DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 3 and Part 4

RIN 2900–AK66

Special Monthly Compensation for Women Veterans Who Lose a Breast as a Result of a Service-Connected Disability

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs adjudication regulations to provide for payment of special monthly compensation for a woman veteran who loses one or both breasts as a result of service-connected disability. The intended effect of this amendment is to implement legislation authorizing VA to provide this benefit.

DATES: *Effective Date:* This amendment is effective March 18, 2002.

FOR FURTHER INFORMATION CONTACT: Caroll McBrine, M.D., Consultant, Policy and Regulations Staff (211A), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 273–7230.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of July 20, 2001 (66 FR 37940–37941), we published a proposal to implement section 302 of the Veterans Benefits and Health Care Improvement Act of 2000, Public Law 106–419, 114 Stat. 1822, 1853 which amended 38 U.S.C. 1114(k) by providing entitlement to special monthly compensation (SMC) if a woman veteran suffers the anatomical loss of one or both breasts (including loss by mastectomy) as a result of service-connected disability. We proposed to amend 38 CFR 3.350(a), which is titled ''Special monthly compensation ratings,'' by adding new paragraph (7) to define ''anatomical loss of a breast'' for purposes of this benefit as requiring ''complete surgical removal of breast tissue (or the equivalent loss of breast tissue due to injury).'' This includes radical mastectomy, modified radical mastectomy, and simple (or total) mastectomy, but not wide local excision (including partial mastectomy, lumpectomy, tylectomy, segmentectomy, and quadrantectomy).

We received 19 comments on the proposed regulation, one from the Vietnam Veterans of America, one from the Disabled American Veterans, and 17 from individuals. Fifteen commenters supported the proposal, many very strongly.

Three commenters, while supporting the proposal, felt that men should also receive SMC for a mastectomy. Public Law 106–419, Section 302, 114 Stat. at 1853, authorizes this benefit only ''in the case of a woman veteran,'' and we therefore have no legal authority to award SMC to male veterans based on anatomical loss of one or both breasts.

One commenter inquired about whether this rulemaking would encourage women veterans to choose mastectomy over lumpectomy. We do not believe that payment of this additional benefit for complete surgical removal of breast tissue will influence a woman's decision about what procedure to undergo in order to rid her body of cancer. Rather, we believe that this decision, like other medical decisions, will be based on many factors and will be made in consultation with her physician. Moreover, VA has statutory authority to award SMC only for anatomical loss of one or both breasts and a lumpectomy clearly does not constitute such loss.

The same commenter inquired about the rationale for paying SMC for a mastectomy. The commenter asked whether a mastectomy impinges on an individual's ability to do a job and whether SMC is intended to negate mental anguish. The commenter also asked whether there is disability, i.e., restricted ability to earn income, after an individual's recovery from a mastectomy is complete. Another commenter objected to payment of SMC based on anatomical loss of a breast because a mastectomy does not interfere with the ability to hold a job or earn a living.

Generally, basic rates of wartime disability compensation are based on the average impairment in earning capacity resulting from a particular disability, as set forth in the Schedule for Rating Disabilities. 38 U.S.C. 1155. Congress, however, has authorized payment of SMC based on noneconomic factors resulting from a service-connected disability such as personal inconvenience, social inadaptability, or the profound nature of the disability. See S. Rep. No. 82–1681, at 2, 130–31 (1952); H.R. Rep. No. 89–6, at 4 (1965). Congress has authorized SMC for anatomical loss of a breast, and VA is obligated to carry out 38 U.S.C. 1114(k), as amended by Public Law 106–419.

One commenter felt that anatomical loss of a breast is not a service-connected disability and that SMC should be paid only if the breast surgery took place on active duty. Another commenter inquired about whether a veteran must develop the condition that results in loss of a breast or breasts while on active duty. Another commenter opposed paying this benefit at all because there is no evidence that anything in service could have caused breast cancer.

