet App 268

Medical certificate recording veteran’s blood pressure and stating that veteran received treatment for “essential hypertension” was not material evidence warranting reopening his claim for service-connected hypertension.  Corpuz v Brown (1993) 4 Vet App 110 (ovrd as stated in Vencel v Principi (2004, US) 2004 US App Vet Claims LEXIS 290)

Veteran who had been evaluated for paranoid ideation failed to present any new and material evidence to warrant reopening claim that his mental disorder resulted from VA hospitalization or treatment.  Baritsky v Principi (1993) 4 Vet App 41

New medical evidence discussing veteran’s "significant" MMPI test score for paranoia did not establish etiological relationship between present ratable disability and service, hence was not material.  Walden v Brown (1993) 4 Vet App 402

New and material evidence of service connection for acquired psychiatric disorder consisted of VA examination reports not originally considered which diagnosed psychiatric disorders.  Taylor v Brown (1993) 4 Vet App 473

Statements from private and VA examinations and treatments did not constitute material evidence regarding veteran's service connection for right knee disability since much evidence did not pertain to veteran's knee but other ailments, and that which did pertain to knee did not indicate that problems could be attributed to aggravation in service.  McIntosh v Brown (1993) 4 Vet App 553

Claimant whose veteran husband died of alcoholic liver disease did not submit new and material evidence warranting reopening claim for service connection for veteran's death; medical and psychological examination record confirming diagnosis of alcoholism during service did not address subject of liver disease in any way, and fact was already before Board.  Barfield v Brown (1993) 5 Vet App 8

Medical examination which concluded that veteran suffered from post-hallucinogen perception disorder secondary to alleged controlled experimental use of LSD in earlier medical treatment was new evidence, probative of issue at hand, and reasonably likely to change

11. Lay testimony or evidence, generally

Mother's affidavit concerning family's observance of veteran's behavior during his first year after service was both new and material since neither mother nor anyone else had previously submitted affidavit to that effect and, if found credible, there was reasonable probability it could change outcome by corroborating physician's diagnosis of schizophrenia. Sagainza v Derwinski (1991) 1 Vet App 575

Veteran presented new and material evidence warranting reopening his claim for service connection for malaria and for seizure disorder secondary to malaria where he submitted letter from corpsman verifying that he treated veteran in field for malaria-like symptoms and neuropsychologists' opinions that veteran likely suffered from malaria while serving in Vietnam and that history of malaria was probably cause of his symptom complex. Mohr v Derwinksi (1992) 3 Vet App 63

Evidence submitted by veteran claiming service-connected disability compensation for acquired psychiatric disorder was new and material; it included lay evidence from person who had known veteran prior to, during, and subsequent to his service and thus presented basis other than pure speculation for assessing veteran's schizophrenia. Chisholm v Principi (1992) 3 Vet App 420, subsequent app (2003, US) 2003 US App Vet Claims LEXIS 287

Statements from former military policeman and social worker at shelter where veteran resided that veteran exhibited during two periods of active duty for training symptoms later diagnosed as schizophrenia constituted new and material evidence warranting reopening claim. Mata v Veterans Affairs (1993) 4 Vet App 276

Veteran claiming service connection for multiple sclerosis failed to present new and material evidence since it consisted of sworn testimony of veteran and his wife that was merely reiteration of testimony and lay statements previously before Board. Spencer v Brown (1993) 4 Vet App 283, affd (1994, CA FC) 17 F.3d 368, cert den (1994) 513 US 810, 130 L Ed 2d 19, 115 S Ct 61

Statements from veteran's former high school special needs instructor, guidance counselor and U.S. Senator addressing veteran's academic and social progress in high school and expressing hope that VA would rule favorably were not relevant or probative of veteran's claim, therefore not material. Laposky v Brown (1993) 4 Vet App 331

Letters containing writers' observations of veteran were not material since they were not related to nor probative of alleged service connection for residuals of cerebral contusion. Keating v Brown (1993) 4 Vet App 408

New and material evidence warranting reopening claim for service connection for bilateral hammertoe deformities and back disorder consisted of testimony from two service comrades as to back, leg, and foot problems experienced by veteran during service. Stozek v Brown (1993) 4 Vet App 457

Lay assertions of medical causation cannot serve as predicate for reopening claim, just as they will not suffice to establish plausible, well-grounded claim. Moray v Brown (1993) 5 Vet App 211

Veteran's statements that his psychiatric disorder and seizure disorder were causally related to in-service head injury were insufficient to reopen claim because they were lay assertions of medical causation, and medical records offered did not relate any then-current condition to service injury or condition. Fluker v Brown (1993) 5 Vet App 296

Board erred in failing to consider affidavit of claimant's fellow villagers which, if true, tended to corroborate testimony of claimant and her paramour 30 years earlier that claimant lived continuously with veteran until his death, and in failing to give reasons or bases for its acceptance or rejection. Vecina v Brown (1994) 6 Vet App 519

Affidavit from officer of guerilla unit, dated after BVA's prior decision, constituted new and material evidence supporting reopening of claim for revocation of forfeiture; it related to issue of
appellant's having rendered assistance to enemy and because of its date could not have been submitted in connection with BVA decision that predated it. Villaruz v Brown (1995) 7 Vet App 561

Widow failed to present new and material evidence to reopen service-connection claim for husband's death; widow submitted excerpts from medical textbooks, testimony by friends and family of veteran, and statement of person who served with veteran, but submitted no medical evidence linking veteran's service-connected scrub typhus or malaria to alleged dysentery and then further to his death. Marciniak v Brown (1997) 10 Vet App 198, affd (1998, CA FC) 168 F.3d 1322

Lay evidence concerning manifestations of chronic condition during service or within presumption period may suffice to well ground claim; when condition is not chronic and there is no medical evidence of causal nexus, continuity of symptomatology, which may be shown by medical evidence or lay testimony, would be required. Hickson v West (1999) 12 Vet App 247, 1999 US App Vet Claims LEXIS 1, app dismd, motion gr (1999, CA FC) 215 F.3d 1346, reported in full (1999, CA FC) 1999 US App LEXIS 19998

Matter was remanded to Board of Veterans Appeals for readjudication because Board did not adequately set forth reasons or bases for rejecting testimony of veteran's mother about veteran's psychiatric condition when veteran alleged that testimony provided new and material evidence and that evidence was grounds for re-opening previously disallowed claim. Fortuck v Principi (2003) 17 Vet App 173, 2003 US App Vet Claims LEXIS 519

12. By veteran


Evidence submitted by veteran was new and material and claim for service connection for back injuries should have been reopened where evidence consisted of lay testimony that included veteran's prior assertion that he injured his back during service, along with additional assertions of specific injury and hospitalization dates, and location of VA hospital facilities. Poe v Derwinski (1992) 3 Vet App 55

Board correctly determined that evidence submitted was not new and material on claim of service connection for skin disorder where it consisted of veteran's statements, copy of news article regarding veteran, and report from National Personnel Records Center indicating that no additional pertinent records were available. Stephens v Principi (1992) 3 Vet App 513

Veteran's sworn testimony concerning claim that hearing loss started during service was new and material justifying reopening claim. Cuevas v Principi (1993) 4 Vet App 542

Veteran's sworn testimony that he injured his back lifting artillery shell in service was new because they was no evidence of such accident at time of prior Board decisions, and was material since it established reasonable possibility of changing outcome of prior denial of service connection for back disorder. Ashley v Principi (1993) 4 Vet App 75

Veteran's sworn testimony that he had injured his back in service lifting artillery shell was new and material since it had not previously been before Board and, if believed, created reasonable possibility that denial of service-connected disability for back disorder would be changed. Ashley v Principi (1993) 4 Vet App 75

Veteran's testimony that, shortly after service, physician treated him for nervous condition did not constitute new and material evidence; at most it was merely corroborative, and circumstances strongly indicated question whether veteran was ever treated by this doctor or whether transcript was in error and reference was actually to one of veteran's physicians whose records were previously considered by Board. Henderson v Brown (1993) 6 Vet App 45
Veteran presented sufficient evidence to reopen claim for service connection for pes planus since his statements regarding continuity of pain in connection with his feet were new and were competent because they related to observable condition and pes planus is condition that lends itself to observation by lay witness, and statements were material because determinative issue in denial of service connection was question of continuity of symptomatology. Falzone v Brown (1995) 8 Vet App 398

Veteran did not submit new and material evidence required to reopen service-connection claims of throat and cardiovascular disabilities, since statement that he had had trouble with his throat since his discharge was only recitation of what he had told hospital personnel and therefore was not material, statement that he had been treated for his throat as result of karate chop at particular month and year was not material because it was not probative of causal link between appellant's service and present condition, and appellant's history of intermittent heart pains was only recitation by appellant and therefore not material. Butler v Brown (1996) 9 Vet App 167

Veteran's testimony that he had incurred nervous disorder and left knee disability during service and that he underwent attitude change during his first period of service and had relapse of this condition during his service in National Guard did not constitute new and material evidence of claim of service connection for schizophrenia since record was devoid of any medical evidence establishing causal nexus between veteran's current psychiatric condition and his military service. Mercado-Martinez v West (1998) 11 Vet App 415

Veteran did not have well-grounded claim of peripheral neuropathy since he did not have current diagnosis of peripheral neuropathy, even though he had served in Vietnam and had one of enumerated diseases listed in regulation. Winters v West (1999) 12 Vet App 203, vacated, remanded (2000, CA FC) 219 F.3d 1375 (criticized in Doe v United States (2005) 63 Fed Cl 798)

13. -By veteran's spouse, widow or widower

Surviving spouse was not entitled to have claim reopened since evidence, although new, was not material since it did not provide requisite clinical or laboratory evidence relating to service connection for veteran's tuberculosis. Tubianosa v Derwinski (1992) 3 Vet App 181

Neither widow's nor her son's testimony supported contention that veteran's service-connected chronic bronchitis caused or contributed substantially to veteran's death, which was listed as from "natural causes" following autopsy, hence did not constitute new and material evidence to reopen claim. Williams v Brown (1993) 4 Vet App 200

Widow's letter from Social Security Administration showing her entitlement to monthly widow's benefits as result of her marriage to veteran constituted new and material evidence sufficient to reopen claim for DIC. Camphor v Brown (1993) 5 Vet App 514

Appellant's newly submitted evidence relating to death of her cohabitant could not change outcome of forfeiture of her rights to DIC benefits because it actually supported finding that she lied to VA; therefore, BVA did not err in refusing to reopen her claim. Reyes v Brown (1994) 7 Vet App 113

Widow did not submit material evidence to reopen decision that denied recognition of veteran's purported adopted children for VA purposes since it was not relevant to or probative of whether adoption decree comport or had to comport with applicable Philippine law, specifically to whether natural children of appellant who were over 14 consented to adoption and to whether Philippine Department of Social Welfare conducted case study prior to adoption. Mata v Brown (1996) 8 Vet App 485

14. Books or articles

Veteran claiming service-connected disability compensation for brain damage failed to present new and material evidence justifying reopening of claim; some had been considered by Board and new magazine articles regarding brain damage from boxing were cumulative of considered evidence. Miller v Derwinksi (1992) 3 Vet App 90

Board correctly determined that evidence submitted was not new and material on claim of service connection for skin disorder where it consisted of veteran's statements, copy of news
article regarding veteran, and report from National Personnel Records Center indicating that no additional pertinent records were available. Stephens v Principi (1992) 3 Vet App 513

Veteran's personal hearing testimony and statements from relatives and acquaintances, although relevant, was cumulative, and new evidence of newspaper articles and documents was not relevant to veteran's claim that his mental illness was caused by stay in VA hospital. Baritsky v Principi (1993) 4 Vet App 41

Widow failed to present new and material evidence to reopen service-connection claim for husband's death; widow submitted excerpts from medical textbooks, testimony by friends and family of veteran, and statement of person who served with veteran, but submitted no medical evidence linking veteran's service-connected scrub typhus or malaria to alleged dysentery and then further to his death. Marciniak v Brown (1997) 10 Vet App 198, aff'd (1998, CA FC) 168 F.3d 1322

15. Government documents

Board correctly determined that evidence submitted was not new and material on claim of service connection for skin disorder where it consisted of veteran's statements, copy of news article regarding veteran, and report from National Personnel Records Center indicating that no additional pertinent records were available. Stephens v Principi (1992) 3 Vet App 513

Veteran did not submit new and material evidence warranting reopening claim for ulcerative colitis since decision by Army Correction Board amending veteran's medical disability did not contain any information related to ulcerative colitis during veteran's period of service and concluded that no evidence indicated he had suffered from it at time of his physical evaluation or prior to separation. Sugar v Brown (1993) 5 Vet App 265

Medical evidence underlying Social Security Administration's award of veteran disability insurance benefits either constituted duplicate copies of records previously considered and thus was not new, or, although new, did not show continuity of symptomatology for veteran's back condition, or was irrelevant because evidence related to treatment and examination of veteran with respect to his stroke, not back condition for which he claimed service connection. Godfrey v Brown (1995) 7 Vet App 398


Claim for VA benefits as veteran's child who was permanently incapable of self-support before attaining age 18 could be reopened as resubmitted claim since evidence of appellant's earlier application for VA benefits and RO letter denying them was not part of record when Board decision subject of instant appeal. Fulkerson v West (1999) 12 Vet App 268, 1999 US App Vet Claims LEXIS 93, 1999 US App Vet Claims LEXIS 168

16. Miscellaneous

Department of Veterans Affairs' regulatory interpretation of its statutory authority for denying earlier effective date for service connection of veteran's post-traumatic stress disorder than date he reopened for new and material evidence was upheld as reasonable interpretation by agency under Chevron deference. Sears v Principi (2003, CA FC) 349 F.3d 1326, cert den (2004) 541 US 960, 158 L Ed 2d 401, 124 S Ct 1723

Veteran failed to provide new and material evidence for reopening denial of service connection for psychiatric disorder where Board had found that, although disorder was congenital or developmental, seizure disorder did not become manifest until 10 years after separation from service. Estep v Derwinski (1991) 3 Vet App 2

Veteran failed to submit new and material evidence to warrant reopening claim for service connection for residuals of frostbite and for arthritis of multiple joints; his own statements and that of lay witness were duplicative of evidence previously submitted and therefore cumulative, and VA clinic records and x-rays were new but not material since they did not show that veteran's present condition was present in service or within one year following discharge. Pollard v Brown (1993) 6 Vet App 11

Letter from and statement by veteran's wife were not new to claim for service connection for acquired psychiatric disorder since they were cumulative of other lay testimony previously considered, and VA psychiatric evaluation report was not material since it was not probative of whether veteran's preexisting psychiatric disorder was aggravated during service. Annoni v Brown (1993) 5 Vet App 463, app dism'd without op (1994, CA FC) 22 F.3d 1106

Veteran's childhood medical records and notarized statement from his mother constituted new and material evidence as matter of law since they tended to show that he did not have asthma prior to service and were thus relevant and probative of whether he had preexisting condition. Crowe v Brown (1994) 7 Vet App 238

Denial of request to reopen claim for back disorder and vocational rehabilitation benefits that had been previously denied on ground of lack of qualifying service discharge was not erroneous since evidence veteran presented did not present reasonable possibility of changed outcome on his discharge status and thus was not new or material. Hayes v Brown (1995) 7 Vet App 420

Letter from physician regarding chest trauma, though new, was not material since it did not link chest trauma specifically to appellant's current lung disease condition; and claim for cuts above right eye and concussion were not well grounded since appellant submitted no medical evidence of those disabilities but only his own sworn statements that they were combat-related. Beausoleil v Brown (1996) 8 Vet App 459

Claim for left varicocele would not be reopened since veteran's school records, although they were of some probative value, could not reasonably change result since they did not contain even one, let alone two, comprehensive clinical evaluations, and, since they ended three years before appellant's induction, did not rebut clinical evaluations that identified condition some two or three years later. Nici v Brown (1996) 9 Vet App 494

§ 5109. Independent medical opinions
cxliv Discussion and Analysis in the Veterans Benefits Manual

(a) When, in the judgment of the Secretary, expert medical opinion, in addition to that available within the Department, is warranted by the medical complexity or controversy involved in a case being considered by the Department, the Secretary may secure an advisory medical opinion from one or more independent medical experts who are not employees of the Department.

(b) The Secretary shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical opinions. Any such arrangement shall provide that the actual selection of the expert or experts to give the advisory opinion in an individual case shall be made by an appropriate official of such institution.

(c) The Secretary shall furnish a claimant with notice that an advisory medical opinion has been requested under this section with respect to the claimant's case and shall furnish the claimant with a copy of such opinion when it is received by the Secretary.

Effective date of section:
This section is effective Sept. 1, 1989 as provided by Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(a), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3009, as 38 USCS § 5109.
Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Cross References
This section is referred to in 38 USCS § 5701

Research Guide
Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:119

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 153

§ 5109A. Revision of decisions on grounds of clear and unmistakable error
cxlv Discussion and Analysis in the Veterans Benefits Manual
(a) A decision by the Secretary under this chapter [38 USCS §§ 5100 et seq.] is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

Other provisions:

Application of section. Act Nov. 21, 1997, P. L. 105-111, § 1(c)(1), 111 Stat. 2272, provides: "Sections 5109A and 7111 of title 38, United States Code, as added by this section, apply to any determination made before, on, or after the date of the enactment of this Act."

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:161, 162

Statute providing that decision of Board may be reviewed for clear and unmistakable error does not supersede VA regulation to similar effect since it made no change in substantive standards governing modifications of regional office decision because of clear and unmistakable error, rather merely codified prior regulation. Donovan v West (1998, CA FC) 158 F.3d 1377, cert den (1999) 526 US 1019, 143 L Ed 2d 351, 119 S Ct 1255

Court of Appeals for Veterans Claims properly interpreted term "evidence" as used in 38 USCS § 5109A(a) as being limited to evidence that was of record at time challenged regional office decision was made. Pierce v Principi (2001, CA FC) 240 F.3d 1348

Breach of duty to assist veteran cannot constitute clear and unmistakable error (CUE) based on requirements that CUE be outcome determinative and be based on record that existed at time of original decision. Cook v Principi (2002, CA FC) 318 F.3d 1334, reh, en banc, den (2003, CA FC) 56 Fed Appx 496 and cert den (2003) 539 US 926, 156 L Ed 2d 603, 123 S Ct 2574

Decision of Court of Appeals for Veterans Claims was affirmed when Veterans Claim court determined that it was precluded under 38 C.F.R. § 20.1400(b) from reviewing earlier decision of Board of Veterans Appeals for clear and unmistakable error when earlier decision had been reviewed and affirmed by appellate court. Winsett v Principi (2003, CA FC) 341 F.3d 1329, reh den, reh, en banc, den (2003, CA FC) 2003 US App LEXIS 21172 and cert den (2003) 540 US 1082, 157 L Ed 2d 758, 124 S Ct 943

Court of Appeals for Veterans Claims' rejection of finding of clear and unmistakable error as to veteran's claim was affirmed, although court misconstrued Department of Veterans Affairs duty to fully and sympathetically develop claim, it was harmless error. Szemraj v Principi (2004, CA FC) 357 F.3d 1370

Where veteran, who was awarded retroactive disability payments due to clear and unmistakable error made in 1969, argued that he was entitled to interest on difference because without interest he was paid in deflated nominal dollars, rather than in real dollars, and under
"same effect" language of 38 USCS § 5109A(b), payment of nominal 1969 dollars made in 1996 (year in which he was awarded difference) did not have "same effect" as payment of nominal 1969 dollars made in 1969, Court of Appeals reiterated its prior holding that "same effect" language of 38 USCS § 5109A(b) was not clear waiver of "no-interest rule" inherent in government's sovereign immunity. Sandstrom v Principi (2004, CA FC) 358 F.3d 1376

Regional office decision issued in 1999 were rendered nonfinal by appellant's timely appeal of those decision to Board and thus were not subject to clear and unmistakable error claims. Link v West (1998) 12 Vet App 39

Claim of clear and unmistakable error under 38 USCS § 5109(A) must allege some degree of specificity and since there is neither notice of disagreement nor final Board decision addressing specific claim of clear and unmistakable error raised by veteran, Court of Appeals for Veterans Claims does not have jurisdiction to hear claim for first time. Andre v West (2000) 14 Vet App 7, 2000 US App Vet Claims LEXIS 707, affd (2002, CA FC) 301 F.3d 1354

Court of Appeals for Veterans Claims cannot disturb Board's conclusion that regional office decision did not contain clear and unmistakable error on ground decision was arbitrary, capricious, or otherwise not in accordance with law under 38 USCS § 7261(a)(3)(A) and 38 USCS § 5109A where veteran's claim is request for reweighing of evidence. Simmons v West (2000) 14 Vet App 84, 2000 US App Vet Claims LEXIS 860

Veteran was not entitled to have retroactive VA disability compensation benefits award paid at current rate, rather than at rate of effective date, plus cost of living increases that were authorized throughout time period of award, since doing so would have been violation of government's sovereign immunity, since Congress had not authorized such payments. Sandstrom v Principi (2002) 16 Vet App 481, 2002 US App Vet Claims LEXIS 881, affd (2004, CA FC) 358 F.3d 1376

Board of Veterans' Appeals denial of veteran's claim for clear and unmistakable error was vacated, where claim may have been denied on basis of pleading insufficiency; proper procedure was to dismiss such claim without prejudice. Simmons v Principi (2003) 17 Vet App 104, 2003 US App Vet Claims LEXIS 403

On review of 1983 decision of Board of Veterans' Appeals (Board), Board was bound to apply regulations as they existed in 1983, and new interpretations of 38 USCS § 1111 (former 38 USCS § 311) and 38 USCS § 1153 (former 38 USCS § 353), interpretations to which Secretary of Veterans Affairs also agreed, that apparently conflicted with those regulations could not be basis for clear and unmistakable error for 1983 decision. Jordan v Principi (2003) 17 Vet App 261, 2003 US App Vet Claims LEXIS 721, affd (2005, CA FC) 401 F.3d 1296

Where veteran claimed that prior disability determinations contained clear and unmistakable error, review of veteran's claims of error was statutorily limited to determining whether decision of Board of Veteran's Appeals denying claims was arbitrary, capricious, abuse of discretion, or contrary to law and, thus, plenary review was unavailable to consider underlying decisions. Andrews v Principi (2004) 18 Vet App 177, 2004 US App Vet Claims LEXIS 383

Prior disability determinations contained (before 1990) were not required to expressly address evidence and veteran's bare allegation that prior decisions failed to consider evidence did not assert any specific error in decision of Board of Veteran's Appeals that court could review. Andrews v Principi (2004) 18 Vet App 177, 2004 US App Vet Claims LEXIS 383

Board of Veterans Appeals erred under 38 USCS § 5109A(e) when it proceeded to adjudicate clear and unconvincing error (CUE) claim in first instance without offering to remand question to regional office; moreover, error could not be considered nonprejudicial under 38 USCS § 7261(b)(2) because court could not decide that veteran could not possibly have prevailed on claim had matter been sent back to RO for initial CUE adjudication; thus, Board's decision was vacated and remanded. Huston v Principi (2004) 18 Vet App 395, 2004 US App Vet Claims LEXIS 580, subsequent app (2004) 18 Vet App 405, 2004 US App Vet Claims LEXIS 600, motion gr, dismd (2004, US) 2004 US App Vet Claims LEXIS 713

Determination that there was clear and unconvincing error (CUE) must be based on record and law that existed at time of prior decision; in order for there to be valid claim of CUE, claimant,

There was no clear and unmistakable error in denial of veteran's request for award of special monthly compensation under former 38 USCS § 314(m) (replaced by 38 USCS § 1114) where veteran failed to point to any evidence that reflected that muscles used to move his elbow joint were atrophied or would have become atrophied; veteran's argument that loss of supination and pronation even with movement in joint (unfavorable ankylosis) constituted lack of "natural elbow action" was without merit because under 38 C.F.R. § 3.350(c)(1), "natural elbow action" was defined in terms of muscle atrophy and prospective muscle atrophy. Augustine v Principi (2004) 18 Vet App 505, 2004 US App Vet Claims LEXIS 722

§ 5109B. Expedited treatment of remanded claims

The Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the appropriate regional office of the Veterans Benefits Administration of any claim that is remanded to a regional office of the Veterans Benefits Administration by the Board of Veterans' Appeals.

SUBCHAPTER II. EFFECTIVE DATES

§ 5110. Effective dates of awards
§ 5111. Commencement of period of payment
§ 5112. Effective dates of reductions and discontinuances
§ 5113. Effective dates of educational benefits

§ 5110. Effective dates of awards
cxlvii Discussion and Analysis in the Veterans Benefits Manual

(a) Unless specifically provided otherwise in this chapter [38 USCS §§ 5100 et seq.], the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

(b) (1) The effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release.

   (2) The effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if application is received within one year from such date.

   (3) (A) The effective date of an award of disability pension to a veteran described in subparagraph (B) of this paragraph shall be the date of application or the date on which the veteran became permanently and totally disabled, if the veteran applies for a retroactive award within one year from such date, whichever is to the advantage of the veteran.

       (B) A veteran referred to in subparagraph (A) of this paragraph is a veteran who is permanently and totally disabled and who is prevented by a disability from
applying for disability pension for a period of at least 30 days beginning on the
date on which the veteran became permanently and totally disabled.

(c) The effective date of an award of disability compensation by reason of section 1151
of this title [38 USCS § 1151] shall be the date such injury or aggravation was suffered if
an application therefor is received within one year from such date.

(d) The effective date of an award of death compensation, dependency and indemnity
compensation, or death pension for which application is received within one year from
the date of death shall be the first day of the month in which the death occurred.

(e) (1) Except as provided in paragraph (2) of this subsection, the effective date of an
award of dependency and indemnity compensation to a child shall be the first day of the
month in which the child's entitlement arose if application therefor is received within one
year from such date.

(2) In the case of a child who is eighteen years of age or over and who immediately
before becoming eighteen years of age was counted under section 1311(b) of this title
[38 USCS § 1311(b)] in determining the amount of the dependency and indemnity
compensation of a surviving spouse, the effective date of an award of dependency and
indemnity compensation to such child shall be the date the child attains the age of
eighteen years if application therefor is received within one year from such date.

(f) An award of additional compensation on account of dependents based on the
establishment of a disability rating in the percentage evaluation specified by law for the
purpose shall be payable from the effective date of such rating; but only if proof of
dependents is received within one year from the date of notification of such rating action.

(g) Subject to the provisions of section 5101 of this title [38 USCS § 5101], where
compensation, dependency and indemnity compensation, or pension is awarded or
increased pursuant to any Act or administrative issue, the effective date of such award or
increase shall be fixed in accordance with the facts found but shall not be earlier than the
effective date of the Act or administrative issue. In no event shall such award or increase
be retroactive for more than one year from the date of application therefor or the date of
administrative determination of entitlement, whichever is earlier.

(h) Where an award of pension has been deferred or pension has been awarded at a rate
based on anticipated income for a year and the claimant later establishes that income for
that year was at a rate warranting entitlement or increased entitlement, the effective date
of such entitlement or increase shall be fixed in accordance with the facts found if
satisfactory evidence is received before the expiration of the next calendar year.

(i) Whenever any disallowed claim is reopened and thereafter allowed on the basis of
new and material evidence resulting from the correction of the military records of the
proper service department under section 1552 of title 10 [10 USCS § 1552], or the change,
correction, or modification of a discharge or dismissal under section 1553 of title 10 [10
USCS § 1553], or from other corrective action by competent authority, the effective date
of commencement of the benefits so awarded shall be the date on which an application
was filed for correction of the military record or for the change, modification, or
correction of a discharge or dismissal, as the case may be, or the date such disallowed
claim was filed, whichever date is the later, but in no event shall such award of benefits be retroactive for more than one year from the date of reopening of such disallowed claim. This subsection shall not apply to any application or claim for Government life insurance benefits.

(j) Where a report or a finding of death of any person in the active military, naval, or air service has been made by the Secretary concerned, the effective date of an award of death compensation, dependency and indemnity compensation, or death pension, as applicable, shall be the first day of the month fixed by that Secretary as the month of death in such report or finding, if application therefor is received within one year from the date such report or finding has been made; however, such benefits shall not be payable to any person for any period for which such person has received, or was entitled to receive, an allowance, allotment, or service pay of the deceased.

(k) The effective date of the award of benefits to a surviving spouse or of an award or increase of benefits based on recognition of a child, upon annulment of a marriage shall be the date the judicial decree of annulment becomes final if a claim therefor is filed within one year from the date the judicial decree of annulment becomes final; in all other cases the effective date shall be the date the claim is filed.

(l) The effective date of an award of benefits to a surviving spouse based upon a termination of a remarriage by death or divorce, or of an award or increase of benefits based on recognition of a child upon termination of the child's marriage by death or divorce, shall be the date of death or the date the judicial decree or divorce becomes final, if an application therefor is received within one year from such termination.

(m) [Deleted]

(n) The effective date of the award of any benefit or any increase therein by reason of marriage or the birth or adoption of a child shall be the date of such event if proof of such event is received by the Secretary within one year from the date of the marriage, birth, or adoption.

**Amendments:**


Act Oct. 15, 1962, (effective on the first day of the second calendar month which begins after Oct. 15, 1962, with certain exceptions, as provided by § 7 of such Act, which appears as 38 USCS § 110 note), substituted new section for one which read:

"(a) Unless specifically provided otherwise in this chapter, the effective date of an award of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

"(b) The effective date of an award of disability compensation to a veteran shall be the day following the date of his discharge or release if application therefor is received within one year from such date of discharge or release.

"(c) The effective date of an award of death compensation, dependency and indemnity compensation, or death pension shall be the day after the date of death if application therefor is received within one year from such date of death."
"(d) The effective date of an award of dependency and indemnity compensation to a child shall be the date the child's entitlement arose if application therefor is received within one year from such date the entitlement arose.

"(e) Where a report or a finding of death of any person in the active military, naval, or air service has been made by the Secretary concerned, the effective date of an award of death compensation, dependency and indemnity compensation, or death pension, as applicable, shall be the day after the date fixed by the Secretary as the date of death in such report or finding, if application therefor is received within one year from the date such report or finding has been made; however, such benefits shall not be payable to any person for any period for which such person has received, or was entitled to receive, an allowance, allotment, or service pay of the deceased.

"(f) The effective date of the award of benefits to a widow or of an award or increase of benefits based on recognition of a child, upon annulment of a marriage shall be the date the judicial decree of annulment becomes final if a claim therefor is filed within one year from the date the judicial decree of annulment becomes final; in all other cases the effective date shall be the date the claim is filed."

1970. Act Aug. 12, 1970 (effective 1/1/71, as provided by § 9 of such Act, which appears as 38 USCS § 1114 note), added subsecs. (l) and (m).


1973. Act Dec. 6, 1973 (effective 7/1/74, as provided by § 8 of such Act, which appears as 38 USCS § 1521 note, and applicable as provided by § 6(b) of such Act, which appears as a note to this section), in subsec. (b), designated existing matter as para. (1) and added para. (2).

1974. Act Dec. 21, 1974 (effective 1/1/75, as provided by § 10 of such Act, which appears as 38 USCS § 1521 note), substituted new subsec. (l) for one which read: "(l) The effective date of an award of benefits to a widow based upon termination of a remarriage by death or divorce shall be the date of death or the date the judicial decree or divorce becomes final, if an application therefor is received within one year from such termination."

1975. Act Aug. 5, 1975 (effective 8/1/75, as provided by § 301 of such Act, which appears as 38 USCS § 1114 note), in subsec. (b), redesignated para. (2) as para. (3) and added new para. (2).

1981. Act Oct. 17, 1981 (effective 10/1/81, as provided by § 701(a) of such Act, which appears as 38 USCS § 1114 note), in subsec. (e), substituted "(1) Except as provided in paragraph (2) of this subsection, the " for "The", and added para. (2).

1983. Act Nov. 21, 1983, in subsecs. (k), (l), and (m), substituted "surviving spouse" for "widow".

1984. Act March 2, 1984, in subsec. (m), substituted "section" for "subsection".

Act July 18, 1984 (applicable as provided by § 2501(b) of such Act, which appears as a note to this section), in subsec. (b)(3), designated existing provisions as subpara. (A), and as so designated, inserted "described in subparagraph (B) of this paragraph", and substituted "the veteran applies for a retroactive award" for "an application therefor is received", and added subpara. (B); and substituted subsec. (d) for one which read: "The effective date of an award of death compensation, dependency and indemnity compensation, or death pension, where application is received within one year from the date of death, shall be the first day of the month in which the death occurred."


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3010, as 38 USCS § 5110, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).
Such Act further, in subsec.(j), following "month fixed by", substituted "that Secretary" for "the Secretary".

Such Act further, in subsec. (n), substituted "Secretary" for "Veterans' Administration".

1994. Act Nov. 2, 1994 deleted subsec. (m), which read: "(m) The effective date of an award of benefits to a surviving spouse based upon termination of actions described in section 103(d)(3) of this title shall not be earlier than the date of receipt of application therefor filed after termination of such actions and after December 31, 1970.".

2004. Act Dec. 10, 2004, in subsec. (d), deleted "(1)" preceding "The effective date", substituted "death compensation, dependency and indemnity compensation, or death pension" for "death compensation or dependency and indemnity compensation", and deleted para. (2), which read: "(2) The effective date of an award of death pension for which application is received within 45 days from the date of death shall be the first day of the month in which the death occurred.".

Other provisions:

Application of amendments made by § 6(a) of Act Dec. 6, 1973. Act Dec. 6, 1973, P. L. 93-177, § 6(b), 87 Stat. 696, provided: "Subsection (a) of this section [amending this section] shall apply to applications filed after its effective date [effective Jan. 1, 1974], but in no event shall an award made thereunder be effective prior to such effective date.".

Application of amendments made by § 2501(a) of Act July 18, 1984. Act July 18, 1984, P. L. 98-369, Division B, Title V, Part A, § 2501(b), 98 Stat. 1117, provided: "The amendments made by subsection (a)(1) [amending subsec. (b)(3) of this section] and the provisions of paragraph (2) of section 3010(d) [now section 5110(d)(2)] of title 38, United States Code, as added by subsection (a)(2) shall take effect with respect to applications that are first received after September 30, 1984, for benefits under chapter 15 of title 38, United States Code [38 USCS §§ 1501 et seq.]".

Code of Federal Regulations

Department of Veterans Affairs-Adjudication, 38 CFR Part 3
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References

This section is referred to in 38 USCS §§ 511, 5310, 6103

1. Generally
2. Additional compensation for dependents
3. Additional compensation for increased disability
4. Death compensation
5. Restoration of benefits after annulment of marriage
6. Reopened claims
7. Taxation
8. Judicial review
9. Miscellaneous

1. Generally

"Date of administrative determination of entitlement" in § 5110(g) means date upon which administrative determination is made, not date which administrative process determines that claimant became entitled to benefits, since it is straightforward meaning of phrase and supported by legislative history that statute was intended to obviate necessity of potential beneficiary filing specific claim for new benefit where VA can make determinations of entitlement on its own.
initiative because of previously decided claim on file. McCay v Brown (1997, CA FC) 106 F.3d 1577

Although 38 USCS § 5110(b) provides limited exception to rule found in § 5110(a) governing effective date of award, judgment of Court of Appeals for Veterans Claims that "facts found" did not support retroactive award of 100 percent rating to veteran's date of discharge is affirmed since object of § 5110 is only to determine date from which compensation shall be awarded, not to determine rating or level of compensation that will apply from time award is deemed effective. Meeks v West (2000, CA FC) 216 F.3d 1363

Failure by Department of Veterans Affairs to provide veteran with notice of eligibility for benefits as required under 38 USCS §§ 7722(b) and (c)(1) could not serve as basis for tolling one-year filing deadline of 38 USCS § 5110(b)(1); unequivocal command in 38 USCS § 5110(a) was that effective date of benefits could not be earlier than filing of application for such benefits and further, 38 USCS § 5110 did not contain statute of limitations that could have been tolled, but merely indicated when benefits could begin and provided for earlier date under certain limited circumstances. Andrews v Principi (2003, CA FC) 351 F.3d 1134

Honorable discharge as of actual date of discharge issued pursuant to findings of Board of Review acting under former 38 USC § 693b rendered its recipient eligible for benefits from date of his separation from military or naval service. 1945 ADVA 665

Appellant who sought to have effective date of his service-connection claim relate back to 1954 when his original application was filed failed to overcome presumption of constitutionality of statute under rational basis test; Congress decided that veterans awarded disability compensation based on claim filed within one year after separation should receive retroactive benefits, which appears to give veterans who are disabled some time after discharge without losing any possible benefits, and obvious reason for not extending benefit for period longer than one year would be to ease financial burden on nation and administrative burden on Secretary, and it is reasonable to believe that evidentiary findings would become more difficult after one year. Wright v Gober (1997) 10 Vet App 343

Language of subsection (g) is clear in explicitly precluding award of retroactive benefits beyond one-year period provided for in that section and is not subject to equitable tolling. Viglas v Brown (1994) 7 Vet App 1

Phrase "application therefor" means application which resulted in award of disability compensation that is to be assigned effective date under 38 USCS § 5110 and is not limited to just filing of application for original claim. Livesay v Principi (2001) 15 Vet App 165, 2001 US App Vet Claims LEXIS 1009

Where widow of veteran sought earlier effective date for her claim of entitlement for benefits of dependency and indemnity compensation (DIC) benefits, widow could not obtain relief through equitable tolling of 38 USCS § 5110(d)(1) based on fact that Secretary of Veterans Affairs may not have properly acted in accordance with 38 USCS §§ 7722(c) or (d). Kay v Principi (2002) 16 Vet App 529, 2002 US App Vet Claims LEXIS 998

2. Additional compensation for dependents

Benefits are payable retroactively upon correction of error by Veterans' Administration [now Department of Veterans Affairs] if correction is based on evidence already received when error was made; though retroactive correction of disability rating using evidence in file at time of error adjusts degree of disability and qualifies veteran for additional allowance for dependents, benefits are not payable for any period prior to date Veterans' Administration [now Department of Veterans Affairs] received evidence showing dependents. 1959 ADVA 963

Payments of additional compensation on account of dependents after establishing veteran's disability rating were authorized under Administration Instruction 1, 38 USCS § 3011 [now 38 USCS § 5111], retroactively to effective date of any initial entitling rating made on or after June 8, 1960. 1964 ADVA 987

Where widow of veteran argued that, because she asserted that her husband died from "cancer" in her 1975 dependency and indemnity compensation claim, that claim necessarily
included claim for non-Hodgkin's lymphoma and that under 38 C.F.R. § 3.313 she was eligible for earlier effective date based on 38 C.F.R. § 3.309(e), that argument was without merit; at time of 1976 adjudication, evidence established that widow's claim was one for Hodgkin's disease, and, therefore, evidence did not reasonably raise any claims for cause of death by types of cancer other than Hodgkin's disease. Bonner v Nicholson (2005) 19 Vet App 188, 2005 US App Vet Claims LEXIS 408

Under 38 C.F.R. § 3.114(a)(3), where widow of veteran did not file her informal claim for dependency and indemnity compensation (DIC) until more than one year after 38 C.F.R. § 3.309(e) was enacted in February 1994, earliest possible effective date available to her for her DIC claim was November 1, 1994, date awarded. Bonner v Nicholson (2005) 19 Vet App 188, 2005 US App Vet Claims LEXIS 408

3. Additional compensation for increased disability

Statute is clear as to what "increase" means; when it states that earliest effective date of award of increased compensation shall be earliest date as of which it is ascertainable that increase in disability had occurred, if application were received within one year from such date, only cognizable increase is one to next disability level. Hazan v Gober (1997) 10 Vet App 511

Statute rather than 38 CFR § 3.157(b) is proper standard for determining effective date of increased disability compensation and in instant case required that Board determine whether it was ascertainable that increase in disability had occurred as early as October 1985, one year prior to veteran's claim for increased compensation, particularly since as early as June 1984 veteran had pending claim for compensation and VA examination strongly suggested that he was unemployable. Wood v Derwinski (1991) 1 Vet App 367

Plausible basis for Board's determination of earliest date on which veteran's increased rating for psychiatric disability consisted of VA examination of that date. Gonzales-Soto v Principi (1992) 3 Vet App 330

Effective date for increased compensation due to increased disability was properly fixed as date of receipt of veteran's request for reopening claim since it was earliest date as of which it was factually ascertainable that increased disability had occurred. Alexander v Derwinski (1992) 3 Vet App 83

Evidence in claimant's file which demonstrates that increase in disability was ascertainable up to one year prior to claimant's submission of claim for VA compensation should be dispositive on question of effective date of any award that ensues. Quarles v Derwinski (1992) 3 Vet App 129

Veteran submitted informal claim for total disability rating based on individual unemployability and Board erred in not considering it in determining earliest date by which veteran's disability was ascertainable. Servello v Derwinski (1992) 3 Vet App 196

Board erred in denying veteran entitlement to earlier effective date for disability on grounds that veteran failed to respond to order to report for medical examination where VA files contained at least two other addresses than one to which order was sent and Secretary failed to demonstrate that address to which order was sent was latest address of record or that veteran lacked adequate reason or good cause for failing to report for scheduled examination. Hyson v Brown (1993) 5 Vet App 262

Board's finding that veteran's disability had not increased in severity in year prior to his claim was supported by plausible basis in record; record on appeal contained no medical records suggesting increase in such time period. Scott v Brown (1994) 7 Vet App 184

Vietnam veteran exposed to agent orange was entitled to retroactive benefits to one year prior to his May 1990 application for benefits for dermatofibrosarcoma protuberance since statute allows it; regulation allowing grace period only if claimant met eligibility criteria on its 1985 effective date would not be applied since it was not promulgated until after veteran's application, and such application does not give effect to Congress' intent to provide grace period for filing claims. McCay v Brown (1996) 9 Vet App 183, affd (1997, CA FC) 106 F.3d 1577

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Effective date for appellant's increased rating for schizophrenia was governed by later of date of increase or date claim was received; for date of earlier-received claim to be effective date, there must be factually ascertainable increase that occurred more than one year prior to receipt of claim for increase. Harper v Brown (1997) 10 Vet App 125

Because Board of Veterans' Appeals improperly failed to consider whether all evidence of record, including evidence predating Board's 1985 decision, showed an ascertainable increase in severity of veteran's then 50 percent rated service-connected post-concussion syndrome, Board's determination that February 24, 1986 was earliest possible effective date for veteran's post-concussion syndrome is clearly erroneous under 38 USCS § 5110. Swanson v West (1999) 12 Vet App 442, 1999 US App Vet Claims LEXIS 548, motion gr, op withdrawn, app dismd (1999) 13 Vet App 197, 1999 US App Vet Claims LEXIS 1358

There is plausible basis in record for Board's finding that veteran was not entitled to earlier effective date for total disability rating based on individual unemployability pursuant to 38 USCS § 5110(b)(2) where record on appeal does not contain any medical evidence that veteran was entitled to disability rating based on individual unemployability prior to date found by Board, veteran's application did not contain prior Social Security award, and Social Security award was not submitted until more than four years after veteran filed claim. Hurd v West (2000) 13 Vet App 449, 2000 US App Vet Claims LEXIS 354, affd (2001, CA FC) 7 Fed Appx 928

4. Death compensation

Children of veteran were entitled to death benefits effective on day following date of last payment to widow who forfeited her rights to death benefits by submitting false and fraudulent evidence in connection with her original claim. 1936 ADVA 389

Death compensation was payable to child from day following date of veteran's death if child was otherwise entitled, where widow who had filed claim died without completing such claim. 1944 ADVA 551

Claim filed just prior to one year after report of veteran's death during World War II was timely, even though death had occurred more than one year prior to filing, and compensation was payable to widow under former 38 USCS § 733. 1946 ADVA 732

5. Restoration of benefits after annulment of marriage

When remarriage of widow or child of veteran that terminated benefits is later declared voidable, restoration of such person to benefits rolls is not to antedate date of decree of nullity; restoration of person involved in void remarriage is not to precede date of separation following discovery that marriage was void, but void nature of such remarriage is to be established by decree of court of competent jurisdiction except where competent authority finds facts so clear as to permit determination by Veterans' Administration [now Department of Veterans Affairs] of voidness without formal decree of nullity. 1949 ADVA 824

Widow who remarried and lost benefits was precluded from their restoration unless her remarriage was void, rather than voidable, and such preclusion applied to dependency and indemnity compensation from January 1, 1917; concerning compensation and pension, benefits were not payable on any claim based on annulment of voidable remarriage unless claim and supporting evidence were received by agency before January 1, 1958. 1959 ADVA 962

VA had no duty to notify widow of eligibility for reinstated pension benefits based on divorce from second husband in absence of any evidence that VA knew or should have known of her changed status making her again eligible for pension. Lyman v Brown (1993) 5 Vet App 194

6. Reopened claims

Department of Veterans Affairs' regulatory interpretation of its statutory authority for denying earlier effective date for service connection of veteran's post-traumatic stress disorder than date he reopened for new and material evidence was upheld as reasonable interpretation by agency under Chevron deference. Sears v Principi (2003, CA FC) 349 F.3d 1326, cert den (2004) 541 US 960, 158 L Ed 2d 401, 124 S Ct 1723
Denial of veteran’s claim for earlier effective date for his total disability based on individual unemployability was proper because, on claim to reopen, effective date could not predate application for claim to reopen, absent showing of clear and unmistakable error. Leonard v Nicholson (2005, CA FC) 405 F.3d 1333

Award granted on reopened claim may not be made effective prior to date of reopened claim. Lapier v Brown (1993) 5 Vet App 215

Effective date for total rating based on individual unemployability due to service-connected disability was properly set at date application for reconsideration of prior final BVA decision was received by VA. Firek v Derwinski (1992) 3 Vet App 145

Board’s finding that only appropriate effective date of award of service connection for veteran’s psychiatric disorder could be date of receipt of claim to reopen was clearly erroneous based on undetermined status of clear and unmistakable error as to earlier RO decision confirming earlier RO decision denying service connection and possibility that that decision did not become final. Mason v Brown (1995) 8 Vet App 44

Veteran was not entitled to earlier effective date for award of service connection for schizophrenia based on 1984 upgrade of his discharge since grant of service connection in 1993, following appellant’s 1989 reopening, was not based on 1984 upgrade of discharge, but on newly presented medical evidence that he had diagnoses of schizophrenia within year of discharge from active duty; grant of service connection rested on medical evidence submitted many years after character of appellant’s discharge was changed and not because of that change. Washington v Gober (1997) 10 Vet App 391

Effective date of grant of service connection for chronic subluxation and dislocation of left shoulder and internal derangement of right knee was June 1991 since appellant’s current disability was not verified by VA medical personnel until 1991 when he reopened his claim. Wamhoff v Brown (1996) 8 Vet App 517

Veteran was not entitled to earlier effective date for service connection for schizophrenia based on 1984 upgrade of his discharge since grant of service connection in 1993 was not based on 1984 upgrade of appellant’s discharge, but on newly presented medical evidence that he had diagnoses of schizophrenia and had exhibited manifestations within year after his discharge from active duty. Washington v Gober (1997) 10 Vet App 391

Veteran’s widow was not entitled to earlier effective date for death pension benefits award based on change of law in other case, since her claim was not pending at time of other decision but reopened based on submission of new and material evidence following final disallowance. Smith v West (1998) 11 Vet App 134

Board of Veterans’ Appeals committed clear error in assigning effective date of claim as September 18, 1990 instead of September 12, 1988 where claimant’s skin cancer existed at time case was reopened on September 12, 1988; there was no final decision on 1988 reopened claim even though August 1990 decision explicitly denied claim since decision says claim is neither fully developed nor ripe for review, and implicitly remanded claim for further development; and only plausible basis for determining effective date is 38 USCS § 5110(a)(2). Perry v West (1999) 12 Vet App 365, 1999 US App Vet Claims LEXIS 254

Veteran’s effective date for service connection for dissociative identity disorder under 38 USCS § 5110(a) is date veteran submitted claim and not earlier date when regional office denied veteran entitlement to service connection for borderline personality disorder since regional office decision became final when veteran failed to file timely appeal. Melton v West (2000) 13 Vet App 442, 2000 US App Vet Claims LEXIS 343

Denial of veteran’s claim for effective date earlier than October 26, 1995, for service connection for post-traumatic stress disorder was proper as Board of Veterans Appeals could not reach back to date of original claim as possible effective date for award of service-connected benefits that was predicated on reopened claim. Sears v Principi (2002) 16 Vet App 244, 2002 US App Vet Claims LEXIS 604, affd (2003, CA FC) 349 F.3d 1326, cert den (2004) 541 US 960, 158 L Ed 2d 401, 124 S Ct 1723

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Where reopening of veteran's claim due to new and material evidence would not have resulted in earlier effective date for veteran's award of rating of total disability based on individual unemployability (TDIU), and veteran's appeal was not predicated upon clear and unmistakable error (CUE), decision of Board of Veterans' Appeals (BVA) denying earlier effective date was affirmed. Leonard v Principi (2004) 17 Vet App 447, 2004 US App Vet Claims LEXIS 81, affd (2005, CA FC) 2005 US App LEXIS 7407

Veteran filed only one claim for service connection for hearing loss, even if there were two theories advanced; therefore, no claim remained pending after Board of Veterans Appeals (BVA) rejected at least one of veteran's theories and, because veteran did not demonstrate that BVA's denial of earlier effective date under 38 USCS § 5110(a) was clearly erroneous under 38 USCS § 7261(a)(4), BVA decision was affirmed. Bingham v Principi (2004) 18 Vet App 470, 2004 US App Vet Claims LEXIS 547

7. Taxation

Payments initially received by former serviceman as retirement pay were excluded from his taxable income as payments for service-connected disability following retroactive increase in disability benefits. Strickland v Commissioner (1976, CA4) 540 F.2d 1196, 76-1 USTC ¶ 9291, 37 AFTR 2d 998

Plaintiff widow, survivor of military veteran, was granted tax refund relief for funds withheld from her Survivor Benefit Plan receipts for period of time for which she was retroactively entitled to Dependency and Indemnity Compensation benefits, which were nontaxable under 38 USCS § 5301. Ebert v United States (2005) 66 Fed Cl 287, 2005-2 USTC ¶ 50495, 96 AFTR 2d 5163

8. Judicial review

The decision of the Administrator [now Secretary] became "final and conclusive" within the meaning of 38 USCS § 211(a), and the District Court correctly ruled that it lacked jurisdiction to review that decision, where, based on a "Difference of Opinion" under 38 C.F.R. 3.105(b), corrective action was taken on a serviceman's widow's claim for dependency and indemnity compensation benefits, previously and finally disallowed, but reopened by the Administrator [now Secretary] who decided to allow benefits effective as of a later date. Sibonga v Administrator of Veterans Affairs (1972, App DC) 147 US App DC 370, 458 F.2d 789, cert den (1972) 409 US 952, 34 L Ed 2d 224, 93 S Ct 298, reh den (1972) 409 US 1068, 34 L Ed 2d 521, 93 S Ct 564

Decision of Administrator [now Secretary] not to pay certain benefits retroactively is not subject to judicial review. Taylor v United States (1974, WD Ark) 379 F Supp 642


Decision by Board of Veterans Appeals that applied more stringent standard for disability rating under pre-1999 Disability Code, which required that tinnitus be "persistent" as opposed to post-1999 Disability Code, which required condition to be "recurring," was arbitrary and capricious and matter was remanded for reassessment and for assessment of effective date before June 1999 based upon pre-1999 Disability Code. Smith v Principi (2003) 17 Vet App 168, 2003 US App Vet Claims LEXIS 426, revd, remanded (2004, CA FC) 108 Fed Appx 628

Where question of whether appellant's claim remained pending was reasonably raised before Board of Veterans' Appeals, Board's failure to address whether claim remained open rendered its statement of reasons or bases inadequate. Acosta v Principi (2004) 18 Vet App 53, 2004 US App Vet Claims LEXIS 271

Veteran's argument for earlier effective date for benefits-based on application of equitable-tolling principles to 38 USCS § 5110(b)(3)(A) and (B) and 38 C.F.R. § 3.400(b)(1)(ii)(B)-failed because 38 USCS § 5110 did not contain statute of limitations but merely

9. Miscellaneous

Failure by Board of Veterans' Appeals to consider presumptive eligibility in its initial decision did not create "incomplete adjudication" that left veteran's claim open; under 38 USCS §§ 7104 and 7103, finality attached once claim for benefits was disallowed, not when particular theory was rejected. Bingham v Nicholson (2005, CA FC) 421 F.3d 1346

Upon final disallowance of claim, provisions of applicable regulations restore service connection based on definite determination of difference of opinion, effective only at date of approval, notwithstanding that regional office possessed same evidence at time of severance of service connection which was ultimately considered under appropriate regulation. 1960 ADVA 970

DIC claimant was not entitled to effective date earlier than Board established, even though Secretary erroneously failed to award appellant increase in DIC over 20 years earlier, since claimant did not file claim with Secretary earlier and Secretary was not required to out potential beneficiaries. Wells v Principi (1992) 3 Vet App 307

Board properly determined that benefits were payable from date veteran filed his claim, not from earlier date when he first contacted veterans' outreach center since there was no evidence that earlier contact was for purpose of applying for benefits. KL v Brown (1993) 5 Vet App 205

Fact that widow may have received erroneous information from VA employee regarding her eligibility for DIC benefits did not entitle her to earlier effective date based on estoppel since statute specifically provides that effective date is date of application. McTighe v Brown (1994) 7 Vet App 29

Veteran exposed to agent orange was entitled to retroactive benefits for one-year period before his application for benefits for soft tissue sarcoma under 1991 regulation with retroactive effective date of 1985 providing presumptive service-connection for soft tissue sarcomas manifested after service based on exposure to herbicides containing dioxin; veteran was not required to meet eligibility criteria as of 1985 effective date, since law did not change until regulation was promulgated in 1991, and veteran filed his claim before law changed. McCay v Brown (1996) 9 Vet App 183, affd (1997, CA FC) 106 F.3d 1577

Board's decision denying appellant entitlement to effective date of service connected disorder retroactive to 1984 had plausible basis in record which indicated that appellant withdraw his posttraumatic stress disorder claim that year; social worker assigned to evaluate appellant for PTSD in that year made contemporaneous report indicating that PTSD evaluation was apparently scheduled in error as appellant reported he had no emotional problems and had not applied for such disability, physical but not psychological examination was conducted that year, and RO adjudicated only ankle claim and appellant did not object to Board's not adjudicating another issue. Hanson v Brown (1996) 9 Vet App 29

Effective date for veteran's award of service connection for mitochondrial myopathy manifested by disabilities in other than lower extremities was not earlier than date he was hospitalized for muscle pain and weakness in all muscle groups, even though it was not until for years later that analysis of appellant's second muscle biopsy resulted in actual diagnosis of mitochondrial myopathy, since earlier rating decision was not product of clear and unmistakable error; appellant suffered from ailment that was apparently obscure in nature and difficult to diagnose. Williams v Gober (1997) 10 Vet App 447

Board of Veterans' Appeals did not err in concluding claimant was not entitled to effective date earlier than March 30, 1993 pursuant to 38 USCS § 5110 where March 30, 1993 was date claimant filed formal application for pension and compensation benefits; even though medical evidence did exist that anxiety disorder was related to service-connected gastric disorder prior to the revisions and terms and conditions of the Matthew Bender Master Agreement.
March 30, 1993, effective date of award of service connection is not based on date of earliest medical evidence demonstrating causal connection, and mere receipt of medical records cannot be construed as informal claim; although filed application for secondary service connection of mental disorder relating to service-connected gastric condition in 1964, 1964 date cannot serve as effective date since regional office determined anxiety disorder was non-service-connected condition, claimant did not appeal and determination became final, and claimant has not alleged clear and unmistakable error; and although 1967 Social Security Administration report indicated nervous condition was probably related to stomach condition, report was not submitted to VA until February 1994. Lalonde v West (1999) 12 Vet App 377, 1999 US App Vet Claims LEXIS 313

There is plausible basis in record for Board's determination of effective date of September 1, 1967 pursuant to 38 USCS § 5110(a) where claim for dependency and indemnity compensation was not filed until 1973, veteran died July 14, 1961, and effective date granted was date applicant filed claim for Social Security Administration benefits Schoolman v West (1999) 12 Vet App 307, 1999 US App Vet Claims LEXIS 148

While 38 USCS § 5110(b)(1) allows for compensation back to date of discharge if application is filed within one year of discharge, it does not require that 100 percent rating ultimately awarded must be retroactive if rating level does not accord with facts found Meeks v West (1999) 12 Vet App 352, 1999 US App Vet Claims LEXIS 243, affd (2000, CA FC) 216 F.3d 1363

Board of Veterans' Appeals was required to make findings as to date entitlement arose, 38 USCS § 5110(a), and earliest date as of which it is factually ascertainable that increase in disability had occurred if application or claim had been received within one year after such date, 38 USCS § 5110(b)(2), 38 C.F.R. § 3.400(o)(2). Thomas v Principi (2002) 16 Vet App 197, 2002 US App Vet Claims LEXIS 485

Regardless of whether Secretary of Veterans Affairs complied with requirements of 38 USCS § 7722 to provide benefits information and assistance to veteran, § 7722 did not provide any basis for equitably tolling statutorily mandated and unequivocal period for filing claims for benefits under 38 USCS § 5110(b)(1). Andrews v Principi (2002) 16 Vet App 309, 2002 US App Vet Claims LEXIS 677, affd (2003, CA FC) 351 F.3d 1134

Any authority of Secretary of Veterans Affairs to provide equitable relief under 38 USCS § 503 was not subject to judicial review, and thus, authority under § 503 did not extend to court nor permit court to apply equitable tolling of statutorily mandated and unequivocal period for filing claims for benefits under 38 USCS § 5110(b)(1). Andrews v Principi (2002) 16 Vet App 309, 2002 US App Vet Claims LEXIS 677, affd (2003, CA FC) 351 F.3d 1134

§ 5111. Commencement of period of payment

cxlvii Discussion and Analysis in the Veterans Benefits Manual

(a) Notwithstanding section 5110 of this title [38 USCS § 5110] or any other provision of law and except as provided in subsection (c) of this section, payment of monetary benefits based on an award or an increased award of compensation, dependency and indemnity compensation, or pension may not be made to an individual for any period before the first day of the calendar month following the month in which the award or increased award became effective as provided under section 5110 of this title [38 USCS § 5110] or such other provision of law.

(b) (1) Except as provided in paragraph (2) of this subsection, during the period between the effective date of an award or increased award as provided under section 5110 of this title [38 USCS § 5110] or other provision of law and the commencement of the period of payment based on such award as provided under subsection (a) of this section, an individual entitled to receive monetary benefits shall be deemed to be in receipt of such benefits for the purpose of all laws administered by the Secretary.
(2) If any person who is in receipt of retired or retirement pay would also be eligible to receive compensation or pension upon the filing of a waiver of such pay in accordance with section 5305 of this title [38 USCS § 5305], such waiver shall not become effective until the first day of the month following the month in which such waiver is filed, and nothing in this section shall prohibit the receipt of retired or retirement pay for any period before such effective date.

(c) (1) This section shall apply to payments made pursuant to section 5310 of this title [38 USCS § 5310] only if the monthly amount of dependency and indemnity compensation or pension payable to the surviving spouse is greater than the amount of compensation or pension the veteran would have received, but for such veteran's death, for the month in which such veteran's death occurred.

(2) In the case of a temporary increase in compensation for hospitalization or treatment where such hospitalization or treatment commences and terminates within the same calendar month, the period of payment shall commence on the first day of such month.

(d) For the purposes of this section, the term "award or increased award" means--

(1) an original or reopened award; or

(2) an award that is increased because of an added dependent, increase in disability or disability rating, or reduction in income.

Amendments:

1984. Act March 2, 1984 (effective 10/1/83, as provided by § 114 of such Act, which appears as 38 USCS § 1112 note), in subsec. (c), designated the existing provisions as para. (1), and added para. (2).

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3011, as 38 USCS § 5111, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, in subsec. (b)(1), substituted "administered by the Secretary" for "administered by the Veterans' Administration".

Other provisions:

Application of section. Act Sept. 8, 1982, P. L. 97-253, Title IV, § 401(b), 96 Stat. 802, provides: "Section 3011 [now section 5111] of title 38, United States Code, as added by subsection (a), shall apply to awards and increased awards the effective dates of which are after September 30, 1982.".

Code of Federal Regulations

Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Amount of survivor benefit plan annuity is reduced by amount of dependency and indemnification contribution and corresponding refund of survivor benefit plan contribution is paid to beneficiary where, upon service member's death, surviving spouse is eligible for both survivor benefit plan annuity and Veterans Administration dependency and indemnity compensation; despite fact that under 38 USCS § 3011 [now 38 USCS § 5111], dependency and indemnity compensation payments are not effective until first of month following month of service member's death, beneficiary is deemed eligible for and in receipt of dependency and indemnity compensation payments for purposes of survivor benefit plan annuity computation and refund of survivor benefit plan contributions under 10 USCS § 1450. (1984) 63 Comp Gen 536
§ 5112. Effective dates of reductions and discontinuances

cxlviii Discussion and Analysis in the Veterans Benefits Manual

(a) Except as otherwise specified in this section, the effective date of reduction or discontinuance of compensation, dependency and indemnity compensation, or pension shall be fixed in accordance with the facts found.

(b) The effective date of a reduction or discontinuance of compensation, dependency and indemnity compensation, or pension--

(1) by reason of marriage or remarriage, or death of a payee shall be the last day of the month before such marriage, remarriage, or death occurs;

(2) by reason of marriage, annulment, divorce, or death of a dependent of a payee shall be the last day of the month in which such marriage, annulment, divorce, or death occurs;

(3) by reason of receipt of active service pay or retirement pay shall be the day before the date such pay began;

(4) by reason of--

(A) change in income shall (except as provided in section 5312 of this title [38 USCS § 5312]) be the last day of the month in which the change occurred; and

(B) change in corpus of estate shall be the last day of the calendar year in which the change occurred;

(5) by reason of a change in disability or employability of a veteran in receipt of pension shall be the last day of the month in which discontinuance of the award is approved;

(6) by reason of change in law or administrative issue, change in interpretation of a law or administrative issue, or, for compensation purposes, a change in service-connected or employability status or change in physical condition shall be the last day of the month following sixty days from the date of notice to the payee (at the payee's last address of record) of the reduction or discontinuance;

(7) by reason of the discontinuance of school attendance of a payee or a dependent of a payee shall be the last day of the month in which such discontinuance occurred;

(8) by reason of termination of a temporary increase in compensation for hospitalization or treatment shall be the last day of the month in which the hospital discharge or termination of treatment occurred, whichever is earlier;

(9) by reason of an erroneous award based on an act of commission or omission by the beneficiary, or with the beneficiary's knowledge, shall be the effective date of the award; and

(10) by reason of an erroneous award based solely on administrative error or error in judgment shall be the date of last payment.

(c) [Deleted]

Amendments:

1962. Act Oct. 15, 1962 (effective as provided by § 7 of such Act, which appears as 38 USCS § 110 note) substituted subsec. (b) for former subsecs. (b) and (c) which read:

"(b) Where compensation, dependency and indemnity compensation, or pension has been awarded and a reduction or discontinuance is thereafter effected as to rates, such reduction
"(c) The effective date of a reduction or discontinuance of compensation, dependency and indemnity compensation, or pension—

"(1) by reason of death, shall be the date of death;

"(2) by reason of marriage or remarriage, shall be the day before the date of marriage or remarriage;

"(3) by reason of attaining age eighteen (or twenty-one, as applicable), shall be the day before the eighteenth (or twenty-first) birthday;

"(4) by reason of fraud on the part of the beneficiary, or with his knowledge, shall be the effective date of the award; and

"(5) by reason of receipt of active service pay or retirement pay, shall be the day before the date such pay began."

1966. Act Nov. 2, 1966 (effective 1st day of 2d calendar month following 11/2/66, as provided by § 7 of such Act, which appears as 38 USCS § 1315 note), in subsec. (b)(4), inserted ", except that when a change in income is due to an increase in payments under a public or private retirement plan or program the effective date of a reduction or discontinuance resulting therefrom shall be the last day of the calendar year in which the change occurred".

1968. Act March 28, 1968 (effective on the 1st day of the 1st calendar month following the month of initial payment of increases in monthly insurance benefits provided by Social Security Amendments of 1967 [Act Jan. 2, 1968, P. L. 90-248, 81 Stat. 821], as provided by § 6(b) of such Act, which appears as 38 USCS § 1521 note), substituted subsec. (b)(4) for one which read: "by reason of change in income or corpus of estate shall be the last day of the month in which the change occurred, except that when a change in income is due to an increase in payments under a public or private retirement plan or program the effective date of a reduction or discontinuance resulting therefrom shall be the last day of the calendar year in which the change occurred;".

1971. Act Dec. 15, 1971 (effective 1/1/72, as provided by § 6 of such Act, which appears as 38 USCS § 1521 note), in subsec. (b)(2), substituted "calendar year" for "month".

1976. Act Sept. 30, 1976 (effective 10/1/76, as provided by § 406 of such Act, which appears as 38 USCS § 1101 note), in subsec. (b), in para. (2), inserted "annulment," wherever appearing, and in para. (9), substituted "the beneficiary's" for "his".

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as 38 USCS § 101 note), substituted new subsec. (b)(4) for one which read: "by reason of change in income or corpus of estate shall be the last day of the calendar year in which the change occurred;".

1982. Act Sept. 8, 1982 (applicable as provided by § 402(b) of such Act, which appears as a note to this section), in subsec. (b)(2), substituted "month" for "calendar year".

1986. Act Oct. 28, 1986, in subsec. (b)(6), substituted "the payee's" for "his"; and added subsec. (c)

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3012, as 38 USCS § 5112, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

2001. Act Dec. 27, 2001, deleted subsec. (c), which read: "(c) The effective date of a discontinuance under section 5503(b)(1)(A) of this title of pension, compensation, or emergency officers' retirement pay by reason of hospital treatment or institutional or domiciliary care shall be the last day of the first month of such treatment or care during which
the value of the veteran's estate, as determined under such section, equals or exceeds $1,500."

Other provisions:

Application of Sept. 8, 1982 amendment. Act Sept. 8, 1982, P. L. 97-253, Title IV, § 402(b), 96 Stat. 802, provided: "The amendment made by subsection (a) [amending subsec. (b)(2) of this section] shall apply with respect to any marriage, annulment, divorce, or death that occurs after September 30, 1982.".

Code of Federal Regulations

Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

1. Generally

Survivors may not pursue disability compensation claims of veteran, even as heirs to veteran's estate since veteran's entitlement to payment of disability compensation termination on last day of month preceding veteran's death. Haines v West (1998, CA FC) 154 F.3d 1298, cert den (1999) 526 US 1016, 143 L Ed 2d 347, 119 S Ct 1249 and (criticized in Terry v Principi (2004, CA FC) 367 F.3d 1291

Veteran's claim for compensation under 38 USCS § 1110 was extinguished by his death, notwithstanding CVA's procedural rules expressly allowing substitution; issue of substitution is separate from standing, allowing derivative actions to proceed after death of veteran-claimant would render section 5112's express termination of payment of disability compensation virtually meaningless, and Congress established in section 5121 singular exception to this rule in form of wholly separate procedure for designated survivors to recover limited amounts of disability benefits due and unpaid at veteran's death. Richard ex rel. Richard v West (1998, CA FC) 161 F.3d 719 (criticized in Terry v Principi (2004, CA FC) 367 F.3d 1291)

Date of last payment is discontinuance or ending date for awards based upon either erroneous action or erroneous or improper application of law or administrative instructions. 1943 ADVA 544

Proper date of reduction or discontinuance for erroneous payment due to mistake of fact is commencing date of erroneous payment under 38 USCS § 3012 [now 38 USCS § 5112], and for erroneous payment due to mistake of law, proper date of reduction or discontinuance is date of last payment. 1961 ADVA 975

2. Remarriage

Widow, otherwise eligible, of veteran who died after June 28, 1934 was entitled to benefits under former 38 USCS 503-507 only if proper claim was filed by her before her remarriage, and such remarriage terminated right to payment as of day before remarriage. 1936 ADVA 372

Even if appellant had actually reported her remarriage to VA, it did not absolve her of responsibility of reading regulations that were included in her initial DIC package nor did it validate cashing checks subsequently sent to her. Jordan v Brown (1997) 10 Vet App 171

§ 5113. Effective dates of educational benefits

cxlix Discussion and Analysis in the Veterans Benefits Manual

(a) Except as provided in subsections (b) and (c), effective dates relating to awards under chapters 30, 31, 32, 34, and 35 of this title [38 USCS §§ 3001 et seq., 3100 et seq., 3201 et seq., 3451 et seq., and 3500 et seq.] or chapter 106 of title 10 [10 USCS §§ 2131 et seq.]
shall, to the extent feasible, correspond to effective dates relating to awards of disability compensation.

(b) (1) When determining the effective date of an award under chapter 35 of this title [38 USCS §§ 3500 et seq.] for an individual described in paragraph (2) based on an original claim, the Secretary may consider the individual's application as having been filed on the eligibility date of the individual if that eligibility date is more than one year before the date of the initial rating decision.

(2) An individual referred to in paragraph (1) is an eligible person who--

(A) submits to the Secretary an original application for educational assistance under chapter 35 of this title [38 USCS §§ 3500 et seq.] within one year of the date that the Secretary makes the rating decision;

(B) claims such educational assistance for pursuit of an approved program of education during a period preceding the one-year period ending on the date on which the application was received by the Secretary; and

(C) would have been entitled to such educational assistance for such course pursuit if the individual had submitted such an application on the individual's eligibility date.

(3) In this subsection:

(A) The term "eligibility date" means the date on which an individual becomes an eligible person.

(B) The term "eligible person" has the meaning given that term under section 3501(a)(1) of this title [38 USCS § 3501(a)(1)] under subparagraph (A)(i), (A)(ii), (B), or (D) of such section by reason of either (i) the service-connected death or (ii) service-connected total disability permanent in nature of the veteran from whom such eligibility is derived.

(C) The term "initial rating decision" means with respect to an eligible person a decision made by the Secretary that establishes (i) service connection for such veteran's death or (ii) the existence of such veteran's service-connected total disability permanent in nature, as the case may be.

(c) The effective date of an adjustment of benefits under any chapter referred to in subsection (a) of this section, if made on the basis of a certification made by the veteran or person and accepted by the Secretary under section 3680(g) of this title [38 USCS § 3680(g)], shall be the date of the change.

Amendments:

1966. Act March 3, 1966 (effective 3/3/66, as provided by § 12(a) of such Act, which appears as 38 USCS § 3451 note), substituted "34" for "33".


1989. Act Dec. 18, 1989 substituted "(a) Except as provided in subsection (b) of this section, effective for "Effective"; and added subsec. (b).


Act May 7, 1991 redesignated this section, formerly 38 USCS § 3013, as 38 USCS § 5113.

Act Aug. 6, 1991 amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).
2000. Act Nov. 1, 2000 (applicable as provided by § 113(b) of such Act, which appears as a note to this section), in subsec. (a), substituted "subsections (b) and (c)" for "subsection (b) of this section", redesignated subsec. (b) as subsec. (c), and added new subsec. (b).

Other provisions:

Applicability of Nov. 1, 2000 amendments. Act Nov. 1, 2000, P. L. 106-419, Title I, Subtitle B, § 113(b), 114 Stat. 1832, provides:

"The amendments made by subsection (a) [amending this section] shall apply to applications first made under section 3513 of title 38, United States Code, that--"

"(1) are received on or after the date of the enactment of this Act; or"

"(2) on the date of the enactment of this Act, are pending (A) with the Secretary of Veterans Affairs, or (B) exhaustion of available administrative and judicial remedies.".

Code of Federal Regulations

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Regulation precluding retroactive induction into chapter 31 vocational rehabilitation program for period in which veteran received educational benefits under another VA program is impermissibly restrictive to extent it imposes limits on veteran's receipt of such benefits to period that does not correspond to effective date of disability award, as language § 5113(a) clearly commands. Bernier v Brown (1995) 7 Vet App 434, app dismd without op (1995, CA FC) 73 F.3d 377, reported in full (1995, CA FC) 1995 US App LEXIS 36579

SUBCHAPTER III. PAYMENT OF BENEFITS

§ 5120. Payment of benefits; delivery
§ 5121. Payment of certain accrued benefits upon death of [a] beneficiary
§ 5122. Cancellation of checks mailed to deceased payees
§ 5123. Rounding down of pension rates
§ 5124. Acceptance of claimant's statement as proof of relationship
§ 5125. Acceptance of reports of private physician examinations
§ 5126. Benefits not to be denied based on lack of mailing address
[§§ 5201-5228. Transferred]

§ 5120. Payment of benefits; delivery

(a) Monetary benefits under laws administered by the Secretary shall be paid by checks drawn, pursuant to certification by the Secretary, in such form as to protect the United States against loss, and payable by the Treasurer of the United States. Such checks shall be payable without separate vouchers or receipts except in any case in which the Secretary may consider a voucher necessary for the protection of the Government. Such checks shall be transmitted by mail to the payee thereof at the payee's last known address and, if the payee has moved and filed a regular change of address notice with the United States Postal Service, shall be forwarded to the payee. The envelope or cover of each such check shall bear on the face thereof the following notice: "POSTMASTER: PLEASE FORWARD if addressee has moved and filed a regular change-of-address notice. If addressee is deceased, return the letter with date of death, if known."

(b) Postmasters, delivery clerks, letter carriers, and all other postal employees are prohibited from delivering any mail addressed by the United States and containing any
such check to any person whomsoever if such person has died or in the case of a surviving spouse, if the postal employee believes that surviving spouse has remarried (unless the mail is addressed to the surviving spouse in the name surviving spouse has acquired by the remarriage). The preceding sentence shall apply in the case of checks in payment of benefits other than pension, compensation, dependency and indemnity compensation, and insurance, only insofar as the Secretary deems it necessary to protect the United States against loss.

(c) Whenever mail is not delivered because of the prohibition of subsection (b), such mail shall be returned forthwith by the postmaster with a statement of the reason for so doing, and if because of death or remarriage, the date thereof, if known. Checks returned under this subsection because of death or remarriage shall be canceled.

(d) Notwithstanding subsection (a) of this section, pursuant to an agreement with the Department of the Treasury under which the Secretary certifies such benefits for payment, monetary benefits under laws administered by the Secretary may be paid other than by check upon the written request of the person to whom such benefits are to be paid, if such noncheck payment is determined by the Secretary to be in the best interest of such payees and the management of monetary benefits programs by the Department.

(e) Whenever the first day of any calendar month falls on a Saturday, Sunday, or legal public holiday (as defined in section 6103 of title 5 [5 USCS § 6103]), the Secretary shall, to the maximum extent practicable, certify benefit payments for such month in such a way that such payments will be delivered by mail, or transmitted for credit to the payee's account pursuant to subsection (d) of this section, on the Friday immediately preceding such Saturday or Sunday, or in the case of a legal holiday, the weekday (other than Saturday) immediately preceding such legal public holiday, notwithstanding that such delivery or transmission of such payments is made in the same calendar month for which such payments are issued.

(f) (1) In the case of a payee who does not have a mailing address, payments of monetary benefits under laws administered by the Secretary shall be delivered under an appropriate method prescribed pursuant to paragraph (2) of this subsection.

   (2) The Secretary shall prescribe an appropriate method or methods for the delivery of payments of monetary benefits under laws administered by the Secretary in cases described in paragraph (1) of this subsection. To the maximum extent practicable, such method or methods shall be designed to ensure the delivery of payments in such cases.

Amendments:

1977. Act Oct. 3, 1977 substituted the section heading for one which read: "Payment of benefits by check; delivery"; and added subssecs. (d) and (e).


1986. Act Oct. 27, 1986 (effective with respect to payments made on or after 10/1/86, as provided by § 11007(b)(2), which appears as a note to this section) added subsec. (f).

Act Oct. 28, 1986, in subsec. (a), substituted "the payee's" for "his", "the payee" for "he", and "the payee" for "him" respectively; in subsec. (b) substituted "such person" for "he", "surviving...
spouse" for "widow" following "of a", "surviving spouse" for "she" following "that" and "name", "the" for "her" following "acquired by", and substituted "to the surviving spouse" for "to her".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3020, as 38 USCS § 5120.

Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veteran's Administration" wherever appearing, substituted "Department" for "Veteran's Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Other provisions:


Effective date and application of Act Oct. 27, 1986. Act Oct. 27, 1986, P. L. 99-570, Title XI, Subtitle C, § 11007(b)(2), 100 Stat. 3207-170, provides: "The amendment made by subsection (a)(2) [amending this section] shall take effect with respect to payments made on or after October 1, 1986.”.

1. Generally
2. Liability for checks
3. Proof of payment

1. Generally

United States is not charged with knowledge of signatures of vast multitude of persons who are entitled under law to receive pensions. United States v National Exchange Bank (1909) 214 US 302, 53 L Ed 1006, 29 S Ct 665

Veterans Administration [now Department of Veterans Affairs] lacks authority to withhold benefits payment checks from beneficiaries merely because beneficiary has attempted to assign such benefits, and Administration [now Department] is required to mail such checks to payee's last known address of record, regardless of disposition beneficiary may make of such payment. 1972 ADVA 993

2. Liability for checks

Federal government is liable for full amount of check paid to pensioner, where endorsed by payee to bank, although amount is greatly in excess of amount due to pensioner. Wells, F. & Co. v United States (1891, CCD Cal) 45 F 337

Since check drawn by federal government to order of deceased pensioner is void, collecting bank is liable to federal government. United States v First Nat'l Bank (1897, CCD Kan) 82 F 410

3. Proof of payment

Payment of pension cannot be proved by parol. United States v Scott (1885, CCD Ohio) 25 F 470

§ 5121. Payment of certain accrued benefits upon death of [a] beneficiary

Discussion and Analysis in the Veterans Benefits Manual

(a) Except as provided in section 3329 and 3330 of title 31 [31 USCS § 3329 and 3330], periodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions or those based on evidence in the file at date of death (hereinafter in
this section and section 5122 of this title [38 USCS § 5122] referred to as "accrued
benefits") and due and unpaid, shall, upon the death of such individual be paid as follows:

(1) Upon the death of a person receiving an apportioned share of benefits payable to a
veteran, all or any part of such benefits to the veteran or to any other dependent or
dependents of the veteran, as may be determined by the Secretary.

(2) Upon the death of a veteran, to the living person first listed below:

(A) The veteran's spouse.
(B) The veteran's children (in equal shares).
(C) The veteran's dependent parents (in equal shares).

(3) Upon the death of a widow or remarried surviving spouse, to the children of the
deceased veteran.

(4) Upon the death of a child, to the surviving children of the veteran who are entitled
to death compensation, dependency and indemnity compensation, or death pension.

(5) Upon the death of a child claiming benefits under chapter 18 of this title [38
USCS §§ 1801 et seq.], to the surviving parents.

(6) In all other cases, only so much of the accrued benefits may be paid as may be
necessary to reimburse the person who bore the expense of last sickness and burial.

(b) No part of any accrued benefits shall be used to reimburse any political subdivision of
the United States for expenses incurred in the last sickness or burial of any beneficiary.

(c) Applications for accrued benefits must be filed within one year after the date of death.
If a claimant's application is incomplete at the time it is originally submitted, the
Secretary shall notify the claimant of the evidence necessary to complete the application.
If such evidence is not received within one year from the date of such notification, no
accrued benefits may be paid.

Explanatory notes:

Brackets have been inserted around the word "a" in the section heading to indicate that the
heading does not conform to the item in the chapter analysis.

Amendments:

1972. Act June 30, 1972 (effective on the first day of the second calendar month which
begins after 6/30/72, as provided by § 301(a) of such Act, which appears as 38 USCS § 1114
note), in subsec. (a), introductory matter, deleted "section 3203(a)(2)(A) of this title and"
preceding "sections 123-128".

"sections 123-128 of title 31".


(b)(2)(A)-(C) substituted "The veteran's" for "His".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3021, as 38 USCS §
5121, and amended the references in this section to reflect the redesignations made by §§
401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the
Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator"
wherever appearing.
1996. Act Oct. 9, 1996, in subsec. (a), in the introductory matter, substituted "two years" for "one year".


2003. Act Dec. 16, 2003 (applicable with respect to deaths occurring on or after 12/16/2003, as provided by § 104(d) of such Act, which appears as a note to this section), in subsec. (a), in the introductory matter, deleted "for a period not to exceed two years" following "unpaid", in para. (4), deleted "and" following the concluding semicolon, redesignated para. (5) as para. (6), and inserted new para. (5).

Such Act further, in subsec. (a), in the introductory matter, substituted "or decisions or" for "or decisions, or", and, in para. (1), subparas. (A)-(C) of para. (2), and paras. (3) and (4), substituted the concluding period for a semicolon.

Other provisions:

Application of Dec. 16, 2003 amendments. Act Dec. 16, 2003, P. L. 108-183, Title I, § 104(d), 117 Stat. 2656, provides: "The amendments made by subsections (a) and (b) [amending subsec. (a) of this section] shall apply with respect to deaths occurring on or after the date of the enactment of this Act."

Cross References

This section is referred to in 38 USCS § 5122

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws §§ 39, 148, 150, 152

1. Generally
2. Construction
3. Establishment of right to benefits
4. Pension rights of children
5. Funeral and burial expenses
6. Miscellaneous

1. Generally

Veteran's claim for compensation under 38 USCS § 1110 was extinguished by his death, notwithstanding CVA's procedural rules expressly allowing substitution; issue of substitution is separate from standing, allowing derivative actions to proceed after death of veteran-claimant would render section 5112's express termination of payment of disability compensation virtually meaningless, and Congress established in section 5121 singular exception to this rule in form of wholly separate procedure for designated survivors to recover limited amounts of disability benefits due and unpaid at veteran's death. Richard ex rel. Richard v West (1998, CA FC) 161 F.3d 719 (criticized in Terry v Principi (2004, CA FC) 367 F.3d 1291)

Report from service department, containing information essential for rating and adjudication of claim for benefits filed before death, is evidence in file at date of death, even though not received in Veterans' Administration [now Department of Veterans Affairs] until after death of claimant. 1943 ADVA 548

One-time payment for assistance for specially adapted housing does not qualify as "periodic monetary benefit" and is not payable as accrued benefit after veteran's death. Pappalardo v Brown (1993) 6 Vet App 63

Accrued-benefits claim is different from service-connection claims of veteran from whose service former claim is derived, therefore, in order for survivor to pursue accrued-benefits claim
based on deceased veteran's claim which was pending at time of his death, accrued-benefits claimant must file NOD as to accrued-benefits claim in order to initiate review by BVA, and ultimately Court, of that claim. Zevalkink v Brown (1994) 6 Vet App 483, affd (1996, CA FC) 102 F.3d 1236, cert den (1997) 521 US 1103, 138 L Ed 2d 988, 117 S Ct 2478

Veteran who served on active duty until February 1962 but did not serve in Republic of Vietnam did not have requisite service during period of war to meet basic eligibility requirements for non-service-connected benefits. Fischer v West (1998) 11 Vet App 121

2. Construction

Clear and unambiguous language of 38 USCS § 5121(a) only limits survivor's recovery of accrued veteran's benefits to maximum two-year period of benefits accrued at any time during veteran's life; therefore, decision denying recovery of appellant's deceased spouse's accrued benefits was reversed and remanded. Terry v Principi (2004, CA FC) 367 F.3d 1291

Term "accrued pensions" meant amount of money unpaid on pensioner's valid claim at time of his death. (1887) 19 Op Atty Gen 1

Pension money was not "accrued" after it had been paid to pensioner's guardian and had been turned over by such guardian to administrator of deceased pensioner. Appanoose County v Carson (1930) 210 Iowa 801, 229 NW 152

Although deceased veteran's retroactive benefits were paid in lump sum, award constituted accrued benefits under 38 USCS § 5121(a); retroactive award was for disability compensation benefits and special monthly compensation benefits, both of which were periodic payments, and award was due and unpaid at time of veteran's death even though funds were transferred to veteran's account six days after veteran's death. Wilkes v Principi (2002) 16 Vet App 237, 2002 US App Vet Claims LEXIS 587


38 USCS § 5121(a) provides for payment of (1) periodic monetary benefits to which individual was entitled at death under existing ratings or decisions; or (2) periodic monetary benefits based on evidence in file at date of entitled individual's death and due and unpaid for period not to exceed two years, which are called "accrued benefits" for purposes of 38 USCS §§ 5121 and 5122. Bonny v Principi (2002) 16 Vet App 504, 2002 US App Vet Claims LEXIS 944

Widow of veteran was entitled to receive disability benefits awarded but unpaid, i.e., full amount of periodic monetary benefits to which her deceased husband, veteran, was entitled at death, and not simply benefits that had accrued to veteran but remained unpaid at this death, because "accrued benefits," as referenced in 38 USCS § 5121, were statutorily defined subset of "periodic monetary benefits," and important distinction between two types of periodic monetary benefits was that one type of benefit was due to be paid to veteran at his death and one type was not; as to former, when benefits had been awarded but not paid pre-death, eligible survivor was to receive entire amount of award and thus right to receive entire amount of periodic monetary benefits that was awarded to eligible individual shifted to eligible survivor when payment of award was not made before eligible individual died. Bonny v Principi (2002) 16 Vet App 504, 2002 US App Vet Claims LEXIS 944

Court of Appeals for Veterans Claims (Court) rejected argument by widow of veteran that 38 USCS § 5121 did not specifically limit that two-year period to two years immediately preceding death of veteran because Court had previously interpreted two-year period under 38 USCS § 5121 as two years immediately preceding veteran's death. Sharp v Principi (2004) 17 Vet App 431, 2004 US App Vet Claims LEXIS 14, affd in part and vacated in part, remanded (2005, CA FC) 403 F.3d 1324

3. Establishment of right to benefits

Death benefits accrued under former 38 USC § 503 were not payable since evidence in file at date of death did not establish entitlement of claimant. 1944 ADVA 551
Presence in Administration [now Department] files of notarized copy of public record of marriage which constituted prima facie establishment of marital status when considered in light of decisions of court of state in which marriage was performed and of which parties were residents qualified veteran for pension rate payable to married man based on evidence in file at date of death. 1944 ADVA 601

Denial of accrued benefits on hypothesis that veteran had not filed valid claim during his life was fundamentally flawed since claim at issue was that filed by veteran's wife, and statute only requires that claim be filed within one year of veteran's death, which it was. Hayes v Brown (1993) 4 Vet App 353

Veteran's surviving spouse was entitled to one year of accrued benefits due veteran at time of his death where evidence in veteran's claim file included 26 high blood pressure readings from 1943 hospitalization. Satchel v Derwinski (1991) 1 Vet App 258

Appellant's accrued benefits claim derived from veteran's original claims for service connection would be based on evidence in file at time of veteran's death. Smith v Brown (1997) 10 Vet App 330

Nephew of deceased veteran was not eligible to receive veteran's accrued benefits since nephew did not fall within specifically enumerated category of recipients under 39 USCS § 5121(a)(2) because he was not child, spouse, or dependent parent of veteran. Wilkes v Principi (2002) 16 Vet App 237, 2002 US App Vet Claims LEXIS 587

Where veteran was compensated fully under 38 USCS § 1115 for two years immediately preceding his death, there were no accrued benefits for widow to claim. Sharp v Principi (2004) 17 Vet App 431, 2004 US App Vet Claims LEXIS 14, affd in part and vacated in part, remanded (2005, CA FC) 403 F.3d 1324

4. Pension rights of children

Where applicant died while his pension claim was pending, leaving daughter under 16 and widow, and after daughter became 16, mother died and pension was later allowed, daughter was entitled to accrued pension. (1881) 17 Op Atty Gen 190

Children of deceased pensioner had no rights or interest in pension money as long as widowed mother lived. Jones v Porter (1895, Tex Civ App) 30 SW 1119

Veteran's son's claim for accrued benefits is predicated upon accrued-benefits application filed after veteran's death and since it could not have been filed prior to veteran's death on December 1, 1988, NOD could not have been filed prior to effective date of statute providing appeal to court. Laconti v Principi (1992) 3 Vet App 550

BVA did not err in denying reimbursement to child of veteran for failure to make apply within one year of date of death. Caranto v Brown (1993) 4 Vet App 516

Court lacked jurisdiction over attempt by alleged daughter to continue appeal of deceased claimant since there had been no VA determination as to whether petitioner met status requirements of accrued-benefits claimant under § 5121. Edmonds v Brown (1996) 9 Vet App 159

There is no legal basis for 70 year-old appellant to be paid dependency and indemnity compensation pursuant to 38 USCS § 1310(a) or 38 USCS § 1318, or to be paid accrued benefits under 38 USCS § 5121(a), since 38 USC 101(4)(A) excludes from category of "child" anyone who is more than 23 years of age. Burris v Principi (2001) 15 Vet App 348, 2001 US App Vet Claims LEXIS 1498

5. Funeral and burial expenses

Statutes limiting attorneys' fees in application for pension did not apply to attorney for one claiming reimbursement for expenses of last sickness and burial of deceased pensioner. United States v Nicewonger (1884, DC Pa) 20 F 438
Proportionate share of death benefits to which veteran's illegitimate child was entitled during its lifetime was payable as reimbursement to person who bore expense of last illness and burial of child rather than to child of veteran living with his widow. 1945 ADVA 666

While expiration of time for filing claim by any person qualifying first on list of beneficiaries normally did not set up right of person next in line on list, such person, whether child or person who bore expenses of last sickness and burial, was eligible if claim was timely filed since widow otherwise first in line has disqualified herself by fraud. 1946 ADVA 712

Funeral and burial expenses of United States veteran incurred by foreign government and paid pursuant to legal obligation of such government were not subject to reimbursement either from statutory burial allowance or from accrued pension or compensation due and unpaid at death of veteran, but such payments were authorized if foreign government paid for funeral expenses from general funds not specifically authorized for such purposes. 1954 ADVA 937

6. Miscellaneous

Denial of widow's claim for accrued disability benefits was vacated and remanded because 38 USCS § § 5121(a) did not limit survivor's recovery of accrued benefits to those benefits accrued in two-year period immediately prior to veteran's death; such recovery could be awarded for any two-year period. Sharp v Nicholson (2005, CA FC) 403 F.3d 1324

Issuing of certificate for arrears of pension did not create debt against government which survived to administrator. Donnelly's Case (1881) 17 Ct Cl 105

Veteran's widow was not entitled to receive automobile purchase assistance as accrued benefit to which veteran was entitled before his death, since record did not show that certificate of eligibility was ever issued or that veteran entered into sales agreement to purchase automobile between time his eligibility was established and his death; 38 USCS § 5121 accrued benefits are paid to veteran's surviving spouse, children, or dependent parent, or person who bore expense of last sickness and burial, while automobile purchase assistance payment is made to seller of automobile. Gillis v West (1998) 11 Vet App 441

Substitution by party claiming accrued benefits under § 5121 is not permissible where appellant is veteran who dies while denial by Board of veteran's disability claim is pending; this is to ensure that Board decision and underlying regional office decision will have no preclusive effect in adjudication of any accrued-benefit claims derived from veteran's entitlements. Kawad v West (1998) 12 Vet App 61

Although veteran was due retroactive special monthly compensation benefits from time of discharge in 1946 until error was rectified in 1980, since veteran was fully compensated during two years prior to death in 1992, there are no accrued benefits for veteran's daughter to claim pursuant to 38 USCS § 5121(a). Marlow v West (1999) 12 Vet App 548, 1999 US App Vet Claims LEXIS 908, affd (2000, CA FC) 232 F.3d 905, reported in full (2000, CA FC) 2000 US App LEXIS 5100

Surviving spouse's notice of appeal was informal claim for accrued benefits and timely under 38 USCS § 5121(c) since it was filed within one year after veteran's death. Teten v West (2000) 13 Vet App 560, 2000 US App Vet Claims LEXIS 723

Vetern's signed application for VA compensation or pension stating that he was married only once, to appellant, and providing her name and Social Security number, was evidence in file at veteran's death of claimant's marriage to veteran which, if found credible on remand, would support her claim for accrued benefits. Jones v Brown (1996) 8 Vet App 558, revd sub nom Jones v West (1998, CA FC) 136 F.3d 1296, cert den (1998) 525 US 834, 142 L Ed 2d 71, 119 S Ct 90

Veteran's widow, who ultimately prevailed in her claim for survivor benefits, was not entitled to attorney's fees under Equal Access to Justice Act, 28 USCS § 2412, because position that was taken by Secretary of Veterans Affairs at administrative level was reasonable; position that was taken by Secretary before court was also reasonable application of facts to law, given that matter of interpreting 38 USCS § 5121 under particular circumstances was one of first impression for court. Bonny v Principi (2004) 18 Vet App 218, 2004 US App Vet Claims LEXIS 527
§ 5122. Cancellation of checks mailed to deceased payees

A check received by a payee in payment of accrued benefits shall, if the payee died on or after the last day of the period covered by the check, be returned to the issuing office and canceled, unless negotiated by the payee or the duly appointed representative of the payee's estate. The amount represented by such check, or any amount recovered by reason of improper negotiation of any such check, shall be payable in the manner provided in section 5121 of this title [38 USCS § 5121], without regard to section 5121(c) of this title [38 USCS § 5121(c)]. Any amount not paid in the manner provided in section 5121 of this title [38 USCS § 5121] shall be paid to the estate of the deceased payee unless the estate will escheat.

Amendments:
1986. Act Oct. 28, 1986 substituted "the payee's" for "his".
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3022, as 38 USCS § 5122, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).
1996. Act Oct. 19, 1996 deleted "upon settlement by the General Accounting Office" following "shall be paid".

Transfer of functions:
For transfer of functions contained in this section from the Comptroller General to the Director of the Office of Management and Budget, effective June 30, 1996, see Act Nov. 19, 1995, P. L. 104-53, Title II, § 211, 109 Stat. 535, which appears as 31 USCS § 501 note.

Code of Federal Regulations
Office of Personnel Management-Procedures for settling claims, 5 CFR Part 178

Cross References
This section is referred to in 38 USCS § 5121

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 39
Where veteran was awarded retroactive benefits, but veteran died before benefits were electronically transferred to veteran's account and veteran's bank returned funds to Department of Veterans Affairs, veteran's estate was not entitled to payment of accrued benefits because veteran died before transfer and thus could not have "received" transferred funds within meaning of 38 USCS § 5122. Wilkes v Principi (2002) 16 Vet App 237, 2002 US App Vet Claims LEXIS 587

§ 5123. Rounding down of pension rates

The monthly or other periodic rate of pension payable to an individual under section 1521, 1541, or 1542 of this title [38 USCS § 1521, 1541, or 1542] or under section 306(a) of the Veterans' and Survivors' Pension Improvement Act of 1978 (Public Law 95-588) [38 USCS § 1521 note], if not a multiple of $1, shall be rounded down to the nearest dollar.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3023, as 38 USCS § 5123.

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Other provisions:

Application of section. Act Sept. 8, 1982, P. L. 97-253, Title IV, § 403(b), 96 Stat. 802; April 20, 1983, P. L. 98-21, Title I, Part B, § 111(e), 97 Stat. 73; July 18, 1984, P. L. 98-369, Division B, Title VI, Subtitle D, § 2662(j), 98 Stat. 1160 (effective as provided by § 2664(a) of such Act, which appears as 42 USCS § 401 note), provides:

"(1) Except as provided in paragraph (2), the amendment made by subsection (a)(1) [adding this section] shall apply with respect to amounts payable for periods beginning after May 31, 1983.

"(2) In the cases of individuals to whom pension is payable under sections 521, 541 and 542 [now sections 1521, 1541 and 1542] of title 38, United States Code, the amendment made by subsection (a)(1) shall take effect on the first day after May 31, 1983, that an increase is made in maximum annual rates of pension pursuant to section 3112 [now section 5312] of title 38, United States Code.".

§ 5124. Acceptance of claimant's statement as proof of relationship

(a) For purposes of benefits under laws administered by the Secretary, the Secretary may accept the written statement of a claimant as proof of the existence of any relationship specified in subsection (b) for the purpose of acting on such individual's claim for benefits.

(b) Subsection (a) applies to proof of the existence of any of the following relationships between a claimant and another person:

(1) Marriage.
(2) Dissolution of a marriage.
(3) Birth of a child.
(4) Death of any family member.

(c) The Secretary may require the submission of documentation in support of the claimant's statement if--

(1) the claimant does not reside within a State;
(2) the statement on its face raises a question as to its validity;
(3) there is conflicting information of record; or
(4) there is reasonable indication, in the statement or otherwise, of fraud or misrepresentation.

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:118

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 152

§ 5125. Acceptance of reports of private physician examinations
Discussion and Analysis in the Veterans Benefits Manual

For purposes of establishing any claim for benefits under chapter 11 or 15 of this title [38 USCS §§ 1101 et seq. or 1501 et seq.], a report of a medical examination administered by a private physician that is provided by a claimant in support of a claim for benefits under that chapter may be accepted without a requirement for confirmation by an examination by a physician employed by the Veterans Health Administration if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim.

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:119

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 153

Where veteran provided letter from private audiologist, which opined that veteran's hearing loss was likely caused by exposure to heavy-weapons fire during combat, acceptance of opinion without confirmation was permissive rather than mandatory and it was not arbitrary and capricious to schedule veteran for medical examination. Kowalski v Nicholson (2005) 19 Vet App 171, 2005 US App Vet Claims LEXIS 362

§ 5126. Benefits not to be denied based on lack of mailing address

Benefits under laws administered by the Secretary may not be denied a claimant on the basis that the claimant does not have a mailing address.

[§§ 5201-5228. Transferred]
CHAPTER 53.  SPECIAL PROVISIONS RELATING TO BENEFITS

§ 5301. Nonassignability and exempt status of benefits
§ 5302. Waiver of recovery of claims by the United States
§ 5303. Certain bars to benefits
§ 5303A. Minimum active-duty service requirement
§ 5304. Prohibition against duplication of benefits
§ 5305. Waiver of retired pay
§ 5306. Renunciation of right to benefits
§ 5307. Apportionment of benefits
§ 5308. Withholding benefits of persons in territory of the enemy
§ 5309. Payment of certain withheld benefits
§ 5310. Payment of benefits for month of death
§ 5311. Prohibition of certain benefit payments
§ 5312. Annual adjustment of certain benefit rates
§ 5313. Limitation on payment of compensation and dependency and indemnity compensation to persons incarcerated for conviction of a felony
§ 5313A. Limitation on payment of clothing allowance to incarcerated veterans
§ 5313B. Prohibition on providing certain benefits with respect to persons who are fugitive felons
§ 5314. Indebtedness offsets
§ 5315. Interest and administrative cost charges on delinquent payments of certain amounts due the United States
§ 5316. Authority to sue to collect certain debts
§ 5317. Use of income information from other agencies: notice and verification
§ 5318. Review of Social Security Administration death information
§ 5319. Limitations on access to financial records

Amendments:


1972. Act June 30, 1972, P. L. 92-328, Title II, § 203, 86 Stat. 397, amended the analysis of this chapter, in item 3102 by substituting "claims by the United States" for "overpayments".

1978. Act Nov. 4, 1976, P. L. 95-588, Title III, § 305(b), 92 Stat. 2508, amended the analysis of this chapter by adding item 3112.


1991. Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239, revised the analysis of this chapter by amending the section numbers in accordance with the redesignations made by § 402(b) of such Act (see Table II preceding 38 USCS § 101).


§ 5301. Nonassignability and exempt status of benefits

(a) (1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title [38 USCS §§ 1901 et seq.], or of servicemen's indemnity.

(2) For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving a benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

(3) (A) This paragraph is intended to clarify that, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or dependency and indemnity compensation, as the case may be, except as provided in subparagraph (B), and including deposit into a joint account from which such other person may make withdrawals, or otherwise, such agreement shall be deemed to be an assignment and is prohibited.

(B) Notwithstanding subparagraph (A), nothing in this paragraph is intended to prohibit a loan involving a beneficiary under the terms of which the beneficiary may use the benefit to repay such other person as long as each of the periodic payments made to repay such other person is separately and voluntarily executed by the beneficiary or is made by preauthorized electronic funds transfer pursuant to the Electronic Funds Transfers Act (15 U.S.C. 1693 et seq.).

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(C) Any agreement or arrangement for collateral for security for an agreement that is prohibited under subparagraph (A) is also prohibited and is void from its inception.

(b) This section shall prohibit the collection by setoff or otherwise out of any benefits payable pursuant to any law administered by the Secretary and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (1) any person other than the indebted beneficiary or the beneficiary's estate; or (2) any beneficiary or the beneficiary's estate except amounts due the United States by such beneficiary or the beneficiary's estate by reason of overpayments or illegal payments made under such laws to such beneficiary or the beneficiary's estate or to the beneficiary's dependents as such. If the benefits referred to in the preceding sentence are insurance payable by reason of yearly renewable term insurance, United States Government life insurance, or National Service Life Insurance issued by the United States, the exemption provided in this section shall not apply to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness is in the form of liens to secure unpaid premiums or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits.

(c) (1) Notwithstanding any other provision of this section, the Secretary may, after receiving a request under paragraph (2) of this subsection relating to a veteran, collect by offset of any compensation or pension payable to the veteran under laws administered by the Secretary the uncollected portion of the amount of any indebtedness associated with the veteran's participation in a plan prescribed in chapter 73 of title 10 [10 USCS §§ 1431 et seq.].

(2) If the Secretary concerned (as defined in section 101(5) of title 37 [37 USCS § 101(5)]) has tried under section 3711(a) of title 31 [31 USCS § 3711(a)] to collect an amount described in paragraph (1) of this subsection in the case of any veteran, has been unable to collect such amount, and has determined that the uncollected portion of such amount is not collectible from amounts payable by that Secretary to the veteran or that the veteran is not receiving any payment from that Secretary, that Secretary may request the Secretary to make collections in the case of such veteran as authorized in paragraph (1) of this subsection.

(3) (A) A collection authorized by paragraph (1) of this subsection shall be conducted in accordance with the procedures prescribed in section 3716 of title 31 [31 USCS § 3716] for administrative offset collections made after attempts to collect claims under section 3711(a) of such title [31 USCS § 3711(a)].

(B) For the purposes of subparagraph (A) of this paragraph, as used in the second sentence of section 3716(a) of title 31 [31 USCS § 3716(a)]--

(i) the term "records of the agency" shall be considered to refer to the records of the department of the Secretary concerned; and

(ii) the term "agency" in clauses (3) and (4) shall be considered to refer to such department.

(4) Funds collected under this subsection shall be credited to the Department of Defense Military Retirement Fund under chapter 74 of title 10 [10 USCS §§ 1461 et seq.] or to the Retired Pay Account of the Coast Guard, as appropriate.

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(d) Notwithstanding subsection (a) of this section, payments of benefits under laws administered by the Secretary shall not be exempt from levy under subchapter D of chapter 64 of the Internal Revenue Code of 1986 (26 U.S.C. 6331 et seq.).

(e) In the case of a person who--

(1) has been determined to be eligible to receive pension or compensation under laws administered by the Secretary but for the receipt by such person of pay pursuant to any provision of law providing retired or retirement pay to members or former members of the Armed Forces or commissioned officers of the National Oceanic and Atmospheric Administration or of the Public Health Service; and

(2) files a waiver of such pay in accordance with section 5305 of this title [38 USCS § 5305] in the amount of such pension or compensation before the end of the one-year period beginning on the date such person is notified by the Secretary of such person's eligibility for such pension or compensation.

the retired or retirement pay of such person shall be exempt from taxation, as provided in subsection (a) of this section, in an amount equal to the amount of pension or compensation which would have been paid to such person but for the receipt by such person of such pay.

Amendments:

1976. Act Oct. 15, 1976 (effective 12/1/76, as provided by § 703(c) of such Act, which appears as 38 USCS § 3693 note), in subsec. (a), inserted "For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving his or her benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited."

1978. Act Oct. 18, 1978 (effective 10/1/78, as provided by § 401 of such Act, which appears as 38 USCS § 1114 note), added subsec. (d).


1986. Act Oct. 28, 1986, in subsec. (a) substituted "a" for "his or her" preceding "benefit check"; in subsec. (b) substituted "the beneficiary's" for "his" wherever appearing; redesignated subsecs. (c) and (d) as subsecs. (d) and (e) respectively, and added a new subsec. (c).

1989. Act Nov. 29, 1989 (effective Oct. 1, 1991, as provided by § 1404(b)(3) of such Act, which appears as 10 USCS § 12731 note), as amended by Act April 6, 1991, in subsec. (c)(1), deleted "subchapter I or II of" before "chapter 73".


Act May 7, 1991 redesignated this section, formerly 38 USCS § 3101, as 38 USCS § 5301, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act June 13, 1991 (amending this section as in effect immediately before the enactment of Act May 9, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (d), substituted "the Internal Revenue Code of 1986" for "the Internal Revenue Code of 1954".

Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.
Such Act further, in subsec. (c)(2), substituted "that Secretary" for "the Secretary" preceding "payable amount", "payment from the", and "may request the Administrator".

Such Act further, in subsec. (e)(2), substituted "Secretary" for "Veterans' Administration".

Act Aug. 14, 1991 (applicable as provided by § 505(b) of such Act, which appears as a note to this section), in subsec. (c)(4), inserted "or to the Retired Pay Account of the Coast Guard, as appropriate".


Other provisions:

Undue hardship; relief, Act Nov. 23, 1977, P. L. 95-202, Title III, § 305(c), 91 Stat. 1444 (effective 11/23/77, as provided in § 501 of such Act), provides:

"(1) Where an educational institution--

"(A) has in its possession veterans' or eligible persons' benefit checks made payable to a veteran or eligible person and mailed to such educational institution for a course offered (i) under the provisions of subchapter VI of chapter 34 of title 38, United States Code [38 USCS §§ 1681 et seq.], or (ii) at a location not in a State under the provisions of section 1676 of title 38, United States Code, and which course was commenced by such veteran or eligible person prior to December 1, 1976, and completed not later than June 30, 1977; and

"(B) holds a power of attorney executed by the veteran or eligible person prior to December 1, 1976, authorizing the educational institution to negotiate such benefit check,

the Administrator may, where the Administrator finds there is undue hardship on such educational institution, provide such relief as the Administrator determines equitable pursuant to regulations which the Administrator shall prescribe.

"(2) Where an accredited correspondence school--

"(A) has in its possession veterans' or eligible persons' benefit checks made payable to a veteran or eligible person and mailed to such school for lessons completed by the veteran or eligible person under section 1786 of this title and serviced by the school prior to January 1, 1977; and

"(B) holds a power of attorney executed by the veteran or eligible person prior to December 1, 1976, authorizing the school to negotiate such benefit check,

the Administrator may, where the Administrator finds that there is undue hardship on such educational institution and the courses were taken by veterans or eligible persons residing in a State, provide such relief as the Administrator determines equitable pursuant to regulations which the Administrator shall prescribe.".


Code of Federal Regulations
Department of Veterans Affairs-United States Government life insurance, 38 CFR Part 6
Department of Veterans Affairs-National Service life insurance, 38 CFR Part 8
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References

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This section is referred to in 26 USCS § 137; 38 USCS § 1908; 42 USCS § 417

Research Guide

Federal Procedure:
11 Fed Proc L Ed, Enforcement of Judgments § 31:30

Am Jur:
30 Am Jur 2d, Executions and Enforcements of Judgments § 573
31 Am Jur 2d, Exemptions §§ 196, 199-201, 286, 287
44A Am Jur 2d, Insurance § 1876
71 Am Jur 2d, State and Local Taxation § 262
77 Am Jur 2d, Veterans and Veterans’ Laws § 38

Bankruptcy:
4 Collier on Bankruptcy (Matthew Bender 15th ed. rev), ch 522, Exemptions ¶ 522.02
4 Collier Bankruptcy Practice Guide, ch 74, Exemptions ¶ 74.67
2 Collier Bankruptcy Manual, ch 522, Exemptions ¶ 522.02

Annotations:
National Service Life Insurance: Change of beneficiary. 13 ALR Fed 6
Exemption of proceeds of National Service Life Insurance from claims of creditors. 54 ALR2d 1335
Trust, or contract to hold for benefit of another, with respect to proceeds of National Service Life Insurance. 70 ALR2d 1358

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I. IN GENERAL

1. Generally
   Those who deal with War Risk Insurance Bureau [now Department of Veterans Affairs] are
   assumed to know statutes and regulations which govern it. Jewell v United States (1939, DC Ky)
   27 F Supp 836

2. Constitutionality
   Congress clearly has power to provide for exemption of servicemen's or veterans' benefits.
   Derzis v Vales (1933) 227 Ala 471, 150 So 461; Gaskins v Security-First Nat'l Bank (1939) 30
   Cal App 2d 409, 86 P2d 681
Act of Congress exempting veterans' benefits is not unconstitutional on ground that it enlarges exemption from creditors' claims to sum in excess of that fixed by state constitution. Purvis v Walls (1931) 184 Ark 887, 44 SW2d 353

Predecessor to 38 USCS § 5301, exempting veterans' benefits from taxation, was authorized by war power of Congress. Atlanta v Stokes (1932) 175 Ga 201, 165 SE 270 (criticized in Trotter v Tennessee (1933) 290 US 354, 78 L Ed 358, 54 S Ct 138) and (criticized in City Council of Augusta v Ransom (1934) 179 Ga 179, 175 SE 497) and (criticized in Porter v Watson (1935) 51 Ga App 848, 181 SE 680) and (criticized in Liles v H. K. Mulford Co. (1935) 52 Ga App 674, 184 SE 396)

3. Purpose

Purpose of predecessor to 38 USCS § 5301 was to safeguard payments made to, or for benefit of, soldier and beneficiary. Pagel v Pagel (1934) 291 US 473, 78 L Ed 921, 54 S Ct 497

Purpose of 38 USCS § 3101 [now 38 USCS § 5301] is to protect not only recipient of benefits but also to afford some degree of security to recipient's family and dependents. Surplus v Remmele (1949) 194 Misc 1036, 87 NYS2d 651; State ex rel. Eastern State Hospital v Beard (1979, Okla) 600 P2d 324

38 USCS § 3101(a) [now 38 USCS § 5301(a)] was designed by Congress to place benefits beyond reach and anticipation of creditors by assignment and from seizure under process issued for collection of debts. Ex parte Johnson (1979, Tex Civ App Waco) 583 SW2d 660

Purpose of exemption is protection of veteran, and exemption should not be extended to deceased veteran's estate. In re Buxton's Estate (1944) 246 Wis 97, 16 NW2d 399, 33 AFTR 294

4. Construction, generally

Legislation making benefits paid by Veterans' Administration [now Department of Veterans Affairs] exempt from taxation and creditors' claims should be liberally construed to protect funds granted by Congress for maintenance and support of beneficiaries of such legislation. Porter v Aetna Casualty & Surety Co. (1962) 370 US 159, 8 L Ed 2d 407, 82 S Ct 1231

Statute exempting veterans' benefits from claims of creditors must receive liberal interpretation. Yake v Yake (1936) 170 Md 75, 183 A 555; Hoerster v Johnson City State Bank (1933, Tex Civ App) 58 SW2d 142

Right of veterans to be exempt from creditor claims against benefits must be liberally construed to protect funds granted by Congress for maintenance and support of eligible veterans. American Training Services, Inc. v Veterans Admin. (1977, DC NJ) 434 F Supp 988

Statute does not constitute limitation on Secretary's obligation with regard to payment of attorney's fees from appellant's past due benefits; that payment to appellant and appellant's attorney are to be calculated in accordance with existing regulations. Aronson v Derwinski (1992) 3 Vet App 162

5. Relationship with other laws, generally

42 USCS § 659 authorizes assignment of benefits, which would otherwise be not assignable, under 38 USCS § 3101(a) [now 38 USCS § 5301(a)]. Sturgell v Creasy (1981, CA6 Ohio) 640 F.2d 843

38 USCS § 5301(a) provides federal right that is enforceable under 42 USCS § 1983. Higgins v Beyer (2002, CA3 NJ) 293 F.3d 683

In determining institutionalized spouse's Medicaid eligibility, state's practice of "deeming" Social Security and Veterans' benefit income paid to institutionalized spouse as being available for community spouse did not violate "anti-attachment" provisions of Social Security Act, 42 USCS § 407(a), or Veterans Act, 38 USCS § 5301(a)(1), because mere fact that unhappy spouse could request fair hearing to review decisions in "deeming" process did not create any type of administrative or judicial mechanism bearing any resemblance to execution, levy, attachment, or
garnishment such that availability of fair hearing did not constitute legal process. Bianconi v Preston (2005, DC Mass) 383 F Supp 2d 276


National Service Life Insurance is contract made in pursuance of federal law and must be construed with reference to 38 USCS § 717 and § 3101 [now § 5301], regulations promulgated thereunder, and decisions applicable thereto, rather than by laws and decisions governing private insurance companies. In re Estate of Pechman (1974, Colo App) 532 P2d 385

6. -State laws

To extent New Jersey statute authorizes prison officials to deduct funds derived from prisoner's Veteran's Administration disability benefits check to pay fine assessed to compensate victims of violent crimes, it conflicts with purpose and objectives of Congress in enacting 38 USCS § 5301(a) and is void under Supremacy Clause. Higgins v Beyer (2002, CA3 NJ) 293 F.3d 683

38 USCS § 3101(a) [now 38 USCS § 5301(a)] was not intended to remove benefits from application of marital property laws of the several states, including community property laws of Texas. Ex parte Johnson (1979, Tex Civ App Waco) 583 SW2d 660

Although failure to include within 10 USCS § 1408(c)(1) disability payments received in accordance with waiver executed pursuant to 28 USCS § 3105 arguably leads to conclusion that Congress' intent was to preclude states from recognizing community interest in such payments, neither 38 USCS § 3101(a) [now 38 USCS § 5301(a)] prohibition against assignments of Veterans' benefits nor any other federal law directly or positively precludes application of Louisiana's community property law to disability payments received pursuant to 38 USCS § 3105 [now 38 USCS § 5305] election. Campbell v Campbell (1985, La App 2d Cir) 474 So 2d 1339, cert den (1985, La) 478 So 2d 148

II. ASSIGNMENT OF BENEFITS

A. In General

7. Application of prohibition

Prohibition against assignment has no application to proceeds of insurance after payment to beneficiary; contract by beneficiary agreeing to pay proceeds to another is enforceable against him. Bostrom v Bostrom (1931) 60 ND 792, 236 NW 732

Provisions of 38 USCS § 3101(a) [now 38 USCS § 5301(a)], both before and after 1976 amendment, prohibit arrangement whereby veteran has educational benefit check sent directly to educational institution which, upon previous power of attorney given by veteran, endorses check and deposits it to institution's account; even though Veterans Administration [now Department of Veterans Affairs] for some period of time recognized such activity, absent affirmative misconduct by agency or its officers, agency is not bound by statements of officials which may have indicated approval of such tuition funding arrangement. American Training Services, Inc. v Veterans Admin. (1977, DC NJ) 434 F Supp 988

38 USCS § 3101 [now 38 USCS § 5301] does not apply in case of former wife seeking to recover alimony from her former husband. Mims v Mims (1983, Ala Civ App) 442 So 2d 102 (ovrld in part by Ex parte Billeck (2000, Ala) 777 So 2d 105, 24 EBC 2813)

Verbal promise by pension claimant to pay debt when he receives his pension, or out of his pension, is not such pledge, mortgage, assignment, transfer, or sale of pension claim as is forbidden. Crane v Linneus (1884) 77 Me 59

Agreement between widow of soldier of revolution, entitled to pension under Act of 1848, c. 120, and agent that latter was to receive certain part of pension money for his services in obtaining it was void, and money received under such agreement could be recovered by pensioner in action of assumpsit. Powell v Jennings (1856) 48 NC 547

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Lien provision in fee agreement between veteran and counsel granting attorney lien on veteran's claim for benefits and any sum recovered is unreasonable and unenforceable under 38 USCS § 7263(d) because it conflicts with 38 USCS § 5301(a) and 38 USCS § 5904(d)(3). Busch v West (1999) 12 Vet App 552, 1999 US App Vet Claims LEXIS 950

8. Effect of purported assignment

Veterans Administration [now Department of Veterans Affairs] is precluded by 38 USCS § 3101 [now 38 USCS § 5301] from giving any effect to purported assignment of benefit payments, but Veterans Administration [now Department of Veterans Affairs] lacks authority to withhold benefit payment checks from beneficiaries merely because beneficiary has attempted to assign such benefits, and Administration [now Department] is required to mail such checks to payee’s last known address of record, regardless of disposition beneficiary may make of such payment. 1972 ADVA 993

B. Insurance

9. Generally

Congress has declared public policy of nation by enactment of 38 USCS § 717(a) [now § 1917(a)] and § 3101(a) [now § 5301(a)] and if veteran could contract to surrender his right to change beneficiary, or assign proceeds of National Service Life Insurance policy, and then be held liable in damages for breach of such contract, public policy would be frustrated. McJunkin v Estate of McJunkin (1973, Tex Civ App Dallas) 493 SW2d 278

Absent language restricting right to execute later changes in beneficiary designations, insured's motive for beneficiary designation change is not questionable as improper assignment. VA GCO 15-76

Provisions of 38 USCS §§ 717(a) [now § 1917(a)], 749 [now § 1949], and 3101 [now § 5301] guarantee decedent's absolute right to determine beneficiary of policy. Sessions v Sessions (1974, Okla App) 525 P2d 1269

10. Assignment by insured, generally

Agreement by insured with his mother that, in consideration of her advancing money for payment of premiums and other purposes, he would continue her as beneficiary under policy was in effect assignment of insurance. Von Der Lippi-Lipski v United States (1925) 55 App DC 202, 4 F.2d 168

Agreement whereby disabled veteran assigned share of his compensation to wife to whom he was married while mentally incompetent, which marriage was subsequently annulled, was void though incorporated in annulment decree. Yake v Yake (1936) 170 Md 75, 183 A 555

Where, two days before his death, insured executed change of beneficiary form designating his mother (whom at the time he owed $4000) as primary beneficiary and his brother as contingent beneficiary, and in "Remarks" section of form wrote: "This to take care of unpaid debts to the mother in case of her death the brother is to take care of all unpaid debts," such action does not constitute assignment or "in the nature of an assignment." Stafford v United States (1955, DC La) 128 F Supp 435

Community property settlement agreement, executed by father who agreed to name son as irrevocable beneficiary of National Service Life Insurance policy and to surrender right to change beneficiary of policy, was illegal and unenforceable and estate of father was not liable to son for damages for breach of contract after father changed beneficiary. McJunkin v Estate of McJunkin (1973, Tex Civ App Dallas) 493 SW2d 278

11. Under court order

Courts do not have jurisdiction to make an order regarding permanent change of beneficiary under a National Service Life Insurance policy. Reed v Reed (1971) 29 Colo App 199, 481 P2d 125

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State court had no jurisdiction to enter judgment requiring irrevocable designation of beneficiary of any part of proceeds. Sessions v Sessions (1974, Okla App) 525 P2d 1269

12. Imposition of constructive trust

Imposition of constructive trust in proceeds of National Service Life Insurance policies, in which deceased's parents were designated beneficiaries, could not be established in favor of insured's children whom he had agreed to designate as beneficiaries in property settlement with his wife. Sehrt v Sehrt (1960, 1st Dist) 179 Cal App 2d 167, 3 Cal Rptr 555

To impress trust upon proceeds of National Service Life Insurance policy would result in an evasion of intent of Congress. Lefrak v Lefrak (1975, 2d Dept) 47 App Div 2d 912, 366 NYS2d 672

By the clear terms of 38 USCS § 717 [now § 1917] and § 3101 [now § 5301], one who was not designated as the beneficiary of a National Service Life Insurance policy at the time of insured's death, was precluded from recovering proceeds of such policy in suit initiated directly against the United States or against the designated beneficiary, including any attempt to impress a trust upon the proceeds in the hands of the beneficiary. Will of Hilton (1976) 88 Misc 2d 760, 388 NYS2d 985

Where decedent was insured under National Service Life Insurance and at time of divorce from plaintiff was ordered to make plaintiff beneficiary of balance due on alimony judgment until judgment was paid, but decedent later married defendant and made her beneficiary of policy, proceeds of policy were not subject to constructive trust in favor of former wife. Sessions v Sessions (1974, Okla App) 525 P2d 1269

III. EXEMPTION FROM TAXATION

13. Generally

Proceeds of government life insurance cannot be used by bank as trustee to collect amount of estate tax paid by bank as trustee from inter vivos trust fund in its hands as such proceeds are declared by statute to be immune from taxes. In re Roosevelt's Estate (1947) 191 Misc 840, 77 NYS2d 252

Proceeds of war risk insurance policy payable to insured's estate may be used by executor to pay delinquent taxes due from insured to United States government for previous years. In re Coleman's Estate (1936) 179 Okla 251, 65 P2d 467

14. Income taxes

Exemption from taxation of compensation and war risk insurance disability benefits to mentally incompetent veteran, conferred by predecessor to 38 USCS § 3101 [now 38 USCS § 5301] was not enlarged by fact that payment is made to his guardian. Trotter v Tennessee (1933) 290 US 354, 78 L Ed 358, 54 S Ct 138

Where guardian of veteran received warrants or checks of government in payment of adjusted compensation or insurance due ward, and he deposited them in bank which collected them and credited proceeds to veteran's account, such deposits were not subject to taxation by county and municipal authorities. Lawrence v Shaw (1937) 300 US 245, 81 L Ed 623, 57 S Ct 443, 108 ALR 1102

Amounts of retired pay received by master sergeant, retired from regular army of United States after thirty years of meritorious service, were properly included in his gross income, although taxpayer claimed that such retirement pay was exempt from taxation, where his retirement was solely pursuant to statutes relating generally to retired army personnel. Hoeppel v Westover (1948, SD Cal) 79 F Supp 794, 48-2 USTC ¶ 9418, 37 AFTR 367

Where pensioner was non compos mentis and his pension was being paid to his guardian, such pension was nontaxable. Manning v Spry (1903) 121 Iowa 191, 96 NW 873
Payment of pension or compensation to guardian does not leave money in control of government so as to be exempt from taxation. State ex rel. Smith v Board of Commrs (1931) 132 Kan 233, 294 P 915, cert den (1931) 283 US 855, 75 L Ed 1462, 51 S Ct 648

Exemption from taxation ceased as soon as money was paid to veteran, it not being then "payable", and payment to his guardian was payment to veteran and has same effect. Arcese v Commonwealth (1933) 160 Va 116, 168 SE 465

Plaintiff widow, survivor of military veteran, was granted tax refund relief for funds withheld from her Survivor Benefit Plan receipts for period of time for which she was retroactively entitled to Dependency and Indemnity Compensation benefits, which were nontaxable under 38 USCS § 5301 and were credited retroactively against withholding from taxable Survivor Benefit Plan payments pursuant to 10 USCS § 1450(c). Ebert v United States (2005) 66 Fed Cl 287, 2005-2 USTC ¶ 50495, 96 AFTR 2d 5163

15. Estate and inheritance taxes

Inasmuch as predecessor to 38 USCS § 3101 [now 38 USCS § 5301] relating to exemption from taxation of proceeds of war risk insurance did not purport to exempt such proceeds from death duties, veteran's contract with government under Act was not unconstitutionally impaired by inclusion of such proceeds in computing total amount of his insurance for purposes of Federal estate tax. United States Trust Co. v Helvering (1939) 307 US 57, 83 L Ed 1104, 59 S Ct 692, 39-1 USTC ¶ 9466, 22 AFTR 327

Proceeds of war risk insurance were part of decedent's gross estate subject to federal tax. Bankers Trust Co. v Commissioner (1935, BTA) 33 BTA 746

Heirs at law, who received war risk insurance from deceased service man, took as beneficiaries, and insurance money they received was exempt from state inheritance tax. Succession of Geier (1924) 155 La 167, 99 So 26, 32 ALR 353

Proceeds of war risk insurance policy were not subject to state inheritance tax. In re Harris' Estate (1930) 179 Minn 450, 229 NW 781

Amount payable to estate of insured on death of beneficiary before receipt of all installments was subject to state transfer tax. In re Schaeffer's Estate (1927) 130 Misc 436, 224 NYS 305

Statute did not exempt from New York state transfer tax transfers of proceeds from estate of deceased insured to those who took in distribution of estate. In re Dean's Estate (1927) 131 Misc 125, 225 NYS 543

State could not levy succession tax upon proceeds of war risk insurance which will be distributed to aunts and uncles of insured. Tax Com. of Ohio v Rife (1927, Hamilton Co) 27 Ohio App 516, 162 NE 398, affd (1928) 119 Ohio St 83, 6 Ohio L Abs 385, 162 NE 390

Adjusted service bonds were not such part of veteran's estate as would make them subject to state transfer inheritance tax; Congress directed payment of adjusted service bonds to estate of veteran, not as asset thereof, but merely for purpose of ascertaining veteran's next of kin, and expressly relieved bonds from taxation. In re Schmuckli's Estate (1941, Pa) 17 A2d 876

State inheritance tax was an excise tax on the succession to property at or by reason of death and was not a tax on property; accordingly, proceeds of National Service Life Insurance policy were subject to state inheritance tax. In re Estate of Super (1968) 428 Pa 476, 239 A2d 380

Commuted value of war risk insurance policy, turned over by government to estate of deceased soldier for distribution to beneficiaries, was not subject to state inheritance tax. Watkins v Hall (1929) 107 W Va 202, 147 SE 876

16. Taxation of interest on benefit payments

Interest received by guardian on money paid by United States was not exempt from state income tax. 20 Op Atty Gen 270

Interest received on pension money was not exempt from taxation. Bednar v Carroll (1908) 138 Iowa 338, 116 NW 315
17. Taxation of property purchased with benefit payments

Exemption from taxation of compensation paid by United States to its disabled veterans and of disability benefits under policy of war risk insurance, conferred by predecessor to 38 USCS § 3101 [now 38 USCS § 5301] was lost when money is converted into land and buildings. Trotter v Tennessee (1933) 290 US 354, 78 L Ed 358, 54 S Ct 138

Land purchased by guardian of incompetent World War veteran out of compensation was not exempt from taxation. Johnson v Board of Comm'rs (1933) 61 SD 372, 249 NW 683; State v Blair (1933) 165 Tenn 519, 57 SW2d 455, affd (1933) 290 US 354, 78 L Ed 358, 54 S Ct 138

Property purchased by guardian with benefit payment by United States was not exempt from state property taxation. 20 Op Atty Gen 270

Property purchased with benefit payment was not exempt from state taxation. 20 Op Atty Gen 1190

Exemption from taxation did not extend to land purchased with proceeds of compensation. State v Wright (1932) 224 Ala 357, 140 So 584

Lands purchased with money paid by United States to World War veterans as adjusted service compensation or bonus were subject to state taxation. Ford v Harrington (1934) 189 Ark 48, 70 SW2d 49

Real estate purchased with exempt money was exempt from taxation. Atlanta v Stokes (1932) 175 Ga 201, 165 SE 270 (criticized in Trotter v Tennessee (1933) 290 US 354, 78 L Ed 358, 54 S Ct 138) and (criticized in City Council of Augusta v Ransom (1934) 179 Ga 179, 175 SE 497) and (criticized in Porter v Watson (1935) 51 Ga App 848, 181 SE 680) and (criticized in Liles v H. K. Mulford Co. (1935) 52 Ga App 674, 184 SE 396)

Property purchased by veteran with money paid to him by government was not exempt from taxation. Martin v Guilford County (1931) 201 NC 63, 158 SE 847, 76 ALR 978; Lambert v Guilford County (1931) 201 NC 67, 158 SE 849

Compensation money invested in real property did not render land exempt from taxation. Raburn v Board of Comm'rs (1934) 168 Okla 4, 31 P2d 840

Mortgages purchased with proceeds of compensation paid to veteran were not exempt from taxation. Saxe v Board of Revision of Taxes (1932) 107 Pa Super 108, 163 A 317, affd (1933) 311 Pa 545, 166 A 853

IV. EXEMPTION FROM CLAIMS OF CREDITORS AND PROCESS

A. In General

18. Generally

Amendments to veteran relief acts making government insurance proceeds exempt from creditors are effective retroactively. In re McCormick's Estate (1938) 169 Misc 672, 8 NYS2d 179

Pensioner may use money in any manner he may see proper for his own benefit and to secure comfort of his family, free from attacks of creditors. Holmes v Tallada (1889) 125 Pa 133, 17 A 238

19. Construction, generally

Words "attachment, levy or seizure" are not to be construed so narrowly as to embrace only process in hands of officer for service. Mahar v McIntyre (1936, DC Mass) 16 F Supp 961

Award of alimony pendente lite is not "attachment, levy, or seizure" under 38 USCS § 3101(a) [now 38 USCS § 5301(a)], since award of alimony pendente lite is legal enforcement of marital duty rather than process for collection of debt. Collins v Collins (1984, La App 3d Cir) 458 So 2d 1008

Action by Commissioner of Public Assistance to recover amount of aid furnished defendant, on statutory ground that she had received $10,000 as beneficiary of war risk insurance policy,
was not dismissible on ground that insurance received was exempt from claims of creditors, levy, and execution. King v Sturtevant (1954) 206 Misc 153, 134 NYS2d 605

Claims for support and care of minor children of incompetent veteran were not subject to exemption of veteran's benefits from claims of creditors, since obligation of father to support minor children was not debt within purview of exemption statute, such obligation growing out of parental status and public policy. Gaskins v Security-First Nat'l Bank (1939) 30 Cal App 2d 409, 86 P2d 681

Exemption does not extend to nonresident adult heirs of veteran as against claim for board and lodging furnished veteran. In re Cerello's Estate (1935) 155 Misc 709, 281 NYS 599

20. -Benefits

In an action by the named beneficiary under National Service Life Insurance policy for recovery of expenditures incurred in defending a claim to proceeds in the state court, the statutory exemption from seizure of proceeds under 38 USCS § 3101 [now 38 USCS § 5301] is not a "benefit" of the policy which the Government has the duty to protect, and the failure of the Government to protect such claim to the policy proceeds in the state courts does not violate any statutory or contractual duty to the beneficiary, the policy terms and statutory provisions advantageous to an insured and his beneficiaries being primarily intended to protect those individuals from inaction or wrongdoing by the agency charged with administering the NSLI Program. Smith v United States (1972, CA9 Wash) 460 F.2d 985

Dividends payable under NSLI policy were benefits payable by Veterans' Administration [now Department of Veterans Affairs], and exempt under predecessor to 38 USCS § 3101 [now 38 USCS § 5301]. Administrator's decision, Veterans Administration, No. 832, November 25, 1949

Proceeds of war risk insurance and allowances for military services were exempt, and levy and sale were enjoined. Rucker v Merck (1931) 172 Ga 793, 159 SE 501 (criticized in City Council of Augusta v Ransom (1934) 179 Ga 179, 175 SE 497) and (criticized in Porter v Watson (1935) 51 Ga App 848, 181 SE 680) and (criticized in Liles v H. K. Mulford Co. (1935) 52 Ga App 674, 184 SE 396)

Pension money in possession of pensioner was exempt from seizure. Folschow v Werner (1881) 51 Wis 85, 7 NW 911

21. -Creditors

State institution was entitled to reimbursement out of veteran's exempt funds for care and maintenance of veteran in such institution, since state was not creditor within meaning of predecessor to 38 USCS § 3101 [now 38 USCS § 5301]. Savoid v District of Columbia (1961, App DC) 110 US App DC 39, 288 F.2d 851; In re Guardianship of Bemowski (1958) 3 Wis 2d 133, 88 NW2d 22

Divorced wife of veteran claiming payment of statutory dower in personalty out of funds in hands of his guardian received from United States government as compensation was not creditor, and fund was subject to appropriation in payment of her claim, notwithstanding fact that government had allotted her $30 per month out of veteran's disability compensation. Stone v Stone (1934) 188 Ark 622, 67 SW2d 189

State hospital asserting claim against insured's estate for maintenance of elderly beneficiary of NSLI policy was not creditor within meaning of 38 USCS § 3101 [now 38 USCS § 5301]. Cruce v Arkansas State Hospital (1966) 241 Ark 680, 409 SW2d 342

Claim of de facto guardian, made in guardianship proceedings, for expenditures on behalf of ward constituted charge arising during administration of ward's estate, rather than claim of creditor, and benefits paid by Veterans Administration [now Department of Veterans Affairs] were not exempt from such claim. In re Guardianship of Giambastiani (1934) 1 Cal App 2d 639, 37 P2d 142

Bank in which veteran's compensation was deposited could not be considered "creditor" of veteran, but was debtor. Gainey v Bank of Thomasville (1933) 176 Ga 736, 168 SE 877
Guardian of incompetent veteran was not "creditor," and estate was not exempt from payment of compensation to guardian under order of court. Hines v McKenzie (1933) 216 Iowa 1388, 250 NW 687

Funds paid to war veteran as compensation were not exempt from demand for alimony, wife not being creditor. Hollis v Bryan (1932) 166 Miss 874, 143 So 687

Alimony due wife under decree of divorce, even where solely for support of child, did not render divorced wife a "creditor," and fact that Veterans' Administration [now Department of Veterans Affairs] had made allotment from such compensation to child did not prevent seizure. In re Gardner (1936) 220 Wis 493, 264 NW 643

22. Duration of exemption

Fund is protected only while in course of transmission to pensioner, and when it has been paid to him it is liable to seizure. McIntosh v Aubrey (1902) 185 US 122, 46 L Ed 834, 22 S Ct 561

Under terms of 38 USCS § 3101 [now 38 USCS § 5301], exemption clearly applies to funds within terms of statute after payment thereof by government and after receipt thereof by veteran, his guardian, or other fiduciary. Hannah v Hannah (1940) 191 Ga 134, 11 SE2d 779; James v James (1942, Hardin Co) 69 Ohio App 485, 24 Ohio Ops 206, 37 Ohio L Abs 66, 44 NE2d 368

Although money derived from pension is protected by congressional enactment against demands of creditors of pensioner while it remains with pension office, or in hands of any officer or agent thereof, or is in course of transmission to such pensioner, after it reaches his hands, it becomes same as money derived from other sources. Sohl v Wainwright Trust Co. (1921) 76 Ind App 198, 130 NE 282

Exemption from creditors' claims is inapplicable to funds which have come into possession of veteran or his guardian. Department of Public Welfare use of Central State Hospital v Allen (1934) 255 Ky 301, 74 SW2d 329

Amount of pension money may be taken into account in estimating income for purpose of fixing alimony, provision that pension "shall inure wholly to his benefit" being effectuated by payment to him. Wheeler v Wheeler (1912, NJ Ch Ct) 94 A 85; Bailey v Bailey (1904) 76 Vt 264, 56 A 1014

Pension is protected only in transit to pensioner, and no further. Omans v Beeman (1910) 66 Misc 625, 124 NYS 166

Pension check given by pensioner to his wife is not subject to attachment. Bullard v Goodno (1901) 73 Vt 88, 50 A 544

23. Effect of bankruptcy of recipient of benefits

Pension money in hands of bankrupt as it was received, at time petition in bankruptcy was filed, is exempt. In re Bean (1900, DC Vt) 100 F 262

Pension moneys, received by bankrupt before filing his petition, are not exempt, even though they have not been invested or intermingled with other funds. In re Jones (1909, DC Me) 166 F 337

Pension is something against which trustee in bankruptcy has no claim. In re Hoag (1915, DC NY) 227 F 480

Proceeds of bonds paid to veteran are exempt from claims of creditors of veteran on his adjudication as bankrupt. In re Houchins (1937, DC Va) 17 F Supp 556

Where debtor agreed to pay creditor his future monthly retirement and veterans disability payments in exchange for lump sum payment, agreement did not create express trust and agreement was subject to discharge because: (1) creditor's argument that agreement created purported trust failed because there was no trust res as rights to military retired pay and veterans' disability benefits were neither entitlements nor vested rights, (2) 37 USCS § 701(c) and 38 USCS § 5301(a)(1) restricted debtor's right to transfer benefits, and (3) creditor's reliance on Uniformed Services Former Spouses' Protection Act was misplaced because nothing in that
statute suggested that Congress intended it to apply outside domestic relations context. Bowden v Structured Invs. Co., LLC (In re Bowden) (2004, BC WD Wash) 315 BR 903

24. Miscellaneous

Sureties of veteran's administrator are liable for payment to creditor made by administrator with compensation which was part of veteran's estate. Morris v National Surety Co. (1934) 179 Ga 902, 177 SE 677

Award of alimony out of pension money was valid, but attorney fees could not be allowed, as relationship of debtor and creditor existed as to that item. Stone v Stone (1934) 188 Ark 622, 67 SW2d 189

Claim on assignment of portion of war risk insurance covering attorney fees in excess of amount fixed by rules is disallowed. In re Zadurian's Estate (1931) 142 Misc 24, 253 NYS 652

Proceeds of government life insurance policy were chargeable with attorneys fees for legal services which included collection of insurance proceeds. In re Roosevelt's Estate (1947) 191 Misc 840, 77 NYS2d 252

B. Application of Exemption to Funds in Possession of Particular Parties

25. Administrators

Pension fund in hands of administrator of estate of pensioner was not exempt. Appanoose County v Carson (1930) 210 Iowa 801, 229 NW 152

Proceeds of war risk insurance in hands of administrator of dead veteran were not subject to claims of creditors of either insured or distributee of fund. Mixon v Mixon (1932) 203 NC 566, 166 SE 516

Where beneficiary in war risk insurance policy died before insured, and no other designation of beneficiary were made by insured, proceeds in hands of personal representative of insured are not exempt from claims of creditors. In re Bollow's Estate (1936) 223 Wis 262, 270 NW 82, 109 ALR 429

26. Guardians or committees

Payments made by United States under National Service Life Insurance on life of deceased soldier, while in hands of guardian of estate of deceased's minor child, were exempt from claims of creditors and were not subject or liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by beneficiary. Maddox v Elliott (1946) 248 Ala 271, 27 So 2d 498

Monies paid to guardian of mentally incompetent veteran under 38 USCS § 3101 [now 38 USCS § 5301] could not be subjected by garnishment against guardian for payment of judgment obtained by creditor against such non compos mentis. Allen v Glover (1974) 293 Ala 377, 304 So 2d 172

Payment to guardian did not leave fund in custody of government so as to be exempt under Act June 7, 1924, § 22. State ex rel. Smith v Board of Comm'rs (1931) 132 Kan 233, 294 P 915, cert den (1931) 283 US 855, 75 L Ed 1462, 51 S Ct 648

Money in hands of committee for insane veteran, which had been paid him by government as compensation for disabled veteran, was subject to claims for alimony and other debts of soldier. Arms' Committee v Arms (1935) 260 Ky 634, 86 SW2d 542

Accumulation of disability benefits paid to veteran's committee during lifetime of veteran were not exempt from claims of creditors of veteran after his death. In re Cerello's Estate (1935) 155 Misc 709, 281 NYS 599

Guardian of person non compos mentis, who was entitled to pension from United States, was not bound to apply pension money in his hands to payment of pre-existing debts of his ward. Grandview Hospital Co. v Clark (1928, Hamilton Co) 30 Ohio App 30, 164 NE 67
Principal of pension in hands of guardian was exempt, while interest thereon was not. Appanoose County v Henke (1929) 207 Iowa 835, 223 NW 876

Guardian had no right to waive exemption, and his investment of fund and commingling of principal and interest did not render part of fund representing principal subject to execution, and where guardian had made expenditures, it would be presumed that they are made from non-exempt interest. Appanoose County v Henke (1929) 207 Iowa 835, 223 NW 876

27. Designated beneficiaries or distributees

Sum representing present value of unpaid installments of War Risk insurance paid to estate of insured were not exempt from claims of creditors of distributees of estate once such sums were distributed by estate. Funk v Luithle (1929) 58 ND 416, 226 NW 595

Exemption of proceeds of War Risk insurance from claims of creditors operated in favor of substituted beneficiary where designated beneficiary died in lifetime of insured. Perrydore v Hester (1926) 215 Ala 268, 110 So 403

Pension moneys, received from federal government, were exempt in hands of widow of deceased pensioner. Surplus v Remmele (1949) 194 Misc 1036, 87 NYS2d 651

Where unpaid installments on veteran's policy were paid to his estate upon his death and distributed under laws of Texas by administrator, share of distributee, who was not beneficiary, was subject to garnishment. Vita v Morris (1934, Tex Civ App) 75 SW2d 157

Where beneficiary in policy died before receiving all installments, and balance due was paid in lump sum to administratrix, heir of insured took as beneficiary under policy and his interest was not subject to garnishment. Hunt v Slagle (1932) 45 Ga App 470, 165 SE 287 (criticized in Porter v Watson (1935) 51 Ga App 848, 181 SE 680)

While proceeds of insurance, in hands of ultimate beneficiaries, were not exempt, they were exempt where sought to be reached by claim against estate of insured. Succession of Robinson (1931) 16 La App 82, 132 So 261

28. Estate of veteran

Where deceased soldier had taken out contract of yearly renewable term war risk insurance payable to himself as beneficiary, payments to his estate were exempt from claims of creditors and allowances for costs and charges of administration. Haley v United States (1942, DC Mont) 46 F Supp 4, vacated on other grounds (1944, CA9 Mont) 145 F.2d 235

War risk insurance becoming part of estate of intestate was to be distributed according to applicable laws of descent, subject to claims of creditors. In re Hallbom's Estate (1933) 189 Minn 383, 249 NW 417, affd (1934) 291 US 473, 78 L Ed 921, 54 S Ct 497

Installments which became payable to estate of insured soldier upon death of designated beneficiary were subject to garnishment by creditors of veteran. Granite City Bank v Burt (1935) 52 Ga App 308, 183 SE 125

Proceeds of policy payable to estate were not exempt from claims of creditors after death of insured. First Nat'l Bank v Cann's Ex'x (1932) 247 Ky 618, 57 SW2d 461

War risk insurance proceeds, after death of both insured and beneficiaries, became asset generally of insured's estate and was available for payment of claims by creditors of deceased soldier. In re Hallbom's Estate (1933) 189 Minn 383, 249 NW 417, affd (1934) 291 US 473, 78 L Ed 921, 54 S Ct 497

Proceeds of NSLI policy payable to insured's estate were benefits payable under laws relating to veterans and exempt within meaning of predecessor to 38 USCS § 3101 [now 38 USCS § 5301]. In re Frazier's Estate (1953) 204 Misc 542, 124 NYS2d 295

29. Miscellaneous

Exemption granted does not extend beyond insured and designated beneficiary, and, if such beneficiary dies before receiving all installments, remainder thereof is not exempt from claims of
creditors of deceased insured. Pagel v Pagel (1934) 291 US 473, 78 L Ed 921, 54 S Ct 497; In re Fox's Estate (1934) 62 SD 586, 255 NW 565

Exemption was not allowed to heirs at law of person to whom award was made under policy. Dunagin's Guardianship v East Mississippi State Hospital (1933) 167 Miss 766, 150 So 370

C. Application of Exemption to Particular Dispositions of Funds

30. Direct deposits

Under 38 USCS § 3101(a) [now 38 USCS § 5301(a)], veterans, in safekeeping of their benefits, may use normal modes adopted by community for that purpose, provided that benefit funds, regardless of technicalities of title and other formalities, are readily available as needed for support and maintenance, actually retain qualities of moneys, and are not converted into permanent investments; benefits paid by United States Veterans' Administration [now Department of Veterans Affairs] retain their exempt status after being deposited in account in federal savings and loan association. Porter v Aetna Casualty & Surety Co. (1962) 370 US 159, 8 L Ed 2d 407, 82 S Ct 1231

Payments made by Veterans' Administration [now Department of Veterans Affairs] to incompetent Air Force veteran as disability compensation due to him and deposited by veteran's committee in accounts in federal savings and loan associations were exempt from attachment by judgment creditor of veteran by virtue of 38 USCS § 3101(a) [now 38 USCS § 5301(a)] where particular savings and loan associations involved permitted withdrawals from accounts as quickly as withdrawal from checking account, integrity of deposits was assured by federal supervision of associations plus federal insurance of accounts, deposits were neither of speculative character nor time deposits at interest, and deposits were only funds available to meet veteran's needs. Porter v Aetna Casualty & Surety Co. (1962) 370 US 159, 8 L Ed 2d 407, 82 S Ct 1231

Exemption of veterans' benefits from claims of creditors extended to payments deposited in bank by beneficiary or his guardian. Derzis v Vafes (1933) 227 Ala 471, 150 So 461; Hannah v Hannah (1940) 191 Ga 134, 11 SE2d 779; Speer v Pierce (1934) 18 Tenn App 351, 77 SW2d 77

Money paid by government to guardian and deposited in bank by him was not subject to garnishment. Wilson v Sawyer (1928) 177 Ark 492, 6 SW2d 825

Deposit of pension money in mutual savings bank was exempt from execution. Price v Society for Sav. (1894) 64 Conn 362, 30 A 139

Under predecessor to 38 USCS § 3101 [now 38 USCS § 5301] exempting proceeds of war risk insurance from claims of creditors, money paid over to beneficiary and deposited by her in bank was not subject to garnishment. Payne v Jordan (1921) 152 Ga 367, 110 SE 4, subsequent app (1927) 36 Ga App 787, 138 SE 262 (criticized in Trotter v Tennessee (1933) 290 US 354, 78 L Ed 358, 54 S Ct 138) and (criticized in Porter v Watson (1935) 51 Ga App 848, 181 SE 680)

Bank account, composed solely of proceeds of pension checks, was not exempt from claim of state for payment of charges assessed under its mental health act for care of incompetent veteran in state hospital. Department of Public Welfare v Sevcik (1960) 18 Ill 2d 449, 164 NE2d 10

Dismissal of count in complaint whereby plaintiff challenged provisions of a money manager agreement authorizing defendant bank to make charges against funds on deposit in plaintiff's checking account on the theory that some of the funds in that account derived from veterans' disability compensation payments made to him, and these were exempt, under 38 USCS § 3101 [now 38 USCS § 5301], from the kinds of charges purportedly authorized by the money manager agreement, was correct where the count failed to allege that defendant had in fact made any charges against the funds in plaintiff's account. Rush v Casco Bank & Trust Co. (1975, Me) 348 A2d 237
Exemption of veterans' benefits from claims of creditor extended to payments deposited in bank account which was subject to check or draft, and did not draw interest. In re Bowen (1943) 141 Ohio St 602, 26 Ohio Ops 173, 49 NE2d 753

Back compensation for disability, received by veteran and deposited in bank by his mother after he turned it over to her, was exempt from creditors. Speer v Pierce (1934) 18 Tenn App 351, 77 SW2d 77

Pension money deposited in name of wife in savings account was subject to attachment by creditor of pensioner. Spelman v Aldrich (1878) 126 Mass 113

Pension money mingled with other money of pensioner in deposit in bank could be taken by bank in satisfaction of debt owing from pensioner to bank. Pentz v First Nat'l Bank (1920) 75 Pa Super 1

31. Investments, generally

Deposit of veterans' benefits by veteran in his name as "attorney" did not amount to investment of funds so as to subject deposit to claims of creditors. Williams v United States Fidelity & Guaranty Co. (1939) 71 App DC 9, 107 F.2d 210

Benefits, which are readily available as needed for support and maintenance, and retain the qualities of moneys, and which have not been converted into permanent investments, are exempt from claims. District of Columbia v Phillips (1965, App DC) 121 US App DC 11, 347 F.2d 795

Exemption of veterans' benefits from claims of creditors did not extend to property purchased with such benefits or to investment of such benefits. Hannah v Hannah (1940) 191 Ga 134, 11 SE2d 779; Hale v Gravallese (1960) 340 Mass 722, 166 NE2d 557; In re Bowen (1943) 141 Ohio St 602, 26 Ohio Ops 173, 49 NE2d 753

Exemption did not extend to savings account and savings bonds growing out of deposits and purchases of proceeds of veteran's disability pension checks. Hale v Gravallese (1960) 340 Mass 722, 166 NE2d 557

Benefits in form of pension and war risk insurance paid to veteran or his guardian by federal government and deposited in checking account in bank were exempt from claims of creditors; but such benefits, when placed in savings account at interest or converted into real estate, lost their exempt status and became investments amenable to creditor's demands. In re Bowen (1943) 141 Ohio St 602, 26 Ohio Ops 173, 49 NE2d 753

32. -Bonds or notes

Negotiable notes and United States bonds purchased for incompetent World War veteran by his guardian out of benefits paid under Federal laws relating to such veterans, and held as investments, were not exempt from execution upon judgment against veteran, under predecessor to 38 USCS § 3101 [now 38 USCS § 5301] exempting "payments of benefits due or to become due" and "such payments made to, or on account of, a beneficiary." Carrier v Bryant (1939) 306 US 545, 83 L Ed 976, 59 S Ct 707

Government bonds owned by prisoner were not exempt from Michigan Prison Reimbursement Act though they were purchased with funds received by prisoner's guardian from Veterans' Administration [now Department of Veterans Affairs]. Auditor General v Olezniczak (1942) 302 Mich 336, 4 NW2d 679

Funds received by guardian of veteran were not exempt after being invested in mortgages or United States bonds. In re Gardner (1936) 220 Wis 493, 264 NW 643

33. -Real or personal property

Automobile, purchased by veteran with money received as compensation from United States, was subject to execution for debt. Liles v H. K. Mulford Co. (1935) 52 Ga App 674, 184 SE 396

Property purchased with pension money was liable to sale on execution. Cavanaugh v Smith (1882) 84 Ind 380; Faurote v Carr (1886) 108 Ind 123, 9 NE 350; Johnson v Elkins (1890) 90 Ky 163, 13 SW 448
Property purchased by veteran with disability benefits funds received from government was not exempt from claims of creditors. In re Guardianship of Letourneau (1941) 238 Wis 473, 300 NW 248 (ovrd in part by In re Guardianship of Bemowski (1958) 3 Wis 2d 133, 88 NW2d 22)

Real estate of veteran was not exempt from levy though purchased with benefit payments received from federal government. McCurry v Peek (1936) 54 Ga App 341, 187 SE 854; Henderson v Missoula (1938) 106 Mont 596, 79 P2d 547, 116 ALR 1425

Land, standing in name of wife, which had been purchased with pension money of her husband, was liable to execution for husband's debts. Crow v Brown (1890) 81 Iowa 344, 46 NW 993

Where pensioner gave his pension certificate to his wife, with which she purchased real estate in her own name, such property was not subject to execution on judgment against pensioner. Marquardt v Mason (1893) 87 Iowa 136, 54 NW 72

Homestead acquired with pension money could be sold on execution. Curtis v Helton (1900) 109 Ky 493, 59 SW 745; Friend v Garcelon (1884) 77 Me 25

Land was not exempt merely because price was paid with pension money. Hudspeth v Harrison (1884) 13 Ky Ops 25 (ovrd in part by Matthews v Lewis (1981, Ky) 617 SW2d 43)

Exemption from taxation with respect to payments of benefits did not extend to real estate purchased in part or wholly out of such payments. Lucas v Board of Equalization (1957) 165 Neb 315, 85 NW2d 638, cert den (1958) 356 US 938, 2 L Ed 2d 813, 78 S Ct 780

Provisions exempting from levy, execution, and seizure proceeds of veterans adjusted service compensation and disability compensation did not extend to realty purchased by veteran with proceeds of such compensation. James v James (1942, Hardin Co) 69 Ohio App 485, 24 Ohio Ops 206, 37 Ohio L Abs 66, 44 NE2d 368

D. Application of Exemption to Claims for Support or Maintenance

1. In General

34. Generally

Assignment of his pension certificate by inmate of national home for volunteer soldiers did not give home right to collect pension for any period of time other than that during which he remained inmate of home. (1879) 16 Op Atty Gen 374

Insurance paid into veteran's estate after death of beneficiary was not subject to claim for lodging and care alleged to have been furnished veteran during years 1906 to 1918. In re McCormick's Estate (1938) 169 Misc 672, 8 NYS2d 179

35. Claims of governmental entities

Benefits of veteran serviceman were not exempt from claims of state agency that undertook full responsibility for veteran's care and maintenance. Department of Health & Rehabilitative Services v Davis (1980, CA5 Ala) 616 F.2d 828

District court erred in dismissing 42 USCS § 1983 claim brought by inmate against prison employees who deducted funds derived from inmate's Veteran's Administration disability benefits check to pay fine to New Jersey Victims of Crime Compensation Board pursuant to N.J. Stat. Ann. § 2C:43-3.1, as employees’ action was levy or seizure of benefits prohibited by 38 USCS § 5301(a). Higgins v Beyer (2002, CA3 NJ) 293 F.3d 683

State or public institution was not entitled to have such part of its claim for care and maintenance of veteran as accrued prior to appointment of veteran's guardian or committee paid out of funds in hands of guardian or committee realized from veterans' benefit payments. District of Columbia v Reilly (1957, App DC) 102 US App DC 9, 249 F.2d 524; In re Guardianship of Bemowski (1958) 3 Wis 2d 133, 88 NW2d 22

Rules adopted by boards of commissioners of soldiers' homes, requiring inmates to contribute portion of their pension money to support of home, did not violate 38 USCS § 3101 [now 38 USCS § 5301]; state soldiers' home could require inmates who received pensions to
surrender all of it over $6 per month, to be paid to certain relatives, if any, or if no such specified relatives, be credited to support fund. Ball v Evans (1896) 98 Iowa 708, 68 NW 435

38 USCS § 3101 [now 38 USCS § 5301] did not bar recovery by state from guardian of veteran, all of whose estate was derived from veteran's benefits, for services rendered in caring for the veteran in a state mental hospital. State v Bean (1963) 159 Me 455, 195 A2d 68

State could recover under state prison reimbursement statute, out of exempt funds, for maintenance and support of veteran in state prison. Auditor General v Olezniczak (1942) 302 Mich 336, 4 NW2d 679

Money in the estate of deceased veteran, which came from a federal veteran's pension payable to the decedent during his lifetime, was not exempt from the judgment claim recovered by the state on account of care and treatment furnished the veteran in state hospital. State v Monaco (1963) 81 NJ Super 448, 195 A2d 910

State could enforce claim against funds received by incompetent veteran based on state statutory liability on part of committee to pay reasonable cost of incompetent's maintenance and treatment in state institution. In re Simpson (1946) 270 App Div 902, 61 NYS2d 529, app dismd (1947) 296 NY 831, 72 NE2d 20

Exemption of veterans benefits from claims of creditor applied even to claim for care and maintenance of incompetent veteran in state institution. In re Cervantes (1940) 174 Misc 594, 22 NYS2d 116

Proceeds of veteran's disability pension, accrued and placed on deposit in account, which, upon such veteran's death, was paid to his administrator, was not exempt from claim by state for such veteran's care and maintenance. State v Wendt (1953) 94 Ohio App 440, 52 Ohio Ops 150, 116 NE2d 30

State was attributed special status because it had provided very support for which veterans' benefits were intended by providing incompetent veteran with care and maintenance in state mental institution where state had no choice but to accept veteran and provide necessary support since it was engaged in governmental function and could not, as private individual or institution might, refuse services prior to payment so that deceased incompetent veteran's estate was subject to state claims for cost of care and maintenance. State ex rel. Eastern State Hospital v Beard (1979, Okla) 600 P2d 324

Exemption extended to claim for care and maintenance furnished to veteran as inmate of state institution. In re Guardianship of Letourneau (1941) 238 Wis 473, 300 NW 248 (ovrd in part by In re Guardianship of Bemowski (1958) 3 Wis 2d 133, 88 NW2d 22)

Exemption in favor of veteran did not apply to claim for care and support furnished to incompetent veteran by state while such veteran was confined to state mental institution and under guardianship. In re Guardianship of Bemowski (1958) 3 Wis 2d 133, 88 NW2d 22

2. Dependents of Veteran

36. Generally

Obligation of father to support his minor children was not exempted debt, and benefits due veteran would be subject to claims for their care. Gaskins v Security-First Nat'l Bank (1939) 30 Cal App 2d 409, 86 P2d 681

Pensioner could be compelled to use pension to support wife. Tully v Tully (1893) 159 Mass 91, 34 NE 79; Martin v Hurlburt & Rutland Sav. Bank (1888) 60 Vt 364, 14 A 649

Exemption does not prevent payment of support for infant from funds received by her from Veterans' Administration [now Department of Veterans Affairs]. In re Delano's Guardianship (1952, Sur) 114 NYS2d 183

37. Court support orders

State statute construed by state courts as authorizing award of child support from veteran's disability benefits which are his sole income does not conflict with 38 USCS § 3101 [now 38
USCS § 5301] since Congress intended veterans' disability benefits to used in part to support veteran's family; under Supremacy Clause of U.S. Constitution (Art VI, Cl 2) state statute is not preempted by 38 USCS § 3101 [now 38 USCS § 5301] providing that veterans' benefits payments shall not be liable to "attachment, levy, or seizure" where § 3101 [now § 5301] does not apply to shield veterans' disability payments from seizure under otherwise valid child support order.  Rose v Rose (1987) 481 US 619, 95 L Ed 2d 599, 107 S Ct 2029

Court-appointed guardian of incompetent veteran may make voluntary payments of spousal support in accordance with California court order from bank account representing accumulated compensation payments, but funds are not subject to direct attachment or involuntary diversion except to extent permitted under 42 USCS § 662(f)(2).  VA GCO 4-84

Exemption was inapplicable to children's support payments enforceable by civil contempt only.  Dillard v Dillard (1960, Tex Civ App Austin) 341 SW2d 668

Wife could collect judgment for support money from fund consisting exclusively of money furnished by Veterans' Administration [now Department of Veterans Affairs], for care, maintenance, and support of incompetent veteran husband.  Pishue v Pishue (1949) 32 Wash 2d 750, 203 P2d 1070

38. Claims of governmental entities

38 USCS § 3101 [now 38 USCS § 5301] did not bar recovery of claims of state hospital against incompetent parent of deceased serviceman under 38 USCS § 321.  Cruce v Arkansas State Hospital (1966) 241 Ark 680, 409 SW2d 342

County was entitled to collect for care of deceased widow of veteran, where assets of estate was pension money.  In re Todd's Estate (1952) 243 Iowa 930, 54 NW2d 521

Exemption did not extend to claim of state for maintenance of insane beneficiary at insane hospital, since purpose of pension was to supply support and maintenance.  In re Lewis' Estate (1938) 287 Mich 179, 283 NW 21

In action to receive compensation for services rendered in care and maintenance of incompetent veteran's deceased mother by state hospital, income accumulated by veteran through pension fund was subject to claim by hospital.  In re Thellusson (1947) 190 Misc 470, 74 NYS2d 837

Committee of incompetent veteran could be required to pay state hospital for care, maintenance, and medical treatment of veteran's wife out of income, current or accumulated, received from pension funds or investment thereof.  In re Shinberg (1947, Sup) 76 NYS2d 334

Though deceased's estate consisted of items accumulated from proceeds of pension as widow of Civil War veteran, state department could be allowed claim against her estate for her care and maintenance while she was confined in county asylum, as against contention that exemption extended to estate of deceased pensioner.  In re Buxton's Estate (1944) 246 Wis 97, 16 NW2d 399, 33 AFTR 294

V. COLLECTION OF CLAIMS OF UNITED STATES

39. Generally

Payments made to deceased veteran's wife as "dependent widowed mother," by reason of her son and daughter, stepchildren of veteran, could be set off against balance sought by widow as administratrix of her husband's estate, where children had been inmates in veteran's home and not members of soldier's household, but rule was otherwise as to payments made to daughter, and to mother as legal guardian of her son, there being no mutuality between claim and setoff as to such payments.  United States v Mroch (1937, CA6 Ohio) 88 F.2d 888

Whether or not pension payments or disability compensation erroneously received by plaintiff from Veterans' Administration should be set off against salary payments due him from it is matter for administrative settlement through consideration and decision by Administrator of Veterans' Administration [now Secretary of Veterans Affairs] and not by courts.  Egan v United States
Government can charge fund in its possession with claims it has against fund's owner. Di Silvestro v United States (1966, ED NY) 268 F Supp 516, revd on other grounds (1968, CA2 NY) 405 F.2d 150

Dividends payable under National Service Life Insurance policy are benefits payable by Veterans' Administration [now Department of Veterans Affairs] under law it administers relating to veterans, and hence such dividends are not subject to setoff or claims of United States arising under any other act or acts administered by any agency other than Veterans' Administration [now Department of Veterans Affairs]. 1949 ADVA 832

Though withholding of premiums forwarded by or for veteran is not authorized in order to reinstate lapsed policy of insurance, to purchase additional insurance, or to liquidate overpayment of compensation, pension, subsistence allowance, readjustment allowance, or indebtedness arising out of loan guaranty or insurance under former 38 USC §§ 694 et seq., withholding dividends or premiums refundable because of retroactive finding of total disability is proper in liquidating such overpayments or illegal payments. 1949 ADVA 804

Veterans Administration [now Department of Veterans Affairs] is not entitled to setoff for indebtedness from benefits payable under laws it administers absent specific authorization. 1954 ADVA 949

Except as to overpayments arising with respect to Veterans' Administration [now Department of Veterans Affairs] benefits no payments can be offset to liquidate indebtedness owed United States except where beneficiary voluntarily requests deduction from benefit amount otherwise payable. VA GCO 29-79

Claim of United States arising from payment of settlement check is not overpayment or illegal payment arising under laws administered by Veterans Administration [now Department of Veterans Affairs] and related to veterans under 38 USCS § 3101(b) [now 38 USCS § 5301(b)] for purposes of recovery of such claim by offset against Veterans Administration [now Department of Veterans Affairs] benefits; such claim may not be considered indebtedness arising from participation in benefits program administered by Veterans Administration [now Department of Veterans Affairs] for purposes of offset under authority of 38 USCS § 3114(a) [now 38 USCS § 5314(a)]. VAG CO 9-83

40. Payments on insurance policies

Government may recover on counterclaim for amounts erroneously paid to beneficiary under insurance contract where beneficiary brought suit upon government's refusal to pay further installments. Cummings v United States (1929, DC Minn) 34 F.2d 284

Where payments of insurance of deceased veteran are erroneously divided among his half brothers and sisters without taking into account children of deceased half sister, amounts which should have been paid to children may be deducted when final settlement is made by lumpsum payment. Bowling Green Trust Co. v United States (1939, DC Ky) 27 F Supp 970

41. Loan guarantees

Proceeds paid pursuant to loan guaranty under former 38 USC §§ 694 et seq. and not recouped from property are recoverable from veteran's pension or insurance payments, unless Administrator [now Secretary] in his discretion determines that veteran was not at fault and that such recovery would defeat purposes of benefits otherwise payable or would be against equity or good conscience; but such payments are not recoverable from pension benefits payable to veteran's widow or dependents or from any insurance payable to beneficiary after his death. 1944 ADVA 607

Pension benefits payable to widow of serviceman killed in World War II for herself and minor children were subject to offset for amount paid pursuant to loan guaranteed under Servicemen's Readjustment Act of 1944 (38 USCS §§ 1801 et seq.); however, benefits payable to or for minor

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42. Property

It was error to satisfy veteran's indebtedness for unaccounted vocational training property out of compensation due him before reinstating his war risk insurance contract, rather than from payments due under insurance contract upon its reinstatement, which error greatly lessened amount of insurance revived. United States v Robinson (1939, CA9 Cal) 103 F.2d 713

43. Fines

Sums due United States from veteran on account of fine imposed in criminal prosecution may not be setoff against, or withheld from, sums awarded veteran as disability compensation. McElhany v United States (1944) 101 Ct Cl 286

United States may not withhold amount of fine imposed against veteran from his monthly disability compensation payments, and veteran's claim to recover such wrongfully withheld payments accrues when amounts are withheld on first day of month following month for which amounts became due. Hermann v United States (1949) 113 Ct Cl 54, 81 F Supp 830

VI. PRACTICE AND PROCEDURE

44. Generally

Affidavits showing source of funds used to purchase real estate were admissible on issue of exemption from taxation. Atlanta v Stokes (1932) 175 Ga 201, 165 SE 270 (criticized in Trotter v Tennessee (1933) 290 US 354, 78 L Ed 358, 54 S Ct 138) and (criticized in City Council of Augusta v Ransom (1934) 179 Ga 179, 175 SE 497) and (criticized in Porter v Watson (1935) 51 Ga App 848, 181 SE 680) and (criticized in Liles v H. K. Mulford Co. (1935) 52 Ga App 674, 184 SE 396)

45. Burden of proof

Rule that he who claims exemption bears burden of establishing it means no more than that one who seeks exemption must show that he is as matter of fact within class which is as matter of law exempt. Williams v United States Fidelity & Guaranty Co. (1939) 71 App DC 9, 107 F.2d 210

38 USCS § 3101(a) [now 38 USCS § 5301(a)] is not unconditional and does not prevent state from placing reasonable burden on debtor to claim exemption. Phillips v Bartolomie (1975, 1st Dist) 46 Cal App 3d 346, 121 Cal Rptr 56

46. Estoppel

Veterans Administration [now Department of Veterans Affairs] was not equitably estopped from arguing that tuition arrangement was prohibited by 38 USCS § 3101(a) [now 38 USCS § 5301(a)] by statements of its officials which might have indicated approval of tuition funding arrangement for direct payment; such approval was erroneous and beyond scope of authority vested in Veterans Administration [now Department of Veterans Affairs] by Congress. American Training Services, Inc. v Veterans Admin. (1977, DC NJ) 434 F Supp 988

47. Damages

Proper measure of damages for wrongful garnishment of exempt proceeds, was six per cent interest on money while wrongfully impounded. Purvis v Walls (1931) 184 Ark 887, 44 SW2d 353

§ 5302. Waiver of recovery of claims by the United States

Discussion and Analysis in the Veterans Benefits Manual
(a) There shall be no recovery of payments (or any interest thereon) or overpayments (or any interest thereon) of any benefits under any of the laws administered by the Secretary whenever the Secretary determines that recovery would be against equity and good conscience, if an application for relief is made within 180 days from the date of notification of the indebtedness by the Secretary to the payee, or within such longer period as the Secretary determines is reasonable in a case in which the payee demonstrates to the satisfaction of the Secretary that such notification was not actually received by such payee within a reasonable period after such date. The Secretary shall include in the notification to the payee a statement of the right of the payee to submit an application for a waiver under this subsection and a description of the procedures for submitting the application.

(b) With respect to any loan guaranteed, insured, or made under chapter 37 of this title [38 USCS §§ 3701 et seq.], the Secretary shall, except as provided in subsection (c) of this section, waive payment of an indebtedness to the Department by the veteran (as defined in sections 101, 3701, and 3702(a)(2)(C)(ii) of this title [38 USCS §§ 101, 3701, and 3702(a)(2)(C)(ii)]), or the veteran's spouse, following default and loss of the property, where the Secretary determines that collection of such indebtedness would be against equity and good conscience. An application for relief under this subsection must be made within one year after the date on which the veteran receives notice by certified mail with return receipt requested from the Secretary of the indebtedness. The Secretary shall include in the notification a statement of the right of the veteran to submit an application for a waiver under this subsection and a description of the procedures for submitting the application.

(c) The recovery of any payment or the collection of any indebtedness (or any interest thereon) may not be waived under this section if, in the Secretary's opinion, there exists in connection with the claim for such waiver an indication of fraud, misrepresentation or bad faith on the part of the person or persons having an interest in obtaining a waiver of such recovery or the collection of such indebtedness (or any interest thereon).

(d) No certifying or disbursing officer shall be liable for any amount paid to any person where the recovery of such amount is waived under subsection (a) or (b).

(e) Where the recovery of a payment or overpayment made from the National Service Life Insurance Fund or United States Government Life Insurance Fund is waived under this section, the fund from which the payment was made shall be reimbursed from the National Service Life Insurance appropriation or the military and naval insurance appropriation, as applicable.

Amendments:

1972. Act June 30, 1972 (effective 6/30/72, as provided by § 301(c) of such Act, which appears as 38 USCS § 3713 note), substituted this section for one which read:

"§ 3102. Waiver of recovery of overpayments

"(a) There shall be no recovery of payments or overpayments of any benefits (except servicemen's indemnity) under any of the laws administered by the Veterans' Administration from any person who, in the judgment of the Administrator, is without fault on his part, and where, in the judgment of the Administrator, such recovery would defeat the purpose of benefits otherwise authorized or would be against equity and good conscience.
"(b) No certifying or disbursing officer shall be liable for any amount paid to any person where the recovery of such amount is waived under subsection (a).

"(c) Where the recovery of a payment or overpayment made from the National Service Life Insurance Fund or United States Government life insurance fund is waived under this section, the fund from which the payment was made shall be reimbursed from the National Service Life Insurance appropriation or the military and naval insurance appropriation, as applicable.

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(f)(1) of such Act, which appears as 38 USCS § 5314 note), in subsec. (a), inserted "(or any interest thereon)"; and in subsec. (c), inserted "(or any interest thereon)" wherever appearing.

1982. Act Oct. 14, 1982 (effective as provided by § 407(b) of such Act, which appears as a note to this section), in subsec. (a), substituted "180 days" for "two years" and inserted ", or within such longer period as the Administrator determines is reasonable in a case in which the payee demonstrates to the satisfaction of the Administrator that such notification was not actually received by such payee within a reasonable period after such date".

1986. Act Oct. 28, 1986, in subsec. (b), substituted "the veteran's" for "his"; and in subsec. (c), substituted "the Administrator" for "his" wherever appearing.

1989. Act Dec. 18, 1989, in subsec. (b), substituted "shall, except as provided in subsection (c) of this section," for "may"; and in subsec. (c), substituted "The recovery of any payment or the collection of any indebtedness (or any interest thereon) may not be waived under this section" for "The Administrator may not exercise the Administrator's authority under subsection (a) or (b) of this section to waive recovery of any payment or the collection of any indebtedness (or any interest thereon)", and substituted "or bad faith" for ", material fault, or lack of good faith".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3102, as 38 USCS § 5302.

Act June 13, 1991, as amended by Act Oct. 28, 1992, in subsec. (a), added the sentence beginning "The Secretary shall include in the notification . . ."; and, in subsec. (b), substituted "101, 1801, and 1802(a)(2)(C)(ii) of this title" for "101 and 1801" and added the two sentences beginning "An application for relief . . ." and "The Secretary shall include in the notification . . .".

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

1997. Act Aug. 5, 1997 (applicable as provided by § 8033(b) of such Act, which appears as 38 USCS § 3726 note), in subsec. (b), inserted "with return receipt requested".

Other provisions:

Applicability of waiver to prior claims. Act June 30, 1972, P. L. 92-328, Title II, § 202(b), 86 Stat. 397, provided: "The waiver authority provided by section 3102(a) of title 38, United States Code [now 38 USCS § 5302(a)], as amended by subsection (a) of this section shall apply to improper payments, overpayments, and indebtedness established by the Administrator prior to the effective date of this Act [effective June 30, 1972] if application for relief was pending on the date of enactment of this Act, or such an application is made within two years from the date of enactment of this Act."

subsec. (a) of this section] shall apply only with respect to notifications of indebtedness that are made by the Administrator of Veterans' Affairs after March 31, 1983."

**Code of Federal Regulations**

Fiscal Service, Department of the Treasury-General regulations governing U. S. securities, 31 CFR Part 306

Department of Veterans Affairs-General provisions, 38 CFR Part 1

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

**Cross References**

This section is referred to in 38 USCS §§ 3680, 3685, 3713, 5314, 5315, 5701

**Research Guide**

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:41

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 40

Annotations:

Association of persons as proper representative of class under Rule 23 of Federal Rules of Civil Procedure governing maintenance of class actions. 63 ALR Fed 361

1. Generally

2. Relationship to other laws

3. Right to request waiver

4. Time for request for waiver

5. Grounds for waiver

6. Liability of certifying or disbursing officer

7. Judicial review

1. Generally

Right to administrative waiver of debt under § 3102 [now 38 USCS § 5302] accruing to widow of veteran from whom Veterans Administration [now Department of Veterans Affairs] brought suit for repayment of benefit overpaid to veteran was unaffected by pendency of repayment litigation and District Court appropriately denied motion to dismiss or stay action for repayment. United States v Estate of Payne (1988, CA5 Tex) 836 F.2d 914

Veterans' Administration [now Department of Veterans Affairs] could not recoup overpayment of veteran's benefits to joint account shared by now-deceased veteran with wife without notice and opportunity to wife to request waiver of recoupment. Beauchesne v Nimmo (1983, DC Conn) 562 F Supp 250

Provision of former 38 USC § 809 barring recovery of payments applied to payments by Veterans Administration [now Department of Veterans Affairs] described as "overpayment of dividend," refund of premiums, premiums which should have been collected but were erroneously waived, and also to other overpayment of any benefit made under National Service Life Insurance Act. 1951 ADVA 875

Waiver authority under 38 USCS § 3102 [now 38 USCS § 5302] applied uniformly to overpayments of any VA benefits. VA GCO 12-79

Notice provisions under Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000), did not apply to veteran's request for waiver of

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indebtedness under 38 USCS § 5302 because: (1) waiver of overpayment was not claim for benefits under chapter 51 of title 38 of U.S. Code but, rather, application for waiver of overcompensation under chapter 53, and VCAA notice provisions of 38 USCS § 5103(a) did not apply to chapter 53; and (2) 38 USCS § 5302(a) contained notice provision specific to request for waiver of overpayment and specific notice provisions of 38 USCS § 5302(a) superceded general VCAA notice provisions. Lueras v Principi (2004) 18 Vet App 435, 2004 US App Vet Claims LEXIS 651, subsequent app (2004, US) 2004 US App Vet Claims LEXIS 714

2. Relationship to other laws

Veteran was required to reimburse government for erroneous overpayment of educational benefits by Veterans Administration [now Department of Veterans Affairs] under 38 USCS § 1780 [now § 3680] where he received payment for period during which he completed no courses because of illness but failed to avail himself of right granted by § 1780(3) [now § 3680] to apply for waiver of indebtedness pursuant to § 3102 [now § 5302], since reimbursement requirement applied regardless of whether overpayment resulted from fault of veteran or not. United States v Kirby (1981, ND Ga) 522 F Supp 424

Upgraded discharge constituted new and material evidence not previously available under 38 USCS § 3010 [now 38 USCS § 5110], allowing application for waiver to be resubmitted notwithstanding that more than 2 years [now 180 days] had passed, although favorable decision could nonetheless be foreclosed if operation of 38 USCS § 3102(c) [now 38 USCS § 5302(c)] was invoked. VA GCO 10-79

3. Right to request waiver

Waiver of government's right to recover overpayments of Veterans Administration [now Department of Veterans Affairs] could not be sought by administratrix of payee's estate under 38 USCS § 3102(a) [now 38 USCS § 5302(a)]; because administratrix was neither payee nor beneficiary of payments at issue; payee's failure before his death to seek waiver within statutory period made overpayment final. United States v Estate of Payne (1987, ED Tex) 654 F Supp 399, affd (1988, CA5 Tex) 836 F.2d 914

In denying widow's claim for waiver of recovery of overpayment of death pension benefits, BVA improperly relied on General Counsel's opinion that any sum collected by VA prior to amendment of waiver statute would impermissibly give statute retroactive effect; widow was entitled to benefit from any applicable provisions in changes in law. Franklin v Brown (1993) 5 Vet App 190

4. Time for request for waiver

Application for waiver must be made within 2 years [now 180 days]; due process rights of recipient of educational benefits who was required to make reimbursement was not violated by recovery of overpayments where United States twice informed recipient that he had incurred overpayments and that he could seek waiver and where recipient failed to seek waiver within 2 year period. United States v Brandon (1986, CA4 NC) 781 F.2d 1051

Incarcerated veteran timely asserted claim for partial waiver where letter to regional office contesting reduction of monthly benefits payment and computation of amount of indebtedness arising from overpayments was filed within 180-day period under 38 USCS § 5302(a). Narron v West (1999) 13 Vet App 223, 1999 US App Vet Claims LEXIS 1354

Decision by Board Veterans' Appeals that appellant had not timely filed request for waiver of overpayment pursuant to 38 USCS § 5302(a) is affirmed where, although appellant did not recall receiving notice of indebtedness, appellant did not dispute that request was filed well after 180 day period expired and did not present clear evidence to contrary that notice was properly mailed to her. McCullough v Principi (2001) 15 Vet App 272, 2001 US App Vet Claims LEXIS 1222

Request for waiver of overpayment of benefits was untimely filed under 38 USCS § 5302(a) after veteran's widow presumptively received notice of overpayment, and widow's alleged mental illness was not permissible ground for extending statutory period. Barger v Principi (2002) 16 Vet App 132, 2002 US App Vet Claims LEXIS 381

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5. Grounds for waiver

Mortgagee was entitled to waiver of foreclosure deficiency under 38 USCS § 3102 [now 38 USCS § 5302], where he did not contest foreclosure of loan guaranteed by Veterans' Administration [now Department of Veterans Affairs] after state department of veterans affairs assured him he would have no personal liability for deficiency, because collection of deficiency would be contrary to equity and good conscience. United States v Church (1990, ND Ind) 736 F Supp 1494

Amounts paid pursuant to loan guaranty and not recouped from property pledged were recoverable from veteran's pension or insurance payments, unless Administrator [now Secretary] in his discretion determined that veteran was not at fault and that such recovery would defeat purposes of such benefits otherwise payable or would be inequitable. 1944 ADVA 607

Collection of debt secured by insurance contract out of moneys that became payable on account of such contract was not subject to waiver, but collection out of benefits other than proceeds of such insurance contract could be waived if recovery would defeat purpose of benefits otherwise authorized or would be against equity and good conscience. 1951 ADVA 875

Administration [now Department] was not authorized to grant general waiver of debt simply because of hardship and present inability of veteran to pay, and waiver authority where recovery would be against equity in good conscience did not give power to grant general waiver permanently negating opportunity of government to effect recovery while ignoring question of veteran's fault in creation of indebtedness or failing to consider general equitable principles; waiver was appropriate if veteran was not at fault and recovery of whole or part would either defeat purposes of veterans' benefits otherwise payable or be against equity and good conscience. 1951 ADVA 887

Board's Decision to grant partial rather than full wavier of loan deficiency was appropriate where debt was neither fault of veteran nor of VA, veteran was gainfully employed and able to meet his current financial obligations, even though he had three minor children and his wife was legally blind, and he owned three vehicles, although he was only one able to drive them, one of which was luxury item valued at $12,500. Stone v Derwinski (1992) 2 Vet App 56

Board did not err in waiving half of debt since collection would not be against equity and good conscience because veteran was paying several other creditors each month and therefore should be able to make payments to government, although his psychiatric disability might have contributed to his home loan default. Green v Derwinski (1991) 1 Vet App 570

Board's review of evidence and conclusion that veteran was partially at fault in creation of debt gave adequate reasons for denying waiver of $12,000 of debt and granting over $2,000 waiver. Nelson v Brown (1993) 4 Vet App 298

Board's denial of waiver of recovery of overpayment of improved death pension benefits was erroneous where it contained no discussion whether claimant's uncontroverted evidence that four times she had indicated that she was not receiving that which she was receiving resulted in preclusion of waiver because of any indication of fraud, misrepresentation or bad faith, and where Board failed to discuss or provide reasons for not discussing all elements to be considered in determining whether recovery would be against equity and good conscience. Ridings v Brown (1994) 6 Vet App 544

Veteran was not entitled to waiver of recovery of overpayment of disability pension benefits since he was guilty of fraud. Brown v Brown (1995) 8 Vet App 40

BVA's decision to waive over $5,000 of veteran's total indebtedness but require repayment of some $4,000 was neither arbitrary, capricious, nor abuse of discretion where it found that appellant had defaulted on loan but that appellant, lender, and VA all shared some fault; appellant abandoned property and neglected his contractual responsibility to government, deterioration of appellant's neighborhood was neither his fault nor VA's, appellant substantially relied upon written assurances from holder of deed of trust that VA had accepted his deed in lieu of foreclosure and VA failed to perceive and rectify this confusion. Kaplan v Brown (1996) 9 Vet App 116, app dismd (1996, CA FC) 1996 US App LEXIS 34808
6. Liability of certifying or disbursing officer

Provision of 38 USCS § 3102(d) [now 38 USCS § 5302(d)] immunizing certifying or disbursing officer from liability for any amount paid whenever Administrator [now Secretary] has waived claim against beneficiary does not serve to protect educational institution from such claims, but protects only agency employees; phrase "certifying officer" refers to individual employed by Veterans Administration [now Department of Veterans Affairs] for certification purposes. Colorado v VA (1977, DC Colo) 430 F Supp 551, affd (1979, CA10 Colo) 602 F.2d 926, cert den (1980) 444 US 1014, 62 L Ed 2d 643, 100 S Ct 663

7. Judicial review

Under 38 USCS § 3102 [now 38 USCS § 5302], any determination by the Veterans' Administration [now Department of Veterans Affairs] was final and not subject to review by federal district court. United States v Oxner (1964, ED Ark) 229 F Supp 58

Government suit to recover overpayments of educational benefits to veteran was not ripe for adjudication where there had been no second-level review of veteran's application for waiver under 38 USCS § 3102 [now 38 USCS § 5302], nor could government rely on theory that veteran failed to request appeal during one-year period of limitation, where it never informed veteran of adverse decision reached at first level of review. United States v Rowin (1982, WD NY) 550 F Supp 643 (superseded by statute as stated in Daniels v United States (2000, CA6 Ohio) 2000 US App LEXIS 1798)

Board did not err in finding that veteran's actions constituted fraud and accordingly denied waiver of recovery of overpayment of improved pension benefits, upon evidence that veteran completed and signed numerous false income statements over five years to effect that his wife was not employed. Farless v Derwinski (1992) 2 Vet App 555

Although scope of review of waiver decisions under arbitrary and capricious standard is narrow and court may not substitute its judgment for that of agency, agency must examine relevant date and articulate satisfactory explanation for its action, including rational connection between facts found and choices made. Cullen v Brown (1993) 5 Vet App 510

Appellant has not demonstrated that Board failed to articulate satisfactory explanation for its decision denying entitlement to waiver of recovery of overpayments pursuant to 38 USCS § 5302(a) where appellant has not pointed to any authority indicating VA had duty to notify veterans receiving compensation of enactment of 38 USCS § 5313, limiting compensation payments to incarcerated felons; although Board did not explicitly address appellant's contentions that criminal proceedings depleted his financial resources and that his expenses exceeded his income, Board's determination that appellant's "basic necessities" are provided for by correctional institution necessarily encompasses implicit determination that claimed expenditures were not for "basic necessities" and that inadequate funds for such expenditures would not lead to deprivation of "basic necessities; and Board's explanation for its finding of unjust enrichment was satisfactory. Bruce v Gober (2000) 13 Vet App 565, 2000 US App Vet Claims LEXIS 764, reconsideration gr, op withdrawn, remanded, motion den (2001) 15 Vet App 27, 2001 US App Vet Claims LEXIS 688

In request for waiver of indebtedness under 38 USCS § 5302, Board of Veterans' Appeals provided detailed analysis based on record in support of its conclusion that veteran acted in bad faith by willfully and intentionally not disclosing his and his spouse's total income and net-worth; he chose to withhold these material facts with full knowledge that pension rate was based on all income from all sources to himself and his spouse. Lueras v Principi (2004) 18 Vet App 435, 2004 US App Vet Claims LEXIS 651, subsequent app (2004, US) 2004 US App Vet Claims LEXIS 714

§ 5303. Certain bars to benefits

(a) The discharge or dismissal by reason of the sentence of a general court-martial of any person from the Armed Forces, or the discharge of any such person on the ground that
such person was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, or as a deserter, or on the basis of an absence without authority from active duty for a continuous period of at least one hundred and eighty days if such person was discharged under conditions other than honorable unless such person demonstrates to the satisfaction of the Secretary that there are compelling circumstances to warrant such prolonged unauthorized absence, or of an officer by the acceptance of such officer's resignation for the good of the service, or (except as provided in subsection (c)) the discharge of any individual during a period of hostilities as an alien, shall bar all rights of such person under laws administered by the Secretary based upon the period of service from which discharged or dismissed, notwithstanding any action subsequent to the date of such discharge by a board established pursuant to section 1553 of title 10 [10 USCS § 1553].

(b) Notwithstanding subsection (a), if it is established to the satisfaction of the Secretary that, at the time of the commission of an offense leading to a person's court-martial, discharge, or resignation, that person was insane, such person shall not be precluded from benefits under laws administered by the Secretary based upon the period of service from which such person was separated.

(c) Subsection (a) shall not apply to any alien whose service was honest and faithful, and who was not discharged on the individual's own application or solicitation as an alien. No individual shall be considered as having been discharged on the individual's own application or solicitation as an alien in the absence of affirmative evidence establishing that the individual was so discharged.

(d) This section shall not apply to any war-risk insurance, Government (converted) or National Service Life Insurance policy.

(e) (1) Notwithstanding any other provision of law, (A) no benefits under laws administered by the Secretary shall be provided, as a result of a change in or new issuance of a discharge under section 1553 of title 10 [10 USCS § 1553], except upon a case-by-case review by the board of review concerned, subject to review by the Secretary concerned, under such section, of all the evidence and factors in each case under published uniform standards (which shall be historically consistent with criteria for determining honorable service and shall not include any criterion for automatically granting or denying such change or issuance) and procedures generally applicable to all persons administratively discharged or released from active military, naval, or air service under other than honorable conditions; and (B) any such person shall be afforded an opportunity to apply for such review under such section 1553 [10 USCS § 1553] for a period of time terminating not less than one year after the date on which such uniform standards and procedures are promulgated and published.

(2) Notwithstanding any other provision of law--

(A) no person discharged or released from active military, naval, or air service under other than honorable conditions who has been awarded a general or honorable discharge under revised standards for the review of discharges, (i) as implemented by the President's directive of January 19, 1977, initiating further action with respect to the President's Proclamation 4313 of September 16, 1974
[50 USCS Appx § 462 note], (ii) as implemented on or after April 5, 1977, under the Department of Defense's special discharge review program, or (iii) as implemented subsequent to April 5, 1977, and not made applicable to all persons administratively discharged or released from active military, naval, or air service under other than honorable conditions, shall be entitled to benefits under laws administered by the Secretary except upon a determination, based on a case-by-case review, under standards (meeting the requirements of paragraph (1) of this subsection) applied by the board of review concerned under section 1553 of title 10 [10 USCS § 1553], subject to review by the Secretary concerned, that such person would be awarded an upgraded discharge under such standards; and (B) such determination shall be made by such board (i) on an expedited basis after notification by the Department to the Secretary concerned that such person has received, is in receipt of, or has applied for such benefits or after a written request is made by such person or such determination, (ii) on its own initiative before October 9, 1978, in any case where a general or honorable discharge has been awarded before October 9, 1977, under revised standards referred to in clause (A)(i), (ii), or (iii) of this paragraph, or (iii) on its own initiative at the time a general or honorable discharge is so awarded in any case where a general or honorable discharge is awarded after October 8, 1977.

If such board makes a preliminary determination that such person would not have been awarded an upgraded discharge under standards meeting the requirements of paragraph (1) of this subsection, such person shall be entitled to an appearance before the board, as provided for in section 1553(c) of title 10 [10 USCS § 1553(c)], prior to a final determination on such question and shall be given written notice by the board of such preliminary determination and of the right to such appearance. The Secretary shall, as soon as administratively feasible, notify the appropriate board of review of the receipt of benefits under laws administered by the Secretary, or of the application for such benefits, by any person awarded an upgraded discharge under revised standards referred to in clause (A)(i), (ii), or (iii) of this paragraph with respect to whom a favorable determination has not been made under this paragraph.

Amendments:

1959. Act July 28, 1959, in subsec. (c), inserted "No individual shall be considered as having been discharged on his own application or solicitation as an alien in the absence of affirmative evidence establishing that he was so discharged.".

1977. Act Oct. 8, 1977 (effective and applicable as provided by § 5 of such Act, which appears as a note to this section), in subsec. (a), inserted "or on the basis of an absence without authority from active duty for a continuous period of at least one hundred and eighty days if such person was discharged under conditions other than honorable unless such person demonstrates to the satisfaction of the Administrator that there are compelling circumstances to warrant such prolonged unauthorized absence," and inserted ", notwithstanding any action subsequent to the date of such discharge by a board established pursuant to section 1553 of title 10"; and added subsec. (e).

1982 Act Oct. 12, 1982, in subsec. (e)(2)(B), substituted "before October 9, 1978," for "within one year after the date of enactment of this paragraph"; substituted "before October 9, 1977," for "on or prior to the date of enactment of this paragraph"; and substituted "October 8, 1977" for "such enactment date".
1986. Act Oct. 28, 1986, in subsec. (a), substituted "such person" for "he" following "ground that", and substituted "such officer's" for "his"; in subsec. (b) substituted "a person's for "his", "that" for "any" following "resignation," and "such person" for "he" following "from which"; in subsec. (c) substituted "the individual's" for "his" wherever appearing and "the individual" for "he"; and in the concluding matter of subsec. (e) substituted "the" for "his or her" following "and of".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3103, as 38 USCS § 5303.

Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Other provisions:

Expedited determinations after information and notification to persons awarded general or honorable discharges; procedures for application to 10 USCS § 1552 Board and to Secretary of Veterans' Affairs. Act Oct. 8, 1977, P. L. 95-126, § 1(b), 91 Stat. 1107 (effective 10/8/77, as provided by § 5 of such Act, which appears as a note to this section); May 7, 1991, P. L. 102-40, Title IV, § 402(d)(2), 105 Stat. 239, provides:

"(1) The Secretary of Defense shall fully inform each person awarded a general or honorable discharge under revised standards for the review of discharges referred to in section 5302(e)(2)(A)(i), (ii), or (iii) [formerly 3103(e)(2)(A)(i), (ii), or (iii) of title 38, United States Code, as added by subsection (a)(2) of this section, of his or her right to obtain an expedited determination under section 5303(e)(2)(B)(i) [formerly 3103(e)(2)(B)(i)] of such title and of the implications of the provisions of this Act [this note among other things; for classification, see USCS Tables volumes] for each such person.

"(2) Notwithstanding any other provision of law, the Secretary of Defense shall inform each person who applies to a board of review under section 1553 of title 10, United States Code, and who appears to have been discharged under circumstances which might constitute a bar to benefits under section 5303(a) [formerly 3103(a)] of title 38, United States Code, (A) that such person might possibly be administratively found to be entitled to benefits under laws administered by the Veterans' Administration [now Department of Veterans Affairs] only through the action of a board for the correction of military records under section 1552 of such title 10 or the action of the Administrator of Veterans' Affairs [now Secretary of Veterans Affairs] under section 5303 (formerly 3103) of such title 38 and (B) of the procedures for making application to such section 1552 board for such purpose and to the Administrator of Veterans' Affairs [now Secretary of Veterans Affairs] for such purpose (including the right to proceed concurrently under such sections 5303 [formerly 3103], 1552, and 1553 [this section and 10 USCS §§ 1552, 1553]).".

Health care and benefits. Act Oct. 8, 1977, P. L. 95-126, § 2, 91 Stat. 1107 (effective 10/8/77, as provided by § 5 of Act); May 7, 1991, P. L. 102-40, Title IV, § 402(d)(2), 105 Stat. 239, provides: "Notwithstanding any other provision of law, the Administrator of Veterans' Affairs [now Secretary of Veterans' Affairs] shall provide the type of health care and related benefits authorized to be provided under chapter 17 of title 38, United States Code [38 USCS §§ 1701 et seq.], for any disability incurred or aggravated during active military, naval, or air service in line of duty by a person other than a person barred from receiving benefits by section 5303(a) [formerly 3103(a)] of such title, but shall not provide such health care and related benefits pursuant to this section for any disability incurred or aggravated during a period of service from which such person was discharged by reason of a bad conduct discharge.".

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Regulations respecting standards and procedures for determination of separation from active service under conditions other than dishonorable free of unique or special advantages or special distinctions between veterans. Act Oct. 8, 1977, P. L. 95-126, § 4, 91 Stat. 1108 (effective 10/8/77, as provided by § 5 of such Act); May 7, 1991, P. L. 102-40, Title IV, § 402(d)(2), 105 Stat. 239, provides: "In promulgating, or making any revisions of or amendments to, regulations governing the standards and procedures by which the Veterans' Administration [ now Department of Veterans Affairs] determines whether a person was discharged or released from active military, naval, or air service under conditions other than dishonorable, the Administrator of Veterans' Affairs [now Secretary of Veterans' Affairs] shall, in keeping with the spirit and intent of this Act [this note, among other things: for classification, see USCS Tables volumes], not promulgate any such regulations or revise or amend any such regulations for the purpose of, or having the effect of, (1) providing any unique or special advantage to veterans awarded general or honorable discharges under revised standards for the review of discharges described in section 5303(e)(2)(A)(i), (ii), or (iii) [formerly 3103(e)(2)(A)(i), (ii), or (iii)] of title 38, United States Code, as added by section 1(a)(2) of this Act, or (2) otherwise making any special distinction between such veterans and other veterans."


