DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 5

RIN 2900–AL89

Dependency and Indemnity Compensation Benefits

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) has published a series of Notices of Proposed Rulemaking (NPRM)s setting out new proposed regulations governing VA compensation, pension, burial and related benefits that would be located in a new part of the Code of Federal Regulations. This NPRM adds proposed regulations concerning dependency and indemnity compensation (DIC) for a veteran's surviving spouse, children, and parents and general rules relating to proof of death and service-connected cause of death to that proposed new part. The intended effect of the proposed revisions is to assist claimants and VA personnel in locating and understanding these provisions.

DATES: Comments must be received by VA on or before December 20, 2005.

ADDRESSES: Written comments may be submitted by: mail or hand-delivery to Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026; e-mail to *VAregulations@va.gov* or through *http://www.Regulations.gov.* Comments should indicate that they are submitted in response to ''RIN 2900–AL89.'' 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: Clay Witt, Chief, 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 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 ''VA Claims Processing Task Force: Report to the Secretary of Veterans Affairs.'' 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 content of the regulations in 38 CFR part 3 governing the compensation and pension program of the Veterans Benefits Administration. 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 one such portion. It includes proposed rules regarding DIC for a veteran's surviving spouse, children, and parents and proposed rules relating to proof of death and service-connected cause of death. After review and consideration of public comments, final versions of these proposed regulations will ultimately be published in a new part 5 in 38 CFR.

Outline

Overview of New Part 5 Organization
Overview of Proposed Subpart G Organization
Table Comparing Current Part 3 Rules With Proposed Part 5 Rules
Content of Proposed Regulations

General Provisions

5.500 Proof of death.
5.501 Proving death by other means.
5.502 Proving death after 7 years of continuous, unexplained absence.
5.503 Establishing the date of death.
5.504 Service-connected cause of death.

Dependency and Indemnity Compensation—General

5.510 Dependency and indemnity compensation—basic entitlement.
5.511 Special monthly dependency and indemnity compensation.
5.512 Eligibility for death compensation or death pension instead of dependency and indemnity compensation.

Dependency and Indemnity Compensation—Eligibility Requirements and Payment Rules for Surviving Spouses and Children

5.520 Dependency and indemnity compensation—time of marriage requirements for surviving spouses.
5.521 [Reserved]
5.522 Dependency and indemnity compensation benefits for survivors of certain veterans rated totally disabled at time of death—offset of wrongful death damages.
5.523 [Reserved]
5.524 Awards of dependency and indemnity compensation benefits to children when there is a retroactive award to a schoolchild.

Dependency and Indemnity Compensation—Eligibility Requirements and Payment Rules for Parents

5.530—Eligibility for, and payment of, parents' dependency and indemnity compensation.
5.531 General income rules.
5.532 Deductions from income.
5.533 Exclusions from income.
5.534 When VA counts parents' income.
5.535 Adjustments to parents' DIC when income is less than anticipated.
5.536 Parents' dependency and indemnity compensation rates.
5.537 Payment intervals.

Effective Dates

Note: For information concerning proposed §§ 5.550 through 5.572, see 69 FR 59072 (Oct. 1, 2004).

5.573 Effective date for dependency and indemnity compensation rate adjustments when an additional survivor files an application.
5.574 Effective dates of awards and discontinuances of special monthly dependency and indemnity compensation.
Omission of rule in 38 CFR 3.22(h).
Endnote Regarding Amendatory Language
Paperwork Reduction Act
Regulatory Flexibility Act
Executive Order 12866
Unfunded Mandates
Catalog of Federal Domestic Assistance Numbers
List of Subjects in 38 CFR Part 5

Overview of New Part 5 Organization

We plan to organize the part 5 regulations so that all provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. We believe this organization will allow claimants, beneficiaries, and their representatives, as well as VA personnel, to find information relating to a specific benefit more quickly than the organization provided in current part 3.

The first major subdivision would be ''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 was published as proposed on January 30, 2004. *See* 69 FR 4820.

''Subpart C—Adjudicative Process, General'' would inform readers about claims and benefit application filing procedures, VA's duties, rights and responsibilities of claimants and

beneficiaries, general evidence requirements, and general effective dates for new awards, as well as revision of decisions and protection of VA ratings. This subpart will be published as three separate NPRMs due to its size. The first, concerning the duties of VA and the rights and responsibilities of claimants and beneficiaries, was published on May 10, 2005. See 70 FR 24680.

''Subpart D—Dependents and Survivors'' would inform readers how VA determines whether an individual is a dependent or a survivor for purposes of determining eligibility for VA benefits. It would also provide the evidence requirements for these 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. This subpart will be published as three separate NPRMs due to its size. The first, concerning presumptions related to service connection, was published on July 27, 2004. *See* 69 FR 44614.

''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. This subpart will be published as two separate NPRMs due to its size. The portion concerning Old-Law Pension, Section 306 Pension, and elections of Improved Pension was published as proposed on December 27, 2004. *See* 69 FR 77578.

''Subpart G—Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary'' would contain regulations governing claims for DIC; death compensation; accrued benefits; benefits awarded, but unpaid at death; and various special rules that apply to the disposition of VA benefits, or proceeds of VA benefits, when a beneficiary dies. This subpart would also include related definitions, effective-date rules, and rate-of-payment rules. This subpart will be published as two separate NPRMs due to its size. The portion concerning accrued benefits, special rules applicable upon the death of a beneficiary, and several effective date rules, was published as proposed on October 1, 2004. *See* 69 FR 59072. The portion concerning DIC benefits and general provisions relating to proof of death and service-connected cause of death is the subject of this NPRM.

''Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors'' would pertain to special and ancillary 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 and their survivors.

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

''Subpart K—Matters Affecting Receipt of Benefits'' would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits.

''Subpart L—Payments and Adjustments to Payments'' would include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules. Because of its size, proposed regulations in subpart L will be published in two separate NPRMs.

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 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 include, in the relevant portion of the Supplementary Information, 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. The current part 3 section we cite may differ from its eventual part 5 counterpart in some respects, but we believe this method will assist readers in understanding these proposed regulations where no part 5 counterpart has yet been published. 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]'' where the part 5 regulation citation would be placed.

In connection with this rulemaking, VA will accept comments relating to a prior rulemaking issued as a part of the Project, if the matter being commented on relates to both Notices of Proposed Rulemaking. 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.

Overview of Proposed Subpart G Organization

As its title, ''Dependency and Indemnity Compensation, Accrued Benefits, Death Compensation Benefits, and Special Rules Applicable Upon Death of a Beneficiary,'' suggests, proposed subpart G will address a broad range of VA death benefits. Because of its length, subpart G will be published in two separate NPRMs. This NPRM pertains to those regulations governing DIC benefits and general provisions relating to proof of death and service-connected cause of death. Although 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.

Table Comparing Current Part 3 Rules With Proposed Part 5 Rules

The following table shows the relationship between the current regulations in part 3 and the proposed regulations contained in this NPRM:

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph
5.500(a)	New.
5.500(b)	3.211(a).
5.500(c)(1)	3.211(d)(1).
5.500(c)(2)	3.211(d)(2).
5.500(c)(3)	3.211(d)(3).
5.500(d)	3.211(b).
5.500(e)	3.211(c).
5.501(a)	New.
5.501(b)	3.211(e), first sentence.
5.501(c)	3.211(e), second sentence.
5.501(d)	3.211(f) and (g).
5.502(a)	3.212(a).
5.502(b)	3.212(b).
5.502(c)	3.212(b) and (c).
5.503(a)	New.
5.503(b)	3.212(a).
5.503(c)	New.
5.504(a)	New.
5.504(b)	New.
5.504(c)(1)	New.
5.504(c)(2)	3.312(c)(3) and (c)(4).
5.510(a)	3.5(a).

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph
5.510(b), except for (b)(1)(ii).	New.
5.510(b)(1)(ii)	3.5(b).
5.510(c)	3.5(d).
5.510(d)	3.251(a)(1).
5.511(a)	3.351(a)(3), (a)(4), (b), and (c)(3).
5.511(b)	3.351(c)(1) and (c)(2).
5.511(c)	3.351(e).
5.512	3.5(c).
5.520(a)	New.
5.520(b)(1)(i)	Introduction to 3.54.
5.520(b)(1)(ii)	3.54(c)(2).
5.520(b)(1)(iii)	3.54(c)(3).
5.520(b)(1)(iv)	3.54(c)(1)
5.520(b)(2)	New.
5.521	Reserved.
5.522(a) and (b)	3.22(e).
5.522(c)(1)	New.
5.522(c)(2)	3.22(g).
5.522(c)(3)	New.
5.522(c)(4)	3.22(f).
5.522(c)(5)	3.22(g).
5.522(d)	3.22(g).
5.523	Reserved.
5.524(a), except for (a)(1).	3.650(c)(2).
5.524(a)(1)	3.650(c)(1).
5.524(b) and (c)	3.650(c)(1).
5.530	New.
5.531(a)	3.251(b), Introduction to 3.262(a).
5.531(b)(1)	Introduction to 3.262(a).
5.531(b)(2)(i)	3.261(a)(7).
5.531(b)(2)(ii)	3.261(a)(26).
5.531(b)(2)(iii)	3.262(h).
5.531(c)	Introduction to 3.262(b) and 3.262(b)(1).
5.531(d)(1) and (d)(2)	3.262(k)(1) and (k)(2).
5.531(d)(3)	New.
5.531(d)(4)	3.262(k)(1).
5.531(e)	3.260(b).
5.532(a)	3.262(a)(2) and (a)(3).
5.532(b)	3.262(j)(4).
5.532(c)	3.262(o) and (p).
5.532(d)	Introduction to 3.262(l), 3.262(l)(4).
5.532(e)	3.261(a)(22), and 3.262(a)(1).
5.533(a)	3.261(a)(12).
5.533(b)	3.262(c), (d), and (f).
5.533(c) and (d)	3.261(a)(20).
5.533(e)	3.262(f).
5.533(f)	3.261(a)(13).
5.533(g)	Introduction to 3.262(e), (e)(4), (f), (g), (i)(2), (j)(1), (j)(2), and (j)(4).
5.533(h)	Introduction to 3.262(t), (t)(1).
5.533(i)	3.262(k)(5).
5.533(j)	3.261(a)(31).
5.533(k)	3.262(w).
5.533(l) through (n)	New.
5.533(o)	3.262(a)(2), last sentence.
5.533(p)	3.261(a)(22).
5.533(q)	New.
5.534(a)	3.251(b) and Introduction to 3.260.
5.534(b)	3.260(c), (d), and (f).
5.534(c)	3.260(f).
5.535	3.660(b), Introduction and (b)(1).
5.536(a)	3.25.
5.536(b)	3.25, 3.27(b) and (d).
5.536(c)	3.251(a)(2).
5.536(d)	3.251(a)(4).
5.536(e)	3.251(a)(5).
5.536(f)(1)	3.25(a), (c), and (d).
5.536(f)(2)	3.25(e).
5.536(g)	3.260(f).
5.536(h)	3.704(b).
5.537	Introduction to 3.30 and 3.30(e).
5.573(a)	Introduction to 3.650(a).
5.573(b)(1)	3.650(a)(1).
5.573(b)(2)	3.650(a)(2).
5.573(c)	3.650(b).
5.573(d)	Unnumbered paragraph in 3.650(a).
5.573(e)	Introduction to 3.650(a).
5.574(a)	3.402(c) and 3.404.
5.574(b)(1)	3.502(e)(1) and 3.504.
5.574(b)(2)	New.

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 regarding the subject matter of this rulemaking is accounted for in the table. In some instances other portions of the part 3 sections that are addressed in these proposed regulations will appear in subparts of part 5 that are being published separately for public comment. 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 separate NPRM. The table also does not include provisions from part 3 regulations that will not be repeated in part 5. Such provisions are discussed specifically under the appropriate part 5 heading in this preamble. Readers are invited to comment on the proposed part 5 provisions and also on our proposals to omit those part 3 provisions from part 5.

Content of Proposed Regulations

General Provisions

5.500 Proof of death.

Proposed § 5.500 is a reorganization of rules in current § 3.211(a) through (d), which describe the kinds of evidence that would suffice as proof of death applicable in most cases. Section 5.500(a) is new. Section 5.500(a)(1) states the purpose of § 5.500. Section 5.500(a)(2) provides a rule for applying § 5.500, specifically that VA will accept the evidence described in any relevant paragraph of § 5.500 as proof of death. This rule reflects current VA practice and clarifies that the various methods of proving death set out in § 5.500 are alternatives.

Current § 3.211(d) describes various forms of proof of death VA will accept when an individual dies abroad. Section 3.211(d)(3) lists ''[a]n official report of death from the head of the department concerned, where the deceased person was, at the time of death, a civilian employee of such department.'' We propose instead to describe this acceptable form of proof of death, in § 5.500(c)(3), as ''[a]n official report of death of a civilian employee of the U.S. Government from the employing U.S. Government entity.'' This revision serves to clarify that the rule applies to a U.S. Government employee and that it is not limited to employing Federal entities that are cabinet departments. Further, reports of death need not necessarily come from the head of the employing entity. VA's concern is that such a report is an authentic official report of the Federal entity. Implicit in the requirement for an official report is that the report will have been issued by a person authorized to issue it, but that person will not necessarily be the person who is the head of the employing entity.

5.501 Proving death by other means.

Proposed § 5.501 is based on current § 3.211(e) through (g) and long-standing VA practice. It states the rules on how to prove death where the evidence described in proposed § 5.500 is not available. It includes new § 5.501(a), which describes the scope of the section.

Proposed § 5.501(d)(2) clarifies how VA determines whether death has occurred in those cases where a body has not been recovered, or the body cannot be identified. Current § 3.211(f) provides that ''[w]here it is indicated that the veteran died under circumstances which precluded recovery or identification of the body, the fact of death should be established

by the best evidence, which from the nature of the case must be supposed to exist.'' The ''best evidence'' requirement is not explained. However, it is long-standing VA practice to consider statements from the claimant and other witnesses describing the facts that led them to believe that the person in question died. We also note that this portion of the regulation should provide information regarding what to do when the death of any person, not just a veteran, is relevant and the body cannot be recovered or identified. Proposed § 5.501(d)(2) addresses these issues by broadening the scope of this portion of the regulation to cover the death of any person whose body cannot be recovered or identified and by clarifying the kinds of evidence VA considers in this situation.

Current § 3.211(f) refers to ''an official'' authorized to approve a finding of the fact of death. Proposed § 5.501(d)(3) clarifies that this means an authorized VA official.

Current § 3.211(e) requires the submission of affidavits to prove the fact of death. In line with VA's current practice of accepting somewhat less formal means of proof in most instances, proposed § 5.501 permits the submission of either certified statements or affidavits. (We note that ''certified statement'' will be defined in subpart A of part 5, which will be the subject of a separate NPRM.)

5.502 Proving death after 7 years of continuous, unexplained absence.

Proposed § 5.502 provides rules regarding how a claimant may establish the fact of a person's death if that person has been missing for 7 years or more and his or her absence is unexplained. It is derived from current § 3.212.

Current § 3.212 includes a requirement that ''satisfactory evidence'' be produced to show a person's continued and unexplained absence. In order to clarify what evidence is necessary to establish the death of a missing person, we propose to replace the phrase ''satisfactory evidence'' with ''competent, credible evidence'' because this term more appropriately describes the qualities that make such evidence ''satisfactory.'' VA will propose a definition of ''competent evidence'' in a separate NPRM. ''Credible'' evidence is just evidence that is believable. (''Credible testimony is that which is plausible or capable of being believed.'' *Caluza* v. *Brown*, 7 Vet. App. 498, 511 (1995).)

