



Federal Register

**Friday,
January 30, 2004**

Part VI

Department of Veterans Affairs

**38 CFR Part 5
Service Requirements for Veterans;
Proposed Rule**

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 5

RIN 2900-AL67

Service Requirements for Veterans

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its Compensation and Pension regulations relating to service requirements for veterans, currently found in part 3 of title 38, Code of Federal Regulations (CFR), and to relocate them in new part 5. We propose to reorganize these regulations in a more logical order, add new section and paragraph headings, rewrite certain sections, and divide certain sections into one or more separate new sections. VA's principal goals in rewriting and reorganizing the current regulations are to provide readers with clearer language and more easily understood regulatory requirements.

DATES: Comments must be received by VA on or before March 30, 2004.

ADDRESSES: Written comments may be submitted by: mail or hand-delivery to Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; fax to (202) 273-9026; e-mail to VAregulations@mail.va.gov; or, through www.Regulations.gov. Comments should indicate that they are submitted in response to "RIN 2900-AL67." All 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) 273-9515 for an appointment.

FOR FURTHER INFORMATION CONTACT: Bill Russo, Chief, C&P Regulations Rewrite Project (00REG2), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-9515.

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 Report to the Secretary of Veterans

Affairs by the VA Claims Processing Task Force. 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 regulations in 38 CFR part 3 governing the Compensation and Pension (C&P) program of the Veterans Benefits Administration (VBA). 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 the first such portion.

Overview of New Organization

We plan to remove the compensation and pension benefit regulations from 38 CFR part 3 and relocate them in new part 5. We also plan to reorganize the regulations so that all provisions governing a specific benefit are located in the same part, with general provisions pertaining to all compensation and pension benefits also grouped together. We believe this reorganization will allow claimants and their representatives, as well as VA adjudicators, to find information relating to a specific benefit more quickly.

The first major subdivision is "Subpart A—General Provisions." It would include information regarding the scope of the regulations in new part 5, delegations of authority, general definitions, and general policy provisions for this part.

"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 is the subject of this document.

"Subpart C—Adjudicative Process, General" would inform readers about types of claims and filing procedures, VA's duties, rights and responsibilities of claimants, and general effective dates, as well as revision of decisions and protection of VA ratings.

"Subpart D—Dependents of Veterans" would provide information about how VA determines whether an individual is a dependent and evidence requirements for such determinations.

"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.

"Subpart F—Nonservice-Connected Disability Pensions and Death Pensions" would include information regarding the three types of nonservice-connected pension: Improved pension, old law pension, and section 306 pension. This subpart would also include those provisions that state how to establish entitlement to each pension, and the effective dates governing each pension.

"Subpart G—Dependency and Indemnity Compensation, Death Compensation, and Accrued Benefits" would contain those regulations governing claims for dependency and indemnity compensation (DIC), death compensation, accrued benefits, and benefits awarded, but unpaid, at death. This subpart would also include rules and definitions relating to these benefits and related effective dates and rates of payment.

"Subpart H—Special Benefits for Veterans, Dependents, and Survivors" would pertain to ancillary and special benefits available, including benefits for children with various birth defects.

"Subpart I—Benefits For Filipino Veterans and Survivors" would pertain to the various benefits available to Filipino veterans.

"Subpart J—Burial Benefits" would pertain to burial allowances.

"Subpart K—Matters Affecting Receipt of Benefits" would contain those provisions regarding determinations of willful misconduct, competency, and insanity, which may affect claimants' entitlement to benefits. This subpart would also contain information about forfeiture and renunciation of benefits.

"Subpart L—Payments and Adjustments to Payments" would include general rate-setting rules, several adjustment and resumption regulations, and election of benefit.

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

Some of the regulations in this Notice of Proposed Rulemaking (NPRM) cross-reference other compensation and pension regulations. If those regulations have been published in this or earlier NPRMs, we cite the proposed part 5 section. We also cite the **Federal**

Register page 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 to the current part 3 regulation that deals with the same subject matter. 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]” in the place where the part 5 regulation citation would be placed.

The current part 3 section we cite may differ from its eventual part 5 replacement in some respects, but we believe this method will assist readers in understanding these proposed regulations where no part 5 replacement has yet been published. VA will provide a separate opportunity for public comment on each segment of proposed part 5 regulations before adopting a final version of part 5.

Organization of Proposed Subpart B

This proposed rulemaking pertains to those regulations governing service requirements for compensation and pension benefits. These regulations would be contained in proposed subpart B of new 38 CFR part 5. While 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.

The following table shows the correspondence between the current regulations in part 3 and those proposed regulations contained in this proposed rulemaking:

| Proposed part 5 section or paragraph | Based in whole or in part on 38 CFR part 3 section or paragraph |
|--------------------------------------|---|
| 5.20 | 3.2. |
| 5.21(a) | 3.6(a), 3.7(a). |
| 5.21(b) | 3.15. |
| 5.22(a) | 3.6(b)(1). |
| 5.22(b) | 3.6(b)(7). |
| 5.22(c) | new (cross reference). |
| 5.23(a)(1) | 3.6(b)(1). |
| 5.23(a)(2) | 3.6(c)(1). |
| 5.23(a)(3) | 3.6(d)(1) & (2). |
| 5.23(b)(1) | 3.6(b)(1). |
| 5.23(b)(2) | 3.6(c)(3). |
| 5.23(b)(3) | 3.6(d)(4). |
| 5.23(c) | new (cross reference). |
| 5.24(a) | 3.6(b)(4) & (7). |
| 5.24(b)(1) | 3.6(b)(5). |
| 5.24(b)(2) | 3.6(c)(5). |
| 5.24(c)(1) | 3.6(c)(4). |
| 5.24(c)(2) | 3.6(d)(3). |

| Proposed part 5 section or paragraph | Based in whole or in part on 38 CFR part 3 section or paragraph |
|--------------------------------------|---|
| 5.24(c)(3) | 3.700(a)(1)(ii). |
| 5.24(d) | new (cross reference). |
| 5.25(a)(1) | 3.6(b)(2). |
| 5.25(a)(2) | 3.6(c)(2). |
| 5.25(a)(3) | 3.6(d)(1) & (2). |
| 5.25(b) | 3.6(b)(3). |
| 5.25(c) | 3.6(c)(6) & (d)(4)(iii). |
| 5.25(d) | new (cross reference). |
| 5.26 | 3.7(o). |
| 5.27(a) and (b) | 3.7(x). |
| 5.27(c) | 3.7(x), 3.400(z). |
| 5.28 | 3.7(c)–(e), (h)–(l), (n), (p), & (s)–(w). |
| 5.29(a)(1) | 3.6(b)(6). |
| 5.29(a)(2) | 3.6(b)(7). |
| 5.29(a)(3) | new (cross reference). |
| 5.29(b) | 3.6(e). |
| 5.30(a) | 3.12(a) first sentence. |
| 5.30(b) | new. |
| 5.30(c) | 3.12(a) & (k)(1); 3.14(d). |
| 5.30(d) | new. |
| 5.30(e) | 3.12(k)(2)–(3). |
| 5.30(f) | 3.12(d). |
| 5.31(a) | new (purpose provision). |
| 5.31(b) | new. |
| 5.31(c) | 3.7(b), 3.12(c). |
| 5.31(d) | new. |
| 5.31(e) | 3.12(j). |
| 5.32 | 3.12(c)(6). |
| 5.33 | 3.12(b), (c)(6). |
| 5.34(a) | new (purpose provision). |
| 5.34(b) | new. |
| 5.34(c) | 3.12(e). |
| 5.34(d) | 3.400(g). |
| 5.35(a) | new (purpose provision). |
| 5.35(b) | 3.12(f). |
| 5.35(c) & (d) | 3.12(g). |
| 5.35(e) | 3.400(g). |
| 5.36(a) | 3.12(h). |
| 5.36(b) and (c) | 3.12(i). |
| 5.37(a) | new (purpose provision). |
| 5.37(b) | 3.13(a). |
| 5.37(c) | 3.13(b). |
| 5.37(d) | 3.13(c). |
| 5.38(a) | new (purpose provision). |
| 5.38(b) | 3.14(a) & (c). |
| 5.38(c) | 3.14(b). |
| 5.39(a) | 3.12a(b). |
| 5.39(b)(1) | 3.12a(c)(1). |
| 5.39(b)(2) | 3.12a(c)(2). |
| 5.39(c)(1) | 3.12a(a)(1). |
| 5.39(c)(2) | 3.203(c) last sentence. |
| 5.39(d) | 3.12a(d). |
| 5.39(e) | 3.15. |
| 5.39(f) | 3.12a(e). |
| 5.40(a) | 3.203(a). |
| 5.40(b) | 3.203(a)(2). |
| 5.40(c) | 3.203(a)(1) & (3). |
| 5.40(d) | 3.203(c). |

Readers who use this table to compare existing regulatory provisions with the proposed provisions, and who observe a substantive 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 affected by these proposed regulations 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 will be published for public comment at a later time. 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 future notice of proposed rulemaking. The table also does not include material from the current sections that will be removed from part 3 and not carried forward to part 5. A listing of material VA proposes to remove from part 3 appears later in this document.

Periods of War and Types of Military Service

In new § 5.20, we propose revisions to the rules concerning what periods of service VA recognizes as wartime service, beginning with the Mexican border period. Most of the information is presented in a table for easy reference.

Because there are no veterans of the Civil War, the Indian Wars, or the Spanish-American War on VA’s compensation and pension rolls and most, if not all, dependents with claims based on these earlier periods of war have already filed them, we propose to delete the provisions related to these periods of war and refer regulation users to the applicable statutory provisions concerning these earlier periods of war. This deletion would not affect benefit entitlement in any way. Should the occasion arise, VA will adjudicate any new claim using statutory definitions of earlier periods of war.

A definition of the term “period of war” in 38 U.S.C. 1101(2)(A) extends the period recognized as World War I service for the purpose of benefits awarded under 38 U.S.C. chapter 11 (for example, disability compensation, death compensation, and benefits under 38 U.S.C. 1151, “Benefits for persons disabled by treatment or vocational rehabilitation”). World War I is similarly extended by 38 U.S.C. 1501(2) for the purpose of non-service-connected pension benefits awarded under 38 U.S.C. chapter 15. We propose to clarify the nature of these extensions in § 5.20(b)(2).

Similarly, the definition of the term “period of war” in 38 U.S.C. 1101(2)(B) extends the period recognized as World War II service for benefits awarded under 38 U.S.C. chapter 11. These proposed amendments would clarify the limited nature of this extension in § 5.20(c).

Next, VA proposes to remove current 38 CFR 3.6, “Duty periods;” § 3.7, “Individuals and groups considered to have performed active military, naval,

or air service;" and § 3.15, "Computation of service;" and to rewrite them as nine separate, new sections that focus on the individual performing the duty instead of the type of duty performed. The new sections will be numbered §§ 5.21 to 5.29.

We propose in the first section, § 5.21, to state the general conditions for active military service. Essentially, we propose to use the term "active military service" in lieu of the longer term "active military, naval, or air service" in 38 U.S.C. 101(24) and current part 3 for simplicity and convenience. Note that, as an equivalent to the longer "active military, naval, or air service," "active military service" is a broader term than "active duty." Compare 38 U.S.C. 101(21) with 38 U.S.C. 101(24).

Proposed § 5.21(a)(6) includes the provisions from current § 3.7(a) concerning the duty status of active duty and reserve persons assigned to the Postmaster General for the aerial transportation of mail from February 10, 1934, through March 26, 1935. This provision concerns the continuation of active duty for the persons involved and not persons "considered to have performed" active duty, as stated in § 3.7, and is more appropriately included with the active military service provisions.

In addition, we propose moving the types of duty not counted as active military service, such as time on agricultural furlough or time lost when absent without leave, from current § 3.15, "Computation of service," to § 5.21(b). One of these provisions is "time lost [while] under arrest (without acquittal)." We propose to expand the exception for acquittal to include situations where the charges which led to arrest are dismissed. If charges are dismissed, there would never be a conviction for the offenses charged to taint the period of service in question. Further, we propose to clarify that the rule that time spent serving a court-martial sentence is not active military service for VA purposes is subject to 10 U.S.C. 875(a) that provides, under certain circumstances, for the restoration of "all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved."

Finally, we propose to remove the sentence in § 3.15 concerning leave authorized by General Order No. 130, War Department, for claims based on Spanish-American War service as being included in active military service. We propose to remove this sentence because according to VA records, the last veteran of this war died in 1992. Although VA is paying death benefits to survivors

based on this service, we do not believe we will receive any new claims from veterans who served in the Spanish-American War. In addition, we believe that the provision is unnecessary because periods of authorized leave are normally included as active military service.

We propose to define the periods of duty that count as active duty in § 5.22, stating that active duty is full-time duty and continues until midnight of the date of discharge from active duty.

"Special work" is a category of service performed by Reservists, normally for limited periods of time. For example, 10 U.S.C. 115, "Personnel strengths: Requirements for annual authorization," refers at subsection (d)(6) to "Members of reserve components on active duty for 180 days or less to perform special work" and at subsection (d)(9) to "members of reserve components * * * on active duty for more than 180 days but less than 271 days to perform special work in support of the combatant commands." We have not addressed whether active duty for special work is active duty for VA purposes in the text of these proposed regulations. However, we believe that it may be the case for at least some special work assignments, particularly those that involve combat duties. We invite public comment on whether, and to what extent, VA should recognize military duty for special work as active duty for VA purposes.

We propose in § 5.23 to state how VA classifies various types of service performed by Reserve and National Guard personnel. One change to the current section, § 3.6, will be removal of the provisions for determining active duty for training for full-time duty performed by the National Guard of any State while participating in the reenactment of the Battle of First Manassas in July 1961. We believe all National Guard members eligible for benefits under this provision have already applied for benefits and there will be no new applicants. If we receive a new application for entitlement to benefits under this provision, we will consider the application under the authorizing public law (Public Law 87-83, 75 Stat. 200 (1961)). Otherwise, we have simply restructured the current section and no substantive changes are proposed.

In § 5.24, we propose to include all the provisions applicable to types of duty for Armed Services Academy cadets, midshipmen, preparatory school attendees, and Senior Reserve Officers' Training Corps members. This proposed section includes a provision from current § 3.700(a)(1)(ii), which states

"Time spent by members of the ROTC in drills as part of their activities as members of the corps is not active service." We have moved this sentence to this new section because it relates directly to the topic of this new section.

Likewise, proposed § 5.25 contains all the provisions pertaining to duty and related service in the Public Health Service, in the Coast and Geodetic Survey and its successor agencies, and of temporary members of the Coast Guard Reserves. Under current § 3.6(b)(3)(ii), one of the ways in which the service of a commissioned officer of the Coast and Geodetic Survey or of its successor agencies is considered to be active duty is if the officer was "(i)n the Philippine Islands on December 7, 1941, and continuously in such islands thereafter." Under the current regulation and in its authorizing statute, 38 U.S.C. 101(21)(C), this means continuously thereafter until July 29, 1945. We propose to make that clearer in § 5.25(b)(1)(iv).

