

**DEPARTMENT OF VETERANS  
AFFAIRS**

**38 CFR Part 3**

RIN 2900-A170

**Monetary Allowance Under 38 U.S.C.  
1805 for a Child Suffering From Spina  
Bifida Who Is a Child of a Vietnam  
Veteran**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** This document amends the Department of Veterans Affairs (VA) adjudication regulations to provide for payment of a monetary allowance to a child suffering from spina bifida who is a child of a Vietnam veteran. The intended effect of this amendment is to implement legislation authorizing VA to provide such benefits.

**DATES:** *Effective Date:* October 1, 1997.

**FOR FURTHER INFORMATION CONTACT:** John Bisset, Jr., Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW, Washington, DC 20420, telephone (202) 273-7230.

**SUPPLEMENTARY INFORMATION:** Section 3 of the Agent Orange Act of 1991, Pub. L. 102-4, 105 Stat. 11, directed the Secretary of Veterans Affairs to seek to enter into an agreement with the National Academy of Sciences (NAS) for a series of reports to review and summarize the scientific evidence concerning the association between exposure to herbicides used in support of military operations in the Republic of Vietnam during the Vietnam era, and each disease suspected to be associated with such exposure. In its most recent report, entitled "Veterans and Agent Orange: Update 1996," which was released on March 14, 1996, NAS noted what it considered "limited/suggestive evidence of an association" between herbicide exposure and spina bifida in the offspring of Vietnam veterans.

Since VA did not have the statutory authority to provide benefits to children of veterans based on birth defects, the Secretary announced on May 28, 1996, that he would seek legislation to provide an appropriate remedy. VA submitted proposed legislation to Congress in July of that year. Section 421 of Pub. L. 104-204 added a new chapter 18 to title 38, United States Code, authorizing VA to provide certain benefits, including a monthly monetary allowance, to children suffering from spina bifida who are the natural children of veterans who served in the Republic of Vietnam during the Vietnam era. VA published a proposal to

implement section 421 of Pub. L. 104-204 in the **Federal Register** of May 1, 1997 (62 FR 23724-23731). Interested persons were invited to submit written comments on or before June 30, 1997. We received a total of thirty-two comments from: the Vietnam Veterans of America, Inc.; the Vietnam Veterans of America (Illinois State Council Service Program); a combined comment from the National Veterans Legal Services Program (NVLSP), the Spina Bifida Association of America, and the National Alliance of Veteran Family Service Organizations; the Veterans of Foreign Wars of the United States (VFW); The American Legion; the Paralyzed Veterans of America (PVA); Senator Tom Daschle; Senator John D. Rockefeller IV; and twenty-four other concerned individuals.

A number of commenters specifically recommended changes to the statutory language of title 38, United States Code, chapter 18. Others recommended that in the regulation we change the amount of the monetary allowance associated with the three levels of disability; add additional payment levels for the monetary allowance; pay the monetary allowance retroactive to dates prior to October 1, 1997; provide automobile adaptive equipment or an automobile allowance and specially adapted housing to children with spina bifida; pay the benefit to children with spina bifida occulta; pay the benefit to grandchildren of Vietnam veterans; and pay the benefit to the children of certain individuals who do not meet the statutory definition of the term "veteran." No changes are made based on these comments. VA has no legal authority to make any of these changes.

One commenter suggested that in the regulation VA use the term "biological child" of a Vietnam veteran rather than "natural child."

Section 1801(1) of title 38, United States Code, defines the term "child" for purposes of this benefit as meaning, among other things, a "natural child" of a Vietnam veteran. The term "natural" as used in the statute means relating naturally rather than by adoption (Webster's New World Dictionary, Third College Ed., 1988, 903), so in our judgment the terms "natural child" and "biological child" are synonymous. Using a term in the regulation that is inconsistent with the statutory language might imply a difference that we do not intend. Therefore, we make no change based on this suggestion.

One commenter stated that a child with spina bifida who is the legally adopted child of a Vietnam veteran should be eligible for this benefit.

The statute clearly defines the term "child" as used in determining eligibility for spina bifida benefits as meaning the natural child of a Vietnam veteran (see 38 U.S.C. 1801 (1)). Since VA has no authority to expand that statutory definition, we make no change based on this comment.

We proposed to terminate the monetary allowance effective the last day of the month before the month in which the beneficiary dies. A commenter suggested that we terminate not only this benefit, but benefits to veterans and survivors as well, effective the first day of the month following the month of death.

Because 38 U.S.C. 5112(b)(1) requires VA to discontinue compensation, dependency and indemnity compensation, or pension payments on the last day of the month before the death of the beneficiary, we have no discretion with respect to these benefits. Although Pub. L. 104-204 is silent on the issue of effective dates for discontinuing the monetary allowance, there is no indication in chapter 18 of title 38, United States Code, or its legislative history that Congress intended VA to administer the monetary allowance for children with spina bifida any differently than compensation, dependency and indemnity compensation, or pension in this respect, and we make no change based on this suggestion.

We proposed to define the term "Vietnam veteran," for purposes of this benefit, to include an individual with service in the waters offshore and service in other locations "if the conditions of service involved duty or visitation in the Republic of Vietnam." One commenter recommended that we eliminate the phrase "if the conditions of service involved duty or visitation in the Republic of Vietnam."