All other proposed revisions to the language of § 3.212 are structural in nature and do not change the substance of the regulation.

5.503 Establishing the date of death.

The fact of death, that is that a person died, may be established through the evidence described in §§ 5.500 and 5.501, but that evidence may not show exactly when death occurred. The exact date of death may never be known when the fact of death is established using the presumption in § 5.502 when there has been a 7-year unexplained absence. Proposed § 5.503 sets out rules for establishing the date of death for VA purposes in such circumstances.

The current regulation concerning the 7-year-absence death presumption, § 3.212(a), refers to an individual who has been absent ''from his or her home and family for a period of 7 years or more.'' It provides that in such cases death occurred ''as of the expiration of such period.'' It is not entirely clear from the language used whether the ''or more'' is part of ''such period.'' VA's practice has been to presume that death occurred seven years after the person was last known to be alive in cases where the fact of death is established under current § 3.212 (proposed § 5.502). This date of death presumption is set out more clearly in proposed § 5.503(b).

In cases where the fact of death is proven by the evidence described in proposed § 5.500 or § 5.501, and not the 7-year-absence rule, but the exact date of death is unknown, long-standing VA practice is that the date of death can be established as the date the deceased person was last seen alive, the date the body was found, or any time between those dates, depending on the circumstances. Proposed § 5.503(c) incorporates and clarifies this practice. It includes standards for setting the date of death when the body of the deceased is found and a presumption that, if no identifiable body is found, the date of death is the date the deceased was last known to be alive in the absence of evidence to the contrary.

5.504 Service-connected cause of death.

The next regulation in this NPRM concerns how VA determines whether a veteran's death was service connected. This determination is important to a veteran's survivors because a veteran's service-connected death is a foundation for awarding several types of VA benefits. For example, see proposed § 5.510, ''Dependency and indemnity compensation—basic entitlement,'' and § 3.1600(a) (concerning the service-connected burial allowance). Proposed paragraph (a) of § 5.504 sets this context and explains that the purpose of the section is to provide rules on how VA determines whether a veteran's death was service connected.

Proposed paragraph (b) defines ''service-connected disability'' for purposes of proposed § 5.504. An examination of 38 U.S.C. 1310(a), the basic authorizing statute for the award of DIC for service-connected deaths, is instructive. The statute provides:

> (a) When any veteran dies after December 31, 1956, from a service-connected or compensable disability, the Secretary shall pay dependency and indemnity compensation to such veteran's surviving spouse, children, and parents. The standards and criteria for determining whether or not a disability is service-connected shall be those applicable under chapter 11 of this title.

Chapter 11 of Title 38, United States Code, referenced in 38 U.S.C. 1310(a), contains the provisions for determining whether living veterans are entitled to service connection for disabilities. In other words, VA determines whether a disability is service connected in death cases using the same principles it applies in determining service connection for the disabilities of living veterans. Therefore, § 5.504(b)(1) defines service-connected disability, in the context of service-connected cause of death, as ''(i) * * * a disability that was service connected at the time of the veteran's death, or (ii) [a] disability that is service connectable under the provisions of subpart E of this part, 'Claims for service connection and disability compensation.' '' (Subpart E will be the subject of a separate NPRM.) To preclude an interpretation that a traumatic death in service was so sudden that it did not produce a ''disability'' before death and that the death was therefore not service-connectable, we also propose to state in § 5.504(b)(1)(ii) that ''[f]or purposes of this section, VA will deem a sudden death in service from trauma to have been preceded by disability from the trauma.''

There is an important exception to the principle stated in proposed § 5.504(b)(1)(i) that (for purposes of determining service-connected causes of death) service-connected disabilities include disabilities that were service connected at the time of the veteran's death. Congress has precluded VA from granting service connection for the cause of a veteran's death in some cases, even though the disability in question may have been service connected at the time of the veteran's death.

One such case results from 38 U.S.C. 1103(a), which provides that ''[n]otwithstanding any other provision of law, a veteran's disability or death shall not be considered to have resulted

from personal injury suffered or disease contracted in the line of duty in the active military, naval, or air service for purposes of this title on the basis that it resulted from injury or disease attributable to the use of tobacco products by the veteran during the veteran's service.'' *See also Kane* v. *Principi*, 17 Vet. App. 97, 101 (2003) (''Thus, the plain language of 38 U.S.C. § 1103 expresses the Congressional intent to no longer award service connection for a veteran's death that results from a service connected disease that was 'capable of being attributed' to the use of tobacco products during the veteran's service.'').

Another case in which service connection may not be granted for the cause of death based on a disability service connected at the time of death is the result of 38 U.S.C. 105(a) which provides, in part, that ''[a]n injury or disease incurred during active military, naval, or air service will be deemed to have been incurred in line of duty and not the result of the veteran's own misconduct when the person on whose account benefits are claimed was, at the time the injury was suffered or disease contracted, in active military, naval, or air service, whether on active duty or on authorized leave, unless such injury or disease was a result of the person's own willful misconduct or abuse of alcohol or drugs.'' *See also* VAOPGCPREC 11–96, 61 FR 66748, 66750 (1996), which held that ''[s]ection 8052 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101–508, § 8052, 104 Stat. 1388, 1388–351, applicable to claims filed after October 31, 1990, precludes an injury or disease that is a result of a person's own abuse of alcohol or drugs from being considered incurred in line of duty and, consequently, precludes resulting disability or death from being considered service connected.''

We propose to provide for these Congressionally mandated exceptions, and any such exceptions that may arise in the future, by stating the following in proposed § 5.504(b)(2):

(2) *Exception.* For purposes of this section, ''service-connected disability'' does not include a disability that was service connected at the time of the veteran's death if the law in effect at the time of a survivor's claim precludes VA from establishing service connection for the cause of the veteran's death. See § 3.300 of this chapter, ''Claims based on the effects of tobacco products,'' and § 3.301(d) of this chapter ''Line of duty; abuse of alcohol or drugs.''

We note that current § 3.301(d), cross-referenced in proposed § 5.504(b)(2), does not yet include provisions based on *Allen* v. *Principi*, 237 F.3d 1368 (Fed. Cir. 2001) (concluding that 38 U.S.C. 1110 does not preclude compensation for an alcohol or drug abuse disability secondary to a service-connected disability). However, we anticipated that we will address that issue in the part 5 equivalent of § 3.301(d) and that part 5 regulation would be the one cross-referenced in the final version of proposed 5.504.

Proposed § 5.504(c) addresses the kind of link that must exist between a service-connected disability and the veteran's death in order for VA to determine that the death was service connected. It is based on the provisions of current § 3.312(c). Current § 3.312(c) distinguishes between ''principal'' and ''contributory'' causes of death and includes elaborate provisions concerning ''contributory'' causes of death. We believe that these provisions can be simplified considerably.

The causation question can be adjudicated using two relatively simple standards that better reflect VA's long-standing practice and interpretation of the authorizing statutes. The first standard would be to determine if the veteran's death would have occurred in the absence of the service-connected disability, or the combined effects of multiple service-connected disabilities. If the answer is that the death would not have occurred in the absence of the service-connected disability, or disabilities, service connection should be awarded for the cause of the veteran's death.

Answering this ''in the absence of'' question should resolve a broad spectrum of cases. Sometimes the answer to the question will depend upon medical evidence. For example, if the medical evidence (such as autopsy reports, reports of the veteran's final hospitalization, etc.) shows that the veteran died of a particular kind of cancer, then clearly the veteran would not have died in the absence of that cancer. If that cancer was service connected or service connectable, the death should be service connected.

The ''in the absence of'' standard should also work well in other types of cases that may involve fact finding beyond the purely medical realm, such as cases involving service-connected or service-connectable disabilities that produce impairment of balance or physical mobility that plays a role in the death of a veteran. For example, a veteran with a service-connected leg amputation might have died as the result of a slip and fall accident. A veteran who was bedridden due to the service-connected residuals of a stroke might have died in a home fire. The literal cause of death might be the injuries sustained in the accident or fire, but the evidence might show that the impaired mobility due to the service-connected disabilities caused the accident in one case and prevented the veteran from escaping from the fire in the other. In both cases, the veteran would not have died in the absence of the service-connected disability and determining that the death is service connected would be appropriate under the proposed test.

However, there are circumstances where death would be service connected under the provisions in current § 3.312(c) even though such death would not satisfy the ''in the absence of'' test described above. Specifically, current § 3.312(c)(3) and (4) provide:

(3) Service-connected diseases or injuries involving active processes affecting vital organs should receive careful consideration as a contributory cause of death, the primary cause being unrelated, from the viewpoint of whether there were resulting debilitating effects and general impairment of health to an extent that would render the person materially less capable of resisting the effects of other disease or injury primarily causing death. Where the service-connected condition affects vital organs as distinguished from muscular or skeletal functions and is evaluated as 100 percent disabling, debilitation may be assumed.

(4) There are primary causes of death which by their very nature are so overwhelming that eventual death can be anticipated irrespective of coexisting conditions, but, even in such cases, there is for consideration whether there may be a reasonable basis for holding that a service-connected condition was of such severity as to have a material influence in accelerating death. In this situation, however, it would not generally be reasonable to hold that a service-connected condition accelerated death unless such condition affected a vital organ and was of itself of a progressive or debilitating nature.

While stated in different ways, the basic concept in these provisions is the same. Even though a veteran may have died of a nonservice-connected disability, VA may grant service connection for the cause of death if the service-connected disability was so debilitating that death was materially hastened. VA proposes to preserve this concept in § 5.504(c)(2), together with the presumption that such a degree of debilitation is presumed where a service-connected disability rated as 100% disabling affects vital organs. ''Vital organs'' are also defined in this proposed paragraph as ''those organs necessary to sustain life, including the heart, lungs, central nervous system, liver, and kidneys.'' (''The word 'vital' means necessary to life or essential.'' *Federal Tel. & Radio Corp.* v. *Associated*

Tel. & Tel. Co., 169 F.2nd 1012, 1015 (3rd Cir. 1948). ''[V]ital * * * 1. Of or characteristic of life: *vital processes.* 2. Necessary to the continuation of life; life sustaining: *vital functions.*'' *The American Heritage Dictionary of the English Language* 1433 (New College Ed. 1976). ''[V]ital * * * necessary to or pertaining to life.'' *Dorland's Illustrated Medical Dictionary* 1834 (28th ed. 1994).)

Dependency and Indemnity Compensation—General

5.510 Dependency and indemnity compensation—basic entitlement.

Proposed § 5.510 is the first of several sequential proposed regulations explaining DIC benefits for a veteran's surviving spouse, children, and parents. It serves as an introduction to the DIC program and outlines basic requirements for DIC entitlement. It includes provisions from current 38 CFR 3.5(a), (b), and (d).

Proposed paragraph (a) defines DIC and is derived from current § 3.5(a).

Proposed § 5.510(b) sets out the three statutory bases for the award of DIC: (1) Service-connected death during or after service (38 U.S.C. 1310, ''Deaths entitling survivors to dependency and indemnity compensation''); (2) service-connected disability that had been rated as totally disabling for certain specified periods of time prior to the veteran's death (38 U.S.C. 1318, ''Benefits for survivors of certain veterans rated totally disabled at time of death''); and (3) death due to incidents occurring during certain VA-furnished medical, training, rehabilitation, or compensated work therapy services (38 U.S.C. 1151, ''Benefits for persons disabled by treatment or vocational rehabilitation'').

Proposed paragraph (b) also includes provisions from current § 3.5(b). Current § 3.5(b) includes three different date of death requirements for basic entitlement to DIC based upon the interplay between DIC and a benefit program called death compensation that DIC replaced in the 1950s. VA data shows that fewer than 1,000 persons, primarily the parents of veterans, are still receiving death compensation benefits. On the other hand, more than 300,000 persons are receiving DIC benefits. Detailed information about the relationship between DIC and death compensation was desirable years ago when current § 3.5 was drafted and VA was transitioning between the two death-benefit programs. However, a simpler explanation of DIC benefits will now be more useful to most claimants and VA personnel adjudicating claims. Therefore, we propose to place death compensation rules in a portion of subpart G dealing with death compensation (published as part of a separate NPRM, *see* 69 FR 59072, Oct. 1, 2004) and include only essential information about the relationship between DIC and death compensation in VA's DIC regulations, such as proposed § 5.510.

Specifically, we state in proposed § 5.510(b)(1)(ii) that ''DIC is not payable unless the service-connected death occurred after December 31, 1956, except in the case of certain individuals receiving or eligible to receive death compensation who elect to receive DIC in lieu of death compensation.''. The few users seeking more information about death compensation and the election of DIC in lieu of death compensation would be referred to other sections that address those topics.

In keeping with the simplification of § 5.510 in comparison with current § 3.5, we have intentionally not repeated in § 5.510 some of the details in current § 3.5(b)(2) concerning entitlement to elect DIC in lieu of death compensation. Current § 3.5(b)(2) provides that one of the bases for DIC entitlement is that ''[d]eath occurred prior to January 1, 1957, and the claimant was receiving or eligible to receive death compensation on December 31, 1956 (or, as to a parent, would have been eligible except for income), under laws in effect on that date or who subsequently becomes eligible by reason of a death which occurred prior to January 1, 1957.'' Instead, as previously indicated, we propose to merely state in § 5.510(b)(1)(ii) that ''DIC is not payable unless the service-connected death occurred after December 31, 1956, except in the case of certain individuals receiving or eligible to receive death compensation who elect to receive DIC in lieu of death compensation.'' We intend no substantive change. A person could not be ''receiving, or eligible to receive, death compensation'' unless they were ''receiving or eligible to receive death compensation on December 31, 1956 '' under laws in effect on that date or * * * subsequently bec[a]me[] eligible by reason of a death which occurred prior to January 1, 1957.'' And, as also mentioned previously, rules concerning death compensation entitlement are addressed elsewhere in proposed part 5. The same is true of rules concerning the election of DIC in lieu of death compensation.

Finally, in paragraph (d) of proposed § 5.510, we state that DIC for parents is subject to income limitations. This provision is derived from current 38 CFR 3.251(a).

5.511 Special monthly dependency and indemnity compensation.

Proposed § 5.511, based on current 38 CFR 3.351(a)(3), (a)(4), (b), (c), and (e), provides for payment of increased DIC benefits to a surviving spouse or parent based on the need for regular aid and attendance or being permanently housebound.

5.512 Eligibility for death compensation or death pension instead of dependency and indemnity compensation.

Proposed § 5.512 explains that VA may not pay death compensation or death pension to a person eligible for DIC based upon a death occurring after December 31, 1956, subject to the right of a surviving spouse to elect death pension in lieu of DIC. This proposed section is based on current § 3.5(c), which is, in turn, based on 38 U.S.C. 1317, ''Restriction on payments under this chapter.''

Current § 3.5(c) states:

> No person eligible for dependency and indemnity compensation by reason of a death occurring on or after January 1, 1957, shall be eligible by reason of such death for death pension or compensation under any other law administered by the Department of Veterans Affairs, except that, effective November 2, 1994, a surviving spouse who is receiving dependency and indemnity compensation may elect to receive death pension instead of such compensation.

The November 2, 1994, date referenced in current § 3.5(c) is the effective date of Pub. L. 103–446, which added subsection (b) to 38 U.S.C. 1317, thereby permitting DIC recipients to elect to receive death pension instead of DIC. *See* Veterans' Benefits Improvements Act of 1994, Pub. L. 103–446, section 111(a), 108 Stat. 4645, 4654. Including the date was helpful during the time when the right to elect death pension in lieu of DIC was new. However, we propose to omit it from this revision inasmuch as elections are prospective and its inclusion is no longer necessary.