"This Act [amendment of 38 USCS §§ 101, 3103 (now § 5303); enactment of 38 USCS § 3103 (now § 5303) note] shall become effective on the date of its enactment, except that--

"(1) section 2 [38 USCS § 5303 note] shall become effective on October 1, 1977, or on such enactment date; whichever is later; and

"(2) the amendments made by section 1(a) [amending this section] shall apply retroactively to deny benefits under laws administered by the Veterans' Administration, except that, notwithstanding any other provision of law--

"(A) with respect to any person who, on such enactment date is receiving benefits under laws administered by the Veterans' Administration, (i) such benefits shall not be terminated under paragraph (2) of section 3103(e) [now section 5303(e)] of title 38, United States Code, as added by section 1(a)(2) of this Act, until (I) the day on which a final determination not favorable to the person concerned is made on an expedited basis under paragraph (2) of such section 3103(e) [now section 5303(e)], (II) the day following the expiration of ninety days after a preliminary determination not favorable to such person is made under such paragraph, or (III) the day following the expiration of one hundred and eighty days after such enactment date, whichever day is the earliest, and (ii) the United States shall not make any claim to recover the value of any benefits provided to such person prior to such earliest day;

"(B) with respect to any person awarded a general or honorable discharge under revised standards for the review of discharges referred to in clause (A)(i), (ii), or (iii) of such paragraph [subsec. (e)(2)(A)(i), (ii), or (iii) of this section] who has been provided any such benefits prior to such enactment date, the United States shall not make any claim to recover the value of any benefits so provided; and

"(C) the amendments made by clause (1) of section 1(a) shall apply (i) retroactively only to persons awarded general or honorable discharges under such revised standards and to persons who, prior to the date of enactment of this Act, had not attained general eligibility for such benefits by virtue of (I) a change in or new issuance of a discharge under section 1553 of title 10, United States Code, or (II) any other provision of law, and (ii) prospectively (on and after such enactment date) to all other persons."

Code of Federal Regulations
Fiscal Service, Department of the Treasury-General regulations governing U. S. securities, 31 CFR Part 306
Office of the Secretary of Defense-Discharge Review Board (DRB) procedures and standards, 32 CFR Part 70
Department of the Army-Personnel review board, 32 CFR Part 581
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References
This section is referred to in 38 USCS § 3103

Research Guide
Am Jur:
3C Am Jur 2d, Aliens and Citizens § 2190
77 Am Jur 2d, Veterans and Veterans’ Laws § 32

Annotations:
Discharge from armed forces on ground of conscientious objection. 10 ALR Fed 15
Association of persons as proper representative of class under Rule 23 of Federal Rules of Civil Procedure governing maintenance of class actions. 63 ALR Fed 361

1. Generally
2. Classification of discharge
3. Upgrading of discharge
4. Miscellaneous

1. Generally
Bad-conduct discharge would not affect accused’s benefits accrued through prior service from which he was honorably discharged since under 38 USCS § 3103 [now 38 USCS § 5303] discharge by reason of sentence of court-martial bars veterans' benefits based on period of service from which discharged or dismissed. United States v Lenard (1988, ACMR) 27 MJ 739
Veteran who was in desertion from prior peacetime service at date of enlistment in Spanish-American War was not thereby barred from receipt of pension for Spanish-American War service. 1935 ADVA 348
Veteran found insane at the time he committed act for which he was given discharge without honor was eligible for benefits, otherwise pensionable, for disabilities incurred during that period of service. 1944 ADVA 553
Spanish-American War veteran restored to duty after desertion and subsequently honorably discharged was entitled to pension under re-enacted Spanish-American War laws since provisions of former 38 USCS § 693g superseded those of former 10 USCS § 1432. 1946 ADVA 714
In determining that veteran's discharge was considered to have been issued under conditions that precluded payment of VA benefits, Board did not err in looking to factors other than veteran's own statements why he went AWOL prior to his discharge and looking to totality of evidence of record. Lane v Principi (2002) 16 Vet App 78, 2002 US App Vet Claims LEXIS 276, affd (2003, CA FC) 339 F.3d 1331

2. Classification of discharge
Veteran dishonorably discharged upon court-martial from enlistment entered into prior to November 11, 1918, who was honorably discharged from enlistment entered into between
November 12, 1918 and July 2, 1921, was not honorably discharged World War veteran under regulations applicable to claims for reimbursement of burial expenses. 1938 ADVA 428

Veteran discharged from United States Army during World War II in order to enter Army of Cuba from which he received honorable discharge on November 9, 1944 was discharged from active service under conditions other than dishonorable for purposes of former 38 USCS § 697c. 1949 ADVA 811

Veteran administratively discharged for conduct triable by court-martial, i.e., spending 32 of 176 days in service AWOL, was properly denied veterans' benefits. Winter v Principi (1993) 4 Vet App 29

Widow of dishonorably discharged veteran failed to present any new evidence of veteran's insanity during commission of offense for which he was court-martialed; evidence of treatment for headaches and dizziness is not probative of sanity. Helige v Principi (1993) 4 Vet App 32

Minor offense exception to discharge for willful and persistent misconduct was properly denied where appellant was in AWOL status for almost thirty percent of his time in service. Struck v Brown (1996) 9 Vet App 145

3. Upgrading of discharge

Summary judgment was inappropriate due to existing issues of material fact in former naval servicemen's actions claiming that 38 USCS § 3103 [now 38 USCS § 5303] was violated because Navy interpreted Secretary of Defense's memorandum regarding upgrading of less than honorable discharges related to drug use and possession in manner different from interpretations by Army and Air Force, where affidavits of President of Army's discharge review board and Chief of Air Force's discharge review board were submitted to offset evidence of random sampling of discharge recharacterization cases in Army and Air Force that had been submitted to indicate discrepancy in interpretation. Vietnam Veterans of America v Secretary of Navy (1988, App DC) 269 US App DC 35, 843 F.2d 528

There was no merit to contention that upgrading of discharge to one of under honorable conditions entitled recipient to benefits, based upon interpretation of 38 CFR § 3.12(h), since such interpretation would directly conflict with 38 USCS § 3103(e) [now 38 USCS § 5303(e)] and therefore cause regulation to be void. Demo v United States (1983) 3 Cl Ct 349

Former Marines and Navy personnel were not entitled to mandated discharge upgrades based on Taird Memoranda, which provided for recharacterization of less-than-honorable discharges issued prior to 7/7/71 based solely on use or possession of drugs, even though court agreed that 38 USCS § 3103(e)(1) [now 38 USCS § 5303(e)(1)] uniformity requirement was being violated by inconsistent approaches component branches had adopted, because D.C. Circuit had ruled that component branches need only review applicable discharges but need not employ uniform standards. Vietnam Veterans of America v Secretary of Navy (1990, DC Dist Col) 741 F Supp 1

Veteran honorably restored to duty following dishonorable discharge pursuant to sentence of general court-martial was not entitled to monetary benefits for disability incurred subsequent to dishonorable discharge from World War service. 1935 ADVA 347

Veteran given discharge other than honorable on October 22, 1917 as enemy alien and upgraded to honorable discharge on August 18, 1945 by review board was now rated as permanently and totally disabled for nonservice pension purposes, and qualified for benefits. 1945 ADVA 673

Navy action issuing serviceman honorable discharge through Board for Correction of Naval Records, though done by administrative agency in executive department and not by Congress, had status of special Act of Congress for his relief, and was final and conclusive upon Veterans' Administration [now Department of Veterans Affairs]; thus, bars of 38 USCS § 101 and § 3103 [now § 5303] were set aside by such action, and serviceman was eligible for veterans benefits. 1962 ADVA 980

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Corrective action by discharge review board did not remove conditional bar to benefits resulting from issuance of other than honorable discharge based on continuous period of unauthorized absence from active service of 180 days or more. VA GCO 30-79

4. Miscellaneous

Secretary of Veterans Affairs is permitted to consider totality of circumstances, rather than relying solely on veteran’s explanation, in determining under 38 USCS § 5303(a) whether veteran demonstrated compelling circumstances for being absent without leave and was thus not barred from receiving veterans’ benefits. Lane v Principi (2003, CA FC) 339 F.3d 1331

Where veteran stated that veteran’s absence without leave was based on drug dependence and adverse effects of combat experiences, but there was no objective evidence of drug use or mental impairment at time of absence, totality of circumstances justified denial of veteran’s claim for benefits; veteran failed to show compelling circumstances for absence to warrant eligibility for benefits under 38 USCS § 5303(a). Lane v Principi (2003, CA FC) 339 F.3d 1331

Where there existed 2 grounds upon which plaintiff could have been denied veterans' benefits dating from World War II, discharge by reason of general court martial pursuant to 38 USCS § 3103 [now 38 USCS § 5303] and regulation denying benefits to persons discharged for homosexual activity, and Administration [now Department] contended that denial of benefits to plaintiff resulted exclusively from latter ground, plaintiff's request for declaratory judgment finding 38 USCS § 3103 [now 38 USCS § 5303] unconstitutional had to be dismissed as there was no justifiable controversy between parties based on that statute as long as ground of homosexual discharge continued to bar plaintiff's receipt of benefits. Kiser v Johnson (1975, MD Pa) 404 F Supp 879

Military judge did not err in failing to instruct court members that dishonorable or bad-conduct discharge would deprive accused of substantially all benefits administered by Veterans' Administration [now Department of Veterans Affairs] since accused had completed prior enlistments honorably without break in service and bad-conduct discharge only affects rights based upon period of service from which discharged. United States v Goodwin (1991, CMA) 33 MJ 18

Veteran's conduct in spending 32 of 176 days he was in service in AWOL status was severe and persistent, hence other than honorable discharge based on it barred veteran from receipt of benefits. Winter v Principi (1993) 4 Vet App 29

Claim for benefits should not have been reopened since veteran's widow presented no new and material evidence regarding sanity of veteran, who was court-martialed and dishonorably discharged. Helige v Principi (1993) 4 Vet App 32

§ 5303A. Minimum active-duty service requirement

cvi
Discussion and Analysis in the Veterans Benefits Manual

(a) Notwithstanding any other provision of law, any requirements for eligibility for or entitlement to any benefit under this title or any other law administered by the Secretary that are based on the length of active duty served by a person who initially enters such service after September 7, 1980, shall be exclusively as prescribed in this title.

(b) (1) Except as provided in paragraph (3) of this subsection, a person described in paragraph (2) of this subsection who is discharged or released from a period of active duty before completing the shorter of--
   (A) 24 months of continuous active duty, or
   (B) the full period for which such person was called or ordered to active duty, is not eligible by reason of such period of active duty for any benefit under this title or any other law administered by the Secretary.

(2) Paragraph (1) of this subsection applies--
(A) to any person who originally enlists in a regular component of the Armed Forces after September 7, 1980; and
(B) to any other person who enters on active duty after October 16, 1981, and has not previously completed a continuous period of active duty of at least 24 months or been discharged or released from active duty under section 1171 of title 10 [10 USCS § 1171].

(3) Paragraph (1) of this subsection does not apply--
(A) to a person who is discharged or released from active duty under section 1171 or 1173 of title 10 [10 USCS §§ 1171 or 1173];
(B) to a person who is discharged or released from active duty for a disability incurred or aggravated in line of duty;
(C) to a person who has a disability that the Secretary has determined to be compensable under chapter 11 of this title [38 USCS §§ 1101 et seq.];
(D) to the provision of a benefit for or in connection with a service-connected disability, condition, or death;
(E) to benefits under chapter 19 of this title [38 USCS §§ 1901 et seq.];
(F) to benefits under chapter 30 or chapter 37 of this title [38 USCS §§ 3001 et seq. or 3701 et seq.] by reason of--
   (i) a discharge or release from active duty for the convenience of the Government, as described in sections 3011(a)(1)(A)(ii)(II) and 3012(b)(1)(A)(iv) of this title [38 USCS §§ 3011(a)(1)(A)(ii)(II) and 3012(b)(1)(A)(iv)];
   (ii) a discharge or release from active duty for a medical condition which preexisted service on active duty and which the Secretary determines is not service connected, as described in clauses (A)(ii)(I) and (B)(ii)(I) of section 3011(a)(1) of this title [38 USCS § 3011(a)(1)] and in section 3012(b)(1)(A)(ii) of this title [38 USCS § 3012(b)(1)(A)(ii)];
   (iii) an involuntary discharge or release from active duty for the convenience of the Government as a result of a reduction in force, as described in clauses (A)(ii)(III) and (B)(ii)(III) of section 3011(a)(1) of this title [38 USCS § 3011(a)(1)] and in section 3012(b)(1)(A)(v) of this title [38 USCS § 3012(b)(1)(A)(v)]; or
   (iv) a discharge or release from active duty for a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as described in section 3011(a)(1)(A)(ii)(I) of this title [38 USCS § 3011(a)(1)(A)(ii)(I)]; or
(G) to benefits under chapter 43 of this title [38 USCS §§ 4301 et seq.].

(c) (1) Except as provided in paragraph (2) of this subsection, no dependent or survivor of a person as to whom subsection (b) of this section requires the denial of benefits shall, by reason of such person's period of active duty, be provided with any benefit under this title or any other law administered by the Secretary.

(2) Paragraph (1) of this subsection does not apply to benefits under chapters 19 and 37 of this title [38 USCS §§ 1901 et seq. and 3701 et seq.].
(d) (1) Notwithstanding any other provision of law and except as provided in paragraph (3) of this subsection, a person described in paragraph (2) of this subsection who is discharged or released from a period of active duty before completing the shorter of--
   (A) 24 months of continuous active duty, or
   (B) the full period for which such person was called or ordered to active duty, is not eligible by reason of such period of active duty for any benefit under Federal law (other than this title or any other law administered by the Secretary), and no dependent or survivor of such person shall be eligible for any such benefit by reason of such period of active duty of such person.

(2) Paragraph (1) of this subsection applies--
   (A) to any person who originally enlists in a regular component of the Armed Forces after September 7, 1980; and
   (B) to any other person who enters on active duty after October 13, 1982, and has not previously completed a continuous period of active duty of at least 24 months or been discharged or released from active duty under section 1171 of title 10 [10 USCS § 1171].

(3) Paragraph (1) of this subsection does not apply--
   (A) to any person described in clause (A), (B), or (C) of subsection (b)(3) of this section; or
   (B) with respect to a benefit under (i) the Social Security Act other than additional wages deemed to have been paid, under section 229(a) of the Social Security Act (42 U.S.C. 429(a)), for any calendar quarter beginning after October 13, 1982, or (ii) title 5 other than a benefit based on meeting the definition of preference eligible in section 2108(3) of such title.

(e) For the purposes of this section, the term "benefit" includes a right or privilege, but does not include a refund of a participant's contributions to the educational benefits program provided by chapter 32 of this title [38 USCS §§ 3201 et seq.].

(f) Nothing in this section shall be construed to deprive any person of any procedural rights, including any rights to assistance in applying for or claiming a benefit.

References in text:
The "Social Security Act", referred to in this section, is Act Aug. 14, 1935, ch 531, which appears generally as 42 USCS §§ 301 et seq. For full classification of such Act, consult USCS Tables volumes.

Effective date of section:
Act Oct. 17, 1981, P. L. 97-66, Title VII, § 701(b)(1), 95 Stat. 1037, which appears as 38 USCS § 1114 note, provides that this section is effective on enactment on Oct. 17, 1981.

Amendments:
1986. Act Oct. 28, 1986, in subsec. (b)(3), in subpara. (D), deleted "or" following "death;", in subpara. (E) substituted ";" or for the concluding period, and added subpara. (F).
1988. Act Nov. 18, 1988 (effective as provided by § 102(c) of such Act, which appears as 38 USCS § 1411 note) substituted subsec. (b)(3)(F) for one which read: "to benefits under chapter 30 of this title in the case of a person entitled to benefits under such chapter by reason of section 1411(a)(1)(A)(ii)(II) of this title."

1990. Act Nov. 5, 1990 (effective 10/19/84 as provided by § 562(c) of such Act, which appears as 38 USCS § 3011 note), in subsec. (b)(3)(F), in cl. (ii), deleted "or" after the concluding semicolon, in cl. (iii), substituted "; or" for the concluding period, and added cl. (iv).

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3103A, as 38 USCS § 5303A.

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

1994. Act Oct. 13, 1994 (effective and applicable as provided by § 8 of such Act, which appears as 38 USCS § 4301 note), in subsec. (b)(3), in subpara. (E), deleted "or" after the concluding semicolon, in subpara. (F)(iv), substituted "; or" for the concluding period, and added subpara. (G).

Act Nov. 2, 1994, in subsec. (b)(3), in the introductory matter of subpara. (F), inserted "or chapter 37".

1998. Act Nov. 11, 1998, in subsec. (d), in para. (2)(B), substituted "after October 13, 1982," for "on or after the date of the enactment of this subsection" and, in para. (3)(B)(i), substituted "after October 13, 1982," for "on or after the date of the enactment of this subsection."

Other provisions:

Application of section. Act Oct. 17, 1981, P. L. 97-66, Title VI, § 604(b), 95 Stat. 1036 (effective on enactment on 10/17/81, as provided by § 701(b)(1) of such Act, which appears as 38 USCS § 314 note) provides: "Section 3103A [now section 5303A] of title 38, United States Code, as added by subsection (a), shall not apply with respect to the receipt by any person of any benefit provided by or pursuant to law before the date of the enactment of this Act. Notwithstanding such section, a person who before such date has received a certificate of eligibility from the Administrator of Veterans' Affairs for benefits under chapter 37 of title 38, United States Code [38 USCS §§ 3701 et seq.], is eligible for such benefits after such date."


"Section 3103A [now section 5303A] of title 38, United States Code, as amended by subsection (a) [see the 1982 Amendments notes], is the law with respect to the matters stated in such section and applies, in accordance with its terms, with respect to benefits under Federal law, regardless of the particular title of the United States Code or other law under which any such benefit is provided or the department, agency, or instrumentality which administers any such benefit."

Application of subsec. (d); additional wages. Act Oct. 14, 1982, P. L. 97-306, Title IV, § 408(b), 96 Stat. 1446, provides:

"(1) Subsection (d) of section 3103A [now section 5303A] of title 38, United States Code, as added by subsection (a)(2), shall not apply with respect to the receipt by any person of any benefit provided by or pursuant to law before the date of the enactment of this Act.

"(2) For the purposes of paragraph (1) of this subsection additional wages deemed to have been paid under section 229(a) of the Social Security Act (42 U.S.C. 429(a)) shall be considered to be a benefit that was received by a person on the date that such person was
discharged or released from active duty (as defined in section 101(21) of title 38, United States Code.

**Code of Federal Regulations**

Fiscal Service, Department of the Treasury-General regulations governing U. S. securities, 31 CFR Part 306

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

**Cross References**

This section is referred to in 12 USCS §§ 31709, 1715k; 38 USCS § 3702

**Research Guide**

*Am Jur:*

3C Am Jur 2d, Aliens and Citizens §§ 2177, 2179, 2195

77 Am Jur 2d, Veterans and Veterans' Laws § 29

*Law Review Articles:*

Hazard. Employers' obligations under the Uniformed Services Employment and Reemployment Rights Act. 31 Colo L 55, February 2002

Beasley. Protecting America's reservists: application of state and federal law to reservists' claims of unfair labor practices. 7 Ga BJ 10, February 2002

Whelan. The Uniform Services Employment and Reemployment Rights Act and homeland security. 71 J Kan BA 20, January 2002

**§ 5304. Prohibition against duplication of benefits**

(a) (1) Except as provided in section 1414 of title 10 [10 USCS § 1414] or to the extent that retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers, regular, or reserve retirement pay, or initial award of naval pension granted after July 13, 1943, shall be made concurrently to any person based on such person's own service or concurrently to any person based on the service of any other person.

(2) Notwithstanding the provisions of paragraph (1) of this subsection and of section 5305 of this title [38 USCS § 5305], pension under section 1521 or 1541 of this title [38 USCS § 1521 or 1541] may be paid to a person entitled to receive retired or retirement pay described in section 5305 of this title [38 USCS § 5305] concurrently with such person's receipt of such retired or retirement pay if the annual amount of such retired or retirement pay is counted as annual income for the purposes of chapter 15 of this title [38 USCS §§ 1501 et seq.].

(b) (1) Except as provided in paragraphs (2) and (3) of this subsection and in section 1521(i) of this title [38 USCS § 1521(i)], the receipt of pension, compensation, or dependency and indemnity compensation by a surviving spouse, child, or parent on account of the death of any person, or receipt by any person of pension or compensation on account of such person's own service, shall not bar the payment of pension, compensation, or dependency and indemnity compensation on account of the death or disability of any other person.
(2) Benefits other than insurance under laws administered by the Secretary may not be paid or furnished to or on account of any child by reason of the death of more than one parent in the same parental line; however, the child may elect one or more times to receive benefits by reason of the death of any one of such parents.

(3) Benefits other than insurance under laws administered by the Secretary may not be paid to any person by reason of the death of more than one person to whom such person was married; however, the person may elect one or more times to receive benefits by reason of the death of any one spouse.

(c) Pension, compensation, or retirement pay on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay.

Amendments:

1960. Act June 8, 1960 (applicable as provided by § 2 of such Act, which appears as a note to this section), substituted new subsec. (b)(2) for one which read: "If a child receives or there is paid by the Veterans' Administration on account of a child dependency and indemnity compensation, or death compensation, by reason of the death of a parent, dependency and indemnity compensation by reason of the death of another parent in the same parental line may not be paid to or on account of such child."

1964. Act Oct. 13, 1964 (effective 1/1/65, as provided by § 11(a) of such Act, which appears as 38 USCS § 1503 note), in subsec. (a), inserted "or concurrently to any person based on the service of any other person".

1970. Act Aug. 12, 1970 (effective 1/1/71, as provided by § 9 of such Act, which appears as 38 USCS § 1114 note), in subsec. (b), in para. (1), substituted "paragraphs (2) and (3)" for "paragraph (2)", and added para. (3).

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as 38 USCS § 101 note), in subsec. (b)(1), inserted "of this subsection and in section 521(i) of this title".

1980. Act Oct. 7, 1980 (effective 10/1/80, as provided by § 601(b) of such Act, which appears as 38 USCS § 1114 note), redesignated subsec. (a) as subsec. (a)(1); added subsec. (a)(2).

1986. Act Oct. 28, 1986, in subsec. (a)(1), substituted "such person's" for "his"; in subsec. (b), in para. (1), substituted "surviving spouse" for "widow" and "such person's" for "his" respectively, and in para. (3) substituted "such person" for "he or she"; and in subsec. (c), substituted "any person's" for "his", "such" for "any" and "such person" for "he" respectively.

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3104, as 38 USCS § 5304, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing.


Other provisions:

Application of June 8, 1960 amendment. Act June 8, 1960, P. L. 86-495, § 2, 74 Stat. 163, provides: "The amendment made by this Act [amending this section] shall apply only to cases where the death of a parent occurs after the date of enactment of this Act.".
Veterans' benefits are gratuities and establish no vested rights in recipient; such benefits may be withdrawn at any time by act of Congress, and to make withdrawal effective, Congress may in turn withdraw jurisdiction from courts over decisions of Administrator in relation thereto. Van Horne v Hines (1941) 74 App DC 214, 122 F.2d 207, cert den (1941) 314 US 689, 86 L Ed 552, 62 S Ct 360, reh den (1942) 314 US 717, 86 L Ed 570, 62 S Ct 478

Because disabled military retirees were seeking money they alleged they were owed from period prior to enactment of new statute, § 641 of National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, (2003 Act), and because not all members of prospective class were affected by Congress's partial repeal of "concurrent receipt" prohibition in 2001, new statutory provision did not render case moot; however, argument that concurrent receipt prohibition was not rational because Congress had expressed disapproval of prohibition in recent years was not well founded as concurrent receipt prohibition was previously declared rational and it was equally rational in present. Howard v United States (2004, CA FC) 354 F.3d 1358

Congress has power to make retrospective changes in war risk insurance contract, altering rights that would ordinarily be deemed vested and subsequent amendments of federal statutes on subject govern disposition of proceeds from these policies, even where insured had died before enactment of such amendments, and estate of beneficiary under such policies has no vested interest in installments of insurance due after death of beneficiary. Day v Bradshaw (1939) 174 Va 105, 5 SE2d 514

Precedent establishes that concurrent receipt prohibition, codified at 38 USCS § 5304, passes rational basis scrutiny; subsequent congressional modification of prohibition does not eliminate its rational basis. Howard v United States (2004, CA FC) 354 F.3d 1358

38 USCS §§ 3104 and 3105 [now 38 USCS §§ 5304 and 5305] which preclude disabled military retirees entitled to receive longevity retired pay and disability compensation from the Veterans Administration [now Department of Veterans Affairs], from receiving both forms of compensation at the same time and require waiver of retired pay equal in amount to any Veterans Administration [now Department of Veterans Affairs] disability compensation received or else be precluded from receiving disability benefits, does not deny equal protection since statutes bear demonstrable fair and substantial relation to legitimate legislative objectives such as fiscal restraint. Absher v United States (1986, CA) 805 F.2d 1025, cert den (1987) 481 US 1028, 95 L Ed 2d 526, 107 S Ct 1953
Obvious purpose of Congress was to make comprehensive provision for veterans of World War and for those persons in whom they were interested by reason of ties of blood and marriage. In re McCormick's Estate (1938) 169 Misc 672, 8 NYS2d 179

4. Application, generally

Retired officer barred from receiving retirement pay by 5 USC § 5532 while holding office under Federal Government was nevertheless entitled to pension, so long as he was not receiving active service or retirement pay. 1946 ADVA 682

Compensation or pension was payable to former Army officer who had been wholly retired from date of such retirement. 1947 ADVA 764

Maximum amount of naval allowance pension payable to veteran so entitled was one-fourth rate of compensation or pension payable, exclusive of any additional allowance payable either for specific disability or dependents. 1949 ADVA 814

Sergeant in Marine Corps, who, prior to enactment of War Risk Insurance Act of October 6, 1917, had served in Corps for more than 21 years and who had become "disabled from sea service" by wound received in action in June, 1916, but who, though entitled to honorable discharge from service upon October 6, 1917, did not actually receive his discharge until November 5, 1917, was entitled both to disability benefits and also to whatever allowance he might be otherwise entitled to under provisions of War Risk Insurance Act. (1918) 31 Op Atty Gen 296

5. -Consolidation of disability benefits

Benefits payable for World War I service-connected disabilities and World War II service-connected disabilities consolidated and paid as one award was not thereby barred by provisions prohibiting concurrent payment of pension, compensation, or retirement pay. 1946 ADVA 723

6. -Dependents benefits

Under provisions of former 38 USCS § 472, death compensation was payable on behalf of minor from 2 sources, her natural father and her stepfather, both of whom were veterans. 1931 ADVA 55

Dependent mother of veteran was eligible for award of death compensation benefits covering period during which she received or was entitled to receive pension from Philippine Veterans’ Board, but such benefits were not payable for any period for which she had received or was entitled to receive allowance, allotment, or service pay of deceased veteran, paid in whole or in part from Federal funds. 1949 ADVA 809

7. Miscellaneous

Choice of deceased incompetent to receive benefits from Navy did not bar decedent's wife and daughter from receiving Social Security benefits to which they were otherwise entitled where reasonable alternatives other than that chosen by incompetent were available at time of election. Taylor v Gardner (1968, CA8 Ark) 393 F.2d 257

§ 5305. Waiver of retired pay

clix

Discussion and Analysis in the Veterans Benefits Manual

Except as provided in section 1414 of title 10 [10 USCS § 1414], any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Secretary if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which
such retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Secretary of the receipt of such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay.

Amendments:


1986. Act Oct. 28, 1986, substituted "such person" for "he" following "is" and "such person's" for "his".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3105, as 38 USCS § 5305.

Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, and substituted "Secretary" for "Veterans' Administration".


Cross References

This section is referred to in 38 USCS §§ 5111, 5301, 5304

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:5

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 37
1. Generally
2. Constitutionality
3. Right of election
4. Effective date of waiver
5. Taxation

1. Generally
Retired officer of regular establishment, who held civilian office under Federal Government and who had waived retirement pay and, in accordance with former 5 USC § 59a, elected to receive salary of his office, was not entitled to pension under former 38 USC § 26c. 1945 ADVA 651

2. Constitutionality
38 USCS §§ 3104 and 3105 [now 38 USCS §§ 5304 and 5305] which preclude disabled military retirees entitled to receive longevity retired pay and disability compensation from the Veterans Administration [now Department of Veterans Affairs], from receiving both forms of compensation at the same time and require waiver of retired pay equal in amount to any Veterans Administration [now Department of Veterans Affairs] compensation received or else be precluded from receiving disability benefits, does not deny equal protection since statutes bear demonstrable fair and substantial relation to legitimate legislative objectives such as fiscal

3. Right of election
Officer entitled to retirement pay, who was also entitled to compensation or pension, was entitled to elect benefit he desired to receive, and such election did not bar him from subsequent election of other benefit to which he was entitled; former 5 USC § 59a did not apply to compensation or pension and did not preclude such election.  1945 ADVA 671

Wife in her capacity as legal guardian of her missing incompetent husband was not entitled to elect to receive compensation in lieu of naval retirement pay absent court order authorizing such election, but compensation was payable to wife and minor children of veteran regardless of whether there had been election between retirement pay and compensation.  1947 ADVA 763

4. Effective date of waiver
Waiver of retired pay under 38 USCS § 3105 [now 38 USCS § 5305], entitling officer to receipt of benefits from Veterans Administration [now Department of Veterans Affairs], is effective from earliest date of entitlement to compensation from Veterans Administration [now Department of Veterans Affairs] for purposes of recomputing amount by which retired pay must be decreased due to officer's civilian employment.  (1979) 58 Comp Gen 622

5. Taxation
Payments initially received by former serviceman as retirement pay could be excluded from his taxable income as payments for service-connected disability following retroactive increase in disability benefits since neither 38 USCS § 3105 [now 38 USCS § 5305] nor administrative practice of Veterans' Administration [now Department of Veterans Affairs] required new waiver of retirement pay to be filed in order to receive any increased disability benefits.  Strickland v Commissioner (1976, CA4) 540 F.2d 1196, 76-1 USTC ¶ 9291, 37 AFTR 2d 998

§ 5306. Renouncement of right to benefits
Discussion and Analysis in the Veterans Benefits Manual

(a) Any person entitled to pension, compensation, or dependency and indemnity compensation under any of the laws administered by the Secretary may renounce the right thereto. The application renouncing the right shall be in writing over the person's signature. Upon the filing of such an application, payment of such benefits and the right thereto shall be terminated, and such person shall be denied any and all rights thereto from such filing.

(b) Renouncement of rights shall not preclude any person from filing a new application for pension, compensation, or dependency and indemnity compensation at a later date, but such new application shall be treated as an original application, and no payments shall be made for any period before the date such new application is filed.

(c) Notwithstanding subsection (b), if a new application for pension under chapter 15 of this title [38 USCS §§ 1501 et seq.] or for dependency and indemnity compensation for parents under section 1315 of this title [38 USCS § 1315] is filed within one year after renouncement of that benefit, such application shall not be treated as an original application and benefits will be payable as if the renouncement had not occurred.

Amendments:
1986. Act Oct. 28, 1986, in subsec. (a), substituted "the" for "his" following "renounce".
Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:6

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 37
1. Generally
2. Partial renunciation
3. Effect of renunciation

1. Generally
Widow of veteran was not entitled to renounce her rights to benefits to which she and her children were entitled, but withdrawal of claim returned its status to that existing prior to filing. 1938 ADVA 431
Recipient of emergency officer retirement pay was entitled to renounce such benefit under provisions of applicable regulation. 1946 ADVA 684

2. Partial renunciation
Veteran was not entitled to renounce his rights merely to portion of his compensation. 1948 ADVA 795

3. Effect of renunciation
Waiver of monetary benefits by any person entitled thereto did not bar granting out-patient or hospital treatment. 1934 ADVA 241
Renunciation of compensation did not affect determination of eligibility and need for vocational rehabilitation. 1947 ADVA 760
Renouncement of compensation pursuant to 38 USCS § 3106 [now 38 USCS § 5306] extinguished entitlement and protection of disability rating under 38 USCS § 110. VA GCO 5-83

§ 5307. Apportionment of benefits

(a) All or any part of the compensation, pension, or emergency officers' retirement pay payable on account of any veteran may--
(1) if the veteran is being furnished hospital treatment, institutional, or domiciliary care by the United States, or any political subdivision thereof, be apportioned on behalf of the veteran's spouse, the veteran's children, or dependent parents; and
(2) if the veteran is not living with the veteran's spouse, or if the veteran's children are not in the custody of the veteran, be apportioned as may be prescribed by the Secretary.

(b) Where any of the children of a deceased veteran are not in the custody of the veteran's surviving spouse, the pension, compensation, or dependency and indemnity
compensation otherwise payable to the surviving spouse may be apportioned as prescribed by the Secretary.

(c) If a veteran is not living with the veteran's spouse, or if any of the veteran's children are not in the custody of the veteran, any subsistence allowance payable to the veteran under chapter 31 of this title [38 USCS §§ 3100 et seq.] or that portion of the educational assistance allowance payable on account of dependents under chapter 34 of this title [38 USCS §§ 3451 et seq.] may be apportioned as may be prescribed by the Secretary.

Amendments:

1972. Act Oct. 24, 1972 (effective 90 days after 10/24/72, as provided by § 601(b) of such Act, which appears as 38 USCS § 4101 note), in subsec. (c), inserted "or that portion of the educational assistance allowance payable on account of dependents under chapter 34 of this title".

1983. Act Nov. 21, 1983, in subsec. (a), in para. (1), substituted "the veteran's spouse" for "his wife" and inserted "the veteran's" preceding "children", and in para (2), substituted "the veteran's spouse" for "his wife", substituted "the veteran's" for "his" preceding "children", and substituted "the custody of the veteran" for "his custody"; in subsec. (b), substituted "surviving spouse" for "widow" wherever it appears; and, in subsec. (c), substituted "the veteran's spouse" for "his wife", substituted "the veteran's" for "his" preceding "children", and substituted "the veteran" for "him", preceding "under".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3107, as 38 USCS § 5307.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Code of Federal Regulations

Fiscal Service, Department of the Treasury-General regulations governing U. S. securities, 31 CFR Part 306

Cross References

This section is referred to in 38 USCS § 5313

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 37

1. Generally
2. Relationship with other laws
3. Benefits subject to apportionment
4. Apportionment on behalf of child

1. Generally

Funds received by wife on behalf of imprisoned husband from Veterans' Administration [now Department of Veterans Affairs] could not be considered income of wife, in absence of apportionment under 38 USCS § 3107(c) [now 38 USCS § 5307(c)], for purposes of diminishing entitlement to welfare benefits. State v Wallace (1982) 97 Wash 2d 846, 651 P2d 201

Money paid to wife as apportionment of her husband's gratuity was for purpose of support and maintenance of wife and could not be construed as being in lieu of statutory dower. Stone v Stone (1934) 188 Ark 622, 67 SW2d 189

2. Relationship with other laws
State statute construed by state courts as authorizing award of child support from veteran's disability benefits which are his sole income does not conflict with 38 USCS § 3107 [now 38 USCS § 5307] since Congress intended veterans' disability benefits to be used in part to support veteran's family; state statute is not preempted by § 3107 [now § 5307], under Supremacy Clause of U.S. Constitution (Art VI, C1 2) where § 3107 [now § 5307] giving Veterans' Administration [now Department of Veterans Affairs] discretionary authority to apportion disability compensation on behalf of veteran's children is not intended to displace state court's power to enforce child support order. Rose v Rose (1987) 481 US 619, 95 L Ed 2d 599, 107 S Ct 2029

3. Benefits subject to apportionment

Pension benefits payable to Naval veterans under former 38 USC § 229 and § 230 were not subject to apportionment. 1947 ADVA 772

4. Apportionment on behalf of child

Board did not err in denying veteran's claim to discontinue apportionment of his disability pension benefits on behalf of his minor child; apportionment was continued because child did not reside with veteran and veteran was not otherwise contributing to child's support and apportionment was less than current amount of additional benefits veteran was receiving because of having dependent child. Hall v Brown (1993) 5 Vet App 294, app dismd without op (1994, CA FC) 33 F.3d 64, reported in full (1994, CA FC) 1994 US App LEXIS 18219

Record supported BVA's determination that increased amount of apportionment of veteran's disability benefits was not warranted on behalf of veteran's minor children or that increased amount of apportionment would not result in undue financial hardship to veteran where veteran was providing child support from other sources and his expenses approximated his income; veteran received approximately $1835 monthly, $678 from Social Security of which $354 was apportioned for his children, and $1225 from VA of which $350 was apportioned for children, and that he paid additional $300 in child support and $200 in alimony monthly. Costa v West (1998) 11 Vet App 102

§ 5308. Withholding benefits of persons in territory of the enemy

(a) When any alien entitled to gratuitous benefits under laws administered by the Secretary is located in territory of, or under military control of, an enemy of the United States or of any of its allies, any award of such benefits in favor of such alien shall be terminated forthwith.

(b) Any alien whose award is terminated under subsection (a) shall not thereafter be entitled to any such gratuitous benefits except upon the filing of a new claim, accompanied by evidence satisfactory to the Secretary showing that such alien was not guilty of mutiny, treason, sabotage, or rendering assistance to such enemy. Except as provided in section 5309 of this title [38 USCS § 5309], such gratuitous benefits shall not be paid for any period before the date the new claim is filed.

(c) While such alien is located in territory of, or under military control of, an enemy of the United States or of any of its allies, the Secretary, in the Secretary's discretion, may apportion and pay any part of such benefits to the dependents of such alien. No dependent of such alien shall receive benefits by reason of this subsection in excess of the amount to which the dependent would be entitled if such alien were dead.

Amendments:

1986. Act Oct. 28, 1986, in subsec. (c), substituted "the Administrator's" for "his" and "the dependent" for "he" respectively.
§ 5309. Payment of certain withheld benefits

(a) Any person who, but for section 5308 of this title [38 USCS § 5308], was entitled to benefits under any of the laws administered by the Secretary, whose award of benefits was terminated under such section, or whose benefits were not paid pursuant to sections 3329 and 3330 of title 31 [31 USCS §§ 3329 and 3330], and who was not guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or its allies, shall be paid the full amount of any benefits not paid because of such section 5308, or withheld (including the amount of any checks covered on such person's account into the Treasury as miscellaneous receipts together with any amount to such person's credit in the special-deposit account) pursuant to sections 3329 and 3330 of title 31 [31 USCS §§ 3329 and 3330]. The Secretary shall certify to the Secretary of the Treasury the amounts of payments which, but for this section, would have been made from the special deposit account, and the Secretary of the Treasury, as directed by the Secretary, shall reimburse the appropriations of the Department from such special deposit account, or cover into the Treasury as miscellaneous receipts the amount so certified.

(b) No payments shall be made for any period before the date claim therefor is filed under this section to any person whose award was terminated, or whose benefits were not paid, before July 1, 1954, because such person was a citizen or subject of Germany or Japan residing in Germany or Japan.

Amendments:


1986. Act Oct. 28, 1986, in subsec. (a), substituted "such person's" for "his" wherever appearing; and in subsec. (b) substituted "such person" for "he".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3109, as 38 USCS § 5309, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).
Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Cross References

This section is referred to in 38 USCS § 5308

Veteran whose compensation payments were withheld and deposited with Treasury Department pursuant to 31 USCS § 123 [now 31 USCS §§ 3329 and 3330] because he was German citizen residing in Germany during World War II was entitled to payment of amounts of compensation withheld and deposited, and also to compensation for period from July 13, 1943, enactment date of former 38 USC § 729 [now 38 USCS § 5308] which provided for discontinuance of such payments, to date of veteran's departure from Germany. 1952 ADVA 909

§ 5310. Payment of benefits for month of death

discuss "Discussion and Analysis in the Veterans Benefits Manual"

(a) If, in accordance with the provisions of section 5110(d) of this title [38 USCS § 5110(d)], a surviving spouse is entitled to death benefits under chapter 11, 13, or 15 of this title [38 USCS §§ 1101 et seq., 1301 et seq., or 1501 et seq.] for the month in which a veteran's death occurs, the amount of such death benefits for that month shall be not less than the amount of benefits the veteran would have received under chapter 11 or 15 of this title [38 USCS §§ 1101 et seq. or 1501 et seq.] for that month but for the death of the veteran.

(b) (1) If the surviving spouse of a veteran who was in receipt of compensation or pension at the time of death is not entitled to death benefits under chapter 11, 13, or 15 of this title [38 USCS §§ 1101 et seq., 1301 et seq., or 1501 et seq.] for the month in which the veteran's death occurs, that surviving spouse shall be entitled to a benefit for that month in the amount of benefits the veteran would have received under chapter 11 or 15 of this title [38 USCS §§ 1101 et seq. or 1501 et seq.] for that month but for the death of the veteran.

(2) If (notwithstanding section 5112(b)(1) of this title [38 USCS § 5112(b)(1)]) a check or other payment is issued to, and in the name of, the deceased veteran as a benefit payment under chapter 11 or 15 of this title [38 USCS §§ 1101 et seq. or 1501 et seq.] for the month in which death occurs, that check or other payment (A) shall be treated for all purposes as being payable to the surviving spouse, and (B) if that check or other payment is negotiated or deposited, shall be considered to be the benefit to which the surviving spouse is entitled under paragraph (1). However, if such check or other payment is in an amount less than the amount of the benefit under paragraph (1), the unpaid amount shall be treated in the same manner as an accrued benefit under section 5121 of this title [38 USCS § 5121].

Effective date of section:

Act Oct. 15, 1962, P. L. 87-825, § 7, 76 Stat. 950, provided that this section is effective on the first day of the second calendar month which begins after Oct. 15, 1962; for exceptions to this date, see § 7 of Act Oct. 15, 1962, which appears as 38 USCS § 110 note.

Amendments:
1983. Act Nov. 21, 1983, substituted "surviving spouse" for "widow", and substituted "the death of the veteran" for "his death".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3110, as 38 USCS § 5310, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

1996. Act Oct. 9, 1996 (applicable as provided by § 506(b) of such Act, which appears as a note to this section) designated the existing text as subsec. (a); and added subsec. (b).

1997. Act Nov. 21, 1997, in subsec. (b)(2), substituted "under paragraph (1)" for "under this paragraph".

Other provisions:


Cross References

This section is referred to in 38 USCS § 5111

§ 5311. Prohibition of certain benefit payments

There shall be no payment of dependency and indemnity compensation, death compensation, or death pension which, because of a widow's relationship with another man before enactment of Public Law 87-674, would not have been payable by the Veterans' Administration under the standard for determining remarriage applied by that agency before said enactment.

References in text:

"Public Law 87-674", referred to in this section, is Act Sept. 19, 1962, P. L. 87-674, 76 Stat 558, which amended 38 USCS 101, 103, and 5110 [former 3010]. For full classification of such Act, consult USCS Tables volumes.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3111, as 38 USCS § 5311.

Code of Federal Regulations

Fiscal Service, Department of the Treasury-General regulations governing U. S. securities, 31 CFR Part 306

It was not Congress's intent to make the command of 38 USCS § 3111 [now 38 USCS § 5311] concerning payment of benefits applicable to final judgments no longer subject to appeal. Daylo v Administrator of Veterans' Affairs (1974, App DC) 163 US App DC 251, 501 F.2d 811

§ 5312. Annual adjustment of certain benefit rates

(a) Whenever there is an increase in benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) as a result of a determination made under section 215(i) of such Act (42 U.S.C. 415(i)), the Secretary shall, effective on the date of such increase in benefit amounts, increase each maximum annual rate of pension under sections 1521, 1541, and 1542 of this title [38 USCS §§ 1521, 1541, and 1542], the rate
of increased pension and the rate of increased pension paid under such sections 1521 and 1541 on account of children and each rate of monthly allowance paid under section 1805 of this title [38 USCS § 1805], as such rates were in effect immediately prior to the date of such increase in benefit amounts payable under title II of the Social Security Act [42 USCS §§ 401 et seq.], by the same percentage as the percentage by with such benefit amounts are increased.

(b) (1) Whenever there is an increase in benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) as a result of a determination made under section 215(i) of such Act (42 U.S.C. 215(i)), the Secretary shall, effective on the date of such increase in benefit amounts, increase the maximum monthly rates of dependency and indemnity compensation for parents payable under subsections (b), (c), and (d), and the monthly rate provided in subsection (g), of section 1315 of this title [38 USCS § 1315] and the annual income limitations prescribed in subsections (b)(3), (c)(3), and (d)(3) of such section, and the annual benefit amount limitations under sections 5507(c)(2)(D) and 5508 of this title [38 USCS § 5507(c)(2)(D) and 5508], as such rates and limitations were in effect immediately prior to the date of such increase in benefit amounts payable under title II of the Social Security Act [42 USCS §§ 401 et seq.], by the same percentage as the percentage by which such benefit amounts are increased.

(2) (A) Whenever there is an increase under paragraph (1) of this subsection in such rates and annual income limitations, the Secretary shall, effective on the date of such increase in such rates and limitations, adjust (as provided in subparagraph (B) of this paragraph) the rates of dependency and indemnity compensation payable under subsection (b)(1) or (c)(1) of section 1315 of this title [38 USCS § 1315] to any parent whose annual income is more than $800 but not more than the annual income limitation in effect under subsection (b)(3) or (c)(3) of such section, as appropriate, and adjust the rates of such compensation payable under subsection (d)(1) of such section to any parent whose annual income is more than $1,000 but not more than the annual income limitation in effect under subsection (d)(3) of such section.

(B) The adjustment in rates of dependency and indemnity compensation referred to in subparagraph (A) of this paragraph shall be made by the Secretary in accordance with regulations which the Secretary shall prescribe.

(c) (1) Whenever there is an increase under subsection (a) in benefit rates payable under sections 1521, 1541, 1542, and 1805 of this title [38 USCS §§ 1521, 1541, 1542, and 1805] and an increase under subsection (b) in benefit rates and annual income limitations under section 1315 of this title [38 USCS § 1315], the Secretary shall publish such rates and limitations (including those rates adjusted by the Secretary under subsection (b)(2) of this section), as increased pursuant to such subsections, in the Federal Register at the same time as the material required by section 215(i)(2)(D) of the Social Security Act (42 U.S.C. 415(i)(2)(D)) is published by reason of a determination under section 215(i) of such Act (42 U.S.C. 415(i)).

(2) Whenever such rates and income limitations are so increased, the Secretary may round such rates and income limitations in such manner as the Secretary considers equitable and appropriate for ease of administration.

Effective date of section:
This section became effective on January 1, 1979, pursuant to § 401 of Act Nov. 4, 1978, P. L. 95-588, which appears as 38 USCS § 101 note.

Amendments:


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3112, as 38 USCS § 5312.

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Secretary" for "Administrator" wherever appearing.

1996. Act Sept. 26, 1996 (effective 10/1/97 unless legislation is enacted providing for an earlier date, as provided by § 422(c) of such Act, which appears as 38 USCS § 1151 note), in subsec. (a), substituted ", the rate of increased pension" for "and the rate of increased pension" and inserted "and each rate of monthly allowance paid under section 1805 of this title,"; and, in subsec. (c)(1), substituted "1542, and 1805" for "and 1542".

2004. Act Dec. 10, 2004 (effective 7/1/2005, pursuant to § 507(a) of such Act, which appears as a note to this section), in subsec. (b)(1), inserted "and the annual benefit amount limitations under sections 5507(c)(2)(D) and 5508 of this title,".

Other provisions:


"(a) In general. Except as otherwise provided, this title and the amendments made by this title [adding 38 USCS §§ 5506-5510 and 6106-6108, and amending 38 USCS § 5502, 5312, 6101, and the chapter analyses preceding 38 USCS §§ 5501 and 6101] shall take effect on the first day of the seventh month beginning after the date of the enactment of this Act.

"(b) Special rules.(1) Section 5510 of title 38, United States Code, as added by section 505(a), shall take effect on the date of the enactment of this Act.

"(2) Sections 6106 and 6107 of title 38, United States Code, as added by section 503(a), shall apply with respect to any determinations by the Secretary of Veterans Affairs made after the date of the enactment of this Act of misuse of funds by a fiduciary.".

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Department of Veterans Affairs-Adjudication,  38 CFR Part 3

Cross References

This section is referred to in 7 USCS § 2014; 38 USCS §§ 1315, 1521, 1541, 1542, 1722, 5112

Plain meaning of statutes requires that Minimum Income Widow provision of Survivor Benefit Plan be included as annual income and that appropriate deductions be made. Johnson v Brown (1996) 9 Vet App 369

VA properly included appellant's share of inheritance from her sister's death, half of $116,000, in calculating her countable income and concluding that appellant's pension had to be terminated. Bone v Brown (1996) 9 Vet App 446
§ 5313. Limitation on payment of compensation and dependency and indemnity compensation to persons incarcerated for conviction of a felony

discussion and analysis in the veterans benefits manual

(a) (1) To the extent provided in subsection (d) of this section, any person who is entitled to compensation or to dependency and indemnity compensation and who is incarcerated in a Federal, State, or local penal institution for a period in excess of sixty days for conviction of a felony shall not be paid such compensation or dependency and indemnity compensation, for the period beginning on the sixty-first day of such incarceration and ending on the day such incarceration ends, in an amount that exceeds--

(A) in the case of a veteran with a service-connected disability rated at 20 percent or more, the rate of compensation payable under section 1114(a) of this title [38 USCS § 1114(a)]; or

(B) in the case of a veteran with a service-connected disability not rated at 20 percent or more or in the case of a surviving spouse, parent, or child, one-half of the rate of compensation payable under section 1114(a) of this title [38 USCS § 1114(a)].

(2) The provisions of paragraph (1) of this subsection shall not apply with respect to any period during which a person is participating in a work-release program or is residing in a halfway house.

(b) (1) All or any part of the compensation not paid to a veteran by reason of subsection (a) of this section may, as appropriate in an individual case, be apportioned under the same terms and conditions as are provided under section 5307 of this title [38 USCS § 5307].

(2) All or any part of the dependency and indemnity compensation not paid to a surviving spouse or child by reason of subsection (a) of this section may, as appropriate in an individual case, be apportioned as follows:

(A) In the case of dependency and indemnity compensation not paid to a surviving spouse, any apportionment shall be to the surviving child or children.

(B) In the case of dependency and indemnity compensation not paid to a surviving child, any apportionment shall be to the surviving spouse or other surviving children, as applicable.

(3) No apportionment may be made under this subsection to or on behalf of any person who is incarcerated in a Federal, State, or local penal institution for conviction of a felony.

(c) The Secretary shall not assign to any veteran a rating of total disability based on the individual unemployability of the veteran resulting from a service-connected disability during any period during which the veteran is incarcerated in a Federal, State, or local penal institution for conviction of a felony.

(d) The provisions of subsection (a) of this section shall apply (1) with respect to any period of incarceration of a person for conviction of a felony committed after October 7, 1980, and (2) with respect to any period of incarceration on or after October 1, 1980, for conviction of a felony of a person who on October 1, 1980, is incarcerated for conviction of such felony and with respect to whom the action granting an award of compensation or dependency and indemnity compensation is taken on or after such date.

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(e) For purposes of this section--
(1) The term "compensation" includes disability compensation payable under section 1151 of this title [38 USCS § 1151].
(2) The term "dependency and indemnity compensation" means death compensation payable under section 1121 or 1141 of this title [38 USCS § 1121 or 1141], death compensation and dependency and indemnity compensation payable under section 1151 of this title [38 USCS § 1151], and any benefit payable under chapter 13 of this title [38 USCS §§ 1301 et seq.].

**Effective date of section:**
Act Oct. 7, 1980, P. L. 96-385, Title VI, § 601(d), 94 Stat. 1538, which appears as 38 USCS § 1114 note, provides that this section is effective on Oct. 7, 1980.

**Amendments:**
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3113, as 38 USCS § 5313, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).
Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).
Such Act further substituted "Secretary" for "Administrator" wherever appearing.

**Other provisions:**
"(a) Limitation. Section 5313 of title 38, United States Code, other than subsection (d) of that section, shall apply with respect to the payment of compensation to or with respect to any veteran described in subsection (b).

"(b) Covered veterans. A veteran described in this subsection is a veteran who is entitled to compensation and who--

"(1) on October 7, 1980, was incarcerated in a Federal, State, or local penal institution for a felony committed before that date; and

"(2) remains so incarcerated for conviction of that felony as of the date of the enactment of this Act.

"(c) Effective date. This section shall apply with respect to the payment of compensation for months beginning on or after the end of the 90-day period beginning on the date of the enactment of this Act.

"(d) Compensation defined. For purposes of this section, the term 'compensation' has the meaning given that term in section 5313 of title 38, United States Code."

**Research Guide**

**Annotations:**

Validity, construction, and effect of § 202(x) of Social Security Act (42 USCS § 402(x)), mandating suspension of old-age, survivors, and disability insurance benefits for incarcerated felons. 86 ALR Fed 748
When it found that veteran was incarcerated at state prison, Board of Veterans' Appeals had not made findings on whether correctional facility that was operated by corporation was state penal institution for purposes of 38 USCS § 5313(a)(1); resolution of that issue might involve very specific factual determinations regarding contracts and other documents that were best for Board to make in first instance, so court remanded for further proceedings veteran's appeal from Board decision denying veteran payment of full disability compensation during his incarceration.


§ 5313A. Limitation on payment of clothing allowance to incarcerated veterans

In the case of a veteran who is incarcerated in a Federal, State, or local penal institution for a period in excess of 60 days and who is furnished clothing without charge by the institution, the amount of any annual clothing allowance payable to the veteran under section 1162 of this title [38 USCS § 1162] shall be reduced by an amount equal to 1/365 of the amount of the allowance otherwise payable under that section for each day on which the veteran was so incarcerated during the 12-month period preceding the date on which payment of the allowance would be due. This section shall be carried out under regulations prescribed by the Secretary.

§ 5313B. Prohibition on providing certain benefits with respect to persons who are fugitive felons

(a) A veteran who is otherwise eligible for a benefit specified in subsection (c) may not be paid or otherwise provided such benefit for any period during which such veteran is a fugitive felon. A dependent of a veteran who is otherwise eligible for a benefit specified in subsection (c) may not be paid or otherwise provided such benefit for any period during which such veteran or such dependent is a fugitive felon.

(b) For purposes of this section:
   (1) The term "fugitive felon" means a person who is a fugitive by reason of--
       (A) fleeing to avoid prosecution, or custody or confinement after conviction, for an offense, or an attempt to commit an offense, which is a felony under the laws of the place from which the person flees; or
       (B) violating a condition of probation or parole imposed for commission of a felony under Federal or State law.
   (2) The term "felony" includes a high misdemeanor under the laws of a State which characterizes as high misdemeanors offenses that would be felony offenses under Federal law.
   (3) The term "dependent" means a spouse, surviving spouse, child, or dependent parent of a veteran.

(c) A benefit specified in this subsection is a benefit under any of the following:
   (1) Chapter 11 of this title [38 USCS §§ 1101 et seq.].
   (2) Chapter 13 of this title [38 USCS §§ 1301 et seq.].
   (3) Chapter 15 of this title [38 USCS §§ 1501 et seq.].
   (4) Chapter 17 of this title [38 USCS §§ 1701 et seq.].
   (5) Chapter 19 of this title [38 USCS §§ 1901 et seq.].
   (6) Chapter 30, 31, 32, 34, or 35 of this title [38 USCS §§ 3001 et seq, 3100 et seq., 3201 et seq., 3451 et seq., or 3500 et seq.].
(d) (1) The Secretary shall furnish to any Federal, State, or local law enforcement official, upon the written request of such official, the most current address maintained by the Secretary of a person who is eligible for a benefit specified in subsection (c) if such official--

   (A) provides to the Secretary such information as the Secretary may require to fully identify the person;
   (B) identifies the person as being a fugitive felon; and
   (C) certifies to the Secretary that apprehending such person is within the official duties of such official.

(2) The Secretary shall enter into memoranda of understanding with Federal law enforcement agencies, and may enter into agreements with State and local law enforcement agencies, for purposes of furnishing information to such agencies under paragraph (1).

§ 5314. Indebtedness offsets

(a) Subject to subsections (b) and (d) of this section and section 3485(e) of this title [38 USCS § 3485(e)], the Secretary shall (unless the Secretary waives recovery under section 5302 of this title [38 USCS § 5302]) deduct the amount of the indebtedness of any person who has been determined to be indebted to the United States by virtue of such person's participation in a benefits program administered by the Secretary from future payments made to such person under any law administered by the Secretary.

(b) Deductions may not be made under subsection (a) of this section with respect to the indebtedness of a person described in such subsection unless the Secretary--

   (1) has made reasonable efforts to notify such person of such person's right to dispute through prescribed administrative processes the existence or amount of such indebtedness and of such person's right to request a waiver of such indebtedness under section 5302 of this title [38 USCS § 5302];
   (2) has made a determination with respect to any such dispute or request or has determined that the time required to make such a determination before making deductions would jeopardize the Secretary's ability to recover the full amount of such indebtedness through deductions from such payments; and
   (3) has made reasonable efforts to notify such person about the proposed deductions from such payments.

(c) Notwithstanding any other provision of this title or of any other law, the authority of the Secretary to make deductions under this section or to take other administrative action authorized by law for the purpose of collecting an indebtedness described in subsection (a) of this section, or for the purpose of determining the creditworthiness of a person who owes such an indebtedness, shall not be subject to any limitation with respect to the time for bringing civil actions or for commencing administrative proceedings.

(d) The Secretary shall prescribe regulations for the administration of this section.

Effective date of section:
Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(f)(1), 94 Stat. 2218, which appears as a note to this section, provides that this section is effective on Oct. 1, 1980, except as otherwise specifically provided.

Amendments:


Act May 7, 1991 redesignated this section, formerly 38 USCS § 3114, as 38 USCS § 5314, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

Other provisions:

Promulgation of regulations under sections 5314 and 5315. Act Oct. 17, 1980, P. L. 96-466, Title VI, § 605(b), 94 Stat. 2211 (effective 10/1/80, as provided by § 802(f)(1) of such Act), provides: "The Administrator of Veterans' Affairs shall, not later than January 1, 1981, prescribe the regulations required to be prescribed under sections 3114 and 3115 [now sections 5314 and 5315] of title 38, United States Code, as added by subsection (a).".


"(1) Except as provided in paragraph (2), the amendments made by title VI [adding this section, among other things; for full classification, consult USCS Tables volumes] shall become effective on October 1, 1980.

"(2) The amendments made by sections 603 and 604 [amending 38 USCS 1677, 1786, 1798] shall not apply to any person receiving educational assistance under chapter 34 or 35 of title 38, United States Code [38 USCS §§ 3451 et seq. or 3500 et seq.], on September 1, 1980, for the pursuit of a program of education, as defined in section 1652(b) of such title, in which such person is enrolled on that date, for as long as such person continuously thereafter is so enrolled and meets the requirements of eligibility for such assistance for the pursuit of such program under the provisions of such chapter and chapter 36 of such title [38 USCS §§ 3670 et seq.] as in effect on that date.".

Cross References

This section is referred to in 38 USCS § 3485

§ 5315. Interest and administrative cost charges on delinquent payments of certain amounts due the United States

(a) Notwithstanding any other provision of this title or of any other law and subject to sections 3485(e) and 5302 of this title [38 USCS §§ 3485(e) and 5302], interest and administrative costs (as described in subsections (b) and (c) of this section) shall be charged, under regulations which the Secretary shall prescribe, on any amount owed to the United States--

(1) for an indebtedness resulting from a person's participation in a benefits program administered by the Secretary other than a loan, loan-guaranty, or loan-insurance program;
(2) for an indebtedness resulting from the provision of care or services under chapter 17 of this title [38 USCS §§ 1701 et seq.]; or
(3) to the extent not precluded by the terms of the loan instruments concerned, for an indebtedness resulting from a person's participation in a program of loans, loan guaranties, or loan insurance administered by the Secretary under this title.

(b) (1) Interest on the amount of any indebtedness described in subsection (a) of this section shall accrue from the day on which the initial notification of the amount due is mailed to the person who owes such amount (using the most current address of such person that is available to the Secretary), but interest under this section shall not be charged (A) for any period before October 17, 1980, or (B) if the amount due is paid within a reasonable period of time. The Secretary shall, in the regulations prescribed pursuant to subsection (a) of this section, prescribe what constitutes a reasonable period of time for payment of an indebtedness after the initial notification of indebtedness has been mailed.

(2) The rate of interest to be charged under this section shall be based on the rate of interest paid by the United States for its borrowing and shall be determined by the Secretary under such regulations.

(c) The administrative costs to be charged under this section with respect to an amount owed to the United States shall be so much of the costs incurred by the United States in collecting such amount as the Secretary determines, under such regulations, to be reasonable and appropriate.

Effective date of section:

Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(f)(1), 94 Stat. 2218, which appears as 38 USCS § 5314 note, provides that this section is effective on Oct. 1, 1980, except as otherwise specifically provided.

Amendments:

1991. Act March 22, 1991, in subsec. (a), in the introductory matter, substituted "sections 1685(e) and 3102" for "section 3102".

Act May 7, 1991 redesignated this section, formerly 38 USCS § 3115, as 38 USCS § 5315, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.


Code of Federal Regulations
Department of Veterans Affairs-General provisions, 38 CFR Part 1

Cross References
This section is referred to in 38 USCS §§ 3485
Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws §§ 40, 113

Motion for injunctive relief against accrual of interest during pendency of appeal would be denied where appellant did not demonstrate that he had legal right to cessation of accrual of interest in indebtedness at issue in underlying appeal and thus had not demonstrated likelihood of success on merits. Kaplan v Brown (1995) 7 Vet App 425

§ 5316. Authority to sue to collect certain debts

(a) (1) The Secretary shall take appropriate steps to authorize attorneys employed by the Department to exercise, subject to paragraphs (2) and (3) of this subsection, the right of the United States to bring suit in any court of competent jurisdiction to recover any indebtedness owed to the United States by a person by virtue of such person's participation in a benefits program administered by the Secretary.

(2) No suit may be filed under this section to recover any indebtedness owed by any person to the United States unless the Secretary has determined, under regulations which the Secretary shall prescribe, that such person has failed to respond appropriately to reasonable administrative efforts to collect such indebtedness.

(3) The activities of attorneys employed by the Department in bringing suit under this section shall be subject to the direction and supervision of the Attorney General of the United States and to such terms and conditions as the Attorney General may prescribe.

(b) Nothing in this section shall derogate from the authority of the Attorney General of the United States under sections 516 and 519 of title 28 [28 USCS §§ 516 and 519] to direct and supervise all litigation to which the United States or an agency or officer of the United States is a party.

Effective date of section:

Act Oct. 17, 1980, P. L. 96-466, Title VIII, § 802(f)(1), 94 Stat. 2218, which appears as 38 USCS § 5314 note, provides that this section is effective on Oct. 1, 1980, except as otherwise specifically provided.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3116, as 38 USCS § 5316.

Act June 13, 1991 (amending section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (a), substituted "The" for "Within ninety days after the date of the enactment of this section, the"; deleted subsec. (b), which read: "Not later than ninety days after the date of the enactment of this section, the Administrator and the Attorney General of the United States shall submit to the appropriate committees of the Congress a joint report that describes and explains the actions taken by the Administrator and the Attorney General to implement subsection (a) of this section."; and redesignated subsec. (c) as new subsec. (b).

Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.
Veteran’s Administration [now Department of Veterans Affairs] was not precluded from bringing suit to recover alleged overpayments in educational assistance benefits, notwithstanding 38 USCS 3116(a)(2) [now 38 USCS § 5316(a)(2)] providing that no suit for overpayment may be filed unless Administrator [now Secretary] determines that person has failed to respond appropriately to reasonable administrative efforts to correct such indebtedness, where Veteran’s Administration [now Department of Veterans Affairs] sent several letters to defendant requesting payment of alleged overpayment, Veteran's Administration [now Department of Veterans Affairs] also sent certificate of indebtedness setting forth amount allegedly due and basis for alleged debt, defendant received demand letter requesting payment once again before suit was filed, and prior to filing of suit, government determined that defendant had failed to respond to reasonable efforts to collect alleged debt. United States v Brandon (1985, WD NC) 601 F Supp 795, revd on other grounds (1986, CA4 NC) 781 F.2d 1051

§ 5317. Use of income information from other agencies: notice and verification

(a) The Secretary shall notify each applicant for a benefit or service described in subsection (c) of this section that income information furnished by the applicant to the Secretary may be compared with information obtained by the Secretary from the Commissioner of Social Security or the Secretary of the Treasury under section 6103(1)(7)(D)(viii) of the Internal Revenue Code of 1986 [26 USCS § 6103(1)(7)(D)(viii)]. The Secretary shall periodically transmit to recipients of such benefits and services additional notifications of such matters.

(b) The Secretary may not, by reason of information obtained from the Commissioner of Social Security or the Secretary of the Treasury under section 6103(1)(7)(D)(viii) of the Internal Revenue Code of 1986 [26 USCS § 6103(1)(7)(D)(viii)], terminate, deny, suspend, or reduce any benefit or service described in subsection (c) of this section until the Secretary takes appropriate steps to verify independently information relating to the following:

   (1) The amount of the asset or income involved.
   (2) Whether such individual actually has (or had) access to such asset or income for the individual's own use.
   (3) The period or periods when the individual actually had such asset or income.

(c) The benefits and services described in this subsection are the following:

   (1) Needs-based pension benefits provided under chapter 15 of this title [38 USCS §§ 1501 et seq.] or under any other law administered by the Secretary.
   (2) Parents' dependency and indemnity compensation provided under section 1315 of this title [38 USCS § 1315].
   (3) Health-care services furnished under subsections (a)(2)(G), (a)(3), and (b) of section 1710 of this title [38 USCS § 1710].
(4) Compensation paid under chapter 11 of this title [38 USCS §§ 1101 et seq.] at the 100 percent rate based solely on unemployability and without regard to the fact that the disability or disabilities are not rated as 100 percent disabling under the rating schedule.

(d) In the case of compensation described in subsection (c)(4) of this section, the Secretary may independently verify or otherwise act upon wage or self-employment information referred to in subsection (b) of this section only if the Secretary finds that the amount and duration of the earnings reported in that information clearly indicate that the individual may no longer be qualified for a rating of total disability.

(e) The Secretary shall inform the individual of the findings made by the Secretary on the basis of verified information under subsection (b) of this section, and shall give the individual an opportunity to contest such findings, in the same manner as applies to other information and findings relating to eligibility for the benefit or service involved.

(f) The Secretary shall pay the expenses of carrying out this section from amounts available to the Department for the payment of compensation and pension.

(g) The authority of the Secretary to obtain information from the Secretary of the Treasury or the Commissioner of Social Security under section 6103(1)(7)(D)(viii) of the Internal Revenue Code of 1986 [26 USCS § 6103(1)(7)(D)(viii)] expires on September 30, 2008.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3117, as 38 USCS § 5317.

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).


1996. Act Oct. 9, 1996, in subsec. (c)(3), substituted "subsections (a)(2)(G), (a)(3), and (b) of section 1710" for "sections 1710(a)(1)(l), 1710(a)(2), 1710(b), and 1712(a)(2)(B)".


2003. Act Dec. 16, 2003, in subsecs. (a), (b), and (g), substituted "Commissioner of Social Security" for "Secretary of Health and Human Services".

Other provisions:

Notice to current beneficiaries. Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle F, § 8051(c), 104 Stat. 1388-351, provides:

"(1) The Secretary of Veterans Affairs shall notify individuals who (as of the date of the enactment of this Act) are applicants for or recipients of the benefits described in subsection (c) (other than paragraph (3)) of section 3117 of title 38, United States Code (as added by subsection (b)), that income information furnished to the Secretary by such applicants and
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recipients may be compared with information obtained by the Secretary from the Secretary of Health and Human Services or the Secretary of the Treasury under clause (viii) of section 6103(l)(7)(D) of the Internal Revenue Code of 1986 [26 USCS § 6103(l)(7)(D)] (as added by subsection (a)).

"(2) Notification under paragraph (1) shall be made not later than 90 days after the date of the enactment of this Act.

"(3) The Secretary of Veterans Affairs may not obtain information from the Secretary of Health and Human Services or the Secretary of the Treasury under section 6103(1)(7)(D)(viii) of the Internal Revenue Code of 1986 [26 USCS § 6103(1)(7)(D)(viii)] (as added by subsection (a)) until notification under paragraph (1) is made.".

Study by Comptroller General; report. Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle F, § 3051(d), 104 Stat. 1388-351, provides: "The Comptroller General of the United States shall conduct a study of the effectiveness of the amendments made by this section and shall submit a report on such study to the Committees on Veterans' Affairs and Ways and Means of the House of Representatives and the Committees on Veterans' Affairs and Finance of the Senate not later than January 1, 1992.".

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 158

§ 5318. Review of Social Security Administration death information

(a) The Secretary shall periodically compare Department of Veterans Affairs information regarding persons to or for whom compensation or pension is being paid with information in the records of the Social Security Administration relating to persons who have died for the purposes of--

(1) determining whether any such persons to whom compensation and pension is being paid are deceased;
(2) ensuring that such payments to or for any such persons who are deceased are terminated in a timely manner; and
(3) ensuring that collection of overpayments of such benefits resulting from payments after the death of such persons is initiated in a timely manner.

(b) The Social Security Administration death information referred to in subsection (a) of this section is death information available to the Secretary from or through the Commissioner of Social Security, including death information available to the Commissioner from a State, pursuant to a memorandum of understanding entered into by the Secretary and the Commissioner. Any such memorandum of understanding shall include safeguards to assure that information made available under it is not used for unauthorized purposes or improperly disclosed.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3118, as 38 USCS § 5318.
for "Secretary of Health and Human Services", substituted "to the Commissioner" for "to the Secretary of Health and Human Services", and substituted "the Secretary and the Commissioner" for "such Secretaries".

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 17

§ 5319. Limitations on access to financial records

(a) The Secretary may make a request referred to in section 1113(p) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3413(p)) only if the Secretary determines that the requested information--
   (1) is necessary in order for the Secretary to administer the provisions of law referred to in that section; and
   (2) cannot be secured by a reasonable search of records and information of the Department.

(b) The Secretary shall include a certification of the determinations referred to in subsection (a) in each request presented to a financial institution.

(c) Information disclosed pursuant to a request referred to in subsection (a) may be used solely for the purpose of the administration of benefits programs under laws administered by the Secretary if, except for the exemption in subsection (a), the disclosure of that information would otherwise be prohibited by any provision of the Right to Financial Privacy Act of 1978 [12 USCS §§ 3401 et seq.].

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 16

CHAPTER 55. MINORS, INCOMPETENTS, AND OTHER WARDS

§ 5501. Commitment actions
§ 5502. Payments to and supervision of fiduciaries
§ 5503. Hospitalized veterans and estates of incompetent institutionalized veterans
§ 5504. Administration of trust funds
[§ 5505. Repealed]
§ 5506. Definition of "fiduciary"
§ 5507. Inquiry, investigations, and qualification of fiduciaries
§ 5508. Periodic onsite reviews of institutional fiduciaries
§ 5509. Authority to require fiduciary to receive payments at regional offices of the Department when failing to provide required accounting
§ 5510. Annual report

Amendments:

1990. Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle A, § 8001(a)(2), 104 Stat. 1388-342, applicable as provided by § 8001(b) of such Act, which appears as 38 USCS § 5505 note, amended the analysis of this chapter by adding item 3205 [5505].

1991. Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239, revised the analysis of this chapter by amending the section numbers in accordance with the redesignations made by § 402(b) of the above Act (see Table II preceding 38 USCS § 101).


§ 5501. Commitment actions

The Secretary may incur necessary court costs and other expenses incident to proceedings for the commitment of mentally incompetent veterans to a Department hospital or domiciliary when necessary for treatment or domiciliary purposes.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3201, as 38 USCS § 5501.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 42

§ 5502. Payments to and supervision of fiduciaries

(a) (1) Where it appears to the Secretary that the interest of the beneficiary would be served thereby, payment of benefits under any law administered by the Secretary may be made directly to the beneficiary or to a relative or some other fiduciary for the use and benefit of the beneficiary, regardless of any legal disability on the part of the beneficiary. Where, in the opinion of the Secretary, any fiduciary receiving funds on behalf of a Department beneficiary is acting in such a number of cases as to make it impracticable to conserve properly the estates or to supervise the persons of the beneficiaries, the Secretary may refuse to make payments in such cases as the Secretary may deem proper.

(2) In a case in which the Secretary determines that a commission is necessary in order to obtain the services of a fiduciary in the best interests of a beneficiary, the Secretary may authorize a fiduciary appointed by the Secretary to obtain from the beneficiary's estate a reasonable commission for fiduciary services rendered, but the commission for any year may not exceed 4 percent of the monetary benefits under laws administered by the Secretary paid on behalf of the beneficiary to the fiduciary.
during such year. A commission may not be authorized for a fiduciary who receives any other form of remuneration or payment in connection with rendering fiduciary services for benefits under this title on behalf of the beneficiary.

(b) Whenever it appears that any fiduciary, in the opinion of the Secretary, is not properly executing or has not properly executed the duties of the trust of such fiduciary or has collected or paid, or is attempting to collect or pay, fees, commissions, or allowances that are inequitable or in excess of those allowed by law for the duties performed or expenses incurred or has failed to make such payments as may be necessary for the benefit of the ward or the dependents of the ward, then the Secretary may appear, by the Secretary's authorized attorney, in the court which has appointed such fiduciary, or in any court having original, concurrent, or appellate jurisdiction over said cause, and make proper presentation of such matters. The Secretary, in the Secretary's discretion, may suspend payments to any such fiduciary who shall neglect or refuse, after reasonable notice, to render an account to the Secretary from time to time showing the application of such payments for the benefit of such incompetent or minor beneficiary, or who shall neglect or refuse to administer the estate according to law. The Secretary may require the fiduciary, as part of such account, to disclose any additional financial information concerning the beneficiary (except for information that is not available to the fiduciary). The Secretary may appear or intervene by the Secretary's authorized attorney in any court as an interested party in any litigation instituted by the Secretary or otherwise, directly affecting money paid to such fiduciary under this section.

(c) Authority is hereby granted for the payment of any court or other expenses incident to any investigation or court proceeding for the appointment of any fiduciary or other person for the purpose of payment of benefits payable under laws administered by the Secretary or the removal of such fiduciary and appointment of another, and of expenses in connection with the administration of such benefits by such fiduciaries, or in connection with any other court proceeding hereby authorized, when such payment is authorized by the Secretary.

(d) All or any part of any benefits the payment of which is suspended or withheld under this section may, in the discretion of the Secretary, be paid temporarily to the person having custody and control of the incompetent or minor beneficiary, to be used solely for the benefit of such beneficiary, or, in the case of an incompetent veteran, may be apportioned to the dependent or dependents, if any of such veteran. Any part not so paid and any funds of a mentally incompetent or insane veteran not paid to the chief officer of the institution in which such veteran is a patient nor apportioned to the veterans' dependent or dependents may be ordered held in the Treasury to the credit of such beneficiary. All funds so held shall be disbursed under the order and in the discretion of the Secretary for the benefit of such beneficiary or the beneficiary's dependents. Any balance remaining in such fund to the credit of any beneficiary may be paid to the beneficiary if the beneficiary recovers and is found competent, or if a minor, attains majority, or otherwise to the beneficiary's fiduciary or the beneficiary's dependents. Any payment will not be made to the beneficiary's personal representative, except as otherwise provided by law; however, payment will not be made to the beneficiary's personal representative if, under the law of the beneficiary's last legal residence, the beneficiary's estate would escheat to the State. In the event of the death of a mentally incompetent or insane veteran, all
gratuitous benefits under laws administered by the Secretary deposited before or after August 7, 1959, in the personal funds of patients trust fund on account of such veteran shall not be paid to the personal representative of such veteran, but shall be paid to the following persons living at the time of settlement, and in the order named: The surviving spouse, the children (without regard to age or marital status) in equal parts, and the dependent parents of such veteran, in equal parts. If any balance remains, such balance shall be deposited to the credit of the applicable current appropriation; except that there may be paid only so much of such balance as may be necessary to reimburse a person (other than a political subdivision of the United States) who bore the expenses of last sickness or burial of the veteran for such expenses. No payment shall be made under the two preceding sentences of this subsection unless claim therefor is filed with the Secretary within five years after the death of the veteran, except that, if any person so entitled under said two sentences is under legal disability at the time of death of the veteran, such five-year period of limitation shall run from the termination or removal of the legal disability.

(e) Any funds in the hands of a fiduciary appointed by a State court or the Secretary derived from benefits payable under laws administered by the Secretary, which under the law of the State wherein the beneficiary had last legal residence would escheat to the State, shall escheat to the United States and shall be returned by such fiduciary, or by the personal representative of the deceased beneficiary, less legal expenses of any administration necessary to determine that an escheat is in order, to the Secretary, and shall be deposited to the credit of the applicable revolving fund, trust fund, or appropriation.

Amendments:

1959. Act Aug. 7, 1959 (effective as provided by § 3 of such Act, which appears as a note to this section), in subsec. (d), inserted "In the event of the death of a mentally incompetent or insane veteran, all gratuitous benefits under laws administered by the Veterans' Administration deposited before or after the date of enactment of this sentence in the personal funds of patients trust fund on account of such veteran shall not be paid to the personal representative of such veteran, but shall be paid to the following persons living at the time of settlement, and in the order named: The surviving spouse, the children (without regard to age or marital status) in equal parts, and the dependent parents of such veteran, in equal parts. If any balance remains, such balance shall be deposited to the credit of the applicable current appropriation; except that there may be paid only so much of such balance as may be necessary to reimburse a person (other than a political subdivision of the United States) who bore the expenses of last sickness or burial of the veteran for such expenses."

1972. Act June 30, 1972 (effective 8/1/72, as provided by § 301(a) of such Act, which appears as 38 USCS § 1114 note), in subsec. (d), inserted "No payment shall be made under the two preceding sentences of this subsection unless claim therefor is filed with the Veterans' Administration within five years after the death of the veteran, except that, if any person so entitled under said two sentences is under legal disability at the time of death of the veteran, such five-year period of limitation shall run from the termination or removal of the legal disability."

1974. Act May 31, 1974 (effective 7/1/74, as provided by § 401 of such Act, which appears as 38 USCS § 1114 note), substituted new subsec. (a) for one which read: "Except as provided in section 1701(c) of this title, where any payment of benefits under any law administered by the Veterans' Administration is to be made to a minor, other than a person in the active military, naval, or air service, or to a person mentally incompetent, or under other legal
disability adjudged by a court of competent jurisdiction, such payment may be made to the person who is constituted guardian, curator, or conservator by the laws of the State of residence of the claimant, or who is otherwise legally vested with the care of the claimant or his estate. Where in the opinion of the Administrator any guardian, curator, conservator, or other person is acting as fiduciary in such a number of cases as to make it impracticable to conserve properly the estates or to supervise the persons of the wards, the Administrator may refuse to make future payments in such cases as he may deem proper. Before receipt of notice by the Veterans' Administration that any such person is under such other legal disability adjudged by some court of competent jurisdiction, payment may be made to such person direct. Where no guardian, curator, or conservator of the person under legal disability has been appointed under the laws of the State of residence of the claimant, the Administrator shall determine the person who is otherwise legally vested with the care of the claimant or his estate.

In subsec. (c), substituted "fiduciary or other person for the purpose of payment of benefits payable under laws administered by the Veterans' Administration" for "guardian, curator, conservator, or other person legally vested with the care of the claimant or his estate", and substituted "benefits" for "estates"; in subsec. (e), substituted "fiduciary appointed by a State court or the Veterans' Administration" for "guardian, curator, conservator, or person legally vested with the care of the beneficiary or his estate.", and substituted "fiduciary" for "guardian, curator, conservator, or person legally vested with the care of the beneficiary or his estate" following "such"; and deleted subssecs. (f) and (g) which read:

"(f) In the case of any incompetent veteran having no guardian, payment of compensation, pension, or retirement pay may be made in the discretion of the Administrator to the wife of such veteran for the use of the veteran and his dependents.

"(g) Payment of death benefits to a widow for herself and child or children, if any, may be made directly to such widow, notwithstanding she may be a minor."


1984. Act March 2, 1984, in the catchline, substituted "fiduciaries" for "guardians"; and, in subsec. (a), designated the existing provisions as para. (1), and added para. (2).

1986. Act Oct. 28, 1986, in subsec. (a)(1), substituted "the Administrator" for "he" following "such cases as"; in subsec. (b), substituted "the trust of such guardian, curator, conservator, or other person" for "his trust", substituted "the Administrator's" for "his duly" and "his" following "by", "in", and "by", respectively, inserted "The Administrator may require the fiduciary, as part of such account, to disclose any additional financial information concerning the beneficiary (except for information that is not available to the fiduciary).", and substituted "the Administrator" for "himself" following "instituted by"; in subsec. (d) substituted "the veteran's" for "his" following "apportioned to", "the beneficiary's" for "his" following "beneficiary or", "the beneficiary for "him" following "paid to", and "if" and substituted "the beneficiary's" for "his" following "otherwise to", "event of", "death to", "made to", "law of", and "residence," respectively; and in subsec. (e) deleted "his" preceding "last legal".

1991. Act May 7, 1991, in subsec. (d), substituted "a patient" for "an inmate", and redesignated this section, formerly 38 USCS § 3202, as 38 USCS § 5502.

Act Aug. 6, 1991, in subsecs. (a)(2), (d), and (e), substituted "Secretary" for "Veterans' Administration".

Such Act further substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

2004. Act Dec. 10, 2004 (effective July 1, 2005, pursuant to § 507(a) of such Act, which appears as 38 USCS § 5312 note), in subsec. (a), in para. (1), substituted "other fiduciary" for "other person", and, in para. (2), inserted "for benefits under this title"; in subsec. (b), substituted "that any fiduciary" for "that any guardian, curator, conservator, or other person",
substituted “fiduciary or has collected” for “guardian, curator, conservator, or other person or has collected”, and substituted “any such fiduciary” for “any such guardian, curator, conservator, or other person”; and, in subsec. (d), substituted “fiduciary” for “guardian, curator, or conservator”.

Other provisions:

Effective date of Aug. 7, 1959 amendments. Act Aug. 7, 1959, P. L. 86-146, § 3, 73 Stat. 298, provides: “The amendments made by this Act [amending this section and 38 USCS § 3203 (now § 5503)] shall take effect as of the first day of the first calendar month which begins more than ninety days after the date of enactment of this Act.”.

Code of Federal Regulations

Department of Veterans Affairs-United States Government life insurance, 38 CFR Part 6
Department of Veterans Affairs-Veterans Benefits Administration, fiduciary activities, 38 CFR Part 13
Department of Veterans Affairs-Legal services, General Counsel, and miscellaneous claims, 38 CFR Part 14

Cross References

This section is referred to in 38 USCS § 3501

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:11, 14

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 43

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I. IN GENERAL

1. Generally
   Federal legislation with respect to pensions and funds for their payment is binding on states. In re Campbell's Estate (1949) 195 Misc 520, 89 NYS2d 310

2. Construction
   The word "benefits" is to be broadly interpreted. Waters v United States (1963, CA5 La) 316 F.2d 301
   Provisions for appearance or intervention of Secretary of Veterans Affairs in matters involving appointed fiduciary for veteran under 38 USCS § 5502(b) do not explicitly authorize granting of affirmative relief against Secretary and thus do not constitute clear and unequivocal waiver of sovereign immunity. In re Guardianship & Conservatorship of Blunt (2005, DC ND) 358 F Supp 2d 882
   Word "funds" includes bonds remaining in veteran's estate at time of his death which have been purchased with his pension money. In re Estate of Plich (1960) 141 Colo 425, 348 P2d 706

3. Effect of payment of benefits to guardian
   Payment to guardian vests title in ward and discharges obligation of United States. Spicer v Smith (1933) 288 US 430, 77 L Ed 875, 53 S Ct 415, 84 ALR 1525
   Payment to discharged guardian of incompetent veteran is not improper so as to warrant recovery by Administrator [now Secretary] after death of incompetent. Klaskala v United States (1929, DC NY) 36 F.2d 395

4. Provision of benefits to spouse
   Benefit was payable at discretion of Administrator [now Secretary of Veterans Affairs] to wife of incompetent veteran, who has no guardian and to whom death compensation was due on account of death of his son under former 38 USCS § 450. 1944 ADVA 552
   38 USCS § 3202 [now 38 USCS § 5502] enabled Veterans' Administration [now Department of Veterans Affairs] to accept application signed by spouse of eligible, incompetent veteran for automobile authorized to veteran. VA GCO 9-76

5. Regulations
   Regulations of Veterans' Administration [now Department of Veterans Affairs] as to allowances to guardians were recommendatory only and not binding on state court. United States Veterans' Bureau v Glenn (1932) 226 Mo App 674, 46 SW2d 200

II. SUPERVISION OF FIDUCIARIES

A. In General

6. Generally
   First Amendment and privacy claims of pension recipient were properly dismissed, where benefit money was cared for by state due to recipient's incompetence and recipient sought unrestricted access to money and objected to requirement of 38 USCS § 3203(a)(1) [now 38 USCS § 5503(a)(1)] that he report and describe to state, as fiduciary, religious items purchased with benefits, since recipient had not exhausted his administrative remedies pursuant to 38 USCS
§§ 4001 et seq. in objecting to appointment of state as fiduciary. Whitmire v United States Veterans Admin. (1986, WD Wash) 661 F Supp 720

State appointment of guardian for incapacitated veteran does not require designation of guardian as fiduciary payee for veteran's benefits, nor notice to or consultation with guardian prior to designation. In re Guardianship & Conservatorship of Blunt (2005, DC ND) 358 F Supp 2d 882


**7. Scope of authority, generally**

Where Secretary of Veterans Affairs designated administrator of facility where incapacitated veteran was housed as fiduciary payee of veteran's benefits, rather than state court-appointed guardian of veteran, designation was reasonable; after proper investigation and consideration of relevant factors, Secretary properly determined that it was more efficient to funnel benefits directly to administrator and avoid payment of guardian's fee, and administrator was suitable and trustworthy payee. In re Guardianship & Conservatorship of Blunt (2005, DC ND) 358 F Supp 2d 882

Veterans' Administration [now Department of Veterans Affairs] is not given control over funds of mental incompetents that have come into custody of guardians. White v White (1935) 230 Ala 641, 162 So 368

Pension money, paid to guardian of pensioner, is not subject to state control. Manning v Spry (1903) 121 Iowa 191, 96 NW 873

**8. Requirement of bond**

Bond could not be exacted of natural tutor of veteran's minor children, for faithful performance of trust, when he was appointed under general laws of state. In re Wyly's Tutorship (1938) 191 La 644, 186 So 55

**9. Approval of investments**

Approval of Regional Attorney of United States Veterans Administration [now Department of Veterans Affairs] of investments of money paid to guardian does not validate investments when contrary to state law regulating investments by guardians. White v White (1935) 230 Ala 641, 162 So 368

Wisdom of investment of ward's funds made under authority of county court having jurisdiction of ward's estate could not be challenged on objection to approval of guardian's report. In re Vaughn's Guardianship (1937) 181 Okla 274, 73 P2d 411

Disbursements made by guardian without authority of probate court, when in violation of state statute, were illegal. Bagwell v McCombs (1930, Tex Civ App) 31 SW2d 835

**10. Allowance of legal fees**

State court may authorize guardian of incompetent veteran to pay attorney employed to prosecute request for reinstatement of disability pension compensation for his services in amount exceeding fee established by federal authority for prosecution of pension claims. Hines v Stein (1936) 298 US 94, 80 L Ed 1063, 56 S Ct 699, reh den (1936) 298 US 692, 80 L Ed 1409, 56 S Ct 945

Additional compensation allowed guardian for legal services was error. Hines v Paregol (1935, Dist Col App) 64 App DC 306, 77 F.2d 953

**B. Practice and Procedure**

**11. Generally**

District counsel may ethically represent guardian in routine guardianship matters involving beneficiary without creating bar under attorney-client privilege which would prevent district
counsel from ethically representing Administrator [now Secretary] in proceeding against guardian, provided guardian is properly instructed initially and district counsel's representation of guardian has ceased at time proceeding against guardian arises. VA GCO 31-79

12. Department as party to proceedings

Administrator [now Secretary] of Veterans Affairs was entitled and duty bound to appear, in case involving compensation of guardian, and represent interest of ward. Hines v Paregol (1935, Dist Col App) 64 App DC 306, 77 F.2d 953

Veterans' Administration [now Department of Veterans Affairs] had right to appear in accounting of guardian of incompetent and object to his report. In re Arrak's Guardianship (1934) 218 Iowa 117, 254 NW 307

Court would not pass on right of Administrator [now Secretary] of Veterans Affairs to intervene in proceeding to relieve guardian of veteran, non compos mentis, and guardian's surety, for loss to veteran's funds when such question was presented on rehearing only. Hamilton v James (1936) 231 Ala 668, 166 So 425

Where amount of adjusted service certificate of deceased veteran has been paid natural executrix of his minor children, Administrator [now Secretary] could intervene to question correctness of executrix' accounts of her trust. In re Wyly's Tutorship (1938) 191 La 644, 186 So 55

Veterans' Administration [now Department of Veterans Affairs] had authority to intervene in behalf of ward in accounting proceedings by guardian of insane veteran. Veterans Administration v Boles (1932) 227 Mo App 1023, 61 SW2d 757

13. Burden of proof

Guardian of incompetent veteran submitting evidence as to his services was properly allowed compensation in absence of opposing evidence. Hines v McKenzie (1933) 216 Iowa 1388, 250 NW 687

14. Mandamus proceedings

In mandamus proceeding against receiver of insolvent bank to compel turning over of funds, representative of government or Veterans' Administration [now Department of Veterans Affairs] was required to be before court. Hamilton v James (1936) 231 Ala 668, 166 So 425

Mandamus did not lie to compel receiver of insolvent bank to turn over funds deposited by committee of convict mistakenly paid him by Veterans' Administration [now Department of Veterans Affairs]. Masters v Morrison (1936) 117 W Va 33, 183 SE 691

15. Costs

In proceeding by director [now Secretary] against guardian, latter was not entitled to costs on dismissal. Hines v Taft (1932, Minn) 241 NW 796

16. Appellate review

Administrator [now Secretary] of Veterans Affairs was entitled to appeal from order of court approving account of guardian of incompetent veteran which order made allowance of attorney fees as against contention he was not aggrieved and was not party to proceedings in trial court. In re Guardianship of Copsey (1936) 7 Cal 2d 199, 60 P2d 121

Administrator [now Secretary] of Veterans Affairs had right to appeal in cases involving compensation of guardian under Missouri law. Hines v Hook (1935) 338 Mo 114, 89 SW2d 52

Officials of Veterans' Administration [now Department of Veterans Affairs] could appeal from allowance to guardian out of compensation money. In re Guardianship of MacNair (1931) 163 Wash 508, 2 P2d 82

III. PAYMENTS TO BENEFICIARY OF INCOMPETENTS

17. Generally
Payment from benefit fund of reasonable funeral expenses of beneficiary is not prohibited where other funds capable of being used for such purpose were not available; proceeds of insurance on life of veteran's incompetent beneficiary, who died in state institution, intestate and without distributees, and whose estate consisted of such proceeds and balance of unexpended pension moneys, constituted a definite, traceable fund, unconnected with governmental benefits, and should, therefore, have been first used in payment of beneficiary's funeral expenses and perpetual care of her grave, and, where sum total of such proceeds exceeded such expenditures, net estate should have been paid to Treasurer of United States. In re Price's Estate (1951) 199 Misc 833, 104 NYS2d 518

18. Limitation period for claims


Where estate of incompetent Spanish American War veteran who died intestate consisted of assets derived solely from deceased's pension, and more than five years had elapsed following intestate's death without filing by any person of claim of right to distributive share of estate, distributable balance thereof was required to be paid to treasurer of United States. In re Campbell's Estate (1949) 195 Misc 520, 89 NYS2d 310

IV. ESCHEAT OR REVERSION TO UNITED STATES

19. Generally

State escheat statute is based upon state sovereignty and is direction for devolution of property, and it may not prevail over United States Constitution or over congressional act which does not deprive one of property interests without due process of law; state has no right, by virtue of its sovereignty, to escheat pension funds merely because they are found within jurisdiction of state, and where gift of pension is limited to extent that, if veteran died intestate and without heirs, any unexpended balance reverted to donor, as between state and federal governments fund would go to latter; fact that veteran has been declared incompetent is immaterial on question of reversion of unexpended pension money to government on death of veteran intestate and without heirs. Estate of Lindquist (1944) 25 Cal 2d 697, 154 P2d 879, cert den (1945) 325 US 869, 89 L Ed 1988, 65 S Ct 1408 and cert den (1945) 325 US 869, 89 L Ed 1988, 65 S Ct 1410

Provision for escheat to United States of pension funds which otherwise would escheat to state in which veteran died was not unreasonable. Estate of Lindquist (1944) 25 Cal 2d 697, 154 P2d 879, cert den (1945) 325 US 869, 89 L Ed 1988, 65 S Ct 1408 and cert den (1945) 325 US 869, 89 L Ed 1988, 65 S Ct 1410

20. Purpose

Intent of Congress in passing 38 USCS § 3202(e) [now 38 USCS § 5502(e)] was that state should not benefit from funds originally provided veteran by federal government. United States v Board of Comm'rs (1977, DC Md) 432 F Supp 629

21. Construction

Although 38 USCS § 3202(e) [now § 5202(e)] speaks in terms of “escheat”, it creates reversionary interest in Federal Government, and reference in 38 USCS § 3203(e) [now 38 USCS § 5502(e)] to State law of escheat is designed only to provide method by which it can be determined whether reversionary events have occurred, and, as property reverts to Federal Government, state has no power of taxation over such property. In re Estate of Novotny (1978, SD NY) 446 F Supp 1027

38 USCS § 3202(e) [now 38 USCS § 5502(e)] impliedly prohibits expenditure of any part of benefit fund, when other funds are available, for any purpose other than that required to determine that escheat is in order. In re Price's Estate (1951) 199 Misc 833, 104 NYS2d 518
22. Application

Estate of resident of District of Columbia, consisting of payments made to decedent, who died intestate and without heirs, by Veterans' Administration [now Department of Veterans Affairs] for his benefit escheated to United States, and not to District of Columbia. In re Germanovich's Estate (1954, DC Dist Col) 122 F Supp 169

Portion of estate of intestate decedent, dying without heirs, subject to 38 USCS § 3202(e) [now 38 USCS § 5502(e)], was not subject to State escheat laws. In re Estate of Novotny (1978, SD NY) 446 F Supp 1027

Where funds remaining in hands of administrator of deceased Spanish American War veteran were all derived from pension payments made to him or to his guardian after amendment to provide that such funds should escheat to United States, residue of such funds was impressed with reversionary right in favor of United States. Estate of Walker (1944) 25 Cal 2d 719, 154 P2d 891, cert den (1945) 325 US 869, 89 L Ed 1988, 65 S Ct 1408 and cert den (1945) 325 US 869, 89 L Ed 1989, 65 S Ct 1410

Where veteran died intestate and his net estate consisted wholly of unexpended benefits afforded him by United States and no distributees of veteran were discovered, United States was entitled to estate which estate under laws of state would have escheated to it; federal statutes are paramount to state law. In re Hammond's Estate (1956, 2d Dept) 2 App Div 2d 160, 154 NYS2d 820, affd (1956) 3 NY2d 567, 170 NYS2d 505, 147 NE2d 777

Estates of incompetent beneficiaries of Veterans' Administration [now Department of Veterans Affairs] who died intestate, being nonusers of veteran's facility at death, without next of kin, and whose assets were derived solely from pensions or other benefits paid by Veterans' Administration [now Department of Veterans Affairs], escheated to United States. In re Price's Estate (1951) 199 Misc 833, 104 NYS2d 518

Where next of kin of decedent could not with due diligence be found, balance of estate was payable directly to United States. In re Grout's Estate (1950, Sur) 127 NYS2d 773

Assets of hospitalized veteran, whose distributees could not with due diligence be ascertained, were payable to United States and did not escheat to state. In re Regan's Estate (1959) 18 Misc 2d 463, 185 NYS2d 350

Portion of intestate decedent's estate, which consisted of proceeds of National Service Life Insurance Policy, was not subject to recapture by Veterans' Administration [now Department of Veterans Affairs] as they became absolute property of beneficiary after death of veteran and prior to her death. In re Estate of Strahler (1974) 79 Misc 2d 134, 359 NYS2d 481, affd (1976, 2d Dept) 51 App Div 2d 746, 379 NYS2d 475

Institutional award payees are required to return surplus gratuitous funds held for deceased beneficiaries to Veterans' Administration [now Department of Veterans Affairs] rather than turn them over to deceased's personal representative. VA GCO 6-83

§ 5503. Hospitalized veterans and estates of incompetent institutionalized veterans

(a) (1) (A) Where any veteran having neither spouse nor child is being furnished domiciliary care by the Department, no pension in excess of $90 per month shall be paid to or for the veteran for any period after the end of the third full calendar month following the month of admission for such care.

(B) Except as provided in subparagraph (D) of this paragraph, where any veteran having neither spouse nor child is being furnished nursing home care by the Department, no pension in excess of $90 per month shall be paid to or for the veteran for any period after the end of the third full calendar month following the month of admission for such care. Any amount in excess of $90 per month to

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which the veteran would be entitled but for the application of the preceding sentence shall be deposited in a revolving fund at the Department medical facility which furnished the veteran nursing care, and such amount shall be available for obligation without fiscal year limitation to help defray operating expenses of that facility.

(C) No pension in excess of $90 per month shall be paid to or for a veteran having neither spouse nor child for any period after the month in which such veteran is readmitted for care described in subparagraph (A) or (B) of this paragraph and furnished by the Department, if such veteran is readmitted within six months of a period of care in connection with which pension was reduced pursuant to subparagraph (A) or (B) of this paragraph.

(D) In the case of a veteran being furnished nursing home care by the Department and with respect to whom subparagraph (B) of this paragraph requires a reduction in pension, such reduction shall not be made for a period of up to three additional calendar months after the last day of the third month referred to in such subparagraph if the Secretary determines that the primary purpose for the furnishing of such care during such additional period is for the Department to provide such veteran with a prescribed program of rehabilitation services, under chapter 17 of this title [38 USCS §§ 1701 et seq.], designed to restore the veteran's ability to function within such veteran's family and community. If the Secretary determines that it is necessary, after such period, for the veteran to continue such program of rehabilitation services in order to achieve the purposes of such program and that the primary purpose of furnishing nursing home care to the veteran continues to be the provision of such program to the veteran, the reduction in pension required by subparagraph (B) of this paragraph shall not be made for the number of calendar months that the Secretary determines is necessary for the veteran to achieve the purposes of such program.

(2) The provisions of paragraph (1) shall also apply to a veteran being furnished such care who has a spouse but whose pension is payable under section 1521(b) of this title [38 USCS § 1521(b)]. In such a case, the Secretary may apportion and pay to the spouse, upon an affirmative showing of hardship, all or any part of the amounts in excess of the amount payable to the veteran while being furnished such care which would be payable to the veteran if pension were payable under section 1521(c) of this title [38 USCS § 1521(c)].

(b) Notwithstanding any other provision of this section or any other provision of law, no reduction shall be made in the pension of any veteran for any part of the period during which the veteran is furnished hospital treatment, or institutional or domiciliary care, for Hansen's disease, by the United States or any political subdivision thereof.

(c) Where any veteran in receipt of an aid and attendance allowance described in section 1114(r) of this title [38 USCS § 1114(r)] is hospitalized at Government expense, such allowance shall be discontinued from the first day of the second calendar month which begins after the date of the veteran's admission for such hospitalization for so long as such hospitalization continues. Any discontinuance required by administrative regulation, during hospitalization of a veteran by the Department, of increased pension based on need of regular aid and attendance or additional compensation based on need of regular

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aid and attendance as described in subsection (l) or (m) of section 1114 of this title [38 USCS § 1114], shall not be effective earlier than the first day of the second calendar month which begins after the date of the veteran's admission for hospitalization. In case a veteran affected by this subsection leaves a hospital against medical advice and is thereafter admitted to hospitalization within six months from the date of such departure, such allowance, increased pension, or additional compensation, as the case may be, shall be discontinued from the date of such readmission for so long as such hospitalization continues.

(d) (1) For the purposes of this subsection--
   (A) the term "Medicaid plan" means a State plan for medical assistance referred to in section 1902(a) of the Social Security Act (42 U.S.C. 1396a(a)); and
   (B) the term "nursing facility" means a nursing facility described in section 1919 of such Act (42 U.S.C. 1396r), other than a facility that is a State home with respect to which the Secretary makes per diem payments for nursing home care pursuant to section 1741(a) of this title [38 USCS § 1741(a)].

(2) If a veteran having neither spouse nor child is covered by a Medicaid plan for services furnished such veteran by a nursing facility, no pension in excess of $90 per month shall be paid to or for the veteran for any period after the month of admission to such nursing facility.

(3) Notwithstanding any provision of title XIX of the Social Security Act [42 USCS §§ 1396 et seq.], the amount of the payment paid a nursing facility pursuant to a Medicaid plan for services furnished a veteran may not be reduced by any amount of pension permitted to be paid such veteran under paragraph (2) of this subsection.

(4) A veteran is not liable to the United States for any payment of pension in excess of the amount permitted under this subsection that is paid to or for the veteran by reason of the inability or failure of the Secretary to reduce the veteran's pension under this subsection unless such inability or failure is the result of a willful concealment by the veteran of information necessary to make a reduction in pension under this subsection.

(5) The provisions of this subsection shall apply with respect to a surviving spouse having no child in the same manner as they apply to a veteran having neither spouse nor child.

(6) The costs of administering this subsection shall be paid for from amounts available to the Department of Veterans Affairs for the payment of compensation and pension.

(7) This subsection expires on September 30, 2011.

(e), (f) [Redesignated]

Amendments:

1959. Act Aug. 7, 1959 (effective 12/1/59, as provided by § 3 of such Act, which appears as 38 USCS § 5502 note), in subsec. (a)(2)(B), inserted "under the last two sentences of section 3202(d) of this title or" wherever appearing; in subsec. (b), redesignated para. (3) as para. (4), and substituted paras. (1)-(3) for former paras. (1) and (2), which read:

"(1) Where any veteran having neither wife, child, nor dependent parent is being furnished hospital treatment, institutional or domiciliary care by the Veterans' Administration, and is rated by the Veterans' Administration in accordance with
regulations as being incompetent by reason of mental illness, the pension, compensation, or retirement pay of such veteran shall be subject to the provisions of subsection (a) of this section; however, no payment of a lump sum herein authorized shall be made until after the expiration of six months following a finding of competency.

"(2) In any case where the estate of such incompetent veteran derived from any source equals or exceeds $1,500, further payments of such benefits (except retired pay, but including emergency officers' retirement pay) shall not be made until the estate is reduced to $500. The amount which would be payable but for this subsection shall be paid to the veteran as provided for the lump sum in paragraph (1) of this subsection, but in the event of the veteran's death no part thereof shall be payable.".

Act Aug. 29, 1959 (effective 7/1/60, as provided by § 10 of such Act, which appears as 38 USCS § 1521 note), in subsec. (a)(1) and (b)(1), substituted "compensation or" for "pension, compensation, or" wherever appearing; redesignated subsec. (d) as subsec. (e); and added new subsec.(d).

1962. Act July 25, 1962, in subsec. (a)(2)(A), substituted "third, if no spouse or child, then to the dependent parents in equal parts" for "third, if no spouse or child, then to the father and mother in equal parts; fourth, if either the father or mother is dead, then to the one surviving; fifth, if there is no spouse, child, father, mother or mother at the time of settlement, then to the brothers and sisters in equal parts". For application of this section, as amended, see Other provisions note to this section.

Act July 27, 1962 (effective on the first day of the first calendar month which begins more than 30 days after 7/7/62, which appears as a note to this section), in subsec. (d), in para. (1), inserted "having neither wife nor child", and substituted new para. (2) for one which read: "Where the payment of pension to any veteran is subject to the provisions of paragraph (1) of this subsection the Administrator may apportion and pay to his wife or children the balance of the pension which the veteran would receive but for such paragraph (1).".

Act Sept. 7, 1962 (effective on the first day of the first calendar month which begins after 9/7/62, but no payments shall be made by reason of this amendment for any period before such effective date, as provided by § 4 of such Act, which appears as 38 USCS § 1112 note), added subsec. (f).

1964. Act Aug. 19, 1964 (applicable as provided by § 5(b) of such Act, which appears as a note to this section), substituted subsec. (f) for one which read: "Where any veteran in receipt of an aid and attendance allowance described in section 314(r) of this title is hospitalized at Government expense, such allowance shall be discontinued from the first day of the second calendar month which begins after the date of his admission for such hospitalization for so long as such hospitalization continues. In case a veteran covered by this subsection leaves a hospital against medical advice and is thereafter readmitted to hospitalization, such allowance shall be discontinued from the date of such readmission for so long as such hospitalization continues.".

1966. Act March 7, 1966 (applicable as provided by § 3 of such Act, which appears as a note to this section), in subsec. (a)(1), substituted "within six months from the date of such departure," for a comma; and in subsec. (f), substituted "with six months from the date of such departure," for a comma.

1969. Act June 11, 1969, in subsec. (d)(2), substituted "the amount payable to the veteran while being furnished such care which would be payable to him if pension were payable under section 521(c) of this title" for "$30 per month which would be payable to the veteran while being furnished such care if pension were payable to him under section 521(c) of this title".

1972. Act June 30, 1972 (effective 8/1/72, as provided by § 301(a) of such Act, which appears as 38 USCS § 1114 note), deleted subsec. (a) which read:

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“(a)(1) Where any veteran having neither wife, child, nor dependent parent is being furnished hospital treatment, institutional or domiciliary care by the Veterans' Administration any compensation or retirement pay otherwise payable shall continue without reduction until the first day of the seventh calendar month following the month of admission of such veteran for treatment or care. If treatment or care extends beyond that period, the compensation or retirement pay, if $30 per month or less, shall continue without reduction, but if greater than $30 per month, the compensation or retirement pay shall not exceed 50 per centum of the amount otherwise payable or $30 per month, whichever is the greater. If such veteran is discharged from such treatment or care upon certification by the officer in charge of the hospital, institution, or home, that maximum benefits have been received or that release is approved, he shall be paid in a lump sum such additional amount as would equal the total sum by which his compensation or retirement pay has been reduced under this section. If treatment or care is terminated by the veteran against medical advice or as the result of disciplinary action the amount by which any compensation or retirement pay is reduced hereunder, shall be paid to him at the expiration of six months after such termination or, in the event of his prior death, as provided in paragraph (2) of this subsection; and the compensation or retirement pay of any veteran leaving against medical advice or as the result of disciplinary action shall, upon a succeeding readmission for treatment or care within six months from the date of such departure, be subject to reduction, as herein provided, from the date of such readmission, but if such subsequent treatment or care is continued until discharged therefrom upon certification, by the officer in charge of the hospital, institution, or home in which treatment or care was furnished, that maximum benefits have been received or that release is approved, the veteran shall be paid in a lump sum such additional amount as would equal the total sum by which his compensation or retirement pay has been reduced under this section after such readmission.

“(2)(A) In the event of the death of any veteran subject to the provisions of this section, while receiving hospital treatment, institutional or domiciliary care, or before payment of any lump sum authorized herein, such lump sum shall be paid in the following order of precedence: First, to the spouse, second, if the decedent left no spouse, or if the spouse is dead at time of settlement, then to the children (without regard to their age or marital status) in equal parts; third, if no spouse or child, then to the dependent parents in equal parts. If there are no persons in the classes named to whom payment may be made under this paragraph, no payment shall be made, except there may be paid only so much of the lump sum as may be necessary to reimburse a person who bore the expenses of last sickness or burial, but no part of the lump sum shall be used to reimburse any political subdivision of the United States for expenses incurred in the last sickness or burial of such veteran.

“(B) No payment shall be made under the last two sentences of section 3202(d) of this title or under this paragraph (2) unless claim therefor is filed with the Veterans' Administration within five years after the death of the veteran, except that, if any person so entitled under the last two sentences of section 3202(d) of this title or under this paragraph is under legal disability at the time of death of the veteran, such five-year period of limitation shall run from the termination or removal of the legal disability.”.

Such Act further redesignated subsec. (d) as subsec. (a); in subsec. (b), substituted para. (1) for paras. (1) and (2) which read:

"(1) Where any veteran having neither wife, child, nor dependent parent is being furnished hospital treatment, institutional or domiciliary care by the Veterans' Administration, and is rated by the Veterans' Administration in accordance with regulations as being incompetent by reason of mental illness, the compensation or retirement pay of such veteran shall be subject to the provisions of subsection (a) of this section; however, no payment of a lump sum herein authorized shall be made to the veteran until after the expiration of six months following a finding of competency and in
the event of the veteran's death before payment of such lump sum no part thereof shall be payable.

"(2) In any case in which such an incompetent veteran having neither wife nor child is being furnished hospital treatment, institutional or domiciliary care without charge or otherwise by the United States, or any political subdivision thereof, and his estate from any source equals or exceeds $1,500, further payments of pension, compensation, or emergency officers' retirement pay shall not be made until the estate is reduced to $500. The amount which would be payable but for this paragraph shall be paid to the veteran as provided for the lump sum in paragraph (1) of this subsection, but in the event of the veteran's death before payment of such lump sum no part thereof shall be payable.

Such Act further redesignated paras. (3) and (4) as paras. (2) and (3), respectively, in para. (2), as so redesignated, substituted "paragraph (1)" and "Paragraph (1)" for "paragraph (2)" and "Paragraph (2)", respectively; in subsec. (c), deleted "(a) or" following "subsection"; redesignated subsec. (e) as subsec. (d); in subsec. (d), as so redesignated, deleted ", compensation, or retirement pay", preceding "of any veteran"; and redesignated subsec. (f) as subsec (e).

1973. Act Dec. 6, 1973 (effective 1/1/74, as provided by § 8 of such Act, which appears as 38 USCS § 1521 note), in subsec. (a)(1), substituted "50" for "30".

1978. Act Nov. 4, 1978 (effective 1/1/79, as provided by § 401 of such Act, which appears as 38 USCS § 101 note), substituted new subsec. (a)(1) for one which read: "Where any veteran having neither wife nor child is being furnished hospital treatment, institutional, or domiciliary care by the Veterans' Administration, no pension in excess of $50 per month shall be paid to or for the veteran for any period after (a) the end of the second full calendar month following the month of admission for treatment or care or (b) readmission for treatment or care within six months following termination of a period of treatment or care of not less than two full calendar months.".

1980. Act Oct. 7, 1980 (effective 10/1/80, as provided by § 601(b) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a)(1)(C), substituted "in connection with which pension was reduced pursuant to subparagraph (A) or (B) of this paragraph" for "of not less than two full calendar months".

1981. Act Oct. 17, 1981 (applicable as provided by § 701(b)(5) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a)(1), in subpara. (B), substituted "Except as provided in subparagraph (D) of this paragraph, where" for "Where", and added subpara. (D).

1983. Act Nov. 21, 1983, in subsec. (a)(2), substituted "spouse" for "wife" wherever it appears, and substituted "the veteran" for "him" following "payable to"; in subsec. (b), in para. (1), substituted "spouse" for "wife", and substituted "the veteran's" for "his", and, in para. (2), substituted "the veteran's" for "his", and substituted "the veteran" for "him" following "furnished"; in subsec. (c), substituted "spouse" for "wife", and, in subsec. (d), substituted "the veteran" for "he".

1984. Act Oct. 24, 1984, in subsec. (b)(1), designated the sentence beginning "In any case in which a veteran . . ." as subpara. (A), in subpara. (A), as so designated, substituted "or" for a comma following "treatment", deleted "by reason of mental illness" following "being incompetent", and inserted "(excluding the value of the veteran's home unless there is no reasonable likelihood that the veteran will again reside in such home)", designated the sentence beginning "The amount which would be payable . . ." as subpara. (B), and added subpara. (C).

1986. Act Oct. 28, 1986, in subsec. (e) substituted "the veteran's" for "his" following "date of".

1989. Act Dec. 18, 1989 (effective 2/1/90 as provided by § 111(b) of such Act, which appears as a note to this section), in subsec. (a)(1), in subpara. (A), substituted "$90" for "$60", and "third" for "second", in subpara. (B), substituted "$90" for "$60" and deleted "hospital or"
following "being furnishing", and in subpara. (D), deleted "hospital or" following "being
furnished" and following "purpose of furnishing".

1990. Act Nov. 5, 1990 (effective on enactment as provided by § 8003(b) of such Act, which
appears a note to this section) added subsec. (f).

1991. Act May 7, 1991 (applicable as provided in § 304(b) of such Act, which appears as a
note to this section), in subsec. (f)(1)(B), inserted ", other than a facility that is a State home
with respect to which the Secretary makes per diem payments for nursing home care
pursuant to section 641(a) of this title".

Such Act further redesignated this section, formerly 38 USCS § 3203, as 38 USCS § 5503.

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made
by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further, in subsec. (b)(1)(A), substituted "Secretary" for "Veterans' Administration".

Such Act further substituted "Department" for "Veterans' Administration" wherever appearing,
and substituted "Secretary" for "Administrator" wherever appearing.

Act Aug. 14, 1991 (effective as provided by § 101(b) of such Act, which appears as a note to
this section), in subsec. (a)(1)(C), substituted "$90" for "$60".

1992. Act Oct. 29, 1992 (effective 11/1/92 and applicable with respect to months after
October 1992, as provided by § 601(d) of such Act, which appears as a note to this section),
in subsec. (a), in para. (1), in subpara. (B), inserted "Effective through September 30, 1997,
any amount in excess of $90 per month to which the veteran would be entitled but for the
application of the preceding sentence shall be deposited in a revolving fund at the
Department medical facility which furnished the veteran nursing care, and such amount shall
be available for obligation without fiscal year limitation to help defray operating expenses of
that facility.".

Such Act further (effective 10/1/92, and applicable with respect to months after September
1992 as provided by § 601(d) of such Act, which appears as a note to this section), in subsec.
(f), redesignated paras. (5) and (6) as paras. (6) and (7), respectively, and added a new para.
(5).

Such Act further, in subsec. (f), in para. (7) as redesignated, substituted "September 30,
1997" for "September 30, 1992".

30, 1997".

30, 1996".

1998. Act Nov. 11, 1998 (effective as of 10/1/97, as provided by § 904(b) of such Act, which
appears as a note to this section), in subsec. (a)(1)(B), substituted "Any" for "Effective
through September 30, 1997, any".

2000. Act Nov. 1, 2000, in subsec. (b)(1), in subpara. (A), substituted "the amount equal to
five times the section 1114(j) rate" for "$1,500" and substituted "one-half that amount" for
"$500", and added subpara. (D); and, in subsec. (f)(7), substituted "September 30, 2008" for
"September 30, 2002".

2001. Act Dec. 27, 2001, deleted subsecs. (b) and (c), which read:

"(b)(1)(A) In any case in which a veteran having neither spouse nor child is being furnished
hospital treatment or institutional or domiciliary care without charge or otherwise by the
United States, or any political subdivision thereof, is rated by the Secretary in accordance
with regulations as being incompetent, and the veteran's estate (excluding the value of the
veteran's home unless there is no reasonable likelihood that the veteran will again reside in
such home), from any source equals or exceeds the amount equal to five times the section
1114(j) rate, further payments of pension, compensation, or emergency officers' retirement pay shall not be made until the estate is reduced to one-half that amount.

"(B) The amount which would be payable but for this paragraph shall be paid to the veteran in a lump sum; however, no payment of a lump sum herein authorized shall be made to the veteran until after the expiration of six months following a finding of competency and in the event of the veteran's death before payment of such lump sum no part thereof shall be payable.

"(C) The Secretary may waive the discontinuance under this paragraph of payments to a veteran with respect to not more than 60 days of care of the veteran during any calendar year if the Secretary determines that the waiver is necessary in order to avoid a hardship for the veteran. Any such waiver shall be made pursuant to regulations which the Secretary shall prescribe.

"(D) For purposes of this paragraph, the term 'section 1114(j) rate' means the monthly rate of compensation in effect under section 1114(j) of this title for a veteran with a service-connected disability rated as total.

"(2) Where any benefit is discontinued by reason of paragraph (1) of this subsection the Secretary may nevertheless apportion and pay to the dependent parents of the veteran on the basis of need all or any part of the benefit which would otherwise be payable to or for such incompetent veteran. Paragraph (1) of this subsection shall not prevent the payment, out of any remaining amounts discontinued under that paragraph, on account of any veteran of so much of the veteran's pension, compensation, or retirement pay as equals the amount charged to the veteran for the veteran's current care and maintenance in the institution in which treatment or care is furnished the veteran, but not more than the amount determined by the Secretary to be the proper charge as fixed by any applicable statute or valid administrative regulation.

"(3) All or any part of the pension, compensation, or retirement pay payable on account of any incompetent veteran who is being furnished hospital treatment, institutional or domiciliary care may, in the discretion of the Secretary, be paid to the chief officer of the institution wherein the veteran is being furnished such treatment or care, to be properly accounted for by such chief officer and to be used for the benefit of the veteran.

"(c) Any veteran subject to the provisions of subsection (b) shall be deemed to be single and without dependents in the absence of satisfactory evidence to the contrary. In no event shall increased compensation, pension, or retirement pay of such veteran be granted for any period more than one year before receipt of satisfactory evidence showing such veteran has a spouse, child, or dependent parent."

redesignated subsecs. (d)-(f) as new subsecs. (b)-(d), respectively; and, in subsec. (d) as redesignated, in para. (7), substituted "September 30, 2011" for "September 30, 2008".

Other provisions:

Application of July 25, 1962 amendment. Act July 25, 1962, P. L. 87-544, § 2, 76 Stat. 208, provided: "The amendment made by this Act [amending this section] shall also apply to cases in which pension eligibility is subject to the provisions of section 9(b) of the Veterans' Pension Act of 1959 [38 USCS § 521 note].".


"(a) The amendments made by this Act [amending this section] shall not apply to cases in which pension is payable pursuant to sections 9(b) and (c) of the Veterans' Pension Act of 1959 [38 USCS § 521 note]."
"(b) The amendments made by this Act [amending this section] shall take effect on the first day of the first calendar month which begins more than thirty days after the date of enactment of this Act."

**Application of amendment made by § 5(a) of Act Aug. 19, 1964.** Act Aug. 19, 1964, P. L. 88-450, § 5(b), 78 Stat. 504, provided: "The amendment made by this section [amending this section] shall apply only with respect to compensation or pension based upon need of regular aid and attendance in the case of veterans admitted for hospitalization on or after the first day of the second calendar month which begins after the date of enactment of this Act."

**Application of March 7, 1966 amendments.** Act March 7, 1966, P. L. 89-362, § 3, 80 Stat. 30, provided: "The amendments made by this Act [amending this section] shall also apply to cases in which pension eligibility is subject to the provisions of section 9(b) of the Veterans' Pension Act of 1959 [38 USCS § 521 note]."

**Payment of lump sum compensation or retirement pay to veterans withheld pursuant to provisions in effect on day before effective date of Act June 30, 1972.** Act June 30, 1972, P. L. 92-328, Title I, § 106, 86 Stat. 395 (effective as provided by § 301 of such Act, which appears as notes to 38 USCS §§ 1114, 1134, and 3713), provided: "All compensation or retirement pay which is being withheld pursuant to the provisions of subsections (a) and (b)(1) of section 3203 [now section 5503], title 38, United States Code, in effect on the day before the effective date of this Act, shall be paid to the veteran, if competent, in a lump sum. If the veteran is incompetent, the withheld amounts shall be paid in a lump sum, or successive lump sums, subject to the $1,500 and $500 limitations of subsection (b)(1) of such section 3203 [now section 5503] as amended by this Act. If a competent veteran dies before payment is made the withheld amounts shall be paid according to the order of precedence, and subject to the time limitation, of subsection (a)(2) of such section 3203 [now section 5503] in effect the day before the effective date of this Act. In the event of the death of an incompetent veteran before payment of all withheld amounts, no part of the remainder shall be payable."

**Effective date and application of Oct. 17, 1981 amendments.** Act Oct. 17, 1981, P. L. 97-66, Title VII, § 701(b)(5), 95 Stat. 1037, which appears as 38 USCS § 1114 note, provided that the amendments made by § 602 of such Act to this section are effective on enactment on Oct. 17, 1981 and applicable with respect to veterans admitted to a Veterans' Administration hospital or nursing home on or after such date.

**Promulgation of regulations.** Act Oct. 24, 1984, P. L. 98-543, Title IV, § 402(b), 98 Stat. 2749, provides: "The Administrator shall prescribe regulations under subparagraph (C) of section 3203(b)(1) (as added by subsection (a), not later than 60 days after the date of the enactment of this Act)."

**Improvement in pension program administration.** Act Dec. 3, 1985, P. L. 99-166, Title I, § 108(d), 99 Stat. 947, provides:

"(1) In order to improve the timeliness of adjustments made pursuant to section 3203(a) of title 38, United States Code [subsec. (a) of this section], in the amount of pension being paid to a veteran who is being furnished nursing home care by the Veterans' Administration, the Chief Medical Director [Under Secretary for Health] of the Veterans' Administration shall develop improved procedures for notifying the Chief Benefits Director [Under Secretary for Benefits] of the Veterans' Administration when a veteran is admitted to a nursing home.

"(2) The Administrator shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the development and implementation of such procedures. The report shall be submitted not later than 90 days after the date of the enactment of this Act."

**Effective date of Dec. 18, 1989 amendments.** Act Dec. 18, 1989, P. L. 101-237, Title I, Part B, § 111(b), 103 Stat. 2065, provides: "The amendments made by subsection (a) [amending subsec. (a) of this section] shall take effect on February 1, 1990."
Effective date of subsec. (f). Act Nov. 5, 1990, P. L. 101-508, Title VIII, Subtitle A, § 8003(b), 104 Stat. 1388-342, provides: "The amendment made by subsection (a) [adding subsec. (f) of this section] shall take effect on November 1, 1990, or the date of the enactment of this Act, whichever is later.".


References to positions of Chief Medical Director and Chief Benefits Director of the Department of Veterans Affairs. Act Oct. 9, 1992, P. L. 102-405, Title III, § 302(e), 106 Stat. 1985, which appears as 38 USCS § 305 note, provides that any reference to the Chief Medical Director or the Chief Benefits Director of the Department of Veterans Affairs in any Federal law, Executive order, rule, regulation, or delegation of authority, or any document of or pertaining to the Department of Veterans Affairs shall be deemed to refer to the Under Secretary for Health and the Under Secretary for Benefits, respectively, of such Department.

Effective dates and application of Oct. 29, 1992 amendments. Act Oct. 29, 1992, P. L. 102-568, Title VI, § 601(d), 106 Stat. 4342, provides: "The amendments made by subsection (a) [amending this section] shall take effect on October 1, 1991, and shall apply with respect to months after September 1992. The amendment made by subsection (c) [amending this section] shall take effect on November 1, 1992, and shall apply with respect to months after October, 1992.".

Effective date of Nov. 11, 1998 amendment. Act Nov. 11, 1998, P. L. 105-368, Title IX, § 904(b), 112 Stat. 3361, provides: "The amendment made by subsection (a) [amending subsec. (a)(1)(B) of this section] shall take effect as of October 1, 1997.".

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3
Department of Veterans Affairs-Veterans Benefits Administration, fiduciary activities, 38 CFR Part 13

Cross References
This section is referred to in 38 USCS §§ 1114, 5112

Research Guide
Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:19, 20

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 45
1. Generally
2. Constitutionality
3. Purpose
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7. Payments to state institutions

1. Generally

Veterans hospitalized in Naval hospitals under provisions of former 38 USC § 706 are not subject to provisions of 24 USCS § 6. 1933 ADVA 209

2. Constitutionality

There is a rational justification for the classification that benefits may be withheld from an incompetent veteran having neither wife nor child whose estate exceeds $1500 and who is being furnished hospital treatment without charge by a state; classifications governing operation of 38 USCS § 3203(b) [now 38 USCS § 5503(b)] are "rationally related" to purpose of 38 USCS that veterans' benefits be paid only, as term suggests, for benefit of veterans; reclamation of veterans' benefits paid contra to 38 USCS § 3203(b) [now 38 USCS § 5503(b)] is not precluded by Due Process Clause of Fifth Amendment. United States v Macioci (1972, DC RI) 345 F Supp 325

Barring of benefit payments to parents of deceased incompetent veterans under 38 USCS § 3203(b) [now 38 USCS § 5503(b)] does not violate Due Process Clause of Fifth Amendment. Ziviak v United States (1976, DC Mass) 411 F Supp 416, affd (1976) 429 US 801, 50 L Ed 2d 64, 97 S Ct 36, reh den (1976) 429 US 951, 50 L Ed 2d 319, 97 S Ct 371

3. Purpose

In enacting 38 USCS § 3203 [now 38 USCS § 5503], Congress was wholly concerned with gratuitous benefits and with cutting off collateral relatives from such grants. Berkey v United States (1966) 176 Ct Cl 1, 361 F.2d 983

One of obvious purposes of 38 USCS § 3203 [now § 5503] is that, under appropriate circumstances, benefits authorized therein be provided to needy veterans and their immediate dependents; corollary of this purpose is that compensation should not be paid where there is little likelihood that it will ultimately benefit eligible veteran or his dependents. United States v Macioci (1972, DC RI) 345 F Supp 325

4. Construction, generally

38 USCS § 3203 [now 38 USCS § 5503] did not cut off payment to the immediate family of an institutionalized incompetent veteran from the accumulated retirement pay. Berkey v United States (1966) 176 Ct Cl 1, 361 F.2d 983

Hospitalization furnished eligible veterans by Philippine Government, which Veterans Administration [now Department of Veterans Affairs] reimbursed under 50 USC Appx § 1991 et seq., was not hospitalization furnished by Veterans Administration [now Department of Veterans Affairs] so as to make former 38 USC § 739 applicable with respect to veterans receiving such medical care and treatment. 1949 ADVA 829

5. Reduction of benefits

Pension payable under former 38 USC § 229 or former § 230 was subject to reduction when disabled veteran, having no dependents, was being furnished hospital treatment, institutional or domiciliary care by government. 1945 ADVA 662

Section 3203(b)(1) [now 38 USCS § 5503(b)(1)] applied to incompetent veterans without dependents, in tax-supported institutions, regardless of whether veteran was paying cost of care. VA GCO 5-85

6. Lump sum payments

Former 38 USC § 739 specifically included adult child for purposes of lump sum payment; claimants qualified as children of veteran since relation of stepchild existed between veteran and those of his wife's children who became members of his household during their minority and
family relationship common between parent and child continued to date of veteran's death. 1949 ADVA 818

Veteran furloughed for period of 30 days or more was not discharged for purposes of former 38 USC § 739, and therefore moneys withheld were not payable in lump sum when he left institution on such furlough; veteran was not entitled to full amount of compensation or pension for first 6 months after his return to institution from such furlough. 1950 ADVA 846

Lump sum disability compensation was payable to sisters of veteran as person or persons next in line within class designated in former 38 USC § 739 since veteran's father died on date of issuance of lump sum disability compensation check, and check was not delivered until after payee's death. 1951 ADVA 869

Statute mandates lump-sum payment after expiration of six months following competency finding, hence regulation denying such payment to veterans who, before payment is made, are again rated incompetent and do not have proper dependent, contravenes statute. Felton v Principi (1993) 4 Vet App 61, remanded (1993, Vet App) 1993 US Vet App LEXIS 89 and vacated on other grounds, op replaced, on reconsideration, motion den (1993) 4 Vet App 363

When veteran was re-rated competent, he was entitled to lump-sum payment six-months later, and fact that he was re-rated incompetent well outside 6-month period was irrelevant. Felton v Principi (1993) 4 Vet App 61, remanded (1993, Vet App) 1993 US Vet App LEXIS 89 and vacated on other grounds, op replaced, on reconsideration, motion den (1993) 4 Vet App 363

Statute mandates lump-sum payment after expiration of six months following competency finding even if veteran is thereafter again found incompetent, and regulation denying such payment to those veterans who before payment is made are again rated incompetent and do not have proper dependent imposes unauthorized limitation on scope of statute. Felton v Brown (1993) 4 Vet App 363

7. Payments to state institutions

State could not compel guardian of incompetent veteran confined in state hospital to pay full cost of his care and maintenance out of disability pension payments made to veteran's guardian by Veterans' Administration [now Department of Veterans Affairs]. In re Estate of Chojnacki (1959) 397 Pa 596, 156 A2d 812, cert den (1960) 363 US 826, 4 L Ed 2d 1522, 80 S Ct 1595

§ 5504. Administration of trust funds

All cash balances in the personal funds of patients and the funds due incompetent beneficiaries trust funds administered by the Secretary, and all moneys received which are properly for deposit into these funds, may be deposited, respectively, into deposit fund accounts with the United States Treasury and such balances and deposits shall thereupon be available for disbursement for properly authorized purposes. When any balances have been on deposit with the Treasurer of the United States for more than one year and represent moneys belonging to individuals whose whereabouts are unknown, they shall be transferred and disposed of as directed in section 1322(a) of title 31 [31 USCS § 1322(a)].

Amendments:

1982. Act Sept. 13, 1982, substituted "section 1322(a) of title 31" for "the last proviso of subsection (a) of section 725s of title 31".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3204, as 38 USCS § 5504.

Act Aug. 6, 1991 substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing.

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 42

Clothing fund is entitled to award from funds deposited to credit of beneficiary in funds due incompetent beneficiaries to reimburse fund for amount erroneously expended in behalf of beneficiary. 1941 ADVA 467

[§ 5505. Repealed]


§ 5506. Definition of "fiduciary"

For purposes of this chapter and chapter 61 of this title [38 USCS §§ 5501 et seq. and 6101 et seq.], the term "fiduciary" means-

(1) a person who is a guardian, curator, conservator, committee, or person legally vested with the responsibility or care of a claimant (or a claimant's estate) or of a beneficiary (or a beneficiary's estate); or

(2) any other person having been appointed in a representative capacity to receive money paid under any of the laws administered by the Secretary for the use and benefit of a minor, incompetent, or other beneficiary.

Effective date of section:

This section took effect on July 1, 2005, pursuant to § 507(a) of Act Dec. 10, 2004, P. L. 108-454, which appears as 38 USCS § 5312 note.

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 44

§ 5507. Inquiry, investigations, and qualification of fiduciaries

(a) Any certification of a person for payment of benefits of a beneficiary to that person as such beneficiary's fiduciary under section 5502 of this title [38 USCS § 5502] shall be made on the basis of-

(1) an inquiry or investigation by the Secretary of the fitness of that person to serve as fiduciary for that beneficiary, such inquiry or investigation-

(A) to be conducted in advance of such certification;

(B) to the extent practicable, to include a face-to-face interview with such person; and

(C) to the extent practicable, to include a copy of a credit report for such person issued within one year of the date of the proposed appointment;

(2) adequate evidence that certification of that person as fiduciary for that beneficiary is in the interest of such beneficiary (as determined by the Secretary under regulations); and

(3) the furnishing of any bond that may be required by the Secretary.
(b) As part of any inquiry or investigation of any person under subsection (a), the Secretary shall request information concerning whether that person has been convicted of any offense under Federal or State law which resulted in imprisonment for more than one year. If that person has been convicted of such an offense, the Secretary may certify the person as a fiduciary only if the Secretary finds that the person is an appropriate person to act as fiduciary for the beneficiary concerned under the circumstances.

(c)

(1) In the case of a proposed fiduciary described in paragraph (2), the Secretary, in conducting an inquiry or investigation under subsection (a)(1), may carry out such inquiry or investigation on an expedited basis that may include waiver of any specific requirement relating to such inquiry or investigation, including the otherwise applicable provisions of subparagraphs (A), (B), and (C) of such subsection. Any such inquiry or investigation carried out on such an expedited basis shall be carried out under regulations prescribed for purposes of this section.

(2) Paragraph (1) applies with respect to a proposed fiduciary who is-

(A) the parent (natural, adopted, or stepparent) of a beneficiary who is a minor;

(B) the spouse or parent of an incompetent beneficiary;

(C) a person who has been appointed a fiduciary of the beneficiary by a court of competent jurisdiction;

(D) being appointed to manage an estate where the annual amount of veterans benefits to be managed by the proposed fiduciary does not exceed $3,600, as adjusted pursuant to section 5312 of this title [38 USCS § 5312].

(d) Temporary fiduciaries. When in the opinion of the Secretary, a temporary fiduciary is needed in order to protect the assets of the beneficiary while a determination of incompetency is being made or appealed or a fiduciary is appealing a determination of misuse, the Secretary may appoint one or more temporary fiduciaries for a period not to exceed 120 days. If a final decision has not been made within 120 days, the Secretary may not continue the appointment of the fiduciary without obtaining a court order for appointment of a guardian, conservator, or other fiduciary under the authority provided in section 5502(b) of this title [38 USCS § 5502(b)].

Effective date of section:
This section took effect on July 1, 2005, pursuant to § 507(a) of Act Dec. 10, 2004, P. L. 108-454, which appears as 38 USCS § 5312 note.

§ 5508. Periodic onsite reviews of institutional fiduciaries

In addition to such other reviews of fiduciaries as the Secretary may otherwise conduct, the Secretary shall provide for the periodic onsite review of any person or agency located in the United States that receives the benefits payable under laws administered by the Secretary to another individual pursuant to the appointment of such person or agency as a fiduciary under section 5502(a)(1) of this title [38 USCS § 5502(a)(1)] in any case in which the fiduciary is serving in that capacity with respect to more than 20 beneficiaries and the total annual amount of such benefits exceeds $50,000, as adjusted pursuant to section 5312 of this title [38 USCS § 5312].

Effective date of section:
§ 5509. Authority to require fiduciary to receive payments at regional offices of the Department when failing to provide required accounting

(a) Required reports and accountings. The Secretary may require a fiduciary to file a report or accounting pursuant to regulations prescribed by the Secretary.

(b) Actions upon failure to file. In any case in which a fiduciary fails to submit a report or accounting required by the Secretary under subsection (a), the Secretary may, after furnishing notice to such fiduciary and the beneficiary entitled to such payment of benefits, require that such fiduciary appear in person at a regional office of the Department serving the area in which the beneficiary resides in order to receive such payments.

Effective date of section:
This section took effect on July 1, 2005, pursuant to § 507(a) of Act Dec. 10, 2004, P. L. 108-454, which appears as 38 USCS § 5312 note.

§ 5510. Annual report

The Secretary shall include in the Annual Benefits Report of the Veterans Benefits Administration or the Secretary's Annual Performance and Accountability Report information concerning fiduciaries who have been appointed to receive payments for beneficiaries of the Department. As part of such information, the Secretary shall separately set forth the following:

(1) The number of beneficiaries in each category (veteran, surviving spouse, child, adult disabled child, or parent).
(2) The types of benefit being paid (compensation, pension, dependency and indemnity compensation, death pension or benefits payable to a disabled child under chapter 18 of this title [38 USCS §§ 1801 et seq.]).
(3) The total annual amounts and average annual amounts of benefits paid to fiduciaries for each category and type of benefit.
(4) The number of fiduciaries who are the spouse, parent, legal custodian, court-appointed fiduciary, institutional fiduciary, custodian in fact, and supervised direct payees.
(5) The number of cases in which the fiduciary was changed by the Secretary because of a finding that benefits had been misused.
(6) How such cases of misuse of benefits were addressed by the Secretary.
(7) The final disposition of such cases of misuse of benefits, including the number and dollar amount of any benefits reissued to beneficiaries.
(8) The number of fiduciary cases referred to the Office of the Inspector General and the nature of the actions taken by the Inspector General.
(9) The total amount of money recovered by the government in cases arising from the misuse of benefits by a fiduciary.
(10) Such other information as the Secretary considers appropriate.

Effective date of section:
This section took effect on July 1, 2005, pursuant to § 507(a) of Act Dec. 10, 2004, P. L. 108-454, which appears as 38 USCS § 5312 note.
This section took effect on enactment, pursuant to § 507(b)(1) of Act Dec. 10, 2004, P.L. 108-454, which appears as 38 USCS § 5312 note.)

CHAPTER 57. RECORDS AND INVESTIGATIONS

SUBCHAPTER I. RECORDS

SUBCHAPTER II. INVESTIGATIONS

Amendments:

1980. Act Oct. 7, 1980, P. L. 96-385, Title V, § 505(b), 94 Stat. 1537 (effective 10/7/80, as provided by § 601(d) of such Act, which appears as 38 USCS § 1114 note), added item 3305.

1991. Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 402(b) of such Act (see Table II preceding 38 USCS § 101).


SUBCHAPTER I. RECORDS

§ 5701. Confidential nature of claims
§ 5702. Furnishing of records
§ 5703. Certification of records of District of Columbia
§ 5704. Transcript of trial records
§ 5705. Confidentiality of medical quality-assurance records

§ 5701. Confidential nature of claims

(a) All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Secretary and the names and addresses of present or former members of the Armed Forces, and their dependents, in the possession of the Department shall be confidential and privileged, and no disclosure thereof shall be made except as provided in this section.

(b) The Secretary shall make disclosure of such files, records, reports, and other papers and documents as are described in subsection (a) of this section as follows:

1. To a claimant or duly authorized agent or representative of a claimant as to matters concerning the claimant alone when, in the judgment of the Secretary, such disclosure would not be injurious to the physical or mental health of the claimant and to an independent medical expert or experts for an advisory opinion pursuant to section 5109 or 7109 of this title [38 USCS § 5109 or 7109].

2. When required by process of a United States court to be produced in any suit or proceeding therein pending.

3. When required by any department or other agency of the United States Government.

4. In all proceedings in the nature of an inquest into the mental competency of a claimant.
(5) In any suit or other judicial proceeding when in the judgment of the Secretary such disclosure is deemed necessary and proper.

(6) In connection with any proceeding for the collection of an amount owed to the United States by virtue of a person's participation in any benefit program administered by the Secretary when in the judgment of the Secretary such disclosure is deemed necessary and proper.

(c) (1) The amount of any payment made by the Secretary to any person receiving benefits under a program administered by the Secretary shall be made known to any person who applies for such information.

(2) Any appraisal report or certificate of reasonable value submitted to or prepared by the Secretary in connection with any loan guaranteed, insured, or made under chapter 37 of this title [38 USCS §§ 3701 et seq.] shall be made available to any person who applies for such report or certificate.

(3) Subject to the approval of the President, the Secretary may publish at any time and in any manner any or all information of record pertaining to any claim filed with the Secretary if the Secretary determines that the public interest warrants or requires such publication.

(d) The Secretary as a matter of discretion may authorize an inspection of Department records of duly authorized representatives of recognized organizations.

(e) Except as otherwise specifically provided in this section with respect to certain information, the Secretary may release information, statistics, or reports to individuals or organizations when in the Secretary's judgment such release would serve a useful purpose.

(f) The Secretary may, pursuant to regulations the Secretary shall prescribe, release the name or address, or both, of any present or former member of the Armed Forces, or a dependent of a present or former member of the Armed Forces, (1) to any nonprofit organization if the release is directly connected with the conduct of programs and the utilization of benefits under this title, or (2) to any criminal or civil law enforcement governmental agency or instrumentality charged under applicable law with the protection of the public health or safety if a qualified representative of such agency or instrumentality has made a written request that such name or address be provided for a purpose authorized by law. Any organization or member thereof or other person who, knowing that the use of any name or address released by the Secretary pursuant to the preceding sentence is limited to the purpose specified in such sentence, willfully uses such name or address for a purpose other than those so specified, shall be guilty of a misdemeanor and be fined not more than $5,000 in the case of a first offense and not more than $20,000 in the case of any subsequent offense.

(g) (1) Subject to the provisions of this subsection, and under regulations which the Secretary shall prescribe, the Secretary may release the name or address, or both, of any person who is a present or former member of the Armed Forces, or who is a dependent of a present or former member of the Armed Forces, to a consumer reporting agency if the release of such information is necessary for a purpose described in paragraph (2) of this subsection.
(2) A release of information under paragraph (1) of this subsection concerning a person described in such paragraph may be made for the purpose of--

(A) locating such a person--
   (i) who has been administratively determined to be indebted to the United States by virtue of the person's participation in a benefits program administered by the Secretary; or
   (ii) if the Secretary has determined under such regulations that (I) it is necessary to locate such person in order to conduct a study pursuant to section 527 of this title [38 USCS § 527] or a study required by any other provision of law, and (II) all reasonable steps have been taken to assure that the release of such information to such reporting agency will not have an adverse effect on such person; or

(B) obtaining a consumer report in order to assess the ability of a person described in subparagraph (A)(i) of this paragraph to repay the indebtedness of such person to the United States, but the Secretary may release the name or address of such person for the purpose stated in this clause only if the Secretary determines under such regulations that such person has failed to respond appropriately to administrative efforts to collect such indebtedness.

(3) The Secretary may also release to a consumer reporting agency, for the purposes specified in subparagraph (A) or (B) of paragraph (2) of this subsection, such other information as the Secretary determines under such regulations is reasonably necessary to identify a person described in such paragraph, except that the Secretary may not release to a consumer reporting agency any information which indicates any indebtedness on the part of such person to the United States or any information which reflects adversely on such person. Before releasing any information under this paragraph, the Secretary shall, under such regulations, take reasonable steps to provide for the protection of the personal privacy of persons about whom information is proposed to be released under this paragraph.

(4) (A) If the Secretary determines, under regulations which the Secretary shall prescribe, that a person described in paragraph (1) of this subsection has failed to respond appropriately to reasonable administrative efforts to collect an indebtedness of such person described in paragraph (2)(A)(i) of this subsection, the Secretary may release information concerning the indebtedness, including the name and address of such person, to a consumer reporting agency for the purpose of making such information available for inclusion in consumer reports regarding such person and, if necessary, for the purpose of locating such person, if--
   (i) the Secretary has (I) made reasonable efforts to notify such person of such person's right to dispute through prescribed administrative processes the existence or amount of such indebtedness and of such person's right to request a waiver of such indebtedness under section 5302 of this title [38 USCS § 5302], (II) afforded such person a reasonable opportunity to exercise such rights, and (III) made a determination with respect to any such dispute or request; and
   (ii) thirty calendar days have elapsed after the day on which the Secretary has made a determination that reasonable efforts have been made to notify such person (I) that the Secretary intends to release such information for such
purpose or purposes, and (II) that, upon the request of such person, the Secretary shall inform such person of whether such information has been so released and of the name and address of each consumer reporting agency to which such information was released by the Secretary and of the specific information so released.

(B) After release of any information under subparagraph (A) of this paragraph concerning the indebtedness of any person, the Secretary shall promptly notify--

(i) each consumer reporting agency to which such information has been released by the Secretary; and

(ii) each consumer reporting agency described in subsection (i)(3)(B)(i) of this section to which such information has been transmitted by the Secretary through a consumer reporting agency described in subsection (i)(3)(B)(ii)(I) of this section,

of any substantial change in the status or amount of such indebtedness and, upon the request of any such consumer reporting agency for verification of any or all information so released, promptly verify or correct, as appropriate, such information. The Secretary shall also, after the release of such information, inform such person, upon the request of such person, of the name and address of each consumer reporting agency described in clause (i) or (ii) of this subparagraph to which such information was released or transmitted by the Secretary and of the specific information so released or transmitted.

(h) (1) Under regulations which the Secretary shall prescribe, the Secretary may release the name or address, or both, of any person who is a present or former member of the Armed Forces, or who is a dependent of a present or former member of the Armed Forces (and other information relating to the identity of such person), to any person in a category of persons described in such regulations and specified in such regulations as a category of persons to whom such information may be released, if the release of such information is necessary for a purpose described in paragraph (2) of this subsection.

(2) A release of information under paragraph (1) of this subsection may be made for the purpose of--

(A) determining the creditworthiness, credit capacity, income, or financial resources of a person who has (i) applied for any benefit under chapter 37 of this title [38 USCS §§ 3701 et seq.], or (ii) submitted an offer to the Secretary for the purchase of property acquired by the Secretary under section 3720(a)(5) of this title [38 USCS § 3720(a)(5)];

(B) verifying, either before or after the Secretary has approved a person's application for assistance in the form of a loan guaranty or loan insurance under chapter 37 of this title [38 USCS §§ 3701 et seq.], information submitted by a lender to the Secretary regarding the creditworthiness, credit capacity, income, or financial resources of such person;

(C) offering for sale or other disposition by the Secretary, pursuant to section 3720 of this title [38 USCS § 3720], any loan or installment sale contract owned or held by the Secretary; or

(D) providing assistance to any applicant for benefits under chapter 37 of this title [38 USCS §§ 3701 et seq.] or administering such benefits if the Secretary
promptly records the fact of such release in appropriate records pertaining to the person concerning whom such release was made.

(i) (1) No contract entered into for any of the purposes of subsection (g) or (h) of this section, and no action taken pursuant to any such contract or either such subsection, shall result in the application of section 552a of title 5 [5 USCS § 552a] to any consumer reporting agency or any employee of a consumer reporting agency.

(2) The Secretary shall take reasonable steps to provide for the protection of the personal privacy of persons about whom information is disclosed under subsection (g) or (h) of this section.

(3) For the purposes of this subsection and of subsection (g) of this section--

(A) The term "consumer report" has the meaning provided such term in subsection (d) of section 603 of the Fair Credit Reporting Act (15 U.S.C. 1681a(d)).

(B) The term "consumer reporting agency" means--

(i) a consumer reporting agency as such term is defined in subsection (f) of section 603 of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)), or

(ii) any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of (I) obtaining credit or other information on consumers for the purpose of furnishing such information to consumer reporting agencies (as defined in clause (i) of this paragraph), or (II) serving as a marketing agent under arrangements enabling third parties to obtain such information from such reporting agencies.

(j) Except as provided in subsection (i)(1) of this section, any disclosure made pursuant to this section shall be made in accordance with the provisions of section 552a of title 5 [5 USCS § 552a].

Amendments:

1962. Act Sept. 19, 1962 (effective 1/1/63, as provided by § 4 of such Act, which appears as a note to this section), in para. (1), inserted "And to an independent medical expert or experts for an advisory opinion pursuant to section 4009 of this title."


1972. Act Oct. 24, 1972, in the introductory matter, inserted "and the names and addresses of present or former personnel of the armed services, and their dependents, in the possession of the Veterans' Administration"; and added para. (9).

1976. Act June 29, 1976 (applicable as provided by § 1(b) of such Act, which appears as a note to this section), redesignated the introductory matter as subsec. (a); in subsec. (a), as so redesignated, substituted "provided in this section." for "follows:"; added subsec. (b), introductory matter; redesignated paras. (1)-(5) as paras. (1)-(5) of subsec. (b); redesignated paras. (6)-(9) as subsecs. (c)-(f), respectively; in subsec. (e), as so redesignated, substituted "Except as otherwise specifically provided in this section with respect to certain information, the" for "The"; and substituted subsecs. (f) and (g), for subsec. (f), as so redesignated, which read: "the Administrator may, pursuant to regulations he shall prescribe, release the names and addresses of present or former personnel of the armed services, and/or dependents to any nonprofit organization but only if the release is directly connected with the conduct of programs and the utilization of benefits under this title. Any such organization or member thereof which uses such names and addresses for purposes other than those specified in this clause shall be fined not more than $500 in the case of a first offense, and not more than $5,000 in the case of subsequent offenses.".
Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (b)(1), substituted "of a claimant" for "his" and substituted "the claimant" for "himself" preceding "alone"; in subsec. (d), substituted "as a matter of" for "in his"; and in subsec. (e), substituted "the Administrator's" for "his".

1980. Act Oct. 17, 1980 (effective 10/1/80, as provided by § 802(f)(1) of such Act, which appears as 38 USCS § 5314 note), in subsec. (a), substituted "members of the Armed Forces" for "personnel of the armed services"; added subsec. (b)(6); substituted new subsec. (c) for one which read: "The amount of pension, compensation, or dependency and indemnity compensation of any beneficiary shall be made known to any person who applies for such information, and the Administrator, with the approval of the President, upon determination that the public interest warrants or requires, may, at any time and in any manner, publish any or all information of record pertaining to any claim."; in subsec. (f), substituted "name or address, or both, of any present or former member of the Armed Forces, or a dependent of a present or former member of the Armed Forces" for "names or addresses, or both, of any present or former members of the Armed Forces, and/or their dependents", and substituted "such name or address" for "such names or addresses"; redesignated subsec. (g) as subsec. (j); added subsecs. (g)-(l); and in subsec. (j), as so redesignated substituted "Except as provided in subsection (j)(1) of this section, any" for "Any".

1989. Act Aug. 16, 1989 (effective and applicable as provided by § 302(c) of such Act, which appears as a note to this section), in subsec. (b)(1), substituted "section 3009 or 4009" for "section 4009".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3301, as 38 USCS § 5701, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101), and, in cl. (g)(2)(A)(ii), substituted "section 527" for "section 219".

Such Act further substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, substituted "Department" for "Veterans' Administration" wherever appearing, except in subsec. (c), paras (1)-(3), and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

Such Act further, in subsec. (c), in paras. (1)-(3), substituted "Secretary" for "Veterans' Administration".

2001. Act June 5, 2001, in subsec. (g), in paras. (2)(B) and (3), substituted "subparagraph" for "clause".

Other provisions:


Application of amendment made to subsec. (f) of this section by Act June 29, 1976. Act June 29, 1976, P. L. 94-321, § 1(b), 90 Stat. 714, provides: "The amendments made by subsection (a) of this section with respect to subsection (f) (as redesignated by subsection (a)(3) of this section) of section 3301 [now section 5701] of title 38, United States Code (except for the increase in criminal penalties for a violation of the second sentence of such subsection (f)), shall be effective with respect to names or addresses released on and after October 24, 1972."

Effective date and application of Aug. 16, 1989 amendments. Act Aug. 16, 1989, P. L. 101-94, Title III, § 302(c), 103 Stat. 628, provides: "The amendments made by subsections (a) [amending subsec. (b)(1) of this section] and (b) [amending 38 USCS 7292(d)(1)] shall take
effect as if included in the Veterans' Judicial Review Act [for full classification of such Act, consult USCS Tables volumes]."

**Code of Federal Regulations**

Department of Veterans Affairs-General provisions, 38 CFR Part 1

Department of Veterans Affairs-Board of Veterans' Appeals: Appeals regulations, 38 CFR Part 19

**Cross References**

This section is referred to in 38 USCS §§ 1729, 5702, 7105, 7332, 7464

**Research Guide**

**Federal Procedure:**

3 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 502, Required Reports Privileged by Statute (Supreme Court Standard 502) § 502.04

12 Fed Proc L Ed, Evidence § 33:297


33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:212, 301, 359

**Am Jur:**

37A Am Jur 2d, Freedom of Information Acts § 121

44A Am Jur 2d, Insurance §§ 1884, 1897

77 Am Jur 2d, Veterans and Veterans' Laws § 5

**Forms:**

24A Am Jur Pl & Pr Forms (1999), Veterans and Veterans' Laws, § 21

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7. Miscellaneous

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**I. IN GENERAL**

1. Generally

It was intent of Congress that Veterans Administration [now Department of Veterans Affairs] records should not be open to inspection to everyone and that examination thereof, beyond specific exceptions stated in predecessor to 38 USCS § 5701, should be allowed only with permission of ex serviceman concerned therewith, or when, in judgment of Administrator [now Secretary], such disclosure is deemed necessary and proper. Ross v Cities Service Gas Co. (1957, DC Mo) 21 FRD 34

2. Relationship with other laws
Veteran was not entitled to equitable relief because Veterans Administration [now Department of Veterans Affairs] released veteran's medical and psychiatric records to U.S. deputy attorney pursuant to federal grand jury subpoena without veteran's authorization on ground that District of Columbia statute barred disclosure of mental health information, since Veterans' Records Statute, 38 USCS §§ 3301 et seq., [now 38 USCS §§ 5701 et seq.] preempts local statute to extent local statute regulates disclosure of information held by agency, since Veterans' Records Statute establishes comprehensive scheme designed to occupy field of rules governing disclosure of veterans' records, there is no indication that Congress intended local or state laws to impose additional requirements and penalties upon disclosure process, and disclosure of veterans' records did not encroach upon area of traditional state regulation; even if Veterans' Records Statute did not occupy regulatory field, doctrine of federal preemption would still apply because local ban could substantially impede federal activities or place prohibition on federal government. Doe v Stephens (1988, App DC) 271 US App DC 230, 851 F.2d 1457

II. DISCLOSURE

3. To claimant

District Court could properly compel government to produce record of claimant to insurance proceeds so that claimant could examine record in advance of trial on insurance claim. Third Nat'l Bank & Trust Co. v United States (1931, CA6 Ohio) 53 F.2d 599

In action to recover on war risk insurance, court could order production of books and records of government agencies for inspection of plaintiff, unless government stipulated that it would have records in question available to plaintiff at trial, in case they were required as proof. Gonzalez v United States (1924, DC NY) 298 F 1003

Motion by claimant, suing government, to compel inspection of records, is proper remedy, and inspection was allowed. Massey v United States (1930, DC Wash) 46 F.2d 78; Seattle Title Trust Co. v United States (1931, DC Wash) 49 F.2d 818

Insured in policy of war risk insurance was entitled to inspection of files, records, and report concerning his case in Veterans' Administration [now Department of Veterans Affairs]. Chytracek v United States (1932, DC Minn) 60 F.2d 325

38 USCS § 3301(b)(1) [now 38 USCS § 5701(b)(1)] is not mandatory; rather, disclosure under its provisions rests within the discretion of the Administrator [now Secretary]; mandamus will not lie to control the exercise of that discretion. Hester v Melidosian (1966, ED Pa) 261 F Supp 659

4. Pursuant to federal court process

Debtor was not entitled to damages under Federal Tort Claims Act §§ 1346, 2671 et seq. for improper release by Veterans Administration [now Department of Veterans Affairs] of veteran's medical and psychiatric records to U.S. attorney pursuant to grand jury subpoena, since agency based its decision to release records on regulations promulgated under 38 USCS § 3301 [now 38 USCS § 5701] providing for disclosure of records required by process by U.S. court or federal agency, notwithstanding that subsequent to release those regulations were invalidated to extent regulations were inconsistent with Privacy Act, 5 USCS § 552a, since under 28 USCS § 2680 excludes action for damages for lack of due care by government employee based on act or omission in execution of statute or regulation whether such statute or regulation is valid. Doe v Stephens (1988, App DC) 271 US App DC 230, 851 F.2d 1457

Whether disclosure of Veterans Administration [now Department of Veterans Affairs] records is "necessary and proper" in private litigation is matter which must be determined in first instance by court in which judicial proceeding is pending. Ross v Cities Service Gas Co. (1957, DC Mo) 21 FRD 34

5. Pursuant to federal agency request

Any official request, written or oral, is sufficient upon which to furnish records from Veterans Administration [now Department of Veterans Affairs] to another department or agency of United

6. For purposes of suits and judicial proceedings

Former Veterans' Administration counseling psychologist dismissed as result of complaints of improper sexual advances made against him by 3 female beneficiaries, was not entitled to receive, in action under Freedom of Information Act (5 USCS § 552), copies of counseling records, tests and psychological profiles of complainants, since disclosure was expressly prohibited by 38 USCS § 3301(a) [now 38 USCS § 5701(a)]. Doyle v Behan (1982, CA5 Tex) 670 F.2d 535

Administrator of Veterans' Administration [now Secretary of Veterans Affairs] could permit access to records in action involving insurance policies, as against contention that they contained privileged communications. Penn Mut. Life Ins. Co. v Ireton (1937) 57 Idaho 466, 65 P2d 1032

Plaintiff's medical records at Veterans Administration [now Department of Veterans Affairs] could be subject of discovery since plaintiff placed his health in issue and thereby waived statutory privilege where defendant's discovery request was limited to specific records relating exclusively to injury to same area of body as that put in issue by plaintiff. Martinez v Rutledge (1979, Tex Civ App Dallas) 592 SW2d 398

7. Miscellaneous

Under 38 USCS § 3301(e) [now 38 USCS § 5701(e)] Administrator [now Secretary] had discretion to disclose to state motor vehicle division that hospital patient had convulsive disorder which could affect public safety. Fitch v Veterans Admin. (1979, CA8 Neb) 597 F.2d 1152

Veterans' Administration had no duty to inform state department of vehicles that veteran undergoing psychiatric treatment could not safely operate motor vehicle, notwithstanding state law requiring such reports, where department made no written request for information desired, since 38 USCS § 3301 [now 38 USCS § 5701] barred release of information concerning veteran, in absence of written request from governmental public health or safety agency. Hasenei v United States (1982, DC Md) 541 F Supp 999

Court would grant standing order excepting Secretary from proscriptions of two privacy laws, 5 USCS § 552a and 38 USCS § 3301, to obviate need to obtain written consent to disclosure of records since those laws would otherwise prohibit Secretary from filing with court relevant records from veteran's case file and thus frustrate right of appeal conferred by Veteran's Judicial Review Act. In re Motion for Standing Order (1990) 1 Vet App 555

III. ADMISSIBILITY AND USE OF RECORDS

8. Actions on insurance policies

In action on war risk insurance policy, report of doctor found in files, showing existence of tubercular condition, was admissible, but mere estimates of disability were immaterial. Runkle v United States (1930, CA10 Colo) 42 F.2d 804

Certificates from medical officers as to physical examination by surgeon nine days before discharge of insured were admissible in action on war risk insurance policy. United States v Cole (1930, CA6 Ohio) 45 F.2d 339

Records of Veterans' Administration [now Department of Veterans Affairs] were admissible in evidence in action on policy. United States v Stamey (1931, CA9 Wash) 48 F.2d 150

Reports of physicians to Veterans' Administration [now Department of Veterans Affairs] were inadmissible where there was no showing that physicians could not be produced as witnesses; and self-serving declarations in such reports, made by plaintiff at time of various examinations, were not admissible against defendant. United States v Wilson (1931, CA4 SC) 50 F.2d 1063

In war risk policy case, letter of Administrator [now Secretary] as to disability for purpose of compensation was inadmissible, but reports of physicians were admissible. McNally v United States (1931, CA8 Minn) 52 F.2d 440
Introduction of reports of physical examination by government physicians was permissible as against objection that it would deprive defendant of right of cross-examination. United States v Blackburn (1931, CA9 Wash) 53 F.2d 19

Records of Veterans' Administration [now Department of Veterans Affairs] as to physical condition of war risk insurance policy holders could be examined in advance of trial, and pertinency of such evidence need not be shown where pertinency was evident on face of pleadings; effect of such evidence was to be determined under ordinary rules of evidence, and self-serving declarations made by insured were not admissible, and statements contained therein could not be introduced in evidence if persons making them were available as witnesses. Third Nat'l Bank & Trust Co. v United States (1931, CA6 Ohio) 53 F.2d 599

Letters from Veterans' Administration [now Department of Veterans Affairs] relating to disability compensation were admissible in insurance case. United States v Dougherty (1931, CA7 Ill) 54 F.2d 721

Veterans' Administration [now Department of Veterans Affairs] reports of physical examinations were admissible in action on war risk policy, as against objection of hearsay and self-serving declarations. United States v Smith (1932, CA9 Wash) 55 F.2d 141, 81 ALR 926

Reports of government physicians were admissible in action on war risk insurance policy with respect to diagnosis based on observation of physical facts, but inadmissible as to prognosis based on mere opinion of physicians. Long v United States (1932, CA4 SC) 59 F.2d 602

While Veterans' Administration [now Department of Veterans Affairs] records were competent on issue as to existence of physical ailments, opinions expressed therein were wholly immaterial where not based on issue of total and permanent disability within meaning of a war risk policy. United States v Ingalls (1933, CA10 NM) 67 F.2d 593

Ordinarily rating for compensation were not admissible to show total and permanent disability. Lockett v United States (1936, CA5 Ga) 86 F.2d 1

Result of examinations by Veterans' Administration [now Department of Veterans Affairs] were admissible in action on war risk insurance policy on issue as to total and permanent disability. Clark v United States (1931, DC Ky) 48 F.2d 291; Nichols v United States (1931, DC Ky) 48 F.2d 293

Reports of physical examinations made by physicians were not admissible where they contained self-serving declarations by insured, and such reports were not rendered admissible by stipulation authorizing use of report of commissioner appointed to settle issues, who made summary of all facts shown by Veterans' Administration [now Department of Veterans Affairs] records. United States v Balance (1932, Dist Col App) 59 F.2d 1040

9. Tort actions

In action by administrator of estate of deceased to recover damages for her death brought against railroad under provisions of Federal Employers' Liability Act (45 USCS § 51 et seq.) where decedent's husband was only one of her surviving relatives as to whom evidence of pecuniary loss was adduced, defendant properly used induction report of surviving husband to attack his credibility and as part of its own case in mitigation of damages. McGlothan v Pennsylvania R. Co. (1948, CA3 Pa) 170 F.2d 121

Murderer's service records and records of Veterans' Administration [now Department of Veterans Affairs] as to his mental competency could, after proper basis was established, be introduced in evidence in trial of wrongful death action brought by personal representative of murder victim against murderer's employer. Kendall v Gore Properties, Inc. (1956, App DC) 98 US App DC 378, 236 F.2d 673

Testimony of government physicians as to information obtained in making examination of war veteran after injury was inadmissible in personal injury action. Cruce v Missouri P. R. Co. (1926) 171 Ark 1074, 287 SW 583

§ 5702. Furnishing of records
Discussion and Analysis in the Veterans Benefits Manual

(a) Any person desiring a copy of any record, paper, and so forth, in the custody of the Secretary that may be disclosed under section 5701 of this title [38 USCS § 5701] must submit to the Secretary an application in writing for such copy. The application shall state specifically--

(1) the particular record, paper, and so forth, a copy of which is desired and whether certified or uncertified; and
(2) the purpose for which such copy is desired to be used.

(b) The Secretary may establish a schedule of fees for copies and certification of such records.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3302, as 38 USCS § 5702, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act.

Act Aug. 6, 1991, purported to amend subsec. (a) of this section by substituting "Secretary" for "Veterans' Administration"; however, inasmuch as this section was enacted without a subsec. (a), such amendment was made to the first undesignated subsec. as the probable intent of Congress.

Such Act further, in subsec. (b), substituted "Secretary" for "Administrator".

1994. Act Nov. 2, 1994 designated the first paragraph of the section as subsec. (a), in subsec. (a) as so designated, substituted "custody of the Secretary that may be disclosed under section 5701 of this title must submit to the Secretary an application in writing for such copy. The application shall state" for "custody of the Secretary, which may be disclosed under section 5701 of this title, must make written application therefor to the Secretary, stating".

Such Act further purported to substitute "may establish" for "is authorized to fix" in subsec. (c); however, the amendment was executed in subsec. (b) in order to effectuate the intent of Congress.

Code of Federal Regulations

Department of Veterans Affairs-General provisions, 38 CFR Part 1

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 5

Forms:

16A Fed Proc Forms L Ed, Veterans and Veterans' Laws § 68:144

38 USCS § 3302 [now 38 USCS § 5702] does not apply to an agency or branch of the federal government, but rather to "any person" who may be entitled to have a copy of any record in the custody of the Veterans' Administration [now Department of Veterans Affairs] under the other exceptions listed in 38 USCS § 3301 [now 38 USCS § 5701]; an official request, written or oral, is sufficient upon which to furnish records from the Veterans' Administration [now Department of Veterans Affairs] to another department or agency of the United States government. Flowers v United States (1964, WD Okla) 230 F Supp 747, affd (1965, CA10 Okla) 348 F.2d 910, cert den (1966) 382 US 994, 15 L Ed 2d 481, 86 S Ct 578

§ 5703. Certification of records of District of Columbia

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When a copy of any public record of the District of Columbia is required by the Secretary to be used in determining the eligibility of any person for benefits under laws administered by the Secretary, the official custodian of such public record shall without charge provide the applicant for such benefits or any person (including any veterans' organization) acting on the veteran's behalf or the authorized representative of the Secretary with a certified copy of such record.

Amendments:

1986. Act Oct. 28, 1986, substituted "the veteran's" for "his".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3303, as 38 USCS § 5703.

Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, and substituted "Secretary" for "Veterans' Administration" wherever appearing.

§ 5704. Transcript of trial records

The Secretary may purchase transcripts of the record, including all evidence, of trial of litigated cases.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3304, as 38 USCS § 5704.

Act Aug. 6, 1991 substituted "Secretary" for "Administrator" wherever appearing.

§ 5705. Confidentiality of medical quality-assurance records

(a) Records and documents created by the Department as part of a medical quality-assurance program (other than reports submitted pursuant to section 7311(g) of this title [38 USCS § 7311(g)]) are confidential and privileged and may not be disclosed to any person or entity except as provided in subsection (b) of this section.

(b) (1) Subject to paragraph (2) of this subsection, a record or document described in subsection (a) of this section shall, upon request, be disclosed as follows:

(A) To a Federal agency or private organization, if such record or document is needed by such agency or organization to perform licensing or accreditation functions related to Department health-care facilities or to perform monitoring, required by statute, of Department health-care facilities.

(B) To a Federal executive agency or provider of health-care services, if such record or document is required by such agency or provider for participation by the Department in a health-care program with such agency or provider.

(C) To a criminal or civil law enforcement governmental agency or instrumentality charged under applicable law with the protection of the public health or safety, if a qualified representative of such agency or instrumentality makes a written request that such record or document be provided for a purpose authorized by law.

(D) To health-care personnel, to the extent necessary to meet a medical emergency affecting the health or safety of any individual.
(2) The name of and other identifying information regarding any individual patient or employee of the Department, or any other individual associated with the Department for purposes of a medical quality-assurance program, contained in a record or document described in subsection (a) of this section shall be deleted from any record or document before any disclosure made under this subsection if disclosure of such name and identifying information would constitute a clearly unwarranted invasion of personal privacy.

(3) No person or entity to whom a record or document has been disclosed under this subsection shall make further disclosure of such record or document except for a purpose provided in this subsection.

(4) Nothing in this section shall be construed as authority to withhold any record or document from a committee of either House of Congress or any joint committee of Congress, if such record or document pertains to any matter within the jurisdiction of such committee or joint committee.

(5) Nothing in this section shall be construed as limiting the use of records and documents described in subsection (a) of this section within the Department (including contractors and consultants of the Department).

(6) Nothing in this section shall be construed as authorizing or requiring withholding from any person or entity the disclosure of statistical information regarding Department health-care programs (including such information as aggregate morbidity and mortality rates associated with specific activities at individual Department health-care facilities) that does not implicitly or explicitly identify individual patients or employees of the Department, or individuals who participated in the conduct of a medical quality-assurance review.

(c) For the purpose of this section, the term "medical quality-assurance program" means--

(1) with respect to any activity carried out before October 7, 1980, a Department systematic health-care review activity carried out by or for the Department for the purpose of improving the quality of medical care or improving the utilization of health-care resources in Department health-care facilities; and

(2) with respect to any activity carried out on or after October 7, 1980, a Department systematic health-care review activity designated by the Secretary to be carried out by or for the Department for either such purpose.

(d) (1) The Secretary shall prescribe regulations to carry out this section. In prescribing such regulations, the Secretary shall specify those activities carried out before October 7, 1980, which the Secretary determines meet the definition of medical quality-assurance program in subsection (c)(1) of this section and those activities which the Secretary has designated under subsection (c)(2) of this section. The Secretary shall, to the extent appropriate, incorporate into such regulations the provisions of the administrative guidelines and procedures governing such programs in existence on October 7, 1980.

(2) An activity may not be considered as having been designated as a medical quality-assurance program for the purposes of subsection (c)(2) of this section unless the designation has been specified in such regulations.

(e) Any person who, knowing that a document or record is a document or record described in subsection (a) of this section, willfully discloses such record or document except as provided for in subsection (b) of this section shall be fined not more than
$5,000 in the case of a first offense and not more than $20,000 in the case of a subsequent offense.

**References in text:**

"Section 7311(g)", referred to in subsec. (a), was repealed by Act Nov. 2, 1994, P. L. 103-446, Title XII, § 1201(g)(5), 108 Stat. 4687. The repealed subsection provided for reports to congressional committees.

**Effective date of section:**

Act Oct. 7, 1980, P. L. 96-385, Title VI, § 601(d), 94 Stat. 1538, which appears as 38 USCS § 1114 note, provides that this section is effective on Oct. 7, 1980.

**Amendments:**

1985. Act Dec. 3, 1985, in subsec. (a), inserted "(other than reports submitted pursuant to section 4152(b) of this title)"; and, in subsec. (b), added para. (6).

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3305, as 38 USCS § 5705; and, in subsec. (a), substituted "section 7311(g)" for "section 4152(b)".

Act June 13, 1991 (amending section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (c)(1) and (2), substituted "October 7, 1980," for "the date of the enactment of this section,"; in subsec. (d), in para. (1), substituted "The" for "Not later than 180 days after the date of the enactment of this section, the", and "October 7, 1980," for "such enactment date", deleted "existing" before "administrative guidelines", and inserted "in existence on October 7, 1980", and, in para. (2), substituted "An activity may not be considered" for "After the date on which such regulations are first prescribed, no activity shall be considered".

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Such Act further, in subsec. (b), in para. (2), substituted "patient or employee of the Department," for "Veterans' Administration patient or employee," and, in para. (6), substituted "patients or employees of the Department," for "Veterans' Administration patients or employees".

**Code of Federal Regulations**

Department of Veterans Affairs-Medical, 38 CFR Part 17

**Research Guide**

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 5

Plaintiff in medical malpractice action was not entitled by discovery to memorandum written by Chairman of Board of Investigation to Medical Center Director regarding investigation outlining facts pertaining to plaintiff's surgery, since memo was confidential in accordance with § 3305 [now § 5705] as record and document pertaining to medical quality assurance program of Veterans Administration [now Department of Veterans Affairs], and exceptions for disclosure under § 3305 [now § 5705] were inapplicable to plaintiff. Utterback v United States (1987, WD Ky) 121 FRD 297

**SUBCHAPTER II. INVESTIGATIONS**

§ 5711. Authority to issue subpoenas

§ 5712. Validity of affidavits

§ 5713. Disobedience to subpoena
§ 5711. Authority to issue subpoenas

(a) For the purposes of the laws administered by the Secretary, the Secretary, and those employees to whom the Secretary may delegate such authority, to the extent of the authority so delegated, shall have the power to--

(1) issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles from the place of hearing;
(2) require the production of books, papers, documents, and other evidence;
(3) take affidavits and administer oaths and affirmations;
(4) aid claimants in the preparation and presentation of claims; and
(5) make investigations and examine witnesses upon any matter within the jurisdiction of the Department.

(b) Any person required by such subpoena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3311, as 38 USCS § 5711.

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991) substituted this heading and section for ones which read:

"§ 5711. Authority to issue subpoenas

"For the purposes of the laws administered by the Veterans' Administration, the Administrator, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Veterans' Administration. Any person required by such subpoena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States.".

Code of Federal Regulations

Department of Veterans Affairs-Delegations of authority, 38 CFR Part 2

Department of Veterans Affairs-Veterans Benefits Administration, fiduciary activities, 38 CFR Part 13

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:2, 336

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 23

1. Generally
2. Application for subpoena
3. Notice of examination
4. Right to counsel
5. Privileges
6. Miscellaneous

1. Generally
   Subpena power of Administrator [now Secretary] of Veterans Affairs applies to matters involving veterans’ education. Carroll Vocational Institute v United States (1954, CA5 La) 211 F.2d 539, cert den (1954) 348 US 833, 99 L Ed 657, 75 S Ct 56

2. Application for subpena
   Application for subpena should identify with reasonable certainty pension claims in which testimony is required. In re Gross (1897, CCD La) 78 F 107

3. Notice of examination
   Pension claimants should have notice of time and place of examination. In re O'Shea (1908, DC NJ) 166 F 180

4. Right to counsel
   Pension claimants may be represented by counsel. In re O'Shea (1908, DC NJ) 166 F 180

5. Privileges
   Witness may refuse to answer incriminating questions. In re O'Shea (1908, DC NJ) 166 F 180
   Pension examiner, in examining witness in danger of incriminating himself, must warn him of danger and advise him of his constitutional privilege to remain silent and refuse to answer. United States v Bell (1897, CCD Tenn) 81 F 830
   Protection from liability by privilege accorded witness extends to statements made to pension examiner. Wheeler v Hager (1936) 293 Mass 534, 200 NE 561

6. Miscellaneous
   Examiner cannot be held to account, under state statutes, for acts done by him in his official capacity as examiner of pensions under authority of laws of United States. In re Waite (1897, DC Iowa) 81 F 359, affd (1898, CA8 Iowa) 88 F 102, app dismd (1901) 180 US 635, 45 L Ed 709, 21 S Ct 920

§ 5712. Validity of affidavits

Any such oath, affirmation, affidavit, or examination, when certified under the hand of any such employee by whom it was administered or taken and authenticated by the seal of the Department, may be offered or used in any court of the United States and without further proof of the identity or authority of such employee shall have like force and effect as if administered or taken before a clerk of such court.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3312, as 38 USCS § 5712.
Act Aug. 6, 1991 substituted "Department" for "Veterans' Administration" wherever appearing.

Research Guide

Federal Procedure:
§ 5713. Disobedience to subpoena

In case of disobedience to any such subpoena, the aid of any district court of the United States may be invoked in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which the inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any officer, agent, or employee of any corporation or to any other person, issue an order requiring such corporation or other person to appear or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3313, as 38 USCS § 5713.

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991) substituted the section heading for one which read: "§ 3313. Disobedience to subpena" and substituted "subpoena" for "subpena" both places it appears in text.

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:3

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 23

1. Generally
2. Constitutionality
3. Nature of enforcement proceeding
4. Basis for enforcement proceeding

1. Generally
Under predecessor to 38 USCS § 3313, courts were empowered to compel witnesses to appear and testify. In re Gross (1897, CCD La) 78 F 107

2. Constitutionality
Predecessor to 38 USCS § 3313 [now 38 USCS § 5713] was constitutional. In re Gross (1897, CCD La) 78 F 107

3. Nature of enforcement proceeding
Action by Veterans Administration [now Department of Veterans Affairs] to enforce administrative subpoena is equitable in character and equitable considerations should prevail. Chapman v Maren Elwood College (1955, CA9 Cal) 225 F.2d 230
4. Basis for enforcement proceeding

Veterans Administration [now Department of Veterans Affairs] official is not permitted to use court's enforcement of administrative subpoena without making showing that original issuance of subpoena was reasonable and founded upon proper cause, with question of reasonableness left for determination of court.  Chapman v Maren Elwood College (1955, CA9 Cal) 225 F.2d 230

CHAPTER 59.  AGENTS AND ATTORNEYS

§ 5901. Prohibition against acting as claims agent or attorney
§ 5902. Recognition of representatives of organizations
§ 5903. Recognition with respect to particular claims
§ 5904. Recognition of agents and attorneys generally
§ 5905. Penalty for certain acts

Amendments:

1991. Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 402(b) of the above Act (see Table II preceding 38 USCS § 101).

§ 5901. Prohibition against acting as claims agent or attorney

Except as provided by section 500 of title 5 [5 USCS § 500], no individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim under laws administered by the Secretary unless such individual has been recognized for such purposes by the Secretary.

Amendments:

1969. Act June 11, 1969, substituted "Except as provided by section 500 of title 5, no" for "No".
1986. Act Oct. 28, 1986, substituted "such individual" for "he".
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3401, as 38 USCS § 5901.
Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:4

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 151

Administrative Procedure Act (5 USCS §§ 501 et seq.) did not repeal provisions relating to presentation of claims before Veterans' Administration [now Department of Veterans Affairs].
Gostovich v Valore (1957, DC Pa) 153 F Supp 826, app dismd (1958) 355 US 608, 2 L Ed 2d 525, 78 S Ct 546

§ 5902. Recognition of representatives of organizations

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(a) (1) The Secretary may recognize representatives of the American National Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, the Veterans of Foreign Wars, and such other organizations as the Secretary may approve, in the preparation, presentation, and prosecution of claims under laws administered by the Secretary.

(2) The Secretary may, in the discretion of the Secretary, furnish, if available, space and office facilities for the use of paid fulltime representatives of national organizations so recognized.

(b) No individual shall be recognized under this section--
(1) unless the individual has certified to the Secretary that no fee or compensation of any nature will be charged any individual for services rendered in connection with any claim; and
(2) unless, with respect to each claim, such individual has filed with the Secretary a power of attorney, executed in such manner and form as the Secretary may prescribe.

(c) (1) Unless a claimant specifically indicates in a power of attorney filed with the Department a desire to appoint only a recognized representative of an organization listed in or approved under subsection (a), the Secretary may, for any purpose, treat the power of attorney naming such an organization, a specific office of such an organization, or a recognized representative of such an organization as the claimant's representative as an appointment of the entire organization as the claimant's representative.

(2) Whenever the Secretary is required or permitted to notify a claimant's representative, and the claimant has named in a power of attorney an organization listed in or approved under subsection (a), a specific office of such an organization, or a recognized representative of such an organization without specifically indicating a desire to appoint only a recognized representative of the organization, the Secretary shall notify the organization at the address designated by the organization for the purpose of receiving the notification concerned.

(d) Service rendered in connection with any such claim, while not on active duty, by any retired officer, warrant officer, or enlisted member of the Armed Forces recognized under this section shall not be a violation of sections 203, 205, 206, or 207 of title 18 [18 USCS §§ 203, 205, 206, or 207].

Amendments:

1969. Act June 11, 1969, in subsec. (c), substituted "sections 203, 205, 206, or 207 of title 18" for "section 281 or 283 of title 18, or a violation of section 99 of title 5".

1983. Act Nov. 21, 1983, in subsec. (a), in para. (1), substituted "the Administrator" for "he", and, in para. (2), substituted "the discretion of the Administrator" for "his discretion"; in subsec. (b)(1), substituted "the individual" for "he"; and, in subsec. (c), substituted "member" for "man".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3402, as 38 USCS § 5902.

Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.
1996. Act Oct. 9, 1996 (applicable as provided by § 508(b) of such Act, which appears as a note to this section) redesignated subsec. (c) as subsec. (d); and added new subsec. (c).

Other provisions:

Applicability of Oct. 9, 1996 amendments. Act Oct. 9, 1996, P. L. 104-275, Title V, § 508(b), 110 Stat. 3344, provides: “The amendments made by this section [amending this section] apply to any power of attorney filed with the Department of Veterans Affairs, regardless of the date of its execution.”.

Code of Federal Regulations

Department of Veterans Affairs-Legal services, General Counsel, and miscellaneous claims, 38 CFR Part 14

Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18

Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a

Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References

This chapter is referred to in 10 USCS § 2679; 38 USCS §§ 521, 1711, 3735

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 151

Forms:

16A Fed Procedural Forms L Ed, Veterans and Veterans' Laws §§ 68:15, 16

Authorization of Administrator of Veterans' Administration [now Secretary of Veterans Affairs] to recognize representatives of Veterans of Foreign Wars in prosecution of claims and to furnish them office space tends to indicate government involvement in VFW to such extent that constitutional due process guarantees become operative. Stearns v Veterans of Foreign Wars (1974, App DC) 163 US App DC 120, 500 F.2d 788

Amendment of 38 USCS § 5902 by Veterans' Benefit Improvement Act of 1996, § 508, to include new subsection (c), does not have retroactive application to past notifications by Secretary. Ryan v West (1999) 13 Vet App 151, 1999 US App Vet Claims LEXIS 1274

§ 5903. Recognition with respect to particular claims

cxxx

Discussion and Analysis in the Veterans Benefits Manual

The Secretary may recognize any individual for the preparation, presentation, and prosecution of any particular claim for benefits under any of the laws administered by the Secretary if--

(1) such individual has certified to the Secretary that no fee or compensation of any nature will be charged any individual for services rendered in connection with such claim; and

(2) such individual has filed with the Secretary a power of attorney, executed in such manner and in such form as the Secretary may prescribe.
Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3403, as 38 USCS § 5903.

Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Code of Federal Regulations

Department of Veterans Affairs-Legal services, General Counsel, and miscellaneous claims, 38 CFR Part 14

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 151

Forms:
16A Fed Procedural Forms L Ed, Veterans and Veterans' Laws § 68:17

1. Generally
2. Persons entitled to recognition

1. Generally

38 USCS § 3403 [now 38 USCS 5903] refers only to recognition by Administrator of Veterans Administration [now Secretary of Veterans Affairs] with respect to proceedings before it, not to proceedings in courts of United States. Fermin v Army Board for Correction of Military Records (1963, CA9 Cal) 312 F.2d 552

2. Persons entitled to recognition

Nephew of deceased veteran was not proper party to maintain action on behalf of mother of veteran for life and disability insurance benefits. Fermin v Army Board for Correction of Military Records (1963, CA9 Cal) 312 F.2d 552

§ 5904. Recognition of agents and attorneys generally

(a) The Secretary may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Secretary. The Secretary may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

(b) The Secretary, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Department any agent or attorney recognized under this section if the Secretary finds that such agent or attorney--

(1) has engaged in any unlawful, unprofessional, or dishonest practice;
(2) has been guilty of disreputable conduct;
(3) is incompetent;
(4) has violated or refused to comply with any of the laws administered by the Secretary, or with any of the regulations or instructions governing practice before the Department; or
(5) has in any manner deceived, misled, or threatened any actual or prospective claimant.

(c) (1) Except as provided in paragraph (3), in connection with a proceeding before the Department with respect to benefits under laws administered by the Secretary, a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case. Such a fee may be charged, allowed, or paid in the case of services provided after such date only if an agent or attorney is retained with respect to such case before the end of the one-year period beginning on that date. The limitation in the preceding sentence does not apply to services provided with respect to proceedings before a court.

(2) A person who, acting as agent or attorney in a case referred to in paragraph (1) of this subsection, represents a person before the Department or the Board of Veterans' Appeals after the Board first makes a final decision in the case shall file a copy of any fee agreement between them with the Board at such time as may be specified by the Board. The Board, upon its own motion or the request of either party, may review such a fee agreement and may order a reduction in the fee called for in the agreement if the Board finds that the fee is excessive or unreasonable. A finding or order of the Board under the preceding sentence may be reviewed by the United States Court of Appeals for Veterans Claims under section 7263(d) of this title [38 USCS § 7263(d)].

(3) A reasonable fee may be charged or paid in connection with any proceeding before the Department in a case arising out of a loan made, guaranteed, or insured under chapter 37 of this title [38 USCS §§ 3701 et seq.]. A person who charges a fee under this paragraph shall enter into a written agreement with the person represented and shall file a copy of the fee agreement with the Secretary at such time, and in such manner, as may be specified by the Secretary.

(d) (1) When a claimant and an attorney have entered into a fee agreement described in paragraph (2) of this subsection, the total fee payable to the attorney may not exceed 20 percent of the total amount of any past-due benefits awarded on the basis of the claim.

(2) (A) A fee agreement referred to in paragraph (1) is one under which the total amount of the fee payable to the attorney--

(i) is to be paid to the attorney by the Secretary directly from any past-due benefits awarded on the basis of the claim; and

(ii) is contingent on whether or not the matter is resolved in a manner favorable to the claimant.

(B) For purposes of subparagraph (A) of this paragraph, a claim shall be considered to have been resolved in a manner favorable to the claimant if all or any part of the relief sought is granted.

(3) To the extent that past-due benefits are awarded in any proceeding before the Secretary, the Board of Veterans' Appeals, or the United States Court of Appeals for Veterans Claims, the Secretary may direct that payment of any attorneys' fee under a fee arrangement described in paragraph (1) of this subsection be made out of such past-due benefits. In no event may the Secretary withhold for the purpose of such payment any portion of benefits payable for a period after the date of the final
decision of the Secretary, the Board of Veterans' Appeals, or Court of Appeals for Veterans Claims making (or ordering the making of) the award.

Amendments:

1986. Act Oct. 28, 1986, in subsec. (b), substituted "the Administrator" for "he".

1988. Act Nov. 18, 1988 (effective 9/1/89 and applicable as provided by §§ 401(a) and 403 of such Act, which appear as 38 USCS § 7251 note and a note to this section, respectively) substituted subsecs. (c) and (d) for former subsec. (c), which read:

"(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees--

"(1) shall be determined and paid as prescribed by the Administrator;

"(2) shall not exceed $10 with respect to any one claim; and

"(3) shall be deducted from monetary benefits claimed and allowed.".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3404, as 38 USCS § 5904, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

1992. Act Oct. 9, 1992 (applicable as provided by § 303(b) of such Act, which appears as a note to this section), in subsec. (c), in para. (1), substituted "Except as provided in paragraph (3), in" for "In", and added para. (3).

1994. Act Nov. 2, 1994 (applicable with respect to fee agreements entered into on or after the date of enactment, as provided by § 504(b), which appears as a note to this section), in subsec. (d)(2), substituted subpara. (A) for one which read: "A fee agreement referred to in paragraph (1) of this subsection is one under which (i) the amount of the fee payable to the attorney is to be paid to the attorney by the Secretary directly from any past-due benefits awarded on the basis of the claim, and (ii) the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant.".

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsecs. (c)(1) and (d)(3), substituted "United States Court of Appeals for Veterans Claims" for "United States Court of Veterans Appeals".

Other provisions:

Repeal of provision relating to application of Nov. 18, 1988 amendment of subsec. (c). Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 403, 102 Stat. 4122, which formerly appeared as a note to this section, was repealed by Act Dec. 27, 2001, P. L. 107-103, Title VI, § 603(b), 115 Stat. 999. Such note provided that the Nov. 18, 1988 amendment of subsec. (c) of this section applied only with respect to services of agents and attorneys in cases in which a notice of disagreement was filed on or after Nov. 18, 1988.

Applicability of subsec. (c)(3). Act Oct. 9, 1992, P. L. 102-405, Title III, § 303(b), 106 Stat. 1985, provides: "Paragraph (3) of section 5904(c) of title 38, United States Code, as added by subsection (a), shall apply with respect to services of agents and attorneys provided after the date of the enactment of this Act.".

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Fee agreements. For provisions relating to fees awarded under this section and 28 USCS § 2412(d), see § 506(c) of Act Oct. 29, 1992, P. L. 102-572, which appears as 28 USCS § 2412 note.

Application of Nov. 2, 1994 amendment. Act Nov. 2, 1994, P. L. 103-446, Title V, § 504(b), 108 Stat. 4664, provides: "The amendment made by subsection (a) [amending subsec. (d)(2)(A) of this section] shall apply with respect to fee agreements entered into on or after the date of the enactment of this Act."

