

Marianne Swanson, Computer Security
Division, National Institute of Standards
and Technology.

12 p.m.

Lunch.

1 p.m.

Continuing Discussion and Review of
NERC's Recommended Standard.

3 p.m.

Adjourn.

[FR Doc. 02-31144 Filed 12-11-02; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AK77

Additional Disability or Death Due to Hospital Care, Medical or Surgical Treatment, Examination, Training and Rehabilitation Services, or Compensated Work Therapy Program

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its adjudication regulations concerning awards of compensation or dependency and indemnity compensation for additional disability or death caused by VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy (CWT) program.

The proposed amendment provides that benefits will be payable for additional disability or death caused by VA hospital care, medical or surgical treatment, or examination only if VA fault or "an event not reasonably foreseeable" proximately caused the disability or death. It further provides that benefits will be payable for additional disability or death proximately caused by VA's provision of training and rehabilitation services or CWT program. This amendment reflects amendments to 38 U.S.C. 1151, the statutory authority for such benefits.

DATES: Comments must be received on or before February 10, 2003.

ADDRESSES: Mail or hand deliver written comments to: Director, Office of Regulations Management (02D), Room 1154, 810 Vermont Ave., NW., Washington, DC 20420; or fax comments to (202) 273-9289; or e-mail comments to OGCRegulations@mail.va.gov. Comments should indicate that they are submitted in response to "RIN 2900-AK77." All comments received will be available for public inspection in the Office of Regulations Management, Room 1158, between the hours of 8 a.m.

and 4:30 p.m., Monday through Friday (except holidays).

FOR FURTHER INFORMATION CONTACT: Beth McCoy, Consultant, Regulations Staff, Compensation and Pension Service (211A), Veterans Benefits Administration, Department of Veterans Affairs, 111 W. Huron St., Buffalo, NY 14202, (716) 551-4842.

SUPPLEMENTARY INFORMATION: Section 1151 of 38 U.S.C. previously authorized the award of compensation or dependency and indemnity compensation for any additional disability or death of a veteran which did not result from the veteran's own willful misconduct but which did result from an injury or aggravation of an injury suffered as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation awarded under any of the laws administered by VA or as a result of having submitted to an examination under any such law. 38 CFR 3.358 and 3.800 contain the regulatory provisions implementing those statutory provisions.

Effective for claims filed on or after October 1, 1997, section 422(a) of Public Law 104-204, 110 Stat. 2874, 2926 (1996), amended 38 U.S.C. 1151 to authorize an award of compensation or dependency and indemnity compensation for a veteran's "qualifying additional disability" or "qualifying death." Under 38 U.S.C. 1151, as amended, an additional disability or death qualifies for compensation or dependency and indemnity compensation if it (1) was not the result of the veteran's willful misconduct; (2) was caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by VA, either by a VA employee or in a VA facility; and (3) was proximately caused by carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on VA's part in furnishing the care, treatment, or examination, or by an event not reasonably foreseeable. An additional disability or death also qualifies for benefits if it was not the result of the veteran's willful misconduct and was proximately caused by VA's provision of training and rehabilitation services as part of an approved rehabilitation program under 38 U.S.C. chapter 31.

Section 303 of Public Law 106-419, 114 Stat. 1853, effective November 1, 2000, amended 38 U.S.C. 1151(a)(2) to further expand the circumstances under which benefits are payable. For claims received on or after November 1, 2000, additional disability or death qualifies

for entitlement to compensation and DIC if it was not the result of the veteran's willful misconduct and was proximately caused by participation in a compensated work therapy (CWT) program under 38 U.S.C. 1718.