VA defines the term *service in the Republic of Vietnam*, for the purposes of presuming herbicide exposure, to include service in the waters offshore and service in other locations "if the conditions of service involved duty or visitation in the Republic of Vietnam" (see 38 CFR 3.307(a)(6)(iii)). Because herbicides were not applied in waters off the shore of Vietnam, limiting the scope of the term *service in the Republic of Vietnam* to persons whose service involved duty or visitation in the Republic of Vietnam limits the focus of the presumption of exposure to persons who may have been in areas where herbicides could have been encountered. Since the purpose of this rulemaking is to provide a monetary allowance to the children of those same veterans that VA presumes to be

herbicide-exposed if the children are born with spina bifida, it would be inappropriate to revise the presumption of exposure for the purposes of this benefit. We make no change based on this comment.

VA proposed to amend 38 CFR 3.263 and 3.275 to implement the provisions of 38 U.S.C. 1805(c) that specify that the monetary allowance not be considered income or resources in determining eligibility for benefits under any Federal program. One commenter stated that not only should the monetary allowance be excluded from VA net worth calculations but that assets purchased with the monetary allowance should also be excluded from those calculations.

Both §§ 3.263 and 3.275 define "net worth" to mean the market value, less mortgages or other encumbrances, of all real and personal properties owned by the claimant, except the claimant's dwelling (single family unit), including a reasonable lot area, and personal effects suitable and consistent with the claimant's reasonable mode of life. In our judgment, that definition allows reasonable exclusions from net worth for purposes of VA's income-based benefit programs, and we make no change based on this comment.

Several commenters suggested that VA provide an outreach plan as part of the final regulation. Although we intend informally to advise potentially eligible claimants that benefits are available and to solicit claims, we see no reason to include a statement regarding this matter in the regulations, since those who read the regulations necessarily would know about the program.

Several commenters stated that spina bifida claimants should have the same due process and appellate rights as other VA claimants.

38 CFR 3.103, Procedural due process and appellate rights, clearly states that its provisions apply to all claims for benefits and relief within the purview of VA's adjudication regulations (38 CFR part 3). Since the regulatory framework for the monetary allowance to children with spina bifida (38 CFR 3.814) is codified within 38 CFR part 3, the due process and appellate rights provided by § 3.103 apply to spina bifida claimants.

One commenter requested that the comment period for this rulemaking proceeding be extended until the end of the comment period for the proposed rule regarding vocational training and rehabilitation for Vietnam veterans' children who suffer from spina bifida.

Such an extension is unwarranted. An understanding of the issues in the rulemaking proceeding regarding vocational training and rehabilitation is

not necessary to make informed comments regarding this rulemaking proceeding.

Another commenter recommended that VA use its Schedule for Rating Disabilities (title 38, Code of Federal Regulations, part 4) to evaluate the severity of disabilities for the purpose of furnishing the monetary allowance for spina bifida.

38 U.S.C. 1155, the statutory authority for VA's Schedule for Rating Disabilities, provides that evaluations of disabled veterans be based, as far as practicable, upon average impairment of earning capacity resulting from similar disabilities in civil occupations, and be at one of ten grades in 10 percent increments. 38 U.S.C. 1805(b) authorizes VA to pay a monetary allowance to an eligible child with spina bifida at one of three levels based on the degree of disability suffered by the child, as determined in accordance with a schedule for rating such disabilities to be prescribed by the Secretary. By requiring evaluations at three levels rather than 10, and by not directing that evaluations be based on average impairment of earning capacity or be expressed in percentages, Congress established requirements for evaluating spina bifida so different from the requirements for evaluating disabilities for compensation and pension purposes that they are incompatible with the Schedule for Rating Disabilities. By codifying the requirement to establish rating criteria for spina bifida other than under the authority of 38 U.S.C. 1155, Congress further indicated its expectation that children with spina bifida would be evaluated under different criteria. For these reasons, we make no change based on this comment.

Section 1805 of title 38, United States Code, provides a monetary allowance at one of three levels to eligible individuals based on the degree of disability to be determined according to a rating schedule prescribed by the Secretary. We proposed to base the three levels of disability on neurological deficit, as manifested by impairment of functioning of: the extremities; bowel or bladder; and intellect; and to evaluate each of those at one of three levels of severity. Several commenters objected that those criteria are too narrow because they fail to include all disabilities "related to, or secondary to, spina bifida," such as hydrocephalus, Arnold-Chiari malformation, sexual/reproductive dysfunction, latex allergy, seizure disorders, etc.

While spina bifida is commonly associated with other developmental defects and congenital abnormalities, 38 U.S.C. 1805 authorizes VA to pay the

monetary allowance for any "disability resulting from" spina bifida. Neurological deficit is the main determinant of disability for individuals with spina bifida (Long-term Outcome in Surgically Treated Spina Bifida Cystica, Isao Date, M.D., Yasunori Yagyu, M.D., Shoji Asari, M.D., and Takshi Ohmoto, M.D., *Surg. Neurol.* 1993, 40:471-5).

Conditions that are commonly associated with spina bifida, such as Arnold-Chiari malformation, hydrocephalus, etc., generally affect one or more of the same functions we proposed to use for rating spina bifida. The evaluation criteria do not require the raters to rate impairment of those functions only to the extent that it is due to spina bifida, but allow them to take into account the effect on those functions of associated conditions. In our judgment, the rating criteria that we proposed constitute a reasonable method for differentiating between three levels of disability, as Congress required, and we make no change based on these comments.