Code of Federal Regulations
Department of Veterans Affairs-Legal services, General Counsel, and miscellaneous claims, 38 CFR Part 14

Cross References
This section is referred to in 38 USCS §§ 5905, 7263

Research Guide
Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:4, 9, 237-239, 243

Am Jur:
60A Am Jur 2d, Pensions and Retirement Funds § 1268
77 Am Jur 2d, Veterans and Veterans' Laws § 151

Forms:
16A Fed Procedural Forms L Ed, Veterans and Veterans' Laws § 68:17

Annotations:
Governmental regulation of attorneys' fees as violating due process under Federal Constitution's Fifth or Fourteenth Amendment--Supreme Court cases, 108 L Ed 2d 1034

Law Review Articles:
Tunny; Frank. Federal Roles in Lawyer Reform. 27 Stan L Rev 333
Veterans' Right to Counsel: A Constitutional Challenge to 38 USC § 3404. 4 Univ of San Fernando Valley L Rev 121, Spring 1975

1. Generally
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11. Miscellaneous

1. Generally
   38 USCS § 3404 [now 38 USCS § 5904] refers only to recognition by Administrator of Veterans Administration [now Department of Veterans Affairs] with respect to proceedings before
it, not to proceedings in courts of United States. Fermin v Army Board for Correction of Military Records (1963, CA9 Cal) 312 F.2d 552

Statute requiring Secretary to make decision under law that affects provision of benefits by Secretary to veteran applied to attorney's claim for fee under § 5904(d) erroneously paid to veteran; decision interpreted law affecting veteran's benefits. Cox v West (1998, CA FC) 149 F.3d 1360

Neither history of amendments to law, nor its changing position in U.S. Code through passage of series of consolidation statutes, alters fact that, as originally enacted, 38 USCS § 5904 was part of Public Law that affects provision of benefits, and therefore, is subject to review by Board of Veterans' Appeals and Court of Appeals for Veterans Claims under terms of 38 USCS § 511. Bates v Nicholson (2005, CA FC) 398 F.3d 1355

Court of Appeals for Veterans Claims erred in concluding that it lacked jurisdiction to consider attorney's request for mandamus requiring Secretary of Veterans Affairs to issue statement of case so that he could appeal decision to terminate his accreditation to represent claimants before Department of Veterans Affairs to Board of Veterans' Appeals (BVA) as 38 USCS § 5904 was part of single statutory enactment that affected provision of benefits and as result, it was subject to review by BVA and Court of Appeals for Veterans Claims under terms of 38 USCS § 511. Bates v Nicholson (2005, CA FC) 398 F.3d 1355

Board's determination that appellant was eligible for attorney fees under 38 USCS § 5904(C)(2) is vacated for want of original jurisdiction to decide eligibility for direct payment of withheld contingency fee. Booth v Gober (2000) 14 Vet App 121, 2000 US App Vet Claims LEXIS 878

Board does not have original jurisdiction to consider any issues regarding entitlement to attorney fees in direct-payment cases under 38 USCS § 5904(c)(2) and all issues involving entitlement or eligibility for attorney fees under direct-payment contingency fee agreements must first be addressed by regional office in accordance with normal adjudication procedures. Scates v Gober (2000) 14 Vet App 62, 2000 US App Vet Claims LEXIS 797, affd, mod (2002, CA FC) 282 F.3d 1362, reh den, reh, en banc, den (2002, CA FC) 2002 US App LEXIS 13278 and cert den (2002) 537 US 884, 154 L Ed 2d 142, 123 S Ct 116

Regardless of whether withhold-and-pay provision of 38 USCS § 5904(d) is mandatory or discretionary, Secretary is obligated to pay attorney pursuant to regulation adopted by VA and sanctioned by statute; even though all past-due benefits were disbursed to veteran, attorney is entitled to be paid directly by Secretary agreed-upon attorney fees in amount of 20 percent of past-due benefits. Cox v Gober (2000) 14 Vet App 148, 2000 US App Vet Claims LEXIS 892, reconsideration gr, affd in part and mod in part (2001) 15 Vet App 280, 2001 US App Vet Claims LEXIS 1246

Secretary is obliged by his own regulation to pay attorney under withhold-and-pay contingency-fee agreement if regulatory requirements and statutory requirements of 38 USCS § 5904(d) are met; existence of erroneous payment of all past-due benefits is immaterial to Secretary's responsibility to make payment to which there is lawful entitlement. Snyder v Gober (2000) 14 Vet App 154, 2000 US App Vet Claims LEXIS 893, reconsideration gr, affd in part and mod in part (2001) 15 Vet App 285, 2001 US App Vet Claims LEXIS 1247

38 USCS § 5904(c)(2) requires that determinations of eligibility, which must be done by regional office in first instance, are prerequisite for Board review of reasonableness of non-direct payment fee agreement. Snyder v Principi (2001) 15 Vet App 285, 2001 US App Vet Claims LEXIS 1247

Petitioner did not show that decision by Department of Veterans Affairs (VA) General Counsel (GC) to terminate petitioner's accreditation under 38 USCS § 5904(b) was decision under law that affected provision of benefits by Secretary of Veterans Affairs to veterans or dependents or survivors of veterans under 38 USCS § 511(a); accordingly, it was not matter subject to review by Board of Veterans' Appeals, pursuant to 38 USCS § 7104(a), and was thus not matter over which court had jurisdiction under 38 USCS § 7252(a); therefore, veteran's petition for writ of mandamus ordering Secretary to provide statement of case was dismissed for

2. Constitutionality

Predecessor to 38 USCS § 5904, setting maximum fee for assistance in preparation and execution of claim for war risk insurance, did not constitute unconstitutional deprivation of property. Margolin v United States (1925) 269 US 93, 70 L Ed 176, 46 S Ct 64

Predecessor to 38 USCS § 5904 was valid exercise of Congressional power. Hines v Lowrey (1938) 305 US 85, 83 L Ed 56, 59 S Ct 31

Provision of 38 USCS § 3404 [now 38 USCS § 5904] limiting that could be paid attorney or agent who represented veteran seeking benefits for service connected death or disability did not violate due process; nor did provision violate First Amendment since claims process allowed claimant to make meaningful presentation and significant government interests favored limitation on speech. Walters v Nat'l Ass'n of Radiation Survivors (1985) 473 US 305, 87 L Ed 2d 220, 105 S Ct 3180 (superseded by statute as stated in Cintron v West (1999) 13 Vet App 251, 1999 US App Vet Claims LEXIS 1334)

38 USCS § 3404 [now 38 USCS § 5904] limitation on fees of attorneys was valid. Purvis v United States (1932, CA8 Ark) 61 F.2d 992


Predecessor statute limiting to $10 amount claimant can pay attorney was not unconstitutional as applied to individuals with claims based on exposure to ionizing radiation since attorneys were not necessary to ensure procedural fairness in adjudication of such claims. National Ass'n of Radiation Survivors v Derwinski (1993, CA9 Cal) 994 F.2d 583, reported at, in part (1993, CA9 Cal) 93 CDOS 4526, 93 Daily Journal DAR 7729 and cert den (1993) 510 US 1023, 126 L Ed 2d 592, 114 S Ct 634

Former statute's $10 cap on attorneys' fees did not deny veteran right to assistance of counsel; veteran did not show that he had right to counsel in veterans' benefits proceedings or that statute prohibits him from obtaining legal advice. Marozsan v United States (1996, CA7 Ind) 90 F.3d 1284, reh, en banc, den (1996, CA7 Ind) 1996 US App LEXIS 23455 and cert den (1997) 520 US 1109, 137 L Ed 2d 317, 117 S Ct 1117

Statutory limitation of fee payable by veteran to attorney is reasonable exercise of congressional power over veterans' affairs and does not violate veterans' constitutional rights to procedural due process or to equal protection of laws. Gendron v Saxbe (1975, CD Cal) 389 F Supp 1303, affd (1975) 423 US 802, 46 L Ed 2d 23, 96 S Ct 9

Fee limitation provisions of 38 USCS § 3404 [now 38 USCS § 5904] did not violate due process or first amendment rights when judged by generality of cases to which Veterans laws applied, and disability claimant could show neither sufficient risk of deprivation of private interest nor evidence that her case was so complex as to justify disturbing congressional intent, and further, claimant failed to show that § 3404 [now § 5904] denied her access to meaningful representation. Dyer v Walters (1986, ED Mo) 646 F Supp 791

Congress had power to limit fees of agents to assist in obtaining pensions and to punish violation of law. United States v Marks (1869, CCD Ky) 2 Abb 531, 26 F Cas 1162, No 15721

3. Purpose

Congress intended to protect all veterans, competent and incompetent, in all courts, whether state or federal, against imposition or payment of fees in excess of amount fixed. Hines v Lowrey (1938) 305 US 85, 83 L Ed 56, 59 S Ct 31; Sanchez v United States (1943, CA1 Puerto Rico) 134 F.2d 279, cert den (1943) 319 US 768, 87 L Ed 1717, 63 S Ct 1325

Intention is not only to protect pensioner but government as well. Christie v Steger's Adm'r (1900) 21 Ky LR 1799, 56 SW 521
Statutes limiting fees for procuring pensions were founded upon policy of federal government to protect class of persons who might be incompetent to fully protect themselves; they must necessarily be very absolute and rigorous in order to be effective. Hall v Kimmer (1886) 61 Mich 269, 28 NW 96

4. Application of fee limitation, generally

Maximum fee limitation in predecessor to 38 USCS § 5904, relating to war risk insurance, applied only to payments to be made by or out of funds of applicant, and to dealings by attorney with or on behalf of applicant. Welty v United States (1924, CA6 Ohio) 2 F.2d 562, 3 Ohio L Abs 544

Statutes governing fees for obtaining pensions were not limited to persons who are recognized or known to Commissioner of Pensions [now Secretary of Veterans Affairs] as attorneys or agents for applicants; all persons rendering services in procuring such pension were governed thereby. Caverly v Robbins (1889) 149 Mass 16, 20 NE 450

Services performed by guardian, preparatory to prosecution of claim for pension, were not services of attorney, agent, or other person in procuring pension, within meaning of pension laws. Southwick v Evans (1890) 17 RI 198, 21 A 104

5. -Particular services or proceedings

Both old and new versions of § 3404 apply to limit participation of attorneys in Veterans Affairs Department debt collection proceedings, in home loan guarantee context, when veteran seeks waiver of indebtedness. Bahnmiller v Derwinski (1991, CA4 Va) 923 F.2d 1085

Limitation on attorneys’ fees in predecessor to 38 USCS § 5904 was applicable to services rendered for term insurance. United States v Rhodes (1937, DC Pa) 18 F Supp 110

Attorney's fee limitation provisions in both old and new versions of 38 USCS § 3404 [now 38 USCS § 5904] apply to debt collection proceedings brought against veteran until final administrative decision is reached within agency, because defense of debt collection action, which is usually to recover overpaid benefits and may seek setoff against benefits, is within both definitions given clear congressional intention to prevent veterans' benefits from being diverted to attorneys. Bahnmiller v Derwinski (1989, ED Va) 724 F Supp 1208, affd in part and vacated in part on other grounds (1991, CA4 Va) 923 F.2d 1085

Where fiancee of deceased veteran retained services of attorneys to seek probate of alleged nuncupative will and agreed to pay attorneys thirty-three and one-third percent of any and all recovery which might be obtained, and by reason of having procured probate of will, fiancee, long after such probate, became entitled to and was paid, large part of veteran's war risk insurance, predecessor to 38 USCS § 5904, limiting compensation of attorneys for preparation of papers with respect to application to collect insurance, was not applicable. In re Mason's Estate (1940) 174 Misc 218, 20 NYS2d 501

Attorney was not entitled to more than $10 in fees since NOD was filed prior to Act's effective date; subsequent BVA decisions and NODs pertained to pre-Act claim. In re Fee Agreement of Smith (1993) 6 Vet App 25

RO's decision on remand from Board did not constitute final decision of Board for purposes of statute's limitation on when attorney's fee may be charged, allowed, or paid; RO was acting on behalf of Board only in sense that decision facilitated Board's appellate review, and it seems inconceivable that RO decision could ever be decision of Board for that purpose even if RO completed Board's appellate review function by awarding all benefits sought on appeal or claimant withdrew NOD or otherwise acquiesced in RO's decision. In re Fee Agreement of Stanley (1996) 9 Vet App 203

Attorney was not entitled to fees from past-due benefits awarded to veteran for entitlements to total rating based on individual unemployability (TDIU) and special monthly compensation, since issue of TDIU was not before BVA in either of its underlying decisions; claim for TDIU is separate from those of underlying disabilities which cause unemployability. In re Fee Agreement of Leventhal (1996) 9 Vet App 387

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No payment of attorneys' fees was warranted or permitted for services rendered before VA and Board in connection with veteran's claim for posttraumatic stress syndrome since veteran was awarded benefits for it by RO under nonadversarial system of VA claims processing and PTSD claim was never subject of final BVA decision. In re Fee Agreement of Stanley (1997) 10 Vet App 104, app dismd (1997, CA FC) 1997 US App LEXIS 36411

Attorney was entitled to attorney's fees from past-due benefits awarded to veteran since BVA's failure to adjudicate claim reasonably before it amounted to denial of benefits sought and therefore final adverse decision. In re Fee Agreement of Smith (1997) 10 Vet App 311

Attorney was entitled to fee from past-due benefits awarded to veteran whom he represented since there was final BVA decision as to issues of total disability due to individual unemployability and depression. In re Fee Agreement Cox (1998) 11 Vet App 158

Attorney was not entitled to charge attorney fees under 38 USCS § 5904(c)(1) for services rendered before Board of Veterans' Appeals (BVA) or Department of Veterans Affairs (VA) with respect to secondary service connection for veteran's back disability or for total disability based on individual unemployability where attorney was not retained within one year after 1990 BVA decision; 1994 BVA decision, though final on issue of secondary service connection, was not first final decision; and services provided before Board and VA after remand from Court of Appeals for Veterans Claims were not continuation of proceedings before Court of Appeals for Veterans Claims so as to be exempt from § 5904(c)(1) limitations on charging attorney fees; however, under § 5904(d)(1), attorney's successful representation of veteran before Court of Appeals for Veterans Claims created entitlement to direct payment by Secretary of 20 percent of past-due benefits awarded on basis of claim underlying Court's decision. In re Fee Agreement of Mason (1999) 13 Vet App 79, 1999 US App Vet Claims LEXIS 1112

6. -Payment by third persons

Since test of illegality was whether compensation was paid directly or indirectly from insurance fund, attorney could receive any amount of compensation from third person for services in securing benefits of war risk insurance for another. Welty v United States (1924, CA6 Ohio) 2 F.2d 562, 3 Ohio L Abs 544

Law firm's broad arguments that Department of Veterans Affairs (DVA) lacked authority to regulate disinterested fee payers and that DVA's effort to regulate third-party fee payers was contrary to 38 USCS § 5904(c), were rejected, and 2002 amendments to disinterested third-party payer regulation were upheld as they were not arbitrary and capricious. Carpenter v Sec'y of Veterans Affairs (2003, CA FC) 343 F.3d 1347

7. -Miscellaneous

If money was given to person who procured pension as mere gift, without any demand on his part, it was not violation of pension laws. Schwab v Ginkinger (1897) 181 Pa 8, 37 A 125

By no sort of contrivance or device, either under disguise of loan or purchase of property or gift, or any other scheme, could attorney prosecuting pension claim demand or receive or retain any more than fee allowed by law. United States v Moyers (1882, CCD Tenn) 15 F 411; Hall v Kimmer (1886) 61 Mich 269, 28 NW 96

Fee which includes both Equal Access to Justice Act (EAJA) award plus contingency fee for work performed before Court of Appeals for Veterans Claims, Board, and VA on same claim such that fee is enhanced by EAJA award is unreasonable pursuant to 38 USCS §§ 5904(c) and 7263. Carpenter v Principi (2001) 15 Vet App 64, 2001 US App Vet Claims LEXIS 815, app dismd (2003, CA FC) 327 F.3d 1371, reh den,reh, en banc, den (2003, CA FC) 2003 US App LEXIS 14589

8. Fee agreements

Contracts for collection of fees in excess of valid statutory limitations and for services validly prohibited by statute cannot stand whether made with competent veteran or with guardian of incompetent veteran. Hines v Lowrey (1938) 305 US 85, 83 L Ed 56, 59 S Ct 31
Court of Veterans Appeals lacked subject matter over attorney's motion to compel Secretary to pay attorney's fee specified in fee agreement since fee agreements are properly before court only when it reviews decision of Board concerning agreement or any other matter decided by Board and court did not have decision of Board before it for review when attorney's motion was filed, and attorney's motion was not one for review of fee agreement pursuant to § 7263, rather to compel action to give agreement effect. Wick v Brown (In re Wick) (1994, CA FC) 40 F.3d 367

Since parties to review of fee agreement are claimant on one hand and attorney on other, and Board serves in quasi-judicial role, when review of fee agreement is statutorily authorized it is appropriate, indeed necessary, for Board to communicate directly with represented client in connection with such review of fee agreement. Nagler v Derwinski (1991) 1 Vet App 297

BVA Chairman has no power to review attorney-fee agreements for representation at administrative level; review of fee agreements for VA/BVA is matter reposed by statute in Board itself and not in Secretary; hence Secretary cannot promulgate regulation providing that Chairman's ruling on motion for review of the agreement will constitute final decision of Board; neither does Chairman's administrative control and supervision authority authorize him to review attorney-fee agreements. In re Smith (1991) 1 Vet App 492

Portions of Form 2-22a concerning fee agreement filing requirements contained misleading and erroneous information about fee agreements because it indicated that where payment of fees was permitted, copy of agreement must be filed, since governing statute does not require that representative enter into fee agreement with veteran. Jones v Derwinski (1991) 1 Vet App 596

In consolidated case, fee agreement between first attorney and client did not satisfy statute's requirements, so Secretary was not required to withhold fee from client's past-due benefits nor pay fee directly to attorney; second attorney did not represent appellant before court and agreement was not reviewed by BVA, hence court lacked jurisdiction to review agreement and would not do so by writ of mandamus; third attorney's fee agreement satisfied statute's requirements hence attorney was entitled to be paid by Secretary. In re Smith (1993) 4 Vet App 487, sub nom, vacated, remanded Wick v Brown (In re Wick) (1994, CA FC) 40 F.3d 367

Contingency fee arrangement for attorneys' fee of 20 percent of past-due benefits received was presumed to be and was reasonable since it was in compliance with relevant statutory requirements and appellant's lay assertions regarding value and extent of legal services rendered by counsel were insufficient as matter of law to rebut presumption. In re Fee Agreement of Vernon (1996) 8 Vet App 457

Lien provision in fee agreement between veteran and counsel granting attorney lien on veteran's claim for benefits and any sum recovered is unreasonable and unenforceable under 38 USCS § 7263(d) because it conflicts with 38 USCS § 5301(a) and 38 USCS § 5904(d)(3). Busch v West (1999) 12 Vet App 552, 1999 US App Vet Claims LEXIS 950

§ 5904(c)(2) or 38 USCS § 7263(d) to address threshold question of whether there is fee agreement, in view of termination of attorney-client relationship, which would warrant withholding of portion of award; although jurisdiction exists under 38 USCS § 7252, § 5904 cannot justify Board's decision to award attorney fees since contingent fee agreement ceased to exist under state law when attorney-client relationship terminated. Scates v West (1999) 13 Vet App 98, 1999 US App Vet Claims LEXIS 1116, motion gr, op withdrawn (2000) 13 Vet App 304, 2000 US App Vet Claims LEXIS 51


Where attorney successfully represented veteran seeking to recover past due benefits from Department of Veterans Affairs, fee agreement executed between attorney and veteran in compliance with 38 USCS § 5904(d), which was thereafter accepted by Secretary, did not give
Board had authority to review fee agreement pursuant to 38 USCS § 5904(c) even though fee agreement was entered into after Board made final decision in veteran's case where agreement addressed representation before Court of Appeals for Veterans Claims and Board, agreement was filed with Board on same date it was filed with Court of Appeals for Veterans Claims, and agreement satisfied requirements of § 5904(c). Carpenter v Principi (2001) 15 Vet App 64, 2001 US App Vet Claims LEXIS 815, app dismd (2003, CA FC) 327 F.3d 1371, reh den, reh, en banc, den (2003, CA FC) 2003 US App LEXIS 14589

All issues involving eligibility for attorney fees under non-direct-payment fee agreements, as contrasted with issues of reasonableness and excessiveness, must first be addressed by Veterans Administration Regional Office in accordance with normal adjudication procedures and cannot be subject of original Board of Veterans' Appeals review. Stanley v Principi (2002) 16 Vet App 356, 2002 US App Vet Claims LEXIS 702

Board of Veterans Appeals did not err in its determination that appellant attorney was not entitled to direct payment by Department of Veterans Affairs of 20 percent of veteran's son's past-due dependency and indemnity compensation (DIC) benefits pursuant to his fee agreement with veteran's widow because, although attorney's successful representation of veteran's widow had result of qualifying intervenor for DIC benefits, those benefits for her helpless-adult son under 38 USCS § 1314 were separate and distinct from veteran's widow's DIC benefits under 38 USCS § 1311, and there was no evidence of record that attorney ever entered into any fee agreement with intervenor. Hanlin v Nicholson (2005) 19 Vet App 350, 2005 US App Vet Claims LEXIS 616

9. Reimbursement of advances and expenses

Agent, attorney, or other person aiding pensioner could be reimbursed money which he advanced to or for him, and could also be repaid actual expenses incurred in prosecuting pension claim. United States v Moore (1883, CCD Ky) 18 F 686

10. Recovery of excess fees

Under predecessor to 38 USCS § 5904 excess fees for legal services could be recovered in action for money had and received. Morgan v Hutcheson (1940) 61 Ga App 763, 7 SE2d 691

Predecessor to 38 USCS § 5904, while making collection of excess fee a misdemeanor, did not penalize its payment and did not expressly give right of recovery to person making payment. Denny's Adm'r v Denny's Heirs (1936) 264 Ky 467, 94 SW2d 978

Pensioner could recover excessive fees. Smart v White (1882) 73 Me 332; Hall v Kimmer (1886) 61 Mich 269, 28 NW 96

Excessive fee could be recovered in action of assumpsit, even though it was paid voluntarily. Ladd v Barton (1886) 64 NH 613, 6 A 483

11. Miscellaneous

There was nothing which definitely undertook to put limitation upon state court's right to make allowance to guardian of incompetent veteran for attorney fees for attorney employed by guardian to obtain reinstatement of ward's disability pension. Hines v Stein (1936) 298 US 94, 80 L Ed 1063, 56 S Ct 699, reh den (1936) 298 US 692, 80 L Ed 1409, 56 S Ct 945

38 USCS § 5904(d)(2)(A) and (3) and 38 C.F.R. § 20.609(h) do not create implied-in-fact contract to pay attorney who represented veterans from past-due veteran benefits, where statute was directive from Congress rather than promise from Department of Veterans Affairs and attorney failed to offer any evidence of mutuality of intent, offer, or acceptance. Hanlin v United States (2003, CA FC) 316 F.3d 1325

Circuit court lacked jurisdiction to review decision of United States Court of Appeals for Veterans Claims regarding reasonableness of attorney's fee agreement with veteran; more specific provisions of 38 USCS § 7263(d) overrode general grant of jurisdiction in 38 USCS 7292(a) and, thus, precluded review of decision of Veterans' Court's under 38 USCS § 5904(c)(2).
Carpenter v Principi (2003, CA FC) 327 F.3d 1371, reh den, reh, en banc, den (2003, CA FC) 2003 US App LEXIS 14589

Court lacked jurisdiction to resolve dispute regarding amount of fees payable by her to attorney pursuant to statute, fee agreement, and payment under Equal Access to Justice Act, since no case was currently pending before court to which those matters related. In re Fee Agreement of Bates (1997) 10 Vet App 547

Where attorney successfully represented veteran seeking to recover past due benefits from Department of Veterans Affairs, fee agreement executed between attorney and veteran in compliance with 38 USCS § 5904(d), which was thereafter accepted by Secretary, did not give rise to implied-in-fact contract that is enforceable in Court of Federal Claims. Hanlin v United States (2001) 50 Fed Cl 697, affd (2003, CA FC) 316 F.3d 1325

As is inherent in 38 USCS § 5904(d)(2)(A)(i), Secretary is obligated to withhold and pay agreed-upon fee directly to attorney despite fact of erroneous payment to veteran. Cox v Principi (2001) 15 Vet App 280, 2001 US App Vet Claims LEXIS 1246

Where veteran's son's "helpless child" claim was awarded as part of nonadversarial system of Department of Veterans Affairs claims processing and was never subject of final Board of Veterans Appeals decision, attorney fees under 38 USCS § 5904 could not be awarded. Hanlin v Nicholson (2005) 19 Vet App 350, 2005 US App Vet Claims LEXIS 616

§ 5905. Penalty for certain acts

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 5904 or 1984 of this title [38 USCS §§ 5904 or 1984], or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due to the claimant or beneficiary, shall be fined as provided in title 18, or imprisoned for not more than one year, or both.

Amendments:

1986. Act Oct. 28, 1986 substituted "to the claimant or beneficiary" for "him".

1988. Act Nov. 18, 1988 (effective 9/1/89 as provided by § 401(a) of such Act, which appears as 38 USCS § 7251 note) substituted "shall be fined as provided in title 18, or imprisoned not more than one year, or both" for "shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3405, as 38 USCS § 5905, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Code of Federal Regulations

Department of Veterans Affairs-Legal services, General Counsel, and miscellaneous claims, 38 CFR Part 14

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:345

Am Jur:
Annotations:
Missconduct involving intoxication as ground for disciplinary action against attorney. 1
ALR5th 874
1. Generally
2. Purpose
3. Application
4. Offenses relating to fees
5. Offenses relating to withholding of recovery
6. Sufficiency of indictment
7. Evidence
8. Jury instructions

1. Generally
In prosecution in United States District Court for Puerto Rico, it was immaterial that defendant
might also have been tried in insular court for defrauding beneficiary personally. Lopez v United
States (1926, CA1 Puerto Rico) 17 F.2d 462

2. Purpose
Purpose of predecessor to 38 USCS § 5905 was to protect World War veterans from being
charged excessive fees for aid in prosecuting applications to Veterans' Administration [now
Department of Veterans Affairs] for benefits under various statutes passed for their relief and
assistance. Sanchez v United States (1943, CA1 Puerto Rico) 134 F.2d 279, cert den (1943)
319 US 768, 87 L Ed 1717, 63 S Ct 1325

3. Application
38 USCS § 3405 [now 38 USCS § 5905] did not apply to counsel fees in litigation; after
administrative denial of veteran's claim, attorney who subsequently successfully prosecuted the
claim in a lawsuit was entitled to fees up to 25 percent of recovery in court's discretion.
App DC 154, 461 F.2d 1240, 18 ALR Fed 890, cert den (1972) 409 US 949, 34 L Ed 2d 220, 93 S
Ct 270

Purpose of 38 USCS § 3405 [now 38 USCS § 5905] was to prevent unscrupulous persons

Since any agent or attorney, or any other person, was liable under predecessor to 38 USCS
§ 5905 for withholding from pensioner any part of his pension, it was not necessary to show that
defendant was regular attorney for pensioner. United States v Schindler (1880, CCD NY) 18
Blatchf 227, 10 F 547

Predecessor to 38 USCS § 5905 was not limited to persons who are recognized or known to
Commissioner of Pensions [now Secretary of Veterans Affairs] as attorneys or agents of
applicants for pensions. Caverly v Robbins (1889) 149 Mass 16, 20 NE 450

4. Offenses relating to fees
If excessive fee was paid by applicant's father, and in no manner affected property interests
of applicant himself, there was no offense. Welty v United States (1924, CA6 Ohio) 2 F.2d 562,
3 Ohio L Abs 544
To constitute crime it was not essential that excessive charge be received pursuant to promise by, or understanding with, beneficiary, or as result of demand by defendant. Lopez v United States (1926, CA1 Puerto Rico) 17 F.2d 462

Demand for fee greater than statute allowed could be made by suit as well as by word of mouth or other form of demand. Purvis v United States (1932, CA8 Ark) 61 F.2d 992

State court judgment directing payment of fee to attorney who handled claim of veteran was not judicial determination of legality of fee precluding prosecution. Smith v United States (1936, CA8 Ark) 83 F.2d 631

In prosecution for receiving excessive fee, it was good defense that fee also included services in clearing charge of desertion. United States v Snow (1877, CCED Tenn) 2 Flip 1, 27 F Cas 1255, No 16350

Attorney acted unprofessionally by attempting to secure fee from client through improper contract and by engaging in inappropriate efforts to collect attorneys' fees, warranting public reprimand. In re McCarty (1997) 10 Vet App 192

5. Offenses relating to withholding of recovery

It is immaterial whether pension was obtained, or whether excessive sum was taken from particular pension money received. Frisbie v United States (1895) 157 US 160, 39 L Ed 657, 15 S Ct 586

Word "withholding" contemplated not fraudulent obtaining of money from pensioner, but withholding of money before it reached pensioner's hands. Ballew v United States (1895) 160 US 187, 40 L Ed 388, 16 S Ct 263

Attorney was not liable for withholding funds sufficient to pay for other professional services rendered for pensioner. United States v Hewitt (1882, DC NJ) 11 F 243

Attorney who received pensioner's check and cashed it by endorsing her name upon it and appropriated money to his own use was guilty of "withholding" when he subsequently refused to pay check. United States v Ryckman (1882, DC Tenn) 12 F 46

6. Sufficiency of indictment

Indictment charging defendant with withholding "pay" and "bounty" was not offense. United States v Benecke (1879) 98 US 447, 8 Otto 447, 25 L Ed 192

It was sufficient to allege that defendant was engaged in prosecuting claim for pension; his regular profession was immaterial. Frisbie v United States (1895) 157 US 160, 39 L Ed 657, 15 S Ct 586

Indictment was not defective because it did not state what kind of war risk insurance was involved. Lucas v United States (1935, CA5 Tex) 80 F.2d 372, cert den (1936) 297 US 709, 80 L Ed 996, 56 S Ct 502

Descriptive allegations of indictment charging defendant with having received larger compensation for prosecuting pension claim than allowed by law was sufficient where defendant knew what he was charged with. Perry v United States (1936, CA5 Fla) 84 F.2d 567

Indictment following words of predecessor to 38 USCS § 5905 was sufficient. United States v Wilson (1886, DC Mass) 29 F 286

7. Evidence

Letters of attorney for veteran showing acknowledgment of guilt by attorney in violation of predecessor to 38 USCS § 5905 and attempt on attorney's behalf to evade consequences were admissible. Negron v United States (1929, CA1 Puerto Rico) 30 F.2d 584

Complaint filed in state court was admissible as evidence of demand for excessive fee under predecessor to 38 USCS § 5905. Purvis v United States (1932, CA8 Ark) 61 F.2d 992

It was enough to support conviction for government to show that excessive fee was solicited, contracted, charged, or received for assistance, whether or not such assistance was ever in fact
rendered in preparation and execution of necessary papers in any application to Veterans' Administration [now Department of Veterans Affairs]. Sanchez v United States (1943, CA1 Puerto Rico) 134 F.2d 279, cert den (1943) 319 US 768, 87 L Ed 1717, 63 S Ct 1325

Government showing that defendant sold piece of property to pensioner at value largely in excess of its real value, as mere trick, by which he obtained more than legal fee, was competent evidence. United States v Koch (1884, CCD Mo) 21 F 873

8. Jury instructions

Instruction that it was necessary to establish that defendant was agent or instrumental in prosecution of claim, and that he withheld from pensioner some part of pension that was allowed was proper. Humes v United States (1898) 170 US 210, 42 L Ed 1011, 18 S Ct 602

CHAPTER 61. PENAL AND FORFEITURE PROVISIONS

§ 6101. Misappropriation by fiduciaries
§ 6102. Fraudulent acceptance of payments
§ 6103. Forfeiture for fraud
§ 6104. Forfeiture for treason
§ 6105. Forfeiture for subversive activities
§ 6106. Misuse of benefits by fiduciaries
§ 6107. Reissuance of benefits
§ 6108. Authority for judicial orders of restitution

Amendments:
1991. Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 402(b) of such Act (see Table II preceding 38 USCS § 101).

§ 6101. Misappropriation by fiduciaries

(a) Whoever, being a fiduciary (as defined in section 5506 of this title [38 USCS § 5506]) for the benefit of a minor, incompetent, or other beneficiary under laws administered by the Secretary, shall lend, borrow, pledge, hypothecate, use, or exchange for other funds or property, except as authorized by law, or embezzle or in any manner misappropriate any such money or property derived therefrom in whole or in part and coming into such fiduciary's control in any manner whatever in the execution of such fiduciary's trust, or under color of such fiduciary's office or service as such fiduciary, shall be fined in accordance with title 18, or imprisoned not more than five years, or both.

(b) Any willful neglect or refusal to make and file proper accountings or reports concerning such money or property as required by law shall be taken to be sufficient evidence prima facie of such embezzlement or misappropriation.

Amendments:
1986. Act Oct. 28, 1986, in subsec. (a), substituted "a claimant's" for "his" following "claimant or", and "such fiduciary's" for "his" wherever appearing.
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3501, as 38 USCS § 6101.

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (a), substituted "in accordance with title 18" for "not more than 2,000".

Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing.


2004. Act Dec. 10, 2004 (effective 7/1/2005, pursuant to § 507(a) of such Act, which appears as 38 USCS § 5312 note), in subsec. (a), substituted "fiduciary (as defined in section 5506 of this title) for the benefit of a minor, incompetent, or other beneficiary under laws administered by the Secretary," for "guardian, curator, conservator, committee, or person legally vested with the responsibility or care of a claimant or a claimant's estate, or any other person having charge and custody in a fiduciary capacity of money heretofore or hereafter paid under any of the laws administered by the Secretary for the benefit of any minor, incompetent, or other beneficiary."

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:14, 15

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 44
1. Generally
2. Pledge of property
3. Mens rea
4. Statute of limitations
5. Collateral penalties

1. Generally
Upon payment of money to guardian, title passes from United States to veteran; and denunciation of embezzlement by guardians is not inconsistent with such view. Spicer v Smith (1933) 288 US 430, 77 L Ed 875, 53 S Ct 415, 84 ALR 1525

Administrator of home in which veteran no longer resided after VA check on his behalf was sent to and cashed by home was properly considered to be fiduciary even though administrator did not personally sign agreement with VA with respect to veteran United States v Zyskind (1997, CA2 NY) 118 F.3d 113

Representative payee of child receiving benefits cannot knowingly and wilfully convert payments to any use other than for use and benefit of child beneficiary without being subject to misdemeanor under 38 USCS § 3501 [now 38 USCS § 6101]; thus, state department concerned with Aid to Dependent Children may not require representative payee to use benefits for other members of child's family and state regulations which considered that children who applied for Aid have available to them all governmental income received by another child in same household conflicted with controlling Federal policy. Howard v Madigan (1973, DC SD) 363 F Supp 351

2. Pledge of property
Under predecessor to 38 USCS § 6101, "pledging" consisted of encumbering property so as to make unavailable for veteran’s support so much of it as must answer loan. United States v Lewis (1947, CA2 NY) 161 F.2d 683
3. Mens rea

Prosecution must prove criminal intent although not specified in statute; mere negligence will not support embezzlement conviction. United States v Strickland (1975, CA5 Ala) 509 F.2d 273 (criticized in United States v Upton (1996, CA5 Tex) 91 F.3d 677, 41 CCF ¶ 76965)

4. Statute of limitations

Prosecution for pledging securities commenced within three years from date of transfer but more than three years after original pledge was barred by statute of limitations. United States v Lewis (1947, CA2 NY) 161 F.2d 683

5. Collateral penalties

Attorney guilty of misappropriation of funds paid by Veterans' Administration [now Department of Veterans Affairs] was subject to disbarment. Re Mantell (1928) 225 App Div 5, 232 NYS 336; Re Lewis (1945) 269 App Div 432, 55 NYS2d 774, application den 272 App Div 1015, 74 NYS2d 926 and motion den (1st Dept) 10 App Div 2d 915, 203 NYS2d 1006, app den (1st Dept) 11 App Div 2d 670, 203 NYS2d 1006 and motion dismd 8 NY2d 1024, 206 NYS2d 793, 170 NE2d 213. In re Dillard (1956) 48 Wash 2d 376, 293 P2d 761

§ 6102. Fraudulent acceptance of payments

(a) Any person entitled to monetary benefits under any of the laws administered by the Secretary whose right to payment thereof ceases upon the happening of any contingency, who thereafter fraudulently accepts any such payment, shall be fined in accordance with Title 18, or imprisoned not more than one year, or both.

(b) Whoever obtains or receives any money or check under any of the laws administered by the Secretary without being entitled to it, and with intent to defraud the United States or any beneficiary of the United States, shall be fined in accordance with Title 18, or imprisoned not more than one year, or both.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3502, as 38 USCS § 6102.

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsecs. (a) and (b), substituted "in accordance with title 18" for "not more than 2,000".

Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 41

§ 6103. Forfeiture for fraud

(a) Whoever knowingly makes or causes to be made or conspires, combines, aids, or assists in, agrees to, arranges for, or in any way procures the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, concerning any claim for benefits under any of the laws administered by the Secretary (except laws pertaining to insurance benefits) shall forfeit all rights, claims, and benefits.
under all laws administered by the Secretary (except laws pertaining to insurance benefits).

(b) Whenever a veteran entitled to disability compensation has forfeited the right to such compensation under this section, the compensation payable but for the forfeiture shall thereafter be paid to the veteran's spouse, children, and parents. Payments made to a spouse, children, and parents under the preceding sentence shall not exceed the amounts payable to each if the veteran had died from service-connected disability. No spouse, child, or parent who participated in the fraud for which forfeiture was imposed shall receive any payment by reason of this subsection. An apportionment award under this subsection may not be made in any case after September 1, 1959.

(c) Forfeiture of benefits by a veteran shall not prohibit payment of the burial allowance, death compensation, dependency and indemnity compensation, or death pension in the event of the veteran's death.

(d) (1) After September 1, 1959, no forfeiture of benefits may be imposed under this section or section 6104 of this title [38 USCS § 6104] upon any individual who was a resident of, or domiciled in, a State at the time the act or acts occurred on account of which benefits would, but for this subsection, be forfeited unless such individual ceases to be a resident of, or domiciled in, a State before the expiration of the period during which criminal prosecution could be instituted. This subsection shall not apply with respect to (A), any forfeiture occurring before September 1, 1959, or (B) an act or acts which occurred in the Philippine Islands before July 4, 1946.

(2) The Secretary is hereby authorized and directed to review all cases in which, because of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, a forfeiture of gratuitous benefits under laws administered by the Secretary was imposed, pursuant to this section or prior provisions of law, on or before September 1, 1959. In any such case in which the Secretary determines that the forfeiture would not have been imposed under the provisions of this section in effect after September 1, 1959, the Secretary shall remit the forfeiture, effective June 30, 1972. Benefits to which the individual concerned becomes eligible by virtue of any such remission may be awarded, upon application therefor, and the effective date of any award of compensation, dependency and indemnity compensation, or pension made in such a case shall be fixed in accordance with the provisions of section 5110(g) of this title [38 USCS § 5110(g)].

Amendments:

1959. Act Sept. 1, 1959 added subsecs. (d) and (e).


1972. Act June 30, 1972 (effective 6/30/72, as provided by § 301(c) of such Act, which appears as 38 USCS § 3713 note), in subsec. (d), designated existing matter as para. (1), and added para. (2).

1983. Act Nov. 21, 1983, in subsec. (b), substituted "the" for "his" following "has forfeited", substituted "the veteran's spouse" for "his wife", and substituted "spouse" for "wife" wherever it appears.
1986. Act Oct. 28, 1986, in subsec. (c), substituted "the veteran's" for "his"; and in subsec. (d)(2) substituted "the Administrator" for "he" wherever appearing.

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3503, as 38 USCS § 6103, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (b), added "An apportionment award under this subsection may not be made in any case after September 1, 1959."; and deleted subsec. (e), which read: "No appointment award under subsection (b) of this section shall be made in any case after the date of enactment of this subsection."

Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

1994. Act Nov. 2, 1994, in subsec. (d), in para. (1), substituted "(A)" and "(B)" for "(a)" and "(b)”, respectively, and substituted "before" for "prior to", and in para. (2), substituted "June 30, 1972" for "the date of enactment of this amendatory Act".

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:7

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 33
1. Generally
2. Administrative determination of basis for forfeiture
3. Collateral challenge to forfeiture
4. Judicial review of forfeiture
5. Circumstances modifying forfeiture of rights
6. Recovery of forfeited funds by United States

1. Generally
Veteran who is mentally incompetent is not capable of perpetrating fraud. United States v Cathcard (1946, DC Neb) 70 F Supp 653

2. Administrative determination of basis for forfeiture
Determination of fraud upon which Administrator [now Secretary] acts retroactively to recover overpayments from veterans in case of fraud was not of conclusive nature. Hines v United States (1939) 70 App DC 206, 105 F.2d 85

Forfeiture, when determined by administrative officer charged with its enforcement, was not affected by fact that prosecution to enforce other penalties was not instituted. (1932) 37 Op Atty Gen 23

Appellant's newly submitted evidence relating to death of her cohabitant could not change outcome of forfeiture of her rights to DIC benefits because it actually supported finding that she lied to VA; therefore, BVA did not err in refusing to reopen her claim. Reyes v Brown (1994) 7 Vet App 113

3. Collateral challenge to forfeiture

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Action could not be maintained by plaintiff, whose benefits had been forfeited for alleged fraud, for a declaration that the forfeiture was void. Milliken v Gleason (1964, CA1 RI) 332 F.2d 122, cert den (1965) 379 US 1002, 13 L Ed 2d 703, 85 S Ct 723

4. Judicial review of forfeiture

Under predecessor to statute forfeitures based upon vitiating fraud concerning any claim for benefits might have been administratively determined, but ample and substantial grounds dictated congressional intention that veteran's service-connected disability compensation was not to be forfeited by virtue of unreviewable decision in agency that veteran was guilty of so serious offense as treason or rendering assistance to enemy in time of war. Wellman v Whittier (1958, App DC) 104 US App DC 6, 259 F.2d 163 (superseded by statute as stated in Carter v Cleland (1980, App DC) 207 US App DC 6, 643 F.2d 1) and (superseded by statute as stated in Gott v Walters (1985, App DC) 244 US App DC 193, 756 F.2d 902) and (superseded by statute as stated in Marozsan v United States (1988, CA7 Ind) 852 F.2d 1469)

Decision of Board of Veterans' Appeal that veteran knowingly made false writing concerning his claim and therefore forfeited all his rights was not subject to judicial review. Di Silvestro v United States Veterans Admin. (1957, DC NY) 151 F Supp 337

VA benefits recipient or claimant who has been subject of final decision declaring forfeiture of eligibility for VA benefits pursuant to 38 USCS § 6103 may have final decision reopened upon presentation of new and material evidence or revised based on finding of clear and unmistakable error in original forfeiture decision. Trilles v West (2000) 13 Vet App 314, 2000 US App Vet Claims LEXIS 100

5. Circumstances modifying forfeiture of rights

Widow whose violation of predecessor to 38 USCS § 6103 later repealed worked forfeiture of rights, but who thereafter contracted marriage to another veteran was entitled to benefits from latter marriage since such marriage had so changed her status that she had lost her identity as person who forfeited rights to benefits under such acts. 1936 ADVA 385

Forfeiture under former 38 USC § 715 as widow of one veteran is not bar to payment of death compensation as mother of another serviceman when such rights were based on service subsequent to forfeiture. 1953 ADVA 933

One who pleaded guilty and was pardoned unconditionally, was entitled to benefits from date of pardon and prior to commission of offense. (1930) 36 Op Atty Gen 193

6. Recovery of forfeited funds by United States

United States was entitled to recover amount of pension checks from veteran's widow and corporation which cashed them, where at time she received them as unremarried widow she was in fact common-law wife of another, and so known to be by corporation. United States v Michaelson (1945, DC Minn) 58 F Supp 796

Compensation money in estate of deceased veteran forfeited under former 38 USC § 555 was not to be distributed to other heirs, but rather was to be retained and conserved to United States as direct consequence of imposition of forfeiture. 1936 ADVA 364

§ 6104. Forfeiture for treason

(a) Any person shown by evidence satisfactory to the Secretary to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies shall forfeit all accrued or future gratuitous benefits under laws administered by the Secretary.

(b) The Secretary, in the Secretary's discretion, may apportion and pay any part of benefits forfeited under subsection (a) to the dependents of the person forfeiting such
benefits. No dependent of any person shall receive benefits by reason of this subsection in excess of the amount to which the dependent would be entitled if such person were dead.

(c) In the case of any forfeiture under this section there shall be no authority after September 1, 1959 (1) to make an apportionment award pursuant to subsection (b) or (2) to make an award to any person of gratuitous benefits based on any period of military, naval, or air service commencing before the date of commission of the offense.

Amendments:
1969. Act June 11, 1969, in subsec. (c), substituted "September 1, 1959" for "the date of enactment of this subsection".
1982. Act Oct. 12, 1982, in subsec. (a), inserted "to" preceding "be guilty".
1986. Act Oct. 28, 1986, in subsec. (b), substituted "the Administrator's" for "his" and "the dependent" for "he" respectively.
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3504, as 38 USCS § 6104.

Such Act further substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

Code of Federal Regulations
Department of Veterans Affairs-Adjudication, 38 CFR Part 3

Cross References
This section is referred to in 38 USCS § 6103

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 33
1. Generally
2. Construction
3. Determination and enforcement

1. Generally
38 USCS § 3504 [now 38 USCS § 6104] was within constitutional power of Congress, and was not invalid as bill of attainder on theory that it was penal and imposed punishment. Thompson v Gleason (1962, App DC) 115 US App DC 201, 317 F.2d 901 (superseded by statute as stated in Carter v Cleland (1980, App DC) 207 US App DC 6, 643 F.2d 1) and (superseded by statute as stated in Gott v Walters (1985, App DC) 244 US App DC 193, 756 F.2d 902) and (superseded by statute as stated in Marozsan v United States (1988, CA7 Ind) 852 F.2d 1469); Thompson v Whittier (1960, DC Dist Col) 185 F Supp 306, app dismd (1961) 365 US 465, 5 L Ed 2d 704, 81 S Ct 712

2. Construction
Strict interpretation necessary to such drastic predecessor forfeiture statute required that it be limited to specific grounds spelled out by Congress, with clear proof of overt acts relied on. Wellman v Whittier (1958, App DC) 104 US App DC 6, 259 F.2d 163 (superseded by statute as
stated in Carter v Cleland (1980, App DC) 207 US App DC 6, 643 F.2d 1) and (superseded by statute as stated in Gott v Walters (1985, App DC) 244 US App DC 193, 756 F.2d 902) and (superseded by statute as stated in Marozsan v United States (1988, CA7 Ind) 852 F.2d 1469)

The phrase "rendering assistance to an enemy of the United States" in 38 USCS § 3504 [now 38 USCS § 6104] meant any act defined by Congress as a crime and which indeed rendered assistance to an enemy. Thompson v Gleason (1962, App DC) 115 US App DC 201, 317 F.2d 901 (superseded by statute as stated in Carter v Cleland (1980, App DC) 207 US App DC 6, 643 F.2d 1) and (superseded by statute as stated in Gott v Walters (1985, App DC) 244 US App DC 193, 756 F.2d 902) and (superseded by statute as stated in Marozsan v United States (1988, CA7 Ind) 852 F.2d 1469)

Veterans' Judicial Review Act did not change meaning of "evidence satisfactory to Secretary" clause, in view of plenary grant of right of judicial review of Board decisions adverse to veterans and other claimants to veterans benefits; if court is to have discretion to allow appeal in forfeiture cases, such power must be specifically granted, and court is unwilling to read into § 6104 such limitation on right of appeal where Board orders or sustains forfeiture. Tulingan v Brown (1996) 9 Vet App 484, affd (1998, CA FC) 152 F.3d 943, reported in full (1998, CA FC) 1998 US App LEXIS 4389 and (ovrd by Trilles v West (2000) 13 Vet App 314, 2000 US App Vet Claims LEXIS 100)

3. Determination and enforcement

Question of whether veteran rendered assistance to enemy of United States by his writings and speeches favorable to Communist cause during Korean Conflict was to be determined in first instance by Administrator [now Secretary] of Veterans Affairs. Thompson v Gleason (1962, App DC) 115 US App DC 201, 317 F.2d 901 (superseded by statute as stated in Carter v Cleland (1980, App DC) 207 US App DC 6, 643 F.2d 1) and (superseded by statute as stated in Gott v Walters (1985, App DC) 244 US App DC 193, 756 F.2d 902) and (superseded by statute as stated in Marozsan v United States (1988, CA7 Ind) 852 F.2d 1469)

Administrator [now Secretary] of Veterans Affairs was not entitled to determine forfeiture under former 38 USC § 728 of Naval Pension Allowance payable pursuant to former §§ 229 and 230 since such Naval Pension was not payment under law administered by Veterans Administration [now Department of Veterans Affairs]. 1953 ADVA 931

Board failed to give adequate reasons for its determination that its prior decisions decisions holding veteran was disloyal to U.S. during Japanese occupation of Philippines did not involve obvious error; Board did not discuss conflicting documents in record from Army regarding its determination of loyalty question. Lizaso v Brown (1993) 5 Vet App 380

Widow's claim for revocation of forfeiture of benefits will be reviewed as claim to reopen rather than original claim since regulation requires that in case where forfeiture was made for treason or subversive activities (38 USCS §§ 6104, 6105), issues involved in survivor's claim for death benefits will be decided with regard to prior dispositions of those issues. Jandoc v Brown (1996) 8 Vet App 476

Board provided insufficient reasons for its finding that appellant had forfeited his right to veterans benefits due to his membership in Bureau of Constabulary in Philippines during World War II, since it did not cite any statute or regulation to support its statement that BC service, per se, constitutes rendering assistance to enemy, and "VA recognition" of BC as having been part of Japanese occupying forces did not constitute competent evidence to support finding. Macarubbo v Gober (1997) 10 Vet App 388

§ 6105. Forfeiture for subversive activities

(a) Any individual who is convicted after September 1, 1959, of any offense listed in subsection (b) of this section shall, from and after the date of commission of such offense, have no right to gratuitous benefits (including the right to burial in a national cemetery)
under laws administered by the Secretary based on periods of military, naval, or air
service commencing before the date of the commission of such offense and no other
person shall be entitled to such benefits on account of such individual. After receipt of
notice of the return of an indictment for such an offense the Secretary shall suspend
payment of such gratuitous benefits pending disposition of the criminal proceedings. If
any individual whose right to benefits has been terminated pursuant to this section is
granted a pardon of the offense by the President of the United States, the right to such
benefits shall be restored as of the date of such pardon.

(b) The offenses referred to in subsection (a) of this section are those offenses for which
punishment is prescribed in--

(1) sections 894, 904, and 906 of title 10 [10 USCS §§ 894, 904, and 906] (articles 94,
104, and 106 of the Uniform Code of Military Justice);

(2) sections 175, 229, 792, 793, 794, 798, 831, 1091, 2332a, 2332b, 2381, 2382, 2383,
2384, 2385, 2387, 2388, 2389, 2390, and chapter 105 of title 18 [18 USCS §§ 175,
229, 792, 793, 794, 798, 831, 1091, 2332a, 2332b, 2381, 2382, 2383, 2384, 2385,
2387, 2388, 2389, 2390, and 2151 et seq.];

(3) sections 222, 223, 224, 225, and 226 of the Atomic Energy Act of 1954 (42 U.S.C.
2272, 2273, 2274, 2275, and 2276); and


(c) The Secretary of Defense or the Secretary of Homeland Security, as appropriate, shall
notify the Secretary in each case in which an individual is convicted of an offense listed
in paragraph (1) of subsection (b). The Attorney General shall notify the Secretary in
each case in which an individual is indicted or convicted of an offense listed in paragraph
(2), (3), or (4) of subsection (b).

Amendments:

1971. Act Sept. 25, 1971 substituted new subsec. (b)(4) for one which read: "in the following
sections of the Internal Security Act of 1950: sections 4, 112, and 113.".

1973. Act June 18, 1973 (effective 6/18/73, as provided by § 10(a) of such Act, which
appears as 38 USCS § 2400 note), in subsec. (a), inserted "(including the right to burial in a
national cemetery)".

enactment of this section"; and substituted subsec. (b) for one which read: "The offenses
referred to in subsection (a) of this section are those offenses for which punishment is
prescribed (1) in the following provisions of title 18, United States Code: sections 792, 793,
794, 798, 2381, 2382, 2383, 2384, 2385, 2387, 2388, 2389, 2390, and chapter 105; (2) in the
Uniform Code of Military Justice, articles 94, 104, and 106; (3) in the following sections of the
Atomic Energy Act of 1954: sections 222, 223, 224, 225, and 226; and (4) in section 4 of the
Internal Security Act of 1950."

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 3505, as 38 USCS §
6105.

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act
May 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (c), substituted "clauses
(2)," for "clauses (1),", "Secretary of Transportation, as" for "Secretary of the Treasury, as
may be", and "clause (1) of that subsection" for "clause (2) of subsection (b) of this section".

Act Aug. 6, 1991, in subsec. (a), substituted "Secretary" for "Veterans' Administration".
Such Act further substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, and, in subsec. (c), substituted "Secretary" for "Administrator" wherever appearing.

1994. Act Nov. 2, 1994, in subsec. (c), substituted "paragraph (2), (3), or (4) of subsection (b)" for "clauses (2), (3), or (4) of subsection (b) of this section" and "paragraph (1) of subsection (b)" for "clause (1) of that subsection", and reversed the order of the first two sentences in the subsection.

2002. Act Nov. 25, 2002 (effective on 3/1/2003 pursuant to § 1704(g) of such Act, which appears as 10 USCS § 101 note), in subsec. (c), substituted "of Homeland Security" for "of Transportation".

2003. Act Dec. 16, 2003 (applicable as provided by § 705(b) of such Act, which appears as a note to this section), in subsec. (b)(2), inserted "175, 229" and "831, 1091, 2332a, 2332b,".

Other provisions:


Cross References

This section is referred to in 38 USCS § 2402

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws §§ 33, 140

§ 6106. Misuse of benefits by fiduciaries

(a) Fee forfeiture in case of benefit misuse by fiduciaries. A fiduciary may not collect a fee from a beneficiary for any month with respect to which the Secretary or a court of competent jurisdiction has determined that the fiduciary misused all or part of the individual's benefit, and any amount so collected by the fiduciary as a fee for such month shall be treated as a misused part of the individual's benefit.

(b) Misuse of benefits defined. For purposes of this chapter [38 USCS §§ 6101 et seq.], misuse of benefits by a fiduciary occurs in any case in which the fiduciary receives payment, under any of laws administered by the Secretary, for the use and benefit of a beneficiary and uses such payment, or any part thereof, for a use other than for the use and benefit of such beneficiary or that beneficiary's dependents. Retention by a fiduciary of an amount of a benefit payment as a fiduciary fee or commission, or as attorney's fees (including expenses) and court costs, if authorized by the Secretary or a court of competent jurisdiction, shall be considered to be for the use or benefit of such beneficiary.

(c) Regulations. The Secretary may prescribe by regulation the meaning of the term "use and benefit" for purposes of this section.

Other provisions:

Application of section. This section applies with respect to any determinations by the Secretary of Veterans Affairs made after December 10, 2004, of misuse of funds by a
§ 6107. Reissuance of benefits

(a) Negligent failure by Secretary.
   (1) In any case in which the negligent failure of the Secretary to investigate or monitor a fiduciary results in misuse of benefits by the fiduciary, the Secretary shall pay to the beneficiary or the beneficiary's successor fiduciary an amount equal to the amount of benefits that were so misused.
   (2) There shall be considered to have been a negligent failure by the Secretary to investigate and monitor a fiduciary in the following cases:
      (A) A case in which the Secretary failed to review a fiduciary's accounting within 60 days of the date on which that accounting is scheduled for review.
      (B) A case in which the Secretary was notified of allegations of misuse, but failed to act within 60 days of the date of such notification to terminate the fiduciary.
      (C) In any other case in which actual negligence is shown.

(b) Reissuance of misused benefits in other cases.
   (1) In any case in which a fiduciary described in paragraph (2) misuses all or part of an individual's benefit paid to such fiduciary, the Secretary shall pay to the beneficiary or the beneficiary's successor fiduciary an amount equal to the amount of such benefit so misused.
   (2) Paragraph (1) applies to a fiduciary that:
      (A) is not an individual; or
      (B) is an individual who, for any month during a period when misuse occurs, serves 10 or more individuals who are beneficiaries under this title.
   (3) In any other case in which the Secretary obtains recoupment from a fiduciary who has misused benefits, the Secretary shall promptly remit payment of the recouped amounts to the beneficiary or the beneficiary's successor fiduciary as the case may be.

(c) Limitation on total amount paid. The total of the amounts paid to a beneficiary (or a beneficiary's successor fiduciary) under this section may not exceed the total benefit amount misused by the fiduciary with respect to that beneficiary.

(d) Recoupment of amounts reissued. In any case in which the Secretary reissues a benefit payment (in whole or in part) under subsection (a) or (b), the Secretary shall make a good faith effort to obtain recoupment from the fiduciary to whom the payment was originally made.

Other provisions:

Application of section. This section applies with respect to any determinations by the Secretary of Veterans Affairs made after December 10, 2004, of misuse of funds by a fiduciary, pursuant to § 507(b)(2) of Act Dec. 10, 2004, P. L. 108-454, which appears as 38 USCS § 5312 note.

§ 6108. Authority for judicial orders of restitution [Caution: This section takes effect on July 1, 2005, pursuant to § 507(a) of Act Dec. 10, 2004, P. L. 108-454, which appears as 38 USCS § 5312 note.]
(a) Any Federal court, when sentencing a defendant convicted of an offense arising from
the misuse of benefits under this title, may order, in addition to or in lieu of any other
penalty authorized by law, that the defendant make restitution to the Department.

(b) Sections 3612, 3663, and 3664 of title 18 [18 USCS §§ 3612, 3663, and 3664] shall
apply with respect to the issuance and enforcement of orders of restitution under
subsection (a). In so applying those sections, the Department shall be considered the
victim.

(c) If the court does not order restitution, or orders only partial restitution, under
subsection (a), the court shall state on the record the reasons therefor.

(d) Amounts received in connection with misuse by a fiduciary of funds paid as benefits
under laws administered by the Secretary shall be paid to the individual whose benefits
were misused. If the Secretary has previously reissued the misused benefits, the amounts
shall be treated in the same manner as overpayments recouped by the Secretary and shall
be deposited to the credit of the applicable revolving fund, trust fund, or appropriation.

Effective date of section:
This section takes effect on July 1, 2005, pursuant to § 507(a) of Act Dec. 10, 2004, P. L.
108-454, which appears as 38 USCS § 5312 note.

CHAPTER 63. OUTREACH ACTIVITIES

§ 6301. Purpose; definitions
§ 6302. Biennial plan
§ 6303. Outreach services
§ 6304. Veterans assistance offices
§ 6305. Outstationing of counseling and outreach personnel
§ 6306. Use of other agencies
§ 6307. Outreach for eligible dependents
§ 6308. Biennial report to Congress

Amendments:
heading and chapter analysis.

§ 6301. Purpose; definitions

(a) Purpose. The Congress declares that--
(1) the outreach services program authorized by this chapter [38 USCS §§ 6301 et
seq.] is for the purpose of ensuring that all veterans (especially those who have been
recently discharged or released from active military, naval, or air service and those
who are eligible for readjustment or other benefits and services under laws
administered by the Department) are provided timely and appropriate assistance to
aid and encourage them in applying for and obtaining such benefits and services in
order that they may achieve a rapid social and economic readjustment to civilian life
and obtain a higher standard of living for themselves and their dependents; and
(2) the outreach services program authorized by this chapter [38 USCS §§ 6301 et seq.] is for the purpose of charging the Department with the affirmative duty of seeking out eligible veterans and eligible dependents and providing them with such services.

(b) **Definitions.** For the purposes of this chapter [38 USCS §§ 6301 et seq.]-
   (1) the term "other governmental programs" includes all programs under State or local laws as well as all programs under Federal law other than those authorized by this title; and
   (2) the term "eligible dependent" means a spouse, surviving spouse, child, or dependent parent of a person who served in the active military, naval, or air service.

§ 6302. **Biennial plan**

(a) **Biennial plan required.** The Secretary shall, during the first nine months of every odd-numbered year, prepare a biennial plan for the outreach activities of the Department for the two-fiscal-year period beginning on October 1 of that year.

(b) **Elements.** Each biennial plan under subsection (a) shall include the following:
   (1) Plans for efforts to identify eligible veterans and eligible dependents who are not enrolled or registered with the Department for benefits or services under the programs administered by the Secretary.
   (2) Plans for informing eligible veterans and eligible dependents of modifications of the benefits and services under the programs administered by the Secretary, including eligibility for medical and nursing care and services.

(c) **Coordination in development.** In developing the biennial plan under subsection (a), the Secretary shall consult with the following:
   (1) Directors or other appropriate officials of organizations approved by the Secretary under section 5902 of this title [38 USCS § 5902].
   (2) Directors or other appropriate officials of State and local education and training programs.
   (3) Representatives of nongovernmental organizations that carry out veterans outreach programs.
   (4) Representatives of State and local veterans employment organizations.
   (5) Other individuals and organizations that the Secretary considers appropriate.

§ 6303. **Outreach services**

(a) **Requirement to provide services.** In carrying out the purposes of this chapter [38 USCS §§ 6301 et seq.], the Secretary shall provide the outreach services specified in subsections (b) through (d). In areas where a significant number of eligible veterans and eligible dependents speak a language other than English as their principal language, such services shall, to the maximum feasible extent, be provided in the principal language of such persons.

(b) **Individual notice to new veterans.** The Secretary shall by letter advise each veteran at the time of the veteran's discharge or release from active military, naval, or air service (or as soon as possible after such discharge or release) of all benefits and services
under laws administered by the Department for which the veteran may be eligible. In carrying out this subsection, the Secretary shall ensure, through the use of veteran-student services under section 3485 of this title [38 USCS § 3485], that contact, in person or by telephone, is made with those veterans who, on the basis of their military service records, do not have a high school education or equivalent at the time of discharge or release.

(c) **Distribution of information.**

(1) The Secretary--

(A) shall distribute full information to eligible veterans and eligible dependents regarding all benefits and services to which they may be entitled under laws administered by the Secretary; and

(B) may, to the extent feasible, distribute information on other governmental programs (including manpower and training programs) which the Secretary determines would be beneficial to veterans.

(2) Whenever a veteran or dependent first applies for any benefit under laws administered by the Secretary (including a request for burial or related benefits or an application for life insurance proceeds), the Secretary shall provide to the veteran or dependent information concerning benefits and health care services under programs administered by the Secretary. Such information shall be provided not later than three months after the date of such application.

(d) **Provision of aid and assistance.** The Secretary shall provide, to the maximum extent possible, aid and assistance (including personal interviews) to members of the Armed Forces, veterans, and eligible dependents with respect to subsections (b) and (c) and in the preparation and presentation of claims under laws administered by the Department.

(e) **Assignment of employees.** In carrying out this section, the Secretary shall assign such employees as the Secretary considers appropriate to conduct outreach programs and provide outreach services for homeless veterans. Such outreach services may include site visits through which homeless veterans can be identified and provided assistance in obtaining benefits and services that may be available to them.

§ 6304. **Veterans assistance offices**

(a) **In general.** The Secretary shall establish and maintain veterans assistance offices at such places throughout the United States and its territories and possessions, and in the Commonwealth of Puerto Rico, as the Secretary determines to be necessary to carry out the purposes of this chapter [38 USCS §§ 6301 et seq.]. The Secretary may maintain such offices on such military installations located elsewhere as the Secretary, after consultation with the Secretary of Defense and taking into account recommendations, if any, of the Secretary of Labor, determines to be necessary to carry out such purposes.

(b) **Location of offices.** In establishing and maintaining such offices, the Secretary shall give due regard to--

(1) the geographical distribution of veterans recently discharged or released from active military, naval, or air service;

(2) the special needs of educationally disadvantaged veterans (including their need for accessibility of outreach services); and
(3) the necessity of providing appropriate outreach services in less populated areas.

§ 6305. Outstationing of counseling and outreach personnel

The Secretary may station employees of the Department at locations other than Department offices, including educational institutions, to provide--

(1) counseling and other assistance regarding benefits under this title to veterans and other persons eligible for benefits under this title; and

(2) outreach services under this chapter [38 USCS §§ 6301 et seq.].

§ 6306. Use of other agencies

(a) In carrying out this chapter [38 USCS §§ 6301 et seq.], the Secretary shall arrange with the Secretary of Labor for the State employment service to match the particular qualifications of an eligible veteran or eligible dependent with an appropriate job or job training opportunity, including, where possible, arrangements for outstationing the State employment personnel who provide such assistance at appropriate facilities of the Department.

(b) In carrying out this chapter [38 USCS §§ 6301 et seq.], the Secretary shall, in consultation with the Secretary of Labor, actively seek to promote the development and establishment of employment opportunities, training opportunities, and other opportunities for veterans, with particular emphasis on the needs of veterans with service-connected disabilities and other eligible veterans, taking into account applicable rates of unemployment and the employment emphases set forth in chapter 42 of this title [38 USCS §§ 4211 et seq.].

(c) In carrying out this chapter [38 USCS §§ 6301 et seq.], the Secretary shall cooperate with and use the services of any Federal department or agency or any State or local governmental agency or recognized national or other organization.

(d) In carrying out this chapter [38 USCS §§ 6301 et seq.], the Secretary shall, where appropriate, make referrals to any Federal department or agency or State or local governmental unit or recognized national or other organization.

(e) In carrying out this chapter [38 USCS §§ 6301 et seq.], the Secretary may furnish available space and office facilities for the use of authorized representatives of such governmental unit or other organization providing services.

(f) In carrying out this chapter [38 USCS §§ 6301 et seq.], the Secretary shall conduct and provide for studies, in consultation with appropriate Federal departments and agencies, to determine the most effective program design to carry out the purposes of this chapter [38 USCS §§ 6301 et seq.].

§ 6307. Outreach for eligible dependents

(a) Needs of dependents. In carrying out this chapter [38 USCS §§ 6301 et seq.], the Secretary shall ensure that the needs of eligible dependents are fully addressed.

(b) Information as to availability of outreach services for dependents. The Secretary shall ensure that the availability of outreach services and assistance for eligible
dependents under this chapter [38 USCS §§ 6301 et seq.] is made known through a
variety of means, including the Internet, announcements in veterans publications, and
announcements to the media.

§ 6308. Biennial report to Congress

(a) Report required. The Secretary shall, not later than December 1 of every
even-numbered year (beginning in 2008), submit to Congress a report on the outreach
activities carried out by the Department.

(b) Content. Each report under this section shall include the following:
(1) A description of the implementation during the preceding fiscal year of the current
biennial plan under section 6302 of this title [38 USCS § 6302].
(2) Recommendations for the improvement or more effective administration of the
outreach activities of the Department.

PART V. BOARDS, ADMINISTRATIONS, AND SERVICES

CHAPTER 71. BOARD OF VETERANS' APPEALS
CHAPTER 72. UNITED STATES COURT OF APPEALS FOR VETERANS
CLAIMS
CHAPTER 73. VETERANS HEALTH ADMINISTRATION-ORGANIZATION
AND FUNCTIONS
CHAPTER 74. VETERANS HEALTH ADMINISTRATION-PERSONNEL
CHAPTER 76. HEALTH PROFESSIONALS EDUCATIONAL ASSISTANCE
PROGRAM
CHAPTER 77. VETERANS BENEFITS ADMINISTRATION
CHAPTER 78. VETERANS' CANTEEN SERVICE

Amendments:
76.
Act Nov. 18, 1988, P. L. 100-687, Title III, § 301(b), 102 Stat. 4121, added item 72.
of this Part by amending the section numbers in accordance with the redesignations made by
§ 402(b) of such Act (see Table II preceding 38 USCS § 101).
Act May 7, 1991, P. L. 102-40, Title IV, § 403(e)(1), 105 Stat. 240, amended the heading of
Part V by substituting "PART V. BOARDS, ADMINISTRATIONS, AND SERVICES" for "PART
V. BOARDS AND DEPARTMENTS".
Act May 7, 1991, P. L. 102-40, Title IV, § 403(f)(2), 105 Stat. 241, substituted items 73 and
74 for items 73 and 75, which read:
"73. Department of Medicine and Surgery . . . . . . . . . . . . . . . . . . . . . . 4101" and
"75. Veterans’ Canteen Service . . . . . . . . . . . . . . . . . . . . . 4201", respectively,
and added item 78.
"United States" before "Court of Veterans Appeals".

CHAPTER 71.  BOARD OF VETERANS' APPEALS

§ 7101. Composition of Board of Veterans' Appeals
§ 7101A. Members of Board: appointment; pay; performance review
§ 7102. Assignment of members of Board
§ 7103. Reconsideration; correction of obvious errors
§ 7104. Jurisdiction of the Board
§ 7105. Filing of notice of disagreement and appeal
§ 7105A. Simultaneously contested claims
§ 7106. Administrative appeals
§ 7107. Appeals: dockets; hearings
§ 7108. Rejection of applications
§ 7109. Independent medical opinions
   [§ 7110. Repealed]
§ 7111. Revision of decisions on grounds of clear and unmistakable error
§ 7112. Expedited treatment of remanded claims

Amendments:

1962. Act Sept. 19, 1962, P. L. 87-666, § 2, 76 Stat. 554, amended the analysis of this chapter by substituting items 4005, 4005A, 4006, and 4007 for former items 4005-4007 which read:

"4005. Applications for review on appeal.
"4006. Docketing of appeals.
"4007. Simultaneously contested claims.".


1991. Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239, amended the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 402(b) of such Act (see Table II preceding 38 USCS § 101).

1994. Act July 1, 1994, P. L. 103-271, §§ 6(b), 7(a)(2), (b)(3), 108 Stat. 742, 743, amended the analysis of this chapter by substituting items 7103 and 7107 for ones which read "7103. Determinations by the Board." and "7107. Docketing of appeals.", and by deleting item 7110, which read "7110. Traveling sections.".
Act Nov. 2, 1994, P. L. 103-446, Title II, § 201(a)(2), 108 Stat. 4656, amended the analysis of this chapter by adding item 7101A.


§ 7101. Composition of Board of Veterans' Appeals
(a) There is in the Department a Board of Veterans' Appeals (hereinafter in this chapter [38 USCS §§ 7101 et seq.] referred to as the "Board"). The Board is under the administrative control and supervision of a chairman directly responsible to the Secretary. The Board shall consist of a Chairman, a Vice Chairman, and such number of members as may be found necessary in order to conduct hearings and dispose of appeals properly before the Board in a timely manner. The Board shall have such other professional, administrative, clerical, and stenographic personnel as are necessary in conducting hearings and considering and disposing of appeals properly before the Board. The Board shall have sufficient personnel under the preceding sentence to enable the Board to conduct hearings and consider and dispose of appeals properly before the Board in a timely manner.

(b) (1) The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, for a term of six years. The Chairman shall be subject to the same ethical and legal limitations and restrictions concerning involvement in political activities as apply to judges of the United States Court of Appeals for Veterans Claims.

(2) The Chairman may be removed by the President for misconduct, inefficiency, neglect of duty, or engaging in the practice of law or for physical or mental disability which, in the opinion of the President, prevents the proper execution of the Chairman's duties. The Chairman may not be removed from office by the President on any other grounds. Any such removal may only be made after notice and opportunity for hearing.

(3) The Chairman may be appointed under this subsection to more than one term. If, upon the expiration of the term of office for which the Chairman was appointed, the position of Chairman would become vacant, the individual serving as Chairman may, with the approval of the Secretary, continue to serve as Chairman until either appointed to another term or a successor is appointed, but not beyond the end of the Congress during which the term of office expired.

(4) The Secretary shall designate one member of the Board as Vice Chairman. The Vice Chairman shall perform such functions as the Chairman may specify. Such member shall serve as Vice Chairman at the pleasure of the Secretary.

(c) (1) (A) The Chairman may from time to time designate one or more employees of the Department to serve as acting members of the Board. Except as provided in subparagraph (B), any such designation shall be for a period not to exceed 90 days, as determined by the Chairman.

(B) An individual designated as an acting member of the Board may continue to serve as an acting member of the Board in the making of any determination on a proceeding for which the individual was designated as an acting member of the Board, notwithstanding the termination of the period of designation of the individual as an acting member of the Board under subparagraph (A) or (C).

(C) An individual may not serve as an acting member of the Board for more than 270 days during any one-year period.

(D) At no time may the number of acting members exceed 20 percent of the total of the number of Board members and acting Board members combined.
(2) In each annual report to the Congress under section 529 of this title [38 USCS § 529], the Secretary shall provide detailed descriptions of the activities undertaken and plans made in the fiscal year for which the report is made with respect to the authority provided by paragraph (1) of this subsection. In each such report, the Secretary shall indicate, in terms of full-time employee equivalents, the number of acting members of the Board designated under such paragraph (1) during the year for which the report is made.

(d) (1) After the end of each fiscal year, the Chairman shall prepare a report on the activities of the Board during that fiscal year and the projected activities of the Board for the fiscal year during which the report is prepared and the next fiscal year. Such report shall be included in the documents providing detailed information on the budget for the Department that the Secretary submits to the Congress in conjunction with the President's budget submission for any fiscal year pursuant to section 1105 of title 31 [31 USCS § 1105].

(2) Each such report shall include, with respect to the preceding fiscal year, information specifying--
   (A) the number of cases appealed to the Board during that year;
   (B) the number of cases pending before the Board at the beginning and at the end of that year;
   (C) the number of such cases which were filed during each of the 36 months preceding the current fiscal year;
   (D) the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the preceding fiscal year;
   (E) the number of members of the Board at the end of the year and the number of professional, administrative, clerical, stenographic, and other personnel employed by the Board at the end of the preceding fiscal year; and
   (F) the number of employees of the Department designated under subsection (c)(1) to serve as acting members of the Board during that year and the number of cases in which each such member participated during that year.

(3) The projections in each such report for the current fiscal year and for the next fiscal year shall include (for each such year)--
   (A) an estimate of the number of cases to be appealed to the Board; and
   (B) an evaluation of the ability of the Board (based on existing and projected personnel levels) to ensure timely disposition of such appeals as required by section 7101(a) of this title [38 USCS § 7101(a)].

(e) A performance incentive that is authorized by law for officers and employees of the Federal Government may be awarded to a member of the Board (including an acting member) by reason of that member's service on the Board only if the Chairman of the Board determines that such member should be awarded that incentive. A determination by the Chairman for such purpose shall be made taking into consideration the quality of performance of the Board member.

Amendments:

1984. Act March 2, 1984, in subsec. (a), substituted "65" for "fifty", and deleted "associate" following "(not more than 65) of"; and added subsec. (c).
1988. Act Nov. 18, 1988 (effective on enactment as provided by § 401(c) of such Act, which appears as 38 USCS § 7251 note) added subsecs. (d) and (e).

Such Act further (effective 2/1/89 as provided by § 401(b) of such Act, which appears as 38 USCS § 7251 note) substituted subsec. (b) for one which read: "Members of the Board (including the Chairman and Vice Chairman) shall be appointed by the Administrator with the approval of the President."

Such Act further (effective 1/1/89 as provided by § 401(d) of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), deleted "and" following "Vice Chairman," , substituted "necessary in order to conduct hearings and dispose of appeals properly before the Board in a timely manner. The Board shall have" for "necessary, and", and added the sentence beginning "The Board shall have . . . ."

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4001, as 38 USCS § 7101, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (a), substituted "There is" for "There shall be" and ". The Board is under the" for "under the".

Act Aug. 6, 1991, in para. (c)(3), substituted "section 529" for "section 214".

Such Act further substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

1994. Act July 1, 1994, in subsec. (a), deleted "(not more than 65)" following "such number"; in subsec. (b), in para. (1), inserted "The Chairman shall be subject to the same ethical and legal limitations and restrictions concerning involvement in political activities as apply to judges of the United States Court of Veterans Appeals."; in subsec. (c), substituted para. (1) for one which read: "(1) Subject to paragraph (2) of this subsection, the Chairman may from time to time designate employees of the Department to serve as temporary members of the Board. Any such designation shall be for a period of not to exceed one year, as determined by the Chairman. An individual may not serve as a temporary member of the Board for more than 24 months during any 48-month period.", deleted para. (2), which read: "(2) Designation under paragraph (1) of this subsection of an individual as a temporary member of the Board may not be made when there are fewer than 65 members of the Board.", redesignated para (3) as new para (2) and, in para. (2) as so redesignated, substituted "the number of acting members of the Board designated under such paragraph (1) during the year for which the report is made." for "the number of temporary Board members designated under this subsection and the number of acting Board members designated under section 7102(a)(2)(A)(ii) of this title during the year for which the report is made."; in subsec. (d), in para. (2), in subpara. (D), deleted "and" following the concluding semicolon, in subpara. (E) substituted ";" for a concluding period, and added subpara. (F), in para. (3)(B), substituted "section 7101(a)" for "section 7103(d)"; and, in subsec. (e), substituted "an" for "a temporary or".

Act Nov. 2, 1994, in subsec. (b), deleted para. (2), which read:

"(2) The other members of the Board (including the Vice Chairman) shall be appointed by the Secretary, with the approval of the President, based upon recommendations of the Chairman. Each such member shall be appointed for a term of nine years.

"(B) A member of the Board (other than the Chairman) may be removed by the Secretary upon the recommendation of the Chairman. In the case of a removal that would be covered by section 7521 of title 5 in the case of an administrative law judge, a removal of a member of the Board under this paragraph shall be carried out subject to the same requirements as apply to removal of an administrative law judge under that section. Section 554(a)(2) of title 5 shall not apply to a removal action under this subparagraph. In
such a removal action, a member shall have the rights set out in section 7513(b) of such title.

designated as new para. (2) the sentences in para. (1) beginning "The Chairman may be removed . . .", "The Chairman may not be removed . . .", and "Any such removal . . .", and, in para. (3), substituted "The Chairman" for "Members (including the Chairman)", and added the sentence beginning "If, upon the expiration of the term . . .".

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsec. (b)(1), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".


Other provisions:

Transition to new Board. Act Nov. 18, 1988, P. L. 100-687, Div A, Title II, § 201(c), (d), 102 Stat. 4109, effective on enactment as provided by § 401(c) of such Act, which appears as 38 USCS § 7251 note, provides:

"(c) Transition to new board.(1) Appointments of members of the Board of Veterans' Appeals under subsection (b)(2) of section 4001 [now section 7101] of title 38, United States Code (as amended by subsection (a)), may not be made until a Chairman is appointed under subsection (b)(1) of that section.

"(2) An individual who is serving as a member of the Board on the date of the enactment of this Act may continue to serve as a member until the earlier of--

"(A) the date on which the individual's successor (as designated by the Administrator) is appointed under subsection (b)(2) of that section, or

"(B) the end of the 180-day period beginning on the day after the date on which the Chairman is appointed under subsection (b)(1) of such section.

"(d) Initial terms of office. Notwithstanding the second sentence of section 4001(b)(2) [now section 7101(b)(2)] of title 38, United States Code (as amended by subsection (a)), specifying the term for which members of the Board of Veterans' Appeals shall be appointed, of the members first appointed under that section--

"(A) 22 shall be appointed for a term of three years;

"(B) 22 shall be appointed for a term of six years; and

"(C) 22 shall be appointed for a term of nine years,

as determined by the Administrator at the time of the initial appointments.".

Code of Federal Regulations

Department of Veterans Affairs-Board of Veterans' Appeals: Appeals regulations, 38 CFR Part 19

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws §§ 9, 162

Forms:

24A Am Jur Pl & Pr Forms (1999), Veterans and Veterans' Laws, §§ 19, 26

Law Review Articles:
Discussion and Analysis in the Veterans Benefits Manual

§ 7101A. Members of Board: appointment; pay; performance review

(a) (1) The members of the Board of Veterans' Appeals other than the Chairman (and including the Vice Chairman) shall be appointed by the Secretary, with the approval of the President, based upon recommendations of the Chairman.

(2) Each member of the Board shall be a member in good standing of the bar of a State.

(b) Members of the Board (other than the Chairman and any member of the Board who is a member of the Senior Executive Service) shall, in accordance with regulations prescribed by the Secretary, be paid basic pay at rates equivalent to the rates payable under section 5372 of title 5 [5 USCS § 5372].

(c) (1) (A) The Chairman shall establish a panel to review the performance of members of the Board. The panel shall be comprised of the Chairman and two other members of the Board (other than the Vice Chairman). The Chairman shall periodically rotate membership on the panel so as to ensure that each member of the Board (other than the Vice Chairman) serves as a member of the panel for and within a reasonable period.

(B) Not less than one year after the job performance standards under subsection (f) are initially established, and not less often than once every three years thereafter, the performance review panel shall determine, with respect to each member of the Board (other than the Chairman or a member who is a member of the Senior Executive Service), whether that member's job performance as a member of the Board meets the performance standards for a member of the Board established under subsection (f). Each such determination shall be in writing.

(2) If the determination of the performance review panel in any case is that the member's job performance as a member of the Board meets the performance standards for a member of the Board established under subsection (f), the Chairman shall recertify the member's appointment as a member of the Board.

(3) If the determination of the performance review panel in any case is that the member's job performance does not meet the performance standards for a member of the Board established under subsection (f), the Chairman shall, based upon the individual circumstances, either--

(A) grant the member a conditional recertification; or

(B) recommend to the Secretary that the member be noncertified.

(4) In the case of a member of the Board who is granted a conditional recertification under paragraph (3)(A) or (5)(A), the performance review panel shall review the member's job performance record and make a further determination under paragraph (1) concerning that member not later than one year after the date of the conditional recertification. If the determination of the performance review panel at that time is that the member's job performance as a member of the Board still does not meet the
performance standards for a member of the Board established under subsection (f), the Chairman shall recommend to the Secretary that the member be noncertified. (5) In a case in which the Chairman recommends to the Secretary under paragraph (3) or (4) that a member be noncertified, the Secretary, after considering the recommendation of the Chairman, may either--

(A) grant the member a conditional recertification; or
(B) determine that the member should be noncertified.

(d) (1) If the Secretary, based upon the recommendation of the Chairman, determines that a member of the Board should be noncertified, that member's appointment as a member of the Board shall be terminated and that member shall be removed from the Board.

(2) (A) Upon removal from the Board under paragraph (1) of a member of the Board who before appointment to the Board served as an attorney in the civil service, the Secretary shall appoint that member to an attorney position at the Board, if the removed member so requests. If the removed member served in an attorney position at the Board immediately before appointment to the Board, appointment to an attorney position under this paragraph shall be in the grade and step held by the removed member immediately before such appointment to the Board.

(B) The Secretary is not required to make an appointment to an attorney position under this paragraph if the Secretary determines that the member of the Board removed under paragraph (1) is not qualified for the position.

(e) (1) A member of the Board (other than the Chairman or a member of the Senior Executive Service) may be removed as a member of the Board by reason of job performance only as provided in subsections (c) and (d). Such a member may be removed by the Secretary, upon the recommendation of the Chairman, for any other reason as determined by the Secretary.

(2) In the case of a removal of a member under this section for a reason other than job performance that would be covered by section 7521 of title 5 [5 USCS § 7521] in the case of an administrative law judge, the removal of the member of the Board shall be carried out subject to the same requirements as apply to removal of an administrative law judge under that section. Section 554(a)(2) of title 5 [5 USCS § 554(a)(2)] shall not apply to a removal action under this subsection. In such a removal action, a member shall have the rights set out in section 7513(b) of that title [5 USCS § 7513(b)].

(f) The Chairman, subject to the approval of the Secretary, shall establish standards for the performance of the job of a member of the Board (other than the Chairman or a member of the Senior Executive Service). Those standards shall establish objective and fair criteria for evaluation of the job performance of a member of the Board.

(g) The Secretary shall prescribe procedures for the administration of this section, including deadlines and time schedules for different actions under this section.

Amendments:

1998. Act Nov. 11, 1998, in subsec. (a), designated the existing provisions as para. (1), and added para. (2); and, in subsec. (d), substituted para. (2) for one which read: "(2) Upon removal from the Board under paragraph (1), a member of the Board (other than the Chairman) who was a career or career-conditional employee in the civil service before
commencement of service as a member of the Board shall revert to the civil service grade and series held by the member immediately before the appointment of the member to the Board.

Other provisions:

Effect of Nov. 2, 1994 amendments upon existing rate of pay of members of Board. Act Nov. 2, 1994, P. L. 103-446, Title II, § 201(b), 108 Stat. 4656, provides: "The rate of basic pay payable to an individual who is a member of the Board of Veterans' Appeals on the date of the enactment of this Act may not be reduced by reason of the amendments made by this section [adding this section] to a rate below the rate payable to such individual on the day before such date."

Effective date of subsec. (b). Act Nov. 2, 1994, P. L. 103-446, Title II, § 201(c), 108 Stat. 4657, provides: "Section 7101A(b) of title 38, United States Code, as added by subsection (a), shall take effect on the first day of the first pay period beginning after December 31, 1994."

Deadline for establishment of job performance standards for members of Board; report to Congress. Act Nov. 2, 1994, P. L. 103-446, Title II, § 202, 108 Stat. 4657, provides:

"(a) Deadline. The job performance standards required to be established by section 7101A(f) of title 38, United States Code, as added by section 201(a), shall be established not later than 90 days after the date of the enactment of this Act.

"(b) Submission to Congressional Committees. Not later than the date on which the standards referred to in subsection (a) take effect, the Secretary of Veterans Affairs shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report describing the standards established by the Chairman of the Board of Veterans' Appeals."

§ 7102. Assignment of members of Board

(a) A proceeding instituted before the Board may be assigned to an individual member of the Board or to a panel of not less than three members of the Board. A member or panel assigned a proceeding shall make a determination thereon, including any motion filed in connection therewith. The member or panel, as the case may be, shall make a report under section 7104(d) of this title [38 USCS § 7104(d)] on any such determination, which report shall constitute the final disposition of the proceeding by the member or panel.

(b) A proceeding may not be assigned to the Chairman as an individual member. The Chairman may participate in a proceeding assigned to a panel or in a reconsideration assigned to a panel of members.

Amendments:

1984. Act March 2, 1984 inserted the subsection designators (a) through (c); in subsec. (a) as so designated, designated the first sentence as para. (1) and substituted para. (2) for the second sentence, which read: "If a section as a result of a vacancy or absence or inability of a member assigned thereto to serve thereon is composed of a number of members less than designated for the section, the Chairman may assign other members to the section or direct the section to proceed with the transaction of business without awaiting any additional assignment of members thereto.", and added para. (3); and, in subsec. (b) as so designated, deleted "associate" preceding "member" in two places.
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4002, as 38 USCS § 7102, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing.

1994. Act July 1, 1994, substituted this section for one which read:

"(a)(1) The Chairman may from time to time divide the Board into sections of three members, assign the members of the Board thereto, and designate the chief thereof.

"(2)(A) If a section is composed of fewer than three members as a result of the absence of a member or a vacancy on the Board or the inability of a member assigned to a section to serve on that section, the Chairman--

"(i) may assign another member of the Board to the section;

"(ii) may designate an employee of the Department to serve as an acting member of the Board on such section for a period of not to exceed 90 days, as determined by the Chairman; or

"(iii) may direct the section to proceed with the transaction of business without awaiting the assignment of an additional member to the section.

"(B) An individual may not serve as an acting member of the Board for more than 270 days during any 12-month period.

"(3) A section of the Board may not at any time have among its members more than one individual who is a temporary member designated under section 7101(c) of this title or an acting member designated under paragraph (2)(A)(ii) of this subsection.

"(b) A hearing docket shall be maintained and formal recorded hearings shall be held by such member or members as the Chairman may designate, the member or members being of the section which will make final determination in the claim.

"(c) A section of the Board shall make a determination on any proceeding instituted before the Board and on any motion in connection therewith assigned to such section by the Chairman and shall make a report of any such determination, which report shall constitute its final disposition of the proceeding."

Cross References

This section is referred to in 38 USCS § 7103

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 163

§ 7103. Reconsideration; correction of obvious errors

From Discussion and Analysis in the Veterans Benefits Manual

(a) The decision of the Board determining a matter under section 7102 of this title [38 USCS § 7102] is final unless the Chairman orders reconsideration of the decision in accordance with subsection (b). Such an order may be made on the Chairman's initiative or upon motion of the claimant.

(b) (1) Upon the order of the Chairman for reconsideration of the decision in a case, the case shall be referred--
(A) in the case of a matter originally heard by a single member of the Board, to a panel of not less than three members of the Board; or
(B) in the case of a matter originally heard by a panel of members of the Board, to an enlarged panel of the Board.

(2) A panel referred to in paragraph (1) may not include the member, or any member of the panel, that made the decision subject to reconsideration.

(3) A panel reconsidering a case under this subsection shall render its decision after reviewing the entire record before the Board. The decision of the panel shall be made by a majority vote of the members of the panel. The decision of the panel shall constitute the final decision of the Board.

(c) The Board on its own motion may correct an obvious error in the record, without regard to whether there has been a motion or order for reconsideration.

Amendments:

1988. Act Nov. 18, 1988 (effective 1/1/89 as provided by § 401(d) of such Act, which appears as 38 USCS § 7251 note) substituted this section for one which read:

"(a) The determination of the section, when unanimously concurred in by the members of the section shall be the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned reach a contrary conclusion.

"(b) When there is a disagreement among the members of the section the concurrence of the Chairman with the majority of members of such section shall constitute the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned reach a contrary conclusion.".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4003, as 38 USCS § 7103.

1994 Act July 1, 1994, substituted this section for one which read:

"§ 7103. Determinations by the Board

"(a) Decisions by a section of the Board shall be made by a majority of the members of the section. The decision of the section is final unless the Chairman orders reconsideration of the case.

"(b) If the Chairman orders reconsideration in a case, the case shall upon reconsideration be heard by an expanded section of the Board. When a case is heard by an expanded section of the Board after such a motion for reconsideration, the decision of a majority of the members of the expanded section shall constitute the final decision of the Board.

"(c) Notwithstanding subsections (a) and (b) of this section, the Board on its own motion may correct an obvious error in the record.".

Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References
This section is referred to in 38 USCS § 7107

Research Guide

Federal Procedure:
1. Generally

Decision of U.S. Board of Veterans Appeals was considered final decision when reconsideration was not pursued by Chairman of Board or by veteran. Hayslip v Principi (2004, CA FC) 364 F.3d 1321

Failure by Board of Veterans' Appeals to consider presumptive eligibility in its initial decision did not create "incomplete adjudication" that left veteran's claim open; under 38 USCS §§ 7104 and 7103, finality attached once claim for benefits was disallowed, not when particular theory was rejected. Bingham v Nicholson (2005, CA FC) 421 F.3d 1346

Veteran's petition for writ of mandamus would be denied where petitioner did not file motion for reconsideration of BVA decision on remand and thus failed to exhaust administrative remedies available to him. Herrmann v Brown (1995) 8 Vet App 60

Petitioner was not entitled to extraordinary relief in nature of writ of mandamus from Board of Veterans' Appeals order under All Writs Act, 28 USCS § 1651, because he had neither shown clear and indisputable right to writ, nor exhausted his administrative remedies, as petitioner could file request for reconsideration with Board under 38 USCS § 7103, or he could appeal subsequent regional office decision, and further, petitioner's claim was moving through Veterans Affairs claims appellate process. O'Branovic v Nicholson (2005) 19 Vet App 81, 2005 US App Vet Claims LEXIS 144

2. Obvious error

Board failed to give adequate reasons for its determination that its prior decisions holding veteran was disloyal to U.S. during Japanese occupation of Philippines did not involve obvious error; Board did not discuss conflicting documents in record from Army regarding its determination of loyalty question. Lizaso v Brown (1993) 5 Vet App 380

3. Change in controlling law

Where intervening change in controlling law is clear, BVA should enter disposition which is consistent with current case law, rather than file motion to recall and clarify Court's previous mandate or decision. Goble v Brown (1996) 9 Vet App 22

§ 7104. Jurisdiction of the Board

(a) All questions in a matter which under section 511(a) of this title [38 USCS § 511(a)] is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

(b) Except as provided in section 5108 of this title [38 USCS § 5108], when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.
(c) The Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.

(d) Each decision of the Board shall include--
   (1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record; and
   (2) an order granting appropriate relief or denying relief.

(e) (1) After reaching a decision on a case, the Board shall promptly mail a copy of its written decision to the claimant at the last known address of the claimant.
   (2) If the claimant has an authorized representative, the Board shall--
      (A) mail a copy of its written decision to the authorized representative at the last known address of the authorized representative; or
      (B) send a copy of its written decision to the authorized representative by any means reasonably likely to provide the authorized representative with a copy of the decision within the same time a copy would be expected to reach the authorized representative if sent by first-class mail.

Amendments:

1961. Act July 20, 1961 (effective 1/1/62, as provided by § 2 of such Act, which appears as a note to this section) added subsec. (d).

1988. Act Nov. 18, 1988 (effective 1/1/89 as provided by § 401(d) of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), added the sentences beginning "The Board shall . . ." and "Decisions of the Board shall be . . ."; and substituted subsecs. (d) and (e) for former subsec. (d), which read: "(d) The decisions of the Board shall be in writing and shall contain findings of fact and conclusions of law separately stated.".

Such Act further (effective 9/1/89 as provided by § 401(a) of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), substituted "All questions in a matter which under 211(a) of this title is subject to decision by the Administrator" for "All questions on claims involving benefits under the laws administered by the Veterans' Administration".

Such Act further (effective 9/1/89 as provided by § 301 of Act Aug. 16, 1989, P. L. 101-94 (see note to this section)) substituted subsec. (b) for one which read: "(b) When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered; however, where subsequent to disallowance of a claim, new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision."

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4004, as 38 USCS § 7104, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act June 13, 1991 (effective 11/18/88 as provided by § 14(g)(2) of such Act), amending Act Nov. 18, 1988, in subsec. (a) in effect at that time, inserted "the" preceding "laws administered by the Veterans' Administration".

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Such Act further, in subsec. (c), substituted "chief legal officer of the Department" for "chief law officer".

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1994. Act July 1, 1994, in subsec. (a), deleted "The Board shall decide any such appeal only after affording the claimant an opportunity for a hearing." following "made by the Board.", and substituted "511(a)" for "211(a)".

1996. Act Oct. 9, 1996 substituted subsec. (e) for one which read: "(e) After reaching a decision in a case, the Board shall promptly mail a copy of its written decision to the claimant and the claimant's authorized representative (if any) at the last known address of the claimant and at the last known address of such representative (if any).".

Other provisions:


Code of Federal Regulations
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Cross References
This section is referred to in 38 USCS §§ 7102, 7266

Research Guide

Federal Procedure:

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 163, 165, 166

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I. IN GENERAL

1. Generally

Appeals from decisions by adjudication division on matters of basic eligibility, such as those enumerated in regulations governing guarantee on home loans, are within jurisdiction of Board of Veterans Appeals. 1945 ADVA 618

BVA failed to address whether eligibility for fee-basis outpatient services is question of eligibility for outpatient treatment within scope of its jurisdiction and, if so, why it did not have jurisdiction; issue was particularly relevant since 38 USCS § 1703 provides for fee-basis medical services, § 1712 authorizes fee-basis medical services to be provided on outpatient basis, and § 1701 defines medical services to include treatment. Webb v Brown (1994) 7 Vet App 122

Whenever claimant protests adverse determination with regard to timeliness of notice of disagreement (NOD), appropriate action is for Department of Veterans Affairs regional office (RO) to issue statement of case on that issue; RO's determination that NOD was not timely filed is appealable issue. Marsh v Nicholson (2005) 19 Vet App 381, 2005 US App Vet Claims LEXIS 734

2. Statement of claim

Board's failure to construe appellant's Form 1-9 so as to have raised compensation and pension issues was in contradiction of its regulation mandating liberal construction of such forms and thus a violation of statute. Myers v Derwinski (1991) 1 Vet App 127

Veteran's medical record showing that his arthritic condition might be secondary to his service-connected disabilities constituted new and material evidence which Board should have considered; Board is not limited to issues specifically mentioned in appellant's VA Form 1-9 appeal but must consider entire evidence of record in making its decision. Giglio v Derwinski (1992) 2 Vet App 560

3. Reopening of claim

Board did not exceed its authority by discussing Iowa criminal statute establishing blood alcohol level as conclusive proof of illegal intoxication for person operating motor vehicle, in denying veteran's claim for benefits for injuries incurred in automobile accident on grounds that injuries were caused by his own willful misconduct and therefore not in line of duty, since Board did not adopt Iowa state law, but merely considered it as one factor in defining willful misconduct in applicable federal regulation. Yeoman v West (1998, CA FC) 140 F.3d 1443

Court of Appeals for Veterans Claims erred in holding that veteran is foreclosed under 38 USCS § 7104(b) from raising clear and unmistakable error claim with regard to 1947 regional office rating decision since 1984 and 1991 decisions of Board of Veterans Appeals did not subsume 1947 rating as neither decision addressed veteran's instant claim that 1945 rating tables should have been used to determine proper rating of injuries. Brown v West (2000, CA FC) 203 F.3d 1378

Even if veteran appeals only ultimate question of entitlement to benefits, 38 USCS § 511(a) and 38 USCS § 7104(a) authorize Board of Veterans' Appeals to make final decision on behalf of Secretary regarding whether new and material evidence has been presented by veteran;
although regional office determined veteran had presented new and material evidence to warrant reopening of claim, Board did not err in ruling that veteran had failed to present new and material evidence, even though veteran only appealed regional office's determination that disability was not service connected. Jackson v Principi (2001, CA FC) 265 F.3d 1366

Board should not have reopened claim where it found that evidence submitted was duplicative. Kehoskie v Derwinski (1991) 2 Vet App 31

Physician's diagnosis of severe traumatic arthritis was improperly rejected by Board as not constituting new and material evidence since basis for rejection was simply unsubstantiated medical conclusion that residuals of such severe injury would have been clinically manifested at earlier time. Godwin v Derwinski (1991) 1 Vet App 419

Where claim has been reopened Board must supply reasons or bases for its findings, but this obligation is not satisfied by adopting findings which are based upon inadequate reasons or bases. Oppenheimer v Derwinski (1991) 1 Vet App 370

Board did not err in holding that evidence submitted since its decision was not new and material where much of it had already been considered and evidence not previously submitted pertained to unrelated medical problems and therefore was not material. Garland v Derwinski (1991) 1 Vet App 250

Board's decision failed to contain statement of reasons or bases to support its assertion that evidence received since its earlier decision had not served to alter factual basis in it. Smith v Derwinski (1991) 1 Vet App 235

Physician's statements did not attribute cause of veteran's death to any of three conditions for which service connection was established, hence could not create reasonable probability of changing outcome of prior decision that veteran's service-connected conditions did not contribute to his death, thus were not material for purposes of reopening claim. Deese v Derwinski (1992) 2 Vet App 637

Appeal would not be reconsidered where plausible basis existed for Board's decision and appellant provided no compelling reasons for reconsidering that holding. Gonzales-Soto v Principi (1992) 3 Vet App 527

Reconsideration of decision dismissing appeal for lack of jurisdiction due to untimely NOA would be granted upon absence of evidence that appellant's representative had actually received copy of decision appealed. Thompson v Brown (1995) 8 Vet App 430

Duplicate service medical records are not new and material evidence sufficient to reopen claim. Wilkins v Brown (1996) 8 Vet App 555

Board's determination that evidence was not new for purpose of reopening claim pursuant to 38 USCS § 5108, 38 USCS § 7104(b), and 38 USCS § 7105(c) is affirmed where, since last final disallowance, newly presented evidence was merely cumulative of other evidence previously presented and veteran's statements concerning claimed onset of disease was mere recitation of accounts made elsewhere Vargas-Gonzalez v West (1999) 12 Vet App 321, 1999 US App Vet Claims LEXIS 174

Where reopening of veteran's claim due to new and material evidence would not have resulted in earlier effective date for veteran's award of rating of total disability based on individual unemployability (TDIU), and veteran's appeal was not predicated upon clear and unmistakable error (CUE), decision of Board of Veterans' Appeals (BVA) denying earlier effective date was affirmed. Leonard v Principi (2004) 17 Vet App 447, 2004 US App Vet Claims LEXIS 81, affd (2005, CA FC) 2005 US App LEXIS 7407

4. Appellate review

On petition for review of certain regulations promulgated by Secretary of United States Department of Veterans Affairs (Secretary) filed by veterans organizations, 38 C.F.R. § 19.9(a)(2), in conjunction with 38 C.F.R. § 20.1304, was invalid because it was inconsistent with requirement of 38 USCS § 7104(a) that all questions in matter which was subject to decision by Secretary under 38 USCS § 511(a) should be subject to one review on appeal to Secretary, 38 C.F.R. §
19.9(a)(2)(ii) was invalid because it was contrary to 38 USCS § 5103(b), which provided claimant one year to submit evidence, but remaining challenged provisions were not arbitrary, capricious, or contrary to law under 5 USCS § 706(2)(A) because 38 C.F.R. § 19.31 did not conflict with 38 C.F.R. § 3.103, 38 C.F.R. § 20.903 was not contrary to 38 USCS § 5103, and 38 C.F.R. § 20.1304's requirement for good cause and ninety-day response period does not conflict with 38 USCS § 5103's notice and time limitations. Disabled Am. Veterans v Sec'y of Veterans Affairs (2003, CA FC) 327 F.3d 1339

Court of Appeals for Federal Circuit had no jurisdiction to consider veteran's claim that Court of Appeals for Veterans Claims should have remanded his case to Board of Veterans' Appeals to consider informed consent form as evidence in veteran's claim for benefits under 38 USCS § 1151(a) due to injuries sustained following surgery performed by Department of Veterans Affairs surgeons; to decide issue, Federal Circuit would have been required to review Veterans Court's application of law, i.e., 38 USCS § 7104(d)(1), to facts and failure to consider consent form, and 38 USCS § 7292(d)(2) precluded Federal Circuit's review of factual determinations and applications of law to facts where no constitutional issues were involved. Cook v Principi (2003, CA FC) 353 F.3d 937

Court of Appeals for Veterans Claims properly determined that it lacked jurisdiction over claimant's appeal of Board of Veterans' Appeals remand order because Board's remand was not "decision" within meaning of 38 USCS §§ 7252(a) and 7104(d) where it contained no order granting or denying relief; moreover, claimant's contention that Board's refusal to address his arguments should be reviewed as decision of Board was without merit because Veterans' Court's jurisdiction was premised on and defined by Board's decision concerning matter that was being appealed, and when Board had not rendered decision on particular issue, Veterans' Court had no jurisdiction to consider it under 38 USCS § 7252(a). Kirkpatrick v Nicholson (2005, CA FC) 417 F.3d 1361

38 CFR § 20.901(a) was not contrary to appellate function of Board of Veterans Appeals and "one review on appeal" requirement of 38 USCS § 7104(a) because 38 USCS § 7109 created necessary exception to "one review on appeal" rule; Congress enacted 38 USCS § 7109 upon assumption expressed in statutory text-that Board had authority to procure internal Department of Veterans Affairs medical opinion-and legislative history showed that Congress, in enacting § 7109, contemplated that departmental medical opinions would be secured by Board. DAV v Sec'y of Veterans Affairs (2005, CA FC) 419 F.3d 1317

DVA's correction of appellant's individual retirement record to exclude special pay was not reviewable by Board or OPM for purposes of determining whether he was entitled to waiver of overpayment under 5 USCS § 8346. Bacani v Office of Personnel Management (1994, MSPB) 64 MSPR 588, dismd (1995, CA FC) 56 F.3d 79, reported in full (1995, CA FC) 1995 US App LEXIS 11969

Form 1-9 hearing before personnel in field office is not action from which petitioner may file notice of disagreement and thus obtain jurisdiction before Veterans Court; since field office is acting in appellate role, it is no longer agency of original jurisdiction so that any written disagreement with that decision is not valid notice of disagreement and therefore cannot provide statutory basis for Veterans Court jurisdiction. Strott v Derwinski (1992, CA) 964 F.2d 1124, app dismd (1992, Vet App) 1992 US Vet App LEXIS 306, app dismd (1992) 3 Vet App 258

Court lacked jurisdiction to review final decision of Board rendered prior to Veterans' Judicial Review Act's effective date since it was subject to prior law which included statutory bar to judicial review of BVA decisions. Robie v Derwinski (1991) 1 Vet App 612

Appeal filed approximately 130 days after Board's decision was timely where Board's decision was sent to regional office for distribution instead of directly to appellant's representative as required by 38 USCS § 7104. Trammell v Brown (1994) 6 Vet App 181, remanded (1995, Vet App) 1995 US Vet App LEXIS 347 and (superseded by statute as stated in Dippel v West (1999) 12 Vet App 466, 1999 US App Vet Claims LEXIS 611)

RO's decision on appellant's back claim should have been automatically returned to Board for further appellate processing since RO, on remand, awarded 10 percent rating and effective date...
of March 8, 1991, but rating schedule provided for ratings higher than 10 percent for intervertebral disc disease and earlier effective date and had previously been sought by veteran while his claim was on appeal to Board. Holland v Brown (1996) 9 Vet App 324

Claimant for veterans benefits submission of postmark-stamped certified-mail receipt was accepted as evidence of timely mailing of notice of appeal, where envelope in which original notice was mailed was lost. Evans v Principi (2003) 17 Vet App 443, 2003 US App Vet Claims LEXIS 168, remanded (2004, US) 2004 US App Vet Claims LEXIS 379

Petitioner did not show that decision by Department of Veterans Affairs (VA) General Counsel (GC) to terminate petitioner's accreditation under 38 USCS § 5904(b) was decision under law that affected provision of benefits by Secretary of Veterans Affairs to veterans or dependents or survivors of veterans under 38 USCS § 511(a); accordingly, it was not matter subject to review by Board of Veterans' Appeals, pursuant to 38 USCS § 7104(a), and was thus not matter over which court had jurisdiction under 38 USCS § 7252(a); therefore, veteran's petition for writ of mandamus ordering Secretary to provide statement of case was dismissed for lack of jurisdiction. Bates v Principi (2004) 17 Vet App 443, 2004 US App Vet Claims LEXIS 50, revd, remanded (2005, CA FC) 398 F.3d 1355

Court of Appeals holds that claim of clear and unmistakable error (CUE) may not be filed as to matter that is still appealable to this Court, or is pending on appeal with this Court or at higher court; thus, where veteran had filed direct appeal of March 2003 Board of Veterans' Appeals decision, pursuant to 38 CFR § 20.1410, Board should have stayed its consideration of veteran's CUE claim upon receiving notice that veteran had filed direct appeal of that decision. May v Nicholson (2005) 19 Vet App 310, 2005 US App Vet Claims LEXIS 536

5. Miscellaneous

Exception to finality rule of 38 USCS § 7104(b) as result of intervening change in law providing new cause of action is not applicable to change in evidentiary standard for rebutting presumption preservice disability underwent increase in severity during service since change is procedural in nature and not substantive. Routen v West (1998, CA FC) 142 F.3d 1434, cert den (1998) 525 US 962, 142 L Ed 2d 328, 119 S Ct 404

Failure by Board of Veterans' Appeals to consider presumptive eligibility in its initial decision did not create "incomplete adjudication" that left veteran's claim open; under 38 USCS §§ 7104 and 7103, finality attached once claim for benefits was disallowed, not when particular theory was rejected. Bingham v Nicholson (2005, CA FC) 421 F.3d 1346

Given statutory scheme in §§ 7104(b) and 5108, new and material evidence requirement is material legal issue which BVA has legal duty to address, regardless of whether RO adjudicated claim on merits and failed to apply new and material evidence standard, since, if BVA adjudicates claim on merits without resolving new and material evidence issue, its actions would violate its statutory mandate, and, similarly, once it finds no new and material evidence, it is bound by express statutory mandate not to consider merits of case. Barnett v Brown (1995) 8 Vet App 1, affd (1996, CA FC) 83 F.3d 1380

To extent document of veteran's exposure to radiation furnished to VA by Air Force was incomplete, veteran must look to Air Force, not VA, for correction of military record. Lauginiger v Brown (1993) 4 Vet App 214

Appellants whose service connection for breast cancer due to exposure to ionizing radiation during World War II had been remanded four times was not entitled to writ of mandamus directing board to decide claims without further remand of nonpresumptive aspect of claim; while remands were undoubtedly frustrating to appellant, they were reasonable and avoided fragmenting his claim into multiple appeals contrary to well-established appellate procedures, and appellant had adequate remedy by way of appeal. Nash v West (1998) 11 Vet App 91

Veteran was barred by doctrine of res judicata from asserting claim for earlier effective date for his service connection award for seizure disorder where issue before court in instant appeal and in prior decision was whether veteran was entitled to earlier effective date for service connection award and parties agreed that prior decision concerning veteran's award was valid
and final judgment, decision in prior action was on merits, and same parties were involved in both cases. Bissonnette v Principi (2004) 18 Vet App 105, 2004 US App Vet Claims LEXIS 346

II. CONSIDERATION AND EVALUATION OF EVIDENCE

6. Generally

Remand was required for complete analysis of credibility or probative value of evidence submitted by veteran in support of his claim for service connection for residuals of gun shot wound, to address veteran's unemployability in light of pain he suffered and effect of narcotic pain killers, and for Board to articulate with reasonable clarity its reasons or basis for rejection of such evidence, if it continued to reject that evidence. Moyer v Derwinski (1992) 2 Vet App 289

Evidence submitted by veteran was both new and material and was not properly considered by Board, warranting remand. Tobin v Derwinski (1991) 2 Vet App 34

Secretary was required to reopen veteran's service-connection claim for headaches and adjudicate it on basis of all evidence, since evidence submitted since prior final RO decision included diagnoses of post-traumatic chronic brain syndrome and post-traumatic headaches and evidence that veteran had suffered headaches continually since in-service accident. Vanderpool v Derwinski (1992) 3 Vet App 273

Since claim for increase in disability rating is new claim, all relevant evidence of record must be considered. Lenderman v Principi (1992) 3 Vet App 491

In support of claim to service connection for psychiatric disorder, World War II veteran's submission in 1990 of 13-page psychiatric report from psychiatrist who examined veteran and copies of evidence furnished by veteran constituted new and material evidence since there was reasonable likelihood it would change outcome of 1953 decision. Chisem v Brown (1993) 4 Vet App 169

Board's use of medical treatise did not violate requirement that claimant be given notice and opportunity to respond to that treatise where there was plausible basis in record for Board's decision denying service connection for hypertension as secondary to service-connected diabetes mellitus. Flynn v Brown (1994) 6 Vet App 500

Board failed to provide adequate reasons for denying veteran's claim for vocational rehabilitation benefits to assist him in obtaining doctorate in optometry with minor in pharmacy where it denied claim because of veteran's failure to cooperate in additional testing but failed to adequately inform him of purpose of the further evaluation, reason consideration of his claim was suspended, and steps necessary to resume initial evaluation. Wing v West (1998) 11 Vet App 98

7. Board failure under particular circumstances

In concluding that veteran was not unemployable and therefore denying his claim for pension benefits, Board failed to consider and evaluate relevant evidence submitted by veteran and its impact on his ability to engage in substantial gainful employment. Collier v Derwinski (1991) 1 Vet App 413

Physician's statement that portions of veteran's deep venous system might be chronically thrombosed because of his past history of knee trauma presented basis for well-grounded claim for secondary service connection for venous thrombosis and Board's simply concluding without explanation that venous thrombosis is condition for which service connection is not in effect erroneously ignored question of whether veteran was entitled to service connection for condition. Martin v Derwinski (1991) 1 Vet App 411

Board, in reducing veteran's disability rating, failed to consider all evidence, including what effect, if any, intervening auto accident may have had on his knee condition; Board also failed to discuss relationship between veteran's past depressive neurosis and present schizophrenia and whether schizophrenia is entitled to service connection. Corbbrey v Derwinski (1992) 3 Vet App 266
In denying surviving spouse death benefits, Board erred in considering all evidence submitted, in determining whether under Alabama law claimant and veteran had common-law marriage. Scott v Principi (1992) 3 Vet App 352

Given veteran’s Purple Heart, Board was obligated either to accept veteran’s lay evidence of service incurrence or explain why §1154 did not apply or why veteran’s version of events was not consistent with circumstances of his service. Shaw v Principi (1992) 3 Vet App 365

Board erred in denying service connection for PTSD claim where it failed to address veteran’s claim that his psychiatric examination was inadequate because examiner failed to comment on the causes of veteran’s condition or relationship of his symptoms to his combat history and because his claim file was not examined at time of examination. Perez v Derwinski (1992) 2 Vet App 562

Veteran’s medical record showing that his arthritic condition might be secondary to his service-connected disabilities constituted new and material evidence which Board should have considered; Board is not limited to issues specifically mentioned in appellant’s VA Form 1-9 appeal but must consider entire evidence of record in making its decision. Giglio v Derwinski (1992) 2 Vet App 560

In denying increased rating for postoperative residuals of extruded L4-5 disc with radiculopathy, Board erred in failing to analyze evidence in light of regulation requiring it to regard as “seriously disabled” any part of musculoskeletal system that becomes painful on use. Clouatre v Derwinski (1992) 2 Vet App 590

In light of VA counseling psychologist’s report that veteran could not perform work requiring standing, walking, or treading, and veterans’ assertion that VA physician stated he could not perform work sitting, Board failed to provided analysis of credibility or probative value of evidence in rejecting claim based on individual unemployability. Foster v Principi (1993) 4 Vet App 35

In denying appellant increased rating for service-connected hypertensive vascular hearth disease, BVA erred in failing to consider possible application of other diagnostic codes. Zimmerman v Principi (1992) 4 Vet App 1

In denying total disability rating based on individual unemployability, Board failed to consider adequately all evidence, in light of counseling psychologist’s report that veteran was unable to perform work that would require walking, standing, or treading and veteran’s assertion that VA physician said he could not perform work sitting. Foster v Principi (1993) 4 Vet App 35

In denying service connection for right thoracic outlet syndrome, Board erred in failing to consider whether there was continuity of symptomatology after discharge from service that eventually led to clinical diagnosis 1-1/2 years later, requiring remand for medical examination that shall include prior medical records. Rhodes v Brown (1993) 4 Vet App 124

To extent Board relied on medical treatises in denying service connection for multiple sclerosis it erred since it had not given veteran notice and opportunity to respond to treatises, and it erred in failing to rely on any evidence other than its own unsubstantiated opinion that veteran’s in-service hospitalization was devoid of neurological problems. Traut v Brown (1994) 6 Vet App 495

In denying service connection for residuals of injuries to veteran’s hands, Board failed to consider VA examiner’s report stating that abnormalities of appellant’s hands might be secondary to old soft tissue injuries, or if it did consider report, Board failed to state its reasons or bases for not according it any weight, requiring remand. Keel v Brown (1995) 8 Vet App 82, op withdrawn, app dismd (1996, Vet App) 1996 US Vet App LEXIS 184

Claim for increased rating for post-traumatic stress disorder would be remanded for adequate statement of reasons or basis for Board’s conclusions; conclusion that disability merited only 50 percent disability rating was not supported by adequate statement explaining why PTSD, which “materially” contributed to “serious” employment handicap, was productive of only considerable, not severe, social and industrial adaptability. Mittleider v West (1998) 11 Vet App 181

Remand was required since Board failed to provide adequate statement of reasons or bases for denying appellant more than 50 percent disability rating for service-connected post-traumatic
stress disorder, including its implicit determination that appellant's spouse was not one of his most intimate contacts. Kingston v West (1998) 11 Vet App 272

Board's denial of veteran's claim for rating increase was legally erroneous since, in failing to assign 100 percent rating for veteran's active disease, Board did not grant veteran benefit of law most favorable to him because it did not base its analogous rating of his lymphadenopathy on amended rating schedule. Green v West (1998) 11 Vet App 472

Reliance solely on V.A. Gen. Counsel Precedent Op. 5-99, which excluded occipital encephalocele suffered by veteran's child from definition of spina bifida, failed to provide adequate reasons or bases for denial of benefits, since binding opinion did not preclude finding that child was entitled to benefits for having form or manifestation of spina bifida, as indicated by uncontroverted medical evidence which was not analyzed or discussed. Jones v Principi (2002) 16 Vet App 219, 2002 US App Vet Claims LEXIS 579

Where widow of veteran sought earlier effective date for her claim of entitlement for award of dependency and indemnity compensation (DIC) benefits claiming that she applied for these benefits at the same time she applied for Social Security Administration (SSA) lump-sum death payment (LSDP), court concluded that there was nothing to support Board of Veterans' Appeals' (Board) purported conclusion that widow only filed lump-sum death payment (LSDP) application rather than joint application that included Veterans Administration (VA) benefits, especially where widow's original application was not even in evidence, and Board improperly relied on current forms for SSA death benefits, which resulted in improper assumption that SSA death benefits form was same in 1981 as it was at time of case. Kay v Principi (2002) 16 Vet App 529, 2002 US App Vet Claims LEXIS 998

Matter was remanded to Board of Veterans Appeals for readjudication because Board did not adequately set forth reasons or bases for rejecting testimony of veteran's mother about veteran's psychiatric condition when veteran alleged that testimony provided new and material evidence and that evidence was grounds for re-opening previously disallowed claim. Fortuck v Principi (2003) 17 Vet App 173, 2003 US App Vet Claims LEXIS 519

Finding, that residuals of gunshot wound to veteran's shoulder involved only injury to one muscle group and not to second muscle group, was contrary to 38 USCS § 7104(a) in failing to address whether veteran's disability rating for second muscle group was protected by length of time it had been in effect and, if not protected, failing to address evidence supporting involvement of second muscle group. Mariano v Principi (2003) 17 Vet App 305, 2003 US App Vet Claims LEXIS 782

Where veteran's ulcer condition preexisted service, and veteran had suffered marked increase in symptoms associated with his ulcer, applying law in existence in 1955, Department of Veterans Affairs regional office was required to have made" specific finding" of natural progression of condition; absent such finding, it was error to conclude that presumption of aggravation had been rebutted. Joyce v Nicholson (2005) 19 Vet App 36, 2005 US App Vet Claims LEXIS 97

8. Board compliance under particular circumstances

Board had more than plausible basis to reject physician's conjecture that appellant's neuropsychiatric disorder appeared to have deteriorated while in service in light of total record which included records of lengthy hospitalization for such disorder dating back to 8 years before he entered service and reports of hospitalizations even prior to that time. Corry v Derwinski (1992) 3 Vet App 231, affd without op sub nom Corry v Brown (1993, CA FC) 16 F.3d 420, reported in full (1993, CA FC) 1993 US App LEXIS 31546

Evidence in support of claim to reopen decision denying service-connected disability compensation for acquired psychiatric disorder and left-eye disorder was not material, since, although probative of current disability, there was no reasonable probability that new evidence would change outcome of prior BVA decision. Smith v Derwinski (1992) 2 Vet App 587
Board’s denial of increased disability rating for right and left iliac crest donor site bone graft scars was not erroneous given record medical evidence describing veteran's scars as slightly tender. E-Farahji v Brown (1993) 5 Vet App 278

Board adequately considered issue of pain; it reviewed medical records referring to pain and found that severely disabling rating currently assigned to condition encompassed veteran's pain. Kellar v Brown (1994) 6 Vet App 157

In denying widow's claim of service connection for veteran's death from rectal cancer from veteran's one day of service at Nagasaki in November 1945, Board failed to address all of factors specified in regulation § 3.311(e), and because medical evidence before Board did not address all those factors, Board was required to remand claim for medical opinion to be obtained that would be adequate for requisite analysis. Hilkert v West (1998) 11 Vet App 284, substituted op (1999) 12 Vet App 145, affd (2000, CA FC) 232 F.3d 908

In request for waiver of indebtedness under 38 USCS § 5302, Board of Veterans' Appeals provided detailed analysis based on record in support of its conclusion that veteran acted in bad faith by willfully and intentionally not disclosing his and his spouse's total income and net-worth; he chose to withhold these material facts with full knowledge that pension rate was based on all income from all sources to himself and his spouse. Lueras v Principi (2004) 18 Vet App 435, 2004 US App Vet Claims LEXIS 651, subsequent app (2004, US) 2004 US App Vet Claims LEXIS 714

Evidence, e.g., veteran's statements during his initial examination that he had experienced intermittent epigastria pain and vomiting, supported conclusion of Board of Veterans' Appeals that veteran's ulcer had preexisted service. Joyce v Nicholson (2005) 19 Vet App 36, 2005 US App Vet Claims LEXIS 97

Board of Veterans' Appeals correctly determined that proper effective date of veteran's award of service connection was in October 2000 where veteran submitted additional evidence almost two years after Board denied his claim to reopen and that evidence should not have been considered as having been filed in connection with claim to reopen, and Board appropriately considered veteran's claim as new claim to reopen. Jackson v Nicholson (2005) 19 Vet App 207, 2005 US App Vet Claims LEXIS 439

9. Necessity of remand under particular circumstances

Remand was required for Board to adequately address and analyze physicians' reports which indicated veteran suffered from spinal fusion, spondylolisthesis, pain, and concomitant limitation of motion. Lewis v Derwinski (1992) 3 Vet App 259

Remand was required for BVA to obtain further medical opinion as to probability that any of multitude of diseases or symptoms in veteran's service record represented presence of HIV infection, since Board considered only intestinal symptoms. MN v Brown (1993) 5 Vet App 173

Remand was required since Board's denial of service connection for low back disorder was unsupported by any objective medical evidence; medical opinions furnished were general conclusions based on history furnished by veteran and were unsupported by clinical evidence, and Board's conclusion that veteran's fall on ice was most probable cause of his problems was equally suppositious since it was unsupported by objective medical evidence. Black v Brown (1993) 5 Vet App 177

In denying appellant recognition as former prisoner of war, Board erred in failing to consider "Former POW Medical History" report in which appellant presented material evidence that he had experienced physical and psychological hardships while being detained in Switzerland during World War II and remand is necessary in order for Board to consider that evidence and to provide adequate statement of reasons or bases under 38 USCS § 7104(d)(1). Thompson v Gober (2000) 14 Vet App 187, 2000 US App Vet Claims LEXIS 1068

III. REQUIREMENT OF WRITTEN STATEMENT

10. Generally
BVA decision would be reversed and remanded since it contained neither analysis of credibility or probative value of evidence submitted by veteran, nor statement of reasons or basis for Board's implicit rejection of this evidence and its conclusion that doctrine of reasonable doubt was inapplicable. Cartright v Derwinski (1991) 2 Vet App 24

Decision upholding 10-percent disability rating for PTSD with alcoholism and determination that claimant was not unemployable as result of service-connected disorders would be remanded for reconsideration and statement of reasons or bases adequate to explain to both veteran and court its findings and fact and conclusions of law. Ohland v Derwinski (1991) 1 Vet App 147

Remand was required for Board to explain eye disorders found upon examination as well as doctor's remarks with regard to etiologies of those disorders in terms understandable to veteran and that would facilitate effective judicial review. McNeely v Principi (1992) 3 Vet App 357

Board's failure to consider all record evidence and provide reasons or bases for its evaluation of evidence does not permit informed review by court, hence case cannot be affirmed or reversed but must be remanded. Begiers v Derwinski (1992) 2 Vet App 583

Remand was required since it was impossible for court to tell whether Board ruled that veteran did not have PTSD or that he did not have PTSD as direct result of his service. Collins v Derwinski (1991) 3 Vet App 6

Remand would be granted upon Secretary's confession that Board erred in failing to consider and discuss adequately all governing rating criteria. Dondero v Derwinski (1992) 3 Vet App 169

Board's conclusory statement that "this has not been substantiated" in response to appellant's evidence that she never received improved pension election card does not comply with statutory requirement that BVA provide written statement of its findings and conclusions, and reasons and bases for them. Montalvo v Brown (1995) 7 Vet App 312, dismd (1995, CA FC) 64 F.3d 675, reported in full (1995, CA FC) 1995 US App LEXIS 22918

11. Findings and conclusions

Social and industrial examination report constituted plausible basis for BVA's factual determination that veteran's post-traumatic stress disorder warranted only 30-percent, not 50-percent, rating. Hillyard v Derwinski (1991) 1 Vet App 349

Denial of dependency and indemnity compensation for non-service connected death of veteran was erroneous where decision contained four findings of fact only two of which addressed disputed issues and two conclusions of law and findings and conclusions were not explained or supported by reasons or bases and widow's contentions were not directly addressed. Sammarco v Derwinski (1991) 1 Vet App 111

There was plausible basis for Board's factual finding that there was insufficient evidence to support finding of post-traumatic stress disorder stemming from service member's military service; Board was not bound to accept service member's uncorroborated account of his Vietnam experience or social worker's and psychiatrist's unsubstantiated opinions that alleged PTSD had its origins in appellant's Vietnam service, especially since there was considerable passage of time between putative stressful events recounted by appellant and onset of alleged PTSD. Wood v Derwinski (1991) 1 Vet App 190

Although plausible basis existed in record for Board to deny veteran's claim for increased disability rating, Board erred in failing to address veteran's claim of unemployability due to service-connected disabilities. Sanders v Principi (1992) 3 Vet App 334

Board's implicit finding that five-year lapse between manifestation and diagnosis of ulcer was unreasonable was clearly erroneous where treating physician's statement evidencing his continuous treatment of veteran during that period established necessary strong evidentiary link between manifested disease and diagnosed disease. Cook v Brown (1993) 4 Vet App 231

Board had plausible basis for denying service connection for bilateral hearing loss given absence of complaints regarding hearing disorder at time of appellant's separation examination and lack of evidence of post-service treatment until first objective medical evidence of hearing
loss was established 33 years later, combined with medical treatises' undermining appellant's evidence and contentions. Godfrey v Brown (1995) 8 Vet App 113

BVA's finding that appellant was already receiving highest possible rating for anatomical loss of his left eye (40 percent) and that therefore increased rating was not warranted was not clearly erroneous since applicable regulation requires that rating be based upon condition of eyes before any non-service-connected increase in disability, hence increase in non-service-connected vision impairment in his right eye was not properly factor. Villano v Brown (1997) 10 Vet App 248

Board's observation that appellant's lower extremities were normal at his separation examination and appellant's acknowledgment that he sought no medical treatment until 15 years later formed adequate basis for implicit rejection of appellant's chronicity claim and for conclusion that in-service episode of thrombophlebitis was acute and transitory. Crance v Derwinski (1991) 1 Vet App 238

Board's decision concluding that veteran's condition was not so severe as to preclude gainful employment did not contain statement of reasons or bases for this conclusion, nor was examination by orthopedist or neurologist, as recommended by own examining physician, conducted. Hyder v Derwinski (1991) 1 Vet App 221

Board of Veterans' Appeals unquestionably violated 38 USCS § 7104(a) and (d)(1) in failing to address Veterans Claims Assistance Act of 2000 which had been enacted and became effective while veteran's claim was still pending before Board and, in light of remand for readjudication, appellant is prevailing party entitled to award of attorney fees. Cycholl v Principi (2001) 15 Vet App 355, 2001 US App Vet Claims LEXIS 1499

12. Necessity reasons or bases be stated

Remand was required for complete analysis of credibility or probative value of evidence submitted by veteran in support of his claim for service connection for residuals of gun shot wound, to address veteran's unemployability in light of pain he suffered and effect of narcotic pain killers, and for Board to articulate with reasonable clarity its reasons or basis for rejection of such evidence, if it continued to reject that evidence. Moyer v Derwinski (1992) 2 Vet App 289

In light of finding of post-traumatic changes listed under radiological findings relating to veteran's left hip, Board was required to explain its evaluation of that evidence in concluding that there was no x-ray evidence of arthritis in left hip, which it failed to do. Anderson v Brown (1993) 5 Vet App 347

In rejecting claim for service-connection for veteran's death, Board failed to provide adequate reasons or bases; it failed to address evidence of possible stressors in veteran's Vietnam service, including combat with guerillas, exposure to sniper fire, participating in guarding his compound, and evidence that two men from his company had received Purple Hearts and another was killed by enemy fire. Ashley v Brown (1993) 6 Vet App 52

In light of implication of compatibility of some of claimant's symptoms of polio and "diagnostic doubt" raised by examining physician, rote recitation by Board that evidence does not raise reasonable doubt is inadequate statement of reasons or bases for concluding that veteran is not entitled to benefit of doubt under 38 USCS § 3007. Green v Derwinski (1991) 1 Vet App 121

Board failed to give adequate reasons or bases for concluding that veteran was not precluded from all forms of substantially gainful employment in denying his claim for non service-connected pension. Odiorne v Principi (1992) 3 Vet App 456

Remand was required because BVA decision failed to account for evidence which it found persuasive or unpersuasive and lacked requisite clear analysis and succinct but complete explanations. Ussery v Brown (1995) 8 Vet App 64.

Board complied with remand order to provide reasons why 1959 RO decision was not product of clear and unmistakable error where it stated that because that decision was subsumed by subsequent decisions, and court precedents provide that clear and unmistakable error is unreviewable in such instance, appellant's clear and unmistakable error claim did not exist as matter of law. Winslow v Brown (1996) 8 Vet App 469.
Where it is not clear that VA claimant has withdrawn particular claim from appeal to BVA, it is not sufficient for Board to conclude that there is abandonment without providing adequate statement of reasons or bases to support that conclusion, taking into account all facts relating to status of claim as well as Secretary's obligations to construe liberally all submissions by claimant. Verdon v Brown (1996) 8 Vet App 529

Since appellant's claim was basically simple disagreement with how RO weighed evidence, any inadequacy in Board's statement of reasons or bases for its decision on claim of clear and unmistakable error would be nonprejudicial error because CUE claim could not have been granted on any of theories advanced by appellant. Eddy v Brown (1996) 9 Vet App 52

Although there was plausible basis in record for Board's finding that veteran's death was due to self-inflicted gunshot wound to head while playing Russian roulette, Board's decision did not contain adequate statement of reasons or bases for its conclusion that veteran's death was result of his own willful misconduct; to extent Board may have equated intoxication with willful misconduct, it failed to discuss evidence that supported finding of nonintoxication. Myore v Brown (1996) 9 Vet App 498

Board failed to provide sufficient reasons for its determination that appellant had forfeited his right to veterans benefits due to his membership in Bureau of Constabulary in Philippines during World War II; BVA did not cite any statute or regulation to support its statement that BC service per se constituted rendering assistance to enemy, and "VA recognition" does not constitute competent evidence to support such finding. Macarubbo v Gober (1997) 10 Vet App 388

Board's decision to adopt independent medical expert's opinion may satisfy statutory requirement for adequate statement of reasons or bases where, as in instant case, expert has fairly considered material evidence which appears to support appellant's position; in denying service connection for cause of death of plaintiff's husband from myocardial infarction due to heart disease, Board addressed plaintiff's physician's opinion that pain and stress from veteran's service-connected leg injuries contributed to his heart disease and eventual death, but rejected underlying medical theory that stress from service-connected injuries was either proximate cause of death or accelerated it, adopting instead independent medical expert's opinion that effect of stress on development of heart disease is still controversial and unproven and that there were other well-known, indisputable coronary risk factors present in veteran's case. Wray v Brown (1995) 7 Vet App 488

Decision denying spouse's entitlement to compensation under 38 USCS § 1318(b)(1) because veteran was not rated totally disabled for minimum period of 10 years prior to death is affirmed where Board supported its finding pursuant to 38 USCS § 7104(d)(1) that evidence presented by veteran's treating physician, though new and material, does not show that there was clear and unmistakable error in previous rating decisions since physician began treating veteran within 10-year period prior to veteran's death. Allin v Brown (1997) 10 Vet App 55

Board statement that extraschedular evaluation was not appropriate because veteran's disorder was not so unusual and exceptional as to render impractical application of regular rating standards is inadequate statement of reason and bases under 38 USCS § 7104(d)(1) since Board did not identify findings important to decision or account for evidence it found persuasive or unpersuasive. Johnston v Brown (1997) 10 Vet App 80

Board did not provide adequate statement of "reasons or bases" pursuant to 38 USCS § 7104(d)(1) for denying veteran's claim to reopen for service connection for eye disease where Board discounted ophthalmologist's statement as not probative without further discussion but ophthalmologist opined that diagnoses during veteran's enlistment examination did not have anything to do with veteran's histoplasmosis, that chest x-ray showing histoplasmosis in chest at induction does not rule in or rule out histoplasmosis in eye, and that veteran's conditions may have been due to other diagnoses. Norris v West (1998) 11 Vet App 219, affd (1999, CA FC) 215 F.3d 1347, reh den (1999, CA FC) 1999 US App LEXIS 27054

Board's decision, issued after enactment of Veterans Claims Assistance Act, fails to mention new statute or to indicate whether appellant is entitled to additional notification or assistance from VA prior to adjudication of claim, and Board failed to adequately consider all applicable provisions.
of law and to provide adequate statement of reasons or bases for its decision under 38 USCS § 7104(a). Weaver v Principi (2001) 14 Vet App 301, 2001 US App Vet Claims LEXIS 224

Decision of Board of Veterans' Appeals that veteran's disabilities and their effect on veteran's employability were not sufficiently extraordinary or unusual to warrant extraschedular ratings was not supported by adequate statement of reasons or bases, since finding was inconsistent with Board's remand of veteran's claim for total disability based on individual unemployability for lack of complete record; both inquiries required complete picture of veteran's service-connected disabilities and their effect on employability, and it was thus premature to deny extraschedular ratings in view of admittedly incomplete record. Brambley v Principi (2003) 17 Vet App 20, 2003 US App Vet Claims LEXIS 109

Where veteran never obtained medical examination promised by VA hearing officer, Board of Veterans' Appeals (BVA) was obligated, in light of veteran-friendly nature of veterans benefits adjudication system and reasons-or-bases requirement of 38 USCS § 7104(d)(1), to discuss hearing officer's statements and explain why VA would not or need not provide promised medical examination. Sanders v Principi (2003) 17 Vet App 232, 2003 US App Vet Claims LEXIS 651, app dismd (2004, CA FC) 87 Fed Appx 179

Veteran's assertion of reasons-or-bases error, in order to raise clear and unmistakable error (CUE), was rejected where veteran failed to establish that Board of Veterans' Appeals had any duty to raise CUE motion sua sponte. Baxter v Principi (2004) 17 Vet App 407, 2004 US App Vet Claims LEXIS 1

Because veteran's surviving spouse had received compliant notice, any Board of Veterans' Affairs reasons-or-bases deficiency in discussion how 38 USCS § 5103(a)/38 C.F.R. § 3.159(b)(1) notice had been satisfied in case would of necessity be nonprejudicial to claimant pursuant to 38 USCS § 7261(b)(2); court's review was not hindered by any reasons-or-bases deficiency in Board decision, and remand under 38 USCS § 7104(a) and (d)(1) for reasons-or-bases error would be of no benefit to veteran and would therefore be pointless. Mayfield v Nicholson (2005) 19 Vet App 103, 2005 US App Vet Claims LEXIS 197, reh, en banc, den (2005, US) 2005 US App Vet Claims LEXIS 304

Decision of Board of Veterans Appeals was vacated and remanded for further development and issuance of readjudicated decision supported by adequate statement of reasons or bases; Board had failed to provide explanation as to all material issues of law presented on record when it did not address (or cite) 38 CFR § 3.41. Pelea v Nicholson (2005) 19 Vet App 296, 2005 US App Vet Claims LEXIS 537

13. Bases for determination of claim

Board failed to follow its own procedures in automatically assigning 100 percent evaluation for 70 percent evaluation based on post traumatic stress disorder where veteran had clearly raised issue of unemployability and in evidence section of its decision, Board noted three times that veteran was considered unemployable by his doctors. Snow v Derwinski (1991) 1 Vet App 417

Board ignored its own regulation regarding disability caused by service-connected disease or injury in dealing with veteran's repeated allegation that his right knee condition was caused by his service-connected left knee disability. Payne v Derwinski (1990) 1 Vet App 85

Board erred in reducing veteran's disability rating which had been in effect for more than five years without benefit of examination comparable to that on which original rating was based. Jeanes v Derwinski (1992) 3 Vet App 264

Board committed legal error in using standard that exceeded that found in regulation for eczema where it implied that constant itching must be shown by excoriation but regulation was silent regarding excoriation or any other particular evidence needed to show continual itching. Pernorio v Derwinski (1992) 2 Vet App 625

Board's conclusion that lay evidence alone is insufficient to establish injury in service was contrary to express language of regulation providing that such injury may be established by competent medical evidence, lay evidence, or both. Cahall v Derwinski (1991) 3 Vet App 4
While a reversal of prior rating decision may be based upon clear and unmistakable error such that retroactive award of benefits is warranted, it cannot be predicated merely upon difference of opinion. Ertell v Derwinski (1991) 3 Vet App 18

In denying increased rating for service-connected hypertensive vascular heart disease, Board improperly failed to consider diagnostic codes other than DC 7101 and provided reasons or bases for its determination regarding their applicability. Zimmerman v Principi (1992) 4 Vet App 1

Plausible basis for denying service-connection for bilateral ear disorder and hearing loss consisted of evidence that veteran entered service with scarring on both eardrums and all audiometric evaluations in service revealed normal hearing. Slater v Principi (1993) 4 Vet App 43

There was no plausible basis for Board's conclusion that veteran's tinnitus was caused by disease rather than in-service acoustic trauma, particularly in light of benefit-of-doubt rule. Bucklinger v Brown (1993) 5 Vet App 435

Board erroneously relied upon its own medical judgment in rejecting claim for service connection for multiple sclerosis. Talley v Brown (1993) 6 Vet App 72

Board's citation of two medical treatises in its decision denying service connection for residuals of motor vehicle accident was erroneous where it was not clear that treatises were ever provided to appellant, but error was harmless since there was no new and material evidence to warrant reopening claim. White v Brown (1994) 6 Vet App 247

In rejecting veteran's claim for reimbursement for his private hospitalization bills incurred when VA doctor advised him to go to nearest private hospital for treatment, Board improperly concluded that it had no jurisdiction of reimbursement for medical expenses based on prior authorization; assuming that BVA has no jurisdiction over medical determinations, only basis for BVA to deny jurisdiction would be if it were to find that Secretary determined that appellant did not need hospital care. Similes v Brown (1994) 6 Vet App 555

In denying veteran increased rating for neurosis currently rated at 10 percent, Board erred in considering factors wholly outside rating criteria provided by regulations. Massey v Brown (1994) 7 Vet App 204

Board's decision denying service connection would be vacated where it violated fair process principle by telling appellant it would only consider additional evidence on written motion for good cause for its submission, failed to consider veteran's and veteran's wife's testimony, and did not advise claimant to obtain other forms of evidence since his service medical records had been destroyed. Smith v Brown (1996) 9 Vet App 363, reported at (1996) 10 Vet App 44

Board's supplemental decision provided ample reasons and bases for denial of service connection and determination that benefit of doubt doctrine did not compel decision in favor of veteran. Gilbert v Derwinski (1991) 1 Vet App 61

Where Board of Veterans' Appeals (BVA) did not consider veteran's testimony that he had engaged in combat, BVA did not consider adequately all of evidence and material of record, and all applicable provisions of law, and provide adequate statement of reasons or bases for its decision, as required by 38 USCS § 7104(a), (d)(1). Moran v Principi (2003) 17 Vet App 149, 2003 US App Vet Claims LEXIS 479

Where Board of Veterans' Appeals failed to provide adequate statement of reasons or bases, as required by 38 USCS § 7104(d)(1), for its determination that veteran's medical tests were not authorized by VA, court vacated Board's decision and remanded matter. Jeffcoat v Principi (2003) 17 Vet App 213, 2003 US App Vet Claims LEXIS 315

IV. PARTICULAR DECISIONS

A. Disability Rating

14. Board error found
Board’s decision was not failure to discount evidence in support of veteran's claims for increased rating for posttraumatic stress disorder, but failure to recognize that all evidence of record, when considered in light of total record, was in favor of claim. Crandell v Derwinski (1992) 2 Vet App 113

Although Board increased veteran's service-connected disability rating from 10 percent to 30 percent, it failed to properly assess his condition in manner consistent with rating schedule and failed to provide reasons or basis for its conclusion that veteran was employable, requiring remand. Washington v Derwinski (1991) 1 Vet App 459

Decision that veteran's industrial impairment was only "considerable" and hence veteran was not entitled to more than 50 percent rating for service-connected PTSD failed to comply with reasons or bases requirement; at minimum, Board must clearly explain basis for changing finding of industrial impairment to "considerable" from "severe" and provide missing analysis of why veteran was not entitled to 70 percent rating. Fletcher v Derwinski (1991) 1 Vet App 394

Board did not provide reasons or bases for its determination not to grant increase in disability for veteran's psychiatric and intervertebral syndrome and for its determination on veteran's eligibility for total unemployability. Ferraro v Derwinski (1991) 1 Vet App 326

In denying increase in disability rating assigned to claimant's service connected anxiety disorder, Board failed to provide adequate reasons or bases for its credibility and probative weight determinations regarding hearsay testimony, findings of clinical psychiatric examination, and findings of any physical exams that might have been conducted on claimant. Barnes v Derwinski (1991) 1 Vet App 288

Board's decision reducing veteran's disability compensation rating from 70 to 50 percent for service-connected psychiatric disability was deficient in failing to evaluate and state reasons or bases for its findings and conclusions as to sworn testimony of veteran and his sister, failing to review or comment on its evaluation of full psychiatric history of veteran, and failing to discuss and apply certain regulations pertinent to case. Peyton v Derwinski (1991) 1 Vet App 282

Brief discussion in Board's decision which led to conclusion that appellant did not meet criteria for individual unemployability failed to account for service-connected disability rated at 30 percent and therefore would be reversed and remanded. Goodman v Derwinski (1991) 1 Vet App 280

Denial of reopened claim for increased rating for veteran's 30-percent service-connected post-traumatic stress disorder would be reversed and remanded since Board simply concluded that criteria for rating of more than 30 percent were not met without providing reasons or bases for its actions supported by thorough analysis of how rating schedule for PTSD applies to relevant evidence in record. Webster v Derwinski (1991) 1 Vet App 155

Board's decision refusing to increase disability rating for service-connected panic disorder with anxiety, obsessive thoughts and secondary major depression from 50 to 100 percent failed to provide adequate explanation for apparent dismissal of evidence favorable to appellant's claim and conclusion that impairment was not more than considerable in degree. Wilson v Derwinski (1991) 1 Vet App 139

Board failed to provide adequate reasons for decision not to increase disability rating assigned to veteran's maxillary sinusitis since it failed to make explicit credibility findings regarding veteran's testimony that he suffered from numerous sinus headaches and constant drainage from his sinuses. Ashmore v Derwinski (1991) 1 Vet App 580

Board failed to explain why it gave only cursory treatment to benefit-of-doubt doctrine in increasing veteran's service-connected disability rating from 30 to 50 percent, why it did not give veteran higher rating in light of substantial record evidence that his overall impairment from disabilities more than "considerably" impaired his social and industrial capabilities, and why it did not consider a total rating for individual employability. Shoemaker v Derwinski (1992) 3 Vet App 248

Board failed to articulate reasons for its bare finding that evidence did not permit it to conclude that veteran's unemployability was due to service-connected disabilities, and it failed to
consider relationship, if any, between his service-connected and non-service-connected disabilities.  

Board failed to provide any explanation for its implicit rejection of veteran's wife's affidavit which appeared to support increased rating for service-connected frozen feet; Board may not ignore relevant lay evidence.  

Board failed to discuss its evaluation of VA physician's opinion that veteran was unemployable, to discuss evidence that veteran's severe pain due to service-connected disabilities might affect his unemployability, and to clarify whether it concluded that veteran was not unemployable or not unemployable solely due to service-connected disabilities.  

Board chose diagnostic code for ailment whose symptoms were analogous to veteran's, rather than one most analogous to cause of veteran's ailment, and failed to explain on what regulatory authority it did so.  

Board failed to provide reasons or bases for denying claim for increased rating for burn scars where by choosing one sentence from medical examination it implicitly rejected veteran's testimony without providing any reasons.  

Board, in denying veteran's claim for total disability rating based on individual unemployability due to service-connected disability, failed to address credibility of veteran's testimony, failed to provide bases for its implicit rejection of such testimony, and failed to consider evidence that special allowances had been made for veteran at his last place of employment.  

Board failed to address applicable regulations and to provide adequate statement of reasons for its findings and conclusions in denying an increased disability rating for chronic lumbosacral strain with left leg radiculopathy.  

Board failed to provide reasons for denying increased rating for service-connected PTSD; it failed to provide reasons for its implicit rejection of psychiatrist's and counselor's opinions that veteran was totally disabled and unemployable and for why it applied schedular rating for "considerable" rather than "severe" or "total" impairment.  

Board failed to provide sufficient explanation for its denial of increased rating for PTSD since it failed to explain why it gave greater weight to one medical examination over another.  

Board failed to provide adequate reasons for finding veteran was not permanently precluded from substantially gainful employment, specifically failing to address veteran's patchwork history of employment.  

Although in denying claim for total disability pension Board discussed evidence, it did not identify those findings it deemed crucial to its decision or to account for evidence it found persuasive or unpersuasive; this was exacerbated by Board's failure to discuss veteran's award of SSA disability benefits.  

Although BVA properly raised issue of pyramiding in its decision due to veteran's claim for separate ratings based on scar in right inguinal area, it failed to include reasons for so concluding according to applicable law and regulations.  

Board failed to provide adequate reasons for finding veteran was not permanently precluded from substantially gainful employment, specifically failing to address veteran's patchwork employment history.  

Board's conclusion that veteran's service-connected disabilities limited his options for engaging in physically demanding employment but that his disabilities, when considered with his educational level and occupational experience, were insufficiently disabling to render veteran unemployable did not satisfy statute's requirement that Board provide reasons or bases for its decision.
Board failed to provide adequate reasons to support its denial of permanent and total disability rating where veteran filed for increased compensation based on unemployability, failed to discuss submitted evidence, including reference to Social Security benefits, medical records, and earlier evidence of unemployability. Abbott v Brown (1993) 5 Vet App 197, app dismd without op (1993, CA FC) 9 F.3d 978, reported in full (1993, CA FC) 1993 US App LEXIS 30512

Board's decision denying total disability based on individual unemployability contained no express discussion of two VA examination reports of veteran, and from its discussion of veteran's claim of disabling pain from service-connected disabilities, it was unclear whether Board viewed VA examiners' findings to be credible objective evidence of disabling pain, requiring remand for clarification. Hatlestad v Brown (1993) 5 Vet App 524

BVA did not provide sufficient reasons to support its rejection of veteran's claim for rating in excess of 10 percent for service-connected left knee condition; decision failed to explain relevant statutes and regulations, and failed to discuss and analyze evidence considered. Smith v Brown (1993) 5 Vet App 335

Board's denial of claim for non-service-connected pension based on permanent and total disability was erroneous since it was based in part on mischaracterization of medical evidence, Board failed to provide analysis of credibility and probative value of much of evidence, and, in evaluating severity of veteran's disabilities, Board failed to discuss evidence of record in context of VA's schedule for rating disabilities. Genous v Brown (1993) 5 Vet App 422

There was no plausible basis for Board's denying total disability rating due to individual employability given numerous psychiatric opinions in favor of appellant's claim and lack of any evidence to contrary; fact that one psychiatrist stated that appellant was equally affected by his service-connected PTSD and his non-service-connected schizoaffective disorder was not same as saying that appellant would have been capable of employment if he did not suffer from non-service-connected psychiatric disorder. Vettese v Brown (1994) 7 Vet App 31, subsequent app (1994) 7 Vet App 21

Board's statement that appellant's occupation was not found to be unsuitable on basis of his specific employment handicap and condition, without supporting analysis and explanation, was inadequate statement of its determination that there was no increase in appellant's service-connected disability. Wilson v Brown (1995) 7 Vet App 542

Board's statement of reasons for denying appellant's claim for increased disability rating for left-shoulder disorder was not adequate where it did not explain how pain on use was factored into its evaluation of veteran's disability in terms of limitation-of-motion equivalency under Diagnostic Code 5201. DeLuca v Brown (1995) 8 Vet App 202

In denying increased ratings for service-connected degenerative changes of appellant's right and left hips, Board's reliance on VA examination to discount appellant's complaint of hip pain was erroneous where VA examination was not intended to evaluate any complaints of pain. Hicks v Brown (1995) 8 Vet App 417 (ovrld in part by Padgett v Nicholson (2005, US) 2005 US App Vet Claims LEXIS 196)

Board did not provide adequate reasons for rejecting claim of total unemployability where it did not even discuss appellant's educational and occupational history, did not sufficiently explain why it chose to rely on psychiatric panel report and industrial survey while ignoring report of individual psychiatrist and psychologist, and offered nothing more than bare conclusory statement when it concluded that appellant was not unemployable. Cathell v Brown (1996) 8 Vet App 539

BVA's conclusory statement that appellant's social affect and behavior was inconsistent with severe social and industrial impairment was insufficient statement of basis for its decision denying veteran increased rating for PTSD; need for statement of reasons or bases is particularly acute when BVA findings and conclusions pertain to degree of disability resulting from mental disorders such as PTSD. Mitchem v Brown (1996) 9 Vet App 138

Board's finding, in decision denying extra-schedule evaluation and entitlement to increased disability rating for blindness in left eye, which stated that evidence did not show marked interference with employment resulting was cursory at best, and did not even mention letter from prospective employer which denied appellant position due to his physical disabilities.
notwithstanding its conclusion that appellant possessed many qualities which would be favorable for position. Bagwell v Brown (1996) 9 Vet App 337

Board failed to provide adequate statement of reasons or bases for its rejection of veteran's clear and unmistakable error claim as to RO decision finding that gunshot wound went through and through skin, where there was medical evidence that bullet had penetrated deltoid muscle, in support of through-and-through penetrating muscle wound with little or no contrary evidence. Beyrle v Brown (1996) 9 Vet App 377

Board gave inadequate reasons for denying extraschedular disability evaluation since its statement, that there had been no demonstration of marked interference with employment or frequent periods of hospitalization so as to render application of regular schedular criteria impractical, was not supported by any evidence and did not account for evidence which Board found persuasive or unpersuasive. Fleshman v Brown (1996) 9 Vet App 406, vacated, op withdrawn, substituted op, remanded (1996) 9 Vet App 548, affd (1998, CA FC) 138 F.3d 1429, cert den (1998) 525 US 947, 142 L Ed 2d 307, 119 S Ct 371

BVA failed to adequately explain its reasons for denying increased disability rating for appellant's right sternoclavicular separation since, although it briefly mentioned that it took appellant's complaints of pain into consideration, it did not clearly indicate or describe what role assertions of pain played in its decision. Smallwood v Brown (1997) 10 Vet App 93

Board failed to provide adequate reasons for its denial of non-service-connected pension under § 1521; it apparently considered regulations pertaining to permanent and total disability rating without first evaluating veteran's conditions under schedule of ratings, and last evaluation of veteran's non-service-connected disabilities was made by RO 4 years earlier and Board did not mention its results, nor did Board discuss whether veteran was entitled to VA pension on extra-schedular basis, or explain why it found that his disabilities did not prevent him from working. Grantham v Brown (1995) 8 Vet App 228, revd on other grounds, in part, dismd, in part, remanded (1997, CA FC) 114 F.3d 1156, on remand, remanded (1998, Vet App) 1998 US Vet App LEXIS 588 and (ovrd as stated in Rittenhouse v West (1998, Vet App) 1998 US Vet App LEXIS 945)

Denial of increased rating for service-connected pericarditis was not supported by plausible basis in record since most recent medical report, which Board focused on, provided clear evidence that enlarged heart existed. Drosky v Brown (1997) 10 Vet App 251

Board's denial of increased disability rating for paranoid schizophrenia and total disability rating based on individual unemployability was not supported by sufficient reasons or bases. Zink v Brown (1997) 10 Vet App 258

Where rating schedule provided listing for beriberi, Board failed to explain why that provision was not applicable prior to assigning analogous rating. Suttman v Brown (1993) 5 Vet App 127

Board provided inadequate statement of reasons or bases for its rating of service-connected left-foot plantar fasciitis where it described regulatory provisions but made only conclusory findings; it did not apply regulations to facts before it. Fenderson v West (1999) 12 Vet App 119 (superseded by statute as stated in Madsen v Principi (2002, US) 2002 US App Vet Claims LEXIS 618)

In evaluating frequency of veteran's headache episodes under 38 C.F.R. § 4.124a, Diagnostic Code 8100 (2002), Board of Veterans' Appeals improperly based its determination by comparing number of "severe" headache episodes with "mild to moderate" ones; that comparison was absurd because greater number of less-severe headaches that veteran suffered, more difficult it would be for his "severe" headaches to be considered "very frequent" so as to meet requirement for 50 percent rating. Pierce v Principi (2004) 18 Vet App 440, 2004 US App Vet Claims LEXIS 652

Nothing in 38 C.F.R. § 4.124a, Diagnostic Code 8100 (2002), requires that claimant be completely unable to work in order to qualify for 50 percent rating; if "economic inadaptability" were read to import unemployability, claimant, if he met economic-inadaptability criterion, would then be eligible for rating of total disability based on individual unemployability resulting from

15. Board error not found

Board did not err in denying increased disability rating for bronchiectasis with left lower lobectomy, currently rated as 30 percent disabling. Collins v Derwinski (1992) 2 Vet App 215

Board did not err in refusing to increase disability rating from 50 to 70 percent for service-connected paranoid schizophrenia. Hand v Derwinski (1992) 3 Vet App 68

Board provided adequate reasons for concluding that there was no evidence prior to February 5, 1985, to support 100 percent PTSD rating, hence for its denial of earlier effective date for that rating on basis of clear error in prior RO and BVA decisions. Padgett v Brown (1993) 4 Vet App 247

Board's denial of total disability rating based on unemployability was plausible since there were no circumstances in record that placed veteran, rated at 80 percent, in different category than other veterans so rated. Van Hoose v Brown (1993) 4 Vet App 361, app dismd without op (1993, CA FC) 9 F.3d 978

There was plausible basis for denying increased rating for nervous condition and individual unemployability, including report of VA psychiatric examination and 50 percent disabling anxiety disorder. Blackburn v Brown (1993) 4 Vet App 395

Plausible basis existed for Board's determination that veteran did not incur any additional disability stemming from nasal surgery; records indicated that surgery was successful, there was no indication of negligence or fault by VA, and veteran did not experience additional disabilities because of VA's treatment. Reichner v Brown (1993) 4 Vet App 418

Thirty percent disability rating for veteran's service-connected right shoulder condition was not clearly erroneous given evidence of VA examination indicating that veteran could abduct his right arm to 60 degrees. Stanton v Brown (1993) 5 Vet App 563

Board gave adequate reasons for denying increased rating for appellant's service-connected schizophrenia where it reviewed entire history of appellant's condition and all evidence in support of or against his claim and based its decision on language and findings of most recent VA psychiatric evaluation. Cox v Brown (1994) 6 Vet App 459, app dismd without op (1994, CA FC) 1994 US App LEXIS 30090

Plausible basis existed for Board's finding that veteran was not entitled to increased disability rating for residuals of gunshot wound of left shoulder in most recent medical examination. Francisco v Brown (1994) 7 Vet App 55

Denial of increased rating for bilateral calluses was not clearly erroneous because, regardless of diagnostic code chosen, there was no medical evidence linking appellant's pain, tenderness, and impairment of gait to service-connected calluses. Tedeschi v Brown (1995) 7 Vet App 411

Board's finding that claimant was ineligible for disability compensation because his discharge was based on willful and persistent misconduct had plausible basis in record, which reflected seven-month period during which appellant was AWOL several times and failed to obey lawful order and appellant's failure to offer anything which would indicate that circumstances were beyond his control or that he was unable to seek assistance for his problems. Stringham v Brown (1995) 8 Vet App 445

BVA did not clearly err in denying increased service rating for veteran's right-shoulder disability where his current award of 40 percent represented maximum disability allowed under regulations (50 percent minus 10 percent to account for veteran's pre-service injury). Dinsay v Brown (1996) 9 Vet App 79 (criticized in Lynch v Gober (1997) 11 Vet App 22)

Board's denial of increased rating for left wrist disability because of shell fragment wound was not clearly erroneous where neither of two preceding VA examinations indicated that appellant had moderately severe injury to muscles affecting wrist extension, so that he did not satisfy criteria for next-higher disability rating. Johnston v Brown (1997) 10 Vet App 80
Board’s denial of rating higher than 50 percent for veteran’s posttraumatic stress disorder had plausible basis in record, including examining psychiatrist's report that veteran had moderate difficulty in social, etc., functioning, and that main element in his mental status was passive/aggressive personality disorder, and SSA's disability determination report which listed his primary diagnosis as personality disorder but stated that no secondary diagnosis was established. Carpenter v Brown (1995) 8 Vet App 240

Board had plausible basis for denying increased rating for veteran's service-connected left-knee shrapnel wound scars since it thoroughly analyzed all appellant's past medical records and examinations which consistently revealed that scars on left knee were nontender and nonadherent, that they had no keloid formation, and that they presented no other symptom or pathology. Garlejo v Brown (1997) 10 Vet App 229

Board had plausible basis for denying increased rating for right inguinal hernia residuals in physician's report that inguinal hernia had not recurred and there was no abnormal tenderness. Dunn v West (1998) 11 Vet App 462

There was no clear and unmistakable error in denial of veteran's request for award of special monthly compensation under former 38 USCS § 314(m) (replaced by 38 USCS § 1114) where veteran failed to point to any evidence that reflected that muscles used to move his elbow joint were atrophied or would have become atrophied; veteran's argument that loss of supination and pronation even with movement in joint (unfavorable ankylosis) constituted lack of "natural elbow action" was without merit because under 38 C.F.R. § 3.350(c)(1), "natural elbow action" was defined in terms of muscle atrophy and prospective muscle atrophy. Augustine v Principi (2004) 18 Vet App 505, 2004 US App Vet Claims LEXIS 722

16. Remand required

Denial of increased disability rating of 100 percent for WWII veteran who had been seriously wounded would be remanded because of insufficient statement of bases for findings and conclusions. Hatlestad v Derwinski (1991) 1 Vet App 164

Ambiguities between Board decision and evidence of record required remand for determination of surviving spouse's claim of entitlement to accrued benefits based on alleged entitlement to increase in veteran's disability rating. Hayes v Derwinski (1991) 1 Vet App 186

Remand was required for Board to explain why particular diagnostic code was applied to rating veteran's chronic obstructive pulmonary disease and why others which might reasonably apply to same condition were not selected. Merson v Principi (1992) 3 Vet App 305

Remand was required for Board to consider entitlement to 100 percent disability rating for anxiety neurosis and to explain its analysis and conclusions on issue. Jones v Principi (1992) 3 Vet App 396

Remand was required for readjudication of disability rating claim; Board failed to conduct necessary medical examinations and to provide sufficient reasons or bases for its decision. Rossiello v Principi (1992) 3 Vet App 430

Although plausible basis in record existed for Board's denying increased rating for hypertensive cardiovascular disease on grounds that schedular requirements had not been met, case would be remanded for consideration of extra-schedular total rating given veteran's employment history, heavy medications required for service-connected hypertension, and his apparent illiteracy. Fisher v Principi (1993) 4 Vet App 57

Although denial of increased rating for hypertensive cardiovascular disease had plausible basis, remand was required for reconsideration of denial of total rating based on individual unemployability given extraneous circumstances that might warrant such rating, including veteran's employment history, heavy medications he takes for service-connected hypertension, and his apparent illiteracy. Fisher v Principi (1993) 4 Vet App 57

Remand was required for Board to provide adequate reasons its assertion, in denying earlier effective date for increased compensation for choroidal gyrate atrophy with restricted visual fields, that private clinical records cannot provide basis for assigning compensable rating for any disorder prior to date they are received by VA. Meeks v Brown (1993) 5 Vet App 284
Remand was required on individual unemployability claim for new decision to include statement of reasons and to consider impact of veteran's service-connected disabilities, both alone and in combination, on his ability to secure substantially gainful employment. Hodges v Brown (1993) 5 Vet App 375


Remand was required for Board to consider and discuss how regulations related to pain applied to veteran's claim for increased rating for residuals of left femur fracture in light of frequent references in record to veteran's complaints of pain, and despite veteran's failure to raise issue of applicability of regulations related to pain. Voyles v Brown (1993) 5 Vet App 451

BVA failed to articulate satisfactory statement of reasons for its rating, hence it was impossible for court to determine why this appellant, as opposed to other veterans with similar claims, was not rated for his foot drop separately, requiring remand. Bierman v Brown (1994) 6 Vet App 125

BVA failed to discuss appellant's pain, mention regulation requiring it to consider impact of pain in making its rating determination, or discuss possible link between appellant's complaints and his service-connected psychiatric disorder, requiring remand. Spurgeon v Brown (1997) 10 Vet App 194

Determination that veteran was not entitled to non-service-connected disability pension benefits because his income exceeded statutory limit required remand since board did not apply appropriate regulation subparagraph to veteran's wife's retirement payout and did not address issues of statutory and regulatory construction raised on record. Keen v West (1999) 12 Vet App 176, motions ruled upon, op withdrawn, app dismd (1999) 13 Vet App 29, 1999 US App Vet Claims LEXIS 990

Because Board of Veterans' Appeals failed to provide adequate statement of reasons or bases pursuant to 38 USCS § 7104(d) when it rejected or failed to consider veteran's testimony of "constant high ringing" in ears, and because there is inconsistent testimony in record with respect to whether tinnitus claim is "persistent," remand of claim for increased rating is necessary Clyburn v West (1999) 12 Vet App 296, 1999 US App Vet Claims LEXIS 147

Board's decision is inadequate for appellate review pursuant to 38 USCS § 7104(d) and Board's decision is vacated and matter remanded where veteran had been rated with foot muscle disability for twenty years and Board changed evaluation criteria to different diagnostic code; reason for Board's decision is unclear since Board did not discuss issue of severance or why change in diagnostic code is not analogous to severance, Board may have modified disability rating to conform to evidence, or Board may not have wanted to award veteran duplicate disability ratings for same symptomatology. Sanders v West (2000) 13 Vet App 491, 2000 US App Vet Claims LEXIS 372

Court of Appeals for Veterans Claims cannot determine whether Board of Veterans' Appeals correctly determined that 30 percent disability rating for interstitial lung disease secondary to asbestos exposure was proper where Board's decision lacks adequate reasons or bases under 38 USCS § 7104 since it does not clarify delineation between veteran's asbestos-related lung or respiratory ailments and veteran's possible nicotine-dependence-related lung or respiratory ailments. Parker v Principi (2002) 15 Vet App 407, 2002 US App Vet Claims LEXIS 33

Board of Veterans' Appeals, even when it was denying jurisdiction, was required to include statement of reasons or bases for its decision; Board simply cited 38 C.F.R. § 20.101(b) for proposition that medical determinations were not reviewable, but failed to conduct critical review of nature of decision to support its conclusion that this provision was applicable. King v Nicholson (2006) 19 Vet App 406, 2006 US App Vet Claims LEXIS 2

B. Service Connection
17. Board error found

Reversal rather than remand was required since Board's decision failed to recognize that there simply was no evidence of record against veteran's claim for service connection. Mohr v Derwinski (1992) 2 Vet App 101

Board erred in denying service connection for basal-cell carcinoma where it failed to address evidence, including veteran's testimony that he was stationed in Pacific theater and served as deckhand, that his family showed no skin cancer or skin problems, and that since his discharge his employment had been indoors and he had not engaged in any significant outdoor recreational activities. Douglas v Derwinski (1992) 2 Vet App 103, affd in part and vacated in part, on reconsideration, en banc (1992) 2 Vet App 435

In rejecting WWII veteran's claim for service connection for foot problems, Board committed reversible error in failing to explain its basis for rejecting veteran's assertion that he had foot problems at discharge or that he had always been bothered with foot problems, or significance of examining physician's reference to possible frozen feet residual of posttraumatic arthritis lumbar, knees, ankles and feet. Moore v Derwinski (1991) 1 Vet App 401

Board's decision that veteran's chronic right knee disability was not incurred in or aggravated by wartime service did not include reasons or bases adequate to explain to both veteran and court its findings of fact and conclusions of law; Board decision dismissed veteran's evidence with conclusory statement that it was insufficient to demonstrate service connection. O'Hare v Derwinski (1991) 1 Vet App 365

Board's findings and conclusion that evidence did not establish causal relationship between service-connected post-traumatic stress disorder and veteran's duodenal ulcer were so vague that it was impossible to review them. Fallo v Derwinski (1991) 1 Vet App 175

In denying veteran's claim for service-connection for schizophrenia, Board failed to articulate reasons or bases for apparent dismissal of evidence of record favorable to veteran, including psychiatrist's statement supporting veteran's claim. Willis v Derwinski (1990) 1 Vet App 63

BVA failed to give reasons or bases for its findings and conclusions in denying service connection for hearing loss and tinnitus where its decision contained no statement as to credibility and probative value of veteran's sworn testimony and lay and medical supporting evidence, and Board failed to identify any factors referenced in its conclusory statement that other factors of precipatory or contributory nature had not been ruled out. Mattson v Derwinski (1992) 2 Vet App 643

Board failed to provide any reasoning to support its denial of service connection for sinusitis as postoperative residual of surgery for deviated septum where it merely stated that disorder did not occur until many years after veteran's service; Board cannot make a medical determination based on its own opinion. Dunnagan v Derwinski (1992) 2 Vet App 557

Bare conclusory statement that veteran's arthritis did not result from trauma was insufficient to satisfy statutory requirement that bases of Board's decision be stated, particularly in light of presumption of service connection for traumatic arthritis for POWs. Myers v Derwinski (1991) 3 Vet App 11

Board offered neither reasons nor bases for its conclusion denying service connection for veteran's ocular histoplasmosis where it simply stated that veteran's disorder did not occur until several years after service; court does not know incubation period for histoplasmosis and Board cannot make medical determination based on its own opinion. Johnson v Derwinski (1991) 3 Vet App 16

Board's affirmation of its repeated denial of service connection for seizure disorder was deficient since it neither discussed evidence from veteran's ex-wife describing seizure episodes during veteran's service nor explained why that evidence did not support VA physician's opinion. Quinn v Derwinski (1992) 3 Vet App 23

Board failed to state reasons for apparently ignoring definitive evidence that veteran was treated for back injury while in service, in denying claim for service-connected back disorder. Stevenson v Derwinski (1992) 3 Vet App 31

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Board failed to provide statutorily required statement of reasons for its conclusion that veteran was not unemployable solely as a result of his service-connected disabilities where it failed to analyze separate and combined impact of veteran's service-connected PTSD and his nonservice-connected personality disorders, and ignored medical examiner's conclusions that primary diagnosis was PTSD. Hanson v Derwinski (1992) 3 Vet App 65

In face of evidence from separation physical examination that veteran's hearing was impaired during service, there was no basis for denying service connection on the ground that veteran was not treated for this impairment while in service. Ledford v Derwinksi (1992) 3 Vet App 87

Board failed to provide adequate statement of denial of service-connected disability compensation for aggravation of scoliosis; Board provided no support for its finding that scoliosis was developmental defect. Guetti v Derwinski (1992) 3 Vet App 94

Board's conclusion that service-connected pulmonary tuberculosis did not materially contribute to veteran's death was not supported by adequate statement of its reasons or bases, but was rife with ambiguities; Board never separately addressed veteran's chronic obstructive pulmonary disease nor explained its conclusion that tuberculosis was inactive. Curl v Derwinski (1992) 3 Vet App 98, appeal after remand, app dismd (1993, Vet App) 1993 US Vet App LEXIS 233


Board's conclusion that veteran's death did not result from service-connected disability was not adequately supported where Board failed to address medical opinion or explore possible contribution of veteran's service-connected pulmonary tuberculosis to development of his chronic obstructive pulmonary disease. Galvagno v Derwinski (1992) 3 Vet App 118

Board failed to provide adequate reasons for denying service connection for anomaly of thoracic spine at T3-4 in not explaining its implicit decision not to provide the scope of physical examination and diagnosis requested by veteran to discover etiology of anomaly at T3-4. Hall v Derwinski (1992) 3 Vet App 148

Board failed to provide reasons for rejecting evidence that veteran had engaged in combat with enemy and was exposed to significant stressful experiences in Vietnam in rejecting veteran's claim for service-connected PTSD disability. Trytek v Derwinski (1992) 3 Vet App 153, app dismd (1993, Vet App) 1993 US Vet App LEXIS 607

Board did not fully address why veteran's service-connected disorders of arteriosclerotic heart disease and hypertension did not play role in his death, and Board's conclusion that malignant melanoma was so overwhelming that it produced veteran's death was not clearly substantiated in record; because veteran's service-connected disorders involved vital organs, more detailed discussion should have been provided. Schoonover v Derwinski (1992) 3 Vet App 166

Board erred in failing to provide reasons for rejecting three medical opinions and substituting its own. Miller v Derwinski (1992) 3 Vet App 201

Board's statement of reasons did not adequately address add evidence favorable to veteran who claimed service-connection for asbestosis, specifically failing to explain why it rejected two physicians' opinions that veteran's asbestosis was caused by exposure to asbestos during service. Hogwood v Principi (1992) 3 Vet App 409, appeal after remand, app dismd (1995, Vet App) 1995 US Vet App LEXIS 420

Board did not substantiate with independent medical evidence its conclusion that it was unable to conclude veteran's hearing loss was service connected, after veteran presented evidence of service connection. Sibley v Principi (1993) 4 Vet App 37

BVA failed to provide adequate reasons for concluding that veteran's death from pancreatitis due to chronic ethanol abuse was not service connected. Watson v Brown (1993) 4 Vet App 189

Board failed to provide adequate statement of reasons for rejecting veteran's claim of service connection for PTSD, in particular for rejecting two diagnoses of PTSD and embracing two diagnoses to contrary. Williams v Brown (1993) 4 Vet App 270

Board did not provide adequate reasons for denying service connection for Buerger's disease; Board did not comment on credibility of probative value of lay evidence veteran submitted not did it appear to apply presumptive regulation to evidence Watson v Brown (1993) 4 Vet App 309

Board's bare conclusory remark that veteran's job description did not indicate he was in fact exposed to asbestos to any significant decree was inadequate basis for denial of claim for service connection for asbestosis, particularly in light of veteran's sworn testimony that he wore asbestos gloves to perform his job and Board's failure to explain standard for "significant" exposure. McGinty v Brown (1993) 4 Vet App 428

Denial of service connection for psychiatric disorder was erroneous where Board did not explain its rejection of veteran's testimony that his psychiatric problems had begun during his in-service isolation. Oredson v Brown (1993) 4 Vet App 450, judgment entered (1995, Vet App) 1995 US Vet App LEXIS 933

Board failed to articulate reasons for finding that veteran's preexisting psychiatric disorder was not aggravated in service, i.e., by failing to explain its dismissal of veteran's treating psychiatrist and psychologist. Guerrieri v Brown (1993) 4 Vet App 467

Board referred to no evidentiary basis for its conclusion that veteran displayed "uncured" congenital heart "disease" during service which, by definition, must have preexisted service; every veteran is presumed to have been in sound condition when enrolled with exception of disorders noted at induction or established by clear and unmistakable evidence to have preexisted. Monroe v Brown (1993) 4 Vet App 513

Board's determination that veteran's hypertension was not secondarily related to his service-connected PTSD was flawed in failing to include analysis of credibility or probative value of physicians' opinions submitted by veteran. Perman v Brown (1993) 5 Vet App 237

Board erred in denying service connection in merely citing to medical treatises referenced in its decision without quoting them and in failing to provide veteran with reasonable notice of texts and reliance proposed to be placed on them. Houston v Brown (1993) 5 Vet App 245

Board's conclusion that nearly all astigmatism is congenital is insufficient to met statute's requirement of providing reasons or bases for its decisions; Board made no attempt to clarify or discuss how pre-service traumatic injury or astigmatism related to veteran's vision problem or why it concluded veteran's right eye was not injured in service. Browder v Brown (1993) 5 Vet App 268

Board failed to discuss all evidence concerning appellant's left ear hearing in denying claim for service connection; although it discussed veteran's discharge examination and subsequent audiological evaluations, it did not discuss statement in one that test results for left ear were incomplete and inconclusive nor did it discuss VA physician's statement that veteran appeared to have mild hearing loss. Butts v Brown (1993) 5 Vet App 532

Board's explanation for rejecting numerous diagnoses of veteran's schizophrenia in denying service connection was inadequate where it acknowledged diagnoses, asserted its charge of making independent determination, and made conclusory statement of findings. Nash v Brown (1993) 6 Vet App 1

Veteran's widow provided competent medical evidence that veteran's death from liver cancer was service-related-in that it was associated with hepatitis and/or cirrhosis, which were related to veteran's long history of alcohol and drug abuse which in turn was attempt to self-medicate his service-connected PTSD-and Board rejected evidence based on its own unsubstantiated medical conclusions. Romeo v Brown (1993) 5 Vet App 388
Veteran’s claim for service connection for asthma was not well grounded and should have been denied by RO and Board where only evidence he presented was that he was healthy prior to service and that he had difficulty breathing following service, that his condition following service was very "bad," and that he began complaining of what he called asthma upon his return from service some 40 years earlier, but he presented no evidence relating his current condition to his military service. Layno v Brown (1994) 6 Vet App 465

In denying widow’s claim for DIC on grounds that veteran’s death was not service-connected, Board erred as matter of law in concluding that veteran's alcoholism was result of willful misconduct for which service connection could not be granted, since statutory amendment by which disabilities secondary to alcoholism are barred by "willful misconduct" did not apply to claim filed before October 31, 1990. Gabrielson v Brown (1994) 7 Vet App 36

BVA erred by not providing reasons or bases for refuting physician's medical opinion that veteran's current knee disability could be etiologically related to in-service trauma many years earlier by simply stating that veteran had no "objective clinical evidence" of knee injury contemporaneous with service and that clinical evidence of arthritis 30 years later is too remote to be etiologically related to in-service accident; Board must provide medical basis other than its own unsubstantiated conclusions to support its ultimate decision. Rollings v Brown (1995) 8 Vet App 8

Board’s reasons were inadequate for concluding that veteran was not service-connected for residuals of frostbite where it failed to address appellant's testimony that he had burning sensation and numbness in his feet and hands, nurse's testimony that he had frostbite of feet and hands which was going to produce numbness and tingling, and his daughter's statement that she remembered her father complaining of burning, itching, and peeling feet before he was diagnosed with diabetes. Goss v Brown (1996) 9 Vet App 109

Board improperly denied veteran's application for service-connection for pre-skin cancers where veteran's medical evidence supported such connection and record contained no contrary medical evidence, rather Board relied on its unsubstantiated medical conclusions. Sokowski v Derwinski (1991) 2 Vet App 75

Board did not provide adequate reasons or bases pursuant to 38 USCS § 7104(d)(1) for denying veteran's claim where Board restated opinion of doctor in conjunction with denial of presumptive service connection but did not articulate its reasons for finding Under Secretary of Benefits' opinion convincing. Stone v Gober (2000) 14 Vet App 116, 2000 US App Vet Claims LEXIS 879


Board of Veterans' Appeals' discussion of hypothetical application of 38 C.F.R. § 3.306(b)(1) by Veterans' Affairs regional office was deficient because it did not explain how that regulation would apply to facts of appellant's service connection claim for hypothyroidism; moreover, Statement of Case did not comply with former 38 USCS § 4005(d)(1) (redesignated 38 USCS § 7105) because it did not refer to, discuss, or summarize in any way § 3.306(b)(1); thus, there was

Although Board of Veterans' Appeals did not comply with 38 USCS § 7104(d)(1) when it failed to support its conclusion that Department of Veterans Affairs was not required under 38 USCS § 5103A(d) to provide veteran with medical examination with respect to veteran's claims for service connection for poor vision and hearing-loss disability, error was nonprejudicial under 38 USCS § 7261(b) because there was no evidence in record reflecting that veteran suffered event, injury, or disease in service that could be associated with those symptoms. Duenas v Principi (2004) 18 Vet App 512, 2004 US App Vet Claims LEXIS 798

Where veteran sought presumptive service connection under 38 USCS § 1117 for variety of undiagnosed conditions allegedly incurred during Persian Gulf War, Board of Veterans' Appeals failed to support its finding of lack of service connection; for purposes of presumptive service connection, veteran was not required to present objective medical evidence of symptoms nor to establish link between symptoms and veteran's service in Persian Gulf War, lay testimony was competent concerning symptoms which were capable of lay observation, and lack of medical etiology for symptoms supported rather than negated veteran's claim. Gutierrez v Principi (2004) 19 Vet App 1, 2004 US App Vet Claims LEXIS 834

Where veteran's hearing loss allegedly resulted from exposure to heavy-weapons fire during Korean War, and veteran's private audiologist stated in letter that such exposure was likely beginning of veteran's hearing loss, Board of Veterans' Appeals properly gave limited probative value to opinion of audiologist, but Board failed to consider whether veteran's claim of combat-related injury was sufficient to establish service connection under 38 USCS § 1154(b). Kowalski v Nicholson (2005) 19 Vet App 171, 2005 US App Vet Claims LEXIS 362

18. Board error not found

Record contained more than merely plausible basis for BVA's factual determination that veteran's respiratory disease existed prior to service and was not aggravated while in service where it included not only brother's letter to medical officer during veteran's service stating that appellant suffered from respiratory complaint since infancy, but also medical progress notes from shortly before appellant's disability discharge, and report of board of medical officers certifying appellant's disability discharge. Poindexter v Derwinski (1992) 3 Vet App 35

In denying service connection for PTSD Board considered conflicting evidence and adequately explained why it chose one version of events over other. Autry v Brown (1993) 4 Vet App 337

Board's denial of service connection for HIV was not clearly erroneous and had plausible basis where Board obtained and reviewed all available clinical evidence, which showed no indication of HIV during service and that veteran did not test positive for HIV until over one year after discharge. Kern v Brown (1993) 4 Vet App 350

Denial of increased rating for veteran's service-connected left-sciatic-nerve injury with foot drop was inadequately explained; Board failed to explain significance of evidence, from VA neurological examinations, showing that veteran had marked muscular atrophy in left leg. Anderson v Brown (1993) 4 Vet App 420, op withdrawn, op replaced, app dismd, in part, remanded, in part (1993) 5 Vet App 347

Record contained plausible basis for denial of service connection for back disorder, including evidence that disability was recurrence of injury predating his service and was not aggravated during service beyond natural progress of condition. Holoway v Brown (1993) 4 Vet App 454

Denial of service connection for peptic ulcer disease, rheumatism, and chest disorder had plausible basis, including examinations upon separation from service that showed no complaints or findings of any of claimed diseases or conditions. De Los Reyes v Brown (1993) 4 Vet App 548

Absence of record evidence of residuals of shell fragment wounds of veteran's right leg and left side of head constituted plausible basis for denying service connection for residuals of such wounds. Pefianco v Brown (1993) 5 Vet App 226
Board's denial of service connection for PTSD was not clearly erroneous and had plausible basis: veteran's original claim for service connection was for chemical dependency, not PTSD; all examining physicians were consistent as to veteran's alcohol and substance abuse, but not PTSD; VA examination specifically found that diagnostic criteria for PTSD were not present. Irby v Brown (1994) 6 Vet App 132

Board's factual findings on which service connection for arthritis was denied were plausible where appellant's physician's letter stated that findings from appellant's salivary gland biopsy were consistent with Sjogren's syndrome but did not absolutely reveal it, and VA rheumatologist refuted physician's findings and determined there was no evidence of Sjogren's syndrome, found no joint abnormalities except as related to appellant's recent right ankle injury, and concluded that appellant's history of joint pain which preceding his service was not related to any neurologic syndrome. McGraw v Brown (1994) 7 Vet App 138

There was plausible basis in record for Board's conclusion that veteran's degenerative osteoarthritis of spine was not service connected where there was no documentation in either his Air Force or National Guard records of back injury, including 1952 Air Force separation examination and 1959 National Guard enlistment examination, 1965 examination attributed back pain to fact that his car's driver's seat caused him back strain and fatigue, doctor who performed VA examination characterized condition as degenerative osteoarthritis with no mention that it was caused or aggravated by in-service injuries, and x-rays were normal. Cahall v Brown (1994) 7 Vet App 232, motion gr, dismd (1995, CA FC) 1995 US App LEXIS 16970

Denial of service connection for temporomandibular joint (TMJ) disorder, including arthritis, was supported by medical evidence that, even if certain posterior teeth had been removed in service, they were not primary factor in development of disability and significant of missing teeth was debatable; BVA was not bound to accept conflicting medical opinions which were based on dental history related by appellant. Owens v Brown (1995) 7 Vet App 429

Board's denial of restoration of service connection for cause of veteran's death in 1988 had plausible basis since record reflected that veteran's pulmonary tuberculosis was declared inactive since 1985 and that no complications from disorder were reported in years thereafter, and none of medical evidence noted causal connection between veteran's PTB and his cause of death. Ventigan v Brown (1996) 9 Vet App 34

There was clearly plausible basis for denying service connection for gastrointestinal disorder where no examination had noted any problems or rendered diagnosis regarding stomach disorder. Hayes v Brown (1996) 9 Vet App 67

Director of Compensation and Pension Service's statement that, after reviewing all evidence, there was no reasonable possibility that World War II veteran's colon and skin cancer were result of exposure to ionizing radiation provided plausible basis for Board's denial of service connection for cancers diagnosed in 1987 and 1991. Davis v Brown (1997) 10 Vet App 209

On review of 1983 decision of Board of Veterans' Appeals (Board), Board was bound to apply regulations as they existed in 1983, and new interpretations of 38 USCS § 1111 (former 38 USCS § 311) and 38 USCS § 1153 (former 38 USCS § 353), interpretations to which Secretary of Veterans Affairs also agreed, that apparently conflicted with those regulations could not be basis for clear and unmistakable error for 1983 decision. Jordan v Principi (2003) 17 Vet App 261, 2003 US App Vet Claims LEXIS 721, affd (2005, CA FC) 401 F.3d 1296

19. Remand required

Remand was required for denial of non-service-connected disability pension claim on basis that veteran's multiple joint arthritis and other disabilities prevented his obtaining substantially gainful employment. Chicco v Derwinski (1991) 1 Vet App 400

Remand for decision concerning service connection for PTSD and panic disorder was required since Board never concluded whether panic disorder was preexisting condition. Hayes v Derwinski (1991) 3 Vet App 7, reconsideration gr, remanded on other grounds (1991) 1 Vet App 482
Board's decision denying service connection for degenerative disc condition lacked medical foundation and would be remanded; Board simply noted proximity of first laminectomy to veteran's industrial accident and implied that accident necessitated operation. 

Johnson v Principi (1992) 3 Vet App 448

Denial of service-connection for veteran's heart-disorder disability would be vacated and remanded for Board's failure to provide adequate reasons or bases explaining its evaluation of all lay and medical evidence both old and new and its analysis of application of benefit-of-doubt rule. 

Nagler v Principi (1992) 3 Vet App 488

Remand was required for Board's failure to adequately give reasons for denying veteran's service-connection claim for ear disorder, given evidence from veteran's private physician of ear disorder as well as that from VA medical examination and outpatient record. 

Sibley v Principi (1993) 4 Vet App 37

In denying service connection for PTSD, Board neither set forth standard for what constitutes requisite stressor nor applied standard to record evidence, hence decision would be vacated and remanded. 

Maynard v Brown (1993) 4 Vet App 341

Remand was required for Board to provide reasons for its assignment of effective date for veteran's service connected Graves' disease so that veteran could understand Board's decision and how it related to whatever decision Board renders on direct, as opposed to presumptive, service connection. 


Board's failure to address medical opinions that veteran's current condition was indicative of exposure to HIV virus during service required remand; whether he became infected with HIV during service is distinct from whether he exhibited symptoms of HIV infection during service. 

ZN v Brown (1994) 6 Vet App 183

Board failed to provide adequate reasons for its rejection of material evidence in support of claim for service-connection for hearing loss and tinnitus, requiring remand for readjudication. 

Kelly v Brown (1995) 7 Vet App 471

Board failed to provide adequate statement of reasons and bases analyzing weight and credibility of all record evidence that supported servicemember's account of sexual assault in service, requiring remand; although there might be good reasons to reject some of evidence, Board was required to address evidence and give reasons for accepting or rejecting it. 

YR v West (1998) 11 Vet App 393

Veteran raised secondary-service claim in notice of disagreement which Board erred in failing to address, requiring remand; veteran proffered evidence to well ground claim for lower-extremity secondary service connection in form of medical evidence of current calf pain linked to his pes planus. 

Buckley v West (1998) 12 Vet App 76

Board failed to provide reason to support its decision that veteran was notified of 1969 denial of service connection, when it became clear during oral argument that whether veteran was properly notified was unresolved factual matter, requiring remand. 


Board of Veterans' Appeals statement of reasons or bases for determining that veteran was ineligible for benefits based on full-time duty in U.S. Coast Guard or his Service in Merchant Marine was not sufficient under 38 USCS § 7104(a), (d)(1) because, inter alia, Board failed to address certain evidence he submitted pertaining to his possible service and appeared to rely on veteran's DD Form 214 as dispositive of his dates of service; moreover, Department of Veterans Affairs (VA) erred under 38 USCS § 5103A because it did not make additional request seeking verification of service following submission of additional documents by veteran to VA regional office; however, because it was unclear whether Board properly considered all documents before it, it would be premature to determine whether Board's denial of veteran's claim was "clearly erroneous" under 38 USCS § 7261(a)(4), and, thus, court remanded matter for further development. 


Where record before Board of Veterans' Appeals contained: (1) veteran's statement that he experienced difficulty in breathing, easy fatigability, and recurring rapid heartbeat, (2) veteran's
assertion that those symptoms were symptoms of his claimed disabilities and that he had experienced them since his separation from service, and (3) discharge examination report that included notation of tachycardia, which was abnormality of cardiovascular system, Board did not comply with 38 USCS § 7104(d)(1) in that it failed to support its conclusion that Department of Veterans Affairs was not required under 38 USCS § 5103A(d) to provide veteran with medical examination with respect to his claim for service connection for heart disease; matter was remanded so that Board could properly address whether record: (1) contained competent evidence that veteran had recurrent symptoms of heart disease, and (2) indicated that those symptoms might be associated with his active military service. Duenas v Principi (2004) 18 Vet App 512, 2004 US App Vet Claims LEXIS 798

C. Other Decisions

20. Miscellaneous

Board's finding of earliest effective date of increased award for facial scarring as date claim was reopened was proper since there was nothing in record prior to that date to indicate that scarring was anything more than "slightly disfiguring."  Hazzard v Brown (1993) 4 Vet App 254

Board's statement of reasons or bases supporting its determination of date for resumption of disability compensation was inadequate; Board cited and accurately described earlier regulations but then simply ignored them and applied current regulations to preclude earlier effective date for compensation without providing explanation for when and how regulations changed and whether they were intended to have retroactive effect. Jones v West (1998) 12 Vet App 98

Board decision denying eligibility for non-service-connected, needs-based pension benefits would be vacated and remanded since Board did not explain why regulation providing that "active duty" includes authorized travel to and from such duty did not apply. Pacheco v West (1998) 12 Vet App 36

Board's conclusion that diagnostic code 5286 is not applicable to veteran's lumbar-spine disability is unsupported by any analysis or citation to authority and violates requirements of 38 USCS § 7104(d)(1). Colayong v West (1999) 12 Vet App 524, 1999 US App Vet Claims LEXIS 885

Board's decision that surviving spouse's dependency and indemnity compensation benefits will be offset by entire amount of settlement under Federal Tort Claims Act for wrongful death of veteran under 38 USCS § 1318(d) is vacated and matter remanded as Board failed to set forth adequate statement of reasons or bases pursuant to 38 USCS § 7104(a) and (d)(1) where Board did not address how much money was received by plaintiffs other than surviving spouse, whether money received by such plaintiff was received ultimately by surviving spouse through estate distribution, whether such distribution was considered received by surviving spouse, and whether money received by attorney was "received" by surviving spouse. Bryan v West (2000) 13 Vet App 482, 2000 US App Vet Claims LEXIS 362

Board erroneously dismissed veteran's claim for interest on past-due benefits since, if Board had liberally framed issue in terms of whether appellant had received maximum monetary award to which he was legally entitled, including interest, or whether there were any amounts omitted in calculation of past-due benefits, including interest, claim would have been within Board's jurisdiction pursuant to 38 USCS § 7104. Smith v Gober (2000) 14 Vet App 227, 2000 US App Vet Claims LEXIS 1179, affd (2002, CA FC) 281 F.3d 1384, cert den (2002) 537 US 821, 154 L Ed 2d 28, 123 S Ct 99

Board of Veterans' Appeals decision was vacated, where Board failed to mention or discuss notice requirements in 38 USCS § 5103(a) with respect to veteran's direct-appeal earlier-effective date (EED) claim; Department of Veterans Affairs (VA) also did not comply with certain notice requirements in § 5103(a), as there were no documents in which VA purported to advise veteran of information and evidence necessary to substantiate his direct-appeal EED claim. Huston v Principi (2003) 17 Vet App 195, 2003 US App Vet Claims LEXIS 533, vacated, remanded (2004, CA FC) 98 Fed Appx 883, subsequent app, remanded (2004, US) 2004 US App Vet Claims LEXIS 446 and on remand, remanded (2004, US) 2004 US App Vet Claims LEXIS 629 and on

Where widow of veteran argued that, because she asserted that her husband died from "cancer" in her 1975 dependency and indemnity compensation claim, that claim necessarily included claim for non-Hodgkin's lymphoma and that under 38 C.F.R. § 3.313 she was eligible for earlier effective date based on 38 C.F.R. § 3.309(e), that argument was without merit; at time of 1976 adjudication, evidence established that widow's claim was one for Hodgkin's disease, and, therefore, evidence did not reasonably raise any claims for cause of death by types of cancer other than Hodgkin's disease. Bonner v Nicholson (2005) 19 Vet App 188, 2005 US App Vet Claims LEXIS 408

Under 38 C.F.R. § 3.114(a)(3), where widow of veteran did not file her informal claim for dependency and indemnity compensation (DIC) until more than one year after 38 C.F.R. § 3.309(e) was enacted in February 1994, earliest possible effective date available to her for her DIC claim was November 1, 1994, date awarded. Bonner v Nicholson (2005) 19 Vet App 188, 2005 US App Vet Claims LEXIS 408

V. MAILING OF DECISION

21. Generally

Evidence was sufficient to rebut presumption of regularity and hold that Secretary failed to comply with provision requiring Board to promptly mail copy of its written decision to claimant where agency not only failed to show that decision was mailed but after issuance of decision claimant twice wrote to veteran service officer who had represented him and neither letter reflected that he had received copy of decision, rather appeared to be efforts to seek information regarding status of his case. Chute v Derwinski (1991) 1 Vet App 352

Mailing of Board decision to appellant's representative does not satisfy statute's requirement; under plain language of section, written decision must be mailed to both claimant and claimant's representative. Chadwick v Derwinski (1990) 1 Vet App 74

Term "mail" in subsection providing that Board shall mail copy of its written decision to claimant means that BVA decision must be correctly addressed, stamped with proper postage, and delivered directly by BVA into custody of U.S. Postal Service. Davis v Brown (1994) 7 Vet App 298, remanded (1996, Vet App) 1996 US Vet App LEXIS 153 and (superseded by statute as stated in Dippel v West (1999) 12 Vet App 466, 1999 US App Vet Claims LEXIS 611)

Secretary failed to prove compliance with requirement that BVA mail copy of its decision to claimant's last known address where decision mailed to claimant's initial address was returned as undeliverable but later material in claimant's file disclosed other possible and plausible addresses; appellant's notification to VA through RO of his new address was sufficient notice to require Board to have mailed its decision to new address. Cross v Brown (1996) 9 Vet App 18

Although appellant claimed that he did not receive Board's decision because of change of address, he did not allege that Board was aware of his new address at time its decision was issued, and when decision was returned to Board, Board did make further attempts to deliver decision to veteran, thus date of original mailing to appellant's last known address marked start of 120-day appeal period. McNaron v Brown (1997) 10 Vet App 61, affd without op sub nom McNaron v Gober (1997, CA FC) 121 F.3d 728, reported in full (1997, CA FC) 1997 US App LEXIS 22480

Although appellant contends decision was not received due to change of address, appellant does not allege Board was aware of new address at time decision was issued, and appellant has failed to present evidence necessary to establish jurisdiction where Board mailed its decision to appellant's last known address as then required by 38 USCS § 7104(e) and appellant failed to file Notice of Appeal within 120 days from date of mailing of Board's decision pursuant to 38 USCS § 7266(a) and U.S. Vet. App. R. 4. McNaron v Brown (1997) 10 Vet App 61, affd without op sub
nom McNaron v Gober (1997, CA FC) 121 F.3d 728, reported in full (1997, CA FC) 1997 US App LEXIS 22480

Amendment of 38 USCS § 7104(e) by Veterans' Benefit Improvement Act of 1996, § 509, is not to be applied retroactively. Ryan v West (1999) 13 Vet App 151, 1999 US App Vet Claims LEXIS 1274

Applying presumption of regularity that Board of Veterans' Appeals discharged its official duties under 38 USCS § 7104(e) by mailing copy of its decision denying earlier effective date for service-connection disability benefits, court concluded that veteran had not rebutted presumption of regularity even though Board's mailing was returned as undeliverable where there was no additional and plausible address in claims file at time of Board's decision. Davis v Principi (2003) 17 Vet App 29, 2003 US App Vet Claims LEXIS 167, subsequent app (2004, CA FC) 85 Fed Appx 771

22. Relationship to 38 USCS § 5104

Section 5104's general command to provide certain types of notices is given content as to BVA decisions by section 7104(e)'s more specific command to provide copies of BVA decisions by "mail," and types of notice required by section 5104(a) must be mailed along with copy of BVA decision; so read, provisions are compatible and do not conflict. Thompson v Brown (1995) 8 Vet App 169

23. Mailing to authorized representative

Board failed to comply with statutory mailing requirement where, instead of mailing copy to appellant's designated service representative, it mailed copies to local RO for distribution to veterans' service organizations; therefore, 120-day NOA filing period did not begin prior to court's receipt of NOA and NOA was therefore timely filed. Leo v Brown (1995) 8 Vet App 28, op withdrawn, substituted op, on reh (1995) 8 Vet App 410, remanded (1997, Vet App) 1997 US Vet App LEXIS 340

Although BVA did not deposit copy of its decision with U.S. Postal Service with cover addressed to veteran's representative but hand-delivered it to Military Order of Purple Heart (MOPH) Appeals Office in same office building, any defect in providing appellant with copy of decision had been cured by date appellant's California MOPH representative submitted statement in support of claim to VA, indicating that defect in providing copy to representative had been cured by then. Pepitone v Brown (1995) 8 Vet App 31

Board failed to comply with statutory mailing requirement where it failed to mail copy of its decision to address designated by appellant for his service representative; appellant clearly designated local office of American Legion as that of his representative, yet Board mailed decision to American Legion's national appeals office. Leo v Brown (1995) 8 Vet App 410, remanded (1997, Vet App) 1997 US Vet App LEXIS 340

Actual receipt can be achieved through flat mail procedure if there is proof of actual receipt by representative and reliance for such receipt is not based upon mere assertion that standard flat mail procedures were followed. Thompson v Brown (1996) 9 Vet App 173, subsequent app (1996, CA FC) 104 F.3d 376, reported in full (1996, CA FC) 1996 US App LEXIS 32409, reh, en banc, den (1997, CA FC) 1997 US App LEXIS 1669 and cert den (1997) 522 US 825, 139 L Ed 2d 42, 118 S Ct 85

Mailing decision to national DAV office as appellant's representative was proper where appellant clearly appointed DAV as his representative and it in fact represented him before BVA, despite appellant's having given local Philippine address as address of record for purposes of receiving correspondence, since there were no accredited DAV representatives in Philippines and statute only requires Board to mail decision to appellant's authorized representative. Navarro v Brown (1996) 9 Vet App 192

Presumption of regularity in mailing decision to appellant attached where appellant designated national veterans service organization as his representative but did not specify
address but, before decision was mailed, organization had designated to BVA address for mailing of decisions. Hill v Brown (1996) 9 Vet App 246

Presumption of regularity in mailing decision to appellant attached where appellant designated national veterans service organization as his representative but did not specify address but, before decision was mailed, organization had designated to BVA address for mailing of decisions, hence appellant failed to establish that his appeal filed more than 120 days after BVA decision was timely filed. Reich v Brown (1996) 9 Vet App 271

BVA decision was properly mailed to Disabled American Veterans' national office for purposes of triggering time limit for filing notice of appeal, where veteran had designated DAV as his representation, not provided any address for DAV representative, BVA decision was mailed to address specified in instructions from senior officials at DAV, and appellant did not rebut presumption that mailing was carried out properly. Perez v Brown (1996) 9 Vet App 452

Although presumption of regularity of mailing of BVA decision to appellant's service representative, American Legion, because court had invalidated type of flat-mail procedures that involved sending copies of BVA decisions to local ROs for distribution to veterans' service organizations, any defects in mailing were cured by date of appellant's letter to his Senator in which he acknowledged having received copy of BVA decision and his representative had copy in his files. Ibeling v Brown (1995) 8 Vet App 256

Where appellant typed "The American Legion" in Box 3 of VA Form 23-22 but did not indicate specific address and therefore did not designate local Philippines AL office as her representative, BVA was not required to mail copy of its decision to Philippines office. Paniag v Brown (1997) 10 Vet App 265

Mailing of decision to national headquarters of Disabled American Veterans conformed with statute in effect at time of Board's decision where appellant did not designate local representative in Block 3 and Secretary's evidence that appellant had been represented by at least five other individuals from DAV, including representatives from national office, established that his representation was "organizational" not personal. Leonard v Brown (1997) 10 Vet App 315

Notice of appeal was timely filed under 38 USCS § 7266(a) where appellant filed motion for reconsideration more than 120 days after Board's decision but filed notice of appeal within 120 days of denial of motion for reconsideration since 38 USCS § 7104(e), as amended by Veterans' Benefits Improvement Act § 509, has no application where defect in providing notice of decision to appellant's representative became harmless when appellant advanced case by filing motion for reconsideration or notice of appeal; even if amendment applied, Secretary's motion to dismiss appeal must be denied since version of law most favorable to appellant must be applied and retroactive application would be impermissible. Dippel v West (1999) 12 Vet App 466, 1999 US App Vet Claims LEXIS 611, motion gr, remanded (2000) 330 NLRB 492, 170 BNA LRRM 1097, 1999-00 CCH NLRB ¶ 15371

Board's forwarding of decision by "flat mail" to veteran's representative did not qualify as mailing under 38 USCS § 7104(e) and rebuts presumption of regularity since amendment to 38 USCS § 7104(e) by Veterans' Benefit Improvement Act of 1996, § 509, does not apply retroactively. Ryan v West (1999) 13 Vet App 151, 1999 US App Vet Claims LEXIS 1274

§ 7105. Filing of notice of disagreement and appeal

cxcii Discussion and Analysis in the Veterans Benefits Manual

(a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter [38 USCS §§ 7101 et seq.] and regulations of the Secretary.

(b) (1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial
review or determination. Such notice, and appeals, must be in writing and be filed with the activity which entered the determination with which disagreement is expressed (hereinafter referred to as the "agency of original jurisdiction"). A notice of disagreement postmarked before the expiration of the one-year period will be accepted as timely filed.

(2) Notices of disagreement, and appeals, must be in writing and may be filed by the claimant, the claimant's legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by the claimant or guardian. Not more than one recognized organization, attorney, or agent will be recognized at any one time in the prosecution of a claim.

(c) If no notice of disagreement is filed in accordance with this chapter [38 USCS §§ 7101 et seq.] within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

(d) (1) Where the claimant, or the claimant's representative, within the time specified in this chapter [38 USCS §§ 7101 et seq.], files a notice of disagreement with the decision of the agency of original jurisdiction, such agency will take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title. If such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice of disagreement, such agency shall prepare a statement of the case. A statement of the case shall include the following:

(A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed.

(B) A citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision.

(C) The decision on each issue and a summary of the reasons for such decision.

(2) A statement of the case, as required by this subsection, will not disclose matters that would be contrary to section 5701 of this title [38 USCS § 5701] or otherwise contrary to the public interest. Such matters may be disclosed to a designated representative unless the relationship between the claimant and the representative is such that disclosure to the representative would be as harmful as if made to the claimant.

(3) Copies of the "statement of the case" prescribed in paragraph (1) of this subsection will be submitted to the claimant and to the claimant's representative, if there is one. The claimant will be afforded a period of sixty days from the date the statement of the case is mailed to file the formal appeal. This may be extended for a reasonable period on request for good cause shown. The appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case. The benefits sought on appeal must be clearly identified. The agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case, but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans' Appeals.

(4) The claimant in any case may not be presumed to agree with any statement of fact contained in the statement of the case to which the claimant does not specifically express agreement.
The Board of Veterans' Appeals may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

Effective date of section:
This section is effective Jan. 1, 1963, as provided by Act Sept. 19, 1962, P. L. 87-666, § 3, 76 Stat. 554, which appears as a note to this section.

Amendments:
1986. Act Oct. 28, 1986, in subsec. (b)(2) substituted "the claimant's" for "his" and "the claimant or guardian" for "him"; and in subsec. (d)(1), (3), substituted "the claimant's" for "his" wherever appearing.

