

**DEPARTMENT OF VETERANS
AFFAIRS**

38 CFR Part 5

RIN 2900-AL88

Special Ratings

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to reorganize and rewrite in plain language regulations relating to special ratings and ratings for health care eligibility only. These revisions are proposed as part of VA's rewrite and reorganization of all of its compensation and pension rules in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist claimants and VA personnel in locating and understanding these provisions.

DATES: Comments must be received by VA on or before December 16, 2008.

ADDRESSES: Written comments may be submitted through <http://www.Regulations.gov>; by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. (This is not a toll free number).

Comments should indicate that they are submitted in response to "RIN 2900-AL88—Special Ratings." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

FOR FURTHER INFORMATION CONTACT: William F. Russo, Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-9515. (This is not a toll free number).

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

a recommendation made in the October 2001 "VA Claims Processing Task Force: Report to the Secretary of Veterans Affairs." The Task Force recommended that the compensation and pension regulations be rewritten and reorganized in order to improve VA's claims adjudication process. Therefore, the Project began its efforts by reviewing, reorganizing, and redrafting the content of the regulations in 38 CFR part 3 governing the compensation and pension program of the Veterans Benefits Administration. These regulations are among the most difficult VA regulations for readers to understand and apply.

Once rewritten, the proposed regulations will be published in several portions for public review and comment. This is one such portion. It includes proposed rules regarding special ratings. After review and consideration of public comments, final versions of these proposed regulations will ultimately be published in a new part 5 in 38 CFR.

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Overview of New Part 5 Organization

We plan to organize the new part 5 regulations so that most provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. This organization will allow claimants, beneficiaries, and their representatives, as well as VA adjudicators, to find information relating to a specific benefit more quickly than the organization provided in current part 3.

The first major subdivision would be "Subpart A—General Provisions." It would include information regarding the scope of the regulations in new part 5, general definitions, and general policy provisions for this part. This subpart was published as proposed on March 31, 2006. *See* 71 FR 16464.

"Subpart B—Service Requirements for Veterans" would include information regarding a veteran's military service, including the minimum service requirement, types of service, periods of war, and service evidence requirements. This subpart was published as proposed on January 30, 2004. *See* 69 FR 4820.

"Subpart C—Adjudicative Process, General" would inform readers about types of claims and filing procedures, VA's duties, rights and responsibilities of claimants and beneficiaries, general evidence requirements, and effective dates for new awards, as well as revision of decisions and protection of VA ratings. This subpart will be published as three separate Notices of Proposed Rulemaking (NPRMs) due to its size. The first, concerning the duties of VA and the rights and responsibilities of claimants and beneficiaries, was published as proposed on May 10, 2005. *See* 70 FR 24680. The second, covering general evidence requirements, effective dates for awards, revision of decisions, and protection of VA ratings, was published as proposed on May 22, 2007. *See* 72 FR 28770. The third NPRM, concerning rules on filing VA benefits claims, was published as proposed on April 14, 2008. *See* 73 FR 20136.

"Subpart D—Dependents and Survivors" would inform readers how VA determines whether an individual is a dependent or a survivor of a veteran.

It would also provide the evidence requirements for these determinations. This subpart was published as proposed on September 20, 2006. *See* 71 FR 55052.

"Subpart E—Claims for Service Connection and Disability Compensation" would define service-connected compensation, including direct and secondary service connection. This subpart would inform readers how VA determines entitlement to service connection. The subpart would also contain those provisions governing presumptions related to service connection, rating principles, and effective dates, as well as several special ratings. This subpart will be published as three separate NPRMs due to its size. The first, concerning presumptions related to service connection, was published as proposed on July 27, 2004. *See* 69 FR 44614. The second, concerning special ratings, is the subject of this document.

"Subpart F—Nonservice-Connected Disability Pensions and Death Pensions" would include information regarding the three types of nonservice-connected pension: Old-Law Pension, Section 306 Pension, and Improved Pension. This subpart would also include those provisions that state how to establish entitlement to Improved Pension, and the effective dates governing each pension. This subpart would be published in two separate NPRMs due to its size. The portion concerning Old-Law Pension, Section 306 Pension, and elections of Improved Pension was published as proposed on December 27, 2004. *See* 69 FR 77578. The portion concerning Improved Pension was published as proposed on September 26, 2007. *See* 72 FR 54776.

"Subpart G—Dependency and Indemnity Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary" would contain regulations governing claims for dependency and indemnity compensation (DIC); accrued benefits; benefits awarded, but unpaid at death; and various special rules that apply to the disposition of VA benefits, or proceeds of VA benefits, when a beneficiary dies. This subpart would also include related definitions, effective-date rules, and rate-of-payment rules. This subpart was published as two separate NPRMs due to its size. The portion concerning accrued benefits, special rules applicable upon the death of a beneficiary, and several effective-date rules was published as proposed on October 1, 2004. *See* 69 FR 59072. The portion concerning DIC benefits and general provisions relating to proof of death and service-connected cause of

death was published as proposed on October 21, 2005. *See* 70 FR 61326.

"Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors" would pertain to special and ancillary benefits available, including benefits for children with various birth defects. This subpart was published as proposed on March 9, 2007. *See* 72 FR 10860.

"Subpart I—Benefits for Certain Filipino Veterans and Survivors" would pertain to the various benefits available to Filipino veterans and their survivors. This subpart was published as proposed on June 30, 2006. *See* 71 FR 37790.

"Subpart J—Burial Benefits" would pertain to burial allowances. This subpart was published as proposed on April 8, 2008. *See* 73 FR 19021.

"Subpart K—Matters Affecting the Receipt of Benefits" would contain provisions regarding bars to benefits, forfeiture of benefits, and renunciation of benefits. This subpart was published as proposed on May 31, 2006. *See* 71 FR 31056.

"Subpart L—Payments and Adjustments to Payments" would include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules. This subpart will be published as two separate NPRMs due to its size. The portion concerning payments to beneficiaries who are eligible for more than one benefit was published as proposed on October 2, 2007. *See* 72 FR 56136.

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

Some of the regulations in this NPRM cross-reference other compensation and pension regulations. If those regulations have been published in this or earlier NPRMs for the Project, we cite the proposed part 5 section. We also include, in the relevant portion of the Supplementary Information, the **Federal Register** document citation (including the Regulation Identifier Number and Subject Heading) where a proposed part 5 section published in an earlier NPRM may be found. However, where a regulation proposed in this NPRM would cross-reference a proposed part 5 regulation that has not yet been published, we cite the current part 3 regulation that deals with the same subject matter. The current part 3 section we cite may differ from its eventual part 5 counterpart in some respects, but this method will assist

readers in understanding these proposed regulations where no part 5 counterpart has yet been published. If there is no part 3 counterpart to a proposed part 5 regulation that has not yet been published, we have inserted “[regulation that will be published in a future Notice of Proposed Rulemaking]” where the part 5 regulation citation would be placed.

Because of its large size, proposed part 5 will be published in a number of NPRMs, such as this one. VA will not adopt any portion of part 5 as final until all of the NPRMs have been published for public comment.

In connection with this rulemaking, VA will accept comments relating to a prior rulemaking issued as a part of the Project, if the matter being commented on relates to both rulemakings.

Overview of This Notice of Proposed Rulemaking

This proposed rulemaking pertains to those regulations governing special ratings. These regulations would be contained in proposed Subpart E of new 38 CFR part 5. Although these regulations have been substantially restructured and rewritten for greater clarity and ease of use, most of the basic concepts contained in these proposed regulations are the same as in their existing counterparts in 38 CFR part 3. However, a few substantive changes are proposed, as are some regulations that do not have counterparts in 38 CFR part 3.

Table Comparing Current Part 3 Rules With Proposed Part 5 Rules

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

| Proposed part 5 section or paragraph | Based in whole or in part on 38 CFR part 3 section or paragraph | Based in whole or in part on 38 CFR part 3 section or paragraph | Proposed part 5 section or paragraph | Based in whole or in part on 38 CFR part 3 section or paragraph |
|--------------------------------------|---|---|--------------------------------------|---|
| 5.320(a) | 3.351(b), 3.352(a) [first, fifth–seventh sentences]. | 3.350(a), 3.350(a). New. | 5.331(c) | 3.350(f)(2)(vii). |
| 5.320(b) | 3.352(a) [second–fourth sentences]. | 3.350(a)(1)(i) [first sentence]. | 5.331(c)(1) | 3.350(f)(2)(vii) (A). |
| 5.321(a) | 3.351(a)(2) and (b). | 3.350(a)(1)(i) [second sentence]. | 5.331(c)(2) | 3.350(f)(2)(vii) (B). |
| 5.321(b)(1)–(3) | 3.351(c)(1)–(2). | New. | 5.331(c)(3) | 3.350(f)(2)(vii) (C). |
| 5.321(c) | 3.351(c)(3). | 3.350(a)(1)(i) [first sentence]. | 5.331(d) | 3.350(f)(3) and (f)(4)(i). |
| 5.322(a) | New. | 3.350(a)(1)(i) [second sentence]. | 5.331(e)(1),(2) | 3.350(f)(4). |
| 5.322(b), (c)(1)–(3) | 3.350(a)(2)(i). | New. | 5.331(e)(3) | 3.350(f)(4)(ii). |
| 5.322(c)(4) | 3.350(a)(2)(i) (b) [sic]. | New. | 5.331(f) | 3.350(f)(5). |
| 5.322(d) | 3.350(c)(2). | 3.350(a)(1)(iii). | 5.332(a) | 3.350(h)(1) and (2). |
| 5.322(e) | 3.350(c)(2). | 3.350(a)(1)(iv). | 5.332(b) | 3.350(h). |
| 5.322(f) | 3.350(d). | 3.350(a)(3)(i). | 5.332(c) | 3.350(f) and 3.352(b). |
| 5.322(g) | 3.350(b)(2) [second sentence]. | 3.350(a)(3)(ii). | 5.332(c)(1)(i) | 3.350(h)(2) and 3.352(b)(1)(i). |
| 5.323(a)(1)–(8) | 3.350(a). | 3.350(a)(5). | 5.332(c)(1)(ii) | 3.352(b)(1)(ii). |
| | | 3.350(a)(6). | 5.332(c)(1)(iii) | 3.352(b)(1)(iii). |
| | | | 5.332(c)(1)(iv) | 3.352(b)(1)(iii). |
| | | | 5.332(c)(2) | 3.352(b)(2) [first sentence]. |
| | | | 5.332(c)(3) | 3.352(b)(2) [second sentence]. |
| | | | 5.332(c)(4) | 3.352(b)(2) [third sentence]. |
| | | | 5.332(c)(5) | 3.352(b)(3). |
| | | | 5.332(c)(6) | 3.352(b)(4). |
| | | | 5.333 [introduction] | 3.350(i). |
| | | | 5.333(a) | 3.350(i)(1). |
| | | | 5.333(b) | 3.350(i)(2). |
| | | | 5.334 | New. |
| | | | 5.335(a) | 3.401(a)(1). |
| | | | 5.335(b) | 3.401(a)(1). |
| | | | 5.336(a)(1) | 3.401(a)(3). |
| | | | 5.336(a)(2) | 3.401(a)(3). |
| | | | 5.336(b) | 3.501(b)(3). |
| | | | 5.337 | 3.401(a)(2). |
| | | | 5.340 | 3.370. |
| | | | 5.341 | 3.371. |
| | | | 5.342 | 3.372. |
| | | | 5.343 | 3.374. |
| | | | 5.344 | 3.375. |
| | | | 5.345 | 3.378. |
| | | | 5.346(a) | 3.959. |
| | | | 5.346(b)(1)(i) | 3.350(g)(1). |
| | | | 5.346(b)(1)(ii) | 3.401(g). |
| | | | 5.346(b)(2) | 3.350(g)(2). |
| | | | 5.347 | 3.343(b). |
| | | | 5.350 | 3.361. |
| | | | 5.351 | 3.361(a)(2), 3.400(i). |
| | | | 5.352 | 3.362. |
| | | | 5.353 | 3.363. |
| | | | 5.360(a) | New. |
| | | | 5.360(b) | 3.381(a). |
| | | | 5.360(c)(1) | 3.381(e)(1). |

| Proposed part 5 section or paragraph | Based in whole or in part on 38 CFR part 3 section or paragraph |
|--------------------------------------|---|
| 5.360(c)(2) | 3.381(e)(2). |
| 5.360(c)(3) | 3.381(d)(5). |
| 5.360(c)(4) | 3.381(d)(6). |
| 5.360(d)(1)–(3) | 3.381(b). |
| 5.360(d)(4) | 3.381(c) [first sentence]. |
| 5.360(e) [introduction] | 3.381(c) [second sentence]. |
| 5.360(e)(1) | 3.381(d)(1). |
| 5.360(e)(2) | 3.381(d)(2). |
| 5.360(e)(3) | 3.381(d)(3). |
| 5.360(e)(4) | 3.381(d)(4). |
| 5.360(e)(5) | 3.381(e)(3). |
| 5.360(e)(6) | 3.381(e)(4). |
| 5.360(e)(7) | 3.381(f). |
| 5.361(a) | 3.360(a). |
| 5.361(b) | 3.360(c). |
| 5.361(c) | 3.360(b). |
| 5.362 | New. |
| 5.363 | 3.359. |
| 5.365 | 3.300. |
| 5.366 | 3.385. |
| 5.367 | 3.357. |
| 5.368 | 3.315(b), (c). |

Readers who use this table to compare the proposed provisions with the existing regulatory provisions, and who observe a difference between them, should consult the text that appears later in this document for an explanation of significant changes in each regulation. Not every paragraph of every current part 3 section regarding the subject matter of this rulemaking is accounted for in the table. In some instances, other portions of the part 3 sections that are contained in these proposed regulations appear in subparts of part 5 that are being published separately for public comment. For example, a reader might find a reference to paragraph (a) of a part 3 section in the table, but no reference to paragraph (b) of that section because paragraph (b) will be addressed in a separate NPRM. The table also does not include provisions from part 3 regulations that will not be carried forward to part 5. Such provisions are discussed specifically under the appropriate part 5 heading in this preamble. Readers are invited to comment on the proposed part 5 provisions and on our proposals to omit those part 3 provisions from part 5.

Content of Proposed Regulations
Special Monthly Compensation

5.320 Determining Need for Regular Aid and Attendance

Proposed § 5.320 is derived primarily from current § 3.352(a). Although § 3.352(a) by its terms applies only to determinations of the need for regular aid and attendance under § 3.351(c)(3) (increased DIC based on need for aid and attendance), in practice VA applies § 3.352(a) as the general criteria for determining the need for regular aid and attendance in every context for which benefits are premised on such a need and administered under part 3. This is reflected in part by the reference to the § 3.352(a) criteria in § 3.351(c)(3), which applies to a veteran, spouse, surviving spouse, or parent, and in § 3.350(b)(3), which refers to § 3.352(a) for the criteria to determine whether a veteran qualifies for special monthly compensation (SMC) based on the need for regular aid and attendance. In part 5, we would explicitly make these criteria generally applicable to all determinations of the need for regular aid and attendance, and, in so doing, will simplify and clarify the criteria.

Current § 3.351(b) uses the term “helpless” to mean requiring “the regular aid and attendance of another person,” but the Veterans’ Housing Opportunity and Benefits Improvement Act of 2006 amended certain sections of title 38, United States Code, to replace the term “helpless” with the term “significantly disabled” (and similar terminology) when describing veterans, dependents, or survivors who need regular aid and attendance benefits. See Public Law 109–233, sec. 502, 120 Stat. 398, 415 (June 15, 2006). Despite the change in terminology, the Act did not make any substantive change to title 38. See Explanatory Statement on Amendment to Senate Bill, S. 1235, as amended, 152 Cong. Rec. H2976, H2978 (daily ed. May 22, 2006). The proposed part 5 criteria for needing regular aid and attendance, however, would not reference the statutory requirement that a person be “helpless” or “so significantly disabled” as to regularly need aid and attendance. The statutory term serves in § 3.352(a) as the basis for the application of the various criteria that can serve as the basis for a finding that an individual is in need of regular aid and attendance, which would be listed in proposed § 5.320(a)(1)–(6). But those criteria clearly apply only if a person is disabled and, as a result, the reference to being “so significantly disabled” is superfluous. We would, instead, simply state that a person needs

regular aid and attendance if that person is unable to perform the functions listed in paragraphs (a)(1)–(6).

In addition, current § 3.351(b) uses the term “require” rather than “need” regular aid and attendance. We propose to use “need” in proposed part 5. The words “need” and “require” have identical meanings, but part 3 uses “need” more than 60 times when referring to regular aid and attendance, but uses “require” only five times. In the authorizing statutes, 38 U.S.C. 1114(l) uses the phrase “in need of regular aid and attendance”, while 38 U.S.C. 1115(1)(E) and 1502(b) use “need or require the regular aid and attendance.” The word “need” is perfectly clear, and more easily understood than “require” or “need or require,” and using the word “need” will not result in any substantive difference between parts 3 and 5.

We would also omit the phrase “of another person.” In current part 3, the phrase inconsistently appears after “aid and attendance.” It is in current §§ 3.25(e) and 3.351(b), but not in §§ 3.350, 3.351(c), or 3.352. The statutes authorizing benefits based on needing “regular aid and attendance” do not consistently use the phrase “of another person.” Compare, e.g., 38 U.S.C. 1114(l), (m), (r) (not using “of another person”), with 38 U.S.C. 1115(1)(E) (using “of another person”). All of the criteria for determining need for aid and attendance listed in § 3.352, “Criteria for determining aid and attendance and ‘permanently bedridden,’” concern tasks that must be done by someone other than the person needing aid and attendance. Therefore, the phrase “of another person” is unnecessary.

In proposed § 5.320(a) we would specifically note that the need for regular aid and attendance need not be permanent. There is no express statutory requirement that a person’s need for regular aid and attendance is permanent in nature, and the proposed rule is consistent with the current regulation. Indeed, to impose a “permanent” requirement might conflict with 38 U.S.C. 1114(l), which distinguishes a veteran’s need for regular aid and attendance from a veteran being “permanently bedridden,” as further explained later in this NPRM.

As noted above, proposed § 5.320(a)(1)–(6) would set forth the basic criteria to establish the need for regular aid and attendance, which are derived from current § 3.352(a). The language describing the criteria in the proposed paragraph is plainer and more modern than that of the current regulation, but there are no substantive differences. In particular, current

§ 3.352(a), “Basic criteria for regular aid and attendance and permanently bedridden,” specifies that “physical or mental” incapacity necessitates assistance in protecting “the claimant from hazards or dangers incident to his or her daily environment.” In the proposed rule, we have omitted the phrase “physical or mental.” The term “incapacity” needs no such qualification because the only possible incapacitating causes of a person’s inability to avoid hazards or dangers are physical or mental. Thus, the phrase “physical or mental” is superfluous.

Proposed § 5.320(b) reflects VA’s policy to consider a person who is bedridden to also be a person who needs regular aid and attendance. Although the title of current § 3.352 and the caption to § 3.352(a) refer to the term “permanently bedridden,” the text of § 3.352(a) describes “bedridden” status without such qualification. Indeed, 38 U.S.C. 1114(l) contains the sole statutory requirement that a veteran be “permanently bedridden,” stating that a veteran is eligible for special monthly compensation at the rate set forth in section 1114(l) if the veteran “is permanently bedridden or with such significant disabilities as to be in need of regular aid and attendance.” That requirement would be covered by § 5.324(d).

Thus, proposed § 5.320(b) implements the general statutory criterion, appearing in several places in title 38, United States Code, that a person who is so significantly disabled as to need regular aid and attendance is entitled to certain VA benefits. It is reasonable to assume that a person who is bedridden due to disability has such need. Therefore, proposed part 5, like part 3, would consider a person who is bedridden to be one who needs regular aid and attendance.