New 38 U.S.C. 1114(k) provides SMC if the loss of one or both breasts occurred ''as the result of a service-connected disability.'' ''Service connected'' means that a disability was incurred or aggravated in line of duty in the active military, naval, or air service. 38 U.S.C. 101(16). ''Line of duty'' means that, at the time the injury or disease causing the disability occurred, the veteran was in active military, naval, or air service and that the injury or disease was not the result of the veteran's own willful misconduct or abuse of alcohol or drugs. 38 U.S.C. 105(a). Thus, a disability need not be the result of exposure to contaminants, chemicals, or drugs during service, as one of the commenters suggested, in order to be service connected. Further, if a woman veteran contracts breast cancer while on active duty, any disability resulting from the cancer would be service connected and SMC would be payable for a resulting mastectomy, irrespective of when the operation occurred. If a veteran is diagnosed with breast cancer after service, any resulting disability would be service connected, and SMC would be payable for a resulting mastectomy, if the evidence establishes that the cancer was incurred during service or during a post-service presumptive period. 38 CFR 3.303(a). The statute entitles women who have anatomical loss of one or both breasts to this benefit, and VA is obligated to pay the benefit as directed by Congress. Again, if the disability causing the mastectomy is service connected, a woman veteran would be entitled to SMC, irrespective of when her surgery occurred.

One commenter asked whether SMC would be paid for prophylactic mastectomies. We will pay SMC for any mastectomy that is medically determined to be secondary to, or necessary to treat, a service-connected condition.

Two commenters objected to restricting this benefit to those who have had a complete mastectomy, rather than including those with less extensive breast surgery such as wide local excision that they maintain can result in ''significant'' anatomical loss. They feel that VA's definition of the statutory term ''anatomical loss'' in new section 3.350(a)(7) as requiring loss of all breast tissue is contrary to 38 U.S.C. 1114(k) and Congress' intent. 38 U.S.C. 1114(k), to which Congress added loss of one or both breasts as a basis for SMC, clearly

distinguishes between anatomical loss and loss of use of a body part. Section 1114(k) provides SMC if a veteran, as a result of a service-connected disability, ''has suffered the anatomical loss or loss of use of one or more creative organs, or one foot, or one hand, or both buttocks,'' or, in the case of a woman veteran, ''the anatomical loss of one or both breasts.'' Anatomical loss for purposes of section 1114(k) in each case means loss of the entire body part, although less than complete anatomical loss may qualify as ''loss of use''. For example, when VA pays SMC due to less than complete removal of a testicle, it is paid on the basis of loss of use, rather than anatomical loss, of the affected organ. (See 38 CFR 3.350(a)(1).) Given the plain language of section 302 of Public Law 106–419, providing SMC for ''anatomical loss of one or both breasts (including loss by mastectomy),'' we believe that the definition of this phrase in new section 3.350(a)(7), requiring complete removal of a breast in order to receive SMC, is in accord with 38 U.S.C. 1114(k).

One of these commenters noted that, in the preamble to the proposed rule, VA chose complete peroneal nerve paralysis as an analogous situation to anatomical loss of one or both breasts and said that a much better analogy is loss of use of a testicle, where SMC is awarded based on a reduction in the size of the organ.

SMC is payable under 38 U.S.C. 1114(k) for ''the anatomical loss or loss of use of one or more creative organs.'' Consistent with section 1114(k), 38 CFR 3.350(a)(1)(i) states that loss of a creative organ (such as a testicle) means acquired absence of the organ. Section 3.350(a)(1)(i)(a) and (b) also define loss of use of one testicle as the situation where either the diameters of the affected testicle are reduced to one-third of the corresponding diameters of the paired normal testicle, or the diameters of the affected testicle are reduced to one-half or less of the corresponding normal testicle and there is alteration of consistency so that the affected testicle is considerably harder or softer than the corresponding normal testicle. We believe that defining ''anatomical loss'' of a breast as ''complete surgical removal of breast tissue'' is consistent with defining loss of a creative organ to mean ''acquired absence'' of the organ. Since Congress provided no statutory authority to pay SMC for loss of use of one or both breasts, we make no change based on this comment.