We propose to extract from § 3.7(o) and place in reorganized § 5.26, "Circumstances where persons ordered to service, but who did not serve, are considered to have performed active duty," provisions concerning entitlement to VA benefits for certain National Guard personnel and for persons who volunteer or are drafted for military service and incur injury or disease while engaged in required activities before entry into active Federal military duty. This proposed section explains that persons injured during an induction examination, or while traveling to an induction processing center, or National Guard members reporting to a rendezvous, or under other similar circumstances, are considered to have performed active duty for purposes of entitlement to VA benefits.

The remainder of current § 3.7 concerns individuals or groups who are not military personnel in the usual sense, but who have contributed significantly to the national defense. Because of the contributions of these individuals and groups, Congress (through specific statutory enactments), VA (through statutory interpretations in Administrator's Decisions), courts, and the Secretary of Defense (exercising authority granted in section 401 of Public Law 95-202) have determined that their work warrants recognition as active military service.

VA proposes to include information about these individuals and groups in two separate proposed sections, § 5.27, "Individuals and groups designated by the Secretary of Defense as having performed active military service," and

§ 5.28, “Other individuals and groups designated as having performed active military service.” Both sections list these individuals and groups in alphabetical order.

In § 5.27, we propose to update the list, currently contained in 38 CFR 3.7(x), of those individuals and groups the Secretary of Defense (frequently through the Secretary of the Air Force acting as Executive Agent of the Secretary of Defense) has determined have performed active military service. Notice of these determinations is given to the public in **Federal Register** notices issued by the Department of Defense.

These notices include the date the Secretary of Defense, or the Secretary’s agent, recognized the applicable group(s) as having performed active military service for the purpose of VA benefits. We propose to include recognition effective date information for each group listed in § 5.27.

The following table includes a list of the relevant groups (in alphabetical order) and the recognition effective date for each group, as well as a citation to the applicable **Federal Register** notice describing the decision by the Secretary of Defense. There are two exceptions with respect to **Federal Register**

citations. One group, the Women’s Air Forces Service Pilots (WASP), was specifically recognized by Pub. L. 95–202, the statute that authorizes the Secretary of Defense to make these determinations. In that case, the effective date of recognition is the effective date specified in the statute. Information about another group, “Quartermaster Corps Keswick Crew on Corregidor (WWII),” does not appear to have been published in the **Federal Register**. In that case, we have cited the Department of Defense memorandum recognizing the group.

| Individuals and groups designated by the Secretary of Defense as having performed active military service | Individual or group recognition date | FEDERAL REGISTER citation or authority recognizing the individual or group |
|--|--|--|
| American Merchant Marine in oceangoing service, during the Period of Armed Conflict, December 7, 1941, to August 15, 1945. | Recognized effective January 19, 1988. | 53 FR 2775. |
| The approximately 50 Chamorro and Carolinian former native policemen who received military training in the Donnal area of central Saipan and were placed under the command of Lt. Casino of the 6th Provisional Military Police Battalion to accompany United States Marines on active, combat-patrol activity from August 19, 1945, to September 2, 1945. | Recognized effective September 30, 1999. | 64 FR 56773. |
| Civilian Crewmen of the United States Coast and Geodetic Survey (USCGS) vessels, who performed their service in areas of immediate military hazard while conducting cooperative operations with and for the U.S. Armed Forces within a time frame of December 7, 1941, to August 15, 1945. Qualifying USCGS vessels specified by the Secretary of Defense, or his or her designee, are the Derickson, Explorer, Gilbert, Hilgard, E. Lester Jones, Lydonia, Patton, Surveyor, Wainwright, Westdahl, Oceanographer, Hydrographer, and the Pathfinder. | Recognized effective April 8, 1991. | 56 FR 23054, 57 FR 24600. |
| Civilian employees of Pacific Naval Air Bases who actively participated in Defense of Wake Island during World War II. | Recognized effective January 22, 1981. | 46 FR 11857. |
| Civilian Navy Identification Friend or Foe (IFF) Technicians, who served in the Combat Areas of the Pacific during World War II (December 7, 1941, to August 15, 1945). | Recognized effective August 2, 1988. | 53 FR 32425. |
| Civilian personnel assigned to the Secret Intelligence Element of the Office of Strategic Services (OSS). | Recognized effective December 27, 1982. | 48 FR 1532. |
| Engineer Field Clerks (WWI) | Recognized effective August 31, 1979. | 44 FR 55622. |
| Guam Combat Patrol | Recognized effective May 10, 1983. | 48 FR 23295. |
| Honorably discharged members of the American Volunteer Group (Flying Tigers), who served during the Period December 7, 1941, to July 18, 1942. | Recognized effective May 3, 1991. | 56 FR 26072. |
| Honorably discharged members of the American Volunteer Guard, Eritrea Service Command, who served during the Period June 21, 1942, to March 31, 1943. | Recognized effective June 29, 1992. | 57 FR 34766. |
| Male Civilian Ferry Pilots | Recognized effective July 17, 1981. | 46 FR 39197. |
| The Operational Analysis Group of the Office of Scientific Research and Development, Office of Emergency Management, which served overseas with the U.S. Army Air Corps from December 7, 1941, through August 15, 1945. | Recognized effective August 27, 1999. | 64 FR 53364. |
| Quartermaster Corps Female Clerical Employees serving with the AEF (American Expeditionary Forces) in World War I. | Recognized effective January 22, 1981. | 46 FR 11857. |

| Individuals and groups designated by the Secretary of Defense as having performed active military service | Individual or group recognition date | FEDERAL REGISTER citation or authority recognizing the individual or group |
|--|--|--|
| Quartermaster Corps Keswick Crew on Corregidor (WWII). | Recognized effective February 7, 1984. | Memorandum from the Acting Assistant Secretary of the Air Force (Manpower, Reserve Affairs and Installations), Determination of Active Military Service (Feb. 7, 1984) (on file with DOD Civilian/Military Service Review Board)). |
| Reconstruction Aides and Dietitians in World War I | Recognized effective July 6, 1981. | 46 FR 37306. |
| Signal Corps Female Telephone Operators Unit of World War I. | Recognized effective May 15, 1979. | 44 FR 32019. |
| Three scouts/guides, Miguel Tenorio, Penedicto Taisacan, and Cristino Dela Cruz, who assisted the U.S. Marines in the offensive operations against the Japanese on the Northern Mariana Islands from June 19, 1944, through September 2, 1945. | Recognized effective September 30, 1999. | 64 FR 56773. |
| U.S. civilian employees of American Airlines, who served overseas as a result of American Airlines' contract with the Air Transport Command during the Period December 14, 1941, through August 14, 1945. | Recognized effective October 5, 1990. | 55 FR 46706. |
| U.S. civilian female employees of the U.S. Army Nurse Corps while serving in the defense of Bataan and Corregidor during the Period January 2, 1942, to February 3, 1945. | Recognized effective December 13, 1993. | 59 FR 298. |
| U.S. Civilian Flight Crew and Aviation Ground Support Employees of Braniff Airways, who served overseas in the North Atlantic or under the jurisdiction of the North Atlantic Wing, Air Transport Command (ATC), as a result of a contract with the ATC during the Period February 26, 1942, through August 14, 1945. | Recognized effective June 2, 1997. | 62 FR 36263. |
| U.S. Civilian Flight Crew and Aviation Ground Support Employees of Consolidated Vultree Aircraft Corporation (Consairway Division), who served overseas as a result of a contract with the Air Transport Command during the Period December 14, 1941, through August 14, 1945. | Recognized effective June 29, 1992. | 57 FR 34765. |
| U.S. Civilian Flight Crew and Aviation Ground Support Employees of Northeast Airlines Atlantic Division, who served overseas as a result of Northeast Airlines' Contract with the Air Transport Command during the Period December 7, 1941, through August 14, 1945. | Recognized effective June 2, 1997. | 62 FR 36263. |
| U.S. Civilian Flight Crew and Aviation Ground Support Employees of Northwest Airlines, who served overseas as a result of Northwest Airline's contract with the Air Transport Command during the Period December 14, 1941, through August 14, 1945. | Recognized effective December 13, 1993. | 59 FR 297. |
| U.S. Civilian Flight Crew and Aviation Ground Support Employees of Pan American World Airways and Its Subsidiaries and Affiliates, who served overseas as a result of Pan American's Contract with the Air Transport Command and Naval Air Transport Service during the Period December 14, 1941, through August 14, 1945. | Recognized effective July 16, 1992. | 57 FR 34765. |
| U.S. Civilian Flight Crew and Aviation Ground Support Employees of Transcontinental and Western Air (TWA), Inc., who served overseas as a result of TWA's contract with the Air Transport Command during the Period December 14, 1941, through August 14, 1945. The "Flight Crew" includes pursers. | Recognized effective May 13, 1992. | 57 FR 24479, 68 FR 11068. |
| U.S. Civilian Flight Crew and Aviation Ground Support Employees of United Air Lines (UAL), who served overseas as a result of UAL's contract with the Air Transport Command during the Period December 14, 1941, through August 14, 1945. | Recognized effective May 13, 1992. | 57 FR 24478. |
| U.S. civilian volunteers, who actively participated in the Defense of Bataan. | Recognized effective February 7, 1984. | 49 FR 7849. |
| U.S. civilians of the American Field Service (AFS), who served overseas operationally in World War I during the Period August 31, 1917, to January 1, 1918. | Recognized effective August 30, 1990. | 55 FR 46707. |
| U.S. civilians of the American Field Service (AFS), who served overseas under U.S. Armies and U.S. Army Groups in World War II during the Period December 7, 1941, through May 8, 1945. | Recognized effective August 30, 1990. | 55 FR 46707. |

| Individuals and groups designated by the Secretary of Defense as having performed active military service | Individual or group recognition date | FEDERAL REGISTER citation or authority recognizing the individual or group |
|---|---|--|
| U.S. Merchant Seamen who served on blockships in support of Operation Mulberry. | Recognized effective October 18, 1985. | 50 FR 46332. |
| Wake Island Defenders from Guam | Recognized effective April 7, 1982. | 47 FR 17324. |
| Women's Air Forces Service Pilots (WASP) | Recognized effective November 23, 1977. | Sec. 401, Pub. L. 95-202, 91 Stat. 1433, 1449. |
| Women's Army Auxiliary Corps (WAAC) | Recognized effective March 18, 1980. | 45 FR 23716, 45 FR 26115. |

Proposed § 5.27(a) provides basic information about the designation of individuals and groups by the Secretary of Defense. These individuals and groups are listed in § 5.27(b).

We propose to add three additional groups recognized by the Department of Defense to update the list in proposed § 5.27.

In the **Federal Register** of October 1, 1999 (64 FR 53364-65), the Secretary of the Air Force published a notice that he had determined that the service of the members of the group known as "The Operational Analysis Group of the Office of Scientific Research and Development, Office of Emergency Management, which served overseas with the U.S. Army Air Corps from December 7, 1941, through August 15, 1945," shall be considered active duty for the purpose of all laws administered by VA.

In the **Federal Register** of October 21, 1999 (64 FR 56773-74), the Secretary of the Air Force published a notice that he had determined that the service of the members of the groups known as:

[T]hree scouts/guides, Miguel Tenorio, Benedicto Taisacan, and Cristino Dela Cruz, who assisted the U.S. Marines in the offensive operations against the Japanese on the Northern Mariana Islands from June 19, 1944, through September 2, 1945, and * * * "the approximately 50 Chamorro and Carolinian former, native policemen who received military training in the Donnal area of central Saipan and were placed under the command of Lt. Casino of the 6th Provisional Military Police Battalion to accompany United States Marines on active, combat-patrol activity from August 19, 1945, to September 2, 1945,

shall be considered to be active duty for the purpose of all laws administered by VA.

We also propose to add additional information concerning three groups already recognized. The first group is "[c]ivilian Crewmen of the United States (U.S.) Coast and Geodetic Survey vessels, who performed their service in areas of immediate military hazard while conducting cooperative operations with and for the U.S. Armed Forces within a time frame of December 7, 1941, to August 15, 1945." The

Department of Defense has specifically designated qualifying vessels upon which members of the group must have served. 57 FR 24600, June 10, 1992. We propose adding this information at § 5.27(b)(3) to assist claimants and their representatives in identifying service potentially qualifying for VA benefits.

In proposed § 5.27(b)(7), we have amended the title of the group "Engineer Field Clerks" to the more complete "Engineer Field Clerks (WWI)." See 44 FR 55622, September 27, 1979.

The third group is "U.S. Civilian Flight Crew and Aviation Ground Support Employees of Transcontinental and Western Air (TWA), Inc., who served overseas as a result of TWA's contract with the Air Transport Command during the Period December 14, 1941, through August 14, 1945." On February 21, 2003, the Secretary of the Air Force (acting as Executive Agent of the Secretary of Defense) determined that "Flight Crew" includes pursers. 68 FR 11068, March 7, 2003. This information has been added at proposed § 5.28(b)(25).

One of the Project's design goals is to associate effective date rules that concern specific regulations with those regulations so that related material will be in one place for the convenience of claimants and their representatives and VA personnel who adjudicate claims. Therefore, we propose to include rules for determining the effective date for awarding VA benefits to a member of a group that would be listed in proposed § 5.27 as proposed § 5.27(c). Proposed § 5.27(c) would replace effective date rules for awards to these groups currently included in the introduction to § 3.7(x) and in § 3.400(z).

38 U.S.C. 5110(g) provides that:

(g) Subject to the provisions of section 5101 of this title [concerning the requirement for filing a claim for VA benefits], where compensation, dependency and indemnity compensation, or pension is awarded or increased pursuant to any Act or administrative issue, the effective date of such award or increase shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue. In no event shall

such award or increase be retroactive for more than one year from the date of application therefor or the date of administrative determination of entitlement, whichever is earlier.

Another statutory provision, 38 U.S.C. 1832(b)(2), as amended by the Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651 (2003), extends § 5110(g) to cover claims for certain benefits for children of Vietnam veterans and of veterans of covered service in Korea under 38 U.S.C. chapter 18.

Because each decision of the Department of Defense to include a new group is a liberalizing change with respect to eligibility for VA benefits, we propose to treat the decision as a liberalizing "administrative issue" under 5110(g). The effective date of recognition established by the Department of Defense would be the effective date of the "administrative issue."

While neither 38 U.S.C. 5110(g) nor its current implementing regulation, § 3.114, is specifically cited in current § 3.400(z), we note that this approach is consistent with the approach used in § 3.400(z). Note, for example, the potential for up to one year in retroactive benefits under certain circumstances in § 3.400(z)(2)(iii) and in 38 U.S.C. 5110(g). This approach would also produce a result that appears to be consistent with the view of the Department of Defense. For example, the **Federal Register** notice of the group described at proposed § 5.27(b)(2) states that benefits are not retroactive. See 64 FR 56773.

In drafting the 38 U.S.C. 5110(g)-based effective date provision in proposed § 5.27(c), we have substituted "date entitlement arose" for "facts found." VA interprets "facts found" and another phrase used in effective date rules, "date entitlement arose," as having the same basic meaning. We are proposing to use only one of these terms, "date entitlement arose," in all of our proposed regulations to improve consistency. "Date entitlement arose" will be defined in a later notice of

proposed rulemaking as part of the project.