Proposed § 5.320(b) is based on the rules governing “bedridden” determinations under current § 3.352(a). Current § 3.352(a) includes a statement that having “voluntarily taken to bed” would not support a finding of bedridden status. We propose to reword this requirement by stating that the person “must remain in bed due to his or her disability or disabilities,” thus eliminating the possibility that voluntary bed rest could qualify. We would add that the bed rest must be based on medical necessity, but clarify that such necessity cannot be for convalescence or cure. These statements are consistent with the current rule and will not lead to a different result in cases adjudicated under part 5.

The last two sentences of § 3.352(a) state, “Determinations that the veteran

is so helpless, [sic] as to be in need of regular aid and attendance will not be based solely upon an opinion that the claimant’s condition is such as would require him or her to be in bed. They must be based on the actual requirement of personal assistance from others.” Because the proposed regulation makes clear that a person who is bedridden also is in need of aid and attendance, we will not repeat these sentences in part 5.

5.321 *Additional Compensation for Veteran Whose Spouse Needs Regular Aid and Attendance*

Current § 3.351(a)(2) states that a veteran in receipt of disability compensation may be eligible for increased compensation if he or she has a spouse who is in need of regular aid and attendance. The authorizing statute, 38 U.S.C. 1115, requires a veteran to be entitled to disability compensation and to have a disability rating of not less than 30 percent to qualify for this additional benefit. We propose to include this language in § 5.321(a) because it reflects the current statutory criteria and will help readers locate the eligibility requirements.

Current § 3.351(c) contains the general criteria for determining whether a dependent spouse needs regular aid and attendance. We propose to reorganize these criteria in proposed § 5.321(b) and (c). Proposed paragraph (b) would be titled “Automatic eligibility”; it would explain that a spouse would be found to be in need of regular aid and attendance if he or she is blind or has a serious visual impairment or is a patient in a nursing home due to mental or physical incapacity. Proposed paragraph (c) would be entitled “Factual need”; it would state the principle found in current paragraph (c)(3) that a spouse will be considered in need of regular aid and attendance if a factual need is shown under proposed § 5.320.

Under current § 3.351(c), a “spouse * * * will be considered in need of regular aid and attendance if he or she: (1) Is blind or so nearly blind as to have corrected visual acuity of 5/200 or less, in both eyes, or concentric contraction of the visual field to 5 degrees or less.” Although not stated explicitly, it is longstanding VA practice to require that the concentric contraction be bilateral. The 1945 Schedule for Rating Disabilities states, “With visual acuity 5/200 or less or the visual field reduced to 5 degrees contraction, *in either event in both eyes*, the question of entitlement on account of regular aid and attendance will be determined on the facts in the individual case.” 1945 Rating Schedule, page 53–54, para.10 (4/1/1946)

(emphasis added); *see also* 38 CFR 4.79 (substantially the same). Requiring bilateral concentric contraction of the visual field to 5 degrees bilaterally implements the “so nearly blind” criterion of need for regular aid and attendance in the authorizing statute. *See* 38 U.S.C. 1115(1)(E). The current VA rating schedule rates unilateral concentric contraction of the visual field to 5 degrees as 30 percent disabling; bilateral concentric contraction of the visual field to 5 degrees is rated 100 percent disabling. 38 CFR 4.84a, diagnostic code 6080 (2007). These rating criteria demonstrate that unilateral contraction of the visual field to 5 degrees cannot rationally be considered “so nearly blind” as to need regular aid and attendance within the meaning of 38 U.S.C. 1115(1)(E). Although § 4.79 and diagnostic code 6080 apply to rating the vision of veterans, there is no rational basis to construe the criterion “so nearly blind” differently for veterans and for their spouses. Hence, we propose to clarify that the concentric contraction criterion applies to both eyes. Stating the visual field criterion of the need as bilateral in proposed § 5.321(b) merely states current VA practice explicitly. It makes no substantive change.

We propose to cite 38 U.S.C. 1115 as the authority for proposed § 5.321, to show the actual authority for the criteria for need of a spouse for regular aid and attendance, especially regarding the nursing home and the blindness criteria. The authority citation for current § 3.351(c), is stated as 38 U.S.C. 1502(b), but this is incomplete. Section 1502(b) is the authority for those criteria in the context of pension. Section 1115(1)(E) authorizes special monthly compensation to a veteran with a spouse who needs regular aid and attendance. Hence, we have cited section 1115 as authority for proposed § 5.321.

The criteria to establish a dependent spouse’s need for regular aid and attendance for purposes of a veteran’s entitlement to additional compensation, set forth in 38 U.S.C. 1115(1)(E), include that the spouse be “blind, or so nearly blind or significantly disabled as to need or require the regular aid and attendance of another person.” However, the implementing regulation, 38 CFR § 3.351(c)(1), defines “blind or so nearly blind” as “to have corrected visual acuity of 5/200 or less, in both eyes, or concentric contraction of the visual field to 5 degrees or less.” These criteria are similar to the criteria in 38 U.S.C. 1114(l), which provides special monthly compensation to a veteran with such visual disability.

We note that it has been VA's longstanding practice to apply these criteria. The "Veterans Disability Compensation and Survivor Benefits Act of 1976," Public Law 94-433, sec. 102, 90 Stat. 1375 (Sep. 30, 1976), authorized VA to provide additional compensation to veterans whose spouses needed regular aid and attendance, and that legislation was the source of what is now 38 U.S.C. 1115(1)(E). In 1976, VA amended § 3.351(a) to authorize such additional compensation. 41 FR 55872, 55874 (Dec. 23, 1976); VA Transmittal Sheet 617 (Oct. 1, 1967). However, the criteria for blindness, 5/200 visual acuity or 5 degrees concentric contraction of the visual field, remained unchanged. In light of VA's consistent, long-standing use of these criteria in this context, we propose to use the criteria in § 5.321.

In promulgating § 3.351(c)(1), VA adopted these more specific criteria, rather than the vague and difficult-to-apply criteria in 38 U.S.C. 1115(1)(E), because they are more objective and easier to apply. Moreover, this definition of "blind or so nearly blind" does not limit the veteran's entitlement to additional compensation under section 1115(1)(E), because § 5.321(c) allows the spouse to be considered in need of regular aid and attendance based on the facts in the individual case, regardless of his or her vision. This provision implements the language in 38 U.S.C. 1115(1)(E) that authorizes VA to pay such additional compensation when the veteran's spouse is "so * * * significantly disabled as to need or require the regular aid and attendance of another person."

5.322 Special Monthly Compensation—General Information and Definitions of Disabilities

Proposed § 5.322 would define disabilities that establish entitlement to SMC under the sections that follow that are not defined in those sections. Proposed paragraph (a) states that SMC is available for veterans who need regular aid and attendance, are bedridden, suffer certain service-connected disabilities or combinations of disabilities (considering also certain nonservice-connected disabilities in determining entitlement to certain SMC rates), or have a spouse who needs regular aid and attendance. The paragraph identifies by cross reference the regulations that address the potential contribution of a nonservice-connected disability to entitlement to SMC. This paragraph also informs the user where and how to find the monetary rates of SMC.

Proposed paragraphs (b) through (g) would consolidate principles that apply to establishing particular levels of compensation throughout current § 3.350. By consolidating these principles in proposed § 5.322 and, thereafter, referencing the particular paragraph where applicable, it will be easier for readers to find specific rules.

Title 38, United States Code, provides SMC for "anatomical loss or loss of use of" certain body parts. 38 U.S.C. 1114(k)-(p). Current § 3.350 variously uses the phrases "anatomical loss or loss of use [of the named body part]" and "loss or loss of use [of the named body part]." These phrases mean the same thing. Where § 3.350 uses "loss of [a named body part]", as contrasted with "loss of use of [a named body part]," "loss of" means anatomical loss, consistent with their statutory derivation. Compare, e.g., 38 U.S.C. 1114(k) ("anatomical loss or loss of use of one or more creative organs") with § 3.350(a)(1)(i) ("Loss of a creative organ will be shown by acquired absence of one or both testicles * * * ovaries or other creative organ"). For consistency within part 5, we propose to use "anatomical loss or loss of use [of the named body part]" and "anatomical loss [of the named body part]" throughout part 5.

We propose to define the loss of use of a hand or a foot at proposed § 5.322 paragraphs (b) and (c), respectively. These definitions are derived from current § 3.350(a)(2). Current § 3.350(a)(2)(i)(a) [sic] refers to "complete ankylosis of two major joints of an extremity," but does not define "major joints." VA has defined the major joints in 38 CFR 4.45(f), and we propose to incorporate this definition into paragraphs (b) and (c) regarding the upper and lower extremity, respectively, as an aid to readers. Current § 3.350(a)(2)(i)(a) [sic] also refers to "[e]xtremely unfavorable complete ankylosis of the knee" without defining this term. VA has defined extremely unfavorable ankylosis of the knee in 38 4.71a, Diagnostic Code 5256, and we propose to incorporate this definition into paragraph (c)(1) as an aid to readers.

Current § 3.350(a)(2)(i) states the amount of function of a hand or foot of which there is loss of use as follows: "Loss of use of a hand or a foot will be held to exist when no effective function remains other than that which would be equally well served by an amputation stump * * * with use of a suitable prosthetic appliance." This means the function of the hand or foot is less than or equal to the function of a prosthesis attached to the amputation stump.

Proposed § 5.322(b) and (c) have restated the extent of function that qualifies as loss of use of a hand or foot, respectively, as "functions no better than a prosthesis would function if attached to the [arm or leg] at a point of amputation below the [elbow or knee]." "[F]unctions no better than" means the same thing as "no effective function remains other than that which would be equally well served by." No substantive change is intended.

Proposed § 5.322(d) is based on current § 3.350(c)(2). The first sentence of current § 3.350(c)(2) states that in determining whether there is natural elbow or knee action for purposes of § 3.350(c)(1)(ii) and (iii), VA will consider whether use of the proper prosthetic appliance requires natural use of the joint or whether necessary motion is otherwise controlled, in that the muscles affecting joint motion, if not already atrophied, will become so. In proposed § 5.322(d), we would explain the effect of VA's consideration of whether the veteran is able to use a prosthesis that requires the natural use of the elbow or knee joint. The regulation explains that natural elbow or knee action is prevented when a prosthesis is in place if the veteran is unable to use a prosthesis that requires the natural use of the elbow or knee joint, or if the veteran is unable to move such a joint, as in complete ankylosis or complete paralysis. In order to simplify the rule, we propose not to repeat that VA will consider whether when using a proper prosthesis necessary motion is controlled by means other than natural use of the joint so that the muscles affecting joint motion, if not already atrophied, will become so. This language is not contained in 38 U.S.C. 1114 and does not aid in determining whether use of a prosthesis prevents natural elbow or knee action with a prosthesis in place.

Current § 3.350(c)(2) refers to "no movement in the joint, as in ankylosis or complete paralysis." In proposed § 5.322(d), we have inserted the word "complete" before "ankylosis" to clarify the intent of the current rule that the ankylosis must be complete.

Proposed § 5.322(e) is derived from current § 3.350(d). VA will consider a veteran prevented from wearing a prosthesis due to amputation of an extremity (arm or leg) near the shoulder or hip if the anatomical loss prevents the use of a prosthesis, and reamputation at a higher level that permits the use of a prosthesis is not possible. If a prosthesis cannot be worn at the present level of amputation but could be worn if there were a reamputation at a higher level, VA will

consider the veteran not to have an anatomical loss of the extremity (arm or leg) so near the shoulder or hip as to qualify for SMC under 38 U.S.C. 1114(n). Instead, VA will consider the veteran eligible only for SMC based on anatomical loss or loss of use of the arm at a level, or with complications, preventing natural elbow action with a prosthesis in place.

We note that, like current § 3.350(d), § 3.350(f) requires anatomical loss of the leg or arm so near the hip or shoulder as to prevent the use of prosthetic appliance. We propose to make § 5.322 applicable to the part 5 counterparts to these provisions as well, instead of limiting its application to the counterparts of § 3.350(d), in an effort to ensure consistent use and application of terminology and promote consistency in VA decisionmaking.

Proposed § 5.322(f) is consistent with the second sentence of current § 3.350(b)(2). The rule bars payment of SMC to a veteran who has actual visual acuity better than 5/200 but is nevertheless assigned a disability rating based on visual acuity of 5/200. The rating schedule for impaired visual acuity, 38 CFR 4.84a, Table V, provides for rating based on impaired visual acuity of 5/200 to veterans with impaired visual acuity ranging between 5/200 and more than 10/200. See 38 CFR 4.83. However, SMC under 38 U.S.C. 1114 is available only to a veteran with visual acuity of 5/200 or less. Therefore, proposed § 5.322(f), like current § 3.350(b)(2), requires adjudicators to ascertain that a veteran in receipt of disability compensation based on visual acuity of 5/200 actually suffers from impaired visual acuity of 5/200 or less.

We propose to include the definition of loss of use or blindness of an eye, having only light perception, at proposed § 5.322(g). This definition is derived from current § 3.350(a)(4). We propose to restate “considered of negligible utility” contained in current § 3.350(a)(4) as “considered insignificant usefulness of sight” in § 5.322(g). Readers might misinterpret “considered of negligible utility” in the current regulation as meaning that a report showing visual acuity difficulties at distances less than 3 feet would make the result of the visual examination not useful in determining entitlement to SMC. The words “negligible utility” means insignificant usefulness of sight. The proposed restatement will make clear that the regulation refers to the disabling nature of a veteran’s visual acuity and not to the evidentiary weight of a visual examination report.

5.323 Special Monthly Compensation Under 38 U.S.C. 1114(k)

Proposed § 5.323 is derived from current § 3.350(a). The proposed regulation would be titled “Special monthly compensation under 38 U.S.C. 1114(k).”

In § 5.323(a)(8), we have clarified that treatment of breast tissue with radiation does not include diagnostic procedures that require the use of radiation. We do not believe that Congress intended to include diagnostic procedures such as a mammogram or other x-ray examination as a basis for compensation under 38 U.S.C. 1114(k), because such examinations are routinely performed.

Examination § 5.323(b) is derived from the remaining three sentences in current § 3.350(a).

Proposed § 5.323(c) is derived from current § 3.350(a)(1). Proposed § 5.323(c)(1) defines a “creative organ” as an organ directly involved in reproduction. In VAOPGCPREC 2–2000, 65 FR 33422 (May 23, 2000), VA’s General Counsel noted that the term “creative organ” is not defined in 38 U.S.C. 1114(k), nor in any other provision of title 38, United States Code. It is unique to section 1114(k) and is used in current § 3.350(a)(1) without definition. After examining the issue, the General Counsel determined that by using the term “creative organ” Congress meant procreative, or reproductive, organs. The proposed definition is consistent with VAOPGCPREC 2–2000.

Proposed § 5.323(c)(2) restates the first sentence of current § 3.350(a)(1)(i). The second sentence of current § 3.350(a)(1)(i) is restated in proposed § 5.323(c)(3)(i) through (iii).

Current 38 CFR 3.350(a)(1)(i)(c) states that loss of use of a creative organ may be shown “when a biopsy, recommended by a board including a genitourologist and accepted by the veteran, establishes the absence of spermatozoa.” We propose to use somewhat different language in § 5.323(c)(3)(iii) as follows: “Absence of spermatozoa proven by biopsy performed with the informed consent of the veteran.” We note that the reference to “a board” in the current rule relates to VA’s former procedure of having a board of three VA employees (including a physician) adjudicate claims. Because this is no longer VA’s procedure, and because any physician or VA adjudicator may order a biopsy, we propose not to include that reference in § 5.323(c)(3)(iii). The phrase “accepted by the veteran” might be misconstrued to mean that a veteran may accept or reject biopsy results. The intent of

§ 3.350(a)(1)(i)(c) was to clarify that undergoing a biopsy is voluntary and requires the veteran’s informed consent.

Proposed § 5.323(c)(3)(iv) is a new provision that states that loss of use of a creative organ exists when medical evidence shows that, due to injury or disease, reproduction is not possible without medical intervention. Although essentially the definition of loss of use, this provision is based on VA’s long-standing policy of awarding SMC if the medical evidence of record shows the loss of erectile power secondary to a disease process such as diabetes or multiple sclerosis in a male veteran or a condition of the reproductive tract, such as retrograde ejaculation or spermatozoa dumping into the bladder in a male veteran or the removal of a fallopian tube in a female veteran, that results in the loss of use of a creative organ.

We also propose to include in § 5.323(c)(3)(iv)(A) a statement reflecting long-standing VA policy that would allow for the award of SMC under 38 U.S.C. 1114(k) for the anatomical loss or loss of use of a creative organ even when one paired creative organ is capable of reproduction and the other is not. Both 38 U.S.C. 1114(k) and 38 CFR 3.350(a) are silent regarding this type of medical condition. Adding this rule to the proposed regulation is beneficial to veterans.

In § 5.323(c)(4), we propose to state that payment of SMC would be proper under 38 U.S.C. 1114(k) for loss of use of a creative organ even in instances when a veteran uses prescription medications or mechanical devices to treat erectile dysfunction. Veterans should not be prevented from receiving SMC when they are receiving treatment that corrects an otherwise compensable condition to some degree, particularly since the improvement in the condition may only be partial and because the loss of use may return when the treatment is suspended.

In § 5.323(c)(5), we propose to state clearly that SMC under 38 U.S.C. 1114(k) would be payable for a service-connected anatomical loss of a creative organ even if it is preceded by a nonservice-connected loss of use of that same organ. In addition, in proposed § 5.323(c)(5)(i) through (iv), we have included examples illustrating this principle. SMC should be granted even if the veteran was first unable to procreate for nonservice-connected reasons. Congress has provided two bases for SMC, anatomical loss or loss of use. Compensation for service-connected anatomical loss is authorized even though there was a preexisting,

nonservice-connected loss of use. *See* VAOPGCPREC 5–89, 54 FR 38033 (Sept. 14, 1989). According to the legislative history of 38 U.S.C. 1114(k), the purpose of SMC for anatomical loss or loss of use of a creative organ is to account for psychological factors as well as the loss of physical integrity. *See id.* Even where a veteran has previously suffered the anatomical loss of certain creative organs that results in the loss of use of the remaining creative organs, the psychological impact and the loss of physical integrity resulting from the later anatomical loss of one of the remaining organs cannot be ignored. An award of SMC under these circumstances is consistent with the terms of the statute and precedent opinions by VA's General Counsel. *See* VAOPGCPREC 93–90, 56 FR 1220 (Jan. 11, 1991).

Proposed § 5.323(c)(6) and (7) are derived from current § 3.350(a)(1)(iii) and (iv) respectively. We propose not to repeat the specific language from § 3.350(a)(1)(ii) in part 5. Current § 3.350(a)(1)(ii) addresses the issue of establishing service connection for “loss or loss of use” of a creative organ resulting from wounds or other trauma sustained in service or resulting from operations in service for the relief of other conditions for which the creative organ becomes incidentally involved. This provision is redundant of the basic principles for establishing service connection for a disability, which are contained in current § 3.303 and which the eventual part 5 counterpart to that regulation will address.

Current 38 CFR 3.350(a)(1)(iv) states:

Atrophy resulting from mumps followed by orchitis in service is service connected. Since atrophy is usually perceptible within 1 to 6 months after infection subsides, an examination more than 6 months after the subsidence of orchitis demonstrating a normal genitourinary system will be considered in determining rebuttal of service incurrence of atrophy later demonstrated. Mumps not followed by orchitis in service will not suffice as the antecedent cause of subsequent atrophy for the purpose of authorizing the benefit.

In proposed § 5.323(c)(7), we explicitly state the presumption implicit in the current rule, § 3.350(a)(1)(iv), by using the word “presumed.” We also propose not to repeat the third sentence of § 3.350(a)(1)(iv) because it is redundant.

In proposed § 5.323(d), we would define loss of use of the buttocks. This definition is derived from current § 3.350(a)(3).

