§ 3.815 Monetary allowance under 38 U.S.C. chapter 18 for an individual with disability from covered birth defects whose biological mother is or was a Vietnam veteran; identification of covered birth defects.

(a) Monthly monetary allowance—

(1) General. VA will pay a monthly monetary allowance under subchapter II of 38 U.S.C. chapter 18 to or for an individual whose biological mother is or was a Vietnam veteran and who VA has determined to have disability resulting from one or more covered birth defects. Except as provided in paragraph (a)(3) of this section, the amount of the monetary allowance paid will be based upon the level of such disability suffered by the individual, as determined in accordance with the provisions of paragraph (e) of this section.

(2) Affirmative evidence of cause other than mother's service during Vietnam era. No monetary allowance will be provided under this section based on a particular birth defect of an individual in any case where affirmative evidence establishes that the birth defect results from a cause other than the active military, naval, or air service of the individual’s mother during the Vietnam era and, in determining the level of disability for an individual with more than one birth defect, the particular defect resulting from other causes will be excluded from consideration. This will not prevent VA from paying a monetary allowance under this section for other birth defects.

(3) Nonduplication; spina bifida. In the case of an individual whose only covered birth defect is spina bifida, a monetary allowance will be paid under § 3.814, and not under this section, nor...
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will the individual be evaluated for disability under this section. In the case of an individual who has spina bifida and one or more additional covered birth defects, a monetary allowance will be paid under this section and the amount of the monetary allowance will be not less than the amount the individual would receive if his or her only covered birth defect were spina bifida. If, but for the individual’s one or more additional covered birth defects, the monetary allowance payable to or for the individual would be based on an evaluation at Level I, II, or III, respectively, under §3.814(d), the evaluation of the individual’s level of disability under paragraph (e) of this section will be not less than Level II, III, or IV, respectively.

(b) No effect on other VA benefits. Receipt of a monetary allowance under 38 U.S.C. chapter 18 will not affect the right of the individual, or the right of any person based on the individual’s relationship to that person, to receive any other benefit to which the individual, or that person, may be entitled under any law administered by VA.

(c) Definitions—(1) Vietnam veteran. For the purposes of this section, the term Vietnam veteran means a person who performed active military, naval, or air service in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975, without regard to the characterization of the person’s service. Service in the Republic of Vietnam includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

(2) Individual. For the purposes of this section, the term individual means a person, regardless of age or marital status, whose biological mother is or was a Vietnam veteran and who was conceived after the date on which the veteran first entered the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975. Notwithstanding the provisions of §3.204(a)(1), VA will require the types of evidence specified in §§3.209 and 3.210 sufficient to establish that a person is the biological son or daughter of a Vietnam veteran.

(3) Covered birth defect. For the purposes of this section, the term covered birth defect means any birth defect identified by VA as a birth defect that is associated with the service of women Vietnam veterans in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975, and that has resulted, or may result, in permanent physical or mental disability. However, the term covered birth defect does not include a condition due to a:

(i) Familial disorder;  
(ii) Birth-related injury; or  
(iii) Fetal or neonatal infirmity with well-established causes.

(d) Identification of covered birth defects. All birth defects that are not excluded under the provisions of this paragraph are covered birth defects.

(1) Covered birth defects include, but are not limited to, the following (however, if a birth defect is determined to be familial in a particular family, it will not be a covered birth defect):

(i) Achondroplasia;  
(ii) Cleft lip and cleft palate;  
(iii) Congenital heart disease;  
(iv) Congenital talipes equinovarus (clubfoot);  
(v) Esophageal and intestinal atresia;  
(vi) Hallerman-Streiff syndrome;  
(vii) Hip dysplasia;  
(viii) Hirschprung’s disease (congenital megacolon);  
(ix) Hydrocephalus due to aqueductal stenosis;  
(x) Hypospadias;  
(xi) Imperforate anus;  
(xii) Neural tube defects (including spina bifida, encephalocele, and anencephaly);  
(xiii) Poland syndrome;  
(xiv) Pyloric stenosis;  
(xv) Syndactyly (fused digits);  
(xvi) Tracheoesophageal fistula;  
(xvii) Undescended testicle; and  
(xviii) Williams syndrome.