Several commenters felt that the payment criteria do not take into account the synergistic effect of disabilities and recommended that an individual with more than one Level II disability be rated at Level III.

Congress mandated rating criteria supporting three levels of payment. If we are to administer this monetary allowance equitably, and in the manner we believe Congress intended, in assigning an intermediate (Level II) payment based on combined aspects of neurological impairment, we must consider not only that some beneficiaries with spina bifida may be less severely disabled than a particular individual, but that some may be more severely disabled. Someone with even four Level II disabilities, for example, would not be as severely disabled as someone with any of the Level III disabilities, because the criteria used to assess each disability represent incremental degrees of severity from least (Level I) through most severe (Level III). Since Congress established three levels of payment, it would not be equitable, in our judgment, to pay someone with Level II impairment of each neurological function considered in the criteria the same amount as someone with Level III impairment of each neurological function considered. The criteria as proposed represent a reasonable and equitable method for distinguishing three levels of disability, and we make no change based on this comment.

We proposed to measure impairment of intellectual functioning using

intelligence quotient (I.Q.). A number of commenters stated that I.Q. is not the best representation of intellectual functioning as it relates to level of disability. Some recommended that we use "performance I.Q." or "assessed intellectual functioning" instead.

According to a recent British study, it is, in fact, I.Q. that is one of the two main determinants of disability and dependency in individuals with spina bifida, neurological deficit being the other (Open spina bifida: a complete cohort reviewed 25 years after closure, Urology Department, Addenbrooke's Hospital, Cambridge, UK, *Dev Med Child Neurol* 1995 Jan; 37(1):19-29). Furthermore, it is important to keep the criteria as simple and objective as possible to ensure consistent ratings and timely resolution of claims. Although I.Q. can be measured by any of several standardized tests that are in general use, we are not aware of any comparable standard objective measures for the other aspects of intellectual functioning that the commenters suggested we use. For these reasons, we make no change based on these comments.

One commenter felt that the payment criteria should take into account emotional suffering due to past surgical procedures.

38 U.S.C. 1805 authorizes a monetary allowance for disability resulting from spina bifida. In normal usage, the term "disability" implies a lack of the ability to function normally, physically or mentally (Dorland's Illustrated Medical Dictionary, 27th ed. 1988, 480). In our judgment, mental suffering due to prior surgeries is not a disability as that term is used in the statute, and we make no change based on this comment.

We proposed to evaluate impairment of bowel and bladder function from least (Level I) to most (Level III) severely impaired based on whether an individual is continent of urine and feces, requires drugs or mechanical means to maintain proper bladder or bowel function, or is completely incontinent of urine or feces. A number of commenters stated that these criteria penalize individuals for receiving appropriate treatment and are a financial disincentive to seeking treatment.

The issue is not whether impairment of bowel or bladder function is severely disabling—we can concede that it is—but the degree of severity. An individual who is continent at least part of the time, by whatever means, is clearly less disabled than one who is unable to attain any degree of continence by any means. Even in cases where an individual has attained continence of either bowel or bladder function

through drugs or mechanical means, other factors would influence the payment level. For example, some individuals may be able to attain continence for either bowel or bladder function but not both. In such a case, the payment level would remain at Level III. Furthermore, individuals with impairment of bowel or bladder function will, in many cases, have other impairments that affect the payment level, so that a change from incontinence to continence might not warrant any change in the payment level. In our judgment, the fact that a beneficiary might, in rare cases, receive a higher monthly payment if he or she does not follow procedures designed to alleviate, or at least manage, incontinence will not outweigh for most individuals with spina bifida the incentives, from both health and social perspectives, to follow such a program. We therefore make no change based on this comment.

Two commenters pointed out that because the degree of continence may change, the payment level may need to change. One recommended that we not reduce the payment from Level II (based on the fact that an individual requires drugs to maintain urinary continence) to Level I, until one year after he or she becomes continent without drugs, in order to ascertain whether continence can be maintained without medication.

The payment level is based on a combination of specified functional impairments. For that reason, a change in the severity of one type of impairment would not necessarily affect the payment level. A reduction from Level II to Level I based on the fact that an individual has achieved urinary continence, for example, would occur only if all other specified impairments (bowel, ambulation, I.Q., upper extremities) were also at Level I. Under the provisions of 38 CFR 3.814, VA will reevaluate the disability level whenever there is an indication of material change in an individual's condition; these evaluations will generally be based on medical reports from the beneficiary's primary care physician or the medical institution where he or she receives treatment. Should the health-care provider indicate that the long-term effect of withdrawing treatment cannot yet be determined, the rating activity could defer the reevaluation if it had any potential effect on the payment level. The length of any deferment should be based on medical evidence rather than a fixed period set by regulation, however, and we make no change based on this comment.

Because all children less than one year of age, whether or not they are

suffering from spina bifida, are essentially helpless, incontinent, unable to walk, and too young for I.Q. to be measured, we proposed to pay children under the age of one at Level I. Several commenters objected to this provision.

One commenter stated that this provision is unfair because it is at odds with the likely disability once the child is old enough to be properly examined, and arbitrary because it treats infants with spina bifida differently than older individuals with spina bifida without a rational basis.