In proposed § 5.323(e) and (f), we would define deafness and aphonia. These definitions are derived from

current § 3.350(a)(5) and (6), respectively.

5.324 *Special Monthly Compensation under 38 U.S.C. 1114(l)*

Proposed § 5.324 is derived from current § 3.350(b). (Note that the part 5 counterpart to the second sentence of current § 3.350(b)(2) is contained at proposed § 5.322(f), discussed above.)

In proposed § 5.324(a) and (b) we refer only to hands and feet, not to “extremities.” Although current § 3.350(b)(1), refers to loss of use of an extremity, the context clearly indicates that “extremity” refers only to a hand or foot. Section 3.350(a) only discusses the loss of use of hands or feet and current § 3.350(a)(2), which is referred to in § 3.350(b)(1), only pertains to loss of use of a hand or foot.

Section 1114(l) of title 38 of the United States Code provides for special monthly compensation (SMC) if a veteran is “permanently bedridden.” Current § 3.350(b)(4) implements this rule by referring the reader to the criteria in current § 3.352(a); however, but for its title, § 3.352(a) defines “bedridden” without requiring permanence. It makes sense to define “permanently bedridden” in proposed § 5.324, among the criteria for the benefit authorized by section 1114(l), because that is the only statute that contains such a criterion.

For proposed § 5.324, we would adapt the language of other current part 3 regulations that require permanence of a condition as a criterion of entitlement to a benefit. Part 3 contains three sections that characterize permanence of a condition. Section 3.350(i)(2) states that a veteran is permanently housebound because of service-connected disability or disabilities when he or she “is substantially confined as a direct result of service-connected disabilities to his or her dwelling and the immediate premises or, if institutionalized, to the ward or clinical areas, and it is reasonably certain that the disability or disabilities and resultant confinement will continue throughout his or her lifetime.” Section 3.351(d)(2), (e), and (f) state requirements for Improved Disability Pension, DIC, and Improved Death Pension, respectively, in substantially the same language.

Section 3.340(b) states, “Permanence of total disability will be taken to exist when such impairment is reasonably certain to continue throughout the life of the disabled person. * * * [B]ecoming permanently * * * bedridden constitutes permanent total disability.” In § 3.340(b), VA explicitly equates “permanently bedridden” with “permanence of total disability.” In

each of these sections, permanence is characterized by the continuance of the condition described throughout the life of the person concerned.

Proposed § 5.324(d) would authorize special monthly compensation to a veteran whose service-connected disability or disabilities require him or her to remain in bed, “and it is reasonably certain that the confinement to bed will continue throughout his or her lifetime.” This definition is simple, easy to apply, and consistent with VA's definitions of permanence in other similar regulations.

Paragraphs (d) and (e) of proposed § 5.324 are derived from current § 3.350(b)(4) and (3), respectively. Though this reverses the order of the “Need for aid and attendance” and the “Permanently bedridden” paragraphs in § 3.350, we have chosen to follow the sequence of these criteria in section 1114(l). Unless the veteran would be entitled to an additional allowance under 38 U.S.C. 1114(r) (*see* § 5.332), it is more favorable to the veteran to base a grant of SMC under 38 U.S.C. 1114(l) on permanently bedridden status rather than the need for regular aid and attendance because SMC based on the need for regular aid and attendance might be reduced during hospitalization (*see* § 3.552). In the current regulation, this information is contained in § 3.350(b)(4), which pertains to permanently bedridden status. However, we provide the information to instruct VA personnel to consider whether a veteran is permanently bedridden if the veteran meets the requirements of the need for regular aid and attendance. We anticipate that it will be more helpful to VA personnel and other readers to place this information in proposed § 5.324(e), which pertains to the need for regular aid and attendance. Furthermore, we have made the rule mandatory by changing “should” to “will,” to avoid confusion about whether or when to apply it.

5.325 *Special Monthly Compensation at the Intermediate Rate Between 38 U.S.C. 1114(l) and (m)*

Proposed § 5.325 is derived from those provisions in current § 3.350(f)—specifically § 3.350(f)(1)(i), (iii), and (vi) and § 3.350(f)(2)(i)—that provide for entitlement to SMC at the intermediate rate between the rates established under 38 U.S.C. 1114(l) and (m). The statutory authority for § 5.325 would be 38 U.S.C. 1114(p). The introductory paragraph of proposed § 5.325 clarifies current § 3.350(f) as it pertains to rounding to the nearest dollar the intermediate rate between 38 U.S.C. 1114(l) and (m). The

current rule, § 3.350(f), requires VA to round “to the nearest dollar.” We propose to clarify the rule so that it requires VA to round “down to the next lower dollar.” This accords with the statutory requirement to round “down to the nearest dollar.” 38 U.S.C. 1114(p). We have clarified the same point in §§ 5.327, 5.329, and 5.331, which relate to other SMC awards.

Proposed § 5.325(d) is based on current § 3.350(f)(2)(i). We propose to add concentric contraction of the visual field reduced to 5 degrees or less as an equivalent alternative to 5/200 visual acuity contained in the current regulation. Current § 3.350(b)(2) provides the basis for treating visual acuity of 5/200 and a concentric contraction reduced to 5 degrees or less as equally disabling. Because the provisions of § 3.350 will be divided in part 5, we propose to apply this principle wherever it is applicable in the proposed regulations.

5.326 Special Monthly Compensation Under 38 U.S.C. 1114(m)

Proposed § 5.326 is derived in part from current § 3.350(c). It is also derived from those provisions in current § 3.350(f)—specifically § 3.350(f)(1)(ii), (iv), and (viii) and § 3.350(f)(2)(ii)—that provide for entitlement to SMC at the rate authorized by 38 U.S.C. 1114(m).

Proposed § 5.326(a) is based on current § 3.350(c)(1)(i). To determine the loss of use of a hand, we have added a cross reference to proposed § 5.322, which contains the part 5 counterpart to current § 3.350(a)(2). The criteria contained in § 3.350(a)(2) are used in the current regulations to determine loss of use of a hand as a basis for SMC under 38 U.S.C. 1114(k) and (l). It is VA’s long-standing practice to determine loss of use of a hand as a basis for SMC under 38 U.S.C. 1114(m) using the same criteria. This practice ensures consistent use and application of terminology, which will promote consistency in VA decision-making.

Proposed § 5.326(c) is based on current § 3.350(f)(1)(ii). Where the current regulation states, “Anatomical loss or loss of use of one foot with anatomical loss of one leg so near the hip as to prevent use of prosthetic appliance. * * *”, proposed paragraph (c) would state, “* * * with anatomical loss of the other leg * * *.” VA interprets section 1114(m) to mean the anatomical loss or loss of use of the foot and the anatomical loss of the leg described in this section must involve opposite limbs. Once a leg is lost, the foot on that leg is also lost. Statute and regulation already provide SMC for the anatomical loss or loss of use of a single

foot, 38 U.S.C. 1114(k); § 3.350(a)(2), and for the anatomical loss or loss of use of both feet. 38 U.S.C. 1114; 38 CFR 3.350(b). It would compensate the veteran twice for the same disability to permit SMC for anatomical loss of a leg so near the hip as to prevent use of a prosthetic appliance and anatomical loss or loss of use of the foot of the same leg. VA believes that Congress did not intend such a result.

Proposed § 5.326(i) is based on current § 3.350(c)(1)(v), (c)(3), and § 4.79 of this chapter. For the reasons stated in the preamble to proposed § 5.320(a), above, we have used the phrase “need regular aid and attendance” instead of “helpless” in § 5.326. We have combined sections 3.350(c)(1)(v) and 3.350(c)(3) in proposed § 5.326(i) because § 3.350(c)(3) states how VA applies § 3.350(c)(1)(v) when the veteran’s visual acuity in both eyes is 5/200 or the visual field in both eyes is reduced to 5 degrees concentric contraction. Section 3.350(c)(3) mandates that if the veteran’s visual acuity in both eyes is 5/200 or the visual field in both eyes is reduced to 5 degrees concentric contraction, VA will examine the facts in the individual case to determine whether the veteran’s vision makes the veteran need regular aid and attendance. Proposed § 5.326(i) also clarifies by cross reference that VA will apply the criteria found at § 5.320 in determining whether a veteran needs regular aid and attendance. Whereas current § 3.350(c)(3) only states that the need for regular aid and attendance will be determined on the facts in the individual case, the language in § 5.326(i) notifies veterans and VA personnel of the specific criteria. The use of these criteria ensures consistent use and application of terminology, which will promote consistency in VA decision-making. The application of the criteria for the need for regular aid and attendance in § 5.320 to claims for SMC under 38 U.S.C. 1114(m) is consistent with current VA practice and, therefore, the explicit reference to these criteria does not constitute a change from the current regulation.

5.327 Special Monthly Compensation at the Intermediate Rate Between 38 U.S.C. 1114(m) and (n)

Proposed § 5.327 is derived from those provisions in current § 3.350(f)—specifically § 3.350(f)(1)(v), (vii), (ix), and (x) and § 3.350(f)(2)(iii)—that provide for entitlement to SMC at the intermediate rate between 38 U.S.C. 1114(m) and (n) for specified disabilities. The statutory authority for the provisions is 38 U.S.C. 1114(p). Paragraphs (a) and (b), the counterparts

of § 3.350(f)(1)(x) and (f)(1)(v), respectively, would require the involvement of opposite limbs, as described in the discussion of § 5.326(c), above, for the same reasons discussed above. That is, proposed paragraph (a) provides the stated benefit for “[a]natomical loss or loss of use of one hand with anatomical loss or loss of use of the other arm.” Proposed paragraph (b) provides the stated benefit for “[a]natomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place with anatomical loss of the other leg.”

5.328 Special Monthly Compensation Under 38 U.S.C. 1114(n)

Proposed § 5.328 is derived in part from current § 3.350(d). It is also derived from current § 3.350(f)(1)(xi) which provides for entitlement to SMC at the rate authorized by 38 U.S.C. 1114(n). Proposed § 5.328(a) applies the concepts contained in current § 3.350(c)(2) pertaining to natural elbow action and SMC under 38 U.S.C. 1114(m) pertaining to SMC under 38 U.S.C. 1114(n). The use of this language in proposed § 5.328(a) ensures consistent use and application of terminology, which will promote consistency in VA decision-making.

Proposed § 5.328(b), the counterparts of § 3.350(f)(1)(xi), would require the involvement of opposite limbs, as described in the discussion of § 5.326(c), above, for the same reasons discussed above. That is, proposed paragraph (b) would state, “Anatomical loss or loss of use of one hand with anatomical loss of the other arm.”

Current § 3.350(d) states that, “The special monthly compensation provided by 38 U.S.C. 1114(n) is payable for any of the conditions which follow: Amputation is a prerequisite except for loss of use of both arms and blindness without light perception in both eyes.” The statute uses the term “anatomical loss.” It does not use the term “amputation,” but the two terms have identical meaning. Therefore, we have used “anatomical loss” rather than “amputation” in § 5.328. We have not repeated the sentence of § 3.350(d) beginning “Amputation is a prerequisite * * *” because it is superfluous. It does not confer any rights or benefits. The paragraphs that contain the prerequisite of anatomical loss are explicit as to that requirement. It is not a prerequisite in those paragraphs that do not require it.

We propose to clarify the rule in current § 3.350(d)(4), which establishes entitlement under 38 U.S.C. 1114(n) for anatomical loss of both eyes or blindness without light perception in

both eyes, by stating in proposed § 5.328(e) that benefits under 38 U.S.C. 1114(n) are available based on “anatomical loss of one eye and blindness without light perception in the other eye.” The current regulation does not provide for a similar visual disability involving the anatomical loss of one eye and blindness without light perception in the other eye. If there is anatomical loss of an eye, there would be no light perception in that eye. Although current § 3.350(d)(4) does not explicitly state the basis for entitlement, where there is anatomical loss of one eye and blindness without light perception in the other eye, there is also, obviously, no light perception in either eye. Therefore, entitlement to 38 U.S.C. 1114(n) would be established under the current rule.

5.329 Special Monthly Compensation at the Intermediate Rate Between 38 U.S.C. 1114(n) and (o)

Proposed § 5.329 is derived from current § 3.350(f)(1)(xii), which provides for entitlement to SMC at the intermediate rate between 38 U.S.C. 1114(n) and (o) for anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place and anatomical loss of the other arm so near the shoulder as to prevent the use of prosthetic appliance. The statutory authority for this provision is 38 U.S.C. 1114(p).

5.330 Special Monthly Compensation Under 38 U.S.C. 1114(o)

Proposed § 5.330 is derived from current § 3.350(e).

Proposed § 5.330(b) is based on current § 3.350(e)(1)(iii). Proposed paragraph (b) implements a statutory amendment to 38 U.S.C. 1114(o), the authority for paragraph (b) of this section. Public Law 110–157, sec. 101, 121 Stat. 1831, (Dec. 26, 2007). Specifically, the statutory amendment changed the visual acuity criterion of section 1114(o) from 5/200 to 20/200. Section 5.330(b) would implement this statutory change.

Current § 3.350(e)(2) refers to paraplegia and states that paralysis of both lower extremities with loss of anal and bladder sphincter control will entitle a veteran to the maximum rate under 38 U.S.C. 1114(o). In § 5.330(d), we propose to substitute the phrase “loss of use” for the current term “paralysis.” The term “paralysis” is not defined for VA purposes. It is a term most commonly associated with inability to move or have sensation in a body part as a result of an injury or a disease involving the nervous system.

This is a narrow definition that does not address disabilities as a result of muscle or bone damage. The phrase “loss of use” is used extensively by VA personnel in rating disabilities involving the extremities and therefore is an appropriate substitute term. The phrase “loss of use” will be clearer to the reader and will ensure that loss of use will entitle a veteran to this level of SMC.

The basis for an award of SMC at the maximum rate under 38 U.S.C. 1114(o) for a veteran who has loss of anal and bladder sphincter control together with loss of use of both lower extremities is that such a veteran is presumed to be in need of regular aid and attendance. As such, the veteran is entitled to SMC under 38 U.S.C. 1114(l) and 1114(m). A veteran with disabilities entitled to two or more of the rates provided in 38 U.S.C. 1114(l) through (n) is entitled to compensation under 38 U.S.C. 1114(o). This basis for entitlement is restated in proposed § 5.330(d).

We will not repeat § 3.350(e)(4) and the third and fourth sentences of § 3.350(e)(3). These sentences are redundant of § 3.350(e)(1)(ii), which states that the special monthly compensation provided by 38 U.S.C. 1114(o) is payable for “* * * [c]onditions entitling to two or more of the rates (no condition being considered twice) provided in 38 U.S.C. 1114(l) through (n).” This provision is incorporated in § 5.330(e).

Current § 3.350(e)(4) reads, “The maximum rate, as a result of including helplessness as one of the entitling multiple disabilities, is intended to cover, in addition to obvious losses and blindness, conditions such as the loss of use of two extremities with absolute deafness and nearly total blindness or with severe multiple injuries producing total disability outside the useless extremities, these conditions being construed as loss of use of two extremities and helplessness.” This paragraph essentially re-states § 3.350(e)(1)(ii), which is incorporated in § 5.330(e).

Similarly, the second, third and fourth sentences of § 3.350(e)(3) reads:

This requires, for example, that where a veteran who had suffered the loss or loss of use of two extremities is being considered for the maximum rate on account of helplessness requiring regular aid and attendance, the latter must be based on need resulting from pathology other than that of the extremities. If the loss or loss of use of two extremities or being permanently bedridden leaves the person helpless, increase is not in order on account of this helplessness. Under no circumstances will the combination of ‘being permanently bedridden’ and ‘being so helpless as to require regular aid and

attendance’ without separate and distinct anatomical loss, or loss of use, of two extremities, or blindness, be taken as entitling to the maximum benefit.

These sentences merely elaborate on or rephrase the limitation from current § 3.350(e)(1)(ii) that the same disability may not be considered as the basis for two rates of SMC. Although some explanation of the concepts of current § 3.350(e)(1)(ii) is helpful, the more concise discussion proposed in paragraphs (e)(1) and (2) of § 5.330 is still sufficient and easier to read and understand.

5.331 Special Monthly Compensation Under 38 U.S.C. 1114(p)

Proposed § 5.331 is derived from current § 3.350(f)(2) through (f)(5). The proposed regulation provides rules regarding payment of additional SMC under 38 U.S.C. 1114(p).

Proposed § 5.331(b)(1) is based on current § 3.350(f)(2)(iv). Instead of referring to blindness in both eyes with visual acuity of 5/200 or less, we propose to refer to proposed § 5.324(c), which provides for SMC for veterans with visual acuity of 5/200 or less. Note that, as discussed in the preamble to proposed § 5.325, we would thereby add concentric contraction of the visual field to 5 degrees or less as an equivalent alternative to 5/200 visual acuity contained in current § 3.350(f)(2)(iv).

Current § 3.350(f)(3) states that “additional single permanent disability or combinations of permanent disabilities independently ratable at 50 percent or more” are bases for additional SMC, as specified in the rule. In § 5.331(d)(1), we propose to change the plural, “combinations,” to the singular, “combination,” because the intent of § 3.350(f)(3) was to require only one combination of disabilities independently ratable at 50 percent or more for entitlement to the specified additional SMC.

In proposed § 5.331(d)(1) and (e)(2), we state VA’s long-standing policy that the half-step increase for additional permanent independent disability or disabilities ratable at 50 percent or more, contained in current § 3.350(f)(3), may not be paid concurrently with the full-step increase for an additional single permanent independent 100 percent disability, contained in current § 3.350(f)(4). This policy is consistent with the language of 38 U.S.C. 1114(p), which states that if a veteran’s service-connected disabilities exceed the requirements for a particular rate, VA may award an additional full-step or an additional half-step to the veteran. The full-step and the half-step are alternative awards, not cumulative awards.

In proposed § 5.331(d)(2) and (e)(3), we restate and clarify the rule now in § 3.350(f)(4)(i) affecting entitlement to the additional half or whole-step based on additional independent disability or disabilities ratable at 50 percent or more, or the single permanent independent 100 percent disability, respectively. Current § 3.350(f)(4)(i) states, “Where the multiple loss or loss of use entitlement to a statutory or intermediate rate between 38 U.S.C. 1114(l) and (o) is caused by the same etiological disease or injury, that disease or injury may not serve as the basis for the independent 50 percent or 100 percent unless it is so rated without regard to the loss or loss of use.” We would not use the word “etiological,” because it is superfluous and possibly confusing.

“Etiology” is a medical term that means “the causes or origin of a disease or disorder.” *Dorland’s Illustrated Medical Dictionary* 660 (31st ed. 2007). So, although diabetic neuropathy, *Dorland’s* 1287, and diabetic retinopathy, *Dorland’s* 1659, might have the same etiology, it is not VA’s intent that the phrase “same etiological disease” preclude the independent 50-percent-or-more or the independent 100 percent benefit if separate and distinct disabilities with the same etiology otherwise meet the criteria for entitlement. Likewise, VA does not intend to preclude the benefit if separate and distinct injuries have the same etiology, for example, a motor vehicle accident, or a bomb blast. Simply, in the context of § 5.331(d)(2) and (e)(3), the phrases “same etiological disease or injury” and “same disease or injury” mean the same thing. No substantive change from the meaning of current § 3.350(f)(4)(i) is intended.

We would state the rule in § 5.331(d)(2) as it pertains to the additional independent disability or disabilities ratable at 50 percent or more as the basis of entitlement to benefits under 38 U.S.C. 1114(p), and in § 5.331(e)(3) as it pertains to the single additional independent 100 percent disability as the basis of entitlement to benefits under 38 U.S.C. 1114(p). By doing so, we would reinforce that the basis for special monthly compensation (under other than section 1114(p)) must be independent of the disability or disabilities that are independently ratable at 50 percent or more, or of the single disability that is ratable at 100 percent.