Current § 3.5(c) speaks of the right of a surviving spouse ''receiving'' DIC to elect death pension. However, under 38 U.S.C. 1317(b), the surviving spouse need only be eligible for DIC in order to make this election. Proposed § 5.512(b) uses the statutory term. No other substantive changes are proposed.

Dependency and Indemnity Compensation—Eligibility Requirements and Payment Rules for Surviving Spouses and Children

5.520 Dependency and indemnity compensation—time of marriage requirements for surviving spouses.

A surviving spouse must meet various requirements in order to qualify for DIC benefits. These include requirements that the date of his or her marriage to the veteran, or the length of that marriage, must fall within certain parameters. Proposed § 5.520, based on portions of current § 3.54 and applicable statutory provisions, sets out the time of marriage requirements and the ways in which the requirements can be met.

The first way in which the requirements can be met is set out in the introduction to current § 3.54, which explains that a surviving spouse who married the veteran before, or during, the veteran's service may qualify for DIC. Three alternative time-of-marriage requirements, which apply when the veteran and the surviving spouse were married after the veteran's separation from service, are listed in current § 3.54(c). These alternative requirements are that the surviving spouse was married to the veteran:

(1) Before the expiration of 15 years after the termination of the period of service in which the injury or disease causing the death of the veteran was incurred or aggravated, or

(2) For 1 year or more, or

(3) For any period of time if a child was born of the marriage, or was born to them before the marriage.

This list in current § 3.54(c) is based on 38 U.S.C. 1304, ''Special provisions relating to surviving spouses,'' which applies to a surviving spouse who is seeking DIC under 38 U.S.C. 1310. However, current § 3.54 does not explain time of marriage requirements for surviving spouses who married the veteran after service and who are seeking DIC under 38 U.S.C. 1151 or 38 U.S.C. 1318. Proposed § 5.520 explains how the time of marriage requirement applies to claims for DIC under any of the three statutory bases for DIC.

The time of marriage requirements are not specifically addressed in 38 U.S.C. 1151. However, subsection 1151(a) provides that ''[DIC] under chapter 13 of this title shall be awarded for a qualifying * * * death of a veteran *in the same manner as if such * * * death were service-connected.*'' (Emphasis added.) Therefore, we conclude that the three methods in current § 3.54(c) for meeting the time of marriage requirements under 38 U.S.C. 1310 also apply to cases in which DIC is awarded based upon the provisions of 38 U.S.C. 1151. Proposed § 5.520(b) includes this information.

Proposed § 5.520(b)(1)(ii) resolves an ambiguity in the current regulation. As noted above, the time of marriage requirements for eligibility for DIC under 38 U.S.C. 1151 or 1310 may be met if the surviving spouse was married to the veteran for one year or more. We propose to state that multiple periods of marriage can be added together to meet this 1-year marriage requirement. The one-year marriage requirement is designed to prevent abuse by sham ''death bed'' marriages to obtain benefits. We believe that there is much less risk of such abuse where the veteran and the surviving spouse have had an ongoing close relationship demonstrated by previous marriage. This information has been included to fill a gap in the current regulation.

We believe that this interpretation, favorable to surviving spouses, is reasonable. The statute authorizing the time of marriage requirement, 38 U.S.C. 1304, does not prohibit adding multiple periods of marriage together. On the other hand, 38 U.S.C. 1318 does provide such a prohibition. Specifically, 38 U.S.C. 1318(c)(1) provides that benefits may not be paid under that section to a surviving spouse of a veteran unless ''the surviving spouse was married to the veteran for one year or more immediately preceding the veteran's death.'' Inasmuch as Congress prohibited combining multiple marriages together to meet the 1-year marriage requirement in 38 U.S.C. 1318 and did not do so in 38 U.S.C. 1304, we believe it was Congress' intent not to apply the prohibition to other claims for DIC. Norman J. Singer, *Sutherland On Statutory Construction* § 46:06 (6th ed. 2000) (''when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended. In like manner, where the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.''). Therefore, we have included in proposed § 5.520(b)(1)(ii) that multiple periods of marriage may be combined to meet the 1-year marriage requirement for claims of DIC based on 38 U.S.C. 1151 or 1310.

Proposed § 5.520(b)(2) describes the methods of meeting the time of marriage requirements under 38 U.S.C. 1318, which only provides for two methods of meeting the requirements. Following the statute, proposed paragraph (b)(2) omits the provision for marriage ''[b]efore the expiration of 15 years after the termination of the period of service in which the injury or disease causing the death of the veteran was incurred or aggravated.''

Concerning the one-year marriage requirement in claims based on 38 U.S.C. 1318, we have previously noted that the statute provides that benefits may not be paid to a surviving spouse unless ''the surviving spouse was married to the veteran for one year or more *immediately preceding* the veteran's death.'' 38 U.S.C. 1318(c)(1) (emphasis added). VA interprets this provision to mean that multiple periods of marriage cannot be added together to meet the 1-year marriage requirement for purposes of eligibility for DIC under 38 U.S.C. 1318. In order to satisfy the one-year marriage requirement, the veteran and spouse must have been married continuously for a year or more immediately prior to the veteran's death. Therefore, we propose to add the requirement for continuity of the marriage during the year prior to the veteran's death to paragraph § 5.520(b)(2).

5.521 [Reserved]

VA proposes to set out in §§ 5.521 and 5.522 the rules concerning the payment of DIC benefits to the survivors of certain deceased veterans who received, or were entitled to receive, compensation for service-connected disability rated as totally disabling. These rules would be based on the statute that authorizes DIC on this basis, 38 U.S.C. 1318, and VA's implementing regulation, current § 3.22.

However, we propose to simply reserve § 5.521 for purposes of this NPRM. VA is undertaking a separate rulemaking to respond to a decision by the United States Court of Appeals for the Federal Circuit in *National Organization of Veterans' Advocates, Inc.* v. *Secretary of Veterans Affairs,* 314 F.3d 1373 (Fed. Cir. 2003). *See* 69 FR 62229 (2004). This proposed rulemaking involves revision of provisions of current § 3.22(b), which defines ''entitled to receive'' for purposes of determining whether a veteran's survivors are entitled to benefits under 38 U.S.C. 1318. *See* 38 U.S.C. 1318(b). We propose to reserve § 5.521 as the eventual location for a part 5 regulation that will repeat the material in § 3.22(b) after the final amendment of § 3.22(b) is adopted.

5.522 Dependency and indemnity compensation benefits for survivors of certain veterans rated totally disabled at time of death—offset of wrongful death damages.

VA is required by 38 U.S.C. 1318(d) to offset the value of money or property

a surviving spouse or child may receive ''pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of, any cause of action for damages'' for the death of a veteran against any death benefits to which the spouse or child may be entitled under 38 U.S.C. 1318. Current § 3.22(e) implements this requirement. In proposed § 5.522, the part 5 replacement for § 3.22(e), we have restructured this material in more readily understandable language and to provide additional information about how the offset should be calculated.

An opinion by the United States Court of Appeals for Veterans Claims in *Bryan* v. *West,* 13 Vet. App. 482 (2000), shows the need for regulatory guidance concerning how offsets are calculated. In *Bryan* the Court remanded a case to the Board of Veterans' Appeals in order for the Board to decide the following matters with respect to a 38 U.S.C. 1318(d) offset: ''(1) How much money was received by a plaintiff other than [the VA claimant]; (2) Whether the money received by such a plaintiff was received ultimately by [the VA claimant] through estate distribution; (3) If so, whether such distribution was considered received by [the VA claimant]; and (4) Whether the money received by her attorney was, in contemplation of law, 'received' by [the VA claimant].'' Proposed § 5.522 addresses these and other practical issues.

Proposed § 5.522(c)(1) incorporates a concept favorable to VA claimants (because it would reduce the amount of offset) from a 1997 Precedent Opinion by VA's General Counsel, VAOPGCPREC 3–97, which states:

> Section 1318(d) of title 38, United States Code, requires offset against survivors' benefits payable under section 1318 of amounts received by the beneficiary pursuant to an award, settlement, or compromise based on a claim for damages resulting from the death of a veteran, i.e., the types of damages typically recoverable under state wrongful death statutes, but does not require offset of amounts received pursuant to a survival action as compensation for injuries suffered by the veteran prior to his or her death.

Legislative history is of some assistance in determining other aspects of how the offset should be calculated. VAOPGCPREC 3–97 includes the following information, at paragraph 10:

> The legislative history indicates that the purpose of providing DIC in the case of such non-service-connected deaths was to provide a measure of income to the surviving spouse or child to replace the support lost when the veteran died. In a report prepared during consideration of that legislation, the Senate Committee on Veterans' Affairs stated that ''[t]he appropriate Federal obligation to these survivors should, in the Committee's view, be the replacement of the support lost when the veteran dies.'' S. Rep. No. 1054, 95th Cong., 2d Sess. 28 (1978), reprinted in 1978 U.S.C.C.A.N. 3465, 3486. Similarly, the basis for authorizing such benefits was described during floor debates as follows:
>
> The purpose of those benefits is to provide income security to the survivors. This reflects the Committee's view that the veteran's total disability endured over a lengthy period of time, necessarily results in a substantial impairment of the veteran's ability to provide for his or her survivors; and that the primary purpose of the new benefit is to compensate for that impairment.
>
> 124 Cong. Rec. S12687 (daily ed. Aug. 7, 1978) (statement of Sen. Cranston). * * *

Particularly in view of Congressional intent that 38 U.S.C. 1318 benefits are to provide for the survivors' support, we propose to look to whether the money or property received is actually available to meet the claimants' needs and obligations, rather than the technical form in which the money or property is passed to the claimant, in calculating the offset under 38 U.S.C. 1318(d). In this regard, we propose to adopt the rationale in paragraph 13 of VAOPGCPREC 3–97:

> 13. Finally, we note that the reference in section 1318(d) to amounts received ''pursuant to'' an award, settlement, or compromise may be intended to indicate that the surviving spouse or child need not have been an actual party to the action, but need only have received money or property of value ''pursuant to'' the action. Many state statutes require wrongful death actions to be brought by a representative of the estate or other designated representative, although such actions are for the exclusive benefit of the actual beneficiaries. 22A Am. Jur. 2d Death § 399. The phrase ''pursuant to'' may be read as clarifying that offset will be required against amounts received by the actual beneficiaries pursuant to a wrongful death action regardless of whether the beneficiaries were individually named as parties in the award, settlement, or compromise.

Under proposed § 5.522(c)(2), any amounts used to pay a third party to satisfy a legal obligation of the claimant would be considered as ''received'' by the claimant regardless of whether the claimant receives the damages and pays the third party directly or whether the third party is paid on the claimant's behalf by the party liable for the damages. This view is consistent with long-standing VA policy that attorney's fees, court costs and other expenses incident to a civil claim are not deductible from the total amount awarded or accepted. For example, current § 3.22(g) provides that when a VA beneficiary reports money or property received, ''[e]xpenses incident to recovery, such as attorney's fees, may not be deducted from the amount to be reported.'' However, in providing that damages going to pay attorney's fees and costs be included in the offset, proposed § 5.522(c)(2) limits the amount included to the particular claimant's proportional share of fees and costs in cases where the recovered damages are payable to multiple parties.

The 38 U.S.C. 1318(d) offset would not normally include damages payable to another person or entity. However, because the focus of 38 U.S.C. 1318(d) is on who receives the money or property, that exclusion does not apply where the other person or entity is merely acting as a conduit to pass the money or property recovered to the claimant. For example, a wrongful death award paid to a veteran's estate that is then distributed to the claimant, or paid into a trust for the benefit of the claimant, would be included in the offset. We propose to address this situation in § 5.522(c)(3).

Another addition to proposed § 5.522 provides for determining the date of the valuation of property for purposes of this section. Current § 3.22(g) requires, in part, that a beneficiary receiving DIC under 38 U.S.C. 1318 report the value of property received as damages for the death of a veteran at fair market value, but is silent as to the time of valuation of such property. The statute, 38 U.S.C. 1318, is also silent as to the time of valuation. We propose to fill this gap by providing, in § 5.522(c)(5), that the property be valued at its fair market value at the time the claimant receives it. We believe that this is most consistent with the expressed Congressional intent that these DIC benefits serve to provide for the support of the veteran's survivors.

Proposed paragraph (d), based on current § 3.22(g), states the DIC beneficiary's obligation to report wrongful death recoveries to VA. We propose to add that overpayments created by failure to report will be subject to recovery if not waived. The instructions for VA Form 21–534, ''Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child (Including Death Compensation if Applicable),'' notify claimants of the reporting requirement described in proposed § 5.522(d).

5.523 [Reserved]

As indicated in the discussion concerning reservation of § 5.521, VA is undertaking a separate rule-making to respond to a decision by the United

States Court of Appeals for the Federal Circuit in *National Organization of Veterans' Advocates, Inc.* v. *Secretary of Veterans Affairs,* 314 F.3d 1373 (Fed. Cir. 2003). *See* 69 FR 62229 (2004). That proposed rulemaking involves revision of provisions of current § 3.5(e) relating to the rates of DIC payable to surviving spouses and moving those provisions into new § 3.10. We propose to reserve § 5.523 as the eventual location for the part 5 regulation that will repeat the material in proposed § 3.10 when § 3.10 is adopted as a final rule.

5.524 Awards of dependency and indemnity compensation benefits to children when there is a retroactive award to a school child.

Under 38 U.S.C. 1313, ''Dependency and indemnity compensation to children,'' DIC is payable to eligible children when there is no surviving spouse entitled to DIC. The total amount payable to the children, which varies according to the number of eligible children, is divided and paid to the children in equal shares. However, there is an exception to the equal-share rule that applies to a retroactive payment to a child whose entitlement terminated when he or she reached eighteen years of age, but who later reestablished entitlement because he or she is pursuing a course of instruction at an approved educational institution.

We have addressed rules concerning this exception, currently found in § 3.650(c), in proposed § 5.524. In an effort to make them more understandable, we have substantially restructured the text. In proposed § 5.524(a), ''Applicability,'' we have also provided more context by including a description of the equal-share rule and a better description of the exception to that rule that § 5.524 addresses.

Because of requirements of 38 U.S.C. 5111, ''Commencement of period of payment,'' payment of newly awarded or increased DIC does not begin to accrue until the first day of the calendar month following the month in which the award or increased award became effective. For that reason, proposed § 5.524 refers to the ''payment commencement date,'' rather than the ''effective date,'' in some instances.

We have not included the provisions in § 3.650(c)(3) that state the method for determining retroactive awards to a school child for periods prior to October 1, 1981 (a date established by Congress in the Veterans' Disability Compensation, Housing, and Memorial Benefits Amendments of 1981, Pub. L. 97–66, 95 Stat. 1026). We propose to omit this provision because we believe that all eligible dependents who could be affected by the provision have already received their benefits. In the unlikely event that the need should arise, VA could process the retroactive award relying on applicable statutory authority.

Dependency and Indemnity Compensation—Eligibility Requirements and Payment Rules for Parents

5.530 Eligibility for, and payment of, parents' dependency and indemnity compensation.

Proposed § 5.530 serves as an introduction to a group of regulations concerning parents' DIC and provides a brief overview of that VA benefit program.

As noted previously, proposed § 5.510(b) sets out the three statutory bases for the award of DIC. Proposed paragraph § 5.530(a) explains that only two of those bases are applicable to parents' DIC. This is because 38 U.S.C. 1318, which provides for payment of DIC to the survivors of certain veterans with a service-connected disability rated as totally disabling at the time of their death, only provides benefits to the veteran's surviving spouse and children.

Unlike DIC benefits payable to surviving spouses and children, parents' DIC is an income-based benefit program. Under 38 U.S.C. 1315(b) the amount of parents' DIC payable bears an inverse relationship to the amount of the parents' income and no DIC is payable if the parents' income exceeds statutory limits. Proposed paragraph 5.530(b) states these principles and, through a cross-reference, points readers to subsequent part 5 sections that provide income and payment rate rules.