The rating criteria for spina bifida are based on impairment of specified neurological functions. These functions have not yet developed in newborns, regardless of their spina bifida status. We do not dispute the fact that an infant with spina bifida has disabilities due to the condition. However, since it would be purely speculative to assess the severity of impairment of neurological functions until such time as those functions would have developed, in our judgment, there is a rational basis for setting the level of the monthly allowance at the lowest rate established by statute. As for the comment that Level I may not reflect the eventual severity of the child's disability, we believe that the monetary allowance is meant to reflect the current, rather than potential, level of severity, and that the requirement to reevaluate at age one is sufficient to ensure the child will be paid according to the actual impairment of neurological function once it is possible to objectively assess that impairment.

Three commenters felt that a child under the age of one should be paid at Level III. One commenter gave as a reason that this is the period of most intensive medical and surgical treatment. Another said a child with hydrocephalus could have multiple shunt malfunctions.

The issue is impairment of specific functions that are not yet developed in any infant. A child eligible for the monetary allowance is also entitled to health care from VA, including medical care, supplies, transportation, etc. Such a child will not be deprived of needed medical care because of the amount of monetary allowance. Furthermore, a child under the age of one may be evaluated at Level III if a pediatric neurologist or pediatric neurosurgeon certifies that there is a neurologic deficit present that will prevent the individual from ambulating, that will preclude self-care and feeding self because of sensory or motor impairment of the upper extremities, or that will make it impossible for the individual to achieve urinary or fecal continence. For these

reasons, we make no change based on this comment.

One commenter said this inequity of presuming a Level I could continue for years if the parents or VA fail to arrange a reevaluation.

No changes are made based on this comment. These regulations require VA to reevaluate a child when it reaches one year of age and thereafter at intervals of not more than five years. That is adequate protection against the inequity the commenter foresees. Anything beyond that would be a duty beyond the scope of VA's responsibility. Furthermore, a child, parent, or guardian may submit evidence that the disability has worsened at any time after the child is one year of age, and VA will determine whether that evidence warrants a change in the amount of monetary allowance.

Several commenters felt that the provision requiring certification by a pediatric neurologist for an infant to be paid at Level III is too stringent. Some commenters suggested that in addition to pediatric neurologists the certification also should be allowed to be made by pediatric neurosurgeons. We agree that such determinations could also be made by pediatric neurosurgeons. However, due to the difficulty of making an objective prognosis for infants with this complex disability, we believe that only pediatric neurologists and pediatric neurosurgeons have sufficient expertise to ensure that the option of rating the infant at Level III is equitably and consistently applied. Accordingly, the final rule limits such certifications to pediatric neurologists and pediatric neurosurgeons.

Some commenters said that infants with spina bifida, particularly those in rural areas, might not have access to a pediatric neurologist and recommended that VA accept certifications from other health-care practitioners.

Hospitals even in rural areas offer referral services for treatment or evaluation of severely disabled children. Under the provisions of 38 U.S.C. 1803, VA will provide an eligible child with spina bifida any health care, including transportation expenses, that it determines is necessary. If VA determines that evaluation by a pediatric neurologist or a pediatric neurosurgeon qualifies as a reasonable need, the services of a pediatric neurologist or a pediatric neurosurgeon will be available to any eligible disabled child who needs them, and we make no change based on this comment.

We proposed to rate impairment of neurological function of the lower extremities at Level I if the individual

is able to walk without braces or other external support; at Level II if he or she is ambulatory, but only with braces or other external support; and at Level III if he or she is unable to ambulate. One commenter said that the need to wear braces should warrant a Level III determination, and another said that some who can walk without braces still have very severe disability.

This comment raises the same issue, i.e., the degree of severity, discussed above in conjunction with the synergistic effects of disabilities. In order to administer this monetary allowance equitably, it is important that we consider not only that some beneficiaries may be less severely disabled than an individual rated at Level II, but also that some may be more severely disabled. While spina bifida is undoubtedly a very disabling condition, the statute requires us to establish rating criteria that distinguish three levels of disability. A person able to ambulate with braces or other external support is unquestionably less severely disabled than an individual who is unable to ambulate. We believe, therefore, the proposed criteria establish a clear and reasonable separation between the intermediate and most severe levels of impairment of neurological functioning of the lower extremities, and we make no change based on this comment.

We proposed to reevaluate individuals with spina bifida at the age of one year and then at intervals of no more than five years until the individual reaches the age of 21. One commenter proposed that VA waive further reevaluation if the child's primary caregiver states that it is unlikely that the overall level of disability will improve.

Periodic reevaluations are necessary because, until maturity, the level of neurological functioning may fluctuate. Virtually all children can be taught to ambulate with sufficient bracing and external support, for example, but those with lesions at L2 or higher will usually revert to wheelchairs in the teenage period (*Diseases of the Nervous System*, Arthur K. Asbury, M.D., Guy M. McKhann, M.D., and W. Ian McDonald, Ph. D., 1986, 712). The purpose of the reevaluations is to ensure that the beneficiary is being paid at the level commensurate with the severity of the disability. Although reevaluation will generally be based on private medical evidence, it is the VA adjudicator, rather than the caregiver, who is responsible for determining how that medical evidence compares to the requirements set forth in VA regulations. We therefore make no change based on this comment.

One commenter noted that the application form asked for parents' Social Security numbers. The commenter asserted that the form should clearly state that this is optional information. No change to the form is made based on this comment. The form clearly and prominently states in the material under the heading "Privacy Act Information" that disclosure of Social Security numbers is voluntary.