The effective date rules in proposed § 5.27(c) are consistent with relevant portions of another 38 U.S.C. 5110(g)-based regulation, current § 3.114.

With respect to the individuals and groups described in proposed § 5.27, current § 3.7(x) provides that “[t]he effective dates for an award based upon such service shall be as provided by § 3.400(z) and 38 U.S.C. 5110, except that in no event shall such an award be made effective earlier than November 23, 1977.” We have not included similar information in proposed § 5.27(c). The November 23, 1977, date is the effective date of Pub. L. 95–202, which recognized the service of the Women’s Air Forces Service Pilots (WASP) and authorized the Secretary of Defense to recognize the service of similarly situated groups in the future. Thus the only group recognized effective November 23, 1977, is the WASP group, as noted in proposed § 5.27(b)(32). The recognition effective date of all other groups is later, as shown in proposed § 5.27(b).

In § 5.28, we propose to list those individuals and groups determined specifically by the Congress, or by court or VA decisions interpreting applicable legislative provisions, to have performed active military service. These groups are currently listed in various paragraphs of current § 3.7, as shown on the table presented earlier.

We propose to update the list of groups and descriptions of the groups where indicated. Proposed § 5.28(a) would add service in the Alaska Territorial Guard during World War II to the list of groups and individuals. *See* Public Law 106–259, 114 Stat. 656 (2000). We have also added material to § 5.28(e) to notify readers that the Coast Guard is now under the jurisdiction of the Department of Homeland Security. *See* Public Law 107–296, 116 Stat. 2135 (2002). In addition, we propose to correct an error in current § 3.7(h), which lists “[a]ctive service in Coast Guard on or after January 29, 1915.” The relevant date is actually January 28, 1915. *See* Pub. L. No. 77–182, 55 Stat. 598 (1941). *See also* 14 U.S.C. 1 (“The Coast Guard as established January 28, 1915, shall be a military service and a branch of the Armed Forces of the United States at all times.”)

Proposed § 5.29, “Circumstances under which certain travel periods may be classified as military service,” contains the rules pertaining to when a service member performing authorized travel is considered to be on active duty, active duty for training, or inactive duty training. Consistent with the language of

current § 3.6(e)(2), § 5.29(b)(3) restates that the burden of proof is on the claimant to show that disability or death was incurred while the service member was going to, or returning from, authorized active duty for training or inactive duty training. *See* 38 U.S.C. 106(d)(3). We propose to add a cross reference to provisions in § 5.26 concerning travel by persons who were ordered to service but did not serve.

Service Creditable for VA Benefits

Current § 3.12, the rules pertaining to service requirements for VA benefits, is long and extremely complex. It contains rules pertaining to several subjects: How VA determines whether discharges were issued under other than dishonorable conditions; certain statutory bars to VA benefits; the effect of discharge upgrades by different armed forces boards on decisions VA makes concerning service members’ discharges; the effect of certain special discharge-upgrade programs in the 1970s; and various other subjects. We propose to divide § 3.12 by topic into separate sections, which would be numbered §§ 5.30 through 5.36.

A requirement for VA benefits is status as a “veteran,” which means that the service member was discharged or released from active military service under other than dishonorable conditions. *See* 38 U.S.C. 101(2). Proposed § 5.30 would state the rules pertaining to VA’s determinations of whether a service member’s discharge or release was under other than dishonorable conditions.

Proposed revisions include updating terminology to reflect the change by the Department of Defense in the term “undesirable discharge” to “other than honorable discharge.”

VA proposes to clarify, through new §§ 5.30(b)(1) and 5.31(b)(1), that a service member’s discharge or release from service under other than honorable conditions, if it bars benefits at all, or a discharge or dismissal for commission of an act that results in a statutory bar to VA benefits, bars VA benefits only based on the period of service for which the relevant discharge, release, or dismissal was issued. Neither bars the award of benefits based upon other qualifying periods of service. This would avoid potential confusion in cases where the veteran has one period of service that ended with a discharge under dishonorable conditions and one or more other periods of service which ended with a discharge under other than dishonorable conditions.

This matter was considered by VA’s General Counsel in 1991 in response to a request from the Department of the Air

Force for an opinion as to the effect of a discharge under dishonorable conditions on a service member’s eligibility to receive veterans’ benefits based on another period of service which terminated under honorable conditions. The General Counsel held that:

Unless the Secretary of Veterans Affairs determines that an individual is guilty of an offense listed in 38 U.S.C. 6104 (formerly § 3504) (mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies) or the individual is convicted of an offense listed in 38 U.S.C. 6105 (formerly § 3505) (articles 94 (mutiny or sedition), 104 (aiding the enemy), and 106 (spying) of the Uniform Code of Military Justice; various provisions of title 18, United States Code, relating to espionage, treason, rebellion, sedition, subversive activities, and sabotage; violations of the Atomic Energy Act of 1954 and the Internal Security Act of 1950), a discharge under dishonorable conditions does not bar that individual from receiving gratuitous benefits administered by the Department of Veterans Affairs, including burial in a national cemetery, based on a prior period of service which terminated under conditions other than dishonorable. However, if VA determines, subject to the severe limitations on application of 38 U.S.C. 6104 to U.S. residents and domiciliaries after September 1, 1959, under 38 U.S.C. 6103(d)(1) (formerly § 3503(d)(1)), that an individual is guilty of an offense listed in 38 U.S.C. 6104, or if an individual is convicted of an offense listed in 38 U.S.C. 6105, such individual is barred from receiving all accrued or future benefits regardless of whether the individual may have had a prior period of honorable service. VAOPGCPREC 61–91.

Proposed §§ 5.30(b) and 5.31(b) reflect the general rule that a discharge or release under dishonorable conditions applies only to the period of service to which the discharge or release pertains, but that this general rule does not preclude forfeiture of VA benefits under 38 U.S.C. 6103 through 6105 or similar statutes governing forfeiture of VA benefits.

We also note that, while it would be highly unusual, the period of service terminating under other than dishonorable conditions could follow as well as precede the period of service terminating under dishonorable conditions. For example, none of the controlling authorities discussed in VAOPGCPREC 61–91 requires a sequence. The issue is whether the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable.

Proposed § 5.30(c) describes the discharges VA will recognize as being under other than dishonorable conditions. Proposed § 5.30(d) lists

those discharges VA will recognize as being under dishonorable conditions. Section 5.30(e) lists the discharges for which VA will make a character of discharge determination. These provisions are based on the explicit provisions of current § 3.12, as noted in the derivation table included earlier in this document, or are implicit in the current regulatory scheme.

Except where the law otherwise specifically provides (such as in the case of certain discharge upgrade programs treated in proposed § 5.36), VA has long considered itself bound by discharges under honorable conditions issued by a service department, such as honorable discharges and general discharges under honorable conditions. Discharges under honorable conditions are, of course, also discharges that are under other than dishonorable conditions. In addition, VA treats uncharacterized entry level separations as being under other than dishonorable conditions. See current § 3.12(a) and (k)(1), § 3.14(d). These are the discharges described in proposed § 5.30(c).

A dishonorable discharge is, by definition, a discharge under dishonorable conditions and issuance of such discharges is a matter for the Department of Defense. This is the subject of proposed § 5.30(d).

Section 5.30(e) describes the types of discharges that lie in a middle ground, neither clearly honorable nor dishonorable: An other than honorable discharge (formerly classified as an "undesirable" discharge); a bad conduct discharge; and certain uncharacterized administrative separations. It is in those cases that VA will make the character of discharge determination because VA must decide whether they are, or are not, discharges "under conditions other than dishonorable" in order to determine eligibility for VA benefits. See generally *Camarena v. Brown*, 6 Vet. App. 565 (1994).

While it does not represent a substantive change, we also propose, in § 5.30(e)(3), to add a parenthetical explaining what "dropped from the rolls" means. VA understands this expression to mean the administrative termination of military status and pay. The U.S. Supreme Court has noted in *Clinton v. Goldsmith*, 526 U.S. 529 (1999) that:

When a service member is dropped from the rolls, he forfeits his military pay. See 37 U.S.C. 803. The drop-from-the-rolls remedy targets a narrow category of service members who are absent without leave (AWOL) or else have been convicted of serious crimes. Since 1870, the President has had authority to drop from the rolls of the Army any officer who

has been AWOL for at least three months. See Act of July 15, 1870, § 17, 16 Stat. 319. The power was subsequently extended to officers confined in prison after final conviction by a civil court, see Act of Jan. 19, 1911, ch. 22, 36 Stat. 894, and then to "any armed force" officer AWOL for at least three months or else finally sentenced to confinement in a Federal or State penitentiary or correctional institution, see Act of May 5, 1950, § 10, 64 Stat. 146.

Id. at 532 n.1.

Proposed § 5.30(f) lists the offenses or events leading to a discharge that VA will recognize as a discharge or separation under dishonorable conditions. Current § 3.12(d)(3) lists "An offense involving moral turpitude. This includes, generally, conviction of a felony." We propose to retain this rule, including the example of conviction of a felony, but to add a general definition of moral turpitude. VA believes that such a definition would be helpful to claimants and to VA employees who adjudicate VA benefit claims.

Claimants ought to be able to know with at least some degree of certainty whether or not a provision applies to their case. This is particularly true of provisions that may serve to bar VA benefits.

The phrase "moral turpitude" is one commonly used in the law and has been examined by legal writers in some depth.

There seems to be a common thread running through the majority of cases concerning misdeeds considered to involve moral turpitude. A crime involving moral turpitude is a criminal act that is done with the willful intent to harm another person or entity through harm to their person or property. In an analysis of more than 100 years of case law involving courts' struggles to define "moral turpitude," one author notes the following with respect to the major categories of crimes found to involve moral turpitude:

Crimes against the person involve moral turpitude when the local statute defining the crime requires "malicious intent." * * * Crimes against property involve moral turpitude if the criminal statute requires an intent to deprive, defraud, or destroy. * * * Aggravated sexual crimes always involve moral turpitude, but some sexual offenses do not. Examples of aggravated sexual crimes are: rape, sexual misconduct with a minor, prostitution, sodomy, lewdness, and gross indecency. Sexual offenses that do not involve moral turpitude include vagrancy, maintaining a nuisance, and fornication. * * * Crimes involving family relationships that courts have held to be "crimes involving moral turpitude" include: adultery, abortion, bigamy, spousal abuse, and child abuse. * * * Crimes of fraud against the government or its authority, like all crimes with an element of fraud, are "crimes involving moral turpitude."

Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 Geo. Immigr. L.J. 259, 267-69 (Winter 2001).

An exhaustive analysis of the concept of moral turpitude in *American Law Reports Federal* includes the observation that:

The presence or absence of criminal or 'evil' intent as an essential element of the crime under consideration is frequently considered as a factor indicative of the moral turpitude of the offense; the 'evil' intent may be evidenced by the use of unjustified violence or the endangerment of human life * * *, or by the presence of an intent to defraud as a necessary ingredient of the offense. * * *

Annotation, *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of §§ 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 USCA §§ 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. Fed. 480, 488 (1975).

VA's proposed definition is: "an offense involves 'moral turpitude' if it is unlawful, it is willful, it is committed without justification or legal excuse, and it is an offense which a reasonable person would expect to cause harm or loss to person or property."

The basic concept is that VA will look at the facts and circumstances surrounding the commission of acts leading to discharge to determine whether they do, or do not, involve moral turpitude under the proposed definition.

When a discharge or release from service is because of one of various offenses listed in current § 3.12(d), VA will consider that discharge or release to be under dishonorable conditions. This list includes the following at § 3.12(d)(5):

Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

Since the time when these words were written in the 1970s, integration of men and women into almost all military specialties and every aspect of military life has become common. We believe it is appropriate for VA to clearly state that all of the sexual offenses listed in this paragraph are egregious no matter

who commits them. Therefore, in § 5.30(f)(5), we propose to replace the word "homosexual" with "sexual," in order to make this rule applicable to all persons.

Proposed § 5.31 describes statutory bars to VA benefits and the exceptions to those bars. Proposed § 5.31(c)(1) would provide information concerning 10 U.S.C. 874(b), which grants service department secretaries the authority to "substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial." VA's General Counsel has held that such a discharge upgrade does not remove the statutory bar to VA benefits that results from discharge or dismissal by reason of the sentence of a general court-martial. In VAOPGCPREC 10-96, after reviewing legislative history and other relevant matters, including the interpretation of 10 U.S.C. 874(b) by the Department of the Navy, the VA General Counsel reasoned at paragraph 11 that:

In view of the foregoing, we conclude that an upgraded discharge awarded pursuant to 10 U.S.C. 874(b) does not alter an individual's service records to change the fact that the individual was discharged or dismissed by reason of the sentence of a general court-martial. In the instant case, the revised DD 214 issued to the appellant, while reflecting a discharge under honorable conditions, continues to identify the sentence of the court-martial as the reason for his discharge. Congress has made clear that a statutory bar to benefits under 38 U.S.C. 5303(a) will be removed "[o]nly in instances when the Board for Correction of Military Records changes the reasons for discharge." H.R. Rep. No. 580, 95th Cong., 1st Sess. at 11, reprinted at 1977 U.S.C.C.A.N. at 2854. Accordingly, because an upgraded discharge issued under 10 U.S.C. 874(b) changes the character of discharge, but not the reasons for discharge, an upgraded discharge issued pursuant to 10 U.S.C. 874(b) does not remove the statutory bar to benefits under section 5303(a) as to individuals discharged or dismissed by reason of the sentence of a general court-martial.

Proposed § 5.31(c)(2) provides the rules concerning discharge or dismissal "[a]s a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities" as a bar to VA benefits.

Another statutory bar to VA benefits is found in title 38 of the United States Code, subsections 5303(a) and (c). These subsections bar the payment of VA benefits to an alien who is discharged because of his or her status as an alien during a time of hostilities between the United States and another nation where the discharge is initiated by the alien's own application or solicitation. Proposed § 5.31(c)(6) concerns this bar

to benefits based on alienage. This proposed revision eliminates material in current § 3.7(b) concerning discharges for alienage upgraded to honorable prior to January 7, 1957, by certain military boards. The material provides that VA accepts such upgrades as proof that a discharge was not at the alien's request. It was added at a time when the burden of proof was on the service member to prove that a discharge for alienage was not based on the service member's application or solicitation. This material is no longer necessary because the burden of proving that the discharge was at the service member's request is now on the government under 38 U.S.C. 5303(c).

Proposed § 5.31(d), explaining that this section concerning statutory bars to benefits does not apply to certain government insurance programs, is new. It follows a statutory provision found at 38 U.S.C. 5303(d). Note that this exclusion applies only to statutory bars to benefits under 38 U.S.C. 5303. It does not affect, for example, the forfeiture of National Service Life Insurance under 38 U.S.C. 1911, "Forfeiture."

