

earnings for purposes of, and is not compensable under, this part if the lost earnings stem from disability discrimination, which may be settled and paid under other provisions of law.

[86 FR 32208, June 17, 2021, as amended at 89 FR 40381, May 10, 2024]

§ 45.10 Calculation of damages: non-economic damages.

(a) *In general.* Non-economic damages are one component of a potential damages award. The claimant has the burden of proof on the amount of non-economic damages by a preponderance of evidence. DoD may request an interview of or statement from the claimant or other person with primary knowledge of the claimant. DoD may also require medical statements documenting the claimant's condition and, in cases of disfigurement, photographs documenting the claimant's condition.

(b) *Elements of non-economic damages.* Non-economic damages include pain and suffering; physical discomfort; mental and emotional trauma or distress; loss of enjoyment of life; physical disfigurement; and the inability to perform daily activities that one performed prior to injury, such as recreational activities. Such damages are compensable as part of non-economic damages.

(c) *Cap on non-economic damages.* In any claim under this part, total non-economic damages may not exceed a cap amount published by DoD via a FEDERAL REGISTER notice. DoD will periodically publish updates to this cap amount via FEDERAL REGISTER notices, consistent with changes in prevailing amounts in the majority of the States with non-economic damages caps.

(d) *Information DoD will consider in calculating non-economic damages.* In addition to the information submitted by the claimant, DoD may consider all relevant information in DoD records or otherwise available to DoD, including assessments from appropriate documentary sources and experts available to DoD.

[86 FR 32208, June 17, 2021, as amended at 87 FR 52462, Aug. 26, 2022; 89 FR 40382, May 10, 2024]

§ 45.11 Calculation of damages: offsets for DoD and VA Government compensation.

(a) *In general.* Total potential economic damages calculated under this part are reduced by offsetting most of the compensation otherwise provided or expected to be provided by DoD or VA for the same harm that is the subject of the medical malpractice claim. DoD has the burden to establish the applicability and amount of any offsets.

(b) *Eligibility for payments and benefits.* In determining the offsets that are applied to a medical malpractice damages award under this part, DoD presumes that a claimant will receive all the payments and benefits for which the claimant is expected to be eligible, whether or not the claimant has taken steps to obtain the payment or benefit or ultimately receives such payment or benefit. A claimant may present evidence that he or she is not eligible for a payment or benefit to rebut the presumption.

(c) *Present value of future payments and benefits.* In determining offsets under this section from economic damages, DoD will use the present value of future payments and benefits. Many such payments and benefits in cases of disability or death are lifetime benefits for members or survivors. With respect to any lifetime payments or benefits that may terminate upon the remarriage of a surviving spouse, DoD will not assume a remarriage. Estimates will be based on actuarial information provided by the Chief Actuary, DoD Office of the Actuary, taking into consideration methods and assumptions approved by the DoD Board of Actuaries and DoD Medicare-Eligible Retiree Health Care Board of Actuaries, respectively, as of the recent actuarial valuation date.

(d) *Information considered.* In determining offsets under this section, DoD will consider all data available in DoD records or information systems, other U.S. Government records systems, and other information available to DoD. This data may include information on military pay and allowances, Disability Evaluation System outcomes, VA disability claims, marital status, number and ages of dependents, survivor benefits, and other information. Access to