Current § 3.350(f)(3), upon which proposed § 5.331(d)(3) is based, states that graduated ratings for arrested tuberculosis “will not be utilized in this connection, but the permanent residuals

of tuberculosis may be utilized.” The wording used in the current regulation can be improved with respect to its use of the language “will not be utilized in this connection” and “may be utilized”, and we will make these improvements in part 5. The current part 3 regulation is derived from VA Regulation 1236(C) (as amended on Oct. 28, 1954) which stated in pertinent part, “Since this subdivision contemplates that [the additional 50 percent disability] be permanent in character, the graduated ratings for arrested tuberculosis * * * will not be utilized in determining entitlement to * * * special monthly compensation.” We have, therefore, reworded the language in proposed § 5.331(d)(3) to reflect that permanent residuals of tuberculosis, and not the graduated ratings for arrested tuberculosis, may serve as the basis for SMC under § 5.331(d) because the graduated ratings for arrested tuberculosis are not intended to be permanent.

Proposed § 5.331(e)(3) is derived from current § 3.350(f)(4)(ii), which states the same rule, verbatim, as does § 3.350(f)(3) quoted above. Proposed § 5.331(e)(3) would state the same rule as does § 5.331(d)(3) for the same reasons.

In proposed § 5.331(f), we have restated the triple extremity rule contained in current § 3.350(f)(5), which provides for compensation for anatomical loss or loss of use of three extremities. We have clarified that the triple extremity rule entitles the veteran to the next higher intermediate rate or, if the veteran is already entitled to an intermediate rate, to the next higher rate under 38 U.S.C. 1114. We note that current paragraphs § 3.350(f)(2), (f)(3), and (f)(5) use different language to describe the same result. Compare 38 CFR 3.350(f)(2)(iv) (“* * * will afford entitlement to the next higher intermediate rate of if the veteran is already entitled to an intermediate rate, to the next higher statutory rate * * *.”) with 38 CFR 3.350(f)(5) (“* * * shall entitle a veteran to the next higher rate without regard to whether that rate is a statutory rate or an intermediate rate.”).

We have phrased the part 5 counterparts so that the language is consistent throughout proposed § 5.331. Likewise, for consistency throughout proposed § 5.331, we have changed the reference to the maximum rate payable for anatomical loss or loss of use of three extremities from “38 U.S.C. 1114(p)” to “38 U.S.C. 1114(o)”. In each other instance of a statement of the maximum rate payable, current § 3.350(f) characterizes the maximum payment as “in no event higher than” or “not above” the rate for 38 U.S.C.

1114(o). Whereas the rate section 1114(o) provides and the maximum rate section 1114(p) provides are the same dollar amount, this change is not substantive.

We also propose to state clearly in proposed § 5.331(f) that VA will combine the loss of use of whichever two extremities will provide the veteran with the highest level of SMC payable before awarding the next higher rate based on the anatomical loss or loss of use of a third extremity. Calculating SMC in this manner provides the highest possible level of SMC. This will ensure that VA personnel comply with current § 3.103(a) which requires “a decision which grants every benefit that can be supported in law.” We also propose to state VA’s long-standing policy that when VA applies the triple extremity rule, a veteran is entitled to keep any rates payable under 38 U.S.C. 1114(k) and any rate payable under 38 U.S.C. 1114(p) for additional independent 50 or 100 percent disabilities.

5.332 Additional Allowance for Regular Aid and Attendance Under 38 U.S.C. 1114(r)(1) or for a Higher Level of Care Under 38 U.S.C. 1114(r)(2)

Proposed § 5.332 is derived from current §§ 3.350(h) and 3.352(b). Under current § 3.350(h)(1), a veteran receiving the maximum rate of SMC provided by 38 U.S.C. 1114(o) or (p), who requires regular aid and attendance or a higher level of care, is entitled to an additional allowance under 38 U.S.C. 1114(r) for any period(s) during which he or she is not hospitalized at the expense of the United States. Current § 3.350(h)(2) is an essentially parallel provision that states that a veteran, receiving SMC at the intermediate rate between 38 U.S.C. 1114(n) and (o) and at the rate under 38 U.S.C. 1114(k), who requires regular aid and attendance or a higher level of care is entitled to an additional allowance under 38 U.S.C. 1114(r) for any period(s) during which he or she is not hospitalized at the expense of the United States. Because veterans are entitled to the same allowance under 38 U.S.C. 1114(r), regardless of whether they are receiving the maximum rate of SMC provided by 38 U.S.C. 1114(o) or are receiving SMC at the intermediate rate between 38 U.S.C. 1114(n) and (o) plus SMC under 38 U.S.C. 1114(k), proposed § 5.332(a) combines the essentially parallel provisions contained in current § 3.350(h)(1) and (2) into a single paragraph.

Current § 3.350(h)(2) differs from proposed § 5.332(a) in that § 3.350(h)(2) does not state that an allowance under 38 U.S.C. 1114(r) is payable regardless

of whether the need for regular aid and attendance or a higher level of care is a partial basis for entitlement to SMC at the specified rate (the intermediate rate between 38 U.S.C. 1114(n) and (o), plus the rate under 38 U.S.C. 1114(k)) or is based on an independent factual determination. However, VA's long-standing practice is to allow the service-connected disabilities that are used to establish entitlement at the specified rate to also be used to establish a factual need for regular aid and attendance or a higher level of care for purposes of benefits under section 1114(r).

Proposed § 5.332(b) is derived from those portions of current § 3.350(h) that refer to veterans who are in need of regular aid and attendance and entitled to an allowance under 38 U.S.C. 1114(r)(1).

Proposed § 5.332(c) is based on those portions of current § 3.350(h) that refer to veterans who, in addition to being in need of regular aid and attendance, require a higher level of care and are entitled to an allowance under 38 U.S.C. 1114(r)(2). Proposed § 5.332(c) also contains the criteria for the allowance under 38 U.S.C. 1114(r)(2) that are described in current § 3.352(b).

There is no part 5 counterpart to current § 3.352(b)(5), which states that the allowance under 38 U.S.C. 1114(r)(2) is to be granted only when the veteran's need for a higher level of care is clearly established and the amount of services required by the veteran on a daily basis is substantial. There is no statutory requirement under 38 U.S.C. 1114(r) that the veteran's need for a higher level of care be "clearly established," and there is no reason to believe that an evidentiary standard different from that set forth in 38 U.S.C. 5107(b) should apply to proof of the need for a higher level of care. Although the current regulation does not impose a new standard of proof, eliminating the "clearly established" requirement should eliminate the possibility that that requirement could be misconstrued as an evidentiary rule. Moreover, the detailed and specific requirements for establishing the need for a higher level of care, set forth in paragraphs (c)(3), (4), (5), and (6), require evidence of a factual nature and sufficiently ensure that the need will be based on evidence of record.

Regarding the current requirement that the amount of needed services be "substantial," the definition of "personal healthcare services" in paragraph (c)(3) describes services that clearly establish a greater need than would be required simply by § 5.320. Hence, there is no need to repeat the term, "substantial," and the application

of this part 5 rule will not produce a different outcome than the application of the current rule.

5.333 Special Monthly Compensation Under 38 U.S.C. 1114(s)

Proposed § 5.333 is a restatement of current § 3.350(i). The definition of housebound is slightly reworded for uniformity throughout part 5. No substantive changes are intended.

5.334 Special Monthly Compensation Tables

We propose to include tables in paragraphs (d) through (g) of this section as aids in determining the statutory or intermediate rate of SMC payable for certain combinations of disabilities. These tables will make it easier for readers of the regulations to determine the proper rate of SMC payable for a combination of severe disabilities. The tables summarize selected regulatory text in proposed §§ 5.323 through 5.333, which contain more detailed information about each benefit. These tables are intended to provide a useful summary of the regulatory text found in current § 3.350. We do not intend these tables to confer any rights or benefits in addition to those conferred by the regulations.

5.335 Effective Dates—Special Monthly Compensation Under §§ 5.332 and 5.333

Proposed § 5.335 is derived from a reorganization of current § 3.401, which establishes the effective date for SMC based on the need for regular aid and attendance or due to being housebound. Current § 3.401(a)(1) states that the effective date for an award of regular aid and attendance and housebound benefits is either the date of receipt of claim or the date entitlement arose, whichever is later, except as provided in current § 3.400(o)(2). The same paragraph also states that when an award "based on an original or reopened claim is effective for a period prior to the date of receipt of the claim, the additional * * * compensation payable by reason of need for regular aid and attendance or housebound status shall also be awarded for any part of the award's retroactive period for which entitlement to the additional benefit is established." To clarify current § 3.401(a)(1), we propose to rewrite this regulation in two separate paragraphs (a) and (b) in proposed § 5.335 so that these two rules can be more easily identified and understood.

Proposed § 5.335(a) would refer to § 3.400(o)(2) of this chapter, and to paragraph (b) of § 5.335 as exceptions to

the general effective date rule stated in paragraph (a) of that section.

In addressing retroactive awards, current 3.401(a)(1) addresses pension as well as compensation awards. We have moved the pension provision to proposed § 5.392. See 72 FR 54776 (Sep. 26, 2007) (effective dates for special monthly pension).

Proposed § 5.335(b) expands the scope of current § 3.401(a)(1), which provides for retroactive awards of SMC for regular aid and attendance or housebound status, as noted above. Proposed § 5.335(b) would provide for retroactive awards of any SMC payment when entitlement to the SMC is established for any part of a retroactive period of compensation based on an original or reopened compensation claim. It is logical to treat the effective date of all SMC awards consistently with the effective date of awards of SMC for regular aid and attendance or housebound status. This is consistent with VA policy to grant every benefit to which veterans are entitled. See proposed § 5.4(b), published in 71 FR 16457 (Mar. 31, 2006).

5.336 Effective Dates—Additional Compensation for Regular Aid and Attendance Payable for a Veteran's Spouse Under § 5.321

Proposed § 5.336 is derived from a reorganization of those parts of current §§ 3.401 and 3.501 relating to the effective date for SMC for regular aid and attendance payable for a veteran's spouse. Current § 3.401(a)(3) states that the effective date for an award of additional compensation payable to a veteran based on the need for regular aid and attendance of a spouse is the date of receipt of the claim or the date entitlement arose, whichever is later. The paragraph also states that additional compensation for regular aid and attendance for a spouse will be awarded retroactively if the award is in conjunction with a retroactive award of compensation based on an original or reopened claim, for any part of the retroactive period for which entitlement to SMC is established. Proposed § 5.336(a)(1) and (2) separate these two rules.

Current § 3.401(a)(3) refers to the benefit payable for regular aid and attendance of the veteran's spouse as "additional disability compensation." Proposed § 5.336(a)(2) specifically identifies the benefit as regular aid and attendance.

Current § 3.501(b)(3) states that the effective date for the discontinuance of additional compensation to a veteran based on the need for regular aid and attendance of a spouse will be the end

of the month in which the award action is taken if the need for regular aid and attendance has ceased. Proposed § 5.336(b) includes this effective date provision.

5.337 Award of Special Monthly Compensation Based on the Need for Regular Aid and Attendance During Period of Hospitalization

Current § 3.401(a)(2) states that, when the need for regular aid and attendance is initially established while a veteran is receiving hospital, institutional, or domiciliary care, the effective date for the award will be the date of discharge. We restate this information in proposed § 5.337. No substantive changes are intended.

Tuberculosis

5.340 Pulmonary Tuberculosis Shown by X-ray in Active Service

We propose to repeat the language of current § 3.370 in proposed § 5.340 without change.

5.341 Presumptive Service Connection for Tuberculous Disease; Wartime and Service After December 31, 1946

We propose to repeat the language of current § 3.371 in proposed § 5.341, with only the following technical changes. First, the proposed rule references the proposed part 5 counterpart to current § 3.307, § 5.261, which was published as proposed on July 27, 2004. See 69 FR 44614, 44624–25. Second, where current § 3.371(c) refers to the time period “within 36 months after the veteran’s separation from service as determined under § 3.307(a)(2),” in proposed § 5.341(c) we refer to the time period as “within the 3-year presumptive period provided by § 5.261(d).” The proposed language matches the language in proposed § 5.341(a)(1) and will make the proposed regulation internally consistent in the reference to the 3-year presumptive period for tuberculosis.

5.342 Initial Grant Following Inactivity of Tuberculosis

We propose to repeat the language of current § 3.372 in proposed § 5.342 without change.

5.343 Effect of Diagnosis of Active Tuberculosis

Proposed § 5.343 repeats the language of current § 3.374, except for one technical change and one clarification. The proposed rule replaces the title “Chief Medical Director” with “Under Secretary for Health,” VA’s current title for the identical position. Section 3.374(b) states, “Reference to the Clinic Director or Chief, Outpatient Service,

will be in order in questionable cases and, if necessary, to the [Under Secretary for Health] in Central Office.” Proposed § 5.343(b) would state, “In a case where there is no such diagnosis, but there is evidence that the veteran has tuberculosis, the case will be referred to [the VA officers specified in the regulation].” This makes clear that the referral is mandatory in the circumstance described, and it eliminates potential uncertainty about what could make a case “questionable.” No substantive changes are intended.

5.344 Determination of Inactivity (Complete Arrest) of Tuberculosis

We propose to repeat the language of current § 3.375 in proposed § 5.344 without change.

5.345 Changes From Activity in Pulmonary Tuberculosis Pension Cases

We propose to repeat the language of current § 3.378 in proposed § 5.345, with only minor, technical revisions.

5.346 Tuberculosis and Compensation Under 38 U.S.C. 1114(q) and 1156

Proposed § 5.346(a) repeats the language of current § 3.959. The proposed section’s title makes clear that it only applies to compensation under 38 U.S.C. 1114(q) and 1156. This is not done in the current regulation. No substantive changes are intended.

Proposed § 5.346(b)(1)(i) is based on current § 3.350(g)(1), which provides for SMC for arrested tuberculosis. The statutory authority for this compensation was 38 U.S.C. 1114(q), which was repealed by section 4(a) of Public Law 90–493, 82 Stat. 409 (Aug. 19, 1968). However, under section 4(b) of Public Law 90–493, a veteran who was receiving or entitled to receive compensation for tuberculosis on August 19, 1968, is entitled to a minimum monthly rate of compensation of \$67. Id. This provision will be placed in part 5 because there are some current veterans who continue to receive this benefit. Although the part 3 equivalent of this paragraph is contained in current § 3.350 with the other SMC provisions authorized by 38 U.S.C. 1114, we propose to place this provision with other regulations pertaining to tuberculosis so that it will be easier to locate.

We propose to repeat the language of current § 3.401(g) in proposed § 5.346(b)(1)(ii) without change. Current § 3.401(g) provides the effective date for the minimum monthly rate of compensation of \$67. Placing this effective date provision in the same regulation as basis for the specific benefit to which it applies is consistent

with our proposal to organize by benefit and topic the part 5 rewrites of the current part 3 regulations.

Proposed § 5.346(b)(2) is based on current § 3.350(g)(2). No substantive changes are intended.

5.347 Continuance of a Total Disability Rating for Service-Connected Tuberculosis

We propose, in § 5.347, to repeat the language of current § 3.343(b) without substantive change. We have updated the term, “rating board” to “agency of original jurisdiction,” VA’s current term for the VA activity that is responsible for making the initial determination on an issue affecting a claimant’s or beneficiary’s right to benefits.

The citation to current § 3.321(b) will be updated to the part 5 equivalent when we publish the final version of this rule.

Injury or Death Due to Hospitalization or Treatment

5.350 Benefits Under 38 U.S.C. 1151(a) for Additional Disability or Death Due to Hospital Care, Medical or Surgical Treatment, Examination, Training and Rehabilitation Services, or Compensated Work Therapy Program

We propose to repeat the language of current § 3.361 in proposed § 5.350 with one substantive change. We have not repeated current § 3.361(g)(1), “Death before January 1, 1957.” The paragraph provides that death compensation is the benefit payable under 38 U.S.C. 1151 for such deaths.

There are fewer than 300 beneficiaries currently receiving death compensation. Except for one small group of beneficiaries, death compensation is payable only if the veteran died prior to January 1, 1957. VA has not received a claim for death compensation in over 10 years and we do not expect to receive any more claims. We conclude that because of the small number of beneficiaries of death compensation, the provisions concerning death compensation do not need to be carried forward to part 5.

We have updated the citation to § 3.114(a), contained in current § 3.361(a)(2), to the proposed part 5 counterpart, § 5.152(a), which was published as proposed on May 22, 2007. See 72 FR 28770, 28789.

Current § 3.361 applies to claims under 38 U.S.C. 1151(a) received by VA after September 30, 1997. Current § 3.358 is a similar regulation that applies to claims under 38 U.S.C. 1151(a) received by VA before October 1, 1997. Because Part 5 will apply only to future claims, we will not repeat the provisions of current § 3.358 in Part 5.

5.351 Effective Dates for Awards of Benefits Under 38 U.S.C. 1151(a)

Proposed § 5.351 is derived from current § 3.400(i)(1). The effective-date rule is restated without substantive change.

5.352 Effect on Benefits Awarded Under 38 U.S.C. 1151(a) of Federal Tort Claims Act Compromises, Settlements, and Judgments Entered After November 30, 1962

Proposed § 5.352 restates current § 3.362 with only minor technical revisions. Current § 3.362 applies to claims under 38 U.S.C. 1151(a) received by VA after September 30, 1997. Current § 3.800 is a similar regulation that applies to claims under 38 U.S.C. 1151(a) received by VA before October 1, 1997. Because part 5 will apply only to future claims, we will not repeat the provisions of current § 3.800 in part 5.

5.353 Effect on Benefits Awarded Under 38 U.S.C. 1151(a) of Federal Tort Claims Act Administrative Awards, Compromises, Settlements, and Judgments Finalized Before December 1, 1962

Proposed § 5.353 restates current § 3.363 with only minor technical revisions. Current § 3.363 applies to claims under 38 U.S.C. 1151(a) received by VA after September 30, 1997. Current § 3.800 is a similar regulation that applies to claims under 38 U.S.C. 1151(a) received by VA before October 1, 1997. Because Part 5 will apply only to future claims, we will not repeat the provisions of current § 3.800 in Part 5.

Ratings for Healthcare Eligibility Only

5.360 Service Connection of Dental Conditions for Treatment Purposes

Proposed § 5.360 is derived from current § 3.381. Proposed paragraph (a) is a cross reference which states that, "Eligibility requirements for dental treatment are set forth in § 17.161 of this chapter."

Proposed paragraph (b) is derived from current § 3.381(a). It lists the dental conditions that may be considered service connected solely for establishing eligibility for outpatient dental treatment. We have added a statement of VA's long-standing policy that monetary compensation cannot be paid for these dental conditions in order to clarify for the public the nature of the VA benefits that veterans are entitled to receive.

In addition, the current regulation under § 3.381(a) lists periodontal disease as one of the four dental conditions that can be considered for service connection, but it does not

indicate whether the periodontal disease must be acute or chronic in nature. We propose to clarify the requirement that periodontal disease must be chronic in nature before service connection can be considered because the current VA regulation, in § 3.381(e)(2), prohibits the establishment of service connection for acute periodontal disease. This clarification is thus consistent with current practice, and including it in this rule will help the readers of this provision.

Current § 3.381(e) says that the conditions listed therein will not be service connected for dental treatment purposes. Section 5.360(c) would insert the word "outpatient", thus: "* * * for outpatient dental treatment purposes:". We note the title of § 3.381 does not include "outpatient," but § 3.381(a) is about conditions that qualify for "outpatient dental treatment as provided in § 17.161 of this chapter." Section 3.381 as a whole distinguishes conditions that do from conditions that do not qualify for treatment as § 17.161 provides. The addition of "outpatient" to proposed paragraph (c) is to harmonize the section internally and to harmonize the section with § 17.161. It makes no substantive change.

5.361 Healthcare Eligibility of Persons Administratively Discharged Under Other-Than-Honorable Conditions

Proposed § 5.361 restates, with minor technical and organizational revisions, current § 3.360. No substantive changes are intended.