Current § 3.12(j) provides that:

(j) No overpayment shall be created as a result of payments made after October 8, 1977, in cases in which the bar contained in paragraph (c)(6) of this section [relating to a statutory bar to VA benefit awards to individuals discharged under other than honorable conditions for being AWOL for 180 days or more] is for application. Accounts in payment status on or after October 8, 1977, shall be terminated at the end of the month in which it is determined that compelling circumstances do not exist, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment, or April 7, 1978, whichever is the earliest.

This material is grounded in provisions of section 5 of Public Law No. 95-126, 91 Stat. 1106 (1977); the same Public Law which, in section 1, amended what is now 38 U.S.C. 5303(a) to add the referenced statutory bar to VA benefits because of lengthy AWOLs. The material in the last two sentences of current § 3.12(j) was important transitional material at the time Public Law No. 95-126 became effective but is now obsolete. We propose to replace the § 3.12(j) material, in § 5.31(e), with simplified award termination provisions that take into account applicable procedural and notice provisions, described currently in § 3.105, "Revision of decisions." We propose to provide, in § 5.31(f), for the bar against overpayment creation by specifying that awards contrary to the statutory bar for lengthy AWOLs will be terminated on the date of last payment.

Proposed § 5.32, "Consideration of mitigating factors in absence without leave cases," deals with cases in which a service member was separated or discharged because of absence without authority (referred to here by the more common term "absence without leave" (AWOL)). One of the statutory bars to VA benefits under 38 U.S.C. 5303(a) is AWOL for a continuous period of at least 180 days. However, this subsection of the statute also provides for an exception where a claimant "demonstrates to the satisfaction of the Secretary [of Veterans Affairs] that there are compelling circumstances to warrant such prolonged unauthorized absence."

Current § 3.12(c)(6) sets up standards for determining whether there are "compelling circumstances" warranting a prolonged AWOL. It requires consideration of certain mitigating factors, such as reasons for being absent, when the service member was AWOL for 180 days or more. It does not provide for consideration of the same mitigating circumstances for lesser absences. Because it is illogical to be more lenient for greater offenses than for lesser ones, VA proposes in new § 5.32, under its general rulemaking authority in 38 U.S.C. 501(a), to make this policy applicable to all cases involving AWOL as the reason for discharge. The effect of this proposed change would be to explicitly permit consideration of factors mitigating AWOL in the context of character of discharge determinations as well as in conjunction with statutory bars to VA benefits. We believe that this is consistent with current VA practice.

As current § 3.12(c)(6) and proposed § 5.32(b) show, VA will consider such factors as how the situation appeared to the service member in light of the service member's age, cultural background, educational level and judgmental maturity in determining whether there were compelling circumstances for an unauthorized absence. However, we wish to be clear that VA does not judge whether compelling circumstances exist on the basis of a claimant's purely subjective viewpoint. Rather, VA looks at the record as a whole in evaluating whether compelling circumstances existed. See *Lane v. Principi*, 339 F.3d 1331 (Fed. Cir. 2003). Therefore, proposed § 5.32(b) notes that "VA will evaluate all of the relevant evidence of record in determining whether there are compelling circumstances to warrant unauthorized absence(s), including consideration of the following factors."

Proposed § 5.33 deals with insanity as a defense to the commission of acts leading to separation from service. This defense is available under 38 U.S.C.

5303(b) in cases involving statutory bars to VA benefits and in character of discharge determinations by regulation. The definition of insanity, now contained in § 3.354(a), will be revised and published for public comment later as part of this Project.

The next two proposed sections, §§ 5.34 and 5.35, state the rules related to the effect of discharge upgrades by boards for the correction of military records and discharge review boards on VA benefit eligibility determinations. Specifically, these rules concern whether VA benefits are barred by the character of a service member's discharge or because of statutory bars to benefits.

Current §§ 3.12 (f) and (g) provide guidance about the effect of discharge upgrades by discharge review boards on existing VA determinations based on a previous discharge, but they are not clear about the effect of such upgrades where VA is making the determination for the first time after the upgrade. We propose to address that shortcoming in § 5.35. The proposed section would also provide information about the effective dates of awards of VA benefits when benefit eligibility is established on the basis of a discharge upgrade by a board for the correction of military records or a discharge review board.

As current § 3.12 does, proposed § 5.35(d) provides that VA will not consider certain upgraded discharges issued by a discharge review board on or after October 8, 1977, in making character of discharge determinations unless certain enumerated statutory conditions for the board's review were met. (See 38 U.S.C. 5303(e)(1).) Proposed § 5.35(d)(2)(iii) clarifies that VA will accept a report of the service department concerned that the discharge review board met those conditions.

Proposed § 5.36 sets out material now contained in § 3.12(h) concerning the effect of certain special discharge upgrade programs in the 1970s. We have rewritten this regulation in an attempt to achieve greater clarity and to simplify the information concerning award terminations and a prohibition against the creation of overpayments.

Current § 3.12(i) provides that:

(i) No overpayments shall be created as a result of payments made after October 8, 1977, based on an upgraded honorable or general discharge issued under one of the programs listed in paragraph (h) of this section which would not be awarded under the standards set forth in paragraph (g) of this section. Accounts in payment status on or after October 8, 1977, shall be terminated the end of the month in which it is determined that the original other than honorable

discharge was not issued under conditions other than dishonorable following notice from the appropriate discharge review board that the discharge would not have been upgraded under the standards set forth in paragraph (g) of this section, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment or April 7, 1978, whichever is the earliest.

This material is grounded in provisions of section 5 of Public Law No. 95-126, 91 Stat. 1106 (1977); the same Public Law which, in section 1, added what is now 38 U.S.C. 5303(e) concerning the effect of certain special discharge upgrade programs in the 1970s. The material in the last two sentences of current § 3.12(i) was important transitional material at the time Public Law No. 95-126 became effective, but is now obsolete. We propose to replace the § 3.12(i) material, in § 5.36(b), with simplified award termination provisions that take into account applicable procedural and notice provisions, described currently in § 3.105, "Revision of decisions." We propose to retain, in § 5.36(c), the bar against overpayment creation and specify that awards contrary to the section will be terminated on the date of last payment.

Proposed § 5.37, a proposed replacement for current § 3.13, concerns whether a service member has veteran status. That, in turn, depends (except for service members who die in service) upon whether the service member was discharged or released from active military service under other than dishonorable conditions. See 38 U.S.C. 101(2) (defining "veteran").

More specifically, proposed § 5.37 concerns a subset of the veteran status question. It typically arises under these circumstances: (1) A person enters military service for a fixed period of time, for example, a 4-year enlistment; (2) before the expiration of that fixed period of time, the person's service obligation is extended due to some change in military status; for example, an early discharge conditioned on immediate reenlistment, conversion from enlisted to officer status, a voluntary extension of service to gain some benefit, or an involuntary extension due to war or national emergency; (3) the person continues to serve honorably through the date when the original period of obligated service would have expired, but is not discharged or released on that date due to the intervening extension of the service obligation because of the change in military status; (4) after the date the period of service would have originally

expired, but before discharge or release from the period of service to which the person became obligated upon the change in military status, the service member is involved in some incident that results in separation from service under dishonorable conditions.

Congress has determined that in such situations service members should be granted veteran status as though they had been discharged or released under other than dishonorable conditions at the time when the period of service they were first obligated to serve expired. The section implements 38 U.S.C. 101(18)(B), which was added by § 3 of Public Law 95-126, 91 Stat. 1106 (1977). The legislative history of this provision shows that Congress was attempting to correct an inequity caused when a discharge was not issued at the end of a service member's initial period of service because he or she agreed to extend their service beyond the initial period of obligation and, in some cases, decided or was offered the opportunity to change their military status. See H.R. Rep. No. 95-580, at 18, *reprinted in* 1977 U.S.C.C.A.N. 2844, 2861.

In drafting proposed § 5.37, we have extensively reorganized current § 3.13 and revised its language to make it more clearly reflect 38 U.S.C. 101(18), the statute's legislative history, and existing VA practice. We propose to title this new section, "Effect of extension of service obligation due to change in military status on eligibility for VA benefits," to clarify that the purpose of this section is to address situations when eligibility for VA benefits may be affected by a change in military status.

We note that even under the current regulation, there need not have been a formal discharge or release at the time military status changed; for example, a change from a Reserve to a Regular commission. The issue is not whether there was a discharge or release at the time of the change in military status, but rather due to the change in status, there was no discharge or release at the time the service member completed the period of service he or she was obligated to serve when they entered service.

We propose two definitions in § 5.37(b). The first is "change in military status." While the end result will be the same as under the current regulation, VA believes that the "change in status" terminology is much clearer and more accurately reflects 38 U.S.C. 101(18) and its legislative history than the "conditional discharge" language found in current § 3.13.

We propose to include a non-exclusive list of five examples of change in military status within this definition. The first four involve extensions of

obligated service through reenlistment or acceptance of an appointment as a commissioned or warrant officer and changes between regular and reserve commissions. We propose to add voluntary or involuntary extensions of military service as a fifth example. Service may be extended on a voluntary or involuntary basis for a variety of reasons. These range from qualifying for financial incentives based on the length of certain tours to occurrences, such as suffering an injury at or near the separation of service date for which military medical care is required. Periods of service are sometimes involuntarily extended due to war or other national emergencies.

Because VA will determine the character of a service member's discharge or release upon the discharge or release from combined periods of service under certain circumstances, we also propose to define what we mean by "combined periods of service" in the context of this section. This is the second definition in proposed paragraph (b).

We propose to eliminate the various rules related to specific periods of war and peacetime service in current § 3.13(a)(1) through (3). These rules are based on VA regulations that predate the enactment of 38 U.S.C. § 101(18)(B) and are no longer necessary.

Proposed paragraph (c) states that VA will determine veteran status by the character of the final termination of the service member's combined periods of service if the combined periods of service terminate under honorable conditions. This is because there is no need to resort to the liberalizing provisions of 38 U.S.C. 101(18)(B) under such circumstances. The previously described sequence of events causing the potential inequity that 38 U.S.C. 101(18)(B) is intended to remedy would not occur because the service member was not "involved in some incident that results in separation from service under dishonorable conditions." If that extended service is terminated by a discharge under other than honorable conditions, the provisions of proposed paragraph (d), which implements 38 U.S.C. 101(18)(B), govern.

Further, we propose to omit language in current § 3.13(b) purporting to list an exception for death pension purposes; specifically "except that, for death pension purposes, § 3.3(b)(3) and (4) is controlling as to basic entitlement when the conditions prescribed therein are met." Proposed § 5.37 concerns veteran status, not pension eligibility rules, and is not inconsistent with those rules.

As part of our revision of these regulations we propose to reorganize

current § 3.13(c), which we believe is unnecessarily confusing. It provides criteria for determining when VA will consider a service member to have been "unconditionally discharged or released from active military, naval or air service" "[d]espite the fact that no unconditional discharge may have been issued."

The term "unconditional discharge" is not one generally used by the various military departments and is not defined in the current regulations. Actually, the criteria listed are the criteria VA uses to determine whether a service member is eligible for VA benefits when he or she was not discharged or released at the expiration of the time he or she was obligated to serve at the beginning of a period of service because of an intervening change in military status that extends the service member's military obligation. We believe that use of "unconditional discharge" in the current regulation adds unnecessary complexity and have eliminated it in favor of a more accurate description in § 5.37(d), the proposed replacement for § 3.13(c). We have also clarified the effective date of the rules described in § 5.37(d). These rules are effective on and after October 8, 1977, the effective date of the provisions of Public Law 95-126 amending 38 U.S.C. 101(18).

Proposed new § 5.38, "Effect of a voided enlistment on eligibility for VA benefits," is based on current § 3.14. The first sentence of current § 3.14(b) states:

Where an enlistment is voided by the service department because the person did not have legal capacity to contract for a reason other than minority (as in the case of an insane person) or because the enlistment was prohibited by statute (a deserter or person convicted of a felony), benefits may not be paid based on that service even though a disability was incurred during such service.

We propose to replace the example of "an insane person," in proposed § 5.38(b), with "a lack of mental capacity to contract." "A lack of mental capacity to contract" is the more customary way to describe this concept in contract law.

The test for lack of capacity is generally said to be whether an individual lacks sufficient mental capacity to understand in a reasonable manner the nature of the transaction in which he or she is engaging, and to understand its consequences and effect upon his or her rights and interests.

53 Am. Jur. 2d *Mentally Impaired Persons* § 156 (1996).

This proposal also includes removal of sentences two and three of current § 3.14(a) and all of § 3.14(d). The second sentence of current § 3.14(a), "Benefits may not be paid, however, unless the

discharge is held to have been under conditions other than dishonorable," is redundant. That concept is addressed in current § 3.12(a) and its proposed replacement, § 5.30.

The third sentence of current § 3.14(a) provides that: "Generally discharge for concealment of a physical or mental defect except incompetency or insanity which would have prevented enlistment will be held to be under dishonorable conditions." In our view, this provision is too rigid. Not every such concealment is with an intent to defraud the government. For example, an individual may conceal defects out of a strong desire to serve one's country in a time of war or other national crisis. Such an act may be misguided, but in VA's view it does not warrant the harsh results flowing from the current regulation. In other cases, a service member might serve with some distinction before a disqualifying preexisting physical or mental defect is discovered. The current regulation leaves VA with little flexibility to consider mitigating circumstances. VA believes that it can address this situation adequately under other provisions and has not included the quoted material in these proposed regulations.

The concept in current § 3.14(d) that VA is bound by a service department's determination that a discharge is honorable is included in the text of proposed § 5.30(c). The remaining material in current § 3.14(d) concerning aliens is, in substance, a cross reference to material in § 3.7(b) concerning certain veterans discharged for alienage whose service may be recognized for VA purposes (as opposed to the service of certain others so discharged who are statutorily barred from receiving VA benefits—see current § 3.12(c)(5) and proposed § 5.31(c)(6)). We do not believe that it is necessary to retain this reference, inasmuch as the referenced material is neither an exception to nor an amplification of the rule that VA is bound by a service department's determination that a discharge is honorable.

Minimum Service and Evidence of Service

The next portion of VA's service package includes removing current § 3.12a, "Minimum active-duty service requirement," and adding a proposed equivalent section, § 5.39, "Minimum active duty service requirement for VA benefits."

Paragraphs (d)(1) through (6) provide exclusions from the minimum active duty service requirement. One of these exclusions is based on 38 U.S.C. 5303A(b)(3)(C), which excludes "a

person who has a disability that the Secretary has determined to be compensable under chapter 11 of this title." In paragraph 5.39(d)(4), we propose to clarify that a "compensable" disability means a service-connected disability evaluated as 10 percent or more disabling under 38 CFR part 4, Schedule for Rating Disabilities; a disability for which special monthly compensation is payable; or a disability that, together with one or more other disabilities, is compensable under current § 3.324, "Multiple noncompensable service-connected disabilities."