One of the commenters also said that VA requirements for finding ''anatomical loss'' of other body parts present even more compelling evidence that it has not approached this rulemaking fairly and objectively because under 38 CFR 4.71a, diagnostic codes 5126 to 5131, VA considers the amputation of four or five fingers to constitute anatomical loss of a hand. The footnotes under these diagnostic codes state ''Entitled to [SMC]'' but do not indicate whether SMC is based on anatomical loss of a hand or loss of use of a hand. The language of 38 CFR 3.350(a)(2)(i), dealing with SMC ratings for loss of use of a hand, however, makes it clear that the situations cited in diagnostic codes 5126 to 5131 constitute loss of use of a hand for purposes of SMC. Section 3.350(a)(2)(i) states that ''[l]oss of use of a hand . . . will be held to exist when no effective function remains other than that which would be equally well served by an amputation stump at the site of election below elbow . . . with use of a suitable prosthetic appliance.'' We therefore make no change based on these comments.

VA appreciates the comments submitted in response to the proposed rule, which is now adopted without change.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

Regulatory Flexibility Act

The Secretary hereby certifies that this 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 (RFA), 5 U.S.C. 601–612. The reason for this certification is that this amendment would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

This final rule has been reviewed by the Office of Management and Budget under Executive Order 12866.

The Catalog of Federal Domestic Assistance program numbers are 64.104 and 64.109.

List of Subjects

38 CFR Part 3

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

38 CFR Part 4

Disability benefits, Individuals with disabilities, Pensions, Veterans.

Approved: January 9, 2002.

Anthony J. Principi,

Secretary of Veterans Affairs.

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

PART 3—ADJUDICATION

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

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

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

2. In § 3.350, paragraph (a) introductory text, the first sentence is revised; and a new paragraph (a)(7) is added immediately following the authority citation for paragraph (a)(6), to read as follows:

§ 3.350 Special monthly compensation ratings.

* * * * *

(a) * * * Special monthly compensation under 38 U.S.C. 1114(k) is payable for each anatomical loss or loss of use of one hand, one foot, both buttocks, one or more creative organs, blindness of one eye having only light perception, deafness of both ears, having absence of air and bone conduction, complete organic aphonia with constant inability to communicate by speech or, in the case of a woman veteran, the anatomical loss of one or both breasts (including loss by mastectomy).* * *

* * * * *

(7) Anatomical loss of a breast exists when there is complete surgical removal of breast tissue (or the equivalent loss of breast tissue due to injury). As defined in 38 CFR 4.116, radical mastectomy, modified radical mastectomy, and simple (or total) mastectomy result in anatomical loss of a breast, but wide local excision, with or without significant alteration of size or form, does not.

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

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PART 4—SCHEDULE FOR RATING DISABILITIES

Subpart B—Disability Ratings

3. The authority citation for part 4 continues to read as follows:

Authority: 38 U.S.C. 1155, unless otherwise noted.

4. Section 4.116, Note 2 is amended by removing ''one or more creative organs,'' and adding, in its place, ''one or more creative organs or anatomical loss of one or both breasts,'.

5. Diagnostic code 7626 in 38 CFR 4.116 is revised to read as follows:

§ 4.116 Schedule of ratings—gynecological conditions and disorders of the breast.

	Rating
* * * * *	
7626 Breast, surgery of:	
Following radical mastectomy:	
Both	[1]80
One	[1]50
Following modified radical mastectomy:	
Both	[2]60
One	[2]40
Following simple mastectomy or wide local excision with significant alteration of size or form:	
Both	[3]50
One	[3]30
Following wide local excision without significant alteration of size or form:	
Both or one	[4]0
Note: For VA purposes:	

[1] *Radical mastectomy* means removal of the entire breast, underlying pectoral muscles, and regional lymph nodes up to the coracoclavicular ligament.

[2] *Modified radical mastectomy* means removal of the entire breast and axillary lymph nodes (in continuity with the breast). Pectoral muscles are left intact.

[3] *Simple (or total) mastectomy* means removal of all of the breast tissue, nipple, and a small portion of the overlying skin, but lymph nodes and muscles are left intact.

[4] *Wide local excision* (including partial mastectomy, lumpectomy, tylectomy, segmentectomy, and quadrantectomy) means removal of a portion of the breast tissue.