Some income-based VA benefit programs also consider the claimant's net worth in determining payments. For example, eligibility for certain benefits requires a specific finding that a parent was actually ''dependent'' upon the veteran, and VA considers the parent's net worth in making such findings. See 38 U.S.C. 102, 1115, 1121, 5121; 38 CFR 3.263(a). However, that is not the case with parents' DIC, as 38 U.S.C 1315 does not require a specific finding of dependency, but merely provides that DIC may be paid to a veteran's parent, subject to reduction based on the parent's income. We therefore propose to state in paragraph 5.530(c) that net worth is not a factor in determining entitlement to parents' DIC or the amount of parents' DIC payable.

5.531 General income rules.

Proposed § 5.531 is based on 38 U.S.C. 1315(f), which contains the basic statutory rules for determining what counts as income for parents' DIC purposes, and portions of current §§ 3.251, 3.260, 3.261 and 3.262 that implement that statute.

Proposed paragraph 5.531(a) states the basic statutory rule that VA must count all payments of any kind from any source in determining income. Beginning with this basic rule permits simplification of the proposed regulation because the all-inclusive nature of the basic rule eliminates any need to catalog types of countable income. All income that a parent receives is income for parents' DIC purposes unless there is a specific exclusion. For example, with this beginning point, provisions such as the first sentence of current § 3.262(j)(2) (providing that, with respect to life insurance, ''the full amount of payments is considered income as received'') become redundant and need not be carried forward. We have also included a cross-reference to proposed § 5.533, ''Exclusions from income,'' where the exceptions to the general rule in paragraph (a) may be found.

Because VA must count all payments, it is necessary to know what VA includes in and excludes from the term ''payments.'' Proposed § 5.531(b) serves that function. It is based on various rules from portions of current §§ 3.261 and 3.262. See the ''Table comparing current part 3 rules with proposed part 5 rules'' earlier in the supplementary information.

Proposed § 5.531(c) provides that if a parent is married, ''income'' is the combined income of the parent and the parent's spouse, except if the marriage has been terminated or the parent is separated from his or her spouse. We also propose to state in paragraph (c) that ''[i]ncome is combined whether the parent's spouse is the veteran's other surviving parent or the veteran's stepparent.'' We believe that this is a clearer statement of the principle in the introduction to current § 3.262(b), which provides that ''[i]ncome of the spouse will be determined under the rules applicable to income of the claimant.'' The income rules in proposed § 5.531 are applicable to a parent. The spouse of a claimant-parent will always be either the veteran's other parent (in which case the rules would expressly apply) or the veteran's stepparent.

Proposed paragraph (d) provides the rules VA uses to determine whether income from property is the income of a parent. Property ownership is an important indicator of the right to income from that property, but it is not always controlling. In keeping with

long-standing VA practice, we propose to state in paragraph (d)(3) that if a parent transfers ownership of income-producing property to another person or legal entity, but retains the right to that income, the income will be counted.

Current § 3.262(k)(1) provides, in part, that ''if property is owned jointly each person will be considered as owning a proportionate share. The claimant's share of property held in partnership will be determined on the facts found.'' Current § 3.262(k)(2) provides, in part, that the ''claimant's share [of income] will be determined in proportion to his right according to the rules of ownership.'' We propose to combine these provisions in § 5.531(d)(4) by stating that ''[i]n the absence of evidence showing otherwise, VA will consider a parent who owns property jointly with others, including partnership property, to be entitled to a share of the income from that property proportionate to the parent's share of ownership. VA will accept the claimant's statement concerning the terms of ownership in the absence of evidence to the contrary.'' The last sentence of paragraph (d)(4) follows the last sentence of current § 3.261(k)(1).

Current § 3.260(b) provides rules for how VA calculates income when there is uncertainty about the amount of income a parent will receive during a calendar year. We propose, in § 5.531(e), to more clearly explain the process involved. We also propose to include a cross-reference to proposed § 5.535, ''Adjustments to parents' DIC when income is less than anticipated,'' to assist users of the proposed regulation in finding information about submitting amended income information.

5.532 Deductions from income.

While all income is counted except where there is statutory authority to exclude it, VA permits deductions from countable income in some instances. That is, the amount of income ultimately counted is the difference between income and certain deductible expenses directly associated with that income. Proposed § 5.532 lists permitted deductions. These deductions are the same as those included in current § 3.262. However, we propose to add some clarifications, as described in the following paragraphs.

Proposed § 5.532(a) continues a rule in current § 3.262(a)(2) that permits the deduction of expenses incident to the operation of businesses and professions from income from those sources. We propose to clarify that ''business'' includes the operation of a farm and transactions involving investment property. Because of this definitional change, it is only necessary to state in § 5.532(a) that losses sustained in operating a business or profession may not be deducted from income from any other source. This is consistent with the rule in current § 3.262(a)(3) that states that ''[a] loss sustained in operating a business, profession, or farm or from investments may not be deducted from income derived from any other source.'' Note also that current § 3.262(a)(3) implies that investment income is counted and that current § 3.262(k)(5) provides, with respect to DIC, that profit from the sale of nonbusiness property is not counted. With respect to investments, VA only counts income when the investment property is sold and does not constantly adjust income based on increases or decreases in the market value of investment property due to market fluctuations. Therefore, VA essentially already treats investment transactions as business transactions.

Proposed § 5.532(b) continues a provision in current § 3.262(j)(4) that permits deduction of related medical, legal, or other expenses from sums recovered under disability, accident, or health insurance. Of course the same expenses cannot be deducted twice. Therefore, we propose to state in § 5.532(b) that if medical expenses are deducted under that paragraph, they cannot be deducted as unusual medical expenses under § 5.532(d).

Proposed § 5.532(d) states the rules for deducting unusual medical expenses, as authorized by 38 U.S.C. 1315(f)(3) and described in current § 3.262(l). Among other things, the latter permits deduction of the unusual medical expenses of relatives of a parent or, under some circumstances, of a parent's spouse who are ''constructive members'' of the household. *See* § 3.262(l)(4). However, there is no definition of what a ''constructive'' household member is. In VAOPGCPREC 61–90, VA's Office of General Counsel discussed exceptions that had been carved out of the general rule that a ''household'' is comprised of those who dwell under the same roof and compose a family. The General Counsel then observed that:

> We regard the foregoing exceptions with respect to the language ''who is a member of a veteran's household'' generally as recognizing any situation where it may be reasonably assumed that the parties would be dwelling under one roof but for unusual or unavoidable circumstances, such as one temporary in nature or one beyond the control of the parties and wherein the family ties and relationship continue and the parties considered themselves morally bound to care for each other.

We believe that this statement captures the meaning of ''constructive'' household membership. However rather than referring to constructive household members and then defining that term, we propose to use a simpler approach by stating in § 5.532(d)(1)(i) that ''[a family member] includes a relative who would normally be a resident of the household, but who is physically absent due to unusual or unavoidable circumstances, such as a child away at school or a family member confined to a nursing home.''

We have not repeated in proposed § 5.532(d) a restriction in current § 3.262(l)(4) that limits the exclusion of unreimbursed amounts a parent pays for the unusual medical expenses of the parent's relatives who are members, or ''constructive members,'' of the parent's household to relatives ''in the ascending as well as descending class.'' We construe this to mean relatives in the parents' direct line. (Ascendant means ''[o]ne who precedes in lineage, such as a parent or grandparent.'' *Black's Law Dictionary* 121 (8th ed. 2004). Descendant means ''[o]ne who follows in lineage, in direct (not collateral) descent from a person. Example are children and grandchildren.'' *Id.* at 476.) This would appear to exclude, for example, the medical expenses of an orphaned niece or nephew who had been taken into the parent's household.

This restriction to the ascending and descending class is not required by statute. The authorizing statute, 38 U.S.C. 1315(f)(3), merely states that ''[t]he Secretary [of Veterans Affairs] may provide by regulation for the exclusion from income under this section of amounts paid by a parent for unusual medical expenses.'' We do not believe that the restriction is necessary, particularly because the deduction is already limited in several ways that should serve to deter any abuse. The deduction is limited to expenses of persons who are relatives, who are members of the parent's household (or who would be a member of the household absent unusual or unavoidable circumstance), and to whom the parent has a moral or legal obligation of support. We also note that there is no such restriction with respect to medical expenses deductions used in calculating VA's largest income-based program, Improved Pension. *See* current § 3.272(g)(1)(i). We believe that VA's rules for determining income for purposes of administering its income-based programs should be consistent unless the law requires otherwise.

The term ''medical expenses'' is used in a number of regulations in current part 3 and would similarly appear in a

number of regulations in proposed part 5. Therefore, we will propose a centralized definition of that term in a separate NPRM as part of the Project. This is the definition referenced in proposed § 5.532(d)(1)(ii).

5.533 Exclusions from income.

Income that VA does not count when calculating parents' income is listed in proposed § 5.533. Paragraph (a) is based on 38 U.S.C. 1315(f)(1)(A), which excludes ''payments of the six-months' death gratuity.'' However, we propose to change the description to ''death gratuity payments by the Secretary concerned under 10 U.S.C. 1475 through 1480.'' The phrase ''six-months' death gratuity'' is obsolete. While the death gratuity consisted of six-months' pay when originally enacted (*see* Pub. L. 66–99, 41 Stat. 367 (1919)), that is no longer the case. Over the years these death gratuity payments have evolved into a fixed sum, rather than a variable amount equal to six-months' pay. *See* 10 U.S.C. 1478. As would be provided in proposed paragraph (a), this exclusion extends to death gratuity payments in lieu of payments under 10 U.S.C. 1478 made to certain survivors of ''Persian Gulf conflict'' veterans as authorized by the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991. *See* Pub. L. 102–25, Title III, Part A, § 307, 105 Stat. 82 (1991). (Note that the phrase ''Secretary concerned'' is defined currently in § 3.1(g). It will also be defined in § 3.1's part 5 equivalent, to be published in another NPRM.)

Subsection (f)(1)(B) of 38 U.S.C. 1315 excludes ''donations from public or private relief or welfare organizations'' from income for parents' DIC purposes. Proposed § 5.533(b) would combine material from several portions of current § 3.262 that explain how VA interprets this exclusion. One of these is current § 3.262(f), which states that ''[b]enefits received under noncontributory programs, such as old age assistance, aid to dependent children, and supplemental security income are subject to the rules contained in paragraph (d) of this section applicable to charitable donations.'' We propose to remove the references to the Old Age Assistance program and the Aid to Dependent Children program because these programs no longer exist. The Old Age Assistance program was phased out and totally replaced by the Supplemental Security Income program in 1972 and the Aid to Dependent Children program became a federal block grant known as Temporary Assistance to Needy Families in 1996.

Section (f)(1)(C) of 38 U.S.C. 1315 provides that several types of VA benefit payments are not counted in determining income for parents' DIC purposes. These include payments made under 38 U.S.C. chapter 15, the chapter that authorizes VA's current Improved Pension program, and ''under the first sentence of section 9(b) of the Veterans' Pension Act of 1959.'' The referenced sentence preserved the rights of persons receiving earlier types of pension to continue to receive that pension at the time that Section 306 pension was introduced. The Veterans' and Survivors' Pension Improvement Act of 1978, Pub. L. 95–588, 92 Stat. 2497 (1978), introduced the current Improved Pension program. Section 306(b)(1) of that public law explicitly repealed section 9(b) of the Veterans' Pension Act of 1959. *See* 92 Stat. 2509. However, section 306(b)(3) of Pub. L. 95–588 provides that those who do not elect to receive Improved Pension ''shall continue to receive pension at the monthly rate being paid to such person on December 31, 1978, subject to all provisions of law applicable to basic eligibility for and payment of pension under section 9(b) of the Veterans' Pension Act of 1959, as in effect on December 31, 1978.'' 92 Stat. 2509. We interpret these various provisions together as excluding all VA nonservice-connected disability and death pension payments from income for parents' DIC purposes, as currently provided in § 3.261(a)(20). That rule is stated in § 5.533(c)(3).

Another exclusion from parents' countable income, found at 38 U.S.C. 1315(f)(1)(G), is ''10 percent of the amount of payments to an individual under public or private retirement, annuity, endowment, or similar plans or programs.'' VA has traditionally construed this ten-percent exclusion to apply to a broad range of payments for disability or death, including payments pursuant to insurance policies, statutory retirement or disability-compensation programs, and tort damages collected pursuant to employer's liability statutes. In a 1966 opinion, designated as VA Administrator's Decision 989, the Administrator of Veterans' Affairs applied the principle that statutes should be construed in favor of veterans and reasoned that such payments are sufficiently similar to payments under a retirement program to come within the meaning of statutory language essentially identical to that in 38 U.S.C. 1315(f)(1)(G). That interpretation is reflected in current VA regulations at 38 CFR 3.262(f), (g), (i)(2), (j)(1), (j)(2), and (j)(4). We propose to aggregate in proposed § 5.533(g) all of the various § 3.262 ten-percent exclusions based on the 38 U.S.C. 1315(f)(1)(G) exclusion.

One of these 10-percent exclusions, found at current § 3.262(i)(2), is for ''payments based on permanent and total disability or death * * * received from the Bureau of Employees' Compensation.'' The Bureau of Employees' Compensation was abolished in 1974. *See* 20 CFR 1.5. Its functions are now carried out by the Office of Workers' Compensation Programs of the U.S. Department of Labor. *See* 20 CFR 1.6(b). This change is reflected in proposed paragraph (g)(4).

Section 1315(f)(1)(K) of 38 U.S.C. 1315 excludes ''profit realized from the disposition of real or personal property other than in the course of a business'' from being counted as income for parents' DIC purposes. Current § 3.262(k)(5) states, in part, that ''[a]ny amounts received in excess of the sales price will be counted as income. Where payments are received in installments, principal and interest will not be counted separately.'' We interpret this last statement to mean that where payments are received in installments, the installments received will not begin to count as income until the total of installments received is equal to the sales price without interest. That rule is more clearly stated at proposed § 5.533(i).

Section 38 U.S.C. 1315(f)(1)(F) excludes, among other things, ''payments of servicemen's indemnity.'' We propose to omit this exclusion because it is now obsolete. The Servicemen's Indemnity Act of 1951, Pub. L. 82–23, 65 Stat. 33, 34 (1951), authorized VA to pay indemnity in the form of $10,000 automatic life insurance coverage to the survivors of members of the Armed Forces who died in service. However, the Act authorizing this benefit was repealed in 1956. *See* sec. 502(9) of the Servicemen's and Veterans' Survivor Benefits Act, Pub. L. 84–881, 70 Stat. 857, 886 (1956).

Current § 3.262(e)(4) provides, in part, that:

> Where a parent was receiving or entitled to receive dependency and indemnity compensation and retirement benefits based on his or her own employment on December 31, 1966, the retirement payments will not be considered income until the amount of the claimant's personal contribution (as distinguished from amounts contributed by the employer) has been received. Thereafter the 10 percent exclusion will apply.

Similarly, current § 3.262(j)(1) provides in part that:

> In dependency and indemnity compensation claims, where the parent is receiving or entitled to receive dependency

and indemnity compensation on December 31, 1966, and is also receiving or entitled to receive annuity payments on that date, or endowment insurance matures on or before that date, no part of the payments received will be considered income until the full amount of the consideration has been received, after which 10 percent of the amount received will be excluded.

We propose to omit these two provisions from § 5.533. It is extremely unlikely that a parent's contributions to retirement benefits, an annuity, or an endowment he or she was receiving on December 31, 1966, were not recovered long ago. Should the occasion arise, VA will adjudicate any affected claims under existing statutory authority.