5.362 Presumption of Service Incurrence of Active Psychosis for Purposes of Entitlement to Hospital, Nursing Home, Domiciliary, and Medical Care

Chapter 17 of title 38 U.S.C. pertains to hospital, nursing home, and domiciliary and medical care for veterans. Section 1702 of this title states:

For the purposes of [chapter 17], any veteran of World War II, the Korean conflict, the Vietnam era, or the Persian Gulf War who developed an active psychosis (1) within two years after discharge or release from the active military, naval, or air service, and (2) before July 26, 1949, in the case of a veteran of World War II, before February 1, 1957, in the case of a veteran of the Korean conflict, before May 8, 1977, in the case of a Vietnam era veteran, or before the end of the two year period beginning on the last day of the Persian Gulf War, in the case of a veteran of the Persian Gulf War, shall be deemed to have incurred such disability in active military, naval, or air service.

We propose a new regulation that implements this statutory provision.

Although the statutory provision was enacted originally in 1958, it has never been codified by regulation. Codifying this provision will help ensure that veterans, their representatives, and VA employees are aware of this potentially important benefit.

Proposed § 5.362(a) sets forth the basic rule that VA will presume service connected an active psychosis that develops in a veteran identified in § 5.362(b). Proposed § 5.362(b) sets forth the statutorily required wartime service and provides the exact periods during which the active psychosis must have developed or, in the case of the ongoing Persian Gulf War, provides that such psychosis must have developed within two years after the end of that war.

To aid the reader, we propose to cross reference § 5.20, published as proposed on January 30, 2004, which specifies the periods of war. See 69 FR 4820, 4832.

5.363 Determination of Service Connection for Former Members of the Armed Forces of Czechoslovakia or Poland

We propose no substantive change to the language of current § 3.359. We have updated the term, "rating board" to "agency of original jurisdiction," VA's current term for the VA activity that is responsible for making the initial determination on an issue affecting a claimant's or beneficiary's right to benefits.

Miscellaneous Service-Connection Regulations

5.365 Claims Based on the Effects of Tobacco Products

We propose to repeat the language of current § 3.300 in § 5.365 without substantive change. We are not repeating the first clause of § 3.300, "For claims received by VA after June 9, 1998," because all claims under part 5 will be received after 1998. For references to other part 3 provisions contained within current § 3.300, we have updated the references to the part 5 counterparts that have already been addressed in a prior NPRM. Sections 5.260, 5.261, 5.262, 5.263, 5.264, 2.265, 5.267, and 5.268 were published as proposed on July 27, 2004. See 69 FR 44614. We have retained the cite to the current part 3 regulation where the proposed part 5 regulation that deals with the same subject matter has not yet been published.

5.366 Disability Due to Impaired Hearing

Proposed § 5.366 is a restatement of current § 3.385. No substantive changes are intended.

5.367 Civil Service Preference Ratings

We propose to repeat the content of current § 3.357 in proposed § 5.367 without change.

5.368 Basic Eligibility Determinations: Home Loan and Education Benefits

We propose to repeat the language of current § 3.315(b) and (c) in proposed § 5.368 without substantive change. Note that this proposed regulation does not contain an equivalent provision to current § 3.315(a); however, current § 3.57(a)(1)(ii) states the same rule regarding the definition of child—that a person 18 years of age or older may be recognized as a “child” for the purpose of compensation and pension benefits, if the person, before reaching 18 years of age, became permanently incapable of self-support by reason of physical or mental disability. Proposed § 5.220(b)(2)(i), the proposed part 5 equivalent of these part 3 provisions, was published on September 20, 2006. See 71 FR 55052, 55069.

In proposed § 5.368, we have changed the citation to § 3.12a to its counterpart in part 5, § 5.39, published as proposed on January 30, 2004. See 69 FR 4820, 4841–42.

Endnote Regarding Amendatory Language

We intend to ultimately remove part 3 entirely, but we are not including amendatory language to accomplish that at this time. VA will provide public notice before removing part 3.

Paperwork Reduction Act of 1995

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

Regulatory Flexibility Act

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

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health

and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined, and it has been determined to be a significant regulatory action under the Executive Order because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more (adjusted annually for inflation) in any 1 year. This proposed rule would have no such effect on State, local, and tribal governments, or the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans’ Dependents; 64.104, Pension for Non-Service Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans

Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.115, Veterans Information and Assistance; and 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida.

List of Subjects in 38 CFR Part 5

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

Approved: July 10, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to further amend 38 CFR part 5 as proposed to be added at 69 FR 4832, January 30, 2004, and as further proposed to be amended at 69 FR 44614, July 27, 2004, as follows:

PART 5—COMPENSATION, PENSION, BURIAL, AND RELATED BENEFITS**Subpart E—Claims for Service Connection and Disability Compensation**

1. The authority citation for subpart E continues to read as follows:

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

2. Sections 5.320 through 5.369 and their undesignated center headings are added to subpart E to read as follows:

Special Monthly Compensation

Sec.

- 5.320 Determining need for regular aid and attendance.
- 5.321 Additional compensation for veteran whose spouse needs regular aid and attendance.
- 5.322 Special monthly compensation—general information and definitions of disabilities.
- 5.323 Special monthly compensation under 38 U.S.C. 1114(k).
- 5.324 Special monthly compensation under 38 U.S.C. 1114(l).
- 5.325 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(l) and (m).
- 5.326 Special monthly compensation under 38 U.S.C. 1114(m).
- 5.327 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(m) and (n).
- 5.328 Special monthly compensation under 38 U.S.C. 1114(n).
- 5.329 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(n) and (o).
- 5.330 Special monthly compensation under 38 U.S.C. 1114(o).
- 5.331 Special monthly compensation under 38 U.S.C. 1114(p).

- 5.332 Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2).
- 5.333 Special monthly compensation under 38 U.S.C. 1114(s).
- 5.334 Special monthly compensation tables.
- 5.335 Effective dates—Special monthly compensation under §§ 5.332 and 5.333.
- 5.336 Effective dates—additional compensation for regular aid and attendance payable for a veteran's spouse under § 5.321.
- 5.337 Award of special monthly compensation based on the need for regular aid and attendance during period of hospitalization.
- 5.338–5.339 [Reserved]

Tuberculosis

- 5.340 Pulmonary tuberculosis shown by X-ray in active service.
- 5.341 Presumptive service connection for tuberculous disease; wartime and service after December 31, 1946.
- 5.342 Initial grant following inactivity of tuberculosis.
- 5.343 Effect of diagnosis of active tuberculosis.
- 5.344 Determination of inactivity (complete arrest) of tuberculosis.
- 5.345 Changes from activity in pulmonary tuberculosis pension cases.
- 5.346 Tuberculosis and compensation under 38 U.S.C. 1114(q) and 1156.
- 5.347 Continuance of a total disability rating for service-connected tuberculosis.
- 5.348–5.349 [Reserved]

Injury or Death Due to Hospitalization or Treatment

- 5.350 Benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.
- 5.351 Effective dates for awards of benefits under 38 U.S.C. 1151(a).
- 5.352 Effect on benefits awarded under 38 U.S.C. 1151(a) of Federal Tort Claims Act compromises, settlements, and judgments entered after November 30, 1962.
- 5.353 Effect on benefits awarded under 38 U.S.C. 1151(a) of Federal Tort Claims Act administrative awards, compromises, settlements, and judgments finalized before December 1, 1962.
- 5.354–5.359 [Reserved]

Ratings for Healthcare Eligibility Only

- 5.360 Service connection of dental conditions for treatment purposes.
- 5.361 Healthcare eligibility of persons administratively discharged under other-than-honorable conditions.
- 5.362 Presumption of service incurrence of active psychosis for purposes of hospital, nursing home, domiciliary, and medical care.
- 5.363 Determination of service connection for former members of the Armed Forces of Czechoslovakia or Poland.
- 5.364 [Reserved]

Miscellaneous Service-Connection Regulations

- 5.365 Claims based on the effects of tobacco products.
- 5.366 Disability due to impaired hearing.
- 5.367 Civil service preference ratings.
- 5.368 Basic eligibility determinations: home loan and education benefits.
- 5.369 [Reserved]
- Subpart E—Claims for Service Connection and Disability Compensation

Special Monthly Compensation

§ 5.320 Determining need for regular aid and attendance.

For the purposes of this part, an individual needs regular aid and attendance if either of the following is true:

(a) The individual, based on his or her condition as a whole, has a temporary or permanent need for assistance, as shown by the extent of his or her impaired ability to perform any or all of the following functions:

- (1) Getting dressed or undressed.
- (2) Keeping clean and presentable.
- (3) Making frequent and necessary adjustments to a prosthetic or orthopedic appliance. (This does not include the adjustment of appliances that able persons also cannot adjust without assistance, such as lacing at the back, supports, and belts.)

(4) Eating or drinking, as a result of the loss of coordination of the upper extremities or extreme weakness.

(5) Attending to bowel and bladder needs.

(6) Protecting himself or herself from the hazards or dangers of his or her daily environment.

(Authority: 38 U.S.C. 1114(l), (m), (r)).

(b) The individual is temporarily or permanently bedridden (i.e., must remain in bed due to his or her disability or disabilities based on medical necessity and not based on a prescription of bed rest for purposes of convalescence or cure).

(Authority: 38 U.S.C. 1114(l))

§ 5.321 Additional compensation for veteran whose spouse needs regular aid and attendance.

(a) *General entitlement.* A veteran who has a service-connected disability rating of at least 30 percent is entitled to special monthly compensation (SMC) if his or her spouse needs regular aid and attendance.

(b) *Automatic eligibility.* The spouse will be considered to be in need of regular aid and attendance if any of the following apply:

- (1) The spouse has corrected visual acuity of 5/200 or less in both eyes;

(2) The spouse has concentric contraction of the visual field to 5 degrees or less in both eyes; or

(3) The spouse is a patient in a nursing home because of mental or physical incapacity.

(c) *Factual need.* If the spouse does not meet the criteria under paragraph (b), the spouse will be considered in need of regular aid and attendance if need is demonstrated under § 5.320.

(Authority: 38 U.S.C. 1115)

§ 5.322 Special monthly compensation—general information and definitions of disabilities.

(a) *General.* (1) Multiple regulations (§§ 5.321, 5.323–5.333) allow special monthly compensation (SMC) to veterans who have certain service-connected disabilities. The monetary rates of payment of SMC are found in 38 U.S.C. 1114 and 1115(1)(E). They are also on the Internet at <http://www.va.gov> and are available from any VA Regional Office. Under 38 U.S.C. 1114 and 1115(1)(E), a veteran is entitled to SMC if he or she is in receipt of service-connected disability compensation and:

- (i) Is in need of regular aid and attendance (see § 5.320);
- (ii) Is permanently bedridden;
- (iii) Has certain disabilities or combinations of disabilities; or
- (iv) Has a spouse who is in need of regular aid and attendance.

(2) Certain nonservice-connected disabilities will be considered in determining entitlement to SMC. (See §§ 5.323(c)(5)) (contribution of nonservice-connected loss of use of creative organ to service-connected loss of use of creative organ); 5.330(b), (c) (bilateral deafness of specified severity); 5.331(b) (bilateral blindness as specified with bilateral deafness as specified).

(3) This section defines disabilities that establish entitlement to SMC and that are not defined in other regulations.

(b) *Loss of use of a hand* means the hand functions no better than a prosthesis would function if attached to the arm at a point of amputation below the elbow. In making this determination, VA will consider the actual remaining function of the hand, including, but not limited to, whether the hand can perform acts such as grasping or manipulation with the same proficiency as an amputation stump with prosthesis. Complete ankylosis of two major joints of an upper extremity is an example of a situation that will constitute loss of use of the hand. The major joints of the upper extremity are the shoulder, elbow, and wrist.

(c) *Loss of use of a foot* means the foot functions no better than a prosthesis

would function if attached to the leg at a point of amputation below the knee. In making this determination, VA will consider the actual remaining function of the foot, including, but not limited to, whether the foot can perform acts such as balance or propulsion with the same proficiency as an amputation stump with prosthesis. Examples of situations that will constitute loss of use of a foot include:

(1) Extremely unfavorable complete ankylosis of the knee, that is, the knee fixed in flexion at an angle of 45 degrees or more;

(2) Complete ankylosis of two major joints of the lower extremity, that is, of the hip, knee, or ankle;

(3) Shortening of the lower extremity of 3.5 inches or more; and

(4) Complete paralysis of the external popliteal nerve (common peroneal) and resulting foot drop, accompanied by characteristic organic changes including trophic and circulatory disturbances and other concomitants that confirm complete paralysis of the nerve.

(d) *Natural elbow or knee action prevented when a prosthesis is in place* means that the veteran is unable to use a prosthesis that requires the natural use of the elbow or knee joint. If there is no movement of the joint (as in complete ankylosis or complete paralysis) and a prosthesis is not used, VA will determine entitlement to SMC based on prevented natural elbow or knee action as if a prosthesis were in place.

(e) *Use of prosthesis prevented* means that the veteran's disability prevents the use of prosthesis. This can establish the veteran's entitlement to SMC in two circumstances:

(1) *Anatomical loss near the shoulder.* A veteran meets the requirements for SMC based on anatomical loss of the upper extremity (arm) near the shoulder if the anatomical loss prevents the use of a prosthesis, and reamputation at a higher level that permits the use of a prosthesis is not possible. However, if the veteran cannot wear a prosthesis at the present level of amputation of the arm but could wear a prosthesis if there were a reamputation at a higher level, VA will consider the veteran eligible only for SMC based on anatomical loss or loss of use of the arm at a level, or with complications, preventing natural elbow action with a prosthesis in place (see paragraph (d) of this section).

(2) *Anatomical loss near the hip.* A veteran meets the requirements for SMC based on anatomical loss of the lower extremity (leg) near the hip if the anatomical loss prevents the use of a prosthesis, and reamputation at a higher level that permits the use of a prosthesis is not possible. However, if the veteran

cannot wear a prosthesis at the present level of amputation of the leg but could wear a prosthesis if there were a reamputation at a higher level, VA will consider the veteran eligible only for SMC based on anatomical loss or loss of use of the leg at a level, or with complications, preventing natural knee action with a prosthesis in place (see paragraph (d) of this section).

(f) *Visual acuity of 5/200 or less.* If the veteran has actual visual acuity better than 5/200 but is nevertheless assigned a disability rating under part 4 of this chapter based on visual acuity of 5/200, the veteran is not considered to have visual acuity of 5/200 or less for purposes of eligibility for SMC. See § 4.83 of this chapter.

(g) *Loss of use or blindness of one eye, having only light perception.* Loss of use or blindness of one eye, having only light perception, means that the veteran is unable to recognize test letters at 1 foot and cannot perceive objects or hand movements, or count fingers, at a distance of 3 feet. A veteran is eligible for SMC under this paragraph if he or she meets the criteria in the preceding sentence, even if the veteran can perceive objects or hand movements, or can count fingers, at distances of less than 3 feet. See § 4.79 of this chapter.

(Authority: 38 U.S.C. 501(a), 1114)

§ 5.323 Special monthly compensation under 38 U.S.C. 1114(k).

(a) *Basic entitlement.* Special monthly compensation (SMC) under 38 U.S.C. 1114(k) is payable to a veteran who has the following service-connected disabilities:

(1) Anatomical loss or loss of use of one hand.

(2) Anatomical loss or loss of use of one foot.

(3) Anatomical loss or loss of use of both buttocks.

(4) Anatomical loss or loss of use of one or more creative organs.

(5) Blindness of one eye having only light perception.

(6) Deafness of both ears having absence of air and bone conduction.

(7) Complete organic aphonia with constant inability to communicate by speech.

(8) In the case of a female veteran, either of the following:

(i) Anatomical loss of 25 percent or more of tissue from a single breast or both breasts in combination (including, but not limited to, loss by mastectomy or partial mastectomy); or

(ii) Treatment of breast tissue with radiation ("treatment" includes therapeutic procedures but not diagnostic procedures).

Note to paragraph (a): For the criteria for determining anatomical loss or loss of use of a hand or of a foot, see § 5.322(b) and (c) respectively. For the criteria for determining loss of use or blindness of one eye, having only light perception, see § 5.322(g).

(b) *Limitations.*

(1) *Combining with 38 U.S.C. 1114(a) through (j), or (s).* SMC under 38 U.S.C. 1114(k) is payable in addition to the compensation authorized by 38 U.S.C. 1114(a) through (j), or (s), subject to the following limitations:

(i) The combined rate of compensation must not exceed the monthly rate provided by 38 U.S.C. 1114(l) when authorized in conjunction with any of the rates provided by 38 U.S.C. 1114(a) through (j), or (s).

(ii) If the veteran has entitlement under 38 U.S.C. 1114(l) through (n), or (p), SMC under 38 U.S.C. 1114(k) is payable for each anatomical loss or loss of use in addition to the losses used to establish entitlement under 38 U.S.C. 1114(l) through (n), or (p), as long as the combined monthly compensation does not exceed the monthly rate provided by 38 U.S.C. 1114(o).

(iii) The additional compensation for dependents under 38 U.S.C. 1115 and the additional allowance for regular aid and attendance or a higher level of care provided by 38 U.S.C. 1114(r) are not subject to the above limitations regarding maximum monthly compensation payable under this paragraph.

(2) *Combining with 38 U.S.C. 1114(l) through (n).* A disability for which SMC is paid under 38 U.S.C. 1114(k) may not be a basis for a higher level of SMC under 38 U.S.C. 1114(l) through (n); however, a disability for which SMC is paid under 38 U.S.C. 1114(k) may be paid concurrently with SMC under 38 U.S.C. 1114(l) through (n), as long as the same disability is not the basis for SMC under both 38 U.S.C. 1114(k) and either 38 U.S.C. 1114(l), (m), or (n). The total combined rate of SMC cannot exceed the amount set forth in 38 U.S.C. 1114(o).

(c) *Creative organ.* (1) A creative organ means an organ directly involved in reproduction.

(2) Anatomical loss of a creative organ exists in any of the following circumstances:

(i) Acquired absence of one or both testicles (other than undescended testicles);

(ii) Acquired absence of one or both ovaries; or

(iii) Acquired absence of other creative organs.

(3) Loss of use of a creative organ exists in any of the following circumstances:

(i) The diameters of the affected testicle are reduced to one-third of the corresponding diameters of the normal testicle;

(ii) The diameters of the affected testicle are reduced to one-half or less of the corresponding normal testicle with changes in consistency of the affected testicle (harder or softer) when compared to the normal testicle;

(iii) Absence of spermatozoa proven by biopsy performed with the informed consent of the veteran; or

(iv) Medical evidence shows that, due to injury or disease, reproduction is not possible without medical intervention. This could occur if the veteran has:

(A) In the case of paired creative organs, the loss of function of at least one such organ; or

(B) In the case of an unpaired creative organ, loss of function.

(4) SMC under 38 U.S.C. 1114(k) is payable for service-connected erectile dysfunction as the loss of use of a creative organ even if the veteran uses prescription medications or mechanical devices to treat the erectile dysfunction. This rule applies regardless of whether such treatment is effective.

(5) SMC under 38 U.S.C. 1114(k) is payable for a service-connected anatomical loss of a creative organ even if it is preceded by a nonservice-connected loss of use. Examples of this include, but are not limited to, the following:

(i) The veteran had a vasectomy before military service with the anatomical loss or loss of use of one testicle during military service;

(ii) The veteran had a vasectomy following military service with a subsequent prostatectomy as a result of service-connected prostate cancer;

(iii) The veteran had impotence as a result of a nonservice-connected psychiatric condition with subsequent prostatectomy due to service-connected prostate cancer; or

(iv) The veteran had a tubal ligation before service with a subsequent oophorectomy due to service-connected injury or disease.