1988. Act Nov. 18, 1988 (effective 1/1/89 as provided by § 401(d) of such Act, which appears as 38 USCS § 7251 note), in subsec. (d), in para. (1), in the introductory matter, substituted "shall prepare a statement of the case. A statement of the case shall include the following:" and subparas. (A)-(C) for "will prepare a statement of the case consisting of- " and former subparas. (A)-(C) which read:

"(A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed;

"(B) A citation or discussion of the pertinent law, regulations, and where applicable, the provisions of the Schedule for Rating Disabilities;

"(C) The decision on such issue or issues and a summary of the reasons therefor."

Such Act further (effective as above), in subsec. (d), substituted para. (4) for one which read: "The appellant will be presumed to be in agreement with any statement of fact contained in the statement of the case to which no exception is taken." and, in para. (5), deleted "will base its decision on the entire record and" following "Board of Veterans' Appeals".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4005, as 38 USCS § 7105, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991 substituted "Secretary" for "Administrator" wherever appearing.


Other provisions:
Effective date of Sept. 19, 1962 amendments. Act Sept. 19, 1962, P. L. 87-666, § 3, 76 Stat. 554, provides: "The amendments made by this Act [repealing 38 USCS 4005, 4007; redesignating 38 USCS § 4006 as § 4007 (now § 7107); and adding 38 USCS 4005, 4005A, 4006 (now §§ 7105, 7105A, 7106)] shall be effective January 1, 1963."

Code of Federal Regulations
Department of Veterans Affairs-National Cemeteries of the Department of Veterans Affairs, 38 CFR Part 38

Cross References
This section is referred to in 38 USCS §§ 7105A, 7106

Research Guide
Federal Procedure:
I. IN GENERAL

1. Generally
   Jurisdiction of Court of Veterans Appeals is determined by date of notice of disagreement that initiates appellate review of particular claim in BVA, and fact that new issues may be raised during course of proceedings in BVA and on remand to agency of original jurisdiction does not alter that rule. Jackson v Brown (1995, CA FC) 55 F.3d 589, reh den (1995, CA FC) 1995 US App LEXIS 13904

   Although termination of benefits was not specifically listed in issue section, statement of case required by 38 USCS § 7105(d)(1) adequately put veteran on notice that termination was at issue; failure did not rise to level of violation of due process. Herndon v Principi (2002, CA FC) 311 F.3d 1121

   There was nothing in 38 USCS § 7105 that required documentary evidence that reflected date notice of decision was mailed and lack of such evidence did not bar application of presumption of regularity. Miley v Principi (2004, CA FC) 366 F.3d 1343, 64 Fed Rules Evid Serv 85

   For purposes of presumption of regularity, it is legally sufficient if U.S. Board of Veterans' Appeals finds that decision notice was designated to be mailed along with other documents, which were in fact mailed shortly after date of decision; in that setting, presumption of regularity may properly be invoked to establish, in absence of contrary evidence, that notice of decision was in fact mailed along with other documents that were sent in timely fashion. Miley v Principi (2004, CA FC) 366 F.3d 1343, 64 Fed Rules Evid Serv 85

   Since RO was acting in appellate role, subsequent adjudication was not decision of agency of original jurisdiction for purposes of filing jurisdiction-conferring notice of disagreement. King v Derwinski (1992) 3 Vet App 242

2. Persons entitled to prosecute claims
   Applications for review on appeal entered by accredited ex-service organization, attorney, or claims agent are to be accepted as valid unless repudiated by claimants concerned, but persons entering and signing such application are not to be recognized in prosecution of claims on appeal unless proper power of attorney is presented to Administration [now Department] and, in applications signed by persons other than accredited representatives, until such persons have been duly admitted to practice as pension attorneys or pension claims agents. 1934 ADVA 234
Right of appeal under former 38 USC § 701 et seq. died with claimant who fails to appeal decision rendered during his lifetime. 1934 ADVA 219

3. Perfection of appeal

Appellant did not perfect her appeal from denial of dependency and indemnity compensation where she did not inquire about claim until more than year after RO issued decision and appellant filed notice of disagreement, despite her claim that she never received RO's statement of case (SOC), since record showed that RO issued SOC and forwarded copy to appellant's service representative, nothing in record reflected that it was not mailed to appellant at address she gave, and that her address did not change in relevant time period. YT v Brown (1996) 9 Vet App 195

Board did not err in dismissing appeal where, after filing NOD, veteran did not file within time limit provided for substantive appeal nor did he request extension of time to do so. Bridges v Brown (1993) 5 Vet App 496

NOD is not sufficient to perfect appeal; after statement of case, appellant must file formal appeal within 60 days. Roy v Brown (1993) 5 Vet App 554

There was no problem, with regard to timeliness of filing of appeal, which would deprive Board of jurisdiction over case as original claim, where veteran filed timely notice of appeal pursuant to 38 USCS § 7105(d)(3), which he later withdrew, but upon expressing his desire to pursue appeal, Regional Office (RO) treated appeal as timely, there was no indication that RO closed appeal, and RO appeared to have treated veteran's filing as timely. Gonzalez-Morales v Principi (2003) 16 Vet App 556, 2003 US App Vet Claims LEXIS 60

Where Department of Veterans Affairs (VA) regional office (RO) mailed statement of case (SOC) to widow and used incorrect ZIP Code, and widow claimed that she did not receive SOC, presumption of regularity of mailing was rebutted, and since Secretary of Veterans Affairs did not establish that mailing was regular or that SOC was delivered to veteran, period for filing substantive appeal under 38 USCS § 7105(d)(3) was tolled and did not begin to run again until RO mailed new copy of SOC to correct address. Crain v Principi (2003) 17 Vet App 182, 2003 US App Vet Claims LEXIS 532

Where veteran's entire claim file, including Statement of Case (SOC), was sent to representative of veteran in response to request of representative who alleged that veteran never received SOC, veteran's appeal was not timely filed after receipt of file; despite representative's assertion that representative was not required to search contents of file to find SOC, it was undisputed that representative was in actual receipt of copy of SOC when file was received and there was no showing that reviewing file was particularly onerous task. Matthews v Principi (2005) 19 Vet App 23, 2005 US App Vet Claims LEXIS 18

4. Judicial review

No jurisdiction exists in District Court or Court of Appeals to review final action of Administrator [now Secretary]. Redfield v Driver (1966, CA9 CAI) 364 F.2d 812

Breach of duty to assist veteran does not vitiate finality of Veterans' Administration (VA) Regional Office's decision; Court of Appeals for Federal Circuit therefore overrules Hayre v. West, 188 F.3d 1327 (Fed. Cir. 1999) to extent that it created additional exception to rule of finality applicable to VA decisions by reason of "grave procedural error." Cook v Principi (2002, CA FC) 318 F.3d 1334, reh, en banc, den (2003, CA FC) 56 Fed Appx 496 and cert den (2003) 539 US 926, 156 L Ed 2d 603, 123 S Ct 2574

United States Court of Appeals for Federal Circuit declined to consider whether trial court should have applied doctrine of equitable tolling to 38 USCS § 7105 because issue was neither presented to nor considered by trial court. Morgan v Principi (2003, CA FC) 327 F.3d 1357, reh den (2003, CA FC) 2003 US App LEXIS 12017

Fact that three appeals were fortuitously consolidated could not give court jurisdiction over two as to which notices of disagreement were filed before November 18, 1988. Tucker v Derwinski (1992) 2 Vet App 201
U.S. Court of Veterans Appeals remanded matter to Board of Veterans Appeals for readjudication because Board did not adequately set forth reasons or bases for rejecting testimony of veteran's mother about veteran's psychiatric condition when veteran alleged that testimony provided new and material evidence and that evidence was grounds for re-opening previously disallowed claim. Fortuck v Principi (2003) 17 Vet App 173, 2003 US App Vet Claims LEXIS 519

Board of Veterans Appeals erred when it dismissed veteran's case claiming that it did not have discretion to hear appeal because veteran failed to identify specific error of law or fact, as purportedly required by 38 C.F.R. § 20.202 and 38 USCS § 7105(d)(5), because Board was not required to dismiss appeal on jurisdictional grounds and in fact, given nature of veteran's appeal, veteran was not required to provide any additional specifics on factual or legal errors that had occurred. Gomez v Principi (2003) 17 Vet App 369, 2003 US App Vet Claims LEXIS 905

Where veteran neither alleged nor showed that notice of disagreement relating to assignment of effective date was filed before decision of Board of Veterans' Appeals, Board did not err under 38 USCS § 7105(a) by not addressing that issue. Urban v Principi (2004) 18 Vet App 143, 2004 US App Vet Claims LEXIS 384

II. NOTICE OF DISAGREEMENT

5. Generally

Notice of disagreement, filed in response to RO decision subsequent to VA Form 1-9 hearing, was not filed with agency of original jurisdiction, thus not effective for court's review purposes. Hudson v Principi (1992) 3 Vet App 467

Board may exercise jurisdiction based on NOD timely filed under statute, i.e., postmarked within one year after notice of unfavorable RO decision is mailed to claimant, or under "not inconsistent" regulations prescribed by Secretary, but not on any basis not provided by statute or regulation. Rowell v Principi (1993) 4 Vet App 9

Veteran's letter to RO constituted valid notice of disagreement where it was filed within one year after mailing notice of decision, was from veteran's representative, and specifically referred to veteran's clear and unmistakable error (CUE) claim and to decision as having considered that claim, and expressly disagreed with contents of RO's subsequent supplement statement of case as deficient in having failed to address CUE issue. Beyrle v Brown (1996) 9 Vet App 24

6. Sufficiency

Veteran's letters to Board and secretary did not constitute jurisdictionally required notice of disagreement since they did not disagree with regional office but with Board. Burton v Derwinski (1991, CA) 933 F.2d 988

Veterans' substantive appeal, along with Va Form 1-646, constituted jurisdictionally valid notice of disagreement. Drenkhahn v Derwinski (1992) 2 Vet App 207

Veteran's Form 1-9 expressing disagreement with decision made by Director, Compensation and Pension Service of Veteran's Benefits Administration was jurisdictionally valid notice of disagreement under statute. Malgapo v Derwinski (1991) 1 Vet App 397


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Oral statement by veteran's accredited representative during hearing before regional office, when later reduced to writing in transcript, constituted valid notice of disagreement; there are no technical, formal requirements for NOD beyond those set in statute since to impose any would exceed Secretary's authority. Tomlin v Brown (1993) 5 Vet App 355


Appellant's alleged letters to Congress indicating her intent to appeal RO decision could not be held to constitute valid notice of disagreement so as to trigger appellate review since letters, if they existed, were not present in record. Villeza v Brown (1996) 9 Vet App 353, app dismd without op (1997, CA FC) 114 F.3d 1206, reported in full (1997, CA FC) 1997 US App LEXIS 12843 and (ovrd by Trilles v West (2000) 13 Vet App 314, 2000 US App Vet Claims LEXIS 100)

Veteran's statements expressing his disagreement with RO's decision as to disability rating and effective date assigned to back-disability claim constituted notice of disagreement. Holland v Gober (1997) 10 Vet App 433


Court of Appeals for Veterans Claims has no jurisdiction over any claim for authorization for payment of private medical expenses where record on appeal does not contain document or reference to document which could possibly serve as jurisdiction-conferring notice of disagreement under 38 USCS § 7105(b)(1). Tellex v Principi (2001) 15 Vet App 233, 2001 US App Vet Claims LEXIS 1103

7. Number

For jurisdictional purposes, there can be only one NOD relating to same claim; plain language of statute supports conclusion that NOD referred to is one which initiates appellate review, and legislative history also supports conclusion. Hamilton v Brown (1994, CA FC) 39 F.3d 1574

Claim appealed by veteran's February 1988 NOD was not satisfied by September 1988 award of 30 percent rating, and because that NOD was not withdrawn by veteran or his representative, veteran could not have filed additional jurisdiction-conferring NOD on or after Act's effective date. AB v Brown (1993) 6 Vet App 35

There can be only one valid NOD as to particular claim, extending to all subsequent RO and BVA adjudications on same claim until final RO or BVA decision has been rendered in that matter or appeal has been withdrawn by claimant; where BVA remands to RO for further development and readjudication claim previously decided by RO and properly appealed to BVA, expression of disagreement with subsequent RO readjudication on remand cannot be NOD; where BVA remands to RO for development and adjudication claim not decided by RO and claimant files timely expression of disagreement with RO, that is NOD as to that claim. Hamilton v Brown (1993) 4 Vet App 528, remanded sub nom Powell v Brown (1993) 5 Vet App 275, reported in full
8. Timeliness

Notice of disagreement from denial of service-connected death compensation was untimely; Board had clearly rejected claimant's only grounds that might support extension for good cause, namely, allegation that she had never originally filed earlier claim and received notice of denial of it. *Bellavance v Principi* (1992) 3 Vet App 402

Time for filing NOD may be extended, or untimely NOD may be accepted, only when such extension or acceptance has been requested and good cause for it has been shown, consistent with regulations, and Board may exercise jurisdiction based on such NODs, but not on any other basis not provided for by statute or regulations. *Rowell v Principi* (1993) 4 Vet App 9

BVA's decision on question of timeliness of veteran's notice of disagreement was procedurally deficient since it failed to address whether its sua sponte consideration of question without first according veteran opportunity to submit evidence of argument on questions was prejudicial. *Marsh v West* (1998) 11 Vet App 468, subsequent app, remanded (2001, US) 2001 US App Vet Claims LEXIS 1303

Although Court of Appeals for Federal Circuit directed Court of Appeals for Veterans Claims to remand case if violation of duty to assist was found with regard to 1972 decision, Court of Appeals for Veterans Claims dismisses case for lack of jurisdiction pursuant to 38 USCS § 7105 even though appellant filed timely Notice of Disagreement (NOD) in 1973; appellant did not pursue appeal after Statement of Case was filed, NOD filed in 1993 was submitted in response to rating decision for entirely separate claim and, even if 1993 NOD perfected 1973 NOD, 1973 NOD was not filed on or after November 18, 1988, as required under Veterans' Judicial Review Act. *Hayre v Principi* (2001) 15 Vet App 48, 2001 US App Vet Claims LEXIS 709 (ovrd as stated in *Shinogee v Principi* (2003, US) 2003 US App Vet Claims LEXIS 305) and (ovrd as stated in *Gilliam v Principi* (2003, US) 2003 US App Vet Claims LEXIS 713) and affd (2003, CA FC) 78 Fed Appx 120 and (ovrd as stated in *Gilliam v Principi* (2004, US) 2004 US App Vet Claims LEXIS 445)

Claimant for veterans benefits was denied relief from order of Board of Veterans' Appeals (Board), although his counsel's letter to Board was sufficient to constitute timely notice of disagreement under 38 USCS § 7105(b), giving Board jurisdiction to review whether substantive appeal on merits of claim was timely. *Matthews v Nicholson* (2005) 19 Vet App 202, 2005 US App Vet Claims LEXIS 425

Record that was presented to Court of Appeals for Veterans Claims did not contain clear evidence rebutting presumption that Department of Veterans Affairs would not have issued statement of case if notice of disagreement veteran submitted was untimely, and court reversed Board of Veterans' Appeals' decision finding that veteran's appeal was untimely under 38 USCS § 7105(b). *Marsh v Nicholson* (2005) 19 Vet App 381, 2005 US App Vet Claims LEXIS 734

9. Survivor's claims

Veteran's son's claim for accrued benefits is predicated upon accrued-benefits application filed after veteran's death and since it could not have been filed prior to veteran's death on December 1, 1988, NOD could not have been filed prior to effective date of statute providing appeal to court. *Laconi v Principi* (1992) 3 Vet App 550

Widow's claim for accrued benefits was separate from that of veteran, hence her letter disagreeing with supplemental statement of case was disagreement in relation to veteran's claim, not hers, so no valid NOD was filed. *Cates v Brown* (1993) 5 Vet App 399

Widow claiming DIC failed to file valid NOD since her letter could not express disagreement of her § 1318 claim since there had never been adjudication of that claim. *Lyon v Brown* (1993) 5 Vet App 507

Accrued-benefits claim is different from service-connection claims of veteran from whose service former claim is derived, therefore, in order for survivor to pursue accrued-benefits claim
based on deceased veteran's claim which was pending at time of his death, accrued-benefits claimant must file NOD as to accrued-benefits claim in order to initiate review by BVA, and ultimately Court, of that claim. Zevalkink v Brown (1994) 6 Vet App 483, affd (1996, CA FC) 102 F.3d 1236, cert den (1997) 521 US 1103, 138 L Ed 2d 988, 117 S Ct 2478

10. Filing prior to Veteran's Judicial Review Act

Veteran's son's claim for accrued benefits is predicated upon accrued-benefits application filed after veteran's death and since it could not have been filed prior to veteran's death on December 1, 1988, NOD could not have been filed prior to effective date of statute providing appeal to court. Lacomti v Principi (1992) 3 Vet App 550

Remand for development of PTSD claim was part of claim more generally described as "nervous condition," hence applicable NOD was one filed before November, 1988. Calvert v Brown (1994) 7 Vet App 194

NOD dated 1990 did not confer jurisdiction over case since it related to continuation of claim as to which original NOD was filed prior to effective date of Veterans' Judicial Review Act. Baker v Brown (1994) 4 Vet App 461

Appellant's first-filed notice of disagreement preceded court's jurisdictional date and it therefore had no jurisdiction. Smith v Brown (1994) 8 Vet App 217

Fact that three appeals were fortuitously consolidated could not give court jurisdiction over two as to which notices of disagreement were filed before November 18, 1988. Tucker v Derwinski (1992) 2 Vet App 201

Board of Veterans Appeals erred when denying veteran earlier effective date for service connection for veteran's back condition; Board properly concluded that veteran's 1959 letter stating that veteran wished to "refile" and to "reopen" veteran's claim met requirements of former 38 USCS § 4005 (redesignated as 38 USCS § 7105), but erred by concluding that letter was not application for review on appeal. Myers v Principi (2002) 16 Vet App 228, 2002 US App Vet Claims LEXIS 585

11. Relation to particular claim

Veteran's newly asserted PTSD claim was not inextricably intertwined with rated depressive neurosis, and thus it was new claim for jurisdictional purposes; it had not been diagnosed and considered at time of prior notice of disagreement filed before November 18, 1988. Ephraim v Brown (1996, CA FC) 82 F.3d 399, on remand, remanded (1996, Vet App) 1996 US Vet App LEXIS 482, costs/fees proceeding sub nom Ephraim v West (1998, Vet App) 1998 US Vet App LEXIS 959

Veteran's 1990 NOD with RO's decision on remand was part of earlier claim of which NOD was premature to confer jurisdiction on court, hence appeal would be dismissed. Cadwell v Brown (1993) 5 Vet App 386

Neither of documents relied upon by veteran as NODs would provide jurisdiction since they related to claims that were already on appeal by virtue of prior NOD. Danko v Brown (1993) 5 Vet App 445

12. Miscellaneous

Even if Board of Veteran's Affairs committed grave procedural error and violated its duty to assist under 38 USCS § 5107(a) by failing to request certain medical records in determining that veteran was not disabled, finality of its decision was not vitiates; judicially-created exception to rule of finality for such errors had been overruled and veteran did not assert either of exceptions set out in 38 USCS § 7105(c). Tetro v Principi (2003, CA FC) 314 F.3d 1310

Department of Veterans Affairs' regulatory interpretation of its statutory authority for denying earlier effective date for service connection of veteran's post-traumatic stress disorder than date he reopened for new and material evidence was upheld as reasonable interpretation by agency under Chevron deference. Sears v Principi (2003, CA FC) 349 F.3d 1326, cert den (2004) 541 US 960, 158 L Ed 2d 401, 124 S Ct 1723
Court rejected veteran's argument that regional office's alleged failure to comply with "detailed reasons" aspect of notice provision in 38 C.F.R. § 3.105(e) amounted to exception to principle of finality articulated in 38 USCS § 7105(c) because statutory scheme provided only two exceptions to rule of finality, namely "new and material evidence" and clear and unmistakable error, and Congress did not intend to allow exceptions to rule of finality in addition to two that it expressly created. Norton v Principi (2004, CA FC) 376 F.3d 1336

Veteran's January 1990 NOD, which disagreed with December 1989 RO denial of rating increase for appellant's chronic eczema, encompassed appellant's total disability-individual unemployability (TDIU) claim which was denied December 1990; well-grounded TDIU informal claim was submitted as separate but related claim when appellant filed for increased rating for his skin condition and supported his application with evidence of his unemployability, TDIU claim originated in 1972 when appellant stated he had been laid off from employment repeatedly because of his skin condition, recurred throughout years, and January 1990 NOD included assertion that appellant's skin and ulcer condition caused loss of seven jobs over 20-year period. Isenbart v Brown (1995) 7 Vet App 537

Board's determination that evidence was not new for purpose of reopening claim pursuant to 38 USCS § 5108, 38 USCS § 7104(b), and 38 USCS § 7105(c) is affirmed where, since last final disallowance, newly presented evidence was merely cumulative of other evidence previously presented and veteran's statements concerning claimed onset of disease was mere recitation of accounts made elsewhere Vargas-Gonzalez v West (1999) 12 Vet App 321, 1999 US App Vet Claims LEXIS 174

Board of Veterans' Appeals' discussion of hypothetical application of 38 C.F.R. § 3.306(b)(1) by Veterans' Affairs regional office was deficient because it did not explain how that regulation would apply to facts of appellant's service connection claim for hypothyroidism; moreover, Statement of Case did not comply with former 38 USCS § 4005(d)(1) (redesignated 38 USCS § 7105) because it did not refer to, discuss, or summarize in any way § 3.306(b)(1); thus, there was reasons-or-bases deficiency requiring remand under 38 USCS § 7104(d)(1). Hines v Principi (2004) 18 Vet App 227, 2004 US App Vet Claims LEXIS 526

§ 7105A. Simultaneously contested claims

cxci Discussion and Analysis in the Veterans Benefits Manual

(a) In simultaneously contested claims where one is allowed and one rejected, the time allowed for the filing of a notice of disagreement shall be sixty days from the date notice of the adverse action is mailed. In such cases the agency of original jurisdiction shall promptly notify all parties in interest at the last known address of the action taken, expressly inviting attention to the fact that notice of disagreement will not be entertained unless filed within the sixty-day period prescribed by this subsection.

(b) Upon the filing of a notice of disagreement, all parties in interest will be furnished with a statement of the case in the same manner as is prescribed in section 7105 [38 USCS § 7105]. The party in interest who filed a notice of disagreement will be allowed thirty days from the date of mailing of such statement of the case in which to file a formal appeal. Extension of time may be granted for good cause shown but with consideration to the interests of the other parties involved. The substance of the appeal will be communicated to the other party or parties in interest and a period of thirty days will be allowed for filing a brief or argument in answer thereto. Such notice shall be forward to the last known address of record of the parties concerned, and such action shall constitute sufficient evidence of notice.

Explanatory notes:
Similar provisions were contained in former 38 USCS § 4007 prior to the general amendment of 38 USCS 4005-4007 by Act Sept. 19, 1962, P. L. 87-666.

Effective date of section:
This section is effective Jan. 1, 1963, as provided by Act Sept. 19, 1962, P. L. 87-666, § 3, 76 Stat. 554, which appears as 38 USCS § 7105 note.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4005A, as 38 USCS § 7105A, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Research Guide

Federal Procedure:

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 162

§ 7106. Administrative appeals

Application for review on appeal may be made within the one-year period prescribed in section 7105 of this title [38 USCS § 7105] by such officials of the Department as may be designated by the Secretary. An application entered under this paragraph shall not operate to deprive the claimant of the right of review on appeal as provided in this chapter [38 USCS §§ 7101 et seq.].

Explanatory notes:
Similar provisions were contained in former 38 USCS § 4005(c)(2) prior to the general amendment of 38 USCS 4005-4007 by Act Sept. 19, 1962, P. L. 87-666.

Effective date of section:
This section is effective Jan. 1, 1963, as provided by Act Sept. 19, 1962, P. L. 87-666, § 3, 76 Stat. 554, which appears as 38 USCS § 7105 note.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4006, as 38 USCS § 7106, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:224, 225

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 162

§ 7107. Appeals: dockets; hearings

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(a) (1) Except as provided in paragraphs (2) and (3) and in subsection (f), each case received pursuant to application for review on appeal shall be considered and decided in regular order according to its place upon the docket.

(2) A case referred to in paragraph (1) may, for cause shown, be advanced on motion for earlier consideration and determination. Any such motion shall set forth succinctly the grounds upon which the motion is based. Such a motion may be granted only--

(A) if the case involves interpretation of law of general application affecting other claims;

(B) if the appellant is seriously ill or is under severe financial hardship; or

(C) for other sufficient cause shown.

(3) A case referred to in paragraph (1) may be postponed for later consideration and determination if such postponement is necessary to afford the appellant a hearing.

(b) The Board shall decide any appeal only after affording the appellant an opportunity for a hearing.

(c) A hearing docket shall be maintained and formal recorded hearings shall be held by such member or members of the Board as the Chairman may designate. Such member or members designated by the Chairman to conduct the hearing shall, except in the case of a reconsideration of a decision under section 7103 of this title [38 USCS § 7103], participate in making the final determination of the claim.

(d) (1) An appellant may request that a hearing before the Board be held at its principal location or at a facility of the Department located within the area served by a regional office of the Department.

(2) A hearing to be held within an area served by a regional office of the Department shall (except as provided in paragraph (3)) be scheduled to be held in accordance with the place of the case on the docket under subsection (a) relative to other cases on the docket for which hearings are scheduled to be held within that area.

(3) A hearing to be held within an area served by a regional office of the Department may, for cause shown, be advanced on motion for an earlier hearing. Any such motion shall set forth succinctly the grounds upon which the motion is based. Such a motion may be granted only--

(A) if the case involves interpretation of law of general application affecting other claims;

(B) if the appellant is seriously ill or is under severe financial hardship; or

(C) for other sufficient cause shown.

(e) (1) At the request of the Chairman, the Secretary may provide suitable facilities and equipment to the Board or other components of the Department to enable an appellant located at a facility within the area served by a regional office to participate, through voice transmission or through picture and voice transmission, by electronic or other means, in a hearing with a Board member or members sitting at the Board's principal location.

(2) When such facilities and equipment are available, the Chairman may afford the appellant an opportunity to participate in a hearing before the Board through the use of such facilities and equipment in lieu of a hearing held by personally appearing before a Board member or panel as provided in subsection (d). Any such hearing shall
be conducted in the same manner as, and shall be considered the equivalent of, a personal hearing. If the appellant declines to participate in a hearing through the use of such facilities and equipment, the opportunity of the appellant to a hearing as provided in such subsection (d) shall not be affected.

(f) Nothing in this section shall preclude the screening of cases for purposes of--
(1) determining the adequacy of the record for decisional purposes; or
(2) the development, or attempted development, of a record found to be inadequate for decisional purposes.

Amendments:

1962. Act Sept. 19, 1962 (effective 1/1/63, as provided by § 3 of such Act, which appears as 38 USCS § 7105 note), redesignated this section, formerly § 4006, as 38 USCS § 4007.
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4007, as 38 USCS § 7107.
1994. Act July 1, 1994, substituted this section for one which read:
"§ 7107. Docketing of appeals

"All cases received pursuant to application for review on appeal shall be considered and decided in regular order according to their places upon the docket; however, for cause shown a case may be advanced on motion for earlier consideration and determination. Every such motion shall set forth succinctly the grounds upon which it is based. No such motion shall be granted except in cases involving interpretation of law of general application affecting other claims, or for other sufficient cause shown.".

Act Nov. 2, 1994, in subsec. (a)(1), substituted "Except as provided in subsection (f), each case" for "Each case"; and added subsec. (f).

1998. Act Nov. 11, 1998, in subsec. (a), in para. (1), inserted "in paragraphs (2) and (3) and", in para. (2), substituted the sentences beginning "Any such motion . . ." and "Such a motion . . .", including subparas. (A), (B), and (C), for "Any such motion shall set forth succinctly the grounds upon which it is based and may not be granted unless the case involves interpretation of law of general application affecting other claims or for other sufficient cause shown.", and added para. (3); and, in subsec. (d), in para. (2), substituted "in accordance with the place of the case on the docket under subsection (a) relative to other cases on the docket for which hearings are scheduled to be held within that area." for "in the order in which requests for hearings within that area are received by the Department.", and substituted para. (3) for one which read: "(3) In a case in which the Secretary is aware that the appellant is seriously ill or is under severe financial hardship, a hearing may be scheduled at a time earlier than would be provided for under paragraph (2).".

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:206, 255, 264, 277

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 162

Phrase "expeditious treatment" in § 302 (38 USCS § 5101, note) of Veterans' Benefits Improvements Act of 1994 (VBIA), Pub. L. No. 103-446, 108 Stat. 4645 (1994), does not require that remanded cases be advanced on Board of Veterans' Appeals' docket pursuant to 38 USCS § 7107(a)(2) and 38 C.F.R. § 20.900(c); therefore, veteran was not entitled to writ of mandamus requiring Secretary of Veterans Affairs to advance veteran's disability benefits case on Board's docket. Dailey v Principi (2003) 17 Vet App 61, 2003 US App Vet Claims LEXIS 285
§ 7108. Rejection of applications

An application for review on appeal shall not be entertained unless it is in conformity with this chapter [38 USCS §§ 7101 et seq.].

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4008, as 38 USCS § 7108.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 162

§ 7109. Independent medical opinions

(a) When, in the judgment of the Board, expert medical opinion, in addition to that available within the Department, is warranted by the medical complexity or controversy involved in an appeal case, the Board may secure an advisory medical opinion from one or more independent medical experts who are not employees of the Department.

(b) The Secretary shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical opinions at the request of the chairman of the Board. Any such arrangement shall provide that the actual selection of the expert or experts to give the advisory opinion in an individual case shall be made by an appropriate official of such institution.

(c) The Board shall furnish a claimant with notice that an advisory medical opinion has been requested under this section with respect to the claimant's case and shall furnish the claimant with a copy of such opinion when it is received by the Board.

Effective date of section:

This section is effective Jan. 1, 1963, as provided by Act Sept. 19, 1962, P. L. 87-671, § 4, 76 Stat. 557, which appears as 38 USCS § 5701 note.

Amendments:

1988. Act Nov. 18, 1988 (effective 9/1/89 as provided by § 401(a) of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), substituted "may" for "is authorized to"; in subsec. (b), substituted "Any such arrangement shall" for "Such arrangement will" and "an individual case shall" for "any individual case will"; and added subsec. (c).

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4009, as 38 USCS § 7109.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Cross References

Disclosure of papers and documents relating to claims to independent medical experts 38 USCS § 5701

This section is referred to in 38 USCS § 5701
Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:254

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 164

Regulation of Department of Veterans Affairs allowing Board to furnish opinion from independent medical examination to claimant's attorney rather than to claimant himself is not inconsistent with 38 USCS § 7109(c). Splane v West (2000, CA FC) 216 F.3d 1058

38 CFR § 20.901(a) was not contrary to appellate function of Board of Veterans Appeals and "one review on appeal" requirement of 38 USCS § 7104(a) because 38 USCS § 7109 created necessary exception to "one review on appeal" rule; Congress enacted 38 USCS § 7109 upon assumption expressed in statutory text that Board had authority to procure internal Department of Veterans Affairs medical opinion and legislative history showed that Congress, in enacting § 7109, contemplated that departmental medical opinions would be secured by Board. DAV v Sec'y of Veterans Affairs (2005, CA FC) 419 F.3d 1317

Board should have obtained medical examination or opinion as to relationship of veteran's in-service and present condition since entry in health record during service indicated "chronic problem" with back. Myers v Brown (1993) 5 Vet App 3

Board did not err in failing to provide reasons and bases for its decision to procure independent medical expert (IME) opinion; although claimant herself requested IME, Board did state in letter to her that IME was necessary for it to undertake further inquiry into medical question in appellant's case and provide appellant every possible consideration, as well as noting that there was medical evidence for and against connection between rheumatic heart disease and veteran's death. Boutwell v West (1998) 11 Vet App 387


[§ 7110. Repealed]


§ 7111. Revision of decisions on grounds of clear and unmistakable error

(a) A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision of the Board that constitutes a reversal or revision of a prior decision of the Board on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.
(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Board on the Board's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Board based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted directly to the Board and shall be decided by the Board on the merits, without referral to any adjudicative or hearing official acting on behalf of the Secretary.

(f) A claim filed with the Secretary that requests reversal or revision of a previous Board decision due to clear and unmistakable error shall be considered to be a request to the Board under this section, and the Secretary shall promptly transmit any such request to the Board for its consideration under this section.

Other provisions:

Application of section. This section applies to any determination made before, on, or after Nov. 21, 1997, pursuant to § 1(c)(1) of Act Nov. 21, 1997, P. L. 105-111, 111 Stat. 2272, which appears as 38 USCS § 5109A note.

Research Guide

Federal Procedure:


Statute providing that decision of Board may be reviewed for clear and unmistakable error does not supersede VA regulation to similar effect since it made no change in substantive standards governing modifications of regional office decision because of clear and unmistakable error, rather merely codified prior regulation. Donovan v West (1998, CA FC) 158 F.3d 1377, cert den (1999) 526 US 1019, 143 L Ed 2d 351, 119 S Ct 1255

Court of Appeals for Veterans Claims did not abuse its discretion or err as matter of law when it failed to remand case in view of enactment of 38 USCS § 7111 while appeal was pending since veteran did not ask for remand and Board decision did not rely on law that was changed by enactment of § 7111. Morris v Principi (2001, CA FC) 239 F.3d 1292

Decision of Court of Appeals for Veterans Claims was affirmed when Veterans Claim court determined that it was precluded under 38 C.F.R. § 20.1400(b) from reviewing earlier decision of Board of Veterans Appeals for clear and unmistakable error when earlier decision had been reviewed and affirmed by appellate court. Winsett v Principi (2003, CA FC) 341 F.3d 1329, reh den, reh, en banc, den (2003, CA FC) 2003 US App LEXIS 21172 and cert den (2003) 540 US 1082, 157 L Ed 2d 758, 124 S Ct 943

Board committed clear and unmistakable error in denying service connection for back disorder where claim was supported by unrebutted medical evidence of record and BVA improperly refuted it with its own unsubstantiated medical opinion. Rose v West (1998) 11 Vet App 169

38 USCS § 7111 does not allow review of claim for clear and unmistakable error in Board of Veterans' Appeals decision unless claim has first been submitted directly to Board for decision and, although United States Court of Appeals for Veterans Claims may consider collateral attack on determination made by Board as to clear and unmistakable error in prior Board decision, as matter of law there can be no clear and unmistakable error as to Board decision directly on appeal. Tetro v West (2000) 13 Vet App 404, 2000 US App Vet Claims LEXIS 259, substituted op (2000) 14 Vet App 100, 2000 US App Vet Claims LEXIS 880, affd (2003, CA FC) 314 F.3d 1310

Board of Veterans' Appeals denial of veteran's claim for clear and unmistakable error was vacated, where claim may have been denied on basis of pleading insufficiency; proper procedure

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was to dismiss such claim without prejudice. Simmons v Principi (2003) 17 Vet App 104, 2003 US App Vet Claims LEXIS 403

On review of 1983 decision of Board of Veterans' Appeals (Board), Board was bound to apply regulations as they existed in 1983, and new interpretations of 38 USCS § 1111 (former 38 USCS § 311) and 38 USCS § 1153 (former 38 USCS § 353), interpretations to which Secretary of Veterans Affairs also agreed, that apparently conflicted with those regulations could not be basis for clear and unmistakable error for 1983 decision. Jordan v Principi (2003) 17 Vet App 261, 2003 US App Vet Claims LEXIS 721, affd (2005, CA FC) 401 F.3d 1296

Court of Appeals holds that claim of clear and unmistakable error (CUE) may not be filed as to matter that is still appealable to this Court, or is pending on appeal with this Court or at higher court; thus, where veteran had filed direct appeal of March 2003 Board of Veterans' Appeals decision, pursuant to 38 CFR § 20.1410, Board should have stayed its consideration of veteran's CUE claim upon receiving notice that veteran had filed direct appeal of that decision. May v Nicholson (2005) 19 Vet App 310, 2005 US App Vet Claims LEXIS 536

§ 7112. Expedited treatment of remanded claims

The Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the Board of any claim that is remanded to the Secretary by the Court of Appeals for Veterans Claims.

CHAPTER 72. UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

SUBCHAPTER I. ORGANIZATION AND JURISDICTION
SUBCHAPTER II. PROCEDURE
SUBCHAPTER III. MISCELLANEOUS PROVISIONS
SUBCHAPTER IV. DECISIONS AND REVIEW
SUBCHAPTER V. RETIREMENT AND SURVIVORS ANNUITIES

Amendments:


1991. Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239, revised the analysis of this chapter by amending the section numbers in accordance with the redesignations made by § 402(b) of such Act (see Table II preceding 38 USCS § 101).


1998. Act Nov. 11, 1998, P. L. 105-368, Title V, Subtitle B, § 512(a)(3), (4)(A), 112 Stat. 3341, substituted the chapter heading for one which read: "UNITED STATES COURT OF VETERANS APPEALS"; and amended the analysis of this chapter by substituting item 7286 for one which read: "7286. Judicial Conference of the Court of Veterans Appeals.", substituting item 7291 for one which read: "7291. Date when United States Court of Veterans Appeals decision becomes final.", and substituting item 7298 for one which read: "7298. Court of Veterans Appeals Retirement Fund.".


SUBCHAPTER I. ORGANIZATION AND JURISDICTION

§ 7251. Status
§ 7252. Jurisdiction; finality of decisions
§ 7253. Composition
§ 7254. Organization
§ 7255. Offices
§ 7256. Times and places of sessions
§ 7257. Recall of retired judges

§ 7251. Status

There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Appeals for Veterans Claims.

Effective date of section:

This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as a note to this section.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4051, as 38 USCS § 7251.

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as a note to this section) substituted "United States Court of Appeals for Veterans Claims" for "United States Court of Veterans Appeals".

Other provisions:


"(a) General effective date. Except as otherwise provided in this section, this division (and the amendments made by this Act [division] [for full classification, consult USCS Tables Volumes]) shall take effect on September 1, 1989.

"(b) Effective date for certain transition provisions. The amendment made by section 201(a) [amending 38 USCS § 7101(b)] shall take effect on February 1, 1989.

"(c) Date of enactment. Sections 201 (other than subsection (a)), 208, 209, 302, and 303, and the amendments made by those sections [amending 5 USCS § 5315 and note; 38 USCS §§ 7101; enacting 38 USCS §§ 7101, 7253, 7255 notes], shall take effect on the date of the enactment of this Act.

"(d) Board of Veterans' Appeals. Sections 202, 203, 205, 206, and 207 [amending 38 USCS §§ 7101, 7103-7105; enacting 38 USCS § 7110] shall take effect as of January 1, 1989. Section 204 [amending 38 USCS § 7104(b)] shall take effect on September 1, 1989.

"(e) Commencement of operation of court of Veterans Appeals. Notwithstanding subsection (a), the United States Court of Veterans Appeals established pursuant to chapter 72 of title 38, United States Code (as added by section 301) [38 USCS §§ 7251 et seq.] shall not begin to operate until at least three judges have been appointed to the court.".
Repeal of provision relating to applicability of chapter. Act Nov. 1, 1988, P. L. 100-687, Div A, Title IV, § 402; May 7, 1991, P. L. 102-40, Title IV, 402(d)(2), 105 Stat. 239, which formerly appeared as a note to this section, was repealed by Act Dec. 27, 2001, P. L. 107-103, Title VI, § 603(a), 115 Stat. 999. Such note provided that Chapter 72 of title 38, United States Code (38 USCS §§ 7251 et seq.), applied to cases in which a notice of disagreement was filed on or after Nov. 1, 1988.

Applicability of 38 USCS §§ 7201 et seq. to Board of Veterans' Appeals decisions. Act Nov. 21, 1997, P. L. 105-111, § 1(c)(2), 111 Stat. 2272, provides: "Notwithstanding section 402 of the Veterans Judicial Review Act (38 U.S.C. 7251 note), chapter 72 of title 38, United States Code, shall apply with respect to any decision of the Board of Veterans' Appeals on a claim alleging that a previous determination of the Board was the product of clear and unmistakable error if that claim is filed after, or was pending before the Department of Veterans Affairs, the Court of Veterans Appeals, the Court of Appeals for the Federal Circuit, or the Supreme Court on the date of the enactment of this Act."

Renaming of the United States Court of Veterans Appeals. Act Nov. 11, 1998, P. L. 105-368, Title V, Subtitle B, § 511(a), 112 Stat. 3341 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as a note to this section), provides: "The United States Court of Veterans Appeals is hereby renamed as, and shall hereafter be known and designated as, the United States Court of Appeals for Veterans Claims."

Other legal references to United States Court of Veterans Appeals. Act Nov. 11, 1998, P. L. 105-368, Title V, Subtitle B, § 512(c), 112 Stat. 3342 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as a note to this section), provides: "Any reference in a law, regulation, document, paper, or other record of the United States to the United States Court of Veterans Appeals shall be deemed to be a reference to the United States Court of Appeals for Veterans Claims."

Effective date of Title V of Act Nov. 11, 1998. Act Nov. 11, 1998, P. L. 105-368, Title V, Subtitle B, § 513, 112 Stat. 3342, provides: "This subtitle, and the amendments made by this subtitle [for full classification, consult USCS Tables volumes], shall take effect on the first day of the first month beginning more than 90 days after the date of the enactment of this Act."

Termination of notice of disagreement as jurisdictional requirement for U.S. Court of Appeals for Veterans Claims; construction; applicability. Act Dec. 27, 2001, P. L. 107-103, Title VI, § 603(c), (d), 115 Stat. 999, provides:

"(c) Construction. The repeal in subsection (a) [repealing § 402 of Act Nov. 1, 1988, P. L. 100-687 (former note to this section)] may not be construed to confer upon the United States Court of Appeals for Veterans Claims jurisdiction over any appeal or other matter not within the jurisdiction of the Court as provided in section 7266(a) of title 38, United States Code.

"(d) Applicability. The repeals made by subsections (a) and (b) [repealing §§ 402 and 403 of Act Nov. 1, 1988, P. L. 100-687 (former notes to 38 USCS §§ 7251 and 5904)] shall apply to any appeal filed with the United States Court of Appeals for Veterans Claims--

"(1) on or after the date of the enactment of this Act; or

"(2) before the date of the enactment of this Act but in which a final decision has not been made under section 7291 of title 38, United States Code, as of that date."

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:284, 305, 308, 362

Am Jur:
§ 7252. Jurisdiction; finality of decisions

The Court of Appeals for Veterans Claim shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of the review shall be limited to the scope provided in section 7261 of this title [38 USCS § 7261]. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title [38 USCS § 1155] or any action of the Secretary in adopting or revising that schedule.

Decisions by the Court are subject to review as provided in section 7292 of this title [38 USCS § 7292].

Effective date of section:

This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4052, as 38 USCS § 7252, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).
Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (a), substituted "Court" for "court" before "shall have power".

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Secretary" for "Administrator" wherever appearing.

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

Other provisions:

Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Research Guide

Federal Procedure:


Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 167

Law Review Articles:


Cragin. The impact of judicial review on the Department of Veterans Affairs' claims adjudication process: the changing role of the Board of Veterans' Appeals. 46 Me L Rev 23, 1994

I. IN GENERAL

1. Generally
2. Effect of veteran's death
3. Record
4. Miscellaneous

II. DETERMINATIONS SUBJECT TO REVIEW

5. Generally
6. Review of schedule of ratings
7. Necessity of Board's final decision
8. Notices of disagreement filed after statute's effective date
9. Review of particular decisions
10. Reconsideration of determination by Board

I. IN GENERAL

1. Generally

Veterans Judicial Review Act's statutory review process vests exclusive jurisdiction over veterans' benefits claims, including decisions of constitutional issues, with Court of Veterans Appeals, thereby depriving district courts of jurisdiction. Beamon v Brown (1997, CA6 Ohio) 125 F.3d 965, 1997 FED App 280P

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United States Court of Appeals for Veterans Claims has jurisdiction under 38 USCS § 7252 to hear arguments presented to it in first instance provided it otherwise has jurisdiction over veteran's claim; whether doctrine of exhaustion of administrative remedies should be invoked entails case-by-case analysis of competing individual and institutional interests, including whether United States Court of Appeals for Veterans Claims should remand matter to Board of Veterans' Appeals pursuant to 38 USCS § 7252. Maggitt v West (2000, CA FC) 202 F.3d 1370

Veteran's claim of entitlement to benefits is dismissed for lack of subject-matter jurisdiction, where he provides no proof that he has exhausted administrative remedies, because, even if he had, process of review leads to Court of Veterans Appeals and then to Federal Circuit pursuant to 38 USCS § 7252. Bell v VA (1996, ND Tex) 946 F Supp 479

Evidentiary equipoise rule of § 5107 does not apply to court's determination of its jurisdiction. Bethea v Derwinski (1992) 2 Vet App 252

Provision limiting judicial review of Board decisions to cases where notice of disagreement was filed on or after November 18, 1988, date of enactment of Veteran's Judicial Review Act, did not violate claimant's Fifth Amendment rights to due process since jurisdictional date was reasonable exercise of legislative power in distributing newly created right of judicial review and it was evidence that Congress was sensitive to need for limiting review of all past Board decisions in recognition of importance of need for degree of finality in decision making process. Strott v Derwinski (1991) 1 Vet App 114, affd (1992, CA) 964 F.2d 1124, app dismd (1992, Vet App) 1992 US Vet App LEXIS 306, app dismd (1992) 3 Vet App 258

Secretary's confession of error was not equivalent of prohibited act of "seeking review"; Secretary has broad role in representing Department before Court and, pursuant to ABA Model Rules of Professional Conduct, Secretary's disclosure of legal authority was worthy of Court's attention, not its disregard. Johnson v Brown (1994) 7 Vet App 95

Court of Federal Claims does not have jurisdiction to review denial of veterans' benefits, because 38 USCS § 511(a) precludes judicial review of veterans' benefits determinations in Court of Federal Claims, 38 USCS § 7252(a) provides that exclusive remedy for denial of veterans' benefits is to appeal to Court of Veterans Appeals, and jurisdiction for appeals from Court of Veterans Appeals lies exclusively in U.S. Court of Appeals for Federal Circuit (38 USCS § 7292). Davis v United States (1996) 36 Fed Cl 556

Assuming all other jurisdictional requirements are met, Court of Appeals for Veterans Claims possesses jurisdiction under 38 USCS § 7252(a) to review all challenges and arguments relating to particular claim; however, Court generally will decline to exercise jurisdiction based upon doctrine of administrative exhaustion when appellant has failed to present those challenges and arguments, either expressly or implicitly, to Board. Stuckey v West (1999) 13 Vet App 163, 1999 US App Vet Claims LEXIS 1276, motion gr, remanded (2001, CA FC) 4 Fed Appx 754 and op withdrawn, remanded (2001) 14 Vet App 254, 2001 US App Vet Claims LEXIS 37

United States Court of Appeals for Veterans Claims has exclusive jurisdiction to review decisions of Board of Veterans' Appeals under 38 USCS § 7252 and United States District Court overstepped its limited jurisdiction when it directed that class action claimants in litigation challenging veterans educational benefits statute could not seek review in Court of Appeals for Veterans Claims of Board denial of individual claims. West v Principi (2001) 15 Vet App 246, 2001 US App Vet Claims LEXIS 1189

Decision of Court of Appeals for Veterans Claims (Court), unless or until overturned, is decision of Court on date it is issued; any rulings, interpretations, or conclusions of law contained in such decision are authoritative and binding as of date decision is issued. Sharp v Principi (2004) 17 Vet App 431, 2004 US App Vet Claims LEXIS 14, affd in part and vacated in part, remanded (2005, CA FC) 403 F.3d 1324

Court of Appeals for Veterans Claims does not have power to retain general and continuing jurisdiction over decision remanded to Board of Veterans' Appeals for new adjudication. Breeden v Principi (2004) 17 Vet App 475, 2004 US App Vet Claims LEXIS 127

Where decision of Board of Veterans' Appeals was not adverse to veteran and where court did not have jurisdiction to review directly appeal from decision of regional office, court did not

2. Effect of veteran's death

Veteran's widow lacked standing to pursue appeal from denial of service connection for malignant melanoma of veteran's left thigh where veteran died during pendency of appeal and neither widow's DIC claim nor relationship of melanoma and veteran's death were presently before court. Coombs v Principi (1992) 3 Vet App 530

Appropriate remedy where veteran dies while appeal is pending is to vacate BVA decision from which appeal was taken to be vacated and to dismiss appeal. Gregory v Brown (1997) 10 Vet App 384


Appeal from denial of veteran's claim for disability compensation would be dismissed upon notice of veteran's death, to ensure that BVA decision and underlying RO decision would have no preclusive effect in adjudication of any accrued-benefits claims derived from veteran's entitlements. Jimenez v Brown (1996) 9 Vet App 445

Appropriate remedy where veteran dies while appeal is pending is to vacate BVA decision from which appeal was taken and to dismiss appeal, since court has no jurisdiction over claim. Gregory v Brown (1997) 10 Vet App 384

Board had no jurisdiction to review sexual harassment claim since Secretary's brief on merits had not been filed and time for any reply by appellant had thus not expired. Yu v West (1998) 11 Vet App 176, app dismd without op (1998, CA FC) 155 F.3d 572, reported in full (1998, CA FC) 1998 US App LEXIS 16059

Court does not, and Board did not, have jurisdiction over appeal of denial of request to reopen disability compensation claim where veteran died long before BVA could address denial, and despite Board's phrasing of service connection issue on appeal as "for accrued benefits purposes," VA has not yet adjudicated accrued benefits claim and Court lacks jurisdiction to consider claim pursuant to 38 USCS § 7252(b). Johnson v West (1998) 11 Vet App 225

3. Record

Court was statutorily precluded from considering rating decision made subsequent to that being appealed. Hartog v Derwinski (1992) 2 Vet App 195

In judging whether communication can be reasonably construed as expressing dissatisfaction with adjudicative decision, court will look not only at actual wording of communication, but also at context in which it was written, and may consider evidence of jurisdictional facts which were not before Board and thus not part of official record before court. Stokes v Derwinski (1991) 1 Vet App 201

Court is precluded by statute from considering any material not contained in record of proceedings before Secretary and Board; hence appellant could chose to pursue appeal on basis of record, or withdraw appeal and seek to have claim reconsidered by Board upon any additional material he might wish to submit. Looper v Derwinski (1991) 2 Vet App 45

Although evidence obtained since date of Board's decision may be submitted to VA Regional Office in attempt to reopen appellant's former claim, it may not be made part of record in appeal now before court, since court's review of Board decisions is statutorily restricted to record of proceedings before Secretary and Board. Hartog v Derwinski (1992) 2 Vet App 194
Court could not accept as part of record of appeal medical records which were not before Board since statute provides that review shall be on record of proceedings before Administrator [now Secretary] and Board; appellant had option to seek to reopen his claim and seek reconsideration on basis of newly discovered records. Rogozinski v Derwinski (1990) 1 Vet App 19

Neither evidence which postdated BVA's decision nor that which existed prior to that decision but was not part of record of proceedings before BVA could be included in record on appeal. Andrews v Derwinski (1991) 3 Vet App 61

Veteran's CAT scan was, as matter of law, before Secretary and Board when Board decision was made where, although it did not literally exist as part of record, veteran's assertion that he had undergone CAT scan at designated VA facility on certain date but had never received results, as well as his request for results, was part of record. Hulse v Derwinski (1992) 3 Vet App 486, subsequent app, motion den (1994, Vet App) 1994 US Vet App LEXIS 646

Medical treatises cited in BVA decision were clearly before and considered by BVA and therefore were part of record of proceedings before it and would be part of appeal record. Colvin v Derwinski (1992) 4 Vet App 132, remanded on other grounds without op (1993) 5 Vet App 169, reported in full (1993) 6 Vet App 177

Since material contained in appendix to veteran's brief, was VA publication, Secretary and BVA had constructive if not actual knowledge of it, hence it was before them when BVA decision was made and would be included in record on appeal. Barclay v Brown (1993) 4 Vet App 161

Court could not consider appellant's argument that he was entitled to pension benefits based on his family's needs since issue was not advanced before Board. Latham v Brown (1993) 4 Vet App 269

If statutory mandate of section 7252 is to followed, relevant records reviewed by Court should be same records that were before Board and Secretary, and redacted record is not same. Yu v Brown (1995) 8 Vet App 184

Court's prior order excluding from record documents that were submitted to BVA after its decision would be affirmed on motion for reconsideration; documents were not part of record before Board and thus not part of record on appeal before court. Murillo v Brown (1996) 9 Vet App 322

Documents which were not part of record of proceedings at time Board issued its decision do not become part of that record when they are submitted in support of motion for reconsideration that BVA Chairman denies, and that denial is not appealed to court; when reconsideration was denied, finality for purposes of appeal is restored to original Board decision and court's review is limited to documents in record as of that date. Murillo v Brown (1995) 8 Vet App 278

Two VA letters were within Secretary's control prior to BVA decision on appeal and thus would be deemed constructively part of record when decision was made. Henderson v Brown (1997) 10 Vet App 272

Although court is precluded by statute from considering any material which was not contained in record of proceedings before Secretary and Board, records may be deemed to be constructively before Board in certain circumstances; in this case non-VA-generated records would not be deemed before Board in absence of any evidence that they were received by Secretary prior to Board decision on appeal, nor would VA-generated document since it pertained to claims for another veteran and was not submitted to VA with regard to appellant's claim. Goodwin v West (1998) 11 Vet App 494

On appeal from denial of claim for service-connected rectal cancer by veteran who was exposed to ionizing radiation in Nagasaki in World War II, counter-designated documents would not be included in record on appeal since they were neither generated by VA nor submitted to VA as part of appellant's claim, and fact that they had been referred to in many cases decided by BVA was insufficient to deem they part of record in this case. Bowey v West (1998) 11 Vet App 106

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Two counter-designated VA letters relating to whether veteran was notified of results of VA examination that found nasal polyp would be deemed included in record on appeal since they were relevant and constructively before Secretary. Henderson v West (1998) 11 Vet App 111, app dismd, in part, stay den (1998) 11 Vet App 245, motions ruled upon (1998, Vet App) 1998 US Vet App LEXIS 918.

Motion to exclude counter designated documents from record on appeal is denied where medical records were generated by VA, were within Secretary's control, and could reasonably be expected to be part of record of proceedings before Secretary and Board pursuant to 38 USCS § 7252; although other documents were submitted to Regional Office and not Board, and were submitted late, regulations promulgated by Secretary created ambiguity and ambiguity is resolved in appellant's favor; and although relevancy of other documents is not readily apparent, documents were before Board and will be included in record on appeal. Sims v West (1998) 11 Vet App 237.

Appellant has provided no documentation to demonstrate that counter designated videotape, pertaining to quality of care provided in VA hospitals, was in Secretary's control, and motion to supplement record on appeal is denied pursuant to 38 USCS § 7252(b). Wilhoite v West (1998) 11 Vet App 251.

Court of Appeals for Veterans Claims will strike documents submitted by appellant which postdate decision by Board of Veterans' Appeals since 38 USCS § 7252(b) requires that review by Court of Appeals for Veterans Claims be on record or proceedings before Secretary and Board. McCullough v Principi (2001) 15 Vet App 272, 2001 US App Vet Claims LEXIS 1222.

Despite December 6, 2002, amendment to 38 USCS § 7261, there is still need for designation and counter designation of record in appeal from decision of Board of Veterans' Appeals, and court's longstanding practice of requiring that only relevant material be included in record on appeal is still in effect; therefore, motion filed by children of veteran, seeking to compel Secretary of Veterans Affairs to transmit complete copy of children's claims files, as record in their appeal from Board decisions denying their claims for education benefits, was denied, and court further declined children's invitation to remove U.S. Ct. Vet. App. R. 10, and amend U.S. Ct. Vet. App. R. 11, 33. Homan v Principi (2003) 17 Vet App 1, 2003 US App Vet Claims LEXIS 73.

4. Miscellaneous

Court of Appeals for Veterans Claims was statutorily authorized pursuant to 38 USCS § 7252(a) to remand case to Board for further proceedings on issue of whether presumption of soundness had been rebutted since evidence was not clearly insufficient to overcome presumption of soundness, evidence before Board was subject to differing interpretation, and proper analysis turned on understanding of what examining physician meant in his report. Adams v Principi (2001, CA FC) 256 F.3d 1318.


Although court has jurisdiction to issue injunction in defense of its jurisdiction upon evidence that agency is intimidating claimants who assert their right of appeal, appellant in instant case was not entitled to injunction where evidence did not show that agency's request that he submit to examination was intended as retaliation for his having appealed. Moore v Derwinski (1990) 1 Vet App 83.

If there is any misfeasance, malfeasance, or nonfeasance on part of government counsel, any sanction for such could not possibly extend to granting relief to appellant, e.g., default judgment, since relief can only be granted by court when error by BVA is found. Kates v Derwinski (1992) 3 Vet App 93.

Court of Federal Claims does not have jurisdiction to entertain claim with respect to denial of disability benefits by Department of Veterans Affairs, since Court of Appeals for Veterans Claims, by virtue of 38 USCS § 7252, has exclusive jurisdiction to review disability decisions of.
II. DETERMINATIONS SUBJECT TO REVIEW

5. Generally

VJRA provides exclusive remedial structure that precludes veteran from asserting Bivens cause of action in district court. Hicks v Small (1995, CA9 Nev) 69 F.3d 967, 95 CDOS 8232, 95 Daily Journal DAR 14206

Court of Veterans Appeals lacked jurisdiction to consider veteran's challenges to termination of his individual unemployability benefits since Board never issued decision on issue and veteran never filed notice of disagreement with termination of his benefits. Ledford v West (1998, CA FC) 136 F.3d 776

Court of Appeals for Veterans Claims did not fail to follow its jurisdictional statute when it declined jurisdiction over arguments not previously made to Board of Veterans' Appeals; nothing compelled or even remotely suggested conclusion that 38 USCS § 7252 required Court of Appeals for Veterans Claims to review not only decisions of Board of Veterans' Appeals, but also to adjudicate arguments not initially raised before Board. Bernklau v Principi (2002, CA FC) 291 F.3d 795 (ovrd in part as stated in Jones v Principi (2004) 18 Vet App 248, 2004 US App Vet Claims LEXIS 536)

Government's summary judgment motion was granted on veteran's claim based on benefits determinations made by Department of Veterans Affairs because Veterans Judicial Review Act deprived court of jurisdiction. Duke v United States (2004, ED Pa) 305 F Supp 2d 478

Government's summary judgment motion was granted on veteran's claims alleging violations of his constitutional rights, where court treated claims as Bivens claims because this was only avenue for receiving compensatory damages from federal officials for alleged violations of constitutional rights; Veterans Judicial Review Act precludes Bivens actions against Department of Veterans Affairs officials. Duke v United States (2004, ED Pa) 305 F Supp 2d 478

Court lacked jurisdiction where claimant failed to exhaust administrative remedies available, including review by Board. In re Quigley (1989) 1 Vet App 1

Court could not consider issue of pension due to service-connected kidney disability, raised for first time on appeal, until it had been properly submitted to RO and adverse determination made there and at Board. Talon v Derwinski (1992) 3 Vet App 74

Standing is far too speculative to permit court to review case where, even if it is determined that injury is likely to be redressed by decision of court, another judicial or administrative proceeding would still be required in order to provide the relief requested. Waterhouse v Principi (1992) 3 Vet App 473

Jurisdictionally valid NOD must have been submitted with respect to claim for which reconsideration is sought in order to empower Court to review denial of such reconsideration by Chairman of Board. Pagaduan v Brown (1993) 6 Vet App 9

Appeals were rendered moot by appellants' having received relief sought, i.e., issuance of statements of case. Thomas v Brown (1996) 9 Vet App 269
Court of Veteran's Appeal has jurisdiction of veteran's life insurance claims disputes; Congress has created system where claimant who is dissatisfied with determination in insurance claim has two possible courses of action—bring suit on claim in U.S. District Court, or appeal to Board and if dissatisfied with that decision, appeal to Court of Veterans Appeals pursuant to § 7252. Young v Derwinski (1990) 1 Vet App 70


United States Court of Appeals for Veterans Claims lacks jurisdiction over petition seeking to enforce directive of Department of Veterans Affairs Office of General Counsel since Court of Appeals for Veterans Claims lacks appellate jurisdiction under 38 USCS § 7252 over any issue that cannot be subject of Board decision. Yi v Principi (2001) 15 Vet App 265, 2001 US App Vet Claims LEXIS 1220

On appeal to Court of Appeals for Veterans Claims (Court), veteran could flesh out and rephrase argument before Court, and requirement of "some degree of specificity" was broad enough to have allowed veteran to rephrase and provide additional argument and support for same basic argument presented before Board of Veterans' Appeals. Jordan v Principi (2003) 17 Vet App 261, 2003 US App Vet Claims LEXIS 721, affd (2005, CA FC) 401 F.3d 1296

6. Review of schedule of ratings

Statutory scheme of 5 USCS §§ 552, 553, and 38 USCS §§ 1155, 7252, consistently excluded from judicial review all content of ratings schedule, as well as actions of Secretary of Veterans Affairs in adopting or revising that content, and 38 USCS § 7261(a)(3)(C) only provides standards of review to be applied by U.S. Court of Appeals for Veterans Claims when reviewing decision from Board of Veterans' Appeals and, thus, under 38 USCS § 7252, such court lacked jurisdiction to review content of diagnostic codes as part of schedule of ratings for disabilities; accordingly, Court of Appeals for Federal Circuit reversed determination of U.S. Court of Appeals for Veterans Claims that 38 C.F.R. § 4.87a, Diagnostic Code 6260, was invalid as inconsistent with 38 USCS § 1110. Wanner v Principi (2004, CA FC) 370 F.3d 1124

Because claimants for disability benefits were not asking court to review contents of ratings schedules at issue, but rather were asking court to correct interpretation of 38 C.F.R. § 4.130, Court of Appeals for Veterans Claims had jurisdiction over case under 38 USCS § 7252(a) and Court of Appeals for Federal Circuit had jurisdiction pursuant to 38 USCS § 7292(a). Sellers v Principi (2004, CA FC) 372 F.3d 1318

Although court did not have jurisdiction to review substance of Secretary's action with respect to revised schedule of ratings for disabilities, it did have jurisdiction to review manner in which schedule was revised. Fugere v Derwinski (1992, CA) 972 F.2d 331, 92 Daily Journal DAR 11387

Although court was prohibited by statute from adjusting schedular rating, it would vacate and remand to Board since Board did not refer claim for increased schedular rating for decision in first instance by appropriate VA officials. Bagwell v Brown (1996) 9 Vet App 157, reconsideration gr, vacated, remanded (1996) 9 Vet App 337

Board lacked jurisdiction to review denial of reconsideration by BVA since notices of disagreement which initiated review of appellant's claims by BVA were all submitted prior to November 18, 1988. Wilson v West (1998) 11 Vet App 253

Court had jurisdiction over appellant challenge to denial of ratings for service connected tinnitus, pursuant to 38 USCS § 7261(a)(3)(C), to determine whether Diagnostic Code (DC) regulation at issue was in violation of statutory right and, pursuant to 38 USCS § 7261(a)(3)(A), to determine whether DC regulation was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law. Wanner v Principi (2003) 17 Vet App 4, 2003 US App Vet Claims LEXIS 88, revd, remanded (2004, CA FC) 370 F.3d 1124 and (ovrld as stated in Smith v Principi (2004) 18 Vet App 448, 2004 US App Vet Claims LEXIS 674)
Where veteran argued that exclusion of periodontal disease as compensable disability under 38 C.F.R. § 3.381(a) conflicted with 38 USCS § 1110 which required compensation for disabilities, under 38 USCS § 7252(b), Court of Veterans Appeals lacked jurisdiction to review regulatory determination that periodontal disease was eligible for treatment benefits but was not compensable disability. Byrd v Nicholson (2005) 19 Vet App 388, 2005 US App Vet Claims LEXIS 802

7. Necessity of Board's final decision

There is no statutory basis for jurisdiction in CVA over acts or decisions of Chairman absent some underlying final decision by board, and, while § 7261 may allow CVA to review actions of Chairman in cases where it already has jurisdiction by virtue of timely appeal from final board decision, it does not independently grant jurisdiction over such actions but merely sets out scope of review. Mayer v Brown (1994, CA FC) 37 F.3d 618, reh den (1994, CA FC) 1994 US App LEXIS 33576 and (ovrd in part by Bailey v West (1998, CA FC) 160 F.3d 1360) and (ovrd in part as stated in Cintron v West (1999) 13 Vet App 251, 1999 US App Vet Claims LEXIS 1334) and (ovrd in part as stated in Harlow v West (1999, US) 1999 US App Vet Claims LEXIS 1411) and (ovrd in part as stated in, ovrd in part as stated in Smith v West (1999, US) 1999 US App Vet Claims LEXIS 1415) and (ovrd in part as stated in Driscoll v West (2000, US) 2000 US App Vet Claims LEXIS 171)

Court of Appeals for Veterans Claims correctly dismissed appeal for lack of jurisdiction under 38 USCS § 7252 since Board had not rendered final decision on clear and unmistakable error claim. Howard v Gober (2000, CA FC) 220 F.3d 1341

Veterans Court properly found it lacked jurisdiction to consider former serviceman's clear and unmistakable error claims raised for first time on appeal. Andre v Principi (2002, CA FC) 301 F.3d 1354

Widow's appeal of non-final order of remand of her claim for veteran's survivor benefits to Board of Veterans' Appeals, for reconsideration in light of Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000), was dismissed where there was no substantial risk that factual determination would not survive entry of final order. Myore v Principi (2003, CA FC) 323 F.3d 1347

Finality rule does not bar court from reviewing decision of Court of Veterans Appeals which overturns Secretary's established standard for denying retroactive release of indebtedness and remands to Board for application of proper standard, since it terminates action challenging Secretary's final determination. Travelstead v Derwinski (1992, CA) 978 F.2d 1244, 93 Daily Journal DAR 1163

Appeal from denial of claim for special monthly compensation for loss of use of veteran's lower extremities would be dismissed as nonfinal since claim referred back to Regional Office was likely to have meaningful impact upon whether veteran's loss of use of his lower extremities derived from service-connected injuries. Hoyer v Derwinski (1991) 1 Vet App 208

Since appellant's anxiety neurosis claim was inextricably intertwined with his heart disorder claim which was referred back to regional office, finality doctrine precluded court from exercising jurisdiction. Harris v Derwinski (1991) 1 Vet App 180


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Issues of direct service connection for appellant's cardiovascular condition and error in previous BVA decisions were not before BVA when it rendered decision being appealed, hence court would not entertain appeal on those issues. Herlehy v Brown (1993) 4 Vet App 122

Issue of compensable disability rating could not be considered by Court where it was not before BVA and Secretary indicated that rating issue was left for decision by VA's regional office. Steelman v Brown (1993) 4 Vet App 335

Court lacked jurisdiction of service-connection claim since Board's remand to RO meant that claim remained pending and was not yet subject of final BVA decision. Morgan v Brown (1996) 9 Vet App 161

Court lacked jurisdiction of appeal of clear and unmistakable error since there was no evidence that RO ever acknowledged error or finally adjudicated claim and therefore no final decision, nor one that had been reviewed by BVA. Best v Brown (1997) 10 Vet App 322

Veteran's July 1989 NOD was rendered invalid for purposes of conferring jurisdiction on court since it related to pre-Act claim on which BVA vacated its decision, hence there was no final decision on appellant's claims to which appellant could file valid NOD until March 1991 decision, and since he failed to do so, court lacked jurisdiction. Frazer v Brown (1993) 6 Vet App 19, subsequent app sub nom Yabut v Brown (1996, Vet App) 1996 US Vet App LEXIS 568

Issues which had been remanded to regional office for further development cannot be considered by United States Court of Appeals for Veterans Claims until such time as Board of Veterans' Appeals has rendered final determination since Court's jurisdiction to review Board decisions is limited by 38 USCS § 7252(a) to review of those Board decisions that are final. Tetro v West (2000) 13 Vet App 404, 2000 US App Vet Claims LEXIS 259, substituted op (2000) 14 Vet App 100, 2000 US App Vet Claims LEXIS 880, affd (2003, CA FC) 314 F.3d 1310

In view of Board's remand of veteran's claims for service connection for headaches, insomnia, mild obstructive airway disease, metallic taste in mouth, and sensitivity to smells, Board's decision with respect to those claims is not final and Court of Appeals for Veterans Claims does not have jurisdiction over those claims pursuant to 38 USCS § 7252(a). Neumann v West (2000) 14 Vet App 12, 2000 US App Vet Claims LEXIS 717, motions ruled upon, remanded (2001, CA FC) 5 Fed Appx 881 and op replaced, remanded (2001) 14 Vet App 304, 2001 US App Vet Claims LEXIS 360

Claims that have been remanded to regional office by Board are not ripe for review by Court of Appeals for Veterans Claims since Court's jurisdiction to review Board decisions is limited by 38 USCS § 7252(a) and 38 USCS § 7266(a) to review of those Board decisions that are final. Tetro v Gober (2000) 14 Vet App 100, 2000 US App Vet Claims LEXIS 880, affd (2003, CA FC) 314 F.3d 1310

Petitioner did not show that decision by Department of Veterans Affairs (VA) General Counsel (GC) to terminate petitioner's accreditation under 38 USCS § 5904(b) was decision under law that affected provision of benefits by Secretary of Veterans Affairs to veterans or dependents or survivors of veterans under 38 USCS § 511(a); accordingly, it was not matter subject to review by Board of Veterans' Appeals, pursuant to 38 USCS § 7104(a), and was thus not matter over which court had jurisdiction under 38 USCS § 7252(a); therefore, veteran's petition for writ of mandamus ordering Secretary to provide statement of case was dismissed for lack of jurisdiction. Bates v Principi (2004) 17 Vet App 443, 2004 US App Vet Claims LEXIS 50, revd, remanded (2005, CA FC) 398 F.3d 1355

Remand by Board of Veterans' Appeals was not final decision and, thus, Court of Appeals for Veterans Claims did not have jurisdiction to hear veteran's appeal where none of issues were subject to final determination; contrary to veteran's assertions, Board's remand did not constitute final decision as to its determination that veteran was not engaged in combat and that his diagnosis of PTSD had been based on unverified stressors because, upon further development, Board could have changed its ruling on these issues. Breeden v Principi (2004) 17 Vet App 475, 2004 US App Vet Claims LEXIS 127

Court of Appeals for Veterans Claims was not required to interpret 38 USCS §§ 7252(a) and 7266(a) to permit it to exercise jurisdiction over non-final decisions of Board of Veterans' Appeals
that altered evidentiary burdens, that limited evidence Department of Veterans Affairs regional office could consider, or that contained misrepresentation of law because court's jurisdiction was limited by statute to final decisions of Board, and court could not create its own exception. Breeden v Principi (2004) 17 Vet App 475, 2004 US App Vet Claims LEXIS 127

8. Notices of disagreement filed after statute's effective date

Newly diagnosed disorder, whether or not medically related to previously diagnosed disorder, cannot be same claim as one previously submitted when it has not been previously considered, hence when there is new diagnosis of new service-related condition and notice of disagreement that relates to decision concerning that condition is filed after November 18, 1988, Court of Veterans Appeals has jurisdiction to review that claim. Ephraim v Brown (1996, CA FC) 82 F.3d 399, on remand, remanded (1996, Vet App) 1996 US Vet App LEXIS 482, costs/fees proceeding sub nom Ephraim v West (1998, Vet App) 1998 US Vet App LEXIS 959

Board lacked jurisdiction of veteran's appeal since both his notices of disagreement were filed prior to November 18, 1988. Sawyer v Derwinski (1992) 2 Vet App 220

Appeal would be dismissed since notice of disagreement was received prior to November 18, 1988. Magula v Derwinski (1990) 1 Vet App 76

Court lacked jurisdiction where notice of disagreement was filed prior to November 18, 1988 even if it could have been timely filed after that date, since statutory language of Act created inflexible barrier to court's jurisdiction. Doub v Derwinski (1990) 1 Vet App 17

Court lacked jurisdiction where notice of disagreement predated act's effective date. Skinner v Derwinski (1990) 1 Vet App 2

Veteran's letters expressing disagreement with VA decision predated cutoff date for jurisdictionally valid NODs, hence court lacked jurisdiction. Balancio v Brown (1993) 5 Vet App 175

Court lacked jurisdiction of appeal where NOD was filed prior to statutory cutoff date for jurisdictionally valid NODs. Burke v Brown (1993) 5 Vet App 180

NOD filed after act's effective date was not valid NOD for jurisdictional purposes since it was not first NOD filed pursuant to particular claim, but NOD with rating decision rendered pursuant to remand from BVA. Adamski v Brown (1993) 5 Vet App 242

BVA Chairman's sua sponte grant of reconsideration of Board decision, precipitated by Notice of Disagreement predating November 18, 1988, and thus beyond court's jurisdiction, cannot defeat right of judicial review of later Board decision with NOD permitting judicial review. Smith v Brown (1996) 8 Vet App 546

Initial notice of decision (NOD) in appeal was filed before November 18, 1988, and court therefore lacked jurisdiction, even though appellant filed notice of appeal listing September 1990 date on which he filed NOD, since that NOD concerned nonfinal BVA action on claim; there can be only one valid NOD as to particular claim until final RO or BVA decision. Kuo v Brown (1993) 9 Vet App 273

9. Review of particular decisions

United States Court of Appeals for Veterans Claims did not lack jurisdiction under 38 USCS § 7252 to consider veteran's constitutional and statutory arguments, and request for remand, where veteran presented request to reopen his claims for service connection, Board of Veterans' Appeals denied request, and veteran timely appealed decision; since § 7252 concerns jurisdiction of United States Court of Appeals for Veterans Claims and court's authority to exercise it, United States Court of Appeals, Federal Circuit, has jurisdiction to review denial of veteran's remand motion even though veteran did not challenge decision of Board in appeal to Court of Appeals for Veterans Claims. Maggitt v West (2000, CA FC) 202 F.3d 1370

Action challenging determination by Secretary of Veterans Affairs that borrower is liable to indemnify VA based upon VA's payment on his guaranteed housing loan must fail, where borrower already appealed decision to Board of Veterans Appeals (BVA), and appealed Board's
affirmance to Court of Veterans Appeals (CVA) where it is still pending, because CVA has exclusive jurisdiction to review decisions of BVA under 38 USCS § 7252, borrower has elected remedies available to him through BVA and CVA, and he has therefore waived any right he might have had to determination by Article III court. Donovan v Gober (1998, WD NY) 5 F Supp 2d 142

Court had jurisdiction to review determination that divorced spouse of veteran who had signed for home loan guarantee owed debt to U.S. Smith v Derwinski (1991) 1 Vet App 267

Although Board made reference back to agency of original jurisdiction of veteran's claim for service connection for back and knee disorders secondary to his service-connected bilateral pes planus, those claims were not inextricably intertwined with decided claim for total rating for compensation based on individual employability, hence latter decision was appealable. Evans v Derwinski (1991) 3 Vet App 1, affd without op (1991, CA) 950 F.2d 732

Remand of appeal claiming that veteran was entitled to higher than 30 percent disability rating for service-connected PTSD was required since it is not court's function to assign rating and Secretary had indicated that, because veteran suffered from numerous neuropsychiatric conditions, additional examination of veteran was necessary. Corchado v Derwinski (1992) 3 Vet App 26

Final judgment in case involving multiple NODs, which was decided consistent with jurisdictional holding in case later overruled on holding that there could only be one valid NOD as to particular claim, could not be collaterally attacked as void; earlier final judgment in case sprang from exercise of jurisdiction that now appeared to be after-fact error, not from action in case where jurisdiction was completely lacking. Breslow v Brown (1993) 5 Vet App 560

Appellant's failure to raise with Board issue of clear and unmistakable error (CUE) with regard to prior adjudications' failure to take wartime veteran's presumption of aggravation into account precluded Court from hearing claim; appellant's prior CUE claims raised were entirely fact-driven, while this was legal matter. Sondel v Brown (1994) 6 Vet App 218

Appeal would be dismissed as beyond court's jurisdiction where it did not arise out of any decision that was adverse to appellant in termination of his pension as to which he filed his NOD, but was premised upon possible adverse action on reapplication-i.e., that adjudication may have prevented him from shielding lump-sum SSA payment from consideration as income on subsequent reapplication for pension-and therefore court's opinion would be merely advisory as to future adjudication. Shoen v Brown (1994) 6 Vet App 456

Having dismissed appeal of BVA decision, court did not have jurisdiction over underlying appeal on date on which appellant commenced appeal of chairman's denial of reconsideration. Jordan v Brown (1995) 8 Vet App 428

In reviewing BVA decision denying appellant's claim for service connection for psychoneurosis, August 1947 decision denying service connection was subsumed in 1988 BVA decision which correctly denied claim for clear and unmistakable error, and Board was precluded from reviewing 1988 decision since it was not subject of appeal, and therefore was precluded from determining service connection since it would effectively overturn 1988 decision. Donovan v Gober (1997) 10 Vet App 404, affd sub nom Donovan v West (1998, CA FC) 158 F.3d 1377, cert den (1999) 526 US 1019, 143 L Ed 2d 351, 119 S Ct 1255

Court was precluded from reviewing 1988 BVA decision that was not subject of appeal and therefore could not review 1947 RO decision for clear and unmistakable error since 1988 decision subsumed earlier decision and correctly found that no clear and unmistakable error existed as matter of law. Donovan v Gober (1997) 10 Vet App 404, affd sub nom Donovan v West (1998, CA FC) 158 F.3d 1377, cert den (1999) 526 US 1019, 143 L Ed 2d 351, 119 S Ct 1255

Board's denial of entitlement to earlier effective date for chronic mononucleosis was not result of clear and unmistakable error since new testing procedures to detect it were not available at time of earlier rating decision. Kronberg v Brown (1993) 4 Vet App 399

Court would vacate its prior decision and BVA's, and remand to BVA veteran's claim with respect to individual unemployability; Board did not explain why it rejected opinions of two physicians that veteran was totally and permanently disabled, did not explain inapplicability of

Remand rather than panel hearing was appropriate where Secretary confessed that he fell short in his duty to assist claimant; with additional facts to be developed, it would be inappropriate for court to make Secretary prisoner to undeveloped record. Goldman v Brown (1996) 9 Vet App 20

Court had jurisdiction over appeal as to October 1994 BVA decision since veteran's September 1994 motion for BVA reconsideration was lawfully disposed of by BVA officer and thus no longer pending at Board. Henderson v West (1998) 12 Vet App 11

Board lacked jurisdiction of appellant's claim for service connection for his psychiatric condition since he failed to raise claim before regional office or BVA, hence there was neither jurisdiction-conferring notice of disagreement or final BVA decision with respect to issue for court to review. Brannon v West (1998) 12 Vet App 32

Court of Appeals for Veterans Claims has jurisdiction under 38 USCS § 7252 to address issue of whether there is fee agreement, in view of termination of attorney-client relationship, to warrant withholding of portion of award where Board issued final decision awarding attorney fees, veteran has been adversely affected, veteran filed timely notice of appeal, and notice of disagreement which initially conferred jurisdiction as to merits of veteran's claim had not gone stale since matter of attorney fees was inchoate to award of past-due benefits. Scates v West (1999) 13 Vet App 98, 1999 US App Vet Claims LEXIS 1116, motion gr, op withdrawn (2000) 13 Vet App 304, 2000 US App Vet Claims LEXIS 51

Board of Veterans' Appeals denial of veteran's claim for clear and unmistakable error was vacated, where claim may have been denied on basis of pleading insufficiency; proper procedure was to dismiss such claim without prejudice. Simmons v Principi (2003) 17 Vet App 104, 2003 US App Vet Claims LEXIS 403

Where decision of Board of Veterans' Appeals was not adverse to veteran and where court did not have jurisdiction to review directly appeal from decision of regional office, court did not possess jurisdiction over appeal. Urban v Principi (2004) 18 Vet App 143, 2004 US App Vet Claims LEXIS 384

Claimant for veterans benefits was denied relief from order of Board of Veterans' Appeals (Board), although his counsel's letter to Board was sufficient to constitute timely notice of disagreement under 38 USCS § 7105(b), giving Board jurisdiction to review whether substantive appeal on merits of claim was timely under 38 USCS § 7252. Matthews v Nicholson (2005) 19 Vet App 202, 2005 US App Vet Claims LEXIS 425

Court of Appeals for Veterans Claims had jurisdiction to assess its own jurisdiction; this included power to review determination by Board of Veterans' Appeals that it lacked jurisdiction over particular claim. King v Nicholson (2006) 19 Vet App 406, 2006 US App Vet Claims LEXIS 2

Veteran's mere reference to similar case in his notice of disagreement was not enough for VA to have inferred that veteran raised claim under 38 USCS § 1151 where reference occurred in another context and record contained no indication that veteran believed he currently had condition caused by VA medical treatment. King v Nicholson (2006) 19 Vet App 406, 2006 US App Vet Claims LEXIS 2

Claimant for veterans benefits was denied relief, where decision of Board of Veterans' Appeals that he did not suffer from service connected post-traumatic stress disorder was based upon preponderance of medical testimony, and was not clearly erroneous under 38 USCS § 7261(a)(4). Forcier v Nicholson (2006) 19 Vet App 414, 2006 US App Vet Claims LEXIS 25

10. Reconsideration of determination by Board

When an appeal is pending in the Court pursuant to the timely filing of a notice of appeal, any attempt by the Board or Chairman to order reconsideration of a Board decision is null and void unless the court first orders remand. Cerullo v Derwinski (1991) 1 Vet App 195, remanded (1991) 1 Vet App 391 and remanded (1991) 1 Vet App 472

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Court lacked jurisdiction of appeal from BVA's decision denying claim for entitlement to service connection for cause of veteran's death since appellant filed motion for reconsideration with BVA within 120-day judicial appeal period, which abated finality of BVA decision. Pulac v Brown (1997) 10 Vet App 11

§ 7253. Composition

Discussion and Analysis in the Veterans Benefits Manual

(a) Composition. The Court of Appeals for Veterans Claims is composed of at least three and not more than seven judges, one of whom shall serve as chief judge in accordance with subsection (d).

(b) Appointment. The judges of the Court shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. A person may not be appointed to the Court who is not a member in good standing of the bar of a Federal court or of the highest court of a State. Not more than the number equal to the next whole number greater than one-half of the number of judges of the Court may be members of the same political party.

(c) Term of office. The term of office of the judges of the Court of Appeals for Veterans Claims shall be 15 years. A judge who is nominated by the President for appointment to an additional term on the Court without a break in service and whose term of office expires while that nomination is pending before the Senate may continue in office for up to 1 year while that nomination is pending.

(d) Chief judge.

(1) The chief judge of the Court is the head of the Court. The chief judge of the Court shall be the judge of the Court in regular active service who is senior in commission among the judges of the Court who--

(A) have served for one or more years as judges of the Court; and

(B) have not previously served as chief judge.

(2) In any case in which there is no judge of the Court in regular active service who has served as a judge of the Court for at least one year, the judge of the court in regular active service who is senior in commission and has not served previously as chief judge shall act as the chief judge.

(3) Except as provided in paragraph (4), a judge of the Court shall serve as the chief judge under paragraph (1) for a term of five years or until the judge becomes age 70, whichever occurs first. If no other judge is eligible under paragraph (1) to serve as chief judge upon the expiration of that term, that judge shall continue to serve as chief judge until another judge becomes eligible under that paragraph to serve as chief judge.

(4) (A) The term of a chief judge shall be terminated before the end of the term prescribed by paragraph (3) if--

(i) the chief judge leaves regular active service as a judge of the Court; or

(ii) the chief judge notifies the other judges of the Court in writing that such judge desires to be relieved of the duties of chief judge.

(B) The effective date of a termination of the term under subparagraph (A) shall be the date on which the chief judge leaves regular active service or the date of the notification under subparagraph (A)(ii), as the case may be.
(5) If a chief judge is temporarily unable to perform the duties of chief judge, those duties shall be performed by the judge of the Court in active service who is present, able and qualified to act, and is next in precedence.
(6) Judges who have the same seniority in commission shall be eligible for service as chief judge in accordance with their relative precedence.

(e) **Salary.** Each judge of the Court shall receive a salary at the same rate as is received by judges of the United States district courts.

(f) **Removal.**
(1) A judge of the Court may be removed from office by the President on grounds of misconduct, neglect of duty, or engaging in the practice of law. A judge of the Court may not be removed from office by the President on any other ground.
(2) Before a judge may be removed from office under this subsection, the judge shall be provided with a full specification of the reasons for the removal and an opportunity to be heard.

(g) **Rules.**
(1) The Court shall prescribe rules, consistent with the provisions of chapter 16 of title 28 [28 USCS §§ 351 et seq.], establishing procedures for the filing of complaints with respect to the conduct of any judge of the Court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, the Court shall have the powers granted to a judicial council under such chapter.
(2) The provisions of sections 354(b) through 360 of title 28 [28 USCS §§ 354(b) through 360], regarding referral or certification to, and petition for review in, the Judicial Conference of the United States and action thereon, shall apply to the exercise by the Court of the powers of a judicial council under paragraph (1) of this subsection. The grounds for removal from office specified in subsection (f)(1) shall provide a basis for a determination pursuant to section 354(b) or 355 of title 28 [28 USCS § 354(b) or 355], and certification and transmittal by the Conference shall be made to the President for consideration under subsection (f).
(3) (A) In conducting hearings pursuant to paragraph (1), the Court may exercise the authority provided under section 1821 of title 28 [28 USCS § 1821] to pay the fees and allowances described in that section.
(B) The Court shall have the power provided under section 361 of title 28 [28 USCS § 361] to award reimbursement for the reasonable expenses described in that section. Reimbursements under this subparagraph shall be made from funds appropriated to the Court.

(h) **Temporary expansion of Court.**
(1) During the period from January 1, 2002, through August 15, 2005, the authorized number of judges of the Court specified in subsection (a) is increased by two.
(2) (A) Of the two additional judges authorized by this subsection--
(i) only one may be appointed pursuant to a nomination made in 2002; and
(ii) only one may be appointed pursuant to a nomination made in 2003.
(B) If a judge is not appointed under this subsection pursuant to a nomination made in 2002, a judge may be appointed under this subsection pursuant to a
nomination made in 2004. If a judge is not appointed under this subsection pursuant to a nomination made in 2003, a judge may be appointed under this subsection pursuant to a nomination made in 2004. In either case, such an appointment may be made only pursuant to a nomination made before October 1, 2004.

(3) The term of office and the eligibility for retirement of a judge appointed under this subsection, other than a judge described in paragraph (4), are governed by the provisions of section 1012 of the Court of Appeals for Veterans Claims Amendments of 1999 (title X of Public Law 106-117; 113 Stat. 1590; 38 U.S.C. 7296 note) if the judge is one of the first two judges appointed to the Court after November 30, 1999.

(4) A judge of the Court as of December 27, 2001, who was appointed to the Court before January 1, 1991, may accept appointment as a judge of the Court under this subsection notwithstanding that the term of office of the judge on the Court has not yet expired under this section. The term of office of an incumbent judge who receives an appointment as described in the preceding sentence shall be 15 years, which includes any period remaining in the unexpired term of the judge. Any service following an appointment under this subsection shall be treated as though served as part of the original term of office of that judge on the Court.

(5) Notwithstanding paragraph (1), an appointment may not be made to the Court if the appointment would result in there being more than seven judges on the Court who were appointed after January 1, 1997. For the purposes of this paragraph, a judge serving in recall status under section 7257 of this title [38 USCS § 7257] shall be disregarded in counting the number of judges appointed to the Court after such date.

Effective date of section:
This section took effect on September 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

Amendments:
1989. Aug. 16, 1989, in subsec. (f)(1), inserted "or" preceding "engaging", and substituted "law" for "law, or physical or mental disability which, in the opinion of the President, prevents the proper execution of the judge's duties".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4053, as 38 USCS § 7253.

Act Aug. 6, 1991 added subsec. (g).

1992. Act Nov. 4, 1992, in subsec. (g), designated the existing provisions as para. (1), and added paras. (2) and (3).


Such Act further (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsecs. (a) and (c), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

1999. Act Nov. 30, 1999 (effective and applicable as provided by § 1036 of such Act, which appears as a note to this section), substituted subsec. (a), for one which read: "(a) The Court of Appeals for Veterans Claims shall be composed of a chief judge and at least two and not more than six associate judges."; substituted subsec. (d), for one which read: "(d) The chief judge is the head of the Court."; and substituted subsec. (e), for one which read:
"(e)(1) The chief judge of the Court shall receive a salary at the same rate as is received by judges of the United States Courts of Appeals.

"(2) Each judge of the Court, other than the chief judge, shall receive a salary at the same rate as is received by judges of the United States district courts."

2001. Act Dec. 27, 2001, in subsecs. (b), (c), (f), and (g), inserted the subsection headings; and added subsec. (h).

2002. Act Nov. 2, 2002, in subsec. (g), in para. (1), substituted "chapter 16" for "section 372(c)" and substituted "such chapter" for "such section", in para. (2), substituted "sections 354(b) through 360" for "paragraphs (7) through (15) of section 372(c)", and substituted "section 354(b) or 355" for "paragraph (7) or (8) of section 372(c)", and, in para. (3)(B), substituted "361" for "372(c)(16)".

2004. Act Dec. 10, 2004, in subsec. (d), in para. (1), inserted "The chief judge of the Court is the head of the Court.", and, in para. (4)(A), in cls. (i) and (ii), substituted "Court" for "court"; and, in subsec. (h)(4), substituted "December 27, 2001" for "the date of the enactment of this subsection".


Other provisions:

Initial appointment of judges to Court of Veterans Appeals. Act Nov. 18, 1988, P. L. 100-687, Div A, Title III, § 302, 102 Stat. 4121, effective on enactment as provided by § 401(c) of such Act, which appears as 38 USCS § 7251 note, provides:

"(a) Chief Judge to be appointed first. The President may not appoint an individual to be an associate judge of the United States Court of Veterans Appeals under section 4053(b) [now section 7253(b)] of title 38, United States Code, as added by section 301, until the chief judge of such Court has been appointed. The President shall, during the period beginning on January 21, 1989, and ending on April 1, 1989, nominate an individual for appointment to the position of chief judge of such Court.

"(b) Judges. Subject to subsection (a), judges of the Court of Veterans Appeals may be appointed after February 1, 1989.".

Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.


"(a) Effective date. The amendments made by this subtitle [amending 38 USCS §§ 7253(a), (d), (e), 7254(d), 7281(g), 7296(a), and 7297(a)] shall take effect on the date of the enactment of this Act.

"(b) Savings provision for incumbent chief judge. The amendments made by this subtitle [amending 38 USCS §§ 7253(a), (d), (e), 7254(d), 7281(g), 7296(a), and 7297(a)] shall not apply while the individual who is chief judge of the Court on the date of the enactment of this Act continues to serve as chief judge. If that individual, upon termination of service as chief judge, provides notice under section 7257 of title 38, United States Code, of availability for service in a recalled status, the rate of pay applicable to that individual under section 7296(c)(1)(A) of such title while serving in a recalled status shall be at the rate of pay applicable to that individual at the time of retirement, if greater than the rate otherwise applicable under that section.".

Cross References

This section is referred to in 38 USCS § 7297

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Research Guide

**Federal Procedure:**

**Law Review Articles:**

Cragin. The impact of judicial review on the Department of Veterans Affairs' claims adjudication process: the changing role of the Board of Veterans' Appeals. 46 Me L Rev 23, 1994

Chief Judge, as head of Court of Veterans Appeals (38 USCS § 7253(d)), has waiver authority granted "the head" of executive agency by 5 USCS § 5584(a)(2) to waive debt. Hilda M. Rapp-Court of Veterans Appeals Employee-Salary Overpayments Waiver (1994) 73 Comp Gen 105

§ 7254. **Organization**

(a) The Court of Appeals for Veterans Claim shall have a seal which shall be judicially noticed.

(b) The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court. Any such panel shall have not less than three judges. The Court shall establish procedures for the assignment of the judges of the Court to such panels and for the designation of the chief of each such panel.

(c) (1) A majority of the judges of the Court shall constitute a quorum for the transaction of the business of the Court. A vacancy in the Court shall not impair the powers or affect the duties of the Court or of the remaining judges of the Court.

   (2) A majority of the judges of a panel of the Court shall constitute a quorum for the transaction of the business of the panel. A vacancy in a panel of the Court shall not impair the powers or affect the duties of the panel or of the remaining judges of the panel.

(d) **Precedence of judges.** The chief judge of the Court shall have precedence and preside at any session that the chief judge attends. The other judges shall have precedence and preside according to the seniority of their original commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

(e) Judges of the Court shall have the authority to administer oaths.

**Effective date of section:**
This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

**Amendments:**
1989. Act Aug. 16, 1989 (applicable and effective as provided by § 302(c) of such Act, which appears as 38 USCS § 5701 note) added subsec. (d).

Act Dec. 18, 1989 added another subsec. (d).

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4054, as 38 USCS § 7254.
Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991) redesignated the second subsec. (d) as subsec. (e).

Act Aug. 6, 1991, purported to redesignate the second subsec. (d) as subsec. (e); however, because of a prior amendment, this amendment could not be executed.

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

1999. Act Nov. 30, 1999 (effective and applicable as provided by § 1036 of such Act, which appears as 38 USCS § 7253 note), substituted subsec. (d), for one which read: "(d) In the event of a vacancy in the position of chief judge of the Court, the associate judge senior in service on the Court shall serve as acting chief judge unless the President designates one of the other associate judges to serve as acting chief judge; in which case the judge so designated shall serve as acting chief judge."

Other provisions:

Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:284, 305, 308, 362

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 170

Law Review Articles:


Cragin. The impact of judicial review on the Department of Veterans Affairs' claims adjudication process: the changing role of the Board of Veterans' Appeals. 46 Me L Rev 23, 1994

Court of Veterans Appeals is not barred by statute or precedent from conducting its own review of charge under 28 USCS § 455 against one of its judges; fact that statute is self-enforcing and self-executing does not mean that judge’s actions are unreviewable as caselaw indicates, and cases cited by CVA were decided before 1974 amendments which replaced subjective test for disqualification. Aronson v Brown (1994, CA FC) 14 F.3d 1578, 94 Daily Journal DAR 3425

§ 7255. Offices

discussion and Analysis in the Veterans Benefits Manual

The principal office of the Court of Appeals for Veterans Claims shall be in the Washington, D.C., metropolitan area, but the Court may sit at any place within the United States.

Effective date of section:

This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.
Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4055, as 38 USCS § 7255.

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note) substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".


Other provisions:

Facility for initial principal office of Court. Act Nov. 18, 1988, P. L. 100-687, Div A, Title III, § 303, 102 Stat. 4121, effective on enactment as provided by § 401(c) of such Act, which appears as 38 USCS § 7251 note, provides: "In the implementation of section 4055 [now section 7255] of title 38, United States Code (as added by section 301), the principal office of the Court of Veterans Appeals shall initially be located, if practicable, in a facility existing on the date of the enactment of this Act that, as determined by the Administrative Office of the United States Courts, would facilitate maximum efficiency and economy in the operation of the Court. The Administrative Office of the United States Courts shall take into consideration the convenience of the location of such facility to needed library resources, clerical and administrative support equipment and personnel, and other resources available for shared use by the Court and other courts or agencies of the Federal Government."

Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.


"(a) Space in the District of Columbia. The Administrator of General Services shall provide suitable building space in the District of Columbia for the United States Court of Veterans Appeals as the Court's principal place of business. The Administrator shall, if necessary, arrange for temporary space for the Court if permanent space is not immediately available for the Court. The Administrator shall place a high priority on the provision of such temporary and permanent space for the Court.

"(b) Approval by Court. Any space to be provided for the Court of Veterans Appeals under subsection (a) must be acceptable to the Court.

"(c) Additional Requirement. Any building space provided to the Court under subsection (a) shall be adjacent to additional building space (in an amount acceptable to the Court) that can be made available to the Court in the future if needed for expansion of the facilities of the Court.

References to United States Court of Veterans Appeals. Pursuant to § 512(c) of Act Nov. 11, 1998, P. L. 105-368, which appears as 38 USCS § 7251 note, any reference in a law, regulation, document, paper, or other record of the United States to the United States Court of Veterans Appeals shall be deemed to be a reference to the United States Court of Appeals for Veterans Claims.

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:284, 305, 308, 362

Law Review Articles:
§ 7256. Times and places of sessions

The times and places of sessions of the Court of Appeals for Veterans Claims shall be prescribed by the chief judge.

Effective date of section:
This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4056, as 38 USCS § 7256.
1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note) substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

Other provisions:
Commencement of operations of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Research Guide
Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:284, 305, 308, 362

Law Review Articles:
Cragin. The impact of judicial review on the Department of Veterans Affairs' claims adjudication process: the changing role of the Board of Veterans' Appeals. 46 Me L Rev 23, 1994

§ 7257. Recall of retired judges

(a) (1) A retired judge of the Court may be recalled for further service on the Court in accordance with this section. To be eligible to be recalled for such service, a retired judge must at the time of the judge's retirement provide to the chief judge of the Court (or, in the case of the chief judge, to the clerk of the Court) notice in writing that the retired judge is available for further service on the Court in accordance with this section and is willing to be recalled under this section. Such a notice provided by a retired judge is irrevocable.

(2) For the purposes of this section--
(A) a retired judge is a judge of the Court of Appeals for Veterans Claims who retires from the Court under section 7296 of this title [38 USCS § 7296] or under chapter 83 or 84 of title 5 [5 USCS §§ 8301 et seq. or 8401 et seq.]; and
(B) a recall-eligible retired judge is a retired judge who has provided a notice under paragraph (1).

(b) (1) The chief judge may recall for further service on the Court a recall-eligible retired judge in accordance with this section. Such a recall shall be made upon written certification by the chief judge that substantial service is expected to be performed by the retired judge for such period, not to exceed 90 days (or the equivalent), as determined by the chief judge to be necessary to meet the needs of the Court.

(2) A recall-eligible retired judge may not be recalled for more than 90 days (or the equivalent) during any calendar year without the judge's consent or for more than a total of 180 days (or the equivalent) during any calendar year.

(3) If a recall-eligible retired judge is recalled by the chief judge in accordance with this section and (other than in the case of a judge who has previously during that calendar year served at least 90 days (or the equivalent) of recalled service on the court) declines (other than by reason of disability) to perform the service to which recalled, the chief judge shall remove that retired judge from the status of a recall-eligible judge.

(4) A recall-eligible retired judge who becomes permanently disabled and as a result of that disability is unable to perform further service on the Court shall be removed from the status of a recall-eligible judge. Determination of such a disability shall be made pursuant to section 7253(g) or 7296(g) of this title [38 USCS § 7253(g) or 7296(g)].

(c) A retired judge who is recalled under this section may exercise all of the judicial powers and duties of the office of a judge in active service.

(d) (1) The pay of a recall-eligible retired judge who retired under section 7296 of this title [38 USCS § 7296] is specified in subsection (c) of that section.

(2) A judge who is recalled under this section who retired under chapter 83 or 84 of title 5 [5 USCS §§ 8301 et seq. or 8401 et seq.] shall be paid, during the period for which the judge serves in recall status, pay at the rate of pay in effect under section 7253(e) of this title [38 USCS § 7253(e)] for a judge performing active service, less the amount of the judge's annuity under the applicable provisions of chapter 83 or 84 of title 5 [5 USCS §§ 8301 et seq. or 8401 et seq.].

(e) (1) Except as provided in subsection (d), a judge who is recalled under this section who retired under chapter 83 or 84 of title 5 [5 USCS §§ 8301 et seq. or 8401 et seq.] shall be considered to be a reemployed annuitant under that chapter.

(2) Nothing in this section affects the right of a judge who retired under chapter 83 or 84 of title 5 [5 USCS §§ 8301 et seq. or 8401 et seq.] to serve as a reemployed annuitant in accordance with the provisions of title 5.

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:284, 305, 308, 362

Law Review Articles:

Cragin. The impact of judicial review on the Department of Veterans Affairs' claims adjudication process: the changing role of the Board of Veterans' Appeals. 46 Me L Rev 23, 1994

SUBCHAPTER II. PROCEDURE

§ 7261. Scope of review
§ 7262. Fee for filing appeals
§ 7263. Representation of parties; fee agreements
§ 7264. Rules of practice and procedure
§ 7265. Contempt authority; assistance to the Court
§ 7266. Notice of appeal
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§ 7269. Publication of decisions

§ 7261. Scope of review

(a) In any action brought under this chapter [38 USCS §§ 7251 et seq.], the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall--

(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;
(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;
(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
(D) without observance of procedure required by law; and
(4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title [38 USCS § 7252(b)] and shall--

(1) take due account of the Secretary's application of section 5107(b) of this title [38 USCS § 5107(b)]; and
(2) take due account of the rule of prejudicial error.
(c) In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.

(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Secretary, the Court shall review only questions raised as to compliance with and the validity of the regulation.

**Effective date of section:**

This section took effect on September 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

**Amendments:**


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4061, as 38 USCS § 7261.

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (c), substituted "Court" for "court".

Act Aug. 6, 1991, substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

2002. Act Dec. 6, 2002 (effective and applicable as provided by § 401(c) of such Act, which appears as a note to this section), in subsec. (a)(4), inserted "adverse to the claimant" and "or reverse"; and substituted subsec. (b) for one which read: ")(b) In making the determinations under subsection (a) of this section, the Court shall take due account of the rule of prejudicial error.".

**Other provisions:**

Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Effective date and application of Dec. 6, 2002 amendments. Act Dec. 6, 2002, P. L. 107-330, Title IV, § 401(c), 116 Stat. 2832, provides:

"(1) Except as provided in paragraph (2), the amendments made by this section [amending subsecs. (a)(4) and (b) of this section] shall take effect on the date of the enactment of this Act.

"(2) The amendments made by this section [amending subsecs. (a)(4) and (b) of this section] shall apply with respect to any case pending for decision before the United States Court of Appeals for Veterans Claims other than a case in which a decision has been entered before the date of the enactment of this Act.".

**Cross References**

This section is referred to in 38 USCS § 7252
Research Guide

Federal Procedure:

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 167

Law Review Articles:
Cragin. The impact of judicial review on the Department of Veterans Affairs' claims adjudication process: the changing role of the Board of Veterans' Appeals. 46 Me L Rev 23, 1994

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I. IN GENERAL

1. Generally

There is no statutory basis for jurisdiction in CVA over acts or decisions of Chairman absent some underlying final decision by board, and, while § 7261 may allow CVA to review actions of Chairman in cases where it already has jurisdiction by virtue of timely appeal from final board decision, it does not independently grant jurisdiction over such actions but merely sets out scope of review. Mayer v Brown (1994, CA FC) 37 F.3d 618, reh den (1994, CA FC) 1994 US App LEXIS 33576 and (ovrd in part by Bailey v West (1998, CA FC) 160 F.3d 1360) and (ovrd in part as stated in Cintron v West (1999) 13 Vet App 251, 1999 US App Vet Claims LEXIS 1334 and (ovrd in part as stated in Harlow v West (1999, US) 1999 US App Vet Claims LEXIS 1411) and (ovrd in part as stated in, ovrd in part as stated in Smith v West (1999, US) 1999 US App Vet Claims LEXIS 1415) and (ovrd in part as stated in Driscoll v West (2000, US) 2000 US App Vet Claims LEXIS 171)

Decision of Court of Veterans Appeals, unless or until overturned by this court en banc, US Court of Appeals for Federal Circuit, or Supreme Court, is decision of Court on date it is issued, and any rulings, interpretations, or conclusions of law contained in such decision are authoritative and binding as of date decision is issued and are to be considered and, when applicable, followed by VA agencies of original jurisdiction, Board of Veterans' Appeal, and Secretary in adjudicating and resolving claims. Tobler v Derwinski (1991) 2 Vet App 8

If constitutional question is properly before court, court has power to make determinations regarding it. Reeves v West (1998) 11 Vet App 255

Where veteran's claim for total disability based on individual unemployability was reinstated on appeal but had never been adjudicated, matter was remanded to Department of Veterans Affairs for adjudication. Roberson v Principi (2003) 17 Vet App 135, 2003 US App Vet Claims LEXIS 402

On appeal to Court of Appeals for Veterans Claims (Court), veteran could flesh out and rephrase argument before Court, and requirement of "some degree of specificity" was broad enough to have allowed veteran to rephrase and provide additional argument and support for same basic argument presented before Board of Veterans' Appeals. Jordan v Principi (2003) 17 Vet App 261, 2003 US App Vet Claims LEXIS 721, affd (2005, CA FC) 401 F.3d 1296

Petitioner was not entitled to relief from Board of Veterans' Appeals' order pursuant to court's power under 38 USCS § 7261(a)(2) because authority granted in § 7261(a)(2) was grant of power to court, not grant of jurisdiction; § 7261 required independent source of jurisdiction for its deployment, such as final Board decision and, because no independent source of jurisdiction was present in case, court was without authority to grant relief petitioner sought. O'Branovic v Nicholson (2005) 19 Vet App 81, 2005 US App Vet Claims LEXIS 144

Court of Appeals for Veterans Claims may not award equitable relief, no matter how compelling facts; however, widow of veteran could raise her equitable claims with Secretary of Veterans Affairs pursuant to 38 USCS § 503(a). Bonner v Nicholson (2005) 19 Vet App 188, 2005 US App Vet Claims LEXIS 408

2. Miscellaneous

Court of Veterans Appeals did not err in declining to consider effect of internal manual which was cited and relied upon by claimant for first time in her reply brief to that court; improper or late presentation of issue or argument under court's rules need not be considered and ordinarily should not be considered. Carbino v West (1999, CA FC) 168 F.3d 32, 42 FR Serv 3d 1182

Regulation providing that untimely application for Restored Entitlement Program for Survivors Benefits would be retroactive only to month in which application was filed was invalid as in excess of statutory authority; directory nature of statute and absence of any time-specific filing requirements clearly indicate that claimant need not file within 11 months of child's 16th birthday in order to be eligible for benefits as of that date. Cole v Derwinski (1992) 2 Vet App 400, affd (1994, CA FC) 35 F.3d 551

Board decision would be set aside where it relied on medical opinion procured by process which violated fair process principle; Board request for opinion appeared to be soliciting opinion to support predetermined outcome since it stated that veteran's in-service chest injury was clearly not related to his fatal pulmonary emphysema. Austin v Brown (1994) 6 Vet App 547


Appeal would not be stayed pending reopening of claim before regional office since attempt to reopen claim was necessarily new case by virtue of fact that it if were reopened it would be on basis of veteran's claim of new and material evidence not considered prior to reopening; if court were to dismiss claim and claim to reopen be denied, veteran would have lost right to review of merits. Pellerin v Brown (1993) 5 Vet App 360

Where Court of Appeals for Veterans Claims is required in de novo review interpretation of statute made by Secretary of Veteran's Affairs, court will address first whether Congress has directly spoken to precise question at issue. Gomez v Principi (2003) 17 Vet App 369, 2003 US App Vet Claims LEXIS 905
Board of Veterans’ Appeals statement of reasons or bases for determining that veteran was ineligible for benefits based on full-time duty in U.S. Coast Guard or his Service in Merchant Marine was not sufficient under 38 USCS § 7104(a), (d)(1) because, inter alia, Board failed to address certain evidence he submitted pertaining to his possible service and appeared to rely on veteran's DD Form 214 as dispositive of his dates of service; moreover, Department of Veterans Affairs (VA) erred under 38 USCS § 5103A because it did not make additional request seeking verification of service following submission of additional documents by veteran to VA regional office; however, because it was unclear whether Board properly considered all documents before it, it would be premature to determine whether Board's denial of veteran's claim was "clearly erroneous" under 38 USCS § 7261(a)(4), and, thus, court remanded matter for further development. Frasure v Principi (2004) 18 Vet App 379, 2004 US App Vet Claims LEXIS 581


II. REVIEW OF FINDINGS

3. Generally

Board's determination of degree of impairment is one of fact entitled to judicial deference and to be set aside only if clearly erroneous. Lovelace v Derwinski (1990) 1 Vet App 73

Perhaps in most cases board's decision on issues of material fact, and court's review of that decision, will be inextricably intertwined with determination whether veteran is entitled to benefit of doubt; where findings of material facts by Board are properly supported and reasoned and Board concludes that fair preponderance of evidence weighs against veteran's claim, it would not be error for Board to deny veteran benefit of doubt, and such denial would not be subject to reversal as arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law because it was premised upon rational basis and supported by appropriate and relevant factors which were properly articulated. Gilbert v Derwinski (1990) 1 Vet App 49, mod on other grounds (1991) 1 Vet App 61

4. Psychiatric conditions

Evidence supported Board's determination that 70 percent schedular rating for psychiatric disorder was appropriate. Gleicher v Derwinski (1991) 2 Vet App 26

Board was clearly erroneous in concluding that veteran's schizophrenia was first demonstrated medically many years after separation; only possible conclusion from record was that veteran's psychiatric condition was present during service. Willis v Derwinski (1991) 1 Vet App 66

Board's finding of fact that veteran's psychiatric disability did not increase in severity as a result of his service was plausible and supported by clinical description in medical records of veteran's condition before entry into service and during his hospitalization during service. Green v Derwinski (1991) 1 Vet App 320, app dismd without op (1992, CA) 976 F.2d 746

VA psychiatrists' examination provided plausible basis for BVA's conclusion that veteran did not currently suffer from acquired psychiatric disorder, including PTSD, hence that conclusion was not subject to reversal as clearly erroneous finding of fact. Brownrigg v Derwinski (1992) 3 Vet App 244

Board's finding that veteran's personality disorder was not acquired psychiatric disease incurred in or aggravated by service was clearly correct; regulatory authority recognizes that such disorders and developmental in nature, hence not entitled to service connection. Beno v Principi (1992) 3 Vet App 439
Insanity determination should also be considered question of fact subject to review on clearly erroneous standard since determination of whether person is insane is in effect determination of whether that person's actions were intentional and thus result of willful misconduct; record provided plausible basis for Board's findings that veteran's injuries were due to his own willful misconduct and not due to insanity, including evidence that he was under extreme emotional distress when he shot himself and had no history of treatment for any kind of mental illness. Zang v Brown (1995) 8 Vet App 246

Claimant for veterans benefits was denied relief, where decision of Board of Veterans' Appeals that he did not suffer from service connected post-traumatic stress disorder was based upon preponderance of medical testimony, and was not clearly erroneous under 38 USCS § 7261(a)(4). Forcier v Nicholson (2006) 19 Vet App 414, 2006 US App Vet Claims LEXIS 25

5. Unemployability

Board's factual determination that veteran was employable was clearly erroneous, warranting reversal of denial of entitlement to total disability rating based on individual unemployability due to veteran's severe hypertensive cardiovascular disease. Hersey v Derwinski (1992) 2 Vet App 91 (ovrd in part by Padgett v Nicholson (2005, US) 2005 US App Vet Claims LEXIS 196)

Board's finding that veteran's service-connected disabilities were not of sufficient severity to prevent his pursuit of substantially gainful employment would be reversed where record showed that veteran was not capable of substantially gainful employment and therefore entitled to total disability rating. Moore v Derwinski (1991) 1 Vet App 356

There was no plausible basis for Board to find that veteran was able to engage in substantially gainful employment where both Postal Service and New York labor department determined that veteran was unemployable. Brown v Brown (1993) 4 Vet App 307

Board's findings that veteran was not unemployable due to service-connected disabilities were clearly erroneous where record contained no evidence rebutting examining psychiatrist's conclusion that veteran was unemployable. Kaiser v Brown (1993) 5 Vet App 411

Numerous examples of appellant's uncooperative behavior, poor attitude, and level of his skills supported BVA's finding that appellant's vocational goal of employment in music industry was not reasonably feasible. Kandik v Brown (1996) 9 Vet App 434

6. Cancer

Board's finding that veteran's death from bronchogenic carcinoma was not related to his exposure to ionizing radiation 32 years earlier was amply supported by record. Jeffers v Derwinski (1992) 3 Vet App 22, app dismd without op (1992, CA) 976 F.2d 746

Plausible basis existed for finding that veteran's lung cancer was not caused by his exposure to minimal radiation during service but by his heavy smoking. Harrison v Principi (1992) 3 Vet App 532

7. Eye or ear conditions

Board's finding that veteran's eye disorder was developmental and not result of septoplasty conducted during service was not clearly erroneous where record was devoid of any evidence supporting veteran's assertion or rebutting Board's conclusion. Hughes v Derwinski (1992) 3 Vet App 57

Record contained plausible basis for Board's denial of service connection for bilateral ear disorder and hearing loss, including evidence that veteran entered service with scarring on both eardrums and all audiometric evaluations in service revealed normal hearing. Slater v Principi (1993) 4 Vet App 43

Board's finding that, with eye protection, farmwork or heavy equipment operation would be feasible was clearly erroneous where it had no evidentiary basis in record and Board ignored veteran's sworn and undisputed testimony that he had worn "best goggles" while farming but that his enucleated eye nevertheless got infected; where veteran submits well-grounded claim for total disability rating based on individual unemployability, BVA may not reject that claim without
producing evidence rather than conjecture that veteran can perform work that would produce sufficient income to be other than marginal. Beaty v Brown (1994) 6 Vet App 532

8. Miscellaneous

Board's failure to consider veteran's unrebutted evidence of painful motion in application for increased rating for rheumatoid arthritis required reversal and remand; board cannot simply ignore parol evidence from claimant, particularly where pain is sole issue. Ferguson v Derwinski (1991) 1 Vet App 428

Board's finding that inservice epigastric complaint did not represent chronic stomach disorder was clearly erroneous. Brannon v Derwinski (1991) 1 Vet App 314

Since 1958 medical examination report actually stated that appellant had post traumatic osteoarthritis not of recent origin but which had been aggravated by injury of 1958, Board's finding that 1958 fall probably caused appellant's arthritic condition was clearly erroneous. Spencer v Derwinski (1991) 1 Vet App 125

Board's finding that appellant's left shoulder pathology was not secondary to his right forearm amputation was clearly erroneous where Board failed to cite independent medical authority or to supplement record through remand to agency of original jurisdiction. Meister v Derwinski (1991) 1 Vet App 472

Board's finding that veteran was not entitled to service connection for cellulitis was not clearly erroneous since there was no record of treatment for that condition until year after his discharge from service. Basillote v Derwinski (1992) 3 Vet App 43

Record contained plausible basis for Board's determination that rheumatoid arthritis and ulcer disease first became manifest many years after service and were unrelated to any incident of service. Cox v Derwinski (1992) 3 Vet App 59

Plausible basis existed for BVA's determination that veteran's condition did not warrant increased rating for residuals of scars to face and ankle where VA examination showed that scars were nontender, nonadherent, and nondepressed, and subsequent examination 28 years later noted virtually unchanged picture. Schoonover v Derwinski (1992) 3 Vet App 166

Implicit determinations that veteran's hospitalizations were not emergent, urgent, or unique were not implausible, based on record, therefore not clearly erroneous. Brooks v Principi (1992) 3 Vet App 406

Board's findings of fact in claim for increased rating for residuals of gunshot wound and fracture of leg were plausible. Archer v Principi (1992) 3 Vet App 433

Board's finding of lack of service connection for headaches was not clearly erroneous; there was no medical evidence suggesting headaches during service or resulting from hiking accident during service. Thaxton v Principi (1992) 3 Vet App 442

Board's findings regarding claimed back disability had plausible basis in record since veteran submitted no evidence in support of service-connection, aggravation by service or secondary to injuries received in service, and his own conjecture is not competent evidence. Dunn v Principi (1992) 3 Vet App 499

Board's finding that veteran was not entitled to total rating for coronary artery disease was unsupported by record and therefore clearly erroneous where both private physician and VA physician concluded that veteran was precluded from employment due to his heart condition. Carroll v Brown (1993) 5 Vet App 208

Denial of service connection for residuals of head injury was not clearly erroneous since, although veteran was treated during service for head injury which resulted in headache and dizziness, record reflected no treatment for or complaints of residuals of head injury through VA's examination less than one year after discharge. Smith v Brown (1993) 5 Vet App 300

BVA's denial of service connection for lumbar disc disease was not clearly erroneous where, although service records indicated that appellate experienced back pain during service, his discharge physical revealed no abnormality of spine or other defects, and evidence indicated that...
disease became manifest many years after his discharge. Thibault v Brown (1993) 5 Vet App 520, app dism'd without op (1994, CA FC) 33 F.3d 64

BVA's findings that veteran's prostate disorder and PTSD were not incurred in or aggravated by service were not clearly erroneous; first sign of prostate disorder was recorded nearly 40 years after veteran's separation from service, and veteran's most recent psychological examination revealed no symptomatology of PTSD. Boeck v Brown (1993) 6 Vet App

Board had plausible basis in record for findings that servicemember's pulmonary disease was not service-connected or that any of his service-connected disabilities had caused heart problems leading to his death; service records mentioned no pulmonary problems and no medical evidence demonstrated causal relationship between service-connected residuals of frozen feet and fatal myocardial infarction. Philbrick v Brown (1993) 5 Vet App 316

Board's finding that veteran's service-connected right above-knee amputation was not principal or contributory cause of death was not clearly erroneous where there was no medical evidence to support widow's assertion of causal connection between veteran's service-connected polio disability, his walk in hospital several minutes before he died, and his death, listed as cardiopulmonary arrest due to metastatic carcinoma on death certificate. Van Slack v Brown (1993) 5 Vet App 499

Any error in Board's rating veteran's knee disability as traumatic arthritis rather than osteoarthritis was nonprejudicial since rating procedure for both disorders is identical. Arnesen v Brown (1995) 8 Vet App 432

Board's finding that veteran's knee infection and amputation was foreseeable risk of gastric surgery given veteran's age, vascular problems, and diabetes, was not clearly erroneous; Board considered physician's opinion that amputation of an extremity is not foreseeable consequence of gastric surgery, but accorded more weight to medical treatise which took into account patients whose states are as physically compromised as was veteran's. Hartman v Derwinski (1992) 2 Vet App 623

There was no clear and unmistakable error in decision that denied service connection for veteran's right foot injury since x-ray indicated no evidence of fracture and, while service medical records did confirm occurrence of injury, they also confirmed that veteran was merely assigned temporary waiver of duties and was excused from running for period of ten days. Grover v West (1999) 12 Vet App 109

Where veteran's claims file was not provided to examiner prior to examination, as required by prior remand, court was unable to conclude under 38 USCS § 7261(b)(2) that veteran was not harmed by lack of compliance with remand and, although examiner's objective findings were properly considered, consideration of examiner's conclusions was precluded. Mariano v Principi (2003) 17 Vet App 305, 2003 US App Vet Claims LEXIS 782

III. REVIEW OF DECISIONS

9. Generally

"Plausible basis" standard of review described by Court of Appeals for Veterans Claims was not misapplication of "clearly erroneous" standard set forth in 38 USCS § 7261(a)(4) where Veterans Court's affirmance of Board's decision was expressly based upon consideration of record on appeal, appellant's original and reply briefs, Secretary's brief, and oral argument of parties. Sanchez-Benitez v Principi (2001, CA FC) 259 F.3d 1356, on remand, remanded (2001) 15 Vet App 268, 2001 US App Vet Claims LEXIS 1219

Veteran's Court committed legal error when it refused to apply harmless error doctrine as required by 38 USCS § 7261(b)(2); court erred when it refused to consider whether difference between notice given to veteran and notice required prejudiced veteran, such that § 7261(b)


Although Board erred in treating evidence submitted by appellant as new and material when Board itself concluded that evidence was cumulative, error would be deemed not prejudicial since appellant failed to satisfy 2-step test for reopening claim on basis of new evidence. Thompson v Derwinski (1991) 1 Vet App 251

Error below, whether procedural or substantive, is prejudicial when error affects substantial right so as to injure interest that statutory or regulatory provision involved was designed to protect such that error affects essential fairness of adjudication; in other words, key to determining whether error is prejudicial is effect of error on essential fairness of adjudication; moreover, although demonstration by one party that error did not affect outcome of case would establish that there was or could be no prejudice, failure of other party to demonstrate that error did affect outcome does not necessarily mean that error was harmless; hence, to persuade that there was no prejudice, party must demonstrate essential fairness of adjudication. Mayfield v Nicholson (2005) 19 Vet App 103, 2005 US App Vet Claims LEXIS 197, reh, en banc, den (2005, US) 2005 US App Vet Claims LEXIS 304

10. Clear and unmistakable error, generally

Both 38 USCS § 7261(a)(1) and § 7261(a)(3)(A) necessarily contemplate de novo review of legal issues such as interpretation of regulation by Board of Veterans' Appeals. Lane v Principi (2003, CA FC) 339 F.3d 1331

If claimant-appellant wishes to reasonably raise clear and unmistakable error, there must be some degree of specificity as to what alleged error is and, unless kind that if true would be clear and unmistakable error on its face, persuasive reasons must be given for why result would have been manifestly different but for alleged error. Fugo v Brown (1993) 6 Vet App 40 (ovrld in part by Simmons v Principi (2003) 17 Vet App 104, 2003 US App Vet Claims LEXIS 403)

Claim that there was error in prior BVA decision, rather than decision on appeal, is claim of clear and unmistakable error, over which court lacks jurisdiction because Board has no jurisdiction over such claim. Trice v Brown (1996) 9 Vet App 245

Court has jurisdiction to review BVA decisions on issue whether there was clear and unmistakable error requiring revision of prior adjudications of either agency of original jurisdiction of BVA over which court does not otherwise have jurisdiction, though it is necessarily limited to determining whether BVA decision was arbitrary, capricious, an abuse or discretion, or otherwise not in accordance with law. Russell v Principi (1992) 3 Vet App 310

Veteran could not simply allege clear and unmistakable error on basis that prior adjudications had improperly weighed and evaluated evidence; such claim must be specific and not mere broad allegation of failure to follow regulations, or failure to give due process, or any other general error. Mindenhall v Brown (1994) 7 Vet App 271, dismd without op (1995, CA FC) 53 F.3d 347, reported in full (1995, CA FC) 1995 US App LEXIS 10345

Court of Appeals for Veterans Claims cannot disturb Board's conclusion that regional office decision did not contain clear and unmistakable error on ground decision was arbitrary, capricious, or otherwise not in accordance with law under 38 USCS § 7261(a)(3)(A) and 38 USCS § 5109A where veteran's claim is request for reweighing of evidence. Simmons v West (2000) 14 Vet App 84, 2000 US App Vet Claims LEXIS 860

Board of Veterans' Appeals denial of veteran's claim for clear and unmistakable error was vacated, where claim may have been denied on basis of pleading insufficiency; proper procedure was to dismiss such claim without prejudice. Simmons v Principi (2003) 17 Vet App 104, 2003 US App Vet Claims LEXIS 403

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On review of 1983 decision of Board of Veterans' Appeals (Board), Board was bound to apply regulations as they existed in 1983, and new interpretations of 38 USCS § 1111 (former 38 USCS § 311) and 38 USCS § 1153 (former 38 USCS § 353), interpretations to which Secretary of Veterans Affairs also agreed, that apparently conflicted with those regulations could not be basis for clear and unmistakable error for 1983 decision. Jordan v Principi (2003) 17 Vet App 261, 2003 US App Vet Claims LEXIS 721, affd (2005, CA FC) 401 F.3d 1296

Where veteran claimed that prior disability determinations contained clear and unmistakable error, review of veteran's claims of error was limited under 38 USCS § 7261(a)(3)(A) to determining whether decision of Board of Veteran's Appeals denying claims was arbitrary, capricious, abuse of discretion, or contrary to law and, thus, plenary review was unavailable to consider underlying decisions. Andrews v Principi (2004) 18 Vet App 177, 2004 US App Vet Claims LEXIS 383

There was no clear and unmistakable error in denial of veteran's request for award of special monthly compensation under former 38 USCS § 314(m) (replaced by 38 USCS § 1114) where veteran failed to point to any evidence that reflected that muscles used to move his elbow joint were atrophied or would have become atrophied; veteran's argument that loss of supination and pronation even with movement in joint (unfavorable ankylosis) constituted lack of "natural elbow action" was without merit because under 38 C.F.R. § 3.350(c)(1), "natural elbow action" was defined in terms of muscle atrophy and prospective muscle atrophy. Augustine v Principi (2004) 18 Vet App 505, 2004 US App Vet Claims LEXIS 722

11. -Particular decisions
   Veteran's letter clearly raised claim of clear and unmistakable error (CUE), though he did not expressly call it CUE claim, where he stated his concern to have his disability acknowledged and corrected to at least its original 40 percent and that amount paid should be corrected by 20 percent for 439 months. Archbold v Brown (1996) 9 Vet App 124


   Veteran did not raise claim of clear and unmistakable error in regional office's rating decisions since references to statute and regulation which had been brought to attention of BVA and RO previously were made in context of describing how RO allegedly had erred earlier in denying entitlement to service connection, not in attempt to raise separate claim of clear and unmistakable error. Phillips v Brown (1997) 10 Vet App 25

   Board properly dismissed claims of clear and unmistakable error; court had previously held that rating decision was never appealed, and later rating decision addressed identical issue of appellant's entitlement to psychiatric disability and thus subsumed earlier decision. Chisem v Gober (1997) 10 Vet App 526

   Decision holding that original rating decision denying service connection was not clearly and unmistakably erroneous was proper; fact that state of medical knowledge in general and medically opinions specifically concerning veteran's cause of death changed after original adjudication cannot be basis for revising earlier rating decision. Porter v Brown (1993) 5 Vet App 233
Board's findings of entitlement to no more than 10 percent disability rating under all applicable diagnostic codes for left wrist disorder, right thigh disorder, and left anterior chest disorder are plausible and not clearly erroneous under 38 USCS § 7261(a)(4) Johnston v Brown (1997) 10 Vet App 80

Board's decision assigning January 27, 1994, as effective date for non-service-connected disability pension was clearly erroneous under 38 USCS § 7261(a)(4) where veteran attempted to reopen claim on December 9, 1992, by submitting Social Security Administration (SSA) decision awarding him disability benefits based on total disability; regional office rendered adverse decision in September, 1993; decision was not final decision since regional office received SSA records on January 27, 1994, prior to expiration of one year appeal period; SSA records are considered as evidence filed in connection with claim pending at beginning of appeal period; and December 9, 1992, is effective date of claim. Muehl v West (1999) 13 Vet App 159, 1999 US App Vet Claims LEXIS 1275

Board decision determining that regional office had not erred in deciding that presumption of soundness had been rebutted in 1947 was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law pursuant to 38 USCS § 7261(a)(3)(A) where service medical record of veteran's induction examination contained notation of scar on right thigh and "confirmed" notation that veteran had benign tumor removed from right thigh prior to service, and notations on veteran's certificate of disability for discharge and medical board report showed veteran's condition existed prior to service; however, Board's denial of clear and unmistakable error was "not otherwise in accordance with law" as to application of presumption of aggravation because evidence before regional office in 1947 could not, as matter of law, have met criteria set forth under regulation in effect at time which required specific finding that increase in disability is due to natural progress of disease. Sondel v West (1999) 13 Vet App 213, 1999 US App Vet Claims LEXIS 1278

Board's factual finding that veteran had "reason to believe" that he was not entitled to special monthly compensation checks that he received did not have plausible basis in record and was clearly erroneous under 38 USCS § 7261(a)(4) where Board supported its finding based on form sent to veteran but form was difficult to read, contained mostly irrelevant information, stated only general policy, and was sent to veteran as attachment to decision awarding veteran additional special monthly compensation, after regional office had specifically inquired as to circumstances of veteran's care. Erickson v West (2000) 13 Vet App 495, 2000 US App Vet Claims LEXIS 380

Where earlier board decision declining to reinstate compensable rating for veteran's disability contained clear and unmistakable error by failing to address 38 C.F.R. § 3.344 (1977), court reversed and remanded current board decision that had upheld earlier decision. Sorakubo v Principi (2002) 16 Vet App 120, 2002 US App Vet Claims LEXIS 350

Prior disability determinations contained (before 1990) were not required to expressly address evidence and veteran's bare allegation that prior decisions failed to consider evidence did not assert any specific error in decision of Board of Veteran's Appeals that court could review. Andrews v Principi (2004) 18 Vet App 177, 2004 US App Vet Claims LEXIS 383


Board of Veterans Appeals erred under 38 USCS § 5109A(e) when it proceeded to adjudicate clear and unconvincing error (CUE) claim in first instance without offering to remand question to regional office; moreover, error could not be considered nonprejudicial under 38 USCS § 7261(b)(2) because court could not decide that veteran could not possibly have prevailed on claim had matter been sent back to RO for initial CUE adjudication; thus, Board's decision was vacated and remanded. Huston v Principi (2004) 18 Vet App 395, 2004 US App Vet Claims LEXIS 580, subsequent app (2004) 18 Vet App 405, 2004 US App Vet Claims LEXIS 600, motion gr, dismd (2004, US) 2004 US App Vet Claims LEXIS 713

Where veteran's ulcer condition preexisted service, and veteran had suffered marked increase in symptoms associated with his ulcer, applying law in existence in 1955, Department of
Veterans Affairs regional office was required to have made "specific finding" of natural progression of condition; absent such finding, it was error to conclude that presumption of aggravation had been rebutted. Joyce v Nicholson (2005) 19 Vet App 36, 2005 US App Vet Claims LEXIS 97

Evidence, e.g., veteran’s statements during his initial examination that he had experienced intermittent epigastria pain and vomiting, supported conclusion of Board of Veterans' Appeals that veteran’s ulcer had preexisted service. Joyce v Nicholson (2005) 19 Vet App 36, 2005 US App Vet Claims LEXIS 97

Court of Appeals holds that claim of clear and unmistakable error (CUE) may not be filed as to matter that is still appealable to this Court, or is pending on appeal with this Court or at higher court; thus, where veteran had filed direct appeal of March 2003 Board of Veterans' Appeals decision, pursuant to 38 CFR § 20.1410, Board should have stayed its consideration of veteran's CUE claim upon receiving notice that veteran had filed direct appeal of that decision. May v Nicholson (2005) 19 Vet App 310, 2005 US App Vet Claims LEXIS 536

12. Disability rating

Statutory scheme of 5 USCS §§ 552, 553, and 38 USCS §§ 1155, 7252, consistently excluded from judicial review all content of ratings schedule, as well as actions of Secretary of Veterans Affairs in adopting or revising that content, and 38 USCS § 7261(a)(3)(C) only provides standards of review to be applied by U.S. Court of Appeals for Veterans Claims when reviewing decision from Board of Veterans' Appeals and, thus, under 38 USCS § 7252, such court lacked jurisdiction to review content of diagnostic codes as part of schedule of ratings for disabilities; accordingly, Court of Appeals for Federal Circuit reversed determination of U.S. Court of Appeals for Veterans Claims that 38 C.F.R. § 4.87a, Diagnostic Code 6260, was invalid as inconsistent with 38 USCS § 1110. Wanner v Principi (2004, CA FC) 370 F.3d 1124

Board erred in reducing veteran’s rating from 100 percent to 10 percent based solely on one examination, where all evidence did not support degree of material improvement found by rating board. Dofflemyer v Derwinski (1992) 2 Vet App 277

Denial of increased rating from 30 to 50 percent for PTSD was not erroneous where there was plausible basis in record for Board’s factual determinations and it committed no legal error. Sellz v Derwinski (1992) 2 Vet App 299

Board apparently inverted decision process and concluded that rating percentage under new criteria in ratings scheduled for mental disorder should be kept same because there was no change in evidence, then made wording of its factual findings consistent with that determination. Sabol v Derwinski (1992) 2 Vet App 228

Board’s refusal to extend disability rating through May 1989 was not arbitrary where progress note disclosed good function of Veteran’s right thumb at end of April and BVA discredited July outpatient orthopedic clinic progress note by implicitly stating that it was unsupported by clinical evidence. Foster v Derwinski (1991) 1 Vet App 393

Reduction of veteran's disability rating for post-traumatic stress disorder from 50 percent to 30 percent was arbitrary and capricious, particularly in light of absence of adequate statement of reasons, where it was done on basis of one inaccurate and incomplete medical report and therefore without observance of applicable regulations. Lehman v Derwinski (1991) 1 Vet App 339


Remand was appropriate since it is not court's function to assign disability rating, but to determine whether BVA clearly erred in denying request for increased rating. Melaragni v Derwinski (1992) 3 Vet App 20

Board's conclusion denying increased rating for PTSD was clearly erroneous and it would be reversed where there simply was no plausible basis for its conclusion that evidence failed to support claim for increased benefits; Board dismissed without comment recommendation of
A social industrial survey performed at request of DVA which addressed heart of issue whether veteran was capable of gainful employment. Crandell v Derwinski (1992) 3 Vet App 33

Where all medical evidence of record supports finding that veteran's disability is at least "severe," thus warranting rating of no less than 70 percent, there is no plausible basis for Board's contrary holding and court will reverse as clearly erroneous. Cleary v Principi (1992) 3 Vet App 495, judgment entered sub nom Cleary v Brown (1993) 6 Vet App 175

Appeal of claim for increased disability rating could be disposed of under clearly erroneous standard since it included wholly factual matters, hence was not inextricably intertwined with issue of unemployability which was referred to RO so as to deprive court of jurisdiction. Parker v Brown (1994) 7 Vet App 116

VA had sufficient medical evidence to change veteran's rating for right lung cancer from 100 to 60 percent, including examinations confirming absence of recurrence or metastasis. Bennett v Brown (1997) 10 Vet App 178

Board acted arbitrarily and capriciously in denying extension of appellant's total disability rating and in failing further to evaluate appellant for total and permanent disability rating where it failed to take into account notations in medical record of appellant's incapacity to work and need for additional convalescent time and instead relied on records that predated those, and failed to take into account subsequent medical notation that appellant required six months of convalescence. Seals v Brown (1995) 8 Vet App 291

Board decision that March 1973 rating decision denying entitlement to service connection for herniated lumbar disc and residuals of lumbar laminectomy did not contain clear and unmistakable error; facts as they were known at time were before RO, VA physician's examination resulting in opinion that appellant's injury was misdiagnosed originally did not occur until after BVA decision, and appellant did not allege that any statutory or regulatory provisions extant at time were incorrectly applied. Rivers v Gober (1997) 10 Vet App 469, subsequent app (2004, US) 2004 US App Vet Claims LEXIS 205

Rating decision determining that appellant's psychosis existed prior to service and was not aggravated by service did not constitute clear and unmistakable error since appellant did not allege that correct facts as known at time were not before adjudicator or that statutory and regulatory provisions extant at time were incorrectly applied. Daniels v Gober (1997) 10 Vet App 474, dismd without op sub nom Daniels v West (1998, CA FC) 155 F.3d 572, reported in full (1998, CA FC) 1998 US App LEXIS 17306

Decision by Board of Veterans Appeals that applied more stringent standard for disability rating under pre-1999 Disability Code, which required that tinnitus be "persistent" as opposed to post-1999 Disability Code, which required condition to be "recurring," was arbitrary and capricious and matter was remanded for reassessment; veteran was also entitled, under regulations as written at that time, to have two assessments because veteran suffered condition bilaterally. Smith v Principi (2003) 17 Vet App 168, 2003 US App Vet Claims LEXIS 426, revd, remanded (2004, CA FC) 108 Fed Appx 628

Finding, that residuals of gunshot wound to veteran's shoulder involved only injury to one muscle group and not to second muscle group, failed to address whether veteran's disability rating for second muscle group was protected by length of time it had been in effect and, if not protected, failed to address evidence supporting involvement of second muscle group. Mariano v Principi (2003) 17 Vet App 305, 2003 US App Vet Claims LEXIS 782

Factual determination, that veteran's arthritis was not residual of service-connected gunshot wound, was clearly erroneous within meaning of 38 USCS § 7261(a)(4) where there was absolutely no medical evidence to support finding since medical examination reports did not address question. Mariano v Principi (2003) 17 Vet App 305, 2003 US App Vet Claims LEXIS 782

Where two examinations reflected at-or-below-shoulder-level flexion measurements, one examination reflected above-shoulder-level flexion measurement, and it was unclear what private physician was measuring, finding, that veteran had arm motion above shoulder level based solely on flexion measurements, had no plausible basis in record; application of 38 USCS § 5107(b) equipoise standard in reaching factual determination based on flexion was, thus, clearly

Where two examiners attributed veteran's limitation of movement of shoulder to service connected residual of gunshot wound, one examiner attributed limitation to arthritis or ambiguous etiology, and one examiner used flawed methodology, application of 38 USCS § 5107(b) equipoise standard in finding that limitation was due to arthritis was clearly erroneous under 38 USCS § 7261(a)(4). Mariano v Principi (2003) 17 Vet App 305, 2003 US App Vet Claims LEXIS 782

In evaluating frequency of veteran's headache episodes under 38 C.F.R. § 4.124a, Diagnostic Code 8100 (2002), Board of Veterans' Appeals improperly based its determination by comparing number of "severe" headache episodes with "mild to moderate" ones; that comparison was absurd because greater number of less-severe headaches that veteran suffered, more difficult it would be for his "severe" headaches to be considered "very frequent" so as to meet requirement for 50 percent rating. Pierce v Principi (2004) 18 Vet App 440, 2004 US App Vet Claims LEXIS 652

Where veteran argued that he was entitled to 50 percent rating for migraine headaches, Board of Veterans' Appeals erred when if failed to discuss letter that veteran wrote to his representative that contained most recent information regarding his headaches, their frequency, severity, incapacitation, and prostration, and his employment status. Pierce v Principi (2004) 18 Vet App 440, 2004 US App Vet Claims LEXIS 652

Nothing in 38 C.F.R. § 4.124a, Diagnostic Code 8100 (2002), requires that claimant be completely unable to work in order to qualify for 50 percent rating; if "economic inadaptability" were read to import unemployability, claimant, if he met economic-inadaptability criterion, would then be eligible for rating of total disability based on individual unemployability resulting from service-connected disability (TDIU) rather than just 50 percent rating. Pierce v Principi (2004) 18 Vet App 440, 2004 US App Vet Claims LEXIS 652

13. Service connection

38 USCS § 7261(a)(4) requires Court of Appeals for Veterans Claims to apply clearly erroneous standard for review of determinations by Board of Veterans' Appeals (BVA) regarding disputed facts or regarding application of established law to facts of particular case; therefore, where BVA concluded that veterans' benefits claimant's evidence of direct causation of peripheral neuropathy related to his chemical exposure while in service was insufficient to establish service connection, lower court properly upheld BVA's finding that medical evidence in record provided plausible basis for denial of service connection and that BVA's decision was not clearly erroneous. Lennox v Principi (2003, CA FC) 353 F.3d 941

Where service member claimed that regional office failed to consider presumption of soundness in its adjudication of his claim for disability benefits and that such failure constituted clear and unmistakable error (CUE), Court of Appeals for Veterans' Claims did not apply incorrect standard of review in evaluating service member's CUE claim, even though it did not expressly address member's challenge to legal sufficiency of evidence. Kent v Principi (2004, CA FC) 389 F.3d 1380

Board's conclusion that no etiological relationship was demonstrated between service-contracted right axillary puncture wound and right axillary/subclavian stenosis first shown many years after wound was contrary to medical evidence of record and not plausible, hence its decision denying service connection was clearly erroneous. Futch v Derwinski (1992) 2 Vet App 204

Board did not err in determining that service connected was not warranted for veteran's low back condition where it outlined record evidence as well as applicable statutory and regulatory provisions, emphasized that veteran failed to provide evidence which demonstrated continuity of symptomatology, and found that veteran failed to account for lengthy time period for which there was no clinical documentation of his low back condition. Mense v Derwinski (1991) 1 Vet App 354
Board did not err in denying service connection for acquired psychiatric disorder where record established that veteran served in Navy for 4 years, suffered head injury as result of traffic accident while in service for which he was service-connected for residuals of injury rated at 0 percent disabling, and was first diagnosed as having psychiatric condition several years after having left service. Little v Derwinski (1991) 1 Vet App 560, amd on other grounds (1991, Vet App) 1991 US Vet App LEXIS 78

Board's determination that National Guard member's multiple sclerosis was not incurred during her active duty for training was not clearly erroneous where it found that first diagnosis of multiple sclerosis dated over one year after her last period of active duty for training and, while appellant introduced evidence of symptoms she allegedly experienced while on active duty for training, she did not introduce any medical evidence indicating diagnosis of multiple sclerosis or any of its symptoms that could not be readily explained by other events. Biggins v Derwinski (1991) 1 Vet App 474

Board did not err in denying surviving spouse's claim for service connection for her husband's death from occlusive coronary atherosclerosis as related to his service-connected sickle-cell anemia where medical treatise is submitted by spouse only raised possibility of relationship between sickle-cell anemia and certain cardiovascular disorders but did not show direct causal relationship. Utendahl v Derwinski (1991) 1 Vet App 530

Board's denial of secondary service connection for veteran's right knee condition was clearly erroneous since its rejection of treating physician's statements regarding causal relationship between service-connected left knee condition and right knee condition had no independent basis in record and medical records conflicted with Board's analysis of medical evidence. Harder v Brown (1993) 5 Vet App 183

In denying service connection for seizure disorder, Board was arbitrary and capricious in finding that presumption of soundness upon induction in 1979 had been rebutted since it did not even discuss credibility of lay statements, including appellant's own testimony, that he had not suffered seizures prior to service, and there was no basis in record for Board's factual finding that 1996 VA neurological examination established that seizure disorder preexisted service since doctor expressly refused to opine regarding etiology of seizure disorder. Vanerson v West (1999) 12 Vet App 254, 1999 US App Vet Claims LEXIS 46


Court had jurisdiction over appellant challenge to denial of ratings for service connected tinnitus, pursuant to 38 USCS § 7261(a)(3)(C), to determine whether Diagnostic Code (DC) regulation at issue was in violation of statutory right and, pursuant to 38 USCS § 7261(a)(3)(A), to determine whether DC regulation was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law. Wanner v Principi (2003) 17 Vet App 4, 2003 US App Vet Claims LEXIS 88, revd, remanded (2004, CA FC) 370 F.3d 1124 and (ovrd as stated in Smith v Principi (2004) 18 Vet App 448, 2004 US App Vet Claims LEXIS 674)

Board of Veterans' Appeals erred to extent that its determination that veteran had not engaged in combat was based on sole criterion of veteran's not having received fire from enemy, which was not required under 38 USCS § 1154(b)'s phrase "engaged in combat with enemy" as interpreted by VA General Counsel opinion; evidence showed that veteran's unit had been responsible for shooting artillery fire into enemy areas and that his unit killed numerous Viet Cong soldiers. Sizemore v Principi (2004) 18 Vet App 264, 2004 US App Vet Claims LEXIS 555

Department of Veterans' Affairs (VA) did not make all reasonable efforts to verify veteran's claimed post-traumatic stress disorder (PTSD) stressors and to verify that veteran was not advised adequately by VA as to types of information that could help verify his claimed in-service stressors; in particular, VA failed to advise veteran that he could submit corroboration in form of
“buddy statements” as to some of occurrences that he alleged were in-service stressors.


Veteran filed only one claim for service connection for hearing loss, even if there were two theories advanced; therefore, no claim remained pending after Board of Veterans Appeals (BVA) rejected at least one of veteran’s theories and, because veteran did not demonstrate that BVA’s denial of earlier effective date under 38 USCS § 5110(a) was clearly erroneous under 38 USCS § 7261(a)(4), BVA decision was affirmed. Bingham v Principi (2004) 18 Vet App 470, 2004 US App Vet Claims LEXIS 547

Board of Veterans Appeals erred when it determined that there was no clear and unconvincing error (CUE) in decision by regional office (RO) because Board failed to provide adequate statement of reasons or bases for its conclusion that RO considered veteran's combat service, as required by 38 USCS § 1154(b); however, Board correctly concluded that veteran failed to provide medical nexus opinion relating any current hearing loss to veteran's military service; thus, veteran could not possibly prevail on his hearing-loss claim, and Board's reasons-or-bases error in not discussing § 1154(b) was nonprejudicial error under 38 USCS § 7261(b)(2). Huston v Principi (2004) 18 Vet App 395, 2004 US App Vet Claims LEXIS 580, subsequent app (2004) 18 Vet App 405, 2004 US App Vet Claims LEXIS 600, motion gr, dismd (2004, US) 2004 US App Vet Claims LEXIS 713

Although Board of Veterans' Appeals did not comply with 38 USCS § 7104(d)(1) when it failed to support its conclusion that Department of Veterans Affairs was not required under 38 USCS § 5103A(d) to provide veteran with medical examination with respect to veteran's claims for service connection for poor vision and hearing-loss disability, error was nonprejudicial under 38 USCS § 7261(b) because there was no evidence in record reflecting that veteran suffered event, injury, or disease in service that could be associated with those symptoms. Duenas v Principi (2004) 18 Vet App 512, 2004 US App Vet Claims LEXIS 798

14. Unemployability

Veteran counsel's failed to raise before Department of Veterans Affairs, in his claim of clear and unmistakable error (CUE) argument that veteran's prior pro se claims should have been construed as asserting claims for total disability based on individual unemployability (TDIU); as Roberson did not apply to counsel-filed CUE motions, Court of Appeals properly refused to consider TDIU issue. Andrews v Nicholson (2005, CA FC) 421 F.3d 1278

Where only evidence showed that appellant had been continually unemployed since 1975, Board erred in failing to consider regulation compelling 100-percent rating for claimant whose 70-percent service-connected mental disability prevents him from engaging in substantially gainful employment. Karnas v Derwinski (1991) 1 Vet App 308 (ovrld in part as stated in, ovrld in part by Kuzma v Principi (2003, CA FC) 341 F.3d 1327 and (ovrld as stated in Griscom v Principi (2003, CA FC) 76 Fed Appx 289) and (ovrld as stated in May v Principi (2003, US) 2003 US App Vet Claims LEXIS 986) and (ovrld as stated in Hollin v Principi (2003, US) 2003 US App Vet Claims LEXIS 960)

Board's determination that prior decision terminating veteran's individual unemployability benefits did not contain clear and unmistakable error was erroneous where Board failed to apply regulation requiring that termination of such benefits require that actual employability be established by clear and convincing evidence and there was no evidence of employability at time of earlier decision. Olson v Brown (1993) 5 Vet App 430

Board's decision denying servicemember's claim of total disability based on individual unemployability lacked any supporting evidence and Board ignored many pertinent facts, e.g., veteran's testimony that he was interested in working, fact that his driver's license had been suspended because of his medical condition or that VA had denied vocational rehabilitation because it determined that his condition made training unfeasible, VA social and industrial survey's conclusion that veteran was unable to work due to narcolepsy, potential employer's letter stating that none of many jobs available would be offered to veteran because his condition posed unacceptable risk of injury, and letter from principal of school where veteran was briefly employed.
which explained that veteran was unable to maintain working schedule. James v Brown (1995) 7 Vet App 495

15. Denial of reconsideration

Although court has jurisdiction to review BVA denials of reconsideration, it may not do so in absence of allegations of new evidence or changed circumstances. Patterson v Brown (1993) 5 Vet App 362

Appeal from Board Chairman's denial of reconsideration of Board decision was not timely, and court thus lacked jurisdiction over it, where notice of appeal was filed nearly two years after issuance of Board's final decision. Cochran v Brown (1996) 8 Vet App 557

Claimant for veterans benefits was denied relief from order of Board of Veterans' Appeals (Board), although his counsel's letter to Board was sufficient to constitute timely notice of disagreement under 38 USCS § 7105(b), giving Board jurisdiction to review whether substantive appeal on merits of claim was timely; however, there was no prejudicial error, relief on reconsideration was not warranted, under 38 USCS § 7261(b)(2). Matthews v Nicholson (2005) 19 Vet App 202, 2005 US App Vet Claims LEXIS 425

16. Miscellaneous

In response to Secretary's complaint that remand ordering that related claim be adjudicated within 90 days was unrealistic given inherent delays in administrative processes, court does not assume and Secretary should presume that "business as usual" defines timetable for action directed by court. Hayes v Derwinski (1991) 1 Vet App 482

Decision or finding of prisoner of war status is legal determination, hence subject to clearly erroneous standard of review. Young v Brown (1993) 4 Vet App 106, subsequent app (1996) 9 Vet App 141, affd sub nom Young v Gober (1997, CA FC) 121 F.3d 662

Board's incompetency determination was legally erroneous where it was made without participation of Veteran's Service Officer, who, according to VA regulations, is to participate in and may modify incompetency determinations. Coleman v Brown (1993) 5 Vet App 371

BVA's reliance on medical treatise in denying service connection for helminthiasis claimed by veteran who had been held by Japanese as POW could not be considered harmless where BVA failed to give veteran notice of its intent to rely on treatise and veteran presented plausible argument calling into question general applicability of treatise's claims. Yabut v Brown (1993) 6 Vet App 79

Board's decision to deny waiver of outstanding VA loan guaranty indebtedness was not arbitrary and capricious since the Board determined that appellant was at fault in creation of debt and that repayment of debt over time would not constitute undue hardship. Parker v Brown (1996) 9 Vet App 476

Conclusion of Board of Veterans' Appeals that telephone call by estranged spouse to report death of veteran was not informal claim but request for information was not arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law pursuant to 38 USCS § 7261(a)(3)(A) since veteran's claims file contents indicated parties were separated which would generally preclude estranged spouse from receiving death pension benefits. Westberry v West (1999) 12 Vet App 510, 1999 US App Vet Claims LEXIS 787, reh, en banc, den (2000) 13 Vet App 305, 2000 US App Vet Claims LEXIS 53 and affd (2001, CA FC) 255 F.3d 1377, reh den (2001, CA FC) 2001 US App LEXIS 23206

Board's decision that appellant had not filed claim for dependency and indemnity compensation was not arbitrary, capricious, abuse of discretion, or otherwise contrary to law under 38 USCS § 7261(a)(3)(A) where, even though appellant's application for burial benefits was informal claim for dependency and indemnity compensation, appellant did not return application form for dependency and indemnity benefits within one year after it had been sent to her. Mitscher v West (1999) 13 Vet App 123, 1999 US App Vet Claims LEXIS 1131

Despite December 6, 2002, amendment to 38 USCS § 7261, there is still need for designation and counter designation of record in appeal from decision of Board of Veterans'
Appeals, and court's longstanding practice of requiring that only relevant material be included in record on appeal is still in effect; therefore, motion filed by children of veteran, seeking to compel Secretary of Veterans Affairs to transmit complete copy of children's claims files, as record in their appeal from Board decisions denying their claims for education benefits, was denied, and court further declined children's invitation to remove U.S. Ct. Vet. App. R. 10, and amend U.S. Ct. Vet. App. R. 11, 33. Homan v Principi (2003) 17 Vet App 1, 2003 US App Vet Claims LEXIS 73

Where Board of Veterans' Appeals (BVA) erred by failing to adequately discuss amended duty to notify in 38 USCS § 5103, BVA's error was non-prejudicial under 38 USCS § 7261(b)(2) because brother's averment that he was brother of deceased veteran was uniquely within brother's knowledge, and under 38 USCS § 101(14) brother was ineligible for dependency and indemnity compensation as matter of law on basis of sibling relationship with veteran. Valiao v Principi (2003) 17 Vet App 229, 2003 US App Vet Claims LEXIS 612

Veteran who was referred from Veterans Affairs clinic to private hospital emergency room was eligible to receive payment of medical expenses incurred during hospitalization at private hospital because there was no plausible basis in record for Board of Veteran's Affairs factual determination that veteran's medical condition did not pose threat to his health, and all evidence in record supported finding that such threat did exist. Cantu v Principi (2004) 18 Vet App 92, 2004 US App Vet Claims LEXIS 304

Limited eligibility period for active-duty service contained in 38 C.F.R. § 3.7(x)(15) (2001 & 2003) reflects limited period previously determined by Secretary of Air Force, who has general authority, as delegated by Secretary of Defense, to designate groups for purposes of active-duty service under G.I. Bill Improvement Act of 1977, Pub. L. No. 95-202, § 401, 91 Stat. 1433 (found at 38 USCS § 106 (note)); Department of Veterans Affair's promulgation of 38 C.F.R. § 3.7(x)(15), including eligibility dates of December 7, 1941, to August 15, 1945, is not arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law or in excess of statutory jurisdiction, authority, or limitations, or in violation of statutory right pursuant to 38 USCS § 7261(a)(3)(A), (C). Frasure v Principi (2004) 18 Vet App 379, 2004 US App Vet Claims LEXIS 581

Where widow of veteran argued that, because she asserted that her husband died from "cancer" in her 1975 dependency and indemnity compensation claim, that claim necessarily included claim for non-Hodgkin's lymphoma and that under 38 C.F.R. § 3.313 she was eligible for earlier effective date based on 38 C.F.R. § 3.309(e), that argument was without merit; at time of 1976 adjudication, evidence established that widow's claim was one for Hodgkin's disease, and, therefore, evidence did not reasonably raise any claims for cause of death by types of cancer other than Hodgkin's disease. Bonner v Nicholson (2005) 19 Vet App 188, 2005 US App Vet Claims LEXIS 408

Under 38 C.F.R. § 3.114(a)(3), where widow of veteran did not file her informal claim for dependency and indemnity compensation (DIC) until more than one year after 38 C.F.R. § 3.309(e) was enacted in February 1994, earliest possible effective date available to her for her DIC claim was November 1, 1994, date awarded. Bonner v Nicholson (2005) 19 Vet App 188, 2005 US App Vet Claims LEXIS 408

Board of Veterans’ Appeals, even when it was denying jurisdiction, was required to include statement of reasons or bases for its decision; Board simply cited 38 C.F.R. § 20.101(b) for proposition that medical determinations were not reviewable, but failed to conduct critical review of nature of decision to support its conclusion that this provision was applicable. King v Nicholson (2006) 19 Vet App 406, 2006 US App Vet Claims LEXIS 2

Veteran's mere reference to similar case in his notice of disagreement was not enough for VA to have inferred that veteran raised claim under 38 USCS § 1151 where reference occurred in another context and record contained no indication that veteran believed he currently had condition caused by VA medical treatment. King v Nicholson (2006) 19 Vet App 406, 2006 US App Vet Claims LEXIS 2

§ 7262. Fee for filing appeals
(a) The Court of Appeals for Veterans Claims may impose a fee of not more than $50 for the filing of any appeal with the Court. The Court shall establish procedures under which such a fee may be waived in the case of an appeal filed by or on behalf of a person who demonstrates that the requirement that such fee be paid will impose a hardship on that person. A decision as to such a waiver is final and may not be reviewed in any other court.

(b) The Court may from time to time adjust the maximum amount permitted for a fee imposed under subsection (a) of this section based upon inflation and similar fees charged by other courts established under Article I of the Constitution.

**Effective date of section:**
This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

**Amendments:**
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4062, as 38 USCS § 7262.
1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

**Other provisions:**

**Commencement of operation of Court of Veterans Appeals.** For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

**Cross References**
Fee for filing appeals, Rules 3, 24, Rules of United States Court of Veterans Appeals, USCS Court Rules

§ 7263. Representation of parties; fee agreements

(a) The Secretary shall be represented before the Court of Appeals for Veterans Claims by the General Counsel of the Department.

(b) Representation of appellants shall be in accordance with the rules of practice prescribed by the Court under section 7264 of this title [38 USCS § 7264]. In addition to members of the bar admitted to practice before the Court in accordance with such rules of practice, the Court may allow other persons to practice before the Court who meet standards of proficiency prescribed in such rules of practice.

(c) A person who represents an appellant before the Court shall file a copy of any fee agreement between the appellant and that person with the Court at the time the appeal is filed. The Court, on its own motion or the motion of any party, may review such a fee agreement.

(d) In reviewing a fee agreement under subsection (c) of this section or under section 5904(c)(2) of this title [38 USCS § 5904(c)(2)], the Court may affirm the finding or order
of the Board and may order a reduction in the fee called for in the agreement if it finds that the fee is excessive or unreasonable. An order of the Court under this subsection is final and may not be reviewed in any other court.

**Effective date of section:**
This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

**Amendments:**

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4063, as 38 USCS § 7263, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

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**Cross References**

Representation of parties, fee agreements, Rule 46, Rules of United States Court of Veterans Appeals, USCS Court Rules

This section is referred to in 38 USCS § 5904

**Research Guide**

**Federal Procedure:**

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:239, 370

**Am Jur:**

77 Am Jur 2d, Veterans and Veterans' Laws § 170

1. Generally

2. Fee agreements

3. Relationship to Equal Access to Justice Act

1. Generally

Circuit court lacked jurisdiction to review decision of United States Court of Appeals for Veterans Claims regarding reasonableness of attorney's fee agreement with veteran; more specific provisions of 38 USCS § 7263(d) overrode general grant of jurisdiction in 38 USCS 7292(a) and, thus, precluded review of decision of Veterans' Court's under 38 USCS § 5904(c)(2). Carpenter v Principi (2003, CA FC) 327 F.3d 1371, reh den, reh, en banc, den (2003, CA FC) 2003 US App LEXIS 14589

Extension of time for government to file brief would be granted, but no further opposed extensions would be, absent exceptional circumstances, which do not include heavy caseload. Ehringer v Brown (1997) 10 Vet App 103
2. Fee agreements

Court of Veterans Appeals lacked subject matter over attorney's motion to compel Secretary to pay attorney's fee specified in fee agreement since fee agreements are properly before court only when it reviews decision of Board concerning agreement or any other matter decided by Board and court did not have decision of Board before it for review when attorney's motion was filed, and attorney's motion was not one for review of fee agreement pursuant to § 7263, rather to compel action to give agreement effect. Wick v Brown (In re Wick) (1994, CA FC) 40 F.3d 367

Court would not review fixed fee agreement at attorney's request for determination whether he was required to make refund because appellant's appeal was dismissed for lack of jurisdiction, because possibility of criminal liability was so remote as to be virtually nonexistent and court's determination of liability would probably not be controlling in any case. In re Motion of Smith (1994) 7 Vet App 89

Court's order resulting from review of fee agreement filed in connection with appeal to it is final and may not be reviewed by any other court. Jurgens v Brown (1995) 8 Vet App 197

Fee agreement was unreasonable because it conflicted with sections 5301 and 5904 regarding assignment or attachment of claims of creditors for purposes of paying attorneys' fees and would thus have to be revised. Collaro v West (1998) 12 Vet App 63

Attorney fee agreement provision denying offset, without qualification, in event of remand and denying offset for costs and expenses if less than full amount of EAJA fees sought is recovered is unreasonable and therefore unenforceable because it would permit unwarranted compensation to attorney and impermissibly mix fees with costs and expenses. Gaines v West (1998) 11 Vet App 113, remanded (1998) 11 Vet App 353

Lien provision in fee agreement between veteran and counsel granting attorney lien on veteran's claim for benefits and any sum recovered is unreasonable and unenforceable under 38 USCS § 7263(d) because it conflicts with 38 USCS § 5301(a) and 38 USCS § 5904(d)(3). Busch v West (1999) 12 Vet App 552, 1999 US App Vet Claims LEXIS 950

Court of Appeals for Veterans Claims does not have jurisdiction under 38 USCS § 5904(c)(2) or 38 USCS § 7263(d) to address threshold question of whether there is fee agreement, in view of termination of attorney-client relationship, which would warrant withholding of portion of award. Scates v West (1999) 13 Vet App 98, 1999 US App Vet Claims LEXIS 1116, motion gr, op withdrawn (2000) 13 Vet App 304, 2000 US App Vet Claims LEXIS 51

Application under Equal Access to Justice Act (EAJA) for supplemental attorney fees in defending fee agreement is denied since issues concerning fee agreement were raised by Court of Appeals for Veterans Claims pursuant to its independent power under 38 USCS § 7263(c) and fee agreement issues relate to original EAJA application only in collateral way. Fritz v West (2000) 13 Vet App 439, 2000 US App Vet Claims LEXIS 308, vacated, remanded (2001, CA FC) 264 F.3d 1372

Request for review of offset provisions of attorney fee agreement was denied because agreement related to later case filed by veteran with assistance of attorney, and did not relate to case that was currently pending before court. Fritz v Nicholson (2005) 19 Vet App 377, 2005 US App Vet Claims LEXIS 792

3. Relationship to Equal Access to Justice Act

Equal Access to Justice Act does apply to proceedings in Court of Veteran's Appeals; on October 29, 1992 the EAJA was amended to add the Court of Veteran's Appeals to the definition of courts authorized to award attorneys fees and the amendment applies to any appeal pending in the Federal Circuit on the date of enactment. Jones v Principi (1992, CA) 985 F.2d 582, reported in full (1992, CA FC) 1992 US App LEXIS 31416

Court lacked authority under Equal Access to Justice Act to award attorney's fees for unsupervised nonattorney practitioners; when Congress used phrase "reasonable attorney fees," court would presume it was aware of case law restricting phrase to work performed or supervised by attorney and was aware of its specific waiver of sovereign immunity to permit payment of attorney's fees to nonattorney practitioners in Tax Court, hence its failure to include nonattorney

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practitioners before CVA must be interpreted as deliberate. Cook v Brown (1994) 6 Vet App 226, affd (1995, CA FC) 68 F.3d 447

Provision of fee agreement stating that client shall execute any and all documents necessary to allow attorney to receive payment of fees under Equal Access to Justice Act was unreasonable and thus unenforceable. In re Fee Agreement of Mason (1998) 11 Vet App 305, 1999 US App Vet Claims LEXIS 122

Fee agreement is unreasonable under 38 USCS § 7263(d) as it precludes reimbursement of costs and expenses to client when EAJA settlement is less than full amount and it allows attorney to judge whether to pursue submission of application for award of EAJA fees Wingo v West (1999) 12 Vet App 305, 1999 US App Vet Claims LEXIS 122


Fee which includes both Equal Access to Justice Act (EAJA) award plus contingency fee for work performed before Court of Appeals for Veterans Claims, Board, and VA on same claim such that fee is enhanced by EAJA award is unreasonable pursuant to 38 USCS §§ 5904(c) and 7263. Carpenter v Principi (2001) 15 Vet App 64, 2001 US App Vet Claims LEXIS 815, app dismd (2003, CA FC) 327 F.3d 1371, reh den, reh, en banc, den (2003, CA FC) 2003 US App LEXIS 14589

§ 7264. Rules of practice and procedure

(a) The proceedings of the Court of Appeals for Veterans Claims shall be conducted in accordance with such rules of practice and procedure as the Court prescribes.

(b) The mailing of a pleading, decision, order, notice, or process in respect of proceedings before the Court shall be held sufficient service of such pleading, decision, order, notice, or process if it is properly addressed to the address furnished by the appellant on the notice of appeal filed under section 7266 of this title [38 USCS § 7266].

(c) Section 455 of title 28 [28 USCS § 455] shall apply to judges and proceedings of the Court.

Effective date of section:

This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4064, as 38 USCS § 7264, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991 added subsec. (c).

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

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Other provisions:

Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Cross References
This section is referred to in 38 USCS § 7263

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:351

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 170, 173

§ 7265. Contempt authority; assistance to the Court

(a) The Court shall have power to punish by fine or imprisonment such contempt of its authority as--

(1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
(2) misbehavior of any of its officers in their official transactions; or
(3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

(b) The Court shall have such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States. The United States marshal for a district in which the Court is sitting shall, if requested by the chief judge of the Court, attend any session of the Court in that district.

Effective date of section:
This section is effective Sept. 1, 1989 as provided by Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(a), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4065, as 38 USCS § 7265.

Other provisions:

Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:349

Am Jur:
70 Am Jur 2d, Sheriffs, Police, and Constables § 33
77 Am Jur 2d, Veterans and Veterans' Laws § 170
1. Generally

2. Misbehavior in presence of court

3. Disobedience of order

1. Generally

Secretary's two-year delay in scheduling medical appointments for veteran was inexcusable and reasons for it without merit, but Secretary's conduct did not constitute disobedience or resistance as to warrant imposition of sanctions under's Court's inherent power. Ebert v Brown (1993) 4 Vet App 434

2. Misbehavior in presence of court

Being mindful of its duty to exercise restraint when deciding whether to impose sanctions, court would not impose sanctions for Deputy Assistant General Counsel's remark during argument addressing whether appellant should receive EAJA fees suggesting that counsel's conduct in underlying litigation did not further client's best interests but was furthering institutional agenda on behalf of his employer, Disabled American Veterans, although accusation was serious one made without factual basis and in inappropriate forum. Massey v Brown (1996) 9 Vet App 134

3. Disobedience of order

Institutional conduct of Secretary in failing to heed court's orders to produce documents displayed indifference to rules and processes of Court, as well as disregard for fair treatment of appellant and neglect by Secretary's representatives of their professional obligations and responsibilities, warranting order that supplemental preliminary record and memorandum be filed within 10 days, as well as show cause order for sanctions. Drenkhahn v Derwinski (1991) 2 Vet App 29

Secretary's continued delay and procrastination in complying with court's orders resulted in additional expenditure of resources by both Court and appellant, warranting imposition of monetary sanctions. Adamski v Derwinski (1991) 2 Vet App 46, app dismd (1993) 5 Vet App 242

§ 7266. Notice of appeal

(a) In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title [38 USCS § 7104(e)].

(b) An appellant shall file a notice of appeal under this section by delivering or mailing the notice to the Court.

(c) A notice of appeal shall be deemed to be received by the Court as follows:

(1) On the date of receipt by the Court, if the notice is delivered.

(2) On the date of the United States Postal Service postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court and is mailed.

(d) For a notice of appeal mailed to the Court to be deemed to be received under subsection (c)(2) on a particular date, the United States Postal Service postmark on the cover in which the notice is posted must be legible. The Court shall determine the
legibility of any such postmark and the Court's determination as to legibility shall be final and not subject to review by any other Court.

Effective date of section:
This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4066, as 38 USCS § 7266, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4), and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991 substituted "Secretary" for "Administrator" wherever appearing.

1994. Act Nov. 2, 1994 (effective on the date of enactment and applicable to notices of appeal delivered or mailed on or after that date, as provided by § 511(b) of such Act, which appears as a note to this section), substituted subsec. (a) for one which read: "In order to obtain review by the Court of Veterans Appeals of a final decision of the Board of Veterans' Appeals, a person adversely affected by that action must file a notice of appeal with the Court. Any such notice must be filed within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title."

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsec. (a)(1), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

2001. Act Dec. 27, 2001, deleted subsec. (b), which read: "(b) The appellant shall also furnish the Secretary with a copy of such notice, but a failure to do so shall not constitute a failure of timely compliance with subsection (a) of this section."; in subsec. (a), deleted the paragraph designator "(1)"; redesignated para. (2) as new subsec. (b), redesignated para. (3) as subsec. (c) and redesignated its subparas. (A) and (B) as paras. (1) and (2), respectively, and redesignated para. (4) as subsec. (d), and, in such subsection as redesignated, substituted "subsection (c)(2)" for "paragraph (3)(B)".

Other provisions:
Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Interim provision for filing notices of appeal. Act Aug. 16,1989, P. L. 101-94, Title II, § 202, 103 Stat. 626, provides: "In the case of a person adversely affected by a final decision of the Board of Veterans' Appeals that is made before the date on which the United States Court of Veterans Appeals has caused to be published in the Federal Register a notice by the Court that it has commenced operations, the period prescribed under section 4066 [now section 7266] of title 38, United States Code, within which a notice of appeal must be filed with the Court shall be extended to the end of the 30-day period beginning on the date such notice is published, if the end of that period is later than the date that would otherwise be applicable under such section."

Effective date and application of Nov. 2, 1994 amendment. Act Nov. 2, 1994, P. L. 103-446, Title V, § 511(b), 108 Stat. 4670, provides: "The amendment made by subsection (a) [amending subsec. (a)] shall take effect on the date of the enactment of this Act and shall apply to notices of appeal that are delivered or mailed to the United States Court of Veterans Appeals on or after that date."

Cross References
1. Generally

Where decision of Board of Veteran's Appeals was entered before enactment of additional notice and assistance requirements set forth in 38 USCS § 5103(a) and where veteran filed notice of appeal after § 5103(a) actions took effect, Court of Appeals for Veterans Claims erred in remanding matter to Board for compliance with § 5103(a) because Board decision was considered final and because § 5103(a) requirements did not apply retroactively to final decisions. Hayslip v Principi (2004, CA FC) 364 F.3d 1321

Custodian's authority to represent claimant before Board also permits prosecution of proceedings before court; statutory provisions regarding judicial review of veteran's claims do not differentiate between review of claims brought directly by claimant and those brought through custodian. Mokal v Derwinski (1990) 1 Vet App 12

Appellants whose notice of appeal were filed more than 120 days after mailing date of Board decisions were not entitled to motions to stay pending decision by Federal Circuit challenging adequate of written notice of appellate rights following adverse BVA decision; even if court were to rule that notice was inadequate, decisions that notices of appeal were untimely were subject to precedential decisions in effect at that time and notices of appellate rights given to appellants had been found to be adequate in precedential decision. Richardson v Gober (1997) 10 Vet App 546, app dismd without op sub nom Raines v West (1998, CA FC) 155 F.3d 569, reported in full (1998, CA FC) 1998 US App LEXIS 12833 and app dismd without op sub nom Richardson v West (1998, CA FC) 155 F.3d 569, reported in full (1998, CA FC) 1998 US App LEXIS 12835

Court of Appeals for Veterans Claims has no jurisdiction under 38 USCS § 7266(a) over appellant's allegations of error in 1999 Board decision since notice of appeal is limited to 1997 Board decision and no notice of appeal has been filed with respect to 1999 decision. Tetro v Gober (2000) 14 Vet App 100, 2000 US App Vet Claims LEXIS 880, affd (2003, CA FC) 314 F.3d 1310

Appeal is dismissed for lack of jurisdiction despite appellant's contention that Board misinterpreted 38 USCS § 1154(b) in such manner as to adversely affect remanded proceedings since any misinterpretation of § 1154(b) would not evade judicial review by Court of Appeals for Veterans Claims and because decision must be final pursuant to 38 USCS § 7266(a) in order for

In widow's claim for veteran's benefits, where widow's notice of appeal had foreign postmark and Court of Appeals for Veterans Claims found that widow's notice of appeal was untimely filed because 38 USCS § 7266 applied only to postmarks of United States Postal Service, fact that 38 USCS § 7266 did not apply to foreign postmarks did not violate equal protection clause because there was rational basis for Congress to have excluded foreign postmarks, for instance, lack of familiarity with foreign postal systems. Lariosa v Principi (2002) 16 Vet App 323, 2002 US App Vet Claims LEXIS 690

On appeal to Court of Appeals for Veterans Claims (Court), veteran could flesh out and rephrase argument before Court, and requirement of "some degree of specificity" was broad enough to have allowed veteran to rephrase and provide additional argument and support for same basic argument presented before Board of Veterans' Appeals. Jordan v Principi (2003) 17 Vet App 261, 2003 US App Vet Claims LEXIS 721, affd (2005, CA FC) 401 F.3d 1296

Court of Appeals for Veterans Claims was not required to interpret 38 USCS §§ 7252(a) and 7266(a) to permit it to exercise jurisdiction over non-final decisions of Board of Veterans' Appeals that altered evidentiary burdens, that limited evidence Department of Veterans Affairs regional office could consider, or that contained misrepresentation of law because court's jurisdiction was limited by statute to final decisions of Board, and court could not create its own exception. Breeden v Principi (2004) 17 Vet App 475, 2004 US App Vet Claims LEXIS 127

Court of Appeals for Veterans Claims does not have power to retain general and continuing jurisdiction over decision remanded to Board of Veterans' Appeals for new adjudication. Breeden v Principi (2004) 17 Vet App 475, 2004 US App Vet Claims LEXIS 127

Veteran had not demonstrated that he was entitled to extraordinary relief through petition for writ of mandamus because veteran could not obtain review of earlier effective date (EED) that was assigned to his claim by asking Department of Veterans Affairs Regional Office to issue statement of case when EED decision had been issued by Board of Veterans Appeals; veteran could have petitioned Board for review of its decision or filed notice of appeal pursuant to 38 USCS § 7266. Harris v Nicholson (2005) 19 Vet App 345, 2005 US App Vet Claims LEXIS 617

2. Persons entitled to file appeals

If veteran, with assistance of Veterans Administration, gathers information to substantiate claim, veteran is entitled to receive appropriate benefits, no matter how long it takes to substantiate claim. Jaquay v Principi (2002, CA FC) 304 F.3d 1276

Board decision cannot deprive claimant of standing to appeal awarding some benefits when claimant is or may be entitled to more, since any claimant who receives less than complete benefits to which he or she is or may be entitled has been "adversely affected" within meaning of statute by Board's decision and thus have standing to appeal to court. Corchado v Derwinski (1991) 1 Vet App 160

Appellant lacked standing to challenge validity of 38 CFR § 4.16(c) providing that mentally disabled veterans rated at 70 percent who are precluded by their mental disorder from securing substantially gainful occupation shall have rating increased to 100 percent since he was arguing that Board should have applied regulation in adjudicating his claim and he was free to raise that argument without challenging regulation's validity and it appeared that regulation in fact operated in his favor rather than harming him so that he was not person adversely affected. Swan v Derwinski (1990) 1 Vet App 20, remanded (1991) 2 Vet App 72

Private hospital is "person adversely affected" so as to be able to appeal. St. Patrick Hosp. v Principi (1993) 4 Vet App 55

Private hospital was person adversely affected, and therefore entitled to appeal, by decision denying reimbursement for unauthorized medical expenses incurred by veteran in private hospital. St. Patrick Hosp. v Principi (1993) 4 Vet App 55

Substitution of veteran's widow was not appropriate since appeal was rendered moot by veteran's death. Shepard v West (1998) 11 Vet App 523
Attorney is "person adversely affected" and has standing under 38 USCS § 7266(a) to pursue claim where Board's determination that veteran's past-due-benefits termination date was miscalculated will reduce amount of attorney fees to be awarded. Cox v West (1999) 12 Vet App 522, 1999 US App Vet Claims LEXIS 886

Court of Appeals for Veterans Claims lacks jurisdiction over appeal under 38 USCS § 7266(a) where Board denied veteran's VA benefits claim and veteran died one week after Board issued decision since surviving spouse lacks standing to pursue appeal. Kelsey v West (2000) 13 Vet App 437, 2000 US App Vet Claims LEXIS 331

Remand by Board of Veterans' Appeals was not final decision and, thus, Court of Appeals for Veterans Claims did not have jurisdiction to hear veteran's appeal where none of issues were subject to final determination; contrary to veteran's assertions, Board's remand did not constitute final decision as to its determination that veteran was not engaged in combat and that his diagnosis of PTSD had been based on unverified stressors because, upon further development, Board could have changed its ruling on these issues. Breeden v Principi (2004) 17 Vet App 475, 2004 US App Vet Claims LEXIS 127

Claimant for veterans benefits was denied relief, where decision of Board of Veterans' Appeals that he did not suffer from service connected post-traumatic stress disorder was based upon preponderance of medical testimony, and was not clearly erroneous under 38 USCS § 7261(a)(4). Forcier v Nicholson (2006) 19 Vet App 414, 2006 US App Vet Claims LEXIS 25

3. Date of mailing of decision

Postmark rule applies to motions for reconsideration which toll time limit for filing appeal to Court of Veterans Appeals. Linville v West (1999, CA FC) 165 F.3d 1382

Presumption that date stamped on Board decision was same as mailing date seemed unwarranted and would not be indulged given its jurisdictional significance; Secretary would be requested to inform court of actual or likely date of mailing Board decision. Sandine v Derwinski (1990) 1 Vet App 26

Presumption of next-day mailing was appropriately applied to decision rendered prior to January 16, 1992, in light of BVA Chairman's affidavit that same-day mailing of decisions prior to that date could not be presumed. Ryan v Derwinski (1992) 2 Vet App 568

In widow's claim for veteran's benefits, her notice of appeal, which had foreign postmark, was deemed filed when received because provision of 38 USCS § 7266 that deemed notice of appeal filed based on date of United States Postal Service postmark did not apply to foreign postmarks. Lariosa v Principi (2002) 16 Vet App 323, 2002 US App Vet Claims LEXIS 690

Veteran was not entitled to equitable tolling of judicial-appeal period set forth in 38 USCS § 7266(a)(1) where although veteran was in jail at time of Board of Veterans' Appeals' decision denying earlier effective date for service-connected disability benefits, veteran's communications with regional office regarding benefits evidenced that veteran knew how to communicate with Department of Veterans Affairs (VA); thus, veteran had failed to exercise due diligence in notifying VA of change of address. Davis v Principi (2003) 17 Vet App 29, 2003 US App Vet Claims LEXIS 167, subsequent app (2004, CA FC) 85 Fed Appx 771

Veteran was not eligible for application of postmark rule in 38 USCS § 7266(c)(2) where he improperly addressed envelope containing his notice of appeal (NOA); veteran addressed NOA to Department of Veterans Affairs (VA) Office of General Counsel (OGC), and as result, OGC address that he used did not enable delivery to intended destination of Court of Appeals for Veterans Claims and appeal was dismissed for lack of jurisdiction. Reed v Principi (2003) 17 Vet App 380, 2003 US App Vet Claims LEXIS 924

Secretary of Veterans Affairs failed to establish that notice of Board of Veterans' Appeals' decision was mailed to veteran at his address where veteran asserted nonreceipt, there were multiple irregularities in Department of Veterans Affairs' handling of veteran's case, including presence of several documents in his file regarding his son's claim that listed his son's address, there was no written standard operating procedure for date-stamping and mailing BVA decisions, and statements concerning mailing procedure were inconsistent and failed to adequately explain...

4. Time for filing of notice of appeal

Incorrect zip code was inconsequential error that did not prevent notice of appeal, otherwise addressed as required, from being "properly addressed" within meaning of 38 USCS § 7266(a)(3)(b). Santoro v Principi (2001, CA FC) 274 F.3d 1366, subsequent app (2002) 15 Vet App 434, 2002 US App Vet Claims LEXIS 131

While equitable tolling is available to toll judicial appeal period of 38 USCS § 7266, veteran who files untimely notice of appeal must nevertheless show that he exercised due diligence in preserving his legal rights. Jaquay v Principi (2002, CA FC) 304 F.3d 1276

Veteran who attempted to file notice of appeal by completing document that was clearly intended to serve as notice of appeal and delivered document to Department of Veterans Affairs regional office from which his claim originated within 120-day statutory period for appeal was entitled to invoke doctrine of equitable tolling. Bailey v Principi (2003, CA FC) 351 F.3d 1381 (criticized in Bobbitt v Principi (2004) 17 Vet App 547, 2004 US App Vet Claims LEXIS 193)

Dismissal of veteran's appeal to Court of Appeals for Veterans Claims was reversed because 120 day requirement for filing appeal under 38 USCS § 7266(a) was potentially subject to equitable tolling when there was some issue that veteran might have missed filing deadline because of mental disease; tolling would be allowed if failure to file in timely manner was direct result of mental illness that rendered veteran incapable of rational thought or deliberate decision, or incapable of handling his own affairs. Barrett v Principi (2004, CA FC) 363 F.3d 1316

Veteran was not entitled to equitable tolling of 120-day requirement of 38 USCS § 7266 to file notice of appeal of decision of Board of Veterans' Appeals that upheld denial of benefits because Congress explicitly decided not to broaden postmark rule of § 7266 to include notices of appeal that was delivered by means other than Postal Service and veteran's only excuse for late filing was that delivery service other than postal service had been used. Mapu v Nicholson (2005, CA FC) 397 F.3d 1375

Notice that was issued by Board of Veterans' Appeals informing veteran of his appeal rights for denial of benefits was not defective under 38 USCS § 5104(a) because it provided general outline of available procedures for obtaining review of final Board decision and was not required to advise him of postmark rule of 38 USCS § 7266. Mapu v Nicholson (2005, CA FC) 397 F.3d 1375

Court reversed dismissal of widow's appeal from denial of her claim for survivor benefits and dependency and indemnity compensation following death of her husband, veteran; like mental illness, physical illness could toll running of limitations period in 38 USCS § 7266(a); when deciding whether to apply equitable tolling, court's inquiry should focus on effect, not source, of appellant's infirmity. Arbas v Nicholson (2005, CA FC) 403 F.3d 1379

When determining whether limitations period in 38 USCS § 7266(a) should be equitably tolled, Court of Appeals for Veterans Claims must focus on whether particular infirmity of veteran prevented him from engaging in "rational thought or deliberate decision making" or rendered him "incapable of handling his own affairs or unable to function in society"; source of such infirmity is irrelevant. Arbas v Nicholson (2005, CA FC) 403 F.3d 1379

Under predecessor statute, Court of Veterans Appeals correctly dismissed appeal for lack of jurisdiction where it was received by clerk after 120-day appeal period, notwithstanding that it was postmarked within 120-day appeal period. Espelita v Derwinski (1992, CA) 958 F.2d 1052, cert den (1992) 506 US 985, 121 L Ed 2d 430, 113 S Ct 491

Notice of appeal would be deemed timely filed where appellant's attorney had contacted court at time when timely notice of appeal could have been filed and received and relied on advice by court that notice of appeal made by certain date would be considered timely filed. Eads v Derwinski (1990) 2 Vet App 3

Notice of appeal filed 3 days after expiration of 120-day period was timely where date of mailing decision would be presumed to be next business day after date of decision, therefore a

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Monday, hence moving beginning of appeal period up 3 days. Bosmay v Derwinski (1992) 2 Vet App 306

Notice of appeal not actually received by court within 120 days would be dismissed for lack of jurisdiction, notwithstanding claimant's allegation that it was mailed six days prior to expiration of appeals period. Langston v Derwinski (1991) 1 Vet App 239

Appeal filed approximately 130 days after Board's decision was timely where Board's decision was sent to regional office for distribution instead of directly to appellant's representative as required by 38 USCS § 7104. Trammell v Brown (1994) 6 Vet App 181, remanded (1995, Vet App) 1995 US Vet App LEXIS 347 and (superseded by statute as stated in Dippel v West (1999) 12 Vet App 466, 1999 US App Vet Claims LEXIS 611)

Notice of appeal not received within 120-day period was untimely, even though it was sent to Court at its former address pursuant to NOA form provided by veterans affairs office, since BVA provided appointee and her then representative Court's current address in appeals notice which accompanied BVA's decision. Townsend v Brown (1996) 9 Vet App 258

Appeal would be dismissed since it was not received by court until 158 days after BVA decision. Ostermiller v Derwinski (1992) 3 Vet App 97

Counsel failed to show facts to warrant equitable tolling of appeal period on 1990 decision despite apparent defect in mailing that decision, since counsel had notice of it at least in 1996 when he received it as copy of second record on appeal and did not file notice of appeal within 120 days of that date. Shepard v West (1998) 12 Vet App 107

Veteran failed to establishing timely filing of appeal since his counsel's letter of representation to VA ousted American Legion as veteran's designated representative concerning pending claims, and counsel's notice of decision began running of 120-day appeal period; veteran thus could not rely on American Legion's not having received notice of decision to toll appeal period. Shepard v West (1998) 11 Vet App 518

Veteran's motion for reconsideration was constructively received by BVA Director of Administrative Service at address at which Director received mail when it was received at mail room some time prior to 121st day after mailing of Board's decision; veteran is not required to include internal VA mail routing symbol in order to have his correspondence delivered to addressee located at street address listed on envelope since it places on VA claimant unreasonable burden of assisting mail room in sorting mail. Zajicek v West (1998) 12 Vet App 48

Circumstances do not support application of equitable tolling to 120-day period for filing Notice of Appeal under 38 USCS § 7266(a) and appeal is dismissed for lack of jurisdiction even though appellant had mailed timely Notice of Appeal which was misdelivered to VA Office of General Counsel instead of Court because of wrong zip code where Court has no evidence it received Notice of Appeal within statutory time period, appellant was fully advised of his appellate rights, Board's notice listed Court's correct zip code, failure of Office of General Counsel to forward Notice of Appeal cannot toll filing period, appellant cannot circumvent 120-day deadline by claiming Postal Service should have corrected address, and Secretary's concession on issue cannot serve to confer jurisdiction. Santoro v West (2000) 13 Vet App 516, 2000 US App Vet Claims LEXIS 468, revd (2001, CA FC) 274 F.3d 1366, subsequent app (2002) 15 Vet App 434, 2002 US App Vet Claims LEXIS 131

Notice of appeal was not timely filed under 38 USCS § 7266(a) and appeal is dismissed for lack of jurisdiction even though Board's decision was mailed to incorrect address since mailing defect was cured by appellant's actual receipt of copy of decision, and notice of appeal was not filed within 120 days. Clark v Principi (2001) 15 Vet App 61, 2001 US App Vet Claims LEXIS 131

Court construed denial of motion to vacate by Board of Veterans' Appeals as final order from which claimant for veterans benefits could file timely notice of appeal. Browne v Principi (2002) 16 Vet App 278, 2002 US App Vet Claims LEXIS 659

Claimant for veterans benefits submission of postmark-stamped certified-mail receipt was accepted as evidence of timely mailing of notice of appeal, where envelope in which original notice was mailed was lost. Evans v Principi (2003) 17 Vet App 41, 2003 US App Vet Claims LEXIS 168, remanded (2004, US) 2004 US App Vet Claims LEXIS 379

Court of Appeals for Veteran Claims declined to hold that failure of compliance with 38 USCS § 5104(a) duty tolled running of 120-day judicial appeal period set forth in 38 USCS § 7266(a)(1) where veteran failed to keep Department of Veterans Affairs apprised of current address, and only question was whether veteran had timely appealed Board of Veterans' Appeals' decision denying earlier effective date for service-connected disability benefits. Davis v Principi (2003) 17 Vet App 29, 2003 US App Vet Claims LEXIS 167, subsequent app (2004, CA FC) 85 Fed Appx 771

Fact that veteran was undergoing psychiatric treatment was not basis to equitably toll his untimely appeal of Board of Veterans' Appeals decision and veteran failed to support his claims that VA failed to properly submit his notice of appeal (NOA) or that any VA employee even assumed duty of submitting NOA. Thornhill v Principi (2004) 17 Vet App 480, 2004 US App Vet Claims LEXIS 129

Equipoise standard of 38 USCS § 5107(b) applies only to determinations of Secretary of Veterans Affairs, not determinations of Court of Appeals for Veterans Claims; therefore, it was not proper standard of review in determination of whether notice of appeal was timely filed with court under 38 USCS § 7266(a) and Ct. Vet. App. R. 4. Tavares v Principi (2004) 18 Vet App 131, 2004 US App Vet Claims LEXIS 371

Under 38 USCS § 7266(a), in order for claimant to obtain review of Board of Veterans' Appeals decision by appellate court, that decision must be final and person adversely affected by that decision must file notice of appeal within 120 days after date on which notice of Board decision was mailed. Urban v Principi (2004) 18 Vet App 143, 2004 US App Vet Claims LEXIS 384

Veteran's notice of appeal seeking review of Board of Veterans' Appeals' decision denying him earlier effective date for his service-connected low-back disability was timely where Secretary of Veterans Affairs failed to establish that notice of Board of Veterans' Appeals' decision was mailed to veteran at his address and date veteran filed notice of appeal was well within 120 days of earliest date he could have received decision. Sthele v Principi (2004) 19 Vet App 11, 2004 US App Vet Claims LEXIS 835


Court of Appeals for Veterans Claims adopts three-part test to determine whether equitable tolling based on extraordinary circumstances is appropriate; (1) extraordinary circumstance must be beyond appellant's control; (2) appellant must demonstrate that untimely filing was direct result of extraordinary circumstances; and (3) appellant must exercise due diligence in preserving his appellate rights, meaning that reasonably diligent appellant, under same circumstances, would not have filed his appeal within 120-day judicial-appeal period; burden of establishing jurisdiction rests with appellant. McCreary v Nicholson (2005) 19 Vet App 324, 2005 US App Vet Claims LEXIS 602

Veteran was not entitled to equitable tolling of 120-day judicial-appeal period under 38 USCS § 7266 where veteran had not established that his untimely appeal was direct result of Hurricane Ivan since in light of low burden on veteran for filing notice of appeal, veteran could not show that he needed his paperwork to file notice of appeal, and veteran failed to show that he had acted with due diligence in pursuing his judicial appeal. McCreary v Nicholson (2005) 19 Vet App 324, 2005 US App Vet Claims LEXIS 602
5. Effect of reconsideration motion

Filing of reconsideration motion with Board during 120-day judicial appeals period postpones start of that appeals period until Board mails to claimant notice of its grant or denial of reconsideration motion. Rosler v Derwinski (1991) 1 Vet App 241

Appeal was timely where it was filed within 120 days from Chairman's denial of reconsideration, which it was seeking review of, not underlying decision. Neves v Brown (1993) 6 Vet App 177


Motion for reconsideration filed within 120-day period for filing appeal with Court tolled period of filing appeal and denial of motion commenced new 120-day period for filing appeal with Court. Blackburn v Brown (1995) 8 Vet App 97

Motion for reconsideration filed with VA within 120-day time period for appeal abated finality of BVA decision until denial of appellant's motion, for purposes of calculating timeliness of appeal. Dudnick v Brown (1996) 9 Vet App 397, subsequent app, remanded on other grounds (1997) 10 Vet App 79

Appellant filed timely notice of appeal from Board's decision because his three reconsideration motions were timely filed so as to toll, each time, 120-day judicial appeal period. Murillo v Brown (1997) 10 Vet App 108

Notice of appeal filed after reconsideration motion before Board would be dismissed. Breslow v Derwinski (1991) 1 Vet App 359

Simultaneous filing of notice of appeal and motion for reconsideration will render underlying agency action nonfinal and jurisdiction will remain with BVA; this encourages finality of agency decisions and exhaustion of administrative remedies prior to judicial review. Losh v Brown (1993) 6 Vet App 87

Although appellant's premature NOA was ineffective but became effective upon Chairman's denial of motion for BVA reconsideration, court lacked jurisdiction since no amended NOA was filed with respect to denial of reconsideration. Wachter v Brown (1995) 7 Vet App 396

To toll statutory period for filing appeal, claimant must file motion for reconsideration with BVA within 120 days from date of mailing of final BVA decision; reconsideration motion filed 121 days after Board issued decision denying claim was untimely and would therefore be denied. Paniag v Gober (1997) 10 Vet App 359

Appellant's notice of appeal was timely filed under 38 USCS § 7266(a) where appellant's motion for reconsideration was postmarked exactly 120 days after date of Board decision and notice of appeal was received by Court on 119th day after board's denial of appellant's motion for reconsideration. Curtis v West (1999) 13 Vet App 114, 1999 US App Vet Claims LEXIS 1123

Although appellant filed notice of appeal within 120 days after date of Board's denial of motion for reconsideration, appellant conceded that motion for reconsideration was not filed with Board within 120 days of initial decision, and appeal is dismissed for lack of jurisdiction under 38 USCS § 7266; circumstances do not support application of equitable tolling even though appellant filed motions for reconsideration with regional office within 120 day period since appellant was fully advised of appellate rights, notice to appellant specifically provides that motion for reconsideration is to be filed with Board, and there is nothing ambiguous in notice's address reference. Cintron v West (1999) 13 Vet App 251, 1999 US App Vet Claims LEXIS 1334

Appeal is dismissed for lack of jurisdiction under 38 USCS § 7266(a) where, even though appellant filed timely notice of appeal from Board's denial of motion for reconsideration, there is no evidence appellant filed motion for reconsideration within 120 days after mailing date of notice of Board's final decision; there is no evidence of United States Postal Service postmark as to any motion filed with either regional office or Board, there is no evidence of when Board actually received motion for reconsideration, and there is no basis to warrant application of equitable

6. Effect of untimely filing of notice of appeal

Claimant lost right to appeal decision of Board of Veterans Appeals; result flowed from his dismissal of appeal after 120-day judicial appeal period had expired. Graves v Principi (2002, CA FC) 294 F.3d 1350

Where veteran's advocate misfiled his appeal from Board of Veterans' Appeals and veteran thus did not timely file his appeal with U.S. Court of Appeals for Veterans Claims, veteran was entitled to benefit of equitable tolling of time period of 38 USCS § 7266, since he diligently filed appeal upon learning of error. Santana-Venegas v Principi (2002, CA FC) 314 F.3d 1293 (criticized in Bobbitt v Principi (2004) 17 Vet App 547, 2004 US App Vet Claims LEXIS 193)

Equitable tolling suspended statutory filing period where veteran sent letter indicating his intention to appeal to wrong office, but otherwise exercised due diligence in preserving his legal rights and put Department of Veterans Affairs (VA) on notice of his intent to seek further review of his claim; in determining whether equitable tolling suspended filing deadline of 38 USCS § 7266, focus was on whether veteran had exercised due diligence in preserving his legal rights, whether veteran's intention was clear, and whether VA was put on notice of his intention to seek further review of his claim; because veteran met both criteria, error in office to which notice was sent was not sufficient to render filing ineligible for consideration under equitable tolling doctrine. Brandenburg v Principi (2004, CA FC) 371 F.3d 1362

Veteran's appeal of denial of benefits was properly dismissed by Court of Appeals for Veterans Claims because that court did not receive veteran's notice of appeal within 120 days of decision of Board of Veterans' Appeals, as was required under 38 USCS § 7266; veteran could not benefit from postmark rule of § 7266 because he sent his notice by private courier and Congress, when adding post mark rule, clearly indicated that rule was only to apply to notice of appeal that was mailed using Postal Service and that notices that were delivered by other means were specifically excluded from application of rule. Mapu v Nicholson (2005, CA FC) 397 F.3d 1375

Court had jurisdiction under 38 USCS § 7292(d)(2) to review decision of Court of Appeals for Veterans Claims that equitable tolling was inappropriate when it dismissed as untimely veteran's appeal of denial of benefits; in interpreting veterans court's jurisdictional statute of 38 USCS § 7266, Court of Appeals for Federal Circuit consistently held that when material facts were not in dispute and adoption of particular legal standard dictated outcome of equitable tolling claim, court had treated question of availability of equitable tolling as matter of law that it was authorized to address on appeal. Mapu v Nicholson (2005, CA FC) 397 F.3d 1375

Appeal from denial of benefits increase filed 23 days after deadline for filing notice of appeal was untimely and Court of Veterans Appeals could not entertain appeal notwithstanding alleged failure of agency to provide notice of appeal rights. Machado v Derwinski (1991, CA) 928 F.2d 389


Appellant failed to meet burden of demonstrating that notice of appeal was filed within 120 days after date of mailing notice of BVA decision, and since judge was not entitled to consider equitable tolling and extraordinary relief, appeal would be dismissed for lack of jurisdiction. Bailey v Gober (1997) 10 Vet App 453, reh, en banc, den (1997) 10 Vet App 454 and revd, remanded (1998, CA FC) 160 F.3d 1360

Although appellant contends decision was not received due to change of address, appellant does not allege Board was aware of new address at time decision was issued, and appellant has failed to present evidence necessary to establish jurisdiction where Board mailed its decision to appellant's last known address as then required by 38 USCS § 7104(e) and appellant failed to file

Appeal is dismissed pursuant to 38 USCS § 7266(a) and U.S. Vet. App. R. 4 because appellant has not met burden of demonstrating that Notice of Appeal was filed within 120 days after date of mailing of notice of Board's decision even though appellant mailed Notice of Appeal within 120-day period to VA Office of General Counsel since appeals notice sent to appellant properly informed appellant that Notice of Appeal must be filed with Court and that filing copy with VA General Counsel will not protect right of appeal; even if VA's General Counsel had duty to forward Notice of Appeal to Court, failure to do so could not toll filing period where appellant had been properly informed of filing requirements. Baisden v West (1998) 11 Vet App 215

Appeal is dismissed for lack of jurisdiction under 38 USCS § 7266 since notice of appeal was filed more than 120 days after notice of Board's decision was mailed and circumstances do not support application of equitable tolling since nothing in notice could reasonably be said to have induced appellant to miss filing deadline and appellant failed to show requisite cause-and-effect relationship between any VA adjudicative conduct and failure to file timely appeal. Chastain v West (2000) 13 Vet App 296, 2000 US App Vet Claims LEXIS 29, affd (2001, CA FC) 6 Fed Appx 854

Court of Appeals for Veterans Claims declined to apply equitable tolling to untimely notice of appeal (NOA) that veteran had improperly sent to Department of Veterans Affairs (VA) Office of General Counsel (OGC), where veteran had benefit of Notice of Appellate Rights, in accordance with 38 USCS § 5104, attached to copy of Board of Veterans' Appeals decision that explicitly provided that filing copy of NOA with OGC would not have protected his right to appeal with Court of Appeals for Veterans Claims. Reed v Principi (2003) 17 Vet App 380, 2003 US App Vet Claims LEXIS 924

Court of Appeals for Veterans Claims declined to apply equitable tolling to untimely notice of appeal (NOA) where veteran mailed NOA to Department of Veterans Affairs (VA) Office of General Counsel, entity with which he had no familiarity, as opposed to cases that had applied equitable tolling because appellants in those cases mailed their NOA to VA regional offices at which their claims originated. Reed v Principi (2003) 17 Vet App 380, 2003 US App Vet Claims LEXIS 924

Veteran's disability benefits case was dismissed as untimely where only document that could have been construed as notice of appeal of prior decision of Board of Veterans' Appeals was filed after 120 day deadline and no basis for tolling was present. Durr v Principi (2004) 17 Vet App 486, 2004 US App Vet Claims LEXIS 128, revd, remanded (2005, CA FC) 400 F.3d 1375

District court was bound by Federal Circuit court's definition of "due diligence," and claimant's actions, in timely filing statement of appeal with Board of Veterans' Appeals (BVA) and asking BVA to forward statement to court, fell under equitable-tolling-doctrine umbrella; although claimant's filing of Notice of Appeal, after BVA did not forward statement, was filed outside of appeal period, it was considered timely and court had jurisdiction to review appeal. Bobbitt v Principi (2004) 17 Vet App 547, 2004 US App Vet Claims LEXIS 193

Appellant did not file timely notice of appeal from decision of Board of Veterans' Appeals, and there was no evidence that tolling of time period in 38 USCS § 7266(a) and Ct. Vet. App. R. 4 was warranted, as appellant was fully advised of his right to appeal, in accordance with 38 USCS § 5104, appellant did not show that he had timely misfiled notice of appeal, and also did not show that appellant had mental illness that made him incapable of timely filing notice of appeal; therefore, appeal was dismissed. Tavares v Principi (2004) 18 Vet App 131, 2004 US App Vet Claims LEXIS 371

Under plain language of 38 USCS § 5103A, Secretary of Veterans Affairs' duty-to-assist provisions apply in connection with claimant's attempt to establish entitlement to his or her claim for award of Veterans Administration benefits and not in connection with claimant's attempt to establish mental incapacity for purposes of tolling judicial-appeal period under 38 USCS § 7266(a)

Veteran's appeal from Board of Veterans Appeals decision was dismissed for lack of jurisdiction because veteran had failed to file his notice of appeal during 120-day judicial-appeal period, and veteran had failed to provide evidence that symptoms of his dementia had manifested in such manner and to such extent that his failure to file his notice of appeal in timely fashion was "a direct result" of his medical condition, warranting equitable tolling. Claiborne v Nicholson (2005) 19 Vet App 181, 2005 US App Vet Claims LEXIS 363

7. Form or sufficiency of notice of appeal

Fact that veteran used wrong form to file notice of appeal was not sufficient to render filing ineligible for consideration under equitable tolling doctrine because veteran's intention to appeal was clear and Department of Veterans Affairs was put on notice of veteran's intention to appeal. Bailey v Principi (2003, CA FC) 351 F.3d 1381 (criticized in Bobbitt v Principi (2004) 17 Vet App 547, 2004 US App Vet Claims LEXIS 193)

During court's formative period, timely written expression of desire for judicial review submitted to claimant's regional office was adequate as substitute notice of appeal. Torres v Derwinski (1990) 1 Vet App 15

Appellant's pro se letter to court identifying veteran, listing his VA file number, and expressing desire to "follow the legal flow" of case was sufficient notice of appeal. Calma v Brown (1996) 9 Vet App 11

Veteran's letter to BVA requesting reconsideration, with copy to Department of Veterans Affairs General Counsel's office, did not constitute notice of appeal where it neither requested review by Court nor even mentioned Court. Martin v Brown (1997) 10 Vet App 100

VA Form 9 (Substantive Appeal to BVA) could not satisfy notice of appeal since it was received by court nearly two years before BVA decision in question and thus could not confer jurisdiction, nor could it possibly satisfy requirement that NOA designate Board decision appealed from. Crampton v Gober (1997) 10 Vet App 386, app dismd (1997, Vet App) 1997 US Vet App LEXIS 857, app dismd (1997, CA FC) 152 F.3d 946

Appellant's filing VA Form 9 did not result in timely notice of appeal to court; form which is device for appealing decision of regional officer to Board, was received by court nearly two years before BVA decision in question and could not confer jurisdiction upon court. Crampton v Gober (1997) 10 Vet App 386, app dismd (1997, Vet App) 1997 US Vet App LEXIS 857, app dismd (1998, CA FC) 152 F.3d 946

§ 7267. Decisions

(a) A decision upon a proceeding before the Court of Appeals for Veterans Claims shall be made as quickly as practicable. In a case heard by a panel of the Court, the decision shall be made by a majority vote of the panel in accordance with the rules of the Court. The decision of the judge or panel hearing the case so made shall be the decision of the Court.