One commenter also noted that the application form asked for the parents' VA claim numbers and asserted that such information is irrelevant and should be eliminated from the form. No change to the form is made based on this comment. Not all parents will have VA claim numbers. However, for those who do, the corresponding claims file should provide relevant information that would eliminate the need for other searching. For example, the file should establish whether the parent had service in the Republic of Vietnam during the Vietnam era.

For the sake of clarity, we have made some non-substantive editorial changes to the proposed language.

VA appreciates the comments submitted in response to the proposed rule. Based on the rationale set forth in the proposed rule and this document, the provisions of the proposed rule are adopted with the changes noted above.

#### **Executive Order 12866**

This final rule has been reviewed by OMB under Executive Order 12866.

#### **Administrative Procedure Act**

There is good cause for making this final rule effective without regard to a 30 day delay. This final rule does not adversely affect anyone, and the affected children need the benefits from the rule as soon as possible.

#### **Paperwork Reduction Act**

Information collection requirements associated with this final rule concerning the Application for Spina Bifida Benefits (38 CFR 3.814) have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act (44 U.S.C. 3504(h)) and have been assigned OMB Control Number 2900-0572.

This collection of information included in 38 CFR 3.814 concerns an application for eligibility for the monetary allowance based on spina bifida that must be submitted on VA Form 21-0304, which has been approved.

OMB assigns a control number for each collection of information it approves. VA may not conduct or

sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The valid OMB control number assigned to the collection of information in this final rule is displayed at the end of the affected section of the regulations.

Two collection of information comments were received and are discussed above.

**Regulatory Flexibility Act**

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

There is no Catalog of Federal Domestic Assistance program number for this benefit.

**List of Subjects in 38 CFR Part 3**

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

Approved: September 11, 1997.

**Hershel W. Gober,**

*Acting Secretary of Veterans Affairs.*

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

**PART 3—ADJUDICATION**

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

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

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

2. In § 3.27, paragraph (c) is redesignated as paragraph (d), a new paragraph (c) is added, and newly redesignated paragraph (d) and its authority citation are revised to read as follows:

**§ 3.27 Automatic adjustment of benefit rates.**

\* \* \* \* \*

(c) *Monetary allowance under 38 U.S.C. 1805 for a child suffering from spina bifida who is a child of a Vietnam veteran.* Whenever there is a cost-of-living increase in benefit amounts payable under section 215(i) of Title II of the Social Security Act, VA shall, effective on the dates such increases become effective, increase by the same percentage the monthly allowance under 38 U.S.C. 1805 for a child suffering from spina bifida who is a child of a Vietnam veteran.

(Authority: 38 U.S.C. 1805(b)(3))

(d) *Publishing requirements.* Increases in pension rates, parents' dependency and indemnity compensation rates and income limitation, and the monthly allowance under 38 U.S.C. 1805 for a child suffering from spina bifida made under this section shall be published in the **Federal Register**.

(Authority: 38 U.S.C. 5312(c)(1), 1805(b)(3))

3. In § 3.105, paragraphs (g) and (h) are redesignated as paragraphs (h) and (i), respectively; in paragraphs (d), (e), (f) and newly redesignated paragraph (h) remove "paragraph (h)" each time it appears and add, in its place, "paragraph (i)"; in newly redesignated paragraph (i)(1) remove "paragraphs (d) through (g)" and add, in its place, "paragraphs (d) through (h)"; in newly redesignated paragraph (i)(2) introductory text remove "paragraph (d), (e), (f) or (g)" and add, in its place, "paragraph (d), (e), (f), (g) or (h)"; in

newly redesignated paragraph (i)(2)(ii) remove "paragraph (f)" and add, in its place, "paragraphs (f) and (g)"; in newly redesignated paragraph (i)(2)(iii) remove "paragraph (g)" and add, in its place, "paragraph (h)"; and add a new paragraph (g) to read as follows:

**§ 3.105 Revision of decisions.**

\* \* \* \* \*

(g) *Reduction in evaluation—monetary allowance to a child suffering from spina bifida under 38 U.S.C. 1805.* Where a change in disability level warrants a reduction of the monthly allowance currently being paid, VA will notify the beneficiary at his or her latest address of record of the proposed reduction, furnish detailed reasons therefor, and allow the beneficiary 60 days to present additional evidence to show that the monthly allowance should be continued at the present level. Unless otherwise provided in paragraph (i) of this section, if VA does not receive additional evidence within that period, it will take final rating action and reduce the award effective the last day of the month following sixty days from the date of notice to the payee of the proposed reduction.

(Authority: 38 U.S.C. 501)

\* \* \* \* \*

**§ 3.158 [Amended]**

4. In § 3.158, paragraphs (a) and (c) are amended by removing "or dependency and indemnity compensation" and adding, in its place, "dependency and indemnity compensation, or monetary allowance under the provisions of 38 U.S.C. 1805".

5. In § 3.261, paragraph (a)(40) is added to read as follows:

**§ 3.261 Character of income; exclusions and estates.**

\* \* \* \* \*

(a) \* \* \*

Income	Dependency (parents)	Dependency and indemnity compensation (parents)	Pension; old-law (veterans, surviving spouses and children)	Pension; section 306 (veterans, surviving spouses and children)	See—
(40) Monetary allowance under 38 U.S.C. 1805 for children suffering from spina bifida who are children of Vietnam Veterans (38 U.S.C. 1805(d)).	Excluded .....	Excluded .....	Excluded .....	Excluded .....	§ 3.262(y).