(2) Birth defects that are familial disorders, including hereditary genetic conditions, are not covered birth defects. Familial disorders include, but are not limited to, the following, unless the birth defect is not familial in a particular family:

(i) Albinism;  
(ii) Alpha-antitrypsin deficiency;  
(iii) Crouzon syndrome;
(iv) Cystic fibrosis;
(v) Duchenne’s muscular dystrophy;
(vi) Galactosemia;
(vii) Hemophilia;
(viii) Huntington’s disease;
(ix) Hurler syndrome;
(x) Kartagener’s syndrome (Primary Ciliary Dyskinesia);
(xi) Marfan syndrome;
(xii) Neurofibromatosis;
(xiii) Osteogenesis imperfecta;
(xiv) Pectus excavatum;
(xv) Phenylketonuria;
(xvi) Sickle cell disease;
(xvii) Tay-Sachs disease;
(xviii) Thalassemia; and
(xix) Wilson’s disease.
(3) Conditions that are congenital malignant neoplasms are not covered birth defects. These include, but are not limited to, the following:
(i) Medulloblastoma;
(ii) Neuroblastoma;
(iii) Retinoblastoma;
(iv) Teratoma; and
(v) Wilm’s tumor.
(4) Conditions that are chromosomal disorders are not covered birth defects. These include, but are not limited to, the following:
(i) Down syndrome and other Trisomies;
(ii) Fragile X syndrome;
(iii) Klinefelter’s syndrome; and
(iv) Turner’s syndrome.
(5) Conditions that are due to birth-related injury are not covered birth defects. These include, but are not limited to, the following:
(i) Brain damage due to anoxia during or around time of birth;
(ii) Cerebral palsy due to birth trauma, (iii) Facial nerve palsy or other peripheral nerve injury;
(iv) Fractured clavicle; and
(v) Horner’s syndrome due to forceful manipulation during birth.
(6) Conditions that are due to a fetal or neonatal infirmity with well-established causes or that are miscellaneous pediatric conditions are not covered birth defects. These include, but are not limited to, the following:
(i) Asthma and other allergies;
(ii) Effects of maternal infection during pregnancy, including but not limited to, maternal rubella, toxoplasmosis, or syphilis;
(iii) Fetal alcohol syndrome or fetal effects of maternal drug use;
(iv) Hyaline membrane disease;
(v) Maternal-infant blood incompatibility;
(vi) Neonatal infections;
(vii) Neonatal jaundice;
(viii) Post-infancy deafness/hearing impairment (onset after the age of one year);
(ix) Prematurity; and
(x) Refractive disorders of the eye.
(7) Conditions that are developmental disorders are not covered birth defects. These include, but are not limited to, the following:
(i) Attention deficit disorder;
(ii) Autism;
(iii) Epilepsy diagnosed after infancy (after the age of one year);
(iv) Learning disorders; and
(v) Mental retardation (unless part of a syndrome that is a covered birth defect).
(8) Conditions that do not result in permanent physical or mental disability are not covered birth defects. These include, but are not limited to:
(i) Conditions rendered non-disabling through treatment;
(ii) Congenital heart problems surgically corrected or resolved without disabling residuals;
(iii) Heart murmurs unassociated with a diagnosed cardiac abnormality;
(iv) Hemangiomas that have resolved with or without treatment; and
(v) Scars (other than of the head, face, or neck) as the only residual of corrective surgery for birth defects.

(e) Disability evaluations. Whenever VA determines, upon receipt of competent medical evidence, that an individual has one or more covered birth defects, VA will determine the level of disability currently resulting. In combination, from the covered birth defects and associated disabilities. No monetary allowance will be payable under this section if VA determines under this paragraph that an individual has no current disability resulting from the covered birth defects, unless VA determines that the provisions of paragraph (a)(3) of this section are for application. Except as otherwise provided in paragraph (a)(3) of this section, VA will determine the level of disability as follows:

(1) Levels of disability.
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(i) Level 0. The individual has no current disability resulting from covered birth defects.