We propose to revise § 3.358(b)(2) to provide that compensation may be paid under § 3.358 for the continuance or natural progress of a preexisting disease or injury if VA failed to exercise reasonable skill and care in the diagnosis or treatment of the condition and VA's failure to do so resulted in additional disability or death that probably would have been prevented by proper diagnosis and treatment. This provision would apply only where VA renders medical services, such as hospitalization, examination, or medical and surgical treatment. It would not apply in the context of vocational rehabilitation training, which does not involve medical services provided by VA. Currently, § 3.358(b)(2) prohibits compensation for the continuance or natural progress of a preexisting disease or injury under all circumstances. This change implements the conclusion of the VA General Counsel in VAOPGCPREC 5-2001. In that opinion, the General Counsel noted that a showing of VA fault or failure to exercise reasonable skill and care is ordinarily not an element of entitlement to benefits under § 3.358. However, the General Counsel further noted that the continuance or natural progress of a preexisting disease or injury could not have been caused by VA hospitalization, treatment, or examination, unless it is shown that the continuance or natural progress probably would have been prevented by proper diagnosis and treatment.

We propose new 38 CFR 3.361 to implement 38 U.S.C. 1151 as amended, new 38 CFR 3.362 to codify rules concerning the offset of benefits awarded under 38 U.S.C. 1151 if the beneficiary has also recovered damages under the Federal Tort Claims Act, and new 38 CFR 3.363 to consolidate regulatory provisions now contained in §§ 3.358 and 3.800.

In accordance with section 422(b)(2) of Public Law 104-204, 110 Stat. 2874, 2927, we propose to apply new §§ 3.361 through 3.363 only to claims received by VA on or after October 1, 1997, and to continue to apply §§ 3.358 and 3.800 to claims received by VA before October 1, 1997. These applicability rules are reflected in proposed §§ 3.358(a), 3.361(a), 3.362(a), 3.363(a), and 3.800(a). The controlling factor is the date VA receives the claim. If a decision pursuant to §§ 3.358 and 3.800 becomes final on a claim received before October

1, 1997, and the claimant later reopens the claim on or after October 1, 1997, then the stricter standards of §§ 3.361 through 3.363 will apply to the reopened claim.

Proposed § 3.361(b), concerning additional disability, is derived from current § 3.358(b)(1) with appropriate changes made to reflect the amendments made by section 422 of Public Law 104–204, section 303 of Public Law 106–419, and editorial changes made to improve clarity. Similarly, proposed § 3.361(c), concerning cause, is derived from current § 3.358(b)(2) and (c)(1).

As amended by section 422 of Public Law 104–204, 38 U.S.C. 1151(a)(1) requires for entitlement that a veteran's additional disability or death be proximately caused either by "an event not reasonably foreseeable" or by "carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault" on VA's part in furnishing the hospital care, medical or surgical treatment, or examination that caused the additional disability or death. We believe that Congress, by listing several synonymous terms relating to negligence, intended not to provide alternative standards of liability, but rather to establish a single standard which would trigger entitlement to 38 U.S.C. 1151 benefits if not met in VA's furnishing of hospital care, medical or surgical treatment, or examination. We further believe that the single standard Congress intended to establish is tort-variety negligence. We recognize that there is not a single standard of liability governing tort claims under the Federal Tort Claims Act, but rather that the standard applied may vary from state to state. However, we also believe that Congress did not intend entitlement to a veterans' benefit to depend on a claimant's state of residence. Accordingly, we intend to apply a uniform standard in the adjudication of claims under 38 U.S.C. 1151.

In tort cases, the phrase "error in judgment" is sometimes used to refer to non-negligent mistakes, such as a diagnosis which was reasonable and was based on the exercise of due skill and care, but which later proves to be incorrect. At other times, however, the phrase "error in judgment" is used to refer to negligent mistakes involving the failure to use due skill and care in making decisions regarding diagnosis and treatment. Because the legislative history of Public Law 104–204 reflects that Congress intended to authorize benefits only where disability or death is due to VA negligence, we conclude that the phrase "error in judgment", as used in 38 U.S.C. 1151, refers to errors

involving negligence and does not encompass reasonable decisions regarding diagnosis and treatment merely because they later prove to have been incorrect. The remaining terms in 38 U.S.C. 1151, *i.e.*, "carelessness", "negligence", "lack of proper skill", and "similar instances of fault", all unambiguously refer to circumstances where VA medical providers have failed to exercise due care in providing medical services. Therefore, in proposed § 3.361(d)(1)(i), we interpret 38 U.S.C. 1151 as providing entitlement to benefits if VA, in furnishing hospital care, medical or surgical treatment, or examination, fails to exercise the degree of care that would be expected of a reasonable health care provider in furnishing hospital care, medical or surgical treatment, or examination.