(6) SMC under 38 U.S.C. 1114(k) is not payable when anatomical loss or loss of use of a creative organ resulted from elective surgery performed after military service. However, if the elective surgery after service was necessary to correct an injury caused by surgery during military service, SMC under 38 U.S.C. 1114(k) is payable. Surgery advised on sound medical judgment for relief of a pathological condition or to prevent possible future pathological

consequences is not considered to be elective surgery.

(7) Atrophy resulting from mumps followed by orchitis in service is presumed service connected. Because atrophy is usually perceptible within 1 to 6 months after infection subsides, an examination more than 6 months after the remission of orchitis demonstrating a normal genitourinary system will be considered in determining if the presumption is rebutted.

(d) *Determining loss of use of both buttocks.* (1) Loss of use of both buttocks exists if there is severe damage by disease or injury to muscle group XVII, bilaterally (See §§ 4.56, 4.73, Diagnostic Code 5317, of this chapter), and additional disability making it impossible for the individual, without assistance, to rise from a seated position and from a stooped position (fingers to toes position) and to maintain postural stability (pelvis upon head of femur). The cited assistance may be provided by the individual's own hands or arms, and, in the matter of postural stability, by a special appliance.

(2) The receipt of SMC for anatomical loss or loss of use of both lower extremities under 38 U.S.C. 1114(l) through (n) does not prevent the receipt of SMC under 38 U.S.C. 1114(k) for loss of use of both buttocks if appropriate tests clearly substantiate there is such additional loss of use.

(e) *Deafness.* Deafness of both ears, having absence of air and bone conduction, exists if an authorized VA audiology examination shows bilateral hearing loss equal to or greater than the bilateral hearing loss required for a maximum rating under the Schedule for Rating Disabilities in part 4 of this chapter.

(f) *Aphonia.* Complete organic aphonia exists if an individual has a disability of the speech organs that constantly precludes communication by speech.

(Authority: 38 U.S.C. 1114(k))

§ 5.324 Special monthly compensation under 38 U.S.C. 1114(l).

Special monthly compensation (SMC) under 38 U.S.C. 1114(l) is payable to a veteran who has any of the following service-connected disabilities:

(a) Anatomical loss or loss of use of both feet. See § 5.322(c).

(b) Anatomical loss or loss of use of one hand and one foot. See § 5.322(b), (c).

(c) Each eye having either:
(1) Blindness with visual acuity of 5/200 or less under § 5.322(f); or
(2) Concentric contraction of the visual field to 5 degrees or less.

(d) Service-connected disability (or disabilities) causing the veteran to be permanently bedridden, which means that the veteran must remain in bed, and it is reasonably certain that the confinement to bed will continue throughout his or her lifetime. The criteria for determining whether a veteran is bedridden are found at § 5.320(b).

(e) Service-connected disability or disabilities establishing the veteran's need for regular aid and attendance under § 5.320. Note: Unless the veteran is entitled to additional SMC under 38 U.S.C. 1114(r) (see § 5.332), VA will award SMC under 38 U.S.C. 1114(l) based on permanently bedridden status if the veteran is permanently bedridden (see paragraph (d) of this section) rather than on the need for regular aid and attendance.

(Authority: 38 U.S.C. 1114(l))

Cross Reference: § 5.330, "Special monthly compensation under 38 U.S.C. 1114(o)" (discussing combinations of awards made under §§ 5.324, 5.326, or 5.328).

§ 5.325 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(l) and (m).

VA will pay special monthly compensation (SMC) at the intermediate rate between 38 U.S.C. 1114(l) and (m) for any of the combinations of disabilities listed in paragraphs (a) through (d) of this section. (The intermediate rate is the arithmetic mean between the rates for (l) and (m), rounded down to the next lower dollar.)

(a) Anatomical loss or loss of use of one foot with anatomical loss or loss of use of the opposite leg at a level, or with complications, preventing natural knee action with prosthesis in place.

(b) Anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place with anatomical loss or loss of use of one foot.

(c) Anatomical loss or loss of use of one hand with anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place.

(d) Blindness of one eye with visual acuity of 5/200 or less, or concentric contraction of the visual field to 5 degrees or less of one eye; and blindness of the other eye, having only light perception.

(Authority: 38 U.S.C. 1114(p))

Cross Reference: § 5.322, "Special monthly compensation—general information and definitions of disabilities" (containing the criteria for the disabilities listed in § 5.325).

§ 5.326 Special monthly compensation under 38 U.S.C. 1114(m).

Special monthly compensation (SMC) under 38 U.S.C. 1114(m) is payable for any of the following combinations of disabilities:

- (a) Anatomical loss or loss of use of both hands.
- (b) Anatomical loss or loss of use of both legs at a level, or with complications, preventing natural knee action with prosthesis in place.
- (c) Anatomical loss or loss of use of one foot with anatomical loss of the other leg so near the hip as to prevent the use of prosthetic appliance.
- (d) Anatomical loss or loss of use of one arm so near the shoulder as to prevent the use of prosthetic appliance with anatomical loss or loss of use of one foot.
- (e) Anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place and anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place.
- (f) Anatomical loss or loss of use of one hand with anatomical loss of one leg so near the hip as to prevent the use of a prosthetic appliance.
- (g) Blindness in both eyes having only light perception.
- (h) Blindness of one eye with visual acuity of 5/200 or less or with concentric contraction of the visual field to 5 degrees or less; and
 - (1) Anatomical loss of the other eye; or
 - (2) Blindness without light perception of the other eye.
- (i) Blindness in both eyes leaving the veteran so significantly disabled as to need regular aid and attendance. If the veteran has visual acuity of 5/200 or less in both eyes or concentric contraction of the visual field to 5 degrees or less in both eyes, then entitlement to compensation at the section 1114(m) rate will be determined on the facts in the individual case.

(Authority: 38 U.S.C. 1114(m), (p))

Cross References: § 5.320, "Determining need for regular aid and attendance." § 5.322, "Special monthly compensation—general information and definitions of disabilities" (containing the criteria for the disabilities listed in § 5.326). § 4.76, "Examination of field [of] vision" (containing the criteria for blindness based on concentric contraction of the visual field). § 5.330, "Special monthly compensation under 38 U.S.C. 1114(o)" (discussing combinations of awards made under §§ 5.324, 5.326, or 5.328).

§ 5.327 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(m) and (n).

VA will pay special monthly compensation (SMC) at the intermediate rate between 38 U.S.C. 1114(m) and (n) for any of the combinations of disabilities listed in paragraphs (a) through (d) of this section. (The intermediate rate is the arithmetic mean between the rates for 38 U.S.C. 1114(m) and (n), rounded down to the nearest dollar.)

(a) Anatomical loss or loss of use of one hand with anatomical loss or loss of use of the other arm at a level, or with complications, preventing natural elbow action with prosthesis in place.

(b) Anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place with anatomical loss of the other leg so near the hip as to prevent the use of prosthetic appliance.

(c) Anatomical loss of one arm so near the shoulder as to prevent the use of prosthetic appliance with anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place.

(d) Anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place with anatomical loss of one leg so near the hip as to prevent the use of prosthetic appliance.

(e) Blindness of one eye, having only light perception; and

(1) Anatomical loss of the other eye; or

(2) Blindness without light perception of the other eye.

(Authority: 38 U.S.C. 1114(p))

Cross References: § 5.322, "Special monthly compensation—general information and definitions of disabilities." § 5.326, "Special monthly compensation under 38 U.S.C. 1114(m)."

§ 5.328 Special monthly compensation under 38 U.S.C. 1114(n).

VA will pay special monthly compensation (SMC) under 38 U.S.C. 1114(n) for any of the combinations of disabilities listed in paragraphs (a) through (e) of this section.

(a) Anatomical loss or loss of use of both arms at a level, or with complications, preventing natural elbow action with prosthesis in place.

(b) Anatomical loss or loss of use of one hand with anatomical loss of the other arm so near the shoulder as to prevent the use of a prosthetic appliance.

(c) Anatomical loss of both legs so near the hip as to prevent the use of prosthetic appliances.

(d) Anatomical loss of one arm so near the shoulder as to prevent the use of a prosthetic appliance and anatomical loss of one leg so near the hip as to prevent the use of a prosthetic appliance.

(e) Anatomical loss of both eyes, blindness without light perception in both eyes, or anatomical loss of one eye and blindness without light perception in the other eye.

(Authority: 38 U.S.C. 1114(n), (p))

Cross References: § 5.322, "Special monthly compensation—general information and definitions of disabilities." § 5.326, "Special monthly compensation under 38 U.S.C. 1114(m)." § 5.327, "Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(m) and (n)" (containing the criteria for the disabilities listed in § 5.328). § 5.330, "Special monthly compensation under 38 U.S.C. 1114(o)" (discussing combinations of awards made under §§ 5.324, 5.326, or 5.328).

§ 5.329 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(n) and (o).

VA will pay special monthly compensation (SMC) at the intermediate rate between 38 U.S.C. 1114(n) and (o) for anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place and anatomical loss of the other arm so near the shoulder as to prevent the use of prosthetic appliance. (The intermediate rate is the arithmetic mean between the rates for (n) and (o), rounded down to the next lower dollar.)

(Authority: 38 U.S.C. 1114(p))

Cross References: § 5.322, "Special monthly compensation—general information and definitions of disabilities." § 5.328, "Special monthly compensation under 38 U.S.C. 1114(n)" (containing the criteria for the disabilities listed in § 5.329).

§ 5.330 Special monthly compensation under 38 U.S.C. 1114(o).

VA will pay special monthly compensation (SMC) under 38 U.S.C. 1114(o) for any of the following combinations of disabilities:

(a) Anatomical loss of both arms so near the shoulder as to prevent the use of prosthetic appliances.

(b) Bilateral deafness rated at 60 percent or more disabling (and the hearing impairment in either one or both ears is service connected) in combination with service-connected blindness with bilateral visual acuity of 20/200 or less.

(c) Service-connected total deafness in one ear or bilateral deafness rated at 40 percent or more disabling (and the

hearing impairment in either one or both ears is service connected) in combination with service-connected blindness of both eyes having only light perception or less.

(d) Loss of use of both lower extremities together with loss of anal and bladder sphincter control. (VA will consider that the requirement of loss of anal and bladder sphincter control is met even though incontinence has been overcome under a strict regimen of rehabilitation training and/or other auxiliary measures.)

(e) Disabilities entitling the veteran to two or more of the monetary rates provided in 38 U.S.C. 1114(l) through (n), without considering any disabilities twice.

(1) *Separate and distinct disabilities.* Entitlement under this paragraph (e) must be based on separate, distinct disabilities.

(2) *Common cause.* A common cause of disabilities that are otherwise separate and distinct will not preclude entitlement to SMC under this paragraph (e). For example, a veteran with service-connected anatomical loss or loss of use of both hands and both feet resulting from a common cause would nevertheless be entitled to SMC.

(Authority: 38 U.S.C. 1114(o))

Cross References: § 5.320, "Determining need for regular aid and attendance." § 5.322, "Special monthly compensation—general information and definitions of disabilities." § 5.328, "Special monthly compensation under 38 U.S.C. 1114(n)." § 5.329, "Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(n) and (o)." § 5.332, "Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2)" (containing criteria based in part on the disabilities listed in § 5.330).

§ 5.331 Special monthly compensation under 38 U.S.C. 1114(p).

(a) *Intermediate or next higher level of special monthly compensation.* In the event the veteran's service-connected disabilities exceed the requirements for any of the rates prescribed under §§ 5.324 through 5.329, VA will pay special monthly compensation (SMC) under 38 U.S.C. 1114(p) as follows. (An intermediate rate authorized by this section is the arithmetic mean between the two rates of SMC, rounded down to the next lower dollar.)

(b) *Bilateral blindness in combination with deafness.* (1) Blindness in both eyes rated under §§ 5.324(c), 5.325(d), or 5.326(h) or (i), with service-connected total deafness in one ear, entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be

entitled to the next higher rate under 38 U.S.C. 1114. However, the rate cannot exceed the rate under 38 U.S.C. 1114(o).

(2) Blindness in both eyes rated under §§ 5.326(g), 5.327(e), or 5.328(e) with bilateral deafness (and the hearing impairment in either one or both ears is service connected) rated at 10 percent or 20 percent disabling entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114. However, the rate cannot exceed the rate under 38 U.S.C. 1114(o).

(3) Blindness in both eyes, rated under §§ 5.324(c), 5.325(d), 5.326(g), (h), or (i), 5.327(e), or 5.328(e), with bilateral deafness rated at not less than 30 percent disabling (and the hearing impairment in one or both ears is service connected) entitles the veteran to the next higher rate under 38 U.S.C. 1114. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher intermediate rate. However, the rate cannot exceed the rate under 38 U.S.C. 1114(o).

(c) *Bilateral blindness in combination with anatomical loss or loss of use of a hand or foot.* Blindness in both eyes, rated under §§ 5.324(c), 5.325(d), 5.326(g), (h), or (i), 5.327(e), or 5.328(e), combined with any of the disabilities described below (in paragraphs (c)(1), (2), or (3) of this section).

(1) Service-connected anatomical loss or loss of use of one hand entitles the veteran to the next higher statutory rate under 38 U.S.C. 1114. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher intermediate rate. However, the rate cannot exceed the rate under 38 U.S.C. 1114(o).

(2) Service-connected anatomical loss or loss of use of one foot which by itself or in combination with another compensable disability would be ratable at 50 percent or more disabling, entitles the veteran to the next higher rate under 38 U.S.C. 1114. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher intermediate rate. However, the rate cannot exceed the rate under 38 U.S.C. 1114(o).

(3) Service-connected anatomical loss or loss of use of one foot which is ratable at less than 50 percent disabling and which is the only compensable disability other than bilateral blindness, entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114.

However, the rate cannot exceed the rate under 38 U.S.C. 1114(o).

(d) *Additional independent disability or disabilities ratable at 50 percent or more disabling.* (1) If a veteran is entitled to SMC under one of the rates payable under §§ 5.324 through 5.329 and also has a permanent disability, or combination of permanent disabilities, which are independently ratable at 50 percent or more disabling, VA will award the veteran SMC at the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, VA will award the next higher rate under 38 U.S.C. 1114. However, the rate payable pursuant to this paragraph cannot exceed the rate under 38 U.S.C. 1114(o). This benefit may not be paid concurrently with the 100 percent rate pursuant to 38 U.S.C. 1114(p) under § 5.331(e).

(2) "Independently ratable" means that the additional disability or disabilities ratable at 50 percent or more disabling are separate and distinct, and involve different anatomical segments or bodily systems, from the disability or disabilities establishing entitlement under §§ 5.324 through 5.329. If the bases for the additional disability or disabilities and the basis for entitlement to SMC under §§ 5.324 through 5.329 are caused by the same disease or injury, VA cannot pay the next higher intermediate rate unless the additional disability or disabilities would be rated 50 percent or more disabling without regard to the basis for entitlement to SMC under §§ 5.324 through 5.329.

(3) Permanent residuals of tuberculosis, and not the graduated ratings for arrested tuberculosis, may serve as the basis for the independent 50 percent disability rating.

(e) *Additional independent disability ratable at 100 percent.* (1) If a veteran is entitled to SMC at one of the rates payable under §§ 5.324 through 5.329 and has a single permanent disability that is independently ratable at 100 percent disabling, VA will award the veteran the next higher rate under 38 U.S.C. 1114. If the veteran is receiving SMC at an intermediate rate, VA will award to the next higher intermediate rate. The single permanent disability must be independently ratable at 100 percent disabling without regard to individual unemployability. The rate assigned under this paragraph cannot exceed the rate under 38 U.S.C. 1114(o). It cannot be paid concurrently with the 50 percent-or-more rate payable under paragraph (d) of this section.

(2) For the definition of "independently ratable," see paragraph (d)(2) of this section.

(3) Permanent residuals of tuberculosis, and not the graduated ratings for arrested tuberculosis, may serve as the basis for the independent 100 percent disability rating.

(f) *Three extremities.* Anatomical loss, loss of use, or a combination of anatomical loss and loss of use of three extremities entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114. VA will combine the anatomical loss or loss of use of whichever two extremities will provide the veteran with the highest level of SMC before combining the third anatomical loss or loss of use of an extremity to award the next higher rate. However, this combined rate cannot exceed the rate under 38 U.S.C. 1114(o). When there is entitlement for triple extremity or blindness with extremity, it will be in addition to any entitlement under 38 U.S.C. 1114(k) or (p) for the 50 or 100 percent elevations for the same extremity.

(Authority: 38 U.S.C. 1114(p))

§ 5.332 Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2).

(a) *General.* The additional allowance that 38 U.S.C. 1114(r) authorizes is payable whether the need for regular aid and attendance or for a higher level of care is a partial basis for entitlement to the maximum rate under 38 U.S.C. 1114(o) or (p), or to the intermediate rate between 38 U.S.C. 1114(n) and (o) plus the rate under 38 U.S.C. 1114(k), or is based on an independent factual determination.

(b) *Criteria for additional allowance under 38 U.S.C. 1114(r)(1).* A veteran is entitled to an additional allowance under 38 U.S.C. 1114(r)(1) when all of the following conditions are met:

(1) The veteran is entitled to the maximum rate under 38 U.S.C. 1114(o) or (p), or to the intermediate rate between 38 U.S.C. 1114(n) and (o) plus the rate under 38 U.S.C. 1114(k);

(2) The veteran meets the requirements for regular aid and attendance under § 5.320; and
(3) The veteran is not hospitalized at United States Government expense.

(c) *Criteria for additional allowance under 38 U.S.C. 1114(r)(2).* (1) *General criteria.* A veteran is entitled to an additional allowance under 38 U.S.C. 1114(r)(2), instead of the allowance under 38 U.S.C. 1114(r)(1), when all of the following conditions are met:

(i) The veteran is entitled to the maximum rate under 38 U.S.C. 1114(o)

or (p), or to the intermediate rate between 38 U.S.C. 1114(n) and (o) plus the rate under 38 U.S.C. 1114(k);

(ii) The veteran meets the requirements for regular aid and attendance under § 5.320;

(iii) The veteran needs a “higher level of care” (as defined in paragraph (c)(2) of this section);

(iv) Without the higher level of care, the veteran would require hospitalization, nursing home care, or other residential institutional care; and
(v) The veteran is not hospitalized at United States Government expense.

(2) *Higher level of care.* For the purposes of this section, a veteran needs a “higher level of care” whenever the veteran requires personal healthcare services provided on a daily basis in the veteran’s residence by a person who is licensed to provide these services or who provides these services under the regular supervision of a licensed healthcare professional.

(3) *Personal healthcare services.* For the purposes of this section, “personal healthcare services” include, but are not limited to, physical therapy, administration of injections, placement of indwelling catheters, the changing of sterile dressings, or similar functions, the performance of which requires professional healthcare training or the regular supervision of a trained healthcare professional.

(4) *Licensed healthcare professional.* For the purposes of this section, a “licensed healthcare professional” includes, but is not limited to, a doctor of medicine or osteopathy, a registered nurse, a licensed practical nurse, or a physical therapist licensed to practice by a State or a political subdivision of a State.

(5) *Under the regular supervision of a licensed healthcare professional.* For the purposes of this section, the term “under the regular supervision of a licensed healthcare professional” means that an unlicensed person performing personal healthcare services is following a regimen of personal healthcare services prescribed by a healthcare professional, and that the healthcare professional consults with the unlicensed person providing the healthcare services at least once each month to monitor the prescribed regimen. The consultation need not be in person; a telephone call is sufficient.

(6) *Care may be provided by a relative of the veteran or a member of the veteran’s household.* A relative of the veteran or a member of the veteran’s household may perform the necessary personal healthcare services. However, such a person must be a licensed healthcare professional or provide the

necessary personal healthcare services under the regular supervision of a licensed healthcare professional.

(Authority: 38 U.S.C. 1114(r))

§ 5.333 Special monthly compensation under 38 U.S.C. 1114(s).