Proposed § 5.533(k) continues an exclusion for payments under section 6 of the Radiation Exposure Compensation Act of 1990, Pub. L. 101–426, 104 Stat. 920, 923. Payments under that act are not countable as income for parents' DIC purposes because section 6(h)(2) of the act provides that amounts paid to individuals under section 6 ''shall not be included as income or resources for purposes of determining eligibility to receive benefits described in section 3803(c)(2)(C) of title 31, United States Code, or the amount of such benefits.'' The list of benefits in 31 U.S.C. 3803(c)(2)(C) includes benefits under 38 U.S.C. chapter 13. *See* 31 U.S.C. 3803(c)(2)(C)(viii). Parents' DIC is such a benefit.

However, payments under section 6 of the Radiation Exposure Compensation Act of 1990 are not the only payments that Congress has excluded from consideration as income for benefit programs on the 31 U.S.C. 3803(c)(2)(C) list. Our research has shown three others that we propose to add to § 5.533 as paragraph (l) through (n). These are payments under section 103(c)(1) of the Ricky Ray Hemophilia Relief Fund Act of 1998, payments under the Energy Employees Occupational Illness Compensation Program, and payments to certain eligible Aleuts under 50 U.S.C Appx. 1989c–5.

There are also a number of other Federal statutes that exempt specific kinds of income from consideration in determining either eligibility for all Federal income-based programs, or eligibility for all of VA's income-based benefit programs. Because those exclusions affect more than the parents' DIC benefit program, they will be addressed in a separate regulation in another NPRM to be published later as part of this Project. This separate regulation is the future regulation mentioned in paragraphs (c)(4) and (q) of proposed § 5.533.

These broad exclusions that will be addressed in a future NPRM include some of the income exclusions that currently appear in §§ 3.261 and 3.262. These are Agent Orange settlement payments, certain relocation payments, annuity payments elected under the Retired Serviceman's Family Protection Plan, restitution to individuals of Japanese ancestry, income received by American Indian beneficiaries from trust or restricted lands, payments under the Alaska Native Claims Settlement Act, payments from certain volunteer programs, Victims of Crime Act of 1984 payments, and monetary allowances under 38 U.S.C. chapter 18 for certain children of veterans who served in Vietnam and Korea. Because these exclusions will be addressed in another regulation included in a future NPRM, they have not been listed in proposed § 5.533.

In redrafting various provisions of current § 3.262 for proposed § 5.533, we have intentionally omitted references to a January 1, 1967, effective date applicable to various income exclusions in paragraphs (e)(4), (i)(2), (j)(1), (j)(4), and (k)(5) of § 3.262. We believe that it is highly unlikely that VA would need to process a retroactive adjustment to a prior parents' DIC award effective more than 35 years in the past. Therefore, we believe it is no longer necessary to refer to these effective dates in the regulation. Should the occasion arise, VA will adjudicate any affected claims under existing statutory authority.

5.534 When VA counts parents' income.

Proposed § 5.534 is based on portions of current §§ 3.251 and 3.260 that pertain to when VA counts income for parents' DIC purposes. Rules concerning pension in current § 3.260 will be addressed in a different NPRM.

Current § 3.251(b) provides that ''[i]ncome will be counted for the calendar year in which it is received and total income for the full calendar year will be considered except as provided in § 3.260.'' The introduction to current § 3.260 provides that ''[f]or entitlement to pension or dependency and indemnity compensation, income will be counted for the calendar year in which it is received.'' Proposed § 5.534(a) provides a consolidated restatement of these rules. It also clarifies that VA uses anticipated income in calculating parents' DIC in some circumstances (for example, see proposed § 5.531(e)).

The remainder of proposed § 5.534 sets out the exceptions referenced in paragraph 5.534(a)(3), ''VA will count parents' total income for the full calendar year except as provided in this section.''

The first exception, addressed in proposed paragraph (b), is based on concepts in current § 3.260(c) and (d) concerning ''proportionate'' income calculations. As proposed paragraph 5.534(b) indicates, ''proportionate'' income calculations are used when parents' DIC is first awarded, or when an award follows a period of no entitlement. Under the proportionate annual income calculation method, VA disregards income received, and expenses paid, during the portion of the year prior to the award of parents' DIC. It then determines what the parent(s)' income would have been if income had been received at the same rate for the entire calendar year as it was from the effective date of the award of parents' DIC to the end of the calendar year. The result is the proportionate annual income.

Paragraph (b)(3) describes the specific steps VA would use to calculate this proportionate annual income. While there are several ways in which the mathematical process involved could be described, we are proposing a daily average method, because we believe this will be the most understandable to regulation users. Basically, VA would calculate the daily average income for the applicable portion of the year and multiply that figure by 365 to determine what annual income would have been if the same level of income had been in effect for the entire year.

As current 3.260(c) does, proposed paragraph 5.534(b) permits using actual annual income, rather than proportionate income, if that would be to the parents' advantage.

The second exception to the general rule in proposed § 5.534(a)(3) is set out in paragraph (c). It states that ''[i]f a parent marries during the applicable calendar year, income received by the parent's spouse prior to the date of the marriage is not counted.'' This simple rule is in accord with long-standing VA practice. It would replace complex rules in current § 3.260(f), as they relate to parents' DIC, and would achieve essentially the same result.

Finally, we note that we have intentionally omitted the rule stated in current § 3.260(a) that installment income ''will be determined by the total amount received or anticipated during the calendar year.'' In terms of whether installment income will be counted as parents' income, this rule is subsumed in the general rule stated in proposed § 5.531(a) that all payments of any kind from any source are counted in determining the income of a veteran's parents. With respect to proposed

§ 5.534, the rule in § 3.260(a) is not an exception to the general rules in § 5.534(a).

5.535 Adjustments to parents' DIC when income is less than anticipated.

Proposed § 5.535 is a simplification and clarification of the rules in current § 3.660(b) that state when VA may make a retroactive award of parents' dependency and indemnity compensation based on amended income information. Current § 3.660(b)(1) and (2) state the following alternative rules for determining when a parent must submit amended income information in order to obtain a retroactive increase in DIC benefits when income decreases:

(1) *Anticipated income*. Where payments were not made or were made at a lower rate because of anticipated income, pension or dependency and indemnity compensation may be awarded or increased in accordance with the facts found but not earlier than the beginning of the appropriate 12-month annualization period if satisfactory evidence is received within the same or the next calendar year.

(Authority: 38 U.S.C. 5110(h))

(2) *Actual income*. Where the claimant's actual income did not permit payment, or payment was made at a lower rate, for a given 12-month annualization period, pension or dependency and indemnity compensation may be awarded or increased, effective the beginning of the next 12-month annualization period, if satisfactory evidence is received within that period.

Proposed § 5.535(b) follows the rule in § 3.660(b)(1). We propose to omit the rule in § 3.660(b)(2), which provides a shorter period of time for submitting amended income information in some instances, because we believe that it has no practical application to parents' DIC cases.

With respect to parents' DIC, current § 3.660(b)(2) contemplates a situation such as the following: A parents' DIC beneficiary provides VA with the amount of income expected for year A. VA pays DIC for year A based on that anticipated income. The beneficiary receives actual income for year A in the amount anticipated. Therefore, no adjustments are necessary for year A. However, income decreases during year B. If the beneficiary provides VA with evidence of the decreased income for year B not later than December 31 of year B, VA will increase benefits for year B because of the decreased income.

However, as a practical matter, what will have taken place in this situation is that VA will have commenced paying benefits for year B either in anticipation that income for year B is going to be the same as it was for year A or on the basis of anticipated income information for year B from the beneficiary. In either case, the situation will be one in which anticipated income for year B turned out to be less than anticipated. Therefore, the rule in 3.660(b)(1) would apply and the parent would have through December 31 of year C to provide evidence of the decreased income for year B.

5.536 Parents' dependency and indemnity compensation rates.

Current part 3 regulations for determining the rates payable for parents' dependency and indemnity compensation are quite complex. Current § 3.25 sets out a series of rules for calculating payments of DIC to parents. The rules vary depending upon whether there is one unmarried parent, one parent who has remarried, two parents living together, two parents not living together, two parents not living together one or both of whom have remarried, or a parent who is a patient in a nursing home or who is so helpless or blind, or so nearly helpless or blind, as to require the regular aid and attendance of another person. The rules refer regulation users to various provisions of 38 U.S.C. 1315 for specific rates. Together with current § 3.27(b), they note that those rates, and the annual income limitation for parents' DIC, are increased in step with cost-of-living increases in benefits under title II of the Social Security Act. (These increases are required by 38 U.S.C. 5312(b).) Because parents' DIC is income based and because 38 U.S.C. 1315 requires it, these rules also provide for rate reductions based on parents' income. They provide a formula for that reduction, but note that the formula will be recomputed when there is a rate increase in order to achieve ''an equitable distribution of the rate increase.''

Current §§ 3.25 and 3.27(d) together require that VA publish in the **Federal Register** the increased DIC payment rates, the annual income limitation increases, and the updated formulas VA uses for reducing DIC payments because of income. Section 3.25 also includes various other rules based on requirements of 38 U.S.C. 1315, such as a $5.00 minimum for parents' DIC payments applicable under some circumstances.

These various provisions of §§ 3.25 and 3.27 are all accurate, but they do not provide the information in a way that is very practical for regulations users who want specific information about the dollar amounts of rates and income limitations and the specific current formulas for calculating payment reductions because of income. Essentially, they send users to different sections of statutes and to announcements by the Social Security Administration to obtain data for performing complex calculations under different scenarios. However, as they also note, VA performs those calculations when there are changes and publishes the result in the **Federal Register**. For an example, see the rates of parents' DIC published in the **Federal Register** on April 7, 2004 (69 FR 18425).

In § 5.536, we propose to take a much simpler and more practical approach. Proposed paragraph (a) states that VA pays DIC to eligible parents based upon statutory requirements and briefly describes the nature of the relevant statutory provisions. It also cross-references the regulation concerning the calculation of parents' DIC based on service of certain Filipino veterans. Then, in paragraph (b), proposed § 5.536 provides that VA will use the data it publishes in the **Federal Register** in calculating parents' DIC payments. VA normally publishes such data within three months of the effective date of the legislative cost-of-living increases.

The remainder of § 5.536 provides specific rate payment rules based on various provisions of current §§ 3.25, 3.251, 3.260, and 3.704. See the ''Table comparing current part 3 rules with proposed part 5 rules'' earlier in the supplementary information.

5.537 Payment intervals.

Proposed § 5.537(a) states the general rule that VA pays parents' DIC monthly. An exception in proposed paragraph (b) is based on the rule in current § 3.30(e) that provides that parents' DIC will be paid semiannually if the amount of the annual benefit is less than 4 percent of the maximum allowable rate as published in the Notices section of the **Federal Register**. We propose to retain the exception, found in the introduction to current § 3.30, that permits parents receiving payment semiannually to elect to receive payment monthly in cases in which other Federal benefits would otherwise be denied.

Effective Dates

5.573 Effective date for dependency and indemnity compensation rate adjustments when an additional survivor files an application.

Proposed § 5.573 is a revision of current § 3.650(a) and (b) and provides general DIC rate and effective date determination rules. We intend no substantive changes in these provisions. We propose to use ''survivor'' rather than the word ''dependent,'' which is used in current § 3.650. DIC is payable

to certain survivors of a veteran who may or may not have been financially dependent upon the veteran. *See* 38 U.S.C. 1310(a) (providing for payment of DIC to a veteran's surviving spouse, children, or parents). This proposed rule would fall at the end of the effective date rules for subpart G previously published for notice and comment. *See* 69 FR 59072 (Oct. 1, 2004).

5.574 Effective dates of awards and discontinuances of special monthly dependency and indemnity compensation.

Proposed § 5.574 provides effective date rules for the award and discontinuance of special monthly DIC benefits. Proposed § 5.574(b)(1), based on current §§ 3.502(e)(1) and 3.504, provides an effective date rule for the discontinuance of special monthly DIC when a surviving spouse or parent is no longer in need of aid and attendance. The current rules refer to discontinuing special monthly DIC on the ''date of last payment.'' We propose to instead state that ''VA will discontinue special monthly DIC based upon the need of aid and attendance effective the first day of the month that follows the month for which VA last paid that benefit.'' The result is exactly the same, but we believe that this description will be clearer to VA claimants and to VA personnel who adjudicate claims. As the name suggests, VA pays special monthly DIC on a monthly basis. *See* 38 U.S.C. 1311(c) and (d) and 1315(g). The ''last payment'' in question is the check for the last month in which VA paid the benefit. Benefit payments would therefore stop on the first day of the following month.

We have not included in this special monthly DIC effective date section language in current § 3.502(e)(2) which states the following: ''If hospitalized at Department of Veterans Affairs expense as a veteran, the date [of discontinuance of the aid and attendance allowance to a surviving spouse will be the date] specified in § 3.552(b)(1) or (3).'' We have also omitted similar language from current § 3.504 pertaining to the discontinuance of the aid and attendance allowance for surviving parents. Current § 3.552(b) is based on 38 U.S.C. 5503(c) (identified in the authority citation at the end of § 3.552(b) under its old designation of 38 U.S.C. 5503(e)). The provisions of 38 U.S.C. 5503(c) only concern adjustments of special monthly disability compensation under various portions of 38 U.S.C. 1114 for veterans who are in need of aid and attendance and special monthly pension for veterans who are in need of aid and attendance.

We propose, in § 5.574(b)(2), to provide an effective date rule for discontinuance of a surviving spouse's special monthly DIC award based on housebound status that parallels the structure of the rule for the discontinuance of a surviving spouse's special monthly DIC award based on the need for aid and attendance. ''When a surviving spouse is no longer housebound, VA will discontinue special monthly DIC based upon housebound status effective the first day of the month that follows the month for which VA last paid that benefit.''

Omission of Rule in 38 CFR 3.22(h)

Current § 3.22(h), based on 38 U.S.C. 1318(e), sets out a rule concerning the offset of certain DIC payments to a surviving spouse against annuity payments to that spouse under a survivor benefit plan applicable to survivors of members of the Armed Forces. We propose not to repeat that rule in part 5. The rule is accurate, but it provides no substantive information that is not included in the underlying statute. Further, the survivor benefit plan in question is not administered by VA. It is administered by the Department of Defense.

Endnote Regarding Amendatory Language

We intend to ultimately remove part 3 entirely, but we are not including amendatory language to accomplish that at this time. VA will provide public notice before removing part 3.

Paperwork Reduction Act

Proposed 38 CFR 5.500 through 5.502, which are set forth in full in the proposed regulatory text portion of this document, contain collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). These provisions prescribe the information VA claimants submit to prove the death of a person upon whose death their entitlement to various VA benefits for survivors depends. As required under section 3507(d) of the Act, VA has submitted a copy of this proposed rulemaking action to the Office of Management and Budget (OMB) for its review of the collection of information.

OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Subject to OMB approval, VA proposes to amend the collection currently approved by OMB under control number 2900–0004 to include the information described in proposed 38 CFR 5.500 through 5.502.

Comments on the collections of information should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Comments should indicate that they are submitted in response to ''RIN 2900–AL89.''

Title: Proof of death.

Summary of collection of information: Survivors of VA beneficiaries may be entitled to certain VA survivors' benefits when that beneficiary dies. Examples of such survivors' benefits that would be governed by provisions of proposed 38 CFR part 5 include benefits awarded, but unpaid at death, and accrued benefits under 38 U.S.C. 5121; death compensation under 38 U.S.C. 1121 and 1141; dependency and indemnity compensation under 38 U.S.C. chapter 13; and death pension under 38 U.S.C. chapter 15. Proposed 38 CFR 5.500 through 5.502 set forth the various kinds of evidence that a survivor may submit to prove the death. VA will provide assistance in obtaining this evidence as provided in 38 CFR 3.159(c).