Proposed § 3.361(d)(1)(ii), concerning consent to care, treatment, or examination, is derived from current § 3.358(c)(3). However, we propose to include a requirement that consent be informed, in accordance with 38 CFR 17.32. As reflected in proposed § 3.361(d)(2), we propose to leave to the factfinder in each claim the determination as to whether the proximate cause of a veteran's additional disability or death was an event not reasonably foreseeable, and for the factfinder, in making that determination, to apply the standard of what a reasonable health care provider would have foreseen. Proposed § 3.361(d)(3), concerning proximate cause by the provision of rehabilitation and training services and, for claims received on or after November 1, 2000, by participation in a CWT program, is derived from current § 3.358(c)(5) with appropriate changes made to reflect the amendments made by section 422 of Public Law 104–204, section 303 of Public Law 106–419, and editorial changes made to improve clarity.

The definition of "Department employee" in proposed § 3.361(e)(1) is derived from 5 U.S.C. 2105(a), which defines "employee" for title 5 (Government Organization and Employees) purposes, modified to refer only to VA employees who are engaged in the furnishing of health care services. The definition of "Department facility" in proposed § 3.361(e)(2) reflects a provision of 38 U.S.C. 1151(a) as amended by section 422 of Public Law 104–204. 38 U.S.C. 1151(a)(1) refers to "a Department facility as defined in section 1701(3)(A)" of title 38, United States Code. Section 1701(3)(A) defines "facilities of the Department" as facilities over which the Secretary has direct jurisdiction. We therefore propose

to define "Department facility" in the same way.

Proposed § 3.361(f)(1) excludes hospital care or medical services furnished pursuant to a contract made under 38 U.S.C. 1703 because, under section 1703's terms, such care or services are furnished in a non-Department facility, and the day-to-day operations of such a facility's employees are not subject to the Secretary's supervision. The exclusion in proposed § 3.361(f)(2) of nursing home care furnished under 38 U.S.C. 1720 is derived from current § 3.358(c)(6). Proposed § 3.361(f)(3) excludes hospital care or medical services provided under 38 U.S.C. 8153 in a facility over which the Secretary does not have direct jurisdiction because care or services under section 8153 are not provided by VA employees but may or may not be furnished in a VA facility. Proposed § 3.361(f)(3) would exclude only such care and services in fact not provided in a VA facility. Proposed § 3.361(g) is derived from current § 3.800(b).

Proposed § 3.362(b), concerning the amount of a tort recovery to be offset from a veteran's compensation awarded under 38 U.S.C. 1151(a), is derived from current § 3.800(a)(2). Proposed § 3.362(c), concerning the amount of a tort recovery to be offset from a survivor's dependency and indemnity compensation (DIC) awarded under 38 U.S.C. 1151(a), is derived from § 3.800(a)(2) and the Office of the General Counsel precedent opinion (VAOPGCPREC) 79–90. That opinion held that the amount to be offset from a DIC award under 38 U.S.C. 1151 depends on the nature of the damages recovered by the claimant under the Federal Tort Claims Act. Amounts recovered by a claimant as damages under a typical "wrongful-death statute" may be offset from a DIC award under 38 U.S.C. 1151, even if the damages are paid to a nominal party as trustee for the veteran's survivors. Each survivor receiving such damages is subject to offset of DIC under 38 U.S.C. 1151 to the extent of sums included in the tort claim's judgment, settlement, or compromise to compensate for harm suffered by that survivor. On the other hand, amounts recovered by a claimant, acting as personal representative of a decedent veteran's estate, as damages under a "survival statute" may not be offset from a DIC award under 38 U.S.C. 1151.