Special monthly compensation (SMC) under 38 U.S.C. 1114(s) is payable to a veteran who has a single service-connected disability rated as 100 percent disabling and either:

(a) An additional service-connected disability, or combination of disabilities, ratable as 60 percent disabling independent of the single service-connected disability rated as 100 percent; or

(b) Is permanently housebound as a result of service-connected disability or disabilities. For the purposes of this section, a veteran is permanently housebound if he or she is substantially confined to his or her residence (ward or clinical areas, if institutionalized) and immediate premises because of a service-connected disability or disabilities, and it is reasonably certain that such disability or disabilities will remain throughout the veteran’s lifetime.

(Authority: 38 U.S.C. 1114(s))

§ 5.334 Special monthly compensation tables.

(a) *General.* The tables in this section are meant as aids to summarize the statutory or intermediate rate of special monthly compensation (SMC) payable to veterans under 38 U.S.C. 1114 for certain combinations of disabilities. The regulatory text in §§ 5.323 through 5.333 describes these benefits in more detail. No additional rights or benefits are conferred by this section. The tables are informative only and will not be used as a basis to grant or deny benefits in a particular case.

(b) *Symbols.* The following defines the symbols used in the tables in this section:

L = the rate under 38 U.S.C. 1114(l).

L^{1/2} = the intermediate rate between 38 U.S.C. 1114(l) and (m).

M = the rate under 38 U.S.C. 1114(m).

M^{1/2} = the intermediate rate between 38 U.S.C. 1114(m) and (n).

N = the rate under 38 U.S.C. 1114(n).

N^{1/2} = the intermediate rate between 38 U.S.C. 1114(n) and (o).

O = the rate under 38 U.S.C. 1114(o).

(c) *Usage.* In Tables 1 through 4, the columns and rows are labeled with specific disabilities or combinations of disabilities. The point where a column and row intersect represents the rate or intermediate rate of SMC payable for the specified combination of disabilities. For example, in Table 1, a veteran who

has the anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place and anatomical loss of one arm so near the shoulder as to prevent the use of prosthetic appliances is entitled to the intermediate rate of

SMC between 38 U.S.C. 1114(m) and (n) (symbol M^{1/2}).
 (d) *Table 1.* To determine the level of SMC payable when there are varying degrees of anatomical loss or loss of use of two extremities, identify the proper degree of loss for one extremity along

the top row of Table 1 and the proper degree of loss for the other extremity down the left column. The square where the column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it.

TABLE 1—SMC—EXTREMITIES ONLY

| Extremities | Anatomical loss or loss of use: one foot | Anatomical loss or loss of use: one hand | Anatomical loss or loss of use: one leg & no knee action | Anatomical loss or loss of use: one arm & no elbow action | Anatomical loss of one leg: near hip | Anatomical loss of one arm: near shoulder |
|---|--|--|--|---|--------------------------------------|---|
| Anatomical loss or loss of use: one foot | L § 5.324(a) | L § 5.324(b) | L ^{1/2} § 5.325(a) | L ^{1/2} § 5.325(b) | M § 5.326(c) | M § 5.326(d) |
| Anatomical loss or loss of use: one hand | L § 5.324(b) | M § 5.326(a) | L ^{1/2} § 5.325(c) | M ^{1/2} § 5.327(a) | M § 5.326(f) | N § 5.328(b) |
| Anatomical loss or loss of use: one leg & no knee action | L ^{1/2} § 5.325(a) | L ^{1/2} § 5.325(c) | M § 5.326(b) | M § 5.326(e) | M ^{1/2} § 5.327(b) | M ^{1/2} § 5.327(c) |
| Anatomical loss or loss of use: one arm & no elbow action | L ^{1/2} § 5.325(b) | M ^{1/2} § 5.327(a) | M § 5.326(e) | N § 5.328(a) | M ^{1/2} § 5.327(d) | N ^{1/2} § 5.329 |
| Anatomical loss of one leg: near hip | M § 5.326(c) | M § 5.326(f) | M ^{1/2} § 5.327(b) | M ^{1/2} § 5.327(d) | N § 5.328(c) | N § 5.328(d) |
| Anatomical loss of one arm: near shoulder | M § 5.326(d) | N § 5.328(b) | M ^{1/2} § 5.327(c) | N ^{1/2} § 5.329 | N § 5.328(d) | O § 5.330(a) |

(e) *Table 2.* To determine the level of SMC payable when there are varying degrees of blindness in both eyes, identify the proper degree of blindness

for one eye down the left column of Table 2 and the proper degree of blindness for the other eye along the top row. The square where the column and

row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it.

TABLE 2—SMC BASED ON BILATERAL BLINDNESS

| Vision in one eye | Vision in other eye | | | | |
|--|--------------------------------|--|--------------------------------|--------------------------------|--------------------------------|
| | Visual acuity of 5/200 or less | Visual field contraction to 5° or less | Light perception only | No light perception | Anatomical loss of eye |
| Visual acuity of 5/200 or less | L § 5.324(c) | L § 5.324(c) | L ^{1/2} § 5.325(d) | M § 5.326(h) | M § 5.326(h) |
| Visual field contraction to 5° or less | L § 5.324(c) | L § 5.324(c) | L ^{1/2} § 5.325(d) | M § 5.326(h) | M § 5.326(h) |
| Light perception only | L ^{1/2} § 5.325(d) | L ^{1/2} § 5.325(d) | M § 5.326(g) | M ^{1/2} § 5.327(e) | M ^{1/2} § 5.327(e) |
| No light perception | M § 5.326(h) | M § 5.326(h) | M ^{1/2} § 5.327(e) | N § 5.328(e) | N § 5.328(e) |
| Anatomical loss of eye | M § 5.326(h) | M § 5.326(h) | M ^{1/2} § 5.327(e) | N § 5.328(e) | N § 5.328(e) |

(f) *Table 3.* To determine the level of SMC when there is bilateral blindness together with anatomical loss or loss of use of an extremity, identify the level of

SMC for bilateral blindness from Table 3 and locate it along the top row. Then identify the proper extremity loss down the left column. The square where the

column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it.

TABLE 3—SMC—BILATERAL BLINDNESS WITH ANATOMICAL LOSS OR LOSS OF USE OF EXTREMITY

| Additional disability | SMC for bilateral blindness alone | | | | |
|--|--|--|--|--|--|
| | “L” | “L½” | “M” | “M½” | “N” |
| Service-connected anatomical loss or loss of use of one foot rated less than 50%, and it is the only compensable disability other than blindness | L½ + K L § 5.331(c)(3); § 5.323(b)(2) | M + K L § 5.331(c)(3); § 5.323(b)(2) | M½ + K L § 5.331(c)(3); § 5.323(b)(2) | N + K L § 5.331(c)(3); § 5.323(b)(2) | N½ + K L § 5.331(c)(3); § 5.323(b)(2) |
| Service-connected anatomical loss or loss of use of one foot rated 50% or more, either alone or in combination with another disability | M + K L § 5.331(c)(2); § 5.323(b)(2) | M½ + K L § 5.331(c)(2); § 5.323(b)(2) | N + K L § 5.331(c)(2); § 5.323(b)(2) | N½ + K L § 5.331(c)(2); § 5.323(b)(2) | O L § 5.331(c)(2); |
| Service-connected anatomical loss or loss of use of one hand | M + K L § 5.331(c)(1); § 5.323(b)(2) | M½ + K L § 5.331(c)(1); § 5.323(b)(2) | N + K L § 5.331(c)(1); § 5.323(b)(2) | N½ + K L § 5.331(c)(1); § 5.323(b)(2) | O L § 5.331(c)(1) |

(g) *Table 4.* To determine the level of SMC when there is bilateral blindness together with deafness, identify the level of SMC for bilateral blindness from Table 4 and locate it along the top row. Then identify the proper degree of deafness down the left column. The square where the column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it.

TABLE 4—SPECIAL MONTHLY COMPENSATION—BILATERAL BLINDNESS WITH DEAFNESS

| Additional disability | SMC for bilateral blindness alone | | | | | |
|--|-----------------------------------|---------------------------|--------------------------------------|----------------------------|---------------------|---------------------|
| | “L” | “L½” | “M” under § 5.326(h) or (i) | “M” under § 5.326(g) | “M½” | “N” |
| Service-connected (SC) total deafness in one ear | L½ § 5.331(b)(1) | M § 5.331(b)(1) | M½ § 5.331(b)(1) | O § 5.330(c) | O § 5.330(c) | O § 5.330(c) |
| Bilateral deafness rated 10% or 20% (one or both ears SC) | L No additional SMC | L No additional SMC | L No additional SMC | M½ § 5.331(b)(2) | N § 5.331(b)(2) | N½ § 5.331(b)(2) |
| Bilateral deafness rated 30% (one or both ears SC) | M § 5.331(b)(3) | M½ § 5.331(b)(3) | N § 5.331(b)(3) | N § 5.331(b)(3) | N½ § 5.331(b)(3) | O § 5.331(b)(3) |
| Bilateral deafness rated 40% or 50% (one or both ears SC) | M § 5.331(b)(3) | M½ § 5.331(b)(3) | N § 5.331(b)(3) | O § 5.330(c) | O § 5.330(c) | O § 5.330(c) |
| Bilateral deafness rated 60% or more (one or both ears SC) | O § 5.330(b) | O § 5.330(b) | O § 5.330(b) | O § 5.330(b) | O § 5.330(b) | O § 5.330(b) |

(Authority: 38 U.S.C. 1114)

§ 5.335 Effective dates—Special monthly compensation under §§ 5.332 and 5.333.

(a) *General Rule.* Except as provided in § 3.400(o)(2) of this chapter (regarding effective dates for increased disability), and in paragraph (b) of this section, the effective date for an award of special monthly compensation (SMC) under §§ 5.332, “Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2),” or 5.333, “Special monthly compensation under 38 U.S.C. 1114(s),” will be the

date of receipt of the claim or the date entitlement arose, whichever is later.

(b) *Retroactive award of SMC.* When VA awards disability compensation, based on an original or reopened claim, for a retroactive period, VA will also award SMC for all or any part(s) of that retroactive period during which the veteran met the eligibility requirements for SMC.

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

§ 5.336 Effective dates—additional compensation for regular aid and attendance payable for a veteran’s spouse under § 5.321.

(a) *Award of regular aid and attendance.* (1) The effective date for an award of additional compensation payable to a veteran because of the veteran’s spouse’s need for regular aid and attendance will be the date of receipt of the claim or the date entitlement arose, whichever is later.

(2) When disability compensation, based on an original or reopened claim, is awarded retroactive to an effective date prior to the date of receipt of the

claim, regular aid and attendance for the spouse will also be awarded for any part of the prior period for which entitlement to regular aid and attendance for the spouse is established.

(b) *Discontinuance of award of regular aid and attendance.* The effective date for the discontinuance of regular aid and attendance will be the end of the month in which VA stops paying the aid and attendance.

Cross References: § 3.501(b)(3) of this chapter, "Veterans [effective dates for reduction or discontinuance of benefits]." (Authority: 38 U.S.C. 501, 5110(b)(1), (2))

§ 5.337 Award of special monthly compensation based on the need for regular aid and attendance during period of hospitalization.

An award of special monthly compensation (SMC) based on a need for regular aid and attendance under § 5.324, "Special monthly compensation under 38 U.S.C. 1114(I)," that is made for a period during which the veteran is or was receiving hospital, institutional, or domiciliary care at VA expense will be effective on the date of discharge or release from hospitalization. If the award is retroactive, VA will not provide compensation based on the need for regular aid and attendance for the period during which the veteran was receiving hospital, institutional, or domiciliary care at VA expense.

§§ 5.338–5.339 [Reserved]

Tuberculosis

§ 5.340 Pulmonary tuberculosis shown by X-ray in active service.

(a) *Active disease.* X-ray evidence alone may be adequate for grant of direct service connection for pulmonary tuberculosis. When under consideration, all available service department films and subsequent films will be secured and read by specialists at designated stations who should have a current examination report and X-ray. Resulting interpretations of service films will be accorded the same consideration for service connection purposes as if clinically established, however, a compensable rating will not be assigned prior to establishment of an active condition by approved methods.

(b) *Inactive disease.* Where the veteran was examined at the time of entrance into active service but no X-ray was made, or if made, is not available and there was no notation or other evidence of active or inactive re-infection type pulmonary tuberculosis existing prior to such entrance, it will be assumed that the condition occurred during service and direct service connection will be in order for inactive

pulmonary tuberculosis shown by X-ray evidence during service in the manner prescribed in paragraph (a) of this section, unless lesions are first shown so soon after entry on active service as to compel the conclusion, on the basis of sound medical principles, that they existed prior to entry on active service.

(c) *Primary lesions.* Healed primary type tuberculosis shown at the time of entrance into active service will not be taken as evidence to rebut direct or presumptive service connection for active re-infection type pulmonary tuberculosis.

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

§ 5.341 Presumptive service connection for tuberculosis disease; wartime and service after December 31, 1946.

(a) *Pulmonary tuberculosis.* (1) Evidence of activity on comparative study of X-ray films showing pulmonary tuberculosis within the 3-year presumptive period provided by § 5.261(d) will be taken as establishing service connection for active pulmonary tuberculosis subsequently diagnosed by approved methods but service connection and rating may be assigned only from the date of such diagnosis or other evidence of clinical activity.

(2) A notation of inactive tuberculosis of the re-infection type at induction or enlistment definitely prevents the grant of service connection under § 5.261 for active tuberculosis, regardless of the fact that it was shown within the appropriate presumptive period.

(b) *Pleurisy with effusion without obvious cause.* Pleurisy with effusion with evidence of diagnostic studies ruling out obvious nontuberculous causes will qualify as active tuberculosis. The requirements for presumptive service connection will be the same as those for tuberculous pleurisy.

(c) *Tuberculous pleurisy and endobronchial tuberculosis.* Tuberculous pleurisy and endobronchial tuberculosis fall within the category of pulmonary tuberculosis for the purpose of service connection on a presumptive basis. Either will be held incurred in service when initially manifested within the 3-year presumptive period provided by § 5.261(d).

(d) *Miliary tuberculosis.* Service connection for miliary tuberculosis involving the lungs is to be determined in the same manner as for other active pulmonary tuberculosis.

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

§ 5.342 Initial grant following inactivity of tuberculosis.

When service connection is granted initially on an original or reopened claim for pulmonary or nonpulmonary tuberculosis and there is satisfactory evidence that the condition was active previously but is now inactive (arrested), it will be presumed that the disease continued to be active for 1 year after the last date of established activity, provided there is no evidence to establish activity or inactivity in the intervening period. For a veteran entitled to receive compensation on August 19, 1968, the beginning date of graduated ratings will commence at the end of the 1-year period. For a veteran who was not receiving or entitled to receive compensation on August 19, 1968, ratings will be assigned in accordance with the Schedule for Rating Disabilities in part 4 of this chapter. This section is not applicable to running award cases.

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

§ 5.343 Effect of diagnosis of active tuberculosis.

(a) *Service diagnosis.* Service department diagnosis of active pulmonary tuberculosis will be accepted unless a board of medical examiners, a Clinic Director, or Chief, Outpatient Service certifies, after considering all the evidence, including the favoring or opposing tuberculosis and activity, that such diagnosis was incorrect. Doubtful cases may be referred to the Under Secretary for Health in Central Office.

(b) *Department of Veterans Affairs diagnosis.* Diagnosis of active pulmonary tuberculosis by the medical authorities of VA as the result of examination, observation, or treatment will be accepted for rating purposes. In a case where there is no such diagnosis, but there is evidence that the veteran has tuberculosis, the case will be referred to the Clinic Director or Chief, Outpatient Service, and, if necessary, to the Under Secretary for Health in Central Office.

(c) *Private physician's diagnosis.* Diagnosis of active pulmonary tuberculosis by private physicians based on their examination, observation or treatment will not be accepted to show the disease was initially manifested within the presumptive period after discharge from active service unless confirmed by acceptable clinical, X-ray or laboratory studies, or by findings of active tuberculosis based upon acceptable hospital observation or treatment.

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

§ 5.344 Determination of inactivity (complete arrest) of tuberculosis.

(a) *Pulmonary tuberculosis.* A veteran shown to have had pulmonary tuberculosis will be held to have reached a condition of "complete arrest" when a diagnosis of inactive is made.

(b) *Nonpulmonary disease.*

Determination of complete arrest of nonpulmonary tuberculosis requires absence of evidence of activity for 6 months. If there are two or more foci of such tuberculosis, one of which is active, the condition will not be considered to be inactive until the tuberculous process has reached arrest in its entirety.

(c) *Arrest following surgery.* Where there has been surgical excision of the lesion or organ, the date of complete arrest will be the date of discharge from the hospital, or 6 months from the date of excision, whichever is later.

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

§ 5.345 Changes from activity in pulmonary tuberculosis pension cases.

A permanent and total disability rating in effect during hospitalization will not be discontinued before hospital discharge based on a change in classification from active. At hospital discharge, the permanent and total rating will be discontinued unless the medical evidence does not support a finding of complete arrest (see § 5.344) or where complete arrest is shown but the medical authorities recommend that employment not be resumed or be resumed only for short hours (not more than 4 hours a day for a 5-day week). If either of the two aforementioned conditions is met, discontinuance will be deferred pending examination in 6 months. Although complete arrest may be established upon that examination, the permanent and total rating may be extended for a further period of 6 months provided the veteran's employment is limited to short hours as recommended by the medical authorities (not more than 4 hours a day for a 5-day week). Similar extensions may be granted under the same conditions at the end of 12 and 18-month periods. At the expiration of 24 months after hospitalization, the case will be considered under § 3.321(b) of this chapter if continued short hours of employment are recommended or if other evidence warrants submission.

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

§ 5.346 Tuberculosis and compensation under 38 U.S.C. 1114(q) and 1156.

(a) *General.* Any veteran who, on August 19, 1968, was receiving or entitled to receive compensation for

active or inactive (arrested) tuberculosis may receive compensation under 38 U.S.C. 1114(q) and 1156 as in effect before August 20, 1968.

(b) *Special monthly compensation (SMC) under 38 U.S.C. 1114(q) for inactive tuberculosis (complete arrest).*

(1)(i) For a veteran who was receiving or entitled to receive compensation for tuberculosis on August 19, 1968, the minimum monthly rate is \$67. This minimum SMC is not to be combined with or added to any other disability compensation. The rating criteria for determining inactivity of tuberculosis are set out in § 5.344.

(ii) The effective date for special monthly compensation (SMC) under paragraph (b)(1)(i) of this section will be the date the graduated rating of the disability or compensation for that degree of disablement combined with other service-connected disabilities provides compensation payable at a rate less than \$67.

(2) For a veteran who was not receiving or entitled to receive compensation for tuberculosis on August 19, 1968, the SMC authorized by paragraph (b)(1) of this section is not payable.

(Authority: 38 U.S.C. 501(a); Pub. L. 90-493, 82 Stat. 809)

§ 5.347 Continuance of a total disability rating for service-connected tuberculosis.

In service-connected cases, ratings for active or inactive tuberculosis will be governed by the Schedule for Rating Disabilities in part 4 of this chapter. Where in the opinion of the agency of original jurisdiction the veteran at the expiration of the period during which a total rating is provided will not be able to maintain inactivity of the disease process under the ordinary conditions of life, the case will be submitted under § 3.321(b) of this chapter.

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

§§ 5.348–5.349 [Reserved]

Injury or Death Due to Hospitalization or Treatment

§ 5.350 Benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.

(a) *Claims subject to this section.* (1) *General.* Except as provided in paragraph (a)(2) of this section, this section applies to claims received by VA after September 30, 1997. This includes original claims and claims to reopen or otherwise readjudicate a previous claim for benefits under 38 U.S.C. 1151 or its predecessors. The effective date of

benefits is subject to § 5.351. For claims received by VA before October 1, 1997, see § 3.358 of this chapter.