(b) A judge or panel shall make a determination upon any proceeding before the Court, and any motion in connection with such a proceeding, that is assigned to the judge or panel. The judge or panel shall make a report of any such determination which constitutes the judge or panel's final disposition of the proceeding.

(c) The Court shall designate in its decision in any case those specific records of the Government on which it relied (if any) in making its decision. The Secretary shall preserve records so designated for not less than the period of time designated by the Archivist of the United States.
Effective date of section:
This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4067, as 38 USCS § 7267.

Act Aug. 6, 1991, P. L. 102-82, in subsec. (a), deleted "except as provided in subsection (d) of this section", following "the decision of the Court"; deleted subsec. (b) and (d), which read: "(b) The Court shall include in its decision a statement of its conclusions of law and determinations as to factual matters."; deleted subsec. (d), which read:

"(d)(1) In the case of a proceeding determined by a single judge of the Court, the decision of the judge shall become the decision of the Court unless before the end of the 30-day period beginning on the date of the decision by the judge the Court, upon the motion of either party or on its own initiative, directs that the decision be reviewed by a panel of the Court. In such a case, the decision of the judge initially deciding the case shall not be a part of the record.

"(2) In the case of a proceeding determined by a panel of the Court, the decision of the panel shall become the decision of the Court unless before the end of the 30-day period beginning on the date of the decision by the panel the Court, upon the motion of either party or on its own initiative, directs that the decision be reviewed by an expanded panel of the Court (or the Court en banc). In such a case, the decision of the panel initially deciding the case shall not be a part of the record.

redesignated subsecs. (c) and (e) as subsecs. (b) and (c), respectively; and, in subsec. (c) as redesignated, substituted "Archivist of the United States" for "Administrator of the National Archives and Records Administration".

Act Aug. 6, 1991, P. L. 102-83, in subsec. (c), substituted "Secretary" for "Administrator".

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

Other provisions:

Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 171

§ 7268. Availability of proceedings

Discussion and Analysis in the Veterans Benefits Manual

(a) Except as provided in subsection (b) of this section, all decisions of the Court of Appeals for Veterans Claims and all briefs, motions, documents, and exhibits received by the Court (including a transcript of the stenographic report of the hearings) shall be public records open to the inspection of the public.
(b) (1) The Court may make any provision which is necessary to prevent the disclosure of confidential information, including a provision that any such document or information be placed under seal to be opened only as directed by the Court.

(2) After the decision of the Court in a proceeding becomes final, the Court may, upon motion of the appellant or the Secretary, permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, submitted to the Court or the Court may, on its own motion, make such other disposition thereof as it considers advisable.

Effective date of section:

This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4068, as 38 USCS § 7268.

Act Aug. 6, 1991, in subsec. (b)(2), substituted "may, upon motion of the appellant or the Secretary," for "shall", and "or" for "before".

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

Other provisions:

Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:359, 406

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 174

1. Generally

2. Standard governing sealing of records

1. Generally

For Court to meet its obligations to general public and to its veteran appellants with regard to public access to its records, it must conduct examination of each case and each document or group of documents for which protection is sought and balance conflicting interest presented in deciding whether to seal record. Pritchett v Derwinski (1992) 2 Vet App 116

2. Standard governing sealing of records

Unsupported conjecture that if public was given access to appeal records appellant might be discriminated against due to her medical condition was insufficient to carry burden of articulating cognizable privacy interest of sufficient significance to overcome presumption of public access to judicial records. Stam v Derwinski (1991) 1 Vet App 317, 19 Media L R 1186

§ 7269. Publication of decisions
(a) The Court of Appeals for Veterans Claims shall provide for the publication of decisions of the Court in such form and manner as may be best adapted for public information and use. The Court may make such exceptions, or may authorize the chief judge to make such exceptions, to the requirement for publication in the preceding sentence as may be appropriate.

(b) Such authorized publication shall be competent evidence of the decisions of the Court of Appeals for Veterans Claims therein contained in all courts of the United States and of the several States without any further proof or authentication thereof.

(c) Such publications shall be subject to sale in the same manner and upon the same terms as other public documents.

Effective date of section:
This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4069, as 38 USCS § 7269.

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsecs. (a) and (b), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

Other provisions:
Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Cross References
Publication of decisions, Rule 36, Rules of United States Court of Veterans Appeals, USCS Court Rules

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 171

SUBCHAPTER III. MISCELLANEOUS PROVISIONS

§ 7281. Employees
§ 7282. Budget and expenditures
§ 7283. Disposition of fees
§ 7284. Fee for transcript of record
§ 7285. Practice and registration fees
§ 7286. Judicial Conference of the Court
§ 7287. Administration

§ 7281. Employees
(a) The Court of Appeals for Veterans Claims may appoint a clerk without regard to the provisions of title 5 governing appointments in the competitive service [5 USCS §§ 3301 et seq.]. The clerk shall serve at the pleasure of the Court.

(b) The judges of the Court may appoint law clerks and secretaries, in such numbers as the Court may approve, without regard to the provisions of title 5 governing appointments in the competitive service [5 USCS §§ 3301 et seq.]. Any such law clerk or secretary shall serve at the pleasure of the appointing judge.

(c) The clerk, with the approval of the Court, may appoint necessary deputies and employees without regard to the provisions of title 5 governing appointments in the competitive service [5 USCS §§ 3301 et seq.].

(d) The Court may fix and adjust the rates of basic pay for the clerk and other employees of the Court without regard to the provisions of chapter 51 [5 USCS §§ 5101 et seq.], subchapter III of chapter 53 [5 USCS §§ 5331 et seq.], or section 5373 of title 5 [5 USCS § 5373]. To the maximum extent feasible, the Court shall compensate employees at rates consistent with those for employees holding comparable positions in the judicial branch.

(e) In making appointments under subsections (a) through (c) of this section, preference shall be given, among equally qualified persons, to persons who are preference eligibles (as defined in section 2108(3) of title 5 [5 USCS § 2108(3)]).

(f) The Court may procure the services of experts and consultants under section 3109 of title 5 [5 USCS § 3109].

(g) The chief judge of the Court may exercise the authority of the Court under this section whenever there are not at least two other judges of the Court.

(h) The Court shall not be considered to be an agency within the meaning of section 3132(a)(1) of title 5 [5 USCS § 3132(a)(1)].

(i) The Court may accept and utilize voluntary services and uncompensated (gratuitous) services, including services as authorized by section 3102(b) of title 5 [5 USCS § 3102(b)] and may accept, hold, administer, and utilize gifts and bequests of personal property for the purposes of aiding or facilitating the work of the Court. Gifts or bequests of money to the Court shall be covered into the Treasury.

**Effective date of section:**

This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

**Amendments:**

1989. Act Aug. 16, 1989 (applicable as provided by § 204(c) of such Act, which appears as a note to this section) substituted this section for one which read: "The Court of Veterans Appeals may appoint such employees as may be necessary to execute the functions vested in the Court. Such appointments shall be made in accordance with the provisions of title 5 governing appointment in the competitive service, except that the Court may classify such positions based upon the classification of comparable positions in the judicial branch. The basic pay of such employees shall be fixed in accordance with subchapter III of chapter 53 of title 5.".
§ 7282. Budget and expenditures

(a) The budget of the Court of Appeals for Veterans Claims as submitted by the Court for inclusion in the budget of the President for any fiscal year shall be included in that budget without review within the executive branch.

(b) The Court may make such expenditures (including expenditures for personal services and rent at the seat of Government and elsewhere, and for law books, books of reference, and periodicals) as may be necessary to execute efficiently the functions vested in the Court.

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(c) All expenditures of the Court shall be allowed and paid upon presentation of itemized vouchers signed by the certifying officer designated by the chief judge. Except as provided in section 7285 of this title [38 USCS § 7285], all such expenditures shall be paid out of moneys appropriated for purposes of the Court.

**Effective date of section:**
This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

**Amendments:**
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4082, as 38 USCS § 7282, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

**Other provisions:**

**Commencement of operation of Court of Veterans Appeals.** For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

§ 7283. Disposition of fees

Except for amounts received pursuant to section 7285 of this title [38 USCS § 7285], all fees received by the Court of Appeals for Veterans Claims shall be covered into the Treasury as miscellaneous receipts.

**Effective date of section:**
This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

**Amendments:**
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4083, as 38 USCS § 7283, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note) substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

**Other provisions:**

**Commencement of operation of Court of Veterans Appeals.** For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

**United States Court of Appeals for Veterans Claims; Fee Schedule.** An order of the court, dated June 9, 1998 (Misc. No. 4-98), provides:

"It is ORDERED, pursuant to Rule 45(f), that the following revised schedule of fees approved by the Court is announced. The fees marked * apply to services on behalf of the United States, if the information requested is available through electronic access. The only change is marked by #:
"For filing Notice of Appeal or Petition for Extraordinary Relief in this Court, but not when the Court orders case redocketing for its administrative convenience -$50.00

"For filing Notice of Appeal to the U.S. Court of Appeals for the Federal Circuit (fee set by that court, payable to this Court) -105.00

"For reproducing a paper copy from original documents or from microfiche or microfilm reproductions of original records, per copy page -.50*

"For each microfiche sheet of film or microfilm jacket copy of any Court record, when available -3.00

"For reproducing audio or video tape recording, including cost of materials - 15.00

"For searching Court records, per name or item searched - 15.00*

"For retrieval of a Court record from a Federal Records Center or National Archives - 25.00

"For certifying a document or paper, whether certification is made directly on the document or by separate instrument - 5.00

"For application for admission to practice before the Court - 30.00

"For a certificate of admission to practice, suitable for framing (fee set by, and payable to, printer) - 25.65#

"For processing a check paid to the Court which is returned for lack of funds (fee set by National Finance Center) - 6.00

"DATED: June 9, 1998".

§ 7284. Fee for transcript of record

The Court of Appeals for Veterans Claims may fix a fee, not in excess of the fee authorized by law to be charged and collected therefor by the clerks of the district courts, for comparing, or for preparing and comparing, a transcript of the record of any proceeding before the Court, or for copying any record, entry, or other paper and the comparison and certification thereof.

Effective date of section:
This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4084, as 38 USCS § 7284.

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note) substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

Other provisions:
Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 174

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§ 7285. Practice and registration fees

(a) The Court of Appeals for Veterans Claims may impose a periodic registration fee on persons admitted to practice before the Court. The frequency and amount of such fee shall be determined by the Court, except that such amount may not exceed $30 per year. The Court may also impose a registration fee on persons (other than judges of the Court) participating at judicial conferences convened pursuant to section 7286 of this title [38 USCS § 7286] or in any other court-sponsored activity.

(b) Amounts received by the Court under subsection (a) of this section shall be available to the Court for the following purposes:
   
   (1) Conducting investigations and proceedings, including employing independent counsel, to pursue disciplinary matters.
   (2) Defraying the expenses of--
      
      (A) judicial conferences convened pursuant to section 7286 of this title [38 USCS § 7286]; and
      
      (B) other activities and programs of the Court that are intended to support and foster communication and relationships between the Court and persons practicing before the Court or the study, understanding, public commemoration, or improvement of veterans law or of the work of the Court.

Effective date of section:

This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4085, as 38 USCS § 7285.

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

2001. Act Dec. 27, 2001, substituted the heading for one which read: "§ 7285. Practice fee"; in subsec. (a), added the sentence beginning "The Court may also impose . . ."; and, in subsec. (b), substituted "for the following purposes:" and paras. (1) and (2) for "for the purposes of (1) employing independent counsel to pursue disciplinary matters, and (2) defraying administrative costs for the implementation of the standards of proficiency prescribed for practice before the Court.".

Other provisions:

Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Cross References

Practice fee, Rule 46, Rules of United States Court of Veterans Appeals, USCS Court Rules

This section is referred to in 38 USCS §§ 7282, 7283

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§ 7286. Judicial Conference of the Court

The Chief Judge of the Court of Appeals for Veterans Claims may summon the judges of the Court to an annual judicial conference, at a time and place that the Chief Judge designates, for the purpose of considering the business of the Court and recommending means of improving the administration of justice within the Court's jurisdiction. The Court shall provide by its rules for representation and active participation at such conference by persons admitted to practice before the Court and by other persons active in the legal profession.

Amendments:

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), substituted the section heading for one which read: "§ 7286. Judicial Conference of the Court of Veterans Appeals" and, in the text, substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

§ 7287. Administration

Notwithstanding any other provision of law, the Court of Appeals for Veterans Claims may exercise, for purposes of management, administration, and expenditure of funds of the Court, the authorities provided for such purposes by any provision of law (including any limitation with respect to such provision of law) applicable to a court of the United States (as that term is defined in section 451 of title 28 [28 USCS § 451]), except to the extent that such provision of law is inconsistent with a provision of this chapter [38 USCS §§ 7251 et seq.].


SUBCHAPTER IV. DECISIONS AND REVIEW

§ 7291. Date when Court decision becomes final

§ 7292. Review by United States Court of Appeals for the Federal Circuit

§ 7291. Date when Court decision becomes final

(a) A decision of the United States Court of Appeals for Veterans Claims shall become final upon the expiration of the time allowed for filing, under section 7292 of this title [38 USCS § 7292], a notice of appeal from such decision, if no such notice is duly filed within such time. If such a notice is filed within such time, such a decision shall become final--

(1) upon the expiration of the time allowed for filing a petition for certiorari with the Supreme Court of the United States, if the decision of the Court of Appeals for Veterans Claims is affirmed or the appeal is dismissed by the United States Court of Appeals for the Federal Circuit and no petition for certiorari is duly filed;
(2) upon the denial of a petition for certiorari, if the decision of the Court of Appeals for Veterans Claims is affirmed or the appeal is dismissed by the United States Court of Appeals for the Federal Circuit; or
(3) upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if that Court directs that the decision of the Court of Appeals for Veterans Claims be affirmed or the appeal dismissed.

(b) (1) If the Supreme Court directs that the decision of the Court of Appeals for Veterans Claims be modified or reversed, the decision of the Court of Appeals for Veterans Claims rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Secretary or the petitioner has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Court of Appeals for Veterans Claims shall become final when so corrected.
(2) If the decision of the Court of Appeals for Veterans Claims is modified or reversed by the United States Court of Appeals for the Federal Circuit and if--
(A) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or
(B) the petition for certiorari has been denied, or
(C) the decision of the United States Court of Appeals for the Federal Circuit has been affirmed by the Supreme Court,
then the decision of the Court of Appeals for Veterans Claims rendered in accordance with the mandate of the United States Court of Appeals for the Federal Circuit shall become final upon the expiration of 30 days from the time such decision of the Court of Appeals for Veterans Claims was rendered, unless within such 30 days either the Secretary or the petitioner has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Court of Appeals for Veterans Claims shall become final when so corrected.

(c) If the Supreme Court orders a rehearing, or if the case is remanded by the United States Court of Appeals for the Federal Circuit to the Court of Appeals for Veterans Claims for a rehearing, and if--
(1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or
(2) the petition for certiorari has been denied, or
(3) the decision of the United States Court of Appeals for the Federal Circuit has been affirmed by the Supreme Court,
then the decision of the Court of Appeals for Veterans Claims rendered upon such rehearing shall become final in the same manner as though no prior decision of the Court of Appeals for Veterans Claims had been rendered.

(d) As used in this section, the term "mandate", in case a mandate has been recalled before the expiration of 30 days from the date of issuance thereof, means the final mandate.

Effective date of section:
This section took effect on Sept. 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4091, as 38 USCS § 7291, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Such Act further substituted "Secretary" for "Administrator" wherever appearing.

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note) substituted the section heading for one which read: "§ 7291. Date when United States Court of Veterans Appeals decision becomes final" and, in subsecs. (a)-(c), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals" wherever appearing.

Other provisions:

Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.

Research Guide

Federal Procedure:


Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 172

§ 7292. Review by United States Court of Appeals for the Federal Circuit

discussion and analysis in the veterans benefits manual

(a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title [38 USCS § 1155]) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeals to United States courts of appeals from United States district courts.

(b) (1) When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is
filed with it within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Veterans Claims, unless a stay is ordered by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit.

(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Appeals for Veterans Claims.

c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28 [28 USCS § 1254].

d) (1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
(D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

e) (1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Appeals for Veterans Claims is not in accordance with law, to modify or reverse the decision of the Court of Appeals for Veterans Claims or to remand the matter, as appropriate.

(2) Rules for review of decisions of the Court of Appeals for Veterans Claims shall be those prescribed by the Supreme Court under section 2072 of title 28 [28 USCS § 2072].

Effective date of section:
This section took effect on September 1, 1989, pursuant to § 401(a) of Act Nov. 18, 1988, P. L. 100-687, which appears as 38 USCS § 7251 note.

Amendments:
1989. Act Aug. 16, 1989 (effective and applicable as provided by § 302(c) of such Act, which appears as 38 USCS § 5701 note), in subsec. (d)(1), in the introductory matter, deleted "statute or" preceding "regulation or".
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4092, as 38 USCS § 7292.
Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (c), substituted "United States Court" for "United States Courts".

Act Aug. 6, 1991 amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Secretary" for "Administrator" wherever appearing.

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsecs. (a), (b), (d), and (e), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals" wherever appearing.

2002. Act Dec. 6, 2002 (applicable as provided by § 402(b) of such Act, which appears as a note to this section), in subsec. (a), inserted "a decision of the Court on a rule of law or of".

Other provisions:

Commencement of operation of Court of Veterans Appeals. For provisions relating to the commencement of the operation of the Court of Veterans Appeals, see Act Nov. 18, 1988, P. L. 100-687, Div A, Title IV, § 401(e), 102 Stat. 4122, which appears as 38 USCS § 7251 note.


The amendment made by subsection (a) [amending subsec. (a) of this section] shall apply with respect to any appeal--

"(1) filed with the United States Court of Appeals for the Federal Circuit on or after the date of the enactment of this Act; or

"(2) pending with the United States Court of Appeals for the Federal Circuit as of the date of the enactment of this Act in which a decision has not been rendered as of that date."

Cross References
This section is referred to in 38 USCS §§ 7252, 7291

Research Guide

Federal Procedure:

10 Moore's Federal Practice (Matthew Bender 3d ed.), ch 54, Judgments; Costs § 54.172
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:407, 414-418, 420

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 175, 176
1. Generally
2. Relationship to Equal Access to Justice Act
3. Review of validity of statute or regulation
4. Factual determinations

1. Generally

Jurisdiction of Court of Appeals for Federal Circuit over "free-standing" constitutional issues, those not involving challenge to interpretation or validity of statute or regulation, is consistent with express statutory grant of jurisdiction in 38 USCS § 7292. In re Bailey (1999, CA FC) 182 F.3d 860

Federal Circuit Court of Appeals may exercise jurisdiction pursuant to 38 USCS § 7292 over appellant's neck and headache claims despite Veterans Court's remand of veteran's back claim
as legal issues presented on appeal to Veterans Court were all distinct, claims are separable, and review will not disrupt orderly process of adjudication with respect to remanded claim. Elkins v Gober (2000, CA FC) 229 F.3d 1369, on remand, remanded (2001, US) 2001 US App Vet Claims LEXIS 113

Veteran's appeal of decision from Court of Appeals for Veterans Claims (CAVC) was not reviewable to extent that veteran's complaints about remand, denial of interest and cost of living increases, denial of review by full panel of CAVC, and denial of notification of procedures used for pro se veterans did not present constitutional violations or questions of statutory or regulatory interpretations. Arnesen v Principi (2002, CA FC) 300 F.3d 1353, reh den (2002, CA FC) 2002 US App LEXIS 20935

Under 2002 amendment to 38 USCS § 7292(a), in case in which decision below regarding governing rule of law would have been altered by adopting position being urged, United States Court of Appeals for Federal Circuit has jurisdiction to entertain matter, even though issue underlying stated position was not "relayed on" by Veterans Court; to that extent at least matter is "case" jurisdiction. Morgan v Principi (2003, CA FC) 327 F.3d 1357, reh den (2003, CA FC) 2003 US App LEXIS 12017

Circuit court lacked jurisdiction to review decision of United States Court of Appeals for Veterans Claims regarding reasonableness of attorney's fee agreement with veteran; more specific provisions of 38 USCS § 7263(d) overrode general grant of jurisdiction in 38 USCS 7292(a) and, thus, precluded review of decision of Veterans' Court's under 38 USCS § 5904(c)(2). Carpenter v Principi (2003, CA FC) 327 F.3d 1371, reh den, reh, en banc, den (2003, CA FC) 2003 US App LEXIS 14589

Because question of whether equitable tolling applies in particular case involves, in part, application of law to fact, and because it frequently requires not only decision as to what legal principle applies but also assessment of facts and decision as to whether application of governing legal principle to those facts requires that limitations period be equitably tolled, where material facts are not in dispute and adoption of particular legal standard would dictate outcome of equitable tolling claim, Court of Appeals for Federal Circuit, when reviewing decision of Court of Appeals for Veterans Claims, treats question of availability of equitable tolling as one that it is authorized by 38 USCS § 7292 to address. Bailey v Principi (2003, CA FC) 351 F.3d 1381 (criticized in Bobbitt v Principi (2004) 17 Vet App 547, 2004 US App Vet Claims LEXIS 193)

Appeals court had jurisdiction under 38 USCS § 7292 to determine whether U.S. Court of Appeals for Veterans Claims misinterpreted court's earlier rulings on issue of law. Moody v Principi (2004, CA FC) 360 F.3d 1306

Because claimants for disability benefits were not asking court to review contents of ratings schedules at issue, but rather were asking court to correct interpretation of 38 C.F.R. § 4.130, Court of Appeals for Veterans Claims had jurisdiction over case under 38 USCS § 7252(a) and Court of Appeals for Federal Circuit had jurisdiction pursuant to 38 USCS § 7292(a). Sellers v Principi (2004, CA FC) 372 F.3d 1318

Court rejected veteran's argument that regional office's alleged failure to comply with "detailed reasons" aspect of notice provision in 38 C.F.R. § 3.105(e) amounted to exception to principle of finality articulated in 38 USCS § 7105(c) because statutory scheme provided only two exceptions to rule of finality, namely "new and material evidence" and clear and unmistakable error, and Congress did not intend to allow exceptions to rule of finality in addition to two that it expressly created. Norton v Principi (2004, CA FC) 376 F.3d 1336

Failure of Court of Appeals for Veterans Claims to consider impact of law that was in effect at time of its decision to award fee to non-attorney practitioner was decision on rule of law within meaning of 38 USCS § 7292, and thus, Court of Appeals for Federal Circuit had "rule of law" jurisdiction to address issue; moreover, although veteran failed to raise issue in court below (because law was not yet in effect), court below erred when it failed to consider effect of § 403 of P. L. 107-330 on its determination of appropriate fee for non-attorney practitioner, because amendment was enacted while appeal was pending and veteran's fee application, pursuant to 28 USCS § 2412, was pending before it. Wilson v Principi (2004, CA FC) 391 F.3d 1203
Failure by Board of Veterans' Appeals to consider presumptive eligibility in its initial decision did not create "incomplete adjudication" that left veteran's claim open; under 38 USCS §§ 7104 and 7103, finality attached once claim for benefits was disallowed, not when particular theory was rejected. Bingham v Nicholson (2005, CA FC) 421 F.3d 1346


Court of Federal Claims does not have jurisdiction to review denial of veterans' benefits, because 38 USCS § 511(a) precludes judicial review of veterans' benefits determinations in Court of Federal Claims, 38 USCS § 7252(a) provides that exclusive remedy for denial of veterans' benefits is to appeal to Court of Veterans Appeals, and jurisdiction for appeals from Court of Veterans Appeals lies exclusively in U.S. Court of Appeals for Federal Circuit (38 USCS § 7292). Davis v United States (1996) 36 Fed Cl 556

Dissent by one member of panel is not and cannot be notification to chief judge of disagreement contemplated by § 7292(b). Bowey v West (1998) 11 Vet App 188

Appellants' construed motion for interlocutory appeal under 38 USCS § 7292(b) was denied where, although appellants stated their interpretation of amendments to 38 USCS § 7261, and correctly noted that there was disagreement between them and Secretary of Veterans Affairs on whether these amendments required court to review entire claims file as record on appeal, nothing in appellants' motion demonstrated how immediate consideration by Court of Appeals for Federal Circuit of their assertion that court was required to review entire record, regardless of relevance of material from that record, would have materially advanced ultimate termination of their appeals. Homan v Principi (2003) 17 Vet App 58, 2003 US App Vet Claims LEXIS 197

2. Relationship to Equal Access to Justice Act

Although VJRA instituted changes in veterans' benefits system and expanded rights of veterans relating to adjudication of their claims-including right to seek judicial review, right to have reasonable doubt resolved in favor of claimant, and right to agency decision based on evidence of record-changes were unmistakably procedural in nature, hence in absence of showing of new basis of entitlement to claimed benefit as result of intervening change in law or regulation, de novo review of previously and finally denied claim to veterans benefits is not available. Spencer v Brown (1994, CA FC) 17 F.3d 368, cert den (1994) 513 US 810, 130 L Ed 2d 19, 115 S Ct 61

Under statute describing boundaries of court's jurisdiction, court is not empowered to review Court of Veterans Appeals' application of standard set forth in Equal Access to Justice Act for determining whether government is liable for attorney's fees and expenses, since such determination necessarily involves determination of facts and application of substantially justified standard of EAJA to those facts. Stillwell v Brown (1995, CA FC) 46 F.3d 1111

Court of Appeals for the Federal Circuit does not have jurisdiction under 38 USCS § 7292(d)(2) to hear appeal from denial of application for attorney fees and expenses pursuant to Equal Access to Justice Act despite contention Secretary erred by not following his own regulations and by deferring to precedent of Court of Appeals for Veterans Claims which was subsequently overruled; there is no statutory requirement that Secretary appeal from Court of Appeals for Veterans Claims' decision that is arguably inconsistent with regulations and, absent legal claim, appeal is reduced to request for review of whether Secretary's litigation position was substantially justified, and Court is specifically precluded from considering such challenge. Clemmons v West (2000, CA FC) 206 F.3d 1401, reh den, reh, en banc, den (2000, CA FC) 2000 US App LEXIS 11467

Whether government's position was substantially justified for purposes of determining Equal Access to Justice Act fees is discretionary inquiry requiring application of law to facts and is specifically excluded from Federal Circuit Court of Appeals' jurisdictional grant under 38 USCS § 7292(d)(2). Bowey v West (2000, CA FC) 218 F.3d 1373
Decision of Court of Appeals for Veterans Claims denying appellant's application for attorney fees and expenses under Equal Access to Justice Act was not matter of statutory interpretation but finding that agency was justified in its position and, as "quintessentially discretionary" ruling necessarily involving questions of fact and application of law to fact, not within jurisdiction of Federal Circuit under 38 USCS § 7292. Carpenter v Gober (2000, CA FC) 228 F.3d 1379

Federal Circuit Court of Appeals has jurisdiction under 38 USCS § 7292(d)(1) to review Court of Appeals for Veterans Claims' dismissal of claim for attorneys fees pursuant to Equal Access to Justice Act despite contention Court of Appeals for Veterans Claims merely interpreted and applied its own precedent and did not perform any statutory interpretation since it is clear that Court of Appeals for Veterans Claims interpreted, either directly or through vehicle of its precedent, statutory language of Equal Access to Justice Act. Burkhardt v Gober (2000, CA FC) 232 F.3d 1363, reh den (2001, CA FC) 2001 US App LEXIS 1347

Ultimate conclusion of whether party prevailed in action is one of law based on findings of fact, notably whether party has received at least some relief on merits of his claim; under these circumstances, it is beyond scope of court of appeals' jurisdiction to address question of whether veteran's attorney is prevailing party within meaning of EAJA. Halpern v Principi (2002, CA FC) 313 F.3d 1364

Court had jurisdiction over veteran's claim that lower court did not use proper standard for determining whether Secretary of Veterans Affairs' position was substantially justified for purposes of Equal Access to Justice Act (EAJA), 28 USCS § 2412(d), but did not have jurisdiction over question of whether lower court was correct in determining that Board of Veterans' Appeals' position was substantially justified. Smith v Principi (2003, CA FC) 343 F.3d 1358, CCH Unemployment Ins Rep ¶ 17096B

In light of Court of Appeals for Veterans Claims' subsequent action in other cases that were similarly situated, it behooved Court of Appeals for Federal Circuit in exercise of its discretion as matter of justice to address question of whether court below should have taken § 403 of Veterans Benefits Act of 2002 into account when it decided veteran's fee petition under Equal Access to Justice Act. Wilson v Principi (2004, CA FC) 391 F.3d 1203

Judgment in appellant's case became final and unappealable when 60-day appeal period to U.S. Court of Appeals for Federal Circuit had run; therefore, application for attorney's fees filed 31 days after that was untimely under EAJA. Grivois v Brown (1994) 7 Vet App 100

3. Review of validity of statute or regulation

Because veteran did not raise argument concerning interpretation of 38 USCS § 1151 in Court of Appeals for Veterans Claims, Court of Appeals will not consider argument in first instance since argument below was predicted entirely on factual question, 38 USCS § 7292(c) does not require Court to decide issue that has been waived, and veteran has no statutory right of appeal under 38 USCS § 7292(c) since court below did not rely on interpretation of law asserted on appeal. Boggs v West (1999, CA FC) 188 F.3d 1335, reh, en banc, den (1999, CA FC) 1999 US App LEXIS 29877

Whether regulations require that informal claim be written involves interpretation of regulation, not application of regulation to particular facts, and Court of Appeals for Federal Circuit has jurisdiction over issue under 38 USCS § 7292(a) and (c). Rodriguez v West (1999, CA FC) 189 F.3d 1351, reh, en banc, den (1999, CA FC) 1999 US App LEXIS 31382 and cert den (2000) 529 US 1004, 146 L Ed 2d 219, 120 S Ct 1270

Issue of whether Department of Veterans Affairs misinterpreted 38 USCS § 5103(a) and thereby violated veteran's right to due process is not properly before Court of Appeals for Federal Circuit since issue was never raised or addressed in Court of Appeals for Veterans Claims, and appeal is dismissed pursuant to 38 USCS § 7292. Smith v West (2000, CA FC) 214 F.3d 1331, reh, en banc, den (2000, CA FC) 2000 US App LEXIS 22323 and cert den (2001) 531 US 1144, 148 L Ed 2d 956, 121 S Ct 1080

Issue of whether statutory presumption of soundness under 38 USCS § 1111 can be overcome by veteran's own statements placing onset of disorder prior to entry into service is not
properly before Court of Appeals for Federal Circuit since issue was not addressed by or presented to Court of Appeals for Veterans Claims, and appeal is dismissed pursuant to 38 USCS § 7292. Belcher v West (2000, CA FC) 214 F.3d 1335, reh, en banc, den (2000, CA FC) 2000 US App LEXIS 23411 and cert den (2001) 531 US 1144, 148 L Ed 2d 956, 121 S Ct 1080

38 USCS § 7292(a) means any party to case may obtain review of Court of Appeals for Veterans Claims' decision insofar as review "relates to" or "concerns" validity of any statute or regulation or interpretation thereof on which decision below depended. Forshey v Principi (2002, CA FC) 284 F.3d 1335, cert den (2002) 537 US 823, 154 L Ed 2d 33, 123 S Ct 110

Widow's appeal of non-final order of remand of her claim for veteran's survivor benefits to Board of Veterans' Appeals, for reconsideration in light of Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000), was dismissed where there was no substantial risk that factual determination would not survive entry of final order. Myore v Principi (2003, CA FC) 323 F.3d 1347

Because no factual issues were presented and veteran challenged validity of regulation, federal circuit court of appeals had jurisdiction to review decision of Court of Appeals for Veterans Claims pursuant to 38 USCS § 7292. Terry v Principi (2003, CA FC) 340 F.3d 1378, reh den (2003, CA FC) 2003 US App LEXIS 24133 and cert den (2004) 541 US 904, 158 L Ed 2d 246, 124 S Ct 1606

Federal Court of Appeals reviewed interpretations of regulation made by Court of Appeals for Veterans Claims to determine if interpretation was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law, and determined that Veterans Claims Court properly precluded review of earlier decision of Board of Veterans Appeals for clear and unmistakable error when earlier decision had been reviewed and affirmed by appellate court. Winsett v Principi (2003, CA FC) 341 F.3d 1329, reh den, reh, en banc, den (2003, CA FC) 2003 US App LEXIS 21172 and cert den (2003) 540 US 1082, 157 L Ed 2d 758, 124 S Ct 943

Where veteran, who was awarded retroactive disability payments due to clear and unmistakable error made in 1969, argued that he was entitled to interest on difference because without interest he was paid in deflated nominal dollars, rather than in real dollars, and under "same effect" language of 38 USCS § 5109A(b), payment of nominal 1969 dollars made in 1996 (year in which he was awarded difference) did not have "same effect" as payment of nominal 1969 dollars made in 1969, Court of Appeals reiterated its prior holding that "same effect" language of 38 USCS § 5109A(b) was not clear waiver of "no-interest rule" inherent in government's sovereign immunity. Sandstrom v Principi (2004, CA FC) 358 F.3d 1376

There was nothing in 38 USCS § 7105 that required documentary evidence that reflected date notice of decision was mailed and lack of such evidence did not bar application of presumption of regularity. Miley v Principi (2004, CA FC) 366 F.3d 1343, 64 Fed Rules Evid Serv 85

Statutory scheme of 5 USCS §§ 552, 553, and 38 USCS §§ 1155, 7252, consistently excluded from judicial review all content of ratings schedule, as well as actions of Secretary of Veterans Affairs in adopting or revising that content, and 38 USCS § 7261(a)(3)(C) only provides standards of review to be applied by U.S. Court of Appeals for Veterans Claims when reviewing decision from Board of Veterans' Appeals and, thus, under 38 USCS § 7252, such court lacked jurisdiction to review content of diagnostic codes as part of schedule of ratings for disabilities; accordingly, Court of Appeals for Federal Circuit reversed determination of U.S. Court of Appeals for Veterans Claims that 38 C.F.R. § 4.87a, Diagnostic Code 6260, was invalid as inconsistent with 38 USCS § 1110. Wanner v Principi (2004, CA FC) 370 F.3d 1124

Court had jurisdiction under 38 USCS § 7292(d)(2) to review decision of Court of Appeals for Veterans Claims that equitable tolling was inappropriate when it dismissed as untimely veteran's appeal of denial of benefits; in interpreting veterans court's jurisdictional statute of 38 USCS § 7266, Court of Appeals for Federal Circuit consistently held that when material facts were not in dispute and adoption of particular legal standard dictated outcome of equitable tolling claim, court had treated question of availability of equitable tolling as matter of law that it was authorized to address on appeal. Mapu v Nicholson (2005, CA FC) 397 F.3d 1375
Federal Circuit had jurisdiction to consider Court of Appeals for Veterans Claims' decision dismissing veteran's appeal for failure to file timely notice of appeal where contents of notice of appeal were not in dispute and interpretation of legal requirements governing notices of appeal dictated case's outcome. Durr v Nicholson (2005, CA FC) 400 F.3d 1375

Court lacked authority to review decision of Court of Veterans' Appeals since appellant's case rested solely on the alleged misinterpretation of legal effect of BVA's decision; in absence of challenge to validity of statute or regulation, or interpretation of constitutional or statutory provision or regulation, court has no authority to consider appeal. Livingston v Derwinski (1992, CA) 959 F.2d 224

4. Factual determinations

Court lacked jurisdiction to review Court of Veterans Appeals' dismissal of surviving spouse's claim as untimely since appellant challenged factual determination of timeliness of notice of appeal. Albun v Brown (1993, CA FC) 9 F.3d 1528

Although veteran's appeal raised questions arguably within appellate court's jurisdiction, those questions presumed and depended upon purported factual determination made in administrative assessment of veteran's claim, and since whether alleged factual determination was made is itself question of fact, it was beyond court's jurisdiction to review. Futrell v Brown (1995, CA FC) 45 F.3d 1534

CVA's affirmance of BVA's decision, declining to reopen benefits claim on ground that no new and material evidence had been proffered, involved factual determination or application of law to facts of particular case and thus was not within court's appellate jurisdiction. Barnett v Brown (1996, CA FC) 83 F.3d 1380

Question of whether veteran's newly submitted medical records qualify as "new and material" evidence sufficient to reopen claim pursuant to 38 USCS § 5108 is question over which Court of Veterans Appeals has final authority, and Court of Appeals is without jurisdiction to review decision of Court of Veterans Appeals under 38 USCS § 7292. Routen v West (1998, CA FC) 142 F.3d 1434, cert den (1998) 525 US 962, 142 L Ed 2d 328, 119 S Ct 404

Whether regional office's failure to consider Army regulations explaining diagnostic codes in medical records would constitute clear and unmistakable error is fact-based and beyond jurisdiction of Court of Appeals for Federal Circuit under 38 USCS § 7292. Yates v West (2000, CA FC) 213 F.3d 1372, cert den (2000) 531 US 960, 148 L Ed 2d 297, 121 S Ct 386

Appeal is dismissed for lack of jurisdiction since 38 USCS § 7292(d)(2) expressly bars Court of Appeals for Federal Circuit from reviewing challenges to application of law to facts of particular case and appellant's claim that equitable tolling should be applied to excuse late filing of notice of appeal requires evaluation of facts. Leonard v Gober (2000, CA FC) 223 F.3d 1374, reh den (2000, CA FC) 2000 US App LEXIS 26868 and cert den (2001) 531 US 1130, 148 L Ed 2d 797, 121 S Ct 889


Argument that Court of Appeals for Veterans Claims erred in affirming Board's denial of service connection because appellant submitted enough proof to establish treatment of hypertension within one year of discharge, and of beriberi heart disease, involves factual challenges over which Court of Appeals has no jurisdiction under 38 USCS § 7292 and appeal is dismissed. Jefferson v Principi (2001, CA FC) 271 F.3d 1072

Order finding that there was no new and material evidence supporting reopening of veterans' claims for service connection was upheld; because new and material evidence determination was fact-intensive, deference to Board of Veterans Appeal's determination was required; question of whether evidence in case was new and material was either factual determination under 38 USCS § 7292(d)(2)(A) or application of law to facts under 38 USCS § 7292(B). Prillaman v Principi (2003, CA FC) 346 F.3d 1362

Veteran who attempted to file notice of appeal by completing document that was clearly intended to serve as notice of appeal and delivered document to Department of Veterans Affairs (VA) regional office from which his claim originated within 120-day statutory period for appeal was entitled to invoke doctrine of equitable tolling; fact that veteran used wrong form or filed it in wrong forum was not sufficient to render filing ineligible for consideration under equitable tolling doctrine because VA was put on notice of veteran's intention to appeal. Bailey v Principi (2003, CA FC) 351 F.3d 1381 (criticized in Bobbitt v Principi (2004) 17 Vet App 547, 2004 US App Vet Claims LEXIS 193)

Court of Appeals for Federal Circuit had no jurisdiction to consider veteran's claim that Court of Appeals for Veterans Claims should have remanded his case to Board of Veterans' Appeals to consider informed consent form as evidence in veteran's claim for benefits under 38 USCS § 1151(a) due to injuries sustained following surgery performed by Department of Veterans Affairs surgeons; to decide issue, Federal Circuit would have been required to review Veterans Court's application of law, i.e., 38 USCS § 7104(d)(1), to facts and failure to consider consent form, and 38 USCS § 7292(d)(2) precluded Federal Circuit's review of factual determinations and applications of law to facts where no constitutional issues were involved. Cook v Principi (2003, CA FC) 353 F.3d 937

Court of Appeals for Veterans Claims' rejection of finding of clear and unmistakable error as to veteran's claim was affirmed; although court misconstrued duty of Department of Veterans Affairs to fully and sympathetically develop claim, it was harmless error. Szemraj v Principi (2004, CA FC) 357 F.3d 1370

Where Secretary of Veterans Affairs argued that even if physical illness could toll limitations period in 38 USCS § 7266(a), veterans widow failed to present sufficient evidence to establish that her illness met criteria for applying equitable tolling in her case, Secretary's argument raised fact question that had not been decided by Court of Appeals for Veterans Claims; under 38 USCS § 7292(d)(2), circuit court lacked jurisdiction to consider fact question in first instance. Arbas v Nicholson (2005, CA FC) 403 F.3d 1379


New and material evidence determinations are generally reviewable for clear error rather than de novo. Elkins v West (1999) 12 Vet App 209

Motion for issuance of mandate is granted where Court previously vacated portion of decision by BVA which held new and material evidence had not been submitted to reopen claim but affirmed decision respecting claim of clear and unmistakable error where veteran's notice of appeal pursuant to 38 USCS § 7292(a) is sufficiently specific to exclude from appeal portion of decision which remanded claim Norris v West (1999) 12 Vet App 304, 1999 US App Vet Claims LEXIS 199

SUBCHAPTER V. RETIREMENT AND SURVIVORS ANNUITIES

§ 7296. Retirement of judges
§ 7296. Retirement of judges

(a) For purposes of this section:
(1) The term "Court" means the United States Court of Appeals for Veterans Claims.
(2) The term "judge" means a judge of the Court.

(b) (1) A judge who meets the age and service requirements set forth in the following table may retire:

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<th>The judge has attained age:</th>
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(2) A judge who is not reappointed following the expiration of the term for which appointed may retire upon the completion of that term if the judge has served as a judge of the Court for 15 years or more.
(3) A judge who becomes permanently disabled and as a result of that disability is unable to perform the duties of the office shall retire.

(c) (1) An individual who retires under subsection (b) of this section and elects under subsection (d) of this section to receive retired pay under this subsection shall (except as provided in paragraph (2) of this subsection) receive retired pay as follows:
(A) In the case of a judge who is a recall-eligible retired judge under section 7257 of this title [38 USCS § 7257] or who was a recall-eligible retired judge under that section and was removed from recall status under subsection (b)(4) of that section by reason of disability, the retired pay of the judge shall be the pay of a judge of the court.
(B) In the case of a judge who at the time of retirement did not provide notice under section 7257 of this title [38 USCS § 7257] of availability for service in a recalled status, the retired pay of the judge shall be the rate of pay applicable to that judge at the time of retirement.
(C) In the case of a judge who was a recall-eligible retired judge under section 7257 of this title [38 USCS § 7257] and was removed from recall status under subsection (b)(3) of that section, the retired pay of the judge shall be the pay of the judge at the time of the removal from recall status.

(2) An individual who serves as a judge for less than 10 years and who retires under subsection (b)(3) of this section and elects under subsection (d) of this section to receive retired pay under this subsection shall receive retired pay at a rate equal to one-half of the rate of pay in effect at the time of retirement.
(3) Retired pay under this subsection shall begin to accrue on the day following the day on which the individual's salary as judge ceases to accrue and shall continue to
accrue during the remainder of the individual's life. Retired pay under this subsection shall be paid in the same manner as the salary of a judge.

(d) (1) A judge may elect to receive retired pay under subsection (c) of this section. Such an election--

(A) may be made only while an individual is a judge (except that, in the case of an individual who fails to be reappointed as judge at the expiration of a term of office, the election may be made at any time before the date after the day on which the individual's successor takes office); and

(B) may not be revoked after the retired pay begins to accrue.

(2) In the case of a judge other than the chief judge, such an election shall be made by filing notice of the election in writing with the chief judge. In the case of the chief judge, such an election shall be made by filing notice of the election in writing with the Director of the Office of Personnel Management.

(3) The chief judge shall transmit to the Director of the Office of Personnel Management a copy of each notice filed with the chief judge under this subsection.

(e) If an individual for whom an election to receive retired pay under subsection (c) is in effect accepts compensation for employment with the United States, the individual shall, to the extent of the amount of that compensation, forfeit all rights to retired pay under subsection (c) of this section for the period for which the compensation is received.

(f) (1) Except as otherwise provided in this subsection, the provisions of the civil service retirement laws (including the provisions relating to the deduction and withholding of amounts from basic pay, salary, and compensation) shall apply with respect to service as a judge as if this section had not been enacted.

(2) In the case of any individual who has filed an election to receive retired pay under subsection (c) of this section--

(A) no annuity or other payment shall be payable to any person under the civil service retirement laws with respect to any service performed by such individual (whether performed before or after such election is filed and whether performed as judge or otherwise) except as authorized by section 8440d of title 5 [5 USCS § 8440d];

(B) no deduction for purposes of the Civil Service Retirement and Disability Fund shall be made from retired pay payable to that individual under subsection (c) of this section or from any other salary, pay, or compensation payable to that individual, for any period beginning after the day on which such election is filed; and

(C) such individual shall be paid the lump-sum credit computed under section 8331(8) or 8401(a) of title 5 [5 USCS § 8331(8) or 8401(a)], whichever applies, upon making application therefor with the Office of Personnel Management.

(3) (A) A cost-of-living adjustment provided by law in annuities payable under civil service retirement laws shall apply to retired pay under this section only in the case of retired pay computed under paragraph (2) of subsection (c).

(B) If such a cost-of-living adjustment would (but for this subparagraph) result in the retired pay of a retired judge being in excess of the annual rate of pay in effect for judges of the Court as provided in section 7253(e) of this title [38 USCS § 7253(e)], such adjustment may be made only in such amount as results in the
retired pay of the retired judge being equal to that annual rate of pay (as in effect on the effective date of such adjustment).

(g) (1) A judge who becomes permanently disabled and as a result of that disability is unable to perform the duties of the office shall certify to the President in writing that such permanent disability exists. If the chief judge retires for such a disability, the retirement of the chief judge shall not take effect until concurred in by the President. If any other judge retires for such a disability, the chief judge shall furnish to the President a certificate of disability signed by the chief judge.

(2) Whenever the President finds that a judge has become permanently disabled and as a result of that disability is unable to perform the duties of the office, the President shall declare that judge to be retired. Before a judge may be retired under this paragraph, the judge shall be provided with a full specification of the reasons for the retirement and an opportunity to be heard.

(h) (1) An individual who has filed an election to receive retired pay under subsection (c) of this section may revoke such election at any time before the first day on which retired pay would (but for such revocation) begin to accrue with respect to such individual.

(2) Any revocation under this subsection shall be made by filing a notice of the election in writing with the Director of the Office of Personnel Management. The Office of Personnel Management shall transmit to the chief judge a copy of each notice filed under this subsection.

(3) In the case of a revocation under this subsection--

(A) for purposes of this section, the individual shall be treated as not having filed an election to receive retired pay under subsection (c) of this section;

(B) for purposes of section 7297 of this title [38 USCS § 7297]--

(i) the individual shall be treated as not having filed an election under section 7297(b) of this title [38 USCS § 7297(b)], and

(ii) section 7297(e) of this title [38 USCS § 7297(e)] shall not apply and the amount credited to such individual's account (together with interest at 3 percent per year, compounded on December 31 of each year to the date on which the revocation is filed) shall be returned to the individual;

(C) no credit shall be allowed for any service as a judge of the Court unless with respect to such service either there has been deducted and withheld the amount required by the civil service retirement laws or there has been deposited in the Civil Service Retirement and Disability Fund an amount equal to the amount so required, with interest;

(D) the Court shall deposit in the Civil Service Retirement and Disability Fund an amount equal to the additional amount it would have contributed to such Fund but for the election under subsection (d); and

(E) if subparagraphs (C) and (D) of this paragraph are complied with, service on the Court shall be treated as service with respect to which deductions and contributions had been made during the period of service.

(i) (1) Beginning with the next pay period after the Director of the Office of Personnel Management receives a notice under subsection (d) of this section that a judge has elected to receive retired pay under this section, the Director shall deduct and withhold 1 percent of the salary of such judge. Amounts shall be so deducted and withheld in a manner...
determined by the Director. Amounts deducted and withheld under this subsection shall be deposited in the Treasury of the United States to the credit of the Court of Appeals for Veterans Claims Judges Retirement Fund. Deductions under this subsection from the salary of a judge shall terminate upon the retirement of the judge or upon the completion of 15 years of service for which either deductions under this subsection or a deposit under subsection (j) of this section has been made, whichever occurs first.

(2) Each judge who makes an election under subsection (d) of this section shall be considered to agree to the deductions from salary which are made under paragraph (1) of this subsection.

(j) A judge who makes an election under subsection (d) of this section shall deposit, for service on the Court performed before the election for which contributions may be made under this section, an amount equal to 1 percent of the salary received for the first years, not exceeding 15 years, of that service. Retired pay may not be allowed until a deposit required by this subsection has been made.

(k) The amounts deducted and withheld under subsection (i) of this section, and the amounts deposited under subsection (j) of this section, shall be deposited in the Court of Appeals for Veterans Claims Retirement Fund for credit to individual accounts in the name of each judge from whom such amounts are received.

References in text:
The "civil service retirement laws", referred to subsecs. (f) and (h), appear generally as 5 USCS §§ 8331 et seq.
The "Civil Service Retirement and Disability Fund", referred to in subsecs. (f) and (h), is provided for in 5 USCS § 8348.
The "Court of Appeals for Veterans Claims Retirement Fund", referred to in subsecs. (i) and (j), is provided for in 38 USCS § 7298.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4096, as 38 USCS § 7296, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).
Act Aug. 6, 1991, in subsec. (f)(2)(A), inserted "except as authorized by section 8440c of title 5".

1998. Act Nov. 11, 1998 (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsecs. (a)(1), (i)(1), and (k), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

1999. Act Nov. 30, 1999, in subsec. (c), in para. (1), substituted "as follows:" and subparas. (A)-(C) for "at the rate of pay in effect at the time of retirement."; and, in subsec. (f), added para. (3).
Such Act further (effective and applicable as provided by § 1036 of such Act, which appears as 38 USCS § 7253 note), in subsec. (a)(2), substituted "a judge" for "the chief judge or an associate judge".

2001. Act Dec. 27, 2001, in subsec. (b)(2), deleted "In order to retire under this paragraph, a judge must, not earlier than 9 months preceding the date of the expiration of the judge’s term
of office and not later than 6 months preceding such date, advise the President in writing that the judge is willing to accept reappointment to the Court." following the concluding period.

Other provisions:

Transitional provisions to stagger terms of judges; definition. Act Nov. 30, 1999, P. L. 106-117, Title X, § 1002, 113 Stat. 1588, provides: "In this title [for full classification, consult USCS Tables volumes], the term 'Court' means the United States Court of Appeals for Veterans Claims.


"Sec. 1011. Early retirement authority for current judges.

"(a) Retirement authorized. One eligible judge may retire in accordance with this section in 2000 or 2001, and one additional eligible judge may retire in accordance with this section in 2001.

"(b) Eligible judges. For purposes of this section, an eligible judge is a judge of the Court (other than the chief judge) who--

"(1) has at least 10 years of service creditable under section 7296 of title 38, United States Code;

"(2) has made an election to receive retired pay under section 7296 of such title;

"(3) has at least 20 years of service described in section 7297(l) of such title; and

"(4) is at least 55 years of age.

"(c) Multiple eligible judges. If for any year specified in subsection (a) more than one eligible judge provides notice in accordance with subsection (d), the judge who has the greatest seniority as a judge of the Court shall be the judge who is eligible to retire in accordance with this section in that year.

"(d) Notice. An eligible judge who desires to retire in accordance with this section with respect to any year covered by subsection (a) shall provide to the President and the chief judge of the Court written notice to that effect and stating that the judge agrees to the temporary service requirements of subsection (j). Such notice shall be provided not later than April 1 of that year and shall specify the retirement date in accordance with subsection (e). Notice provided under this subsection shall be irrevocable.

"(e) Date of retirement. A judge who is eligible to retire in accordance with this section shall be retired during the calendar year as to which notice is provided pursuant to subsection (d), but not earlier than 30 days after the date on which that notice is provided pursuant to subsection (d).

"(f) Applicable provisions. Except as provided in subsections (g) and (j), a judge retired in accordance with this section shall be considered for all purposes to be retired under section 7296(b)(1) of title 38, United States Code.

"(g) Applicability of recall status authority. The provisions of section 7257 of this title shall apply to a judge retired in accordance with this section as if the judge is a judge specified in subsection (a)(2)(A) of that section.

"(h) Rate of retired pay. The rate of retired pay for a judge retiring in accordance with this section is--

"(1) the rate applicable to that judge under section 7296(c)(1) of title 38, United States Code, multiplied by

"(2) the fraction (not in excess of 1) in which--
"(A) the numerator is the number of years of service of the judge as a judge of the Court creditable under section 7296 of such title; and

"(B) the denominator is 15.

"(i) Adjustments in retired pay for judges available for recall. Subject to section 7296(f)(3)(B) of title 38, United States Code, an adjustment provided by law in annuities payable under civil service retirement laws shall apply to retired pay under this section in the case of a judge who is a recall-eligible retired judge under section 7257 of such title or who was a recall-eligible retired judge under that section and was removed from recall status under subsection (b)(4) of that section by reason of disability.

"(j) [Omitted-This subsection amended 38 USCS § 7298(e)(2).]

"(k) Transitional service of judge retired under this section.(1) A judge who retires under this section shall continue to serve on the Court during the period beginning on the effective date of the judge's retirement under subsection (e) and ending on the earlier of--

"(A) the date on which a person is appointed to the position on the Court vacated by the judge's retirement; and

"(B) the date on which the judge's original appointment to the court would have expired.

"(2) Subsections (f) and (g) of section 7253 of title 38, United States Code, shall apply with respect to the service of a judge on the Court under this section.

"(3) Notwithstanding any other provision of law, a person whose service as a judge of the Court continues under this section shall be paid for the period of service under this subsection at the rate that is the difference between the current rate of pay for a judge of the Court and the rate of the judge's retired pay under subsection (g).

"(4) Amounts paid under paragraph (3)--

"(A) shall not be treated as--

"(i) compensation for employment with the United States for purposes of section 7296(e) of title 38, United States Code, or any provision of title 5, United States Code, relating to the receipt or forfeiture of retired pay or retirement annuities by a person accepting compensation for employment with the United States; or

"(ii) pay for purposes of deductions or contributions for or on behalf of the person to retired pay under subchapter V of chapter 72 of title 38, United States Code [38 USCS §§ 7296 et seq.], or under chapter 83 or 84 of title 5, United States Code [5 USCS §§ 8301 et seq. or 8401 et seq.], as applicable; but

"(B) may, at the election of the person, be treated as pay for purposes of deductions or contributions for or on behalf of the person to a retirement or other annuity, or both, under subchapter V of chapter 72 of title 38, United States Code [38 USCS §§ 7296 et seq.], or under chapter 83 or 84 of title 5, United States Code [5 USCS §§ 8301 et seq. or 8401 et seq.], as applicable.

"(5) Amounts paid under paragraph (3) shall be derived from amounts available for payment of salaries and benefits of judges of the Court.

"(6) The service as a judge of the Court under this subsection of a person who makes an election provided for under paragraph (4)(B) shall constitute creditable service toward the judge's years of judicial service for purposes of section 7297 of title 38, United States Code, with such service creditable at a rate equal to the rate at which such service would be creditable for such purposes if served by a judge of the Court under chapter 72 of that
title [38 USCS §§ 7251 et seq.]. For purposes of subsection (k)(3) of that section, the average annual pay for such service shall be the sum of the judge's retired pay and the amount paid under paragraph (3) of this subsection.

"(7) In the case of such a person who makes an election provided for under paragraph (4)(B), upon the termination of the service of that person as a judge of the Court under this subsection, the retired pay of that person under subsection (g) shall be recomputed to reflect the additional period of service served under this subsection.

"(l) Treatment of political party membership. For purposes of determining compliance with the last sentence of section 7253(b) of title 38, United States Code, the political party membership of a judge serving on the Court under subsection (j) shall not be taken into account.

"Sec. 1012. Modified terms for next two judges appointed to the court.

"(a) Modified terms. The term of office of the first two judges appointed to the Court after the date of the enactment of this Act shall be 13 years (rather than the period specified in section 7253(c) of title 38, United States Code).

"(b) Eligibility for retirement. (1) For purposes of determining the eligibility to retire under section 7296 of title 38, United States Code, of the two judges of the Court whose term of office is determined under subsection (a)--

"(A) the age and service requirements in the table in paragraph (2) shall apply to those judges rather than the otherwise applicable age and service requirements specified in the table in subsection (b)(1) of that section; and

"(B) the minimum years of service applicable to those judges for eligibility to retire under the first sentence of subsection (b)(2) of that section shall be 13 years instead of 15 years.

"(2) The age and service requirements in this paragraph are as follows:

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<th>The judge has as a judge</th>
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Transitional provisions to stagger terms of judges; ineligibility of judges on temporary service. Act Nov. 30, 1999, P. L. 106-117, Title X, Subtitle C, § 1032(b), 113 Stat. 1595, provides: "A person serving as a judge of the Court under section 1011 [note to this section] may not serve as chief judge of the Court.".

Cross References

This section is referred to in 5 USCS §§ 8334, 8402, 8440d; 28 USCS §§ 178, 377; 38 USCS §§ 7297, 7298

§ 7297. Survivor annuities

(a) For purposes of this section:

(1) The term "Court" means the United States Court of Appeals for Veterans Claims.
(2) The term "judge" means a judge the chief judge or an associate judge of the Court who is in active service or who has retired under section 7296 of this title [38 USCS § 7296].

(3) The term "pay" means salary received under section 7253(e) of this title [38 USCS § 7253(e)] and retired pay received under section 7296 of this title [38 USCS § 7296].

(4) The term "retirement fund" means the Court of Appeals for Veterans Claims Retirement Fund established under section 7298 of this title [38 USCS § 7298].

(5) The term "surviving spouse" means a surviving spouse of an individual who (A) was married to such individual for at least one year immediately preceding the individual's death, or (B) is a parent of issue by the marriage.

(6) The term "dependent child" has the meaning given the term "child" in section 376(a)(5) of title 28 [28 USCS § 376(a)(5)].

(7) The term "Member of Congress" means a Representative, a Senator, a Delegate to Congress, or the Resident Commissioner of Puerto Rico.

(8) The term "assassination" as applied to a judge shall have the meaning provided that term in section 376(a)(7) of title 28 [28 USCS § 376(a)(7)] as applied to a judicial official.

(b) A judge may become a participant in the annuity program under this section by filing a written election under this subsection while in office or within six months after the date on which the judge marries if the judge has retired under section 7296 of this title [38 USCS § 7296]. Any such election shall be made in such manner as may be prescribed by the Court.

(c) There shall be deducted and withheld each pay period from the pay of a judge who has made an election under subsection (b) of this section a sum equal to that percentage of the judge's pay that is the same as provided for the deduction from the salary or retirement salary of a judge of the United States Court of Federal Claims for the purpose of a survivor annuity under section 376(b)(1)(B) of title 28 [28 USCS § 376(b)(1)(B)]. Amounts so deducted and withheld shall be deposited in the retirement fund. A judge who makes an election under subsection (b) of this section shall be considered by that election to agree to the deductions from the judge's pay required by this subsection.

(d) (1) A judge who makes an election under subsection (b) of this section shall deposit, with interest at 3 percent per year compounded on December 31 of each year, to the credit of the retirement fund, an amount equal to 3.5 percent of the judge's pay and of the judge's basic salary, pay, or compensation for service as a Member of Congress, and for any other civilian service within the purview of section 8332 of title 5 [5 USCS § 8332]. Each such judge may elect to make such deposits in installments during the judge's period of service in such amount and under such conditions as may be determined in each instance by the chief judge. Notwithstanding the failure of a judge to make such deposit, credit shall be allowed for the service rendered, but the annual annuity of the surviving spouse of such judge shall be reduced by an amount equal to 10 percent of the amount of such deposit, computed as of the date of the death of such judge, unless the surviving spouse elects to eliminate such service entirely from credit under subsection (k) of this section. However, a deposit shall not be required from a judge for any year with respect
to which deductions from the judge's pay, or a deposit, were actually made (and not withdrawn) under the civil service retirement laws.

(2) The interest required under the first sentence of paragraph (1) shall not be required for any period--

(A) during which a judge was separated from any service described in section 376(d)(2) of title 28 [28 USCS § 376(d)(2)]; and

(B) during which the judge was not receiving retired pay based on service as a judge or receiving any retirement salary as described in section 376(d)(1) of title 28 [28 USCS § 376(d)(1)].

(e) If the service of a judge who makes an election under subsection (b) of this section terminates other than pursuant to the provisions of section 7296 of this title [38 USCS § 7296], or if any judge ceases to be married after making the election under subsection (b) of this section and revokes (in a writing filed as provided in subsection (b) of this section) such election, the amount credited to the judge's individual account (together with interest at 3 percent per year compounded on December 31 of each year to the date of the judge's relinquishment of office) shall be returned to the judge. For the purpose of this section, the service of a judge making an election under subsection (b) of this section shall be considered to have terminated pursuant to section 7296 of this title [38 USCS § 7296] if--

(1) the judge is not reappointed following expiration of the term for which appointed; and

(2) at or before the time of the expiration of that term, the judge is eligible for and elects to receive retired pay under section 7296 of this title [38 USCS § 7296].

(f) (1) If a judge who makes an election under subsection (b) of this section dies after having rendered at least 18 months of civilian service (computed as prescribed in subsection (1) of this section), for the last 18 months of which the salary deductions provided for by subsection (c) of this section or the deposits required by subsection (d) of this section have actually been made (and not withdrawn) or the salary deductions required by the civil service retirement laws have actually been made (and not withdrawn)--

(A) if the judge is survived by a surviving spouse but not by a dependent child, there shall be paid to the surviving spouse an annuity beginning with the day of the death of the judge, in an amount computed as provided in subsection (k) of this section; or

(B) if the judge is survived by a surviving spouse and a dependent child or children, there shall be paid to the surviving spouse an immediate annuity in an amount computed as provided in subsection (k) of this section and there shall also be paid to or on behalf of each such child an immediate annuity equal to the lesser of--

(i) 10 percent of the average annual pay of such judge (determined in accordance with subsection (k) of this section), or

(ii) 20 percent of such average annual pay, divided by the number of such children; or

(C) if the judge is not survived by a surviving spouse but is survived by a dependent child or children, there shall be paid to or on behalf of each such child an immediate annuity equal to the lesser of--
(i) 20 percent of the average annual pay of such judge (determined in accordance with subsection (k) of this section), or
(ii) 40 percent of such average annual pay, divided by the number of such children.

(2) The annuity payable to a surviving spouse under this subsection shall be terminated--
   (A) upon the surviving spouse's death; or
   (B) upon the remarriage of the surviving spouse before age 55.

(3) The annuity payable to a child under this subsection shall be terminated upon the child's death.

(4) In case of the death of a surviving spouse of a judge leaving a dependent child or children of the judge surviving the spouse, the annuity of such child or children under paragraph (1)(B) of this subsection shall be recomputed and paid as provided in paragraph (1)(C) of this subsection. In any case in which the annuity of a dependent child is terminated, the annuities of any remaining dependent child or children, based upon the service of the same judge, shall be recomputed and paid as though the child whose annuity was so terminated had not survived the judge.

(5) If a judge dies as a result of an assassination and leaves a survivor or survivors who are otherwise entitled to receive annuity payments under this section, the 18-month requirement in the matter in paragraph (1) preceding subparagraph (A) shall not apply.

(g) Questions of family relationships, dependency, and disability arising under this section shall be determined in the same manner as such questions arising under chapter 84 of title 5 [5 USCS §§ 8401 et seq.] are determined.

(h) (1) If-
   (A) a judge making an election under subsection (b) of this section dies while in office (i) before having rendered 5 years of civilian service computed as prescribed in subsection (l) of this section, or (ii) after having rendered 5 years of such civilian service but without a survivor entitled to annuity benefits provided by subsection (f) of this section; or
   (B) the right of all persons entitled to an annuity under subsection (f) of this section based on the service of such judge terminates before a claim for such benefits has been established,
the total amount credited to the individual account of such judge (with interest at 3 percent per year, compounded on December 31 of each year, to the date of the death of such judge) shall be paid in the manner specified in paragraph (2) of this subsection.

(2) An amount payable under paragraph (1) of this subsection shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date title to the payment arises, in the following order of precedence:
   (A) To the beneficiary or beneficiaries whom the judge designated in writing filed before death with the chief judge (except that in the case of the chief judge such designation shall be filed before death as prescribed by the Court).
   (B) To the surviving spouse of the judge.
(C) To the child or children of the judge (and the descendants of any deceased children by representation).
(D) To the parents of the judge or the survivor of them.
(E) To the executor or administrator of the estate of the judge.
(F) To such other next of kin of the judge as may be determined by the chief judge to be entitled under the laws of the domicile of the judge at the time of the judge's death.

(3) Determination as to the surviving spouse, child, or parent of a judge for the purposes of paragraph (2) of this subsection shall be made without regard to the definitions in subsection (a) of this section.

(4) Payment under this subsection in the manner provided in this subsection shall be a bar to recovery by any other person.

(5) In a case in which the annuities of all persons entitled to annuity based upon the service of a judge terminate before the aggregate amount of annuity paid equals the total amount credited to the individual account of such judge (with interest at 3 percent per year, compounded on December 31 of each year to the date of the death of the judge), the difference shall be paid, upon establishment of a valid claim therefor, in the order of precedence prescribed in paragraph (2) of this subsection.

(6) Any accrued annuity remaining unpaid upon the termination (other than by death) of the annuity of any individual based upon the service of a judge shall be paid to that individual. Any accrued annuity remaining unpaid upon the death of an individual receiving an annuity based upon the service of a judge shall be paid, upon the establishment of a valid claim therefor, in the following order of precedence:

(A) To the executor or administrator of the estate of that person.
(B) After 30 days after the date of the death of such individual, to such individual or individuals as may appear in the judgment of the chief judge to be legally entitled thereto.

Such payment shall be a bar to recovery by any other individual.

(i) When a payment under this section is to be made to a minor, or to a person mentally incompetent or under other legal disability adjudged by a court of competent jurisdiction, the payment may be made to the person who is constituted guardian or other fiduciary by the law of the State of residence of such claimant or is otherwise legally vested with the care of the claimant or the claimant's estate. If no guardian or other fiduciary of the person under legal disability has been appointed under the laws of the State of residence of the claimant, the chief judge shall determine the person who is otherwise legally vested with the care of the claimant or the claimant's estate.

(j) Annuities under this section shall accrue monthly and shall be due and payable in monthly installments on the first business day of the month following the month or other period for which the annuity has accrued. An annuity under this section is not assignable, either in law or in equity, or subject to execution, levy, attachment, garnishment, or other legal process.

(k) (1) The annuity of the surviving spouse of a judge making an election under subsection (b) of this section shall be an amount equal to the sum of the following:

(A) The product of--

(i) 1.5 percent of the judge's average annual pay; and
(ii) the sum of the judge's years of judicial service, the judge's years of prior allowable service as a Member of Congress, the judge's years of prior allowable service performed as a member of the Armed Forces, and the judge's years, not exceeding 15, of prior allowable service performed as a congressional employee (as defined in section 2107 of title 5 [5 USCS § 2107]).

(B) Three-fourths of 1 percent of the judge's average annual pay multiplied by the judge's years of allowable service not counted under subparagraph (A) of this paragraph.

(2) An annuity computed under this subsection may not exceed 50 percent of the judge's average annual pay and may not be less than 25 percent of such average annual pay. Such annuity shall be further reduced in accordance with subsection (d) of this section (if applicable).

(3) For purposes of this subsection, the term "average annual pay", with respect to a judge, means the average annual pay received by the judge for judicial service (including periods in which the judge received retired pay under section 7296(d) of this title [38 USCS § 7296(d)]) or for any other prior allowable service during the period of three consecutive years in which the judge received the largest such average annual pay.

(l) Subject to subsection (d) of this section, the years of service of a judge which are allowable as the basis for calculating the amount of the annuity of the judge's surviving spouse shall include the judge's years of service as a judge of the Court, the judge's years of service as a Member of Congress, the judge's years of active service as a member of the Armed Forces not exceeding 5 years in the aggregate and not including any such service for which credit is allowed for the purposes of retirement or retired pay under any other provision of law, and the judge's years of any other civilian service within the purview of section 8332 of title 5 [5 USCS § 8332].

(m) Nothing contained in this section shall be construed to prevent a surviving spouse eligible therefor from simultaneously receiving an annuity under this section and any annuity to which such spouse would otherwise be entitled under any other law without regard to this section, but in computing such other annuity service used in the computation of such spouse's annuity under this section shall not be credited.

(n) A judge making an election under subsection (b) of this section shall, at the time of such election, waive all benefits under the civil service retirement laws except section 8440d of title 5 [5 USCS § 8440d]. Such a waiver shall be made in the same manner and shall have the same force and effect as an election filed under section 7296(d) of this title [38 USCS § 7296(d)].

(o) Each survivor annuity payable from the retirement fund shall be increased at the same time as, and by the same percentage by which, annuities payable from the Judicial Survivors' Annuities Fund are increased pursuant to section 376(m) of title 28 [28 USCS § 376(m)].
The "civil service retirement laws", referred to in subsecs. (d), (f) and (n), appear generally as 5 USCS §§ 8331 et seq.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4097, as 38 USCS § 7297, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (h)(1)(A)(i), substituted "subsection (l)" for "subsection (1)".

Act Aug. 6, 1991, in subsec. (n), inserted "except section 8440c of title 5".

Act Dec. 9, 1991, in subsec. (n), substituted "8440d" for "8440c".

1998. Act Nov. 11, 1998 substituted subsec. (o) for one which read: "(o) Whenever the salaries of judges paid under section 7253(e) of this title are increased, each annuity payable from the retirement fund which is based, in whole or in part, upon a deceased judge having rendered some portion of that judge's final 18 months of service as a judge of the Court, shall also be increased. The amount of the increase in the annuity shall be determined by multiplying the amount of the annuity on the date on which the increase in salaries becomes effective by 3 percent for each full 5 percent by which those salaries were increased."

Such Act further (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note), in subsec. (a), in paras. (1) and (4), substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

1999. Act Nov. 30, 1999, in subsec. (a), in para. (2), inserted "who is in active service or who has retired under section 7296 of this title", in para. (3), substituted "7296" for "7296(c)", in para. (5), substituted "one year" for "two years", and added para. (8); in subsec. (b), inserted "or within six months after the date on which the judge marries if the judge has retired under section 7296 of this title"; in subsec. (c), substituted "that percentage of the judge's pay that is the same as provided for the deduction from the salary or retirement salary of a judge of the United States Court of Federal Claims for the purpose of a survivor annuity under section 376(b)(1)(B) of title 28" for "3.5 percent of the judge's pay"; in subsec. (d), designated the existing provisions as para. (1) and added para. (2); and, in subsec. (f), in para. (1), in the introductory matter, substituted "at least 18 months" for "at least 5 years" and substituted "last 18 months" for "last 5 years", in subpara. (A), deleted "or following the surviving spouse's attainment of the age of 50 years, whichever is the later" after "death of the judge", and added para. (5).

Such Act further (effective and applicable as provided by § 1036 of such Act, which appears as 38 USCS § 7253 note), in subsec. (a)(2), substituted "a judge" for "the chief judge or an associate judge".

Cross References

This section is referred to in 38 USCS §§ 7296, 7298

§ 7298. Retirement Fund

(a) There is established in the Treasury a fund known as the Court of Appeals for Veterans Claims Retirement Fund.

(b) Amounts in the fund are available for the payment of judges' retired pay under section 7296 of this title [38 USCS § 7296] and of annuities, refunds, and allowances under section 7297 of this title [38 USCS § 7297].
(c) Amounts deposited by, or deducted and withheld from the salary and retired pay of, a judge under section 7296 or 7297 of this title [38 USCS § 7296 or 7297] shall be deposited in the fund and credited to an individual account of the judge.

(d) The chief judge of the Court of Appeals for Veterans Claims shall submit to the President an annual estimate of the expenditures and appropriations necessary for the maintenance and operation of the fund, and such supplemental and deficiency estimates as may be required from time to time for the same purposes, according to law.

(e) (1) The chief judge may cause periodic examinations of the retirement fund to be made by an actuary, who may be an actuary employed by another department of the Government temporarily assigned for the purpose.

(2) (A) Subject to the availability of appropriations, there shall be deposited in the Treasury to the credit of the retirement fund, not later than the close of each fiscal year, such amounts as may be required to reduce to zero the unfunded liability (if any) of the fund. Such deposits shall be taken from sums available for that fiscal year for the payment of the expenses of the Court.

(B) For purposes of subparagraph (A) of this paragraph, the term "unfunded liability", with respect to any fiscal year, means the amount estimated by the chief judge to be equal to the excess (as of the close of that fiscal year) of--

(i) the present value of all benefits payable from the fund (determined on an annual basis in accordance with section 9503 of title 31 [31 USCS § 9503]), over

(ii) the sum of--

(I) the present values of future deductions under sections 7296(i) and 7297(c) of this title [38 USCS §§ 7296(i) and 7297(c)] and future deposits under sections 7296(j) and 7296(d) of this title [38 USCS §§ 7296(j) and 7296(d)], and

(II) the balance in the fund as of the close of the fiscal year.

(C) For purposes of subparagraph (B), the term "present value" includes a value determined by an actuary with respect to a payment that may be made under subsection (b) from the retirement fund within the contemplation of law.

(D) Amounts deposited in the retirement fund under this paragraph shall not be credited to the account of any individual.

(f) The Secretary of the Treasury shall invest from time to time, in interest-bearing securities of the United States, such portions of the retirement fund as in such Secretary's judgment may not be immediately required for payments from the fund. The income derived from such investments shall constitute a part of the fund.

(g) For purpose of section 255(g)(1)(B) of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 905(g)(1)(B)), the retirement fund shall be treated in the same manner as the Claims Judges' Retirement Fund.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4098, as 38 USCS § 7298, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Such Act further (effective on the first day of the first month beginning more than 90 days after enactment, as provided by § 513 of such Act, which appears as 38 USCS § 7251 note) substituted the section heading for one which read: “§ 7298. Court of Veterans Appeals Retirement Fund” and, in subsecs. (a) and (d), substituted “Court of Appeals for Veterans Claims” for “Court of Veterans Appeals”.

1999. Act Nov. 30, 1999, in subsec. (e)(2), redesignated subpara. (C) as subpara. (D), and added new subpara. (C).

Cross References
This section is referred to in 38 USCS § 7297

§ 7299. Limitation on activities of retired judges

(a) A retired judge of the Court who is recall-eligible under section 7257 of this title [38 USCS § 7257] and who in the practice of law represents (or supervises or directs the representation of) a client in making any claim relating to veterans' benefits against the United States or any agency thereof shall, pursuant to such section, be considered to have declined recall service and be removed from the status of a recall-eligible judge. The pay of such a judge, pursuant to section 7296 of this title [38 USCS § 7296], shall be the pay of the judge at the time of the removal from recall status.

(b) A recall-eligible judge shall be considered to be an officer or employee of the United States, but only during periods when the judge is serving in recall status. Any prohibition, limitation, or restriction that would otherwise apply to the activities of a recall-eligible judge shall apply only during periods when the judge is serving in recall status.

CHAPTER 73. VETERANS HEALTH ADMINISTRATION-ORGANIZATION AND FUNCTIONS

SUBCHAPTER I. ORGANIZATION
SUBCHAPTER II. GENERAL AUTHORITY AND ADMINISTRATION
SUBCHAPTER III. PROTECTION OF PATIENT RIGHTS
SUBCHAPTER IV. RESEARCH CORPORATIONS

Amendments:
1966. Act Nov. 7, 1966, P. L. 89-785, Title I, §§ 109(b), 111(d), 112(b), 80 Stat. 1371, 1372, in item 4112, substituted “Special Medical Advisory group; other advisory bodies” for “Medical advisory Group”, in item 4114, substituted “Temporary full-time, part-time, and without compensation appointments” for “Temporary and part-time appointments”, and added item 4117.


1988. Act May 20, 1988, P. L. 100-322, Title I, § 122(b), Title II, §§ 204(b), 212(a)(2), 216(e)(1), 102 Stat. 504, 512, 516, 530, added item 4210 [4120] after item 4119, in item 4133, substituted "Nondiscrimination against alcohol and drug abusers and persons infected with human immunodeficiency virus" for "Nondiscrimination in the admission of alcohol and drug abusers to Veterans' Administration health care facilities", in item 4134, substituted "Regulations" for "Coordination; reports" struck out heading for Subchapter IV, which read: "VETERANS' ADMINISTRATION HEALTH PROFESSIONAL SCHOLARSHIP PROGRAM" and items 4141 "Establishment of program; purpose; duration", 4142 "Eligibility; application; written contract", 4143 "Obligated service", 4144 "Breach of contract; liability; waiver", 4145 "Exemption of scholarship payments from taxation", and 4146 "Program subject to availability of appropriations", and added heading for subchapter VI and items 4161-4168.


1991. Act May 7, 1991, P. L. 102-40, Title IV, § 401(a)(1), (3), 105 Stat. 210, substituted the Chapter heading for one which read: "CHAPTER 73. DEPARTMENT OF MEDICINE AND SURGERY", and substituted the Chapter analysis for one which read:

"SUBCHAPTER I. ORGANIZATION; GENERAL

"Section
"4101. Functions of Department.
"4102. Divisions of Department.
"4103. Office of the Chief Medical Director.
"4104. Additional appointments.
"4105. Qualifications of appointees.
"4106. Period of appointments; promotions.
"4107. Grades and pay scales.
"4108. Personnel administration.
"4109. Retirement rights.
"4110. Disciplinary boards.
"4111. Appointment of additional employees.
"4112. Special Medical Advisory Group; other advisory bodies.
"4113. Travel expenses of employees.

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"4114. Temporary full-time, part-time, and without compensation appointments; residencies or internships.

"4115. Regulations.

"4116. Defense of certain malpractice and negligence suits.

"4117. Contracts for scarce medical specialist services.

"4118. Special pay for physicians and dentists.

"4119. Relationship between this subchapter and other provisions of law.

"4210. Recruitment and retention bonus pay for nurses and certain other health-care personnel.

"SUBCHAPTER II. REGIONAL MEDICAL EDUCATION CENTERS

"4121. Designation of Regional Medical Education Centers.

"4122. Supervision and staffing of Centers.

"4123. Personnel eligible for training.

"4124. Consultation.

"SUBCHAPTER III. PROTECTION OF PATIENT RIGHTS

"4131. Informed consent.

"4132. Confidentiality of certain medical records.

"4133. Nondiscrimination against alcohol and drug abusers and persons infected with human immunodeficiency virus.

"4134. Regulations.

"SUBCHAPTER IV. PAY FOR NURSES AND OTHER HEALTH-CARE PERSONNEL

"4141. Nurses and other health-care personnel: competitive pay.

"4142. Nurses and other health-care personnel: administration of pay.

"SUBCHAPTER V. QUALITY ASSURANCE

"4151. Quality assurance program.

"4152. Quality-assurance reports.

"SUBCHAPTER VI. RESEARCH CORPORATIONS

"4161. Authority to establish; status.

"4162. Purpose of corporations.

"4163. Board of directors; executive director.

"4164. General powers.

"4165. Applicable State law.

"4166. Accountability and oversight.

"4167. Report to Congress.

"4168. Expiration of authority."


SUBCHAPTER I. ORGANIZATION

§ 7301. Functions of Veterans Health Administration: in general
§ 7302. Functions of Veterans Health Administration: health-care personnel education and training programs
§ 7303. Functions of Veterans Health Administration: research programs
§ 7304. Regulations
§ 7305. Divisions of Veterans Health Administration
§ 7306. Office of the Under Secretary for Health
§ 7307. Office of Research Oversight

§ 7301. Functions of Veterans Health Administration: in general

(a) There is in the Department of Veterans Affairs a Veterans Health Administration. The Under Secretary for Health is the head of the Administration. The Under Secretary for Health may be referred to as the Chief Medical Director.

(b) The primary function of the Administration is to provide a complete medical and hospital service for the medical care and treatment of veterans, as provided in this title and in regulations prescribed by the Secretary pursuant to this title.

Amendments:

1992. Act Oct. 9, 1992, in subsec. (a), substituted "Under Secretary for Health" for "Chief Medical Director" and added "The Under Secretary for Health may be referred to as the Chief Medical Director."

Research Guide

Am Jur:
Three-year delay in filing appeal could not be excused because of discovery of statute enacted after close of record in appellant's appeal since statute did not warrant different outcome because it did not grant Board appeal rights to employees who previously lacked such rights, but was passed as technical correction to Due Process Amendments Act of 1990 in order to retroactively correct unintentional exclusion by those amendments of certain Veterans Affairs employees from coverage of Chapters 75 and 43, while appellant never had appeal rights because of statutory exclusion set forth in former 38 USCS § 4114. Boyd-Casey v Department of Veterans Affairs (1994, MSPB) 62 MSPR 530

§ 7302. Functions of Veterans Health Administration: health-care personnel education and training programs

(a) In order to carry out more effectively the primary function of the Veterans Health Administration and in order to assist in providing an adequate supply of health personnel to the Nation, the Secretary--

(1) to the extent feasible without interfering with the medical care and treatment of veterans, shall develop and carry out a program of education and training of health personnel; and

(2) shall carry out a major program for the recruitment, training, and employment of veterans with medical military occupation specialties as--

(A) physician assistants;

(B) expanded-function dental auxiliaries; and

(C) other medical technicians.

(b) In carrying out subsection (a)(1), the Secretary shall include in the program of education and training under that subsection the developing and evaluating of new health careers, interdisciplinary approaches, and career advancement opportunities.

(c) In carrying out subsection (a)(2), the Secretary shall include in the program of recruitment, training, and employment under that subsection measures to advise all qualified veterans with military occupation specialties referred to in that subsection, and all members of the armed forces about to be discharged or released from active duty who have such military occupation specialties, of employment opportunities with the Administration.

(d) The Secretary shall carry out subsection (a) in cooperation with the following institutions and organizations:

(1) Schools of medicine, osteopathy, dentistry, nursing, pharmacy, optometry, podiatry, public health, or allied health professions.

(2) Other institutions of higher learning.

(3) Medical centers.

(4) Academic health centers.

(5) Hospitals.

(6) Such other public or nonprofit agencies, institutions, or organizations as the Secretary considers appropriate.

Cross References
This section is referred to in 38 USCS §§ 7303, 7471, 8201, 8241
§ 7303. Functions of Veterans Health Administration: research programs

(a) (1) In order to carry out more effectively the primary function of the Administration and in order to contribute to the Nation's knowledge about disease and disability, the Secretary shall carry out a program of medical research in connection with the provision of medical care and treatment to veterans. Funds appropriated to carry out this section shall remain available until expended.

(2) Such program of medical research shall include biomedical research, mental illness research, prosthetic and other rehabilitative research, and health-care-services research.

(3) Such program shall stress--
   (A) research into spinal-cord injuries and other diseases that lead to paralysis of the lower extremities; and
   (B) research into injuries and illnesses particularly related to service.

(4) In carrying out such research program, the Secretary shall act in cooperation with the entities described in section 7302(d) of this title [38 USCS § 7302(d)].

(b) Prosthetic research shall include research and testing in the field of prosthetic, orthotic, and orthopedic appliances and sensory devices. In order that the unique investigative material and research data in the possession of the Government may result in the improvement of such appliances and devices for all disabled persons, the Secretary (through the Under Secretary for Health) shall make the results of such research available to any person, and shall consult and cooperate with the Secretary of Health and Human Services and the Secretary of Education, in connection with programs carried out under section 204(b)(3) of the Rehabilitation Act of 1973 [29 USCS § 764(b)(3)] (relating to the establishment and support of Rehabilitation Engineering Research Centers).

(c) (1) In conducting or supporting clinical research, the Secretary shall ensure that, whenever possible and appropriate--

   (A) women who are veterans are included as subjects in each project of such research; and
   (B) members of minority groups who are veterans are included as subjects of such research.

(2) In the case of a project of clinical research in which women or members of minority groups will under paragraph (1) be included as subjects of the research, the Secretary shall ensure that the project is designed and carried out so as to provide for a valid analysis of whether the variables being tested in the research affect women or members of minority groups, as the case may be, differently than other persons who are subjects of the research.
(d) (1) The Secretary, in carrying out the Secretary's responsibilities under this section, shall foster and encourage the initiation and expansion of research relating to the health of veterans who are women.

(2) In carrying out this subsection, the Secretary shall consult with the following to assist the Secretary in setting research priorities:

(A) Officials of the Department assigned responsibility for women's health programs and sexual trauma services.

(B) The members of the Advisory Committee on Women Veterans.

(C) Members of appropriate task forces and working groups within the Department (including the Women Veterans Working Group and the Task Force on Treatment of Women Who Suffer Sexual Abuse).

Amendments:

1992. Act Oct. 9, 1992, in subsec. (b), substituted "Under Secretary for Health" for "Chief Medical Director".

1994. Act Nov. 2, 1994, transferred the text of subsec. (c), which began "Funds appropriated . . .", to appear at the end of subsec. (a)(1), added a new subsec. (c), and added subsec. (d).

1998. Act Aug. 7, 1998 (effective on enactment, as provided by § 507 of such Act, which appears as 20 USCS § 9201 note), in subsec. (b), substituted "section 204(b)(3) of the Rehabilitation Act of 1973 (relating to the establishment and support of Rehabilitation Engineering Research Centers)" for "section 204(b)(2) of the Rehabilitation Act of 1973 (29 U.S.C. 762(b)(2)) (relating to the establishment and support of Rehabilitation Engineering Research Centers)".


2003. Act Dec. 6, 2003, deleted subsec. (e), which read: "(e) Amounts for the activities of the field offices of the Office of Research Compliance and Assurance of the Department shall be derived from amounts appropriated for the Veterans Health Administration for Medical Care (rather than from amounts appropriated for the Veterans Health Administration for Medical and Prosthetic Research).".

Other provisions:

Post-traumatic stress disorder research and reports. Act Oct. 9, 1992, P. L. 102-405, Title I, Part B, § 122(a), 106 Stat. 1981, provides: "In carrying out research and awarding grants under chapter 73 of title 38, United States Code [38 USCS §§ 7301 et seq.], the Secretary shall assign a high priority to the conduct of research on mental illness, including research regarding (1) post-traumatic stress disorder, (2) post-traumatic stress disorder in association with substance abuse, and (3) the treatment of those disorders."

Repeal of provision for research relating to health of women veterans. Act Nov. 4, 1992, P. L. 102-585, Title I, § 109, 106 Stat. 4948, which formerly appeared as a note to this section, was repealed by Act Nov. 2, 1994, P. L. 103-452, Title I, § 102(b)(2), 108 Stat. 4786. It provided for the initiation and expansion of research relating to the health of veterans who are women.

Transfer of funds to carry out subsec. (e). Act Jan. 23, 2002, P. L. 107-135, Title II, § 205(b), 115 Stat. 2460, provides: "In order to carry out subsection (e) of section 7303 of title 38, United States Code, as added by subsection (a), for fiscal year 2002, the Secretary of Veterans Affairs shall transfer such sums as necessary for that purpose from amounts appropriated for the Veterans Health Administration for Medical and Prosthetic Research for fiscal year 2002 to amounts appropriated for the Veterans Health Administration for Medical Care for that fiscal year."
§ 7304. Regulations

(a) Unless specifically otherwise provided, the Under Secretary for Health shall prescribe all regulations necessary to the administration of the Veterans Health Administration, including regulations relating to--
   (1) travel, transportation of household goods and effects, and deductions from pay for quarters and subsistence; and
   (2) the custody, use, and preservation of the records, papers, and property of the Administration.

(b) Regulations prescribed by the Under Secretary for Health are subject to the approval of the Secretary.

Amendments:


§ 7305. Divisions of Veterans Health Administration

The Veterans Health Administration shall include the following:
   (1) The Office of the Under Secretary for Health.
   (2) A Medical Service.
   (3) A Dental Service.
   (4) A Podiatric Service.
   (5) An Optometric Service.
   (6) A Nursing Service.
   (7) Such other professional and auxiliary services as the Secretary may find to be necessary to carry out the functions of the Administration.

Amendments:

1992. Act Oct. 9, 1992, in para. (1), substituted "Under Secretary for Health" for "Chief Medical Director".

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 8
§ 7306. Office of the Under Secretary for Health

(a) The Office of the Under Secretary for Health shall consist of the following:
   (1) The Deputy Under Secretary for Health, who shall be the principal assistant of the
       Under Secretary for Health and who shall be a qualified doctor of medicine.
   (2) The Associate Deputy Under Secretary for Health, who shall be an assistant to the
       Under Secretary for Health and the Deputy Under Secretary for Health and who shall
       be a qualified doctor of medicine.
   (3) Not to exceed eight Assistant Under Secretaries for Health.
   (4) Such Medical Directors as may be appointed to suit the needs of the Department,
       who shall be either a qualified doctor of medicine or a qualified doctor of dental
       surgery or dental medicine.
   (5) A Director of Nursing Service, who shall be a qualified registered nurse and who
       shall be responsible to, and report directly to, the Under Secretary for Health for the
       operation of the Nursing Service.
   (6) A Director of Pharmacy Service, a Director of Dietetic Service, a Director of
       Podiatric Service, and a Director of Optometric Service, who shall be responsible to
       the Under Secretary for Health for the operation of their respective Services.
   (7) Such directors of such other professional or auxiliary services as may be
       appointed to suit the needs of the Department, who shall be responsible to the Under
       Secretary for Health for the operation of their respective services.
   (8) The Director of the National Center for Preventive Health, who shall be
       responsible to the Under Secretary for Health for the operation of the Center.
   (9) The Advisor on Physician Assistants, who shall be a physician assistant with
       appropriate experience and who shall advise the Under Secretary for Health on all
       matters relating to the utilization and employment of physician assistants in the
       Administration.
   (10) Such other personnel as may be authorized by this chapter [38 USCS §§ 7301 et
       seq.].

(b) Of the Assistant Under Secretaries for Health appointed under subsection (a)(3)--
   (1) not more than two may be persons qualified in the administration of health
       services who are not doctors of medicine, dental surgery, or dental medicines;
   (2) one shall be a qualified doctor of dental surgery or dental medicine who shall be
       directly responsible to the Under Secretary for Health for the operation of the Dental
       Service; and
   (3) one shall be a qualified physician trained in, or having suitable extensive
       experience in, geriatrics who shall be responsible to the Under Secretary for Health
       for evaluating all research, educational, and clinical health-care programs carried out
       in the Administration in the field of geriatrics and who shall serve as the principal
       advisor to the Under Secretary for Health with respect to such programs.

(c) Appointments under subsection (a) shall be made by the Secretary. In the case of
    appointments under paragraphs (1), (2), (3), (4), and (8) of that subsection, such
    appointments shall be made upon the recommendation of the Under Secretary for Health.

(d) Except as provided in subsection (e)--
(1) any appointment under this section shall be for a period of four years, with reappointment permissible for successive like periods,
(2) any such appointment or reappointment may be extended by the Secretary for a period not in excess of three years, and
(3) any person so appointed or reappointed or whose appointment or reappointment is extended shall be subject to removal by the Secretary for cause.

e) (1) The Secretary may designate a member of the Chaplain Service of the Department as Director, Chaplain Service, for a period of two years, subject to removal by the Secretary for cause. Redesignation under this subsection may be made for successive like periods or for any period not exceeding two years.

(2) A person designated as Director, Chaplain Service, shall at the end of such person's period of service as Director revert to the position, grade, and status which such person held immediately before being designated Director, Chaplain Service, and all service as Director, Chaplain Service, shall be creditable as service in the former position.

(f) In organizing the Office and appointing persons to positions in the Office, the Under Secretary shall ensure that--

(1) the Office is staffed so as to provide the Under Secretary, through a designated clinician in the appropriate discipline in each instance, with expertise and direct policy guidance on--

(A) unique programs operated by the Administration to provide for the specialized treatment and rehabilitation of disabled veterans (including blind rehabilitation, care of spinal cord dysfunction, mental illness, and long-term care); and

(B) the programs established under section 1712A of this title [38 USCS § 1712A]; and

(2) with respect to the programs established under section 1712A of this title [38 USCS § 1712A], a clinician with appropriate expertise in those programs is responsible to the Under Secretary for the management of those programs.

Amendments:

1992. Act Oct. 9, 1992, in the heading and in subsecs. (a), (b), and (c), substituted "Under Secretary for Health" for "Chief Medical Director", wherever appearing; and, in subsec. (a), redesignated para. (7) as para. (8), and added a new para. (7).

Act Nov. 4, 1992, in subsec. (a), redesignated para. (7) as para. (8), and added a new para. (7); and, in subsec. (c), substituted "(4), and (7)" for "and (4)".

1994. Act Nov. 2, 1994, in subsec. (a), in para. (3), substituted "Assistant Under Secretaries for Health" for "Assistant Chief Medical Directors", redesignated para. (7), the first para. (8), and the second para. (8) as paras. (8), (7), and (9), respectively, reversed the order of paras. (8) and (7) as so redesignated, and, in para. (8) as so redesignated, substituted "Under Secretary for Health" for "Chief Medical Director"; in subsec. (b), in the introductory matter, substituted "Assistant Under Secretaries for Health" for "Assistant Chief Medical Directors"; and, in subsec. (c), substituted "and (8)" for "and (7)".


2000. Act Nov. 1, 2000, in subsec. (a), redesignated para. (9) as para. (10), and inserted new para. (9).

Cross References
This section is referred to in 38 USCS §§ 7314, 7401, 7404, 7405, 7408, 7424, 7425

§ 7307. Office of Research Oversight

(a) Requirement for Office.
(1) There is in the Veterans Health Administration an Office of Research Oversight (hereinafter in this section referred to as the "Office"). The Office shall advise the Under Secretary for Health on matters of compliance and assurance in human subjects protections, research safety, and research impropriety and misconduct. The Office shall function independently of entities within the Veterans Health Administration with responsibility for the conduct of medical research programs.
(2) The Office shall--
   (A) monitor, review, and investigate matters of medical research compliance and assurance in the Department with respect to human subjects protections; and
   (B) monitor, review, and investigate matters relating to the protection and safety of human subjects and Department employees participating in medical research in Department programs.

(b) Director.
(1) The head of the Office shall be a Director, who shall report directly to the Under Secretary for Health (without delegation).
(2) Any person appointed as Director shall be--
   (A) an established expert in the field of medical research, administration of medical research programs, or similar fields; and
   (B) qualified to carry out the duties of the Office based on demonstrated experience and expertise.

(c) Functions.
(1) The Director shall report to the Under Secretary for Health on matters relating to protections of human subjects in medical research projects of the Department under any applicable Federal law and regulation, the safety of employees involved in Department medical research programs, and suspected misconduct and impropriety in such programs. In carrying out the preceding sentence, the Director shall consult with employees of the Veterans Health Administration who are responsible for the management and conduct of Department medical research programs.
(2) The matters to be reported by the Director to the Under Secretary under paragraph (1) shall include allegations of research impropriety and misconduct by employees engaged in medical research programs of the Department.
(3) (A) When the Director determines that such a recommendation is warranted, the Director may recommend to the Under Secretary that a Department research activity be terminated, suspended, or restricted, in whole or in part.
   (B) In a case in which the Director reasonably believes that activities of a medical research project of the Department place human subjects' lives or health at imminent risk, the Director shall direct that activities under that project be
immediately suspended or, as appropriate and specified by the Director, be limited.

(d) General functions.

(1) The Director shall conduct periodic inspections and reviews, as the Director determines appropriate, of medical research programs of the Department. Such inspections and reviews shall include review of required documented assurances.
(2) The Director shall observe external accreditation activities conducted for accreditation of medical research programs conducted in facilities of the Department.
(3) The Director shall investigate allegations of research impropriety and misconduct in medical research projects of the Department.
(4) The Director shall submit to the Under Secretary for Health, the Secretary, and the Committees on Veterans' Affairs of the Senate and House of Representatives a report on any suspected lapse, from whatever cause or causes, in protecting safety of human subjects and others, including employees, in medical research programs of the Department.
(5) The Director shall carry out such other duties as the Under Secretary for Health may require.

(e) Source of funds. Amounts for the activities of the Office, including its regional offices, shall be derived from amounts appropriated for the Veterans Health Administration for Medical Care.

(f) Annual report. Not later than March 15 each year, the Director shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the activities of the Office during the preceding calendar year. Each such report shall include, with respect to that year, the following:

(1) A summary of reviews of individual medical research programs of the Department completed by the Office.
(2) Directives and other communications issued by the Office to field activities of the Department.
(3) Results of any investigations undertaken by the Office during the reporting period consonant with the purposes of this section.
(4) Other information that would be of interest to those committees in oversight of the Department medical research program.

(g) Medical research. For purposes of this section, the term "medical research" means medical research described in section 7303(a)(2) of this title [38 USCS § 7303(a)(2)].

SUBCHAPTER II. GENERAL AUTHORITY AND ADMINISTRATION

§ 7311. Quality assurance
§ 7312. Special medical advisory group
§ 7313. Advisory committees: affiliated institutions
§ 7314. Geriatric research, education, and clinical centers
§ 7315. Geriatrics and Gerontology Advisory Committee
§ 7316. Malpractice and negligence suits: defense by United States
§ 7311. Quality assurance

(a) The Secretary shall--
(1) establish and conduct a comprehensive program to monitor and evaluate the quality of health care furnished by the Veterans Health Administration (hereinafter in this section referred to as the "quality-assurance program"); and
(2) delineate the responsibilities of the Under Secretary for Health with respect to the quality-assurance program, including the duties prescribed in this section.

(b) (1) As part of the quality-assurance program, the Under Secretary for Health shall periodically evaluate--
(A) whether there are significant deviations in mortality and morbidity rates for surgical procedures performed by the Administration from prevailing national mortality and morbidity standards for similar procedures; and
(B) if there are such deviations, whether they indicate deficiencies in the quality of health care provided by the Administration.
(2) The evaluation under paragraph (1)(A) shall be made using the information compiled under subsection (c)(1). The evaluation under paragraph (1)(B) shall be made taking into account the factors described in subsection (c)(2)(B).
(3) If, based upon an evaluation under paragraph (1)(A), the Under Secretary for Health determines that there is a deviation referred to in that paragraph, the Under Secretary for Health shall explain the deviation in the report submitted under subsection (f).

(c) (1) The Under Secretary for Health shall--
(A) determine the prevailing national mortality and morbidity standards for each type of surgical procedure performed by the Administration; and
(B) collect data and other information on mortality and morbidity rates in the Administration for each type of surgical procedure performed by the Administration and (with respect to each such procedure) compile the data and other information so collected--
(i) for each medical facility of the Department, in the case of cardiac surgery, heart transplant, and renal transplant programs; and
(ii) in the aggregate, for each other type of surgical procedure.

(2) The Under Secretary for Health shall--
(A) compare the mortality and morbidity rates compiled under paragraph (1)(B) with the national mortality and morbidity standards determined under paragraph (1)(A); and
(B) analyze any deviation between such rates and such standards in terms of the following:
   (i) The characteristics of the respective patient populations.
   (ii) The level of risk for the procedure involved, based on--
      (I) patient age;
      (II) the type and severity of the disease;
      (III) the effect of any complicating diseases; and
      (IV) the degree of difficulty of the procedure.
   (iii) Any other factor that the Under Secretary for Health considers appropriate.

(d) Based on the information compiled and the comparisons, analyses, evaluations, and explanations made under subsections (b) and (c), the Under Secretary for Health, in the report under subsection (f), shall make such recommendations with respect to quality assurance as the Under Secretary for Health considers appropriate.

(e) (1) The Secretary shall allocate sufficient resources (including sufficient personnel with the necessary skills and qualifications) to enable the Administration to carry out its responsibilities under this section.

(2) The Inspector General of the Department shall allocate sufficient resources (including sufficient personnel with the necessary skills and qualifications) to enable the Inspector General to monitor the quality-assurance program.

References in text:
"Subsection (f)", referred to in subssecs. (b)(3) and (d), was repealed by Act Nov. 2, 1994, P. L. 103-446, Title XII, § 1201(g)(3), 108 Stat. 4687.

Amendments:
1992. Act Oct. 9, 1992, in subsecs. (a)(2), (b)(1), (3), (c)(1), (2), (d), and (f)(1), substituted "Under Secretary for Health" for "Chief Medical Director" wherever appearing.
1994. Act Nov. 2, 1994 deleted subssecs. (f) and (g), which read:
"(f)(1) Not later than February 1, 1991, the Under Secretary for Health shall submit to the Secretary a report on the experience through the end of the preceding fiscal year under the quality-assurance program carried out under this section.

"(2) Such report shall include--
"(A) the data and other information compiled and the comparisons, analyses, and evaluations made under subsections (b) and (c) with respect to the period covered by the report; and
"(B) recommendations under subsection (d).
“(g)(1) Not later than 60 days after receiving such report, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a copy of the report, together with any comment concerning the report that the Secretary considers appropriate.

“(2) A report submitted under paragraph (1) shall not be considered to be a record or document as described in section 5705(a) of this title.”.

Other provisions:

Regulations for standards of performance in Department of Veterans Affairs laboratories; report. Act Oct. 28, 1991, P. L. 102-139, Title I, § 101(a), 105 Stat. 742, provides:

“(a) Regulations for standards of performance in Department of Veterans Affairs laboratories. (1) Within the 120-day period beginning on the date on which the Secretary of Health and Human Services promulgates final regulations to implement the standards required by section 353 of the Public Health Service Act (42 U.S.C. 263a), the Secretary of Veterans Affairs, in accordance with the Secretary's authority under title 38, United States Code, shall prescribe regulations to assure consistent performance by medical facility laboratories under the jurisdiction of the Secretary of valid and reliable laboratory examinations and other procedures. Such regulations shall be prescribed in consultation with the Secretary of Health and Human Services and shall establish standards equal to that applicable to other medical facility laboratories in accordance with the requirements of section 353(f) of the Public Health Service Act [42 USCS § 263a(f)].

“(2) Such regulations-

“(A) may include appropriate provisions respecting waivers described in section 353(d) of such act [42 USCS § 263a(d)] and accreditations described in section 353(e) of such Act [42 USCS § 263a(e)]; and

“(B) shall include appropriate provisions respecting compliance with such requirements.

“(b) Report. Within the 180-day period beginning on the date on which the Secretary of Veterans Affairs prescribes regulations required by subsection (a), the Secretary shall submit to the appropriate committees of the Congress a report on those regulations.

“(c) Definition. As used in this section, the term 'medical facility laboratories' means facilities for the biological, micro-biological, serological, chemical, immunohematological, hematological, biophysical, cytological, pathological, or other physical examination of materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings.”.

Quality assurance activities. Act Oct. 9, 1992, P. L. 102-405, Title I, Part A, § 104, 106 Stat. 1775, provides: "Effective on October 1, 1992, programs and activities which (1) the Secretary carries out pursuant to section 7311(a) of title 38, United States Code, or (2) are described in sections 201(a)(1) and 201(a)(3) of Public Law 100-322 (102 Stat. 508) [former 38 USCS § 4151 note] shall be deemed to be part of the operation of hospitals, nursing homes, and domiciliary facilities of the Department of Veterans Affairs, without regard to the location of the duty stations of employees carrying out those programs and activities.”.


“(a) Evaluation. The Secretary of Veterans Affairs shall carry out an evaluation of the efficacy of the nurse managed health care clinics of the Department of Veterans Affairs. The Secretary shall complete the evaluation not later than 18 months after the date of the enactment of this Act.

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(b) Clinics to be evaluated. (1) In carrying out the evaluation under subsection (a), the Secretary shall consider nurse managed health care clinics, including primary care clinics and geriatric care clinics, located in three different geographic service areas of the Department.

(2) If there are not nurse managed health care clinics located in three different geographic service areas as of the commencement of the evaluation, the Secretary shall--

(A) establish nurse managed health care clinics in additional geographic service areas such that there are nurse managed health care clinics in three different geographic service areas for purposes of the evaluation; and

(B) include such clinics, as so established, in the evaluation.

(c) Matters to be evaluated. In carrying out the evaluation under subsection (a), the Secretary shall address the following:

(1) Patient satisfaction.

(2) Provider experiences.

(3) Cost of care.

(4) Access to care, including waiting time for care.

(5) The functional status of patients receiving care.

(6) Any other matters the Secretary considers appropriate.

(d) Report. Not later than 18 months after the date of the enactment of this Act, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on the evaluation carried out under subsection (a). The report shall address the matters specified in subsection (c) and include any other information, and any recommendations, that the Secretary considers appropriate. The Secretary shall provide a copy of the report to the National Commission on VA Nursing established under subtitle D [38 USCS § 7451 note].

Cross References
This section is referred to in 38 USCS § 5705

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 5

§ 7312. Special medical advisory group

(a) The Secretary shall establish an advisory committee to be known as the special medical advisory group. The advisory group shall advise the Secretary, through the Under Secretary for Health, and the Under Secretary for Health directly, relative to the care and treatment of disabled veterans and other matters pertinent to the Administration.

(b) Members of the special medical advisory group shall be appointed by the Secretary upon the recommendation of the Under Secretary for Health. The special medical advisory group shall be composed of--
members of the medical, dental, podiatric, optometric, and allied scientific professions;
(2) other individuals considered by the Under Secretary for Health to have experience pertinent to the mission of the Administration; and
(3) a disabled veteran.

(c) The special medical advisory group shall meet on a regular basis as prescribed by the Secretary. The number, terms of service, pay, and allowances of members of the advisory group shall be prescribed in accordance with existing law and regulations.

(d) Not later than February 1 of each year, the special medical advisory group shall submit to the Secretary and the Congress a report on the activities of the advisory group during the preceding fiscal year. No report shall be required under this subsection after December 31, 2004.

Amendments:
1992. Act Oct. 9, 1992, in subsecs. (a) and (b), substituted "Under Secretary for Health" for "Chief Medical Director" wherever appearing.
1994. Act Nov. 2, 1994, in subsec. (d), substituted "the activities of the advisory group" for "the advisory groups activities".
2000. Act Nov. 1, 2000, in subsec. (d), added the sentence beginning "No report . . .".

Cross References
This section is referred to in 38 USCS §§ 305, 7474, 8155, 8201

§ 7313. Advisory committees: affiliated institutions

(a) In each case where the Secretary has a contract or agreement with any school, institution of higher learning, medical center, hospital, or other public or nonprofit agency, institution, or organization for the training or education of health personnel, the Secretary shall establish an advisory committee to advise the Secretary and the Under Secretary for Health with respect to policy matters arising in connection with, and the operation of, the program with respect to which it was appointed. Such a committee may be a dean's committee, a medical advisory committee, or the like.

(b) Any such advisory committee may be established on an institution-wide, multi-disciplinary basis or on a regional basis whenever establishment on such a basis is found to be feasible.

(c) Members of each such advisory committee shall be appointed by the Secretary and shall include personnel of the Department (including appropriate representation from the full-time staff) and of the entity with which the Secretary has entered into the contract or agreement. The number of members, and terms of members, of each advisory committee shall be prescribed by the Secretary.

(d) The Secretary shall require that the Chief of the Nursing Service (or the designee of the Chief) at each Department health-care facility be included in the membership of each policymaking committee at that facility. Such committees include: (1) committees relating to matters such as budget, education, position management, clinical executive
issues, planning, and resource allocation, and (2) the dean's committee or other advisory committee established under subsection (a).

Amendments:

1992. Act Oct. 9, 1992, in subsec. (a), substituted "Under Secretary for Health" for "Chief Medical Director".

Cross References

This section is referred to in 38 USCS § 7423

§ 7314. Geriatric research, education, and clinical centers

(a) The Secretary, upon the recommendation of the Under Secretary for Health and pursuant to the provisions of this section, shall designate not more than 25 Department health-care facilities as the locations for centers of geriatric research, education, and clinical activities and (subject to the appropriation of sufficient funds for such purpose) shall establish and operate such centers at such locations in accordance with this section.

(b) In designating locations for centers under subsection (a), the Secretary, upon the recommendation of the Under Secretary for Health, shall--

(1) designate each Department health-care facility that as of August 26, 1980, was operating a geriatric research, education, and clinical center unless (on the recommendation of the Under Secretary for Health) the Secretary determines that such facility does not meet the requirements of subsection (c) or has not demonstrated effectiveness in carrying out the established purposes of such center or the purposes of title III of the Veterans’ Administration Health-Care Amendments of 1980 (Public Law 96-330; 94 Stat. 1048) or the potential to carry out such purposes effectively in the reasonably foreseeable future; and

(2) assure appropriate geographic distribution of such facilities.

(c) The Secretary may not designate a health-care facility as a location for a center under subsection (a) unless the peer review panel established under subsection (d) has determined under that subsection that the proposal submitted by such facility as a location for a new center under subsection (a) is among those proposals which have met the highest competitive standards of scientific and clinical merit, and the Secretary (upon the recommendation of the Under Secretary for Health) determines that the facility has (or may reasonably be anticipated to develop) each of the following:

(1) An arrangement with an accredited medical school which provides education and training in geriatrics and with which such facility is affiliated under which residents receive education and training in geriatrics through regular rotation through such center and through nursing home, extended care, or domiciliary units of such facility so as to provide such residents with training in the diagnosis and treatment of chronic diseases of older individuals, including cardiopulmonary conditions, senile dementia, and neurological disorders.

(2) An arrangement under which nursing or allied health personnel receive training and education in geriatrics through regular rotation through nursing home, extended care, or domiciliary units of such facility.

(3) The ability to attract the participation of scientists who are capable of ingenuity and creativity in health-care research efforts.
(4) A policymaking advisory committee composed of appropriate health-care and research representatives of the facility and of the affiliated school or schools to advise the directors of such facility and such center on policy matters pertaining to the activities of such center during the period of the operation of such center.

(5) The capability to conduct effectively evaluations of the activities of such center.

(d) (1) In order to provide advice to assist the Secretary and the Under Secretary for Health in carrying out their responsibilities under this section, the Assistant Under Secretary for Health described in section 7306(b)(3) of this title [38 USCS § 7306(b)(3)] shall establish a panel to assess the scientific and clinical merit of proposals that are submitted to the Secretary for the establishment of new centers under this section.

(2) The membership of the panel shall consist of experts in the fields of geriatric and gerontological research, education, and clinical care. Members of the panel shall serve as consultants to the Department for a period of no longer than six months.

(3) The panel shall review each proposal submitted to the panel by the Assistant Under Secretary and shall submit its views on the relative scientific and clinical merit of each such proposal to the Assistant Under Secretary.

(4) The panel shall not be subject to the Federal Advisory Committee Act [5 USCS Appx.].

(e) Before providing funds for the operation of any such center at a health-care facility other than a health-care facility designated under subsection (b)(1), the Secretary shall assure that the center at each facility designated under such subsection is receiving adequate funding to enable such center to function effectively in the areas of geriatric research, education, and clinical activities.

(f) There are authorized to be appropriated such sums as may be necessary for the support of the research and education activities of the centers established pursuant to subsection (a). The Under Secretary for Health shall allocate to such centers from other funds appropriated generally for the Department medical care account and medical and prosthetics research account, as appropriate, such amounts as the Under Secretary for Health determines appropriate.

(g) Activities of clinical and scientific investigation at each center established under subsection (a) shall be eligible to compete for the award of funding from funds appropriated for the Department medical and prosthetics research account and shall receive priority in the award of funding from such account insofar as funds are awarded to projects for research in geriatrics and gerontology.

References in text:
"Title III of the Veterans' Administration Health-Care Amendments of 1980", referred to in this section, is Title III of Act Aug. 26, 1980, P. L. 96-330, 94 Stat. 1048. For full classification of such Title, consult USCS Tables volumes.

Explanatory notes:
Act Nov. 2, 1994, P. L. 103-446, Title XII, § 1202(b)(2), effective Aug. 6, 1991, and as if included in the amendment of P. L. 102-83, as provided by § 1202 of Act Nov. 2, 1994, amended § 4(a)(4) of Act Aug. 6, 1991, P. L. 102-83, by adding a subparagraph (E) listing sections 7314(b)(1) and 7315(b)(2) as exceptions to the general amendment provided for by
§ 4(a)(3) of Public Law 102-83, which directed that, except as otherwise provided for in paragraphs (1), (2) and (4) of § 4(a) of P. L. 102-83, "Department" be substituted for "Veterans' Administration" wherever appearing in Title 38.

Amendments:

1992. Act Oct. 9, 1992, in subsecs. (a), (b), (c), and (e), substituted "Under Secretary for Health" for "Chief Medical Director" wherever appearing.

Act Nov. 4, 1992, in subsec. (c), in the introductory matter, inserted "the peer review panel established under subsection (d) has determined under that subsection that the proposal submitted by such facility as a location for a new center under subsection (a) is among those proposals which have met the highest competitive standards of scientific and clinical merit, and"; redesignated subsecs. (d)-(f) as subsecs. (e)-(g), respectively, and added a new subsec. (d).

1994. Act Nov. 2, 1994, in subsec. (d), in para. (1), substituted "the Secretary and the Under Secretary for Health in carrying out" for "the Chief Medical Director and the Secretary to carry out" and "the Assistant Under Secretary for Health described in section 7306(b)(3)" for "the Assistant Chief Medical Director described in section 7306(b)(3)", and, in para. (3), substituted "Assistant Under Secretary" for "Assistant Chief Medical Director" wherever appearing.

Other provisions:

Congressional declaration of purpose in creating centers of geriatric research, education, and clinical activities. Act Aug. 26, 1980, P. L. 96-330, Title III, § 301, 94 Stat. 1048, provides: "The purposes of this title [consult USCS Tables volumes for classification] are (1) to improve and expand the capability of Veterans' Administration [now Department of Veterans Affairs] health-care facilities to respond with the most effective and appropriate services possible to the medical, psychological and social needs of the increasing number of older veterans, and (2) to advance scientific knowledge regarding such needs and the methods of meeting them by facilitating higher quality geriatric care for eligible older veterans through geriatric and gerontological research, the training of health personnel in the provision of health care to older individuals, and the development of improved models of clinical services for eligible older veterans."

Cross References

This section is referred to in 38 USCS § 7315

§ 7315. Geriatrics and Gerontology Advisory Committee

(a) The Secretary shall establish in the Veterans Health Administration a Geriatrics and Gerontology Advisory Committee (hereinafter in this section referred to as the "Committee"). The membership of the Committee shall be appointed by the Secretary, upon the recommendation of the Under Secretary for Health, and shall include individuals who are not employees of the Federal Government and who have demonstrated interest and expertise in research, education, and clinical activities related to aging and at least one representative of a national veterans service organization. The Secretary, upon the recommendation of the Under Secretary for Health, shall invite representatives of other appropriate departments and agencies of the United States to participate in the activities of the Committee and shall provide the Committee with such staff and other support as may be necessary for the Committee to carry out effectively its functions under this section.

(b) The Committee shall--
(1) advise the Under Secretary for Health on all matters pertaining to geriatrics and gerontology;
(2) assess, through an evaluation process (including a site visit conducted not later than three years after the date of the establishment of each new center and not later than two years after the date of the last evaluation of those centers in operation on August 26, 1980), the ability of each center established under section 7314 of this title [38 USCS § 7314] to achieve its established purposes and the purposes of title III of the Veterans' Administration Health-Care Amendments of 1980 (Public Law 96-330; 94 Stat. 1048);
(3) assess the capability of the Department to provide high quality geriatric services, extended services, and other health-care services to eligible older veterans, taking into consideration the likely demand for such services from such veterans;
(4) assess the current and projected needs of eligible older veterans for geriatric services, extended-care services, and other health-care services from the Department and its activities and plans designed to meet such needs; and
(5) perform such additional functions as the Secretary or Under Secretary for Health may direct.

c (1) The Committee shall submit to the Secretary, through the Under Secretary for Health, such reports as the Committee considers appropriate with respect to its findings and conclusions under subsection (b). Such reports shall include the following:
   (A) Descriptions of the operations of the centers of geriatric research, education, and clinical activities established pursuant to section 7314 of this title [38 USCS § 7314].
   (B) Assessments of the quality of the operations of such centers.
   (C) An assessment of the extent to which the Department, through the operation of such centers and other health-care facilities and programs, is meeting the needs of eligible older veterans for geriatric services, extended-care services, and other health-care services.
   (D) Assessments of and recommendations for correcting any deficiencies in the operations of such centers.
   (E) Recommendations for such other geriatric services, extended-care services, and other health-care services as may be needed to meet the needs of older veterans.
(2) Whenever the Committee submits a report to the Secretary under paragraph (1), the Committee shall at the same time transmit a copy of the report in the same form to the appropriate committees of Congress. Not later than 90 days after receipt of a report under that paragraph, the Secretary shall submit to the appropriate committees of Congress a report containing any comments and recommendations of the Secretary with respect to the report of the Committee.

References in text:
"Title III of the Veterans' Administration Health-Care Amendments of 1980", referred to in this section, is Title III of Act Aug. 26, 1980, P. L. 96-330, 94 Stat. 1048. For full classification of such Title, consult USCS Tables volumes.

Explanatory notes:
Act Nov. 2, 1994, P. L. 103-446, Title XII, § 1202(b)(2), effective Aug. 6, 1991, and as if included in the amendment of P. L. 102-83, as provided by § 1202 of Act Nov. 2, 1994, amended § 4(a)(4) of Act Aug. 6, 1991, P. L. 102-83, by adding a subparagraph (E) listing sections 7314(b)(1) and 7315(b)(2) as exceptions to the general amendment provided for by § 4(a)(3) of Public Law 102-83, which directed that, except as otherwise provided for in paragraphs (1), (2) and (4) of § 4(a) of P. L. 102-83, "Department" be substituted for "Veterans' Administration" wherever appearing in Title 38.

Amendments:

1992. Act Oct. 9, 1992, in subsecs. (a) and (b)(1), (5), substituted "Under Secretary for Health" for "Chief Medical Director"; and, in subsec. (c), in para. (1), substituted "Under Secretary for Health" for "Chief Medical Director", and substituted para. (2) for one which read: "Not later than 90 days after receipt of a report submitted under paragraph (1), the Secretary shall transmit the report, together with the Secretary's comments and recommendations thereon, to the appropriate committees of the Congress."

1994. Act Nov. 2, 1994, in subsec. (b)(2), purported to substitute "Veterans' Administration" for "Department"; however the amendment could not be executed because of a prior amendment.


Other provisions:

Termination of advisory committees established after Jan. 5, 1973. Act Oct. 6, 1972, P. L. 92-463, §§ 3(2) and 14, 86 Stat. 770, 776 (effective 1/5/73, as provided by § 15 of such Act), which is classified as 5 USCS Appx, provides that advisory committees established after Jan. 5, 1973, are to terminate not later than the expiration of the two-year period beginning on the date of establishment unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a board established by the Congress, its duration is otherwise provided for by law.

§ 7316. Malpractice and negligence suits: defense by United States

(a) (1) The remedy--

(A) against the United States provided by sections 1346(b) and 2672 of title 28 [28 USCS §§ 1346(b) and 2672], or

(B) through proceedings for compensation or other benefits from the United States as provided by any other law, where the availability of such benefits precludes a remedy under section 1346(b) or 2672 of title 28 [28 USCS § 1346(b) or 2672],

for damages for personal injury, including death, allegedly arising from malpractice or negligence of a health care employee of the Administration in furnishing health care or treatment while in the exercise of that employee's duties in or for the Administration shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the health care employee (or employee's estate) whose act or omission gave rise to such claim.

(2) For purposes of paragraph (1), the term "health care employee of the Administration" means a physician, dentist, podiatrist, chiropractor, optometrist, nurse, physician assistant, expanded-function dental auxiliary, pharmacist, or paramedical (such as medical and dental technicians, nursing assistants, and therapists), or other supporting personnel.
(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) (or such person's estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the Secretary to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Secretary.

(c) Upon a certification by the Attorney General that the defendant was acting in the scope of such person's employment in or for the Administration at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. After removal the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the employee whose act or omission gave rise to the suit was not acting within the scope of such person's office or employment, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28 [28 USCS § 2677], and with the same effect.

(e) The Secretary may, to the extent the Secretary considers appropriate, hold harmless or provide liability insurance for any person to whom the immunity provisions of this section apply (as described in subsection (a)), for damage for personal injury or death, or for property damage, negligently caused by such person while furnishing medical care or treatment (including the conduct of clinical studies or investigations) in the exercise of such person's duties in or for the Administration, if such person is assigned to a foreign country, detailed to State or political division thereof, or is acting under any other circumstances which would preclude the remedies of an injured third person against the United States, provided by sections 1346(b) and 2672 of title 28 [28 USCS §§ 1346(b) and 2672], for such damage or injury.

(f) The exception provided in section 2680(h) of title 28 [28 USCS § 2680(h)] shall not apply to any claim arising out of a negligent or wrongful act or omission of any person described in subsection (a) in furnishing medical care or treatment (including medical care or treatment furnished in the course of a clinical study or investigation) while in the exercise of such person's duties in or for the Administration.

Amendments:

2003. Act Dec. 6, 2003 (effective 180 days after enactment, as provided by § 302(h) of such Act, which appears as a note to this section), in subsec. (a), in para. (1), in the concluding matter, substituted "health" for "medical" wherever appearing, and, in para. (2), substituted "health" for "medical" and inserted "chiropractor.".
Other provisions:

Effective date of amendments made by § 302 of Act Dec. 6, 2003, P. L. 108-170. Act Dec. 6, 2003, P. L. 108-170, Title III, § 302(h), 117 Stat. 2058, provides: "The amendments made by this section [amending 38 USCS §§ 7316(a), 7401, 7402(b), 7403(a)(2), 7404(b)(1), 7409(a), and 7421(b)] shall take effect at the end of the 180-day period beginning on the date of the enactment of this Act.".

Code of Federal Regulations

Department of Justice-Certification and decertification in connection with certain suits based upon acts or omissions of Federal employees and other persons, 28 CFR Part 15

Cross References

This section is referred to in 38 USCS §§ 515, 1712

Research Guide

Federal Procedure:
31 Fed Proc L Ed, Tort Claims Against the United States §§ 73:341, 343, 348, 357, 422

Am Jur:
35A Am Jur 2d, Federal Tort Claims Act §§ 21, 142, 144, 149, 158, 223
77 Am Jur 2d, Veterans and Veterans' Laws §§ 15, 21

FTCA's intentional tort exclusion bars claim for damages based on unauthorized performance of surgery, but operation of exclusion is nullified in context of tort claims arising out of conduct of VA medical personnel within scope of 38 USCS § 7316 (former § 4116). Franklin v United States (1993, CA10 Okla) 992 F.2d 1492 (criticized in Senger v United States (1996, CA9 Or) 103 F.3d 1437, 96 CDOS 9466, 96 Daily Journal DAR 15573, 12 BNA IER Cas 598) and (criticized in Doe Parents No. 1 v Dep't of Educ. (2002) 100 Hawaii 34, 58 P3d 545)

Action filed by plaintiffs, mother and father, alleging that U.S., through actions of doctor, failed to obtain mother's informed consent to use procedure during birth of their son, would not be dismissed for lack of subject matter jurisdiction on ground that claim sounded in battery under state law and U.S. had not waived its sovereign immunity for intentional tort of battery under Federal Tort Claims Act (FTCA), 28 USCS § 2680(h), because 42 USCS § 233(e) allowed plaintiff to pursue battery claim against U.S. by abrogating immunity provided in FTCA under 28 USCS § 2680(h), and phrase "arising out of negligence" in § 233(e) did not bar plaintiffs' claim for lack of informed consent on ground that such claim could never sound in negligence under state law, and lack of phrase "wrongful act or omission" in § 233(e), which phrase was included in 38 USCS § 7316(f) and 10 USCS § 1089(e), did not mean that battery claim could not be brought by plaintiffs; logical reading of 42 USCS § 233(e) would be to prevent situation where those who live in jurisdictions like Pennsylvania could raise claim against individual employee for battery that could also be characterized in negligence terms, when same employee was covered by FTCA for all negligence claims arising from same incident. Leab v Chambersburg Hosp. (2005, MD Pa) 230 FRD 395

§ 7317. Hazardous research projects: indemnification of contractors

(a) (1) With the approval of the Secretary, any contract or research authorized by section 7303 of this title [38 USCS § 7303], the performance of which involves a risk of an unusually hazardous nature, may provide that the United States will indemnify the contractor as provided in paragraph (2), but only to the extent that the liability, loss, or damage concerned arises out of the direct performance of the contract and to the extent not covered by the financial protection required under subsection (e).
(2) Indemnity under paragraph (1) is indemnity against either or both of the following:
   (A) Liability (including reasonable expenses of litigation or settlement) to third persons, except liability under State or Federal workers' injury compensation laws to employees of the contractor employed at the site of and in connection with the contract for which indemnification is granted, for death, bodily injury, or loss of or damage to property, from a risk that the contract defines as unusually hazardous.
   (B) Loss of or damage to property of the contractor from a risk that the contract defines as unusually hazardous.

(b) A contract that provides for indemnification in accordance with subsection (a) must also provide for--
   (1) notice to the United States of any claim or suit against the contractor for death, bodily injury, or loss of or damage to property; and
   (2) control of or assistance in the defense by the United States, at its election, of any such suit or claim for which indemnification is provided hereunder.

(c) A payment may not be made under subsection (a) unless the Secretary certifies that the amount is just and reasonable.

(d) Upon approval by the Secretary, payments under subsection (a) may be made from--
   (1) funds obligated for the performance of the contract concerned;
   (2) funds available for research or development or both, and not otherwise obligated; or
   (3) funds appropriated for those payments.

(e) Each contractor which is a party to an indemnification agreement under subsection (a) shall have and maintain financial protection of such type and in such amounts as the Secretary shall require to cover liability to third persons and loss of or damage to the contractor's property. The amount of financial protection required shall be the maximum amount of insurance available from private sources, except that the Secretary may establish a lesser amount, taking into consideration the cost and terms of private insurance. Such financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination of such measures.

(f) In administering the provisions of this section, the Secretary may use the facilities and services of private insurance organizations and may contract to pay a reasonable compensation therefor. Any contract made under the provisions of this section may be made without regard to the provisions of section 3709 of the Revised Statutes (41 U.S.C. 5), upon a showing by the Secretary that advertising is not reasonably practicable, and advance payments may be made under any such contract.

(g) The authority to indemnify contractors under this section does not create any rights in third persons which would not otherwise exist by law.

(h) Funds appropriated to carry out this section shall remain available until expended.
(i) In this section, the term 'contractor' includes subcontractors of any tier under a contract containing an indemnification provision pursuant to subsection (a).

§ 7318. National Center for Preventive Health

(a) (1) The Under Secretary for Health shall establish and operate in the Veterans Health Administration a National Center for Preventive Health (hereinafter in this section referred to as the "Center"). The Center shall be located at a Department health care facility.

(2) The head of the Center is the Director of Preventive Health (hereinafter in this section referred to as the "Director").

(3) The Under Secretary for Health shall provide the Center with such staff and other support as may be necessary for the Center to carry out effectively its functions under this section.

(b) The purposes of the Center are the following:

(1) To provide a central office for monitoring and encouraging the activities of the Veterans Health Administration with respect to the provision, evaluation, and improvement of preventive health services.

(2) To promote the expansion and improvement of clinical, research, and educational activities of the Veterans Health Administration with respect to such services.

(c) In carrying out the purposes of the Center, the Director shall do the following:

(1) Develop and maintain current information on clinical activities of the Veterans Health Administration relating to preventive health services, including activities relating to--

(A) the on-going provision of regularly-furnished services; and

(B) patient education and screening programs carried out throughout the Administration.

(2) Develop and maintain detailed current information on research activities of the Veterans Health Administration relating to preventive health services.

(3) In order to encourage the effective provision of preventive health services by Veterans Health Administration personnel--

(A) ensure the dissemination to such personnel of any appropriate information on such services that is derived from research carried out by the Administration; and

(B) acquire and ensure the dissemination to such personnel of any appropriate information on research and clinical practices relating to such services that are carried out by researchers, clinicians, and educators who are not affiliated with the Administration.

(4) Facilitate the optimal use of the unique resources of the Department for cooperative research into health outcomes by initiating recommendations, and responding to requests of the Under Secretary for Health and the Director of the Medical and Prosthetic Research Service, for such research into preventive health services.

(5) Provide advisory services to personnel of Department health-care facilities with respect to the planning or furnishing of preventive health services by such personnel.
(d) There is authorized to be appropriated $1,500,000 to the Medical Care General and Special Fund of the Department of Veterans Affairs for each fiscal year for the purpose of permitting the National Center for Preventive Affairs to carry out research, clinical, educational, and administrative activities under this section. Such activities shall be considered to be part of the operation of health-care facilities of the Department without regard to the location at which such activities are carried out.

(c) In this section, the term "preventive health services" has the meaning given such term in section 1701(9) of this title [38 USCS § 1701(9)].

Amendments:


Other provisions:

Selection of facility at which Center to be established. Act Nov. 4, 1992, P. L. 102-585, Title V, Subtitle B, § 511(c), 106 Stat. 4956; Nov. 2, 1994, P. L. 103-446, Title XII, § 1202(e)(2), 108 Stat. 4689, provides: "In order to establish the National Center for Preventive Health pursuant to section 7318 of title 38, United States Code, as added by subsection (a), the Under Secretary for Health of the Department of Veterans Affairs shall solicit proposals from Department health care facilities to establish the center. The Under Secretary for Health shall establish such center at the facility or facilities which the Under Secretary for Health determines, on the basis of a review and analysis of such proposals, would most effectively carry out the purposes set forth in subsection (b) of such section."

Cross References

This section is referred to in 38 USCS § 1704

§ 7319. Mammography quality standards

(a) A mammogram may not be performed at a Department facility unless that facility is accredited for that purpose by a private nonprofit organization designated by the Secretary. An organization designated by the Secretary under this subsection shall meet the standards for accrediting bodies established under subsection (e) of section 354 of the Public Health Service Act (42 U.S.C. 263b).

(b) The Secretary, in consultation with the Secretary of Health and Human Services, shall prescribe quality assurance and quality control standards relating to the performance and interpretation of mammograms and use of mammogram equipment and facilities of the Department of Veterans Affairs consistent with the requirements of section 354(f)(1) of the Public Health Service Act [42 USCS § 263b(f)(1)]. Such standards shall be no less stringent than the standards prescribed by the Secretary of Health and Human Services under section 354(f) of the Public Health Service Act [42 USCS § 263b(f)].

(c) (1) The Secretary, to ensure compliance with the standards prescribed under subsection (b), shall provide for an annual inspection of the equipment and facilities used by and in Department health care facilities for the performance of mammograms. Such inspections shall be carried out in a manner consistent with the inspection of certified facilities by the Secretary of Health and Human Services under section 354(g) of the Public Health Service Act [42 USCS § 263b(g)].
(2) The Secretary may not provide for an inspection under paragraph (1) to be performed by a State agency.

(d) The Secretary shall ensure that mammograms performed for the Department under contract with any non-Department facility or provider conform to the quality standards prescribed by the Secretary of Health and Human Services under section 354 of the Public Health Service Act [42 USCS § 263b].

(e) For the purposes of this section, the term "mammogram" has the meaning given such term in paragraph (5) of section 354(a) of the Public Health Service Act [42 USCS § 263b(a)(5)].

Other provisions:

Deadline for prescribing standards. Act Oct. 9, 1996, P. L. 104-262, Title III, Subtitle B, § 321(b), 110 Stat. 3195, provides: "The Secretary of Veterans Affairs shall prescribe standards under subsection (b) of section 7319 of title 38, United States Code, as added by subsection (a), not later than the end of the 120-day period beginning on the date of the enactment of this Act."

Implementation report. Act Oct. 9, 1996, P. L. 104-262, Title III, Subtitle B, § 321(c), 110 Stat. 3195, provides: "The Secretary shall submit to the Committees on Veterans’ Affairs of the Senate and House of Representatives a report on the Secretary’s implementation of section 7319 of title 38, United States Code, as added by subsection (a). The report shall be submitted not later than 120 days after the date of the enactment of this Act."

§ 7320. Centers for mental illness research, education, and clinical activities

(a) The purpose of this section is to provide for the improvement of the provision of health-care services and related counseling services to eligible veterans suffering from mental illness (especially mental illness related to service-related conditions) through--

(1) the conduct of research (including research on improving mental health service facilities of the Department and on improving the delivery of mental health services by the Department);

(2) the education and training of health care personnel of the Department; and

(3) the development of improved models and systems for the furnishing of mental health services by the Department.

(b) (1) The Secretary shall establish and operate centers for mental illness research, education, and clinical activities. Such centers shall be established and operated by collaborating Department facilities as provided in subsection (c)(1). Each such center shall function as a center for--

(A) research on mental health services;

(B) the use by the Department of specific models for furnishing services to treat serious mental illness;

(C) education and training of health-care professionals of the Department; and

(D) the development and implementation of innovative clinical activities and systems of care with respect to the delivery of such services by the Department.

(2) The Secretary shall, upon the recommendation of the Under Secretary for Health, designate the centers under this section. In making such designations, the Secretary shall ensure that the centers designated are located in various geographic regions of the United States. The Secretary may designate a center under this section only if-
(A) the proposal submitted for the designation of the center meets the requirements of subsection (c);
(B) the Secretary makes the finding described in subsection (d); and
(C) the peer review panel established under subsection (e) makes the determination specified in subsection (e)(3) with respect to that proposal.

(3) Not more than five centers may be designated under this section.
(4) The authority of the Secretary to establish and operate centers under this section is subject to the appropriation of funds for that purpose.

(c) A proposal submitted for the designation of a center under this section shall--
(1) provide for close collaboration in the establishment and operation of the center, and for the provision of care and the conduct of research and education at the center, by a Department facility or facilities in the same geographic area which have a mission centered on care of the mentally ill and a Department facility in that area which has a mission of providing tertiary medical care;
(2) provide that no less than 50 percent of the funds appropriated for the center for support of clinical care, research, and education will be provided to the collaborating facility or facilities that have a mission centered on care of the mentally ill; and
(3) provide for a governance arrangement between the collaborating Department facilities which ensures that the center will be established and operated in a manner aimed at improving the quality of mental health care at the collaborating facility or facilities which have a mission centered on care of the mentally ill.

(d) The finding referred to in subsection (b)(2)(B) with respect to a proposal for designation of a site as a location of a center under this section is a finding by the Secretary, upon the recommendation of the Under Secretary for Health, that the facilities submitting the proposal have developed (or may reasonably be anticipated to develop) each of the following:
(1) An arrangement with an accredited medical school that provides education and training in psychiatry and with which one or more of the participating Department facilities is affiliated under which medical residents receive education and training in psychiatry through regular rotation through the participating Department facilities so as to provide such residents with training in the diagnosis and treatment of mental illness.
(2) An arrangement with an accredited graduate program of psychology under which students receive education and training in clinical, counseling, or professional psychology through regular rotation through the participating Department facilities so as to provide such students with training in the diagnosis and treatment of mental illness.
(3) An arrangement under which nursing, social work, counseling, or allied health personnel receive training and education in mental health care through regular rotation through the participating Department facilities.
(4) The ability to attract scientists who have demonstrated achievement in research--
   (A) into the evaluation of innovative approaches to the design of mental health services; or
   (B) into the causes, prevention, and treatment of mental illness.
(5) The capability to evaluate effectively the activities of the center, including activities relating to the evaluation of specific efforts to improve the quality and effectiveness of mental health services provided by the Department at or through individual facilities.

(e) (1) In order to provide advice to assist the Secretary and the Under Secretary for Health to carry out their responsibilities under this section, the official within the central office of the Veterans Health Administration responsible for mental health and behavioral sciences matters shall establish a peer review panel to assess the scientific and clinical merit of proposals that are submitted to the Secretary for the designation of centers under this section.

(2) The panel shall consist of experts in the fields of mental health research, education and training, and clinical care. Members of the panel shall serve as consultants to the Department.

(3) The panel shall review each proposal submitted to the panel by the official referred to in paragraph (1) and shall submit to that official its views on the relative scientific and clinical merit of each such proposal. The panel shall specifically determine with respect to each such proposal whether that proposal is among those proposals which have met the highest competitive standards of scientific and clinical merit.

(4) The panel shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).

(f) Clinical and scientific investigation activities at each center established under this section--

(1) may compete for the award of funding from amounts appropriated for the Department of Veterans Affairs medical and prosthetics research account; and

(2) shall receive priority in the award of funding from such account insofar as funds are awarded to projects and activities relating to mental illness.

(g) The Under Secretary for Health shall ensure that at least three centers designated under this section emphasize research into means of improving the quality of care for veterans suffering from mental illness through the development of community-based alternatives to institutional treatment for such illness.

(h) The Under Secretary for Health shall ensure that information produced by the research, education and training, and clinical activities of centers established under this section that may be useful for other activities of the Veterans Health Administration is disseminated throughout the Veterans Health Administration. Such dissemination shall be made through publications, through programs of continuing medical and related education provided through regional medical education centers under subchapter VI of chapter 74 of this title [38 USCS §§ 7471 et seq.], and through other means. Such programs of continuing medical education shall receive priority in the award of funding.

(i) The official within the central office of the Veterans Health Administration responsible for mental health and behavioral sciences matters shall be responsible for supervising the operation of the centers established pursuant to this section and shall
provide for ongoing evaluation of the centers and their compliance with the requirements of this section.

(j) (1) There are authorized to be appropriated to the Department of Veterans Affairs for the basic support of the research and education and training activities of centers established pursuant to this section amounts as follows:
   (A) $3,125,000 for fiscal year 1998.
   (B) $6,250,000 for each of fiscal years 1999 through 2001.
(2) In addition to funds appropriated for a fiscal year pursuant to the authorization of appropriations in paragraph (1), the Under Secretary for Health shall allocate to such centers from other funds appropriated for that fiscal year generally for the Department of Veterans Affairs medical care account and the Department of Veterans Affairs medical and prosthetics research account such amounts as the Under Secretary for Health determines appropriate to carry out the purposes of this section.

Other provisions:

Annual reports; implementation. Act Oct. 9, 1996, P. L. 104-262, Title III, Subtitle C, § 334(b), (c), 110 Stat. 3203, provides:

"(b) Annual reports. Not later than February 1 of each of 1999, 2000, 2001, and 2002, the Secretary of Veterans Affairs shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the status and activities during the previous fiscal year of the centers for mental illness research, education, and clinical activities established pursuant to section 7320 of title 38, United States Code (as added by subsection (a)). Each such report shall include the following:

"(1) A description of the activities carried out at each center and the funding provided for such activities.

"(2) A description of the advances made at each of the participating facilities of the center in research, education and training, and clinical activities relating to mental illness in veterans.

"(3) A description of the actions taken by the Under Secretary for Health pursuant to subsection (h) of that section (as so added) to disseminate information derived from such activities throughout the Veterans Health Administration.

"(4) The Secretary's evaluations of the effectiveness of the centers in fulfilling the purposes of the centers.

"(c) Implementation. The Secretary of Veterans Affairs shall designate at least one center under section 7320 of title 38, United States Code, not later than January 1, 1998.".

§ 7321. Committee on Care of Severely Chronically Mentally Ill Veterans

(a) The Secretary, acting through the Under Secretary for Health, shall establish in the Veterans Health Administration a Committee on Care of Severely Chronically Mentally Ill Veterans. The Under Secretary shall appoint employees of the Department with expertise in the care of the chronically mentally ill to serve on the committee.

(b) The committee shall assess, and carry out a continuing assessment of, the capability of the Veterans Health Administration to meet effectively the treatment and rehabilitation needs of mentally ill veterans whose mental illness is severe and chronic and who are
eligible for health care furnished by the Department, including the needs of such veterans who are women. In carrying out that responsibility, the committee shall--

(1) evaluate the care provided to such veterans through the Veterans Health Administration;
(2) identify systemwide problems in caring for such veterans in facilities of the Veterans Health Administration;
(3) identify specific facilities within the Veterans Health Administration at which program enrichment is needed to improve treatment and rehabilitation of such veterans; and
(4) identify model programs which the committee considers to have been successful in the treatment and rehabilitation of such veterans and which should be implemented more widely in or through facilities of the Veterans Health Administration.

(c) The committee shall--

(1) advise the Under Secretary regarding the development of policies for the care and rehabilitation of severely chronically mentally ill veterans; and
(2) make recommendations to the Under Secretary--
   (A) for improving programs of care of such veterans at specific facilities and throughout the Veterans Health Administration;
   (B) for establishing special programs of education and training relevant to the care of such veterans for employees of the Veterans Health Administration;
   (C) regarding research needs and priorities relevant to the care of such veterans; and
   (D) regarding the appropriate allocation of resources for all such activities.

(d) (1) Not later than April 1, 1997, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the implementation of this section. The report shall include the following:
   (A) A list of the members of the committee.
   (B) The assessment of the Under Secretary for Health, after review of the initial findings of the committee, regarding the capability of the Veterans Health Administration, on a systemwide and facility-by-facility basis, to meet effectively the treatment and rehabilitation needs of severely chronically mentally ill veterans who are eligible for Department care.
   (C) The plans of the committee for further assessments.
   (D) The findings and recommendations made by the committee to the Under Secretary for Health and the views of the Under Secretary on such findings and recommendations.
   (E) A description of the steps taken, plans made (and a timetable for their execution), and resources to be applied toward improving the capability of the Veterans Health Administration to meet effectively the treatment and rehabilitation needs of severely chronically mentally ill veterans who are eligible for Department care.

(2) Not later than June 1 of each year through 2008, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report containing information updating the reports submitted under this subsection before the submission of such report.
§ 7322. Breast cancer mammography policy

(a) The Under Secretary for Health shall develop a national policy for the Veterans Health Administration on mammography screening for veterans.

(b) The policy developed under subsection (a) shall--
   (1) specify standards of mammography screening;
   (2) provide recommendations with respect to screening, and the frequency of screening, for--
      (A) women veterans who are over the age of 39; and
      (B) veterans, without regard to age, who have clinical symptoms, risk factors, or family history of breast cancer; and
   (3) provide for clinician discretion.

Other provisions:

Report to Congress; effective date of policy; accordance with other guidelines. Act Nov. 21, 1997, P. L. 105-114, Title II, § 208(b), (c), 111 Stat. 2289, 2290, provides:

"(b) Effective date. The Secretary of Veterans Affairs shall develop the national policy on mammography screening required by section 7322 of title 38, United States Code, as added by subsection (a), and shall furnish such policy in a report to the Committees on Veterans' Affairs of the Senate and House of Representatives, not later than 60 days after the date of the enactment of this Act. Such policy shall not take effect before the expiration of 30 days after the date of its submission to those committees.

"(c) Sense of Congress. It is the sense of Congress that the policy developed under section 7322 of title 38, United States Code, as added by subsection (a), shall be in accordance with the guidelines endorsed by the Secretary of Health and Human Services and the Director of the National Institutes of Health."

§ 7323. Required consultations with nurses

The Under Secretary for Health shall ensure that--
   (1) the director of a geographic service area, in formulating policy relating to the provision of patient care, shall consult regularly with a senior nurse executive or senior nurse executives; and
   (2) the director of a medical center shall include a registered nurse as a member of any committee used at that medical center to provide recommendations or decisions on medical center operations or policy affecting clinical services, clinical outcomes, budget, or resources.

§ 7324. Annual report on use of authorities to enhance retention of experienced nurses

(a) Annual report. Not later than January 31 each year, the Secretary, acting through the Under Secretary for Health, shall submit to Congress a report on the use during the...
preceding year of authorities for purposes of retaining experienced nurses in the Veterans Health Administration, as follows:

(1) The authorities under chapter 76 of this title [38 USCS §§ 7601 et seq.].
(2) The authority under VA Directive 5102.1, relating to the Department of Veterans Affairs nurse qualification standard, dated November 10, 1999, or any successor directive.
(3) Any other authorities available to the Secretary for those purposes.

(b) Report elements. Each report under subsection (a) shall specify for the period covered by such report, for each Department medical facility and for each geographic service area of the Department, the following:

(1) The number of waivers requested under the authority referred to in subsection (a)(2), and the number of waivers granted under that authority, to promote to the Nurse II grade or Nurse III grade under the Nurse Schedule under section 7404(b)(1) of this title [38 USCS § 7404(b)(1)] any nurse who has not completed a baccalaureate degree in nursing in a recognized school of nursing, set forth by age, race, and years of experience of the individuals subject to such waiver requests and waivers, as the case may be.

(2) The programs carried out to facilitate the use of nursing education programs by experienced nurses, including programs for flexible scheduling, scholarships, salary replacement pay, and on-site classes.

Other provisions:

Initial report. Act Jan. 23, 2002, P. L. 107-135, Title I, Subtitle B, § 125(c), 115 Stat. 2453, provides: "The initial report required under section 7324 of title 38, United States Code, as added by subsection (a), shall be submitted to the National Commission on VA Nursing established under subtitle D [38 USCS § 7451 note] as well as to Congress."

§ 7325. Medical emergency preparedness centers

(a) Establishment of centers.

(1) The Secretary shall establish four medical emergency preparedness centers in accordance with this section. Each such center shall be established at a Department medical center and shall be staffed by Department employees.

(2) The Under Secretary for Health shall be responsible for supervising the operation of the centers established under this section. The Under Secretary shall provide for ongoing evaluation of the centers and their compliance with the requirements of this section.

(3) The Under Secretary shall carry out the Under Secretary's functions under paragraph (2) in consultation with the Assistant Secretary of Veterans Affairs with responsibility for operations, preparedness, security, and law enforcement functions.

(b) Mission. The mission of the centers shall be as follows:

(1) To carry out research on, and to develop methods of detection, diagnosis, prevention, and treatment of injuries, diseases, and illnesses arising from the use of chemical, biological, radiological, incendiary or other explosive weapons or devices posing threats to the public health and safety.

(2) To provide education, training, and advice to health care professionals, including health care professionals outside the Veterans Health Administration, through the
National Disaster Medical System established pursuant to section 2811(b) of the Public Health Service Act (42 U.S.C. 300hh-11(b)) or through interagency agreements entered into by the Secretary for that purpose.

(3) In the event of a disaster or emergency referred to in section 1785(b) of this title [38 USCS § 1785(b)], to provide such laboratory, epidemiological, medical, or other assistance as the Secretary considers appropriate to Federal, State, and local health care agencies and personnel involved in or responding to the disaster or emergency.

(c) Selection of centers.

(1) The Secretary shall select the sites for the centers on the basis of a competitive selection process. The Secretary may not designate a site as a location for a center under this section unless the Secretary makes a finding under paragraph (2) with respect to the proposal for the designation of such site. To the maximum extent practicable, the Secretary shall ensure the geographic dispersal of the sites throughout the United States. Any such center may be a consortium of efforts of more than one medical center.

(2) A finding by the Secretary referred to in paragraph (1) with respect to a proposal for designation of a site as a location of a center under this section is a finding by the Secretary, upon the recommendations of the Under Secretary for Health and the Assistant Secretary with responsibility for operations, preparedness, security, and law enforcement functions, that the facility or facilities submitting the proposal have developed (or may reasonably be anticipated to develop) each of the following:

(A) An arrangement with a qualifying medical school and a qualifying school of public health (or a consortium of such schools) under which physicians and other persons in the health field receive education and training through the participating Department medical facilities so as to provide those persons with training in the detection, diagnosis, prevention, and treatment of injuries, diseases, and illnesses induced by exposures to chemical and biological substances, radiation, and incendiary or other explosive weapons or devices.

(B) An arrangement with a graduate school specializing in epidemiology under which students receive education and training in epidemiology through the participating Department facilities so as to provide such students with training in the epidemiology of contagious and infectious diseases and chemical and radiation poisoning in an exposed population.

(C) An arrangement under which nursing, social work, counseling, or allied health personnel and students receive training and education in recognizing and caring for conditions associated with exposures to toxins through the participating Department facilities.

(D) The ability to attract scientists who have made significant contributions to the development of innovative approaches to the detection, diagnosis, prevention, or treatment of injuries, diseases, and illnesses arising from the use of chemical, biological, radiological, incendiary or other explosive weapons or devices posing threats to the public health and safety.

(3) For purposes of paragraph (2)(A)--

(A) a qualifying medical school is an accredited medical school that provides education and training in toxicology and environmental health hazards and with
which one or more of the participating Department medical centers is affiliated; and
(B) a qualifying school of public health is an accredited school of public health that provides education and training in toxicology and environmental health hazards and with which one or more of the participating Department medical centers is affiliated.

(d) Research activities. Each center shall conduct research on improved medical preparedness to protect the Nation from threats in the area of that center's expertise. Each center may seek research funds from public and private sources for such purpose.

(e) Dissemination of research products.
(1) The Under Secretary for Health and the Assistant Secretary with responsibility for operations, preparedness, security, and law enforcement functions shall ensure that information produced by the research, education and training, and clinical activities of centers established under this section is made available, as appropriate, to health-care providers in the United States. Dissemination of such information shall be made through publications, through programs of continuing medical and related education provided through regional medical education centers under subchapter VI of chapter 74 of this title [38 USCS §§ 7471 et seq.], and through other means. Such programs of continuing medical education shall receive priority in the award of funding.
(2) The Secretary shall ensure that the work of the centers is conducted in close coordination with other Federal departments and agencies and that research products or other information of the centers shall be coordinated and shared with other Federal departments and agencies.

(f) Coordination of activities. The Secretary shall take appropriate actions to ensure that the work of each center is carried out--
(1) in close coordination with the Department of Defense, the Department of Health and Human Services, and other departments, agencies, and elements of the Government charged with coordination of plans for United States homeland security; and
(2) after taking into consideration applicable recommendations of the working group on the prevention, preparedness, and response to bioterrorism and other public health emergencies established under section 319F(a) of the Public Health Service Act (42 U.S.C. 247d-6(a)) or any other joint interagency advisory group or committee designated by the President or the President's designee to coordinate Federal research on weapons of mass destruction.

(g) Assistance to other agencies. The Secretary may provide assistance requested by appropriate Federal, State, and local civil and criminal authorities in investigations, inquiries, and data analyses as necessary to protect the public safety and prevent or obviate biological, chemical, or radiological threats.

(h) Detail of employees from other agencies. Upon approval by the Secretary, the Director of a center may request the temporary assignment or detail to the center, on a nonreimbursable basis, of employees from other departments and agencies of the United
States who have expertise that would further the mission of the center. Any such employee may be so assigned or detailed on a nonreimbursable basis pursuant to such a request.

(i) **Funding.**

(1) Amounts appropriated for the activities of the centers under this section shall be appropriated separately from amounts appropriated for the Department for medical care.

(2) In addition to funds appropriated for a fiscal year specifically for the activities of the centers pursuant to paragraph (1), the Under Secretary for Health shall allocate to such centers from other funds appropriated for that fiscal year generally for the Department medical care account and the Department medical and prosthetics research account such amounts as the Under Secretary determines appropriate to carry out the purposes of this section. Any determination by the Under Secretary under the preceding sentence shall be made in consultation with the Assistant Secretary with responsibility for operations, preparedness, security, and law enforcement functions.

(3) There are authorized to be appropriated for the centers under this section $20,000,000 for each of fiscal years 2003 through 2007.

**Other provisions:**


"(1) In order to assist the Secretary of Veterans Affairs and the Under Secretary of Veterans Affairs for Health in selecting sites for centers under section 7325 of title 38, United States Code, as added by subsection (a), the Under Secretary shall establish a peer review panel to assess the scientific and clinical merit of proposals that are submitted to the Secretary for the designation of such centers. The peer review panel shall be established in consultation with the Assistant Secretary of Veterans Affairs with responsibility for operations, preparedness, security, and law enforcement functions.

"(2) The peer review panel shall include experts in the fields of toxicological research, infectious diseases, radiology, clinical care of patients exposed to such hazards, and other persons as determined appropriate by the Secretary. Members of the panel shall serve as consultants to the Department of Veterans Affairs.

"(3) The panel shall review each proposal submitted to the panel by the officials referred to in paragraph (1) and shall submit to the Under Secretary for Health its views on the relative scientific and clinical merit of each such proposal. The panel shall specifically determine with respect to each such proposal whether that proposal is among those proposals which have met the highest competitive standards of scientific and clinical merit.

"(4) The panel shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).".

**Research Guide**

**Am Jur:**

77 Am Jur 2d, Veterans and Veterans' Laws § 3

§ 7326. Education and training programs on medical response to consequences of terrorist activities
(a) **Education program.** The Secretary shall carry out a program to develop and disseminate a series of model education and training programs on the medical responses to the consequences of terrorist activities.

(b) **Implementing official.** The program shall be carried out through the Under Secretary for Health, in consultation with the Assistant Secretary of Veterans Affairs with responsibility for operations, preparedness, security, and law enforcement functions.

(c) **Content of programs.** The education and training programs developed under the program shall be modelled after programs established at the F. Edward Hebirt [Hibert] School of Medicine of the Uniformed Services University of the Health Sciences and shall include, at a minimum, training for health care professionals in the following:

1. Recognition of chemical, biological, radiological, incendiary, or other explosive agents, weapons, or devices that may be used in terrorist activities.
2. Identification of the potential symptoms of exposure to those agents.
3. Understanding of the potential long-term health consequences, including psychological effects, resulting from exposure to those agents, weapons, or devices.
4. Emergency treatment for exposure to those agents, weapons, or devices.
5. An appropriate course of followup treatment, supportive care, and referral.
6. Actions that can be taken while providing care for exposure to those agents, weapons, or devices to protect against contamination, injury, or other hazards from such exposure.
7. Information on how to seek consultative support and to report suspected or actual use of those agents.

(d) **Potential trainees.** In designing the education and training programs under this section, the Secretary shall ensure that different programs are designed for health-care professionals in Department medical centers. The programs shall be designed to be disseminated to health professions students, graduate health and medical education trainees, and health practitioners in a variety of fields.

(e) **Consultation.** In establishing education and training programs under this section, the Secretary shall consult with appropriate representatives of accrediting, certifying, and coordinating organizations in the field of health professions education.

**Explanatory notes:**

"Hibert" has been inserted in brackets in subsec. (c) to indicate the spelling probably intended by Congress.

**Other provisions:**

**Implementation of section.** Act Nov. 7, 2002, P. L. 107-287, § 3(b), 116 Stat. 2028, provides: "The Secretary of Veterans Affairs shall implement section 7326 of title 38, United States Code, as added by subsection (a), not later than the end of the 90-day period beginning on the date of the enactment of this Act."

**Research Guide**

**Am Jur:**

77 Am Jur 2d, Veterans and Veterans' Laws § 3
§ 7327. Centers for research, education, and clinical activities on complex multi-trauma associated with combat injuries

(a) Purpose. The purpose of this section is to provide for the improvement of the provision of health care services and related rehabilitation and education services to eligible veterans suffering from complex multi-trauma associated with combat injuries through-

(1) the development of improved models and systems for the furnishing by the Department of health care, rehabilitation, and education services to veterans;
(2) the conduct of research to support the provision of such services in accordance with the most current evidence on multi-trauma injuries; and
(3) the education and training of health care personnel of the Department with respect to the provision of such services.

(b) Designation of centers.

(1) The Secretary shall designate an appropriate number of cooperative centers for clinical care, consultation, research, and education activities on combat injuries.
(2) Each center designated under paragraph (1) shall function as a center for-
   (A) research on the long-term effects of injuries sustained as a result of combat in order to support the provision of services for such injuries in accordance with the most current evidence on complex multi-trauma;
   (B) the development of rehabilitation methodologies for treating individuals with complex multi-trauma; and
   (C) the continuous and consistent coordination of care from the point of referral throughout the rehabilitation process and ongoing follow-up after return to home and community.
(3) The Secretary shall designate one of the centers designated under paragraph (1) as the lead center for activities referred to in that paragraph. As the lead center for such activities, such center shall-
   (A) develop and provide periodic review of research priorities, and implement protocols, to ensure that projects contribute to the activities of the centers designated under paragraph (1);
   (B) oversee the coordination of the professional and technical activities of such centers to ensure the quality and validity of the methodologies and statistical services for research project leaders;
   (C) develop and ensure the deployment of an efficient and cost-effective data management system for such centers;
   (D) develop and distribute educational materials and products to enhance the evaluation and care of individuals with combat injuries by medical care providers of the Department who are not specialized in the assessment and care of complex multi-trauma;
   (E) develop educational materials for individuals suffering from combat injuries and for their families; and
   (F) serve as a resource for the clinical and research infrastructure of such centers by disseminating clinical outcomes and research findings to improve clinical practice.
(4) The Secretary shall designate centers under paragraph (1) upon the recommendation of the Under Secretary for Health.
(5) The Secretary may designate a center under paragraph (1) only if the center meets the requirements of subsection (c).

(c) **Requirements for centers.** To be designated as a center under this section, a facility shall-
   (1) be a regional lead center for the care of traumatic brain injury;
   (2) be located at a tertiary care medical center and have on-site availability of primary and subspecialty medical services relating to complex multi-trauma;
   (3) have, or have the capacity to develop, the capability of managing impairments associated with combat injuries;
   (4) be affiliated with a school of medicine;
   (5) have, or have experience with, participation in clinical research trials;
   (6) provide amputation care and rehabilitation;
   (7) have pain management programs;
   (8) provide comprehensive brain injury rehabilitation; and
   (9) provide comprehensive general rehabilitation.

(d) **Additional resources.** The Secretary shall provide each center designated under this section such resources as the Secretary determines to be required by such center to achieve adequate capability of managing individuals with complex multi-trauma, including-
   (1) the upgrading of blind rehabilitation services by employing or securing the services of blind rehabilitation specialists;
   (2) employing or securing the services of occupational therapists with blind rehabilitation training;
   (3) employing or securing the services of additional mental health services providers; and
   (4) employing or securing additional rehabilitation nursing staff to meet care needs.

(e) **Cooperation with Department of Defense.**
   (1) The Secretary of Veterans Affairs may assist the Secretary of Defense in the care of members of the Armed Forces with complex multi-trauma at military treatment facilities by-
      (A) making available, in a manner that the Secretary of Veterans Affairs considers appropriate, certified rehabilitation registered nurses of the Department of Veterans Affairs to such facilities to assess and coordinate the care of such members; and
      (B) making available, in a manner that the Secretary of Veterans Affairs considers appropriate, blind rehabilitation specialists of the Department of Veterans Affairs to such facilities to consult with the medical staff of such facilities on the special needs of such members who have visual impairment as a consequence of combat injury.
   (2) Assistance shall be provided under this subsection through agreements for the sharing of health-care resources under section 8111 of this title [38 USCS § 8111].
(f) **Award of funding.** Centers designated under this section may compete for the award of funding from amounts appropriated for the Department for medical and prosthetics research.

(g) **Dissemination of information.**

(1) The Under Secretary for Health shall ensure that information produced by the centers designated under this section that may be useful for other activities of the Veterans Health Administration is disseminated throughout the Administration.

(2) Information shall be disseminated under this subsection through publications, through programs of continuing medical and related education provided through regional medical education centers under subchapter VI of chapter 74 of this title [38 USCS §§ 7471 et seq.], and through other means.

(h) **National oversight.** The Under Secretary for Health shall designate an appropriate officer to oversee the operation of the centers designated under this section and provide for periodic evaluation of the centers.

(i) **Authorization of appropriations.**

(1) There are authorized to be appropriated to the Department of Veterans Affairs for the centers designated under this section amounts as follows:

   (A) $7,000,000 for fiscal year 2005.

   (B) $8,000,000 for each of fiscal years 2006 through 2008.

(2) In addition to amounts authorized to be appropriated by paragraph (1) for a fiscal year, the Under Secretary for Health may allocate to each center designated under this section, from other funds authorized to be appropriated for such fiscal year for the Department generally for medical and for medical and prosthetic research, such amounts as the Under Secretary for Health determines appropriate to carry out the purposes of this section.

**Other provisions:**

**Designation of centers.** Act Nov. 30, 2004, P. L. 108-422, Title III, § 302(b), 118 Stat. 2385, provides: "The Secretary of Veterans Affairs shall designate the centers for research, education, and clinical activities on complex multi-trauma associated with combat injuries required by section 7327 of title 38, United States Code (as added by subsection (a)), not later than 120 days after the date of the enactment of this Act."

§ 7328. **Medical preparedness centers**

(a) **Establishment of centers.**

(1) The Secretary shall establish four medical emergency preparedness centers in accordance with this section. Each such center shall be established at a Department medical center and shall be staffed by Department employees.

(2) The Under Secretary for Health shall be responsible for supervising the operation of the centers established under this section. The Under Secretary shall provide for ongoing evaluation of the centers and their compliance with the requirements of this section.

(3) The Under Secretary shall carry out the Under Secretary's functions under paragraph (2) in consultation with the Assistant Secretary of Veterans Affairs with responsibility for operations, preparedness, security, and law enforcement functions.
(b) **Mission.** The mission of the centers shall be as follows:

1. To carry out research on, and to develop methods of detection, diagnosis, prevention, and treatment of injuries, diseases, and illnesses arising from the use of chemical, biological, radiological, incendiary or other explosive weapons or devices posing threats to the public health and safety.
2. To provide education, training, and advice to health care professionals, including health care professionals outside the Veterans Health Administration, through the National Disaster Medical System established pursuant to section 2811(b) of the Public Health Service Act (42 U.S.C. 300hh-11(b)) or through interagency agreements entered into by the Secretary for that purpose.
3. In the event of a disaster or emergency referred to in section 1785(b) of this title [38 USCS § 1785(b)], to provide such laboratory, epidemiological, medical, or other assistance as the Secretary considers appropriate to Federal, State, and local health care agencies and personnel involved in or responding to the disaster or emergency.

(c) **Selection of centers.**

1. The Secretary shall select the sites for the centers on the basis of a competitive selection process. The Secretary may not designate a site as a location for a center under this section unless the Secretary makes a finding under paragraph (2) with respect to the proposal for the designation of such site. To the maximum extent practicable, the Secretary shall ensure the geographic dispersal of the sites throughout the United States. Any such center may be a consortium of efforts of more than one medical center.
2. A finding by the Secretary referred to in paragraph (1) with respect to a proposal for designation of a site as a location of a center under this section is a finding by the Secretary, upon the recommendations of the Under Secretary for Health and the Assistant Secretary with responsibility for operations, preparedness, security, and law enforcement functions, that the facility or facilities submitting the proposal have developed (or may reasonably be anticipated to develop) each of the following:
   - An arrangement with a qualifying medical school and a qualifying school of public health (or a consortium of such schools) under which physicians and other persons in the health field receive education and training through the participating Department medical facilities so as to provide those persons with training in the detection, diagnosis, prevention, and treatment of injuries, diseases, and illnesses induced by exposures to chemical and biological substances, radiation, and incendiary or other explosive weapons or devices.
   - An arrangement with a graduate school specializing in epidemiology under which students receive education and training in epidemiology through the participating Department facilities so as to provide such students with training in the epidemiology of contagious and infectious diseases and chemical and radiation poisoning in an exposed population.
   - An arrangement under which nursing, social work, counseling, or allied health personnel and students receive training and education in recognizing and caring for conditions associated with exposures to toxins through the participating Department facilities.
   - The ability to attract scientists who have made significant contributions to the development of innovative approaches to the detection, diagnosis, prevention, or
treatment of injuries, diseases, and illnesses arising from the use of chemical, biological, radiological, incendiary or other explosive weapons or devices posing threats to the public health and safety.

(3) For purposes of paragraph (2)(A)--

(A) a qualifying medical school is an accredited medical school that provides education and training in toxicology and environmental health hazards and with which one or more of the participating Department medical centers is affiliated; and

(B) a qualifying school of public health is an accredited school of public health that provides education and training in toxicology and environmental health hazards and with which one or more of the participating Department medical centers is affiliated.

(d) Research activities. Each center shall conduct research on improved medical preparedness to protect the Nation from threats in the area of that center's expertise. Each center may seek research funds from public and private sources for such purpose.

(e) Dissemination of research products.

(1) The Under Secretary for Health and the Assistant Secretary with responsibility for operations, preparedness, security, and law enforcement functions shall ensure that information produced by the research, education and training, and clinical activities of centers established under this section is made available, as appropriate, to health-care providers in the United States. Dissemination of such information shall be made through publications, through programs of continuing medical and related education provided through regional medical education centers under subchapter VI of chapter 74 of this title [38 USCS §§ 7471 et seq.], and through other means. Such programs of continuing medical education shall receive priority in the award of funding.

(2) The Secretary shall ensure that the work of the centers is conducted in close coordination with other Federal departments and agencies and that research products or other information of the centers shall be coordinated and shared with other Federal departments and agencies.

(f) Coordination of activities. The Secretary shall take appropriate actions to ensure that the work of each center is carried out--

(1) in close coordination with the Department of Defense, the Department of Health and Human Services, and other departments, agencies, and elements of the Government charged with coordination of plans for United States homeland security; and

(2) after taking into consideration applicable recommendations of the working group on the prevention, preparedness, and response to bioterrorism and other public health emergencies established under section 319F(a) of the Public Health Service Act (42 U.S.C. 247d-6(a)) or any other joint interagency advisory group or committee designated by the President or the President's designee to coordinate Federal research on weapons of mass destruction.

(g) Assistance to other agencies. The Secretary may provide assistance requested by appropriate Federal, State, and local civil and criminal authorities in investigations,
inquiries, and data analyses as necessary to protect the public safety and prevent or obviate biological, chemical, or radiological threats.

(h) Detail of employees from other agencies. Upon approval by the Secretary, the Director of a center may request the temporary assignment or detail to the center, on a nonreimbursable basis, of employees from other departments and agencies of the United States who have expertise that would further the mission of the center. Any such employee may be so assigned or detailed on a nonreimbursable basis pursuant to such a request.

(i) Funding.

(1) There are authorized to be appropriated for the centers under this section $10,000,000 for each of fiscal years 2005 through 2007.

(2) In addition to any amounts appropriated for a fiscal year specifically for the activities of the centers pursuant to paragraph (1), the Under Secretary for Health shall allocate to the centers from other funds appropriated for that fiscal year generally for the Department medical care account and the Department medical and prosthetic research account such amounts as the Under Secretary determines necessary in order to carry out the purposes of this section.

Explanatory notes:

Section 303(c)(1) of Act Nov. 30, 2004, P. L. 108-422, provided for the enactment of this section with text consisting of the text of subsections (a) through (h) of 38 USCS § 7325 and new subsec. (i).

Other provisions:

Enhancement of medical preparedness of Department of Veterans Affairs: peer review panel; proposals. Act Nov. 30, 2004, P. L. 108-422, Title III, § 303(a), (b), 118 Stat. 2386, provides:

"(a) Peer review panel. In order to assist the Secretary of Veterans Affairs in selecting facilities of the Department of Veterans Affairs to serve as sites for centers under section 7328 of title 38, United States Code, as added by subsection (c), the Secretary shall establish a peer review panel to assess the scientific and clinical merit of proposals that are submitted to the Secretary for the selection of such facilities. The panel shall be established not later than 90 days after the date of the enactment of this Act and shall include experts in the fields of toxicological research, infectious diseases, radiology, clinical care of veterans exposed to such hazards, and other persons as determined appropriate by the Secretary. Members of the panel shall serve as consultants to the Department of Veterans Affairs. Amounts available to the Secretary for Medical Care may be used for purposes of carrying out this subsection. The panel shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.)."

"(b) Proposals. The Secretary shall solicit proposals for designation of facilities as described in subsection (a). The announcement of the solicitation of such proposals shall be issued not later than 60 days after the date of the enactment of this Act, and the deadline for the submission of proposals in response to such solicitation shall be not later than 90 days after the date of such announcement. The peer review panel established under subsection (a) shall complete its review of the proposals and submit its recommendations to the Secretary not later than 60 days after the date of the deadline for the submission of proposals. The Secretary shall then select the four sites for the location of such centers not later than 45 days after the date on which the peer review panel submits its recommendations to the Secretary.".
§ 7331. Informed consent

The Secretary, upon the recommendation of the Under Secretary for Health and pursuant to the provisions of section 7334 of this title [38 USCS § 7334], shall prescribe regulations establishing procedures to ensure that all medical and prosthetic research carried out and, to the maximum extent practicable, all patient care furnished under this title shall be carried out only with the full and informed consent of the patient or subject or, in appropriate cases, a representative thereof.

Effective date of section:
Act Oct. 21, 1976, P. L. 94-581, Title II, § 211, 90 Stat. 2866, provided that this section is effective on Oct. 21, 1976.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4131, as 38 USCS § 7331, substituted "Secretary" for "Administrator", and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).
1992. Act Oct. 9, 1992 substituted "Under Secretary for Health" for "Chief Medical Director".

Code of Federal Regulations
Department of Veterans Affairs-Protection of human subjects, 38 CFR Part 16
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
This section is referred to in 38 USCS § 7334

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 8

Under provisions of 38 USCS § 4131 [now 38 USCS § 7331], mentally ill patients have right to be informed of, and participate in, decision-making aspects of their treatment; to maximum extent practicable, all patient care shall be carried out only with full and informed consent of patient or, in appropriate cases, representative of patient. In re W.S. (1977) 152 NJ Super 298, 377 A2d 969

§ 7332. Confidentiality of certain medical records

(a) (1) Records of the identity, diagnosis, prognosis, or treatment of any patient or subject which are maintained in connection with the performance of any program or activity (including education, training, treatment, rehabilitation, or research) relating to drug
abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia which is carried out by or for the Department under this title shall, except as provided in subsections (e) and (f), be confidential, and (section 5701 of this title [38 USCS § 5701] to the contrary notwithstanding) such records may be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b).

(2) Paragraph (1) prohibits the disclosure to any person or entity other than the patient or subject concerned of the fact that a special written consent is required in order for such records to be disclosed.

(b) (1) The content of any record referred to in subsection (a) may be disclosed by the Secretary in accordance with the prior written consent of the patient or subject with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed in regulations prescribed by the Secretary.

(2) Whether or not any patient or subject, with respect to whom any given record referred to in subsection (a) is maintained, gives written consent, the content of such record may be disclosed by the Secretary as follows:

(A) To medical personnel to the extent necessary to meet a bona fide medical emergency.

(B) To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient or subject in any report of such research, audit, or evaluation, or otherwise disclose patient or subject identities in any manner.

(C) (i) In the case of any record which is maintained in connection with the performance of any program or activity relating to infection with the human immunodeficiency virus, to a Federal, State, or local public-health authority, charged under Federal or State law with the protection of the public health, and to which Federal or State law requires disclosure of such record, if a qualified representative of such authority has made a written request that such record be provided as required pursuant to such law for a purpose authorized by such law.

(ii) A person to whom a record is disclosed under this paragraph may not redisclose or use such record for a purpose other than that for which the disclosure was made.

(D) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient or subject, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

(3) In the event that the patient or subject who is the subject of any record referred to in subsection (a) is deceased, the content of any such record may be disclosed by the Secretary only upon the prior written request of the next of kin, executor, administrator, or other personal representative of such patient or subject and only if the Secretary determines that such disclosure is necessary for such survivor to obtain...
benefits to which such survivor may be entitled, including the pursuit of legal action, but then only to the extent, under such circumstances, and for such purposes as may be allowed in regulations prescribed pursuant to section 7334 of this title [38 USCS § 7334].

(c) Except as authorized by a court order granted under subsection (b)(2)(D), no record referred to in subsection (a) of this section may be used to initiate or substantiate any criminal charges against, or to conduct any investigation of, a patient or subject.

(d) The prohibitions of this section shall continue to apply to records concerning any person who has been a patient or subject, irrespective of whether or when such person ceases to be a patient.

(e) The prohibitions of this section shall not prevent any interchange of records--

(1) within and among those components of the Department furnishing health care to veterans, or determining eligibility for benefits under this title; or

(2) between such components furnishing health care to veterans and the Armed Forces.

(f) (1) Notwithstanding subsection (a) but subject to paragraph (2), a physician or a professional counselor may disclose information or records indicating that a patient or subject is infected with the human immunodeficiency virus if the disclosure is made to (A) the spouse of the patient or subject, or (B) to an individual whom the patient or subject has, during the process of professional counseling or of testing to determine whether the patient or subject is infected with such virus, identified as being a sexual partner of such patient or subject.

(2) (A) A disclosure under paragraph (1) may be made only if the physician or counselor, after making reasonable efforts to counsel and encourage the patient or subject to provide the information to the spouse or sexual partner, reasonably believes that the patient or subject will not provide the information to the spouse or sexual partner and that the disclosure is necessary to protect the health of the spouse or sexual partner.

(B) A disclosure under such paragraph may be made by a physician or counselor other than the physician or counselor referred to in subparagraph (A) if such physician or counselor is unavailable by reason of absence or termination of employment to make the disclosure.

(g) Any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined, in the case of a first offense, up to the maximum amount provided under section 5701(f) of this title [38 USCS § 5701(f)] for a first offense under that section and, in the case of a subsequent offense, up to the maximum amount provided under section 5701(f) of this title [38 USCS § 5701(f)] for a subsequent offense under that section.

Effective date of section:

Act Oct. 21, 1976, P. L. 94-581, Title II, § 211, 90 Stat. 2866, provided that this section is effective on Oct. 21, 1976.

Amendments:
1988. Act May 20, 1988, in subsec. (a), designated the existing provisions as para. (1), and in para. (1) as so designated, inserted "infection with the human immunodeficiency virus, ", substituted "subsections (e) and (f)" for "subsection (e)" , and added para. (2); in subsec. (b), in para. (1), deleted "pursuant to section 4134 of this title" preceding the concluding period, in para. (2), redesignated subpara. (c) as subpara. (D), and added a new subpara. (C); in subsec. (c), substituted "subsection (b)(2)(D)" for "subsection (b)(2)(C)"; redesignated subsec. (f) as subsec. (g), and added a new subsec. (f); in subsec. (g), as so redesignated, substituted "shall be fined, in the case of a first offense, up to the maximum amount provided under section 3301(f) of this title for a first offense under this section and, in the case of a subsequent offense, up to the maximum amount provided under section 3301(f) of this title for a subsequent offense under this section." for "shall be fined not more than $500 in the case of a first offense, and not more than $5,000 in the case of each subsequent offense. ".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4132, as 38 USCS § 7332; and, in subsec. (a), in para. (1), substituted "Department" for "Veterans' Administration" and deleted "of this section" following "in subsections (e) and (f)" and "under subsection (b)" ; in para. (2), deleted "of this subsection" following "Paragraph (1)"; in subsec. (b), in paras. (1)-(3), deleted "of this section" following "in subsection (a)" and substituted "Secretary" for "Administrator" wherever appearing; in subsec. (c), deleted "of this section" following "subsection (b)(2)(D)"; in subsec. (e), in para. (1), substituted "Department" for "Veterans’ Administration"; and, in subsec. (f), in para. (1), deleted "of this section" following "subsection (a)" and deleted "of this subsection" following "to paragraph (2)"; in para. (2), in subpara. (A), deleted "of this section" following "under paragraph (1)" , and in subpara. (B), deleted "of this paragraph" following "in subparagraph (A)" .

Such Act further amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Cross References
This section is referred to in 38 USCS §§ 1729, 1753, 7334, 7464

Research Guide
Federal Procedure:
13 Fed Proc L Ed, Food, Drugs, and Cosmetics § 35:705
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:359, 421

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 8

Forms:

Although Board cannot not order disclosure of relevant information protected from disclosure by statute, its regulations permit party to request subpoena under 5 USCS § 1204, and Board may request appropriate U.S. district court to enforce compliance; procedure is consistent with § 7332’s express authorization allowing release of patient medical records pursuant to court of competent jurisdiction. Hall v Department of Veterans Affairs (1995, MSPB) 67 MSPR 622

§ 7333. Nondiscrimination against alcohol and drug abusers and persons infected with the human immunodeficiency virus

(a) Veterans eligible for treatment under chapter 17 of this title [38 USCS §§ 1701 et seq.] who are alcohol or drug abusers or who are infected with the human immunodeficiency virus shall not be discriminated against in admission or treatment by any Department
health-care facility solely because of their alcohol or drug abuse or dependency or because of their viral infection.

(b) The Secretary shall prescribe regulations for the enforcement of this section. Such regulations, with respect to the admission and treatment of such veterans who are alcohol or drug abusers, shall be prescribed in accordance with section 7334 of this title [38 USCS § 7334].

Effective date of section:
Act Oct. 21, 1976, P. L. 94-581, Title II, § 211, 90 Stat. 2866, provided that this section is effective on Oct. 21, 1976.

Amendments:

1988. Act May 20, 1988 substituted this section and catchline for ones which read:

"§ 4133. Nondiscrimination in the admission of alcohol and drug abusers to Veterans' Administration health care facilities

"Veterans eligible for treatment under chapter 17 of this title who are alcohol or drug abusers and who are suffering from medical disabilities shall not be discriminated against in admission or treatment, solely because of their alcohol or drug abuse or dependence, by any Veterans' Administration health care facility. The Administrator, pursuant to the provisions of section 4134 of this title, shall prescribe regulations for the enforcement of this nondiscrimination policy with respect to the admission and treatment of such eligible veterans who are alcohol or drug abusers."

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4133, as 38 USCS § 7333; in subsec. (a), substituted "Department" for "Veterans' Administration"; and, in subsec. (b), substituted "Secretary" for "Administrator" and amended the references to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Other provisions:


"(a) General rule. Except as provided in subsection (b), the Secretary of Veterans Affairs may not during any fiscal year conduct a widespread testing program to determine infection of humans with the human immunodeficiency virus unless funds have been appropriated to the Department of Veterans Affairs specifically for such a program during the fiscal year.

"(b) Voluntary testing. (1) The Secretary shall provide for a program under which the Department of Veterans Affairs offers each patient to whom the Department is furnishing health care services and who is described in paragraph (2) the opportunity to be tested to determine whether such patient is infected with the human immunodeficiency virus.

"(2) Patients referred to in paragraph (1) are--

"(A) patients who are receiving treatment for intravenous drug abuse,

"(B) patients who are receiving treatment for a disease associated with the human immunodeficiency virus, and

"(C) patients who are otherwise at high risk for infection with such virus.
“(3) Subject to the consent requirement in paragraph (4) and unless medically contraindicated, the test shall be administered to each patient requesting to be tested for infection with such virus.

“(4) A test may not be conducted under this subsection without the prior informed and separate written consent of the patient tested. The Secretary shall provide pre- and post-test counseling regarding the acquired immune deficiency syndrome and the test to each patient who is administered the test.”.

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
This section is referred to in 38 USCS § 7334

Research Guide
Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 8

Although 38 USCS § 4133 [now 38 USCS § 7333] gives cause of action to drug addicted veteran alleging discrimination in treatment at Veterans Administration [now Department of Veterans Affairs] Hospital, failure to exhaust administrative remedies available under 38 USCS §§ 4001-4007 [now 38 USCS §§ 7101 et seq.] precludes consideration of complaint by court. Pettus v Veterans Admin. Hospital (1981, ED Pa) 517 F Supp 656, 33 BNA FEP Cas 903

§ 7334. Regulations

(a) Regulations prescribed by the Secretary under section 7331 of this title [38 USCS § 7331], section 7332 of this title [38 USCS § 7332] with respect to the confidentiality of alcohol and drug abuse medical records, and section 7333 of this title [38 USCS § 7333] with respect to alcohol or drug abusers shall, to the maximum extent feasible consistent with other provisions of this title, make applicable the regulations described in subsection (b) to the conduct of research and to the provision of hospital care, nursing home care, domiciliary care, and medical services under this title.

(b) The regulations referred to in subsection (a) are--

(1) regulations governing human experimentation and informed consent prescribed by the Secretary of Health and Human Services, based on the recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, established by section 201 of the National Research Act (Public Law 93-348; 88 Stat. 348); and

(2) regulations governing (A) the confidentiality of drug and alcohol abuse medical records, and (B) the admission of drug and alcohol abusers to private and public hospitals, prescribed pursuant to the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. 4551 et seq.) and the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1101 et seq.).

(c) Regulations prescribed by the Secretary under sections 7331, 7332, and 7333 of this title [38 USCS §§ 7331, 7332, and 7333] may contain such definitions, and may provide for such safeguards and procedures (including procedures and criteria for the issuance and scope of court orders under section 7332(b)(2)(C) of this title [38 USCS §
7332(b)(2)(C)), as are necessary to prevent circumvention or evasion of such regulations or to facilitate compliance with such regulations.

(d) In prescribing and implementing such regulations, the Secretary shall, from time to time, consult with the Secretary of Health and Human Services and, as appropriate, with the President (or the delegate of the President) in order to achieve the maximum possible coordination of the regulations, and the implementation of the regulations, which they and the Secretary prescribe.

References in text:

“Section 201 of the National Research Act, referred to in subsec. (b)(1), is Act July 12, 1974, P. L. 93-348, 88 Stat. 348, § 201, which formerly appeared as a note under former 42 USCS § 2891-1, and was repealed by Act Nov. 9, 1978, P. L. 95-622, Title III, § 302(b), 92 Stat. 3442.

The "Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970", referred to in subsec. (b)(2), is Act Dec. 31, 1970, P. L. 91-616, 84 Stat. 1848, as amended, which is generally classified to 42 USCS §§ 4541 et seq. For full classification of this Act, consult USCS Tables volumes.

The "Drug Abuse Office and Treatment Act of 1972", referred to in subsec. (b)(2), is Act March 21, 1972, P. L. 92-255, 86 Stat. 65, as amended, which was redesignated as the Drug Abuse Prevention, Treatment, and Rehabilitation Act and is generally classified to 21 USCS §§ 1101 et seq. For full classification of this Act, consult USCS Tables volumes.

The reference to section 7332(b)(2)(C) of this title in subsec. (c) should now probably be read as a reference to section 7332(b)(2)(D) of this title in view of the redesignation of subpara. (C) of para. (2) of subsec. (b) of § 7332, which related to court orders, as subpara. (D) of that provision by Act May 20, 1988. See the 1988 Amendments note.

Effective date of section:

Act Oct. 21, 1976, P. L. 94-581, Title II, § 211, 90 Stat. 2866, provided that this section is effective on Oct. 21, 1976.

Amendments:

1982. Act Oct. 12, 1982, in subsec. (a), in para. (1), substituted "Health and Human Services" for "Health, Education, and Welfare", and, in the concluding matter, substituted "the President (or the delegate of the President)" for "the Director of the Office of Drug Abuse Policy (or any other successor authority)".

1988. Act May 20, 1988 substituted this section and catchline for ones which read:

"§ 4134. Coordination; reports

"(a) Regulations prescribed pursuant to section 4131 of this title, section 4132 of this title with respect to the confidentiality of alcohol and drug abuse medical records, and section 4133 of this title, shall, to the maximum extent feasible consistent with other provisions of this title, make applicable the regulations governing--

"(1) human experimentation and informed consent prescribed by the Secretary of Health and Human Services based on the recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, established by section 201 of the National Research Act, as amended (Public Law 93-348; 88 Stat. 348), and

"(2)(A) the confidentiality of drug and alcohol abuse medical records, and (B) the admission of drug and alcohol abusers to private and public hospitals, prescribed pursuant to the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment,
and Rehabilitation Act of 1970, as amended (42 U.S.C. 4551 et seq.), and the Drug Abuse Office and Treatment Act of 1972, as amended (21 U.S.C. 1101 et seq.), to the conduct of research and to the provision of hospital care, nursing home care, domiciliary care, and medical services under this title. Such regulations may contain such definitions, and may provide for such safeguards and procedures (including procedures and criteria for the issuance and scope of court orders under section 4132(b)(2)(C) of this title as are necessary to prevent circumvention or evasion thereof, or to facilitate compliance therewith. In prescribing and implementing regulations pursuant to this subsection, the Administrator shall, from time to time, consult with the Secretary of Health, Education, and Welfare, and, as appropriate, the President (or the delegate of the President) in order to achieve the maximum possible coordination of the regulations, and the implementation thereof, which they and the Administrator prescribe.

"(b) Not later than sixty days after the effective date of this subsection, the Administrator shall submit to the appropriate committees of the House of Representatives and the Senate a full report with respect to the regulations (including guidelines, policies, and procedures thereunder) prescribed pursuant to subsection (a) of this section. Such report shall include (1) an explanation of any inconsistency between such regulations and the regulations of the Secretary referred to in such subsection (a); (2) an account of the extent, substance, and results of consultations with the Secretary (or Director, as appropriate) respecting the prescribing and implementation of the Administrator's regulations; and (3) such recommendations for legislation and administrative actions as the Administrator determines are necessary and desirable. The Administrator shall timely publish such report in the Federal Register."

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4134, as 38 USCS § 7334; in subsec. (a), deleted "of this section" following "in subsection (b)" and substituted "Secretary" for "Administrator"; in subsec. (b), in the introductory matter, deleted "of this section" following "in subsection (a)"; and, in subsecs. (c) and (d), substituted "Secretary" for "Administrator" wherever appearing.

Such Act further amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Other provisions:

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Termination of Commission. For provisions as to the termination of the National Commission for the Protection of Human Subjects of Biochemical and Behavioral Research, see Act July 12, 1974, P. L. 93-348, § 204(d) and (e), 88 Stat. 348, which appears as 42 USCS § 289l-1 note.

Code of Federal Regulations

Department of Veterans Affairs-Protection of human subjects, 38 CFR Part 16

Cross References

This section is referred to in 38 USCS §§ 7331-7333

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 8

SUBCHAPTER IV. RESEARCH CORPORATIONS
§ 7361. Authority to establish; status
§ 7362. Purpose of corporations
§ 7363. Board of directors; executive director
§ 7364. General powers
§ 7364A. Coverage of employees under certain Federal tort claims laws
§ 7365. Applicable State law
§ 7366. Accountability and oversight
[§ 7367. Repealed]
§ 7368. Expiration of authority

Explanatory notes:
A prior Subchapter IV, which read: "PAY FOR NURSES AND OTHER HEALTH-CARE PERSONNEL, consisting of §§ 4141 and 4142, was deleted by Act May 7, 1991, P. L. 102-40, Title IV, § 401(c)(1), 105 Stat. 238, and §§ 4241 and 4142 were redesignated as §§ 7451 and 7452 and transferred to Subchapter IV of Chapter 74.


A prior Subchapter VI was redesignated as this subchapter.

Amendments:

§ 7361. Authority to establish; status

(a) The Secretary may authorize the establishment at any Department medical center of a nonprofit corporation to provide a flexible funding mechanism for the conduct of approved research and education at the medical center. Except as otherwise required in this subchapter [38 USCS §§ 7361 et seq.] or under regulations prescribed by the Secretary, any such corporation, and its directors and employees, shall be required to comply only with those Federal laws, regulations, and executive orders and directives which apply generally to private nonprofit corporations. Such a corporation may be established to facilitate either research or education or both research and education.

(b) If by the end of the four-year period beginning on the date of the establishment of a corporation under this subchapter [38 USCS §§ 7361 et seq.] the corporation is not recognized as an entity the income of which is exempt from taxation under the Internal Revenue Code of 1986, the Secretary shall dissolve the corporation.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4161, as 38 USCS § 7361; and, in subsec. (a), substituted "Department" for "Veterans' Administration".