We believe that clarifying "compensable" disability to include veterans receiving special monthly compensation and those receiving a 10 percent evaluation for multiple noncompensable disabilities is fair to claimants and consistent with the Congressional intent of § 5303A. Although the legislative history regarding this issue is sparse, it speaks of including language similar to that in current § 3.12a(d)(3) in § 5303A(b)(3)(C) in order to distinguish § 5303A from a parallel statute of the Department of Defense. It appears that Congress intended to make sure that the minimum service requirement only applies to individuals with disabilities "so slight as to be rated as zero-percent disabling, and for which no compensation is payable." S.R. Rep. No. 97-153, 97th Cong., 1st Sess., at 41-42, reprinted in 1981 U.S.S.C.A.N. 1595, 1626. Therefore, consistent with Congressional intent, we propose to make it clear in § 5.39(d)(4) that veterans receiving compensation would be excluded from meeting the minimum service requirement.

Current § 3.12a(a)(1)(i), in discussing a requirement of 24-months of continuous active duty for eligibility for VA benefits, provides that "[n]on-duty periods that are excludable in determining the Department of Veterans Affairs benefit entitlement (e.g., see § 3.15) are not considered as a break in service for continuity purposes but are to be subtracted from total time served." We propose in paragraph (e) to state the provisions regarding temporary breaks in service, currently found in § 3.15. However, because the minimum active duty service requirement in current § 3.12a, and its proposed replacement, only apply to persons who entered service in the early 1980's and thereafter, we are not including breaks that pertain to earlier time periods. We also propose to provide the same clarifications concerning time lost while under arrest and while serving a court martial sentence that appear in

proposed § 5.21(b). See the discussion concerning proposed changes to § 5.21 for additional information.

Under current § 3.12a(e) and 38 U.S.C. 5303A(c), the dependents and survivors of a veteran who does not meet the minimum service requirement are also disqualified from VA benefits, except for benefits under chapter 19 (insurance) and chapter 37 (housing and small business loans) of 38 U.S.C. We propose to further clarify these exceptions in paragraph (f)(2) of proposed § 5.39. As specified in proposed § 5.39(d)(5), and 38 U.S.C. 5303A(b)(3)(D), the minimum service requirement does not bar certain non-compensation VA benefits for a service-connected disability, condition or death. We note this exception through a cross-reference to § 5.39(d)(5).

We also propose to state that the minimum service requirement does not bar an award of DIC based on the veteran's death in service. This is because, under 38 U.S.C. 5303A(b), the minimum service requirement applies only if a person is "discharged or released" before completing the required period of active duty. A veteran who dies in service never has the opportunity to be "discharged or released," so the requirements should not be applied in such a case. Of course the fact that an in-service death is not subject to the minimum service requirement of 38 U.S.C. 5303A does not mean that DIC may not be awarded for a service-connected death that occurs after service. However, 38 U.S.C. 5303A(c), and its proposed implementing regulation at § 5.39(f), would be considered in determining eligibility for DIC based on post-service death whereas an in-service death does not fall under 38 U.S.C. 5303A's minimum service requirement.

The final regulation in this proposed rulemaking is proposed § 5.40, "Service records as evidence of service and character of discharge that qualify for VA benefits." This is a reorganization of current § 3.203, written more concisely to make it more understandable and easier to apply.

VA now has a statutory duty to assist claimants in obtaining evidence to substantiate their claims. Among other things, 38 U.S.C. 5103A(c)(1) provides, with respect to a claim for disability compensation, that VA's assistance will include obtaining "[t]he claimant's service medical records and, if the claimant has furnished the Secretary information sufficient to locate such records, other relevant records pertaining to the claimant's active military, naval, or air service that are

held or maintained by a governmental entity."

The specifics of how VA implements its duty to assist are currently located in 38 CFR 3.159. However, we wish to make the regulations we are updating and revising compatible with that duty. As an example, current § 3.203(a) is entitled "Evidence submitted by a claimant." This, or similar wording, could be taken to imply that VA will not grant a claim if the claimant does not submit evidence of his or her service. We do not wish to imply that VA will not assist in obtaining service records, nor do we wish to imply that claimants may not submit those records with their claims. Therefore, we propose to use more neutral language in this section and to shift the focus from who must submit the evidence of service to what kind of evidence of service VA will accept, whether submitted by or for a claimant or obtained by VA.

Because paragraph (b) and the second sentence of paragraph (c) of current § 3.203 address additional requirements for eligibility for pension or burial benefits, we propose to move these provisions to the appropriate portions of new part 5 dealing with those benefits and to omit this information from this proposed new section.

Proposed paragraphs (a) and (b) state the rules pertaining to what evidence of service is acceptable to VA and the kinds of information that evidence must contain. Paragraph (a) also clarifies that the list of acceptable documents is not all-inclusive. Currently, § 3.203 indicates that the evidence should contain "needed information as to length, time and character of service." In this revision, we propose to change "time" of service to the more specific "dates of service."

We propose to clarify this regulation by specifying in paragraph (c) when verification by the service department is not required. Proposed paragraph (d) would include circumstances when verification from the service department is required. Along with the circumstances listed in current § 3.203(c), we propose to add paragraph (d)(3), which provides that VA will verify service if there is a material discrepancy in the evidence of record. This would, for example, cover situations in which documents concerning service are in conflict or there is credible testimony concerning service that conflicts with other evidence of record.

Endnote Regarding Removals (Deletions) From Part 3 of 38 CFR

This is an advance notice of our intention to remove current §§ 3.2, 3.6,

3.7, 3.12, 3.12a, and 3.13 through 3.15 and portions of §§ 3.203 and 3.400. We are not proposing these changes in part 3 at this time. Readers, however, are invited to comment on these removals at this time. We will propose these part 3 changes and the removal of all of part 3, in the last NPRM concerning the proposed part 5 compensation and pension regulations. VA plans to publish all of the subparts of part 5 for public comment over time. After public comments for all of the proposed subparts have been reviewed and considered, VA intends to remove all of part 3, concurrent with the implementation of part 5.

Paperwork Reduction Act

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 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. This amendment would not 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 document has been reviewed by the Office of Management and Budget under Executive Order 12866.

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 such effect on

State, local, or tribal governments, or the private sector.

Catalog of Federal Domestic Assistance Numbers

The catalog of Federal Domestic Assistance program numbers for this proposal are 64.100–102, 64.104–110, 64.115, and 64.127.

List of Subjects in 38 CFR Part 5

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

Approved: November 6, 2003.

Anthony J. Principi,
Secretary of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to amend 38 CFR chapter I by adding part 5 to read as follows:

PART 5 COMPENSATION, PENSION, BURIAL AND RELATED BENEFITS

Subpart A—[Reserved]

Subpart B—Service Requirements for Veterans

Periods of War and Types of Military Service

- 5.20 Dates of periods of war.
- 5.21 Service VA recognizes as active military service.
- 5.22 Service VA recognizes as active duty.
- 5.23 How VA classifies Reserve and National Guard duty.
- 5.24 How VA classifies duty performed by Armed Services Academy cadets, midshipmen, attendees at the preparatory schools of the Armed Services Academies, and Senior Reserve Officers' Training Corps members.
- 5.25 How VA classifies service in the Public Health Service, in the Coast and Geodetic Survey and its successor agencies, and of temporary members of the Coast Guard Reserve.
- 5.26 Circumstances where persons ordered to service, but who did not serve, are considered to have performed active duty.
- 5.27 Individuals and groups designated by the Secretary of Defense as having performed active military service.

- 5.28 Other individuals and groups designated as having performed active military service.
- 5.29 Circumstances under which certain travel periods may be classified as military service.

Service Creditable for VA Benefits

- 5.30 How VA determines if service qualifies for VA benefits.
- 5.31 Statutory bars to VA benefits.
- 5.32 Consideration of mitigating factors in absence without leave cases.
- 5.33 Insanity as a defense to acts leading to a discharge or dismissal from the service that might be disqualifying for VA benefits.
- 5.34 Effect of discharge upgrades by Armed Forces boards for the correction of military records (10 U.S.C. 1552) on eligibility for VA benefits.
- 5.35 Effect of discharge upgrades by Armed Forces discharge review boards (10 U.S.C. 1553) on eligibility for VA benefits.
- 5.36 Effect of certain special discharge upgrade programs on eligibility for VA benefits.
- 5.37 Effect of extension of service obligation due to change in military status on eligibility for VA benefits.
- 5.38 Effect of a voided enlistment on eligibility for VA benefits.

Minimum Service and Evidence of Service

- 5.39 Minimum active duty service requirement for VA benefits.
- 5.40 Service records as evidence of service and character of discharge that qualify for VA benefits.
- 5.41–5.49 [Reserved]

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

Subpart A—[Reserved]

Subpart B—Service Requirements for Veterans

Periods of War and Types of Military Service

§ 5.20 Dates of periods of war.

This section explains what periods of service VA recognizes as wartime service, beginning with the Mexican border period. See 38 U.S.C. 101 for information concerning earlier periods of war.

| Period | Dates | Exceptions/special rules | Authority |
|----------------------------|---|---|--|
| (a) Mexican Border Period. | May 9, 1916, through April 5, 1917 | Applies to a veteran who served in Mexico, or on the borders of Mexico, or in the waters adjacent to Mexico during the stated period. | 38 U.S.C. 101(30). |
| (b) World War I | April 6, 1917, through November 11, 1918 | (1) April 6, 1917, through April 1, 1920, for United States armed forces serving in Russia. | 38 U.S.C. 101(7), 1101(2)(A), 1501(2). |

| Period | Dates | Exceptions/special rules | Authority |
|----------------------------|---|---|-------------------------------|
| (c) World War II | December 7, 1941, through December 31, 1946. | (2) April 6, 1917, through July 1, 1921, for veterans who served in the active military, naval, or air service after April 5, 1917, and before November 12, 1918. This extension is limited to matters concerning benefits under 38 U.S.C. chapter 11 (service-connected disability compensation, death compensation, and benefits for persons disabled by VA medical treatment or during VA vocational rehabilitation or compensated work therapy) and benefits under 38 U.S.C. chapter 15 ("Pension for Non-Service-Connected Disability or Death or for Service"). World War II service also includes any period of continuous service after December 31, 1946, and before July 26, 1947, if that period of service began before January 1, 1947. This extension is limited to matters concerning benefits under 38 U.S.C. chapter 11 (service-connected disability compensation, death compensation, and benefits for persons disabled by VA medical treatment or during VA vocational rehabilitation, or compensated work therapy). | 38 U.S.C. 101(8), 1101(2)(B). |
| (d) Korean Conflict | June 27, 1950, through January 31, 1955 | None | 38 U.S.C. 101(9). |
| (e) Vietnam Era | August 5, 1964, through May 7, 1975 | The Vietnam Era also includes February 28, 1961, through August 4, 1964, in the case of a veteran who served in the Republic of Vietnam during that period. | 38 U.S.C. 101(29). |
| (f) Persian Gulf War | August 2, 1990, through a date to be prescribed by Presidential proclamation or by law. | | 38 U.S.C. 101(33). |
| (g) Future periods of war. | Beginning on the date of any future declaration of war by the Congress and ending on a date prescribed by Presidential proclamation or concurrent resolution of the Congress. | | 38 U.S.C. 101(11). |

§ 5.21 Service VA recognizes as active military service.

- (a) Active military service includes:
 - (1) Active duty. *See* § 5.22, "Service VA recognizes as active duty."
 - (2) The service of individuals certified by the Secretary of Defense as serving on active military service. *See* § 5.27.
 - (3) The service of individuals and groups listed in § 5.28.
 - (4) Active duty for training during which the individual was disabled or died from a disease or injury incurred or aggravated in line of duty.
 - (5) Inactive duty training during which the individual was disabled or died from an injury incurred or aggravated in line of duty or from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident.
 - (6) Active or Reserve duty for persons who were injured or died while assigned to the Postmaster General for the aerial transportation of mail from February 10, 1934, through March 26, 1935.
 - (b) In determining the period of active military service for service-connected or nonservice-connected benefits, VA will not count:

- (1) Time spent on industrial, agricultural, or indefinite furlough;
 - (2) Time lost when absent without leave and without pay;
 - (3) Time while under arrest without a subsequent acquittal or dismissal of charges;
 - (4) Time during desertion; or
 - (5) Subject to 10 U.S.C. 875 (concerning the restoration of rights, privileges, and property affected by certain court-marital sentences that are set aside or disapproved), time while serving a sentence of confinement imposed by a court-martial.
- (Authority: 38 U.S.C. 101(24), 501(a). Section 5.21(a)(6) also issued under Pub. L. No. 73-140, 48 Stat. 508 (1934))

§ 5.22 Service VA recognizes as active duty.

- (a) Active duty means:
 - (1) Full-time duty in the Armed Forces, other than active duty for training.
 - (2) Certain duty performed by:
 - (i) Reserve and National Guard members. *See* § 5.23.
 - (ii) Armed Services Academy cadets, midshipmen, attendees at the

preparatory schools of the Armed Services Academies, and Senior Reserve Officers' Training Corps members. *See* § 5.24.

(iii) Commissioned officers of the Public Health Service, Coast and Geodetic Survey and its successor agencies, and temporary members of the Coast Guard Reserves. *See* § 5.25.

(3) Certain service of individuals ordered to service but who did not serve. *See* § 5.26.

(b) Active duty continues until midnight of the date of discharge or release from active duty.

(c) Active duty includes certain travel as provided in § 5.29, "Circumstances under which certain travel periods may be classified as military service."

(Authority: 38 U.S.C. 101(21))

§ 5.23 How VA classifies Reserve and National Guard duty.

(a) *Reserves.* (1) *Active duty.* Full-time duty in the Armed Forces performed by a Reservist, other than active duty for training, is active duty.

(2) *Active duty for training.* Full-time duty in the Armed Forces performed by

a Reservist for training purposes is active duty for training.

(3) *Inactive duty training.* Duty that is not full-time duty and that the Secretary concerned prescribes for a Reservist to participate in as a regular period of instruction or appropriate duty is inactive duty training. (See 37 U.S.C. 206, "Reserves; members of National Guard: inactive-duty training.") Special additional duties authorized for a Reservist by an authority designated by the Secretary concerned and performed on a voluntary basis in connection with prescribed training maintenance activities of the unit to which the Reservist is assigned is also inactive duty training.

(b) *National Guard.* (1) *Active duty.* Full-time duty in the Armed Forces performed by a member of the National Guard serving under title 10, United States Code, other than active duty for training, is active duty.

(2) *Active duty for training.* Full-time duty performed by a member of the National Guard of any State under any of the following six circumstances is active duty for training:

(i) When detailed as a rifle instructor for civilians (See 32 U.S.C. 316);

(ii) During required drills and field exercises (See 32 U.S.C. 502);

(iii) While participating in field exercises as directed by the Secretary of the Army or the Secretary of the Air Force (See 32 U.S.C. 503);

(iv) While attending schools or small arms competitions as prescribed by the Secretary of the Army or the Secretary of the Air Force (See 32 U.S.C. 504);

(v) While attending any service school (except the United States Military Academy or the United States Air Force Academy), or attached to an organization of the Army or the Air Force for routine practical instruction during field training or other outdoor exercise. (See 32 U.S.C. 505); or

(vi) When performed under prior provisions of law that correspond to 32 U.S.C. 316, 502, 503, 504, or 505, for each of paragraphs (b)(2)(i) through (v) of this section.