(ii) Level I. The individual meets one or more of the following criteria:

(A) The individual has residual physical or mental effects that only occasionally or intermittently limit or prevent some daily activities; or

(B) The individual has disfigurement or scarring of the head, face, or neck without gross distortion or gross asymmetry of any facial feature (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(iii) Level II. The individual meets one or more of the following criteria:

(A) The individual has residual physical or mental effects that frequently or constantly limit or prevent some daily activities, but the individual is able to work or attend school, carry out most household chores, travel, and provide age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene, and communication, behavior, social interaction, and intellectual functioning are appropriate for age; or

(B) The individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of one facial feature or one paired set of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(iv) Level III. The individual meets one or more of the following criteria:

(A) The individual has residual physical or mental effects that frequently or constantly limit or prevent most daily activities, but the individual is able to provide age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene; and

(B) The individual is unable to work or attend school, travel, or carry out household chores, or does so intermittently and with difficulty;

(C) The individual’s communication, behavior, social interaction, and intellectual functioning are not entirely appropriate for age; or

(D) The individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of two facial features or two paired sets of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(v) Level IV. The individual meets one or more of the following criteria:

(A) The individual has residual physical or mental effects that prevent age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene;

(B) The individual’s communication, behavior, social interaction, and intellectual functioning are grossly inappropriate for age; or

(C) The individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of three facial features or three paired sets of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(2) Assessing limitation of daily activities. Physical or mental effects on the following functions are to be considered in assessing limitation of daily activities:

(i) Mobility (ability to stand and walk, including balance and coordination);

(ii) Manual dexterity;

(iii) Stamina;

(iv) Speech;

(v) Hearing;

(vi) Vision (other than correctable refraction errors);

(vii) Memory;

(viii) Ability to concentrate;

(ix) Appropriateness of behavior; and

(x) Urinary and fecal continence.

(3) Information for determining whether individuals have covered birth defects and rating disability levels. (1) VA may accept statements from private physicians, or examination reports from government or private institutions, for the purposes of determining whether an individual has a covered birth defect and for rating claims for covered birth defects. If they are adequate for such purposes, VA may make the determination and rating without further examination. In the absence of adequate information, VA may schedule examinations for the purpose of determining whether an individual has a covered birth defect and/or assessing the level of disability.

(2) Except in accordance with paragraph (a)(3) of this section, VA will not
§ 3.816 Awards under the Nehmer Court Orders for disability or death caused by a condition presumptively associated with herbicide exposure.

(a) Purpose. This section states effective-date rules required by orders of a United States district court in the class-action case of Nehmer v. United States Department of Veterans Affairs, No. CV–86–6160 TEH (N.D. Cal.).

(b) Definitions. For purposes of this section—

(1) Nehmer class member means:
   (i) A Vietnam veteran who has a covered herbicide disease; or
   (ii) A surviving spouse, child, or parent of a deceased Vietnam veteran who died from a covered herbicide disease.

(2) Covered herbicide disease means a disease for which the Secretary of Veterans Affairs has established a presumption of service connection before October 1, 2002 pursuant to the Agent Orange Act of 1991, Public Law 102–4, other than chloracne. Those diseases are:
   (i) Type 2 Diabetes (Also known as type II diabetes mellitus or adult-onset diabetes).
   (ii) Hodgkin’s disease.
   (iii) Multiple myeloma.
   (iv) Non-Hodgkin’s lymphoma.
   (v) Acute and Subacute peripheral neuropathy.
   (vi) Porphyria cutanea tarda.
   (vii) Prostate cancer.
   (viii) Respiratory cancers (cancer of the lung, bronchus, larynx, or trachea).
   (ix) Soft-tissue sarcoma (as defined in §3.309(e)).

(c) Effective date of disability compensation. If a Nehmer class member is entitled to disability compensation for a covered herbicide disease, the effective date of the award will be as follows:

(1) VA will increase benefits as of the earliest date the evidence establishes that the level of severity increased, but only if the beneficiary applies for an increase within one year of that date.

(2) If benefits were paid erroneously because of beneficiary error, VA will reduce or discontinue benefits as of the date of last payment.

(3) If benefits were paid erroneously because of administrative error, VA will reduce or discontinue benefits as of the date of last payment.

(4) If benefits were paid erroneously because of administrative error, VA will reduce or discontinue benefits as of the date of last payment.