Such Act further substituted "Secretary" for "Administrator" wherever appearing in this section.

1992. Act May 20, 1992 (effective as of Oct. 1, 1991, as provided by § 3(c) of such Act, which appears as a note to this section), in subsec. (b), substituted "four-year period" for "three-year period".

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1996. Act Oct. 9, 1996, in subsec. (b), deleted "section 501(c)(3) of" preceding "the Internal Revenue Code".

1999. Act Nov. 30, 1999, in subsec. (a), inserted "and education" after "approved research", and added the sentence beginning "Such a corporation may be established . . . ."

Other provisions:

Effective date of May 20, 1992 amendments. Act May 20, 1992, P. L. 102-291, § 3(c), 106 Stat. 179, provides: "The amendments made by subsections (a) and (b) [amending subsec. (b) of this section and 38 USCS § 7368] shall take effect as of October 1, 1991."


"The following actions of the Secretary of Veterans Affairs during the period beginning on October 1, 1991, and ending on the date of the enactment of this Act are hereby ratified:

"(1) A failure to dissolve a nonprofit corporation established under section 7361(a) of title 38, United States Code, that, within the three-year period beginning on the date of the establishment of the corporation, was not recognized as an entity the income of which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 [26 USCS § 501(c)(3)].

"(2) The establishment of a nonprofit corporation for approved research under section 7361(a) of title 38, United States Code."

Cross References

This section is referred to in 38 USCS § 7809

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 8

§ 7362. Purpose of corporations

(a) Any corporation established under this subchapter [38 USCS §§ 7361 et seq.] shall be established solely to facilitate research as described in section 7303(a) of this title [38 USCS § 7303(a)] and education and training as described in sections 7302, 7471, 8154, and 1701(6)(B) of this title [38 USCS §§ 7302, 7471, 8154, and 1701(6)(B)] in conjunction with the applicable Department medical center. Any funds received by the Secretary for the conduct of research or education at the medical center other than funds appropriated to the Department may be transferred to and administered by the corporation for these purposes.

(b) For purposes of this section, the term "education and training" means the following:

(1) In the case of employees of the Veterans Health Administration, such term means work-related instruction or other learning experiences to--

(A) improve performance of current duties;

(B) assist employees in maintaining or gaining specialized proficiencies; and

(C) expand understanding of advances and changes in patient care, technology, and health care administration.
Such term includes (in the case of such employees) education and training conducted as part of a residency or other program designed to prepare an individual for an occupation or profession.

(2) In the case of veterans under the care of the Veterans Health Administration, such term means instruction or other learning experiences related to improving and maintaining the health of veterans to patients and to the families and guardians of patients.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4162, as 38 USCS § 7362, substituted "section 7303(a)" for "section 4101(c)(1)", substituted "Secretary" for "Administrator", and substituted "Department" for "Veterans' Administration" wherever appearing in this section.

1999. Act Nov. 30, 1999 designated the existing provisions as subsec. (a) and, in such subsection as so designated, inserted "and education and training as described in sections 7302, 7471, 8154, and 1701(6)(B) of this title", inserted "or education", and substituted "these purposes" for "that purpose"; and added subsec. (b).

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 8

§ 7363. Board of directors; executive director

(a) The Secretary shall provide for the appointment of a board of directors for any corporation established under this subchapter [38 USCS §§ 7361 et seq.]. The board shall include--

(1) the director of the medical center, the chief of staff of the medical center, and as appropriate, the assistant chief of staff for research for the medical center and the assistant chief of staff for education for the medical center, or, in the case of a facility at which such positions do not exist, those officials who are responsible for carrying out the responsibilities of the medical center director, chief of staff, and, as appropriate, the assistant chief of staff for research and the assistant chief of staff for education; and

(2) subject to subsection (c), members who are not officers or employees of the Federal Government and who are familiar with issues involving medical and scientific research or education, as appropriate.

(b) Each such corporation shall have an executive director who shall be appointed by the board of directors with the concurrence of the Under Secretary for Health of the Department. The executive director of a corporation shall be responsible for the operations of the corporation and shall have such specific duties and responsibilities as the board may prescribe.

(c) An individual appointed under subsection (a)(2) to the board of directors of a corporation established under this subchapter [38 USCS §§ 7361 et seq.] may not be affiliated with, employed by, or have any other financial relationship with any entity that is a source of funding for research or education by the Department unless that source of
funding is a governmental entity or an entity the income of which is exempt from taxation under the Internal Revenue Code of 1986.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4163, as 38 USCS § 7363; in subsec. (a), in the introductory matter, substituted "Secretary" for "Administrator"; in para. (2), deleted "of this section" following "to subsection (c)"; in subsecs. (b) and (c), substituted "Department" for "Veterans' Administration"; and, in subsec. (c), deleted "of this section" following "under subsection (a)(2)".

1992. Act Oct. 9, 1992, in subsec. (b), substituted "Under Secretary for Health" for "Chief Medical Director".

1996. Act Oct. 9, 1996, in subsec. (c), deleted "section 501(c)(3) of" preceding "the Internal Revenue Code".

1999. Act Nov. 30, 1999, in subsec. (a), in para. (1), substituted "as appropriate, the assistant chief of staff for research for the medical center and the assistant chief of staff for education for the medical center, or, in the case of a facility at which such positions do not exist, those officials who are responsible for carrying out the responsibilities of the medical center director, chief of staff, and, as appropriate, the assistant chief of staff for research and the assistant chief of staff for education;" for "medical center, and", in para. (2), inserted "or education, as appropriate"; and, in subsec. (c), inserted "or education".

§ 7364. General powers

(a) A corporation established under this subchapter [38 USCS §§ 7361 et seq.] may--

(1) accept gifts and grants from, and enter into contracts with, individuals and public and private entities solely to carry out the purposes of this subchapter [38 USCS §§ 7361 et seq.]; and

(2) employ such employees as it considers necessary for such purposes and fix the compensation of such employees.

(b) A corporation established under this subchapter [38 USCS §§ 7361 et seq.] may not spend funds for a research project unless the project is approved in accordance with procedures prescribed by the Under Secretary for Health for research carried out with Department funds. Such procedures shall include a peer review process.

(c) (1) A corporation established under this subchapter [38 USCS §§ 7361 et seq.] may not spend funds for an education activity unless the activity is approved in accordance with procedures prescribed by the Under Secretary for Health.

(2) The Under Secretary for Health shall prescribe policies and procedures to guide the expenditure of funds by corporations under paragraph (1) consistent with the purpose of such corporations as flexible funding mechanisms.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4164, as 38 USCS § 7364; and, in subsec. (b), substituted "Department" for "Veterans' Administration".

1992. Act Oct. 9, 1992, in subsec. (b), substituted "Under Secretary for Health" for "Chief Medical Director".


§ 7364A. Coverage of employees under certain Federal tort claims laws
(a) An employee of a corporation established under this subchapter who is described by subsection (b) shall be considered an employee of the Government, or a medical care employee of the Veterans Health Administration, for purposes of the following provisions of law:
   (1) Section 1346(b) of title 28 [28 USCS § 1346(b)].
   (2) Chapter 171 of title 28 [28 USCS §§ 2671 et seq.].
   (3) Section 7316 of this title [38 USCS § 7316].

(b) An employee described in this subsection is an employee who--
   (1) has an appointment with the Department, whether with or without compensation;
   (2) is directly or indirectly involved or engaged in research or education and training
      that is approved in accordance with procedures established by the Under Secretary for
      Health for research or education and training; and
   (3) performs such duties under the supervision of Department personnel.

§ 7365. Applicable State law

Any corporation established under this subchapter [38 USCS §§ 7361 et seq.] shall be
established in accordance with the nonprofit corporation laws of the State in which the
applicable medical center is located and shall, to the extent not inconsistent with any
Federal law, be subject to the laws of such State.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4165, as 38 USCS § 7365.

§ 7366. Accountability and oversight

(a) (1) (A) The records of a corporation established under this subchapter [38 USCS §§ 7361 et seq.] shall be available to the Secretary.
   (B) For the purposes of sections 4(a)(1) and 6(a)(1) of the Inspector General Act
      of 1978 [5 USCS Appx. §§ 4(a)(1), 6(a)(1)], the programs and operations of such
      a corporation shall be considered to be programs and operations of the
      Department with respect to which the Inspector General of the Department has
      responsibilities under such Act [5 USCS Appx. §§ 1 et seq.].
   (2) Such a corporation shall be considered an agency for the purposes of section 716
      of title 31 [31 USCS § 716] (relating to availability of information and inspection of
      records by the Comptroller General).

(b) Each such corporation shall submit to the Secretary an annual report providing a
detailed statement of its operations, activities, and accomplishments during that year. A
corporation with revenues in excess of $300,000 for any year shall obtain an audit of the
corporation for that year. A corporation with annual revenues between $10,000 and
$300,000 shall obtain an independent audit of the corporation at least once every three
years. Any audit under the preceding sentences shall be performed by an independent
auditor. The corporation shall include the most recent such audit in the corporation's
report to the Secretary for that year.
(c) (1) Each member of the board of directors of a corporation established under this subchapter [38 USCS §§ 7361 et seq.], each employee of such a corporation, and each employee of the Department who is involved in the functions of the corporation during any year shall be subject to Federal laws and regulations applicable to Federal employees with respect to conflicts of interest in the performance of official functions.

(2) Each corporation established under this subchapter [38 USCS §§ 7361 et seq.] shall each year submit to the Secretary a statement signed by the executive director of the corporation verifying that each director and employee has certified awareness of the laws and regulations referred to in paragraph (1) and of the consequences of violations of those laws and regulations in the same manner as Federal employees are required to so certify.

(d) The Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives an annual report on the corporations established under this subchapter [38 USCS §§ 7361 et seq.]. The report shall set forth the following information:

(1) The location of each corporation.

(2) The amount received by each corporation during the previous year, including--
   (A) the total amount received;
   (B) the amount received from governmental entities for research and the amount received from governmental entities for education;
   (C) the amount received from all other sources for research and the amount received from all other sources for education; and
   (D) if an amount received from a source referred to in subparagraph (C) exceeded $25,000, information that identifies the source.

(3) The amount expended by each corporation during the year, including--
   (A) the amount expended for salary for research staff, the amount expended for salary for education staff, and the amount expended for salary for support staff;
   (B) the amount expended for direct support of research and the amount expended for direct support of education; and
   (C) if the amount expended with respect to any payee exceeded $35,000, information that identifies the payee.

(4) The amount expended by each corporation during the year for travel conducted in conjunction with research and the amount expended for travel in conjunction with education.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4166, as 38 USCS § 7366; and substituted "Secretary" for "Administrator" and "Department" for "Veterans' Administration", wherever appearing in this section.

1996. Act Oct. 9, 1996, in subsec. (b), substituted "A corporation with revenues in excess of $300,000 for any year shall obtain an audit of the corporation for that year. A corporation with annual revenues between $10,000 and $300,000 shall obtain an independent audit of the corporation at least once every three years. Any audit under the preceding sentences shall be performed by an independent auditor. The corporation shall include the most recent such audit" for "The corporation shall obtain a report of independent auditors concerning the receipts and expenditures of funds by the corporation during that year and shall include that report"; in subsec. (c)(2), substituted "a statement signed by the executive director of the corporation certifying that each director and" for "an annual statement signed by the director
or employee certifying that the director or their; and substituted subsec. (d) for one which read: "(d) The Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives an annual report on the number and location of corporations established and the amount of the contributions made to each such corporation.".

1999. Act Nov. 30, 1999, as amended by Act Dec. 27, 2001 (effective 11/30/99 and as if included in Act Nov. 30, 1999, as originally enacted), in subsec. (d), in para. (2), in subpara. (B), inserted "for research and the amount received from governmental entities for education", in subpara. (C), inserted "for research and the amount received from all other sources for education", in subpara. (D), substituted "an" for "the" preceding "amount", in para. (3), in subpara. (A), substituted ", the amount expended for salary for education staff, and the amount expended" for "and" and, in subpara. (B), inserted "and the amount expended for direct support of education", and added para. (4).


2003. Act Dec. 6, 2003, in subsec. (c), inserted "(1)" before "Each member", substituted "any year shall be subject" for "any year-

"(1) shall be subject",

substituted "functions." for "functions; and", and substituted para. (2) for one which read: "(2) shall submit to the Secretary a statement signed by the executive director of the corporation certifying that each director and employee is aware of, and has complied with, such laws and regulations in the same manner as Federal employees are required to.".

**Other provisions:**

**Effective date of Dec. 27, 2001 amendment.** Act Dec. 27, 2001, P. L. 107-103, Title V, § 509(f), 115 Stat. 997, provides that the amendment made by such section to § 204(e)(3) of Act Nov. 30, 1999, P. L. 106-116, which amended this section, is effective as of November 30, 1999, and as if included in the 1999 Act as originally enacted.

**§ 7367. Repealed**


**§ 7368. Expiration of authority**

No corporation may be established under this subchapter [38 USCS §§ 7361 et seq.] after December 31, 2008.

**Amendments:**

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4168, as 38 USCS § 7368.

1992. Act May 20, 1992 (effective as of Oct. 1, 1991, as provided by § 3(c) of such Act, which appears as 38 USCS § 7361 note), substituted "December 31, 1992" for "September 30, 1991".


CHAPTER 74.  VETERANS HEALTH
ADMINISTRATION-PERSONNEL

SUBCHAPTER I. APPOINTMENTS
SUBCHAPTER II. COLLECTIVE BARGAINING AND PERSONNEL ADMINISTRATION
SUBCHAPTER III. PAY FOR PHYSICIANS AND DENTISTS
SUBCHAPTER IV. PAY FOR NURSES AND OTHER HEALTH-CARE PERSONNEL
SUBCHAPTER V. DISCIPLINARY AND GRIEVANCE PROCEDURES
SUBCHAPTER VI. REGIONAL MEDICAL EDUCATION CENTERS

Amendments:


"SUBCHAPTER III. SPECIAL PAY FOR PHYSICIANS AND DENTISTS

"7431. Special pay: authority.
"7432. Special pay: written agreements.
"7433. Special pay: full-time physicians.
"7434. Special pay: part-time physicians.
"7435. Special pay: full-time dentists.
"7436. Special pay: part-time dentists.
"7437. Special pay: general provisions.
"7438. Special pay: coordination with other benefits laws.
"7439. Periodic review of pay of physicians and dentists; quadrennial report.
"7440. Annual report."

and by adding item 7456A.

SUBCHAPTER I.  APPOINTMENTS

§ 7401. Appointments in Veterans Health Administration
§ 7402. Qualifications of appointees
§ 7403. Period of appointments; promotions
§ 7404. Grades and pay scales
§ 7405. Temporary full-time appointments, part-time appointments, and without-compensation appointments
§ 7406. Residencies and internships
§ 7407. Administrative provisions for section 7405 and 7406 appointments
§ 7408. Appointment of additional employees
§ 7409. Contracts for scarce medical specialist services
§ 7410. Additional pay authorities
§ 7411. Full-time board-certified physicians and dentists: reimbursement of continuing professional education expenses

§ 7401. Appointments in Veterans Health Administration

There may be appointed by the Secretary such personnel as the Secretary may find necessary for the health care of veterans (in addition to those in the Office of the Under Secretary for Health appointed under section 7306 of this title [38 USCS § 7306]), as follows:

1. Physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries.
2. Scientific and professional personnel, such as microbiologists, chemists, and biostatisticians.
3. Audiolists, speech pathologists, and audiologist-speech pathologists, biomedical engineers, certified or registered respiratory therapists, dietitians, licensed physical therapists, licensed practical or vocational nurses, medical instrument technicians, medical records administrators or specialists, medical records technicians, medical technologists, dental hygienists, dental assistants, nuclear medicine technologists, occupational therapists, occupational therapy assistants, kinesiotherapists, orthotist-prosthetists, pharmacists, pharmacy technicians, physical therapy assistants, prosthetic representatives, psychologists, diagnostic radiologic technologists, therapeutic radiologic technologists, social workers, blind rehabilitation specialists, and blind rehabilitation outpatient specialists.

Explanatory notes:

Similar provisions were contained in former § 4104 prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:

1992. Act Oct. 9, 1992, in the introductory matter, substituted "Under Secretary for Health" for "Chief Medical Director".

2003. Act Dec. 6, 2003, substituted paras. (2) and (3) for ones which read:

"(2) Psychologists (other than those described in paragraph (3)), dietitians, and other scientific and professional personnel, such as microbiologists, chemists, biostatisticians, and medical and dental technologists.

(3) Clinical or counseling psychologists who hold diplomias as diplomates in psychology from an accrediting authority approved by the Secretary, certified or registered respiratory therapists, licensed physical therapists, licensed practical or vocational nurses, pharmacists, and occupational therapists.".

Such Act further (effective 180 days after enactment, as provided by § 302(h) of such Act, which appears as 38 USCS § 7316 note), in the introductory matter, substituted "health" for "medical", and, in para. (1), inserted "chiropractors."


Other provisions:
Persons in occupations specified in para. (3) who were appointed prior to Dec. 6, 2003. Act Dec. 6, 2003, P. L. 108-170, Title III, § 301(a)(2), provides: "Personnel appointed to the Veterans Health Administration before the date of the enactment of this Act who are in an occupational category of employees specified in paragraph (3) of section 7401 of title 38, United States Code, by reason of the amendment made by paragraph (1)(B) of this subsection [amending para. (3) of this section] shall, as of such date, be deemed to have been appointed to the Administration under such paragraph (3).".

Cross References
This section is referred to in 5 USCS § 7511; 38 USCS §§ 7402-7405, 7407, 7408, 6410, 7411, 7423-7425, 7451, 7452, 7455, 7457, 7461-7463, 7612

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Federal Procedure:
16 Fed Proc L Ed, Government Officers and Employees §§ 40:483, 489
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:47, 54

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 14

Appointments of physicians in Veterans Health Administration (VHA) were not subject to 5 USCS § 3330a, part of Veterans Employment Opportunities Act of 1998; therefore, doctor did not have right to appeal his non-selection by VHA to Merit Systems Protection Board. Scarnati v VA (2003, CA FC) 344 F.3d 1246, 173 BNA LRRM 2417

Arbitration of grievance involving failure of Department of Veterans Affairs to select LPN appointed pursuant to 38 USCS § 7401(3) for vacant position is not barred by 38 USCS §§ 7403(f)(1) and 7425(b) if grievance is covered by parties' grievance procedure. Department of Veterans Affairs, Medical Center, Hot Springs, South Dakota & AFGE, Local 1539 (1993) 48 FLRA No. 84

Individuals appointed under former 38 USCS § 4104 were entitled to appeal adverse actions as though they had been appointed under Title 5. Agcaoili v VA (1991, MSPB) 49 MSPR 82

Appellant who occupied excepted-service position of Staff Nurse, to which she had been appointed under 38 USCS § 7401(1), was appointed without regard to civil-service requirements regarding qualifications and was thus excluded from competitive service and not entitled to chapter 75 appeal rights. Pichon v Department of Veterans Affairs (1995, MSPB) 67 MSPR 325

Record contained conflicting information regarding nature of appellant's appointment, so that remand was required to determine if she was permanent employee appointed under 38 USCS § 7401 or temporary employee appointed under § 7405, before proceeding with her reduction in force appeal. Olson v Dep't of Veterans Affairs (2002, MSPB) 92 MSPR 336, subsequent app (2002, MSPB) 93 MSPR 305

In breach of contract action, doctor failed to show requirements necessary for implied-in-fact contract because: (1) he was federal employee rather than independent contractor; (2) he was appointed pursuant to 38 USCS § 7405(a)(2), which specified that pay and length of employment were subject to change according to Veterans Affairs Secretary, unlike those appointed under 38 USCS § 7401, who were employed on permanent basis, or those appointed under 38 USCS § 7405(a)(1), who were employed on temporary full-time, part-time, or no compensation basis; and (3) those who allegedly promised doctor certain number of hours did not have authority to enter into binding contracts on behalf of government. Pijanowski v United States (2004) 60 Fed Cl 628

§ 7402. Qualifications of appointees
(a) To be eligible for appointment to the positions in the Administration covered by subsection (b), a person must have the applicable qualifications set forth in that subsection.

(b) (1) Physician. To be eligible to be appointed to a physician position, a person must--
(A) hold the degree of doctor of medicine or of doctor of osteopathy from a college or university approved by the Secretary,
(B) have completed an internship satisfactory to the Secretary, and
(C) be licensed to practice medicine, surgery, or osteopathy in a State.
(2) Dentist. To be eligible to be appointed to a dentist position, a person must--
(A) hold the degree of doctor of dental surgery or dental medicine from a college or university approved by the Secretary, and
(B) be licensed to practice dentistry in a State.
(3) Nurse. To be eligible to be appointed to a nurse position, a person must--
(A) have successfully completed a full course of nursing in a recognized school of nursing, approved by the Secretary, and
(B) be registered as a graduate nurse in a State.
(4) Director of a Hospital, Domiciliary, Center, or Outpatient Clinic. To be eligible to be appointed to a director position, a person must have such business and administrative experience and qualifications as the Secretary shall prescribe.
(5) Podiatrist. To be eligible to be appointed to a podiatrist position, a person must--
(A) hold the degree of doctor of podiatric medicine, or its equivalent, from a school of podiatric medicine approved by the Secretary, and
(B) be licensed to practice podiatry in a State.
(6) Optometrist. To be eligible to be appointed to an optometrist position, a person must--
(A) hold the degree of doctor of optometry, or its equivalent, from a school of optometry approved by the Secretary, and
(B) be licensed to practice optometry in a State.
(7) Pharmacist. To be eligible to be appointed to a pharmacist position, a person must--
(A) hold the degree of bachelor of science in pharmacy, or its equivalent, from a school of pharmacy, approved by the Secretary, and
(B) be registered as a pharmacist in a State.
(8) Psychologist. To be eligible to be appointed to a psychologist position, a person must--
(A) hold a doctoral degree in psychology from a college or university approved by the Secretary,
(B) have completed study for such degree in a specialty area of psychology and an internship which are satisfactory to the Secretary, and
(C) be licensed or certified as a psychologist in a State, except that the Secretary may waive the requirement of licensure or certification for an individual psychologist for a period not to exceed two years on the condition that that psychologist provide patient care only under the direct supervision of a psychologist who is so licensed or certified.
(9) Social Worker. To be eligible to be appointed to a social worker position, a person must--
(A) hold a master's degree in social work from a college or university approved by the Secretary; and
(B) be licensed or certified to independently practice social work in a State, except that the Secretary may waive the requirement of licensure or certification for an individual social worker for a reasonable period of time recommended by the Under Secretary for Health.

(10) Chiropractor. To be eligible to be appointed to a chiropractor position, a person must--

(A) hold the degree of doctor of chiropractic, or its equivalent, from a college of chiropractic approved by the Secretary; and
(B) be licensed to practice chiropractic in a State.

(11) Other health-care positions. To be appointed as a physician assistant, expanded-function dental auxiliary, certified or registered respiratory therapist, licensed physical therapist, licensed practical or vocational nurse, occupational therapist, dietitian, microbiologist, chemist, biostatistician, medical technologist, dental technologist, or other position, a person must have such medical, dental, scientific, or technical qualifications as the Secretary shall prescribe.

(c) Except as provided in section 7407(a) of this title [38 USCS § 7407(a)], a person may not be appointed in the Administration to a position listed in section 7401(1) of this title [38 USCS § 7401(1)] unless the person is a citizen of the United States.

(d) A person may not be appointed under section 7401(1) of this title [38 USCS § 7401(1)] to serve in the Administration in any direct patient-care capacity unless the Under Secretary for Health determines that the person possesses such basic proficiency in spoken and written English as will permit such degree of communication with patients and other health-care personnel as will enable the person to carry out the person's health-care responsibilities satisfactorily. Any determination by the Under Secretary for Health under this subsection shall be in accordance with regulations which the Secretary shall prescribe.

(e) A person may not serve as Chief of Staff of a Department health-care facility if the person is not serving on a full-time basis.

(f) A person may not be employed in a position under subsection (b) (other than under paragraph (4) of that subsection) if--

(1) the person is or has been licensed, registered, or certified (as applicable to such position) in more than one State; and
(2) either--

(A) any of those States has terminated such license, registration, or certification for cause; or
(B) the person has voluntarily relinquished such license, registration, or certification in any of those States after being notified in writing by that State of potential termination for cause.

Explanatory notes:

Similar provisions were contained in former §§ 4105 and 4108(b) prior to the repeal of those sections in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.
Amendments:

1991. Act Aug. 14, 1991 (applicable as provided by § 305(b) of such Act which appears as a note to this section), in subsec. (b), redesignated para. (9) as para. (10), and added a new para. (9).

1992. Act Oct. 9, 1992, in subsec. (d), substituted "Under Secretary for Health" for "Chief Medical Director".


2000. Act Nov. 1, 2000, in subsec. (b)(9), substituted "a person must--" and subparas. (A) and (B) for "a person must hold a master's degree in social work from a college or university approved by the Secretary and satisfy the social worker licensure, certification, or registration requirements, if any, of the State in which the social worker is to be employed, except that the Secretary may waive the licensure, certification, or registration requirement of this paragraph for an individual social worker for a reasonable period, not to exceed 3 years, in order for the social worker to take any actions necessary to satisfy the licensure, certification, or registration requirements of such State."

2003. Act Dec. 6, 2003 (effective 180 days after enactment as provided by § 302(h) of such Act, which appears as 38 USCS § 7316 note), in subsec. (b), redesignated para. (10) as para. (11), and inserted new para. (10).

Other provisions:

Application of Aug. 14, 1991 amendment. Act Aug. 14, 1991, P. L. 102-86, Title III, § 305(b), 105 Stat. 417, provides: "The amendment made by subsection (a) [amending subsec. (b) of this section] does not apply to any person employed as a social worker by the Department of Veterans Affairs on or before the date of enactment of this Act."

Requirements respecting basic proficiency in spoken and written English of appointees after Nov. 23, 1977. Act Nov. 23, 1977, P. L. 95-201, § 4(a)(3), 91 Stat. 1430, provides: "Notwithstanding any other provision of law, with respect to persons other than those described in subsection (c) of section 4105 and subsection (f) of section 4114 of title 38, United States Code [former 38 USCS §§ 4105(c), 4114(f)] (as added by paragraphs (1) and (2) of this subsection), who are appointed after the date of enactement of this Act in the Department of Medicine and Surgery in the Veterans' Administration [Veterans Health Administration of the Department of Veterans Affairs] in any direct patient-care capacity, and with respect to persons described in such subsections who are appointed after such enactment date and prior to January 1, 1978, the Administrator of Veterans' Affairs [Secretary of Veterans Affairs], upon the recommendation of the Chief Medical Director [Under Secretary for Health], shall take appropriate steps to provide reasonable assurance that such persons possess such basic proficiency in spoken and written English as will permit such degree of communication with patients and other health-care personnel as will enable such persons to carry out their health-care responsibilities satisfactorily.".

Cross References

This section is referred to in 38 USCS §§ 7407, 7604

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 14

§ 7403. Period of appointments; promotions

(a) (1) Appointments under this chapter [38 USCS §§ 7401 et seq.] of health-care professionals to whom this section applies may be made only after qualifications have
been satisfactorily established in accordance with regulations prescribed by the Secretary, without regard to civil-service requirements.

(2) This section applies to the following persons appointed under this chapter [38 USCS §§ 7401 et seq.):
   (A) Physicians.
   (B) Dentists.
   (C) Podiatrists.
   (D) Optometrists.
   (E) Nurses.
   (F) Physician assistants.
   (G) Expanded-function dental auxiliaries.
   (H) Chiropractors.

(b) (1) Appointments described in subsection (a) shall be for a probationary period of two years.

   (2) The record of each person serving under such an appointment in the Medical, Dental, and Nursing Services shall be reviewed from time to time by a board, appointed in accordance with regulations of the Secretary. If such a board finds that such person is not fully qualified and satisfactory, such person shall be separated from the service.

(c) Promotions of persons to whom this section applies shall be made only after examination given in accordance with regulations prescribed by the Secretary. Advancement within grade may be made in increments of the minimum rate of basic pay of the grade in accordance with regulations prescribed by the Secretary.

(d) In determining eligibility for reinstatement in the Federal civil service of persons appointed to positions in the Administration under this chapter [38 USCS §§ 7401 et seq.] who at the time of appointment have a civil-service status, and whose employment in the Administration is terminated, the period of service performed in the Administration shall be included in computing the period of service under applicable civil-service rules and regulations.

(e) In accordance with regulations prescribed by the Secretary, the grade and annual rate of basic pay of a person to whom this section applies whose level of assignment is changed from a level of assignment in which the grade level is based on both the nature of the assignment and personal qualifications may be adjusted to the grade and annual rate of basic pay otherwise appropriate.

(f) (1) Upon the recommendation of the Under Secretary for Health, the Secretary may--
   (A) use the authority in subsection (a) to establish the qualifications for and (subject to paragraph (2)) to appoint individuals to positions listed in section 7401(3) of this title [38 USCS § 7401(3)]; and
   (B) use the authority provided in subsection (c) for the promotion and advancement of Department employees serving in such positions.

   (2) In using such authority to appoint individuals to such positions, the Secretary shall apply the principles of preference for the hiring of veterans and other persons established in subchapter I of chapter 33 of title 5 [5 USCS §§ 3301 et seq.].
(3) Notwithstanding any other provision of this title or other law, all matters relating to adverse actions, reductions-in-force, the applicability of the principles of preference referred to in paragraph (2), rights of part-time employees, disciplinary actions, and grievance procedures involving individuals appointed to such positions, whether appointed under this section or section 7405(a)(1)(B) of this title [38 USCS § 7405(a)(1)(B)] (including similar actions and procedures involving an employee in a probationary status), shall be resolved under the provisions of title 5 as though such individuals had been appointed under that title.

(g) (1) The Secretary may appoint in the competitive civil service without regard to the provisions of subchapter I of chapter 33 of title 5 [5 USCS §§ 3301 et seq.] (other than sections 3303 and 3328 of such title [5 USCS §§ 3303 and 3328]) an individual who--
   (A) has a recognized degree or certificate from an accredited institution in a health-care profession or occupation; and
   (B) has successfully completed a clinical education program affiliated with the Department.

(2) In using the authority provided by this subsection, the Secretary shall apply the principles of preference for the hiring of veterans and other persons established in subchapter I of chapter 33 of title 5 [5 USCS §§ 3301 et seq.].

(h) (1) If the Secretary uses the authority provided in subsection (c) for the promotion and advancement of an occupational category of employees described in section 7401(3) of this title [38 USCS § 7401(3)], as authorized by subsection (f)(1)(B), the Secretary shall do so through one or more systems prescribed by the Secretary. Each such system shall be planned, developed, and implemented in collaboration with, and with the participation of, exclusive employee representatives of such occupational category of employees.

(2) (A) Before prescribing a system of promotion and advancement of an occupational category of employees under paragraph (1), the Secretary shall provide to exclusive employee representatives of such occupational category of employees a written description of the proposed system.

   (B) Not later than 30 days after receipt of the description of a proposed system under subparagraph (A), exclusive employee representatives may submit to the Secretary the recommendations, if any, of such exclusive employee representatives with respect to the proposed system.

   (C) The Secretary shall give full and fair consideration to any recommendations received under subparagraph (B) in deciding whether and how to proceed with a proposed system.

(3) The Secretary shall implement immediately any part of a system of promotion and advancement under paragraph (1) that is proposed under paragraph (2) for which the Secretary receives no recommendations from exclusive employee representatives under paragraph (2).

(4) If the Secretary receives recommendations under paragraph (2) from exclusive employee representatives on any part of a proposed system of promotion and advancement under that paragraph, the Secretary shall determine whether or not to accept the recommendations, either in whole or in part. If the Secretary determines not to accept all or part of the recommendations, the Secretary shall--
(A) notify the congressional veterans' affairs committees of the recommendations and of the portion of the recommendations that the Secretary has determined not to accept;
(B) meet and confer with such exclusive employee representatives, for a period not less than 30 days, for purposes of attempting to reach an agreement on whether and how to proceed with the portion of the recommendations that the Secretary has determined not to accept;
(C) at the election of the Secretary, or of a majority of such exclusive employee representatives who are participating in negotiations on such matter, employ the services of the Federal Mediation and Conciliation Service during the period referred to in subparagraph (B) for purposes of reaching such agreement; and
(D) if the Secretary determines that activities under subparagraph (B), (C), or both are unsuccessful at reaching such agreement and determines (in the sole and unreviewable discretion of the Secretary) that further meeting and conferral under subparagraph (B), mediation under subparagraph (C), or both are unlikely to reach such agreement--
   (i) notify the congressional veterans' affairs committees of such determinations, identify for such committees the portions of the recommendations that the Secretary has determined not to accept, and provide such committees an explanation and justification for determining to implement the part of the system subject to such portions of the recommendations without regard to such portions of the recommendations; and
   (ii) commencing not earlier than 30 days after notice under clause (i), implement the part of the system subject to the recommendations that the Secretary has determined not to accept without regard to those recommendations.

(5) If the Secretary and exclusive employee representatives reach an agreement under paragraph (4) providing for the resolution of a disagreement on one or more portions of the recommendations that the Secretary had determined not to accept under that paragraph, the Secretary shall immediately implement such resolution.

(6) In implementing a system of promotion and advancement under this subsection, the Secretary shall--
   (A) develop and implement mechanisms to permit exclusive employee representatives to participate in the periodic review and evaluation of the system, including peer review, and in any further planning or development required with respect to the system as a result of such review and evaluation; and
   (B) provide exclusive employee representatives appropriate access to information to ensure that the participation of such exclusive employee representative in activities under subparagraph (A) is productive.

(7) (A) The Secretary may from time to time modify a system of promotion and advancement under this subsection.
   (B) In modifying a system, the Secretary shall take into account any recommendations made by the exclusive employee representatives concerned.
(C) In modifying a system, the Secretary shall comply with paragraphs (2) through (5) and shall treat any proposal for the modification of a system as a proposal for a system for purposes of such paragraphs.

(D) The Secretary shall promptly submit to the congressional veterans' affairs committees a report on any modification of a system. Each report shall include--

(i) an explanation and justification of the modification; and
(ii) a description of any recommendations of exclusive employee representatives with respect to the modification and a statement whether or not the modification was revised in light of such recommendations.

(8) In the case of employees who are not within a unit with respect to which a labor organization is accorded exclusive recognition, the Secretary may develop procedures for input from representatives under this subsection from any appropriate organization that represents a substantial percentage of such employees or, if none, in such other manner as the Secretary considers appropriate, consistent with the purposes of this subsection.

(9) In this subsection, the term "congressional veterans' affairs committees" means the Committees on Veterans' Affairs of the Senate and the House of Representatives.

Explanatory notes:

Similar provisions were contained in former § 4106 prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:


2003. Act Dec. 6, 2003, in subsec. (f)(3), inserted "reductions-in-force, the applicability of the principles of preference referred to in paragraph (2), rights of part-time employees,"; inserted ", whether appointed under this section or section 7405(a)(1)(B) of this title"; and inserted a comma following "status)"; and added subsec. (h).

Such Act further (effective 180 days after enactment, as provided by § 302(h) of such Act, which appears as 38 USCS § 7316 note), in subsec. (a)(2), added subpara. (H).

Cross References

This section is referred to in 38 USCS § 7405

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 14

1. Generally

2. Promotion procedures

1. Generally

Arbitration of grievance involving failure of Department of Veterans Affairs to select LPN appointed pursuant to 38 USCS § 7401(3) for vacant position is not barred by 38 USCS §§ 7403(f)(1) and 7425(b) if grievance is covered by parties’ grievance procedure. Department of Veterans Affairs, Medical Center, Hot Springs, South Dakota & AFGE, Local 1539 (1993) 48 FLRA No. 84

5 USCS § 7114(a)(2)(B) is not inconsistent with authority of Department of Veterans Affairs under 38 USCS § 7403 to terminate probationary employees. Department of Veterans Affairs,
Veterans Affairs Medical Center, Jackson, Mississippi & National Federal of Federal Employees, Local 589 (1993) 48 FLRA No. 83

2. Promotion procedures

Federal Labor Relations Authority, which improperly reasoned that any matter that may be grieved is negotiable under 38 USCS § 7403(f)(3), erroneously determined that union's proposed promotion procedures for hybrid (38 USCS § 7401(3)) Veterans Health Administration employees were negotiable. United States Dep't of Veterans Affairs v Federal Labor Relations Auth. (1993, App DC) 9 F.3d 123, 144 BNA LRRM 2683

Proposals relating to peer review promotion procedures for hybrid VHA employees are nonnegotiable under statute. United States Dep't of Veterans Affairs v Federal Labor Relations Auth. (1993, App DC) 9 F.3d 123, 144 BNA LRRM 2683

Physician for Department of Veterans Affairs was not exempted from requirement of 38 USCS § 7403 that he complete 2-year probationary period before receiving permanent appointment to VA, where he previously had held over 10 successive one-year temporary appointments with VA. Khan v West (2000, WD NC) 122 F Supp 2d 596, revd (2001, CA4 NC) 8 Fed Appx 243

Twelve proposals regarding procedures to be used when promoting hybrid employees appointed under Title 38 were negotiable. NAGE, Local R1-109 & US Dept. of Veterans Affairs Medical Center, Newington, Conn (1992) 44 FLRA No. 29

Authority will henceforth follow court's decision in Veterans Affairs v FLRA, 9 F.3d 123, and consistent with that decision, agency was authorized to prescribe regulations governing probationary peer review proceedings for nonhybrid employees without regard to bargaining and representational rights set forth in statute; such regulations may override statutory rights other than those specifically referencing title 38 employees, including those in § 7114 (a)(2)(B), since it does not specifically reference title 38 employees. Dept. of Veterans Affairs, Veterans Affairs Medical Center, Jackson, MS and National Federation of Federal Employees, Local 589 (1994) 49 FLRA No. 23

Twelve proposals regarding procedures to be used when promoting hybrid employees appointed under title 38 were nonnegotiable; consistent with Veterans Affairs v FLRA, 9 F.3d 123, proposals did not concern matters relating to grievance procedures within meaning of 38 USCS § 7403 and did not seek to enforce agency's specified promotion criteria under applicable grievance procedures. NAGE, Local R1-109 and U.S. Dept. of Veterans Affairs Medical Center, Newington, CT (1994) 49 FLRA No. 58

§ 7404. Grades and pay scales

(a) The annual rates or ranges of rates of basic pay for positions provided in section 7306 of this title [38 USCS § 7306] shall be prescribed from time to time by Executive order as authorized by chapter 53 of title 5 [5 USCS §§ 5301 et seq.] or as otherwise authorized by law. The pay of physicians and dentists serving in positions to which an Executive order applies under the preceding sentence shall be determined under subchapter III of this chapter [38 USCS §§ 7431 et seq.] instead of such Executive order.

(b) The grades for positions provided for in paragraph (1) of section 7401 of this title [38 USCS § 7401] shall be as follows. The annual ranges of rates of basic pay for those grades shall be prescribed from time to time by Executive order as authorized by chapter 53 of title 5 [5 USCS §§ 5301 et seq.] or as otherwise authorized by law:

   Physician and Dentist Schedule

   Physician grade.
   Dentist grade.
Nurse Schedule

Nurse V.
Nurse IV.
Nurse III.
Nurse II.
Nurse I.

Clinical Podiatrist, Chiropractor, and Optometrist Schedule

Chief grade.
Senior grade.
Intermediate grade.
Full grade.
Associate grade.

(c) Notwithstanding the provisions of section 7425(a) of this title [38 USCS § 7425(a)], a person appointed under section 7306 of this title [38 USCS § 7306] who is not eligible for pay under subchapter III [38 USCS §§ 7431 et seq.] shall be deemed to be a career appointee for the purposes of sections 4507 and 5384 of title 5 [5 USCS §§ 4507 and 5384].

(d) Except as provided under subchapter III [38 USCS §§ 7431 et seq.] and in section 7457 of this title [38 USCS § 7457], pay for positions for which basic pay is paid under this section may not be paid at a rate in excess of the rate of basic pay authorized by section 5316 of title 5 [5 USCS § 5316] for positions in Level V of the Executive Schedule.

Explanatory notes:

Similar provisions were contained in former § 4107(a)-(d) prior to the repeal of that section in the revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:


Act Nov. 4, 1992 (effective as provided by § 308 of such Act, which appears as a note to this section), in subsec. (b)(1), substituted the items under the "Nurse Schedule" heading for ones which read: "Director grade.", "Senior grade.", "Intermediate grade.", and "Entry grade.".

2003. Act Dec. 6, 2003 (effective 180 days after enactment, as provided by § 302(h) of such Act, which appears as 38 USCS § 7316 note), in subsec. (b)(1), in the table, substituted "Clinical Podiatrist, Chiropractor, and Optometrist Schedule" for "Clinical Podiatrist and Optometrist Schedule".

2004. Act Dec. 3, 2004, in subsec. (a), added the sentence beginning "The pay of physicians . . ."; in subsec. (b), deleted "(1)" preceding "The grades for", substituted the items under the "Physician and Dentist Schedule" heading for ones which read:

"Director grade.

"Executive grade.

"Chief grade.

"Senior grade.
"Intermediate grade.
"Full grade.
"Associate grade."

and deleted para. (2), which read: "(2) A person may not hold the director grade in the Physician and Dentist Schedule unless the person is serving as a director of a hospital, domiciliary, center, or outpatient clinic (independent) or comparable position. A person may not hold the executive grade in that Schedule unless the person holds the position of chief of staff at a hospital, center, or outpatient clinic (independent), or comparable position."; in subsec. (c), deleted "special" preceding "pay"; and, in subsec. (d), substituted "pay for positions for which basic pay is paid under this section may not be paid at a rate in excess of the rate of basic pay authorized by section 5316 of title 5 for positions in Level V of the Executive Schedule." for "pay may not be paid at a rate in excess of the rate of basic pay for an appropriate level authorized by section 5315 or 5316 of title 5 for positions in the Executive Schedule, as follows:

"(1) Level IV for the Deputy Under Secretary for Health.

"(2) Level V for all other positions for which such basic pay is paid under this section."

Other provisions:

Effective date of Nov. 4, 1992 amendments. Act Nov. 4, 1992, P. L. 102-585, Title III, § 308, 106 Stat. 4953, provides: "The amendments made by sections 301, 302, 303, and 304 [amending 38 USCS §§ 7404, 7451, and 7452] shall take effect with respect to the first pay period beginning on or after the end of the six-month period beginning on the date of the enactment of this Act."


Cross References
This section is referred to in 38 USCS §§ 7451, 7455

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans’ Laws § 14

§ 7405. Temporary full-time appointments, part-time appointments, and without-compensation appointments

(a) The Secretary, upon the recommendation of the Under Secretary for Health, may employ, without regard to civil service or classification laws, rules, or regulations, personnel as follows:

(1) On a temporary full-time basis, part-time basis, or without compensation basis, persons in the following positions:

(A) Positions listed in section 7401(1) of this title [38 USCS § 7401(1)].
(B) Positions listed in section 7401(3) of this title [38 USCS § 7401(3)].
(C) Librarians.
(D) Other professional, clerical, technical, and unskilled personnel (including interns, residents, trainees, and students in medical support programs).
(2) On a fee basis, persons in the following positions:
   (A) Positions listed in section 7401(1) of this title [38 USCS § 7401(1)].
   (B) Positions listed in section 7401(3) of this title [38 USCS § 7401(3)].
   (C) Other professional and technical personnel.

(b) Personnel employed under subsection (a)--
   (1) shall be in addition to personnel described in section 7306 [38 USCS § 7306],
   paragraphs (1) and (3) of section 7401 [38 USCS § 7401], and section 7408 of this title [38 USCS § 7408]; and
   (2) shall be paid such rates of pay as the Secretary may prescribe.

(c) (1) Temporary full-time appointments under this section of persons in positions listed
   in paragraphs (1) and (3) of section 7401 of this title [38 USCS § 7401] may be for a
   period in excess of 90 days only if the Under Secretary for Health finds that
   circumstances render it impracticable to obtain the necessary services through
   appointments under that section.
   (2) A temporary full-time appointment may not be made for a period in excess of two
   years in the case of a person who--
      (A) has successfully completed--
         (i) a full course of nursing in a recognized school of nursing, approved by the
             Secretary; or
         (ii) a full course of training for any category of personnel described in
             paragraph (3) of section 7401 of this title [38 USCS § 7401], or as a physician
             assistant, in a recognized education or training institution approved by the
             Secretary; and
      (B) is pending registration or licensure in a State or certification by a national
          board recognized by the Secretary.
   (3) (A) Temporary full-time appointments of persons in positions referred to in
      subsection (a)(1)(D) shall not exceed three years.
      (B) Temporary full-time appointments under this paragraph may be renewed for
          one or more additional periods not in excess of three years each.
   (4) Temporary full-time appointments of other personnel may not be for a period in
        excess of one year except as authorized in subsection (f).

(d) A part-time appointment may not be for a period of more than one year, except for
   appointments of persons specified in subsection (a)(1)(A) and interns, residents, and
   other trainees in medical support programs and except as authorized in subsection (f).

(e) A student who has a temporary appointment under this section and who is pursuing a
   full course of nursing in a recognized school of nursing approved by the Secretary, or
   who is pursuing a full course of training for any category of personnel described in
   paragraph (3) of section 7401 of this title [38 USCS § 7401] in a recognized education or
   training institution approved by the Secretary, may be reappointed for a period not to
   exceed the duration of the student's academic program.

(f) During any period during which the Secretary is exercising the authority provided in
   subsections (a) and (f)(1) of section 7403 of this title [38 USCS § 7403] in connection
with the appointment, under paragraph (3) of section 7401 of this title [38 USCS § 7401], of personnel in a category of personnel described in such paragraph—

(1) the Secretary may make temporary full-time appointments of personnel in such category for periods exceeding 90 days if the Under Secretary for Health finds that circumstances render it impractical to obtain the necessary services through appointments under paragraph (3) of section 7401 of this title [38 USCS § 7401]; and

(2) part-time appointments of personnel in such category may be for periods of more than one year.

References in text:
The civil service and classification laws, referred to in this section, appear generally as 5 USCS §§ 3301 et seq. and §§ 5101 et seq. and 5331, respectively.

Explanatory notes:
Similar provisions were contained in former § 4114(a) prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:
1992. Act Oct. 9, 1992, in subsecs. (a), (c)(1), and (f)(1), substituted "Under Secretary for Health" for "Chief Medical Director".

2000. Act Nov. 1, 2000, in subsec. (c), substituted para. (2) for one which read: "(2) Temporary full-time appointments of persons who have successfully completed a full course of nursing in a recognized school of nursing, approved by the Secretary, or who have successfully completed a full course of training for any category of personnel described in paragraph (3) of section 7401 of this title in a recognized education or training institution approved by the Secretary, and who are pending registration or licensure in a State, or certification by a national board recognized by the Secretary, shall not exceed two years.", redesignated para. (3) as para. (4), and added new para. (3).

2003. Act Dec. 6, 2003, in subsec. (a), in para. (1), substituted subparas. (B) and (C) for ones which read:

"(B) Certified or registered respiratory therapists, licensed physical therapists, licensed practical or vocational nurses, pharmacists, and occupational therapists.

"(C) Dietitians, social workers, and librarians."

and, in para. (2), substituted subpara. (B) for one which read: "(B) Certified or registered respiratory therapists, licensed physical therapists, licensed practical or vocational nurses, pharmacists, and occupational therapists."

and, in subsec. (c)(1), substituted "paragraphs (1) and (3) of section 7401" for "section 7401(1)".

Cross References
This section is referred to in 5 USCS § 5102; 38 USCS §§ 7407, 7408, 7424, 7425

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Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 14
1. Generally
2. Temporary full-time appointments
3. Part-time appointments
4. Without-compensation appointments
1. Generally

VA physician appointed under 38 USCS § 4114 is not entitled to protection of Whistleblower Protection Act. Chan v Department of Veterans Affairs (1992, MSPB) 53 MSPR 617

In breach of contract action, doctor failed to show requirements necessary for implied-in-fact contract because: (1) he was federal employee rather than independent contractor; (2) he was appointed pursuant to 38 USCS § 7405(a)(2), which specified that pay and length of employment were subject to change according to Veterans Affairs Secretary, unlike those appointed under 38 USCS § 7401, who were employed on permanent basis, or those appointed under 38 USCS § 7405(a)(1), who were employed on temporary full-time, part-time, or no compensation basis; and (3) those who allegedly promised doctor certain number of hours did not have authority to enter into binding contracts on behalf of government. Pijanowski v United States (2004) 60 Fed Cl 628

2. Temporary full-time appointments

Temporary full-time physicians could not succeed with challenge to their continuing designation as temporary employees, even though former 38 USCS § 4114(a)(3)(A) stated that temporary appointments could exceed 90 days only if Chief Medical Director found that circumstances rendered it impracticable to obtain permanent appointments, because regulations provided for up-to-3-year temporary appointments, with possible 3-year renewals, and regulations did not contradict congressional purpose of providing flexibility with regard to temporary appointments, without necessity of national director making express finding of impracticability for each temporary appointment to last beyond 90 days. Woods v Milner (1991, ED Mich) 760 F Supp 623, affd (1992, CA6 Mich) 955 F.2d 436

Nurse with Department of Veterans Affairs under 38 USCS § 3405 who received series of temporary full-time appointments was not entitled to benefit of Title 5's reduction in force procedures; § 7401 provides that appointments under § 7405 may be made without regard to civil service laws, rules or regulations. Beckstrom-Parcell v Dep't of Veterans Affairs (2002, MSPB) 91 MSPR 656

Record contained conflicting information regarding nature of appellant's appointment, so that remand was required to determine if she was permanent employee appointed under 38 USCS § 7401 or temporary employee appointed under § 7405, before proceeding with her reduction in force appeal. Olson v Dep't of Veterans Affairs (2002, MSPB) 92 MSPR 336, subsequent app (2002, MSPB) 93 MSPR 305

3. Part-time appointments

Appellant's request for part-time status required it to convert her appointment to one not authorized by 38 USCS § 7401, since § 7405 did not authorize agency to appoint her to any part-time position other than one that was not to exceed one year, and there was no other authority on which agency could have effected appellant's part-time appointment, but she should have been informed of inapplicability of chapter 75 and its appeal rights to such positions before determining whether she actually consented to conversion of her appointment. Exum v Department of Veterans Affairs (1994, MSPB) 62 MSPR 344

4. Without-compensation appointments

Period of appellant's without-compensation appointment could not be counted toward 3 years of continuous creditable civil federal service to take appellant out of probationary period for purposes of placement in reduction-in-force group. Bridgewood v Department of Veterans Affairs (1997, MSPB) 75 MSPR 480, affd without op (1998, CA FC) 155 F.3d 565, reported in full (1998, CA FC) 1998 US App LEXIS 6163

§ 7406. Residencies and internships
(a) (1) The Secretary may establish residencies and internships. The Secretary may appoint qualified persons to such positions without regard to civil service or classification laws, rules, or regulations.

(2) For the purposes of this section:
   (A) The term "internship" includes the equivalency of an internship as determined in accordance with regulations which the Secretary shall prescribe.
   (B) The term "intern" means a person serving an internship.

(b) The Secretary may prescribe the conditions of employment of persons appointed under this section, including necessary training, and the customary amount and terms of pay for such positions during the period of such employment and training. The amount and terms of such pay may be established retroactively based on changes in such customary amount and terms.

(c) (1) In order to carry out more efficiently the provisions of subsection (a)(1), the Secretary may contract with one or more hospitals, medical schools, or medical installations having hospital facilities and participating with the Department in the training of interns or residents to provide, by the designation of one such institution to serve as a central administrative agency, for the central administration--
   (A) of stipend payments;
   (B) provision of fringe benefits; and
   (C) maintenance of records for such interns and residents.

(2) The Secretary may pay to such designated agency, without regard to any other law or regulation governing the expenditure of Government moneys either in advance or in arrears, an amount to cover the cost for the period such intern or resident serves in a Department facility furnishing hospital care or medical services of--
   (A) stipends fixed by the Secretary pursuant to paragraph (1);
   (B) hospitalization, medical care, and life insurance and any other employee benefits as are agreed upon by the participating institutions for the period that such intern or resident serves in a Department facility furnishing hospital care or medical services;
   (C) tax on employers pursuant to chapter 21 of the Internal Revenue Code of 1986 [26 USCS §§ 3101 et seq.], where applicable; and
   (D) an amount to cover a pro rata share of the cost of expense of such central administrative agency.

(3) (A) Any amounts paid by the Secretary to such central administrative agency to cover the cost of hospitalization, medical care, or life insurance or other employee benefits shall be in lieu of any benefits of like nature to which such intern or resident may be entitled under the provisions of title 5, and the acceptance of stipends and employee benefits from the designated central administrative agency shall constitute a waiver by the recipient of any claim such recipient might have to any payment of stipends or employee benefits to which such recipient may be entitled under this title or title 5.

(B) Notwithstanding subparagraph (A), any period of service of any such intern or resident in a Department hospital shall be deemed creditable service for the purposes of section 8332 of title 5 [5 USCS § 8332].
(4) The agreement with such central administrative agency may further provide that the designated central administrative agency shall--
   (A) make all appropriate deductions from the stipend of each intern and resident for local, State, and Federal taxes;
   (B) maintain all records pertinent to such deductions and make proper deposits of such deductions; and
   (C) maintain all records pertinent to the leave accrued by such intern and resident for the period during which such recipient serves in a participating facility, including a Department facility furnishing hospital care or medical services.

(5) Leave described in paragraph (4)(C) may be pooled, and the intern or resident may be afforded leave by the facility in which such person is serving at the time the leave is to be used to the extent of such person's total accumulated leave, whether or not earned at the facility in which such person is serving at the time the leave is to be afforded.

References in text:
The civil service and classification laws, referred to in this section, appear generally as 5 USCS §§ 3301 et seq. and §§ 5101 et seq. and 5331, respectively.

Explanatory notes:
Similar provisions were contained in former § 4114(b) prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:
1996. Act Oct. 9, 1996, in subsec. (c), in para. (2), substituted "Department facility furnishing hospital care or medical services" for "Department hospital" in two places, in para. (4)(C), substituted "participating facility" for "participating hospital" and substituted "Department facility furnishing hospital care or medical services" for "Department hospital" and, in para. (5), substituted "facility" for "hospital" in two places.

Cross References
This section is referred to in 5 USCS § 5102; 38 USCS §§ 7407, 7408, 7423, 7425, 7461

Research Guide
Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 14

Resident physician participating in psychiatry rotation resident at VA hospital, although receiving no compensation directly from VA hospital, was federal employee within meaning of FTCA; he was treated as such by medical school, by VA hospital, and by 38 USCS § 7406. Ezekiel v Michel (1995, CA7 Ill) 66 F.3d 894

In suit brought by medical resident against his supervisor and Secretary of Department of Veterans Affairs (VA), alleging that he was discharged from residency program at VA medical center without due process in violation of Fifth Amendment, district court properly dismissed resident's claim for equitable relief, including declaratory judgment, reinstatement, and back pay, because resident had neither guarantee of future employment nor statutory right to appeal any adverse personnel action, and, thus, he did not have constitutionally-protected property interest in his former position; resident was temporary employee, and he was appointed under system that allowed employees to be expeditiously separated from service. Hardison v Cohen (2004, CA11 Fla) 375 F.3d 1262, 21 BNA IER Cas 810, 17 FLW Fed C 747
Board lacked jurisdiction of appeal by physician who had been serving under appointment to residency; statute makes plain that civil service regulations do not apply to persons occupying residencies in DVA. Swango v VA (1993, MSPB) 59 MSPR 235

§ 7407. Administrative provisions for section 7405 and 7406 appointments

(a) When the Under Secretary for Health determines that it is not possible to recruit qualified citizens for the necessary services, appointments under sections 7405 and 7406 of this title [38 USCS §§ 7405 and 7406] may be made without regard to the citizenship requirements of section 7402(c) of this title [38 USCS § 7402(c)] or of any other law prohibiting the employment of, or payment of compensation to, a person who is not a citizen of the United States.

(b) (1) Subject to paragraph (2), the Under Secretary for Health may waive for the purpose of the appointment of an individual under section 7405 or 7406 of this title [38 USCS § 7405 or 7406] the requirements set forth in section 7402(b) of this title [38 USCS § 7402(b)]--

(A) that a physician, dentist, psychologist, optometrist, registered nurse, practical or vocational nurse, or physical therapist be licensed or certified, as appropriate;
(B) that the licensure or certification of such an individual be in a State; and
(C) that a psychologist have completed an internship.

(2) The waivers authorized in paragraph (1) may be granted--

(A) in the case of clauses (A) and (C) of such paragraph, if the individual (i) will be employed to conduct research or serve in an academic position, and (ii) will have no responsibility for furnishing direct patient care services; and
(B) in the case of clause (B) of such paragraph, if the individual will be employed to serve in a country other than the United States and the individual's licensure or registration is in the country in which the individual is to serve.

(c) The program of training prescribed by the Secretary in order to qualify a person for the position of full-time physician assistant or expanded-function dental auxiliary shall be considered a full-time institutional program for purposes of chapter 34 of this title [38 USCS §§ 3451 et seq.]. The Secretary may consider training for such a position to be on a less than full-time basis for purposes of such chapter when the combined classroom (and other formal instruction) portion of the program and the on-the-job training portion of the program total less than 30 hours per week.

(d) A person may not be appointed under section 7405 or 7406 of this title [38 USCS § 7405 or 7406] to an occupational category described in section 7401(1) of this title [38 USCS § 7401(1)] or in section 7406 of this title [38 USCS § 7406] unless the person meets the requirements established in section 7402(d) of this title [38 USCS § 7402(d)] and regulations prescribed under that section.

(e) In accordance with the provisions of section 7425(b) of this title [38 USCS § 7425(b)], the provisions of chapter 34 of title 5 [5 USCS §§ 3401 et seq.] pertaining to part-time career employment shall not apply to part-time appointments under sections 7405 and 7406 of this title [38 USCS §§ 7405 and 7406].

**Explanatory notes:**

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Similar provisions were contained in former § 4114(c)-(g) prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:

1992. Act Oct. 9, 1992, in subsecs. (a) and (b)(1), substituted "Under Secretary for Health" for "Chief Medical Director".

Cross References
This section is referred to in 38 USCS § 7402

§ 7408. Appointment of additional employees

(a) There shall be appointed by the Secretary under civil service laws, rules, and regulations, such additional employees, other than those provided in section 7306 [38 USCS § 7306] and paragraphs (1) and (3) of section 7401 of this title [38 USCS § 7401] and those specified in sections 7405 and 7406 of this title [38 USCS §§ 7405 and 7406], as may be necessary to carry out the provisions of this chapter [38 USCS §§ 7401 et seq.].

(b) The Secretary, after considering an individual's existing pay, higher or unique qualifications, or the special needs of the Department, may appoint the individual to a position in the Administration providing direct patient-care services or services incident to direct patient-services at a rate of pay above the minimum rate of the appropriate grade.

References in text:
The civil service laws, referred to in this section, appear generally as 5 USCS §§ 3301 et seq.

Explanatory notes:
Similar provisions were contained in former § 4111 prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:

1994. Act Nov. 2, 1994, in subsec. (a), substituted "civil service" for "civil-service".

Cross References
This section is referred to in 38 USCS § 7405

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 14

§ 7409. Contracts for scarce medical specialist services

(a) The Secretary may enter into contracts with institutions and persons described in subsection (b) to provide scarce medical specialist services at Department facilities. Such services may include the services of physicians, dentists, podiatrists, optometrists, chiropractors, nurses, physician assistants, expanded-function dental auxiliaries, technicians, and other medical support personnel.
(b) Institutions and persons with whom the Secretary may enter into contracts under subsection (a) are the following:

(1) Schools and colleges of medicine, osteopathy, dentistry, podiatry, optometry, and nursing.
(2) Clinics.
(3) Any other group or individual capable of furnishing such scarce medical specialist services.

Explanatory notes:

Similar provisions were contained in former § 4117 prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:

2003. Act Dec. 6, 2003 (effective 180 days after enactment, as provided by § 302(h) of such Act, which appears as 38 USCS § 7316 note), inserted "chiropractors."

Cross References

This section is referred to in 38 USCS § 8110

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 8

§ 7410. Additional pay authorities

The Secretary may authorize the Under Secretary for Health to pay advance payments, recruitment or relocation bonuses, and retention allowances to the personnel described in paragraph (1) of section 7401 of this title [38 USCS § 7401], or interview expenses to candidates for appointment as such personnel, in the same manner, and subject to the same limitations, as in the case of the authority provided under sections 5524a, 5706b, 5753, and 5754 of title 5 [5 USCS §§ 5524a, 5706b, 5753, and 5754].

Explanatory notes:

In the credits for this section, the bracketed designation "(1)" was inserted as the probable intended designation of the paragraph of § 103(a) of Act May 7, 1991, P. L. 102-40, Title I, 105 Stat. 198, which enacted this section.

Amendments:

1992. Act Oct. 9, 1992 substituted "Under Secretary for Health" for "Chief Medical Director".

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 14

§ 7411. Full-time board-certified physicians and dentists: reimbursement of continuing professional education expenses

The Secretary shall reimburse any full-time board-certified physician or dentist appointed under section 7401(1) of this title [38 USCS § 7401(1)] for expenses incurred, up to $1,000 per year, for continuing professional education.
Explanatory notes:

In the credits for this section, the bracketed designation "(1)" was inserted as the probable intended designation of the paragraph of § 103(a) of Act May 7, 1991, P. L. 102-40, Title I, 105 Stat. 198, which enacted this section.

Other provisions:

Applicability of section. Act May 7, 1991, P. L. 102-40, Title I, § 103(b), 105 Stat. 199, provides: "Section 7411 of title 38, United States Code, as added by subsection (a) [(1)], shall apply with respect to expenses incurred for continuing professional education that is pursued after September 30, 1991."

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 14

SUBCHAPTER II. COLLECTIVE BARGAINING AND PERSONNEL ADMINISTRATION

§ 7421. Personnel administration: in general
§ 7422. Collective bargaining
§ 7423. Personnel administration: full-time employees
§ 7424. Travel expenses of certain employees
§ 7425. Employees: laws not applicable
§ 7426. Retirement rights

§ 7421. Personnel administration: in general

(a) Notwithstanding any law, Executive order, or regulation, the Secretary shall prescribe by regulation the hours and conditions of employment and leaves of absence of employees appointed under any provision of this chapter [38 USCS §§ 7401 et seq.] in positions in the Veterans Health Administration listed in subsection (b).

(b) Subsection (a) refers to the following positions:
   (1) Physicians.
   (2) Dentists.
   (3) Podiatrists.
   (4) Optometrists.
   (5) Registered nurses.
   (6) Physician assistants.
   (7) Expanded-duty dental auxiliaries.
   (8) Chiropractors.

Explanatory notes:

Similar provisions were contained in former § 4108(a) prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:

2003. Act Dec. 6, 2003 (effective 180 days after enactment, as provided by § 302(h) of such Act, which appears as 38 USCS § 7316 note), in subsec. (b), added para. (8).
Other provisions:


"(a) Existing collective-bargaining arrangements. Any determination under chapter 71 of title 5, United States Code [5 USCS §§ 7101 et seq.], of a collective bargaining unit within the Veterans Health Administration of the Department of Veterans Affairs, and any recognition under that chapter of an employee labor organization as the exclusive bargaining representative for employees in a collective bargaining unit of the Department of Veterans Affairs, that is in effect on the date of the enactment of this Act shall not be affected by the amendments made by this Act and shall continue in effect in accordance with the terms of such determination or regulation.

"(b) Pending Cases. With respect to cases pending on the date of the enactment of this Act, or those cases which are brought before the establishment of either an administrative grievance procedure pursuant to section 7463 of title 38, United States Code (as added by the amendments made by this title), or a negotiated grievance procedure established under a collective bargaining agreement, such cases shall proceed in the same manner as they would have if this Act had not been enacted.".

**Cross References**

This section is referred to in 38 USCS §§ 7422, 7423

**Research Guide**

**Am Jur:**

77 Am Jur 2d, Veterans and Veterans' Laws § 14

Grant of authority found in 38 USCS § 7421(a) to prescribe by regulation the hours and conditions of employment and leaves of absences of employees does not encompass the authority to implement a system for implementing reductions in force (RIF) contrary to Title 5 USCS RIF framework mandated by Congress; thus, Veterans Health Administration health-care professionals enjoy the protections of RIF procedures along with the right to appeal a RIF separation to the Merit Systems Protection Board . James v Von Zemenszky (2002, CA FC) 284 F.3d 1310, reh den (2002, CA FC) 301 F.3d 1364 and reh den, reh, en banc, den (2002, CA FC) 2002 US App LEXIS 20086

§ 7422. Collective bargaining

(a) Except as otherwise specifically provided in this title, the authority of the Secretary to prescribe regulations under section 7421 of this title [38 USCS § 7421] is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment through representatives chosen by them in accordance with chapter 71 of title 5 [5 USCS §§ 7101 et seq.] (relating to labor-management relations).

(b) Such collective bargaining (and any grievance procedures provided under a collective bargaining agreement) in the case of employees described in section 7421(b) of this title [38 USCS § 7421(b)] may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title.

(c) For purposes of this section, the term "professional conduct or competence" means any of the following:

(1) Direct patient care.
(2) Clinical competence.

(d) An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.

(e) A petition for judicial review or petition for enforcement under section 7123 of title 5 [5 USCS § 7123] in any case involving employees described in section 7421(b) of this title [38 USCS § 7421(b)] or arising out of the applicability of chapter 71 of title 5 [5 USCS §§ 7101 et seq.] to employees in those positions, shall be taken only in the United States Court of Appeals for the District of Columbia Circuit.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans’ Laws § 14

1. Generally

2. Professional conduct or competence

3. Peer review

1. Generally

Although Secretary has no mandatory duty under CSRA [5 USCS §§ 7101 et seq.] to bargain with nurses over working conditions because Title 38 grants Secretary authority to prescribe working conditions of medical professionals employed by Department, collective bargaining agreement voluntarily entered into with union was enforceable under CSRA so that union’s unfair labor practice petition could be heard. American Federation of Government Employees, Local 3884 v Federal Labor Relations Authority (1991, CA8) 930 F.2d 1315, 137 BNA LRRM 2081

Authority lacked jurisdiction to review VA Secretary’s negotiability determination and its own regulations prohibited it from issuing advisory opinions, hence it would not issue decision regarding negotiability of provision. Wisconsin Federation of Nurses and Health Professionals, Veterans Adm. Staff Nurses Council, Local 5032 and U.S. Dept. of Veterans Affairs, Clement J. Zablocki Medical Center, Milwaukee, WI (1993) 47 FLRA No. 85

Federal Labor Relations Authority (FLRA) has jurisdiction to determine whether Department of Veterans Affairs failed to comply with 5 USCS § 7114(a)(2)(B) and thereby violated 5 USCS § 7116(a) and (8); 38 USCS § 7422 does not divest FLRA of jurisdiction, because it deals with collective bargaining, and rights contained in § 7114(a)(2)(B) are not tied to collective bargaining. Department of Veterans Affairs, Veterans Affairs Medical Center, Jackson, Mississippi & National Federal of Federal Employees, Local 589 (1993) 48 FLRA No. 83

Veterans Administration did not commit unfair labor practice by refusing to disclose information requested by union for processing grievance concerning timeliness of proficiency ratings of unit employees because it concerned matter excluded from parties’ negotiated grievance procedure, pursuant to 38 USCS § 7422, and, further, VA Secretary’s determination that subject is excluded from collective bargaining is not reviewable by Authority. Veterans Administration, Long Beach, CA and AFGE, Local 3943, AFL-CIO (1993) 48 FLRA No. 107

Authority had jurisdiction of complaint alleging that respondent violated statute by denying union representative opportunity to speak on behalf of bargaining unit employee at quality assurance investigations; 38 USCS § 7422 did not apply to limit Authority’s jurisdiction since respondent did not assert that it had exercised its authority under 38 USCS § 7421 to prescribe regulation overriding unit employees’ rights to union representation at quality assurance investigations.

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investigations. Dept. of Veterans Affairs, Veterans Affairs Medical Center, Hampton, VA and AFGE, Local 2328, AFL-CIO (1995) 51 FLRA No. 10

Whether supervisor's failure to recommend employee for incentive award was unfair labor practice was excluded from Authority's jurisdiction pursuant to 38 USCS § 7422; regulation alleged to divest Authority of jurisdiction need not be of specific type or contain specific language, and regulation in question was not purely procedural in that it set forth criteria for granting incentive awards. Dept. of Veterans Affairs, Veterans Affairs Medical Center, Washington, DC and District of Columbia Nurses' Association (1997) 53 FLRA No. 68

Authority lacked jurisdiction over allegation that agency committed unfair labor practice by refusing to comply with arbitrator's award since Under Secretary made determination under 38 USCS § 7422, which deprived Authority of jurisdiction over matter. U.S. Dept. of Veterans Affairs, Veterans Affairs Medical Center, Asheville, and AFGE, Local 446 AFL-CIO (2002) 57 FLRA No. 137

2. Professional conduct or competence

Union's action against employer for refusal to arbitrate grievance is dismissed, where employer withdrew its declaration that grievance concerned professional conduct or competence and was thus not subject to grievance procedures under 38 USCS § 7422(b), because employer agreed that arbitration could proceed, so union's action was moot. American Fed'n of Gov't Employees v Brown (1994, DC Dist Col) 866 F Supp 16

3. Peer review

Even if representational rights of VA nurses fall within scope of collective bargaining protections of statute, VA's decision to bar union representation in peer review investigation would still fall within peer review exception to bargaining rights which VA employees have. National Fed'n of Fed. Employees Local 589 v Federal Labor Relations Auth. (1996, App DC) 315 US App DC 290, 73 F.3d 390, 151 BNA LRRM 2174

Agency's determination pursuant to 38 USCS § 7422 that grievance concerned peer review process and therefore was not reviewable was itself not reviewable, hence arbitrator's award, that grievance was arbitrable, was inconsistent with law. U.S. Dept. of Veterans Affairs, Veterans Affairs Medical Center, Amarillo, TX and NFFE, Local 1138 (1994) 49 FLRA No. 136

§ 7423. Personnel administration: full-time employees

(a) The hours of employment in carrying out responsibilities under this title of any employee who is appointed in the Administration under any provision of this chapter [38 USCS §§ 7401 et seq.] on a full-time basis in a position listed in section 7421(b) of this title [38 USCS § 7421(b)] (other than an intern or resident appointed pursuant to section 7406 of this title [38 USCS § 7406]) and who accepts responsibilities for carrying out professional services for remuneration other than those assigned under this title shall consist of not less than 80 hours in a biweekly pay period (as that term is used in section 5504 of title 5 [5 USCS § 5504]).

(b) A person covered by subsection (a) may not do any of the following:

(1) Teach or provide consultative services at any affiliated institution if such teaching or consultation will, because of its nature or duration, conflict with such person's responsibilities under this title.

(2) Accept payment under any insurance or assistance program established under title XVIII or XIX of the Social Security Act [42 USCS §§ 1395 et seq. or 1396 et seq.] or under chapter 55 of title 10 [10 USCS §§ 1071 et seq.] for professional services rendered by such person while carrying out such person's responsibilities under this title.
(3) Accept from any source, with respect to any travel performed by such person in the course of carrying out such person's responsibilities under this title, any payment or per diem for such travel, other than as provided for in section 4111 of title 5 [5 USCS § 4111].

(4) Request or permit any individual or organization to pay, on such person's behalf for insurance insuring such person against malpractice claims arising in the course of carrying out such person's responsibilities under this title or for such person's dues or similar fees for membership in medical or dental societies or related professional associations, except where such payments constitute a part of such person's remuneration for the performance of professional responsibilities permitted under this section, other than those carried out under this title.

(5) Perform, in the course of carrying out such person's responsibilities under this title, professional services for the purpose of generating money for any fund or account which is maintained by an affiliated institution for the benefit of such institution, or for such person's personal benefit, or both.

(c) In the case of any fund or account described in subsection (b)(5) that was established before September 1, 1973--

(1) the affiliated institution shall submit semiannually an accounting to the Secretary and to the Comptroller General of the United States with respect to such fund or account and shall maintain such fund or account subject to full public disclosure and audit by the Secretary and the Comptroller General for a period of three years or for such longer period as the Secretary shall prescribe, and

(2) no person in a position specified in paragraph (1)(B) may receive any cash from amounts deposited in such fund or account derived from services performed before that date.

(d) As used in this section:

(1) The term "affiliated institution" means a medical school or other institution of higher learning with which the Secretary has a contract or agreement as referred to in section 7313 of this title [38 USCS § 7313] for the training or education of health personnel.

(2) The term "remuneration" means the receipt of any amount of monetary benefit from any non-Department source in payment for carrying out any professional responsibilities.

(e) (1) The Secretary shall establish a leave transfer program for the benefit of health-care professionals in positions listed in section 7401(1) of this title [38 USCS § 7401(1)]. The Secretary may also establish a leave bank program for the benefit of such health-care professionals.

(2) To the maximum extent feasible--

(A) the leave transfer program shall provide the same or similar requirements and conditions as are provided for the program established by the Director of the Office of Personnel Management under subchapter III of chapter 63 of title 5 [5 USCS §§ 6331 et seq.]; and

(B) any leave bank program established pursuant to paragraph (1) shall be consistent with the requirements and conditions provided for agency leave bank programs in subchapter IV of such chapter [5 USCS §§ 6361 et seq.].
(3) Participation by a health-care professional in the leave transfer program established pursuant to paragraph (1), and in any leave bank program established pursuant to such paragraph, shall be voluntary. The Secretary may not require any health-care professional to participate in such a program.

(4) (A) The Secretary and the Director of the Office of Personnel Management may enter into an agreement that permits health-care professionals referred to in paragraph (1) to participate in the leave transfer program established by the Director of the Office of Personnel Management under subchapter III of chapter 63 of title 5 [5 USCS §§ 6331 et seq.] or in any leave bank program established for other employees of the Department pursuant to subchapter IV of chapter 63 of title 5 [5 USCS §§ 6361 et seq.], or both.

(B) Participation of such health-care professionals in a leave transfer program or a leave bank program pursuant to an agreement entered into under subparagraph (A) shall be subject to such requirements and conditions as may be prescribed in such agreement.

(5) The Secretary is not required to establish a leave transfer program for any personnel permitted to participate in a leave transfer program pursuant to an agreement referred to in paragraph (4).

(f) The Secretary may purchase promotional items of nominal value for use in the recruitment of individuals for employment under this chapter [38 USCS §§ 7401 et seq.]. The Secretary shall prescribe guidelines for the administration of the preceding sentence.

References in text:
The reference to "paragraph (1)(B)" in subsec. (c)(2) should probably read "paragraph (1)".

Explanatory notes:
Similar provisions were contained in former § 4108(a), (c), and (e) prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:


1996. Act Oct. 9, 1996, in subsec. (b), deleted para. (1), which read: "(1) Assume responsibility for the medical care of any patient other than a patient admitted for treatment at a Department facility, except in those cases where the person, upon request and with the approval of the Under Secretary for Health, assumes such responsibilities to assist communities or medical practice groups to meet medical needs which would not otherwise be available for a period not to exceed 180 calendar days, which may be extended by the Under Secretary for Health for additional periods not to exceed 180 calendar days each." and redesignated paras. (2)-(6) as paras. (1)-(5), respectively; and, in subsec. (c), in the introductory matter, substituted "subsection (b)(5)" for "subsection (b)(6)".

Leave bank program for health-care professionals; establishment. For provisions authorizing the establishment of a leave bank program for health-care professionals covered under subsec. (e) of this section similar to the leave bank program for Federal civilian employees in the reserves who were activated during the Persian Gulf War, see Act April 6, 1991, P. L. 102-25, Title III, Part D, § 361, 105 Stat. 92, which appears as 5 USCS § 6361 note.
§ 7424. Travel expenses of certain employees

(a) The Secretary may pay the expenses (other than membership fees) of persons described in sections 7306 and 7401(1) of this title [38 USCS §§ 7306 and 7401(1)] (including persons in positions described in section 7401(1) of this title [38 USCS § 7401(1)] who are appointed on a temporary full-time basis or a part-time basis under section 7405 of this title [38 USCS § 7405]) who are detailed by the Under Secretary for Health to attend meetings of associations for the promotion of medical and related science.

(b) (1) The Secretary may prescribe regulations establishing conditions under which officers and employees of the Administration who are nationally recognized principal investigators in medical research may be permitted to accept payment, in cash or in kind, from non-Federal agencies, organizations, and individuals for travel and such reasonable subsistence expenses as are approved by the Secretary pursuant to such regulations--
   (A) in connection with their attendance at meetings or in performing advisory services concerned with the functions or activities of the Department; or
   (B) in connection with acceptance of significant awards or with activity related thereto concerned with functions or activities of the Department.

(2) Any such payment may be retained by such officers and employees to cover the cost of such expenses or shall be deposited to the credit of the appropriation from which the cost of such expenses is paid, as may be provided in such regulations.

Explanatory notes:

Similar provisions were contained in former §§ 4108(d) and 4113 prior to the repeal of those sections in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:

1992. Act Oct. 9, 1992, in subsec. (a), substituted "Under Secretary for Health" for "Chief Medical Director".

§ 7425. Employees: laws not applicable

(a) Physicians, dentists, nurses, and other health-care professionals employed by the Administration and appointed under section 7306, 7401(1), 7405, or 7406 of this chapter [38 USCS § 7306, 7401(1), 7405, or 7406] are not subject to the following provisions of law:
   (1) Section 413 of the Civil Service Reform Act of 1978 [5 USCS § 3133 note].
(2) Subchapter II of chapter 31 of title 5 [5 USCS §§ 3131 et seq.].
(3) Subchapter VIII of chapter 33 of title 5 [5 USCS §§ 3391 et seq.].
(4) Subchapter V of chapter 35 of title 5 [5 USCS §§ 3591 et seq.].
(5) Subchapter II of chapter 43 of title 5 [5 USCS §§ 4311 et seq.].
(6) Section 4507 of title 5.
(7) Subchapter VIII of chapter 53 of title 5 [5 USCS §§ 5381 et seq.].
(8) Subchapter V of chapter 75 of title 5 [5 USCS §§ 7541 et seq.].

(b) Notwithstanding any other provision of law, no provision of title 5 or any other law pertaining to the civil service system which is inconsistent with any provision of section 7306 of this title [38 USCS § 7306] or this chapter [38 USCS §§ 7401 et seq.] shall be considered to supersede, override, or otherwise modify such provision of that section or this chapter except to the extent that such provision of title 5 or of such other law specifically provides, by specific reference to a provision of this chapter, or such provision to be superseded, overridden, or otherwise modified.

Explanatory notes:
Similar provisions were contained in former §§ 4101(e) and 4119 prior to the repeal of those sections in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Cross References
This section is referred to in 38 USCS §§ 7404, 7407

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 14

Appointments of physicians in Veterans Health Administration (VHA) were not subject to 5 USCS § 3330a, part of Veterans Employment Opportunities Act of 1998; therefore, doctor did not have right to appeal his non-selection by VHA to Merit Systems Protection Board. Scarnati v VA (2003, CA FC) 344 F.3d 1246, 173 BNA LRRM 2417

Arbitration of grievance involving failure of Department of Veterans Affairs to select LPN appointed pursuant to 38 USCS § 7401(3) for vacant position is not barred by 38 USCS §§ 7403(f)(1) and 7425(b) if grievance is covered by parties' grievance procedure. Department of Veterans Affairs, Medical Center, Hot Springs, South Dakota & AFGE, Local 1539 (1993) 48 FLRA No. 84

§ 7426. Retirement rights

(a) Except as provided in subsection (b), persons appointed to the Administration shall be subject to the provisions of and entitled to benefits under subchapter III of chapter 83 of title 5 [5 USCS §§ 8331 et seq.] or subchapter II of chapter 84 of title 5 [5 USCS §§ 8410 et seq.], whichever is applicable.

(b) (1) In computing the annuity under subchapter III of chapter 83, or subchapter II of chapter 84, of title 5 [5 USCS §§ 8331 et seq. or §§ 8410 et seq.] of an individual who retires under such subchapter (other than under section 8337 or 8451 of such title [5 USCS § 8337 or 8451]) after December 31, 1981, and who served at any time on a less-than-full-time basis in a position in the Administration to which such individual was appointed under subchapter I [38 USCS §§ 7401 et seq.]--
(A) for the purpose of determining such individual's average pay, as defined by section 8331(4) or 8401(3) of title 5 [5 USCS § 8331(4) or 8401(3)], whichever is applicable, the annual rate of basic pay for full-time service shall be deemed to be such individual's rate of basic pay; and
(B) the amount of such individual's annuity as computed under section 8339 or 8415 of title 5 [5 USCS § 8339 or 8415] (before application of any reduction required by subsection (i) of section 8339 [5 USCS § 8339]) shall be multiplied by the fraction equal to the ratio that that individual's total full-time equivalent service bears to that individual's creditable service as determined under section 8332 or 8411 of title 5 [5 USCS § 8332 or 8411], whichever is applicable.

(2) For the purposes of paragraph (1)(B), an individual's full-time equivalent service is the individual's creditable service as determined under section 8332 or 8411 of title 5 [5 USCS § 8332 or 8411], whichever is applicable, except that any period of service of such individual served on a less-than-full-time basis shall be prorated based on the fraction such service bears to full-time service. For the purposes of the preceding sentence, full-time service shall be considered to be 80 hours of service per biweekly pay period.

(3) A survivor annuity computed under section 8341 [5 USCS § 8341], or subchapter IV of chapter 84 [5 USCS §§ 8441 et seq.], of title 5 based on the service of an individual described in paragraph (1) shall be computed based upon such individual's annuity as determined in accordance with such paragraph.

(c) The provisions of subsection (b) shall not apply to the part-time service before April 7, 1986, of a registered nurse, physician assistant, or expanded-function dental auxiliary. In computing the annuity under the applicable provision of law specified in that subsection of an individual covered by the preceding sentence, the service described in that sentence shall be credited as full-time service.

Explanatory notes:

The amendment made by § 1 of Act Oct. 30, 2000, P. L. 106-398, is based on § 1087(g)(5) of Subtitle I of Title X of Division A of H.R. 5408 (114 Stat. 1654A-294), as introduced on Oct. 6, 2000, which was enacted into law by such § 1.

Similar provisions were contained in former §§ 4107(i) and 4109 prior to the repeal of those sections in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:


2000. Act Oct. 30, 2000, deleted subsec. (c), which read: "(c) The Secretary may authorize an exception to the restrictions in subsections (a), (b), and (c) of section 5532 of title 5 if necessary to meet special or emergency employment needs which result from a severe shortage of well-qualified candidates in physician positions, and registered nurse positions, which otherwise cannot be readily met. The authority of the Secretary under the preceding sentence with respect to registered-nurse positions expires on December 31, 1994.".


Cross References

This section is referred to in 38 USCS §§ 7404, 7458
SUBCHAPTER III. PAY FOR PHYSICIANS AND DENTISTS

§ 7431. Pay
§ 7432. Pay of Under Secretary for Health
§ 7433. Administrative matters
[§§ 7434-7440. Omitted]

§ 7431. Pay
(a) Elements of pay. Pay of physicians and dentists in the Veterans Health Administration shall consist of three elements as follows:
   (1) Base pay as provided for under subsection (b).
   (2) Market pay as provided for under subsection (c).
   (3) Performance pay as provided under subsection (d).

(b) Base pay. One element of pay for physicians and dentists shall be base pay. Base pay shall meet the following requirements:
   (1) Each physician and dentist is entitled to base pay determined under the Physician and Dentist Base and Longevity Pay Schedule.
   (2) The Physician and Dentist Base and Longevity Pay Schedule is composed of 15 rates of base pay designated, from the lowest rate of pay to the highest rate of pay, as base pay steps 1 through 15.
   (3) The rate of base pay payable to a physician or dentist is based on the total number of the years of the service of the physician or dentist in the Veterans Health Administration as follows:

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<tr>
<th>For a physician or dentist</th>
<th>The rate of base pay is payable for:</th>
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<td>with total service of:</td>
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<tr>
<td>two years or less.........................</td>
<td>step 1</td>
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<td>more than 2 years and not more than 4 years........</td>
<td>step 2</td>
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<td>more than 4 years and not more than 6 years........</td>
<td>step 3</td>
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<td>more than 6 years and not more than 8 years........</td>
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<td>more than 8 years and not more than 10 years........</td>
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<td>more than 28 years............................</td>
<td>step 15</td>
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</table>
(4) At the same time as rates of basic pay are increased for a year under section 5303 of title 5 [5 USCS § 5303], the Secretary shall increase the amount of base pay payable under this subsection for that year by a percentage equal to the percentage by which rates of basic pay are increased under such section for that year.

(c) Market pay. One element of pay for physicians and dentists shall be market pay. Market pay shall meet the following requirements:

(1) Each physician and dentist is eligible for market pay.

(2) Market pay shall consist of pay intended to reflect the recruitment and retention needs for the specialty or assignment (as defined by the Secretary) of a particular physician or dentist in a facility of the Department of Veterans Affairs.

(3) The annual amount of the market pay payable to a physician or dentist shall be determined by the Secretary on a case-by-case basis.

(4)

(A) In determining the amount of market pay for physicians or dentists, the Secretary shall consult two or more national surveys of pay for physicians or dentists, as applicable, whether prepared by private, public, or quasi-public entities in order to make a general assessment of the range of pays payable to physicians or dentists, as applicable.

(B)

(i) In determining the amount of the market pay for a particular physician or dentist under this subsection, and in determining a tier (if any) to apply to a physician or dentist under subsection (e)(1)(B), the Secretary shall consult with and consider the recommendations of an appropriate panel or board composed of physicians or dentists (as applicable).

(ii) A physician or dentist may not be a member of the panel or board that makes recommendations under clause (i) with respect to the market pay of such physician or dentist, as the case may be.

(iii) The Secretary should, to the extent practicable, ensure that a panel or board consulted under this subparagraph includes physicians or dentists (as applicable) who are practicing clinicians and who do not hold management positions in the medical facility of the Department at which the physician or dentist subject to the consultation is employed.

(5) The determination of the amount of market pay of a physician or dentist shall take into account-

(A) the level of experience of the physician or dentist in the specialty or assignment of the physician or dentist;

(B) the need for the specialty or assignment of the physician or dentist at the medical facility of the Department concerned;

(C) the health care labor market for the specialty or assignment of the physician or dentist, which may cover any geographic area the Secretary considers appropriate for the specialty or assignment;

(D) the board certifications, if any, of the physician or dentist;

(E) the prior experience, if any, of the physician or dentist as an employee of the Veterans Health Administration; and

(F) such other considerations as the Secretary considers appropriate.
(6) The amount of market pay of a physician or dentist shall be evaluated by the Secretary not less often than once every 24 months. The amount of market pay may be adjusted as the result of an evaluation under this paragraph. A physician or dentist whose market pay is evaluated under this paragraph shall receive written notice of the results of such evaluation in accordance with procedures prescribed under section 7433 of this title [38 USCS § 7433].

(7) No adjustment of the amount of market pay of a physician or dentist under paragraph (6) may result in a reduction of the amount of market pay of the physician or dentist while in the same position or assignment at the medical facility of the Department concerned.

d) Performance pay.

(1) One element of pay for physicians and dentists shall be performance pay.

(2) Performance pay shall be paid to a physician or dentist on the basis of the physician's or dentist's achievement of specific goals and performance objectives prescribed by the Secretary.

(3) The Secretary shall ensure that each physician and dentist of the Department is advised of the specific goals or objectives that are to be measured by the Secretary in determining the eligibility of that physician or dentist for performance pay.

(4) The amount of the performance pay payable to a physician or dentist may vary annually on the basis of individual achievement or attainment of the goals or objectives applicable to the physician or dentist under paragraph (2).

(5) The amount of performance pay payable to a physician or dentist in a fiscal year shall be determined in accordance with regulations prescribed by the Secretary, but may not exceed the lower of-

(A) $15,000; or

(B) the amount equal to 7.5 percent of the sum of the base pay and the market pay payable to such physician or dentist in that fiscal year.

(6) A failure to meet goals or objectives applicable to a physician or dentist under paragraph (2) may not be the sole basis for an adverse personnel action against that physician or dentist.

e) Requirements and limitations on total pay.

(1) (A) Not less often than once every two years, the Secretary shall prescribe for Department-wide applicability the minimum and maximum amounts of annual pay that may be paid under this section to physicians and the minimum and maximum amounts of annual pay that may be paid under this section to dentists.

(B) The Secretary may prescribe for Department-wide applicability under this paragraph separate minimum and maximum amounts of pay for a specialty or assignment. If the Secretary prescribes separate minimum and maximum amounts for a specialty or assignment, the Secretary may establish up to four tiers of minimum and maximum amounts for such specialty or assignment and prescribe for each tier a minimum amount and a maximum amount that the Secretary determines appropriate for the professional responsibilities, professional achievements, and administrative duties of the physicians or dentists (as the case may be) whose pay is set within that tier.
(C) Amounts prescribed under this paragraph shall be published in the Federal Register, and shall not take effect until at least 60 days after the date of publication.

(2) Except as provided in paragraph (3) and subject to paragraph (4), the sum of the total amount of the annual rate of base pay payable to a physician or dentist under subsection (b) and the market pay determined for the physician or dentist under subsection (c) may not be less than the minimum amount, nor more than the maximum amount, applicable to specialty or assignment of the physician or dentist under paragraph (1).

(3) The sum of the total amount of the annual rate of base pay payable to a physician or dentist under subsection (b) and the market pay determined for the physician or dentist under subsection (c) may exceed the maximum amount applicable to the specialty or assignment of the physician or dentist under paragraph (1) as a result of an adjustment under paragraph (3) or (4) of subsection (b).

(4) In no case may the total amount of compensation paid to a physician or dentist under this title in any year exceed the amount of annual compensation (excluding expenses) specified in section 102 of title 3 [3 USCS § 102].

(f) **Treatment of pay.** Pay under subsections (b) and (c) of this section shall be considered pay for all purposes, including retirement benefits under chapters 83 and 84 of title 5 [5 USCS §§ 8301 et seq. and 8401 et seq.] and other benefits.

(g) **Ancillary effects of decreases in pay.**
   (1) A decrease in pay of a physician or dentist resulting from an adjustment in the amount of market pay of the physician or dentist under subsection (c) shall not be treated as an adverse action.
   (2) If the pay of a physician or dentist is reduced under this subchapter [38 USCS §§ 7431 et seq.] as a result of an involuntary reassignment in connection with a disciplinary action taken against the physician or dentist, the involuntary reassignment shall be subject to appeal under subchapter V of this chapter [38 USCS §§ 7461 et seq.].

(h) **Delegation of responsibilities.** The Secretary may delegate to an appropriate officer or employee of the Department any responsibility of the Secretary under subsection (c), (d), or (e) except for the responsibilities of the Secretary under subsection (e)(1).

**Explanatory notes:**


Provisions similar to former §§ 7431 et seq. were contained in § 4118 prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

**Other provisions:**

Effective date of subchapter; transition provisions; savings provision; prohibition of retroactive agreements. Act May 7, 1991, P. L. 102-40, Title I, § 104, 105 Stat. 199, provides:
“(a) Effective date. Subchapter III of chapter 74 of title 38, United States Code [38 USCS §§ 7431 et seq.], as added by section 102, shall take effect on the first day of the first pay period beginning after the earlier of--

“(1) July 1, 1991; or

“(2) the end of the 90-day period beginning on the date of the enactment of this Act.

“(b) Transitions provisions. (1) In the case of an agreement entered into under section 4118 of title 38, United States Code, before the date of the enactment of this Act that expires after the effective date specified in subsection (a), the Secretary of Veterans Affairs and the physician or dentist concerned may agree to terminate that agreement as of that effective date in order to permit a new agreement under subchapter III of chapter 74 of title 38, United States Code [38 USCS §§ 7431 et seq.], as added by section 102, to take effect as of that effective date.

“(2) In the case of an agreement entered into under section 4118 of title 38, United States Code, before the date of the enactment of this Act that expires during the period beginning on the date of the enactment of this Act and ending on the effective date specified in subsection (a), an extension or renewal of that agreement may not extend beyond that effective date.

“(3) In the case of a physician or dentist who begins employment with the Department of Veterans Affairs during the period beginning on the date of the enactment of this Act and ending on the effective date specified in subsection (a) who is eligible for an agreement under section 4118 of title 38, United States Code, any such agreement may not extend beyond that effective date.

“(c) Savings provision. Except as provided in subsection (b)(1), any agreement entered into under section 4118 of title 38, United States Code, before the effective date specified in subsection (a) shall remain in effect in accordance with its terms and shall be treated for all purposes in accordance with such section as in effect on the day before such effective date.

“(d) Prohibition of retroactive agreements. An agreement entered into under subchapter III of chapter 74 of title 38, United States Code [38 USCS §§ 7431 et seq.], as added by section 102, may not provide special pay with respect to a period before the effective date specified in subsection (a).”

**Initial rates of base pay for physicians and dentists.** Act Dec. 3, 2004, P. L. 108-445, § 3(c), 118 Stat. 2641, provides:

“The initial rates of base pay established for the base pay steps under the Physician and Dentist Base and Longevity Pay Schedule provided in section 7431(b) of title 38, United States Code (as added by subsection (b)), are as follows:

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<tr>
<th>Base Pay Step:</th>
<th>Rate of Pay:</th>
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<td>1</td>
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"(1) Notwithstanding the 60-day waiting requirement in section 7431(e)(1)(C) of title 38, United States Code (as amended by subsection (b)), pay provided for a physician or dentist under subchapter III of chapter 74 of such title [38 USCS §§ 7431 et seq.], as amended by subsection (b), shall take effect on the first day of the first pay period applicable to such physician or dentist that begins on or after January 1, 2006.

"(2) Pay provided for the Under Secretary for Health under subchapter III of chapter 74 of title 38, United States Code [38 USCS §§ 7431 et seq.], as amended by this section shall take effect on the first day of the first pay period applicable to the Under Secretary that begins on or after January 1, 2006.".


"(1) Physicians and dentists.(A) Pay.(i) The amount of the pay payable on and after the date of the enactment of this Act to a physician or dentist in receipt of pay under section 7404 or 7405 of title 38, United States Code, as of the day before such date shall continue to be determined under such section (as in effect on the day before such date) until the effective date that is applicable under subsection (d) [note to this section] to such physician or dentist, as the case may be.

"(ii) A physician or dentist appointed or reassigned on or after the date of the enactment of this Act, but before the effective date applicable under subsection (d) [note to this section] to such physician or dentist, shall be compensated in accordance with applicable provisions of section 7404 or 7405 of title 38, United States Code (as in effect on the day before the date of the enactment of this Act), until such effective date.

"(B) Special pay.(i) A special pay agreement entered into by a physician or dentist under subchapter III of chapter 74 of title 38, United States Code [38 USCS §§ 7431 et seq.], before the date of the enactment of this Act shall terminate on the date of the enactment of this Act. However, a physician or dentist in receipt of special pay pursuant to such an agreement on that date shall continue to receive special pay under the terms of such agreement until the effective date that is applicable under subsection (d) [note to this section] to such physician or dentist.

"(ii) A physician or dentist described in subparagraph (A)(ii) may be paid special pay under applicable provisions of section 7433, 7434, 7435, or 7436 of title 38, United States Code (as in effect on the day before the date of the enactment of this Act), during the period beginning on the date of the appointment or reassignment of such physician or dentist, as the case may be, and ending on the effective date applicable under subsection (d) [note to this section] to such physician or dentist. However, no special pay agreement shall be required for the payment of special pay under this clause.

"(C) Treatment of special pay.(i) Special pay paid under subparagraph (B) to a physician or dentist during the period beginning on the date of the enactment of this Act and ending on the effective date applicable under subsection (d) to such physician or dentist shall be subject to the provisions of paragraphs (1), (2), (4), (5), and (6) of section 7438(b) of title 38, United States Code (as in effect on the day before the date of the enactment of this Act).

"(ii) Special pay paid to a physician or dentist under section 7438 of title 38, United States Code (as in effect on the day before the date of the enactment of this Act),
shall be fully creditable for purposes of computing benefits under chapters 83 and 84 of title 5, United States Code [5 USCS §§ 8301 et seq. and 8401 et seq.].

"(D) Preservation of pay. The amount of pay paid to a physician or dentist after the effective date of this Act shall not be less than the amount of pay paid to such physician or dentist on the day before the effective date of this Act while such physician or dentist remains in the same position or assignment.

"(2) Under Secretary for Health. (A) Special pay. (i) The current special pay agreement entered into by the Under Secretary for Health under subchapters I and III of chapter 74 of title 38, United States Code [38 USCS §§ 7401 et seq. and 7431 et seq.], before the date of the enactment of this Act shall terminate on the date of the enactment of this Act. However, the Under Secretary shall continue to receive special pay under the terms of such agreement until the effective date that is applicable under subsection (d) to the Under Secretary.

"(ii) An individual appointed as Under Secretary for Health on or after the date of the enactment of this Act and before the effective date applicable under subsection (d) to the Under Secretary shall be paid special pay in accordance with the provisions of sections 7432(d)(2) and 7433 of title 38, United States Code (as in effect on the day before the date of the enactment of this Act), during the period beginning on the date of appointment and ending on such effective date. However, no special pay agreement shall be required for the payment of special pay under this clause.

"(B) Treatment of special pay. Special pay paid under subparagraph (A) during the period beginning on the date of the enactment of this Act and ending on the effective date applicable under subsection (d) [note to this section] to the Under Secretary-

"(i) shall be subject to the provisions of paragraphs (1), (2), (4), (5), and (6) of section 7438(b) of title 38, United States Code (as in effect on the day before the date of the enactment of this Act); and

"(ii) shall be fully creditable for purposes of computing benefits under chapters 83 and 84 of title 5, United States Code [5 USCS §§ 8301 et seq. and 8401 et seq.].

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§ 7432. Pay of Under Secretary for Health

(a) Base pay. The base pay of the Under Secretary for Health shall be the annual rate of basic pay for positions at Level III of the Executive Schedule under section 5314 of title 5 [5 USCS § 5314].

(b) Market pay.

(1) In the case of an Under Secretary for Health who is also a physician or dentist, in addition to the base pay specified in subsection (a) the Under Secretary for Health may also be paid the market pay element of pay of physicians and dentists under section 7431(c) of this title [38 USCS § 7431(c)].

(2) The amount of market pay of the Under Secretary for Health under this subsection shall be established by the Secretary.

(3) In establishing the amount of market pay of the Under Secretary for Health under this subsection, the Secretary shall utilize an appropriate health care labor market selected by the Secretary for purposes of this subsection.
(c) **Treatment of pay.** Pay under this section shall be considered pay for all purposes, including retirement benefits under chapters 83 and 84 of title 5 [5 USCS §§ 8301 et seq. and 8401 et seq.] and other benefits.

**Explanatory notes:**

**Other provisions:**

**Applicability of section.** For provision that pay provided under this subchapter (38 USCS §§ 7431 et seq.) shall take effect on the first day of the first applicable pay period that begins on or after January 1, 2006, see § 3(d) of Act Dec. 3, 2004, P. L. 108-445, which appears as 38 USCS § 7431 note.

§ 7433. **Administrative matters**

(a) **Regulations.**

(1) The Secretary shall prescribe regulations relating to the pay of physicians and dentists in the Veterans Health Administration under this subchapter [38 USCS §§ 7431 et seq.].

(2) In prescribing the regulations, the Secretary shall take into account the recommendations of the Under Secretary for Health on the administration of this subchapter [38 USCS §§ 7431 et seq.]. In formulating recommendations for the purpose of this paragraph, the Under Secretary shall request the views of representatives of labor organizations that are exclusive representatives of physicians and dentists of the Department and the views of representatives of professional organizations of physicians and dentists of the Department.

(b) **Reports.**

(1) Not later than 18 months after the Secretary prescribes the regulations required by subsection (a), and annually thereafter for the next 5 years, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the pay of physicians and dentists in the Veterans Health Administration under this subchapter [38 USCS §§ 7431 et seq.].

(2) Each report under this subsection shall include the following:

   (A) A description of the rates of pay in effect during the current fiscal year with a comparison to the rates in effect during the fiscal year preceding the current fiscal year, set forth by facility and by specialty.

   (B) The number of physicians and dentists who left the Veterans Health Administration during the preceding fiscal year.

   (C) The number of unfilled physician positions and dentist positions in each specialty in the Veterans Health Administration, the average and maximum lengths of time that such positions have been unfilled, and an assessment of the reasons that such positions remain unfilled.
(D) An assessment of the impact of implementation of this subchapter [38 USCS §§ 7431 et seq.] on efforts to recruit and retain physicians and dentists in the Veterans Health Administration.

(3) The first two annual reports under this subsection shall also include a comparison of staffing levels, contract expenditures, and average salaries of physicians and dentists in the Veterans Health Administration for the current fiscal year and for the fiscal year preceding the current fiscal year, set forth by facility and by specialty.

Explanatory notes:

Other provisions:
Applicability of section. For provision that pay provided under this subchapter (38 USCS §§ 7431 et seq.) shall take effect on the first day of the first applicable pay period that begins on or after January 1, 2006, see § 3(d) of Act Dec. 3, 2004, P. L. 108-445, which appears as 38 USCS § 7431 note.

§§ 7434-7440. Omitted
These sections (Act May 7, 1991, P. L. 102-40, Title I, § 102, 105 Stat. 192-198; Oct. 9, 1992, P. L. 102-405, Title II, § 204(a), Title III, 302(c)(1), 106 Stat. 1983, 1984; Nov. 2, 1994, P. L. 103-446, Title XII, § 1201(c)(6), (e)(22), 108 Stat. 4684, 4686; Nov. 1, 2000, P. L. 106-419, Title II, Subtitle A, § 202(a)-(g), 114 Stat. 1840), relating to special pay for physicians and dentists, were omitted in the general revision of this subchapter by § 3(b) of Act Dec. 3, 2004, P. L. 108-445, effective for pay periods beginning on or after January 1, 2006, as provided by § 3(d) of such Act, which appears as 38 USCS § 7431 note. Section 7434 related to special pay for part-time physicians; § 7435 related to special pay for full-time dentists; § 7436 related to special pay for part-time dentists; § 7437 contained general provisions; § 7438 related to coordination with other benefits laws; § 7439 provided for periodic review of pay and a quadrennial report; and § 7440 provided for an annual report on the use of the authorities provided in 38 USCS §§ 7431 et seq.

SUBCHAPTER IV. PAY FOR NURSES AND OTHER HEALTH-CARE PERSONNEL

§ 7451. Nurses and other health-care personnel: competitive pay
§ 7452. Nurses and other health-care personnel: administration of pay
§ 7453. Nurses: additional pay
§ 7454. Physician assistants and other health care professionals: additional pay
§ 7455. Increases in rates of basic pay
§ 7456. Nurses: special rules for weekend duty
§ 7456A. Nurses: alternate work schedules
§ 7457. On-call pay
§ 7458. Recruitment and retention bonus pay

§ 7451. Nurses and other health-care personnel: competitive pay
(a) (1) It is the purpose of this section to ensure, by a means providing increased responsibility and authority to directors of Department health-care facilities, that the rates
of basic pay for health-care personnel positions described in paragraph (2) in each
Department health-care facility (including the rates of basic pay of personnel employed in
such positions on a part-time basis) are sufficient for that facility to be competitive, on
the basis of pay and other employee benefits, with non-Department health-care facilities
in the same labor-market area in the recruitment and retention of qualified personnel for
those positions.

(2) The health-care personnel positions referred to in paragraph (1)(hereinafter in this
section referred to as "covered positions") are the following:
   (A) Registered nurse.
   (B) Such positions referred to in paragraphs (1) and (3) of section 7401 of this
title [38 USCS § 7401] (other than the positions of physician, dentist, and
registered nurse) as the Secretary may determine upon the recommendation of the
Under Secretary for Health.

(3) (A) Except as provided in subparagraph (b), the rates of basic pay for covered
positions in the Department shall be established and adjusted in accordance with this
section instead of subsection (b)(1) of section 7404 of this title [38 USCS § 7404] or
chapter 53 of title 5 [5 USCS §§ 5301 et seq.].
   (B) Under such regulations as the Secretary shall prescribe, the Secretary shall
establish and adjust the rates of basic pay for covered positions at the following
health-care facilities in order to provide rates of basic pay that enable the
Secretary to recruit and retain sufficient numbers of health-care personnel in such
positions at those facilities:
      (i) The Veterans Memorial Medical Center in the Republic of the Philippines.
      (ii) Department of Veterans Affairs health-care facilities located outside the
contiguous States, Alaska, and Hawaii.

(4) The Secretary, after receiving the recommendation of the Under Secretary for
Health, shall prescribe regulations setting forth criteria and procedures to carry out
this section and section 7452 of this title [38 USCS § 7452]. Requirements in such
regulations for directors to provide and maintain documentation of actions taken
under this section shall require no more documentation than the minimum essential
for responsible administration.

(b) The Secretary shall maintain the five grade levels for nurses employed by the
Department under section 7401(1) of this title [38 USCS § 7401(1)] as specified in the
Nurse Schedule in section 7404(b) of this title [38 USCS § 7404(b)]. The Secretary shall,
pursuant to regulations prescribed to carry out this subchapter [38 USCS §§ 7451 et seq.],
establish grades for other covered positions as the Secretary considers appropriate.

(c) (1) For each grade in a covered position, there shall be a range of basic pay. The
maximum rate of basic pay for a grade shall be 133 percent of the minimum rate of basic
pay for the grade, except that, if the Secretary determines that a higher maximum rate is
necessary with respect to any such grade in order to recruit and retain a sufficient number
of high-quality health-care personnel, the Secretary may raise the maximum rate of basic
pay for that grade to a rate not in excess of 175 percent of the minimum rate of basic pay
for the grade. Whenever the Secretary exercises the authority under the preceding
sentence to establish the maximum rate of basic pay at a rate in excess of 133 percent of
the minimum rate for that grade, the Secretary shall, in the next annual report required by
subsection (g), provide justification for doing so to the Committees on Veterans' Affairs of the Senate and House of Representatives.

(2) The maximum rate of basic pay for any grade for a covered position may not exceed the maximum rate of basic pay established for positions in level V of the Executive Schedule under section 5316 of title 5 [5 USCS § 5316].

(3) The range of basic pay for each such grade shall be divided into equal increments, known as "steps". The Secretary shall prescribe the number of steps. Each grade in a covered position shall have the same number of steps. Rates of pay within a grade may not be established at rates other than whole steps. Any increase (other than an adjustment under subsection (d)) within a grade in the rate of basic pay payable to an employee in a covered position shall be by one or more of such step increments.

(d) (1) Subject to subsection (e), the rates of basic pay for each grade in a covered position shall be adjusted periodically in accordance with this subsection in order to achieve the purposes of this section. Such adjustments shall be made--

A whenever there is an adjustment under section 5303 of title 5 [5 USCS § 5303] in the rates of pay under the General Schedule, with the adjustment under this subsection to have the same effective date and to be by the same percentage as the adjustment in the rates of basic pay under the General Schedule; and

B at such additional times as the director of a Department health-care facility, with respect to employees in that grade at that facility, or the Under Secretary for Health, with respect to covered Regional and Central Office employees in that grade, determines.

(2) An adjustment in rates of basic pay under this subsection for a grade shall be carried out by adjusting the amount of the minimum rate of basic pay for that grade in accordance with paragraph (3) and then adjusting the other rates for that grade to conform to the requirements of subsection (c). Except as provided in paragraph (1)(A), such an adjustment in the minimum rate of basic pay for a grade shall be made by the director of a Department health-care facility so as to achieve consistency with the beginning rate of compensation for corresponding health-care professionals in the Bureau of Labor Statistics (BLS) labor-market area of that facility.

(3) (A) In the case of a Department health-care facility located in an area for which there is current information, based upon an industry-wage survey by the Bureau of Labor Statistics for that labor market, on compensation for corresponding health-care professionals for the BLS labor-market area of that facility, the director of the facility concerned shall use that information as the basis for making adjustments in rates of pay under this subsection. Whenever the Bureau of Labor Statistics releases the results of a new industry-wage survey for that labor market that includes information on compensation for corresponding health-care professionals, the director of that facility shall determine, not later than 30 days after the results of the survey are released, whether an adjustment in rates of pay for employees at that facility for any covered position is necessary in order to meet the purposes of this section. If the director determines that such an adjustment is necessary, the adjustment, based upon the information determined in the survey, shall take effect on the first day of the first pay period beginning after that determination.

(B) In the case of a Department health-care facility located in an area for which the Bureau of Labor Statistics does not have current information on compensation
for corresponding health-care professionals for the labor-market area of that facility for any covered position, the director of that facility shall conduct a survey in accordance with this subparagraph and shall adjust the amount of the minimum rate of basic pay for grades in that covered position at that facility based upon that survey. To the extent practicable, the director shall use third-party industry wage surveys to meet the requirements of the preceding sentence. Any such survey shall be conducted in accordance with regulations prescribed by the Secretary. Those regulations shall be developed in consultation with the Secretary of Labor in order to ensure that the director of a facility collects information that is valid and reliable and is consistent with standards of the Bureau. The survey should be conducted using methodology comparable to that used by the Bureau in making industry-wage surveys except to the extent determined infeasible by the Secretary. To the extent practicable, all surveys conducted pursuant to this subparagraph or subparagraph (A) shall include the collection of salary midpoints, actual salaries, lowest and highest salaries, average salaries, bonuses, incentive pays, differential pays, actual beginning rates of pay, and such other information needed to meet the purpose of this section. Upon conducting a survey under this subparagraph, the director concerned shall determine, not later than 30 days after the date on which the collection of information through the survey is completed or published, whether an adjustment in rates of pay for employees at that facility for any covered position is necessary in order to meet the purposes of this section. If the director determines that such an adjustment is necessary, the adjustment, based upon the information determined in the survey, shall take effect on the first day of the first pay period beginning after that determination.

(C) (i) A director of a Department health-care facility may use data on the compensation paid to certified registered nurse anesthetists who are employed on a salary basis by entities that provide anesthesia services through certified registered nurse anesthetists in the labor-market area only if the director--

(I) has conducted a survey of compensation for certified registered nurse anesthetists in the local labor-market area of the facility under subparagraph (B);

(II) has used all available administrative authority with regard to collection of survey data; and

(III) makes a determination (under regulations prescribed by the Secretary) that such survey methods are insufficient to permit the adjustments referred to in subparagraph (B) for such nurse anesthetists employed by the facility.

(ii) For the purposes of this subparagraph, certified registered nurse anesthetists who are so employed by such entities shall be deemed to be corresponding health-care professionals to the certified registered nurse anesthetists employed by the facility.

(iii) [Deleted]

(D) The Under Secretary for Health shall prescribe regulations providing for the adjustment of the rates of basic pay for Regional and Central Office employees in covered positions in order to assure that those rates are sufficient and competitive.
(E) The director of a facility or Under Secretary for Health may not adjust rates of basic pay under this subsection for any pay grade so that the minimum rate of basic pay for that grade is greater than the beginning rates of compensation for corresponding positions at non-Department health-care facilities.

(4) If the director of a Department health-care facility, or the Under Secretary for Health with respect to Regional and Central Office employees, determines, after any survey under paragraph (3)(B), that it is not necessary to adjust the rates of basic pay for employees in a grade of a covered position at that facility in order to carry out the purpose of this section, such an adjustment for employees at that facility in that grade shall not be made.

(5) Information collected by the Department in surveys conducted under this subsection is not subject to disclosure under section 552 of title 5 [5 USCS § 552].

(6) In this subsection--

(A) The term "beginning rate of compensation", with respect to health-care personnel positions in non-Department health-care facilities corresponding to a grade of a covered position, means the sum of--

(i) the minimum rate of pay established for personnel in such positions who have education, training, and experience equivalent or similar to the education, training, and experience required for health-care personnel employed in the same category of Department covered positions; and

(ii) other employee benefits for those positions to the extent that those benefits are reasonably quantifiable.

(B) The term "corresponding", with respect to health-care personnel positions in non-Department health-care facilities, means those positions for which the education, training, and experience requirements are equivalent or similar to the education, training, and experience requirements for health-care personnel positions in Department health-care facilities.

(e) (1) An adjustment in a rate of basic pay under subsection (d) may not reduce the rate of basic pay applicable to any grade of a covered position.

(2) The director of a Department health-care facility, in determining whether to carry out a wage survey under subsection (d)(3) with respect to rates of basic pay for a grade of a covered position, may not consider as a factor in such determination the absence of a current recruitment or retention problem for personnel in that grade of that position. The director shall make such a determination based upon whether, in accordance with criteria established by the Secretary, there is a significant pay-related staffing problem at that facility in any grade for a position. If the director determines that there is such a problem, or that such a problem is likely to exist in the near future, the Director shall provide for a wage survey in accordance with subsection (d)(3).

(3) The Under Secretary for Health may, to the extent necessary to carry out the purposes of subsection (d), modify any determination made by the director of a Department health-care facility with respect to adjusting the rates of basic pay applicable to covered positions. If the determination of the director would result in an adjustment in rates of basic pay applicable to covered positions, any action by the Under Secretary under the preceding sentence shall be made before the effective date of such pay adjustment. Upon such action by the Under Secretary, any adjustment shall take effect on the first day of the first pay period beginning after such action.
The Secretary shall ensure that the Under Secretary establishes a mechanism for the timely exercise of the authority in this paragraph.

(4) Each director of a Department health-care facility shall provide to the Secretary, not later than July 31 each year, a report on staffing for covered positions at that facility. The report shall include the following:
   (A) Information on turnover rates and vacancy rates for each covered position, including a comparison of those rates with the rates for the preceding three years.
   (B) The director's findings concerning the review and evaluation of the facility's staffing situation, including whether there is, or is likely to be, in accordance with criteria established by the Secretary, a significant pay-related staffing problem at that facility for any covered position and, if so, whether a wage survey was conducted, or will be conducted with respect to that position.
   (C) In any case in which the director conducts such a wage survey during the period covered by the report, information describing the survey and any actions taken or not taken based on the survey, and the reasons for taking (or not taking) such actions.
   (D) In any case in which the director, after finding that there is, or is likely to be, in accordance with criteria established by the Secretary, a significant pay-related staffing problem at that facility for any covered position, determines not to conduct a wage survey with respect to that position, a statement of the reasons why the director did not conduct such a survey.

(5) Not later than September 30 of each year, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on staffing for covered positions at Department health care facilities. Each such report shall include the following:
   (A) A summary and analysis of the information contained in the most recent reports submitted by facility directors under paragraph (4).
   (B) The information for each such facility specified in paragraph (4).

(f) Not later than March 1 of each year, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report regarding any pay adjustments under the authority of subsection (d) effective during the 12 months preceding the submission of the report. Each such report shall set forth, by health-care facility, the percentage of such increases and, in any case in which no increase was made, the basis for not providing an increase.

(g) For the purposes of this section, the term "health-care facility" means a medical center, an independent outpatient clinic, or an independent domiciliary facility.

(h) [Redesignated]

References in text:
The "General Schedule", referred to in subsec. (d), appears at 5 USCS § 5332.

Effective date of section:
This section took effect upon enactment, pursuant to § 104 of Act Aug. 15, 1990, P. L. 101-366, which appears as a note to this section.

Amendments:
1991. Act May 7, 1991, redesignated this section, formerly 38 USCS § 4141, as 38 USCS § 7451; in subsec. (a), in para. (2)(B), substituted "paragraphs (1) and (3) of section 4104" for "clauses (1) and (3) of section 4104", in para. (3), substituted "7404" for "4107", and inserted "or chapter 53 of title 5"; and, in para. (4), substituted "7452" for "4142"; in subsec. (b), substituted "7401(1)" for "4104(1)" and "7404(b)" for "4107(b)"; in subsec. (d), in para. (1)(B), inserted "or the Chief Medical Director, with respect to covered Regional and Central Office employees in that grade"," in para. (3), redesignated subpara. (C) as subpara. (D), in subpara. (D) as so redesignated, inserted "or Chief Medical Director", and added a new subpara. (C), and in para. (4), inserted", or the Chief Medical Director with respect to Regional and Central Office employees,"; and, in subsec. (g)(8), substituted "7452(b)(2)" for "4142(b)(2)".

1992. Act Oct. 9, 1992, in subsec. (a), in paras. (2)(B) and (4), and in subsec. (d), in paras. (1)(B), (3)(C), (D), and (4), substituted "Under Secretary for Health" for "Chief Medical Director" wherever appearing.

Act Nov. 4, 1992 (effective as provided by § 308 of such Act, which appears as 38 USCS § 7404 note), in subsec. (a)(3), designated the existing provisions as subpara. (A), substituted "Except as provided in subparagraph (B), the rates" for "The rates", and added subpara. (B); in subsec. (b), substituted "five" for "four"; in subsec. (d)(3), redesignated subparas. (C) and (D) as subparas. (C) and (E), respectively, and added new subpara. (C); and, in subsec. (g), added para. (9).

Such Act further, in subsec. (g), added para. (10).


2000. Act Nov. 1, 2000, in subsec. (d), in para. (1), in the introductory matter, substituted "Subject to subsection (e), the rates" for "The rates" and, in subpara. (A), substituted "section 5303" for "section 5305" and inserted "and to be by the same percentage", in para. (2), substituted "Except as provided in paragraph (1)(A), such" for "Such" and, in para. (3), in subpara. (B), inserted the sentences beginning "To the extent practicable, the director . . ." and "To the extent practicable, all surveys . . .", and inserted "or published", and, in subpara. (C), deleted cl. (iii) which read: "(iii) The authority of the director to use such additional data under this subparagraph with respect to certified registered nurse anesthetists expires on January 1, 1998."; substituted subsec. (e) for one which read: "(e) Adjustments in rates of basic pay under subsection (d) may increase or reduce the rates of basic pay applicable to any grade of a covered position. In the case of such an adjustment that reduces the rates of pay for grade, an employee serving at a Department health-care facility on the day before the effective date of that adjustment in a position affected by the adjustment may not (by reason of that adjustment) incur a reduction in the rate of basic pay applicable to that employee so long as the employee continues to serve in that covered position at that facility. If such an employee is subsequently promoted to a higher grade, or advanced to a higher step within the employee's grade, for which the rate of pay as so adjusted is lower than the employee's rate of basic pay on the day before the effective date of the promotion, the employee shall continue to be paid at a rate of basic pay not less than the rate of basic pay applicable to the employee before the promotion so long as the employee continues to serve in that covered position at that facility."; in subsec. (f), substituted "March 1 of each year" for "February 1 of 1991, 1992, and 1993", and substituted "subsection (d)" for "subsection (d)(1)(A)"; deleted subsec. (g), which read:

"(g) Not later than December 1 of 1991, 1992, and 1993, the Secretary shall submit to the Committees on Veteran' Affairs of the Senate and House of Representatives a report regarding the exercise of the authorities provided in this section for the preceding fiscal year. Each such report shall include the following:
“(1) A review of the use of the authorities provided in this section (including the Secretary's and Under Secretary for Health's actions, findings, recommendations, and other activities under this section) during the preceding fiscal year, including an assessment of the effects of the exercise of such authorities on the ability of the Department to recruit and retain qualified health-care professionals for covered positions.

“(2) The plans for the use of the authorities provided in this subchapter for the next fiscal year.

“(3) A description of the rates of basic pay in effect during the preceding fiscal year, with a comparison to the rates in effect during the previous fiscal year, shown by facility and by covered position.

“(4) The numbers of employees in covered positions (shown separately for registered nurses and for each other covered position) who during the preceding fiscal year (A) left employment with the Department, (B) left employment at one Department medical facility for employment at another Department medical facility, or (C) changed from full-time status to part-time status (and from part-time status to full-time status), and a summary of the reasons therefor.

“(5) The number of vacancies in covered positions in the Administration and a summary of the reasons that those positions are vacant.

“(6) The number of employees who during the preceding fiscal year left employment at a health-care facility in one Bureau of Labor Statistics labor-market area for employment at a health-care facility in another such labor-market area, without changing residence.

“(7) Justification for setting the maximum rate of basic pay for any grade at a rate in excess of 133 percent of the minimum rate of basic pay for that grade.

“(8) The discussion required by section 7452(b)(2) of this title.

“(9) The justification required by section 7452(e) of this title.

“(10) The number of nurses, shown by facility and by grade, who are on pay retention or in the top step of any grade and, with respect to those employees, comprehensive information (by facility) as to whether an extension of the pay grades was sought for these positions, and with respect to each such request for extension, whether such request was granted or denied.”;

and redesignated subsec. (h) as subsec. (g).

2002. Act Jan. 23, 2002, in subsec. (d), in para. (3), in subpara. (A), deleted "beginning rates of" before "compensation" wherever appearing, in subpara. (B), deleted "beginning rates of" before "compensation", and, in subpara. (C)(i), in the introductory matter and in subcl. (I), deleted "beginning rates of" before "compensation", and, in para. (4), deleted "or at any other time that an adjustment in rates of pay is scheduled to take place under this subsection" after "paragraph (3)(B)" and deleted "Whenever a director makes such a determination, the director shall within 10 days notify the Under Secretary for Health of the decision and the reasons for the decision." after "not be made."; and, in subsec. (e)(4), in subpara. (A), deleted "grade in a" after "for each", in subpara. (B) deleted "grade of a" after "for any" and substituted "that position" for "that grade", and, in subpara. (D), deleted "grade of a" after "for any".

Other provisions:

"(a) In general. (1) Except as provided in subsection (b), section 101 [adding former 38 USCS § 4107 note and amending former 38 USCS § 4107(b)] and the amendments made by section 102 [adding 38 USCS §§ 4141 and 4142 (now §§ 7451 and 7452), and amending former 38 USCS §§ 4104(1), 4107(e)(1), and the chapter analysis preceding former 38 USCS § 4101] shall take effect on the date of enactment.

"(2) The amendment made by section 103 [amending former 38 USCS § 4107(e)(5)] shall take effect on the first day of the first pay period beginning after April 1, 1991."

"(b) New pay rates. The rates of basic pay established pursuant to section 4141 [now section 7451] of title 38, United States Code, as added by section 102, shall take effect for covered positions (as defined in that section) with respect to the first pay period beginning on or after April 1, 1991."

**Savings provision; physician assistants' and expanded function dental auxiliaries' pay.**

Act May 7, 1991, P. L. 102-40, Title III, § 301(a) provides: "Physician assistants and expanded-function dental auxiliaries shall continue to be paid after August 14, 1990, according to the Nurse Schedule in [former] section 4107(b) of title 38, United States Code, as in effect on August 14, 1990, until the effective date of a determination by the Secretary to convert those occupations to covered positions and pay them pursuant to section 7451 of such title, as redesignated by section 401(c) [Act May 7, 1991, P. L. 102-40, Title IV, § 401(c), 105 Stat. 238; for full classification, consult USCS Tables]."

**Nursing personnel qualification standards.**

Act Nov. 4, 1992, P. L. 102-585, Title III, § 305, 106 Stat. 4952, provides:

"(a) Revision. The Secretary of Veterans Affairs shall conduct a review of the qualification standards used for nursing personnel at Department health-care facilities and the relationship between those standards and the compression of nursing personnel in the existing intermediate and senior grades. Based upon that review, the Secretary shall revise those qualification standards--

"(1) to reflect the five grade levels for nursing personnel under the Nurse Schedule, as amended by section 301 [amending 38 USCS § 7404(b)(1)]; and

"(2) to reduce the compression of nursing personnel in the existing intermediate and senior grades.

"(b) Deadline for prescribing standards. The Secretary shall prescribe revised qualification standards for nursing personnel pursuant to subsection (a) not later than six months after the date of the enactment of this Act.

"(c) Report. The Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the Secretary's findings and actions under this section. The report shall be submitted not later than six months after the date on which revised qualification standards for nursing personnel are prescribed pursuant to subsection (b)."

**Report on pay for chief nurse position.**

Act Nov. 4, 1992, P. L. 102-585, Title III, § 306, 106 Stat. 4952, provides:

"(a) Review. The Secretary of Veterans Affairs shall conduct a review of--

"(1) the process for determining the rate of basic pay applicable to the Chief Nurse position at Department of Veterans Affairs health-care facilities; and

"(2) the relationship between the rate of such basic pay and the rate of basic pay applicable to nurses in positions subordinate to the Chief Nurse at the respective Department facilities."

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The review shall include an assessment of the adequacy of that process in determining an equitable pay rate for the Chief Nurse position, including an assessment of the accuracy of data collected in the survey process and the difficulties in obtaining accurate data.

"(b) Report. The Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the review and assessment conducted under subsection (a). To the extent that the review discloses difficulties in obtaining accurate data in the survey process with respect to the Chief Nurse position at Department facilities, the Secretary shall include in the report recommendations for corrective action. The Secretary shall also include in the report (1) a listing of the salary differential (expressed as a percentage) between the Chief Nurse at a facility and the highest paid nurse (excluding certified registered nurse anesthetists) serving in a position subordinate to the Chief Nurse, and (2) an analysis of such data. The report shall be submitted not later than 12 months after the date of the enactment of this Act."


"(a) Report required. (1) Not later than February 1, 1999, the Secretary of Veterans Affairs shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report assessing the system of locality-based pay for nurses established under the Department of Veterans Affairs Nurse Pay Act of 1990 (Public Law 101-366) and now set forth in section 7451 of title 38, United States Code.

"(2) The Secretary shall submit with the report under paragraph (1) a copy of the report on the locality pay system prepared by the contractor pursuant to a contract with Systems Flow, Inc., that was entered into on May 22, 1998.

"(b) Matters to be included. The report of the Secretary under subsection (a)(1) shall include the following:

"(1) An assessment of the effects of the locality-based pay system, including information, shown by facility and grade level, regarding the frequency and percentage increases, if any, in the rate of basic pay under that system of nurses employed in the Veterans Health Administration.

"(2) An assessment of the manner in which that system is being applied.

"(3) Plans and recommendations of the Secretary for administrative and legislative improvements or revisions to the locality pay system.

"(4) An explanation of the reasons for any decision not to adopt any recommendation in the report referred to in subsection (a)(2).

"(c) Updated report. Not later than February 1, 2000, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report updating the report submitted under subsection (a)(1)."


"(a) Report. Not later than March 28 of each of 2002 and 2003, the Secretary of Veterans Affairs shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives and to the National Commission on VA Nursing established under subtitle D [note to this section] a report describing each request of the Secretary, during the fiscal year preceding such report, to the Director of the Office of Personnel Management for the following:

"(1) A waiver under subsection (i)(1)(A) of section 8344 of title 5, United States Code, of the provisions of such section in order to meet requirements of the Department of
Veterans Affairs for appointments to nurse positions in the Veterans Health Administration.

"(2) A waiver under subsection (f)(1)(A) of section 8468 of title 5, United States Code, of the provisions of such section in order to meet requirements of the Department for appointments to such positions.

"(3) A grant of authority under subsection (i)(1)(B) of section 8344 of title 5, United States Code, for the waiver of the provisions of such section in order to meet requirements of the Department for appointments to such positions.

"(4) A grant of authority under subsection (f)(1)(B) of section 8468 of title 5, United States Code, for the waiver of the provisions of such section in order to meet requirements of the Department for appointments to such positions.

"(b) Information on responses to requests. The report under subsection (a) shall specify for each request covered by the report--

"(1) the response of the Director to such request; and

"(2) if such request was granted, whether or not the waiver or authority, as the case may be, assisted the Secretary in meeting requirements of the Department for appointments to nurse positions in the Veterans Health Administration."


"Sec. 141. Establishment of Commission.

"(a) Establishment. There is hereby established in the Department of Veterans Affairs a commission to be known as the 'National Commission on VA Nursing' (hereinafter in this subtitle referred to as the 'Commission').

"(b) Composition. The Commission shall be composed of 12 members appointed by the Secretary of Veterans Affairs as follows:

"(1) At least two shall be recognized representatives of employees (including nurses) of the Department of Veterans Affairs.

"(2) At least one shall be a representative of professional associations of nurses of the Department or similar organizations affiliated with the Department's health care practitioners.

"(3) At least one shall be a nurse from a nursing school affiliated with the Department of Veterans Affairs.

"(4) At least two shall be representatives of veterans.

"(5) At least one shall be an economist.

"(6) The remainder shall be appointed in such manner as the Secretary considers appropriate.

"(c) Chair of Commission. The Secretary of Veterans Affairs shall designate one of the members of the Commission to chair the Commission.

"(d) Period of appointment; vacancies. Members shall be appointed for the life of the Commission. Any vacancy in the Commission shall be filled in the same manner as the original appointment.

"(e) Initial organization requirements. All appointments to the Commission shall be made not later than 60 days after the date of the enactment of this Act. The Commission shall convene
Sec. 142. Duties of Commission.

(a) Assessment. The Commission shall--

(1) consider legislative and organizational policy changes to enhance the recruitment and retention of nurses and other nursing personnel by the Department of Veterans Affairs; and

(2) assess the future of the nursing profession within the Department.

(b) Recommendations. The Commission shall recommend legislative and organizational policy changes to enhance the recruitment and retention of nurses and other nursing personnel in the Department.

Sec. 143. Reports.

(a) Commission report. The Commission shall, not later than two years after the date of its first meeting, submit to Congress and the Secretary of Veterans Affairs a report on the Commission's findings and recommendations.

(b) Secretary of Veterans Affairs report. Not later than 60 days after the date of the Commission's report under subsection (a), the Secretary shall submit to Congress a report--

(1) providing the Secretary's views on the Commission's findings and recommendations; and

(2) explaining what actions, if any, the Secretary intends to take to implement the recommendations of the Commission and the Secretary's reasons for doing so.

Sec. 144. Powers.

(a) Hearings. The Commission or, at its direction, any panel or member of the Commission, may, for the purpose of carrying out the provisions of this subtitle, hold hearings and take testimony to the extent that the Commission or any member considers advisable.

(b) Information. The Commission may secure directly from any Federal department or agency information that the Commission considers necessary to enable the Commission to carry out its responsibilities under this subtitle.

Sec. 145. Personnel matters.

(a) Pay of members. Members of the Commission shall serve without pay by reason of their work on the Commission.

(b) Travel expenses. The members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code [5 USCS §§ 5701 et seq.], while away from their homes or regular places of business in the performance of services for the Commission.

(c) Staff. (1) The Secretary may, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, appoint a staff director and such additional personnel as may be necessary to enable the Commission to perform its duties.

(2) The Secretary may fix the pay of the staff director and other personnel appointed under paragraph (1) without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code [5 USCS §§ 5101 et seq. and 5331 et seq.], relating to classification of positions and General Schedule pay rates, except that the rate of pay fixed under this paragraph for the staff director may not exceed the rate payable for level V of the Executive Schedule under section 5316 of such title and the rate of pay
for other personnel may not exceed the maximum rate payable for grade GS-15 of the General Schedule.

"(d) Detail of Government employees. Upon request of the Secretary, the head of any Federal department or agency may detail, on a nonreimbursable basis, any personnel of that department or agency to the Commission to assist it in carrying out its duties.

"Sec. 146. Termination of Commission.

"The Commission shall terminate 90 days after the date of the submission of its report under section 143(a).”.

Pilot program to study innovative recruitment tools to address nursing shortages at Department of Veterans Affairs health care facilities. Act Nov. 30, 2004, P. L. 108-422, Title V, § 501, 118 Stat. 2395, provides:

"(a) Pilot program.(1) Not later than 90 days after the date of the enactment of this Act, the Secretary of Veterans Affairs shall designate a health care service region, or a section within such a region, in which health care facilities of the Department of Veterans Affairs are adversely affected by a shortage of qualified nurses.

"(2) The Secretary shall conduct a pilot program in the region or section designated under paragraph (1) to determine the effectiveness of the use of innovative human capital tools and techniques in the recruitment of qualified nurses for positions at Department health care facilities in such region or section and for the retention of nurses at such facilities. In carrying out the pilot program, the Secretary shall enter into a contract with a private sector entity for services under the pilot program for recruitment of qualified nurses.

"(b) Private sector recruitment practices. For purposes of the pilot program under this section, the Secretary shall identify and use recruitment practices that have proven effective for placing qualified individuals in positions that are difficult to fill due to shortages of qualified individuals or other factors. Recruitment practices to be reviewed by the Secretary for use in the pilot program shall include-

"(1) employer branding and interactive advertising strategies;

"(2) Internet technologies and automated staffing systems; and

"(3) the use of recruitment, advertising, and communication agencies.

"(c) Streamlined hiring process. In carrying out the pilot program under this section, the Secretary shall, at health care facilities of the Department in the region or section in which the pilot program is conducted, revise procedures and systems for selecting and hiring qualified nurses to reduce the length of the hiring process. If the Secretary identifies measures to streamline and automate the hiring process that can only be implemented if authorized by law, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives recommendations for such changes in law as may be necessary to enable such measures to be implemented.

"(d) Report. Not later than one year after the date of the enactment of this Act, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the extent to which the pilot program achieved the goal of improving the recruitment and retention of nurses in Department of Veterans Affairs health care facilities.".

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
This section is referred to in 5 USCS § 5302; 38 USCS § 7452
§ 7452. Nurses and other health-care personnel: administration of pay

(a) (1) Regulations prescribed under section 7451(a) of this title [38 USCS § 7451(a)] shall provide that whenever an employee in a covered position is given a new duty assignment which is a promotion, the rate of basic pay of that employee shall be increased at least one step increment in that employee's grade.

(2) A nurse serving in a head nurse position shall while so serving receive basic pay at a rate two step increments above the rate that would otherwise be applicable to the nurse. If such a nurse is in the highest or next-to-highest step for that nurse's grade, the preceding sentence shall be applied by extrapolation to create additional steps only for the purposes of this paragraph. The limitation in section 7451(c)(1) of this title [38 USCS § 7451(c)(1)] shall not apply with respect to increased basic pay under this paragraph.

(3) An employee in a covered position who is promoted to the next higher grade shall be paid in that grade at a step having a rate of basic pay that is greater than the rate of basic pay applicable to the employee in a covered position on the day before the effective date of the promotion.

(b) (1) Under regulations which the Secretary prescribes for the administration of this section, the director of a Department health-care facility (A) shall pay a cash bonus (in an amount to be determined by the director not to exceed $2,000) to an employee in a covered position at that facility who becomes certified in a specialty recognized by the Department, and (B) may provide such a bonus to an employee in such a position who has demonstrated both exemplary job performance and exemplary job achievement. The authority of the Secretary under this subsection is in addition to any other authority of the Secretary to provide job performance incentives.

(2) The Secretary shall include in the annual report under section 7451(g) of this title [38 USCS § 7451(g)] a discussion of the use during the period covered by the report of the payment of bonuses under this subsection and other job performance incentives available to the Secretary.

(c) (1) The Secretary shall provide (in regulations prescribed for the administration of this section) that the director of a Department health-care facility, in making a new appointment of a person under section 7401(1) of this title [38 USCS § 7401(1)] as an employee in a covered position for employment at that facility, may make that appointment at a rate of pay described in paragraph (3) without being subject to a requirement for prior approval at any higher level of authority within the Department in any case in which the director determines that it is necessary to do so in order to obtain the services of employees in covered positions in cases in which vacancies exist at that health-care facility.

(2) Such a determination may be made by the director of a health-care facility only in order to recruit employees in covered positions with specialized skills, especially employees with skills which are especially difficult or demanding.
(3) A rate of pay referred to in paragraph (1) is a rate of basic pay in excess of the minimum rate of basic pay applicable to the grade in which the appointment is made (but not in excess of the maximum rate of basic pay for that grade).
(4) Whenever the director of a health-care facility makes an appointment described in paragraph (1) without prior approval at a higher level of authority within the Department, the director shall--
   (A) state in a document the reasons for employing the employee in a covered position at a rate of pay in excess of the minimum rate of basic pay applicable to the grade in which the employee is appointed (and retain that document on file); and
   (B) in the first budget documents submitted to the Secretary by the director after the employee is employed, include documentation for the need for such increased rates of basic pay described in clause (A).
(5) Whenever the director of a health-care facility makes an appointment described in paragraph (1) on the basis of a determination described in paragraph (2), the covered employee appointed may continue to receive pay at a rate higher than that which would otherwise be applicable to that employee only so long as the employee continues to serve in a position requiring the specialized skills with respect to which the determination was made.

(d) Whenever the director of a health-care facility makes an appointment described in subsection (c)(1), the director may (without a regard to any requirement for prior approval at any higher level of authority within the Department) increase the rate of pay of other employees in the same covered position at that facility who are in the grade in which the appointment is made and are serving in a position requiring the specialized skills with respect to which the determination under subsection (c)(2) concerning the appointment was made. Any such increase shall continue in effect with respect to any employee only so long as the employee continues to serve in such a position.
(e) An employee in a covered position employed under section 7401(1) of this title [38 USCS § 7401(1)] who (without a break in employment) transfers from one Department health-care facility to another may not be reduced in grade or step within grade (except pursuant to a disciplinary action otherwise authorized by law) if the duties of the position to which the employee transfers are similar to the duties of the position from which the employee transferred. The rate of basic pay of such employee shall be established at the new health-care facility in a manner consistent with the practices at that facility for an employee of that grade and step, except that in the case of an employee whose transfer (other than pursuant to a disciplinary action otherwise authorized by law) to another health-care facility is at the request of the Secretary, the Secretary may provide that for at least the first year following such transfer the employee shall be paid at a rate of basic pay up to the rate applicable to such employee before the transfer, if the Secretary determines that such rate of pay is necessary to fill the position. Whenever the Secretary exercises the authority under the preceding sentence relating to the rate of basic pay of a transferred employee, the Secretary shall, in the next annual report required under section 7451(g) of this title [38 USCS § 7451(g)], provide justification for doing so.
(f) In this section, the term "covered position" has the meaning given that term in section 7451 of this title [38 USCS § 7451].
(g) (1) In order to recruit and retain highly qualified Department nurse executives, the Secretary may, in accordance with regulations prescribed by the Secretary, pay special pay to the nurse executive at each location as follows:

(A) Each Department health care facility.

(B) The Central Office.

(2) The amount of special pay paid to a nurse executive under paragraph (1) shall be not less than $10,000 or more than $25,000.

(3) The amount of special pay paid to a nurse executive under paragraph (1) shall be based on factors such as the grade of the nurse executive position, the scope and complexity of the nurse executive position, the personal qualifications of the nurse executive, the characteristics of the health care facility concerned, the nature and number of specialty care units at the health care facility concerned, demonstrated difficulties in recruitment and retention of nurse executives at the health care facility concerned, and such other factors as the Secretary considers appropriate.

(4) Special pay paid to a nurse executive under paragraph (1) shall be in addition to any other pay (including basic pay) and allowances to which the nurse executive is entitled, and shall be considered pay for all purposes, including retirement benefits under chapters 83 and 84 of title 5 [5 USCS §§ 8301 et seq. and 8401 et seq.], and other benefits, but shall not be considered basic pay for purposes of adverse actions under subchapter V of this chapter [38 USCS §§ 7461 et seq.].

Effective date of section:

This section took effect upon enactment, pursuant to § 104 of Act Aug. 15, 1990, P. L. 101-366, which appears as 38 USCS § 7451 note.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly USCS § 4142, as 38 USCS § 7452; in subsec. (a), in paras. (1) and (2), substituted "7451" for "4141" and, in para. (3), substituted "paid" for "appointed"; in subsec. (b)(2), substituted "7451" for "4141"; in subsecs. (c)(1) and (e), substituted "7401" for "4104"; and, in subsec. (f), substituted "7451" for "4141".

1992. Act Nov. 4, 1992 (effective as provided by § 308 of such Act, which appears as 38 USCS § 7404 note), in subsec. (e), inserted ", except that in the case of an employee whose transfer (other than pursuant to a disciplinary action otherwise authorized by law) to another health-care facility is at the request of the Secretary, the Secretary may provide that for at least the first year following such transfer the employee shall be paid at a rate of basic pay up to the rate applicable to such employee before the transfer, if the Secretary determines that such rate of pay is necessary to fill the position. Whenever the Secretary exercises the authority under the preceding sentence relating to the rate of basic pay of a transferred employee, the Secretary shall, in the next annual report required under section 7451(g) of this title, provide justification for doing so".


Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References

This section is referred to in 38 USCS § 7451

§ 7453. Nurses: additional pay
(a) In addition to the rate of basic pay provided for nurses, a nurse shall receive additional pay as provided by this section.

(b) A nurse performing service on a tour of duty, any part of which is within the period commencing at 6 postmeridian and ending at 6 antemeridian, shall receive additional pay for each hour of service on such tour at a rate equal to 10 percent of the nurse's hourly rate of basic pay if at least four hours of such tour fall between 6 postmeridian and 6 antemeridian. When less than four hours of such tour fall between 6 postmeridian and 6 antemeridian, the nurse shall be paid the differential for each hour of service performed between those hours.

(c) A nurse performing service on a tour of duty, any part of which is within the period commencing at midnight Friday and ending at midnight Sunday, shall receive additional pay for each hour of service on such tour at a rate equal to 25 percent of such nurse's hourly rate of basic pay.

(d) A nurse performing service on a holiday designated by Federal statute or Executive order shall receive for each hour of such service the nurse's hourly rate of basic pay, plus additional pay at a rate equal to such hourly rate of basic pay, for that holiday service, including overtime service. Any service required to be performed by a nurse on such a designated holiday shall be deemed to be a minimum of two hours in duration.

(e) (1) A nurse performing officially ordered or approved hours of service in excess of 40 hours in an administrative workweek, or in excess of eight hours in a day, shall receive overtime pay for each hour of such additional service. The overtime rates shall be one and one-half times such nurse's hourly rate of basic pay.

   (2) For the purposes of this subsection, overtime must be of at least 15 minutes duration in a day to be creditable for overtime pay.

   (3) Compensatory time off in lieu of pay for service performed under the provisions of this subsection shall not be permitted, except as voluntarily requested in writing by the nurse in question.

   (4) Any excess service performed under this subsection on a day when service was not scheduled for such nurse, or for which such nurse is required to return to the nurse's place of employment, shall be deemed to be a minimum of two hours in duration.

   (5) For the purposes of this subsection, the period of a nurse's officially ordered or approved travel away from such nurse's duty station may not be considered to be hours of service unless--

      (A) such travel occurs during such nurse's tour of duty; or

      (B) such travel--

         (i) involves the performance of services while traveling,

         (ii) is incident to travel that involves the performance of services while traveling,

         (iii) is carried out under arduous conditions as determined by the Secretary, or

         (iv) results from an event which could not be scheduled or controlled administratively.
(f) For the purpose of computing the additional pay provided by subsection (b), (c), (d), or (e), a nurse's hourly rate of basic pay shall be derived by dividing such nurse's annual rate of basic pay by 2,080.

(g) When a nurse is entitled to two or more forms of additional pay under subsection (b), (c), (d), or (e) for the same period of service, the amounts of such additional pay shall be computed separately on the basis of such nurse's hourly rate of basic pay, except that no overtime pay as provided in subsection (e) shall be payable for overtime service performed on a holiday designated by Federal statute or Executive order in addition to pay received under subsection (d) for such service.

(h) A nurse who is officially scheduled to be on call outside such nurse's regular hours or on a holiday designated by Federal statute or Executive order shall be paid for each hour of such on-call duty, except for such time as such nurse may be called back to work, at a rate equal to 10 percent of the hourly rate for excess service as provided in subsection (e).

(i) Any additional pay paid pursuant to this section shall not be considered as basic pay for the purposes of the following provisions of title 5 (and any other provision of law relating to benefits based on basic pay):

1. Subchapter VI of chapter 55 [5 USCS §§ 5551 et seq.].
2. Section 5595 [5 USCS § 5595].
3. Chapters 81, 83, 84, and 87 [5 USCS §§ 8101 et seq., 8301 et seq., 8401 et seq., and 8701 et seq.].

(j) (1) Notwithstanding any other provision of law and subject to paragraph (2), the Secretary may increase the rates of additional pay authorized under subsections (b) through (h) if the Secretary determines that it is necessary to do so in order to obtain or retain the services of nurses.

2. An increase under paragraph (1) in rates of additional pay--
   (A) may be made at any specific Department health-care facility in order to provide nurses, or any category of nurses, at such facility additional pay in an amount competitive with, but not exceeding, the amount of the same type of pay that is paid to the same category of nurses at non-Federal health-care facilities in the same geographic area as such Department health-care facility (based upon a reasonably representative sampling of such non-Federal facilities); and
   (B) may be made on a nationwide, local, or other geographic basis if the Secretary finds that such an increase is justified on the basis of a review of the need for such increase (based upon a reasonably representative sampling of non-Federal health-care facilities in the geographic area involved).

Explanatory notes:

Similar provisions were contained in former § 4107(e) prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:

1994. Act Nov. 2, 1994, in subsecs. (f) and (g), substituted "subsection" for "subsections" preceding "(b), (c), (d), or (e)"; and, in subsec. (i)(3), deleted "of title 5" following "87".

Code of Federal Regulations
§ 7454. Physician assistants and other health care professionals: additional pay

(a) Physician assistants and expanded-function dental auxiliaries shall be entitled to additional pay on the same basis as provided for nurses in section 7453 of this title [38 USCS § 7453].

(b) (1) When the Secretary determines it to be necessary in order to obtain or retain the services of individuals in positions listed in section 7401(3) of this title [38 USCS § 7401(3)], the Secretary may, on a nationwide, local, or other geographic basis, pay persons employed in such positions additional pay on the same basis as provided for nurses in section 7453 of this title [38 USCS § 7453].

   (2) Health care professionals employed in positions referred to in paragraph (1) shall be entitled to additional pay on the same basis as provided for nurses in section 7453(c) of this title [38 USCS § 7453(c)].

   (3) Employees appointed under section 7408 of this title [38 USCS § 7408] shall be entitled to additional pay on the same basis as provided for nurses in section 7453(c) of this title [38 USCS § 7453(c)].

(c) The Secretary shall prescribe by regulation standards for compensation and payment under this section.

Explanatory notes:

Similar provisions were contained in former § 4107(f) prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:

2002. Act Jan. 23, 2002 (applicable as provided by § 121(b) of such Act, which appears as a note to this section), in subsec. (b), designated the existing provision as para. (1), and added para. (2).

2003. Act Dec. 6, 2003, in subsec. (b)(1), substituted "individuals in positions listed in section 7401(3) of this title," for "certified or registered respiratory therapists, licensed physical therapists, licensed practical or vocational nurses, pharmacists, or occupational therapists, ".

Such Act further (applicable as provided by § 303(b) of such Act, which appears as a note to this section), in subsec. (b), added para. (3).
Applicability of Jan. 23, 2002 amendment. Act Jan. 23, 2002, P. L. 107-135, Title I, Subtitle B, § 121(b), 115 Stat. 2450, provides: "The amendments made by subsection (a) [amending subsec. (b) of this section] shall apply with respect to pay periods beginning on or after the date of the enactment of this Act.".

Applicability of amendment made by § 303(a) of Act Dec. 6, 2003. Act Dec. 6, 2003, P. L. 108-170, Title III, § 303(b), 117 Stat. 2058, provides: "The amendment made by subsection (a) [adding subsec. (b)(3) of this section] shall take effect with respect to the first pay period beginning on or after January 1, 2004.".

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

§ 7455. Increases in rates of basic pay

(a) (1) Subject to subsections (b), (c), and (d), when the Secretary determines it to be necessary in order to obtain or retain the services of persons described in paragraph (2), the Secretary may increase the minimum, intermediate, or maximum rates of basic pay authorized under applicable statutes and regulations. Any increase in such rates of basic pay--

(A) may be made on a nationwide basis, local basis, or other geographic basis; and

(B) may be made--

(i) for one or more of the grades listed in the schedules in subsection (b)(1) of section 7404 of this title [38 USCS § 7404];

(ii) for one or more of the health personnel fields within such grades; or

(iii) for one or more of the grades of the General Schedule under section 5332 of title 5 [5 USCS § 5332].

(2) Paragraph (1) applies to the following:

(A) Individuals employed in positions listed in paragraphs (1) and (3) of section 7401 of this title [38 USCS § 7401].

(B) Health-care personnel who--

(i) are employed in the Administration (other than administrative, clerical, and physical plant maintenance and protective services employees);

(ii) are paid under the General Schedule pursuant to section 5332 of title 5 [5 USCS § 5332];

(iii) are determined by the Secretary to be providing either direct patient-care services or services incident to direct patient-care services; and

(iv) would not otherwise be available to provide medical care and treatment for veterans.

(C) Employees who are Department police officers providing services under section 902 of this title [38 USCS § 902].

(b) Increases in rates of basic pay may be made under subsection (a) only in order--

(1) to provide pay in an amount competitive with, but not exceeding, the amount of the same type of pay paid to the same category of personnel at non-Federal facilities in the same labor market;

(2) to achieve adequate staffing at particular facilities; or

(3) to recruit personnel with specialized skills, especially those with skills which are especially difficult or demanding.
(c) (1) The amount of any increase under subsection (a) in the maximum rate for any grade may not (except in the case of nurse anesthetists, pharmacists, and licensed physical therapists) exceed by two times the amount by which the maximum for such grade (under applicable provisions of law other than this subsection) exceeds the minimum for such grade (under applicable provisions of law other than this subsection), and the maximum rate as so increased may not exceed the rate paid for individuals serving as Assistant Under Secretary for Health.

(2) Whenever the amount of an increase under subsection (a) results in a rate of basic pay for a position being equal to or greater than the amount that is 94 percent of the maximum amount permitted under paragraph (1), the Secretary shall promptly notify the Committees on Veterans' Affairs of the Senate and House of Representatives of the increase and the amount thereof.

(d) (1) In the exercise of the authority provided in subsection (a) with respect to personnel described in subparagraph (B) or (C) of paragraph (2) of that subsection to increase the rates of basic pay for any category of personnel not appointed under subchapter I [38 USCS §§ 7401 et seq.], the Secretary shall, not less than 45 days before the effective date of a proposed increase, notify the President of the Secretary's intention to provide such an increase.

(2) Such a proposed increase shall not take effect if, before the effective date of the proposed increase, the President disapproves such increase and provides the appropriate committees of the Congress with a written statement of the President's reasons for such disapproval.

(3) If, before that effective date, the President approves such increase, the Secretary may advance the effective date to any date not earlier than the date of the President's approval.

Explanatory notes:

Similar provisions were contained in former § 4107(g) prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:


1992. Act Oct. 9, 1992, in subsec. (c) designated the existing provisions as para. (1), in such para. as so designated, inserted "by two times" and substituted "Under Secretary for Health" for "Chief Medical Director", and added para. (2).


Other provisions:


"By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 7455(d)(2)-(3) of title 38, United States Code, in order to establish procedures for review of proposed increases in the rates of basic pay of certain employees of the Department of Veterans Affairs and of other agencies, it is hereby ordered as follows:

"Section 1. The Director of the Office of Personnel Management is designated to exercise the authority vested in the President by section 7455(d)(2)-(3) of title 38, United States Code,
to review and approve or disapprove the increases in rates of basic pay proposed by the Secretary of Veterans Affairs and to provide the appropriate committees of the Congress with a written statement of the reasons for any such disapproval.

"Sec. 2. In exercising this authority, the Director of the Office of Personnel Management shall assure that any increases in basic pay proposed by the Secretary of Veterans Affairs are in the best interest of the Federal Government, do not exceed the amounts authorized by section 7455, and are made only to:

" (1) Provide pay in an amount competitive with, but not exceeding, the amount of the same type of pay paid to the same category of health-care personnel at non-Federal health-care facilities in the same labor market;

"(2) Achieve adequate staffing at particular facilities; or

"(3) Recruit personnel with specialized skills, especially those with skills which are especially difficult or demanding.

"Sec. 3. The Secretary of Veterans Affairs shall provide to the Director of the Office of Personnel Management such information as the Director may request in order to carry out the responsibilities delegated by this order.

"Sec. 4. The Director of the Office of Personnel Management shall provide the Secretary of Veterans Affairs with a copy of any written statement provided to the appropriate committees of the Congress that sets forth the reasons for disapproval of any proposed increase in rates of basic pay under this order.

"Sec. 5. In the case of any other law authorizing another agency to use the authority provided by section 7455 of title 38, United States Code, the Director of the Office of Personnel Management shall exercise the same authority in the same manner as provided for with respect to section 7455 under sections 1 through 4 of this order, and the head of such other agency shall provide information requested by the Director as provided for in section 3 of this order.

"Sec. 6. Executive Order No. 12438 of August 23, 1983 [former 38 USCS § 4107 note], is revoked.

"Sec. 7. This order shall be effective upon publication in the Federal Register.".

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
This section is referred to in 38 USCS §§ 902, 7457, 7612

§ 7456. Nurses: special rules for weekend duty

(a) Subject to subsection (b), if the Secretary determines it to be necessary in order to obtain or retain the services of nurses at any Department health-care facility, the Secretary may provide, in the case of nurses appointed under this chapter [38 USCS §§ 7401 et seq.] and employed at such facility, that such nurses who work two regularly scheduled 12-hour tours of duty within the period commencing at midnight Friday and ending at midnight the following Sunday shall be considered for all purposes (except computation of full-time equivalent employees for the purposes of determining compliance with personnel ceilings) to have worked a full 40-hour basic workweek.

(b) (1) Basic and additional pay for a nurse who is considered under subsection (a) to have worked a full 40-hour basic workweek shall be subject to paragraphs (2) and (3).
(2) The hourly rate of basic pay for such a nurse for service performed as part of a regularly scheduled 12-hour tour of duty within the period commencing at midnight Friday and ending at midnight the following Sunday shall be derived by dividing the nurse's annual rate of basic pay by 1,248.

(3) (A) Such a nurse who performs a period of service in excess of such nurse's regularly scheduled two 12-hour tours of duty is entitled to overtime pay under section 7453(e) of this title [38 USCS § 7453(e)], or other applicable law, for officially ordered or approved service performed in excess of eight hours on a day other than a Saturday or Sunday or in excess of 24 hours within the period commencing at midnight Friday and ending at midnight the following Sunday.

(B) Except as provided in subparagraph (C), a nurse to whom this subsection is applicable is not entitled to additional pay under section 7453 of this title [38 USCS § 7453], or other applicable law, for any period included in a regularly scheduled 12-hour tour of duty.

(C) If the Secretary determines it to be further necessary in order to obtain or retain the services of nurses at a particular facility, a nurse to whom this paragraph is applicable who performs service in excess of such nurse's regularly scheduled two 12-hour tours of duty may be paid overtime pay under section 7453(e) of this title [38 USCS § 7453(e)], or other applicable law, for all or part of the hours of officially ordered or approved service performed by such nurse in excess of 40 hours during an administrative workweek.

(c) A nurse described in subsection (b)(1) who is absent on approved sick leave or annual leave during a regularly scheduled 12-hour tour of duty shall be charged for such leave at a rate of five hours of leave for three hours of absence.

(d) The Secretary shall prescribe regulations for the implementation of this section.

Explanatory notes:
Similar provisions were contained in former § 4107(h) prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

§ 7456A. Nurses: alternate work schedules

(a) Applicability. This section applies to registered nurses appointed under this chapter [38 USCS §§ 7401 et seq.].

(b) 36/40 work schedule.

(1) (A) Subject to paragraph (2), if the Secretary determines it to be necessary in order to obtain or retain the services of registered nurses at any Department health-care facility, the Secretary may provide, in the case of nurses employed at such facility, that such nurses who work three regularly scheduled 12-hour tours of duty within a work week shall be considered for all purposes to have worked a full 40-hour basic work week.

(B) A nurse who works under the authority in subparagraph (A) shall be considered a 0.90 full-time equivalent employee in computing full-time
equivalent employees for the purposes of determining compliance with personnel ceilings.

(2) (A) Basic and additional pay for a nurse who is considered under paragraph (1) to have worked a full 40-hour basic work week shall be subject to subparagraphs (B) and (C).

(B) The hourly rate of basic pay for a nurse covered by this paragraph for service performed as part of a regularly scheduled 36-hour tour of duty within the work week shall be derived by dividing the nurse's annual rate of basic pay by 1,872.

(C) The Secretary shall pay overtime pay to a nurse covered by this paragraph who-

(i) performs a period of service in excess of such nurse's regularly scheduled 36-hour tour of duty within an administrative work week;

(ii) for officially ordered or approved service, performs a period of service in excess of 8 hours on a day other than a day on which such nurse's regularly scheduled 12-hour tour of duty falls;

(iii) performs a period of service in excess of 12 hours for any day included in the regularly scheduled 36-hour tour of duty work week; or

(iv) performs a period of service in excess of 40 hours during an administrative work week.

(D) The Secretary may provide a nurse to whom this subsection applies with additional pay under section 7453 of this title [38 USCS § 7453] for any period included in a regularly scheduled 12-hour tour of duty.

(3) A nurse who works a work schedule described in this subsection who is absent on approved sick leave or annual leave during a regularly scheduled 12-hour tour of duty shall be charged for such leave at a rate of ten hours of leave for every nine hours of absence.

(c) Holiday pay. A nurse working a work schedule under subsection (b) that includes a holiday designated by law or Executive order shall be eligible for holiday pay under section 7453(d) of this title [38 USCS § 7453(d)] for any service performed by the nurse on such holiday under such section.

(d) 9-month work schedule for certain nurses.

(1) The Secretary may authorize a registered nurse appointed under section 7405 of this title [38 USCS § 7405], with the nurse's written consent, to work full time for nine months with 3 months off duty, within a fiscal year, and be paid at 75 percent of the full-time rate for such nurse's grade for each pay period of such fiscal year.

(2) A nurse who works under the authority in paragraph (1) shall be considered a 0.75 full-time equivalent employee in computing full-time equivalent employees for the purposes of determining compliance with personnel ceilings.

(3) Work under this subsection shall be considered part-time service for purposes of computing benefits under chapters 83 and 84 of title 5 [5 USCS §§ 8301 et seq. and 8401 et seq.].

(4) A nurse who works under the authority in paragraph (1) shall be considered a full-time employee for purposes of chapter 89 of title 5 [5 USCS §§ 8901 et seq.].

(e) Notification of modification of benefits. The Secretary shall provide each employee with respect to whom an alternate work schedule under this section may apply
written notice of the effect, if any, that the alternate work schedule will have on the employee's health care premium, retirement, life insurance premium, probationary status, or other benefit or condition of employment. The notice shall be provided not later than 14 days before the employee consents to the alternate work schedule.

(f) Regulations. The Secretary shall prescribe regulations to carry out this section.

§ 7457. On-call pay

(a) The Secretary may pay an employee to whom this section applies pay at the rate provided in section 7453(h) of this title [38 USCS § 7453(h)] except for such time as the employee may be called back to work.

(b) This section applies to an employee who meets each of the following criteria:

(1) The employee is employed in a position listed in paragraph (3) of section 7401 of this title [38 USCS § 7401] or meets the criteria specified in clauses (i), (ii), and (iii) of section 7455(a)(2)(B) of this title [38 USCS § 7455(a)(2)(B)].

(2) The employee is employed in a work unit for which on-call premium pay is authorized.

(3) The employee is officially scheduled to be on call outside such employee's regular hours or on a holiday designated by Federal statute or Executive order.

(c) An employee who is eligible for on-call pay under subsection (a) and who was receiving standby premium pay pursuant to section 5545 of title 5 [5 USCS § 5545] on May 20, 1988, shall, as long as such employee is employed in the same position and work unit and remains eligible for such standby pay, receive pay for any period of on-call duty at the rate equal to the greater of:

(1) the rate of pay which such employee would receive if being paid the rate of standby pay pursuant to such section that such individual would be entitled to receive if such individual were not scheduled to be on call instead, or

(2) the rate of pay which such employee is entitled to receive including on-call premium pay described in subsection (a).

Explanatory notes:

Similar provisions were contained in former § 4107(j) prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Cross References

This section is referred to in 38 USCS § 7404

§ 7458. Recruitment and retention bonus pay

(a) (1) In order to recruit and retain registered nurses, the Secretary may enter into agreements under this section. Such an agreement may be entered into with any registered nurse who is employed at, or who agrees to accept employment with the Department at, a Department health-care facility that is designated by the Secretary as a health-care facility with a significant shortage in registered nurses in any clinical service.

(2) A registered nurse entering into an agreement under this section shall agree to remain employed by the Department as a registered nurse for a period of time to be specified in the agreement and to serve during that period in a specific health-care
facility that is designated by the Secretary as a health-care facility with a significant shortage of registered nurses in that nurse's clinical service. Such period may not be less than two years or more than four years. Such employment during such period may be on a full-time basis or a part-time basis, as specified in the agreement. Part-time employment as specified in such an agreement may not be less than half-time.

(b) (1) The Secretary shall pay to any nurse entering into an agreement under this section bonus pay in an amount specified in the agreement. The amount of such bonus pay may not exceed--

   (A) $2,000 per year, in the case of an agreement for two years,
   (B) $3,000 per year, in the case of an agreement for three years, and
   (C) $4,000 per year, in the case of an agreement for four years.

(2) In the case of an agreement for employment on less than a full-time basis, the amount of bonus pay shall be pro rated [prorated] accordingly.

(c) (1) Except as provided in paragraph (2) of this subsection, a bonus under this section shall be paid in equal installments after each year of service is completed throughout the period of obligated service specified in the agreement.

(2) (A) The Secretary may make a payment in an amount not in excess of 25 percent of the total bonus in a lump sum at the time that the period of obligated service commences under the agreement.

(B) If the Secretary makes a lump-sum payment under subparagraph (A) of this paragraph, the remaining balance of the bonus shall be paid in equal installments after each year of service is completed throughout the period of obligated service specified in the agreement.

(d) (1) A bonus paid to any individual under this section shall be in addition to any pay or allowance to which the individual is entitled.

(2) The amount of a bonus paid under this section shall not be considered to be basic pay for the purposes of sections 5551, 5552, and 5595 of title 5 [5 USCS §§ 5551, 5552, and 5595], chapters 81, 83, 84, and 87 of such title [5 USCS §§ 8101 et seq., 8301 et seq., 8401 et seq. and 8701 et seq.], or any other provision of law creating an entitlement to benefits based on basic pay.

(e) At least once each year the Secretary, upon the recommendation of the Under Secretary for Health, shall determine the specific health-care facilities and clinical services, if any, as to which there are significant problems with respect to the recruitment and retention of registered nurses. Upon making any such determination, the Secretary shall promptly notify the Committees on Veterans' Affairs of the Senate and the House of Representatives of the determination and the basis for the determination.

(f) The Secretary may enter into agreements under this section with individuals in a health profession other than nursing (and other than a health profession for which special pay may be provided under subchapter III [38 USCS §§ 7431 et seq.]) if the Secretary determines that there are significant problems with respect to recruitment and retention of employees in that health profession. The Secretary's authority to enter into any such agreement under this section, and such agreement, shall be subject to the provisions of
this section in the same manner as are the authority to enter into an agreement under this section with a registered nurse and such an agreement.

(g) (1) Except as provided in paragraph (2) of this subsection, an individual who voluntarily, or because of misconduct, fails to perform services as assigned by the Secretary for the period of obligated service provided in an agreement under this section shall refund to the United States the amount by which the total amount of bonus payments received by that individual under this section exceeds the amount that such individual would have received under an agreement under this section to serve for the period of obligated service actually served (as determined at the time the agreement is entered into). If the period actually served is less than two years, the amount to be refunded is the entire amount paid to the individual.

(2) An individual shall not be required to make a refund under paragraph (1) of this subsection if the Secretary determines, in accordance with regulations prescribed under subsection (h) of this section, that the individual's failure to perform services for the period of obligated service is due to circumstances (not including separation for cause) beyond the control of the individual.

(3) An obligation to refund any portion of a bonus payment under this subsection is, for all purposes, a debt owed to the United States.

(4) The provisions of this subsection and the specific amounts that the individual could be required to refund shall be disclosed to the individual at the time the agreement is entered into and shall be clearly set forth in the contract.

(h) The Secretary shall prescribe regulations to carry out this section.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4120, as 38 USCS § 7458; and, in subsec. (f), substituted "subchapter III" for "section 4118 of this title".

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

1992. Act Oct. 9, 1992, in subsec. (e), substituted "Under Secretary for Health" for "Chief Medical Director".

1994. Act Nov. 2, 1994 substituted the section heading for one which read: "§ 7458. Recruitment and retention bonus pay for nurses and certain other health-care personnel".

SUBCHAPTER V. DISCIPLINARY AND GRIEVANCE PROCEDURES

§ 7461. Adverse actions: section 7401(1) employees
§ 7462. Major adverse actions involving professional conduct or competence
§ 7463. Other adverse actions
§ 7464. Disciplinary Appeals Boards

§ 7461. Adverse actions: section 7401(1) employees

(a) Whenever the Under Secretary for Health (or an official designated by the Under Secretary for Health) brings charges based on conduct or performance against a section 7401(1) [38 USCS § 7401(1)] employee and as a result of those charges an adverse
personnel action is taken against the employee, the employee shall have the right to appeal the action.

(b) (1) If the case involves or includes a question of professional conduct or competence in which a major adverse action was taken, such an appeal shall be made to a Disciplinary Appeals Board under section 7462 of this title [38 USCS § 7462].

(2) In any other case, such an appeal shall be made--

(A) through Department grievance procedures under section 7463 of this title [38 USCS § 7463], in any case that involves or includes a question of professional conduct or competence in which a major adverse action was not taken or in any case of an employee who is not covered by a collective bargaining agreement under chapter 71 of title 5 [5 USCS §§ 7101 et seq.]; or

(B) through grievance procedures provided through collective bargaining under chapter 71 of title 5 [5 USCS §§ 7101 et seq.] or through Department grievance procedures under section 7463 of this title [38 USCS § 7463], as the employee elects, in the case of an employee covered by a collective bargaining agreement under chapter 71 of title 5 [5 USCS §§ 7101 et seq.] that does not involve or include a question of professional conduct or competence.

(c) For purposes of this subchapter [38 USCS §§ 7461 et seq.].--

(1) Section 7401(1) [38 USCS § 7401(1)] employees are employees of the Department employed on a full-time basis under a permanent appointment in a position listed in section 7401(1) of this title [38 USCS § 7401(1)] (other than interns and residents appointed pursuant to section 7406 of this title [38 USCS § 7406]).

(2) A major adverse action is an adverse action which includes any of the following:

(A) Suspension.
(B) Transfer.
(C) Reduction in grade.
(D) Reduction in basic pay.
(E) Discharge.

(3) A question of professional conduct or competence is a question involving any of the following:

(A) Direct patient care.
(B) Clinical competence.

(d) An issue of whether a matter or question concerns, or arises out of, professional conduct or competence is not itself subject to any grievance procedure provided by law, regulation, or collective bargaining and may not be reviewed by any other agency.

(e) Whenever the Secretary proposes to prescribe regulations under this subchapter [38 USCS §§ 7461 et seq.], the Secretary shall publish the proposed regulations in the Federal Register for notice-and-comment not less than 30 days before the day on which they take effect.

Explanatory notes:

Similar provisions to §§ 7431 et seq. were contained in former § 4110 prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:
1992. Act Oct. 9, 1992, in subsec. (a), substituted "Under Secretary for Health" for "Chief Medical Director".

Other provisions:

Deadline for regulations. Act May 7, 1991, P. L. 102-40, Title II, § 204, 105 Stat. 207, provides: "The Secretary of Veterans Affairs shall prescribe regulations under subchapter V of chapter 74 of title 38, United States Code [38 USCS §§ 7461 et seq.] (as added by section 203), not later than 180 days after the date of the enactment of this Act. Such regulations shall be published in the Federal Register for notice-and-comment not less than 30 days before the day on which they take effect.".

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:47, 48

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 14

In suit brought by medical resident against his supervisor and Secretary of Department of Veterans Affairs (VA), alleging that he was discharged from residency program at VA medical center without due process in violation of Fifth Amendment, district court properly dismissed resident's Bivens claim for money damages because such claim was barred by remedial provisions of Title 38, which excluded resident from remedial processes afforded to permanent VA employees; thus, it would thwart will of Congress to allow resident to bring such action when permanent VA physicians, who were provided limited remedies in Title 38, could not. Hardison v Cohen (2004, CA11 Fla) 375 F.3d 1262, 21 BNA IER Cas 810, 17 FLW Fed C 747

In suit brought by medical resident against his supervisor and Secretary of Department of Veterans Affairs (VA), alleging that he was discharged from residency program at VA medical center without due process in violation of Fifth Amendment, district court properly dismissed resident's claim for equitable relief, including declaratory judgment, reinstatement, and back pay, because resident had neither guarantee of future employment nor statutory right to appeal any adverse personnel action, and, thus, he did not have constitutionally-protected property interest in his former position; resident was temporary employee, and he was appointed under system that allowed employees to be expeditiously separated from service. Hardison v Cohen (2004, CA11 Fla) 375 F.3d 1262, 21 BNA IER Cas 810, 17 FLW Fed C 747

VA doctor's discharge was properly deemed unappealable to Disciplinary Appeals Board under 38 USCS § 7461, even though it stemmed from his decision to seek review of radioactive treatment of patient through unapproved channels, where discharge was more specifically for his refusal to follow direct order of superior to submit to examination to evaluate his suspicious and hostile actions, because, given ambiguity of § 7461(c), if VA wishes to classify insubordination as outside jurisdiction of Board, even insubordination that stems from dispute about employee's professional conduct or competence, we cannot conclude that this interpretation is arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law. Gergans v Brown (1995, ND Ill) 911 F Supp 308

IRA jurisdiction over instant appeal under Whistleblower Protection Act was not precluded by title 38 because actions complained of were not subject to Disciplinary Appeals Board procedure of title 38. Dick v Department of Veterans Affairs (1999, MSPB) 83 MSPR 464

§ 7462. Major adverse actions involving professional conduct or competence

(a) (1) Disciplinary Appeals Boards appointed under section 7464 of this title [38 USCS § 7464] shall have exclusive jurisdiction to review any case--
(A) which arises out of (or which includes) a question of professional conduct or competence of a section 7401(1) [38 USCS § 7401(1)] employee; and
(B) in which a major adverse action was taken.

(2) The board shall include in its record of decision in any mixed case a statement of the board's exclusive jurisdiction under this subsection and the basis for such exclusive jurisdiction.

(3) For purposes of paragraph (2), a mixed case is a case that includes both a major adverse action arising out of a question of professional conduct or competence and an adverse action which is not a major adverse action or which does not arise out of a question of professional conduct or competence.

(b) (1) In any case in which charges are brought against a section 7401(1) [38 USCS § 7401(1)] employee which arises out of, or includes, a question of professional conduct or competence which could result in a major adverse action, the employee is entitled to the following:
   (A) At least 30 days advance written notice from the Under Secretary for Health or other charging official specifically stating the basis for each charge, the adverse actions that could be taken if the charges are sustained, and a statement of any specific law, regulation, policy, procedure, practice, or other specific instruction that has been violated with respect to each charge, except that the requirement for notification in advance may be waived if there is reasonable cause to believe that the employee has committed a crime for which the employee may be imprisoned.
   (B) A reasonable time, but not less than seven days, to present an answer orally and in writing to the Under Secretary for Health or other deciding official, who shall be an official higher in rank than the charging official, and to submit affidavits and other documentary evidence in support of the answer.

(2) In any case described in paragraph (1), the employee is entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case.

(3) (A) If a proposed adverse action covered by this section is not withdrawn, the deciding official shall render a decision in writing within 21 days of receipt by the deciding official of the employee's answer. The decision shall include a statement of the specific reasons for the decision with respect to each charge. If a major adverse action is imposed, the decision shall state whether any of the charges sustained arose out of a question of professional conduct or competence. If any of the charges are sustained, the notice of the decision to the employee shall include notice of the employee's rights of appeal.
   (B) Notwithstanding the 21-day period specified in subparagraph (A), a proposed adverse action may be held in abeyance if the employee requests, and the deciding official agrees, that the employee shall seek counseling or treatment for a condition covered under the Rehabilitation Act of 1973 [29 USCS §§ 701 et seq.]. Any such abeyance of a proposed action may not extend for more than one year.

(4) (A) The Secretary may require that any answer and submission under paragraph (1)(B) be submitted so as to be received within 30 days of the date of the written notice of the charges, except that the Secretary shall allow the granting of extensions for good cause shown.
(B) The Secretary shall require that any appeal to a Disciplinary Appeals Board from a decision to impose a major adverse action shall be received within 30 days after the date of service of the written decision on the employee.

(c) (1) When a Disciplinary Appeals Board convenes to consider an appeal in a case under this section, the board, before proceeding to consider the merits of the appeal, shall determine whether the case is properly before it.

(2) Upon hearing such an appeal, the board shall, with respect to each charge appealed to the board, sustain the charge, dismiss the charge, or sustain the charge in part and dismiss the charge in part. If the deciding official is sustained (in whole or in part) with respect to any such charge, the board shall--

(A) approve the action as imposed;
(B) approve the action with modification, reduction, or exception; or
(C) reverse the action.

(3) A board shall afford an employee appealing an adverse action under this section an opportunity for an oral hearing. If such a hearing is held, the board shall provide the employee with a transcript of the hearing.

(4) The board shall render a decision in any case within 45 days of completion of the hearing, if there is a hearing, and in any event no later than 120 days after the appeal commenced.

(d) (1) After resolving any question as to whether a matter involves professional conduct or competence, the Secretary shall cause to be executed the decision of the Disciplinary Appeals Board in a timely manner and in any event in not more than 90 days after the decision of the Board is received by the Secretary. Pursuant to the board's decision, the Secretary may order reinstatement, award back pay, and provide such other remedies as the board found appropriate relating directly to the proposed action, including expungement of records relating to the action.

(2) If the Secretary finds a decision of the board to be clearly contrary to the evidence or unlawful, the Secretary may--

(A) reverse the decision of the board, or
(B) vacate the decision of the board and remand the matter to the Board for further consideration.

(3) If the Secretary finds the decision of the board (while not clearly contrary to the evidence or unlawful) to be not justified by the nature of the charges, the Secretary may mitigate the adverse action imposed.

(4) The Secretary's execution of a board's decision shall be the final administrative action in the case.

(e) The Secretary may designate an employee of the Department to represent management in any case before a Disciplinary Appeals Board.

(f) (1) A section 7401(1) [38 USCS § 7401(1)] employee adversely affected by a final order or decision of a Disciplinary Appeals Board (as reviewed by the Secretary) may obtain judicial review of the order or decision.

(2) In any case in which judicial review is sought under this subsection, the court shall review the record and hold unlawful and set aside any agency action, finding, or conclusion found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) obtained without procedures required by law, rule, or regulation having been followed; or
(C) unsupported by substantial evidence.

Explanatory notes:
Similar provisions to §§ 7431 et seq. were contained in former § 4110 prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:
1992. Act Oct. 9, 1992, in subsec. (b)(1), in subparas. (A) and (B), substituted "Under Secretary for Health" for "Chief Medical Director".

Cross References
This section is referred to in 38 USCS §§ 7461, 7463, 7464

Research Guide
Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:47, 49-54

Where, 11 years after her guilty plea, defendant filed motion in her original criminal case to expunge her conviction alleging that there was inadequate basis for her Alford plea, that her attorney had conflict of interest, and that her plea rested on search and seizure that was later declared unlawful in co-defendant's matter, defendant's claims were solely "equitable" and, thus, to obtain expungement, defendant was required to first obtain judgment that her conviction was unlawful; defendant had not first sought relief under any statute such as 18 USCS §§ 921(a)(20), (33)(B)(ii), 3607(b), (c), 5010(a) (repealed 1984), 21 USCS § 844a(j), 38 USCS § 7462(d)(1), 10 USCS § 1565(e), 42 USCS § 14132(d), 28 USCS § 2255, or All Writs Act, 28 USCS § 1651, or under theory stemming from pardon under U.S. Const. art. II, § 2, cl. 1. United States v Crowell (2004, CA9 Or) 374 F.3d 790

Physician discharged by Veterans Administration could not attack discharge on ground that decision was not timely, where delays beyond period for termination proceedings set forth in 38 USCS § 7462(c)(4) were made by agreement of parties, in one instance upon request of physician. Claasen v Brown (1998, ND W Va) 33 F Supp 2d 511, affd (1999, CA4 W Va) 201 F.3d 435, reported in full (1999, CA4 W Va) 1999 US App LEXIS 20838

Employee, who worked for Department of Veterans Affairs, palpated patients breast while she was under anesthesia and without patient's permission; court held that this constituted unprofessional misconduct pursuant to 38 USCS § 7462, and decision of disciplinary appeals board was affirmed. Abaqueta v United States (2003, DC Ariz) 255 F Supp 2d 1020

§ 7463. Other adverse actions

(a) The Secretary shall prescribe by regulation procedures for the consideration of grievances of section 7401(1) [38 USCS § 7401(1)] employees arising from adverse personnel actions in which each action taken either--
   (1) is not a major adverse action; or
   (2) does not arise out of a question of professional conduct or competence.

Disciplinary Appeals Boards shall not have jurisdiction to review such matters, other than as part of a mixed case (as defined in section 7462(a)(3) of this title [38 USCS § 7462(a)(3)]).
(b) In the case of an employee who is a member of a collective bargaining unit under chapter 71 of title 5 [5 USCS §§ 7101 et seq.], the employee may seek review of an adverse action described in subsection (a) either under the grievance procedures provided through regulations prescribed under subsection (a) or through grievance procedures determined through collective bargaining, but not under both. The employee shall elect which grievance procedure to follow. Any such election may not be revoked.

(c) (1) In any case in which charges are brought against a section 7401(1) [38 USCS § 7401(1)] employee which could result in a major adverse action and which do not involve professional conduct or competence, the employee is entitled to the same notice and opportunity to answer with respect to those charges as provided in subparagraphs (A) and (B) of section 7462(b)(1) of this title [38 USCS § 7462(b)(1)].

(2) In any other case in which charges are brought against a section 7401(1) [38 USCS § 7401(1)] employee, the employee is entitled to--

(A) an advance written notice stating the specific reason for the proposed action, and

(B) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.

(d) Grievance procedures prescribed under subsection (a) shall include the following:

(1) A right to formal review by an impartial examiner within the Department of Veterans Affairs, who, in the case of an adverse action arising from a question of professional conduct or competence, shall be selected from the panel designated under section 7464 of this title [38 USCS § 7464].

(2) A right to a prompt report of the findings and recommendations by the impartial examiner.

(3) A right to a prompt review of the examiner's findings and recommendations by an official of a higher level than the official who decided upon the action. That official may accept, modify, or reject the examiner's recommendations.

(e) In any review of an adverse action under the grievance procedures prescribed under subsection (a), the employee is entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case.

Explanatory notes:
Similar provisions to §§ 7431 et seq. were contained in former § 4110 prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Cross References
This section is referred to in 38 USCS §§ 7461, 7464

Research Guide

Federal Procedure:

33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:48, 49, 54

Federal employee's non-frivolous allegations, in his affidavit and affidavits of co-workers, that employee's demotion was involuntary conferred jurisdiction on the Merit Systems Protection Board to hear claim that employee was coerced into accepting demotion in retaliation for whistleblowing activity. Dick v Dep't of Veterans Affairs (2002, CA FC) 290 F.3d 1356 (criticized in Lloyd v SBA (2004, MSPB) 96 MSPR 518)
Where a federal employee claimed that demotion was involuntary because employee was coerced into accepting demotion in retaliation for whistleblowing activity, employee did not waive hearing on merits by cancelling a hearing that the administrative judge erroneously considered to be jurisdictional rather than on the merits. Dick v Dep't of Veterans Affairs (2002, CA FC) 290 F.3d 1356 (criticized in Lloyd v SBA (2004, MSPB) 96 MSPR 518)

Comprehensive remedial scheme under 38 USCS § 7463 and its implementing regulations constituted special factor which warranted denial of implied constitutional remedy against officials of federal veterans' medical center for allegedly violating physician's constitutional rights after physician was terminated. Newmark v Principi (2003, ED Pa) 262 F Supp 2d 509

Board could exercise jurisdiction over physician's IRA appeal consistent with disciplinary scheme established by Congress for 38 USCS § 7401 employees where record showed that agency's removal action did not arise out of question of professional conduct or competence, but rather out of question of "preemployment suitability," hence was disciplinary action under 38 USCS § 7463, not under § 7462 which must be accorded deference. Cochran v Department of Veterans Affairs (1995, MSPB) 67 MSPR 167

§ 7464. Disciplinary Appeals Boards

(a) The Secretary shall from time to time appoint boards to hear appeals of major adverse actions described in section 7462 of this title [38 USCS § 7462]. Such boards shall be known as Disciplinary Appeals Boards. Each board shall consist of three employees of the Department, each of whom shall be of the same grade as, or be senior in grade to, the employee who is appealing an adverse action. At least two of the members of each board shall be employed in the same category of position as the employee who is appealing the adverse action. Members of a board shall be appointed from individuals on the panel established under subsection (d).

(b) (1) In appointing a board for any case, the Secretary shall designate one of the members to be chairman and one of the members to be secretary of the board, each of whom shall have authority to administer oaths.

(2) Appointment of boards, and the proceedings of such boards, shall be carried out under regulations prescribed by the Secretary. A verbatim record shall be maintained of board hearings.

(c) (1) Notwithstanding sections 5701 and 7332 of this title [38 USCS §§ 5701 and 7332], the chairman of a board, upon request of an employee whose case is under consideration by the board (or a representative of that employee) may, in connection with the considerations of the board, review records or information covered by those sections and may authorize the disclosure of such records or information to that employee (or representative) to the extent the board considers appropriate for purposes of the proceedings of the board in that case.

(2) In any such case the board chairman may direct that measures be taken to protect the personal privacy of individuals whose records are involved. Any person who uses or discloses a record or information covered by this subsection for any purpose other than in connection with the proceedings of the board shall be fined not more than $5,000 in the case of a first offense and not more than $20,000 in the case of a subsequent offense.

(d) (1) The Secretary shall provide for the periodic designation of employees of the Department who are qualified to serve on Disciplinary Appeals Boards. Those employees
shall constitute the panel from which board members in a case are appointed. The Secretary shall provide (without charge) a list of the names of employees on the panel to any person requesting such list.

(2) The Secretary shall announce periodically, and not less often than annually, that the roster of employees on the panel is available as described in paragraph (1). Such announcement shall be made at Department medical facilities and through publication in the Federal Register. Notice of a name being on the list must be provided at least 30 days before the individual selected may serve on a Board or as a grievance examiner. Employees, employee organizations, and other interested parties may submit comments to the Secretary concerning the suitability for service on the panel of any employee whose name is on the list.

(3) The Secretary shall provide training in the functions and duties of Disciplinary Appeals Boards and grievance procedures under section 7463 of this title [38 USCS § 7463] for employees selected to be on the panel.

Explanatory notes:

Similar provisions to §§ 7431 et seq. were contained in former § 4110 prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Cross References

This section is referred to in 38 USCS §§ 7462, 7463

1. Generally

2. Unfair labor practice proceedings

1. Generally

Physician alleging constitutional violations which drove him from his job had adequate remedies under statutory scheme covering employees in Department of Medicine and Surgery and was therefore precluded from bringing Bivens action. Berry v Hollander (1991, CA9 Or) 925 F.2d 311, 91 CDOS 874, 91 Daily Journal DAR 1413

2. Unfair labor practice proceedings

FLRA was entitled to deference, when supported by Department of Veterans Affairs, in interpreting personnel provisions of Titles 5 and 38 to hold that it could not apply dual motivation analysis to find unfair labor practice when possible motivation for disciplinary action was inaptitude, inefficiency or misconduct, and disciplinary action was effectuated through peer review under 38 USCS § 4110 [repealed]. American Fed'n of Gov't Employees, Local 3306 v Federal Labor Relations Auth. (1993, CA2) 2 F.3d 6, 143 BNA LRRM 3035

In resolving unfair labor practice complaints involving professional employees of Department of Veterans Affairs, to extent respondent asserts lawful reason for taking disputed action and reason is consistent with final determination made pursuant to exercise of agency's exclusive authority under Title 38, review of such action may be sought only pursuant to procedures set forth in Title 38 or implementing regulations and final determination made pursuant to such exclusive authority will not be substantively reviewable in unfair labor practices proceeding. Dept. of Veterans Affairs, Veterans Administration Medical Center, San Francisco, Cal. & Karen O'Rourke (1991) 40 FLRA No. 30

SUBCHAPTER VI. REGIONAL MEDICAL EDUCATION CENTERS

§ 7471. Designation of Regional Medical Education Centers
§ 7472. Supervision and staffing of Centers
§ 7473. Personnel eligible for training
§ 7474. Consultation

§ 7471. Designation of Regional Medical Education Centers

(a) In carrying out the Secretary's functions under section 7302 of this title [38 USCS §
7302] with regard to the training of health personnel, the Secretary shall implement a
program under which the Secretary shall designate as Regional Medical Education
Centers such Department hospitals as the Secretary determines appropriate to carry out
the provisions of this subchapter [38 USCS §§ 7471 et seq].

(b) Each Regional Medical Education Center (hereinafter in this subchapter [38 USCS §§
7471 et seq.] referred to as "Center") designated under subsection (a) shall provide
continuing medical and related education programs for personnel eligible for training
under this subchapter [38 USCS §§ 7471 et seq.]. Such programs shall include the
following:
(1) The teaching of newly developed medical skills and the use of newly developed
medical technologies and equipment.
(2) Advanced clinical instruction.
(3) The opportunity for conducting clinical investigations.
(4) Clinical demonstrations in the use of new types of health personnel and in the
better use of the skills of existing health personnel.
(5) Routine verification of basic medical skills and, where determined necessary,
remediation of any deficiency in such skills.

Explanatory notes:
Similar provisions were contained in former § 4121 prior to the repeal of that section in the

§ 7472. Supervision and staffing of Centers

(a) Centers shall be operated under the supervision of the Under Secretary for Health and
shall be staffed with personnel qualified to provide the highest quality instruction and
training in various medical and health care disciplines.

(b) As a means of providing appropriate recognition to persons in the career service of
the Administration who possess outstanding qualifications in a particular medical or
health care discipline, the Under Secretary for Health shall from time to time and for such
period as the Under Secretary for Health considers appropriate assign such persons to
serve as visiting instructors at Centers.

(c) Whenever the Under Secretary for Health considers it necessary for the effective
conduct of the program provided for under this subchapter [38 USCS §§ 7471 et seq.],
the Under Secretary for Health may contract for the services of highly qualified medical
and health personnel from outside the Department to serve as instructors at such Centers.

Explanatory notes:
Similar provisions were contained in former § 4122 prior to the repeal of that section in the
§ 7473. Personnel eligible for training

(a) The Under Secretary for Health shall determine the manner in which personnel are to be selected for training in the Centers. Preference shall be given to career personnel of the Administration.

(b) To the extent that facilities are available medical and health personnel from outside the Administration may, on a reimbursable basis, be provided training in the Centers. Such reimbursement may include reciprocal training of personnel of the Administration provided under sharing arrangements entered into by the Under Secretary for Health and the heads of the entities providing such reciprocal training. Any amounts received by the United States as reimbursement under this subsection shall be credited to the applicable Department medical appropriation account.

Explanatory notes:
Similar provisions were contained in former § 4123 prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:

§ 7474. Consultation

The Under Secretary for Health shall carry out this subchapter [38 USCS §§ 7471 et seq.] after consultation with the special medical advisory group established pursuant to section 7312(a) of this title [38 USCS § 7312(a)].

Explanatory notes:
Similar provisions were contained in former § 4124 prior to the repeal of that section in the complete revision of chapter 73 by Act May 7, 1991, P. L. 102-40.

Amendments:
1992. Act Oct. 9, 1992 substituted "Under Secretary for Health" for "Chief Medical Director".
Amendments:


1991. Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239, revised the analysis of this chapter by amending the section numbers in accordance with the redesignations made by § 402(b) of such Act (see Table II preceding 38 USCS § 101).

1998. Act Nov. 11, 1998, P. L. 105-368, Title VIII, §§ 802(b), 803(b), 112 Stat. 3356, 3358, amended the analysis of this chapter by adding the subchapter VI and VII headings, items 7671 through 7676, and items 7681 through 7684.


§ 7601. Establishment of program; purpose

(a) There is hereby established a program to be known as the Department of Veterans' Affairs Health Professionals Educational Assistance Program (hereinafter in this chapter [38 USCS §§ 7601 et seq.] referred to as the "Educational Assistance Program"). The program consists of--

(1) the scholarship program provided for in subchapter II of this chapter [38 USCS §§ 7611 et seq.];
(2) the tuition reimbursement program provided for in subchapter III of this chapter [38 USCS §§ 7621 et seq.];
(3) the Selected Reserve member stipend program provided for under subchapter V of this chapter [38 USCS §§ 7651 et seq.];
(4) the employee incentive scholarship program provided for in subchapter VI of this chapter [38 USCS §§ 7671 et seq.]; and
(5) the education debt reduction program provided for in subchapter VII of this chapter [38 USCS §§ 7681 et seq.].

(b) The purpose of the Educational Assistance Program is to assist in providing an adequate supply of trained health-care personnel for the Department and the Nation.

Amendments:


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4301, as 38 USCS § 7601.

Act Aug. 6, 1991, in subsec. (a), substituted "Department of Veterans' Affairs" for "Veterans' Administration".

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Such Act further substituted "Department" for "Veterans' Administration" wherever appearing.


1998. Act Nov. 11, 1998, in subsec. (a), in para. (2), deleted "and" after the concluding semicolon, in para. (3), substituted the concluding semicolon for a period, and added paras. (4) and (5).

Other provisions:
Health professional education loan payment program. Act Oct. 6, 1992, P. L. 102-389, Title I, 106 Stat. 1574, provides that the following sums are appropriated for the Department of Veterans Affairs for the fiscal year ending Sept. 30, 1993: "For payment of outstanding tuition loans to Department of Veterans Affairs health care professional employees (excluding physicians and dentists) who agree to remain in service for one year or more, $5,000,000, to remain available until September 30, 1994: Provided, That the Secretary, in order to recruit and retain such employees, may make such payments, not to exceed $3,000 during any calendar year, or $12,000 in total, to any such employee who has an outstanding tuition loan from an educational institution approved by the Secretary that has led to a degree in the health care occupation in which such individual is employed: Provided further, That no payment shall be made in advance: Provided further, That regulations shall be promulgated by the Secretary to implement this program.".

Repeal of provision prohibiting payments to health professionals for payment of tuition loans. Act Nov. 4, 1992, P. L. 102-585, Title V, Subtitle C, § 523(b), 106 Stat. 4959, which formerly appeared as a note to this section, was repealed by Act Nov. 11, 1998, P. L. 105-368, Title VIII, § 804, 112 Stat. 3358. Such note prohibited the Secretary of Veterans Affairs from providing payments to health-care professional employees of the Department of Veterans Affairs for payment of tuition loans.

§ 7602. Eligibility

(a) (1) To be eligible to participate in the Educational Assistance Program under subchapter II, III, or VI of this chapter [38 USCS §§ 7611 et seq., 7621 et seq., or 7671 et seq.], an individual must be accepted for enrollment or be currently enrolled as a student at a qualifying educational institution in a course of education or training that is approved by the Secretary and that leads toward completion of a degree in a field of education or training for which a scholarship may be awarded under subchapter II of this chapter [38 USCS §§ 7611 et seq.], for which tuition reimbursement may be provided under subchapter III of this chapter [38 USCS §§ 7621 et seq.], or for which a scholarship may be awarded under subchapter VI of this chapter [38 USCS §§ 7671 et seq.], as the case may be.

(2) A qualifying educational institution for purposes of this section is an educational institution that is in a State and that (as determined by the Secretary) is an accredited institution.

(b) An individual is not eligible to apply to participate in the Educational Assistance Program under subchapter II, III, or VI of this chapter [38 USCS §§ 7611 et seq., 7621 et seq., or 7671 et seq.] if the individual is obligated under any other Federal program to perform service after completion of the course of education or training of such individual referred to in subsection (a) of this section.

Amendments:

1990. Act Aug. 15, 1990, in subsecs. (a)(1) and (b), inserted "under subchapter I or II of this chapter".
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4302, as 38 USCS § 7602.
Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

1998. Act Nov. 11, 1998, in subsec. (a)(1), substituted "subchapter II, III, or VI" for "subchapter I or II", substituted ", for which" for "or for which" preceding "tuition", and inserted ", or for which a scholarship may be awarded under subchapter VI of this chapter, as the case may be"; and, in subsec. (b), substituted "subchapter II, III, or VI" for "subchapter I or II".

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
This section is referred to in 38 USCS § 7612

§ 7603. Application and acceptance

(a) (1) To apply to participate in the Educational Assistance Program under subchapter II, III, V, or VI of this chapter [38 USCS §§ 7611 et seq., 7621 et seq., 7651 et seq., or 7671 et seq.], an individual shall submit to the Secretary an application for such participation together with an agreement described in section 7604 of this title [38 USCS § 7604] under which the participant agrees to serve a period of obligated service in the Veterans Health Administration as provided in the agreement in return for payment of educational assistance as provided in the agreement.

(2) To apply to participate in the Educational Assistance Program under subchapter VII of this chapter [38 USCS §§ 7681 et seq.], an individual shall submit to the Secretary an application for such participation.

(b) (1) An individual becomes a participant in the Educational Assistance Program upon the Secretary's approval of the individual's application and the Secretary's acceptance of the agreement (if required).

(2) Upon the Secretary's approval of an individual's participation in the program, the Secretary shall promptly notify the individual of that approval. Such notice shall be in writing.