(3) *Inactive duty training.* Duty, other than full-time duty, performed by a member of the National Guard of any State under any of the following six circumstances is inactive duty training:

(i) When detailed as a rifle instructor for civilians (See 32 U.S.C. 316);

(ii) During required drills and field exercises (See 32 U.S.C. 502);

(iii) While participating in field exercises as directed by the Secretary of the Army or the Secretary of the Air Force (See 32 U.S.C. 503);

(iv) While attending schools or small arms competitions as prescribed by the

Secretary of the Army or the Secretary of the Air Force (See 32 U.S.C. 504);

(v) While attending any service school (except the United States Military Academy or the United States Air Force Academy), or attached to an organization of the Army or the Air Force for routine practical instruction during field training or other outdoor exercise (See 32 U.S.C. 505); or

(vi) When performed under prior provisions of law that correspond to 32 U.S.C. 316, 502, 503, 504, or 505, for each of paragraphs (b)(3)(i) through (v) of this section.

(4) *Exception.* Inactive duty training does not include work or study performed in connection with correspondence courses, or attendance at an educational institution in an inactive status.

(c) *Certain travel periods.* For issues involving travel of a reservist or member of the National Guard, see § 5.29, "Circumstances under which certain travel periods may be classified as military service."

(Authority: 38 U.S.C. 101(21)–(23), 106, and 501(a))

§ 5.24 How VA classifies duty performed by Armed Services Academy cadets, midshipmen, attendees at the preparatory schools of the Armed Services Academies, and Senior Reserve Officers' Training Corps members.

(a) *Service as a cadet or midshipman.* Service as a cadet at the United States Air Force Academy, United States Military Academy, or United States Coast Guard Academy, or as a midshipman at the United States Naval Academy qualifies as active duty. The period of such duty continues until midnight of the date of discharge or release from the respective service academy.

(b) *Preparatory school attendance.* (1) *Active duty.* Attendance at the preparatory schools of the United States Air Force Academy, the United States Military Academy, or the United States Naval Academy is considered active duty if:

(i) The individual was an enlisted active-duty member who was reassigned to a preparatory school without a release from active duty; or

(ii) The individual has a commitment to perform active duty in the Armed Forces that would be binding upon disenrollment from the preparatory school.

(2) *Active duty for training.* Except as provided in paragraph (b)(1)(ii) of this section, attendance at the preparatory schools of the United States Air Force Academy, the United States Military Academy, or the United States Naval

Academy by an individual who enters the preparatory school directly from the Reserves, National Guard, or civilian life is active duty for training.

(c) *Senior Reserve Officers' Training Corps.* (1) *Active duty for training.* Duty performed by a member of a Senior Reserve Officers' Training Corps program when ordered to duty for the purpose of training or a practice cruise under statutes and regulations governing the Armed Forces conduct of the Senior Reserve Officers' Training Corps is active duty for training.

(Authority: 10 U.S.C. chapter 103)

(i) This paragraph (c)(1) is effective October 1, 1982, for death or disability resulting from disease or injury that occurred on or after October 1, 1982.

(ii) This paragraph (c)(1) is effective October 1, 1983, for death or disability resulting from disease or injury that occurred on or before September 30, 1982.

(iii) For duty on or after October 1, 1988, the duty must be a prerequisite to the member being commissioned and must be at least four continuous weeks long.

(2) *Inactive duty training.* Training by a member of, or applicant for membership (a student enrolled, during a semester or other enrollment term, in a course that is part of Reserve Officers' Training Corps instruction at an educational institution) in the Senior Reserve Officers' Training Corps prescribed under 10 U.S.C. Chapter 103 ("Senior Reserve Officers' Training Corps") is inactive duty training.

(3) *Drills.* Time spent by members of the Senior Reserve Officers' Training Corps in drills as part of their activities as members of the corps is not active military service.

(d) *Travel.* For issues involving travel under this section, see § 5.29, "Circumstances under which certain travel periods may be classified as military service."

(Authority: 38 U.S.C. 101, 106, and 501(a))

§ 5.25 How VA classifies service in the Public Health Service, in the Coast and Geodetic Survey and its successor agencies, and of temporary members of the Coast Guard Reserve.

(a) *Public Health Service.* (1) *Active duty.* (i) Full-time duty, other than for training purposes, as a commissioned officer of the Regular or Reserve Corps of the Public Health Service is active duty if performed:

(A) On or after July 29, 1945;

(B) Before July 29, 1945, under circumstances affording entitlement to full military benefits; or

(C) At any time, for the purposes of dependency and indemnity compensation.

(ii) Such active duty continues until midnight of the date of discharge or release from active duty.

(2) *Active duty for training.* Full-time duty for training purposes performed as a commissioned officer of the Reserve Corps of the Public Health Service is active duty for training if performed:

(i) On or after July 29, 1945;

(ii) Before July 29, 1945, under circumstances affording entitlement to full military benefits, as determined by the Secretary of the Department of Defense; or

(iii) At any time, for the purposes of dependency and indemnity compensation.

(3) *Inactive duty training.* Either of the following kinds of service is inactive duty training:

(i) Duty, other than full-time duty, prescribed for commissioned officers of the Reserve Corps of the Public Health Service by the Secretary of Health and Human Services under 37 U.S.C. 206 (Reserves; members of National Guard: Inactive-duty training) or any other provision of law; or

(ii) Special additional duties authorized for commissioned officers of the Reserve Corps of the Public Health Service by an authority designated by the Secretary of Health and Human Services and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

(b) *Coast and Geodetic Survey and successor agencies.* (1) *Active duty.* Full-time duty as a commissioned officer in the Coast and Geodetic Survey and its successor agencies, the Environmental Science Services Administration and the National Oceanic and Atmospheric Administration, is active duty if performed:

(i) On or after July 29, 1945;

(ii) Before July 29, 1945, while on transfer to one of the Armed Forces;

(iii) Before July 29, 1945, in time of war or National emergency declared by the President, while assigned to duty on a project for one of the Armed Forces in an area that the Secretary of Defense has determined to be of immediate military hazard;

(iv) In the Philippine Islands on December 7, 1941, and continuously in such islands thereafter until July 29, 1945; or

(v) At any time for purposes of dependency and indemnity compensation.

(2) Such active duty continues until midnight of the date of discharge or release from active duty.

(c) *Temporary member of the Coast Guard Reserve.* Duty performed as a temporary member of the Coast Guard Reserve is not active duty for training or inactive duty training.

(d) *Travel.* For issues involving travel by members of the Public Health Service, members of the Coast and Geodetic Survey and its successor agencies, or reservists under this section, see § 5.29, "Circumstances under which certain travel periods may be classified as military service."

(Authority: 38 U.S.C. 101, 106, and 501(a))

§ 5.26 Circumstances where persons ordered to service, but who did not serve, are considered to have performed active duty.

(a) *Persons included.* The persons described in paragraph (a) of this section who meet the requirements of paragraphs (a) and (b) of this section will be considered to have performed active duty for entitlement to VA benefits.

(1) *Volunteers.* Volunteers are included, provided they have applied for enlistment or enrollment in the active military service and have been provisionally accepted and directed or ordered to report to a place for final acceptance into the service.

(2) *Draftees.* Persons selected or drafted for enrollment in the active military service are included if they report, before being rejected for service, according to a call from their local draft board.

(3) *National Guard.* Members of the National Guard are included when they have been called into Federal active service, but have not yet been enrolled in such service, and when reporting to a designated rendezvous.

(b) *Injury or disease.* This section applies only if a person described in paragraph (a) of this section suffers an injury, or contracts a disease, in line of duty while going to, coming from, or at a place designated for final acceptance or entry upon active duty. This applies to a draftee or selectee when reporting for preinduction examination or for final induction on active duty. This section does not apply to an injury or disease suffered during a period of inactive duty status or period of waiting after a final physical examination and prior to beginning the trip to report for induction. The injury or disease must be due to some factor relating to compliance with proper orders.

(Authority: 38 U.S.C. 106(b))

§ 5.27 Individuals and groups designated by the Secretary of Defense as having performed active military service.

(a) *Designation by the Secretary of Defense.* Service performed by certain persons and groups that served the Armed Forces of the United States in a capacity that was considered civilian employment or contractual service under Public Law 95-202, is active military service for the purpose of VA benefits provided that the Secretary of Defense, or his or her designee, certifies this as active military service and issues a discharge under honorable conditions.

(b) *Individuals and groups included.* The Secretary of Defense, or his or her designee, has certified as active military service the service of the following individuals and groups:

(1) American Merchant Marine in oceangoing service, during the Period of Armed Conflict, December 7, 1941, to August 15, 1945. Recognized effective January 19, 1988.

(2) The approximately 50 Chamorro and Carolinian former native policemen who received military training in the Donnal area of central Saipan and were placed under the command of Lt. Casino of the 6th Provisional Military Police Battalion to accompany United States Marines on active, combat-patrol activity from August 19, 1945, to September 2, 1945. Recognized effective September 30, 1999.

(3) Civilian Crewmen of the United States Coast and Geodetic Survey (USCGS) vessels, who performed their service in areas of immediate military hazard while conducting cooperative operations with and for the U.S. Armed Forces within a time frame of December 7, 1941, to August 15, 1945. Qualifying USCGS vessels specified by the Secretary of Defense, or his or her designee, are the Derickson, Explorer, Gilbert, Hilgard, E. Lester Jones, Lydonia, Patton, Surveyor, Wainwright, Westdahl, Oceanographer, Hydrographer, and Pathfinder. Recognized effective April 8, 1991.

(4) Civilian employees of Pacific Naval Air Bases who actively participated in Defense of Wake Island during World War II. Recognized effective January 22, 1981.

(5) Civilian Navy Identification Friend or Foe (IFF) Technicians, who served in the Combat Areas of the Pacific during World War II (December 7, 1941, to August 15, 1945). Recognized effective August 2, 1988.

(6) Civilian personnel assigned to the Secret Intelligence Element of the Office of Strategic Services (OSS). Recognized effective December 27, 1982.

(7) Engineer Field Clerks (WWI). Recognized effective August 31, 1979.

(8) Guam Combat Patrol. Recognized effective May 10, 1983.

(9) Honorably discharged members of the American Volunteer Group (Flying Tigers), who served during the Period December 7, 1941, to July 18, 1942. Recognized effective May 3, 1991.

(10) Honorably discharged members of the American Volunteer Guard, Eritrea Service Command, who served during the Period June 21, 1942, to March 31, 1943. Recognized effective June 29, 1992.

(11) Male Civilian Ferry Pilots. Recognized effective July 17, 1981.

(12) The Operational Analysis Group of the Office of Scientific Research and Development, Office of Emergency Management, which served overseas with the U.S. Army Air Corps from December 7, 1941, through August 15, 1945. Recognized effective August 27, 1999.

(13) Quartermaster Corps Female Clerical Employees serving with the AEF (American Expeditionary Forces) in World War I. Recognized effective January 22, 1981.

(14) Quartermaster Corps Keswick Crew on Corregidor (WWII). Recognized effective February 7, 1984.

(15) Reconstruction Aides and Dietitians in World War I. Recognized effective July 6, 1981.

(16) Signal Corps Female Telephone Operators Unit of World War I. Recognized effective May 15, 1979.

(17) Three scouts/guides, Miguel Tenorio, Penedicto Taisacan, and Cristino Dela Cruz, who assisted the U.S. Marines in the offensive operations against the Japanese on the Northern Mariana Islands from June 19, 1944, through September 2, 1945. Recognized effective September 30, 1999.

(18) U.S. civilian employees of American Airlines, who served overseas as a result of American Airlines' contract with the Air Transport Command during the Period December 14, 1941, through August 14, 1945. Recognized effective October 5, 1990.

(19) U.S. civilian female employees of the U.S. Army Nurse Corps while serving in the defense of Bataan and Corregidor during the Period January 2, 1942, to February 3, 1945. Recognized effective December 13, 1993.

(20) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Braniff Airways, who served overseas in the North Atlantic or under the jurisdiction of the North Atlantic Wing, Air Transport Command (ATC), as a result of a contract with the ATC during the Period February 26, 1942, through August 14, 1945. Recognized effective June 2, 1997.

(21) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Consolidated Vultree Aircraft Corporation (Consairway Division), who served overseas as a result of a contract with the Air Transport Command during the Period December 14, 1941, through August 14, 1945. Recognized effective June 29, 1992.

(22) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Northeast Airlines Atlantic Division, who served overseas as a result of Northeast Airlines' Contract with the Air Transport Command during the Period December 7, 1941, through August 14, 1945. Recognized effective June 2, 1997.

(23) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Northwest Airlines, who served overseas as a result of Northwest Airline's contract with the Air Transport Command during the Period December 14, 1941, through August 14, 1945. Recognized effective December 13, 1993.

(24) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Pan American World Airways and Its Subsidiaries and Affiliates, who served overseas as a result of Pan American's Contract with the Air Transport Command and Naval Air Transport Service during the Period December 14, 1941, through August 14, 1945. Recognized effective July 16, 1992.

(25) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Transcontinental and Western Air (TWA), Inc., who served overseas as a result of TWA's contract with the Air Transport Command during the Period December 14, 1941, through August 14, 1945. The "Flight Crew" includes pursers. Recognized effective May 13, 1992.

(26) U.S. Civilian Flight Crew and Aviation Ground Support Employees of United Air Lines (UAL), who served overseas as a result of UAL's contract with the Air Transport Command during the Period December 14, 1941, through August 14, 1945. Recognized effective May 13, 1992.

(27) U.S. civilian volunteers, who actively participated in the Defense of Bataan. Recognized effective February 7, 1984.

(28) U.S. civilians of the American Field Service (AFS), who served overseas operationally in World War I during the Period August 31, 1917, to January 1, 1918. Recognized effective August 30, 1990.

(29) U.S. civilians of the American Field Service (AFS), who served overseas under U.S. Armies and U.S. Army Groups in World War II during

the Period December 7, 1941, through May 8, 1945. Recognized effective August 30, 1990.

(30) U.S. Merchant Seamen who served on blockships in support of Operation Mulberry. Recognized effective October 18, 1985.

(31) Wake Island Defenders from Guam. Recognized effective April 7, 1982.

(32) Women's Air Forces Service Pilots (WASP). Recognized effective November 23, 1977.

(33) Women's Army Auxiliary Corps (WAAC). Recognized effective March 18, 1980.

(c) *Effective dates of awards.* (1) *Scope.* Paragraph (c) of this section establishes the effective date of an award of any of the following benefits based on service in a group listed in this section:

- (i) Pension;
- (ii) Compensation;
- (iii) Dependency and indemnity compensation; and
- (iv) Monetary allowances for a child of:

(A) A Vietnam veteran under § 3.814 of this chapter, "Monetary allowance under 38 U.S.C. chapter 18 for an individual suffering from spina bifida whose biological father or mother is or was a Vietnam veteran;"

(B) A Vietnam veteran under § 3.815 of this chapter, "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;"

(C) A veteran of covered service in Korea under 38 U.S.C. 1821, "Benefits for children of certain Korea service veterans born with spina bifida."