\* \* \* \* \*

6. In § 3.262, paragraph (y) is added immediately preceding the final authority citation at the end of the section to read as follows:

**§ 3.262 Evaluation of income.**

\* \* \* \* \*

(y) *Monetary allowance under 38 U.S.C. 1805 for a child suffering from spina bifida who is a child of a Vietnam*

*veteran.* There shall be excluded from income computation any allowance paid under the provisions of 38 U.S.C. 1805 to a child suffering from spina

bifida who is the child of a Vietnam veteran.

(Authority: 38 U.S.C. 1805(d))

\* \* \* \* \*

7. In § 3.263, paragraph (g) is added to read as follows:

**§ 3.263 Corpus of estate; net worth.**

\* \* \* \* \*

(g) *Monetary allowance under 38 U.S.C. 1805 for a child suffering from spina bifida who is a child of a Vietnam veteran.* There shall be excluded from the corpus of estate or net worth of a claimant any allowance paid under the provisions of 38 U.S.C. 1805 to a child suffering from spina bifida who is the child of a Vietnam veteran.

(Authority: 38 U.S.C. 1805(d))

8. In § 3.272, paragraph (u) is added to read as follows:

**§ 3.272 Exclusions from income.**

\* \* \* \* \*

(u) *Monetary allowance under 38 U.S.C. 1805 for a child suffering from spina bifida who is a child of a Vietnam veteran.* Any allowance paid under the provisions of 38 U.S.C. 1805 to a child suffering from spina bifida who is the child of a Vietnam veteran.

(Authority: 38 U.S.C. 1805(d))

9. In § 3.275, paragraph (i) is added to read as follows:

**§ 3.275 Criteria for evaluating net worth.**

\* \* \* \* \*

(i) *Monetary allowance under 38 U.S.C. 1805 for a child suffering from spina bifida who is a child of a Vietnam veteran.* There shall be excluded from the corpus of estate or net worth of a

claimant any allowance paid under the provisions of 38 U.S.C. 1805 to a child suffering from spina bifida who is the child of a Vietnam veteran.

(Authority: 38 U.S.C. 1805(d))

10. In § 3.403, the introductory text and paragraphs (a) through (e) are redesignated as paragraph (a) introductory text and paragraphs (a)(1) through (a)(5), respectively, and paragraph (b) is added to read as follows:

**§ 3.403 Children.**

\* \* \* \* \*

(b) *Monetary allowance under 38 U.S.C. 1805 for a child suffering from spina bifida who is a child of a Vietnam veteran (§ 3.814).* An award of the monetary allowance under 38 U.S.C. 1805 to a child suffering from spina bifida who is the child of a Vietnam veteran will be either date of birth if claim is received within one year of that date, or, date of claim, but not earlier than October 1, 1997.

(Authority: 38 U.S.C. 1806, 5110(n); sec. 422(c), Pub. L. 104-204, 110 Stat. 2926)

11. In § 3.503, the introductory text and paragraphs (a) through (j) are redesignated as paragraph (a) introductory text and paragraphs (a)(1) through (a)(10), respectively, and paragraph (b) is added to read as follows:

**§ 3.503 Children.**

\* \* \* \* \*

(b) *Monetary allowance under 38 U.S.C. 1805 for a child suffering from spina bifida who is a child of a Vietnam veteran (§ 3.814).* The effective date of

discontinuance of the monthly allowance under 38 U.S.C. 1805 to a child suffering from spina bifida who is the child of a Vietnam veteran will be the last day of the month before the month in which the death of the child occurred.

(Authority: 38 U.S.C. 501)

12. Section 3.814 is added under the undesignated centerheading "Special Benefits" to read as follows:

**§ 3.814 Monetary allowance under 38 U.S.C. 1805 for a child suffering from spina bifida who is a child of a Vietnam veteran.**

(a) VA shall pay a monthly allowance based upon the level of disability determined under the provisions of paragraph (d) of this section to or for a child who it has determined is suffering from spina bifida and who is a child of a Vietnam veteran. Receipt of this allowance shall not affect the right of the child, or the right of any individual based on the child's relationship to that individual, to receive any other benefit to which the child, or that individual, may be entitled under any law administered by VA. If a child suffering from spina bifida is the natural child of two Vietnam veterans, he or she is entitled to only one monthly allowance under this section.

(b) Applicants for the monetary allowance under this section must submit an application to the VA regional office and include the information mandated on the following VA form entitled "Application for Spina Bifida Benefits":