(c) (1) In distributing application forms and agreement forms to individuals desiring to participate in the Educational Assistance Program, the Secretary shall include with such forms the following:

(A) A fair summary of the rights and liabilities of an individual whose application is approved (and whose agreement is accepted) by the Secretary, including a clear explanation of the damages to which the United States is entitled if the individual breaches the agreement.

(B) A full description of the terms and conditions that apply to participation in the Educational Assistance Program and service in the Veterans Health Administration.

(2) The Secretary shall make such application forms and other information available to individuals desiring to participate in the Educational Assistance Program on a date sufficiently early to allow such individuals adequate time to prepare and submit such forms.
(d) In selecting applicants for acceptance in the Educational Assistance Program, the Secretary shall give priority to the applications of individuals who have previously received educational assistance under the program and have not completed the course of education or training undertaken under such program.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4303, as 38 USCS § 7603, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

1994. Act Nov. 2, 1994, in subsecs. (a) and (c)(1)(B), substituted "Veterans Health Administration" for "Department of Medicine and Surgery".

1998. Act Nov. 11, 1998, in subsec. (a), designated the existing provisions as para. (1) and, in such paragraph, substituted "To apply to participate in the Educational Assistance Program under subsection II, III, V, or VI of this chapter," for "To apply to participate in the Educational Assistance Program," and added para. (2); and, in subsec. (b)(1), inserted "(if required)".

2000. Act Nov. 1, 2000, in subsec. (a)(1), substituted "subchapter" for "subsection".

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
This section is referred to in 38 USCS §§ 7612, 7616, 7617, 7622, 7623, 7652-7654

§ 7604. Terms of agreement

An agreement between the Secretary and a participant in the Educational Assistance Program shall be in writing, shall be signed by the participant, and shall include the following provisions:

(1) The Secretary's agreement--
   (A) to provide the participant with educational assistance as authorized in subchapter II, III, V, or VI of this chapter [38 USCS §§ 7611 et seq., 7621 et seq., 7651 et seq., or 7671 et seq.] and specified in the agreement; and
   (B) to afford the participant the opportunity for employment in the Veterans Health Administration (subject to the availability of appropriated funds for such purpose and other qualifications established in accordance with section 7402 of this title [38 USCS § 7402]).

(2) The participant's agreement--
   (A) to accept such educational assistance;
   (B) to maintain enrollment and attendance in the course of training until completed;
   (C) while enrolled in such course, to maintain an acceptable level of academic standing (as determined by the educational institution offering such course of training under regulations prescribed by the Secretary); and
   (D) after completion of the course of training, to serve as a full-time employee in the Veterans Health Administration as specified in the agreement in accordance
with subchapter II, III, V, or VI of this chapter [38 USCS §§ 7611 et seq., 7621 et seq., 7651 et seq., or 7671 et seq.].

(3) A provision that any financial obligation of the United States arising out of an agreement entered into under this chapter [38 USCS §§ 7601 et seq.], and any obligation of the participant which is conditioned on such agreement, is contingent upon funds being appropriated for educational assistance under this chapter [38 USCS §§ 7601 et seq.].

(4) A statement of the damages to which the United States is entitled under this chapter [38 USCS §§ 7601 et seq.] for the participant's breach of the agreement.

(5) Such other terms as are required to be included in the agreement under subchapter II, III, V, or VI of this chapter [38 USCS §§ 7611 et seq., 7621 et seq., 7651 et seq., or 7671 et seq.] or as the Secretary may require consistent with the provisions of this chapter [38 USCS §§ 7601 et seq.].

Amendments:

1990. Act Aug. 15, 1990, in paras. (1)(A), (2)(D), and (5), substituted "subchapters II, III, or V" for "subchapter II or III".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4304, as 38 USCS § 7604; and, in para. (1), in subpara. (B), substituted "section 7402" for "section 4105".

Act Aug. 6, 1991, substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

1994. Act Nov. 2, 1994, in paras. (1)(B) and (2)(D), substituted "Veterans Health Administration" for "Department of Medicine and Surgery".

Such Act further, in paras. (1)(A), (2)(D), and (5), substituted "subchapter" for "subchapters".

1998. Act Nov. 11, 1998, in paras. (1)(A), (2)(D), and (5), substituted "subchapter II, III, V, or VI" for "subchapter II, III, or V".

Cross References

This section is referred to in 38 USCS §§ 7603, 7612, 7622

SUBCHAPTER II. SCHOLARSHIP PROGRAM

§ 7611. Authority for program
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§ 7611. Authority for program

As part of the Educational Assistance Program, the Secretary shall carry out a scholarship program under this subchapter [38 USCS §§ 7611 et seq.]. The program shall be known as the Department of Veterans' Affairs Health Professional Scholarship Program (hereinafter in this chapter [38 USCS §§ 7601 et seq.] referred to as the "Scholarship Program").
Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4311, as 38 USCS § 7611.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Such Act further substituted "Department of Veterans' Affairs" for "Veterans' Administration" wherever appearing.

Other provisions:

Health professional scholarship program. Act Feb. 13, 1996, P. L. 104-110, Title II, § 202(b), 110 Stat. 770, provides:

"(1) The Secretary shall submit to Congress, not later than March 31, 1997, a report setting forth the results of a study evaluating the operation of the health professional scholarship program under subchapter II of chapter 76 of title 38 [38 USCS §§ 7611 et seq.], United States Code. The study shall evaluate the efficacy of the program with respect to recruitment and retention of health care personnel for the Department of Veterans Affairs and shall compare the costs and benefits of the program with the costs and benefits of alternative methods of ensuring adequate recruitment and retention of such personnel.

"(2) The Secretary shall carry out the study under this paragraph through a private contractor. The report under paragraph (1) shall include the report of the contractor and the comments, if any, of the Secretary on that report.".

Submission of overdue report. Act. Nov. 21, 1997, P. L. 105-114, Title II, § 207(b), 111 Stat. 2289, provides: "The Secretary of Veterans Affairs shall submit to Congress not later than 180 days after the date of the enactment of this Act the report evaluating the operation of the health professional scholarship program required to be submitted not later than March 31, 1997, under section 202(b) of Public Law 104-110 (110 Stat. 770).".

§ 7612. Eligibility; application; agreement

(a) (1) Except as provided in paragraph (2) of this subsection, an individual must be accepted for enrollment or be enrolled (as described in section 7602 of this title [38 USCS § 7602]) as a full-time student to be eligible to participate in the Scholarship Program.

(2) An individual who is an eligible Department employee may be accepted as a participant if accepted for enrollment or enrolled (as described in section 7602 of this title [38 USCS § 7602]) for study on less than a full-time but not less than a half-time basis. (Such a participant is hereinafter in this subchapter [38 USCS §§ 7611 et seq.] referred to as a "part-time student".)

(3) For the purposes of paragraph (2) of this subsection, an eligible Department employee is a full-time Department employee who is permanently assigned to a Department health-care facility on the date on which the individual submits the application referred to in section 7603 of this title [38 USCS § 7603] and on the date on which the individual becomes a participant in the Scholarship Program.

(b) (1) A scholarship may be awarded under this subchapter [38 USCS §§ 7611 et seq.] only in a qualifying field of education or training.

(2) A qualifying field of education or training for purposes of this subchapter [38 USCS §§ 7611 et seq.] is education or training leading to employment (under section 7401 of this title [38 USCS § 7401]) as any of the following:

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(A) A physician, dentist, podiatrist, optometrist, nurse, physician assistant, or expanded function dental auxiliary.
(B) A psychologist described in section 7401(3) of this title [38 USCS § 7401(3)]
or a certified or registered respiratory therapist, licensed physical therapist, orlicensed practical or vocational nurse.

(3) The Secretary may designate additional fields of education or training asqualifying fields of education or training if the education or training leads toemployment in a position which would qualify the individual for increased basic payunder subsection (a)(1) of section 7455 of this title [38 USCS § 7455] for personneldescribed in subsection (a)(2)(B) of such section.

(4) Before awarding the initial scholarship in a course of education or training otherthan medicine or nursing, the Secretary shall notify the Committees on Veterans'Affairs of the Senate and House of Representatives of the Secretary's intent to awardascholarship in such course of education or training. The notice shall include astatement of the reasons why the award of scholarships in that course of education ortraining is necessary to assist in providing the Department with an adequate supply ofpersonnel in the health profession concerned. Any such notice shall be given not lessthan 60 days before the first such scholarship is awarded.

(5) In selecting applicants for the Scholarship Program, the Secretary--
(A) shall give priority to applicants who will be entering their final year in acourse of training; and
(B) shall ensure an equitable allocation of scholarships to persons enrolled in thesecond year of a program leading to an associate degree in nursing.

(c) (1) An agreement between the Secretary and a participant in the Scholarship Programshall (in addition to the requirements set forth in section 7604 of this title [38 USCS §7604]) include the following:
(A) The Secretary's agreement to provide the participant with a scholarship underthis subchapter [38 USCS §§ 7611 et seq.] for a specified number (from one tofour) of school years during which the participant is pursuing a course ofeducation or training described in section 7602 of this title [38 USCS § 7602].
(B) The participant's agreement to serve as a full-time employee in the VeteransHealth Administration for a period of time (hereinafter in this subchapter [38USCS §§ 7611 et seq.] referred to as the "period of obligated service") of onecalendar year for each school year or part thereof for which the participant wasprovided a scholarship under the Scholarship Program, but for not less than twoyears.

(2) In a case in which an extension is granted under section 7614(3) of this title [38USCS § 7614(3)], the number of years for which a scholarship may be providedunder this subchapter [38 USCS §§ 7611 et seq.] shall be the number of school yearsprovided for as a result of the extension.

(3) In the case of a participant who is a part-time student--
(A) the period of obligated service shall be reduced in accordance with theproportion that the number of credit hours carried by such participant in any suchschool year bears to the number of credit hours required to be carried by afull-time student in the course of training being pursued by the participant, but inno event to less than one year; and
(B) the agreement shall include the participant's agreement to maintain employment, while enrolled in such course of education or training, as a Department employee permanently assigned to a Department health-care facility.

(4) If a participant's period of obligated service is deferred under section 7616(b)(3)(A)(i) of this title [38 USCS § 7616(b)(3)(A)(i)], the agreement terms under paragraph (1) of this subsection shall provide for the participant to serve any additional period of obligated service that is prescribed by the Secretary under section 7616(b)(4)(B) of this title [38 USCS § 7616(b)(4)(B)].

Amendments:

1989. Act Dec. 18, 1989, in subsec. (b), substituted para. (5) for one which read: "In selecting applicants for the Scholarship Program, the Administrator shall give priority to the applications of individuals who will be entering their final year in a course of training."

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4312, as 38 USCS § 7612, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Such Act further, in subsec. (b), in para. (2), in the introductory matter, substituted "section 7401" for "section 4104", in subpara. (B), substituted "section 7401(3)" for "section 4104(3)" and, in para. (3), substituted "subsection (a)(1) of section 7455 of this title for personnel described in subsection (a)(2)(B) of such section" for "section 4107(g)(1)(B) of this title".

Act Aug. 6, 1991 substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

1992. Act Oct. 9, 1992 (applicable to scholarship agreements entered into after enactment, as provided by § 202(b) of such Act, which appears as a note to this section), in subsec. (c)(1)(B), inserted ", but for not less than two years".

1994. Act Nov. 2, 1994, in subsec. (c)(1)(B), substituted "Veterans Health Administration" for "Department of Medicine and Surgery".

Other provisions:

Implementation of 1989 amendment. Act Dec. 18, 1989, P. L. 101-237, Title II, § 207(b), 103 Stat. 2068, provides: "The Secretary of Veterans Affairs shall provide for the implementation of the amendment made by subsection (a) [amending 38 USCS § 7612(b)(5)] beginning with scholarships awarded under section 4312 [now section 7612] of title 38, United States Code, during 1990.".

Application of 1992 amendment. Act Oct. 9, 1992, P. L. 102-405, Title II, § 202(b), 106 Stat. 1982, provides: "The amendment made by subsection (a) [amending this section] shall apply to scholarship agreements entered into after the date of the enactment of this Act.".

Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17

§ 7613. Scholarship

(a) A scholarship provided to a participant in the Scholarship Program for a school year under the Scholarship Program shall consist of payment of the tuition of the participant for that school year, payment of other reasonable educational expenses (including fees, books, and laboratory expenses) for that school year, and a stipend determined under subsection (b) of this section.
(b) A stipend under this section for a school year shall be payment to the participant of not in excess of $485 per month (adjusted in accordance with section 7631 of this title [38 USCS § 7631]) for each of the 12 consecutive months beginning with the first month of the school year, except that a stipend may not be paid to a participant who is a full-time employee of the Department. The stipend of a participant who is a part-time student shall be adjusted as provided in sections 7614(1) and 7614(2) of this title [38 USCS §§ 7614(1) and 7614(2)].

(c) The Secretary may arrange with an educational institution in which a participant in the Scholarship Program is enrolled for the payment to the educational institution of the amounts of tuition and other reasonable educational expenses described in subsection (a) of this section. Such payments may be made without regard to subsections (a) and (b) of section 3324 of title 31 [31 USCS § 3324].

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4313, as 38 USCS § 7613, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, substituted "Department" for "Veterans’ Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
This section is referred to in 38 USCS §§ 7617, 7631

§ 7614. Part-time students

In the case of a participant who is a part-time student--
(1) the maximum amount of the stipend payable to the participant shall be reduced in accordance with the proportion that the number of credit hours carried by such participant bears to the number of credit hours required to be carried by a full-time student in the course of education or training being pursued by the participant;
(2) a stipend may not be paid for any month during which the participant is not actually attending the course of training in which the participant is enrolled; and
(3) the Secretary may extend the period for which a scholarship may be awarded to the participant to a maximum of six school years if the Secretary determines that the extension would be in the best interest of the United States.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4314, as 38 USCS § 7614.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
§ 7615. Status of participants

Participants in the Scholarship Program shall not by reason of their participation in such program (1) be considered to be employees of the Federal Government, or (2) be counted against any personnel ceiling affecting the Veterans Health Administration.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4315, as 38 USCS § 7615.
1994. Act Nov. 2, 1994 substituted "Veterans Health Administration" for "Department of Medicine and Surgery".

§ 7616. Obligated service

(a) Each participant in the Scholarship Program shall provide service as a full-time employee of the Department for the period of obligated service provided in the agreement of the participant entered into under section 7603 of this title [38 USCS § 7603]. Such service shall be provided in the full-time clinical practice of such participant's profession or in another health-care position in an assignment or location determined by the Secretary.

(b) (1) Not later than 60 days before the participant's service commencement date, the Secretary shall notify the participant of that service commencement date. That date is the date for the beginning of the participant's period of obligated service.

(2) As soon as possible after the participant's service commencement date, the Secretary shall--

(A) in the case of a participant who is not a full-time employee in the Veterans Health Administration, appoint such participant as such an employee; and

(B) in the case of a participant who is an employee in the Veterans Health Administration but is not serving in a position for which such participant's course of education or training prepared such participant, assign such participant to such a position.

(3) (A) (i) In the case of a participant receiving a degree from a school of medicine, osteopathy, dentistry, optometry, or podiatry, the participant's service commencement date is the date upon which the participant becomes licensed to practice medicine, osteopathy, dentistry, optometry, or podiatry, as the case may be, in a State. However, the Secretary may, at the request of such participant, defer such date until the end of the period of time required for the participant to complete an internship or residency or other advanced clinical training. If the participant requests such a deferral, the Secretary shall notify the participant that such deferral could lead to an additional period of obligated service in accordance with paragraph (4) of this subsection.

(ii) No such period of internship or residency or other advanced clinical training shall be counted toward satisfying a period of obligated service under this subchapter [38 USCS §§ 7611 et seq.].

(B) In the case of a participant receiving a degree from a school of nursing, the participant's service commencement date is the later of (i) the participant's course
completion date, or (ii) the date upon which the participant becomes licensed as a registered nurse in a State.

(C) In the case of a participant not covered by subparagraph (A) or (B) of this paragraph, the participant's service commencement date is the later of (i) the participant's course completion date, or (ii) the date the participant meets any applicable licensure or certification requirements.

(4) A participant whose period of obligated service is deferred under paragraph (3)(A) of this subsection shall be required to undertake internship or residency or other advanced clinical training in an accredited program in an educational institution which is an affiliated institution (as defined in section 7423(d)(1) of this title [38 USCS § 7423(d)(1)]) and with respect to which the affiliation agreement provides that all or part of the internship or residency or other advanced clinical training will be undertaken in a Department health-care facility. Such a participant may, at the discretion of the Secretary and upon the recommendation of the Under Secretary for Health, incur an additional period of obligated service--

(A) at the rate of one-half of a calendar year for each year of internship or residency or other advanced clinical training (or a proportionate ratio thereof), if the internship, residency, or advanced clinical training is in a medical specialty necessary to meet the health-care requirements of the Department (as determined under regulations prescribed by the Secretary); or

(B) at the rate of three-quarters of a calendar year for each year of internship or residency or other advanced clinical training (or a proportionate ratio thereof), if the internship, residency, or advanced clinical training is not in a medical specialty necessary to meet the health-care requirements of the Department (as determined under regulations prescribed by the Secretary).

(5) The Secretary shall by regulation prescribe the service commencement date for participants who were part-time students. Such regulations shall prescribe terms as similar as practicable to the terms set forth in paragraph (3) of this subsection.

(c) (1) Except as provided in paragraph (2) of this subsection, a participant in the Scholarship Program shall be considered to have begun serving such participant's period of obligated service--

(A) on the date, after such participant's course completion date, on which such participant (in accordance with subsection (b) of this section) is appointed under this chapter [38 USCS §§ 7601 et seq.] as a full-time employee in the Veterans Health Administration; or

(B) if the participant is a full-time employee in the Veterans Health Administration on such course completion date, on the date thereafter on which such participant is assigned to a position for which such participant's course of training prepared such participant.

(2) A participant in the Scholarship Program who on such participant's course completion date is a full-time employee in the Veterans Health Administration serving in a capacity for which such participant's course of training prepared such participant shall be considered to have begun serving such participant's period of obligated service on such course completion date.
(3) For the purposes of this section, the term "course completion date" means the date on which a participant in the Scholarship Program completes such participant's course of education or training under the program.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4316, as 38 USCS § 7616, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Such Act further, in subsec. (b), in para. (4), substituted "section 7423(d)(1)" for "section 4108(c)(1)".

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.


1994. Act Nov. 2, 1994, in subsecs. (b)(2) and (c), substituted "Veterans Health Administration" for "Department of Medicine and Surgery" wherever appearing.

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
This section is referred to in 38 USCS §§ 7612, 7617

§ 7617. Breach of agreement: liability

(a) A participant in the Scholarship Program (other than a participant described in subsection (b) of this section) who fails to accept payment, or instructs the educational institution in which the participant is enrolled not to accept payment, in whole or in part, of a scholarship under the agreement entered into under section 7603 of this title [38 USCS § 7603] shall be liable to the United States for liquidated damages in the amount of $1,500. Such liability is in addition to any period of obligated service or other obligation or liability under the agreement.

(b) A participant in the Scholarship Program shall be liable to the United States for the amount which has been paid to or on behalf of the participant under the agreement if any of the following occurs:

(1) The participant fails to maintain an acceptable level of academic standing in the educational institution in which the participant is enrolled (as determined by the educational institution under regulations prescribed by the Secretary).
(2) The participant is dismissed from such educational institution for disciplinary reasons.
(3) The participant voluntarily terminates the course of training in such educational institution before the completion of such course of training.
(4) The participant fails to become licensed to practice medicine, osteopathy, dentistry, podiatry, or optometry in a State, fails to become licensed as a registered nurse in a State, or fails to meet any applicable licensure requirement in the case of any other health-care personnel who provide either direct patient-care services or
services incident to direct patient-care services, during a period of time determined under regulations prescribed by the Secretary.

(5) In the case of a participant who is a part-time student, the participant fails to maintain employment, while enrolled in the course of training being pursued by such participant, as a Department employee permanently assigned to a Department health-care facility. Liability under this subsection is in lieu of any service obligation arising under the participant's agreement.

(c) (1) If a participant in the Scholarship Program breaches the agreement by failing (for any reason) to complete such participant's period of obligated service, the United States shall be entitled to recover from the participant an amount determined in accordance with the following formula:

\[ A = 3(\phi)((t-s)/t) \]

In such formula:

(A) "A" is the amount the United States is entitled to recover.

(B) "EC" is the sum of (i) the amounts paid under this subchapter [38 USCS §§ 7611 et seq.] to or on behalf of the participant, and (ii) the interest on such amounts which would be payable if at the time the amounts were paid they were loans bearing interest at the maximum legal prevailing rate, as determined by the Treasurer of the United States.

(C) "t" is the total number of months in the participant's period of obligated service, including any additional period of obligated service in accordance with section 7616(b)(4) of this title [38 USCS § 7616(b)(4)].

(D) "s" is the number of months of such period served by the participant in accordance with section 7613 of this title [38 USCS § 7613].

(2) Any amount of damages which the United States is entitled to recover under this section shall be paid to the United States within the one-year period beginning on the date of the breach of the agreement.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4317, as 38 USCS § 7617, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
This section is referred to in 38 USCS § 7655

§ 7618. Expiration of program

The Secretary may not furnish scholarships to new participants in the Scholarship Program after December 31, 1998.

Amendments:
§ 7621. Authority for program
As part of the Educational Assistance Program, the Secretary shall carry out a tuition reimbursement program under this subchapter [38 USCS §§ 7621 et seq.]. The program shall be known as the Department of Veterans' Affairs Nurse Education Tuition Reimbursement Program (hereinafter in this chapter [38 USCS §§ 7601 et seq.] referred to as the "Tuition Reimbursement Program").

Amendments:
991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4321, as 38 USCS § 7621.
Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing, and substituted "Department of Veterans' Affairs" for "Veterans' Administration" wherever appearing.

§ 7622. Eligibility; application; agreement
(a) To be eligible to participate in the Tuition Reimbursement Program, an individual must be a full-time employee in the Department permanently assigned to a Department health-care facility and must be enrolled in a course of training offered by an institution approved by the Secretary leading toward completion of (1) an associate or higher degree in nursing, or (2) a masters degree or doctoral degree in nursing.

(b) In selecting applicants for acceptance in the Tuition Reimbursement Program, the Secretary (in addition to according priorities as set forth in section 7603(d) of this title [38 USCS § 7603(d)]) shall give special consideration and emphasis to individuals pursuing a course of study which will expedite an increase in the number of registered nurses employed by the Department. The Secretary shall then give priority, in the following order, to--
(1) individuals who have been employed as full-time employees in the Nursing Service in the Veterans Health Administration; and
(2) individuals who have previously received tuition reimbursement under the Tuition Reimbursement Program.
(c) An agreement between the Secretary and a participant in the Tuition Reimbursement Program shall (in addition to the requirements set forth in section 7604 of this title [38 USCS § 7604]) contain the following:

(1) The Secretary's agreement to provide the participant with tuition reimbursement following successful completion (as determined, pursuant to regulations prescribed by the Secretary, by the educational institution involved) of (A) a course or courses required for the course of study described in subsection (a) of this section, or (B) a course or courses taken as necessary prerequisites for degree program enrollment if a letter regarding the potential enrollment of the participant from an appropriate official of the institution involved includes a statement specifying such prerequisites.

(2) The participant's agreement--

(A) to maintain employment, while enrolled in the course of training being pursued by such participant, as a full-time Department employee in the Veterans Health Administration permanently assigned to a Department health-care facility; and

(B) to continue to serve as a full-time employee in the Veterans Health Administration for one year (hereinafter in this subchapter [38 USCS §§ 7621 et seq.] referred to as the "period of obligated service") after completion of the course for which the participant received tuition reimbursement.

(d) Tuition reimbursement provided to a participant in the Tuition Reimbursement Program may not exceed $2,000 per year (adjusted in accordance with section 7631 of this title [38 USCS § 7631]).

(e) The Secretary may arrange with an educational institution pursuant to which such an institution would provide a course or courses at a Department health-care facility to participants in the Tuition Reimbursement Program. Under such an arrangement, the Secretary may agree to pay to the institution an amount not in excess of an amount determined by multiplying the number of participants in such a course by the amount of tuition reimbursement each participant would receive for enrolling and successfully completing such course.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4322, as 38 USCS § 7622, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (d), inserted an open parenthesis before "adjusted in".

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

1994. Act Nov. 2, 1994, in subsecs. (b)(1) and (c)(2)(A), substituted "Veterans Health Administration" for "Department of Medicine and Surgery"; and, in subsec. (c)(2)(B), substituted "the Veterans Health Administration" for "such Department".

Cross References

This section is referred to in 38 USCS §§ 7623, 7631
§ 7623. Obligated service

(a) Each participant in the Tuition Reimbursement Program shall provide service in the full-time clinical practice of such participant's profession as a full-time employee of the Department for the period of obligated service provided in the agreement of such participant entered into under section 7603 of this title [38 USCS § 7603].

(b) A participant who on such participant's course completion date is a full-time employee in the Veterans Health Administration shall be considered to have begun serving such participant's period of obligated service on the course completion date.

(c) Except in the case of a participant whose tuition was paid pursuant to section 7622(f) of this title [38 USCS § 7622(f)], if a participant in the Tuition Reimbursement Program fails to successfully complete a course, no reimbursement will be provided and no period of obligated service will be incurred.

(d) In the case of a participant whose tuition was paid pursuant to section 7622(f) of this title [38 USCS § 7622(f)] and who fails to complete the course involved, the period of obligation shall be of the same duration as it would have been if the participant had successfully completed the course and the course completion date shall be considered to be the date on which the participant's failure becomes an established fact.

(e) For the purposes of this section, the term "course completion date" means the date on which a participant in the Tuition Reimbursement Program completes such participant's course of training under the program.

Amendments:
1988. Act Nov. 18, 1988, in subsecs. (c) and (d), substituted "section 4322(e)" for "section 4322(f)".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4323, as 38 USCS § 7623, and amended the references in this section to reflect the redesignation made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing.

1994. Act Nov. 2, 1994, in subsec. (b), substituted "Veterans Health Administration" for "Department of Medicine and Surgery".

§ 7624. Breach of agreement: liability

(a) A participant in the Tuition Reimbursement Program who fails to maintain employment as a Department employee permanently assigned to a Department health-care facility--

(1) may not be provided reimbursement for tuition for the course or courses in which the participant is enrolled; and

(2) in lieu of any service obligation arising from participation in the program, shall be liable to the United States for the amount which has been paid or is payable to or on behalf of the participant under the agreement, reduced by the proportion that the number of days served for completion of the service obligation bears to the total number of days in the participant's period of obligated service.
(b) Any amount of damages which the United States is entitled to recover under this section shall be paid to the United States within the one-year period beginning on the date of the breach of the agreement.

Amendments:

1988. Act Nov. 18, 1988, in subsec. (a)(2), substituted "participation in the program" for "completion of a course or courses in a previous semester or quarter", inserted "or is payable", and inserted ", reduced by the proportion that the number of days served for completion of the service obligation bears to the total number of days in the participant's period of obligated service".

Such Act further, in subsec. (b), deleted para. (1) which read:

"(1) If a participant in the Tuition Reimbursement Program breaches the agreement by failing (for any reason) to complete such participant's period of obligated service, the United States shall be entitled to recover from the participant an amount determined in accordance with the following formula:

\[ A = 3 \phi ((t-s)/t) \]

"In such formula:

"(A) 'A' is the amount the United States is entitled to recover.
"(B) '=EC' is the sum of (i) the amounts paid under this subchapter to or on behalf of the participant, and (ii) the interest on such amounts which would be payable if at the time the amounts were paid they were loans bearing interest at the maximum legal prevailing rate, as determined by the Treasurer of the United States.
"(C) 't' is the total number of months in the participant's period of obligated service.
"(D) 's' is the number of months of such period served by the participant in accordance with section 4323 of this title."

Such Act further redesignated former para. (2) of subsec. (b) as subsec. (b).


Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing.

§ 7625. Allocation and distribution of funding

In determining the amount of funding to allocate to Department health-care facilities for any fiscal year in connection with the Tuition Reimbursement Program, the Secretary shall take into account (1) the personnel ceiling for that fiscal year for nursing personnel, and (2) the recruitment and retention needs of such facilities, as determined by the Secretary.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4325, as 38 USCS § 7625.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

SUBCHAPTER IV. ADMINISTRATIVE MATTERS
§ 7631. Periodic adjustments in amount of assistance

§ 7632. Annual report

§ 7633. Regulations

§ 7634. Breach of agreement; waiver of liability

§ 7635. Service in other agencies

§ 7636. Exemption of educational assistance payments from taxation

§ 7631. Periodic adjustments in amount of assistance

(a) (1) Whenever there is a general Federal pay increase, the Secretary shall increase the maximum monthly stipend amount, the maximum tuition reimbursement amount, the maximum Selected Reserve member stipend amount, the maximum employee incentive scholarship amount, and the maximum education debt reduction payments amount. Any such increase shall take effect with respect to any school year that ends in the fiscal year in which the pay increase takes effect.

(2) The amount of any increase under paragraph (1) of this subsection is the previous maximum amount under that paragraph multiplied by the overall percentage of the adjustment in the rates of pay under the General Schedule made under the general Federal pay increase. Such amount shall be rounded to the next lower multiple of $1.

(b) For purposes of this section:

(1) The term "maximum monthly stipend amount" means the maximum monthly stipend that may be paid to a participant in the Scholarship Program specified in section 7613(b) of this title [38 USCS § 7613(b)] and as previously adjusted (if at all) in accordance with this section.

(2) The term "maximum tuition reimbursement amount" means the maximum amount of tuition reimbursement provided to a participant in the Tuition Reimbursement Program specified in section 7622(e) of this title [38 USCS § 7622(e)] and as previously adjusted (if at all) in accordance with this section.

(3) The term "maximum Selected Reserve member stipend amount" means the maximum amount of assistance provided to a person receiving assistance under subchapter V of this chapter [38 USCS §§ 7651 et seq.], as specified in section 7653 of this title [38 USCS § 7653] and as previously adjusted (if at all) in accordance with this section.

(4) The term "maximum employee incentive scholarship amount" means the maximum amount of the scholarship payable to a participant in the Department of Veterans Affairs Employee Incentive Scholarship Program under subchapter VI of this chapter [38 USCS §§ 7671 et seq.], as specified in section 7673(b)(1) of this title [38 USCS § 7673(b)(1)] and as previously adjusted (if at all) in accordance with this section.

(5) The term "maximum education debt reduction payments amount" means the maximum amount of education debt reduction payments payable to a participant in the Department of Veterans Affairs Education Debt Reduction Program under subchapter VII of this chapter [38 USCS §§ 7681 et seq.], as specified in section 7683(d)(1) of this title [38 USCS § 7683(d)(1)] and as previously adjusted (if at all) in accordance with this section.
(6) The term "general Federal pay increase" means an adjustment (if an increase) in the rates of pay under the General Schedule under subchapter III of chapter 53 of title 5 [5 USCS §§ 5331 et seq.].

Amendments:

1990. Act Aug. 15, 1990, in subsec. (a)(1), substituted "stipend amount," for "stipend amount and" and substituted "amount, and the maximum Selected Reserve member stipend amount." for "amount."; and, in subsec. (b), redesignated para. (3) as para. (4) and added a new para. (3).

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4331, as 38 USCS § 7631, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (b)(4), substituted "chapter 53" for "chapter 51".

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

2002. Act Jan. 23, 2002, in subsec. (a)(1), substituted "the maximum Selected Reserve member stipend amount, the maximum employee incentive scholarship amount," for "and the maximum Selected Reserve member stipend amount", and inserted "and the maximum education debt reduction payments amount"; and, in subsec. (b), in paras. (1)-(3), substituted "this section" for "this subsection", redesignated para. (4) as para. (6), and inserted new paras. (4) and (5).

Other provisions:

Application of section. Act May 20, 1988, P. L. 100-322, Title II, Part B, § 216(d), 102 Stat. 530, provides: "Section 4331 [now section 7631] of title 38, United States Code, as added by subsection (b), shall not apply with respect to a school year ending during fiscal year 1988.".


Cross References

This section is referred to in 38 USCS §§ 7613, 7622, 7653

§ 7632. Annual report

Not later than March 1 of each year, the Secretary shall submit to Congress a report on the Educational Assistance Program. Each such report shall include the following information:

(1) The number of students receiving educational assistance under the Educational Assistance Program, showing the numbers of students receiving assistance under the Scholarship Program, the Tuition Reimbursement Program, the Employee Incentive Scholarship Program, and the Education Debt Reduction Program separately, and the number of students (if any) enrolled in each type of health profession training under each program.

(2) The education institutions (if any) providing such training to students in each program.
The number of applications filed under each program, by health profession category, during the school year beginning in such year and the total number of such applications so filed for all years in which the Educational Assistance Program (or predecessor program) has been in existence.

The average amounts of educational assistance provided per participant in the Scholarship Program, per participant in the Tuition Reimbursement Program, per participant in the Employee Incentive Scholarship Program, and per participant in the Education Debt Reduction Program.

The amount of tuition and other expenses paid, by health profession category, in the aggregate and at each educational institution for the school year beginning in such year and for prior school years.

The number of scholarships accepted, by health profession category, during the school year beginning in such year and the number, by health profession category, which were offered and not accepted.

The number of participants who complete a course or course of training in each program each year and for all years that such program (or predecessor program) has been in existence.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4332, as 38 USCS § 7632.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

1998. Act Nov. 11, 1998, in para. (1), substituted ", the Tuition Reimbursement Program, the Employee Incentive Scholarship Program, and the Education Debt Reduction Program" for "and the Tuition Reimbursement Program" and inserted "(if any)", in para. (2), inserted "(if any)" and, in para. (4), substituted ", per participant" for "and per participant" following "the Scholarship Program" and inserted ", per participant in the Employee Incentive Scholarship Program, and per participant in the Education Debt Reduction Program".

Other provisions:

Termination of reporting requirements. For termination, effective May 15, 2000, of provisions of this section relating to periodic reports to Congress, see § 3003 of Act Dec. 21, 1995, P. L. 104-66, which appears as 31 USCS § 1113 note. See also page 145 of House Document No. 103-7.

§ 7633. Regulations

The Secretary shall prescribe regulations to carry out the Educational Assistance Program.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4333, as 38 USCS § 7633.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17

§ 7634. Breach of agreement; waiver of liability
(a) An obligation under the Educational Assistance Program (or an agreement under the program) of a participant in the Educational Assistance Program for performance of services or payment of damages is canceled upon the death of the participant.

(b) The Secretary shall prescribe regulations providing for the waiver or suspension of any obligation of a participant for service or payment under the Educational Assistance Program (or an agreement under the program) whenever noncompliance by the participant is due to circumstances beyond the control of the participant or whenever the Secretary determines that the waiver or suspension of compliance is in the best interest of the United States.

(c) An obligation of a participant under the Educational Assistance Program (or an agreement thereunder) for payment of damages may not be released by a discharge in bankruptcy under title 11 before the expiration of the five-year period beginning on the first date the payment of such damages is due.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4334, as 38 USCS § 7634.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

§ 7635. Service in other agencies

(a) The Secretary, with the consent of the participant or individual involved and the consent of the head of the department or agency involved, may permit--

(1) a period of obligated service required under this chapter [38 USCS §§ 7601 et seq.] to be performed in the Veterans Health Administration to be performed in another Federal department or agency or in the Armed Forces in lieu of performance of such service in the Veterans Health Administration; and

(2) a period of obligated service required to be performed in another Federal department or agency or in the Armed Forces under another Federal health personnel educational assistance program to be performed in the Veterans Health Administration.

(b) This section shall be carried out in cooperation with the heads of other appropriate departments and agencies.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4335, as 38 USCS § 7635.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

1994. Act Nov. 2, 1994, in subsec. (a), substituted "Veterans Health Administration" for "Department of Medicine and Surgery".

§ 7636. Exemption of educational assistance payments from taxation
Notwithstanding any other law, any payment to, or on behalf of a participant in the Educational Assistance Program, for tuition, education expenses, a stipend, or education debt reduction under this chapter [38 USCS §§ 7601 et seq.] shall be exempt from taxation.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4336, as 38 USCS § 7636.
1998. Act Nov. 11, 1998 substituted "a stipend, or education debt reduction" for "or a stipend".

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

SUBCHAPTER V. STIPEND PROGRAM FOR MEMBERS OF THE SELECTED RESERVE

§ 7651. Authority for program
(a) As part of the Educational Assistance Program, the Secretary of Veterans Affairs may select qualified individuals to receive assistance under this subchapter [38 USCS §§ 7651 et seq.].

(b) To be eligible to receive assistance under this subchapter [38 USCS §§ 7651 et seq.], an individual must be accepted for enrollment or be enrolled as a full-time student at a qualifying educational institution in a course of education or training that is approved by the Secretary and that leads toward completion of a degree in a health profession involving direct patient care or care incident to direct patient care.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4351, as 38 USCS § 7651.

§ 7652. Eligibility: individuals entitled to benefits under the GI Bill program for members of the Selected Reserve

The Secretary of Veterans Affairs may not approve an application under section 7603 of this title [38 USCS § 7603] of an individual applying to receive assistance under this subchapter [38 USCS §§ 7651 et seq.] unless--

(1) the individual is entitled to benefits under chapter 106 of title 10 [10 USCS §§ 2131 et seq.]; and
(2) the score of the individual on the Armed Forces Qualification Test was above the 50th percentile.
Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4352, as 38 USCS § 7652, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

§ 7653. Amount of assistance

The Secretary may pay to a person selected to receive assistance under this subchapter [38 USCS §§ 7651 et seq.] the amount of $400 (adjusted in accordance with section 7631 of this title [38 USCS § 7631]) for each month of the person's enrollment in a program of education or training covered by the agreement of the person entered into under section 7603 of this title [38 USCS § 7603]. Payment of such benefits for any period shall be coordinated with any payment of benefits for the same period under chapter 106 of title 10 [10 USCS §§ 2131 et seq.].

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4353, as 38 USCS § 7653, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Cross References

This section is referred to in 38 USCS § 7631

§ 7654. Obligated service

A person receiving assistance under this subchapter [38 USCS §§ 7651 et seq.] shall provide service in the full-time clinical practice of the person's profession as a full-time employee of the Department for the period of obligated service provided in the agreement of such person entered into under section 7603 of this title [38 USCS § 7603].

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4354, as 38 USCS § 7654, and amended the references in this section to reflect the redesignation made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Cross References

This section is referred to in 38 USCS § 7655

§ 7655. Breach of agreement; liability

(a) (1) Subject to paragraph (2), an individual who is receiving or has received a reserve member stipend under this subchapter [38 USCS §§ 7651 et seq.] and who fails to perform the service for which the individual is obligated under section 7654 of this title [38 USCS § 7654] shall be liable to the United States in an amount determined in accordance with section 7617(c)(1) of this title [38 USCS § 7617(c)(1)].

(2) An individual who, as a result of performing active duty (including active duty for training), is unable to perform the service for which the individual is obligated under section 7654 of this title [38 USCS § 7654] shall be permitted to perform that service upon completion of the active duty service (or active duty for training). The Secretary may, by regulation, waive the requirement for the performance of the service for which the individual is obligated under section 7654 of this title [38 USCS § 7654] in

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any case in which the Secretary determines that the individual is unable to perform the service for reasons beyond the control of the individual or in any case in which the waiver would be in the best interest of the individual and the United States.

(b) Any amount owed the United States under subsection (a) of this section shall be paid to the United States during the one-year period beginning on the date of the breach of the agreement.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4355, as 38 USCS § 7655, and amended the references in this section to reflect the redesignation made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

SUBCHAPTER VI. EMPLOYEE INCENTIVE SCHOLARSHIP PROGRAM

§ 7671. Authority for program
§ 7672. Eligibility; agreement
§ 7673. Scholarship
§ 7674. Obligated service
§ 7675. Breach of agreement: liability

[§ 7676. Repealed]

Amendments:


§ 7671. Authority for program

As part of the Educational Assistance Program, the Secretary may carry out a scholarship program under this subchapter [38 USCS §§ 7671 et seq.]. The program shall be known as the Department of Veterans Affairs Employee Incentive Scholarship Program (hereinafter in this subchapter [38 USCS §§ 7671 et seq.] referred to as the "Program"). The purpose of the Program is to assist, through the establishment of an incentive program for individuals employed in the Veterans Health Administration, in meeting the staffing needs of the Veterans Health Administration for health professional occupations for which recruitment or retention of qualified personnel is difficult.

Amendments:


§ 7672. Eligibility; agreement

(a) Eligibility. To be eligible to participate in the Program, an individual must be an eligible Department employee who is accepted for enrollment or enrolled (as described in section 7602 of this title [38 USCS § 7602]) as a full-time or part-time student in a field of education or training described in subsection (c).

(b) Eligible Department employees. For purposes of subsection (a), an eligible Department employee is any employee of the Department who, as of the date on which
the employee submits an application for participation in the Program, has been continuously employed by the Department for not less than one year.

(c) **Qualifying fields of education or training.** A scholarship may be awarded under the Program only for education and training in a field leading to appointment or retention in a position under section 7401 of this title [38 USCS § 7401].

(d) **Award of scholarships.** Notwithstanding section 7603(d) of this title [38 USCS § 7603(d)], the Secretary, in selecting participants in the Program, may award a scholarship only to applicants who have a record of employment with the Veterans Health Administration which, in the judgment of the Secretary, demonstrates a high likelihood that the applicant will be successful in completing such education or training and in employment in such field.

(e) **Agreement.**

(1) An agreement between the Secretary and a participant in the Program shall (in addition to the requirements set forth in section 7604 of this title [38 USCS § 7604]) include the following:

   (A) The Secretary's agreement to provide the participant with a scholarship under the Program for a specified number (from one to three) of school years during which the participant pursues a course of education or training described in subsection (c) that meets the requirements set forth in section 7602(a) of this title [38 USCS § 7602(a)].

   (B) The participant's agreement to serve as a full-time employee in the Veterans Health Administration for a period of time (hereinafter in this subchapter [38 USCS §§ 7671 et seq.] referred to as the "period of obligated service") determined in accordance with regulations prescribed by the Secretary of up to three calendar years for each school year or part thereof for which the participant was provided a scholarship under the Program, but for not less than 3 years.

   (C) The participant's agreement to serve under subparagraph (B) in a Department facility selected by the Secretary.

(2) In a case in which an extension is granted under section 7673(c)(2) of this title [38 USCS § 7673(c)(2)], the number of years for which a scholarship may be provided under the Program shall be the number of school years provided for as a result of the extension.

(3) In the case of a participant who is a part-time student, the period of obligated service shall be reduced in accordance with the proportion that the number of credit hours carried by such participant in any such school year bears to the number of credit hours required to be carried by a full-time student in the course of training being pursued by the participant, but in no event to less than 1 year.

**Amendments:**


§ 7673. Scholarship
(a) Scholarship. A scholarship provided to a participant in the Program for a school year shall consist of payment of the tuition (or such portion of the tuition as may be provided under subsection (b)) of the participant for that school year and payment of other reasonable educational expenses (including fees, books, and laboratory expenses) for that school year.

(b) Amounts. The total amount of the scholarship payable under subsection (a)--

   (1) in the case of a participant in the Program who is a full-time student, may not exceed $10,000 for the equivalent of one year of full-time coursework; and

   (2) in the case of a participant in the Program who is a part-time student, shall bear the same ratio to the amount that would be paid under paragraph (1) if the participant were a full-time student in the course of education or training being pursued by the participant as the coursework carried by the participant to full-time coursework in that course of education or training.

(c) Limitations on period of payment.

   (1) The maximum number of school years for which a scholarship may be paid under subsection (a) to a participant in the Program shall be six school years.

   (2) A participant in the Program may not receive a scholarship under subsection (a) for more than the equivalent of three years of full-time coursework.

(d) Payment of educational expenses by educational institutions. The Secretary may arrange with an educational institution in which a participant in the Program is enrolled for the payment of the educational expenses described in subsection (a). Such payments may be made without regard to subsections (a) and (b) of section 3324 of title 31 [31 USCS § 3324].

(e) Full-time coursework. For purposes of this section, full-time coursework shall consist of the following:

   (1) In the case of undergraduate coursework, 30 semester hours per undergraduate school year.

   (2) In the case of graduate coursework, 18 semester hours per graduate school year.

Amendments:

2002. Act Jan. 23, 2002, in subsec. (b), in para. (1), substituted "for the equivalent of one year of full-time coursework" for "for any 1 year", and substituted para. (2) for one which read: "(2) in the case of a participant in the Program who is a part-time student, shall be the amount specified in paragraph (1) reduced in accordance with the proportion that the number of credit hours carried by the participant in that school year bears to the number of credit hours required to be carried by a full-time student in the course of education or training being pursued by the participant."; substituted subsec. (c) for one which read:

"(c) Limitation on years of payment.(1) Subject to paragraph (2), a participant in the Program may not receive a scholarship under subsection (a) for more than three school years.

   "(2) The Secretary may extend the number of school years for which a scholarship may be awarded to a participant in the Program who is a part-time student to a maximum of six school years if the Secretary determines that the extension would be in the best interest of the United States.";

and added subsec. (e).
§ 7674. Obligated service

(a) In general. Each participant in the Program shall provide service as a full-time employee of the Department for the period of obligated service provided in the agreement of the participant entered into under section 7603 of this title [38 USCS § 7603]. Such service shall be provided in the full-time clinical practice of such participant's profession or in another health-care position in an assignment or location determined by the Secretary.

(b) Determination of service commencement date.

(1) Not later than 60 days before a participant's service commencement date, the Secretary shall notify the participant of that service commencement date. That date is the date for the beginning of the participant's period of obligated service.

(2) As soon as possible after a participant's service commencement date, the Secretary shall--

(A) in the case of a participant who is not a full-time employee in the Veterans Health Administration, appoint the participant as such an employee; and

(B) in the case of a participant who is an employee in the Veterans Health Administration but is not serving in a position for which the participant's course of education or training prepared the participant, assign the participant to such a position.

(3) In the case of a participant receiving a degree from a school of medicine, osteopathy, dentistry, optometry, or podiatry, the participant's service commencement date is the date upon which the participant becomes licensed to practice medicine, osteopathy, dentistry, optometry, or podiatry, as the case may be, in a State.

(B) In the case of a participant receiving a degree from a school of nursing, the participant's service commencement date is the later of--

(i) the participant's course completion date; or

(ii) the date upon which the participant becomes licensed as a registered nurse in a State.

(C) In the case of a participant not covered by subparagraph (A) or (B), the participant's service commencement date is the later of--

(i) the participant's course completion date; or

(ii) the date the participant meets any applicable licensure or certification requirements.

(4) The Secretary shall by regulation prescribe the service commencement date for participants who were part-time students. Such regulations shall prescribe terms as similar as practicable to the terms set forth in paragraph (3).

(c) Commencement of obligated service.

(1) Except as provided in paragraph (2), a participant in the Program shall be considered to have begun serving the participant's period of obligated service--

(A) on the date, after the participant's course completion date, on which the participant (in accordance with subsection (b)) is appointed as a full-time employee in the Veterans Health Administration; or

(B) if the participant is a full-time employee in the Veterans Health Administration on such course completion date, on the date thereafter on which...
the participant is assigned to a position for which the participant's course of training prepared the participant.

(2) A participant in the Program who on the participant's course completion date is a full-time employee in the Veterans Health Administration serving in a capacity for which the participant's course of training prepared the participant shall be considered to have begun serving the participant's period of obligated service on such course completion date.

(d) **Course completion date defined.** In this section, the term "course completion date" means the date on which a participant in the Program completes the participant's course of education or training under the Program.

§ 7675. **Breach of agreement: liability**

(a) **Liquidated damages.** A participant in the Program (other than a participant described in subsection (b)) who fails to accept payment, or instructs the educational institution in which the participant is enrolled not to accept payment, in whole or in part, of a scholarship under the agreement entered into under section 7603 of this title [38 USCS § 7603] shall be liable to the United States for liquidated damages in the amount of $1,500. Such liability is in addition to any period of obligated service or other obligation or liability under the agreement.

(b) **Liability during course of education or training.**

(1) Except as provided in subsection (d), a participant in the Program shall be liable to the United States for the amount which has been paid to or on behalf of the participant under the agreement if any of the following occurs:

(A) The participant fails to maintain an acceptable level of academic standing in the educational institution in which the participant is enrolled (as determined by the educational institution under regulations prescribed by the Secretary).

(B) The participant is dismissed from such educational institution for disciplinary reasons.

(C) The participant voluntarily terminates the course of education or training in such educational institution before the completion of such course of education or training.

(D) The participant fails to become licensed to practice medicine, osteopathy, dentistry, podiatry, or optometry in a State, fails to become licensed as a registered nurse in a State, or fails to meet any applicable licensure requirement in the case of any other health-care personnel who provide either direct patient-care services or services incident to direct patient-care services, during a period of time determined under regulations prescribed by the Secretary.

(E) In the case of a participant who is a part-time student, the participant fails to maintain employment, while enrolled in the course of training being pursued by the participant, as a Department employee.

(2) Liability under this subsection is in lieu of any service obligation arising under a participant's agreement.

(c) **Liability during period of obligated service.**
(1) Except as provided in subsection (d), if a participant in the Program breaches the agreement by failing for any reason to complete such participant's period of obligated service, the United States shall be entitled to recover from the participant an amount determined in accordance with the following formula:

\[ A = 3(\phi)((t-s)/t) \]

(2) In such formula:

(A) "A" is the amount the United States is entitled to recover.

(B) "EC" is the sum of-

(i) the amounts paid under this subchapter [38 USCS §§ 7671 et seq.] to or on behalf of the participant; and

(ii) the interest on such amounts which would be payable if at the time the amounts were paid they were loans bearing interest at the maximum legal prevailing rate, as determined by the Treasurer of the United States.

(C) "t" is the total number of months in the participant's period of obligated service, including any additional period of obligated service in accordance with section 7673(c)(2) of this title [38 USCS § 7673(c)(2)].

(D) "s" is the number of months of such period served by the participant in accordance with section 7673 of this title [38 USCS § 7673].

(d) Limitation on liability for reductions-in-force. Liability shall not arise under subsection (b)(1)(E) or (c) in the case of a participant otherwise covered by the subsection concerned if the participant fails to maintain employment as a Department employee due to a staffing adjustment.

(e) Period for payment of damages. Any amount of damages which the United States is entitled to recover under this section shall be paid to the United States within the 1-year period beginning on the date of the breach of the agreement.

[§ 7676. Repealed]


SUBCHAPTER VII. EDUCATION DEBT REDUCTION PROGRAM

§ 7681. Authority for program

§ 7682. Eligibility

§ 7683. Education debt reduction

[§ 7684. Repealed]

Amendments:


§ 7681. Authority for program

(a) In general.
(1) As part of the Educational Assistance Program, the Secretary may carry out an education debt reduction program under this subchapter [38 USCS §§ 7681 et seq.]. The program shall be known as the Department of Veterans Affairs Education Debt Reduction Program (hereinafter in this subchapter [38 USCS §§ 7681 et seq.] referred to as the "Education Debt Reduction Program").

(2) The purpose of the Education Debt Reduction Program is to assist in the recruitment of qualified health care professionals for positions in the Veterans Health Administration for which recruitment or retention of an adequate supply of qualified personnel is difficult.

(b) **Relationship to educational assistance program.** Education debt reduction payments under the Education Debt Reduction Program may be in addition to other assistance available to individuals under the Educational Assistance Program.

**Amendments:**


§ 7682. **Eligibility**

(a) **Eligibility.** An individual is eligible to participate in the Education Debt Reduction Program if the individual--

1. is a recently appointed employee in the Veterans Health Administration serving in a position (as determined by the Secretary) providing direct-patient care services or services incident to direct-patient care services for which recruitment or retention of qualified health-care personnel (as so determined) is difficult; and
2. owes any amount of principal or interest under a loan, the proceeds of which were used by or on behalf of that individual to pay costs relating to a course of education or training which led to a degree that qualified the individual for the position referred to in paragraph (1).

(b) **Covered costs.** For purposes of subsection (a)(2), costs relating to a course of education or training include--

1. tuition expenses;
2. all other reasonable educational expenses, including expenses for fees, books, and laboratory expenses; and
3. reasonable living expenses.

(c) **Recently appointed individuals.** For purposes of subsection (a), an individual shall be considered to be recently appointed to a position if the individual has held that position for less than 6 months.

**Amendments:**

2002. Act Jan. 23, 2002, in subsec. (a)(1), substituted "in a position (as determined by the Secretary) providing direct-patient care services or services incident to direct-patient care services" for "under an appointment under section 7402(b) of this title in a position", and substituted "(as so determined)" for "(as determined by the Secretary)".

**Other provisions:**

"(1) Notwithstanding section 7682(c) of title 38, United States Code, the Secretary of Veterans Affairs may treat a covered individual as being a recently appointed employee in the Veterans Health Administration under section 7682(a) of that title for purposes of eligibility in the Education Debt Reduction Program if the Secretary determines that the participation of the individual in the Program under this subsection would further the purposes of the Program.

"(2) For purposes of this subsection, a covered individual is any individual otherwise described by section 7682(a) of title 38, United States Code, as in effect on the day before the date of the enactment of this Act, who--

"(A) was appointed as an employee in a position described in paragraph (1) of that section, as so in effect, between January 1, 1999, and December 31, 2001; and

"(B) is an employee in such position, or in another position described in paragraph (1) of that section, as so in effect, at the time of application for treatment as a covered individual under this subsection.

"(3) The Secretary shall make determinations regarding the exercise of the authority in this subsection on a case-by-case basis.

"(4) The Secretary may not exercise the authority in this subsection after June 30, 2002. The expiration of the authority in this subsection shall not affect the treatment of an individual for purposes of eligibility in the Education Debt Reduction Program.

"(5) In this subsection, the term 'Education Debt Reduction Program' means the Department of Veterans Affairs Education Debt Reduction Program under subchapter VII of chapter 76 of title 38, United States Code [38 USCS §§ 7681 et seq.] ".

§ 7683. Education debt reduction

(a) In general. Education debt reduction payments under the Education Debt Reduction Program shall consist of payments to individuals selected to participate in the program of amounts to reimburse such individuals for payments by such individuals of principal and interest on loans described in section 7682(a)(2) of this title [38 USCS § 7682(a)(2)].

(b) Frequency of payment.

(1) The Secretary may make education debt reduction payments to any given participant in the Education Debt Reduction Program on a monthly or annual basis, as determined by the Secretary.

(2) The Secretary shall make such payments at the end of the period determined by the Secretary under paragraph (1).

(c) Performance requirement. The Secretary may make education debt reduction payments to a participant in the Education Debt Reduction Program for a period only if the Secretary determines that the individual maintained an acceptable level of performance in the position or positions served by the participant during the period.

(d) Maximum annual amount.

(1) Subject to paragraph (2), the amount of education debt reduction payments made to a participant under the Education Debt Reduction Program may not exceed $44,000 over a total of five years of participation in the Program, of which not more
than $10,000 of such payments may be made in each of the fourth and fifth years of participation in the Program.

(2) The total amount payable to a participant in such Program for any year may not exceed the amount of the principal and interest on loans referred to in subsection (a) that is paid by the individual during such year.

Amendments:

2002. Act Jan. 23, 2002, in subsec. (d)(1), deleted "for a year" following "to a participant", and substituted "exceed $44,000 over a total of five years of participation in the Program, of which not more than $10,000 of such payments may be made in each of the fourth and fifth years of participation in the Program." for "exceed--

"(A) $6,000 for the first year of the participant's participation in the Program;

"(B) $8,000 for the second year of the participant's participation in the Program; and

"(C) $10,000 for the third year of the participant's participation in the Program."

[§ 7684. Repealed]


CHAPTER 77. VETERANS BENEFITS ADMINISTRATION

SUBCHAPTER I. ORGANIZATION; GENERAL

SUBCHAPTER II. QUALITY ASSURANCE

Amendments:


"SUBCHAPTER II. VETERANS OUTREACH SERVICES PROGRAM

"7721. Purpose; definitions.

"7722. Outreach services.

"7723. Veterans assistance offices.

"7724. Outstationing of counseling and outreach personnel.

"7725. Use of other agencies.

"7726. Annual report to Congress."

and by substituting the Subchapter II heading for one which read: "Subchapter III. QUALITY ASSURANCE.".

SUBCHAPTER I. ORGANIZATION; GENERAL
§ 7701. Organization of the Administration
§ 7703. Functions of the Administration

§ 7701. Organization of the Administration

(a) There is in the Department of Veterans Affairs a Veterans Benefits Administration. The primary function of the Veterans Benefits Administration is the administration of nonmedical benefits programs of the Department which provide assistance to veterans and their dependents and survivors.

(b) The Veterans Benefits Administration is under the Under Secretary for Benefits, who is directly responsible to the Secretary for the operations of the Administration. The Under Secretary for Benefits may be referred to as the Chief Benefits Director.

Amendments:
1992. Act Oct. 9, 1992, in subsec. (b), substituted "Under Secretary for Benefits" for "Chief Benefits Director" and added "The Under Secretary for Benefits may be referred to as the Chief Benefits Director."

§ 7703. Functions of the Administration

The Veterans Benefits Administration is responsible for the administration of the following programs of the Department:

1. Compensation and pension programs.
2. Vocational rehabilitation and educational assistance programs.
3. Veterans' housing loan programs.
4. Veterans' and servicemembers' life insurance programs.
5. Outreach programs and other veterans' services programs.

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 7

§ 7731. Establishment
§ 7732. Functions
§ 7733. Personnel
§ 7734. Annual report to Congress

SUBCHAPTER II. QUALITY ASSURANCE

[§§ 7721-7727. Repealed]
§ 7731. Establishment
§ 7732. Functions
§ 7733. Personnel
§ 7734. Annual report to Congress

Amendments:
2006. Act June 15, 2006, P. L. 109-233, Title IV, § 402(d)(1), 120 Stat. 411, redesignated this Subchapter (38 USCS §§ 7731 et seq), enacted as Subchapter III of Chapter 77 of Title 38, as Subchapter II of such Chapter.
§§ 7721-7727. Repealed


Other provisions:


Repeal of provision relating to annual reports relating to pilot program for provision of benefits and services to homeless veterans. Act Nov. 10, 1992, P. L. 102-590, § 10, 106 Stat. 5141, which formerly appeared as a note to this section, was repealed by Act Nov. 2, 1994, P. L. 103-446, Title X, § 1001(c), 108 Stat. 4679. Such note related to annual reports relating to activities under a pilot program to expand and improve provision of benefits and services to assist homeless veterans.


Repeal of provision requiring annual report on assistance to homeless veterans. Act Nov. 2, 1994, P. L. 103-446, Title X, § 1001(a), (b), 108 Stat. 4678; Nov. 21, 1997, P. L. 105-114, Title II, § 204, 111 Stat. 2288; Dec. 27, 2001, P. L. 107-103, Title V, § 509(e), 115 Stat. 997, which formerly appeared as a note to this section, was repealed by Act Dec. 21, 2001, P. L. 107-95, § 5(e)(2), 115 Stat. 918. Such note required the Secretary of Veterans Affairs to submit to the Committees on Veterans' Affairs of the Senate and House of Representatives an annual report on assistance to homeless veterans.

§ 7731. Establishment

(a) The Secretary shall carry out a quality assurance program in the Veterans Benefits Administration. The program may be carried out through a single quality assurance division in the Administration or through separate quality assurance entities for each of the principal organizational elements (known as "services") of the Administration.

(b) The Secretary shall ensure that any quality assurance entity established and operated under subsection (a) is established and operated so as to meet generally applicable...
governmental standards for independence and internal controls for the performance of quality reviews of Government performance and results.

Effective date of section:
This section takes effect at the end of the 60-day period beginning on the date of enactment, pursuant to § 801(b) of Act Nov. 30, 1999, P. L. 106-117, which appears as a note to this section.

Other provisions:
Effective date of 38 USCS §§ 7731 et seq. Act Nov. 30, 1999, P. L. 106-117, Title VIII, § 801(b), 113 Stat. 1586, provides: "Subchapter III of chapter 77 of title 38, United States Code [38 USCS §§ 7731 et seq.], as added by subsection (a), shall take effect at the end of the 60-day period beginning on the date of the enactment of this Act."

§ 7732. Functions

The Under Secretary for Benefits, acting through the quality assurance entities established under section 7731(a) [38 USCS § 7731(a)], shall on an ongoing basis perform and oversee quality reviews of the functions of each of the principal organizational elements of the Veterans Benefits Administration.

Effective date of section:
This section takes effect at the end of the 60-day period beginning on the date of enactment, pursuant to § 801(b) of Act Nov. 30, 1999, P. L. 106-117, which appears as 38 USCS § 7731 note.

§ 7733. Personnel

The Secretary shall ensure that the number of full-time employees of the Veterans Benefits Administration assigned to quality assurance functions under this subchapter [38 USCS §§ 7731 et seq.] is adequate to perform the quality assurance functions for which they have responsibility.

Effective date of section:
This section takes effect at the end of the 60-day period beginning on the date of enactment, pursuant to § 801(b) of Act Nov. 30, 1999, P. L. 106-117, which appears as 38 USCS § 7731 note.

§ 7734. Annual report to Congress

The Secretary shall include in the annual report to the Congress required by section 529 of this title [38 USCS § 529] a report on the quality assurance activities carried out under this subchapter [38 USCS §§ 7731 et seq.]. Each such report shall include--
(1) an appraisal of the quality of services provided by the Veterans Benefits Administration, including--
(A) the number of decisions reviewed;
(B) a summary of the findings on the decisions reviewed;
(C) the number of full-time equivalent employees assigned to quality assurance in each division or entity;
(D) specific documentation of compliance with the standards for independence and internal control required by section 7731(b) of this title [38 USCS § 7731(b)]; and
(E) actions taken to improve the quality of services provided and the results obtained;
(2) information with respect to the accuracy of decisions, including trends in that information; and
(3) such other information as the Secretary considers appropriate.

Effective date of section:
This section takes effect at the end of the 60-day period beginning on the date of enactment, pursuant to § 801(b) of Act Nov. 30, 1999, P. L. 106-117, which appears as 38 USCS § 7731 note.

CHAPTER 78. VETERANS' CANTEEN SERVICE

§ 7801. Purpose of Veterans' Canteen Service
§ 7802. Duties of Secretary with respect to Service
§ 7803. Operation of Service
§ 7804. Financing of Service
§ 7805. Revolving fund
§ 7806. Budget of Service
§ 7807. Audit of accounts
§ 7808. Service to be independent unit
§ 7809. Child-care centers
§ 7810. Exemption from personnel ceilings

Amendments:


Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 402(b) of the above Act (see Table II preceding 38 USCS § 101).


§ 7801. Purpose of Veterans' Canteen Service

The Veterans' Canteen Service (hereinafter in this chapter [38 USCS §§ 7801 et seq.] referred to as the "Service") in the Department is an instrumentality of the United States, created for the primary purpose of making available to veterans of the Armed Forces who are hospitalized or domiciled in hospitals and homes of the Department, at reasonable prices, articles of merchandise and services essential to their comfort and well-being.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4201, as 38 USCS § 7801.
Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing.


Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 73

VA and Veterans’ Canteen Service are subject to Randolph-Sheppard Vending Stand Act (20 USCS §§ 107-107f), hence must follow Act's permit application and approval regulations: Act's plain language provides that it applies to federal departments, agencies, and instrumentalities in control of any federal property. Department of Jobs & Training, State Servs. for the Blind & Visually Handicapped v Riley (1994, CA8 Minn) 18 F.3d 606, subsequent app (1997, CA8 Minn) 107 F.3d 648

§ 7802. Duties of Secretary with respect to Service

(a) Locations for canteens. The Secretary shall establish, maintain, and operate canteens where deemed necessary and practicable at hospitals and homes of the Department and at other Department establishments where similar essential facilities are not reasonably available from outside commercial sources.

(b) Warehouses and storage depots. The Secretary shall establish, maintain, and operate such warehouses and storage depots as may be necessary in operating the canteens.

(c) Space, buildings, and structures. The Secretary shall furnish the Service for its use in connection with the establishment, maintenance, and operation thereof; such space, buildings and structures under control of the Department as the Secretary may consider necessary, including normal maintenance and repair service thereon. Reasonable charges, to be determined by the Secretary, shall be paid annually by the Service for the space, buildings, and structures so furnished, except that the Secretary may reduce or waive such charges whenever payment of such charges would impair the working capital required by the Service.

(d) Equipment, services, and utilities. The Secretary shall transfer to the Service without charge, rental, or reimbursement such necessary equipment as may not be needed for other purposes, and furnish the Service such services and utilities, including light, water, and heat, as may be available and necessary for its use. Reasonable charges, to be determined by the Secretary, shall be paid annually by the Service for the utilities so furnished.

(e) Personnel. The Secretary shall employ such persons as are necessary for the establishment, maintenance, and operation of the Service, and pay the salaries, wages, and expenses of all such employees from the funds of the Service. Personnel necessary for the transaction of the business of the Service at canteens, warehouses, and storage depots shall be appointed, compensated from funds of the Service, and removed by the Secretary without regard to the provisions of title 5 governing appointments in the competitive service and chapter 51, and subchapter III of chapter 53 of title 5 [5 USCS §§ 5101 et seq., 5331 et seq.]. Those employees are subject to the provisions of title 5
relating to a preference eligible described in section 2108(3) of title 5 [5 USCS § 2108(3)], subchapter I of chapter 81 of title 5 [5 USCS §§ 8101 et seq.], and subchapter III of chapter 83 of title 5 [5 USCS §§ 8331 et seq.]. An employee appointed under this section may be considered for appointment to a Department position in the competitive service in the same manner that a Department employee in the competitive service is considered for transfer to such position. An employee of the Service who is appointed to a Department position in the competitive service under the authority of the preceding sentence may count toward the time-in-service requirement for a career appointment in such position any previous period of employment in the Service.

(f) Contracts and agreements. The Secretary shall make all necessary contracts or agreements to purchase or sell merchandise, fixtures, equipment, supplies, and services, without regard to section 3709 of the Revised Statutes (41 U.S.C. 5), and to do all things necessary to carry out such contracts or agreements, including the making of necessary adjustments and compromising of claims in connection therewith.

(g) Prices. The Secretary shall fix the prices of merchandise and services in canteens so as to carry out the purposes of this chapter [38 USCS §§ 7801 et seq.].

(h) Gifts and donations. The Secretary may accept gifts and donations of merchandise, fixtures, equipment, and supplies for the use and benefit of the Service.

(i) Rules and regulations. The Secretary shall make such rules and regulations, not inconsistent with the provisions of this chapter [38 USCS §§ 7801 et seq.], as the Secretary considers necessary or appropriate to effectuate its purposes.

(j) Delegation. The Secretary may delegate such duties and powers to employees as the Secretary considers necessary or appropriate, whose official acts performed within the scope of the delegated authority shall have the same force and effect as though performed by the Secretary.

(k) Authority to cash checks, etc. The Secretary may authorize the use of funds of the Service when available, subject to such regulations as the Secretary may deem appropriate, for the purpose of cashing checks, money orders, and similar instruments in nominal amounts for the payment of money presented by veterans hospitalized or domiciled at hospitals and homes of the Department, and by other persons authorized by section 7803 of this title [38 USCS § 7803] to make purchases at canteens. Such checks, money orders, and other similar instruments may be cashed outright or may be accepted, subject to strict administrative controls, in payment for merchandise or services, and the difference between the amount of the purchase and the amount of the tendered instrument refunded in cash.

References in text:
The "provisions of title 5 governing appointments to the competitive service", referred to in subsec. (e), are classified generally to 5 USCS §§ 3301 et seq.

Amendments:
1959. Act July 28, 1959 (effective 7/1/59, as provided by § 2 of such Act, which appears as a note to this section), substituted para. (3) for one which read: "furnish the Service, without charge, rental, or reimbursement, for its use in connection with the establishment,
maintenance, and operation thereof, such space, buildings, and structures under control of the Veterans' Administration as he may consider necessary, including normal maintenance and repair service thereon;".

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in para. (3), substituted "the Administrator" for "he" preceding "may consider"; in para. (9), substituted "the Administrator" for "he"; in para. (10), substituted "the Administrator" for "he" preceding "considers"; and in para. (11), substituted "the Administrator" for "he".

1982. Act Oct. 12, 1982, in para. (5), substituted "without regard to the provisions of title 5 governing appointments in the competitive service and chapter 51 and subchapter III of chapter 53 of title 5. Those employees are subject to the provisions of title 5 relating to a preference eligible described in section 2108(3) of title 5, subchapter I of chapter 81 of title 5, and subchapter III of chapter 83 of title 5;" for "without regard to civil-service laws and the Classification Act of 1949. Such employees shall be subject to the Veterans' Preference Act of 1944, the Civil Service Retirement Act, and laws administered by the Bureau of Employees' Compensation applicable to civilian employees of the United States;"; and, in para. (11), substituted "section 1 of the Act of January 31, 1925 (7 U.S.C. 2217), and section 1 (1st proviso under heading 'OFFICE OF THE SECRETARY') of the Act of May 11, 1922 (7 U.S.C. 2240)" for "sections 521 and 543 of title 5".


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4202, as 38 USCS § 7802, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in para. (6), substituted "section 3709 of the Revised Statutes (41 U.S.C. 5)" for "section 5 of title 41".

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.


Such Act further substituted "(a) Location for canteens. The Secretary shall establish," for "The Secretary shall-

"(1) establish,;"

redesignated paras. (2)-(10) as subssecs. (b)-(k), respectively; in subssecs. (b)-(g), inserted the subsection heading and "The Secretary shall;" in subsec. (h) as redesignated, inserted the subsection heading and "The Secretary may;" in subsec. (i) as redesignated, inserted the subsection heading and "The Secretary shall;" and, in subssecs. (j) and (k) as redesignated, inserted the subsection heading and "The Secretary may".

Other provisions:


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§ 7803. Operation of Service

(a) Primary beneficiaries. Canteens operated by the Service shall be primarily for the use and benefit of-
   (1) veterans hospitalized or domiciled at the facilities at which canteen services are provided; and
   (2) other veterans who are enrolled under section 1705 of this title [38 USCS § 1705].

(b) Other authorized users. Service at such canteens may also be furnished to-
   (1) personnel of the Department and recognized veterans' organizations who are employed at a facility at which canteen services are provided and to other persons so employed;
   (2) the families of persons referred to in paragraph (1) who reside at the facility; and
   (3) relatives and other persons while visiting a person specified in this section.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4203, as 38 USCS § 7803.
Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing.

1999. Act Nov. 30, 1999, in subsec. (a), deleted the subsection designator ")(a)" preceding "The canteens", substituted "in this section" for "in this subsection; however, service to any person not hospitalized, domiciled, or residing at the hospital or home shall be limited to the sale of merchandise or services for consumption or use on the premises"; and deleted subsec. (b), which read: "(b) Service at canteens other than those established at hospitals and homes shall be limited to sales of merchandise and services for consumption or use on the premises, to personnel employed at such establishments, their visitors, and other persons at such establishments on official business."

2004. Act Nov. 30, 2004, substituted the text of this section for text which read: "The canteens at hospitals and homes of the Department shall be primarily for the use and benefits of veterans hospitalized or domiciled at such hospitals and homes. Service at such canteens may also be furnished to personnel of the Department and recognized veterans' organizations employed at such hospitals and homes and to other persons so employed, to the families of all the foregoing persons who reside at the hospital or home concerned, and to relatives and other persons while visiting any of the persons named in this section."

Cross References

This section is referred to in 38 USCS § 7802

§ 7804. Financing of Service

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To finance the establishment, maintenance, and operation of the Service there is hereby authorized to be appropriated, from time to time, such amounts as are necessary to provide for (1) the acquisition of necessary furniture, furnishings, fixtures, and equipment for the establishment, maintenance, and operation of canteens, warehouses, and storage depots; (2) stocks of merchandise and supplies for canteens and reserve stocks of same in warehouses and storage depots; (3) salaries, wages, and expenses of all employees; (4) administrative and operation expenses; and (5) adequate working capital for each canteen and for the Service as a whole. Amounts appropriated under the authority contained in this chapter [38 USCS §§ 7801 et seq.], and all income from canteen operations become and will be administered as a revolving fund to effectuate the provisions of this chapter [38 USCS §§ 7801 et seq.].

Amendments:

1972. Act June 6, 1972, deleted "and premiums on fidelity bonds of employees" preceding "; and (5)".


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4204, as 38 USCS § 7804.

Cross References

This section is referred to in 38 USCS §§ 113, 7810

§ 7805. Revolving fund

The revolving fund shall be deposited in a checking account with the Treasury of the United States. Such amounts thereof as the Secretary may determine to be necessary to establish and maintain operating accounts for the various canteens may be deposited in checking accounts or other interest-bearing accounts in other depositaries selected by the Secretary.

Amendments:

1988. Act May 20, 1988 inserted "or other interest-bearing accounts".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4205, as 38 USCS § 7805.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

§ 7806. Budget of Service

The Service shall prepare annually and submit a budget program as provided for wholly owned Government corporations by chapter 91 of title 31 [31 USCS §§ 9101 et seq.], which shall contain an estimate of the needs of the Service for the ensuing fiscal year including an estimate of the amount required to restore any impairment of the revolving fund resulting from operations of the current fiscal year.

Amendments:

§ 7807. Audit of accounts

The Service shall maintain a set of accounts which shall be audited by the Comptroller General in accordance with the provisions of chapter 35 of title 31 [31 USCS §§ 3501 et seq.].

Amendments:

1975. Act Jan. 2, 1975, substituted this section for one which read: "The Service shall maintain an integral set of accounts which shall be audited annually by the General Accounting Office in accordance with the principles and procedures applicable to commercial transactions as provided by sections 841-869 of title 31. No other audit shall be required.".


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4206, as 38 USCS § 7806.

Other provisions:

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section (see the Amendments note to this section), see § 5 of such Act, which appears as 10 USCS § 101 note.

§ 7808. Service to be independent unit

It is the purpose of this chapter [38 USCS §§ 7801 et seq.] that, under control and supervision of the Secretary, the Service shall function as an independent unit in the Department and shall have exclusive control over all its activities including sales, procurement and supply, finance, including disbursements, and personnel management, except as otherwise provided in this chapter [38 USCS §§ 7801 et seq.].

Amendments:

1982. Act Oct. 12, 1982 substituted "provided in this chapter" for "herein provided".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4207, as 38 USCS § 7807.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" and "Secretary" for "Administrator".

Other provisions:

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section (see the Amendments note to this section), see § 5 of such Act, which appears as 10 USCS § 101 note.
§ 7809. Child-care centers

(a) (1) The Secretary, through the Service, shall provide for the operation of child-care centers at Department facilities in accordance with this section. The operation of such centers shall be carried out to the extent that the Secretary determines, based on the demand for the care involved, that such operation is in the best interest of the Department and that is practicable to do so. The centers shall be available for the children of Department employees and, to the extent space is available, the children of other employees of the Federal Government and the children of employees of affiliated schools and corporations created under section 7361 of this title [38 USCS § 7361].

(2) There shall be in the Service an official who is responsible for all matters relating to the provision of child-care services under the authority of this section.

(b) The Service shall establish reasonable charges for child-care services provided at each child-care center operated under this section. The charges shall be subject to the approval of the Secretary. In the case of a center operated directly by the Service, the charges with respect to the center shall be sufficient to provide for the operating expenses of the center, including the expenses of personnel assigned to the center. In the case of a center operated by a contractor which is a for-profit entity, the charges shall be established by taking into consideration the value of the space and services furnished with respect to the center under subsection (c)(1) of this section.

(c) In connection with the establishment and operation of any child-care center under this section, the Secretary--

(1) shall furnish, at no cost to the center, space in existing Department facilities and utilities, custodial services, and other services and amenities necessary (as determined by the Secretary) for the health and safety of the children provided care at the center;

(2) may, on a reimbursable basis, convert space furnished under clause (1) of this subsection for use as the child-care center and provide other items necessary for the operation of the center, including furniture, office machines and equipment, and telephone service, except that the Secretary may furnish basic telephone service and surplus furniture and equipment without reimbursement;

(3) shall provide for the participation (directly or through a parent advisory committee) of parents of children receiving care in the center and in the establishment of policies to govern the operation of the center and in the oversight of the implementation of such policies;

(4) shall require the development and use of a process for determining the fitness and suitability of prospective employees of or volunteers at the center; and

(5) shall require in connection with the operation of the center compliance with all State and local laws, ordinances, and regulations relating to health and safety and the operation of child-care centers.

d) The Secretary shall prescribe regulations to carry out this section.

e) For the purpose of this section, the term "parent advisory committee" means a committee comprised of, and selected by, the parents of children receiving care in a child-care center operated under this section.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4209, as 38 USCS § 7809, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsecs. (a)(1), (2), (c)(2), and (e), substituted "child-care" for "child care".

Act Aug. 6, 1991 substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

§ 7810. Exemption from personnel ceilings

Persons who are employed by the Service and compensated from the revolving fund established by section 7804 of this title [38 USCS § 7804] may not be considered to be employees of the Department for the purposes of any personnel ceiling which may otherwise be applied to employees of the Department by the President or an official of the executive branch.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 4210, as 38 USCS § 7810, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

PART VI. ACQUISITION AND DISPOSITION OF PROPERTY

CHAPTER 81. ACQUISITION AND OPERATION OF HOSPITAL AND DOMICILIARY FACILITIES; PROCUREMENT AND SUPPLY; ENHANCED-USE LEASES OF REAL PROPERTY

CHAPTER 82. ASSISTANCE IN ESTABLISHING NEW STATE MEDICAL SCHOOLS; GRANTS TO AFFILIATED MEDICAL SCHOOLS; ASSISTANCE TO HEALTH MANPOWER TRAINING INSTITUTIONS

CHAPTER 83. ACCEPTANCE OF GIFTS AND BEQUESTS

CHAPTER 85. DISPOSITION OF DECEASED VETERANS' PERSONAL PROPERTY

Amendments:


1991. Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(2), 105 Stat. 239, revised the analysis of this Part by amending the section numbers in accordance with the redesignations made by § 402(b) of such Act (see Table II preceding 38 USCS § 101).


CHAPTER 81. ACQUISITION AND OPERATION OF HOSPITAL AND DOMICILIARY FACILITIES; PROCUREMENT AND SUPPLY; ENHANCED-USE LEASES OF REAL PROPERTY

SUBCHAPTER I ACQUISITION AND OPERATION OF MEDICAL FACILITIES

SUBCHAPTER II PROCUREMENT AND SUPPLY
SUBCHAPTER III STATE HOME FACILITIES FOR FURNISHING DOMICILIARY, NURSING HOME, AND HOSPITAL CARE
SUBCHAPTER IV SHARING OF MEDICAL FACILITIES, EQUIPMENT, AND INFORMATION
SUBCHAPTER V ENHANCED-USE LEASES OF REAL PROPERTY

Prospective amendments:
Deletion of item 8116, effective 30 days after certification of compliance with 38 USCS § 1710B(b). Act Nov. 30, 2004, P. L. 108-422, Title IV, Subtitle B, § 411(c)(2), 118 Stat. 2389 (effective at the end of the 30-day period beginning on the date on which the Secretary of Veterans Affairs certifies to Congress that the Secretary is in compliance with 38 USCS § 1710B(b), as provided by § 411(f) of such Act, which appears as 38 USCS § 1710B note), provides that the analysis of this chapter is amended by striking the item relating to section 8116.

Amendments:
1966. Act Nov. 7, 1966, P. L. 89-785, Title II, §§ 201(b), 202(c), 2 [204], 80 Stat. 1372, 1373, 1376, amended the analysis of this chapter by substituting item 5004 for one which read: "Garages on hospital and domiciliary reservations.”; substituting item 5012 for one which read: "Authority to procure and dispose of property."; and adding the Subchapter IV heading and items 5051-5056, 5075.
1976. Act Oct. 21, 1976, P. L. 94-581, Title I, § 115(b), 90 Stat. 2853, amended the analysis of this chapter by substituting item 5056 for one which read: "Coordination with programs carried out under the Heart Disease, Cancer, and Stroke Amendments of 1965."
1979. Act June 13, 1979, P. L. 96-22, Title III, § 301(c), 93 Stat. 61, amended the analysis of this chapter by substituting the Subchapter I and II headings and items 5001-5015 and 5021-5024 for ones which read:

"SUBCHAPTER I. PROVISIONS RELATING TO HOSPITALS AND HOMES"
*Section
*5001. Hospital and domiciliary facilities.
*5002. Construction and repair of buildings.
*5003. Use of Armed Forces facilities.
*5004. Garages and parking facilities.
*5005. Acceptance of certain property.
*5006. Property formerly owned by National Home for Disabled Volunteer Soldiers.
*5007. Partial relinquishment of legislative jurisdiction.

"SUBCHAPTER II. PROCUREMENT AND SUPPLY"
*5011. Revolving supply fund.
*5012. Authority to procure and dispose of property and to negotiate for common services.
"5013. Procurement of prosthetic appliances.
"5014. Grant of easements in Government-owned lands.

1982. Act May 4, 1982, P. L. 97-174, §§ 3(b)(2), 4(b), 97 Stat. 74, 75, amended the analysis of this chapter by substituting item 5011 for one which read: "5011. Use of Armed Forces facilities."; and adding item 5011A.


1991. Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 402(b) of such Act (see Table II preceding 38 USCS § 101).


Act Nov. 4, 1992, P. L. 102-585, Title VI, § 603(a)(2), 106 Stat. 4975, amended the analysis of this chapter by adding item 8126.

1994. Act Nov. 2, 1994, P. L. 103-446, Title XII, § 1201(h)(5), (6), 108 Stat. 4688, amended the chapter heading by inserting "ENHANCED-USE" and amended the analysis of this chapter by substituting item 8126 for one which read: "8126. Limitation on prices of drugs procured by Department.


SUBCHAPTER I  ACQUISITION AND OPERATION OF MEDICAL FACILITIES

§ 8101. Definitions
§ 8102. Acquisition of medical facilities
§ 8103. Authority to construct and alter, and to acquire sites for, medical facilities
§ 8104. Congressional approval of certain medical facility acquisitions
§ 8105. Structural requirements
§ 8106. Construction contracts
§ 8107. Operational and construction plans for medical facilities
§ 8108. Contributions to local authorities
§ 8109. Parking facilities
§ 8110. Operation of medical facilities
§ 8111. Sharing of Department of Veterans Affairs and Department of Defense health care resources
§ 8111A. Furnishing of health-care services to members of the Armed Forces during a war or national emergency
§ 8112. Partial relinquishment of legislative jurisdiction
§ 8113. Property formerly owned by National Home for Disabled Volunteer Soldiers
§ 8114. Use of federally owned facilities; use of personnel
§ 8115. Acceptance of certain property
§ 8116. Nursing home revolving fund [Caution: See prospective amendment note below.]
§ 8117. Emergency preparedness
§ 8118. Authority for transfer of real property; Department of Veterans Affairs Capital Asset Fund

§ 8101. Definitions

For the purposes of this subchapter [38 USCS §§ 8101 et seq.]:
(1) The term "alter", with respect to a medical facility, means to repair, remodel, improve, or extend such medical facility.
(2) The terms "construct" and "alter", with respect to a medical facility, include such engineering, architectural, legal, fiscal, and economic investigations and studies and such surveys, designs, plans, construction documents, specifications, procedures, and other similar actions as are necessary for the construction or alteration, as the case may be, of such medical facility and as are carried out after the completion of the advanced planning (including the development of project requirements and design development) for such facility.
(3) The term "medical facility" means any facility or part thereof which is, or will be, under the jurisdiction of the Secretary for the provision of health-care services (including hospital, nursing home, or domiciliary care or medical services), including any necessary building and auxiliary structure, garage, parking facility, mechanical equipment, trackage facilities leading thereto, abutting sidewalks, accommodations for attending personnel, and recreation facilities associated therewith.
(4) The term "committee" means the Committee on Veterans' Affairs of the House of Representatives or the Committee on Veterans' Affairs of the Senate, and the term "committees" means both such committees.

Explanatory notes:

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5001, as 38 USCS § 8101.
Act Aug. 6, 1991 substituted "Secretary" for "Administrator" wherever appearing.
1996. Act Oct. 9, 1996, in para. (2), substituted "construction documents" for "working drawings" and substituted "design development" for "preliminary plans".

Other provisions:
"(a) Except as provided in subsection (b) of this section, the amendments made by section 301 [amending 38 USCS §§ 8101 et seq.] shall take effect on October 1, 1979.

"(b)(1) The amendments made by section 301 [amending 38 USCS §§ 8101 et seq.] shall not apply with respect to the acquisition, construction, or alteration of any medical facility (as defined in section 5001(3) [now section 8101(3)] of title 38, United States Code [para. (3) of this section], as amended by section 301(a) of this Act) if such acquisition, construction, or alteration (not including exchange) was approved before October 1, 1979, by the President.

"(2) The provisions of section 5007(a) [now section 8107(a)] of title 38, United States Code, as amended by section 301(a) of this Act, shall take effect on the date of the enactment of this Act.".

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Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 24, 25

§ 8102. Acquisition of medical facilities
(a) The Secretary shall provide medical facilities for veterans entitled to hospital, nursing home, or domiciliary care or medical services under this title.

(b) No medical facility may be constructed or otherwise acquired or altered except in accordance with the provisions of this subchapter [38 USCS §§ 8101 et seq.].

(c) In carrying out this subchapter [38 USCS §§ 8101 et seq.], the Secretary--
(1) shall provide for the construction and acquisition of medical facilities in a manner that results in the equitable distribution of such facilities throughout the United States,
(d) In considering the need for any project for the construction, alteration, or acquisition (other than by exchange) of a medical facility which is expected to involve a total expenditure of more than $2,000,000, the Secretary shall give consideration to the sharing of health-care resources with the Department of Defense under section 8111 of this title [38 USCS § 8111] as an alternative to all or part of such project.

Explanatory notes:


Amendments:


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5002, as 38 USCS § 8102, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (d), substituted "section 5011" for "section 5001".

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Other provisions:

Effective date and application of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 25

Under its constitutional powers to raise armies and navies and to conduct wars, Congress has power to pay pensions and to build hospitals and homes for veterans. United States v Oregon (1961) 366 US 643, 6 L Ed 2d 575, 81 S Ct 1278, reh den (1961) 368 US 870, 7 L Ed 2d 70, 82 S Ct 24

§ 8103. Authority to construct and alter, and to acquire sites for, medical facilities

(a) Subject to section 8104 of this title [38 USCS § 8104], the Secretary--

(1) may construct or alter any medical facility and may acquire, by purchase, lease, condemnation, donation, exchange, or otherwise, such land or interests in land as the Secretary considers necessary for use as the site for such construction or alteration;
(2) may acquire, by purchase, lease, condemnation, donation, exchange, or otherwise, any facility (including the site of such facility) that the Secretary considers necessary for use as a medical facility; and
(3) in order to assure compliance with section 8110(a)(2) of this title [38 USCS § 8110(a)(2)], in the case of any outpatient medical facility for which it is proposed to lease space and for which a qualified lessor and an appropriate leasing arrangement are available, shall execute a lease for such facility within 12 months after funds are made available for such purpose.

(b) Whenever the Secretary considers it to be in the interest of the United States to construct a new medical facility to replace an existing medical facility, the Secretary (1) may demolish the existing facility and use the site on which it is located for the site of the new medical facility, or (2) if in the judgment of the Secretary it is more advantageous to construct such medical facility on a different site in the same locality, may exchange such existing facility and the site of such existing facility for the different site.

(c) Whenever the Secretary determines that any site acquired for the construction of a medical facility is not suitable for that purpose, the Secretary may exchange such site for another site to be used for that purpose or may sell such site.

(d) (1) The Secretary may provide for the acquisition of not more than three facilities for the provision of outpatient services or nursing home care through lease-purchase arrangements on real property under the jurisdiction of the Department of Veterans Affairs.

(2) (A) In carrying out this subsection and notwithstanding any other provision of law, the Secretary may lease, with or without compensation and for a period of not to exceed 35 years, to another party any of the real property described in paragraph (1) of this subsection.

(B) Such real property shall be used as the site of a facility referred to in paragraph (1) of this subsection--

(i) constructed and owned by the lessee of such real property; and

(ii) leased under paragraph (3)(A) of this subsection to the Department for such use and for such other activities as the Secretary determines are appropriate.

(3) (A) The Secretary may enter into a lease for the use of any facility described in paragraph (2)(B) of this subsection for not more than 35 years under such terms and conditions as may be in the best interests of the Department.

(B) Each agreement to lease a facility under subparagraph (A) of this paragraph shall include a provision that--

(i) the obligation of the United States to make payments under the agreement is subject to the availability of appropriations for that purpose; and

(ii) the ownership of such facility shall vest in the United States at the end of such lease.

(4) (A) The Secretary may sublease any space in such a facility to another party at a rate not less than--

(i) the rental rate paid by the Secretary for such space under paragraph (3) of this subsection; plus
(ii) the amount the Secretary pays for the costs of administering such facility (including operation, maintenance, utility, and rehabilitation costs) which are attributable to such space.

(B) In any such sublease, the Secretary shall include such terms relating to default and nonperformance as the Secretary considers appropriate to protect the interests of the United States.

(5) The Secretary shall use the receipts of any payment for the lease of real property under paragraph (2) for the payment of the lease of a facility under paragraph (3).

(6) The authority to enter into an agreement under this subsection--
(A) shall not take effect until the Secretary has entered into agreements under section 316 of this title [38 USCS § 316] to carry out at least three collocations; and
(B) shall expire on October 1, 1993.

Explanatory notes:
A prior § 5003 (Act Sept. 2, 1958, P. L. 85-857, § 1, 72 Stat. 1252) was omitted in the general revision of this subchapter by Act June 17, 1979, P. L. 96-22. Such section provided for use of facilities of the armed forces. For similar provisions, see 38 USCS § 8111.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5003, as 38 USCS § 8103, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).
Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Other provisions:
Effective date and application of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

Development of medical-facility modular components. Act Dec. 3, 1985, P. L. 99-166, Title III, § 304, 99 Stat. 956; provides: "In order to evaluate the applicability to the Veterans' Administration of the use of modular components in the design and construction of medical facilities for the furnishing of hospital care and to determine the efficiency and cost-effectiveness of that approach, the Administrator of Veterans' Affairs shall, not later than one year after the date of the enactment of this Act, develop a modular approach to the planning and design of an appropriate Veterans' Administration medical facility for the furnishing of hospital care."

Code of Federal Regulations
Department of the Navy-Disposition of property, 32 CFR Part 736

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 25
§ 8104. Congressional approval of certain medical facility acquisitions

(a) (1) The purpose of this subsection is to enable Congress to ensure the equitable distribution of medical facilities throughout the United States, taking into consideration the comparative urgency of the need for the services to be provided in the case of each particular facility.

(2) No funds may be appropriated for any fiscal year, and the Secretary may not obligate or expend funds (other than for advance planning and design), for any major medical facility project or any major medical facility lease unless funds for that project or lease have been specifically authorized by law.

(3) For the purpose of this subsection:

(A) The term "major medical facility project" means a project for the construction, alteration, or acquisition of a medical facility involving a total expenditure of more than $7,000,000, but such term does not include an acquisition by exchange.

(B) The term "major medical facility lease" means a lease for space for use as a new medical facility at an average annual rental of more than $600,000.

(b) Whenever the President or the Secretary submit to the Congress a request for the funding of a major medical facility project (as defined in subsection (a)(3)(A)) or a major medical facility lease (as defined in subsection (a)(3)(B)), the Secretary shall submit to each committee, on the same day, a prospectus of the proposed medical facility. Any such prospectus shall include the following:

(1) A detailed description of the medical facility to be constructed, altered, leased, or otherwise acquired under this subchapter [38 USCS §§ 8101 et seq.] including a description of the location of such facility and, in the case of a prospectus proposing the construction of a new or replacement medical facility, a description of the consideration that was given to acquiring an existing facility by lease or purchase and to the sharing of health-care resources with the Department of Defense under section 8111 of this title [38 USCS § 8111].

(2) An estimate of the cost to the United States of the construction, alteration, lease, or other acquisition of such facility (including site costs, if applicable).

(3) An estimate of the cost to the United States of the equipment required for the operation of such facility.

(4) Demographic data applicable to such facility, including information on projected changes in the population of veterans to be served by the facility over a five-year period and a ten-year period.

(5) Current and projected workload and utilization data regarding the facility.

(6) Current and projected operating costs of the facility, including both recurring and non-recurring costs.

(7) The priority score assigned to the project or lease under the Department's prioritization methodology and, if the project or lease is being proposed for funding before a project or lease with a higher score, a specific explanation of the factors other than the priority score that were considered and the basis on which the project...
or lease is proposed for funding ahead of projects or leases with higher priority scores.

(8) In the case of a prospectus proposing the construction of a new or replacement medical facility, a description of each alternative to construction of the facility that was considered.

(c) Not less than 30 days before obligating funds for a major medical facility project approved by a law described in subsection (a)(2) of this section in an amount that would cause the total amount obligated for that project to exceed the amount specified in the law for that project (or would add to total obligations exceeding such specified amount) by more than 10 percent, the Secretary shall provide the committees with notice of the Secretary's intention to do so and the reasons for the specified amount being exceeded.

(d) In any case in which the Secretary proposes that funds be used for a purpose other than the purpose for which such funds were appropriated, the Secretary shall promptly notify each committee, in writing, of the particulars involved and the reasons why such funds were not used for the purpose for which appropriated.

(e) The Secretary may accept gifts or donations for any of the purposes of this subchapter [38 USCS §§ 8101 et seq.].

(f) The Secretary may not obligate funds in an amount in excess of $500,000 from the Advance Planning Fund of the Department toward design or development of a major medical facility project (as defined in subsection (a)(3)(A)) until--

(1) the Secretary submits to the committees a report on the proposed obligation; and

(2) a period of 30 days has passed after the date on which the report is received by the committees.

(g) The limitation in subsection (f) does not apply to a project for which funds have been authorized by law in accordance with subsection (a)(2).

Explanatory notes:


Amendments:

1985. Act Dec. 3, 1985 substituted subsec. (a) for one which read:

"(a) In order to ensure the equitable distribution of medical facilities throughout the United States, taking into consideration the comparative urgency of the need for the services to be provided in the case of each particular facility--

"(1) no appropriation may be made for the construction, alteration, or acquisition (not including exchanges) of any medical facility which involves a total expenditure of more than $2,000,000 unless each committee has first adopted a resolution approving such construction, alteration, or acquisition and setting forth the estimated cost thereof; and
“(2) no appropriation may be made for the lease of any space for use as a medical facility at an average annual rental of more than $500,000 unless each committee has first adopted a resolution approving such lease and setting forth the estimated cost thereof.”;

and, in subsec. (b)(1), inserted "and, in the case of a prospectus proposing the construction of a new or replacement medical facility, a description of the consideration that was given to acquiring an existing facility by lease or purchase”.

1986. Act Oct. 28, 1986, in subsec. (b)(1), inserted "and to the sharing of health-care resources with the Department of Defense under section 5011 of this title".

1988. Act May 20, 1988, in subsec. (a), substituted paras. (2) and (3) for former paras. (2)-(4) which read:

"(2) After the adoption by the committees during a fiscal year of resolutions with identical texts approving major medical facility projects, it shall not be in order in the House of Representatives or in the Senate to consider a bill, resolution, or amendment making an appropriation for that fiscal year or for the next fiscal year which may be expended for a major medical facility project--

"(A) if the project for which the appropriation is proposed to be made is not approved in those resolutions; or

"(B) in the event that the project is approved in the resolutions, if either--

"(i) the bill, resolution, or amendment making the appropriation does not specify--

"(I) the medical facility project for which the appropriation is proposed to be made; and

"(II) the amount proposed to be appropriated for the project; or

"(ii) the amount proposed to be appropriated for the project (when added to any amount previously appropriated for the project) exceeds the amount approved for the project.

"(3) No appropriation may be made for the lease of any space for use as a medical facility at an average annual rental of more than $500,000 unless each committee has first adopted a resolution approving such lease and setting forth the estimated cost thereof.

"(4) For the purpose of this subsection, the term "major medical facility project" means a project for the construction, alteration, or acquisition of a medical facility involving a total expenditure of more than $2,000,000. Such term does not include an acquisition by exchange.";

substituted subsec. (c) for one which read: "The estimated cost of any construction, alteration, lease, or other acquisition that is approved under this section, as set forth in the pertinent resolutions described in subsection (a) of this section, may be increased by the Administrator in the contract for such construction, alteration, lease, or other acquisition by an amount equal to the percentage increase, if any, as determined by the Administrator, in construction, alteration, lease, or other acquisition costs, as the case may be, from the date of such approval to the date of contract, but in no event may the amount of such increase exceed 10 per centum of such estimated cost."; deleted subsec. (d) which read: "In the case of any medical facility approved for construction, alteration, lease, or other acquisition by each committee under subsection (a) of this section for which funds have not been appropriated within one year after the date of such approval, either such committee may by resolution rescind its approval at any time thereafter before such funds are appropriated."; and redesignated former subssecs. (e) and (f) as subssecs. (d) and (e), respectively.
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5004, as 38 USCS § 8104, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

1992. Act Oct. 9, 1992 (applicable as provided by Act Oct. 9, 1996, § 106(b), which appears as a note to this section), in subsec. (a), substituted para. (2) for one which read:

"(2) It shall not be in order in the Senate or in the House of Representatives to consider a bill, resolution, or amendment which would make an appropriation for any fiscal year which may be expended for a major medical facility project or a major medical facility lease unless--

"(A) such bill, resolution, or amendment specifies the amount to be appropriated for that project or lease,

"(B) the project or lease has been approved in a resolution adopted by the Committee on Veterans' Affairs of that House, and

"(C) the amount to be appropriated for that project or lease is no more than the amount specified in that resolution for that project or lease for that fiscal year.",

and, in para. (3)(B), inserted "new" and substituted "$500,000" for "$300,000"; and, in subsec. (c), substituted "law" for "resolution" in two places.


1996. Act Oct. 9, 1996 (applicable as provided by § 205(b) of such Act, which appears as a note to this section), in subsec. (b), substituted the introductory matter for matter which read: "(b) In the event that the President or the Secretary proposes to the Congress the funding of any construction, alteration, lease, or other acquisition to which subsection (a) of this section is applicable, the Secretary shall submit to each committee, on the same day, a prospectus of the proposed medical facility. Such prospectus shall include--", in para. (1), substituted "A detailed" for "a detailed" and substituted the concluding period for a semicolon, in para. (2), substituted "An estimate" for "an estimate" and substituted the concluding period for "; and", in para. (3), substituted "An estimate" for "an estimate, and added paras. (4)-(8).

Such Act further, in subsec. (a)(3)(A), substituted "$4,000,000" for "$3,000,000"; and added subsec. (f).

1998. Act Nov. 11, 1998, in subsec. (a)(3)(B), substituted "$600,000" for "$300,000".

2003. Act Dec. 6, 2003, in subsec. (a)(3)(A), substituted "$7,000,000" for "$4,000,000".


Other provisions:

Effective date and application of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

Repeal of provision relating to applicability of Oct. 9, 1992 amendments. Act Oct. 9, 1992, P. L. 102-405, § 301(b), 106 Stat. 1984, which formerly appeared as a note to this section, was repealed by Act Oct. 9, 1996, P. L. 104-262, Title II, § 206(b)(1), 110 Stat. 3190. Such note provided that the amendments made by § 301(a) of Act Oct. 9, 1992 (amending subsecs. (a) and (c) of this section) were not applicable with respect to any project for which funds were appropriated before enactment.
Applicability of amendments made by § 301(a) of Act Oct. 9, 1996. Act Oct. 9, 1996, P. L. 104-262, Title II, § 206(b), 110 Stat. 3190, provides:

"(1) Subsection (b) of section 301 of the Veterans' Medical Programs Amendments of 1992 (Public Law 102-405; 106 Stat. 1984) [former note to this section] is repealed.

"(2) The amendments made by subsection (a) of such section [amending subsecs. (a) and (c) of this section] shall apply with respect to any major medical facility project or any major medical facility lease of the Department of Veterans Affairs, regardless of when funds are first appropriated for that project or lease, except that in the case of a project for which funds were first appropriated before October 9, 1992, such amendments shall not apply with respect to amounts appropriated for that project for a fiscal year before fiscal year 1998.".

Cross References
This section is referred to in 38 USCS §§ 8103, 8107, 8109, 8116

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 25

§ 8105. Structural requirements

(a) Each medical facility (including each nursing home facility for which the Secretary contracts under section 1720 of this title [38 USCS § 1720] and each State home facility constructed or altered under subchapter III of this chapter [38 USCS §§ 8131 et seq.] shall be of fire, earthquake, and other natural disaster resistant construction in accordance with standards which the Secretary shall prescribe on a State or regional basis after surveying appropriate State and local laws, ordinances, and building codes and climatic and seismic conditions pertinent to each such facility. When an existing structure is acquired for use as a medical facility, it shall be altered to comply with such standards.

(b) (1) In order to carry out this section, the Secretary shall appoint an advisory committee to be known as the "Advisory Committee on Structural Safety of Department Facilities", on which shall serve at least one architect and one structural engineer who are experts in structural resistance to fire, earthquake, and other natural disasters and who are not employees of the Federal Government.

(2) Such advisory committee shall advise the Secretary on all matters of structural safety in the construction and altering of medical facilities in accordance with the requirements of this section and shall review and make recommendations to the Secretary on the regulations prescribed under this section.

(3) The Associate Deputy Secretary, the Under Secretary for Health or the designee of the Under Secretary for Health, and the Department official charged with the responsibility for construction shall be ex officio members of such advisory committee.

Explanatory notes:
A prior § 5005 (Act Sept. 2, 1958, P. L. 85-857, § 1, 72 Stat. 1252; Oct. 21, 1976, P. L. 94-581, Title II, § 210(e)(4), 90 Stat. 2865) was omitted in the general revision of this subchapter by Act June 17, 1979, P. L. 96-22. Such section provided for acceptance by the President of buildings, structures, equipment, or grounds from States or other political subdivisions or from persons. For similar provisions, see 38 USCS § 8115.

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Amendments:

1979. Act Nov. 28, 1979 (effective 11/28/79, as provided by § 601(b) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), substituted "subchapter III of this chapter" for "section 5031 of this title".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5005, as 38 USCS § 8105.

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.


Other provisions:

Termination of advisory committees. Act Oct. 6, 1972, P. L. 92-463, §§ 3(2), 14, 86 Stat. 770, located in the Federal Advisory Committee Act, 5 USCS Appx., provided that advisory committees established after Jan. 5, 1973, would terminate not later than 2 years after their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2 year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law.

Effective date and application of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17

Department of Veterans Affairs-Grants to States for construction or acquisition of State homes, 38 CFR Part 59

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 25

§ 8106. Construction contracts

(a) The Secretary may carry out any construction or alteration authorized under this subchapter [38 USCS §§ 8101 et seq.] by contract if the Secretary considers it to be advantageous to the United States to do so.

(b) (1) The Secretary may obtain, by contract or otherwise, the services of individuals who are architects or engineers and of architectural and engineering corporations and firms, to the extent that the Secretary may require such services for any medical facility authorized to be constructed or altered under this subchapter [38 USCS §§ 8101 et seq.].

(2) No corporation, firm, or individual may be employed under the authority of paragraph (1) of this subsection on a permanent basis.
(c) Notwithstanding any other provision of this section, the Secretary shall be responsible for all construction authorized under this subchapter [38 USCS §§ 8101 et seq.], including the interpretation of construction contracts, the approval of materials and workmanship supplied pursuant to a construction contract, approval of changes in the construction contract, certification of vouchers for payments due the contractor, and final settlement of the contract.

Explanatory notes:
A prior § 5006 (Act Sept. 2, 1958, P. L. 85-857, § 1, 72 Stat. 1253) was omitted in the general revision of this subchapter by Act June 17, 1979, P. L. 96-22. Such section provided for property formerly owned by the National Home for Disabled Volunteer Soldiers. For similar provisions, see 38 USCS § 8113.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5006, as 38 USCS § 8106.
Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Other provisions:
Effective date and application of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

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Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 25
Clause in government construction contract relating to payment of prevailing rate of wage was inserted by authority of acts of Congress. United States use of Johnson v Morley Const. Co. (1936, DC NY) 17 F Supp 378, affd in part and revd in part on other grounds (1938, CA2 NY) 98 F.2d 781, 1 CCH LC ¶ 18264, cert den (1938) 305 US 651, 83 L Ed 421, 59 S Ct 244

§ 8107. Operational and construction plans for medical facilities
(a) In order to promote effective planning for the efficient provision of care to eligible veterans, the Secretary, based on the analysis and recommendations of the Under Secretary for Health, shall submit to each committee an annual report regarding long-range health planning of the Department. The report shall be submitted each year not later than the date on which the budget for the next fiscal year is submitted to the Congress under section 1105 of title 31 [31 USCS § 1105].

(b) Each report under subsection (a) shall include the following:
(1) A five-year strategic plan for the provision of care under chapter 17 of this title [38 USCS §§ 1701 et seq.] to eligible veterans through coordinated networks of medical facilities operating within prescribed geographic service-delivery areas, such plan to include provision of services for the specialized treatment and rehabilitative needs of disabled veterans (including veterans with spinal cord dysfunction, blindness,
amputations, and mental illness) through distinct programs or facilities of the Department dedicated to the specialized needs of those veterans.

(2) A description of how planning for the networks will be coordinated.

(3), (4) [Deleted]

c) The Secretary shall submit to each committee not later than January 31 of each year a report showing the location, space, cost, and status of each medical facility (1) the construction, alteration, lease, or other acquisition of which has been approved under section 8104(a) of this title [38 USCS § 8104(a)], and (2) which was uncompleted as of the date of the last preceding report made under this subsection.

(d) (1) The Secretary shall submit to each committee, not later than January 31 of each year, a report showing the current priorities of the Department for proposed major medical construction projects. Each such report shall identify the 20 projects, from within all the projects in the Department's inventory of proposed projects, that have the highest priority and, for those 20 projects, the relative priority and rank scoring of each such project and the projected cost of such project (including the projected operating costs, including both recurring and nonrecurring costs). The 20 projects shall be compiled, and their relative rankings shall be shown, by category of project (including the categories of ambulatory care projects, nursing home care projects, and such other categories as the Secretary determines).

(2) The Secretary shall include in each report, for each project listed, a description of the specific factors that account for the relative ranking of that project in relation to other projects within the same category.

(3) In a case in which the relative ranking of a proposed project has changed since the last report under this subsection was submitted, the Secretary shall also include in the report a description of the reasons for the change in the ranking, including an explanation of any change in the scoring of the project under the Department's scoring system for proposed major medical construction projects.

Explanatory notes:


Amendments:

1985. Act Dec. 3, 1985, substituted the section heading for one which read: "Reports to congressional committees"; and, in subsec. (a), designated the existing provisions as para. (1) and, in para. (1) as so designated, substituted "alteration, and operation" for "and alteration", and deleted:

"Such report shall be submitted to the committees on the same day each year and shall contain--"

"(1) a five-year plan for the construction, replacement, or alteration of those medical facilities that, in the judgment of the Administrator, are most in need of construction, replacement, or alteration;

"(2) a list, in order of priority, of not less than ten hospitals that, in the judgment of the Administrator, are most in need of construction or replacement; and
“(3) general plans (including projected costs, site location, and, if appropriate, necessary land acquisition) for each medical facility included in the five-year plan required under clause (1) of this subsection or the list required under clause (2) of this subsection.

The first such report shall be submitted not later than September 1, 1979, and each succeeding report shall be submitted not later than June 30 of each year.”

following “medical facilities.”, and added paras. (2) and (3); and, in subsec. (b), deleted “(beginning in 1981)” following “each year”, inserted “(1)”, and substituted “title, and (2)” for “title and, in the case of the second and each succeeding report made under this subsection.”.


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5007, as 38 USCS § 8107, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (a)(2)(B), deleted a second comma before “are most in need of”.

Act Aug. 6, 1991, substituted “Secretary” for “Administrator” wherever appearing.


1996. Act Oct. 9, 1996 redesignated subsec. (b) as subsec. (c); substituted subsecs. (a) and (b) for former subsec. (a), which read:

“(a)(1) In order to promote effective planning for the orderly construction, replacement, and alteration of medical facilities in accordance with the comparative urgency of the need for the services to be provided by such facilities, the Secretary, after considering the analysis and recommendations of the Chief Medical Director, shall submit to each committee an annual report on the construction, replacement, alteration, and operation of medical facilities.

“(2) Each such report shall contain--

“(A) a five-year strategic plan for the operation and construction of medical facilities--

“(i) setting forth--

“(I) the mission of each existing or proposed medical facility;

“(II) any planned change in such mission; and

“(III) the operational steps needed to achieve the facility’s mission and the dates by which such steps are planned to be completed; and

“(ii) a five-year plan, based on the factors set out in subclause (i) of this clause, for construction, replacement, or alteration projects for each such facility;

“(B) a list, in order of priority, of not less than 10 hospitals that, in the judgment of the Secretary, after considering the analysis and recommendations of the Under Secretary for Health, are most in need of construction or replacement; and

“(C) general plans (including projected costs, site location, and, if appropriate, necessary land acquisition) for each medical facility for which construction, replacement, or alteration is planned under clause (A)(ii) of this paragraph.

“(3) The report under this subsection shall be submitted not later than June 30 of each year.”;

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and added subsec. (d).


2003. Act Dec. 6, 2003, in subsec. (b), deleted paras. (3) and (4), which read:

"(3) A profile regarding each such network of medical facilities which identifies--

"(A) the mission of each existing or proposed medical facility in the network;
"(B) any planned change in the mission for any such facility and the rationale for such planned change;
"(C) the population of veterans to be served by the network and anticipated changes over a five-year period and a ten-year period, respectively, in that population and in the health-care needs of that population;

"(D) information relevant to assessing progress toward the goal of achieving relative equivalency in the level of resources per patient distributed to each network, such information to include the plans for and progress toward lowering the cost of care-delivery in the network (by means such as changes in the mix in the network of physicians, nurses, physician assistants, and advance practice nurses);

"(E) the capacity of non-Federal facilities in the network to provide acute, long-term, and specialized treatment and rehabilitative services (described in section 7306(f)(1)(A) of this title), and determinations regarding the extent to which services to be provided in each service-delivery area and each facility in such area should be provided directly through facilities of the Department or through contract or other arrangements, including arrangements authorized under sections 8111 and 8153 of this title; and

"(F) a five-year plan for construction, replacement, or alteration projects in support of the approved mission of each facility in the network and a description of how those projects will improve access to care, or quality of care, for patients served in the network.

"(4) A status report for each facility on progress toward--

"(A) instituting planned mission changes identified under paragraph (3)(B);
"(B) implementing principles of managed care of eligible veterans; and

"(C) developing and instituting cost-effective alternatives to provision of institutional care.".

Other provisions:

Effective date and application of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

Effective date of June 13, 1979 amendment of subsec. (a). Act June 13, 1979, P. L. 96-22, Title III, § 302(b)(2), 93 Stat. 62, provides: "The provisions of section 5007(a) [now section 8107(a)] of title 38, United States Code, as amended by section 301(a) of this Act, shall take effect on the date of the enactment of this Act.".

§ 8108. Contributions to local authorities

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The Secretary may make contributions to local authorities toward, or for, the construction of traffic controls, road improvements, or other devices adjacent to a medical facility if considered necessary for safe ingress or egress.

**Explanatory notes:**
Similar provisions were contained in former § 5001(g) prior to the general revision of this subchapter by Act June 13, 1979, P. L. 96-22.

**Amendments:**
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5008, as 38 USCS § 8108.
Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

**Other provisions:**
**Effective date and application of section.** Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

**Research Guide**

**Am Jur:**
77 Am Jur 2d, Veterans and Veterans' Laws § 25

§ 8109. Parking facilities

(a) For the purpose of this section--

(1) The term "garage" means a structure (or part of a structure) in which vehicles may be parked.

(2) The term "parking facility" includes--

(A) a surface parking lot; and

(B) a garage.

(3) The term "eligible person" means an individual to whom the Secretary is authorized to furnish medical examination or treatment.

(b) In order to accommodate the vehicles of employees of medical facilities, vehicles used to transport veterans and eligible persons to or from such facilities for the purpose of examination or treatment, and the vehicles of visitors and other individuals having business at such facilities, the Secretary--

(1) may construct or alter parking facilities, and may acquire, by purchase, lease, condemnation, donation, exchange, or otherwise, such land or interests in land as the Secretary considers necessary for use as the site for any such construction or alteration;

(2) may acquire, by purchase, lease, condemnation, donation, exchange, or otherwise, any facility that the Secretary considers necessary for use as a parking facility; and

(3) may operate and maintain parking facilities.
(c) (1) Except as provided in paragraph (2) of this subsection, each employee, visitor, and other individual having business at a medical facility for which parking fees have been established under subsection (d) or (e) of this section shall be charged the applicable parking fee for the use of a parking facility at such medical facility.

(2) A parking fee shall not be charged under this subsection for the accommodation of any vehicle used to transport to or from a medical facility--
   (A) a veteran or eligible person in connection with such veteran or eligible person seeking examination or treatment; or
   (B) a volunteer worker (as determined in accordance with regulations which the Secretary shall prescribe) in connection with such worker performing services for the benefit of veterans receiving care at a medical facility.

(3) The Secretary shall collect (or provide for the collection of) parking fees charged under this subsection.

(d) (1) For each medical facility where funds from the revolving fund described in subsection (h) of this section are expended for--
   (A) a garage constructed or acquired by the Department at a cost exceeding $500,000 (or, in the case of acquisition by lease, $100,000 per year); or
   (B) a project for the alteration of a garage at a cost exceeding $500,000, the Secretary shall prescribe a schedule of parking fees to be charged at all parking facilities used in connection with such medical facility.

(2) The parking fee schedule prescribed for a medical facility referred to in paragraph (1) of this subsection shall be designed to establish fees which the Secretary determines are reasonable under the circumstances.

(e) The Secretary may prescribe a schedule of parking fees for the parking facilities at any medical facility not referred to in subsection (d) of this section. Any such schedule shall be designed to establish fees which the Secretary determines to be reasonable under the circumstances and shall cover all parking facilities used in connection with such medical facility.

(f) The Secretary may contract (by lease or otherwise) for the operation of parking facilities at medical facilities under such terms and conditions as the Secretary prescribes and may do so without regard to laws requiring full and open competition.

(g) Subject to subsections (h) and (i) of this section, there are authorized to be appropriated such amounts as are necessary to finance (in whole or in part) the construction, alteration, and acquisition (including site acquisition) of parking facilities at medical facilities.

(h) (1) Amounts appropriated pursuant to subsection (g) of this section and parking fees collected under subsection (c) of this section shall be administered as a revolving fund and shall be available without fiscal year limitation.

(2) The revolving fund shall be deposited in a checking account with the Treasurer of the United States.

(3) (A) Except as provided in subparagraph (B) of this paragraph, no funds other than funds from the revolving fund may be expended for the construction, alteration, or
acquisition (including site acquisition) of a garage at a medical facility after September 30, 1986.

(B) Subparagraph (A) of this paragraph does not apply to the use of funds for investigations and studies, surveys, designs, plans, construction documents, specifications, and similar actions not directly involved in the physical construction of a structure.

(i) (1) The expenditure of funds from the revolving fund may be made only for the construction, alteration, and acquisition (including site acquisition) of parking facilities at medical facilities and may be made only as provided for in appropriation Acts.

(2) For the purpose of section 8104(a)(2) of this title [38 USCS § 8104(a)(2)], a bill, resolution, or amendment which provides that funds in the revolving fund (including any funds proposed in such bill, resolution, or amendment to be appropriated to the revolving fund) may be expended for a project involving a total expenditure of more than $4,000,000 for the construction, alteration, or acquisition (including site acquisition) of a parking facility or facilities at a medical facility shall be considered to be a bill, resolution, or amendment making an appropriation which may be expended for a major medical facility project.

(j) Funds in a construction account or capital account that are available for a construction project or a nonrecurring maintenance project may be used for the construction or relocation of a surface parking lot incidental to that project.

Explanatory notes:
Similar provisions were contained in former § 5004 prior to the general revision of this subchapter by Act June 13, 1979, P. L. 96-22.

Amendments:
1986. Act Oct. 28, 1986 (effective on enactment as provided by § 223(b) of such Act, which appears as a note to this section) substituted this section for one which read:

"§ 5009. Garages and parking facilities.

"(a) The Administrator may construct, alter, operate, and maintain, on reservations of medical facilities, garages and parking facilities for the accommodation of privately owned vehicles of employees of such facilities and vehicles of visitors and other individuals having business at such facilities.

"(b)(1) The Administrator may establish and collect (or provide for the collection of) fees for the use of such garages and parking facilities at such rate or rates which the Administrator determines would be reasonable under the particular circumstances; but no fee may be charged for the accommodation of any publicly or privately owned vehicle used in connection with the transportation of a veteran to or from any medical facility for the purposes of examination or treatment or in connection with any visit to any patient in such facility. Employees using such garages shall make such reimbursement therefor as the Administrator may deem reasonable.

"(2) The Administrator may contract, by lease or otherwise, with responsible persons, firms, or corporations for the operation of such parking facilities, under such terms and conditions as the Administrator shall prescribe, and without regard to the laws concerning advertising for competitive bids.

"(c)(1) There are authorized to be appropriated such amounts as are necessary to finance in part the construction, alteration, operation, and maintenance of garages and parking facilities
(other than the construction or alteration of any garage or parking facility involving the expenditure of more than $2,000,000). Amounts appropriated under the authority of this section, and all income from fees collected for the use of such garages and parking facilities, shall be administered as a revolving fund to effectuate the provisions of this section, but only to the extent provided for in appropriation Acts.

"(2) The revolving fund shall be deposited in a checking account with the Treasurer of the United States, except that such amounts thereof as the Administrator may determine to be necessary to establish and maintain operating accounts for the various garages and parking facilities may be placed in depositories selected by the Administrator."

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5009, as 38 USCS § 8109, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991 substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

1993. Act Aug. 13, 1993, in subsec. (i)(2), substituted "$3,000,000" for "$2,000,000".


1998. Act Nov. 11, 1998, in subsec. (i)(2), substituted "$4,000,000" for "$3,000,000".


Other provisions:

Effective date and application of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.


"(1) Except as provided in paragraphs (2) and (3), the amendments made by this section [amending this section and the chapter analysis] shall take effect on the date of the enactment of this Act.

"(2)(A) The amendments made by this section shall not abrogate the provisions of a collective bargaining agreement which, on the date of the enactment of this Act, is in effect and includes a provision which specifies a termination date for such agreement.

"(B) After the date of the enactment of this Act, if a collective bargaining agreement described in subparagraph (A) is modified, extended, or renewed, such subparagraph shall no longer, as of the date of the modification, extension, or renewal, apply to such agreement.

"(C) In the case of a collective bargaining agreement which on such date of enactment is in effect but has no provision which specifies a termination date, the authorities and requirements in section 5009 [now section 8109] of title 38, United States Code, as amended by subsection (a)(1) of this section, to establish and collect parking fees shall take effect on January 1, 1988.

"(3) Section 5009 [now section 8109] of title 38, United States Code, as amended by subsection (a)(1) of this section, shall not apply to the expenditure of funds appropriated for a fiscal year prior to fiscal year 1987 for the construction, alteration, or acquisition (including site acquisition) of a parking facility at a Veterans' Administration medical facility.".
§ 8110. Operation of medical facilities

(a) (1) The Secretary shall establish the total number of hospital beds and nursing home beds in medical facilities over which the Secretary has direct jurisdiction for the care and treatment of eligible veterans. The Secretary shall establish the total number of such beds so as to maintain a contingency capacity to assist the Department of Defense in time of war or national emergency to care for the casualties of such war or national emergency. Of the number of beds authorized pursuant to the preceding sentence, the Secretary shall maintain the availability of such additional beds and facilities in addition to the operating bed level as the Secretary considers necessary for such contingency purposes. The President shall include in the Budget transmitted to the Congress for each fiscal year pursuant to section 1105 of title 31 [31 USCS § 1105], an amount for medical care and amounts for construction sufficient to maintain the availability of the contingency capacity referred to in the second sentence of this paragraph. The Secretary shall staff and maintain, in such a manner as to ensure the immediate acceptance and timely and complete care of patients, and in a manner consistent with the policies of the Secretary on overtime, sufficient beds and other treatment capacities to accommodate, and provide such care to, eligible veterans applying for admission and found to be in need of hospital care or medical services.

(2) The Secretary shall maintain the bed and treatment capacities of all Department medical facilities, including the staffing required to maintain such capacities, so as to ensure the accessibility and availability of such beds and treatment capacities to eligible veterans in all States, to minimize delays in admissions and in the provision of hospital, nursing home, and domiciliary care, and of medical services furnished pursuant to section 1710(a) of this title [38 USCS § 1710(a)], and to ensure that eligible veterans are provided such care and services in an appropriate manner.

(3) (A) The Under Secretary for Health shall at the end of each fiscal year (i) analyze agencywide admission policies and the records of those eligible veterans who apply for hospital care, medical services, and nursing home care, but are rejected or not immediately admitted or provided such care or services, and (ii) review and make recommendations regarding the adequacy of staff levels for compliance with the policy established under subparagraph (C), the adequacy of the established operating bed levels, the geographic distribution of operating beds, the demographic characteristics of the veteran population and the associated need for medical care and nursing home facilities and services in each State, and the proportion of the total number of operating beds that are hospital beds and that are nursing home beds.

(B) After considering the analyses and recommendations of the Under Secretary for Health pursuant to subparagraph (A) of this paragraph for any fiscal year, the Secretary shall report to the committees, on or before December 1 after the close of such fiscal year, on the results of the analysis of the Under Secretary for Health
and on the numbers of operating beds and level of treatment capacities required to enable the Department to carry out the primary function of the Veterans Health Administration. The Secretary shall include in each such report recommendations for (i) the numbers of operating beds and the level of treatment capacities required for the health care of veterans and the maintenance of the contingency capacity referred to in paragraph (1) of this subsection, and (ii) the appropriate staffing and funds therefor.

(C) The Secretary shall, in consultation with the Under Secretary for Health, establish a nationwide policy on the staffing of Department medical facilities in order to ensure that such facilities have adequate staff for the provision to veterans of appropriate, high-quality care and services. The policy shall take into account the staffing levels and mixture of staff skills required for the range of care and services provided veterans in Department facilities.

(4) (A) With respect to each law making appropriations for the Department for any fiscal year (or any part of a fiscal year), there shall be provided to the Department the funded personnel ceiling defined in subparagraph (C) of this paragraph and the funds appropriated therefor.

(B) In order to carry out the provisions of subparagraph (A) of this paragraph, the Director of the Office of Management and Budget shall, with respect to each such law (i) provide to the Department for the fiscal year (or part of a fiscal year) concerned such funded personnel ceiling and the funds necessary to achieve such ceiling, and (ii) submit to the appropriate committees of the Congress and to the Comptroller General of the United States certification that the Director has so provided such ceiling. Not later than the thirtieth day after the enactment of such a law or, in the event of the enactment of such a law more than thirty days prior to the fiscal year for which such law makes such appropriations, not later than the tenth day of such fiscal year, the certification required in the first sentence of this subparagraph shall be submitted, together with a report containing complete information on the personnel ceiling that the Director has provided to the Department for the employees described in subparagraph (C) of this paragraph.

(C) For the purposes of this paragraph, the term "funded personnel ceiling" means, with respect to any fiscal year (or part of a fiscal year), the authorization by the Director of the Office of Management and Budget to employ (under the appropriation accounts for medical care, medical and prosthetic research, and medical administration and miscellaneous operating expenses) not less than the number of employees for the employment of which appropriations have been made for such fiscal year (or part of a fiscal year).

(5) Notwithstanding any other provision of this title or of any other law, funds appropriated for the Department under the appropriation accounts for medical care, medical and prosthetic research, and medical administration and miscellaneous operating expenses may not be used for, and no employee compensated from such funds may carry out any activity in connection with, the conduct of any study comparing the cost of the provision by private contractors with the cost of the provision by the Department of commercial or industrial products and services for the Veterans Health Administration unless such funds have been specifically appropriated for that purpose.
(6) (A) Temporary research personnel of the Veterans Health Administration shall be excluded from any ceiling on full-time equivalent employees of the Department or any other personnel ceiling otherwise applicable to employees of the Department. 

(B) For purposes of subparagraph (A) of this paragraph, the term "temporary research personnel" means personnel who are employed in the Veterans Health Administration in other than a career appointment for work on a research activity and who are not paid by the Department or are paid from funds appropriated to the Department to support such activity.

(b) When the Secretary determines, in accordance with regulations which the Secretary shall prescribe, that a Department facility serves a substantial number of veterans with limited English-speaking ability, the Secretary shall establish and implement procedures, upon the recommendation of the Under Secretary for Health, to ensure the identification of sufficient numbers of individuals on such facility's staff who are fluent in both the language most appropriate to such veterans and in English and whose responsibilities shall include providing guidance to such veterans and to appropriate Department staff members with respect to cultural sensitivities and bridging linguistic and cultural differences.

(c) The Secretary shall include in the materials submitted to Congress each year in support of the budget of the Department for the next fiscal year a report on activities and proposals involving contracting for performance by contractor personnel of work previously performed by Department employees. The report shall--

(1) identify those specific activities that are currently performed at a Department facility by more than 10 Department employees which the Secretary proposes to study for possible contracting involving conversion from performance by Department employees to performance by employees of a contractor; and

(2) identify those specific activities that have been contracted for performance by contractor employees during the prior fiscal year (shown by location, subject, scope of contracts, and savings) and shall describe the effect of such contracts on the quality of delivery of health services during such year.

(d) The Secretary may not in any fiscal year close more than 50 percent of the beds within a bed section (of 20 or more beds) of a Department medical center unless the Secretary first submits to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report providing a justification for the closure. No action to carry out such closure may be taken after the submission of such report until the end of the 21-day period beginning on the date of the submission of the report.

(e) The Secretary shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives, not later than January 20 of each year, a report documenting by network for the preceding fiscal year the following:

(1) The number of medical service and surgical service beds, respectively, that were closed during that fiscal year and, for each such closure, a description of the changes in delivery of services that allowed such closure to occur.

(2) The number of nursing home beds that were the subject of a mission change during that fiscal year and the nature of each such mission change.
(f) For purposes of this section:

1. The term "closure", with respect to beds in a medical center, means ceasing to provide staffing for, and to operate, those beds. Such term includes converting the provision of such bed care from care in a Department facility to care under contract arrangements.

2. The term "bed section", with respect to a medical center, means psychiatric beds (including beds for treatment of substance abuse and post-traumatic stress disorder), intermediate, neurology, and rehabilitation medicine beds, extended care (other than nursing home) beds, and domiciliary beds.

3. The term "justification", with respect to closure of beds, means a written report that includes the following:
   (A) An explanation of the reasons for the determination that the closure is appropriate and advisable.
   (B) A description of the changes in the functions to be carried out and the means by which such care and services would continue to be provided to eligible veterans.
   (C) A description of the anticipated effects of the closure on veterans and on their access to care.

Explanatory notes:

Similar provisions were contained in former § 5001(a)(2), (3), (h) prior to the general revision of this subchapter by Act June 13, 1979, P. L. 96-22.

Amendments:

1979. Act Dec. 20, 1979 (effective as provided by § 301(b) of such Act, which appears as a note to this section), added subsec. (a)(4).

1981. Act Oct. 17, 1981 (effective 10/1/81, as provided by § 701(b)(4) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a)(4), in subpara. (A), inserted "for any fiscal year (or any part of a fiscal year)", in subpara. (B) inserted "(or part of a fiscal year)", and in subpara. (D), inserted "or part of a fiscal year)", wherever appearing.

Such Act further (effective on enactment on 10/17/81, as provided by § 701(b)(1) of such Act, which appears as 38 USCS § 1114 note), in subsec. (a), added para. (5).

Act Nov. 3, 1981, in subsec. (a), in para. (1), substituted the sentences beginning "The Administrator shall establish the total number of hospital . . .", "The Administrator shall establish the total number of such . . .", "Of the number . . .", and "The President shall include . . ." for "The Administrator, subject to the approval of the President, is authorized to establish and operate not less than one hundred and twenty-five thousand hospital beds in medical facilities over which the Administrator has direct jurisdiction for the care and treatment of eligible veterans.", and substituted para. (3) for one which read: "(3) The Chief Medical Director shall periodically analyze agencywide admission policies and the records of those eligible veterans who apply for hospital care and medical services but are rejected or not immediately admitted or provided such care or services, and the Administrator shall annually advise each committee of the results of such analysis and the number of any additional beds and treatment capacities and the appropriate staffing and funds therefor found necessary to meet the needs of such veterans for such necessary care and services."; deleted subsec. (b), which read: "(b) The Administrator, subject to the approval of the President, is authorized to establish and operate not less than twelve thousand beds during fiscal year 1980, and during each fiscal year thereafter, for the furnishing of nursing home care to eligible veterans in facilities over which the Administrator has direct jurisdiction. The
beds authorized by this subsection shall be in addition to the beds provided for in subsection (a) of this section.; and redesignated subsec. (c) as new subsec. (b).


Act Nov. 21, 1983, in subsec. (c)(3)(B), substituted "and" for "or" following "quantity".

1984. Act Oct. 19, 1984, in subsec. (a)(4), substituted subpara. (C) for one which read: "(C) Not later than the forty-fifth day after the enactment of each such law, the Comptroller General shall submit to the appropriate committees of the Congress a report stating the Comptroller General's opinion as to whether the Director of the Office of Management and Budget has complied with the requirements of such subparagraph in providing to the Veterans' Administration such funded personnel ceiling.".

1986. Act Oct. 28, 1986, in subsec. (a)(1), substituted "125,000" for "one hundred and twenty-five thousand" "100,000" for "one hundred thousand" and "90,000" for "ninety thousand" wherever appearing.

1988. Act May 20, 1988 (applicable with respect to fiscal years after fiscal year 1987 as provided by § 222(b) of such Act, which appears as a note to this section), in subsec. (a), added para. (6).

Such Act further (applicable as provided by § 401(b) of such Act, which appears as a note to this section), in subsec. (c)(2), in the introductory matter, inserted "responsive bids are received from at least two responsible, financially autonomous bidders and".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5010, as 38 USCS § 8110, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

1992. Act Oct. 9, 1992, in subsec. (a), in paras. (3)(A) and (B), in subsec. (b), and in subsec. (c), in paras. (1) and (3)(B), substituted "Under Secretary for Health" for "Chief Medical Director" wherever appearing.

1994. Act Nov. 2, 1994, in subsec. (a), substituted "Veterans Health Administration" for "Department of Medicine and Surgery" wherever appearing; and, in subsec. (c), in para. (3)(B), substituted "section 513 or 7409" for "section 213 or 4117", substituted para. (7) for one which read: "(7) Not later than February 1, 1984, and February 1 of each of the five succeeding years, the Secretary shall submit a written report to Congress describing the extent to which activities at Department health-care facilities were performed by contractors during the preceding fiscal year and the actual cost savings resulting from such contracts.", and added paras. (8) and (9).

Such Act further purported to amend subsec. (c) by deleting para. (7); however, because of a prior amendment, this amendment was not executed.

1995. Act Dec. 21, 1995, in subsec. (a)(4), in subparas. (A) and (B), substituted "subparagraph (C)" for "subparagraph (D)", deleted subpara. (C), which read: "Whenever the Director of the Office of Management and Budget is required to submit a certification under subparagraph (B) of this paragraph, the Comptroller General shall submit to the appropriate committees of the Congress a report stating the Comptroller General's opinion as to whether the Director has complied with the requirements of that subparagraph. The Comptroller General shall submit the report not later than fifteen days after the end of the period specified
in such subparagraph for the Director to submit the certification.

(D) as new subpara. (C).

and substituted subsec. (c) for one which read:

"(c)(1) Notwithstanding any other provision of law but except as provided in paragraph (3) of
this subsection--

"(A) a contract may not be entered into as a result of which an activity at a
health-care facility over which the Secretary has direct jurisdiction (hereinafter in this
subsection referred to as a 'Department health-care facility') would be converted from
an activity performed by Federal employees to an activity performed by employees of
a contractor of the Government unless the Under Secretary for Health has
determined that such activity is not a direct patient care activity or an activity incident
to direct patient care; and

"(B) in the case of an activity determined by the Under Secretary for Health under
clause (A) of this paragraph to be neither such activity, the Secretary, after
considering the advice of the Under Secretary for Health and the results of a study
described in paragraph (4) of this subsection, may, in the exercise of the Secretary's
sole discretion but subject to paragraph (2) of this subsection, enter into a contract as
a result of which the activity would be converted from an activity performed by
Federal employees to an activity performed by employees of a contractor of the
Government.

"(2) The Secretary may enter into a contract under the circumstances described in
paragraph (1)(B) of this subsection only if responsive bids are received from at least two
responsible, financially autonomous bidders and the Secretary determines--

"(A) based on the study described in paragraph (4) of this subsection with respect to
the activity involved, that the cost to the Government of the performance of such
activity under such a contract over the first five years of such performance (including
the cost to the Government of conducting the study) would be lower by 15 percent or
more than the cost of performance of such activity by Federal employees; and

"(B) that the quantity and quality of health-care services provided to eligible veterans
by the Department at the facility at which the activity is carried out would be
maintained or enhanced as a result of such a contract.

"(3) The provisions of paragraph (1) of this subsection do not apply--

"(A) to a contract or agreement under chapter 17 or section 8111, 8111A, or 8153 of
this title or under section 1535 of title 31; or

"(B) to a contract under section 513 or 7409 of this title if the Under Secretary for
Health determines that such contract is necessary in order to provide services to
eligible veterans at a Department health-care facility that could not otherwise be
provided at such facility.

"(4) A study referred to in paragraph (1)(B) of this subsection is a study that--

"(A) compares the cost of performing an activity at a Department health-care facility
through Federal employees with the cost of performing such activity through a
contractor of the Government;

"(B) is based on an estimate of the most efficient and cost-effective organization for
the effective performance of the activity by Federal employees;
"(C) with respect to the costs of performance of such activity through Federal employees, is based (to the maximum extent feasible) on actual cost factors of the Department for pay and retirement and other fringe benefits for the Federal employees who perform the activity; and

"(D) takes into account (i) the costs to the Government (including severance pay) that would result from the separation of employees whose Federal employment may be terminated as a result of the Secretary entering into a contract described in paragraph (1)(B) of this subsection, and (ii) all costs to the Government associated with the contracting process.

"(5) Prior to conducting a study described in paragraph (4) of this subsection, the Secretary shall (in a timely manner) submit to the appropriate committees of the Congress written notice of a decision to study the activity involved for possible performance by a contractor.

"(6) If, after completion of a study described in paragraph (4) of this subsection, a decision is made to convert performance of the activity involved to contractor performance, the Secretary shall promptly submit to the appropriate committees of the Congress written notice of such decision and a report with respect to such conversion. Each such report shall include--

"(A) a summary of the study described in paragraph (4) of this subsection with respect to such contract;

"(B) a certification that the study itself is available to such committees and that the results of the study meet the requirements of paragraph (2)(A) of this subsection;

"(C) a certification that the requirements of paragraph (2)(B) of this subsection would be met with respect to such contract and a summary of the information that supports such certification;

"(D) if more than 25 jobs are affected, information showing the potential economic impact on the Federal employees affected and the potential economic impact on the local community and the Government of contracting for performance of such activity; and

"(E) information showing the amount of the bid accepted for a contract for the performance of the activity and the cost of performance of such activity by Federal employees, together with the total estimated costs which the Government will incur because of the contract.

"(7) Paragraphs (1) through (6) shall not be in effect during fiscal years 1995 through 1999.

"(8) During the period covered by paragraph (7), whenever an activity at a Department health-care facility is converted from performance by Federal employees to performance by employees of a contractor of the Government, the Secretary shall--

"(A) require in the contract for the performance of such activity that the contractor, in hiring employees for the performance of the contract, give priority to former employees of the Department who have been displaced by the award of the contract; and

"(B) provide to such former employees of the Department all possible assistance in obtaining other Federal employment or entrance into job training and retraining programs.
“(9) The Secretary shall include in the Secretary's annual report to Congress under section 529 of this title, for each fiscal year covered by paragraph (7), a report on the use during the year covered by the report of contracting-out authority made available by reason of paragraph (7). The Secretary shall include in each such report a description of each use of such authority, together with the rationale for the use of such authority and the effect of the use of such authority on patient care and on employees of the Department.”.


2002. Act Jan. 23, 2002, in subsec. (a), in para. (1), inserted "and in a manner consistent with the policies of the Secretary on overtime,"; in para. (2), inserted ", including the staffing required to maintain such capacities,"; substituted "to minimize" for "and to minimize"; and inserted ", and to ensure that eligible veterans are provided such care and services in an appropriate manner", and, in para. (3), in subpara. (A), inserted "the adequacy of staff levels for compliance with the policy established under subparagraph (C),"; and added subpara. (C).

Act Dec. 2, 2002 (effective 10/1/2003, as provided by § 726(b) of such Act, which appears as a note to this section), in subsec. (a)(1), deleted "at not more than 125,000 and not less than 100,000" following "of eligible veterans", deleted "shall operate and maintain a total of not less than 90,000 hospital beds and nursing home beds and" preceding "shall maintain", and deleted "to enable the Department to operate and maintain a total of not less than 90,000 hospital and nursing home beds in accordance with this paragraph and" following "construction sufficient".

Other provisions:

Effective date and application of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

Application of amendment made by § 301(a) of Act Dec. 20, 1979. Act Dec. 20, 1979, P. L. 96-151, Title III, § 301(b), 93 Stat. 1096, provides: "The amendment made by subsection (a) [amending this section] shall take effect with respect to Public Law 96-103 [Nov. 5, 1979, 93 Stat. 771], but, with respect to such Public Law, the certification and report required by subparagraph (B) of paragraph (4) of section 5010 [now section 8110] of title 38, United States Code [subsec. (a)(4)(B) of this section] (as added by such amendment), and the report required by subparagraph (C) of such paragraph [subsec. (a)(4)(C) of this section] (as added by such amendment) shall be submitted to the appropriate committees of the Congress not later than January 15, 1980, and February 1, 1980, respectively.”.

Limitations on contracting out activities at Veterans' Administration health-care facilities. Act Oct. 14, 1982, P. L. 97-306, Title IV, § 409(a), 96 Stat. 1446, provides: "It is the policy of the United States that the Veterans' Administration--

"(1) shall maintain a comprehensive, nationwide health-care system for the direct provision of quality health-care services to eligible veterans; and

"(2) shall operate such system through cost-effective means that are consistent with carrying out fully the functions of the Department of Medicine and Surgery of the Veterans' Administration under title 38, United States Code.".


"(a) In general. (1) Subject to subsection (b), the Administrator shall, not later than June 1, 1988, in urban areas in which there are significant numbers of homeless veterans, convert
underused space located in facilities under the jurisdiction of the Administrator to 500 domiciliary-care beds to be used for the care of veterans in need of domiciliary care, primarily homeless veterans.

"(2) If the Administrator determines that it is impractical to undertake the conversions required in paragraph (1) to the extent required in that paragraph--

"(A) because appropriate space for the conversions is not available in sufficient quantity, or

"(B) because in areas in which there is sufficient space the numbers of homeless veterans in need of domiciliary care who would likely use the beds are not sufficient to warrant the conversions,

the Administrator shall carry out paragraph (1) only to the extent that the Administrator has not determined that it is impractical to do so.

"(b) Prohibition against diminution of certain other conversions. Nothing in this section shall result in the diminution of the conversion of hospital-care beds to nursing-home-care beds by the Veterans' Administration.

"(c) Funding. The Administrator shall carry out subsection (a) within the limits of available appropriations.

Application of amendment made by § 222(a) of Act May 20, 1988. Act May 20, 1988, P. L. 100-322, Title II, Part C, § 222(b), 102 Stat. 531, provides: "The amendment made by subsection (a) [adding subsec. (a)(6) to this section] shall apply with respect to fiscal years after fiscal year 1987."

Application of amendment made by § 401(a) of Act May 20, 1988. Act May 20, 1988, P. L. 100-322, Title IV, Part A, § 401(b), 102 Stat. 543, provides: "The amendment made by subsection (a) [amending subsec. (c)(2) of this section] shall apply only with respect to the awarding of contracts under solicitations issued after the date of the enactment of this Act."


Inventory of medical waste management activities at Department of Veterans Affairs health care facilities. Act Nov. 30, 2004, P. L. 108-422, Title VI, § 602, 118 Stat. 2397, provides:

"(a) Inventory. The Secretary of Veterans Affairs shall establish and maintain a national inventory of medical waste management activities in the health care facilities of the Department of Veterans Affairs. The inventory shall include the following:

"(1) A statement of the current national policy of the Department on managing and disposing of medical waste, including regulated medical waste in all its forms.

"(2) A description of the program of each geographic service area of the Department to manage and dispose of medical waste, including general medical waste and regulated medical waste, with a description of the primary methods used in those programs and the associated costs of those programs, with cost information shown separately for in-house costs (including full-time equivalent employees) and contract costs.

"(b) Report. Not later than June 30, 2005, the Secretary of Veterans Affairs shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on medical waste management activities in the facilities of the Department of Veterans Affairs. The report shall include the following:

"(1) The inventory established under subsection (a), including all the matters specified in that subsection."
“(2) A listing of each violation of medical waste management and disposal regulations reported at any health care facility of the Department over the preceding five years by any Federal or State agency, along with an explanation of any remedial or other action taken by the Secretary in response to each such reported violation.

“(3) A description of any plans to modernize, consolidate, or otherwise improve the management of medical waste and disposal programs at health care facilities of the Department, including the projected costs associated with such plans and any barriers to achieving goals associated with such plans.

“(4) An assessment or evaluation of the available methods of disposing of medical waste and identification of which of those methods are more desirable from an environmental perspective in that they would be least likely to result in contamination of air or water or otherwise cause future cleanup problems.”.

Cross References

This section is referred to in 38 USCS §§ 8103, 8111

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans’ Laws § 25

§ 8111. Sharing of Department of Veterans Affairs and Department of Defense health care resources

(a) Required coordination and sharing of health care resources. The Secretary of Veterans Affairs and the Secretary of Defense shall enter into agreements and contracts for the mutually beneficial coordination, use, or exchange of use of the health care resources of the Department of Veterans Affairs and the Department of Defense with the goal of improving the access to, and quality and cost effectiveness of, the health care provided by the Veterans Health Administration and the Military Health System to the beneficiaries of both Departments.

(b) Joint requirements for Secretaries of Veterans Affairs and Defense. To facilitate the mutually beneficial coordination, use, or exchange of use of the health care resources of the two Departments, the two Secretaries shall carry out the following functions:

(1) Develop and publish a joint strategic vision statement and a joint strategic plan to shape, focus, and prioritize the coordination and sharing efforts among appropriate elements of the two Departments and incorporate the goals and requirements of the joint sharing plan into the strategic and performance plan of each Department under the Government Performance and Results Act of 1993.
(2) Jointly fund the Department of Veterans Affairs-Department of Defense Joint Executive Committee under section 320 of this title [38 USCS § 320].
(3) Continue to facilitate and improve sharing between individual Department of Veterans Affairs and Department of Defense health care facilities, but giving priority of effort to initiatives (A) that improve sharing and coordination of health resources at the intraregional and nationwide levels, and (B) that improve the ability of both Departments to provide coordinated health care.
(4) Establish a joint incentive program under subsection (d).
(c) [Repealed]

(d) Joint incentives program.

(1) Pursuant to subsection (b)(4), the two Secretaries shall carry out a program to identify, provide incentives to, implement, fund, and evaluate creative coordination and sharing initiatives at the facility, intraregional, and nationwide levels. The program shall be administered by the Department of Veterans Affairs-Defense Joint Executive Committee, under procedures jointly prescribed by the two Secretaries.

(2) To facilitate the incentive program, effective October 1, 2003, there is established in the Treasury a fund to be known as the "DOD-VA Health Care Sharing Incentive Fund". Each Secretary shall annually contribute to the fund a minimum of $15,000,000 from the funds appropriated to that Secretary's Department. Such funds shall remain available until expended and shall be available for any purpose authorized by this section.

(3) The program under this subsection shall terminate on September 30, 2007.

(e) Guidelines and policies for implementation of coordination and sharing recommendations, contracts, and agreements.

(1) To implement the recommendations made by the Department of Veterans Affairs-Defense Joint Executive Committee with respect to health care resources, as well as to carry out other health care contracts and agreements for coordination and sharing initiatives as they consider appropriate, the two Secretaries shall jointly issue guidelines and policy directives. Such guidelines and policies shall provide for coordination and sharing that--

(A) is consistent with the health care responsibilities of the Department of Veterans Affairs under this title and with the health care responsibilities of the Department of Defense under chapter 55 of title 10 [10 USCS §§ 1071 et seq.];

(B) will not adversely affect the range of services, the quality of care, or the established priorities for care provided by either Department; and

(C) will not reduce capacities in certain specialized programs of the Department of Veterans Affairs that the Secretary is required to maintain in accordance with section 1706(b) of this title [38 USCS § 1706(b)].

(2) To facilitate the sharing and coordination of health care services between the two Departments, the two Secretaries shall jointly develop and implement guidelines for a standardized, uniform payment and reimbursement schedule for those services. Such schedule shall be implemented no later than October 1, 2003, and shall be revised periodically as necessary. The two Secretaries, following implementation of the schedule, may on a case-by-case basis waive elements of the schedule if they jointly agree that such a waiver is in the best interests of both Departments.

(3) 

(A) The guidelines established under paragraph (1) shall authorize the heads of individual Department of Defense and Department of Veterans Affairs medical facilities and service regions to enter into health care resources coordination and sharing agreements.

(B) Under any such agreement, an individual who is a primary beneficiary of one Department may be provided health care, as provided in the agreement, at a
facility or in the service region of the other Department that is a party to the sharing agreement.

(C) Each such agreement shall identify the health care resources to be shared.

(D) Each such agreement shall provide, and shall specify procedures designed to ensure, that the availability of direct health care to individuals who are not primary beneficiaries of the providing Department is (i) on a referral basis from the facility or service region of the other Department, and (ii) does not (as determined by the head of the providing facility or region) adversely affect the range of services, the quality of care, or the established priorities for care provided to the primary beneficiaries of the providing Department.

(E) Each such agreement shall provide that a providing Department or service region shall be reimbursed for the cost of the health care resources provided under the agreement and that the rate of such reimbursement shall be as determined in accordance with paragraph (2).

(F) Each proposal for an agreement under this paragraph shall be effective (i) on the 46th day after the receipt of such proposal by the Committee, unless earlier disapproved, or (ii) if earlier approved by the Committee, on the date of such approval.

(G) Any funds received through such a uniform payment and reimbursement schedule shall be credited to funds that have been allotted to the facility of either Department that provided the care or services, or is due the funds from, any such agreement.

(f) Annual joint report.

(1) At the time the President's budget is transmitted to Congress in any year pursuant to section 1105 of title 31 [31 USCS § 1105], the two Secretaries shall submit to Congress a joint report on health care coordination and sharing activities under this section during the fiscal year that ended during the previous calendar year.

(2) Each report under this section shall include the following:

(A) The guidelines prescribed under subsection (e) (and any revision of such guidelines).

(B) The assessment of further opportunities identified by the Department of Veterans Affairs-Department of Defense Joint Executive Committee under subsection (d)(3) of section 320 of this title [38 USCS § 320] for the sharing of health-care resources between the two Departments.

(C) Any recommendation made by that committee under subsection (c)(2) of that section during that fiscal year.

(D) A review of the sharing agreements entered into under subsection (e) and a summary of activities under such agreements during such fiscal year and a description of the results of such agreements in improving access to, and the quality and cost effectiveness of, the health care provided by the Veterans Health Administration and the Military Health System to the beneficiaries of both Departments.

(E) A summary of other planning and activities involving either Department in connection with promoting the coordination and sharing of Federal health-care resources during the preceding fiscal year.
(F) Such recommendations for legislation as the two Secretaries consider appropriate to facilitate the sharing of health-care resources between the two Departments.

(3) In addition to the matters specified in paragraph (2), the two Secretaries shall include in the annual report under this subsection an overall status report of the progress of health resources sharing between the two Departments as a consequence of subtitle C of title VII of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314) and of other sharing initiatives taken during the period covered by the report. Such status report shall indicate the status of such sharing and shall include appropriate data as well as analyses of that data. The annual report shall include the following:

(A) Enumerations and explanations of major policy decisions reached by the two Secretaries during the period covered by the report period with respect to sharing between the two Departments.
(B) A description of progress made in new ventures or particular areas of sharing and coordination that would be of policy interest to Congress consistent with the intent of such subtitle.
(C) A description of enhancements of access to care of beneficiaries of both Departments that came about as a result of new sharing approaches brought about by such subtitle.
(D) A description of proposals for which funds are provided through the joint incentives program under subsection (d), together with a description of their results or status at the time of the report, including access improvements, savings, and quality-of-care enhancements they brought about, and a description of any additional use of funds made available under subsection (d).

(4) In addition to the matters specified in paragraphs (2) and (3), the two Secretaries shall include in the annual report under this subsection for each year through 2008 the following:

(A) A description of the measures taken, or planned to be taken, to implement the health resources sharing project under section 722 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314) [note to this section] and any cost savings anticipated, or cost sharing achieved, at facilities participating in the project, including information on improvements in access to care, quality, and timeliness, as well as impediments encountered and legislative recommendations to ameliorate such impediments.
(B) A description of the use of the waiver authority provided by section 722(d)(1) of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314) [note to this section], including--
   (i) a statement of the numbers and types of requests for waivers under that section of administrative policies that have been made during the period covered by the report and, for each such request, an explanation of the content of each request, the intended purpose or result of the requested waiver, and the disposition of each request; and
   (ii) descriptions of any new administrative policies that enhance the success of the project.
(5) In addition to the matters specified in paragraphs (2), (3), and (4), the two Secretaries shall include in the annual report under this subsection for each year through 2009 a report on the pilot program for graduate medical education under section 725 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314) [10 USCS § 1094a note], including activities under the program during the preceding year and each Secretary's assessment of the efficacy of providing education and training under that program.

(g) Definitions. For the purposes of this section:
(1) The term "beneficiary" means a person who is a primary beneficiary of the Department of Veterans Affairs or of the Department of Defense.
(2) The term "direct health care" means health care provided to a beneficiary in a medical facility operated by the Department of Veterans Affairs or the Department of Defense.
(3) The term "head of a medical facility" (A) with respect to a medical facility of the Department of Veterans Affairs, means the director of the facility, and (B) with respect to a medical facility of the Department of Defense, means the medical or dental officer in charge or the contract surgeon in charge.
(4) The term "health-care resource" includes hospital care, medical services, and rehabilitative services, as those terms are defined in paragraphs (5), (6), and (8), respectively, of section 1701 of this title [38 USCS § 1701], services under sections 1782 and 1783 of this title [38 USCS §§ 1782 and 1783], any other health-care service, and any health-care support or administrative resource.
(5) The term "primary beneficiary" (A) with respect to the Department means a person who is eligible under this title (other than under section 1782, 1783, or 1784 [38 USCS § 1782, 1783, or 1784] or subsection (d) of this section) or any other provision of law for care or services in Department medical facilities, and (B) with respect to the Department of Defense, means a member or former member of the Armed Forces who is eligible for care under section 1074 of title 10 [10 USCS § 1074].
(6) The term "providing Department" means the Department of Veterans Affairs, in the case of care or services furnished by a facility of the Department of Veterans Affairs, and the Department of Defense, in the case of care or services furnished by a facility of the Department of Defense.
(7) The term "service region" means a geographic service area of the Veterans Health Administration, in the case of the Department of Veterans Affairs, and a service region, in the case of the Department of Defense.

References in text:

The "Government Performance and Results Act of 1993", referred to in this section, is Act August 3, 1993, P. L. 103-62, which appears in part as 5 USCS § 306 and 31 USCS §§ 1115-1119, 9703, and 9704. For full classification of such Act, consult USCS Tables volumes.

Explanatory notes:
The subtitle designator "I" has been inserted in brackets in the credits relating to Title V of Division A of Act Nov. 24, 2003, P. L. 108-136, to indicate the probable intent of Congress to maintain alphabetical continuity in designating the subtitles in such Title.

Similar provisions were contained in former § 5003 prior to the general revision of this subchapter by Act June 13, 1979, P. L. 96-22.

Amendments:

1982. Act May 4, 1982 substituted the section heading for one which read: "Use of Armed Forces Facilities"; designated the existing provisions as subsec. (a); in subsec. (a), as so designated, substituted "material, and other resources as may be needed to operate such facilities properly, except that the Administrator may not enter into an agreement that would result (1) in a permanent reduction in the total number of authorized Veterans' Administration hospital beds to a level below the minimum number of such beds required by section 5010(a)(1) of this title to be authorized, or (2) in a permanent reduction in the total number of such beds operated and maintained to a level below the minimum number of such beds required by such section to be operated and maintained" for "and material as may be needed to operate such facilities properly, or for the transfer, without reimbursement of appropriations, of facilities, supplies, equipment, or material necessary and proper for authorized care for veterans, except that at no time shall the Administrator enter into any agreement which will result in a permanent reduction of Veterans' Administration hospital and domiciliary beds below the number established or approved on June 22, 1944, plus the estimated number required to meet the load of eligibles under this title,"; and added subssecs (b)-(g).


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5011, as 38 USCS § 8111, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

1992. Act Oct. 9, 1992, in subssecs. (b), (d), and (e), substituted "Under Secretary for Health" for "Chief Medical Director" wherever appearing.

1994. Act Nov. 2, 1994, in subsec. (b), in para. (2), substituted "During odd-numbered fiscal years" for "During fiscal years 1982 and 1983" and "During even-numbered fiscal years" for "During fiscal year 1984" and deleted "Thereafter, the chairmanship of the Committee shall alternate each fiscal year between the Under Secretary for Health and the Assistant Secretary," preceding "The agencies"; and, in para. (4), substituted "At such times as" for "Within nine months of the date of the enactment of this subsection and at such times thereafter as".

Such Act further, in subsec. (f)(6), inserted "of Defense" preceding "consider appropriate".

2002. Act Jan. 23, 2002, in subsec. (g), in para. (4), inserted "services under sections 1782 and 1783 of this title" and, in para. (5), substituted "section 1782, 1783, or 1784" for "section 1711(b) or 1713".

Act Dec. 2, 2002 (effective 10/1/2003 as provided by § 721(c) of such Act, which appears as a note to this section), substituted this section for one which read:

"§ 8111. Sharing of Department and Department of Defense health-care resources

"(a) The Secretary and the Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy may enter into agreements and contracts for the mutual use or exchange of the use of hospital and domiciliary facilities, and such supplies, equipment,
material, and other resources as may be needed to operate such facilities properly, except that the Secretary may not enter into an agreement that would result (1) in a permanent reduction in the total number of authorized Department hospital beds and nursing home beds to a level below the minimum number of such beds required by section 8110(a)(1) of this title to be authorized, or (2) in a permanent reduction in the total number of such beds operated and maintained to a level below the minimum number of such beds required by such section to be operated and maintained or in any way subordinate or transfer the operation of the Department to any other agency of the Government.

"(b)(1) In order to promote the sharing of health-care resources between the Department and the Department of Defense (hereinafter in this section referred to as the 'agencies'), there is established an interagency committee to be known as the Department/Department of Defense Health-Care Resources Sharing Committee (hereinafter in this subsection referred to as the 'Committee').

"(2) The Committee shall be composed of--

"(A) the Under Secretary for Health and such other officers and employees of the Department as the Under Secretary for Health may designate; and

"(B) the Assistant Secretary of Defense for Health Affairs (hereinafter in this section referred to as the 'Assistant Secretary') and such other officers and employees of the Department of Defense as the Assistant Secretary may designate,

except that the size of the Committee shall be mutually determined by the Under Secretary for Health and the Assistant Secretary. During odd-numbered fiscal years, the Under Secretary for Health shall be the chairman of the Committee. During even-numbered fiscal years, the Assistant Secretary shall be the chairman of the Committee. The agencies shall provide administrative support services for the Committee at a level sufficient for the efficient operation of the Committee and shall share the responsibility for the provision of such services on an equitable basis.

"(3) In order to enable the Committee to make recommendations under paragraph (4) of this subsection, the Committee shall on a continuing basis--

"(A) review existing policies, procedures, and practices relating to the sharing of health-care resources between the agencies;

"(B) identify and assess further opportunities for the sharing of health-care resources between the agencies that would not, in the judgment of the Committee, adversely affect the range of services, the quality of care, or the established priorities for care provided by either agency;

"(C) identify changes in policies, procedures, and practices that would, in the judgment of the Committee, promote such sharing of health-care resources between the agencies;

"(D) monitor plans of the agencies for the acquisition of additional health-care resources, including the location of new facilities and the acquisition of major equipment, in order to assess the potential impact of such plans on further opportunities for such sharing of health-care resources; and

"(E) monitor the implementation of activities designed to promote the sharing of health-care resources between the agencies.

"(4) At such times as the Committee considers appropriate, the Committee shall make recommendations to the Secretary or the Secretary of Defense, or both, with respect to (A) changes in policies, procedures, and practices that the Committee has identified under paragraph (3)(C) of this subsection pertaining to the sharing of health-care
resources described in such paragraph, and (B) such other matters as the Committee considers appropriate in order to promote such sharing of health-care resources.

"(c)(1) After considering the recommendations made under subsection (b)(4) of this section, the Secretary and the Secretary of Defense shall jointly establish guidelines to promote the sharing of health-care resources between the agencies. Guidelines established under this subsection shall provide for such sharing consistent with the health-care responsibilities of the Department under this title and with health-care responsibilities of the Department of Defense under chapter 55 of title 10 and so as not to adversely affect the range of services, the quality of care, or the established priorities for care provided by either agency.

"(2) Guidelines established under paragraph (1) of this subsection shall authorize the heads of individual medical facilities of the agencies to enter into health-care resources sharing agreements in accordance with subsection (d) of this section and shall include guidelines for such agreements.

"(d)(1) the head of each medical facility of either agency is authorized to enter into sharing agreements with the heads of medical facilities of the other agency in accordance with guidelines established under subsection (c) of this section. Under any such agreement, an individual who is a primary beneficiary of one agency may be provided health care at a facility of the other agency that is a party to the sharing agreement.

"(2) Each such agreement shall identify the health-care resources to be shared.

"(3) Each such agreement shall provide, and shall specify procedures designed to ensure, that the availability of direct health care to individuals who are not primary beneficiaries of the providing agency (A) is on a referral basis from the facility of the other agency, and (B) does not (as determined by the head of the facility of the providing agency) adversely affect the range of services, the quality of care, or the established priorities for care provided to the primary beneficiaries of the providing agency.

"(4) Each such agreement shall provide that a providing agency shall be reimbursed for the cost of the health-care resources provided under the agreement and that the rate for such reimbursement shall be determined in accordance with the methodology agreed to pursuant to subsection (e) of this section.

"(5) Each proposal for an agreement under paragraph (1) of this section shall be submitted to the Under Secretary for Health and the Assistant Secretary and shall be effective as an agreement in accordance with its terms (A) on the forty-sixth day after receipt of such proposal by both such officials, unless earlier disapproved by either such official, or (B) if earlier approved by both such officials, on the date of such approval.

"(e) Reimbursement under any sharing agreement entered into under subsection (d) of this section shall be based upon a methodology that is agreed upon by the Under Secretary for Health and the Assistant Secretary and that provides appropriate flexibility to the heads of the facilities concerned to take into account local conditions and needs the actual costs to the providing agency’s facility of the health-care resources provided. Any funds received through such a reimbursement shall be credited to funds that have been allotted to the facility that provided the care or services.

"(f) At the time the President’s Budget is transmitted to Congress in any year pursuant to section 1105 of title 31, the Secretary and the Secretary of Defense shall submit a joint report to Congress on the implementation of this section during the fiscal year that ended during the previous calendar year. Each such report shall include--

"(1) the guidelines prescribed under subsection (c) of this section (and any revision of such guidelines);
“(2) the assessment of further opportunities identified under clause (B) of subsection (b)(3) of this section for sharing of health-care resources between agencies;

“(3) any recommendation made under subsection (b)(4) of this section during such fiscal year;

“(4) a review of sharing agreements entered into under subsection (d) of this section and a summary of activities under such agreements during such fiscal year;

“(5) a summary of other planning and activities involving either agency in connection with promoting the coordination and sharing of Federal health-care resources during the preceding fiscal year; and

“(6) such recommendations for legislation as the Secretary and the Secretary of Defense consider appropriate to facilitate the sharing of health-care resources between the agencies.

“(g) For the purposes of this section:

“(1) The term 'beneficiary' means a person who is a primary beneficiary of the Department or of the Department of Defense.

“(2) The term 'direct health care' means health care provided to a beneficiary in a medical facility operated by the Department or the Department of Defense.

“(3) The term 'head of a medical facility' (A) with respect to a medical facility of the Department, means the director of the facility, and (B) with respect to a medical facility of the Department of Defense, means the medical or dental officer in charge or the contract surgeon in charge.

“(4) The term 'health-care resource' includes hospital care, medical services, and rehabilitative services, as those terms are defined in paragraphs (5), (6), and (8), respectively, of section 1701 of this title, services under sections 1782 and 1783 of this title, any other health-care service, and any health-care support or administrative resource.

“(2) The term 'primary beneficiary' (A) with respect to the Department means a person who is eligible under this title (other than under section 1782, 1783, or 1784 or subsection (d) of this section) or any other provision of law for care or service in Department medical facilities, and (B) with respect to the Department of Defense, means a member or former member of the Armed Forces who is eligible for care under section 1074 of title 10.

“(6) The term 'providing agency' means the Department, in the case of care or services furnished by a facility of the Department, and the Department of Defense, in the case of care or services furnished by a facility of the Department of Defense.”.

2003. Act Nov. 24, 2003 (effective on enactment as provided by § 583(d)(2) of such Act, which appears as 38 USCS § 8111 note), in subsec. (b)(2), substituted "the Department of Veterans Affairs-Department of Defense Joint Executive Committee under section 320 of this title" for "the interagency committee provided for under subsection (c)"; deleted subsec. (c), which read:

“(c) DOD-VA Health Executive Committee.(1) There is established an interagency committee to be known as the Department of Veterans Affairs-Department of Defense Health Executive Committee (hereinafter in this section referred to as the "Committee"). The Committee is composed of--

"(A) the Deputy Secretary of Veterans Affairs and such other officers and employees of the Department of Veterans Affairs as the Secretary of Veterans Affairs may designate; and

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"(B) the Under Secretary of Defense for Personnel and Readiness and such other officers and employees of the Department of Defense as the Secretary of Defense may designate.

"(2)(A) During odd-numbered fiscal years, the Deputy Secretary of Veterans Affairs shall chair the Committee. During even-numbered fiscal years, the Under Secretary of Defense shall chair the Committee.

"(B) The Deputy Secretary and the Under Secretary shall determine the size and structure of the Committee, as well as the administrative and procedural guidelines for the operation of the Committee. The two Departments shall share equally the Committee's cost of personnel and administrative support and services. Support for such purposes shall be provided at a level sufficient for the efficient operation of the Committee, including a permanent staff and, as required, other temporary working groups of appropriate departmental staff and outside experts.

"(3) The Committee shall recommend to the Secretaries strategic direction for the joint coordination and sharing efforts between and within the two Departments under this section and shall oversee implementation of those efforts.

"(4) The Committee shall submit to the two Secretaries and to Congress an annual report containing such recommendations as the Committee considers appropriate.

"(5) In order to enable the Committee to make recommendations in its annual report under paragraph (4), the Committee shall do the following:

"(A) Review existing policies, procedures, and practices relating to the coordination and sharing of health care resources between the two Departments.

"(B) Identify changes in policies, procedures, and practices that, in the judgment of the Committee, would promote mutually beneficial coordination, use, or exchange of use of the health care resources of the two Departments, with the goal of improving the access to, and quality and cost effectiveness of, the health care provided by the Veterans Health Administration and the Military Health System to the beneficiaries of both Departments.

"(C) Identify and assess further opportunities for the coordination and sharing of health care resources between the Departments that, in the judgment of the Committee, would not adversely affect the range of services, the quality of care, or the established priorities for care provided by either Department.

"(D) Review the plans of both Departments for the acquisition of additional health care resources, especially new facilities and major equipment and technology, in order to assess the potential effect of such plans on further opportunities for the coordination and sharing of health care resources.

"(E) Review the implementation of activities designed to promote the coordination and sharing of health care resources between the Departments.

"(6) The Committee chairman, under procedures jointly developed by the two Secretaries, may require the Inspector General of either or both Departments to assist in activities under paragraph (5)(E).";
“(B) The assessment of further opportunities identified under subparagraph (C) of subsection (c)(5) for the sharing of health-care resources between the two Departments.

“(C) Any recommendation made under subsection (c)(4) during such fiscal year.”,
and, in paras. (3), (4)(A), (B), and (5), inserted “(Public Law 107-314)”.


2006. Act Jan. 6, 2006, in subsec. (b)(1), inserted "of 1993"; and, in subsec. (d), deleted para. (3) which read:

“(3)(A) For each fiscal year during which the program under this subsection is in effect, the Comptroller General shall conduct a review of the implementation and effectiveness of the incentives program under this subsection. Upon completion of each such annual review, the Comptroller General shall submit to the Committees on Armed Services and Veterans’ Affairs of the Senate and House of Representatives a report on the results of that review. Each such report shall be submitted not later than February 28 of the year following the fiscal year covered by the report. In addition, the Comptroller General shall conduct such a review during the first five months of fiscal year 2004 and, not later than February 28, 2004, shall submit to those committees a report on the implementation and effectiveness of the incentives program under this subsection to that date.

“(B) Each report under this paragraph shall describe activities carried out under the program under this subsection during the preceding fiscal year (or, in the case of the first such report, to the date of the submission of the report). Each report shall include at least the following:

"(i) An analysis of the initiatives funded by the Committee, and the funds so expended by such initiatives, from the DOD-VA Health Care Sharing Incentive Fund, including the purposes and effects of those initiatives on improving access to care by beneficiaries, improvements in the quality of care received by those beneficiaries, and efficiencies gained in delivering services to those beneficiaries.

"(ii) Other matters of interest, including recommendations from the Comptroller General for legislative improvements to the program.”,
and redesignated para. (4) as para. (3).

Other provisions:

Effective date and application of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

Congressional findings. Act May 4, 1982, P. L. 97-174, § 2(a), 96 Stat. 70 provides:

“The Congress makes the following findings:

"(1) There are opportunities for greater sharing of the health-care resources of the Veterans’ Administration and the Department of Defense which would, if achieved, be beneficial to both veterans and members of the Armed Forces and could result in reduced costs to the Government by minimizing duplication and underuse of health-care resources.

"(2) Present incentives to encourage such sharing of health-care resources are inadequate.

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“(3) Such sharing of health-care resources can be achieved without a detrimental effect on the primary health-care beneficiaries of the Veterans' Administration and the Department of Defense.”.

Consultation by the Assistant Secretary of Defense for Health Affairs. Act May 4, 1982, P.L. 97-174, § 3(c), 96 Stat. 74, provides: “The Assistant Secretary of Defense for Health Affairs shall consult regularly with the Surgeons General of the Army, Navy, and Air Force in carrying out the duties and functions assigned to the Assistant Secretary in section 5011 [now section 8111] of title 38, United States Code, as amended by subsection (a) of this section.”.

Guidelines. Act May 4, 1982, P.L. 97-174, § 3(d), 96 Stat. 74, provides: “The guidelines required to be established under subsection (c) of section 5011 [now section 8111] of title 38, United States Code, as added by subsection (a) of this section, shall initially be established not later than twelve months after the date of the enactment of this Act.”.


“Sec. 201. Temporary expansion of authority for sharing agreements.

“(a) Authority. The Secretary of Veterans Affairs may enter into an agreement with the Secretary of Defense under this section to expand the availability of health-care sharing arrangements with the Department of Defense under section 8111(c) of title 38, United States Code. Under such an agreement--

“(1) the head of a Department of Veterans Affairs medical facility may enter into agreements under section 8111(d) of that title with (A) the head of a Department of Defense medical facility, (B) with any other official of the Department of Defense responsible for the provision of care under chapter 55 of title 10, United States Code [10 USCS §§ 1071 et seq.], to persons who are covered beneficiaries under that chapter, in the region of the Department of Veterans Affairs medical facility, or (C) with a contractor of the Department of Defense responsible for the provision of care under chapter 55 of title 10, United States Code [10 USCS §§ 1071 et seq.], to persons who are covered beneficiaries under that chapter, in the region of the Department of Veterans Affairs medical facility; and

“(2) the term 'primary beneficiary' shall be treated as including--

“(A) with respect to the Department of Veterans Affairs, any person who is described in section 1713 of title 38, United States Code; and

“(B) with respect to the Department of Defense, any person who is a covered beneficiary under chapter 55 of title 10, United States Code [10 USCS §§ 1071 et seq.].

“(b) Use of funds. Any amount received by the Secretary from a non-Federal entity as payment for services provided by the Secretary during a prior fiscal year under an agreement entered into under this section may be obligated by the Secretary during the fiscal year in which the Secretary receives the payment.


“A proposed agreement authorized by section 201 that is entered into by the head of a Department of Veterans Affairs medical facility may take effect only if the Under Secretary for Health of the Department of Veterans Affairs finds, and certifies to the Secretary of Veterans Affairs, that implementation of the agreement--

“(1) will result in the improvement of services to eligible veterans at that facility; and
"(2) will not result in the denial of, or a delay in providing, access to care for any veteran at that facility.

"Sec. 203. Expanded sharing agreements with Department of Defense.

"Under an agreement under section 201, guidelines under section 8111(b) of title 38, United States Code, may be modified to provide that, notwithstanding any other provision of law, any person who is a covered beneficiary under chapter 55 of title 10 [10 USCS §§ 1071 et seq.] and who is furnished care or services by a facility of the Department of Veterans Affairs under an agreement entered into under section 8111 of that title, or who is described in section 1713 of title 38, United States Code, and who is furnished care or services by a facility of the Department of Defense, may be authorized to receive such care or services--

"(1) without regard to any otherwise applicable requirement for the payment of a copayment or deductible; or

"(2) subject to a requirement to pay only part of any such otherwise applicable copayment or deductible, as specified in the guidelines.

"Sec. 204. [Repealed]

"Sec. 205. Consultation with veterans service organizations.

"In carrying out this title, the Secretary of Veterans Affairs shall consult with organizations named in or approved under section 5902 of title 38, United States Code.

"Sec. 206. Annual report.

"(a) In general. For each of fiscal years 1993 through 1996, the Secretary of Defense and the Secretary of Veterans Affairs shall include in the annual report of the Secretaries under section 8111(f) of title 38, United States Code, a description of the Secretaries' implementation of this section.

"(b) Additional matters for fiscal year 1996 report. In the report under subsection (a) for fiscal year 1996, the Secretaries shall include the following:

"(1) An assessment of the effect of agreements entered into under section 201 on the delivery of health care to eligible veterans.

"(2) An assessment of the cost savings, if any, associated with provision of services under such agreements to retired members of the Armed Forces, dependents of members or former members of a uniformed service, and beneficiaries under section 1713 of title 38, United States Code.

"(3) Any plans for administrative action, and any recommendations for legislation, that the Secretaries consider appropriate to include in the report.

"Sec. 207. Authority to bill health-plan contracts.

"(a) Right to recover. In the case of a primary beneficiary (as described in section 201(a)(2)(B)) who has coverage under a health-plan contract, as defined in section 1729(i)(1)(A) of title 38, United States Code, and who is furnished care or services by a Department medical facility pursuant to this title, the United States shall have the right to recover or collect charges for such care or services from such health-plan contract to the extent that the beneficiary (or the provider of the care or services) would be eligible to receive payment for such care or services from such health-plan contract if the care or services had not been furnished by a department or agency of the United States. Any funds received from such health-plan contract shall be credited to funds that have been allotted to the facility that furnished the care or services.

"(b) Enforcement. The right of the United States to recover under such a beneficiary's health-plan contract shall be enforceable in the same manner as that provided by
subsection (a)(3), (b), (c)(1), (d), (f), (h), and (i) of section 1729 of title 38, United States Code.”.


“(a) Interagency agreement. (1) The Secretary of Defense shall enter into an agreement (characterized as a memorandum of understanding or otherwise) with the Secretary of Veterans Affairs with respect to the provision of medical care by the Secretary of Veterans Affairs to eligible military retirees in accordance with the provisions of subsection (c). That agreement shall include provisions for reimbursement of the Secretary of Veterans Affairs by the Secretary of Defense for medical care provided by the Secretary of Veterans Affairs to an eligible military retiree and may include such other provisions with respect to the terms and conditions of such care as may be agreed upon by the two Secretaries.

“(2) Reimbursement under the agreement under paragraph (1) shall be in accordance with rates agreed upon by the Secretary of Defense and the Secretary of Veterans Affairs. Such reimbursement may be made by the Secretary of Defense or by the appropriate TRICARE Managed Care Support contractor, as determined in accordance with that agreement.

“(3) In entering into the agreement under paragraph (1), particularly with respect to determination of the rates of reimbursement under paragraph (2), the Secretary of Defense shall consult with TRICARE Managed Care Support contractors.

“(4) The Secretary of Veterans Affairs may not enter into an agreement under paragraph (1) for the provision of care in accordance with the provisions of subsection (c) with respect to any geographic service area, or a part of any such area, of the Veterans Health Administration unless--

“(A) in the judgment of that Secretary, the Department of Veterans Affairs will recover the costs of providing such care to eligible military retirees; and

“(B) that Secretary has certified and documented, with respect to any geographic service area in which the Secretary proposes to provide care in accordance with the provisions of subsection (c), that such geographic service area, or designated part of any such area, has adequate capacity (consistent with the requirements in section 1705(b)(1) of title 38, United States Code, that care to enrollees shall be timely and acceptable in quality) to provide such care.

“(5) The agreement under paragraph (1) shall be entered into by the Secretaries not later than nine months after the date of the enactment of this Act. If the Secretaries are unable to reach agreement, they shall jointly report, by that date or within 30 days thereafter, to the Committees on Armed Services and the Committees on Veterans’ Affairs of the Senate and House of Representatives on the reasons for their inability to reach an agreement and their mutually agreed plan for removing any impediments to final agreement.

“(b) Depositing of reimbursements. Amounts received by the Secretary of Veterans Affairs under the agreement under subsection (a) shall be deposited in the Department of Veterans Affairs Medical Care Collections Fund established under section 1729A of title 38, United States Code.
“(c) Copayment requirement. The provisions of subsections (f)(1) and (g)(1) of section 1710 of title 38, United States Code, shall not apply in the case of an eligible military retiree who is covered by the agreement under subsection (a).

“(d) Phased implementation.(1) The Secretary of Defense shall include in each TRICARE contract entered into after the date of the enactment of this Act provisions to implement the agreement under subsection (a).

“(2) The provisions of the agreement under subsection (a)(2) and the provisions of subsection (c) shall apply to the furnishing of medical care by the Secretary of Veterans Affairs in any area of the United States only if that area is covered by a TRICARE contract that was entered into after the date of the enactment of this Act.

“(e) Eligible military retirees. For purposes of this section, an eligible military retiree is a member of the Army, Navy, Air Force, or Marine Corps who--

“(1) has retired from active military, naval, or air service;

“(2) is eligible for care under the TRICARE program established by the Secretary of Defense;

“(3) has enrolled for care under section 1705 of title 38, United States Code; and

“(4) is not described in paragraph (1) or (2) of section 1710(a) of such title.”.

**VA-DOD sharing agreements for health services.** Act Oct. 30, 2000, P. L. 106-398, § 1, 114 Stat. 1654 (enacting into law § 741 of Subtitle E of Title VII of Division A of H.R. 5408 (114 Stat. 1654A-192), as introduced on Oct. 6, 2000), provides:

“(a) Primacy of sharing agreements. The Secretary of Defense shall--

“(1) give full force and effect to any agreement into which the Secretary or the Secretary of a military department entered under section 8111 of title 38, United States Code, or under section 1535 of title 31, United States Code, which was in effect on September 30, 1999; and

“(2) ensure that the Secretary of the military department concerned directly reimburses the Secretary of Veterans Affairs for any services or resources provided under such agreement in accordance with the terms of such agreement, including terms providing for reimbursement from funds available for that military department.

“(b) Modification or termination. Any agreement described in subsection (a) shall remain in effect in accordance with such subsection unless, during the 12-month period following the date of the enactment of this Act, such agreement is modified or terminated in accordance with the terms of such agreement.”.

**Ex. Or. No. 13214 (revoked).** Ex. Or. No. 13214 of May 28, 2001, 66 Fed. Reg. 29447, which formerly appeared as a note to this section, was revoked by Ex. Or. No. 13316 of September 17, 2003, 68 Fed. Reg. 55255. Such note provided for the President's Task Force to Improve Health Care Delivery for Our Nation's Veterans.

**Effective date of Dec. 2, 2002 amendments.** Act Dec. 2, 2002, P. L. 107-314, Div A, Title VII, Subtitle C, § 721(c), 116 Stat. 2595, provides: "The amendments made by this section [amending this section, the table of sections preceding 38 USCS § 8101, and 10 USCS § 1104] shall take effect on October 1, 2003.”.


“(a) Establishment.(1) The Secretary of Veterans Affairs and the Secretary of Defense shall conduct a health care resources sharing project to serve as a test for evaluating the feasibility,
and the advantages and disadvantages, of measures and programs designed to improve the sharing and coordination of health care and health care resources between the Department of Veterans Affairs and the Department of Defense. The project shall be carried out, as a minimum, at the sites identified under subsection (b).

“(2) Reimbursement between the two Departments with respect to the project under this section shall be made in accordance with the provisions of section 8111(e)(2) of title 38, United States Code, as amended by section 721(a).

“(b) Site identification.(1) Not later than 90 days after the date of the enactment of this Act, the Secretaries shall jointly identify not less than three sites for the conduct of the project under this section.

“(2) For purposes of this section, a site at which the resource sharing project shall be carried out is an area in the United States in which--

“(A) one or more military treatment facilities and one or more VA health care facilities are situated in relative proximity to each other, including facilities engaged in joint ventures as of the date of the enactment of this Act; and

“(B) for which an agreement to coordinate care and programs for patients at those facilities could be implemented not later than October 1, 2004.

“(c) Conduct of project.(1) At sites at which the project is conducted, the Secretaries shall provide a test of a coordinated management system for the military treatment facilities and VA health care facilities participating in the project. Such a coordinated management system for a site shall include at least one of the elements specified in paragraph (2), and each of the elements specified in that paragraph must be included in the coordinated management system for at least one of the participating sites.

“(2) Elements of a coordinated management system referred to in paragraph (1) are the following:

“(A) A budget and financial management system for those facilities that--

“(i) provides managers with information about the costs of providing health care by both Departments at the site; and

“(ii) allows managers to assess the advantages and disadvantages (in terms of relative costs, benefits, and opportunities) of using resources of either Department to provide or enhance health care to beneficiaries of either Department.

“(B) A coordinated staffing and assignment system for the personnel (including contract personnel) employed at or assigned to those facilities, including clinical practitioners of either Department.

“(C) Medical information and information technology systems for those facilities that--

“(i) are compatible with the purposes of the project;

“(ii) communicate with medical information and information technology systems of corresponding elements of those facilities; and

“(iii) incorporate minimum standards of information quality that are at least equivalent to those adopted for the Departments at large in their separate health care systems.

“(d) Authority to waive certain administrative policies.(1)(A) In order to carry out subsection (c), the Secretary of Defense may, in the Secretary’s discretion, waive any administrative
policy of the Department of Defense otherwise applicable to that subsection that specifically conflicts with the purposes of the project, in instances in which the Secretary determines that the waiver is necessary for the purposes of the project.

"(B) In order to carry out subsection (c), the Secretary of Veterans Affairs may, in the Secretary's discretion, waive any administrative policy of the Department of Veterans Affairs otherwise applicable to that subsection that specifically conflicts with the purposes of the project, in instances in which the Secretary determines that the waiver is necessary for the purposes of the project.

"(C) The two Secretaries shall establish procedures for resolving disputes that may arise from the effects of policy changes that are not covered by other agreements or existing procedures.

"(2) No waiver under paragraph (1) may alter any labor-management agreement in effect as of the date of the enactment of this Act or adopted by either Department during the period of the project.

"(e) Use by DOD of certain title 38 personnel authorities.(1) In order to carry out subsection (c), the Secretary of Defense may apply to civilian personnel of the Department of Defense assigned to or employed at a military treatment facility participating in the project any of the provisions of subchapters I, III, and IV of chapter 74 of title 38, United States Code [38 USCS §§ 7401 et seq., 7431 et seq., 7451 et seq.], determined appropriate by the Secretary.

"(2) For purposes of paragraph (1), any reference in chapter 74 of title 38, United States Code [38 USCS §§ 7401 et seq.]--

"(A) to the 'Secretary' or the 'Under Secretary for Health' shall be treated as referring to the Secretary of Defense; and

"(B) to the 'Veterans Health Administration' shall be treated as referring to the Department of Defense.

"(f) Funding. From amounts available for health care for a fiscal year, each Secretary shall make available to carry out the project not less than--

"(1) $3,000,000 for fiscal year 2003;

"(2) $6,000,000 for fiscal year 2004; and

"(3) $9,000,000 for each succeeding year during which the project is in effect.

"(g) Definitions. For purposes of this section:

"(1) The term 'military treatment facility' means a medical facility under the jurisdiction of the Secretary of a military department.

"(2) The term 'VA health care facility' means a facility under the jurisdiction of the Veterans Health Administration of the Department of Veterans Affairs.

"(h) Termination.(1) The project, and the authority provided by this section, shall terminate on September 30, 2007.

"(2) The two Secretaries jointly may terminate the performance of the project at any site when the performance of the project at that site fails to meet performance expectations of the Secretaries, as determined by the Secretaries based on information available to the Secretaries to warrant such action."

“(a) Department of Defense consideration of joint construction. When considering any military construction project for the construction of a new military medical treatment facility in the United States or a territory or possession of the United States, the Secretary of Defense shall consult with the Secretary of Veterans Affairs regarding the feasibility of carrying out a joint project to construct a medical facility that--

“(1) could serve as a facility for health-resources sharing between the Department of Defense and the Department of Veterans Affairs; and

“(2) would be no more costly to each Department to construct and operate than separate facilities for each Department.

“(b) Department of Veterans Affairs consideration of joint construction. When considering the construction of a new or replacement medical facility for the Department of Veterans Affairs, the Secretary of Veterans Affairs shall consult with the Secretary of Defense regarding the feasibility of carrying out a joint project to construct a medical facility that--

“(1) could serve as a facility for health-resources sharing between the Department of Veterans Affairs and the Department of Defense; and

“(2) would be no more costly to each Department to construct and operate than separate facilities for each Department.”.

Cross References
This section is referred to in 10 USCS §§ 1104, 2641; 38 USCS §§ 8102, 8104, 8110

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 25

§ 8111A. Furnishing of health-care services to members of the Armed Forces during a war or national emergency

(a) (1) During and immediately following a period of war, or a period of national emergency declared by the President or the Congress that involves the use of the Armed Forces in armed conflict, the Secretary may furnish hospital care, nursing home care, and medical services to members of the Armed Forces on active duty.

(2) (A) During and immediately following a disaster or emergency referred to in subparagraph (B), the Secretary may furnish hospital care and medical services to members of the Armed Forces on active duty responding to or involved in that disaster or emergency.

(B) A disaster or emergency referred to in this subparagraph is any disaster or emergency as follows:

(i) A major disaster or emergency declared by the President under the Robert B. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.).

(ii) A disaster or emergency in which the National Disaster Medical System established pursuant to section 2811(b) of the Public Health Service Act (42 U.S.C. 300hh-11(b)) is activated by the Secretary of Health and Human Services under paragraph (3)(A) of that section or as otherwise authorized by law.

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The Secretary may give a higher priority to the furnishing of care and services under this section than to the furnishing of care and services to any other group of persons eligible for care and services in medical facilities of the Department with the exception of veterans with service-connected disabilities.

For the purpose of this section, the terms "hospital care", "nursing home care", and "medical services" have the meanings given such terms by sections 1701(5), 101(28), and 1701(6) of this title [38 USCS §§ 1701(5), 101(28), and 1701(6)], respectively, and the term "medical services" includes services under sections 1782 and 1783 of this title [38 USCS § 1782 and 1783].

During a period in which the Secretary is authorized to furnish care and services to members of the Armed Forces under subsection (a) of this section, the Secretary, to the extent authorized by the President and subject to the availability of appropriations or reimbursements under subsection (c) of this section, may enter into contracts with private facilities for the provision during such period by such facilities of hospital care and medical services described in paragraph (2) of this subsection.

Hospital care and medical services referred to in paragraph (1) of this subsection are--

(A) hospital care and medical services authorized under this title for a veteran and necessary for the care or treatment of a condition for which the veteran is receiving medical services at a Department facility under subsection (a) of section 1710 of this title [38 USCS § 1710], in a case in which the delay involved in furnishing such care or services at such Department facility or at any other Department facility reasonably accessible to the veteran would, in the judgment of the Under Secretary for Health, be likely to result in a deterioration of such condition; and

(B) hospital care for a veteran who--

(i) is receiving hospital care under section 1710 of this title [38 USCS § 1710]; or

(ii) is eligible for hospital care under such section and requires such care in a medical emergency that poses a serious threat to the life or health of the veteran;

if Department facilities are not capable of furnishing or continuing to furnish the care required because of the furnishing of care and services to members of the Armed Forces under subsection (a) of this section.

The cost of any care or services provided by the Department under subsection (a) of this section shall be reimbursed to the Department by the Department of Defense at such rates as may be agreed upon by the Secretary and the Secretary of Defense based on the cost of the care or services provided.

Amounts received under this subsection shall be credited to funds allotted to the Department facility that provided the care or services.

The Secretary of Veterans Affairs and the Secretary of Defense shall jointly review plans for the implementation of this section not less often than annually.

Whenever a modification to such plans is agreed to, the Secretaries shall jointly submit to the Committees on Veterans' Affairs of the Senate and House of
Representatives a report on such modification. Any such report shall be submitted within 30 days after the modification is agreed to.

(e) The Secretary shall prescribe regulations to govern any exercise of the authority of the Secretary under subsections (a) and (b) of this section and of the Under Secretary for Health under subsection (b)(2)(A) of this section.

(f) [Repealed]

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5011A, as 38 USCS § 8111A.

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (b)(2)(A), deleted "or (g)" after "(f)"; and substituted subsec. (d) for one which read:
"(d)(1) Not later than six months after the date of the enactment of this section, the Administrator and the Secretary of Defense shall enter into an agreement to plan and establish procedures and guidelines for the implementation of this section. Not later than one year after the date of the enactment of this section, the Administrator and the Secretary shall complete plans for such implementation and shall submit such plans to the Committees on Veterans' Affairs and on Armed Services of the Senate and House of Representatives.

"(2) The Administrator and the Secretary of Defense shall jointly review such plans not less often than annually thereafter and shall report to such committees any modification in such plans within thirty days after the modification is agreed to."

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

1992. Act Oct. 9, 1992, in subsecs. (b)(2)(A) and (e), substituted "Under Secretary for Health" for "Chief Medical Director".

1996. Act Oct. 9, 1996, in subsec. (b)(2)(A), substituted "subsection (a) of section 1710" for "subsection (f) of section 1712".

2000. Act Nov. 1, 2000 repealed subsec. (f), which read: "(f) Within thirty days after a declaration of a period of war or national emergency described in subsection (a) of this section (or as soon after the end of such thirty-day period as is reasonably practicable), the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the Secretary's allocation of facilities and personnel in order to provide priority hospital care, nursing home care, and medical services under this section to members of the Armed Forces. Thereafter, with respect to any fiscal year in which the authority in subsection (b) of this section to enter into contracts with private facilities has been used, the Secretary shall report within ninety days after the end of such fiscal year to those committees regarding the extent of, and the circumstances under which, such authority was used."


Act Nov. 7, 2002, in subsec. (a), redesignated para. (2) as para. (4), designated the second sentence of para. (1) as para. (3), and inserted new para. (2).

Other provisions:
Congressional findings. Act May 4, 1982, P. L. 97-174, § 2(b), 96 Stat. 70, provides:

"The Congress makes the following further findings:

"(1) During and immediately after a period of war or national emergency involving the use of the Armed Forces of the United States in armed conflict, the Department of Defense might not have adequate health-care resources to care for military personnel wounded in combat and other active-duty military personnel.

"(2) The Veterans' Administration has an extensive, comprehensive health-care system that could be used to assist the Department of Defense in caring for such personnel in such a situation."


Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17

Cross References
This section is referred to in 10 USCS § 1104; 38 USCS §§ 1721, 8110

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws §§ 25, 53

§ 8112. Partial relinquishment of legislative jurisdiction

The Secretary, on behalf of the United States, may relinquish to the State in which any lands or interests therein under the supervision or control of the Secretary are situated, such measure of legislative jurisdiction over such lands or interests as is necessary to establish concurrent jurisdiction between the Federal Government and the State concerned. Such partial relinquishment of legislative jurisdiction shall be initiated by filing a notice thereof with the Governor of the State concerned, or in such other manner as may be prescribed by the laws of such State, and shall take effect upon acceptance by such State.

Explanatory notes:
Similar provisions were contained in former § 5007 prior to the general revision of this subchapter by Act June 13, 1979, P. L. 96-22.

A prior § 5012, contained in former subchapter II of this chapter, was redesignated as § 5022 by Act June 13, 1979, P. L. 96-22, Title III, § 301(b)(1), 93 Stat. 61. The section was subsequently redesignated as § 8122 by Act May 7, 1991, P.L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5012, as 38 USCS § 8112.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Other provisions:
Effective date and application of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 25

§ 8113. Property formerly owned by National Home for Disabled Volunteer Soldiers

If by reason of any defeasance or conditional clause or clauses contained in any deed of conveyance of property to the National Home for Disabled Volunteer Soldiers, which property is owned by the United States, the full and complete enjoyment and use of such property is threatened, the Attorney General, upon request of the President, shall institute in the United States district court for the district in which the property is located such proceedings as may be proper to extinguish all outstanding adverse interests. The Attorney General may procure and accept, on behalf of the United States, by gift, purchase, cession, or otherwise, absolute title to, and complete jurisdiction over, all such property.

Explanatory notes:

Similar provisions were contained in former § 5006 prior to the general revision of this subchapter by Act June 13, 1979, P. L. 96-22.

A former § 5013, contained in former subchapter II of this chapter, was redesignated as § 5023 by Act June 13, 1979, P. L. 96-22, Title III, § 301(b)(1), 93 Stat. 61. The section was subsequently redesignated as § 8123 by Act May 7, 1991, P.L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5013, as 38 USCS § 8113.

Other provisions:

Effective date and application of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

By Act July 3, 1939, title to lease from State of New York to Board of Managers of National Home for Disabled Volunteer Soldiers relating to state camp at Bath passed to United States. (1931) 36 Op Atty Gen 484

§ 8114. Use of federally owned facilities; use of personnel

(a) The Secretary, subject to the approval of the President, may use as medical facilities such suitable buildings, structures, and grounds owned by the United States on March 3,
1925, as may be available for such purposes, and the President may by Executive order transfer any such buildings, structures, and grounds to the control and jurisdiction of the Department upon the request of the Secretary.

(b) The President may require the architectural, engineering, constructing, or other forces of any of the departments of the Government to do or assist in the construction and alteration of medical facilities, and the President may employ for such purposes individuals and agencies not connected with the Government, if in the opinion of the President such is desirable, at such compensation as the President may consider reasonable.

Explanatory notes:
Similar provisions were contained in former § 5001(e) prior to the general revision of this subchapter by Act June 13, 1979, P. L. 96-22.

A former § 5014, contained in former subchapter II of this chapter, was redesignated as § 5024 by Act June 13, 1979, P. L. 96-22, Title III, § 301(b)(1), 93 Stat. 61. The section was subsequently redesignated as § 8124 by Act May 7, 1991, P.L. 102-40, Title IV, § 402(b)(1), 105 Stat. 238.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5014, as 38 USCS § 8114.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Other provisions:
Effective date and application of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

Cross References
This section is referred to in 43 USCS § 421c

Research Guide
Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 25

§ 8115. Acceptance of certain property
The President may accept from any State or other political subdivision, or from any person, any building, structure, equipment, or grounds suitable for the care of disabled persons, with due regard to fire or other hazards, state of repair, and all other pertinent considerations. The President may designate which agency of the Federal Government shall have the control and management of any property so accepted.

Explanatory notes:
Similar provisions were contained in former § 5005 prior to the general revision of this subchapter by Act June 13, 1979, P. L. 96-22.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5015, as 38 USCS § 8115.

Other provisions:

Effective date and application of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 24

§ 8116. Nursing home revolving fund [Caution: See prospective amendment note below.]

(a) (1) Amounts realized from a transfer pursuant to section 8122(a)(2)(C) of this title [38 USCS § 8122(a)(2)(C)] shall be administered as a revolving fund and shall be available without fiscal year limitation.

   (2) The revolving fund shall be deposited in a checking account with the Treasurer of the United States.

(b) (1) The expenditure of funds from the revolving fund may be made only for the construction, alteration, and acquisition (including site acquisition) of nursing home facilities and may be made only as provided for in appropriation Acts.

   (2) For the purpose of section 8104(a)(2) of this title [38 USCS § 8104(a)(2)], a bill, resolution, or amendment which provides that funds in the revolving fund may be expended for a project involving a total expenditure of more than $2,000,000 for the construction, alteration, or acquisition (including site acquisition) of a nursing home facility shall be considered to be a bill, resolution, or amendment making an appropriation which may be expended for a major medical facility project.