(2) *Claim received one year or less after the effective date of recognition.* If VA receives the claim within one year of the effective date of recognition, then the effective date of the award is the later of:

- (i) The date entitlement arose, as defined in [regulation that will be published in a future Notice of Proposed Rulemaking concerning proposed subpart C of this part] of this part, or
- (ii) The effective date of recognition.

(3) *Claim received more than one year after the effective date of recognition.* If VA receives the claim more than one year after the effective date of recognition, the effective date of the award or increase is the later of:

- (i) The date entitlement arose, as defined in [regulation that will be published in a future Notice of Proposed Rulemaking concerning proposed subpart C of this part] of this part, or
- (ii) One year prior to the date of receipt of the claim.

(4) *Effective dates for awards based on a review on VA's initiative one year or less after the effective date of recognition.* If VA awards benefits one year or less after the effective date of recognition, the effective date of the award is the later of:

(i) The date entitlement arose, as defined in [regulation that will be published in a future Notice of Proposed Rulemaking concerning proposed subpart C of this part] of this part, or

(ii) The effective date of recognition.

(5) *Effective dates for awards based on a review on VA's initiative more than one year after the effective date of the change.* If VA awards benefits more than one year after the effective date of recognition, the effective date of the award is the later of:

(i) The date entitlement arose, as defined in [regulation that will be published in a future Notice of Proposed Rulemaking concerning proposed subpart C of this part] of this part, or

(ii) One year prior to the date of the VA rating decision awarding the benefit, or if no rating decision is required, one year prior to the date VA otherwise determines that the claimant is entitled to the benefit.

(Authority: 38 U.S.C. 501(a), 1832(b)(2), 5110(g); Sec. 401, Pub. L. 95-202, 91 Stat. 1449, 1450)

§ 5.28 Other individuals and groups designated as having performed active military service.

The following individuals and groups are considered to have performed active military service:

(a) *Alaska Territorial Guard during World War II.* (1) Service in the Alaska Territorial Guard during World War II for any individual who was honorably discharged as determined by the Secretary of Defense is included.

(2) Benefits cannot be paid for this service for any period prior to August 9, 2000.

(b) *Army field clerks.* Army field clerks are included as enlisted men.

(c) *Army Nurse Corps, Navy Nurse Corps, and female dietetic and physical therapy personnel.* Army Nurse Corps, Navy Nurse Corps, and female dietetic and physical therapy personnel are included, as follows:

(1) *Nurse Corps.* Female Army and Navy nurses on active service under order of the service department; or

(2) *Female dietetic and physical therapy personnel.* Female dietetic and physical therapy personnel, excluding students and apprentices, appointed with relative rank on or after December 22, 1942, or commissioned on or after June 22, 1944.

(d) *Aviation camps.* Students who were enlisted men in Aviation camps during World War I are included.

(e) *Coast Guard.* Active service in the Coast Guard on or after January 28, 1915, while under the jurisdiction of the Treasury Department, the Navy Department, the Department of Transportation, or the Department of Homeland Security is included. This does not include temporary members of the Coast Guard Reserves.

(f) *Contract surgeons.* Contract surgeons are included for compensation and DIC, if the disability or death was the result of disease or injury contracted in line of duty during a period of war while actually performing the duties of assistant surgeon or acting assistant surgeon with any military force in the field, or in transit, or in a hospital.

(g) *Field clerks, Quartermaster Corps.* Field clerks of the Quartermaster Corps are included as enlisted personnel.

(h) *Lighthouse service personnel.* Lighthouse service personnel who were transferred to the service and jurisdiction of the War or Navy Departments by Executive order under the Act of August 29, 1916, are included. Effective July 1, 1939, service was consolidated with the Coast Guard.

(i) *Male nurses.* Male nurses who were enlisted in a Medical Corps are included.

(j) *Persons previously having a pensionable or compensable status.* Persons having a pensionable or compensable status prior to January 1, 1959, are included.

(Authority: 38 U.S.C. 1152, 1504)

(k) *Philippine Scouts and others.* See § 3.40.

(l) *Revenue Cutter Service.* The Revenue Cutter Service is included while serving under direction of the Secretary of the Navy in cooperation with the Navy. Effective January 28, 1915, the Revenue Cutter Service was merged into the Coast Guard.

(m) *Russian Railway Service Corps.* Service during World War I in the Russian Railway Service Corps as certified by the Secretary of the Army is included.

(n) *Training camps.* Members of training camps authorized by section 54 of the National Defense Act (Pub. L. No. 64-85), are included, except for members of Student Army Training Corps Camps at the Presidio of San Francisco; Plattsburg, New York; Fort Sheridan, Illinois; Howard University, Washington, DC; Camp Perry, Ohio; and Camp Hancock, Georgia, from July 18, 1918, to September 16, 1918.

(o) *Women's Army Corps (WAC).* Service in the WAC on or after July 1, 1943, is included.

(p) *Women's Reserve of Navy, Marine Corps, and Coast Guard.* Service in the Women's Reserve of the Navy, Marine Corps, and Coast Guard is included and provides the same benefits as members of the Officers Reserve Corps or enlisted men of the United States Navy, Marine Corps, or Coast Guard.

(Authority: 38 U.S.C. 101, 106, and 501(a))

§ 5.29 Circumstances under which certain travel periods may be classified as military service.

(a) *Active duty.* (1) *Travel time to and from active duty.* Travel to or from any period of active duty is active duty if the travel is authorized by the Secretary concerned.

(2) *Travel on discharge or release.* Travel time consisting of the period between the date of discharge or release and arrival home by the most direct route is active duty.

(3) *Persons ordered to service but who did not serve.* For information about the travel of certain persons ordered to service who did not serve, see § 5.26(b).

(b) *Active duty for training or inactive duty training—(1) Travel time for active duty for training or inactive duty training.* Any individual proceeding directly to, or returning directly from, a period of active duty for training or inactive duty training will be considered to be on active duty for training or inactive duty training if the individual was:

(i) Authorized or required by competent authority designated by the Secretary concerned to perform such duty, and

(ii) Disabled or died from an injury, an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident incurred during that travel.

(2) *Determination of status.* VA will determine whether such an individual was authorized or required to perform such duty and whether the individual was disabled or died from an injury, an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident incurred during that travel. In making these determinations, VA will take into consideration:

(i) The hour at which the individual began to proceed to or return from the duty;

(ii) The hour at which the individual was scheduled to arrive for, or at which the individual ceased to perform, such duty;

(iii) The method of travel employed;

(iv) The itinerary;

(v) The manner in which the travel was performed; and

(vi) The immediate cause of disability or death.

(3) *Burden of proof.* Whenever any claim is filed alleging that the claimant is entitled to benefits by reason of travel for active duty for training or inactive duty training, the burden of proof shall be on the claimant.

(Authority: 38 U.S.C. 101(21) and (22), 106(c) and (d))

Service Creditable for VA Benefits

§ 5.30 How VA determines if service qualifies for VA benefits.

(a) *Purpose.* Except for service members who died in service, a requirement for veteran status is discharge or release under other than dishonorable conditions. See § 3.1(d) (defining "veteran"). This section sets out how VA determines whether the service member's discharge or release was under other than dishonorable conditions.

(b) *Limitation to period of service concerned.* (1) *General rule.* A determination under this section that a service member was discharged or released under dishonorable conditions applies only to the period of service to which the discharge or release applies. It does not preclude veteran status with respect to other periods of service from which the service member was discharged or released under other than dishonorable conditions. See also § 5.37 (concerning certain cases where a service member was not discharged or released at the end of the period of time for which he or she was obligated to serve when entering a period of service because of a change in his or her military status during that period of service).

(2) *Forfeiture not precluded.* The provisions of paragraph (b)(1) of this section do not preclude forfeiture of VA benefits under 38 U.S.C. 6103, "Forfeiture for fraud," under 38 U.S.C. 6104, "Forfeiture for treason," under 38 U.S.C. 6105, "Forfeiture for subversive activities," or under similar statutes governing forfeiture of VA benefits.

(c) *Discharges and releases VA recognizes as being under other than dishonorable conditions.* For purposes of making determinations concerning character of discharge for VA purposes, a military discharge that is characterized by the service department as being either honorable or under honorable conditions is binding on VA. Subject to § 5.36 (concerning certain special 1970s-era discharge upgrades), any of the following is a discharge or release under other than dishonorable conditions for VA purposes:

(1) An honorable discharge.

(2) A general discharge under honorable conditions.

(3) An uncharacterized administrative entry level separation in the case of separation of enlisted personnel based on administrative proceedings begun on or after October 1, 1982.

(d) *Discharges VA recognizes as being under dishonorable conditions.* A dishonorable discharge is a discharge under dishonorable conditions for VA purposes, except as provided in § 5.33, "Insanity as a defense to acts leading to a discharge or dismissal from the service which might be disqualifying for VA benefits."

(e) *Discharges and releases for which VA will make the character of discharge determination.* Subject to § 5.36 (concerning certain special 1970s-era discharge upgrades), VA will determine whether the following types of discharges are discharges under other than dishonorable conditions for VA purposes, based on the facts and circumstances surrounding separation:

(1) An other than honorable discharge (formerly an "undesirable" discharge).

(2) A bad conduct discharge.

(3) In the case of separation of enlisted personnel based on administrative proceedings begun on or after October 1, 1982, uncharacterized administrative separations for:

(i) A void enlistment or induction, or

(ii) Dropped from the rolls (that is, administrative termination of military status and pay).

(f) *Offenses or events leading to discharge or release being recognized as a discharge under dishonorable conditions.* For purposes of VA's character of discharge determination under paragraph (e) of this section, a discharge or release because of one or more of the offenses or events specified in paragraph (f) of this section is a discharge or release under dishonorable conditions for VA purposes:

(1) Acceptance of an other than honorable discharge (formerly an "undesirable" discharge) to avoid trial by general court-martial.

(2) Mutiny or spying.

(3) Commission of one or more offenses involving moral turpitude. For purposes of this section, an offense involves "moral turpitude" if it is unlawful, it is willful, it is committed without justification or legal excuse, and it is an offense which a reasonable person would expect to cause harm or loss to person or property. This includes, generally, conviction of a felony.

(4) Engaging in willful and persistent misconduct during military service. A discharge because of a minor offense will not be considered willful and

persistent misconduct if service was otherwise honest, faithful, and meritorious. If the misconduct includes absences without leave, see also § 5.32 (concerning mitigating factors in absence without leave cases).

(5) Sexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of sexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, prostitution, sexual acts or conduct accompanied by assault or coercion, and sexual acts or conduct taking place between service members of disparate rank, grade, or status when the service member has taken advantage of his or her superior rank, grade, or status.

(Authority: 38 U.S.C. 101(2), 501, 1301)

§ 5.31 Statutory bars to VA benefits.

(a) *Purpose.* By Federal statute, commission of certain acts leading to discharge or dismissal from the Armed Forces bars the award of VA benefits (statutory bars). This section describes those acts and exceptions to the statutory bars.

(b) *Limitation to period of service concerned.* (1) *General rule.* A determination under this section that veterans benefits are statutorily barred applies only to the period of service to which the relevant discharge or dismissal applies. It does not preclude the award of benefits based upon other periods of service. See also § 5.37 (concerning certain cases where a service member was not discharged or released at the end of the period of time for which he or she was obligated to serve when entering a period of service because of a change in his or her military status during that period of service).

(2) *Forfeiture not precluded.* The provisions of paragraph (b)(1) of this section do not preclude forfeiture of VA benefits under 38 U.S.C. 6103, "Forfeiture for fraud," under 38 U.S.C. 6104, "Forfeiture for treason," under 38 U.S.C. 6105, "Forfeiture for subversive activities," or under similar statutes governing forfeiture of VA benefits.

(c) *Acts barring benefits.* Benefits are not payable based upon a period of service from which the service member was discharged or dismissed from the Armed Forces under one or more of the following conditions:

(1) By reason of the sentence of a general court-martial. Substitution of an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial under 10 U.S.C. 874(b) (granting

the authority for such substitutions) does not remove this bar to VA benefits.

(2) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities.

(3) As a deserter.

(4) By reason of an absence without official leave (AWOL) for a continuous period of at least 180 days. This bar is subject to § 5.32 (concerning mitigating factors in AWOL cases) and to paragraph (f) of this section (concerning limitations on the creation of overpayments). It applies to any person so discharged who was awarded a discharge under other than honorable conditions and who:

(i) Was awarded an honorable or general discharge under one of the programs listed in § 5.36(a) (concerning certain special 1970s-era discharge upgrades) prior to October 8, 1977; or

(ii) Had not otherwise established basic eligibility to receive VA benefits prior to October 8, 1977. For purposes of paragraph (c)(4)(ii) of this section, the term "established basic eligibility to receive VA benefits" means either a VA determination that an other than honorable discharge was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in § 5.36. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (see § 5.33) or a decision of a board of correction of records established under 10 U.S.C. 1552 (see § 5.34) can establish basic eligibility to receive VA benefits.

(5) By reason of resignation by an officer for the good of the service.

(6) By reason of discharge due to alienage during a period of hostilities based on the request of a service member. However, benefits will not be barred in the absence of affirmative evidence establishing such a request.

(d) *Bars inapplicable to certain insurance.* This section does not apply to war-risk insurance, Government (converted) or National Service Life Insurance policies.

(e) *Termination of awards.* Subject to the provisions of § 3.105 of this chapter, "Revisions of decisions," any award contrary to the provisions of paragraph (c) of this section will be terminated.

(f) *Limitation on creation of overpayments in AWOL cases.* Awards made after October 8, 1977, in cases in which the bar contained in paragraph (c)(4) of this section applies, will be terminated on the date of last payment.

(Authority: 38 U.S.C. 501, 5303; Pub. L. 95-126, 91 Stat. 1106, as amended by Pub. L. 102-40, 105 Stat. 239)

§ 5.32 Consideration of mitigating factors in absence without leave cases.

(a) *Compelling circumstances considered.* Separation for absence without leave (AWOL) will not preclude veteran status under § 5.30 (concerning character of discharge determinations) and will not bar benefit entitlement under § 5.31(c)(4) (concerning AWOL as a statutory bar to VA benefits) if there are compelling circumstances to warrant unauthorized absence(s).

(b) *Factors considered.* VA will evaluate all of the relevant evidence of record in determining whether there are compelling circumstances to warrant unauthorized absence(s), including consideration of the following factors:

(1) *Length of AWOL and character of service.* VA will consider the length of the period(s) of AWOL in comparison to the length and character of service exclusive of the period(s) of AWOL. Service exclusive of the period(s) of AWOL should be of such quality and length that it can be characterized as honest, faithful, meritorious, and of benefit to the nation.

(2) *Examples of circumstances VA will consider.* Reasons offered for being AWOL that VA will consider include family emergencies, compelling family obligations, or similar types of compelling obligations or duties owed to third parties. In evaluating the reasons for being AWOL, VA will consider how the situation appeared to the service member in light of the service member's age, cultural background, educational level and judgmental maturity. VA will also consider evidence showing that the service member's state of mind at the time AWOL began was adversely affected by hardship or suffering during overseas service, or by combat wounds or other service-incurred or aggravated disability.

(3) *Valid legal defense.* VA may find that compelling circumstances exist if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice.