(2) *Compensated Work Therapy.* With respect to claims alleging disability or death due to compensated work therapy, this section applies to claims that were pending before VA on November 1, 2000, or that were received by VA after that date. The effective date of benefits is subject to §§ 5.152(a) and 5.351, and shall not be earlier than November 1, 2000.

(b) *Determining whether a veteran has an additional disability.* To determine whether a veteran has an additional disability, VA will compare the veteran's condition immediately before the beginning of the hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy (CWT) program upon which the claim is based to the veteran's condition after such care, treatment, examination, services, or program has stopped. VA considers each involved body part or system separately.

(c) *Establishing the cause of additional disability or death.* Claims based on additional disability or death due to hospital care, medical or surgical treatment, or examination must meet the causation requirements of this paragraph and paragraph (d)(1) or (d)(2) of this section. Claims based on additional disability or death due to training and rehabilitation services or CWT program must meet the causation requirements of paragraph (d)(3) of this section.

(1) *Actual causation required.* To establish causation, the evidence must show that the hospital care, medical or surgical treatment, or examination resulted in the veteran's additional disability or death. Merely showing that a veteran received care, treatment, or examination and that the veteran has an additional disability or died does not establish cause.

(2) *Continuance or natural progress of injury or disease.* Hospital care, medical or surgical treatment, or examination cannot cause the continuance or natural progress of injury or disease for which the care, treatment, or examination was furnished unless VA's failure to timely diagnose and properly treat the disease or injury proximately caused the continuance or natural progress. The provision of training and rehabilitation services or CWT program cannot cause the continuance or natural progress of injury or disease for which the services were provided.

(3) *Veteran's failure to follow medical instructions.* Additional disability or death caused by a veteran's failure to

follow properly given medical instructions is not caused by hospital care, medical or surgical treatment, or examination.

(d) *Establishing the proximate cause of additional disability or death.* The proximate cause of disability or death is the action or event that directly caused the disability or death, as distinguished from a remote contributing cause.

(1) *Care, treatment, or examination.* To establish that carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on VA's part in furnishing hospital care, medical or surgical treatment, or examination proximately caused a veteran's additional disability or death, it must be shown that the hospital care, medical or surgical treatment, or examination caused the veteran's additional disability or death (as explained in paragraph (c) of this section); and

(i) VA failed to exercise the degree of care that would be expected of a reasonable healthcare provider; or

(ii) VA furnished the hospital care, medical or surgical treatment, or examination without the veteran's or, in appropriate cases, the veteran's representative's informed consent. To determine whether there was informed consent, VA will consider whether the healthcare providers substantially complied with the requirements of § 17.32 of this chapter. Minor deviations from the requirements of § 17.32 of this chapter that are immaterial under the circumstances of a case will not defeat a finding of informed consent. Consent may be express (*i.e.*, given orally or in writing) or implied under the circumstances specified in § 17.32(b) of this chapter, as in emergency situations.

(2) *Events not reasonably foreseeable.* Whether the proximate cause of a veteran's additional disability or death was an event not reasonably foreseeable is in each claim to be determined based on what a reasonable health care provider would have foreseen. The event need not be completely unforeseeable or unimaginable but must be one that a reasonable healthcare provider would not have considered an ordinary risk of the treatment provided. In determining whether an event was reasonably foreseeable, VA will consider whether the risk of that event was the type of risk that a reasonable health care provider would have disclosed in connection with the informed consent procedures of § 17.32 of this chapter.

(3) *Training and rehabilitation services or compensated work therapy program.* To establish that the provision of training and rehabilitation services or

a CWT program proximately caused a veteran's additional disability or death, it must be shown that the veteran's participation in an essential activity or function of the training, services, or CWT program provided or authorized by VA proximately caused the disability or death. The veteran must have been participating in such training, services, or CWT program provided or authorized by VA as part of an approved rehabilitation program under 38 U.S.C. chapter 31 or as part of a CWT program under 38 U.S.C. 1718. It need not be shown that VA approved that specific activity or function, as long as the activity or function is generally accepted as being a necessary component of the training, services, or CWT program that VA provided or authorized.

(e) *Department employees and facilities.* (1) A Department employee is an individual:

(i) Who is appointed by the Department in the civil service under title 38, United States Code, or title 5, United States Code, as an employee as defined in 5 U.S.C. 2105;

(ii) Who is engaged in furnishing hospital care, medical or surgical treatment, or examinations under authority of law; and

(iii) Whose day-to-day activities are subject to supervision by the Secretary of Veterans Affairs.

(2) A Department facility is a facility over which the Secretary of Veterans Affairs has direct jurisdiction.

(f) *Activities that are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility.* The following are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility within the meaning of 38 U.S.C. 1151(a):

(1) Hospital care or medical services furnished under a contract made under 38 U.S.C. 1703.

(2) Nursing home care furnished under 38 U.S.C. 1720.

(3) Hospital care or medical services, including, but not limited to, examination, provided under 38 U.S.C. 8153, in a facility over which the Secretary does not have direct jurisdiction.

(g) *Benefits payable under 38 U.S.C. 1151 for a veteran's death after December 31, 1956.* The benefit payable under 38 U.S.C. 1151(a) to an eligible survivor for a veteran's death occurring after December 31, 1956, is dependency and indemnity compensation.

(Authority: 38 U.S.C. 1151)

§ 5.351 Effective dates for awards of benefits under 38 U.S.C. 1151(a).

The effective date for the award of compensation under § 5.350 based on additional disability or death due to hospitalization, medical or surgical treatment, examinations, vocational rehabilitation training, or compensated work therapy will be one of the following:

(a) *Disability.* Date injury or aggravation was suffered if a claim is received within one year after that date; otherwise, date of receipt of the claim.

(b) *Death.* First day of the month in which the veteran's death occurred, if a claim is received within one year after the date of death; otherwise, date of receipt of the claim.

(c) *Compensated work therapy.* For an award of compensation under § 5.350 based on additional disability or death due to compensated work therapy, see also § 5.350(a)(2).

(Authority: 38 U.S.C. 5110(c))

§ 5.352 Effect on benefits awarded under 38 U.S.C. 1151(a) of Federal Tort Claims Act compromises, settlements, and judgments entered after November 30, 1962.

(a) *Claims subject to this section.* This section applies to claims received by VA after September 30, 1997. This includes original claims and claims to reopen or otherwise readjudicate a previous claim for benefits under 38 U.S.C. 1151(a) or its predecessors.

(b) *Offset of veterans' awards of compensation.* If a veteran's disability is the basis of a judgment under 28 U.S.C. 1346(b) awarded, or a settlement or compromise under 28 U.S.C. 2672 or 2677 entered, after November 30, 1962, the amount to be offset under 38 U.S.C. 1151(b) from any compensation awarded under 38 U.S.C. 1151(a) is the entire amount of the veteran's share of the judgment, settlement, or compromise, including the veteran's proportional share of attorney fees.

(c) *Offset of survivors' awards of dependency and indemnity compensation.* If a veteran's death is the basis of a judgment under 28 U.S.C. 1346(b) awarded, or a settlement or compromise under 28 U.S.C. 2672 or 2677 entered, after November 30, 1962, the amount to be offset under 38 U.S.C. 1151(b) from any dependency and indemnity compensation awarded under 38 U.S.C. 1151(a) to a survivor is only the amount of the judgment, settlement, or compromise representing damages for the veteran's death the survivor receives in an individual capacity or as distribution from the decedent veteran's estate of sums included in the judgment, settlement, or compromise to compensate for harm

suffered by the survivor, plus the survivor's proportional share of attorney fees.

(d) *Offset of structured settlements.*

This paragraph applies if a veteran's disability or death is the basis of a structured settlement or structured compromise under 28 U.S.C. 2672 or 2677 entered after November 30, 1962.

(1) *The amount to be offset.* The amount to be offset under 38 U.S.C. 1151(b) from benefits awarded under 38 U.S.C. 1151(a) is the veteran's or survivor's proportional share of the cost to the United States of the settlement or compromise, including the veteran's or survivor's proportional share of attorney fees.

(2) *When the offset begins.* The offset of benefits awarded under 38 U.S.C. 1151(a) begins the first month after the structured settlement or structured compromise has become final that such benefits would otherwise be paid.

(Authority: 38 U.S.C. 1151)

§ 5.353 Effect on benefits awarded under 38 U.S.C. 1151(a) of Federal Tort Claims Act administrative awards, compromises, settlements, and judgments finalized before December 1, 1962.

(a) *Claims subject to this section.* This section applies to claims received by VA after September 30, 1997. This includes original claims and claims to reopen or otherwise readjudicate a previous claim for benefits under 38 U.S.C. 1151(a) or its predecessors.

(b) *Effect of administrative awards, compromises, settlements, or judgments.* If a veteran's disability or death was the basis of an administrative award under 28 U.S.C. 1346(b) made, or a settlement or compromise under 28 U.S.C. 2672 or 2677 finalized, before December 1, 1962, VA may not award benefits under 38 U.S.C. 1151(a) for any period after such award, settlement, or compromise was made or became final. If a veteran's disability or death was the basis of a judgment under 28 U.S.C. 1346(b) that became final before December 1, 1962, VA may award benefits under 38 U.S.C. 1151(a) for the disability or death unless the terms of the judgment provide otherwise.

(Authority: 38 U.S.C. 1151)

§§ 5.354–5.359 [Reserved]

Ratings for Healthcare Eligibility Only

§ 5.360 Service connection of dental conditions for treatment purposes.

(a) *General Principles.* Eligibility requirements for dental treatment are set forth in § 17.161 of this chapter.

(b) *Conditions service connected for treatment purposes.* VA will not pay compensation for any of the following

dental conditions; however, these conditions may be service connected solely for providing outpatient dental treatment:

- (1) Treatable carious teeth.
- (2) Replaceable missing teeth.
- (3) Dental or alveolar abscesses.
- (4) Chronic periodontal disease.

(c) *Conditions not service connected for treatment purposes.* The following conditions will not be service connected for outpatient dental treatment purposes:

- (1) Calculus.
- (2) Acute periodontal disease.
- (3) Teeth noted at entry as nonrestorable, regardless of treatment during service.
- (4) Teeth noted as missing at entry, regardless of treatment during service.

(d) *Rating principles.* VA will determine service connection for establishing eligibility for outpatient dental treatment using the following principles:

(1) VA will consider each defective or missing tooth and each disease of the teeth and periodontal tissues separately to determine whether the condition was incurred or aggravated in line of duty during active service.

(2) VA will determine whether the condition is due to combat or other in-service trauma.

(3) VA will consider whether the veteran was interned as a prisoner of war.

(4) VA will consider the condition of teeth and periodontal tissues at the time of entry into active duty.

(e) *Aggravation.* Notations of conditions made at entry to service and treatment of such conditions during service (including, but not limited to, fillings, extractions, and placement of a prosthesis) will not be considered as evidence of aggravation, unless additional pathology developed after 180 days or more of active military service.

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

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

(3) Teeth noted as carious but restorable at entry will not be service connected for treatment purposes on the basis that they were filled during service. Service connection may be established for treatment purposes if new caries developed 180 days or more after such teeth were filled.

(4) Teeth noted as carious but restorable at entry will be service

connected for treatment purposes if extraction was required after 180 days or more of active military service.

(5) Third molars will not be service connected for treatment purposes unless disease or pathology of the tooth developed after 180 days or more of active military service, or was due to combat or in-service trauma.

(6) Impacted or malposed teeth and other developmental defects will not be service connected for treatment purposes unless disease or pathology of the teeth developed after 180 days or more of active military service.

(7) Teeth extracted because of chronic periodontal disease will be service connected for treatment purposes only if they were extracted after 180 days or more of active military service.

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

§ 5.361 Healthcare eligibility of persons administratively discharged under other-than-honorable conditions.

(a) *General.* VA will provide healthcare and related benefits authorized by chapter 17 of title 38 U.S.C. to certain former service persons with administrative discharges under other-than-honorable conditions for any disability incurred or aggravated during active military service in line of duty.

(b) *Eligibility criteria.* VA will use the same eligibility criteria that are applicable to determinations of incurrence in service and of incurrence in the line of duty when there is no character of discharge bar to determine a claimant's health-care eligibility.

(c) *Characterization of discharge.* VA will not furnish healthcare and related benefits for any disability incurred in or aggravated during a period of service terminated by a bad conduct discharge or when one of the character of discharge bars listed in § 3.12(c) of this chapter applies.

(Authority: Pub. L. 95–126, 91 Stat. 1106)

§ 5.362 Presumption of service incurrence of active psychosis for purposes of hospital, nursing home, domiciliary, and medical care.

(a) *Presumption of service incurrence for active psychosis.* For purposes of determining eligibility for hospital, nursing home, domiciliary, and medical care under chapter 17 of title 38, United States Code, VA will presume incurrence in active military service any active psychosis developed by a veteran under the circumstances described in paragraph (b) of this section.

(b) *Requirements.* In order to be entitled to a presumption of service incurrence for active psychosis for purposes of this section, a veteran must have served during one of the periods of

war specified in the following table and developed the psychosis within two years after discharge from active military service and before the date specified in the following table that corresponds to the period of war during which the veteran served.

| | |
|-----------------------------|--|
| Veterans who served during: | Must have developed active psychosis within two years after discharge from active military service and before: |
| World War II | July 26, 1949. |
| Korean conflict | February 1, 1957. |
| Vietnam era | May 8, 1977. |
| Persian Gulf War | The end of two-year period beginning on the last day of the Persian Gulf War. |

Cross Reference: § 5.20, "Dates of periods of war."

(Authority: 38 U.S.C. 101(16), 105, 501(a), 1702)

§ 5.363 Determination of service connection for former members of the Armed Forces of Czechoslovakia or Poland.

The agency of original jurisdiction will determine whether the condition for which treatment is claimed by former members of the Armed Forces of Czechoslovakia or Poland under 38 U.S.C. 109(c) is service connected. This determination will be made using the same criteria that apply to determinations of service connection based on service in the Armed Forces of the United States.

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

§ 5.364 [Reserved]

Miscellaneous Service-Connection Regulations

§ 5.365 Claims based on the effects of tobacco products.

(a) Except as provided in paragraph (b) of this section, a disability or death will not be service connected on any basis, including secondary service connection under § 3.310 of this chapter, if it resulted from injury or disease attributable to the veteran's use during service of tobacco products, such as cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco.

(b) Paragraph (a) of this section does not prohibit service connection if any of the following are true:

(1) The disability or death resulted from injury or disease that is otherwise shown to have been incurred or aggravated during service, which means that the disability or death can be service connected on some basis other than the veteran's use of tobacco

products during service or that the disability became manifest or death occurred during service;

(2) The disability or death resulted from injury or disease that appeared to the required degree of disability within any applicable presumptive period under §§ 5.260, 5.261, 5.262, 5.263, 5.264, 5.265, 5.267, or 5.268; or

(3) Service connection is established for ischemic heart disease or other cardiovascular disease under § 3.310(c) of this chapter as secondary to a disability not caused by the use of tobacco products during service.

(Authority: 38 U.S.C. 501(a), 1103, 1103 note)

§ 5.366 Disability due to impaired hearing.

VA will consider impaired hearing to be a disability when any of the following three criteria is satisfied:

(a) The auditory threshold in any of the frequencies of 500, 1000, 2000, 3,000, or 4000 Hertz is 40 decibels or greater;

(b) The auditory thresholds for at least three of the frequencies of 500, 1000, 2000, 3000, or 4000 Hertz are 26 decibels or greater; or

(c) Speech recognition scores using the Maryland CNC Test are less than 94 percent.

(Authority: 38 U.S.C. 1110)

§ 5.367 Civil service preference ratings.

For certifying civil service disability preference only, a service-connected disability may be assigned a rating of less than 10 percent. Any directly or presumptively service-connected injury or disease that exhibits some extent of actual impairment may be held to exist at the level of less than 10 percent. For disabilities incurred in combat, however, no actual impairment is required.

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

§ 5.368 Basic eligibility determinations: home loan and education benefits.

(a) *Loans.* (1) *General.* Eligibility of certain veterans (listed in paragraph (a)(2) of this section) for a loan under 38 U.S.C. chapter 37 requires a determination that the veteran was discharged or released because of a service-connected disability, or that the official service department records show that he or she had, at the time of separation from service, a service-connected disability that in medical judgment would have warranted a discharge for disability. These determinations are subject to the presumption of soundness under § 3.304(b) of this chapter.

Determinations based on World War II, Korean conflict, and Vietnam era service

are also subject to the presumption of aggravation under § 3.306(b) of this chapter, and determinations based on service after January 31, 1955, and before August 5, 1964; or after May 7, 1975, are subject to the presumption of aggravation under § 3.306 (a) and (c) of this chapter. This paragraph is also applicable, regardless of length of service, in determining eligibility to the maximum period of entitlement based on discharge or release for a service-connected disability. (See § 5.39, "Minimum active duty service requirement for VA benefits.")

(2) *Veterans affected.* The veterans affected by this paragraph are:

(i) Veteran of World War II, the Korean conflict, or the Vietnam era who served for less than 90 days; or

(ii) Veterans who served less than 181 days on active duty as defined in §§ 36.4301 and 36.4501, and whose dates of service were:

(A) After July 25, 1947, and before June 27, 1950;

(B) After January 31, 1955, and before to August 5, 1964; or

(C) After May 7, 1975.

(Authority: 38 U.S.C. 3702, 3707)

(b) *Veterans' educational assistance.*

(1) A determination is required as to whether a veteran was discharged or released from active duty service because of a service-connected disability, or whether the official service department records show that the veteran had at time of separation from service a service-connected disability which in medical judgment would have warranted discharge for disability, whenever any of the following circumstances exist:

(i) The veteran applies for benefits under 38 U.S.C. chapter 32, the minimum active duty service requirements of 38 U.S.C. 5303A apply to him or her, and the veteran would be eligible for such benefits only if:

(A) He or she was discharged or released from active duty for a disability incurred or aggravated in the line of duty; or

(B) He or she has a disability that VA has determined to be compensable under 38 U.S.C. chapter 11; or

(ii) The veteran applies for benefits under 38 U.S.C. chapter 30 and:

(A) The evidence of record does not clearly show either that the veteran was discharged or released from active duty for disability or that the veteran's discharge or release from active duty was unrelated to disability, and

(B) The veteran is eligible for basic educational assistance except for the minimum length of active duty service requirements of § 21.7042(a) or § 21.7044(a) of this chapter.

(2) A determination is required as to whether a veteran was discharged or released from service in the Selected Reserve for a service-connected disability or for a medical condition which preexisted the veteran's having become a member of the Selected Reserve and which VA determines is not service connected when the veteran applies for benefits under 38 U.S.C. chapter 30 and:

(i) The veteran would be eligible for basic educational assistance under that chapter only if he or she was discharged from the Selected Reserve for a service-connected disability or for a medical condition which preexisted the veteran's having become a member of

the Selected Reserve and which VA finds is not service connected, or

(ii) The veteran is entitled to basic educational assistance and would be entitled to receive it at the rates stated in § 21.7136(a) or § 21.7137(a) of this chapter only if he or she was discharged from the Selected Reserve for a service-connected disability or for a medical condition which preexisted the veteran's having become a member of the Selected Reserve and which VA finds is not service connected.

(3) A determination is required as to whether a reservist has been unable to pursue a program of education due to a disability which has been incurred in or aggravated by service in the Selected Reserve when:

(i) The reservist is otherwise entitled to educational assistance under 10 U.S.C. chapter 1606, and

(ii) He or she applies for an extension of his or her eligibility period.

(4) The determinations required by paragraphs (b)(1) through (b)(3) of this section are subject to the presumptions of soundness under § 3.304(b) of this chapter and aggravation under § 3.306(a) and (c) of this chapter, based on service rendered after May 7, 1975.

(Authority: 38 U.S.C. 3011(a)(1)(A)(ii), 3012(b)(1), 3202(1)(A), 10 U.S.C. 16133(b))

§ 5.369 [Reserved]

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