BILLING CODE 8320-01-P

 Department of Veterans Affairs		<b>APPLICATION FOR SPINA BIFIDA BENEFITS</b>	
<p><b>PRIVACY ACT INFORMATION:</b> The social security number and other information on this form is requested under 38 U.S.C. chapter 18, which provides benefits to Vietnam veterans' children with spina bifida. Any information on this form may be disclosed outside VA only if authorized under 38 U.S.C. 5701 and the Privacy Act, including the routine uses identified in the VA system of records, 58VA21/22, Compensation, Pension, Education and Rehabilitation Records - VA, published in the Federal Register. Routine disclosures may be made for the following purposes: Debt collection, civil or criminal law enforcement, communications with members of Congress or other representatives, benefits delivery, administration of programs, and personnel administration. Disclosure of the social security numbers and other requested information is voluntary; however, failure to furnish that information would impose administrative difficulties which may result in a delay in processing your application for spina bifida benefits.</p> <p><b>RESPONDENT BURDEN:</b> VA may not conduct or sponsor, and respondent is not required to respond to this collection of information unless it displays a valid OMB Control Number. Public reporting burden for this collection of information is estimated to average 10 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have comments regarding this burden estimate or any other aspect of this collection of information, call 1-800-827-1000 for mailing information on where to send your comments.</p>			
1. NAME OF CLAIMANT-CHILD ( <i>First, middle, last</i> )		2. SOCIAL SECURITY NUMBER OF CLAIMANT-CHILD ( <i>If available</i> )	
3. CLAIMANT-CHILD'S DATE OF BIRTH ( <i>Mo., day, yr.</i> )		4. CLAIMANT-CHILD'S PLACE OF BIRTH ( <i>City and state</i> )	
5. ADDRESS OF CLAIMANT-CHILD ( <i>Include number and street or rural route, city or P.O., State and ZIP Code</i> )		6. TELEPHONE NUMBER OF CLAIMANT-CHILD ( <i>Include Area Code</i> ) (      )	
7. NAME(S) OF NATURAL PARENT(S) ( <i>Please provide information for both</i> )			
A. FATHER ( <i>First, middle, last</i> )		B. MOTHER ( <i>First, middle, last</i> )	
8. ADDRESS, TELEPHONE NUMBER AND VETERAN STATUS OF NATURAL PARENT(S)			
A. FATHER ( <i>Include number and street or rural route, city or P.O., State and ZIP Code</i> )		C. MOTHER ( <i>Include number and street or rural route, city or P.O., State and ZIP Code</i> )	
(      )		(      )	
B. VIETNAM SERVICE? ( <i>If "Yes," provide dates below</i> ) <input type="checkbox"/> YES <input type="checkbox"/> NO ( <i>From: _____ To: _____</i> )		D. VIETNAM SERVICE? ( <i>If "Yes," provide dates below</i> ) <input type="checkbox"/> YES <input type="checkbox"/> NO ( <i>From: _____ To: _____</i> )	
9. SOCIAL SECURITY NUMBER(S) OF NATURAL PARENT(S)			
A. FATHER		B. MOTHER	
10. VA CLAIM NUMBER(S) OF NATURAL PARENT(S) ( <i>If veteran previously applied to VA for any benefit</i> )			
A. FATHER		B. MOTHER	
11. IF CHILD IS UNDER AGE 18 WHO HAS CUSTODY, IF OTHER THAN NATURAL PARENT? ( <i>Complete Items 11A, 11B and 11C</i> )			
A. NAME OF CUSTODIAN/GUARDIAN OF CLAIMANT-CHILD		B. RELATIONSHIP TO CHILD <input type="checkbox"/> ADOPTIVE PARENT <input type="checkbox"/> GUARDIAN <input type="checkbox"/> OTHER ( <i>Specify</i> ) _____	C. ADDRESS OF CUSTODIAN/GUARDIAN OF CLAIMANT-CHILD
12A. IF CLAIMANT-CHILD IS AGE 18 OR OLDER HAS THE CLAIMANT-CHILD BEEN DECLARED INCOMPETENT? <input type="checkbox"/> YES <input type="checkbox"/> NO ( <i>If "Yes," complete Items 12B and 12C</i> )			
12B. NAME AND ADDRESS OF THE COURT WHICH MADE THE FINDING OF INCOMPETENCY?		12C. NAME AND ADDRESS OF THE GUARDIAN	
13. NAME AND ADDRESS OF PRIMARY HEALTH CARE PROVIDER FOR THE CLAIMANT-CHILD			
14A. HAS THE CHILD BEEN DIAGNOSED WITH SPINA BIFIDA? <input type="checkbox"/> YES <input type="checkbox"/> NO ( <i>If "Yes," complete Items 14B and 14C</i> )		14B. DATE OF DIAGNOSIS ( <i>Mo., day, yr.</i> )	
14C. IF THE CLAIMANT-CHILD HAS BEEN TREATED/HOSPITALIZED FOR SPINA BIFIDA RELATED DISABILITIES WITHIN THE LAST YEAR, PLEASE PROVIDE THE NAME AND ADDRESS OF EACH HOSPITAL OR OTHER INSTITUTION WHERE THE TREATMENT WAS PROVIDED ( <i>Use reverse or attach a separate sheet if more space is needed</i> )			
I/We, the undersigned, hereby authorize the hospital or physician shown in Items 13 and 14C to disclose and release to the Department of Veterans Affairs (VA) any information that may have been obtained in connection with the physical examination or treatment of the child.			
15A. SIGNATURE(S) OF PARENT/GUARDIAN/ADULT CHILD		15B. DATE SIGNED	
16A. SIGNATURE OF WITNESS (Required)		16B. DATE SIGNED	
I/We, the undersigned, declare under penalty of perjury that the information provided is true and correct and that the child named in Item 1 above is the natural child of the person(s) named above in Item 7.			
17A. SIGNATURE		17B. DATE SIGNED	
18A. SIGNATURE		18B. DATE SIGNED	

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JUL 1997

(c) *Definitions.*—(1) *Vietnam veteran.* For the purposes of this section, the term “Vietnam veteran” means a veteran who performed active military, naval, or air service in the Republic of Vietnam during the Vietnam era. *Service in the Republic of Vietnam* includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

(2) *Child.* For the purposes of this section, the term “child” means a natural child of a Vietnam veteran, regardless of age or marital status, conceived after the date on which the veteran first served in the Republic of Vietnam during the Vietnam era. Notwithstanding the provisions of § 3.204(a)(1), VA shall require the types of evidence specified in §§ 3.209 and 3.210 sufficient to establish in the judgment of the Secretary that a child is the natural child of a Vietnam veteran.