(Authority: 38 U.S.C. 501, 5303(a))

§ 5.33 Insanity as a defense to acts leading to a discharge or dismissal from the service that might be disqualifying for VA benefits.

If VA determines that a service member was insane at the time of the commission of an act, or acts, leading to separation from the service, the commission of such act(s) will not be a basis for denying status as a veteran

under § 5.30 (concerning character of discharge determinations) or for barring the payment of VA benefits under § 5.31 (concerning statutory bars to benefits). For the definition of "insanity," see § 3.354.

(Authority: 38 U.S.C. 501(a), 5303(b))

§ 5.34 Effect of discharge upgrades by Armed Forces boards for the correction of military records (10 U.S.C. 1552) on eligibility for VA benefits.

(a) *Purpose.* This section describes the effect of discharge upgrades by a board established under 10 U.S.C. 1552 (board for correction of military records) on VA determinations that a service member's discharge or dismissal was under dishonorable conditions or that the service member is statutorily barred from receiving VA benefits.

(b) *Definitions.* For purposes of this section, "any applicable new determination" means a determination under § 5.30 (concerning character of discharge determinations) or § 5.31 (concerning statutory bars to VA benefits). "Applicable previous VA discharge findings" means findings by VA, based upon a previous discharge issued for the same period of service, that a service member's discharge or dismissal was under dishonorable conditions or that the service member is statutorily barred from receiving VA benefits.

(c) *Effect of discharge upgrades.* An honorable discharge, or discharge under honorable conditions, issued through a board for correction of military records is final and conclusive and is binding on VA as to characterization based on the period covered by such service. Such a discharge supersedes a previous discharge issued for the same period of service. It will be the basis for making any applicable new determination and sets aside any applicable previous VA discharge findings.

(d) *Effective date.* If entitlement to benefits is established because of the change, modification, or correction of a discharge or dismissal by a board for the correction of military records, the award of such benefits will be effective from the latest of these dates:

(1) The date of filing with the service department of the application for change, modification, or correction of the discharge or dismissal in the case of either an original claim filed with VA or a previously disallowed claim filed with VA;

(2) The date VA received a previously disallowed claim; or

(3) One year prior to the date of reopening of the previously disallowed VA claim.

(Authority: 10 U.S.C. 1552(a)(4); 38 U.S.C. 501, 5110(i))

§ 5.35 Effect of discharge upgrades by Armed Forces discharge review boards (10 U.S.C. 1553) on eligibility for VA benefits.

(a) *Purpose.* This section describes the effect of discharge upgrades by a board established under 10 U.S.C. 1553 (discharge review board) on VA determinations that a service member's discharge or dismissal was under dishonorable conditions or that the service member is statutorily barred from receiving VA benefits.

(b) *Upgrades issued before October 8, 1977.* Paragraph (b) of this section concerns the effect of an honorable or general discharge (upgraded discharge) issued by a discharge review board before October 8, 1977.

(1) *General rule.* The upgraded discharge will be the basis for making any new determination under § 5.30 (concerning character of discharge determinations) or § 5.31 (concerning statutory bars to VA benefits). The upgraded discharge will also set aside any VA findings, based upon a previous discharge issued for the same period of service, that a service member's discharge or dismissal was under dishonorable conditions or that the service member is statutorily barred from receiving VA benefits.

(2) *Exception.* The rule in paragraph (b)(1) of this section does not apply if:

(i) The previous discharge was executed by reason of the sentence of a general court-martial, or

(ii) The discharge review board was acting under the authority of one of the programs specified in § 5.36 (concerning certain special 1970s-era discharge upgrades).

(c) *Upgrades issued on or after October 8, 1977—effect on statutory bars.* Any new determinations VA makes under § 5.31 (concerning statutory bars to VA benefits) will be made without regard to an honorable or general discharge (upgraded discharge) issued by a discharge review board on or after October 8, 1977. The upgraded discharge will not set aside any VA findings, based upon a previous discharge issued for the same period of service, that a service member is statutorily barred from receiving VA benefits.

(d) *Upgrades issued on or after October 8, 1977—effect on character of discharge determinations.* (1) *General rule.* Any new determinations VA makes under § 5.30 (concerning character of discharge determinations) will be made without regard to an honorable or general discharge (upgraded discharge) issued by a

discharge review board on or after October 8, 1977. The upgraded discharge will not set aside any VA findings, based upon a previous discharge issued for the same period of service, that a service member's discharge or dismissal was under dishonorable conditions.

(2) *Exceptions.* The rule in paragraph (d)(1) of this section does not apply if all of the following conditions are met:

(i) The discharge was upgraded as a result of an individual case review;

(ii) The discharge was upgraded under uniform published standards and procedures that generally apply to all persons administratively discharged or released from active service under conditions other than honorable; and

(iii) Such published standards are consistent with standards for determining honorable service historically used by the service department concerned and do not contain any provision for automatically granting or denying an upgraded discharge. VA will accept a report of the service department concerned that the discharge review board proceeding met these conditions.

(e) *Effective date.* If entitlement to benefits is established because of the change, modification, or correction of a discharge or dismissal by a discharge review board, the award of such benefits will be effective from the latest of these dates:

(1) The date of filing with the service department of the application for change, modification, or correction of the discharge or dismissal in the case of either an original claim filed with VA or a previously disallowed claim filed with VA;

(2) The date VA received a previously disallowed claim; or

(3) One year prior to the date of reopening of the previously disallowed VA claim.

(Authority: 38 U.S.C. 501, 5110(i), 5303(e))

§ 5.36 Effect of certain special discharge upgrade programs on eligibility for VA benefits.

(a) *Programs involved.* Except as provided in § 5.35(d)(2) (pertaining to discharge upgrades based on individual case review under certain published standards), an honorable or general discharge awarded by a discharge review board under one of the following programs does not remove any bar to benefits imposed under § 5.30 (concerning character of discharge determinations) or under § 5.31 (concerning statutory bars to VA benefits):

(1) The President's directive of January 19, 1977, implementing

Presidential Proclamation 4313 of September 16, 1974;

(2) The Department of Defense's special discharge review program effective April 5, 1977; or

(3) Any discharge review program implemented after April 5, 1977, that does not apply to all persons administratively discharged or released from active service under other than honorable conditions.

(b) *Termination of awards.* Subject to the provisions of § 3.105 of this chapter, "Revision of decisions," any award of VA benefits made contrary to paragraph (a) of this section will be terminated.

(c) *No overpayments to be created.* No overpayments will be created as a result of payments made after October 8, 1977, based on an upgraded honorable or general discharge issued under one of the programs listed in paragraph (a) of this section which would not be awarded under the standards set forth in § 5.35(d)(2). Such payments will be terminated effective the date of last payment.

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

(Authority: 38 U.S.C. 5303(e))

§ 5.37 Effect of extension of service obligation due to change in military status on eligibility for VA benefits.

(a) *Purpose.* Except for persons who die in military service, status as a veteran requires that an individual be discharged or released from active military service under conditions other than dishonorable. See § 3.1(d) (defining "veteran"). This section describes how VA will determine whether this requirement has been met when, because of a change in his or her military status, a service member was not discharged or released at the end of the period of time for which he or she was obligated to serve when entering a period of service.

(b) *Definitions:* (1) *Change in military status.* For purposes of this section, a change in military status means a change in status that extends the period of time that a service member is obligated to serve. Examples of such a change in military status include, but are not limited to:

(i) A discharge for acceptance of an appointment as a commissioned officer or warrant officer;

(ii) Change from a Reserve commission to a Regular commission;

(iii) Change from a Regular commission to a Reserve commission;

(iv) Reenlistment; or

(v) Voluntary or involuntary extensions of a period of obligated service.

(2) *Combined periods of service.* For purposes of this section, combined

periods of service means the period of service immediately prior to the change in military status combined with the period of service immediately following the change in military status.

(c) *Combined periods of service terminating with discharge or release under honorable conditions.* VA will determine veteran status by the character of the final termination of the service member's combined periods of service if the combined periods of service terminate under honorable conditions. Otherwise, the provisions of paragraph (d) of this section apply.

(d) *Combined periods of service terminating with discharge or release under other than honorable conditions.* When a service member was not discharged or released at the end of the period of time he or she was obligated to serve when entering a period of service, he or she is eligible to receive VA benefits based upon that period of service if that service member:

(1) Completed active military service for the period of time he or she was obligated to serve at the time of entry into that period of service; and

(2) Due to an intervening change in military status was not discharged or released at the end of that period of time; but

(3) Would have been eligible for a discharge or release under conditions other than dishonorable at the end of that period of time except for the intervening change in military status.

(Authority: 38 U.S.C. 101(18))

§ 5.38 Effect of a voided enlistment on eligibility for VA benefits.

(a) *Purpose.* This section describes whether a claimant is eligible for VA benefits if the service department has voided the service member's enlistment.

(b) *Service considered valid for establishing eligibility for benefits.* A service member's enlistment that is voided by the service department for reasons other than those stated in paragraph (c) of this section is valid from the date of entry upon active duty to the date of voidance by the service department. In the case of an enlistment voided for concealment of age or misrepresentation of age, service is valid from the date of entry upon active duty to the date of discharge.

(c) *Service considered not valid for establishing eligibility for benefits.* A service member's enlistment that is voided by the service department for any of the reasons specified in paragraph (c) of this section is void from the date of entry. A service member is not eligible for VA benefits based on this period of service, if enlistment was voided for any of the following reasons:

(1) Lack of legal capacity to contract, other than on the basis of minority, such as a lack of mental capacity to contract.

(2) A statutory prohibition to enlistment, such as, but not limited to:

- (i) Desertion; or
- (ii) Conviction of a felony.

(Authority: 10 U.S.C. 501, 505; 38 U.S.C. 101(2), 501(a))

Minimum Service and Evidence of Service

§ 5.39 Minimum active duty service requirement for VA benefits.

(a) *Requirement.* Any individual listed in paragraph (b) of this section will not be eligible for VA benefits unless he or she has completed a minimum period of active duty described in paragraph (c) of this section upon discharge or release from service, or qualifies for an exclusion under paragraph (d) of this section.

(b) *Applicability.* The minimum active duty service requirement applies to:

(1) Any person who originally enlisted in a regular component of the Armed Forces and entered on active duty after September 7, 1980 (time spent during temporary assignment to a reserve component awaiting entrance on active duty because of a delayed entry enlistment contract does not count; this section applies if the actual date of entry on active duty is after September 7, 1980); and

(2) Any other person (enlisted or officer) who entered on active duty after October 16, 1981, who had not previously completed a continuous period of active duty of at least 24 months.

(c) *Minimum active duty service requirement.* (1) Except for veterans excluded in paragraph (d) of this section, a veteran must have served the shorter of:

- (i) 24 months of continuous active duty; or
- (ii) The full period of service for which the veteran was called or ordered to active duty.

(2) If it appears that the length of service requirement may not be met, VA will request a complete statement of service to determine if there are any periods of active service that are required to be excluded under paragraph (e) of this section.

(d) *Exclusions.* The minimum active duty service requirement of this section does not apply to:

(1) Any person who was discharged under an early out program described in 10 U.S.C. 1171 (Armed Forces, "Regular enlisted members: early discharge").

(2) Any person who was discharged because of a hardship as described in 10

U.S.C. 1173 (Armed Forces, "Enlisted members: discharge for hardship").

(3) Any person who was discharged or released from active duty because of a disability incurred or aggravated in line of duty,

(i) That, at the time of discharge or release, was determined to be service-connected without presumptive provisions of law, or

(ii) That person had such a disability documented in official service records at the time of discharge that, in VA's medical judgment, would have justified a discharge for the disability.

(4) Any person who has any disability that VA determines to be compensable under 38 U.S.C. chapter 11 because:

(i) VA evaluates the disability as 10 percent or more disabling according to 38 CFR part 4, "Schedule for Rating Disabilities;"

(ii) Special monthly compensation is payable for the disability; or

(iii) The disability, together with one or more other disabilities, is compensable under § 3.324 of this chapter.

(5) The provision of a benefit for or in connection with a service-connected disability, condition, or death.

(6) Insurance benefits under 38 U.S.C. chapter 19.

(e) *Temporary breaks in service.*

Temporary breaks in active duty service for any of the reasons listed below will not be considered to have interrupted the "continuous service" requirement of paragraph (c)(1)(i) of this section; however, time lost due to these breaks must be subtracted from the total service time because these times do not count towards the minimum active duty service requirement:

(1) Time lost due to an industrial, agricultural, or indefinite furlough;

(2) Time lost while absent without leave;

(3) Time lost while under arrest (without acquittal or a dismissal of charges);

(4) Time lost while a deserter; or

(5) Subject to 10 U.S.C. 875(a), (concerning the restoration under certain circumstances of "all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved"), time lost while serving a court martial sentence.

(f) *Effect on eligibility for benefits for survivors and dependents.* (1) *General rule.* If a veteran is ineligible for VA benefits because he or she did not meet the minimum active duty service requirement, the veteran's dependents and survivors are ineligible for benefits based on that service.

(2) *Exceptions.* Paragraph (f)(1) of this section does not bar entitlement to any

of the following VA benefits to which a dependent or survivor may otherwise be entitled:

- (i) Insurance benefits under 38 U.S.C. chapter 19,
- (ii) Housing or small business loans under 38 U.S.C. chapter 37,
- (iv) Benefits described in paragraph (d)(5) of this section,
- (v) DIC based on the veteran's death in service.

(Authority: 38 U.S.C. 5303A)

§ 5.40 Service records as evidence of service and character of discharge that qualify for VA benefits.

(a) *Acceptable evidence of service.* To establish entitlement to pension, compensation, DIC or burial benefits, VA must have evidence of qualifying service and character of discharge from the service department concerned. Documents VA will accept as evidence of service and character of discharge include, but are not limited to, the following:

- (1) A DD Form 214; or

(2) A Certificate of Release or Discharge from Active Duty.

(b) *Content of documents.* The document establishing service must contain information which demonstrates:

- (1) The length of service;
- (2) The dates of service; and
- (3) The character of discharge or release.

(c) *When service department verification is not required.* VA will accept one or more documents issued by a U.S. service department as evidence of service and character of discharge without verifying their authenticity, provided that VA determines that the document is genuine and accurate. The document can be a copy of an original document if the copy:

- (1) Was issued by a service department;
- (2) Is certified by a public custodian of records as a true and exact copy of a document in the custodian's possession; or
- (3) Is certified by an accredited agent, attorney, or service organization

representative as a true and exact copy of either an original document or of a copy issued by the service department or a public custodian of records. This accredited agent, attorney, or service organization representative must have successfully completed VA-prescribed training on military records.

(d) *When service department verification is required.* VA will request verification of service from the appropriate service department if:

(1) The record does not include satisfactory evidence showing the information described in paragraph (b) of this section;

(2) The evidence of record does not meet the requirements of paragraph (c) of this section; or

(3) There is a material discrepancy in the evidence of record.

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

§§ 5.41–5.49 [Reserved]

[FR Doc. 04–1895 Filed 1–29–04; 8:45 am]

BILLING CODE 8320–01–P