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[FR Doc. 02–3677 Filed 2–13–02; 8:45 am]

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AK89

Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA)

AGENCY: Department of Veterans Affairs

ACTION: Interim final rule; Correction.

SUMMARY: In a document published in the **Federal Register** on January 30, 2002 (67 FR 4357), VA amended its medical regulations concerning the ''Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA)'' That interim final rule implemented the provisions of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 and the Veterans' Survivor Benefits Improvements Act of 2001. This document makes a correction in § 17.274(c)(ii) by changing the reference to the effective date of the reduced cost-sharing catastrophic cap from January 1, 2001 to January 1, 2002 to reflect the correct date established by statute.

EFFECTIVE DATE: This document is effective on February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Susan Schmetzer, Chief, Policy & Compliance Division, VA Health Administration Center, P.O. Box 65020, Denver, CO 80206–9020, telephone (303) 331–7552.

In rule FR Doc. 02–2206 published on January 30, 2002 (67 FR 4357), make the following correction: on page 4359, in paragraph (c)(ii), third column, ''January 1, 2001'' is amended to read ''January 1, 2002''.

Approved: February 7, 2002.

Thomas O. Gessel,

Director, Office of Regulations Management, Office of General Counsel, Department of Veterans Affairs.

[FR Doc. 02–3675 Filed 2–13–02; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 82

RIN 0920–ZA00

Methods for Radiation Dose Reconstruction Under the Energy Employees Occupational Illness Compensation Act of 2000

AGENCY: Department of Health and Human Services.

ACTION: Interim Final Rule; Reopening of Comment Period.

SUMMARY: The Department of Health and Human Services (DHHS), is reopening the comment period for the interim final rule for dose reconstruction for certain claims for cancer under the Energy Employees Occupational Illness Program Act (EEOICPA) that was published in the **Federal Register** on Friday, October 5, 2001. After considering these comments, comments previously received, and comments from the Advisory Board on Radiation and Worker Health (ABRWH) DHHS will publish a final rule.

DATES: Public written comments must be received on or before Friday, March 1, 2002.

ADDRESSES: Submit written comments to: Attention—Dose Reconstruction Comments, Department of Health and Human Services, National Institute for Occupational Safety and Health (NIOSH), Robert A. Taft Laboratories, MS–C34, 4676 Columbia Parkway, Cincinnati, OH 45226, Telephone: (513) 533–8450, Fax: (513) 533–8285, email: *NIOCINDOCKET@CDC.GOV.*

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, Cincinnati, OH 45226, Telephone (513) 841–4498 (this is not a toll free number). Information requests may also be submitted by e-mail to *OCAS@CDC.GOV.*

SUPPLEMENTARY INFORMATION: On October 5, 2001, HHS published an interim final rule establishing methods for radiation dose reconstruction to be conducted for certain cancer claims filed under EEOICPA, Public Law 106–398 [See FR Vol. 66, No. 194, 50978]. The notice included a public comment period that ended November 5, 2001. However, DHHS requested the ABRWH to conduct a review of its dose reconstruction methods.

The ABRWH held its first meeting in Washington, DC on January 22–23, 2002. Due to the ABRWH's intensive work on the statutorily required technical review of the proposed probability of causation rule, the ABRWH was unable to complete the requested review of the interim final rule. Public comments, both written and oral, were accepted for inclusion in the docket on both the interim final rule and proposed rulemaking prior to and during the ABRWH meeting. The public comment period closed on the last day of the ABRWH meeting, January 23, 2002.

To allow the ABRWH ample opportunity to complete their review of and comments on the interim final rule, the public comment period for the interim final rule on dose reconstruction will be re-opened until Friday, March 1, 2002. This will allow the ABRWH to have at least one more meeting to prepare their comments on the interim final rule, and to accept further written and oral comments from the general public at its next meeting.

All written comments on the interim final rule for dose reconstruction must be received at the Docket Office on or before Friday, March 1, 2002. Written and oral comments made during the meeting(s) of the ABRWH prior to Friday, March 1, 2002 will also be included in the docket for the interim final rule.