Proposed § 3.362(d), concerning offset of structured settlements, is derived from the principles espoused in VAOPGCPREC 79–90. Structured settlements are settlements or compromises in which the Government,

rather than simply paying to a plaintiff a sum, in settlement or compromise of a claim under the Federal Tort Claims Act, buys an annuity or otherwise funds payments, which may differ in total amount from the amount expended by the Government, to be made to the plaintiff at some future time. We propose to offset from a DIC award only the veteran's or survivor's proportional share of the Government's cost of such a settlement, including the veteran's or survivor's proportional share of attorney fees. Furthermore, the offset is to begin as soon as compensation or DIC payments would be made after the settlement becomes final, not when the settlement payments are actually made to the beneficiary.

The requirement in paragraphs (b), (c), and (d)(1) of proposed § 3.362 that offset of benefits under section 1151 include the claimant's proportional share of attorney fees is derived from the Office of General Counsel precedent opinion 7-94. That opinion held that, when an individual is awarded a judgment or enters into a compromise of a tort claim for a disability or death covered by section 1151, future benefits under section 1151 must be offset by the entire amount of the judgment or settlement proceeds, including the amount of attorney fees paid out of such proceeds.

Proposed § 3.363, concerning a bar to benefits due to alternative recoveries before December 1, 1962, is derived from current § 3.800(a)(3).

We propose to revise 38 CFR 3.154, which identifies the types of communications that may be accepted as a claim for benefits under 38 U.S.C. 1151. The revised § 3.154 would clarify that the requirements of that rule apply to claims under either 38 CFR 3.358 or proposed 38 CFR 3.361. The revised § 3.154 would also more clearly state the requirements under current § 3.154 and 38 CFR 3.1(p) that a communication must be in writing and must indicate an intent to claim benefits under 38 U.S.C. 1151 in order to be accepted as a claim for such benefits. Additionally in § 3.154, we propose to clarify that the format or the way in which a claimant files for benefits under §§ 3.358 or 3.361 is not critical; rather, the controlling factor is some showing that the claimant is seeking disability or death benefits from the Veterans Benefits Administration.

We are also proposing to revise several cross references to 38 U.S.C. 1151, § 3.358 and/or § 3.800 to be consistent with the proposed changes. These cross references are paragraph (i) of § 3.400, paragraph (a)(4) of § 3.708, and paragraph (c) of § 3.807.

Executive Order 12866

This proposed regulatory action has been reviewed by the Office of Management and Budget under Executive Order 12866.

Paperwork Reduction Act

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

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any given year. This rule would have no consequential effect on State, local, or tribal governments.

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, 5 U.S.C. 601-612. 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 flexibility analysis requirements of sections 603 and 604.

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

List of Subjects in 38 CFR Part 3

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

Approved: October 7, 2002.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, we propose to amend 38 CFR part 3 as follows:

PART 3—ADJUDICATION

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

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

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

2. Section 3.154 and the Cross References at the end of the section are revised to read as follows:

§ 3.154 Injury due to hospital treatment, etc.

VA may accept as a claim any communication in writing indicating an intent to file a claim with the Veterans Benefits Administration for disability or for death benefits under § 3.358 (due to hospitalization, medical or surgical treatment, examination, or vocational rehabilitation training) or under § 3.361 (due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program) whether such communication is contained in a formal claim for pension, compensation, dependency and indemnity compensation or in any other document.

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

Cross References: Effective dates. See § 3.400(i). Disability or death due to hospitalization *etc.* See §§ 3.358, 3.361 and 3.800.

3. In § 3.358, the authority citation at the end of the paragraph (a) is removed and paragraphs (a) and (b)(2) are revised to read as follows:

§ 3.358 Compensation for disability or death from hospitalization, medical or surgical treatment, examination, or vocational rehabilitation training (§ 3.800).

(a) *General.* This section applies to claims received by VA before October 1, 1997. If it is determined that there is additional disability resulting from a disease or injury or aggravation of an existing disease or injury suffered as a result of hospitalization, medical or surgical treatment, examination, or vocational rehabilitation training, compensation will be payable for such additional disability. For claims received by VA on or after October 1, 1997, see § 3.361.

(b) * * *

(2) Compensation will not be payable under this section for the continuance or natural progress of a disease or injury for which the hospitalization, medical or surgical treatment or examination was furnished, unless VA's failure to exercise reasonable skill and care in the diagnosis or treatment of the disease or injury caused additional disability or death that probably would have been prevented by proper diagnosis or treatment. Compensation will not be payable under this section for the continuance or natural progress of a disease or injury for which vocational rehabilitation training was provided.