Description of the need for information and proposed use of information: A basic element of entitlement to VA benefits for survivors is establishing the death of the person whom the claimant survives. VA will examine the evidence of death submitted in determining eligibility for claimed survivors' benefits.

Description of likely respondents: VA survivors' benefits claimants.

Estimated number of respondents: Approximately 56,865 per year.

Estimated frequency of responses: This information is collected on a ''one-time'' basis.

Estimated average burden per collection: In most cases survivors will have evidence of death at hand because they have gathered that evidence for probating estates, filing commercial life insurance claims, and similar purposes. Most survivors know that proof of death should accompany applications for VA survivors' benefits and mail copies of the proof of death to VA with their applications. (The information collections in survivor benefit applications have been separately approved by OMB.) VA estimates that the burden for those individuals will be approximately one-quarter hour for locating and mailing the documentation proving death they already have at

hand. In other cases, VA will obtain the proof of death for the claimant. VA is obligated under 38 CFR 3.159(c) to obtain for claimants records in the custody of a Federal department or agency and will make reasonable efforts to obtain records in the custody of other sources. In a relatively small number of cases claimants will need to obtain proof of death and provide it to VA. VA estimates that this will take an average of 1 hour per respondent.

Estimated total annual reporting and recordkeeping burden: This information collection imposes no recordkeeping requirement. VA estimates that it will receive approximately 66,900 applications for VA survivors' benefits annually. VA estimates that it will obtain proof of death for approximately 15 percent of those claimants. Of the remaining 56,865 claimants, VA estimates that approximately 90 percent, or 51,179 claimants, will already have the information at hand and that the remaining 10 percent, or 5,686 claimants, will need to obtain and provide proof of death. The information collection burden per case is approximately one-quarter hour for those who have the information at hand, or a total of 12,795 hours. VA estimates the time necessary to obtain and provide proof of death in other cases will average approximately 1 hour, or 5,686 hours. Therefore VA estimates the total annual reporting burden to be 18,481 hours.

The Department considers comments by the public on proposed collections of information in:

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the proposed collection of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register.** Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed regulations.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed amendment would not affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed 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 of 1995 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 (adjusted annually for inflation) in any given year. This proposed amendment 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 number and title for this proposal is 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

List of Subjects in 38 CFR Part 5

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

Approved: July 13, 2005.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to amend 38 CFR chapter I by further amending subpart G of part 5, as proposed to be added at 69 FR 59084, October 1, 2004, as follows:

PART 5—COMPENSATION, PENSION, BURIAL, AND RELATED BENEFITS

Subpart G—Dependency and Indemnity Compensation, Accrued Benefits, Death Compensation Benefits, and Special Rules Applicable Upon Death of a Beneficiary

1. The authority citation for subpart G of part 5 continues to read as follows:

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

2. Sections 5.500 through 5.549 are added to subpart G to read as follows:

General Provisions

Sec.
5.500 Proof of death.
5.501 Proving death by other means.
5.502 Proving death after 7 years of continuous, unexplained absence.
5.503 Establishing the date of death.
5.504 Service-connected cause of death.
5.505–5.509 [Reserved]

Dependency and Indemnity Compensation—General

5.510 Dependency and indemnity compensation—basic entitlement.
5.511 Special monthly dependency and indemnity compensation.
5.512 Eligibility for death compensation or death pension instead of dependency and indemnity compensation.
5.513–5.519 [Reserved]

Dependency and Indemnity Compensation—Eligibility Requirements and Payment Rules for Surviving Spouses And Children

5.520 Dependency and indemnity compensation—time of marriage requirements for surviving spouses.
5.521 [Reserved]
5.522 Dependency and indemnity compensation benefits for survivors of certain veterans rated totally disabled at time of death—offset of wrongful death damages.
5.523 [Reserved]
5.524 Awards of dependency and indemnity compensation benefits to children when there is a retroactive award to a school child.
5.525–5.529 [Reserved]

Dependency and Indemnity Compensation—Eligibility Requirements and Payment Rules for Parents

5.530 Eligibility for, and payment of, parents' dependency and indemnity compensation.
5.531 General income rules.
5.532 Deductions from income.
5.533 Exclusions from income.
5.534 When VA counts parents' income.
5.535 Adjustments to parents' DIC when income is less than anticipated.
5.536 Parents' dependency and indemnity compensation rates.
5.537 Payment intervals.
5.538–5.549 [Reserved]

General Provisions

§ 5.500 Proof of death.

(a) *Purpose and application.*—(1) This section describes evidence VA will accept to prove that a person has died in cases where the death of the person is relevant to eligibility for a VA benefit. It covers the most common situations. Sections 5.501, ''Proving death by other means,'' and 5.502, ''Proving death after 7 years of continuous, unexplained absence,'' apply where the evidence described in this section is not available.

(2) Where more than one paragraph of this section applies, VA will accept the evidence described in any relevant paragraph as proof of death. For example, if the person died in a U.S. Government hospital located within a State, VA would accept the evidence establishing death specified in either paragraph (b) or (d) of this section.

(b) *Deaths occurring within a State.* Death occurring within a State may be established by: (1) A copy of the public record of the State or community where death occurred, or

(2) A copy of a coroner's report of death, or of a verdict of a coroner's jury, from the State or community where death occurred, provided the report or verdict properly identifies the deceased.

(c) *Deaths occurring abroad.* Death occurring abroad may be established by:

(1) A U.S. consular report of death bearing the signature and seal of the U.S. consul,

(2) A copy of the public record of death authenticated by the U.S. consul or other agency of the State Department or which is exempt from such authentication as provided in § 3.202(b)(4) of this chapter (concerning certain copies of public or church records), or

(3) An official report of death of a civilian employee of the U.S. Government from the employing U.S. Government entity.

(d) *Deaths at institutions under the control of the U.S. Government.* Death occurring in a hospital or other institution under the control of the U.S. Government may be established by:

(1) A death certificate signed by a medical officer, or

(2) A clinical summary, or other report, signed by a medical officer showing the fact and date of death.

(e) *Deaths of members of the uniformed services.* The death of a member of the uniformed services may be established by an official report of the death from the uniformed service concerned.

(Authority: 38 U.S.C. 501(a)(1))

§ 5.501 Proving death by other means.

(a) *Applicability.* This section and § 5.502, ''Proving death after 7 years of continuous, unexplained absence,'' describe methods of proving that a person has died if the death of that person is relevant to eligibility for a VA benefit and the evidence described in § 5.500, ''Proof of death,'' is not available.

(b) *Required statement.* A claimant seeking to establish the fact of death under this section must submit a statement explaining why none of the evidence described in § 5.500 is available.

(c) *Affidavits or certified statements of witnesses who viewed the body.* The fact of death may be established by the affidavit or certified statement of one or more persons who have personal knowledge of the fact of death, have viewed the body of the deceased, and know it to be the body of the person whose death is being alleged. These affidavits or statements should describe all the facts and circumstances known concerning the death, including the place, date, time, and cause of death.

(d) *Other methods of establishing death.* If the claimant cannot furnish the affidavits or certified statements described in paragraph (c) of this section, the fact of death may be established by one of the following:

(1) *U.S. Government agency finding.* In the absence of evidence to the contrary, VA will accept a finding of the fact of death by another U.S. Government agency.

(2) *Body not recovered or not identifiable.* If circumstances preclude recovery or identification of the body of the deceased, the fact of death may be established by the claimant's affidavit or certified statement setting forth the circumstances under which the missing person was last seen and the known facts which led the claimant to believe that death has occurred and one of the following, as applicable:

(i) The affidavits or certified statements of persons who witnessed the event in which the missing person is alleged to have perished, describing the event and, if applicable, why they believe the missing person perished in the event, or

(ii) If the testimony of eyewitnesses is not obtainable, the affidavits or certified statements of persons who have the most reliable information available concerning why the missing person is believed to have been at the event in which the missing person is alleged to have perished, why the missing person was in imminent peril at the time the event occurred, and the basis on which they concluded that death was caused by the event.

(3) *Finding of fact of death by authorized VA official.* An authorized VA official may make a finding of the fact of death where death is shown by competent evidence. *See* § 3.100(a) of this chapter (concerning delegation of authority to make findings and decisions concerning entitlement to VA benefits).

(Authority: 38 U.S.C. 501(a)(1))

§ 5.502 Proving death after 7 years of continuous, unexplained absence.

(a) *Evidence required.* A claimant seeking to establish the death of a person who has been absent for 7 years, where death is not established with documentary evidence described in § 5.500, ''Proof of death,'' or § 5.501, ''Proving death by other means,'' must produce competent, credible evidence to show that:

(1) The person has been continuously absent from home and family for at least 7 years without explanation; and

(2) A diligent search disclosed no evidence of the person's continued existence after the disappearance.

(b) *Finding of death conclusive.* A finding of death under this section will be conclusive and final for the purposes of laws administered by VA except where suit is filed for insurance under 38 U.S.C. 1984, ''Suits on insurance.''

(c) *Impact of findings of death made by other entities.*—(1) State laws that provide for presumption of death are not applicable to claims for VA benefits and may not be used to establish death under this section.

(2) A finding of death by another Federal agency meeting the criteria described in paragraphs (a)(1) and (2) of this section is acceptable for VA purposes if there is no credible evidence to the contrary.

(Authority: 38 U.S.C. 108, 501(a)(1))

§ 5.503 Establishing the date of death.

(a) *Applicability.* This section applies when the fact of death is established under §§ 5.500 through 5.502, but the exact date of death is uncertain.

(b) *Date of death in cases involving a continuous, unexplained absence of seven years or more.* When the fact of death is established under § 5.502, ''Proving death after 7 years of continuous, unexplained absence,'' the date of death for purposes of the laws administered by VA is seven years after the date the person was last known to be alive.

(c) *Date of death in other cases.* If the fact of death is established by the evidence described in § 5.500, ''Proof of death,'' or § 5.501, ''Proving death by

other means,'' VA will determine the date of death for purposes of the laws administered by VA by considering all of the known facts and circumstances surrounding the death, including the condition of the body when found and any estimate of the date of death provided by a coroner or other official within the scope of that official's duties. If no identifiable body is found, the date of death will be presumed to be the date the deceased was last known to be alive in the absence of evidence to the contrary.

(Authority: 38 U.S.C. 108, 501(a))

§ 5.504 Service-connected cause of death.

(a) *Purpose.* Eligibility for several VA benefits for a veteran's survivors requires that the veteran's death be service connected. This section provides the rules VA uses to determine whether a veteran's death is service connected.

(b) *Definition of service-connected disability*—(1) *General.* For purposes of this section, ''service-connected disability'' means:

(i) Except as provided in paragraph (b)(2) of this section, a disability that was service connected at the time of the veteran's death, or

(ii) A disability that is service connectable under the provisions of subpart E of this part, ''Claims for service connection and disability compensation.'' For purposes of this section, VA will deem a sudden death in service from trauma to have been preceded by disability from the trauma.

(2) *Exception.* For purposes of this section, ''service-connected disability'' does not include a disability that was service connected at the time of the veteran's death if the law in effect at the time of a survivor's claim precludes VA from establishing service connection for the cause of the veteran's death. *See* § 3.300 of this chapter, ''Claims based on the effects of tobacco products,'' and § 3.301(d) of this chapter ''Line of duty; abuse of alcohol or drugs.''

(c) *Determining whether a veteran's death is service connected.* A veteran's death is service connected if death resulted from a service-connected disability. Death resulted from a service-connected disability if the service-connected disability produced death or hastened death, as provided in the following paragraphs:

(1) *Service-connected disability produces death.* A service-connected disability is the cause of death if a single service-connected disability, or the combined effect of multiple service-connected disabilities, is such that death would not have occurred in the absence of the disability, or disabilities. If two or more disabilities were present at the time of death, only one of which was service connected or service connectable, and each disability by itself was sufficient to bring about death, VA will grant service connection for the cause of the veteran's death.

(2) *Service-connected disability hastens death.* VA will grant service connection for the cause of death if competent medical evidence shows that a service-connected disability, or the combined effect of multiple service-connected disabilities, was so debilitating as to materially hasten death from nonservice-connected causes. VA will presume such debilitation where a service-connected disability affected a vital organ and was evaluated as 100 percent disabling under the Schedule for Rating Disabilities in part 4 of this chapter at the time of the veteran's death. For purposes of this paragraph, vital organs are those organs necessary to sustain life, including the heart, lungs, central nervous system, liver, and kidneys.

(Authority: 38 U.S.C. 101(16), 501(a), 1121, 1141, 1310)

§§ 5.505–5.509 [Reserved]

Dependency and Indemnity Compensation—General

§ 5.510 Dependency and indemnity compensation—basic entitlement.

(a) *Definition.* Dependency and indemnity compensation (DIC) is a monthly VA payment to a veteran's surviving spouse, child, and/or parent based on the veteran's death. The surviving relative must be otherwise qualified and meet the entitlement criteria provided in this section.

(b) *Bases for entitlement.* There are three ways in which an otherwise qualified survivor may become entitled to DIC:

(1) Service-connected death—38 U.S.C. 1310. (i) VA will grant DIC to the qualified survivors of a veteran when it determines that the cause of the veteran's death, whether occurring during or after service, is service connected. *See* 38 U.S.C. 1310, ''Deaths entitling survivors to dependency and indemnity compensation,'' and § 5.504, ''Service-connected cause of death.''

(ii) DIC is not payable unless the service-connected death occurred after December 31, 1956, except in the case of certain individuals receiving or eligible to receive death compensation who elect to receive DIC in lieu of death compensation. *See* § 3.702 of this chapter, ''Dependency and indemnity compensation.''

(2) *Veterans with a service-connected disability rated as totally disabling at the time of death—38 U.S.C. 1318.* VA will grant DIC to the qualified survivors of a veteran rated totally disabled due to service-connected disability for a specified period of time at the time of death, in the same manner as if the veteran's death were service connected. *See* § 3.22 of this chapter, ''DIC benefits for survivors of certain veterans rated totally disabled at time of death,'' and 38 U.S.C. 1318, ''Benefits for survivors of certain veterans rated totally disabled at time of death.''

(3) *Veterans whose death was due to certain VA-furnished medical, training, compensated work therapy, or rehabilitation services—38 U.S.C. 1151.* VA will grant DIC to the qualified survivors of a veteran whose death was caused by VA-furnished hospital care, medical or surgical treatment, medical examination, training and rehabilitation services, or participation in a compensated work therapy program, in the same manner as if the veteran's death were service connected. *See* §§ 3.358, 3.361 and 3.800 of this chapter and 38 U.S.C. 1151, ''Benefits for persons disabled by treatment or vocational rehabilitation.''

(c) *Certain Federal Employees' Group Life Insurance beneficiaries ineligible.* VA cannot pay DIC to any surviving spouse, child or parent based on the death of a commissioned officer of the Public Health Service, the Coast and Geodetic Survey, the Environmental Science Services Administration, or the National Oceanic and Atmospheric Administration occurring after April 30, 1957, if any amounts are payable based on the same death under the Federal Employees' Group Life Insurance Act of 1954 (Pub. L. 598, 83d Cong., as amended).

(d) *Special rules for parents' DIC.* The basis of entitlement described in paragraph (b)(2) of this section does not apply to parents' DIC and payment of parents' DIC is subject to income limitations. See §§ 5.530 through 5.537 for special eligibility and payment rules for parents' DIC.