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

(d)(1) VA shall determine the level of disability suffered by the child in accordance with the following criteria:

(i) *Level I.* The child is able to walk without braces or other external support (although gait may be impaired), has no sensory or motor impairment of upper extremities, has an IQ of 90 or higher, and is continent of urine and feces.

(ii) *Level II.* Provided that none of the child’s disabilities are severe enough to be evaluated at Level III, and the child: is ambulatory, but only with braces or other external support; or, has sensory or motor impairment of upper extremities, but is able to grasp pen, feed self, and perform self care; or, has an IQ of at least 70 but less than 90; or, requires drugs or intermittent catheterization or other mechanical means to maintain proper urinary bladder function, or mechanisms for proper bowel function.

(iii) *Level III.* The child is unable to ambulate; or, has sensory or motor impairment of upper extremities severe enough to prevent grasping a pen, feeding self, and performing self care; or, has an IQ of 69 or less; or, has complete urinary or fecal incontinence.

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

purpose of assessing the level of disability.

(3) Unless or until VA is able to obtain medical evidence adequate to assess the level of disability due to spina bifida, or to reassess the level of disability when required to do so under the provisions of paragraph (d)(4) or (5) of this section, VA will rate the disability of a person eligible for this monetary allowance at no higher than Level I.

(4) Children under the age of one year will be rated at Level I unless a pediatric neurologist or a pediatric neurosurgeon certifies that, in his or her medical judgment, there is a neurological deficit that will prevent the child from ambulating; from grasping a pen, feeding him or herself, or performing self care; or from achieving urinary or fecal continence. If such a deficit is present, the child will be rated at Level III. In either case, VA will reassess the level of disability when the child reaches the age of one year.

(5) VA will reassess the level of disability due to spina bifida whenever it receives medical evidence indicating that a change is warranted. For individuals between the ages of one and twenty-one, however, it will reassess the level of disability at intervals of not more than five years. Thereafter, it will reassess the level of disability only if evidence indicates there has been a material change in the level of disability or that the current rating may be incorrect.

(Paperwork requirements were approved by the Office of Management and Budget under control number 2900–0572.)

(Authority: 38 U.S.C. 501, 1805)

### PART 3—[AMENDED]

13. The Cross Reference following § 3.57 is amended by removing “§ 3.403(a)” and “§ 3.503(c)” and adding, in their places, “§ 3.403(a)(1)” and “§ 3.503(a)(3)”, respectively.

14. Each Cross Reference following §§ 3.659 and 3.703 is amended by removing “§ 3.503(g)” and adding, in its place, “§ 3.503(a)(7)”.

15. The Cross Reference following § 3.707 is amended by removing “§ 3.503(h)” and adding, in its place, “§ 3.503(a)(8)”.

16. The Cross Reference following § 3.807 is amended by removing “§ 3.503(h)” and adding, in its place, “§ 3.503(a)(8)”.

[FR Doc. 97–25663 Filed 9–29–97; 8:45 am]  
BILLING CODE 8320–01–P

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 17

RIN 2900–A165

#### Provision of Health Care to Vietnam Veterans’ Children With Spina Bifida

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

**SUMMARY:** This document establishes regulations regarding Vietnam veterans’ children with spina bifida. The regulations concern the provision of health care needed for the spina bifida or any disability that is associated with such condition. This action is necessary to establish a mechanism for providing health care to such children in accordance with recently enacted legislation.

**DATES:** *Effective Date:* October 1, 1997.

**FOR FURTHER INFORMATION CONTACT:** Robert De Vesty, Health Systems Specialist, Office of Public Health and Environmental Hazards (13), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington DC, 20420, telephone (202) 273–8575.

**SUPPLEMENTARY INFORMATION:** In a document published in the **Federal Register** on May 1, 1997 (62 FR 23731), we proposed to amend the “Medical” regulations (38 CFR part 17) by setting forth new §§ 17.900–17.905 regarding the provision of health care to Vietnam veterans’ children with spina bifida. Spina bifida is a congenital birth defect, characterized by defective closure of the bones surrounding the spinal cord. The spinal cord and its covering (the meninges) may protrude through the defect.

The provisions of 38 U.S.C. Chapter 18 (Pub. L. 104–204, section 421, September 26, 1996) provide for three separate types of benefits for Vietnam veterans’ children who suffer from spina bifida: (1) Monthly monetary allowances, (2) provision of health care needed for the spina bifida or any disability that is associated with such condition, and (3) provision of vocational training and rehabilitation.

This document establishes a final rule to set forth a mechanism regarding provision of health care to Vietnam veterans’ children with spina bifida.

We requested that comments to the proposed rule be submitted on or before June 30, 1997. We received 33 comments. Based on the rationale set forth in the proposed rule and this document, the proposed rule is adopted as a final rule with changes explained below.