* * * * *

4. Section 3.361 is added to read as follows:

§ 3.361 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.* This section applies to claims received by VA on or after October 1, 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 the provisions of § 3.400(i). For claims received by VA before October 1, 1997, see § 3.358.

(b) *Determining whether a veteran has an additional disability.* To determine whether a veteran has an additional disability, VA compares 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 compensated work therapy 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 a disease or injury.* Hospital care, medical or surgical treatment, or examination cannot cause the continuance or natural progress of a disease or injury 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 a

disease or injury 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 health care 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 health care 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 expressed (*i.e.*, given orally or in writing) or implied under the circumstances specified in § 17.32(b), 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.

(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, for claims received on or after November 1, 2000, 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 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—*(1) *Death before January 1, 1957.* The benefit payable under 38 U.S.C. 1151(a) to an eligible survivor for a veteran's death occurring before January 1, 1957, is death compensation. See §§ 3.5(b)(2) and 3.702 for the right to elect dependency and indemnity compensation.

(2) *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. Section 3.362 is added to read as follows:

§ 3.362 Offsets under 38 U.S.C. 1151(b) of benefits awarded under 38 U.S.C. 1151(a).

(a) *Claims subject to this section.* This section applies to claims received by VA on or after October 1, 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.

(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, on or after December 1, 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, on or after December 1, 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 on or after December 1, 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)

6. Section 3.363 is added to read as follows:

§ 3.363 Bar to benefits under 38 U.S.C. 1151.

(a) *Claims subject to this section.* This section applies to claims received by VA on or after October 1, 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.

(b) *Administrative award, compromises, or settlements, or judgments that bar benefits under 38 U.S.C. 1151.* 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 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 that became final before December 1, 1962, VA may award benefits under 38 U.S.C. 1151 for the disability or death unless the terms of the judgment provide otherwise.

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

7. In § 3.400, the section heading of paragraph (i) is revised to read as follows:

§ 3.400 General.

* * * * *

(i) *Disability or death due to hospitalization, etc.* (38 U.S.C. 5110(c), (d); Public Law 87-825; §§ 3.358, 3.361, and 3.800).* * *

§ 3.708 [Amended]

8. Section 3.708, paragraph (a)(4) is amended by removing "or training," and adding, in its place, "or hospital care, training, or compensated work therapy program. See §§ 3.358 and 3.361."

9. Section 3.800 is amended by adding introductory text to read as follows:

§ 3.800 Disability or death due to hospitalization, etc.

This section applies to claims received by VA before October 1, 1997. For claims received by VA on or after October 1, 1997, see §§ 3.362 and 3.363.

* * * * *

10. In § 3.807, the last sentence of paragraph (c) is amended by removing "§ 3.800" and adding, in its place, "§§ 3.358, 3.361".

* * * * *

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AL-059-200206(b); FRL-7420-1]

Approval and Promulgation of Implementation Plans: Revisions to the Alabama Nitrogen Oxides Budget and Allowance Trading Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency is proposing to approve revisions to the Alabama Department of Environmental Management's nitrogen oxides budget and allowance trading program submitted on September 13, 2002, by the State of Alabama. These revisions are designed to provide greater flexibility to reward sources that achieve quantifiable reductions ahead of the compliance deadline by allowing sources to request credit for early reductions obtained during the 2001 control period.

In the Final Rules Section of this **Federal Register**, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

DATES: Written comments must be received on or before January 13, 2003.

ADDRESSES: Written comments should be addressed to Sean Lakeman, at the EPA Regional Office listed below. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day. Copies of the documents relative to this action are available for public inspection during normal business hours at the following locations:

U.S. Environmental Protection Agency, Region 4, Atlanta Federal Center, Air, Pesticides, and Toxics Management Division, 61 Forsyth Street, Atlanta, Georgia 30303-8960.

FOR FURTHER INFORMATION CONTACT: Sean Lakeman; Regulatory Development