(Authority: 38 U.S.C. 101(14), 1151, 1304, 1310, 1315, 1318; Sec. 501(c)(2), Pub. L. 84–881, 70 Stat. 857, as amended by Sec. 13(u), Pub. L. 85–857, 72 Stat. 1266; Sec. 5, Pub. L. 91–621, 84 Stat. 1863)

§ 5.511 Special monthly dependency and indemnity compensation.

(a) *Entitlement based on need for regular aid and attendance.* A surviving spouse or parent in receipt of dependency and indemnity compensation (DIC) is entitled to special monthly DIC benefits if he or she is helpless, or so nearly helpless as to need the regular aid and attendance of another person. Among other factors,

VA considers the presence of conditions listed in § 3.352(a) of this chapter when determining whether a person demonstrates this degree of helplessness.

(b) *Automatic entitlement.* VA will automatically consider a person to be in need of regular aid and attendance, without having to demonstrate the degree of helplessness described in paragraph (a) of this section, if the person:

(1) Is blind or so nearly blind as to have corrected visual acuity of 5/200 or less in both eyes;

(2) Has concentric contraction of the visual field in both eyes to 5 degrees or less; or

(3) Is a patient in a nursing home because of mental or physical incapacity.

(c) *Entitlement based on permanent housebound status—surviving spouse.* A surviving spouse who does not qualify for special monthly DIC based on need for regular aid and attendance, as provided in paragraphs (a) and (b) of this section, is entitled to special monthly DIC if he or she is permanently housebound. A surviving spouse will be considered permanently housebound if substantially confined to his or her home (ward or clinical areas, if institutionalized) or immediate premises because of a disability or disabilities and it is reasonably certain that such disability or disabilities will remain throughout the surviving spouse's lifetime.

(Authority: 38 U.S.C. 1311(c), (d), 1315(g))

§ 5.512 Eligibility for death compensation or death pension instead of dependency and indemnity compensation.

(a) *General rule.* Subject to paragraph (b) of this section, VA will not pay death compensation or death pension to any person eligible for dependency and indemnity compensation (DIC) based upon a death occurring after December 31, 1956.

(b) *Right of spouse to elect death pension.* A surviving spouse eligible for DIC may elect to receive death pension instead of DIC. For effective date information, see § 3.400(j)(1) of this chapter.

(Authority: 38 U.S.C. 1317)

§§ 5.513–5.519 [Reserved]

Dependency and Indemnity Compensation—Eligibility Requirements and Payment Rules for Surviving Spouses and Children

§ 5.520 Dependency and indemnity compensation—time of marriage requirements for surviving spouses.

(a) *Purpose.* In addition to meeting the marriage requirements necessary to qualify as a surviving spouse, as defined at § 3.50 of this chapter, a surviving spouse must meet certain requirements concerning the time of his or her marriage to the veteran in order to qualify for dependency and indemnity compensation (DIC). This section sets out those requirements.

(b) *Time of marriage requirements*—(1) *Surviving spouse eligible under § 5.510(b)(1) or (b)(3).* A surviving spouse meets the time of marriage requirements for DIC under the bases for eligibility set out in § 5.510(b)(1), ''Service-connected death—38 U.S.C. 1310'' or (b)(3), ''Veterans whose death was due to certain VA-furnished medical, training, compensated work therapy, or rehabilitation services—38 U.S.C. 1151,'' if his or her marriage to the veteran meets any of the following criteria:

(i) The surviving spouse married the veteran before or during the veteran's military service.

(ii) The surviving spouse was married to the veteran for one year or more. Multiple periods of marriage may be added together to meet the 1-year marriage requirement.

(iii) The surviving spouse was married to the veteran for any length of time and a child was born of the marriage or before the marriage. *See* § 3.54(d) of this chapter, ''Child born.''

(iv) The surviving spouse married the veteran within 15 years of the date of termination of the period of service in which the injury or disease causing the veteran's death was incurred or aggravated. For purposes of this paragraph, ''period of service'' means a period of active military service from which the veteran was discharged under conditions other than dishonorable. If the surviving spouse has been married to the veteran more than once, see § 3.54(e) of this chapter, ''More than one marriage to veteran.''

(2) *Surviving spouse eligible under § 5.510(b)(2).* A surviving spouse meets the time of marriage requirements for DIC under the basis for eligibility set out in § 5.510(b)(2), ''Veterans with a service-connected disability rated as totally disabling at the time of death—38 U.S.C. 1318,'' if his or her marriage to the veteran meets any of the following criteria:

(i) The surviving spouse was married to the veteran continuously for one year or more immediately preceding the veteran's death.

(ii) The surviving spouse was married to the veteran for any length of time and a child was born of the marriage or before the marriage. *See* § 3.54(d) of this chapter, ''Child born.''

(Authority: 38 U.S.C. 1151, 1304, 1310, 1318)

§ 5.521 [Reserved]

§ 5.522 Dependency and indemnity compensation benefits for survivors of certain veterans rated totally disabled at time of death—offset of wrongful death damages.

(a) *Applicability.* This section applies when a surviving spouse or child:

(1) Is eligible for dependency and indemnity compensation (DIC) on the basis described in § 5.510(b)(2), ''Veterans with a service-connected disability rated as totally disabling at the time of death—38 U.S.C. 1318,'' and

(2) Receives any money or property of value pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of, any cause of action for damages for the wrongful death of the veteran whose death is the basis for such VA benefits.

(b) *Offset.* VA will not pay DIC on the basis described in § 5.510(b)(2) for any month following a month in which the beneficiary receives money or property described in paragraph (a)(2) of this section until the total amount of such DIC benefits that would otherwise have been payable equals the total of the amount of such money and/or value of such property. This paragraph does not apply to DIC benefits payable under this section for any period preceding the end of the month in which such money or property was received.

(c) *Amount of offset.* The following rules apply when calculating the amount to be offset in DIC cases:

(1) The amount to be offset includes damages typically recoverable under wrongful death statutes, such as reimbursement for the loss of support, services, and other contributions, which the surviving spouse or child would have received if the veteran had lived and, where allowed, reimbursement for pain, suffering or mental anguish of the survivors due to death. Damages recoverable as compensation for injuries suffered by, or economic loss sustained by, the veteran prior to death such as wages lost prior to death, medical expenses, and compensation for the veteran's pain and suffering prior to death are excluded.

(2) The amount to be offset includes amounts paid to a third party to satisfy a legal obligation of the surviving spouse or child. This includes the payment of the claimant's proportional share of attorney's fees, court costs, and other expenses incident to the civil claim.

(3) The amount to be offset excludes money or property payable to a person or entity other than the spouse or child under the terms of the judgment, settlement, or compromise agreement unless the spouse or child receives the benefit of such a payment. For example, wrongful death damages paid to a veteran's estate or into a trust or similar arrangement will be included in the amount to be offset to the extent that they are distributed to, or available for the use and benefit of, the surviving spouse or child.

(4) The amount to be offset excludes benefits received under Social Security or worker's compensation even though such benefits may have been awarded in a judicial proceeding.

(5) The value of property received is that property's fair market value at the time it is received by the claimant.

(d) *Beneficiary's duty to report receipt of money or property.* Any person entitled to DIC on the basis described in § 5.510(b)(2), ''Veterans with a service-connected disability rated as totally disabling at the time of death—38 U.S.C. 1318,'' must promptly report to VA the receipt of any money or property described in paragraph (a)(2) of this section. This obligation may be satisfied by providing VA a copy of the judgment, settlement agreement, or compromise agreement awarding the money or property. Overpayments created by failure to report will be subject to recovery if not waived.

(Authority: 38 U.S.C. 1318(d))

§ 5.523 [Reserved]

§ 5.524 Awards of dependency and indemnity compensation benefits to children when there is a retroactive award to a school child.

(a) *Applicability.* Dependency and indemnity compensation (DIC) is payable to eligible children when there is no surviving spouse entitled to DIC. The total amount payable to the children, which varies according to the number of children, is divided and paid to the children in equal shares. This section states an exception that applies when all of the following conditions are met:

(1) DIC is being paid to one or more children;

(2) DIC was previously paid to an additional child, but that child's DIC was discontinued because he or she reached 18 years of age;

(3) That additional child has reestablished entitlement to DIC because he or she is attending an approved educational institution; and

(4) The effective date of the additional child's reestablished entitlement is prior to the date VA received the application to reestablish entitlement.

(b) *Award to the additional child*—(1) *Retroactive payment.* The payment to the additional child for the period extending from the payment commencement date of the award to the additional child through the month that award was approved is equal to the difference between the total amount payable for all children, including the additional child, during that period and the total amount paid to the other children during that period. If more than one child reestablishes entitlement as described in paragraph (a) of this section, the retroactive award will be paid to each such child in equal shares.

(2) *Payment commencement date for full equal share.* The payment commencement date for the full equal share of DIC to the additional child, or additional children, is the first of the month following the month VA approved his or her reestablished DIC award.

(c) *Effective date of payment of reduced shares to the other children.* The running awards to the other children will be reduced to the amount of their new equal shares effective the first of the month following the month VA approved the award of reestablished DIC to the additional child.

(Authority: 38 U.S.C. 1313(b), 5110(e), 5111)

Cross-references: See also § 3.31 of this chapter, ''Commencement of the period of payment,'' and § 3.667 of this chapter, ''School attendance.''

§§ 5.525–5.529 [Reserved]

Dependency and Indemnity Compensation—Eligibility Requirements and Payment Rules for Parents

§ 5.530 Eligibility for, and payment of, parents' dependency and indemnity compensation.

(a) *Basic eligibility.* A veteran's surviving parents may receive dependency and indemnity compensation (DIC) on the basis described in § 5.510(b)(1), ''Service-connected death—38 U.S.C. 1310,'' and § 5.510(b)(3), ''Veterans whose death was due to certain VA-furnished medical, training, compensated work therapy, or rehabilitation services—38 U.S.C. 1151.'' DIC is not payable to parents on the basis described in § 5.510(b)(2), ''Veterans with a service-connected disability rated as totally disabling at the time of death— 38 U.S.C. 1318.''

(b) *Parents' DIC is income based.* Unlike DIC benefits for a surviving spouse and children, the amount of parents' DIC payable is adjusted based on parents' income and DIC is not payable to parents whose income exceeds statutory limits. Sections 5.531 through 5.537 provide income and payment rules.

(c) *Net worth not considered.* Net worth is not a factor in determining entitlement to parents' DIC or the amount of parents' DIC payable.

(Authority: 38 U.S.C. 501(a), 1151, 1310, 1318, 1315)

§ 5.531 General income rules.

(a) *All payments included in income.* All payments of any kind from any source are counted in determining the income of a veteran's parents, except as provided in § 5.533, ''Exclusions from income.''

(b) *Payments*—(1) *What is included.* For purposes of this section, ''payments'' are cash and cash equivalents (such as checks and other negotiable instruments) and the fair market value of personal services, goods, or room and board a parent receives from someone else in lieu of other forms of payment.

(2) *What is not included.* ''Payments'' do not include any of the following:

(i) The value of a parent's use of his or her own property, such as the rental value of a home a parent owns and lives in.

(ii) Dividends on commercial insurance policies.

(iii) Retirement benefits from the following sources (or to the following persons), if the benefits have been waived pursuant to Federal statute:

(A) Civil Service Retirement and Disability Fund;

(B) Railroad Retirement Board;

(C) District of Columbia, firemen, policemen, or public school teachers;

(D) Former United States Lighthouse Service.

(c) *Spousal income combined.* Income for parents' dependency and indemnity compensation purposes is the combined income of a parent and the parent's spouse, unless the marriage has been terminated or the parent is separated from his or her spouse. Income is combined whether the parent's spouse is the veteran's other surviving parent or the veteran's stepparent. *See also* § 5.534(c) (concerning how much of the spouse's income to count for the year of remarriage).

(d) *Income-producing property*—(1) *Scope.* This paragraph (d) provides rules for determining whether income from property should be counted as a parent's income. The provisions of this paragraph (d) apply to all property, real or personal, in which a parent has an interest, whether acquired through purchase, bequest or inheritance.

(2) *Proof of ownership.* In determining whether to count income from real or personal property, VA will consider the terms of the recorded deed or other evidence of title. However, VA will accept the claimant's statement concerning the terms of ownership in the absence of evidence to the contrary.

(3) *Transfer of ownership with retention of income.* If a parent transfers ownership of property to another person or legal entity, but retains the right to income, the income will be counted.

(4) *Income from jointly owned property.* In the absence of evidence showing otherwise, VA will consider a parent who owns property jointly with others, including partnership property, to be entitled to a share of the income from that property proportionate to the parent's share of ownership. VA will accept the claimant's statement concerning the terms of ownership in the absence of evidence to the contrary.

(e) *Procedure when income amounts are uncertain—deferred determinations.* When a parent is uncertain about the amount of income the parent will receive during a calendar year, VA will calculate dependency and indemnity payments for that calendar year using the highest amount of income the parent estimates, or VA's best estimate of income if the parent's estimate appears to be unrealistically low in light of the parent's past income and current circumstances. VA will adjust benefits, or pay benefits, when actual total income for the year is determined. See also § 5.535, ''Adjustments to parents' DIC when income is less than anticipated.''

(Authority: 38 U.S.C. 1315(f))

§ 5.532 Deductions from income.

(a) *Expenses of a business or profession.* Necessary business operating expenses are deductible from gross income from a business or profession. Examples include the cost of goods sold and payments for rent, taxes, upkeep, repairs, and replacements. Depreciation is not a deductible expense. Losses sustained in operating a business or profession may not be deducted from income from any other source. For purposes of this section, ''business'' includes the operation of a farm and transactions involving investment property.

(b) *Expenses associated with disability, accident, or health insurance recoveries.* Medical, legal, or other expenses incident to the insured disability are deductible from sums recovered under disability, accident, or health insurance. However, if medical expenses are deducted under this paragraph, they cannot be deducted as unusual medical expenses under paragraph (d) of this section.

(c) *Expenses of a deceased spouse or of the deceased veteran*—(1) *Deceased spouse.* Amounts a parent pays for the following expenses of a deceased spouse are deductible:

(i) A deceased spouse's just debts, excluding debts secured by real or personal property.

(ii) The expenses of the spouse's last illness and burial to the extent such expenses are not reimbursed by VA under 38 U.S.C. chapter 23 (*see* subpart J of this part concerning VA burial benefits) or 38 U.S.C. chapter 51 (*see* § 5.551(e) concerning the use of accrued benefits to reimburse the person who bore the expense of a deceased beneficiary's last sickness or burial).

(2) *Deceased veteran.* Amounts a parent pays for the expenses of the veteran's last illness and burial are deductible to the extent that such expenses are not reimbursed by VA under 38 U.S.C. chapter 23 (see subpart J of this part concerning VA burial benefits).

(3) *When expenses are deducted.* Expenses deductible under this paragraph (c) are deductible for the year in which they were paid. However, if such expenses were paid during the year following the year the veteran or spouse died, the expenses may be deducted for the year the expenses were paid or the year of death, whichever is to the parent's advantage.

(4) *Proof of expenses.* VA will accept as proof of expenses deductible under this paragraph (c) a claimant's statement as to the amount and nature of each expense, the date of payment, and the identity of the creditor unless the circumstances create doubt as to the credibility of the statement.

(d) *Unusual medical expenses*—(1) *Applicability*—(i) *Family members.* For purposes of determining whose medical expenses are deductible, a family member is a relative of the parent or parent's spouse who is a member of the household of the parent or parent's spouse whom the parent or parent's spouse has a moral or legal obligation to support. This includes a relative who would normally be a resident of the household, but who is physically absent due to unusual or unavoidable circumstances, such as a child away at school or a family member confined to a nursing home.

(ii) *Medical expenses. See* [regulation that will be published in a future Notice of Proposed Rulemaking] (defining medical expenses).