Prospective amendments:

Repeal of section, effective 30 days after certification of compliance with 38 USCS § 1710B(b). Act Nov. 30, 2004, P. L. 108-422, Title IV, Subtitle B, § 411(c)(1), 118 Stat. 2389 (effective at the end of the 30-day period beginning on the date on which the Secretary of Veterans Affairs certifies to Congress that the Secretary is in compliance with 38 USCS § 1710B(b), as provided by § 411(f) of such Act, which appears as 38 USCS § 1710B note), provides that this section is repealed.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5016, as 38 USCS § 8116, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).
Cross References

This section is referred to in 38 USCS § 8122, 8165

§ 8117. Emergency preparedness

(a) Readiness of Department medical centers.
   (1) The Secretary shall take appropriate actions to provide for the readiness of Department medical centers to protect the patients and staff of such centers from chemical or biological attack or otherwise to respond to such an attack so as to enable such centers to fulfill their obligations as part of the Federal response to public health emergencies.
   (2) Actions under paragraph (1) shall include--
      (A) the provision of decontamination equipment and personal protection equipment at Department medical centers; and
      (B) the provision of training in the use of such equipment to staff of such centers.

(b) Security at Department medical and research facilities.
   (1) The Secretary shall take appropriate actions to provide for the security of Department medical centers and research facilities, including staff and patients at such centers and facilities.
   (2) In taking actions under paragraph (1), the Secretary shall take into account the results of the evaluation of the security needs at Department medical centers and research facilities required by section 154(b)(1) of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Public Law 107-188; 116 Stat. 631) [note to this section], including the results of such evaluation relating to the following needs:
      (A) Needs for the protection of patients and medical staff during emergencies, including a chemical or biological attack or other terrorist attack.
      (B) Needs, if any, for screening personnel engaged in research relating to biological pathogens or agents, including work associated with such research.
      (C) Needs for securing laboratories or other facilities engaged in research relating to biological pathogens or agents.

(c) Tracking of pharmaceuticals and medical supplies and equipment. The Secretary shall develop and maintain a centralized system for tracking the current location and availability of pharmaceuticals, medical supplies, and medical equipment throughout the Department health care system in order to permit the ready identification and utilization of such pharmaceuticals, supplies, and equipment for a variety of purposes, including response to a chemical or biological attack or other terrorist attack.

(d) Training. The Secretary shall ensure that the Department medical centers, in consultation with the accredited medical school affiliates of such medical centers, develop and implement curricula to train resident physicians and health care personnel in medical matters relating to biological, chemical, or radiological attacks or attacks from an incendiary or other explosive weapon.

(e) Participation in National Disaster Medical System.
(1) The Secretary shall establish and maintain a training program to facilitate the participation of the staff of Department medical centers, and of the community partners of such centers, in the National Disaster Medical System established pursuant to section 2811(b) of the Public Health Service Act (42 U.S.C. 300hh-11(b)).

(2) The Secretary shall establish and maintain the training program under paragraph (1) in accordance with the recommendations of the working group on the prevention, preparedness, and response to bioterrorism and other public health emergencies established under section 319F(a) of the Public Health Service Act (42 U.S.C. 247d-6(a)).

(3) The Secretary shall establish and maintain the training program under paragraph (1) in consultation with the following:
   (A) The Secretary of Defense.
   (B) The Secretary of Health and Human Services.
   (C) The Director of the Federal Emergency Management Agency.

(f) Mental health counseling.
   (1) With respect to activities conducted by personnel serving at Department medical centers, the Secretary shall develop and maintain various strategies for providing mental health counseling and assistance, including counseling and assistance for post-traumatic stress disorder, following a bioterrorist attack or other public health emergency to the following persons:
      (A) Veterans.
      (B) Local and community emergency response providers.
      (C) Active duty military personnel.
      (D) Individuals seeking care at Department medical centers.

   (2) The strategies under paragraph (1) shall include the following:
      (A) Training and certification of providers of mental health counseling and assistance.
      (B) Mechanisms for coordinating the provision of mental health counseling and assistance to emergency response providers referred to in paragraph (1).

   (3) The Secretary shall develop and maintain the strategies under paragraph (1) in consultation with the Secretary of Health and Human Services, the American Red Cross, and the working group referred to in subsection (e)(2).

Other provisions:


"(a) [Repealed]

"(b) Security at Department medical and research facilities. (1) Not later than 180 days after the date of the enactment of this Act, the Secretary shall carry out an evaluation of the security needs at Department medical centers and research facilities. The evaluation shall address the following needs:

"(A) Needs for the protection of patients and medical staff during emergencies, including a chemical or biological attack or other terrorist attack.
“(B) Needs, if any, for screening personnel engaged in research relating to biological pathogens or agents, including work associated with such research.

“(C) Needs for securing laboratories or other facilities engaged in research relating to biological pathogens or agents.

“(D) Any other needs the Secretary considers appropriate.

“(2) [Repealed]

“(c)-(f) [Repealed]

“(g) Authorization of appropriations. There is hereby authorized to be appropriated for the Department of Veterans Affairs amounts as follows:

“(1) To carry out activities required by subsection (a) of section 8117 of title 38, United States Code--

“(A) $100,000,000 for fiscal year 2002; and

“(B) such sums as may be necessary for each of fiscal years 2003 through 2006.

“(2) To carry out activities required by subsection (b)(1) of this section and subsections (b) through (f) of section 8117 of title 38, United States Code--

“(A) $33,000,000 for fiscal year 2002; and

“(B) such sums as may be necessary for each of fiscal years 2003 through 2006.”.

§ 8118. Authority for transfer of real property; Department of Veterans Affairs Capital Asset Fund

(a) (1) The Secretary may transfer real property under the jurisdiction or control of the Secretary (including structures and equipment associated therewith) to another department or agency of the United States, to a State (or a political subdivision of a State), or to any public or private entity, including an Indian tribe. Such a transfer may be made only if the Secretary receives compensation of not less than the fair market value of the property, except that no compensation is required, or compensation at less than fair market value may be accepted, in the case of a transfer to a grant and per diem provider (as defined in section 2002 of this title [38 USCS § 2002]). When a transfer is made to a grant and per diem provider for less than fair market value, the Secretary shall require in the terms of the conveyance that if the property transferred is used for any purpose other than a purpose under chapter 20 of this title [38 USCS §§ 2001 et seq.], all right, title, and interest to the property shall revert to the United States.

(2) The Secretary may exercise the authority provided by this section notwithstanding sections 521, 522, and 541 through 545 of title 40 [40 USCS §§ 521, 522, and 541 through 545]. Any such transfer shall be in accordance with this section and section 8122 of this title [38 USCS § 8122].

(3) The authority provided by this section may not be used in a case to which section 8164 of this title [38 USCS § 8164] applies.

(4) The Secretary may enter into partnerships or agreements with public or private entities dedicated to historic preservation to facilitate the transfer, leasing, or adaptive use of structures or properties specified in subsection (b)(3)(D).
(5) The authority of the Secretary under paragraph (1) expires on the date that is seven years after the date of the enactment of this section.

(b)

(1) There is established in the Treasury of the United States a revolving fund to be known as the Department of Veterans Affairs Capital Asset Fund (hereinafter in this section referred to as the "Fund"). Amounts in the Fund shall remain available until expended.

(2) Proceeds from the transfer of real property under this section shall be deposited into the Fund.

(3) To the extent provided in advance in appropriations Acts, amounts in the Fund may be expended for the following purposes:

   (A) Costs associated with the transfer of real property under this section, including costs of demolition, environmental remediation, maintenance and repair, improvements to facilitate the transfer, and administrative expenses.

   (B) Costs, including costs specified in subparagraph (A), associated with future transfers of property under this section.

   (C) Costs associated with enhancing medical care services to veterans by improving, renovating, replacing, updating, or establishing patient care facilities through construction projects to be carried out for an amount less than the amount specified in 8104(a)(3)(A) [38 USCS § 8104(a)(3)(A)] for a major medical facility project.

   (D) Costs, including costs specified in subparagraph (A), associated with the transfer, lease, or adaptive use of a structure or other property under the jurisdiction of the Secretary that is listed on the National Register of Historic Places.

(c) The Secretary shall include in the budget justification materials submitted to Congress for any fiscal year in support of the President's budget for that fiscal year for the Department specification of the following:

   (1) The real property transfers to be undertaken in accordance with this section during that fiscal year.

   (2) All transfers completed under this section during the preceding fiscal year and completed and scheduled to be completed during the fiscal year during which the budget is submitted.

   (3) The deposits into, and expenditures from, the Fund that are incurred or projected for each of the preceding fiscal year, the current fiscal year, and the fiscal year covered by the budget.

Other provisions:

Transfer of unobligated balances to Capital Asset Fund. Act Nov. 30, 2004, P. L. 108-422, Title IV, Subtitle B, § 411(d), 118 Stat. 2389 (effective at the end of the 30-day period beginning on the date on which the Secretary of Veterans Affairs certifies to Congress that the Secretary is in compliance with 38 USCS § 1710B(b), as provided by § 411(f) of such Act, which appears as 38 USCS § 1710B note), provides: "Any unobligated balances in the nursing home revolving fund under section 8116 of title 38, United States Code, as of the date of the enactment of this Act shall be deposited in the Department of Veterans Affairs Capital Asset Fund established under section 8118 of title 38, United States Code (as added by subsection (a))."
SUBCHAPTER II  PROCUREMENT AND SUPPLY

§ 8121. Revolving supply fund
§ 8122. Authority to procure and dispose of property and to negotiate for common services
§ 8123. Procurement of prosthetic appliances
§ 8124. Grant of easements in Government-owned lands
§ 8125. Procurement of health-care items
§ 8126. Limitation on prices of drugs procured by Department and certain other Federal agencies

§ 8121.  Revolving supply fund

(a) The revolving supply fund established for the operation and maintenance of a supply system for the Department (including procurement of supplies, equipment, and personal services and the repair and reclamation of used, spent, or excess personal property) shall be--

(1) available without fiscal year limitations for all expenses necessary for the operation and maintenance of such supply system;
(2) reimbursed from appropriations for the cost of all services, equipment, and supplies furnished, at rates determined by the Secretary on the basis of estimated or actual direct cost (which may be based on the cost of recent significant purchases of the equipment or supply item involved) and indirect cost; and
(3) credited with advances from appropriations for activities to which services or supplies are to be furnished, and all other receipts resulting from the operation of the funds, including property returned to the supply system when no longer required by activities to which it had been furnished, the proceeds of disposal of scraps, excess or surplus personal property of the fund, and receipts from carriers and others for loss of or damage to personal property.

(b) The Secretary may authorize the Secretary of Defense to make purchases through the fund in the same manner as activities of the Department. When services, equipment, or supplies are furnished to the Secretary of Defense through the fund, the reimbursement required by paragraph (2) of subsection (a) shall be made from appropriations made to the Department of Defense, and when services or supplies are to be furnished to the Department of Defense, the fund may be credited, as provided in paragraph (3) of subsection (a), with advances from appropriations available to the Department of Defense.

(c) At the end of each fiscal year, there shall be covered into the Treasury of the United States as miscellaneous receipts such amounts as the Secretary determines to be in excess of the requirements necessary for the maintenance of adequate inventory levels and for the effective financial management of the revolving supply fund.

(d) An adequate system of accounts for the fund shall be maintained on the accrual method, and financial reports prepared on the basis of such accounts. An annual business type budget shall be prepared for operations under the fund.
(e) The Secretary is authorized to capitalize, at fair and reasonable values as determined by the Secretary, all supplies and materials and depot stocks of equipment on hand or on order.

Amendments:

1961. Act Sept. 26, 1961, in subsec. (a), in the introductory matter, substituted "(including procurement of supplies, equipment, and personal services and the repair and reclamation of used, spent, or excess personal property)" for "(including procurement of supplies and equipment and personal services)"; and in para. (3), inserted "property returned to the supply system when no longer required by activities to which it had been furnished."

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (c), substituted "the Administrator" for "him".

1979. Act June 13, 1979 (effective as provided by § 302 of such Act, which appears as a note to this section), redesignated this section as § 5021; it formerly appeared as § 5011.

1980. Act Aug. 26, 1980, in subsec. (a), in para. (2), inserted "cost (which may be based on the cost of recent significant purchases of the equipment or supply item involved)" and substituted new concluding matter for concluding matter which read: "At the end of each fiscal year, any net income of the fund, after making provision for prior losses, shall be covered into the Treasury of the United States as miscellaneous receipts."

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5021, as 38 USCS § 8121.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

2003. Act Dec. 6, 2003 (applicable as provided by § 403(b) of such Act, which appears as a note to this section), redesignated subsecs. (b) and (c) as subsecs. (d) and (e) respectively; redesignated the concluding matter of subsec. (a) as new subsec. (c); and inserted new subsec. (b).

Other provisions:

Effective date and application of redesignation of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that the redesignation of this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.


Applicability of Dec. 6, 2003 amendments. Act Dec. 6, 2003, P. L. 108-170, Title IV, § 403(b), 117 Stat. 2062, provides: "The amendments made by subsection (a) [amending this section] shall apply only with respect to funds appropriated for a fiscal year after fiscal year 2003."

Cross References

This section is referred to in 38 USCS § 1732

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 24
Veterans Administration [now Department of Veterans Affairs] authority under predecessor to 38 USCS § 8121 to receive proceeds from sale of surplus property, did not enable it to conduct its own sales of excess or surplus property; such transactions must be handled by General Services Administration in accordance with Federal Property Act (40 USCS §§ 471 et seq.) (1977) 56 Comp Gen 754

§ 8122. Authority to procure and dispose of property and to negotiate for common services

(a) (1) The Secretary may lease for a term not exceeding three years lands or buildings, or parts or parcels thereof, belonging to the United States under the Secretary's control. Any lease made pursuant to this subsection to any public or nonprofit organization may be made without regard to the provisions of section 3709 of the Revised Statutes (41 U.S.C. 5). Notwithstanding section 1302 of title 40 [40 USCS § 1302], or any other provision of law, a lease made pursuant to this subsection to any public or nonprofit organization may provide for the maintenance, protection, or restoration, by the lessee, of the property leased, as a part or all of the consideration for the lease. Prior to the execution of any such lease, the Secretary shall give appropriate public notice of the Secretary's intention to do so in the newspaper of the community in which the lands or buildings to be leased are located. The proceeds from such leases, less expenses for maintenance, operation, and repair of buildings leased for living quarters, shall be covered into the Treasury of the United States as miscellaneous receipts.

(2) Except as provided in paragraph (3), the Secretary may not during any fiscal year transfer to any other department or agency of the United States or to any other entity real property that is owned by the United States and administered by the Secretary unless the proposed transfer is described in the budget submitted to Congress pursuant to section 1105 of title 31 [31 USCS § 1105] for that fiscal year.

(3) (A) Subject to subparagraph (B) of this paragraph, the Secretary may, without regard to paragraph (2) of this subsection or any other provision of law relating to the disposition of real property by the United States, transfer to a State for use as the site of a State nursing-home or domiciliary facility real property described in subparagraph (E) of this paragraph which the Secretary determines to be excess to the needs of the Department.

(B) A transfer of real property may not be made under this paragraph unless--

(i) the Secretary has determined that the State has provided sufficient assurance that it has the resources (including any resources which are reasonably likely to be available to the State under subchapter III of chapter 81 of this title [38 USCS §§ 8131 et seq.] and section 1741 of this title [38 USCS § 1741]) necessary to construct and operate a State home nursing or domiciliary care facility; and

(ii) the transfer is made subject to the conditions (I) that the property be used by the State for a nursing-home or domiciliary care facility in accordance with the conditions and limitations applicable to State home facilities constructed with assistance under subchapter III of chapter 81 of this title [38 USCS §§ 8131 et seq.], and (II) that, if the property is used at any time for any other purpose, all right, title, and interest in and to the property shall revert to the United States.

(C) A transfer of real property may not be made under this paragraph until--
(i) the Secretary submits to the Committees on Veterans' Affairs of the Senate and House of Representatives, not later than June 1 of the year in which the transfer is proposed to be made (or the year preceding that year), a report providing notice of the proposed transfer; and
(ii) a period of 90 consecutive days elapses after the report is received by those committees.
(D) A transfer under this paragraph shall be made under such additional terms and conditions as the Secretary considers appropriate to protect the interests of the United States.
(E) Real property described in this subparagraph is real property that is owned by the United States and administered by the Secretary.

(b) The Secretary may, for the purpose of extending benefits to veterans and dependents, and to the extent the Secretary deems necessary, procure the necessary space for administrative purposes by lease, purchase, or construction of buildings, or by condemnation or declaration of taking, pursuant to law.

(c) The Secretary may procure laundry services, and other common services as specifically approved by the Secretary from nonprofit, tax-exempt educational, medical or community institutions, without regard to the requirements of section 302(c) of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 252(c)), whenever such services are not reasonably available from private commercial sources. Notwithstanding this exclusion, the provisions of section 304 of that Act (41 U.S.C. 254) shall apply to procurement authorized by this subsection.

(d) (1) Real property under the jurisdiction of the Secretary may not be declared excess by the Secretary and disposed of by the General Services Administration or any other entity of the Federal Government unless the Secretary determines that the property is no longer needed by the Department in carrying out its functions and is not suitable for use for the provision of services to homeless veterans by the Department or by another entity under an enhanced-use lease of such property under section 8162 of this title [38 USCS § 8162].

(2) The Secretary may transfer real property under this section, or under section 8118 of this title [38 USCS § 8118], if the Secretary-
- places a notice in the real estate section of local newspapers and in the Federal Register of the Secretary's intent to transfer that real property (including land, structures, and equipment associated with the property);
- holds a public hearing;
- provides notice to the Administrator of General Services of the Secretary's intention to transfer that real property and waits for 30 days to elapse after providing that notice; and
- after such 30-day period has elapsed, notifies the congressional veterans' affairs committees of the Secretary's intention to dispose of the property and waits for 60 days to elapse from the date of that notice.

References in text:
"Section 302(c) of the Federal Property and Administrative Services Act of 1949", referred to in subsec. (c), which formerly appeared as 41 USCS § 252(c), was deleted by Act July 18,
1974, P. L. 98-369, § 2714(a)(1)(B), and subsec. (c)(1) of such section comprises restated provisions formerly contained in subsec. (e).

Amendments:

1966. Act Nov. 7, 1966, substituted new catchline for one which read: "Authority to procure and dispose of property"; and added subsec. (c).

1973. Act Aug. 2, 1973 (effective 9/1/73, as provided by § 501 of such Act, which appears as 38 USCS § 1701 note), in subsec. (a), inserted "Any lease made pursuant to this subsection to any public or nonprofit organization may be made without regard to the provisions of section 3709 of the Revised Statutes (41 U.S.C. 5). Notwithstanding section 321 of the Act entitled 'An Act making appropriations for the legislative branch of the Government for the fiscal year ending June 30, 1933, and for other purposes,' approved June 30, 1932 (40 U.S.C. 303b), or any other provision of law, a lease made pursuant to this subsection to any public or nonprofit organization may provide for the maintenance, protection, or restoration, by the lessee, of the property leased, as a part or all of the consideration for the lease. Prior to the execution of any such lease, the Administrator shall give appropriate public notice of his intention to do so in the newspaper of the community in which the lands or buildings to be leased are located."

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), substituted "the Administrator's" for "his" wherever appearing; in subsec. (b), substituted "the Administrator" for "he"; and in subsec. (c), substituted "the Administrator" for "him".

1979. Act June 13, 1979 (effective as provided by § 302 of such Act, which appears as a note to this section), redesignated this section as § 5022; it formerly appeared as § 5012.


1988. Act May 20, 1988, in subsec. (a), substituted para. (2) for one which read:

"(A) Before entering into a transaction described in subparagraph (B) of this paragraph with respect to any real property owned by the United States and administered by the Veterans' Administration which has an estimated value in excess of $50,000, the Administrator shall submit a report of the facts concerning the proposed transaction to the Committees on Veterans' Affairs of the Senate and House of Representatives, and such transaction may not then be entered into until after the expiration of 180 days from the date upon which the report is submitted.

"(B) Subparagraph (A) of this paragraph applies to (i) any transfer of an interest in real property to another Federal agency or to a State (or any political subdivision of a State), and (ii) any report to a Federal disposal agency of excess real property.

"(C) A statement in an instrument of conveyance, including a lease, that the requirements of this paragraph have been met, or that the conveyance is not subject to this paragraph, is conclusive for the purposes of all matters pertaining to the ownership of any right or interest in the property conveyed by such instrument."
Act Nov. 18, 1988, in subsec. (a), in para. (2)(A), substituted "Except as provided in paragraph (3) of this subsection, the" for ""The", and added para. (3).

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5022, as 38 USCS § 8122, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (a)(3)(A), substituted "State" for "State home" and "this paragraph" for "the paragraph".

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

2001. Act Dec. 21, 2001, in subsec. (d), inserted "and is not suitable for use for the provision of services to homeless veterans by the Department or by another entity under an enhanced-use lease of such property under section 8162 of this title".


2004. Act Nov. 30, 2004, in subsec. (a), substituted para. (2) for one which read:

"(2)(A) Except as provided in paragraph (3) of this subsection, the Secretary may not during any fiscal year transfer to another Federal agency or to a State (or any political subdivision of a State) any interest in real property described in subparagraph (B) of this paragraph unless (i) the transfer (as proposed) was described in the budget for that fiscal year submitted to Congress pursuant to section 1105 of title 31, and (ii) the Department receives compensation equal to the fair market value of the property.

"(B) An interest in real property described in this subparagraph is an interest in real property that is owned by the United States and administered by the Department and that has an estimated value in excess of $50,000.

"(C) Amounts realized from the transfer of any interest in real property described in subparagraph (B) of this paragraph shall be deposited in the nursing home revolving fund established under section 8116 of this title."

and, in subsec. (d), designated the existing provisions as para. (1), and added para. (2).

Other provisions:

Effective date and application of redesignation of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that the redesignation of this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section, see § 5 of such Act, which appears as 10 USCS § 101 note.

Limitation on transfer of property to other agencies; reports. Act May 20, 1988, P. L. 100-322, Title IV, Part C, § 421(a)(2), 102 Stat. 553, provides: "Any proposed transfer of real property described in subparagraph (B) of section 5022(a)(2) [now section 8122(a)(2)] of title 38, United States Code, as amended by paragraph (1), that is described in a report submitted to the Committees on Veterans' Affairs of the Senate and House of Representatives by the
Administrator not later than 30 days after the date of the enactment of this Act shall be deemed for purposes of subparagraph (A) of that section to have been described in the President's budget for fiscal year 1989."

Cross References
This section is referred to in 36 USCS § 493; 38 USCS §§ 8116, 8162, 8164, 8201

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§ 8123. Procurement of prosthetic appliances

The Secretary may procure prosthetic appliances and necessary services required in the fitting, supplying, and training and use of prosthetic appliances by purchase, manufacture, contract, or in such other manner as the Secretary may determine to be proper, without regard to any other provision of law.

Amendments:
1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), substituted "the Administrator" for "he".
1979. Act June 13, 1979 (effective as provided by § 302 of such Act, which appears as a note to this section), redesignated this section as § 5023; it formerly appeared as § 5013.
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5023, as 38 USCS § 8123.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Other provisions:
Effective date and application of redesignation of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provides that the redesignation of this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

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§ 8124. Grant of easements in Government-owned lands

The Secretary, whenever the Secretary deems it advantageous to the Government and upon such terms and conditions as the Secretary deems advisable, may grant on behalf of the United States to any State, or any agency or political subdivision thereof, or to any public-service company, easements in any rights-of-way over lands belonging to the United States which are under the Secretary's supervision and control. Such grant may include the use of such easements or rights-of-way by public utilities to the extent authorized and under the conditions imposed by the laws of such State relating to use of public highways. Such partial, concurrent, or exclusive jurisdiction over the areas
covered by such easements or rights-of-way, as the Secretary deems necessary or desirable, is hereby ceded to the State in which the land is located. The Secretary may accept or secure on behalf of the United States from the State in which is situated any land conveyed in exchange for any such easement or right-of-way, such jurisdiction as the Secretary may deem necessary or desirable over the land so acquired. Any such easement or right-of-way shall be terminated upon abandonment or nonuse of the same and all right, title, and interest in the land covered thereby shall thereupon revert to the United States or its assignee.

Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), substituted "the Administrator" for "he" preceding "deems it advantageous", "deems advisable", and "may deem", and substituted "the Administrator's" for "his".

1979. Act June 13, 1979 (effective as provided by § 302 of such Act, which appears as a note to this section), redesignated this section as § 5024; it formerly appeared as § 5014.

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5024, as 38 USCS § 8124.

Act Aug. 6, 1991, substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

Other provisions:

Effective date and application of redesignation of section. Act June 13, 1979, P. L. 96-22, Title III, § 302(a), (b)(1), 93 Stat. 62, located at 38 USCS § 8101 note, provided that the redesignation of this section is effective Oct. 1, 1979; but shall not apply with respect to the acquisition, construction, or alteration of any medical facility, as defined in 38 USCS § 5001(3) (now 38 USCS § 8101(3)), if such acquisition, construction, or alteration (not including exchange) was approved before Oct. 1, 1979, by the President.

Cross References

This section is referred to in 43 USCS § 421c

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§ 8125. Procurement of health-care items

(a) Except as provided in subsections (b) and (c) of this section, the Secretary may not procure health-care items under local contracts.

(b) (1) A health-care item for use by the Department may be procured under a local contract if--

(A) the procurement is within the limits prescribed in paragraph (3) of this subsection; and

(B) (i) the item is not otherwise available to the Department medical center concerned,

(ii) procurement of the item by a local contract is necessary for the effective furnishing of health-care services or the conduct of a research or education
program at a Department medical center, as determined by the director of the center in accordance with regulations which the Under Secretary for Health shall prescribe, or

(iii) procurement under a local contract is demonstrably more cost-effective for the item.

(2) In the case of the need for an emergency procurement of a health-care item, such item may be procured under a local contract, but no greater quantity of such item may be procured by a local contract than is reasonably necessary to meet the emergency need and the reasonably foreseeable need for the item at the medical center concerned until resupply can be achieved through procurement actions other than emergency procurement.

(3) (A) Except as provided in subparagraphs (C) and (D) of this paragraph, not more than 20 percent of the total of all health-care items procured by the Department in any fiscal year (measured as a percent of the total cost of all such health-care items procured by the Department in that fiscal year) may be procured under local contracts.

(B) Local contracts for the procurement of health-care items shall, to the maximum extent feasible, be awarded to regular dealers or manufacturers engaged in the wholesale supply of such items.

(C) The Secretary may increase for a fiscal year the percentage specified in subparagraph (A) of this section to a percentage not greater than 30 percent if the Secretary, based on the experience of the Department during the two fiscal years preceding such fiscal year, determines that the increase and the amount of the increase are necessary in the interest of the effective furnishing of health-care services by the Department. The authority to increase such percentage may not be delegated.

(D) Items procured through an emergency procurement shall not be counted for the purpose of this paragraph.

(c) A provision of law that is inconsistent with subsection (a) or (b) of this section shall not apply, to the extent of the inconsistency, to the procurement of a health-care item for use by the Department.

(d) (1) Not later than December 1 of each year, the director of each Department medical center shall transmit to the Secretary a report containing a list indicating the quantity of each health-care item procured at that medical center under a local contract during the preceding fiscal year and the total amount paid for such item during such fiscal year.

(2) Not later than February 1 of each year, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on the experience in carrying out this section during the preceding fiscal year.

(3) [Deleted]

(e) For the purposes of this section:

(1) The term "health-care item" includes any item listed in, or (as determined by the Secretary) of the same nature as an item listed in, Federal Supply Classification (FSC) Group 65 or 66. Such term does not include perishable items. Effective December 1, 1992, such term also includes any item listed in, or (as determined by the Secretary) of the same nature as an item listed in, Federal Supply Classification (FSC) Group 73.
(2) The term "local contract" means a contract entered into by a Department medical center for procurement of an item for use by that medical center.

(3) The term "emergency procurement" means a procurement necessary to meet an emergency need, affecting the health or safety of a person being furnished health-care services by the Department, for an item.

Amendments:


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5025, as 38 USCS § 8125.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.


2001. Act June 5, 2001, in subsec. (d), in para. (1), deleted "(beginning in 1992)" following "each year", in para. (2), deleted "(beginning in 1993)" following "each year", and deleted para. (3), which read: "(3) Not later than February 1 of each year from 1989 through 1992, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on the experience in carrying out this section during the preceding fiscal year. The first such report shall contain information showing the percentage (measured by cost) of the total of all health-care items procured by the Department during fiscal year 1988 that were procured through local contracts. The other reports under this paragraph shall contain information showing the percentage (measured by cost) of the total of all health-care items procured by the Department, and by each Department medical center, during the fiscal year covered by the report that were purchased through local contracts and, in the case of each medical center at which the percentage was greater than 20 percent, an explanation of the reasons why that occurred."

Other provisions:

Standardization of medical and pharmaceutical items. Act May 20, 1988, P. L. 100-322, Title IV, Part A, § 402, 102 Stat. 543; Nov. 18, 1988, P. L. 100-687, Div B, Title XV, § 1508, 102 Stat. 4137, provides: "Not later than October 1, 1989, the Administrator shall develop and fully implement an agency-wide plan for the cost-effective standardization, in a manner consistent with the effective furnishing of health-care services, of health-care items (as defined in section 5025(e)(1) [now section 8125(e)(1)] of title 38, United States Code) procured by the Veterans' Administration. The plan shall provide for the procurement of generic pharmaceutical items when such procurement is more economical than procurement of a name-brand pharmaceutical item unless the Chief Medical Director of the Veterans' Administration [Under Secretary for Health of the Department of Veterans Affairs] (1) determines, after consultation with the Commissioner of the Food and Drug Administration, that an equivalent generic item is not available, or (2) determines that the procurement of a name-brand item is necessary in the interests of effective patient care."

Effective date and application of subsec. (b) of this section. Act May 20, 1988, P. L. 100-322, Title IV, Part A, § 403(b), 102 Stat. 545; Nov. 18, 1988, P. L. 100-687, Div B, Title XV, § 1507(a), 102 Stat. 4136, provides:

"(1) Subsections (b)(1), and (b)(2) of section 5025 [now section 8125] of title 38, United States Code (as added by subsection (a)), shall take effect one year after the date of the enactment of this Act.
"(2) Subsection (b)(3) of such section shall apply to health-care items procured for use by the Veterans' Administration after September 30, 1990."

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§ 8126. Limitation on prices of drugs procured by Department and certain other Federal agencies

(a) Each manufacturer of covered drugs shall enter into a master agreement with the Secretary under which--

(1) beginning January 1, 1993, the manufacturer shall make available for procurement on the Federal Supply Schedule of the General Services Administration each covered drug of the manufacturer;
(2) with respect to each covered drug of the manufacturer procured by a Federal agency described in subsection (b) on or after January 1, 1993, that is purchased under depot contracting systems or listed on the Federal Supply Schedule, the manufacturer has entered into and has in effect a pharmaceutical pricing agreement with the Secretary (or the Federal agency involved, if the Secretary delegates to the Federal agency the authority to enter into such a pharmaceutical pricing agreement) under which the price charged during the one-year period beginning on the date on which the agreement takes effect may not exceed 76 percent of the non-Federal average manufacturer price (less the amount of any additional discount required under subsection (c)) during the one-year period ending one month before such date (or, in the case of a covered drug for which sufficient data for determining the non-Federal average manufacturer price during such period are not available, during such period as the Secretary considers appropriate), except that such price may nominally exceed such amount if found by the Secretary to be in the best interests of the Department or such Federal agencies;
(3) with respect to each covered drug of the manufacturer procured by a State home receiving funds under section 1741 of this title [38 USCS § 1741], the price charged may not exceed the price charged under the Federal Supply Schedule at the time the drug is procured; and
(4) unless the manufacturer meets the requirements of paragraphs (1), (2), and (3), the manufacturer may not receive payment for the purchase of drugs or biologicals from--

(A) a State plan under title XIX of the Social Security Act [42 USCS §§ 1396 et seq.] except as authorized under section 1927(a)(3) of such Act [42 USCS § 1396r-8(a)(3)],
(B) any Federal agency described in subsection (b), or
(C) any entity that receives funds under the Public Health Service Act.

(b) The Federal agencies described in this subsection are as follows:

(1) The Department.
(2) The Department of Defense.
(3) The Public Health Service, including the Indian Health Service.
(4) The Coast Guard.
(c) With respect to any covered drug the price of which is determined in accordance with a pharmaceutical pricing agreement entered into pursuant to subsection (a)(2), beginning on or after January 1, 1993, the manufacturer shall provide a discount in an amount equal to the amount by which the change in non-Federal price exceeds the amount equal to--

(1) the non-Federal average manufacturer price of the drug during the 3-month period that ends one year before the last day of the month preceding the month during which the contract for the covered drug goes into effect (or, in the case of a covered drug for which sufficient data for determining the non-Federal average manufacturer price during such period is not available, during such period as the Secretary considers appropriate); multiplied by

(2) the percentage increase in the Consumer Price Index for all urban consumers (U.S. city average) between the last month of the period described in paragraph (1) and the last month preceding the month during which the contract goes into effect for which Consumer Price Index data is available.

(d) In the case of a covered drug of a manufacturer that has entered into a multi-year contract with the Secretary under subsection (a)(2) for the procurement of the drug--

(1) during any one-year period that follows the first year for which the contract is in effect, the contract price charged for the drug may not exceed the contract price charged during the preceding one-year period, increased by the percentage increase in the Consumer Price Index for all urban consumers (U.S. city average) during the 12-month period ending with the last month of such preceding one-year period for which Consumer Price Index data is available; and

(2) in applying subsection (c) to determine the amount of the discount provided with respect to the drug during a year that follows the first year for which the contract is in effect, any reference in such subsection to "the month during which the contract goes into effect" shall be considered a reference to the first month of such following year.

(e) (1) The manufacturer of any covered drug the price of which is determined in accordance with a pharmaceutical pricing agreement entered into pursuant to subsection (a)(2) shall--

(A) not later than 30 days after the first day of the last quarter that begins before the agreement takes effect (or, in the case of an agreement that takes effect on January 1, 1993, not later than December 4, 1992), report to the Secretary the non-Federal average manufacturer price for the drug during the one-year period that ends on the last day of the previous quarter; and

(B) not later than 30 days after the last day of each quarter for which the agreement is in effect, report to the Secretary the non-Federal average manufacturer price for the drug during such quarter.

(2) The provisions of subparagraphs (B) and (C) of section 1927(b)(3) of the Social Security Act [42 USCS § 1396r-8(b)(3)(B), (C)] shall apply to drugs described in paragraph (1) and the Secretary in the same manner as such provisions apply to covered outpatient drugs and the Secretary of Health and Human Services under such subparagraphs, except that references in such subparagraphs to prices or information reported or required under "subparagraph (A)" shall be deemed to refer to information reported under paragraph (1).
(3) In order to determine the accuracy of a drug price that is reported to the Secretary under paragraph (1), the Secretary may audit the relevant records of the manufacturer or of any wholesaler that distributes the drug, and may delegate the authority to audit such records to the appropriate Federal agency described in subsection (b).

(4) Any information contained in a report submitted to the Secretary under paragraph (1) or obtained by the Secretary through any audit conducted under paragraph (3) shall remain confidential, except as the Secretary determines necessary to carry out this section and to permit the Comptroller General and the Director of the Congressional Budget Office to review the information provided.

(f) The Secretary shall supply to the Secretary of Health and Human Services--
(1) upon the execution or termination of any master agreement, the name of the manufacturer, and
(2) on a quarterly basis, a list of manufacturers who have entered into master agreements under this section.

(g) (1) Any reference in this section to a provision of the Social Security Act shall be deemed to be a reference to the provision as in effect on November 4, 1992.
(2) A manufacturer is deemed to meet the requirements of subsection (a) if the manufacturer establishes to the satisfaction of the Secretary that the manufacturer would comply (and has offered to comply) with the provisions of this section (as in effect immediately after the enactment of this section [enacted Nov. 4, 1992]), and would have entered into an agreement under this section (as such section was in effect at such time), but for a legislative change in this section after November 4, 1992.

(h) In this section:
(1) The term "change in non-Federal price" means, with respect to a covered drug that is subject to an agreement under this section, an amount equal to--
   (A) the non-Federal average manufacturer price of the drug during the 3-month period that ends with the month preceding the month during which a contract goes into effect (or, in the case of a covered drug for which sufficient data for determining the non-Federal average manufacturer price during such period is not available, during such period as the Secretary considers appropriate); minus
   (B) the non-Federal average manufacturer price of the drug during the 3-month period that ends one year before the end of the period described in subparagraph (A) (or, in the case of a covered drug for which sufficient data for determining the non-Federal average manufacturer price during such period is not available, during such period preceding the period described in subparagraph (A) as the Secretary considers appropriate).
(2) The term "covered drug" means--
   (A) a drug described in section 1927(k)(7)(A)(ii) of the Social Security Act [42 USCS § 1396r-8(k)(7)(A)(ii)], or that would be described in such section but for the application of the first sentence of section 1927(k)(3) of such Act [42 USCS § 1396r-8(k)(3)];
   (B) a drug described in section 1927(k)(7)(A)(iv) of the Social Security Act [42 USCS § 1396r-8(k)(7)(A)(iv)], or that would be described in such section but for the application of the first sentence of section 1927(k)(3) of such Act [42 USCS § 1396r-8(k)(3)]; or
(C) any biological product identified under section 600.3 of title 21, Code of Federal Regulations.

(3) The term "depot" means a centralized commodity management system through which covered drugs procured by an agency of the Federal Government are--
   (A) received, stored, and delivered through--
       (i) a federally owned and operated warehouse system, or
       (ii) a commercial entity operating under contract with such agency; or
   (B) delivered directly from the commercial source to the entity using such covered drugs.

(4) The term "manufacturer" means any entity which is engaged in--
   (A) the production, preparation, propagation, compounding, conversion, or processing of prescription drug products, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, or
   (B) in the packaging, repackaging, labeling, relabeling, or distribution of prescription drug products.

Such term does not include a wholesale distributor of drugs or a retail pharmacy licensed under State law.

(5) The term "non-Federal average manufacturer price" means, with respect to a covered drug and a period of time (as determined by the Secretary), the weighted average price of a single form and dosage unit of the drug that is paid by wholesalers in the United States to the manufacturer, taking into account any cash discounts or similar price reductions during that period, but not taking into account--
   (A) any prices paid by the Federal Government; or
   (B) any prices found by the Secretary to be merely nominal in amount.

(6) The term "weighted average price" means, with respect to a covered drug and a period of time (as determined by the Secretary) an amount equal to--
   (A) the sum of the products of the average price per package unit of each quantity of the drug sold during the period and the number of package units of the drug sold during the period; divided by
   (B) the total number of package units of the drug sold during the period.

(i) (1) If the Secretary modifies a multi-year contract described in subsection (d) to include a covered drug of the manufacturer that was not available for inclusion under the contract at the time the contract went into effect, the price of the drug shall be determined as follows:
   (A) For the portion of the first contract year during which the drug is so included, the price of the drug shall be determined in accordance with subsection (a)(2), except that the reference in such subsection to "the one-year period beginning on the date the agreement takes effect" shall be considered a reference to such portion of the first contract year.
   (B) For any subsequent contract year, the price of the drug shall be determined in accordance with subsection (d), except that each reference in such subsection to "the first year for which the contract is in effect" shall be considered a reference to the portion of the first contract year during which the drug is included under the contract.
(2) In this subsection, the term "contract year" means any one-year period for which a multi-year contract described in subsection (d) is in effect.

References in text:
The "Public Health Service Act" referred to in this section, is Act July 1, 1944, ch 373, 58 Stat. 682, which appears generally as 42 USCS §§ 201 et seq. For full classification of such Act, consult USCS Tables volumes.
The "Social Security Act", referred to in this section, is Act Aug. 14, 1935, ch 531, 49 Stat. 620 which appears generally as 42 USCS §§ 301 et seq. For full classification of such Act, consult USCS Tables volumes.

Amendments:
1993. Act April 12, 1993 (effective as if included in the enactment of § 603 of Act Nov. 4, 1992, P. L. 102-585, as provided by § 1(b) of Act April 12, 1993, which appears as a note to this section), in subsec. (a)(2), deleted "preceding such date" following "such period"; in subsec. (c), in the introductory matter, deleted "for calendar quarters" following "subsection (a)(2)," and, in para. (1), deleted "preceding the month during which the contract goes into effect" following "such period", and substituted "multiplied by" for "increased by"; in subsec. (d), substituted para. (1) for one which read: "(1) during any one-year period that follows the first year for which the contract is in effect, the price charged may not exceed the price charged during the preceding one-year period, increased by the percentage increase in the Consumer Price Index for all urban consumers (U.S. city average) between the last months of such one-year periods for which Consumer Price Index data is available; and"; and added subsec. (i).

1994. Act Nov. 2, 1994, in subsec. (e)(1)(A), substituted "December 4, 1992" for "30 days after the date of the enactment of this section" and "one-year" for "1-year"; in subsec. (f)(2), substituted the concluding period for ",", and; and, in subsec. (g)(1) and (2), substituted "November 4, 1992" for "the date of the enactment of this section".

1996. Act Feb. 10, 1996 (effective as if included in the enactment of Act Nov. 4, 1992, § 603, as provided by § 737(b) of Act Feb. 10, 1996, which appears as a note to this section), in subsec. (b), added para. (4).

1997. Act Nov. 21, 1997, in subsec. (h)(2), in subpara. (B), deleted "or" after the concluding semicolon, in subpara. (C), substituted the concluding period for ";" or deleted subpara. (D), which read: "(D) insulin certified under section 506 of the Federal Food, Drug, and Cosmetic Act.".

Other provisions:
Effective date of April 12, 1993 amendments. Act April 12, 1993, P. L. 103-18, § 1(b), 107 Stat. 52, provides: "The amendments made by subsection (a) [amending this section] shall take effect as if included in the enactment of section 603 of the Veterans Health Care Act of 1992 [adding this section and amending the chapter analysis]."


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77 Am Jur 2d, Veterans and Veterans' Laws § 24
SUBCHAPTER III  STATE HOME FACILITIES FOR
FURNISHING DOMICILIARY, NURSING HOME, AND
HOSPITAL CARE

§ 8131. Definitions
§ 8132. Declaration of purpose
§ 8133. Authorization of appropriations
§ 8134. General regulations
§ 8135. Applications with respect to projects; payments
§ 8136. Recapture provisions
§ 8137. State control of operations

Amendments:
1977. Act July 5, 1977, P. L. 95-62, § 4(a), 91 Stat. 263 (effective 10/1/77, as provided by § 5(a) of such Act, which appears as 38 USCS § 8131 note), substituted "DOMICILIARY, NURSING HOME, AND HOSPITAL CARE" for "NURSING HOME CARE".

§ 8131. Definitions
ccvii Discussion and Analysis in the Veterans Benefits Manual

For the purpose of this subchapter [38 USCS §§ 8131 et seq.]--
(1) The veteran population of each State shall be determined on the basis of the latest figures certified by the Department of Commerce.
(2) The term "State" does not include any possession of the United States.
(3) The term "construction" means the construction of new domiciliary or nursing home buildings, the expansion, remodeling, or alteration of existing buildings for the provision of domiciliary, nursing home, adult day health, or hospital care in State homes, and the provision of initial equipment for any such buildings.
(4) The term "cost of construction" means the amount found by the Secretary to be necessary for a construction project, including architect fees, but excluding land acquisition costs.

Amendments:
1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in para. (a), deleted "war" preceding "veteran".
1977. Act July 5, 1977 (effective as provided by § 5 of such Act, which appears as a note to this section), substituted paras. (c) and (d) for ones which read:
"(c) The term 'construction' means the construction of new buildings, the expansion, remodeling, modification, or alteration of existing buildings, and the providing of initial equipment for any such buildings.
"(d) The term 'cost of construction' means the amount found by the Administrator to be necessary for a project of construction of nursing home care facilities, including architect fees, but not including the cost of acquisition of land.".
1986. Act Oct. 28, 1986, (effective 7/1/87, as provided by § 224(e) of such Act, which appears as a note to this section), redesignated subsecs. (a)-(d) as (1)-(4) respectively.
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5031, as 38 USCS § 8131.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Other provisions:


"(a) Except as provided in subsection (b) of this section, the amendments made by this Act [repealing 38 USCS § 644, enacting 38 USCS § 101 note, amending analysis for 38 USCS Chapters 17 and 81, and 38 USCS §§ 8131 et seq.] shall be effective October 1, 1977.

"(b)(1) The terms and conditions of any grant made prior to October 1, 1977, under section 644 of title 38, United States Code [former 38 USCS § 644], and regulations prescribed thereunder, shall remain in full force and effect unless modified, by the mutual agreement of the parties, in accordance with the provisions of subchapter III of chapter 81 of such title [38 USCS §§ 8131 et seq.], and regulations prescribed thereunder, in effect after September 30, 1977.

"(2) With respect to any grant made prior to October 1, 1977, under subchapter III of chapter 81 of such title [38 USCS §§ 8131 et seq.], the Administrator of Veterans' Affairs shall, upon application of a grantee, modify the terms and conditions of such grant to comply with the provisions of such subchapter as amended by this Act, and regulations prescribed thereunder, and shall promptly notify each such grantee of the grantee's right to request such modification.".


Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17
Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18
Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a
Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Grants to States for construction or acquisition of State homes, 38 CFR Part 59

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Virgin Islands is "possession" within meaning of 38 USCS § 5031(b) [now 38 USCS § 8131(b)] and thus Veterans' Administration [now Department of Veterans Affairs] could not extend financial assistance to construct state home facility to furnish nursing care. VA GCO 3-77

§ 8132. Declaration of purpose

The purpose of this subchapter [38 USCS §§ 8131 et seq.] is to assist the several States to construct State home facilities (or to acquire facilities to be used as State home facilities)
for furnishing domiciliary or nursing home care to veterans, and to expand, remodel, or alter existing buildings for furnishing domiciliary, nursing home, adult day health, or hospital care to veterans in State homes.

Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), deleted "war" preceding "veterans".

1977. Act July 5, 1977 (effective as provided by § 5 of such Act, which appears as a note to 38 USCS § 8131), substituted the text of this section for text which read: "The purpose of this subchapter is to assist the several States to construct State home facilities for furnishing nursing home care to veterans."

1984. Act Oct. 19, 1984 inserted "(or to acquire facilities to be used as State home facilities)".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5032, as 38 USCS § 8132.


Code of Federal Regulations

Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18

Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a

Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Department of Veterans Affairs-Grants to States for construction or acquisition of State homes, 38 CFR Part 59

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§ 8133. Authorization of appropriations

(a) There are hereby authorized to be appropriated such sums as are necessary to carry out this subchapter [38 USCS §§ 8131 et seq.]. Sums appropriated pursuant to this section shall be used for making grants to States which have submitted, and have had approved by the Secretary, applications of carrying out the purposes and meeting the requirements of this subchapter [38 USCS §§ 8131 et seq.].

(b) Sums appropriated pursuant to subsection (a) of this section shall remain available until expended.

Amendments:

1965. Act Oct. 31, 1965, deleted subsec. (c) which read: "(c) Not more than 10 per centum of the funds appropriated pursuant to subsection (a) of this section for any fiscal year shall be used to assist in the construction of nursing home care facilities in any one State."
1968. Act July 26, 1968, in subsec. (a), substituted "nine succeeding fiscal years" for "four succeeding fiscal years".

1973. Act Aug. 2, 1973 (effective 9/1/73, as provided by § 501 of such Act, which appears as 38 USCS § 1701 note), in subsec. (a), substituted "fourteen" for "nine".

1977. Act July 5, 1977 (effective as provided by § 5 of such Act, which appears as a note to 38 USCS § 8131), substituted this section for one which read:

"(a) There is hereby authorized to be appropriated $5,000,000 for the fiscal year ending June 30, 1965, and a like sum for each of the fourteen succeeding fiscal years. Sums appropriated pursuant to this section shall be used for making grants to States which have submitted, and have had approved by the Administrator, applications for carrying out the purposes of section 5032 of this title.

"(b) Sums appropriated pursuant to subsection (a) of this section shall remain available until the end of the second fiscal year following the fiscal year for which they are appropriated."

1979. Act Dec. 20, 1979, in subsec. (a), substituted "a like sum for each of the two succeeding fiscal years, and such sums as may be necessary for the fiscal years ending September 30, 1981, and September 30, 1982" for "and a like sum for the succeeding fiscal year".

1982. Act Sept. 8, 1982, in subsec. (a), substituted the sentence beginning "There is hereby . . . " for one which read: "There is hereby authorized to be appropriated $15,000,000 for the fiscal year ending September 30, 1978, a like sum for each of the two succeeding fiscal years, and such sums as may be necessary for the fiscal years ending September 30, 1981, and September 30, 1982."

1986. Act Oct. 28, 1986 (effective July 1, 1987, as provided by § 224(e) of such Act, which appears as 38 USCS § 8131 note), in subsec. (a), substituted the sentence beginning "There is hereby authorized . . . " for one which read: "There is hereby authorized to be appropriated $15,000,000 for fiscal year 1980 and such sums as may be necessary for fiscal year 1981 and for each of the five succeeding fiscal years."

1989. Act Oct. 6, 1989 (effective Oct. 1, 1989, as provided by § 3(a) of such Act, which appears as a note to this section), in subsec. (a), substituted "Secretary" for "Administrator" wherever appearing.

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5033, as 38 USCS § 8133.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

1992. Act Nov. 4, 1992, in subsec. (a), deleted "through September 30, 1992" following "to carry out this subchapter".

Other provisions:


Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17

Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18
§ 8134. General regulations

(a) (1) The Secretary shall prescribe regulations for the purposes of this subchapter [38 USCS §§ 8131 et seq.].

(2) In those regulations, the Secretary shall prescribe for each State the number of nursing home and domiciliary beds for which assistance under this subchapter [38 USCS §§ 8131 et seq.] may be furnished. Such regulations shall be based on projected demand for such care 10 years after the date of the enactment of the Veterans Millennium Health Care and Benefits Act [enacted Nov. 30, 1999] by veterans who at such time are 65 years of age or older and who reside in that State. In determining such projected demand, the Secretary shall take into account travel distances for veterans and their families.

(3) (A) In those regulations, the Secretary shall establish criteria under which the Secretary shall determine, with respect to an application for assistance under this subchapter [38 USCS §§ 8131 et seq.] for a project described in subparagraph (B) which is from a State that has a need for additional beds as determined under subsections (a)(2) and (d)(1), whether the need for such beds is most aptly characterized as great, significant, or limited. Such criteria shall take into account the availability of beds already operated by the Secretary and other providers which appropriately serve the needs which the State proposes to meet with its application.

(B) This paragraph applies to a project for the construction or acquisition of a new State home facility, a project to increase the number of beds available at a State home facility, and a project to replace beds at a State home facility.

(4) The Secretary shall review and, as necessary, revise regulations prescribed under paragraphs (2) and (3) not less often than every four years.

(b) The Secretary shall prescribe the following by regulation:

(1) General standards of construction, repair, and equipment for facilities constructed or acquired with assistance received under this subchapter [38 USCS §§ 8131 et seq.].

(2) General standards for the furnishing of care in facilities which are constructed or acquired with assistance received under this subchapter [38 USCS §§ 8131 et seq.], which standards shall be no less stringent than those standards prescribed by the Secretary pursuant to section 1720(b) of this title [38 USCS § 1720(b)].

(c) The Secretary may inspect any State facility constructed or acquired with assistance received under this subchapter [38 USCS §§ 8131 et seq.] at such times as the Secretary deems necessary to insure that such facility meets the standards prescribed under subsection (b)(2).
(d) (1) In prescribing regulations to carry out this subchapter [38 USCS §§ 8131 et seq.], the Secretary shall provide that in the case of a State that seeks assistance under this subchapter [38 USCS §§ 8131 et seq.] for a project described in subsection (a)(3)(B), the determination of the unmet need for beds for State homes in that State shall be reduced by the number of beds in all previous applications submitted by that State under this subchapter [38 USCS §§ 8131 et seq.], including beds which have not been recognized by the Secretary under section 1741 of this title [38 USCS § 1741].

(2) (A) Financial assistance under this subchapter [38 USCS §§ 8131 et seq.] for a renovation project may only be provided for a project for which the total cost of construction is in excess of $400,000 (as adjusted from time-to-time in such regulations to reflect changes in costs of construction).

(B) For purposes of this paragraph, a renovation project is a project to remodel or alter existing buildings for which financial assistance under this subchapter [38 USCS §§ 8131 et seq.] may be provided and does not include maintenance and repair work which is the responsibility of the State.

Amendments:

1965. Act Oct. 31, 1965, in para. (1), substituted "one and one-half beds" for "one-half bed".

1973. Act Aug. 2, 1973 (effective 9/1/73, as provided by § 501 of such Act, which appears as 38 USCS § 1701 note), in para. (1), substituted "two and one-half beds" for "one and one-half beds".

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in the preliminary matter, substituted "section or any amendment to it with respect to such amendment" for "subchapter"; in para. (1), deleted "war" preceding "veterans" and "veteran"; and added para. (3).

1977. Act July 5, 1977 (effective as provided by § 5 of such Act, which appears as a note to 38 USCS § 8131), substituted new para. (2) for one which read: "General standards of construction, repairs, modernization, alteration, and equipment for facilities for furnishing nursing home care which are constructed with assistance received under this subchapter."; and in para. (3), deleted "nursing home" preceding "care".

1980. Act Aug. 26, 1980, in para. (1), substituted a period for ", which number shall not exceed two and one-half beds per thousand veteran population in the case of any State.".

1984. Act Oct. 19, 1984, in paras. (2) and (3), inserted "or acquired" each place it appears.

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5034, as 38 USCS § 8134.

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991) designated the sentence beginning "Within six months . . ." as subsec. (a) and, in such subsec., substituted "any amendment to this section" for "this section or any amendment to it"; designated the sentence beginning "The Administrator may inspect . . ." as subsec. (b), and, in subsec. (b) as so designated, substituted "the standards prescribed under subsection (a)(3)" for "such standards".

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Secretary" for "Administrator" wherever appearing.

1999. Act Nov. 30, 1999, substituted subsec. (a)(1)-(4) and the introductory matter of new subsec. (b) for:
“(a) Within six months after the date of enactment of any amendment to this section with respect to such amendment, the Secretary shall prescribe the following by regulation:

“(1) The number of beds required to provide adequate nursing home care to veterans residing in each State.”;

redesignated former paras. (2) and (3) of subsec. (a) as paras. (1) and (2), respectively, of new subsec. (b); redesignated former subsec. (b) as subsec. (c) and, in such subsection as redesignated, substituted "subsection (b)(2)" for "subsection (a)(3)"; and added subsec. (d).

Other provisions:

Initial regulations under subsec. (a). Act Nov. 30, 1999, P. L. 106-117, Title II, § 207(d), 113 Stat. 1567, provides: "The Secretary shall prescribe the initial regulations under subsection (a) of section 8134 of title 38, United States Code, as added by subsection (a), not later than April 30, 2000.”.

Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17

Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18

Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a

Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b

Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21

Department of Veterans Affairs-Grants to States for construction or acquisition of State homes, 38 CFR Part 59

Cross References

This section is referred to in 38 USCS § 8135

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Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 26

§ 8135. Applications with respect to projects; payments

(a) Any State desiring to receive assistance for a project for construction of State home facilities (or acquisition of a facility to be used as a State home facility) must submit to the Secretary an application. Such application shall set forth the following:

(1) The amount of the grant requested with respect to such project which may not exceed 65 percent of the estimated cost of construction (or of the estimated cost of facility acquisition and construction) of such project.

(2) A description of the site for such project.

(3) Plans and specifications for such project in accordance with regulations prescribed by the Secretary pursuant to section 8134(a)(2) of this title [38 USCS § 8134(a)(2)].

(4) Reasonable assurance that upon completion of such project the facilities will be used principally to furnish to veterans the level of care for which such application is
made and that not more than 25 percent of the bed occupancy at any one time will consist of patients who are not receiving such level of care as veterans.

(5) Reasonable assurance that title to such site is or will be vested solely in the applicant, a State home, or another agency or instrumentality of the State.

(6) Reasonable assurance that adequate financial support will be available for the construction of the project (or for facility acquisition and construction of the project) by July 1 of the fiscal year for which the application is approved and for its maintenance and operation when complete.

(7) Reasonable assurance that the State will make such reports in such form and containing such information as the Secretary may from time to time reasonably require, and give the Secretary, upon demand, access to the records upon which such information is based.

(8) Reasonable assurance that the rates of pay for laborers and mechanics engaged in construction of the project will be not less than the prevailing local wage rates for similar work as determined in accordance with sections 3141-3144, 3146, and 3147 of title 40 [40 USCS §§ 3141-3144, 3146, and 3147].

(9) In the case of a project for acquisition of a facility, reasonable assurance that the estimated total cost of acquisition of the facility and of any expansion, remodeling, and alteration of the acquired facility will not be greater than the estimated cost of construction of an equivalent new facility.

(b) (1) Any State seeking to receive assistance under this subchapter [38 USCS §§ 8131 et seq.] for a project that would involve construction or acquisition of either nursing home or domiciliary facilities shall include with its application under subsection (a) the following:

(A) Documentation (i) that the site for the project is in reasonable proximity to a sufficient concentration and population of veterans who are 65 years of age and older, and (ii) that there is a reasonable basis to conclude that the facilities when complete will be fully occupied.

(B) A financial plan for the first three years of operation of such facilities.

(C) A five-year capital plan for the State home program for that State.

(2) Failure to provide adequate documentation under paragraph (1)(A) or to provide an adequate financial plan under paragraph (1)(B) shall be a basis for disapproving the application.

(c) (1) Upon receipt of an application under subsection (a) for financial assistance under this subchapter [38 USCS §§ 8131 et seq.], the Secretary--

(A) shall determine whether the application meets the requirements of this section and of the regulations prescribed under section 8134 of this title [38 USCS § 8134];

(B) shall notify the State submitting the application conforms with those requirements and, if it does not, of the actions necessary to bring the application into conformance with those requirements; and

(C) shall determine the priority of the project described in the application in accordance with the provisions of this subsection.

(2) Subject to paragraphs (3) and (5)(C) of this subsection, the Secretary shall accord priority to applications in the following order:
(A) An application from a State that has made sufficient funds available for the project for which the grant is requested so that such project may proceed upon approval of the grant without further action required by the State to make such funds available for such purpose.

(B) An application from a State for a project at an existing facility to remedy a condition or conditions that have been cited by an accrediting institution, by the Secretary, or by a local licensing or approving body of the State as being threatening to the lives or safety of the patients in the facility.

(C) An application from a State that has not previously applied for award of a grant under this subchapter [38 USCS §§ 8131 et seq.] for construction or acquisition of a State nursing home.

(D) An application for construction or acquisition of a nursing home or domiciliary from a State that the Secretary determines, in accordance with regulations under this subchapter [38 USCS §§ 8131 et seq.], has a great need for the beds to be established at such home or facility.

(E) An application from a State for renovations to a State home facility other than renovations described in subparagraph (B).

(F) An application for construction or acquisition of a nursing home or domiciliary from a State that the Secretary determines, in accordance with regulations under this subchapter [38 USCS §§ 8131 et seq.], has a significant need for the beds to be established at such home or facility.

(G) An application that meets other criteria as the Secretary determines appropriate and has established in regulations.

(H) An application for construction or acquisition of a nursing home or domiciliary from a State that the Secretary determines, in accordance with regulations under this subchapter [38 USCS §§ 8131 et seq.], has a limited need for the beds to be established at such home or facility.

(3) In according priorities to projects under paragraph (2) of this subsection, the Secretary--

(A) may not accord any priority to a project for the construction or acquisition of a hospital; and

(B) may not accord any priority to a project which would expand a State's capacity to furnish hospital care in a State home.

(4) The Secretary shall establish a list of approved projects (including projects that have been conditionally approved under paragraph (6) of this subsection), in the order of their priority, as of August 15 of each year. The Secretary shall award grants in the order of their priority on the list during the fiscal year beginning on October 1 of the calendar year in which the list was made.

(5) (A) The Secretary shall defer approval of an application that otherwise meets the requirements of this section if the State submitting the application does not, by the July 1 deadline (as defined in subparagraph (D) of this paragraph), demonstrate to the satisfaction of the Secretary that the State has provided adequate financial support for construction of the project.

(B) In a case in which approval of an application is deferred under subparagraph (A) of this paragraph, the Secretary shall select for award of a grant or grants under this subsection an application or applications which would not have been
approved during the fiscal year but for the deferral and to which the Secretary accords the highest priority under paragraph (2) of this subsection.

(C) An application deferred in accordance with the requirements of this paragraph shall be accorded priority in any subsequent fiscal year ahead of applications that had not been approved before the first day of the fiscal year in which the deferred application was first approved.

(D) For the purposes of this paragraph, the term "July 1 deadline" means July 1 of the fiscal year in which the State is notified by the Secretary of the availability of funding for a grant for such project.

(6) (A) The Secretary may conditionally approve a project under this section, conditionally award a grant for the project, and obligate funds for the grant if the Secretary determines that the application for the grant is sufficiently complete to warrant awarding the grant and that, based on assurances provided by the State submitting the application, the State will complete the application and meet all the requirements referred to in paragraph (1)(A) of this subsection by the date, not later than 180 days after the date of the conditional approval, specified by the Secretary.

(B) If a State does not complete the application and meet all the requirements referred to in such paragraph by the date specified by the Secretary under subparagraph (A) of this paragraph, the Secretary shall rescind the conditional approval and award under such subparagraph and deobligate the funds previously obligated in connection with the application. In the event the Secretary rescinds conditional approval of a project under this subparagraph, the Secretary may not further obligate funds for the project during the fiscal year in which the Secretary rescinds such approval.

(7) (A) Subject to subparagraph (B) of this paragraph, the Secretary may increase the amount of any grant awarded to any State for a project under this section by an amount by which the Secretary determines that the estimated cost of the construction or acquisition has increased from the estimated cost on which the Secretary based the determination to award the grant, without regard to the position of such project on the list established under paragraph (4) of this subsection, if the Secretary determines that the grant was awarded before the State entered into a contract for the construction or acquisition provided for in such project.

(B) A grant may not be increased under subparagraph (A) of this paragraph by more than 10 percent of the amount of the grant initially awarded for such project, and the amount of such grant, as increased, may not exceed 65 percent of the cost of the project.

(d) No application submitted to the Secretary under this section shall be disapproved until the Secretary has afforded the applicant notice and an opportunity for a hearing.

(e) The amount of a grant under this subchapter [38 USCS §§ 8131 et seq.] shall be paid to the applicant or if designated by the applicant, the State home for which such project is being carried out or any other agency or instrumentality of the applicant. Such amount shall be paid, in advance or by way of reimbursement, and in such installments consistent with the progress of the project as the Secretary may determine and certify for payment to the Secretary of the Treasury. Funds paid under this section for an approved project shall be used solely for carrying out such project as so approved.
(f) Any amendment of any application, whether or not approved, shall be subject to approval in the same manner as an original application.

Amendments:

1965. Act Oct. 31, 1965, in subsec. (b), deleted para. (3) which read: "that such a grant would not result in more than 10 per centum of the funds appropriated for any fiscal year pursuant to section 5033(a) of this title being used to assist the construction of facilities in any one State," and redesignated paras. (4) and (5) as paras. (3) and (4), respectively.

1973. Act Aug. 2, 1973 (effective 9/1/73, as provided by § 501 of such Act, which appears as 38 USCS § 1701 note), in subsecs. (a)(1), (b)(2), and (d), substituted "65 per centum" for "50 per centum".

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsecs. (a)(4), deleted "war" preceding "veterans" wherever appearing; and in subsec. (b), in the preliminary matter, substituted "the Administrator" for "he", and in para. (4), deleted "war" preceding "veterans".

1977. Act July 5, 1977 (effective as provided by § 5 of such Act, which appears as a note to 38 USCS § 8131), in subsec. (a), in the preliminary matter, deleted "for furnishing nursing home care" following "State home facilities", in para. (4), substituted "to veterans the level of care for which such application is made" for "nursing home care to veterans", substituted "25 per centum" for "10 per centum", and substituted "such level of" for "nursing home"; substituted new subsec. (b)(3) for one which read: "the application contains such reasonable assurance as to use, title, financial support, reports and access to records, and payment of prevailing rates of wages, as the Administrator may determine to be necessary, and"; in subsec. (c), inserted "notice and"; in subsec. (d), designated existing matter as para. (1), in para. (1), as so designated, substituted "so approved," for "requested with respect to such project in such application.", and added para. (2); and in subsec. (e), substituted "application, whether or not approved," for "approved application".

1982. Act Oct. 12, 1982, in subsecs. (a)(1), (4), (b)(2), and (d)(1), substituted "percent" for "per centum".

1984. Act Oct. 19, 1984, in subsec. (a), in the introductory matter, inserted "(or acquisition of a facility to be used as a State home facility)", in para. (1), inserted "(or of the estimated cost of facility acquisition and construction)", in para. (6), inserted "(or for facility acquisition and construction of the project)", in para. (7), deleted "and" following "is based.", in para. (8), substituted "the Act of March 3, 1931 (40 U.S.C. 276a-276a-5) for "sections 276a through 276a-5 of title 40", and substituted ", and" for a concluding period, and added para. (9); in subsec. (b), in para. (2), inserted "(or of the estimated cost of facility acquisition and construction)", in para. (4), substituted "the carrying out of" for "the construction of"; in subsec. (d)(1), inserted "(or of the estimated cost of facility acquisition and construction)", substituted "carried out" for "construction", substituted "the project" for "construction", and deleted "the construction of" following "this section for".

1985. Act Dec. 3, 1985, in subsec. (a)(6), inserted "by July 1 of the fiscal year for which the application is approved"; and, in subsec. (b), designated the existing provisions as para. (1) and, in para. (1) as so designated, redesignated paras. (1)-(4) as subparas. (A)-(D), and added para. (2).

1986. Act Oct. 28, 1986 (effective July 1, 1987, as provided by § 224(e) of such Act, which appears as 38 USCS § 8131 note) substituted subsec. (b) for one which read:

"(b)(1) The Administrator shall approve any such application if the Administrator finds that--

"(A) there are sufficient funds available to make the grant requested with respect to such project,
"(B) such grant does not exceed 65 percent of the estimated cost of construction (or of the estimated cost of facility acquisition and construction) of such project,

"(C) the application contains such reasonable assurances under subsection (a) of this section as the Administrator may determine to be necessary, and

"(D) the plans and specifications for such project are in accord with regulations prescribed pursuant to section 5034(2) of this title and that the carrying out of such project, together with other projects under construction and other facilities, will not result in more than the number of beds prescribed by the Administrator pursuant to section 5034(1) of this title for the State in which such project is located being available for furnishing nursing home care to veterans in such State.

"(2)(A) The Administrator shall defer approval of an application that meets the requirements of this section if the State submitting the application does not, by the July 1 deadline (as defined in subparagraph (C) of this paragraph), demonstrate to the satisfaction of the Administrator that the State has provided adequate financial support for construction of the project.

"(B) In a case in which approval of an application is deferred under subparagraph (A) of this paragraph--

"(i) the Administrator, in accordance with guidelines established by the Administrator, shall select for award of a grant or grants under this section an application or applications for a nursing home project or projects that the Administrator determines--

"(I) to be most in need;

"(II) would, but for the deferral, not have been approved during the fiscal year in which the deferral occurred; and

"(III) have been provided adequate financial support by the State and are otherwise qualified for approval during the fiscal year; and

"(ii) during the next fiscal year, the application with respect to which approval was deferred shall be accorded priority for approval ahead of applications that had not been approved before the first day of such fiscal year.

"(C) For the purposes of this paragraph, the term 'July 1 deadline' means July 1 of the fiscal year in which the State is notified by the Administrator of the availability of funding for a grant for such project."

Such Act further, in subsec. (d), substituted "The amount of a grant under this subchapter shall be paid" for "(1) Upon approving an application under this section, the Administrator shall certify to the Secretary of the Treasury the amount of the grant so approved, but in no event an amount greater than 65 percent of the estimated cost of construction (or of the estimated cost of facility acquisition and construction) of the project, and shall designate the appropriation from which it shall be paid. Such certification shall provide for payment" and deleted para. (2), which read: "No one State may receive in any fiscal year in the aggregate under this subchapter more than one-third of the amount appropriated for carrying out this subchapter in such fiscal year.".

1988. Act May 20, 1988, in subsec. (b), in para. (4), substituted "August 15" for "July 1", inserted "(including projects that have been conditionally approved under paragraph (6) of this subsection)", and added paras. (6) and (7).
Act May 7, 1991 redesignated this section, formerly 38 USCS § 5035, as 38 USCS § 8135, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (a), in the introductory matter, substituted "Any State" for "After regulations have been prescribed by the Administrator under section 5034 of this title, any State".

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Act Nov. 4, 1992 (applicable to projects that are conditionally approved after 9/30/92, as provided by § 403(b) of such Act, which appears as a note to this section), in subsec. (b)(6), in subpara. (A), substituted "180 days" for "90 days".

Such Act further (applicable to rescissions of conditional approval of projects after the date of enactment of such Act, as provided by § 404(b) of such Act, which appears as a note to this section), in subsec. (b)(6), in subpara. (B), added the sentence beginning "In the event the Secretary . . .".

Act Nov. 2, 1994, in subsec. (a)(3), substituted "section 8134(a)(2)" for "section 8134(2)".

Act Oct. 9, 1996, in subsec. (b), in para. (2)(C), inserted "or adult day health care facilities" and, in para. (3)(A), inserted "or construction (other than new construction) of adult day health care buildings".

Act Nov. 30, 1999, in subsec. (a), in the introductory matter, substituted "set forth the following:" for "set forth-", in paras. (1)-(7), capitalized the first letter of the first word and substituted the concluding period for a comma, in para. (8), capitalized the first letter of the first word and substituted the concluding period for ";"; and, in para. (9), capitalized the first letter of the first word; redesignated subssecs. (b)-(e) as subssecs. (c)-(f), respectively; added new subsec. (b); and, in subsec. (c) as redesignated, in para. (1), in the introductory matter, substituted "under subsection (a) for financial assistance under this subchapter" for "for a grant under subsection (a) of this section", in para. (2), in subpara. (A), deleted "the construction or acquisition of" preceding "the project", and substituted subparas. (B)-(H) for former subparas. (B)-(D), which read:

"(B) An application from a State that does not have a State home facility constructed or acquired with assistance under this subchapter (or for which such a grant has been made).

"(C) An application from a State which the Secretary determines, in accordance with criteria and procedures specified in regulations which the Secretary shall prescribe, has a greater need for nursing home or domiciliary beds or adult day health care facilities than other States from which applications are received.

"(D) An application that meets such other criteria as the Secretary determines are appropriate and has established in regulations."

and, in para. (3), substituted subpara. (A), for one which read: "(A) shall accord priority only to projects which would involve construction or acquisition of either nursing home or domiciliary buildings or construction (other than new construction) of adult day health care buildings; and".

Act Aug. 21, 2002, in subsec. (a)(8), substituted "sections 3141-3144, 3146, and 3147 of title 40" for "the Act of March 3, 1931 (40 U.S.C. 276a-276a-5) (known as the Davis-Bacon Act)".

Other provisions:
Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section (see the Amendments note to this section), see § 5 of such Act, which appears as 10 USCS § 101 note.

Deadline for regulations. Act Oct. 28, 1986, P. L. 99-576, Title II, Part C, § 224(f), 100 Stat. 3263, effective July 1, 1987, as provided by § 224(e) of such Act, which appears as 38 USCS § 8131 note, provides: "The Administrator of Veterans' Affairs shall prescribe regulations not later than April 1, 1987, to implement the amendments made by this section [amending this section and note and 38 USCS §§ 8131, 8133]."

Application of Nov. 4, 1992 § 403(a) amendment. Act Nov. 4, 1992, P. L. 102-585, Title IV, § 403(b), 106 Stat. 4954, provides: "The amendment made by subsection (a) [amending this section] shall apply to projects that are conditionally approved after September 30, 1992."

Application of Nov. 4, 1992 § 404(a) amendment. Act Nov. 4, 1992, P. L. 102-585, Title IV, § 404(b), 106 Stat. 4954, provides: "The amendment made by subsection (a) [amending this section] shall apply to rescissions of conditional approval of projects after the date of enactment of this Act."

Nov. 30, 1999 amendments; transition. Act Nov. 30, 1999, P. L. 106-117, Title II, § 207(c), 113 Stat. 1566, provides:

"(1) The provisions of sections 8134 and 8135 of title 38, United States Code, as in effect on November 10, 1999, shall continue in effect after that date with respect to applications described in section 8135(b)(2)(A) of such title, as in effect on that date, that are identified in paragraph (2) (and to projects and grants pursuant to those applications). The Secretary shall accord priority among those applications in the order listed in paragraph (2).

"(2) Applications covered by paragraph (1) are the following:

"(A) Any application for a fiscal year 1999 priority one project.

"(B) Any application for a fiscal year 2000 priority one project that was submitted by a State that (i) did not receive grant funds from amounts appropriated for fiscal year 1999 under the State home grant program, and (ii) does not have any fiscal year 1999 priority one projects.

"(3) For purposes of this subsection--

"(A) the term 'fiscal year 1999 priority one project' means a project on the list of approved projects established by the Secretary on October 29, 1998, under section 8135(b)(4) of title 38, United States Code, as in effect on that date that (pursuant to section 8135(b)(2)(A) of that title) is in the grouping of projects on that list designated as Priority Group 1;

"(B) the term 'fiscal year 2000 priority one project' means a project on the list of approved projects established by the Secretary on November 3, 1999, under section 8135(b)(4) of title 38, United States Code, as in effect on that date that (pursuant to section 8135(b)(2)(A) of that title) is in the grouping of projects on that list designated as Priority Group 1; and

"(C) the term 'State home grant program' means the grant program under subchapter III of chapter 81 of title 38, United States Code [38 USCS §§ 8131 et seq.]."

Code of Federal Regulations
Office of the Secretary of Labor-Procedures for predetermination of wage rates, 29 CFR Part 1

Office of the Secretary of Labor-Labor standards provisions applicable to contracts covering federally financed and assisted construction (also labor standards provisions applicable to
Recapture provisions

(a) If, within the 20-year period beginning on the date of the approval by the Secretary of the final architectural and engineering inspection of any project with respect to which a grant has been made under this subchapter [38 USCS §§ 8131 et seq.] (except that the Secretary, pursuant to regulations which the Secretary shall prescribe, may at the time of such grant provide for a shorter period than 20, but not less than seven, years, based on the magnitude of the project and the grant amount involved, in the case of acquisition, the expansion, remodeling, or alteration of existing facilities), the facilities covered by the project cease to be operated by a State, a State home, or an agency or instrumentality of a State principally for furnishing domiciliary, nursing home, or hospital care to veterans, the United States shall be entitled to recover from the State which was the recipient of the grant under this subchapter [38 USCS §§ 8131 et seq.], or from the then owner of such facilities, 65 percent of the then value of such project (but in no event an amount greater than the amount of assistance provided under this subchapter [38 USCS §§ 8131 et seq.]), as determined by agreement of the parties or by action brought in the district court of the United States for the district in which such facilities are situated.

(b) The establishment and operation by the Secretary of an outpatient clinic in facilities described in subsection (a) shall not constitute grounds entitling the United States to any recovery under that subsection.

Amendments:

1973. Act Aug. 2, 1973 (effective 9/1/73 as provided by § 501 of such Act, which appears as 38 USCS § 1701 note), substituted "65 per centum" for "50 per centum".

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), deleted "war" preceding "veterans".
1977. Act July 5, 1977 (effective as provided by § 5 of such Act, which appears as note to 38 USCS § 8131), deleted "of facilities for furnishing nursing home care" following "project for construction"; inserted "(except that the Administrator, pursuant to regulations which the Administrator shall prescribe, may at the time of such grant provide for a shorter period than twenty, but not less than seven, years, based on the magnitude of the project and the grant amount involved, in the case of the expansion, remodeling, or alteration of existing facilities)"; substituted "domiciliary, nursing home, or hospital care" for "nursing home care"; and substituted "construction (but in no event an amount greater than the amount of assistance provided for such construction under this subchapter)," for "facilities."

1982. Act Oct. 12, 1982 (applicable as provided by § 5 of such Act, which appears as 10 USCS § 101 note) substituted "percent" for "per centum."


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5036, as 38 USCS § 8136.

1992. Act Nov. 4, 1992 substituted "If, within the 20-year period beginning on the date of the approval by the Secretary of the final architectural and engineering inspection of any project" for "If, within 20 years after completion of any project" and substituted "the facilities covered by the project cease" for "such facilities cease."

2000. Act Nov. 1, 2000 designated the existing provisions as subsec. (a), and added subsec. (b).

Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17
Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectionuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18
Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a
Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Grants to States for construction or acquisition of State homes, 38 CFR Part 59

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 26
Veterans' Administration [now Department of Veterans Affairs] did not have authority to waive recapture provisions of 38 USCS § 5036 [now 38 USCS § 8136] for state veterans home, notwithstanding that home desired to upgrade facility for use at higher level of care than nursing.

VA GCO 15-74

§ 8137. State control of operations
Except as otherwise specifically provided, nothing in this subchapter [38 USCS §§ 8131 et seq.] shall be construed as conferring on any Federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any State home for which facilities are constructed or acquired with assistance received under this subchapter [38 USCS §§ 8131 et seq.].

Amendments:

1984. Act Oct. 19, 1984 inserted "or acquired".
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5037, as 38 USCS § 8137.

Code of Federal Regulations
Department of Veterans Affairs-Medical, 38 CFR Part 17
Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964, 38 CFR Part 18
Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964, 38 CFR Part 18a
Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter, 38 CFR Part 18b
Department of Veterans Affairs-Vocational rehabilitation and education, 38 CFR Part 21
Department of Veterans Affairs-Grants to States for construction or acquisition of State homes, 38 CFR Part 59

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 26

SUBCHAPTER IV  SHARING OF MEDICAL FACILITIES, EQUIPMENT, AND INFORMATION

§ 8151. Statement of congressional purpose
§ 8152. Definitions
§ 8153. Sharing of health-care resources
§ 8154. Exchange of medical information
§ 8155. Pilot programs; grants to medical schools
§ 8156. Coordination with health services development activities carried out under the National Health Planning and Resources Development Act of 1974
§ 8157. Joint title to medical equipment
§ 8158. Deposit in escrow

§ 8151. Statement of congressional purpose

It is the purpose of this subchapter [38 USCS §§ 8151 et seq.] to strengthen the medical programs at Department facilities and improve the quality of health care provided veterans under this title by authorizing the Secretary to enter into agreements with health-care providers in order to share health-care resources with, and receive health-care resources from, such providers while ensuring no diminution of services to veterans.
Amendments:


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5051, as 38 USCS § 8151.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

1993. Act Dec. 20, 1993 added "It is further the purpose of this subchapter to improve the provision of care to veterans under this title by authorizing the Secretary to enter into agreements with State veterans facilities for the sharing of health-care resources."

1996. Act Oct. 9, 1996 substituted the text of this section for text which read: "It is the purpose of this subchapter to improve the quality of hospital care and other medical service provided veterans under this title, by authorizing the Secretary to enter into agreements with medical schools, health-care facilities, and research centers throughout the country in order to receive from and share with such medical schools, health-care facilities, and research centers the most advanced medical techniques and information, as well as certain specialized medical resources which otherwise might not be feasibly available or to effectively utilize other medical resources with the surrounding medical community, without diminution of services to veterans. Among other things, it is intended, by these means, to strengthen the medical programs at those Department hospitals which are located in small cities or rural areas and thus are remote from major medical centers. It is further the purpose of this subchapter to improve the provision of care to veterans under this title by authorizing the Secretary to enter into agreements with State veterans facilities for the sharing of health-care resources."

Code of Federal Regulations

Department of Veterans Affairs-Simplified acquisition procedures for health-care resources, 48 CFR Part 873

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 24

§ 8152. Definitions

For the purposes of this subchapter [38 USCS §§ 8151 et seq.]--
(1) The term "health-care resource" includes hospital care and medical services (as those terms are defined in section 1701 of this title [38 USCS § 1701]), services under sections 1782 and 1783 of this title [38 USCS §§ 1782 and 1783], any other health-care service, and any health-care support or administrative resource.
(2) The term "health-care providers" includes health-care plans and insurers and any organizations, institutions, or other entities or individuals who furnish health-care resources.
(3) The term "hospital", unless otherwise specified, includes any Federal, State, local, or other public or private hospital.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5052, as 38 USCS § 8152.
(a) (1) To secure health-care resources which otherwise might not be feasibly available, or to effectively utilize certain other health-care resources, the Secretary may, when the Secretary determines it to be in the best interest of the prevailing standards of the Department medical care program, make arrangements, by contract or other form of agreement for the mutual use, or exchange of use, of health-care resources between Department health-care facilities and any health-care provider, or other entity or individual.

(2) The Secretary may enter into a contract or other agreement under paragraph (1) if such resources are not, or would not be, used to their maximum effective capacity.

(3) (A) If the health-care resource required is a commercial service, the use of medical equipment or space, or research, and is to be acquired from an institution affiliated with the Department in accordance with section 7302 of this title [38 USCS § 7302], including medical practice groups and other entities associated with affiliated institutions, blood banks, organ banks, or research centers, the Secretary may make arrangements for acquisition of the resource without regard to any law or regulation (including any Executive order, circular, or other administrative policy)
that would otherwise require the use of competitive procedures for acquiring the resource.

(B) (i) If the health-care resource required is a commercial service or the use of medical equipment or space, and is not to be acquired from an entity described in subparagraph (A), any procurement of the resource may be conducted without regard to any law or regulation that would otherwise require the use of competitive procedures for procuring the resource, but only if the procurement is conducted in accordance with the simplified procedures prescribed pursuant to clause (ii).

(ii) The Secretary, in consultation with the Administrator for Federal Procurement Policy, may prescribe simplified procedures for the procurement of health-care resources under this subparagraph. The Secretary shall publish such procedures for public comment in accordance with section 22 of the Office of Federal Procurement Policy Act (41 U.S.C. 418b). Such procedures shall permit all responsible sources, as appropriate, to submit a bid, proposal, or quotation (as appropriate) for the resources to be procured and provide for the consideration by the Department of bids, proposals, or quotations so submitted.

(iii) Pending publication of the procedures under clause (ii), the Secretary shall (except as provided under subparagraph (A)) procure health-care resources referred to in clause (i) in accordance with all procurement laws and regulations.

(C) Any procurement of health-care resources other than those covered by subparagraph (A) or (B) shall be conducted in accordance with all procurement laws and regulations.

(D) For any procurement to be conducted on a sole source basis other than a procurement covered by subparagraph (A), a written justification shall be prepared that includes the information and is approved at the levels prescribed in section 303(f) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)).

(E) As used in this paragraph, the term 'commercial service' means a service that is offered and sold competitively in the commercial marketplace, is performed under standard commercial terms and conditions, and is procured using firm-fixed price contracts.

(b) Arrangements entered into under this section shall provide for payment to the Department in accordance with procedures that provide appropriate flexibility to negotiate payment which is in the best interest of the Government. Any proceeds to the Government received therefrom shall be credited to the applicable Department medical appropriation and to funds that have been allotted to the facility that furnished the resource involved.

(c) Eligibility for hospital care and medical services furnished any veteran pursuant to this section shall be subject to the same terms as though provided in a Department health care facility, and provisions of this title applicable to persons receiving hospital care or medical services in a Department health care facility shall apply to veterans treated under this section.
(d) When a Department health care facility provides hospital care or medical services, pursuant to a contract or agreement authorized by this section, to an individual who is not eligible for such care or services under chapter 17 of this title [38 USCS §§ 1701 et seq.] and who is entitled to hospital or medical insurance benefits under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.), such benefits shall be paid, notwithstanding any condition, limitation, or other provision in that title which would otherwise preclude such payment to such facility for such care or services or, if the contract or agreement so provides, to the community health care facility which is a party to the contract or agreement.

(e) The Secretary may make an arrangement that authorizes the furnishing of services by the Secretary under this section to individuals who are not veterans only if the Secretary determines--

(1) that veterans will receive priority under such an arrangement; and

(2) that such an arrangement--

   (A) is necessary to maintain an acceptable level and quality of service to veterans at that facility; or

   (B) will result in the improvement of services to eligible veterans at that facility.

(f) Any amount received by the Secretary from a non-Federal entity as payment for services provided by the Secretary during a prior fiscal year under an agreement entered into under this section may be obligated by the Secretary during the fiscal year in which the Secretary receives the payment.

(g) The Secretary shall submit to the Congress not later than February 1 of each year a report on the activities carried out under this section during the preceding fiscal year. Each report shall include-

(1) an appraisal of the effectiveness of the activities authorized in this section and the degree of cooperation from other sources, financial and otherwise; and

(2) recommendations for the improvement or more effective administration of such activities.

Amendments:


1973. Act Aug. 2, 1973 (effective 9/1/73, as provided by § 501 of such Act, which appears as 38 USCS § 1701 note), in subsec. (a), introductory matter, deleted "or other medical installations", and inserted "or medical schools or clinics".

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), in the introductory matter, substituted "the Administrator" for "he" preceding "determines", and substituted "clauses" for "paragraphs", and in paras. (1) and (2), inserted "health care"; in subsec. (c), inserted "health care" wherever appearing; and added subsec. (d).

1979. Act Dec. 20, 1979, in subsec. (a), introductory matter, inserted "or organ banks, blood banks, or similar institutions".

1982. Act Oct. 12, 1982 (applicable as provided by § 5 of such Act, which appears as 10 USCS § 101 note), in subsec. (d)(1), substituted "Health and Human Services" for "Health, Education, and Welfare".


1990. Act Aug. 15, 1990, in subsec. (a), substituted "health-care facilities and other health-care facilities (including organ banks, blood banks, or similar institutions), research centers, or medical schools" for "hospitals and other hospitals (or other medical installations having hospital facilities or organ banks, blood banks, or similar institutions) or medical schools or clinics in the medical community", and deleted concluding matter which read: "The Administrator may determine the geographical limitations of a medical community as used in this section.", and in subsec. (b), substituted "a methodology that provides appropriate flexibility to the heads of the facilities concerned to establish an appropriate reimbursement rate after taking into account local conditions and needs and the actual costs to the providing facility of the resource involved" for "a charge which covers the full cost of services rendered, supplies used, and including normal depreciation and amortization costs of equipment", and added "and to funds that have been allotted to the facility that furnished the resource involved".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5053, as 38 USCS § 8153.

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (c), substituted "under this section" for "hereunder".

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Such Act further, in subsec. (d)(2), substituted "the two Secretaries" for "the Secretary and the Administrator".

1993. Act Dec. 20, 1993, in subsec. (a), designated the existing provisions as para. (1), in such para. as so designated, substituted "other form of agreement for the mutual use, or exchange of use, of--", subparas. (A) and (B), and para. (2) for "other form of agreement, as set forth in clauses (1) and (2) below, between Department health-care facilities and other health-care facilities (including organ banks, blood banks, or similar institutions), research centers, or medical schools:

"(1) for the mutual use, or exchange of use, of specialized medical resources when such an agreement will obviate the need for a similar resource to be provided in a Department health care facility; or

"(2) for the mutual use, or exchange of use, of specialized medical resources in a Department health care facility, which have been justified on the basis of veterans' care, but which are not utilized to their maximum effective capacity.".

1996. Act Oct. 9, 1996 substituted the section heading for one which read: "Specialized medical resources"; in subsec. (a), in para. (1), substituted "health-care resources" for "certain specialized medical resources", substituted "other health-care resources" for "other medical resources", and substituted "of health-care resources between Department health-care facilities and any health-care provider, or other entity or individual" for "of--

"(A) specialized medical resources between Department health-care facilities and other health-care facilities (including organ banks, blood banks, or similar institutions), research centers, or medical schools; and

"(B) health-care resources between Department health-care facilities and State home facilities recognized under section 1742(a) of this title".
in para. (2), substituted "if such resources are not, or would not be," for "only if (A) such an agreement will obviate the need for a similar resource to be provided in a Department health care facility, or (B) the Department resources which are the subject of the agreement and which have been justified on the basis of veterans' care are not", and added para. (3); in subsec. (b), substituted "payment to the Department in accordance with procedures that provide appropriate flexibility to negotiate payment which is in the best interest of the Government." for "reciprocal reimbursement based on a methodology that provides appropriate flexibility to the heads of the facilities concerned to establish an appropriate reimbursement rate after taking into account local conditions and needs and the actual costs to the providing facility of the resource involved."; in subsec. (d), substituted "preclude such payment to such facility for such care or services" for "preclude such payment, in accordance with--

"(1) rates prescribed by the Secretary of Health and Human Services, after consultation with the Secretary, and

"(2) procedures jointly prescribed by the two Secretaries to assure reasonable quality of care and services and efficient and economical utilization of resources, to such facility therefor"; redesignated subsec. (e) as subsec. (g); and added new subses. (e) and (f).


Such Act further, as amended by Act Nov. 1, 2000 (effective 11/21/97 and as if included in Act Nov. 21, 1997 as originally enacted, as provided by § 404(b)(2) of the 2000 Act), in subsec. (a)(3), in subpara. (B)(ii), inserted "as appropriate, ".

2000. Act Nov. 1, 2000 (effective 11/21/97 and as if included in Act Nov. 21, 1997 as originally enacted, as provided by § 404(b)(2) of the 2000 Act), amended the directory language of Act Nov. 21, 1997, without affecting the text of this section.

2003. Act Dec. 6, 2003, in subsec. (g), substituted "not later than February 1 of each year" for "not more than 60 days after the end of each fiscal year", and inserted "during the preceding fiscal year".

Other provisions:

Report to congressional committees. Act Oct. 21, 1976, P. L. 94-581, Title I, § 115(c), 90 Stat. 2853, provides: "At such time as the rates and procedures described in section 5053(d) [now section 8153(d)] of title 38, United States Code are prescribed, the Secretary of Health, Education, and Welfare; in consultation with the Administrator of Veterans' Affairs, shall submit to the Committee on Ways and Means and the Committee on Veterans' Affairs of the House of Representatives and to the Committee on Finance and the Committee on Veterans' Affairs of the Senate a full report describing such rates and procedures (and any such additional matters relating to the formulation of such rates and procedures as the Secretary may consider pertinent)."

Effective date of amendment made by § 404(b)(2) of Act Nov. 1, 2000. Act Nov. 1, 2000, P. L. 106-419, Title IV, § 404(b)(2), 114 Stat. 1866, provides that the amendment made by such section (amending the directory language of § 402(e) of Act Nov. 21, 1997, P. L. 105-114, which amended subsec. (a)(3)(B)(ii) of this section) is effective November 21, 1997, and as if included in the 1997 Act as originally enacted.

Code of Federal Regulations

Department of Veterans Affairs-Medical, 38 CFR Part 17

Department of Veterans Affairs-Simplified acquisition procedures for health-care resources, 48 CFR Part 873
§ 8154. Exchange of medical information

(a) The Secretary is authorized to enter into agreements with medical schools, hospitals, research centers, and individual members of the medical profession under which medical information and techniques will be freely exchanged and the medical information services of all parties to the agreement will be available for use by any party to the agreement under conditions specified in the agreement. In carrying out the purposes of this section, the Secretary shall utilize recent developments in electronic equipment to provide a close educational, scientific, and professional link between Department hospitals and major medical centers. Such agreements shall be utilized by the Secretary to the maximum extent practicable to create, at each Department hospital which is a part of any such agreement, an environment of academic medicine which will help such hospital attract and retain highly trained and qualified members of the medical profession.

(b) In order to bring about utilization of all medical information in the surrounding medical community, particularly in remote areas, and to foster and encourage the widest possible cooperation and consultation among all members of the medical profession in such community, the educational facilities and programs established at Department hospitals and the electronic link to medical centers shall be made available for use by the surrounding medical community (including State home facilities furnishing domiciliary, nursing home, or hospital care to veterans). The Secretary may charge a fee for such services (on annual or like basis) at rates which the Secretary determines, after appropriate study, to be fair and equitable. The financial status of any user of such services shall be taken into consideration by the Secretary in establishing the amount of the fee to be paid. Any proceeds to the Government received therefrom shall be credited to the applicable Department medical appropriation.

(c) The Secretary is authorized to enter into agreements with public and nonprofit private institutions, organizations, corporations, and other entities in order to participate in cooperative health-care personnel education programs within the geographical area of any Department health-care facility located in an area remote from major academic health centers.

Amendments:
1976. Act Sept. 28, 1976, in subsec. (b), inserted "Any proceeds to the Government received therefrom shall be credited to the applicable Veterans' Administration medical appropriation."

Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (b), inserted "the following "available for use by", and substituted "the Administrator" for "he" preceding "determines".


1982. Act Sept. 8, 1982, in subsec. (b), inserted "(including State home facilities furnishing domiciliary, nursing home, or hospital care to veterans)".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5054, as 38 USCS § 8154.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Cross References
This section is referred to in 38 USCS § 8155

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:60

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 24

§ 8155. Pilot programs; grants to medical schools

(a) The Secretary may establish an Advisory Subcommittee on Programs for Exchange of Medical Information, of the Special Medical Advisory Group, established under section 7312 of this title [38 USCS § 7312], to advise the Secretary on matters regarding the administration of this section and to coordinate these functions with other research and education programs in the Department of Medicine and Surgery. The Assistant Under Secretary for Health charged with administration of the Department of Medicine and Surgery medical research program shall be an ex officio member of this Subcommittee.

(b) The Secretary, upon the recommendation of the Subcommittee, is authorized to make grants to medical schools, hospitals, and research centers to assist such medical schools, hospitals, and research centers in planning and carrying out agreements authorized by section 8154 of this title [38 USCS § 8154]. Such grants may be used for the employment of personnel, the construction of facilities, the purchasing of equipment when necessary to implement such programs, and for such other purposes as will facilitate the administration of this section.

(c) (1) There is hereby authorized to be appropriated an amount not to exceed $3,500,000 for fiscal year 1976; $1,700,000 for the period beginning July 1, 1976, and ending September 30, 1976; $4,000,000 for fiscal year 1977; $4,000,000 for fiscal year 1978; and $4,000,000 for fiscal year 1979 and for each of the three succeeding fiscal years, for the purpose of developing and carrying out medical information programs under this section on a pilot program basis and for the grants authority in subsection (b) of this
section. Pilot programs authorized by this subsection shall be carried out at Department hospitals in geographically dispersed areas of the United States.

(2) Funds authorized under this section shall not be available to pay the cost of hospital, medical, or other care of patients except to the extent that such cost is determined by the Secretary to be incident to research, training, or demonstration activities carried out under this section.

(d) The Secretary, after consultation with the Subcommittee shall prescribe regulations covering the terms and conditions for making grants under this section.

(e) Each recipient of a grant under this section shall keep such records as the Secretary may prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such grant, the total cost of the project or undertaking in connection with which such grant is made or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such records as will facilitate an effective audit.

(f) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for the purpose of audit and examination, to any books, documents, papers, and records of the recipient of any grant under this section which are pertinent to any such grant.

**Amendments:**

1971. Act Aug. 6, 1971, in subsec. (c)(1), substituted "fiscal year 1968 through 1971, and such sums as may be necessary for each fiscal year 1972 through 1975," for "of the first four fiscal years following the fiscal year in which this subchapter is enacted".

1976. Act Sept. 28, 1976, in subsec. (c)(1), substituted "$3,500,000 for fiscal year 1976; $1,700,000 for the period beginning July 1, 1976, and ending September 30, 1976; $4,000,000 for fiscal year 1977; $4,000,000 for fiscal year 1978; and $4,000,000 for fiscal year 1979," for "$3,000,000 for each fiscal year 1968 through 1971, and such sums as may be necessary for each fiscal year 1972 through 1975.".

Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), substituted "the Administrator" for "him", and substituted "charged with administration of the Department of Medicine and Surgery medical research program" for "for Research and Education in Medicine".

1979. Act Dec. 20, 1979, in subsec. (c)(1), inserted "and for each of the three succeeding fiscal years".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5055, as 38 USCS § 8155, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

1992. Act Oct. 9, 1992, in subsec. (a), substituted "Under Secretary for Health" for "Chief Medical Director".


**Other provisions:**

Redesignation of Veterans Health Services and Research Administration; references to Department of Medicine and Surgery. Act May 7, 1991, P.L. 102-40, § 2, 105 Stat. 187,

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which appears as 38 USCS § 301 note, provides for the redesignation of the Veterans Health Services and Research Administration as the Veterans Health Administration. Such Act further provides that any reference to the Department of Medicine and Surgery of the Veterans' Administration shall be deemed to refer to the Veterans Health Administration.

**Termination of advisory committees, boards and councils, in existence on Jan. 5, 1973.** Act Oct. 6, 1972, P. L. 92-463, §§ 3(2) and 14, 86 Stat. 770, 776 (effective 1/5/73, as provided by § 15 of such Act), which is classified as 5 USCS Appx, provides that the advisory committees in existence on Jan. 5, 1973, are to terminate not later than the expiration of the two-year period following Jan. 5, 1973, unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a board established by the Congress, its duration is otherwise provided for by law.

**Code of Federal Regulations**

Department of Veterans Affairs-Nondiscrimination in federally-assisted programs of the Department of Veterans Affairs-effectuation of Title VI of the Civil Rights Act of 1964,  38 CFR Part 18

Department of Veterans Affairs-Delegation of responsibility in connection with Title VI, Civil Rights Act of 1964,  38 CFR Part 18a

Department of Veterans Affairs-Practice and procedure under Title VI of the Civil Rights Act of 1964 and Part 18 of this chapter,  38 CFR Part 18b

Department of Veterans Affairs-Vocational rehabilitation and education,  38 CFR Part 21

**Research Guide**

**Am Jur:**

77 Am Jur 2d, Veterans and Veterans' Laws § 24

§ 8156. **Coordination with health services development activities carried out under the National Health Planning and Resources Development Act of 1974**

The Secretary and the Secretary of Health and Human Services shall, to the maximum extent practicable, coordinate programs carried out under this subchapter [38 USCS §§ 8151 et seq.] and programs carried out under part F of title XVI of the Public Health Service Act (42 U.S.C. 300t et seq.).

**References in text:**

"The National Health Planning and Resources Development Act of 1974", referred to in the section heading, is Act Jan. 4, 1975, P. L. 93-641, 88 Stat. 2225, which is generally classified to 42 USCS §§ 300k et seq. For full classification of this Act, consult USCS Tables volumes.

"Part F of title XVI of the Public Health Service Act", referred to in this section, was added by Act Jan. 4, 1975, P.L. 93-641, § 4, 88 Stat. 2273, and was redesignated as Part D by Act Oct. 4, 1979, P.L. 96-79, Title II, § 202(a), 93 Stat. 632. Part D of title XVI of the Public Health Service Act is generally classified to 42 USCS §§ 300t et seq. For full classification of this Act, consult USCS Tables volumes.

**Amendments:**

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), substituted new section heading for one which read: "Coordination with programs carried out under the Heart Disease, Cancer, and Stroke Amendments of 1965"; and substituted "part F of title XVI" for "title IX" in the text of the section.
1982. Act Oct. 12, 1982 (applicable as provided by § 5 of such Act, which appears as 10 USCS § 101 note) inserted "(42 U.S.C. 300t et seq.)"; and substituted "Health and Human Services" for "Health, Education, and Welfare".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5056, as 38 USCS § 8156.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 24

§ 8157. Joint title to medical equipment

(a) Subject to subsection (b), the Secretary may enter into agreements with institutions described in section 8153(a) of this title [38 USCS § 8153(a)] for the joint acquisition of medical equipment.

(b) (1) The Secretary may not pay more than one-half of the purchase price of equipment acquired through an agreement under subsection (a).

(2) Any equipment to be procured under such an agreement shall be procured by the Secretary. Title to such equipment shall be held jointly by the United States and the institution.

(3) Before equipment acquired under such an agreement may be used, the parties to the agreement shall arrange by contract under section 8153 of this title [38 USCS § 8153] for the exchange or use of the equipment.

(4) The Secretary may not contract for the acquisition of medical equipment to be purchased jointly under an agreement under subsection (a) until the institution which enters into the agreement provides to the Secretary its share of the purchase price of the medical equipment.

(c) (1) Notwithstanding any other provision of law, the Secretary may transfer the interest of the Department in equipment acquired through an agreement under subsection (a) to the institution which holds joint title to the equipment if the Secretary determines that the transfer would be justified by compelling clinical considerations or the economic interest of the Department. Any such transfer may only be made upon agreement by the institution to pay to the Department the amount equal to one-half of the depreciated purchase price of the equipment. Any such payment when received shall be credited to the applicable Department medical appropriation.

(2) Notwithstanding any other provision of law, the Secretary may acquire the interest of an institution in equipment acquired under subsection (a) if the Secretary determines that the acquisition would be justified by compelling clinical considerations or the economic interests of the Department. The Secretary may not pay more than one-half the depreciated purchase price of that equipment.

Explanatory notes:

A prior § 8157 (Act Nov. 7, 1966, P.L. 89-785, Title II, § 203, 80 Stat. 1376) was repealed by Act Oct. 28, 1986, P.L. 99-576, Title II, § 231(c)(2)(A), 100 Stat. 3264. Such section required the Administrator to submit to Congress reports on the activities carried out under 38 USCS §§ 5053 and 5054 [now 38 USCS §§ 8153 and 8154].
§ 8158. Deposit in escrow

(a) To facilitate the procurement of medical equipment pursuant to section 8157 of this title [38 USCS § 8157], the Secretary may enter into escrow agreements with institutions described in section 8153(a) of this title [38 USCS § 8153(a)]. Any such agreement shall provide that--

(1) the institutions shall pay to the Secretary the funds necessary to make a payment under section 8157(b)(4) of this title [38 USCS § 8157(b)(4)];
(2) the Secretary, as escrow agent, shall administer those funds in an escrow account; and
(3) the Secretary shall disburse the escrowed funds to pay for such equipment upon its delivery or in accordance with the contract to procure the equipment and shall disburse all accrued interest or other earnings on the escrowed funds to the institution.

(b) As escrow agent for funds placed in escrow pursuant to an agreement under subsection (a), the Secretary may--

(1) invest the escrowed funds in obligations of the Federal Government or obligations which are insured or guaranteed by the Federal Government;
(2) retain in the escrow account interest or other earnings on such investments;
(3) disburse the funds pursuant to the escrow agreement; and
(4) return undisbursed funds to the institution.

(c) (1) If the Secretary enters into an escrow agreement under this section, the Secretary may enter into an agreement to procure medical equipment if one-half the purchase price of the equipment is available in an appropriation or fund for the expenditure or obligation.

(2) Funds held in an escrow account under this section shall not be considered to be public funds.
§ 8161. Definitions

For the purposes of this subchapter [38 USCS §§ 8161 et seq.):

(1) The term "enhanced-use lease" means a written lease entered into by the Secretary under this subchapter [38 USCS §§ 8161 et seq.].

(2) The term "congressional veterans' affairs committees" means the Committees on Veterans' Affairs of the Senate and the House of Representatives.

Other provisions:


Training and outreach regarding enhanced-use lease authority. Act Nov. 30, 1999, P. L. 106-117, Title II, § 208(f), 113 Stat. 1568, provides: "The Secretary shall take appropriate actions to provide training and outreach to personnel at Department medical centers regarding the enhanced-use lease authority under subchapter V of chapter 81 of title 38, United States Code [38 USCS §§ 8161 et seq.]. The training and outreach shall address methods of approaching potential lessees in the medical or commercial sectors regarding the possibility of entering into leases under that authority and other appropriate matters."

Independent analysis of opportunities for use of enhanced-use lease authority. Act Nov. 30, 1999, P. L. 106-117, Title II, § 208(g), 113 Stat. 1568, provides:

"(1) The Secretary shall take appropriate actions to secure from an appropriate entity (or entities) independent of the Department an analysis (or analyses) of opportunities for the use of the enhanced-use lease authority under subchapter V of chapter 81 of title 38, United States Code [38 USCS §§ 8161 et seq.].

"(2) An analysis under paragraph (1) shall include--

"(A) a survey of facilities of the Department for purposes of identifying Department property that presents an opportunity for lease under the enhanced-use lease authority;

"(B) an assessment of the feasibility of entering into enhanced-use leases under that authority in the case of any property identified under subparagraph (A) as presenting an opportunity for such lease; and

"(C) an assessment of the resources required at the Department facilities concerned, and at the Department Central Office, in order to facilitate the entering into of enhanced-used leases in the case of property so identified.

"(3) If as a result of a survey under paragraph (2)(A) an entity carrying out an analysis under this subsection determines that a particular Department property presents no opportunities for lease under the enhanced-use lease authority, the analysis shall include the entity's explanation of that determination.

"(4) If as a result of such a survey an entity carrying out an analysis under this subsection determines that certain Department property presents an opportunity for lease under the enhanced-use lease authority, the analysis shall include a single integrated business plan, developed by the entity, that addresses the strategy and resources necessary to implement the plan for all property determined to present an opportunity for such lease.".
§ 8162. Enhanced-use leases

(a) (1) The Secretary may in accordance with this subchapter [38 USCS §§ 8161 et seq.] enter into leases with respect to real property that is under the jurisdiction or control of the Secretary. Any such lease under this subchapter [38 USCS §§ 8161 et seq.] may be referred to as an "enhanced-use lease". The Secretary may dispose of any such property that is leased to another party under this subchapter [38 USCS §§ 8161 et seq.] in accordance with section 8164 of this title [38 USCS § 8164]. The Secretary may exercise the authority provided by this subchapter [38 USCS §§ 8161 et seq.] notwithstanding section 8122 of this title [38 USCS § 8122], subchapter II of chapter 5 of title 40 [40 USCS §§ 521 et seq.], sections 541-555 and 1302 of title 40 [40 USCS §§ 541-555 and 1302], or any other provision of law (other than Federal laws relating to environmental and historic preservation) inconsistent with this section. The applicability of this subchapter [38 USCS §§ 8161 et seq.] to section 421(b) of the Veterans' Benefits and Services Act of 1988 (Public Law 100-322; 102 Stat. 553) [unclassified] is covered by subsection (c).

(2) The Secretary may enter into an enhanced-use lease only if--
   (A) the Secretary determines that--
      (i) at least part of the use of the property under the lease will be to provide appropriate space for an activity contributing to the mission of the Department;
      (ii) the lease will not be inconsistent with and will not adversely affect the mission of the Department; and
      (iii) the lease will enhance the use of the property; or
   (B) the Secretary determines that the implementation of a business plan proposed by the Under Secretary for Health for applying the consideration under such a lease to the provision of medical care and services would result in a demonstrable improvement of services to eligible veterans in the geographic service-delivery area within which the property is located.

(3) The provisions of sections 3141-3144, 3146, and 3147 of title 40 [40 USCS §§ 3141-3144, 3146, and 3147] shall not, by reason of this section, become inapplicable to property that is leased to another party under an enhanced-use lease.

(4) A property that is leased to another party under an enhanced-use lease may not be considered to be unutilized or underutilized for purposes of section 501 of the Stewart B. McKinney Homeless Assistance Act [McKinney-Vento Homeless Assistance Act] (42 U.S.C. 11411).

(b) (1) (A) If the Secretary has determined that a property should be leased to another party through an enhanced-use lease, the Secretary shall select the party with whom the lease will be entered into using selection procedures determined by the Secretary that ensure the integrity of the selection process.

   (B) In the case of a property that the Secretary determines is appropriate for use as a facility to furnish services to homeless veterans under chapter 20 of this title [38 USCS §§ 2001 et seq.], the Secretary may enter into an enhanced-use lease with a provider of homeless services without regard to the selection procedures required under subparagraph (A).

(2) The term of an enhanced-use lease may not exceed 75 years.
(3) (A) Each enhanced-use lease shall be for fair consideration, as determined by the Secretary. Consideration under such a lease may be provided in whole or in part through consideration in-kind.
   (B) Consideration in-kind may include provision of goods or services of benefit to the Department, including construction, repair, remodeling, or other physical improvements of Department facilities, maintenance of Department facilities, or the provision of office, storage, or other usable space.

(4) The terms of an enhanced-use lease may provide for the Secretary to--
   (A) obtain facilities, space, or services on the leased property; and
   (B) use minor construction funds for capital contribution payments.

(c) (1) Subject to paragraph (2), the entering into an enhanced-use lease covering any land or improvement described in section 421(b)(2) of the Veterans' Benefits and Services Act of 1988 (Public Law 100-322; 102 Stat. 553) [unclassified] shall be considered to be prohibited by that section unless specifically authorized by law.

   (2) The entering into an enhanced-use lease by the Secretary covering any land or improvement described in such section 421(b)(2) [unclassified] shall not be considered to be prohibited under that section if under the lease--
      (A) the designated property is to be used only for child-care services;
      (B) those services are to be provided only for the benefit of--
          (i) employees of the Department;
          (ii) individuals employed on the premises of such property; and
          (iii) employees of a health-personnel educational institution that is affiliated with a Department facility;
      (C) over one-half of the employees benefited by the child-care services provided are required to be employees of the Department; and
      (D) over one-half of the children to whom child-care services are provided are required to be children of employees of the Department.

Explanatory notes:

"McKinney-Vento Homeless Assistance Act" has been inserted in brackets in subsec. (a)(4) pursuant to § 2 of Act Oct. 30, 2000, P. L. 106-400 (42 USCS § 11301 note), which provides that any reference in any law, regulation, document, paper, or other record of the United States to the Stewart B. McKinney Homeless Assistance Act shall be deemed to be a reference to the "McKinney-Vento Homeless Assistance Act".

Amendments:

1999. Act Nov. 30, 1999, in subsec. (a), in para. (2), in the introductory matter, substituted "only if--"
   "(A) the Secretary"
for "only if the Secretary", redesignated former subparas. (A)-(C) as cls. (i)-(iii), respectively, and, in cl. (iii) as redesignated, substituted "; or" for a concluding period, and added new subpara. (B); and, in subsec. (b), in para. (2), substituted "may not exceed 75 years." for "may not exceed--"
   "(A) 35 years, in the case of a lease involving the construction of a new building or the substantial rehabilitation of an existing building, as determined by the Secretary; or"
   "(B) 20 years, in the case of a lease not described in subparagraph (A)."
and substituted para. (4) for one which read: "(4) Any payment by the Secretary for the use of space or services by the Department on property that has been leased under this subchapter may only be made from funds appropriated to the Department for the activity that uses the space or services. No other such payment may be made by the Secretary to a lessee under an enhanced-use lease unless the authority to make the payment is provided in advance in an appropriation Act."

2001. Act Dec. 21, 2001 (applicable to leases entered into on or after enactment, as provided by § 10(c) of such Act, which appears as a note to this section), in subsec. (b)(1), designated the existing provisions as subpara. (A), and added subpara. (B).


2003. Act Dec. 15, 2003 (effective 8/21/2002, as provided by § 5 of such Act, which appears as 5 USCS § 5334 note), in subsec. (a)(3), deleted a comma following "of title 40".

Other provisions:

Application of Dec. 21, 2001 amendments. Act Dec. 21, 2001, P. L. 107-95, § 10(c), 115 Stat. 920, provides: "The amendments made by subsection (b) [amending subsec. (b)(1) of this section] shall apply to leases entered into on or after the date of the enactment of this Act."

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 24

§ 8163. Hearing and notice requirements regarding proposed leases

(a) If the Secretary proposes to enter into an enhanced-use lease with respect to certain property, the Secretary shall conduct a public hearing before entering into the lease. The hearing shall be conducted in the community in which the property is located. At the hearing, the Secretary shall receive the views of veterans service organizations and other interested parties regarding the proposed lease of the property and the possible effects of the uses to be made of the property under a lease of the general character then contemplated. The possible effects to be addressed at the hearing shall include effects on--

(1) local commerce and other aspects of the local community;
(2) programs administered by the Department; and
(3) services to veterans in the community.

(b) Before conducting such a hearing, the Secretary shall provide reasonable notice to the congressional veterans' affairs committees and to the public of the proposed lease and of the hearing. The notice shall include the following:

(1) The time and place of the hearing.
(2) Identification of the property proposed to be leased.
(3) A description of the proposed uses of the property under the lease.
(4) A description of how the uses to be made of the property under a lease of the general character then contemplated--

(A) would--
(i) contribute in a cost-effective manner to the mission of the Department;
(ii) not be inconsistent with the mission of the Department;
(iii) not adversely affect the mission of the Department; and
(iv) affect services to veterans; or
(B) would result in a demonstrable improvement of services to eligible veterans in
the geographic service-delivery area within which the property is located.

(5) A description of how those uses would affect services to veterans.

(c) (1) If after a hearing under subsection (a) the Secretary intends to enter into an
enhanced-use lease of the property involved, the Secretary shall notify the congressional
veterans' affairs committees of the Secretary's intention to enter into such lease and shall
publish a notice of such intention in the Federal Register.

(2) The Secretary may not enter into an enhanced use lease until the end of the 45-day
period beginning on the date of the submission of notice under paragraph (1).

(3) Each notice under paragraph (1) shall include the following:
(A) An identification of the property involved.
(B) An explanation of the background of, rationale for, and economic factors in
support of, the proposed lease.
(C) A summary of the views expressed by interested parties at the public hearing
conducted in connection with the proposed designation, together with a summary
of the Secretary's evaluation of those views.
(D) A description of the provisions of the proposed lease.
(E) A description of how the proposed lease--
   (i) would--
       (I) contribute in a cost-effective manner to the mission of the Department;
       (II) not be inconsistent with the mission of the Department;
       (III) not adversely affect the mission of the Department; and
       (IV) affect services to veterans; or
   (ii) would result in a demonstrable improvement of services to eligible
       veterans in the geographic service-delivery area within which the property is
       located.
(F) A description of how the proposed lease would affect services to veterans.
(G) A summary of a cost-benefit analysis of the proposed lease.

(4) [Deleted]

Amendments:

1999. Act Nov. 30, 1999, in subsec. (b), in the introductory matter, substituted "include the
following:" for "include-", in paras. (1)-(3), capitalized the first letter of the first word and
substituted the concluding period for a semicolon, in para. (4), capitalized the first letter of the
first word and substituted subparas. (A) and (B) for former subparas. (A)-(C), which read:

"(A) would contribute in a cost-effective manner to the mission of the Department;

"(B) would not be inconsistent with the mission of the Department; and

"(C) would not adversely affect the mission of the Department; and"

and, in para. (5), capitalized the first letter of the first word.
Such Act further, as amended by Act Nov. 1, 2000 (effective 11/30/99 and as if included in Act Nov. 30, 1999 as originally enacted, as provided by § 404(b)(1) of the 2000 Act), in subsec. (c)(3)(E) substituted cls. (i) and (ii) for former cls. (i)-(iii), which read:

"(i) would contribute in a cost-effective manner to the mission of the Department;

"(ii) would not be inconsistent with the mission of the Department; and

"(iii) would not adversely affect the mission of the Department."

2000. Act Nov. 1, 2000, in subsec. (c), substituted para. (2) for one which read: "(2) The Secretary may not enter into an enhanced-use lease until the end of a 60-day period of continuous session of Congress following the date of the submission of notice under paragraph (1). For purposes of the preceding sentence, continuity of a session of Congress is broken only by an adjournment sine die, and there shall be excluded from the computation of such 60-day period any day during which either House of Congress is not in session during an adjournment of more than three days to a day certain."

Such Act further (effective 11/30/99 and as if included in Act Nov. 30, 1999 as originally enacted, as provided by § 404(b)(1) of the 2000 Act), amended the directory language of Act Nov. 30, 1999, without affecting the text of this section.

2003. Act Dec. 6, 2003, substituted the section heading for one which read: "§ 8163. Designation of property to be leased"; in subsec. (a), in the introductory matter, substituted "enter into an enhanced-use lease with respect to certain property" for "designate a property to be leased under an enhanced-use lease", and substituted "before entering into the lease" for "before making the designation"; in subsec. (b), in the introductory matter, substituted "to the congressional veterans' affairs committees and to the public of the proposed lease" for "of the proposed designation"; and, in subsec. (c), in para. (1), substituted "enter into an enhanced-use lease of the property involved" for "designate the property involved" and substituted "to enter into such lease" for "to so designate the property", in para. (2), substituted "45-day period" for "90-day period", in para. (3), in subpara. (D), substituted "description of the provisions" for "general description" and added subpara. (G), and deleted para. (4), which read:

"(4) Not less than 30 days before entering into an enhanced-use lease, the Secretary shall submit to the congressional veterans' affairs committees a report on the proposed lease. The report shall include--

"(A) updated information with respect to the matters described in paragraph (3);

"(B) a summary of a cost-benefit analysis of the proposed lease;

"(C) a description of the provisions of the proposed lease; and

"(D) a notice of designation with respect to the property."

Other provisions:

Effective date of amendment made by § 404(b)(1) of Act Nov. 1, 2000. Act Nov. 1, 2000, P. L. 106-419, Title IV, § 404(b)(1), 114 Stat. 1865, provides that the amendment made by such section (amending the directory language of § 208(c)(2) of Act Nov. 30, 1999, P. L. 106-117, which amended subsec. (c) of this section) is effective November 30, 1999, and as if included in the 1999 Act as originally enacted.

§ 8164. Authority for disposition of leased property

(a) If, during the term of an enhanced-use lease or within 30 days after the end of the term of the lease, the Secretary determines that the leased property is no longer needed by the Department, the Secretary may initiate action for the transfer to the lessee of all right,
title, and interest of the United States in the property. A disposition of property may not be made under this section unless the Secretary determines that the disposition under this section rather than under section 8118 or 8122 of this title [38 USCS § 8118 or 8122] is in the best interests of the Department.

(b) A disposition under this section may be made for such consideration as the Secretary determines is in the best interest of the United States and upon such other terms and conditions as the Secretary considers appropriate.

(c) Not less than 45 days before a disposition of property is made under this section, the Secretary shall notify the congressional veterans' affairs committees of the Secretary's intent to dispose of the property and shall publish notice of the proposed disposition in the Federal Register. The notice shall describe the background of, rationale for, and economic factors in support of, the proposed disposition (including a cost-benefit analysis summary) and the method, terms, and conditions of the proposed disposition.

Amendments:

2003. Act Dec. 6, 2003, in subsec. (a), deleted "by requesting the Administrator of General Services to dispose of the property pursuant to subsection (b)" following "in the property", and deleted "The Administrator, upon request of the Secretary, shall take appropriate action under this section to dispose of property of the Department that is or has been subject to an enhanced-use lease." following "of the Department."; in subsec. (b), substituted "Secretary determines" for "Secretary and the Administrator of General Services jointly determine" and substituted "Secretary considers" for "Secretary and the Administrator consider"; and, in subsec. (c), substituted "45 days" for "90 days".

2004. Act Nov. 30, 2004, in subsec. (a), inserted "8118 or".

Cross References

This section is referred to in 38 USCS §§ 8161, 8165

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§ 8165. Use of proceeds

(a) (1) Funds received by the Department under an enhanced-use lease and remaining after any deduction from those funds under subsection (b) shall be deposited in the Department of Veterans Affairs Medical Care Collections Fund established under section 1729A of this title [38 USCS § 1729A].

(2) Funds received by the Department from a disposal of leased property under section 8164 of this title [38 USCS § 8164] shall be deposited in the Department of Veterans Affairs Capital Asset Fund established under section 8118 of this title [38 USCS § 8118].

(b) An amount sufficient to pay for any expenses incurred by the Secretary in any fiscal year in connection with an enhanced-use lease shall be deducted from the proceeds of the lease for that fiscal year and may be used by the Secretary to reimburse the account from which the funds were used to pay such expenses. The Secretary may use the proceeds
from any enhanced-use lease to reimburse applicable appropriations of the Department for any expenses incurred in the development of additional enhanced-use leases.

(c) [Deleted]

Amendments:

1999. Act Nov. 30, 1999, in subsec. (a), substituted para. (1), for one which read: "(1) Of the funds received by the Department under an enhanced-use lease and remaining after any deduction from such funds under subsection (b), 75 percent shall be deposited in the nursing home revolving fund established under section 8116 of this title and 25 percent shall be credited to the Medical Care Account of the Department for the use of the Department facility at which the property is located.".


2003. Act Feb. 20, 2003, in subsec. (a)(1), substituted "Department of Veterans Affairs Medical Care Collections Fund established under section 1729A of this title" for "Department of Veterans Affairs Health Services Improvement Fund established under section 1729B of this title".

Act Dec. 6, 2003, in subsec. (a)(2), deleted "and remaining after any deduction from such funds under the laws referred to in subsection (c)" following "of this title"; in subsec. (b), added the sentence beginning "The Secretary may use . . ."; and, deleted subsec. (c), which read: "(c) Subsection (a) does not affect the applicability of subchapter IV of chapter 5 of title 40, with respect to reimbursement of the Administrator of General Services for expenses arising from any disposal of property under section 8164 of this title.".

Act Dec. 15, 2003 (effective 8/21/2002, as provided by § 5 of such Act, which appears as 5 USCS § 5334 note), purported to amend subsec. (c) by deleting a comma following "of title 40"; however, because of prior amendments, this amendment could not be executed.

2004. Act Nov. 30, 2004, in subsec. (a)(2), substituted "Department of Veterans Affairs Capital Asset Fund established under section 8118 of this title" for "nursing home revolving fund".

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§ 8166. Construction standards

(a) Unless the Secretary provides otherwise, the construction, alteration, repair, remodeling, or improvement of the property that is the subject of the lease shall be carried out so as to comply with all standards applicable to construction of Federal buildings. Any such construction, alteration, repair, remodeling, or improvement shall not be subject to any State or local law relating to land use, building codes, permits, or inspections unless the Secretary provides otherwise.

(b) Unless the Secretary has provided that Federal construction standards are not applicable to a property, the Secretary shall conduct periodic inspections of any such construction, alteration, repair, remodeling, or improvement for the purpose of ensuring that the standards are met.
Amendments:


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§ 8167. Exemption from State and local taxes

The interest of the United States in any property subject to an enhanced-use lease and any use by the United States of such property during such lease shall not be subject, directly or indirectly, to any State or local law relative to taxation, fees, assessments, or special assessments, except sales taxes charged in connection with any construction, alteration, repair, remodeling, or improvement project carried out under the lease.

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[8168. Repealed]

This section (Act Aug. 14, 1991, P. L. 102-86, Title IV, § 401(a), 105 Stat. 421) was repealed by Act Nov. 21, 1997, P. L. 105-114, § 205(b), 111 Stat. 2288. It provided for a limitation on the number of enhanced-use leases entered into during any fiscal year.

§ 8169. Expiration

The authority of the Secretary to enter into enhanced-use leases under this subchapter [38 USCS §§ 8161 et seq.] expires on December 31, 2011.

Amendments:


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CHAPTER 82. ASSISTANCE IN ESTABLISHING NEW STATE MEDICAL SCHOOLS; GRANTS TO AFFILIATED MEDICAL SCHOOLS; ASSISTANCE TO HEALTH MANPOWER TRAINING INSTITUTIONS

§ 8201. Coordination with public health programs; administration SUBCHAPTER I PILOT PROGRAM FOR ASSISTANCE IN THE ESTABLISHMENT OF NEW STATE MEDICAL SCHOOLS
SUBCHAPTER II GRANTS TO AFFILIATED MEDICAL SCHOOLS
SUBCHAPTER III ASSISTANCE TO PUBLIC AND NONPROFIT INSTITUTIONS OF HIGHER LEARNING, HOSPITALS AND OTHER HEALTH MANPOWER INSTITUTIONS AFFILIATED WITH THE DEPARTMENT TO INCREASE THE PRODUCTION OF PROFESSIONAL AND OTHER HEALTH PERSONNEL
SUBCHAPTER IV EXPANSION OF DEPARTMENT HOSPITAL EDUCATION AND TRAINING CAPACITY

Amendments:

1991. Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 402(b) of such Act (see Table II preceding 38 USCS § 101).


§ 8201. Coordination with public health programs; administration

(a) The Secretary and the Secretary of Health and Human Services shall, to the maximum extent practicable, coordinate the programs carried out under this chapter [38 USCS §§ 8201 et seq.] and the programs carried out under titles VII, VIII, and IX of the Public Health Service Act (42 U.S.C. 292 et seq.).

(b) The Secretary may not enter into any agreement under subchapter I of this chapter [38 USCS §§ 8211 et seq.] after September 30, 1979.

(c) The Secretary, after consultation with the special medical advisory committee established pursuant to section 7312(a) of this title [38 USCS § 7312(a)], shall prescribe regulations covering the terms and conditions for entering into agreements and making grants under this chapter [38 USCS §§ 8201 et seq.].

(d) Payments made pursuant to grants under this chapter [38 USCS §§ 8201 et seq.] may be made in installments, and either in advance or by way of reimbursement, with necessary adjustments on account of overpayments or underpayments, as the Secretary may determine.

(e) In carrying out the purposes of this chapter [38 USCS §§ 8201 et seq.], the Secretary may lease to any eligible institution for such consideration and under such terms and conditions as the Secretary deems appropriate, such land, buildings, and structures (including equipment therein) under the control and jurisdiction of the Department as may be necessary. The three-year limitation on the term of a lease prescribed in section 8122(a) of this title [38 USCS § 8122(a)] shall not apply with respect to any lease entered into pursuant to this chapter [38 USCS §§ 8201 et seq.], but no such lease may be for a period of more than 50 years. Any lease entered into pursuant to this chapter [38 USCS §§ 8201 et seq.] may be entered into without regard to the provisions of section 3709 of the Revised Statutes (41 U.S.C. 5). Notwithstanding section 1302 of title 40 [40 USCS § 1302], or any other provision of law, a lease entered into pursuant to this chapter [38
USCS §§ 8201 et seq.] may provide for the maintenance, protection, or restoration, by the lessee, of the property leased, as a part or all of the consideration of the lease.

(f) In making grants under this chapter [38 USCS §§ 8201 et seq.], the Secretary shall give special consideration to applications from institutions which provide reasonable assurances, which shall be included in the grant agreement, that priority for admission to health manpower and training programs carried out by such institutions will be given to otherwise qualified veterans who during their military service acquired medical military occupation specialties, and that among such qualified veterans those who served during the Vietnam era and those who are entitled to disability compensation under laws administered by the Secretary or whose discharge or release was for a disability incurred or aggravated in line of duty will be given the highest priority. In carrying out this chapter [38 USCS §§ 8201 et seq.] and section 7302 of this title [38 USCS § 7302] in connection with health manpower and training programs assisted or conducted under this title or in affiliation with a Department medical facility, the Secretary shall take appropriate steps to encourage the institutions involved to afford the priorities described in the first sentence of this subsection and to advise all qualified veterans with such medical military occupation specialties of the steps the Secretary has taken under this subsection and the opportunities available to them as a result of such steps.

(g) (1) Each recipient of assistance under this chapter [38 USCS §§ 8201 et seq.] shall keep such records as the Secretary shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is made or used, the amount of that portion of the cost of the project or undertaking supplied by other sources, and such records as will facilitate an effective audit.

(2) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipient of any assistance under this chapter [38 USCS §§ 8201 et seq.] which are pertinent to such assistance.

(h) [Repealed]

References in text:

The "Public Health Service Act", referred to in subsec. (a), is Act July 1, 1944, ch 373, as amended. Title VII of the Act, as added by Act July 30, 1956, ch 779, § 2, 70 Stat. 717, is generally classified to 42 USCS §§ 292 et seq. Title VIII of the Act, as added by Act Sept. 4, 1964, P. L. 88-581, § 2, 78 Stat. 908, is generally classified to 42 USCS §§ 296 et seq. Title IX of the Act, as added by Act Oct. 6, 1965, P. L. 89-239, § 2, 79 Stat. 926, is generally classified to 42 USCS §§ 299 et seq. For full classification of these Titles, consult USCS Tables volumes.

Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), redesignated subsecs. (e) and (f) as subsecs. (f) and (g), respectively; added new subsec. (e); in subsec. (f), as so redesignated, substituted "the Administrator" for "he" preceding "has taken"; and added subsec. (h).

1979. Act Dec. 20, 1979, substituted new subsec. (b) for one which read: "The Administrator may not enter into any agreement under subchapter I of this chapter or make any grant or
provide other assistance under subchapter II or III of this chapter after the end of the seventh calendar year after the calendar year in which this chapter takes effect.

1980. Act Aug. 26, 1980, in subsec. (e), inserted ", but no such lease may be for a period of more than 50 years".


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5070, as 38 USCS § 8201, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Such Act further, in subsec. (f), substituted "section 7302" for "section 4101(b)".

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (e), substituted "section 5022(a)" for "section 5012(a)".

Such Act further substituted "administered by the Secretary" for "administered by the Veterans' Administration" wherever appearing, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

1994. Act Nov. 2, 1994, in subsec. (c), substituted "section 7312(a)" for "section 4112(a)".

2000. Act Nov. 1, 2000 repealed subsec. (h), which read: "(h) Not later than ninety days after the end of each fiscal year, the Secretary shall submit to the Congress a report on activities carried out under this chapter, including (1) an appraisal of the effectiveness of the programs authorized herein in carrying out their statutory purposes and the degree of cooperation from other sources, financial and otherwise, (2) an appraisal of the contributions of such programs in improving the quantity and quality of physicians and other health care personnel furnishing hospital care and medical services to veterans under this title, (3) a list of the approved but unfunded projects under this chapter and the funds needed for each such project, and (4) recommendations for the improvement or more effective administration of such programs, including any necessary legislation.".


Short titles:
Act Oct. 24, 1972, P. L. 92-541, § 1, 86 Stat. 1100, located at 38 USCS § 101 note, provided that the Act which added this chapter may be cited as the "Veterans' Administration Medical School Assistance and Health Manpower Training Act of 1972".

Other provisions:

Act Oct. 6, 1972, P. L. 92-463, §§ 3(2) and 14, 86 Stat. 770, 776 (effective 1/5/73, as provided by § 15 of such Act), which is classified as 5 USCS Appx, provides that the advisory committees in existence on Jan. 5, 1973, are to terminate not later than the expiration of the two-year period following Jan. 5, 1973, unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a board established by the Congress, its duration is otherwise provided for by law.
Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section (see the Amendments note to this section), see § 5 of such Act, which appears as 10 USCS § 101 note.

Cross References
This section is referred to in 38 USCS § 8213

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SUBCHAPTER I PILOT PROGRAM FOR ASSISTANCE IN THE ESTABLISHMENT OF NEW STATE MEDICAL SCHOOLS

§ 8211. Declaration of purpose
§ 8212. Authorization of appropriations
§ 8213. Pilot program assistance
§ 8214. Limitations

§ 8211. Declaration of purpose
The purpose of this subchapter [38 USCS §§ 8211 et seq.] is to authorize the Secretary to implement a pilot program under which the Secretary may provide assistance in the establishment of new State medical schools at colleges or universities which are primarily supported by the States in which they are located if such schools are located in proximity to, and operated in conjunction with, Department medical facilities.

Amendments:
1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), substituted "the Administrator" for "he" preceding "may provide".
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5071, as 38 USCS § 8211.
Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

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§ 8212. Authorization of appropriations
(a) There is authorized to be appropriated $25,000,000 for the fiscal year ending June 30, 1973, and a like sum for each of the six succeeding fiscal years. Sums appropriated pursuant to this section shall be used for making grants pursuant to section 8213 of this title [38 USCS § 8213].
(b) Sums appropriated pursuant to subsection (a) of this section shall remain available until the end of the sixth fiscal year following the fiscal year for which they are appropriated.
Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5072, as 38 USCS § 8212, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

§ 8213. Pilot program assistance

(a) Subject to subsection (b) of this section, the Secretary may enter into an agreement to provide to any college or university which is primarily supported by the State in which it is located (hereinafter in this subchapter [38 USCS §§ 8211 et seq.] referred to as "institution") the following assistance to enable such institution to establish a new medical school:

(1) The extension, alteration, remodeling, improvement, or repair of buildings and structures (including, as part of a lease made under paragraph (1), the provision of equipment) provided under paragraph (1) to the extent necessary to make them suitable for use as medical school facilities.

(2) The making of grants to assist the institution to pay the cost of the salaries of the faculty of such school during the initial 12-month period of operation of the school and the next six such 12-month periods, but payment under this paragraph may not exceed an amount equal to--

(A) 90 percent of the cost of faculty salaries during the first 12-month period of operation,

(B) 90 percent of such cost during the second such period,

(C) 90 percent of such cost during the third such period,

(D) 80 percent of such cost during the fourth such period,

(E) 70 percent of such cost during the fifth such period,

(F) 60 percent of such cost during the sixth such period, and

(G) 50 percent of such cost during the seventh and eighth such periods.

(b) (1) The Secretary may not enter into any agreement under subsection (a) of this section unless the Secretary finds, and the agreement includes satisfactory assurances, that--

(A) there will be adequate State or other financial support for the proposed school;

(B) the overall plans for the school meet such professional and other standards as the Secretary deems appropriate;

(C) the school will maintain such arrangements with the Department medical facility with which it is associated (including but not limited to such arrangements as may be made under subchapter IV of chapter 81 of this title [38 USCS §§ 8151 et seq.]) as will be mutually beneficial in the carrying out of the mission of the medical facility and the school; and

(D) on the basis of consultation with the appropriate accreditation body or bodies approved for such purpose by the Secretary of Education, there is reasonable assurance that, with the aid of an agreement under subsection (a) of this section, such school will meet the accreditation standards of such body or bodies within a reasonable time.

(2) Any agreement entered into by the Secretary under this subchapter [38 USCS §§ 8211 et seq.] shall contain such terms and conditions (in addition to those imposed
pursuant to section 8201(e) of this title [38 USCS § 8201(e)] and subsection (b)(1) of this section) as the Secretary deems necessary and appropriate to protect the interest of the United States.

(c) If the Secretary, in accordance with such regulations as the Secretary shall prescribe, determines that any school established with assistance under this chapter [38 USCS §§ 8201 et seq.]--

(1) is not accredited and fails to gain appropriate accreditation within a reasonable period of time;
(2) is accredited but fails substantially to carry out the terms of the agreement entered into under this chapter [38 USCS §§ 8201 et seq.]; or
(3) is no longer operated for the purpose for which such assistance was granted,

the Secretary shall be entitled to recover from the recipient of assistance under this chapter [38 USCS §§ 8201 et seq.] the facilities of such school which were established with assistance under this chapter [38 USCS §§ 8201 et seq.]. In order to recover such facilities the Secretary may bring an action in the district court of the United States for the district in which such facilities are situated.

Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), deleted para. (1) which read: "(1) The leasing to the institution, for such consideration and under such terms and conditions as the Administrator deems appropriate, of such land, buildings, and structures (including equipment therein) under the control and jurisdiction of the Veterans' Administration as may be necessary for such school. The three-year limitation on the term of a lease in section 5012(a) of this title shall not apply with respect to any lease entered into pursuant to this paragraph. Any lease made pursuant to this subchapter may be made without regard to the provisions of section 3709 of the Revised Statutes (41 U.S.C. 5). Notwithstanding section 321 of the Act entitled 'An Act making appropriations for the Legislative Branch of the Government for the fiscal year ending June 30, 1933, and for other purposes', approved June 30, 1932 (40 U.S.C. 303b), or any other provision of law, a lease made pursuant to this subchapter may provide for the maintenance, protection, or restoration, by the lessee, of the property leased, as a part or all of the consideration for the lease.", redesignated paras. (2) and (3) as paras. (1) and (2), respectively; in subsec. (b), in para. (1), introductory matter, substituted "the Administrator" for "he", and in para. (2), substituted "the Administrator" for "he" preceding "deems necessary"; in subsec. (c), in the introductory matter, substituted "the Administrator" for "he", and in the concluding matter, substituted "the Administrator" for "he" preceding "shall be entitled".

1981. Act June 17, 1981, in subsec. (a)(2)(G), substituted "seventh and eighth such periods" for "seventh such period".

1982. Act Oct. 12, 1982 (applicable as provided by § 5 of such Act, which appears as 10 USCS § 101 note), in subsec. (b)(1)(D), substituted "Secretary of Education" for "Commissioner of Education of the Department of Health, Education, and Welfare".


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5073, as 38 USCS § 8213, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).
Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Cross References
This section is referred to in 38 USCS § 8212

§ 8214. Limitations
The Secretary may not use the authority under this subchapter [38 USCS §§ 8211 et seq.] to assist in the establishment of more than eight new medical schools. Such schools shall be located in geographically dispersed areas of the United States.

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5074, as 38 USCS § 8214.
Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

SUBCHAPTER II GRANTS TO AFFILIATED MEDICAL SCHOOLS

§ 8221. Declaration of purpose
§ 8222. Authorization of appropriations
§ 8223. Grants

§ 8221. Declaration of purpose
The purpose of this subchapter [38 USCS §§ 8221 et seq.] is to authorize the Secretary to carry out a program of grants to medical schools which have maintained affiliations with the Department in order to assist such schools to expand and improve their training capacities and to cooperate with institutions of the types assisted under subchapter III of this chapter [38 USCS §§ 8231 et seq.] in carrying out the purposes of such subchapter [38 USCS §§ 8221 et seq.].

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5081, as 38 USCS § 8221.
Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

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§ 8222. Authorization of appropriations
(a) There is authorized to be appropriated for carrying out programs authorized under this chapter [38 USCS §§ 8201 et seq.] $50,000,000 for the fiscal year ending June 30, 1973; a like sum for each of the six succeeding fiscal years; $15,000,000 for the fiscal year ending September 30, 1980; $25,000,000 for the fiscal year ending September 30, 1981; and $30,000,000 for the fiscal year ending September 30, 1982.
(b) Sums appropriated pursuant to subsection (a) of this section shall remain available until the end of the sixth fiscal year following the fiscal year for which they are appropriated.

(c) There is authorized to be appropriated for fiscal year 1979 to carry out the programs authorized under this chapter [38 USCS §§ 8201 et seq.] such sums as may be necessary (1) to make to institutions with which the Secretary has entered into agreements under subchapter I of this chapter [38 USCS §§ 8211 et seq.] supplemental grants for which the Secretary had, before May 1, 1978, approved applications from such institutions, and (2) to meet fully the commitments made by the Secretary before May 1, 1978, for grants and applications approved under authority of this subchapter [38 USCS §§ 8221 et seq.] and subchapters III and IV of this chapter [38 USCS §§ 8231 et seq. § 8241], except that no funds appropriated under this subsection may be used for grants and applications approved under this subchapter [38 USCS §§ 8221 et seq.] and such subchapters III and IV [38 USCS §§ 8231 et seq., § 8241] until the full amounts for which applications had been so approved have been obligated under such subchapter I [38 USCS §§ 8211 et seq.].

Amendments:


1979. Act Dec. 20, 1979 substituted new subsec. (a) for one which read: "There is further authorized to be appropriated $50,000,000 for the fiscal year ending June 30, 1973, and a like sum for each of the six succeeding fiscal years, for carrying out programs authorized under this chapter."

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5082, as 38 USCS § 8222.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Cross References

This section is referred to in 38 USCS § 8241

§ 8223. Grants

(a) Any medical school which is affiliated with the Department under an agreement entered into pursuant to this title may apply to the Secretary for a grant under this subchapter [38 USCS §§ 8221 et seq.] to assist such school, in part, to carry out, through the Department medical facility with which it is affiliated, projects and programs in furtherance of the purposes of this subchapter [38 USCS §§ 8221 et seq.], except that no grant shall be made for the construction of any building which will not be located on land under the jurisdiction of the Secretary. Any such application shall contain such information in such detail as the Secretary deems necessary and appropriate.

(b) An application for a grant under this section may be approved by the Secretary only upon the Secretary's determination that--

(1) the proposed projects and programs for which the grant will be made will make a significant contribution to improving the medical education (including continuing education) program of the school;
(2) the application contains or is supported by adequate assurance that any Federal funds made available under this subchapter [38 USCS §§ 8221 et seq.] will be supplemented by funds or other resources available from other sources, whether public or private;

(3) the application sets forth such fiscal control and accounting procedures as may be necessary to assure proper disbursement of, and accounting for, Federal funds expended under this subchapter [38 USCS §§ 8221 et seq.]; and

(4) the application provides for making such reports, in such form and containing such information, as the Secretary may require to carry out the Secretary's functions under this subchapter [38 USCS §§ 8221 et seq.], and for keeping such records and for affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports.

Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), deleted "subchapter IV of chapter 81 of" preceding "this title"; and in subsec. (b), in the introductory matter and para. (4), substituted "the Administrator's" for "his".

1979. Act Dec. 20, 1979, in subsec. (b)(1), deleted "and will result in a substantial increase in the number of medical students attending such school, provided there is reasonable assurance from a recognized accrediting body or bodies approved for such purposes by the Commissioner of Education of the Department of Health, Education, and Welfare that the increase in the number of students will not threaten any existing accreditation or otherwise compromise the quality of the training at such school" following "program of the school".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5083, as 38 USCS § 8223.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

SUBCHAPTER III ASSISTANCE TO PUBLIC AND NONPROFIT INSTITUTIONS OF HIGHER LEARNING, HOSPITALS AND OTHER HEALTH MANPOWER INSTITUTIONS AFFILIATED WITH THE DEPARTMENT TO INCREASE THE PRODUCTION OF PROFESSIONAL AND OTHER HEALTH PERSONNEL

§ 8231. Declaration of purpose
§ 8232. Definition
§ 8233. Grants

Amendments:


§ 8231. Declaration of purpose

The purpose of this subchapter [38 USCS §§ 8231 et seq.] is to authorize the Secretary to carry out a program of grants to provide assistance in the establishment of cooperative arrangements among universities, colleges, junior colleges, community colleges, schools of allied health professions, State and local systems of education, hospitals, and other
nonprofit health manpower institutions affiliated with the Department, designed to coordinate, improve, and expand the training of professional and technical allied health and paramedical personnel, and to assist in developing and evaluating new health careers, interdisciplinary approaches and career advancement opportunities, so as to improve and expand allied and other health manpower utilization.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5091, as 38 USCS § 8231.
Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 27

§ 8232. Definition

For the purpose of this subchapter [38 USCS §§ 8231 et seq.], the term "eligible institution" means any nonprofit educational facility or other public or nonprofit institution, including universities, colleges, junior colleges, community colleges, schools of allied health professions, State and local systems of education, hospitals, and other nonprofit health manpower institutions for the training or education of allied health or other health personnel affiliated with the Department for the conduct of or the providing of guidance for education and training programs for health manpower.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5092, as 38 USCS § 8232.
Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing.

§ 8233. Grants

(a) Any eligible institution may apply to the Secretary for a grant under this subchapter [38 USCS §§ 8231 et seq.] to assist such institution to carry out, through the Department medical facility with which it is, or will become affiliated, educational and clinical projects and programs, matching the clinical requirements of the facility to the health manpower training potential of the eligible institution, for the expansion and improvement of such institution's capacity to train health manpower, including physicians' assistants, nurse practitioners, and other new types of health personnel in furtherance of the purposes of this subchapter [38 USCS §§ 8231 et seq.]. Any such application shall contain a plan to carry out such projects and programs and such other information in such detail as the Secretary deems necessary and appropriate.

(b) An application for a grant under this section may be approved by the Secretary only upon the Secretary's determination that--
(1) the proposed projects and programs for which the grant will be made will make a significant contribution to improving the education (including continuing education) or training program of the eligible institution;
(2) the application contains or is supported by adequate assurance that any Federal funds made available under this subchapter [38 USCS §§ 8231 et seq.] will be supplemented by funds or other resources available from other sources, whether public or private;
(3) the application sets forth such fiscal control and accounting procedures as may be necessary to assure proper disbursement of, and accounting for, Federal funds expended under this subchapter [38 USCS §§ 8231 et seq.]; and
(4) the application provides for making such reports, in such form and containing such information, as the Secretary may require to carry out the Secretary's functions under this subchapter [38 USCS §§ 8231 et seq.], and for keeping such records and for affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports.

Amendments:
1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (b), in the introductory matter and para. (4), substituted "the Administrator's" for "his".
1980. Act Aug. 26, 1980, in subsec. (b)(1), deleted "and will result in a substantial increase in the number of students trained at such institution, provided there is reasonable assurance from a recognized accrediting body or bodies approved for such purposes by the Commissioner of Education of the Department of Health, Education, and Welfare that the increase in the number of students will not threaten any existing accreditation or otherwise compromise the quality of the training at such institution" following "eligible institution".
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5093, as 38 USCS § 8233.
Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

SUBCHAPTER IV EXPANSION OF DEPARTMENT HOSPITAL EDUCATION AND TRAINING CAPACITY

§ 8241. Expenditures to remodel and make special allocations to Department hospitals for health manpower education and training

Amendments:

§ 8241. Expenditures to remodel and make special allocations to Department hospitals for health manpower education and training

Out of funds appropriated to the Department pursuant to the authorization in section 8222 of this title [38 USCS § 8222], the Secretary may expend such sums as the Secretary deems necessary, not to exceed 30 per centum thereof, for (1) the necessary extension, expansion, alteration, improvement, remodeling, or repair of Department buildings and structures (including provision of initial equipment, replacement of obsolete or worn-out
equipment, and, where necessary, addition of classrooms, lecture facilities, laboratories, and other teaching facilities) to the extent necessary to make them suitable for use for health manpower education and training in order to carry out the purpose set forth in section 7302 [38 USCS § 7302], and (2) special allocations to Department hospitals and other medical facilities for the development or initiation of improved methods of education and training which may include the development or initiation of plans which reduce the period of required education and training for health personnel but which do not adversely affect the quality of such education or training.

Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), substituted "the Administrator" for "he" preceding "deems necessary".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5096, as 38 USCS § 8241, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Such Act further substituted "section 7302" for "section 4101(b)".

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 27

CHAPTER 83. ACCEPTANCE OF GIFTS AND BEQUESTS

§ 8301. Authority to accept gifts, devises, and bequests
§ 8302. Legal proceedings
§ 8303. Restricted gifts
§ 8304. Disposition of property
§ 8305. Savings provision

Amendments:

1991. Act May 7, 1991, P. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239, revised the analysis of this Chapter by amending the section numbers in accordance with the redesignations made by § 402(b) of such Act (see Table II preceding 38 USCS § 101).

§ 8301. Authority to accept gifts, devises, and bequests

The Secretary may accept devises, bequests, and gifts, made in any manner, with respect to which the testator or donor shall have indicated the intention that such property shall be for the benefit of groups of persons formerly in the active military, naval, or air service who by virtue of such service alone, or disability suffered therein or therefrom, are or shall be patients or members of any one or more hospitals or homes operated by the United States Government, or has indicated the intention that such property shall be for the benefit of any such hospital or home, or shall be paid or delivered to any official, as such, or any agency in administrative control thereof. The Secretary may also accept, for
use in carrying out all laws administered by the Secretary, gifts, devises, and bequests which will enhance the Secretary's ability to provide services or benefits.

Amendments:


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5101, as 38 USCS § 8301.

Act Aug. 6, 1991, substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

Act Aug. 14, 1991 added the sentence beginning "The Secretary may also accept. . .".

Cross References

This section is referred to in 38 USCS § 8305

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 28

1. Generally

2. Permissible uses

1. Generally

Federal government was authorized to take donations of property by means of bequest to Veterans' Administration [now Department of Veterans Affairs]. Estate of Hendrix (1947) 77 Cal App 2d 647, 176 P2d 398

2. Permissible uses

Donations which were earmarked for approved research or medical education projects could be used for necessary related training. VA GCO 21-75

§ 8302. Legal proceedings

For the purpose of acquiring title to and possession of any property which the Department is by this chapter [38 USCS §§ 8301 et seq.] authorized to accept, the Secretary may initiate and appear in any appropriate legal proceedings, and take such steps therein or in connection therewith as in the Secretary's discretion may be desirable and appropriate to reduce said property to possession. The Secretary may incur such expenses incident to such proceedings as the Secretary deems necessary or appropriate, which shall be paid as are other administrative expenses of the Department. All funds received by devise, bequest, gift, or otherwise, for the purposes contemplated in this chapter [38 USCS §§ 8301 et seq.], including net proceeds of sales authorized by this chapter [38 USCS §§ 8301 et seq.], shall be deposited with the Treasurer of the United States to the credit of the General Post Fund.

Amendments:

1986. Act Oct. 28, 1986 substituted "the Administrator" for "he" following "which" and "proceedings as" and substituted "the Administrator's" for "his" and "The Administrator" for "He".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5102, as 38 USCS § 8302.
§ 8303. Restricted gifts

Disbursements from the General Post Fund shall be made on orders by and within the discretion of the Secretary and in the manner prescribed in section 8523 of this title [38 USCS § 8523]; except that (1) if the testator or donor has directed or shall direct that the devise, bequest, or gift be devoted to a particular use authorized by this chapter [38 USCS §§ 8301 et seq.], the same, less expenses incurred, or the net proceeds thereof, shall be used or disbursed as directed, except that a precatory direction shall be fulfilled only insofar as may be proper or practicable; and (2) if the testator or donor shall have indicated his desire that the devise, bequest, or gift shall be for the benefit of persons in hospitals or homes, or other institutions operated by the United States but under the jurisdiction of an official other than the Secretary, the same, less expenses incurred, or the net proceeds thereof which may come into possession of the Secretary, shall be disbursed by transfer to the governing authorities of such institution, or otherwise, in such manner as the Secretary may determine, for the benefit of the persons in the institution indicated by the testator or donor, for proper purposes, as nearly as practicable in conformity with such desire of the testator or donor.

Amendments:

1986. Act Oct. 28, 1986, substituted "the" for "his" following "direct that" and "desire that".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5103, as 38 USCS § 8303, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

§ 8304. Disposition of property

If the Secretary receives any property other than moneys as contemplated by this chapter [38 USCS §§ 8301 et seq.], the Secretary is authorized in the Secretary's discretion to sell, assign, transfer, and convey the same, or any interest therein claimed by virtue of such devise, bequest, or gift, for such price and upon such terms as the Secretary deems advantageous (including consent to partition of realty and compromise of contested claim of title) and the Secretary's assignment, deed, or other conveyance of any such property, executed in the name and on behalf of the United States, shall be valid to pass to the purchaser thereof such title to said property as the United States, beneficially or as trustee of the General Post Fund, may have by virtue of any such devise, bequest, or gift, and the
research guide

am jur:

77 am jur 2d, veterans and veterans' laws § 28

§ 8305. savings provision

(a) Nothing contained in this chapter [38 uscs §§ 8301 et seq.] shall be construed to repeal or modify any law authorizing the acceptance of devises, bequests, or gifts to the United States for their own use and benefit or for any particular purpose specified by the donors or testators.

(b) Whenever the United States receives property and it appears that it is, or shall have been, the intention of the testator or donor that such devise, bequest, or gift be for the benefit of those persons described in section 8301 of this title [38 uscs § 8301], or any particular hospital or other institution operated primarily for their benefit, such property or the proceeds thereof shall be credited to the General Post Fund, and shall be used or disbursed in accordance with the provisions of this chapter [38 uscs §§ 8301 et seq.].

amendments:

1991. act may 7, 1991 redesignated this section, formerly 38 uscs § 5105, as 38 uscs § 8305, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such act (see table ii preceding 38 uscs § 101).
§ 8501. Vesting of property left by decedents

(a) Personal property left by any decedent upon premises used as a Department facility, which premises are subject to the exclusive legislative jurisdiction of the United States and are within the exterior boundaries of any State or dependency of the United States, shall vest and be disposed of as provided in this subchapter [38 USCS §§ 8501 et seq.], except that--

(1) if such person died leaving a last will and testament probated under the laws of the place of such person's domicile or under the laws of the State or dependency of the United States within the exterior boundaries of which such premises or a part thereof may be, the personal property of such decedent situated upon such premises shall vest in the person or persons entitled thereto under the provisions of such last will and testament; and

(2) if such person died leaving any such property not disposed of by a last will and testament probated in accord with the provisions of paragraph (1) such property shall vest in the persons entitled to take such property by inheritance under and upon the conditions provided by the law of the decedent's domicile. This paragraph shall not apply to property to which the United States is entitled except where such title is divested out of the United States.

(b) Any officer or employee of the United States in possession of any such property may deliver same to the executor (or the administrator with will annexed) who shall have qualified in either jurisdiction as provided in subsection (a)(1); or if none such then to the domiciliary administrator or to any other qualified administrator who shall demand such property. When delivery shall have been made to any such executor or administrator in accordance with this subsection, neither the United States nor any officer or employee thereof shall be liable therefor.

Amendments:


§ 8502. Disposition of unclaimed personal property

§ 8503. Notice of provisions of this subchapter

§ 8504. Disposition of other unclaimed property

§ 8505. Sale or other disposition of property

§ 8506. Notice of sale

§ 8507. Payment of small shipping charges

§ 8508. Relinquishment of Federal jurisdiction

§ 8509. Definitions

§ 8510. Finality of decisions
§ 8502. Disposition of unclaimed personal property

(a) Notwithstanding the provisions of section 8501 of this title [38 USCS § 8501], the Secretary may dispose of the personal property of such decedent left or found upon such premises as hereafter provided in this subchapter [38 USCS §§ 8501 et seq.].

(b) If any veteran (admitted as a veteran), or a dependent or survivor of a veteran receiving care under the penultimate sentence of section 1781(b) of this title [38 USCS § 1781(b)], upon such person's last admission to, or during such person's last period of maintenance in, a Department facility, has personal property situated on such facility and shall have designated in writing a person (natural or corporate) to receive such property when such veteran, dependent or survivor dies, the Secretary or employee of the Department authorized by the Secretary so to act, may transfer possession of such personal property to the person so designated. If there exists no person so designated by such veteran, dependent, or survivor or if the one so designated declines to receive such property, or failed to request such property within ninety days after the Department mails to such designate a notice of death and of the fact of such designation, a description of the property, and an estimate of transportation cost, which shall be paid by such designate if required under the regulations hereinafter mentioned, or if the Secretary declines to transfer possession to such designate, possession of such property may in the discretion of the Secretary or the Secretary's designated subordinate, be transferred to the following persons in the order and manner herein specified unless the parties otherwise agree in writing delivered to the Department, namely, executor or administrator, or if no notice of appointment received, to the spouse, children, grandchildren, parents, grandparents, siblings of the veteran. If claim is made by two or more such relatives having equal priorities, as hereinafore prescribed, or if there are conflicting claims the Secretary or the Secretary's designee may in such case deliver the property either jointly or separately in equal values, to those equally entitled thereto, or may make delivery as may be agreed upon by those entitled, or may in the discretion of the Secretary or the Secretary's designee withhold delivery from them and require the qualification of an administrator or executor of the veterans' estate and thereupon make delivery to such.

(c) If the property of any decedent is not so delivered or claimed and accepted the Secretary or the Secretary's designee may dispose of such property by public or private sale in accordance with the provisions of this subchapter [38 USCS §§ 8501 et seq.] and regulations prescribed by the Secretary.
(d) All sales authorized by this subchapter [38 USCS §§ 8501 et seq.] shall be for cash upon delivery at the premises where sold and without warranty, express or implied. The proceeds of such sales after payment of any expenses incident thereto as may be prescribed by regulations, together with any other moneys left or found on a facility, not disposed of in accordance with this subchapter [38 USCS §§ 8501 et seq.], shall be credited to the General Post Fund, National Homes, Department of Veterans Affairs, a trust fund provided for in section 1321(a)(45) of title 31 [31 USCS § 1321(a)(45)]. In addition to the purposes for which such fund may be used under the existing law, disbursements may be made therefrom as authorized by the Secretary by regulation or otherwise for the purpose of satisfying any legal liability incurred by any employee in administering the provisions of this subchapter [38 USCS §§ 8501 et seq.], including any expense incurred in connection therewith. Legal liability shall not exist when delivery or sale shall have been made in accordance with this subchapter [38 USCS §§ 8501 et seq.].

(e) If, notwithstanding such sale, a claim is filed with the Secretary within five years after notice of sale as herein required, by or on behalf of any person or persons who if known would have been entitled to the property under section 8501 of this title [38 USCS § 8501] or to possession thereof under this section, the Secretary shall determine the person or persons entitled under the provisions of this subchapter and may pay to such person or persons so entitled the proceeds of sale of such property, less expenses. Such payment shall be made out of the said trust fund, and in accord with the provisions of this section or section 8501 of this title [38 USCS § 8501]. Persons under legal disability to sue in their own name may make claim for the proceeds of sale of such property at any time within five years after termination of such legal disability.

(f) Any such property, the sale of which is authorized under this subchapter [38 USCS §§ 8501 et seq.] and which remains unsold, may be used, destroyed, or otherwise disposed of in accordance with regulations promulgated by the Secretary.

Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (b), inserted "or a dependent or survivor of a veteran receiving care under the last sentence of section 613(b) of this title."


1986. Act Oct. 28, 1986, in subsec. (b), substituted "such person's" for "his" wherever appearing, inserted "has personal property situated on such facility and", substituted "to receive such property when such veteran, dependent or survivor dies," for "to whom he desires his personal property situated upon such facility to be delivered, upon the death of such veteran", substituted "the Administrator" for "him" preceding "so to act", substituted "by such veteran, dependent, or survivor" for "by the veteran", deleted "if he has" preceding "failed to", substituted "the Administrator's" for "his", substituted "in writing delivered to the Veterans' Administration" for "as provided in this subchapter.", substituted "children, grandchildren, parents, grandparents, siblings" for "child, grandchild, mother, father, grandmother, grandfather, brother or sister", deleted "In case two or more of those named above request the property, only one shall be entitled to possession thereof and in the order hereinafter set forth, unless they otherwise agree in writing delivered to the Veterans' Administration."

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substituted "in the discretion of the Administrator or the Administrator's designee" for "in his discretion"; and in subsec. (c) substituted "the Administrator's" for "his".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5202, as 38 USCS § 8502, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act June 13, 1991 (amending this section as in effect immediately before enactment of Act May 7, 1991, as provided by § 14(d) of Act June 13, 1991), in subsec. (b), inserted a comma before "namely.".

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

1994. Act Nov. 2, 1994, in subsec. (d), substituted "General Post Fund, National Homes, Department of Veterans Affairs," for "General Post Fund, National Homes, Department,"

2002. Act Jan. 23, 2002, in subsec. (b), substituted "the penultimate sentence of section 1781(b)" for "the last sentence of section 1713(b)".

Cross References

This section is referred to in 38 USCS §§ 101, 8505

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Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs §§ 79:30, 34

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 80

§ 8503. Notice of provisions of this subchapter

All persons having or bringing personal property on the premises of a Department facility shall be given reasonable notice of the provisions of this subchapter [38 USCS §§ 8501 et seq.]. In case of a mentally incompetent person, notice hereof shall be given the guardian or other person having custody or control of such person or, if none, to such person's nearest relative if known. The admission to or continued maintenance in such facility after reasonable notice of the provisions of this subchapter [38 USCS §§ 8501 et seq.] shall constitute consent to the provisions hereof. The death of any person on any such facility or the leaving of property thereon shall be prima facie evidence of a valid agreement for the disposition of such property in accordance with the provisions of this subchapter [38 USCS §§ 8501 et seq.].

Amendments:

1986. Act Oct. 28, 1986, substituted "such person's" for "his".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5203, as 38 USCS § 8503.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing.

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§ 8504. Disposition of other unclaimed property

Any other unclaimed property found on the premises under the control of the Department shall be stored by the officer in charge of such premises and may be sold, used, destroyed, or otherwise disposed of in accordance with regulations promulgated by the Secretary if the owner thereof fails to claim same within ninety days. If undisposed of, the same may be reclaimed by the owner, such person's personal representative or next of kin, upon payment of reasonable storage charges prescribed by regulations. If sold, the net proceeds thereof shall be credited to said post fund to be expended as other assets of such fund. The person who was entitled to such property, or such person's legal representative, or assignee, shall be paid the proceeds of sale thereof, less expenses if claim therefor be made within five years from the date of finding. If the owner shall have died intestate without creditors or next of kin surviving, such proceeds shall not be paid to his legal representative.

Amendments:


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5204, as 38 USCS § 8504.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

§ 8505. Sale or other disposition of property

Any unclaimed personal property as described in section 8502 of this title [38 USCS § 8502] of veterans who have heretofore died or who may hereafter die while maintained as such in the Department facility, and also any unclaimed property heretofore or hereafter found or situated in such facility, may be sold, used, destroyed, or otherwise disposed of in accordance with this subchapter [38 USCS §§ 8501 et seq.], and subject to regulations promulgated by the Secretary pursuant hereto; and the net proceeds of sale thereof shall be credited and be subject to disbursement as provided in this subchapter [38 USCS §§ 8501 et seq.].

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5205, as 38 USCS § 8505, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

§ 8506. Notice of sale

At least ninety days before any sale pursuant to this subchapter [38 USCS §§ 8501 et seq.], written or printed notice thereof describing the property to be sold shall be mailed to the owner of the property or, if deceased, to the owner's executor or administrator, or to the nearest kin, if any such appear by the records of the Department. If none such
appears from said records, similar notice shall be posted at the facility where the death occurred or property shall have been found (if in existence) and at the place where such property is situated at the time of such notice, and also at the place where probate notices are posted in the county wherein the sale is to be had. The person posting such notice shall make an affidavit setting forth the time and place of such posting and attaching thereto a copy of such notice, and such affidavit shall be prima facie evidence of such posting and admissible in evidence as proof of the same.

Amendments:

1986. Act Oct. 28, 1986, substituted "the owner's" for "his".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5206, as 38 USCS § 8506.

Such Act further substituted "Department" for "Veterans' Administration" wherever appearing.

Research Guide

Federal Procedure:

4 Federal Rules of Evidence Manual (Matthew Bender) § 802.02

12A Fed Proc L Ed, Evidence § 33:378

33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:34

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 80

§ 8507. Payment of small shipping charges

Upon receipt of a proper claim for such property under the provisions of this subchapter [38 USCS §§ 8501 et seq.] the Secretary is hereby authorized, in the Secretary's discretion and in accordance with regulations prescribed by the Secretary, to pay mailing or shipping charges not to exceed $25 in the case of each deceased veteran as hereinabove defined.

Amendments:

1986. Act Oct. 28, 1986, substituted "the Administrator's" for "his" and "prescribed by the Administrator" for "by him promulgated".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5207, as 38 USCS § 8507.

Act Aug. 6, 1991, substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

§ 8508. Relinquishment of Federal jurisdiction

Subject to the provisions of this subchapter [38 USCS §§ 8501 et seq.] and to the extent necessary to effectuate the purposes of this subchapter [38 USCS §§ 8501 et seq.], there is hereby relinquished to the respective State or dependency of the United States such jurisdiction pertaining to the administration of estates of decedents as may have been ceded to the United States by said State or dependency of the United States respecting the Federal reservation on which is situated any Department facility while such facility is operated by the Department; such jurisdiction with respect to any such property on any
such reservation to be to the same extent as if such premises had not been ceded to the
United States. Nothing in this section shall be construed to deprive any State or
dependency of the United States of any jurisdiction which it now has nor to give any
State, possession, or dependency of the United States authority over any Federal official
as such on such premises or otherwise.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5208, as 38 USCS §
8508.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever
appearing.

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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 79

§ 8509. Definitions

The term "facility" or "Department facility" as used in this subchapter [38 USCS §§ 8501
et seq.] means those facilities over which the Department has direct and exclusive
administrative jurisdiction, including hospitals or other facilities on property owned or
leased by the United States while operated by the Department.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5209, as 38 USCS §
8509.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever
appearing.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 79

§ 8510. Finality of decisions

Decisions by the Secretary under this subchapter [38 USCS §§ 8501 et seq.] shall not be
reviewable administratively by any other officer of the United States.

Amendments:

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5210, as 38 USCS §
8510.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

Code of Federal Regulations

Department of Veterans Affairs-Disposition of veteran's personal funds and effects, 38
CFR Part 12

Research Guide

Federal Procedure:
§ 8520. Vesting of property left by decedents
(a) Whenever any veteran (admitted as a veteran), or a dependent or survivor of a veteran receiving care under the penultimate sentence of section 1781(b) of this title [38 USCS § 1781(b)], shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by the Department, and shall not leave any surviving spouse, next of kin, or heirs entitled, under the laws of the decedent's domicile, to the decedent's personal property as to which such person dies intestate, all such property, including money and choses in action, owned by such person at the time of death and not disposed of by will or otherwise, shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund (hereinafter in this subchapter referred to as the "Fund"), a trust fund prescribed by section 1321(a)(45) of title 31 [31 USCS § 1321(a)(45)].

(b) The provisions of subsection (a) are conditions precedent to the initial, and also to the further furnishing of care or treatment by the Department in a facility or hospital. The acceptance and the continued acceptance of care or treatment by any veteran (admitted as a veteran to a Department facility or hospital) shall constitute an acceptance of the provisions and conditions of this subchapter [38 USCS §§ 8520 et seq.] and regulations issued in accordance with this subchapter [38 USCS §§ 8520 et seq.].

Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), in subsec. (a), inserted ", or a dependent or survivor of a veteran receiving care under the last sentence of section 613(b) of this title,\".


Amendments:


§ 8520. Vesting of property left by decedents
1986. Act Oct. 28, 1986, in subsec. (a), substituted "any surviving" for "surviving him any", substituted "the decedent's" for "his" preceding "domicile to" and "personal property", substituted "such person" for "he" preceding "dies", and substituted "owned by such person" for "owned by him"; and, in subsec. (b), purported to substitute "such person's" for "his", which could not be executed inasmuch as the word "his" did not appear in text.

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5220, as 38 USCS § 8520.

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Department" for "Veterans' Administration" wherever appearing.


2002. Act Jan. 23, 2002, in subsec. (a), substituted "the penultimate sentence of section 1781(b)" for "the last sentence of section 1713(b)".

Cross References

This section is referred to in 38 USCS §§ 8521, 8526

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws §§ 53, 77

Annotations:

Supreme Court's views as to validity of federal legislation under Tenth Amendment, providing that powers not delegated to United States by Constitution nor prohibited by it to the states are reserved to the states or to the people. 72 L Ed 2d 956

Federal Statute As to Disposition of Personal Property of Veteran Dying in Veterans' Administration Facility Without Spouse or Heirs (38 U.S.C.A. §§ 8520 to 8528 [38 USCS §§ 8520-8528] and Predecessors). 191 ALR Fed 573

1. Generally
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1. Generally

Rights of United States to property of deceased veteran in cases falling within purview of predecessor to 38 USCS §§ 8520, 8521, and 8526 do not arise because property escheats to United States, but by virtue of statutory relationship. In re Gonsky's Estate (1952) 79 ND 123, 55 NW2d 60

Under predecessor to 38 USCS § 8520, United States was entitled, as against state, to all personal property of veteran who died intestate in veterans' hospital after having received care
and treatment there, where veteran had no surviving spouse, next of kin, or heirs entitled to his personal property under laws of his domicile. In re Gonsky's Estate (1952) 79 ND 123, 55 NW2d 60

Assets of hospitalized veteran, whose distributees could not with due diligence be ascertained, were payable to United States and did not escheat to state. In re Regan's Estate (1959) 18 Misc 2d 463, 185 NYS2d 350

2. Constitutionality

38 USCS §§ 5220 et seq. [now 38 USCS §§ 8520 et seq.] do not violate Tenth Amendment, since such authority is necessary and proper to exercise of power of raising armies and navies and conducting wars; Congress may require that personal property left by its wards when they die in government facilities shall be devoted to comfort and recreation of other former service people who must depend upon government for care. United States v Oregon (1961) 366 US 643, 6 L Ed 2d 575, 81 S Ct 1278, reh den (1961) 368 US 870, 7 L Ed 2d 70, 82 S Ct 24

Predecessors to 38 USCS §§ 8520 et seq. did not violate Tenth Amendment. United States v Gallagher (1951, DC Cal) 97 F Supp 1014; In re Witte's Estate (1953) 174 Kan 360, 255 P2d 1039, 36 ALR2d 717

38 USCS § 5220 [now 38 USCS § 8520] is constitutional. In re Estate of Weaver (1978, Sur) 97 Misc 2d 72, 410 NYS2d 777, 42 AFTR 2d 6427, affd (1980, 3d Dept) 74 App Div 2d 678, 424 NYS2d 789

3. Purpose

Congressional purpose in passing 38 USCS § 5220 [now 38 USCS § 8520] was to supply funds to General Post Fund, and it was legislative intent to take from states that which they would otherwise get by escheat. In re Levy (1978, CA2 NY) 574 F.2d 128, affd (1978) 439 US 920, 58 L Ed 2d 314, 99 S Ct 301

Intent of Congress in enacting predecessor to 38 USCS §§ 8520 et seq. was to recapture unexpended benefits conferred upon veterans who die in government institutions leaving no distributees entitled to their personal estate. In re Bonner's Estate (1948) 192 Misc 753, 80 NYS2d 122

4. Construction, generally

While term "all personal property" within meaning of predecessor to 38 USCS § 8520 was broad enough to include veteran's beneficial interest in trust fund created by payment of his pension to treasurer of veterans' home, effect of provision was to vest in United States only such property as would be liable to escheat to state for lack of testamentary disposition and heirs at law. National Home for Disabled Volunteer Soldiers v Wood (1936) 299 US 211, 81 L Ed 130, 57 S Ct 137

Predecessor to 38 USCS § 8520 et seq. was self-executing, not based on any actual contract or agreement. In re Bonner's Estate (1948) 192 Misc 753, 80 NYS2d 122

5. Relationship to other laws, generally

Provisions of predecessor to 38 USCS § 8521, that death of veteran in veterans' hospital "shall give rise to a conclusive presumption of a valid contract," were not inconsistent with predecessor to 38 USCS § 8520, providing for automatic vesting in United States of all personal property, not disposed of by will or otherwise, of veteran dying while member or patient in veterans' facility or veterans' hospital while being furnished care and treatment, "contractual" provisions of predecessor to 38 USCS § 8521 having been included in statute for purpose of reinforcing rather than detracting from provisions of predecessor to 38 USCS § 8520. United States v Oregon (1961) 366 US 643, 6 L Ed 2d 575, 81 S Ct 1278, reh den (1961) 368 US 870, 7 L Ed 2d 70, 82 S Ct 24

6. -State laws
Predecessor to 38 USCS § 8520 prevailed over state statute escheating property to state in which veteran resided at time of death. United States v Stevens (1938) 302 US 623, 82 L Ed 484, 58 S Ct 388

38 USCS § 5220 [now 38 USCS § 8520] did not invade reserved power of state over course of intestate descent and distribution. Mauck v United States (1938, CA9 Cal) 94 F.2d 745

Contracts concerning disposition of personal property of veteran inmate of soldiers' home were not invalid under Illinois law as attempted testamentary dispositions but had been repeatedly enforced when executed. O'Connell v United States (1941, DC Ill) 37 F Supp 832

7. Nature of section

Veteran's admission to veterans' hospital and his acceptance of care while patient therein created valid contract between veteran and United States under predecessors to 38 USCS §§ 8520 and 8521, and ownership of all veteran's personal property vested in United States upon veteran's death where there was no surviving spouse, and no known heirs or next of kin. United States v Gallagher (1951, DC Cal) 97 F Supp 1014

8. Application of section, generally


38 USCS § 5220 [now 38 USCS § 8520] applied where a veteran received institutional treatment or care being furnished by the Veterans Administration [now Department of Veterans Affairs] either in one of its own facilities or in some other facility adopted to meet the veteran's particular needs; 38 USCS § 5220 [now 38 USCS § 8520] was applicable to personal property of veteran who died intestate and without heirs in private nursing home, which was paid for its services by Veterans Administration [now Department of Veterans Affairs]. In re Estate of Wallace (1971) 186 Neb 271, 182 NW2d 829

9. Persons entitled to property under state law

State of Pennsylvania was not heir of intestate though state intestate act provided that if there were no heirs of specified classes, intestate's property would descend to state. In re Estate of Skriziszouski (1955) 382 Pa 634, 116 A2d 841

No private person was "entitled" to decedent's estate, within meaning of predecessor to 38 USCS § 8520, and property vested in United States, subject to claims of distributees presented within 5 years of date of death, where no next of kin had appeared despite lapse of over 3 years since veteran's death and diligent efforts of Administrator [now Secretary] to locate next of kin. In re Bonner's Estate (1948) 192 Misc 753, 80 NYS2d 122

State, although entitled under intestacy act to take citizen's estate in default of all other persons specified, was not person "entitled" to personal property of veteran within meaning of 38 USCS § 5220 [now 38 USCS § 8520]. In re Estate of Skriziszouski (1955) 382 Pa 634, 116 A2d 841

10. Determination of rights to property

United States was not bound by state court decree and is entitled to recover proceeds of veteran's estate from state to which it had been held escheated where United States was not made party to state distribution proceeding. United States v California (1956, DC Cal) 143 F Supp 957

38 USCS § 8520 is self-executing and does not require, in all circumstances, probate proceeding as condition precedent to Veteran's Administration's entitlement to funds. United States v Riggs Nat'l Bank of Wash., D.C., Trust Group (2000, DC Dist Col) 109 F Supp 2d 1
Where veteran died intestate while member or patient in facility, without legal heirs and without having designated beneficiary of his Civil Service Retirement lump-sum benefits, and no administrator of his estate had been named, Civil Service Commission could, under 38 USCS §§ 5220 and 5224 [now 38 USCS §§ 8520 and 8524], pay such benefits directly to General Post Fund, notwithstanding 5 USCS § 8342(c) and (g); where administrator of estate had been named, even though no legal heirs could be found, Civil Service Commission could pay such benefits only to administrator and not directly to General Post Fund. (1976) 43 Op Atty Gen 39

Proof that decedent left no distributees was not condition precedent to exercise by United States of its right to deceased's property. In re Bonner's Estate (1948) 192 Misc 753, 80 NYS2d 122

United States did not have burden of proving that decedent left no distributees as condition precedent to claiming unexpended fund. In re Regan's Estate (1959) 18 Misc 2d 463, 185 NYS2d 350

Under predecessor to 38 USCS § 8520, there was no presumption that veteran died leaving heirs. In re Witte's Estate (1953) 174 Kan 360, 255 P2d 1039, 36 ALR2d 717

11. Delivery of property

Pension moneys of inmate, unapplied for his benefit at time of his death, could be paid into Post Fund only in case there was no widow, minor children, or dependent parent. Durack v National Home for Disabled Volunteer Soldiers (1930, CA1 Me) 44 F.2d 516

38 USCS §§ 5220 et seq. [now 38 USCS §§ 8520 et seq.] were self-executing and savings bank was obligated to deliver funds in savings account to United States notwithstanding absence of probate or administration. United States v Peoples Nat'l Bank (1953, DC Ill) 121 F Supp 331; United States v Mid City Nat'l Bank (1953, DC Ill) 121 F Supp 402; In re Estate of Rodgers (1969) 60 Misc 2d 769, 303 NYS2d 551

12. Taxation of property

Property passing to United States under 38 USCS § 5220 [now 38 USCS § 8520] was not subject to state estate taxes. In re Levy (1978, CA2 NY) 574 F.2d 128, affd (1978) 439 US 920, 58 L Ed 2d 314, 99 S Ct 301

Under 38 USCS § 5220 [now 38 USCS § 8520], United States became vested of property and estate was not subject to state estate tax where veteran died intestate while in hospital, leaving no next of kin. In re Estate of Weaver (1980, 3d Dept) 74 App Div 2d 678, 424 NYS2d 789

§ 8521. Presumption of contract for disposition of personalty

The fact of death of a veteran (admitted as such), or a dependent or survivor of a veteran receiving care under the penultimate sentence of section 1781(b) of this title [38 USCS § 1781(b)], in a facility or hospital, while being furnished care or treatment therein by the Department, leaving no spouse, next of kin, or heirs, shall give rise to a conclusive presumption of a valid contract for the disposition in accordance with this subchapter [38 USCS §§ 8520 et seq.], but subject to its conditions, of all property described in section 8520 of this title [38 USCS § 8520] owned by said decedent at death and as to which such person dies intestate.

Amendments:

1976. Act Oct. 21, 1976 (effective 10/21/76, as provided by § 211 of such Act, which appears as 38 USCS § 111 note), inserted "", or a dependent or survivor of a veteran receiving care under the last sentence of section 613(b) of this title."

1986. Act Oct. 28, 1986, substituted "such person" for "he".
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5221, as 38 USCS § 8521, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).

Act Aug. 6, 1991, amended the references in this section to reflect the redesignations made by § 5(a) of such Act (see Table III preceding 38 USCS § 101).

Such Act further substituted "Department" for "Veterans' Administration" wherever appearing.

2002. Act Jan. 23, 2002, substituted "the penultimate sentence of section 1781(b)" for "the last sentence of section 1713(b)".

Research Guide

Am Jur: 77 Am Jur 2d, Veterans and Veterans' Laws § 77

Annotations:

Federal Statute As to Disposition of Personal Property of Veteran Dying in Veterans' Administration Facility Without Spouse or Heirs (38 U.S.C.A. §§ 8520 to 8528 [38 USCS §§ 8520-8528] and Predecessors). 191 ALR Fed 573

1. Generally
2. Constitutionality
3. Relationship with other laws, generally
   4. -State laws

1. Generally

38 USCS § 5221 [now 38 USCS § 8521] did not control devolution of property, but provided for contract between patient and Veterans' Administration [now Department of Veterans Affairs] for his care and treatment. In re Witte's Estate (1953) 174 Kan 360, 255 P2d 1039, 36 ALR2d 717

2. Constitutionality

38 USCS § 5221 [now 38 USCS § 8521] was based on contractual relationship and did not attempt to regulate and control devolution of property in contravention of United States Constitution. Estate of Turner (1959, 2nd Dist) 171 Cal App 2d 591, 341 P2d 376

3. Relationship with other laws, generally

Provisions of predecessor to 38 USCS § 8521, that death of veteran in veterans' hospital "shall give rise to a conclusive presumption of a valid contract," were not inconsistent with predecessor to 38 USCS § 8520, providing for automatic vesting in United States of all personal property, not disposed of by will or otherwise, of veteran dying while member or patient in veterans' facility or veterans' hospital while being furnished care and treatment, "contractual" provisions of predecessor to 38 USCS § 8521 having been included in statute for purpose of reinforcing rather than detracting from provisions of predecessor to 38 USCS § 8520. United States v Oregon (1961) 366 US 643, 6 L Ed 2d 575, 81 S Ct 1278, reh den (1961) 368 US 870, 7 L Ed 2d 70, 82 S Ct 24

4. -State laws

Contract by veteran for vesting in United States of his personal property upon his death intestate in Veterans Administration [now Department of Veterans Affairs] hospital without spouse, next of kin, or heir, in consideration of care received at hospital, was not invalid as testamentary disposition in violation of state statutory requirements as to wills. In re Witte's Estate (1953) 174 Kan 360, 255 P2d 1039, 36 ALR2d 717

§ 8522. Sale of assets accruing to the Fund
Any assets heretofore or hereafter accruing to the benefit of the Fund, other than money, but including jewelry and other personal effects, may be sold at the times and places and in the manner prescribed by regulations issued by the Secretary. Upon receipt of the purchase price the Secretary is authorized to deliver at the place of sale, said property sold, and upon request to execute and deliver appropriate assignments or other conveyances thereof in the name of the United States, which shall pass to the purchaser such title as decedent had at date of death. The net proceeds after paying any proper sales expense as determined by the Secretary shall forthwith be paid to the Treasurer of the United States to the credit of the Fund; and may be disbursed as are other moneys in the Fund by the Division of Disbursements, Treasury Department, upon order of said Secretary. Articles of personal adornment which are obviously of sentimental value, shall be retained and not sold or otherwise disposed of until the expiration of five years from the date of death of the veteran, without a claim therefor, unless for sanitary or other proper reasons it is deemed unsafe to retain same, in which event they may be destroyed forthwith. Any other articles coming into possession of the Secretary or the Secretary's representative by virtue of this subchapter [38 USCS §§ 8520 et seq.] which, under regulations promulgated by the Secretary, are determined to be unsalable may be destroyed forthwith or at the time prescribed by regulations, or may be used for the purposes for which disbursements might properly be made from the Fund, or if not usable, otherwise disposed of in accordance with regulations.

Amendments:

1986. Act Oct. 28, 1986, substituted "the Administrator" for "he" following "purchase price" and substituted "the Administrator's" for "his".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5222, as 38 USCS § 8522.

Act Aug. 6, 1991, substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

Transfer of functions:

The Division of Disbursements of the Treasury Department was consolidated into the Fiscal Service of the Treasury Department by § 1(a) of 1940 Reorganization Plan No. 3, which is set out as a note following 5 USCS § 903. The Fiscal Service of the Treasury Department is described in 31 USCS § 306.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 77

Annotations:

Federal Statute As to Disposition of Personal Property of Veteran Dying in Veterans' Administration Facility Without Spouse or Heirs (38 U.S.C.A. §§ 8520 to 8528 [38 USCS §§ 8520-8528] and Predecessors). 191 ALR Fed 573

§ 8523. Disbursements from the Fund

Disbursements from the Fund shall be made by the Division of Disbursements, Treasury Department, upon the order and within the discretion of the Secretary for the benefit of members and patients while being supplied care or treatment by the Department in any
facility or hospital. The authority contained in the preceding sentence is not limited to facilities or hospitals under direct administrative control of the Department. There shall be paid out of the assets of the decedent so far as may be the valid claims of creditors against the decedent's estate that would be legally payable therefrom in the absence of this subchapter [38 USCS §§ 8520 et seq.] and without the benefit of any exemption statute, and which may be presented to the Department within one year from the date of death, or within the time, to the person, and in the manner required or permitted by the law of the State wherein administration, if any, is had upon the estate of the deceased veteran; and also the proper expenses and costs of administration, if any. If the decedent's estate is insolvent the distribution to creditors shall be in accordance with the laws of the decedent's domicile, and the preferences and priorities prescribed thereby shall govern, subject to any applicable law of the United States.


1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5223, as 38 USCS § 8523.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" for "Administrator" wherever appearing.

Transfer of functions:
The Division of Disbursements of the Treasury Department was consolidated into the Fiscal Service of the Treasury Department by § 1(a) of 1940 Reorganization Plan No. 3, which is set out as a note following 5 USCS § 903. The Fiscal Service of the Treasury Department is described in 31 USCS § 306.

Cross References
This section is referred to in 38 USCS § 8303

Research Guide

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 77

Annotations:
Federal Statute As to Disposition of Personal Property of Veteran Dying in Veterans' Administration Facility Without Spouse or Heirs (38 U.S.C.A. §§ 8520 to 8528 [38 USCS §§ 8520-8528] and Predecessors). 191 ALR Fed 573

§ 8524. Disposal of remaining assets
The remainder of such assets or their proceeds shall become assets of the United States as trustee for the Fund and disposed of in accordance with this subchapter [38 USCS §§ 8520 et seq.]. If there is administration upon the decedent's estate such assets, other than money, upon claim therefor within the time required by law, shall be delivered by the administrator of the estate to the Secretary or the Secretary's authorized representative, as upon final distribution; and upon the same claim there shall be paid to the Treasurer of the United States for credit to the Fund any such money, available for final distribution. In the absence of administration, any money, chose in action, or other property of the deceased veteran held by any person shall be paid or transferred to the Secretary upon demand by the Secretary or the Secretary's duly authorized representative, who shall
deliver itemized receipt therefor. Such payment or transfer shall constitute a complete acquittance of the transferor with respect to any claims by any administrator, creditor, or next of kin of such decedent.

Amendments:

1986. Act Oct. 28, 1986 substituted "the Administrator's" for "his" wherever appearing and substituted "the Administrator" for "him" following "demand by".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5224, as 38 USCS § 8524.

Act Aug. 6, 1991, substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 77

Annotations:

Federal Statute As to Disposition of Personal Property of Veteran Dying in Veterans' Administration Facility Without Spouse or Heirs (38 U.S.C.A. §§ 8520 to 8528 [38 USCS §§ 8520-8528] and Predecessors). 191 ALR Fed 573

1. Generally
2. Constitutionality
3. Disposition of property
4. Miscellaneous

1. Generally

Federal statute relating to escheat to United States of veteran's estates intended recapture of government funds conferred on such veteran by way of benefits and did not require that United States prove escheat, but placed burden on those claiming interest in subject estate to prove such claim. In re Bonner's Estate (1948) 192 Misc 753, 80 NYS2d 122

2. Constitutionality

United States was entitled to estate of incompetent veteran who died in Veterans' Administration hospital in Oregon without will or legal heirs, rather than State of Oregon under its escheat law, since federal statute providing for vesting of such property did not require contract between veteran and United States, and did not violate Tenth Amendment to Constitution of United States. United States v Oregon (1961) 366 US 643, 6 L Ed 2d 575, 81 S Ct 1278, reh den (1961) 368 US 870, 7 L Ed 2d 70, 82 S Ct 24

State was not entitled to personal property of deceased veteran who entered veterans' hospital prior to his death as against federal government on ground that predecessor to 38 USCS § 8524 violated Tenth Amendment, since right of federal government to recover proceeds was based on valid contract. United States v Gallagher (1951, DC Cal) 97 F Supp 1014

3. Disposition of property

Sum of money, representing pension payments, remaining after administration upon estate of veteran was gift from United States and was his separate property, not community property under California law, and was to paid by his administrator to the General Post Fund. United States v Brown (1952, DC Cal) 110 F Supp 370

Predecessors to 38 USCS §§ 5220 et seq. were self-executing and probate or administration proceedings were not conditions precedent to bank's release to United States of bank deposit of
Where veteran died intestate while member or patient in facility, without legal heirs and
without having designated beneficiary of his Civil Service Retirement lump-sum benefits, and no
administrator of his estate had been named, Civil Service Commission could, under 38 USCS §§
5220 and 5224  [now 38 USCS §§ 8520 and 8524], pay such benefits directly to General Post
Fund, notwithstanding 5 USCS § 8342(c) and (g); where administrator of estate had been named,
even though no legal heirs can be found, Civil Service Commission could pay such benefits only
to administrator and not directly to General Post Fund.  (1976) 43 Op Atty Gen 39

Adjusted service bonds and money saved from payments of federal pension escheated to
United States and not to state where honorably discharged veteran died intestate while patient at
Veteran's Administration [now Department of Veterans Affairs] hospital.  Coakley v Attorney Gen.
(1945) 318 Mass 508, 62 NE2d 659

Where civil war veteran died intestate at soldier's home leased by state to United States, his
personal estate was to be paid to Treasurer of United States and not to treasurer of state, since
federal law was paramount.  In re McGhee's Estate (1932) 149 Misc 713, 268 NYS 79, affd
(1933) 239 App Div 763, 264 NYS 903, affd (1933) 262 NY 686, 188 NE 121

Where estate of incompetent Spanish American War veteran who died intestate consisted of
assets derived solely from deceased's pension, and more than five years had elapsed following
intestate's death without filing by any person of claim of right to distributive share of estate,
Distributable balance was required to be paid to Treasurer of United States.  In re Campbell's
Estate (1949) 195 Misc 520, 89 NYS2d 310

Where estate of deceased incompetent veteran consisted entirely of Veterans' Administration
benefits and earnings therefrom and no one established any claim of kinship, veteran's net
distributable estate was payable to Treasurer of United States.  In re Milnowski's Estate (1956) 3
Misc 2d 730, 155 NYS2d 71

4. Miscellaneous

Congressional intent that state not profit with respect to funds administered by Veterans' Administration [now Department of Veterans Affairs] could be given effect by application of
principles underlying doctrine of marshaling of assets.  In re Price's Estate (1951) 199 Misc 833,
104 NYS2d 518

§ 8525. Court actions

If necessary to obtain such assets the Secretary, through the Secretary's authorized
attorneys, may bring and prosecute appropriate actions at law or other legal proceedings,
the costs and expenses thereof to be paid as are other administrative expenses of the
Department.

Amendments:

1986. Act Oct. 28, 1986, substituted "the Administrator's" for "his".

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5225, as 38 USCS §
8525.

Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing,
and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's",
respectively, wherever appearing.

Research Guide

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 78
§ 8526. Filing of claims for assets

Notwithstanding the crediting to said Fund of the assets, or proceeds thereof, of any decedent, whether upon determination by a court or the Department pursuant to the provisions of section 8520 of this title [38 USCS § 8520], any person claiming a right to such assets may within five years after the death of the decedent file a claim on behalf of such person and any others claiming with the Secretary. Upon receipt of due proof that any person was at date of death of the veteran entitled to the veteran's personal property, or a part thereof, under the laws of the State of domicile of the decedent, the Secretary may pay out of the Fund, but not to exceed the net amount credited thereto from said decedent's estate less any necessary expenses, the amount to which such person, or persons, was or were so entitled, and upon similar claim any assets of the decedent which shall not have been disposed of shall be delivered in kind to the parties legally entitled thereto. If any person so entitled is under legal disability at the date of death of such decedent, such five-year period of limitation shall run from the termination or removal of legal disability. In the event of doubt as to entitlement, the Secretary may cause administration or other appropriate proceedings to be instituted in any court having jurisdiction. In determining questions of fact or law involved in the adjudication of claims made under this section, no judgment, decree, or order entered in any action at law, suit in equity, or other legal proceeding of any character purporting to determine entitlement to said assets or any part thereof, shall be binding upon the United States or the Secretary or determinative of any fact or question involving entitlement to any such property or the proceeds thereof, or any part of the Fund, unless the Secretary has been seasonably served with notice and permitted to become a party to such suit or proceeding if the Secretary makes a request therefor within thirty days after such notice. Notice may be served in person or by registered mail or by certified mail upon the Secretary, or upon the Secretary's authorized attorney in the State wherein the action or proceedings may be pending. Notice may be waived by the Secretary or by the Secretary's authorized attorney, in which event the finding, judgment, or decree shall have the same effect as if the Secretary were a party and served with notice. Any necessary court costs or expenses if authorized by the Secretary may be paid as are other administrative expenses of the Department.

Amendments:

1960. Act June 11, 1960 inserted "or by certified mail".

1986. Act Oct. 28, 1986 substituted "such person" for "himself" following "on behalf of", "the veteran's" for "his", "the Administrator" for "he" preceding "makes a request", and "the Administrator's" for "his" preceding "authorized attorney" wherever appearing.

1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5226, as 38 USCS § 8526, and amended the references in this section to reflect the redesignations made by §§ 401(a)(4) and 402(b) of such Act (see Table II preceding 38 USCS § 101).
Act Aug. 6, 1991, substituted "Department" for "Veterans' Administration" wherever appearing, and substituted "Secretary" and "Secretary's" for "Administrator" and "Administrator's", respectively, wherever appearing.

Research Guide

Federal Procedure:
33A Fed Proc L Ed, Veterans and Veterans' Affairs § 79:35

Am Jur:
77 Am Jur 2d, Veterans and Veterans' Laws § 78

Annotations:
Federal Statute As to Disposition of Personal Property of Veteran Dying in Veterans' Administration Facility Without Spouse or Heirs (38 U.S.C.A. §§ 8520 to 8528 [38 USCS §§ 8520-8528] and Predecessors). 191 ALR Fed 573

1. Generally
2. Property subject to reclamation
3. Time period for reclamation

1. Generally
Pension funds in hands of Treasurer could be reclaimed by intestate's son, although not minor. National Home for Disabled Volunteer Soliders v Wood (1936, CA7 Ill) 81 F.2d 963, affd (1936) 299 US 211, 81 L Ed 130, 57 S Ct 137

2. Property subject to reclamation
Right of reclamation applied to all personal property including pensions. National Home for Disabled Volunteer Soliders v Wood (1936, CA7 Ill) 81 F.2d 963, affd (1936) 299 US 211, 81 L Ed 130, 57 S Ct 137

3. Time period for reclamation
Admission of veteran into national home for disabled soldiers constituted binding contract between veteran and board of managers of home to effect that all property of veteran dying without heirs, next of kin, or legatees would pass to board subject to being reclaimed by heirs within five years, and was binding as against heirs who did not claim veteran's estate within five years of his death. Mauck v United States (1938, CA9 Cal) 94 F.2d 745

Where at time veteran entered soldiers' home he entered into agreement concerning disposition of his personal property, suit filed more than five years after death of veteran was barred. O'Connell v United States (1941, DC Ill) 37 F Supp 832

Death of son of veteran within five years of death of veteran while member of home for disabled veteran soldiers did not toll running of five-year period within which his property was subject to reclamation by any legatee or person entitled to take same by inheritance until appointment of administrator for son's estate, and at expiration of five years with no claims having been advanced, title to veteran's property became absolute in United States. United States v Essex Trust Co. (1942, DC Mass) 44 F Supp 476

§ 8527. Notice of provisions of subchapter

The Secretary shall prescribe a form of application for hospital treatment and domiciliary care which shall include notice of the provisions of this subchapter [38 USCS §§ 8520 et seq.].

Amendments:
1991. Act May 7, 1991 redesignated this section, formerly 38 USCS § 5227, as 38 USCS § 8527.

Act Aug. 6, 1991, substituted "Secretary" for "Administrator" wherever appearing.

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Annotations:

Federal Statute As to Disposition of Personal Property of Veteran Dying in Veterans' Administration Facility Without Spouse or Heirs (38 U.S.C.A. §§ 8520 to 8528 [38 USCS §§ 8520-8528] and Predecessors). 191 ALR Fed 573

Veteran who signed application for and received care at Veterans Administration [now Department of Veterans Affairs] hospital with express notice of statutory provision for vesting in United States of his personal property entered into contractual obligation with respect thereto. In re Witte's Estate (1953) 174 Kan 360, 255 P2d 1039, 36 ALR2d 717

§ 8528. Investment of the Fund

Money in the Fund not required for current disbursements may be invested and reinvested by the Secretary of the Treasury in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States.

Amendments:


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Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 77

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