(iii) *Unusual medical expenses.* For purposes of this section, ''unusual medical expenses'' means unreimbursed medical expenses above five percent of annual income. If annual income includes retirement plan income, the five percent will be calculated prior to deduction of the ten percent exclusion under § 5.533(g), ''Ten percent of income from retirement plans and similar plans and programs.''

(2) *Expenses of parent and parent's family members.* Amounts paid by a parent for his or her own unusual medical expenses and those of family members are deductible.

(3) *Expenses of spouse and spouse's family members.* The deduction includes the unusual medical expenses of the spouse and the spouse's family members if the combined annual income of the parent and the parent's spouse is the basis for calculating income.

(4) *When expenses are deducted.* VA will deduct unusual medical expenses from income for the calendar year in which they were paid regardless of when the expenses were incurred.

(5) *Proof of expenses.* VA will accept the claimant's statement as to the amount and nature of each medical expense, the date of payment, and the identity of the creditor unless the circumstances create doubt as to the credibility of the statement.

(6) *Estimates of expenses for future benefit periods.* For the purpose of authorizing prospective payment of benefits, VA may accept a claimant's estimate of future medical expenses based on a clear and reasonable expectation that unusual medical expenditure will be incurred. VA will adjust an award based on such an estimate upon receipt of an amended estimate or upon receipt of an eligibility verification report. *See also* § 3.256 of this chapter (concerning requirements for eligibility verification reports).

(e) *Certain salary deductions not deductible for determining income.* For purposes of determining a parent's income, a salary may not be reduced by the amount of deductions made under a retirement act or plan or for income tax withholding.

(Authority: 38 U.S.C. 1315(f))

§ 5.533 Exclusions from income.

VA will not count payments from the following sources when calculating

parents' income for dependency and indemnity compensation purposes:

(a) *Death gratuity.* Death gratuity payments by the Secretary concerned under 10 U.S.C. 1475 through 1480. This includes death gratuity payments in lieu of payments under 10 U.S.C. 1478 made to certain survivors of Persian Gulf conflict veterans authorized by sec. 307, Pub. L. 102–25, 105 Stat. 82.

(b) *Donations received.* Donations from public or private relief or welfare organizations, including the following:

(1) The value of maintenance furnished by a relative, friend, or a civic or governmental charitable organization, including money paid to an institution for the care of the parent due to impaired health or advanced age.

(2) Benefits received under noncontributory programs, such as Supplemental Security Income payments.

(c) *Certain VA benefit payments.* The following VA benefit payments:

(1) Payments under 38 U.S.C. chapter 11, ''Compensation for Service-Connected Disability or Death.''

(2) Payments under 38 U.S.C. chapter 13, ''Dependency and Indemnity Compensation for Service-Connected Death.'' However, payments under 38 U.S.C. 1312(a), described in § 3.804 of this chapter, are counted as income.

(3) Nonservice-connected VA disability and death pension payments.

(4) VA benefit payments listed in [regulation that will be published in a future Notice of Proposed Rulemaking].

(d) *Certain life insurance payments.* Payments under policies of Servicemembers' Group Life Insurance, United States Government Life Insurance, or National Service Life Insurance.

(e) *Social Security death payments.* Lump-sum death payments under title II of the Social Security Act.

(f) *State service bonuses.* Payments of a bonus or similar cash gratuity by any State based upon service in the Armed Forces.

(g) *Ten percent of income from retirement plans and similar plans and programs.* Ten percent of the amount of payments to an individual under public or private retirement, annuity, endowment, or similar plans or programs is not counted. This includes payments for:

(1) Annuities or endowments paid under a Federal, State, municipal, or private business or industrial plan.

(2) Old age and survivor's insurance and disability insurance under title II of the Social Security Act.

(3) Retirement benefits received from the Railroad Retirement Board.

(4) Payments for permanent and total disability or death received from the Office of Workers' Compensation Programs of the U.S. Department of Labor, the Social Security Administration, or the Railroad Retirement Board, or pursuant to any worker's compensation or employer's liability statute, including damages collected incident to a tort suit under employer's liability law of the United States or a political subdivision of the United States. This ten-percent exclusion applies after the income from the specified payments is reduced by the deductions described in § 5.532(b), ''Expenses associated with disability, accident, or health insurance recoveries.''

(5) The proceeds of a commercial annuity, endowment, or life insurance.

(6) The proceeds of disability, accident or health insurance. This ten-percent exclusion applies after the income from the specified payments is reduced by the deductions described in § 5.532(b), ''Expenses associated with disability, accident, or health insurance recoveries.''

(h) *Casualty loss reimbursement.* Reimbursements of any kind for any casualty loss are not counted, but only up to the greater of the fair market value or the reasonable replacement value of the property involved immediately preceding the loss. For purposes of this section, a ''casualty loss'' is the complete or partial destruction of property resulting from an identifiable event of a sudden, unexpected or unusual nature.

(i) *Profit from sale of non-business property.*—(1) Profit realized from the sale of real or personal property other than in the course of a business. However, any amounts received in excess of the sale price, such as interest payments, will be counted as income.

(2) If payments are received in installments, the sums received (including principal and interest) will be excluded until the parent has received an amount equal to the sale price. Any amounts received after the sale price has been recovered will be counted as income.

(j) *Payment for civic obligations.* Payments received for discharge of jury duty or other obligatory civic duties.

(k) *Radiation Exposure Compensation Act payments.* Payments under Section 6 of the Radiation Exposure Compensation Act of 1990.

(Authority: 42 U.S.C. 2210 (note))

(l) *Ricky Ray Hemophilia Relief Fund payments.* Payments under section 103(c)(1) of the Ricky Ray Hemophilia Relief Fund Act of 1998.

(Authority: 42 U.S.C. 300c–22 (note))

(m) *Energy Employees Occupational Illness Compensation Program payments.* Payments under the Energy Employees Occupational Illness Compensation Program.

(Authority: 42 U.S.C. 7385e(2))

(n) *Payments to Aleuts.* Payments to certain eligible Aleuts under 50 U.S.C. Appx. 1989c–5.

(Authority: 50 U.S.C. Appx. 1989c–5(d)(2))

(o) *Increased inventory value of a business.* The value of an increase of stock inventory of a business.

(p) *Employer contributions.* An employer's contributions to health and hospitalization plans for either an active or retired employee.

(q) *Other payments.* Other payments listed in [regulation that will be published in a future Notice of Proposed Rulemaking].

(Authority: 38 U.S.C. 1315(f))

§ 5.534 When VA counts parents' income.

(a) *General rules*—(1) VA counts income for parents' dependency and indemnity compensation (DIC) purposes on a calendar year basis.

(2) The calendar year for which VA will count income is the calendar year in which the parent received the income, or anticipates receiving it.

(3) VA will count parents' total income for the full calendar year except as provided in this section.

(b) *Exception for first awards and awards following a period of no entitlement—proportionate annual income*—(1) *When used.* VA will use proportionate annual income for the first award of parents' DIC, or for resuming payments on an award of parents' DIC which was discontinued for a reason other than excess income or a change in marital or dependency status, if it is to the parents' advantage. Otherwise, VA will base the award on the parent's actual total annual income for the entire calendar year.

(2) *Proportionate annual income calculation.* A proportionate annual income calculation disregards income received, and expenses paid, prior to the effective date of an initial award of parents' DIC, or prior to the effective date of an award that follows a period of no entitlement for a reason other than excess income or a change in marital or dependency status. In performing a proportionate annual income calculation, VA first determines what the parents' income was for the portion of the calendar year from the effective date of the award of parents' DIC to the end of the calendar year. VA then calculates what annual income would

have been if income had been received at the same rate for the entire calendar year.

(3) *How VA computes proportionate annual income.* VA will use the following steps in making the proportionate annual income calculation, rounding the result only at the final step.

(i) Determine income from the effective date of the award of parents' DIC to the end of the calendar year, disregarding income received and expenses paid before the effective date of the award.

(ii) Divide the result by the number of days from the effective date of the award of parents' DIC to the end of the calendar year.

(iii) Multiply that result by 365. This result, rounded down to the nearest dollar, is the proportionate annual income.

(c) *Exception for an increase in income because of a parent's marriage.* If a parent marries during the applicable calendar year, income received by the parent's spouse prior to the date of the marriage is not counted.

(Authority: 38 U.S.C. 501(a), 1315(b))

§ 5.535 Adjustments to parents' DIC when income is less than anticipated.

(a) *Applicability.* This section applies when, based on anticipated income, VA did not pay parents' DIC for a particular calendar year, or paid less than the full applicable statutory rate for that particular calendar year, but income for that calendar year was actually less than anticipated.

(b) *Retroactive adjustment; income reporting time limitation.* VA may retroactively pay parents' DIC or pay a higher rate of parents' DIC from the first of the applicable calendar year under the following circumstances:

(1) Satisfactory evidence shows that income was actually less than anticipated for that calendar year and

(2) VA receives such evidence not later than the end of the year following the year to which the evidence pertains. Otherwise, payment or increased payments may not be made for the applicable calendar year on the basis of such evidence.

(Authority: 38 U.S.C. 501(a), 1315(e), 5110(a))

Cross-reference: *See also* § 3.256 of this chapter, ''Eligibility reporting requirements.''

§ 5.536 Parents' dependency and indemnity compensation rates.

(a) *Statutory rates.* VA pays dependency and indemnity compensation (DIC) to eligible parents based upon statutory rates that vary depending upon whether both parents are living, upon the parents' marital status, upon whether a parent is separated from his or her spouse, and upon whether a parent is a patient in a nursing home or helpless or blind or so nearly helpless or blind as to require the aid and attendance of another person. These rates are reduced by varying amounts that depend upon the parents' income. *See* 38 U.S.C. 1315. Rate and income limitations are periodically adjusted whenever there is an increase in benefit amounts payable under title II of the Social Security Act. *See* 38 U.S.C. 5312(b). In cases based on service in the Commonwealth Army of the Philippines, or as a guerrilla or as a Philippine Scout, also see § 3.251(a)(3) of this chapter (concerning calculation of the parents' DIC income limitation for claims based on such service).

(b) *Use of published rates and income limitations.* Whenever there is a cost-of-living increase in benefit amounts payable under section 215(i) of title II of the Social Security Act, VA increases the annual income limitations and the maximum monthly rates of parents' DIC by the same percentage as the Social Security increase. These increases are effective on the same date as the Social Security increase. VA will publish parents' DIC rates, the annual income limitations, and the formulas for adjusting parents' DIC rates for annual income in the Notices section of the **Federal Register** when there is a change in the amounts. VA will use this published data in calculating parents' DIC payments. The rates referenced in paragraphs (c) through (e) of this section are the rates specified in the applicable **Federal Register** notice of an increase in the rates of parents' DIC.

(c) *One parent—remarried.* Where there is only one parent and that parent has remarried and is living with his or her spouse, VA will pay DIC at the rate for one parent who has not remarried, or the rate applicable to a remarried parent living with his or her spouse, whichever will provide the greater monthly rate of DIC. However, § 5.531(c) (requiring spousal income to be combined) applies in either instance.

(d) *One parent—marriage ends or parent is separated from spouse.* Where there is only one parent and that parent has remarried and that marriage has ended or the parent is separated from his or her spouse, the rate of DIC for that parent will be that which would be payable if there were one parent alone, in the case of termination of the marriage, or two parents not living together, in the case of separation.

(e) *Two parents living—one parent files DIC application.* Where there are two parents of the veteran living and only one parent has filed an application for DIC, the rate of DIC payable to that parent will be that which would be payable to such parent if both parents had filed an application.

(f) *Minimum payment*—(1) *Five dollar minimum.* If any payment of parents' DIC is due after the applicable rate payable is adjusted for income, the amount of that payment will not be less than $5.00 monthly.

(2) *Minimum DIC payment required for special monthly DIC.* The special monthly DIC payable to a parent who is a patient in a nursing home, is helpless or blind or requires the aid and attendance of another person will be paid to a parent only if he or she qualifies for at least the minimum DIC payment described in paragraph (f)(1) of this section.

(g) *Rate changes due to changes in marital status or living arrangements.* If a parent's conditions of entitlement change because of a change in marital status or living arrangements, VA will determine the new rate payable based on the new status. For example, if the parent was unmarried for part of the year, and married for part of the year, VA will pay the applicable rate for an unmarried parent for the part of the year that the parent was unmarried, and then pay the applicable rate for a married parent for the part of the year that the parent was married.

(h) *Rates payable when one of two parents receiving death compensation elects DIC*—(1) *Parent who elects DIC.* The rate of DIC for the parent who elects DIC will not exceed the amount that would be paid to the parent if both parents had elected DIC.

(2) *Parent still receiving death compensation.* The rate of death compensation for the parent who did not elect DIC will not exceed the amount that would be paid if both parents were receiving death compensation.

(Authority: 38 U.S.C. 501(a), 1315, 5312)

§ 5.537 Payment intervals.

(a) *Monthly payments.* VA pays parents' dependency and indemnity compensation (DIC) monthly, except as provided in paragraph (b) of this section.

(b) *Exception.* VA will pay the parents' DIC benefit semiannually, on or about June 1 and December 1, if the amount of the annual benefit is less than four percent of the maximum annual rate payable for that parent. However, parents receiving payment semiannually may elect to receive payment monthly in cases in which receiving payments semiannually would cause other Federal benefits to be denied.

(Authority: 38 U.S.C. 501(a), 1315)

§§ 5.538–5.549 [Reserved]

3. Sections 5.573 through 5.579 are added to subpart G to read as follows:

§ 5.573 Effective date for dependency and indemnity compensation rate adjustments when an additional survivor files an application.

(a) *General*. If an additional survivor files an application for dependency and indemnity compensation (DIC) benefits while other survivors are receiving benefits under a running award (for example, one or more children are receiving benefits and another child files for benefits), VA will reduce the running award while VA determines the additional survivor's entitlement when:

(1) The additional survivor has apparent entitlement to benefits; and

(2) Payment to the additional survivor would reduce the DIC benefits being paid to other survivors under the running award.

(b) *Effective date of reduction to running awards*.—(1) *Benefits payable prior to filing of application*. If benefits would be payable to the additional survivor from a date prior to the date VA received the additional survivor's application, the effective date of any reduction in the running award will be the date of the additional survivor's potential entitlement.

(2) *Benefits payable from the date of application*. If benefits would be payable to the additional survivor from the date VA received the additional survivor's application, VA will reduce the running award on the later of the following dates:

(i) The date VA received the additional survivor's application, or

(ii) The first day of the month that follows the month for which VA last paid benefits to the original survivor(s).

(c) *Effective date for award to additional survivor*. If an award for the additional survivor is warranted, the full rate to which the additional survivor is entitled is payable to the additional survivor from the effective date of that award.

(d) *Resumption of previous level of payments to other survivors*. If entitlement is not established for the additional survivor, benefits previously being paid to other survivors will be resumed, if otherwise in order, from the date of the reduction in the running award.

(e) *Exception*. This section does not apply to cases governed by § 5.524, ''Awards of dependency and indemnity compensation benefits to children when there is a retroactive award to a school child.''

(Authority: 38 U.S.C. 1313, 5110(a), (e), 5112)

§ 5.574 Effective dates of awards and discontinuances of special monthly dependency and indemnity compensation.

(a) *Effective date of award*—(1) *General rule*. The effective date for an award of special monthly dependency and indemnity compensation (DIC) will be the date VA receives the application for special monthly DIC or the date entitlement arose, as defined in [regulation that will be published in a future Notice of Proposed Rulemaking], whichever date is later.

(2) *Exception—cases involving a retroactive award of basic DIC*. When an award of basic DIC is effective for a period prior to the date of receipt of the application and a spouse or parent is also entitled to special monthly DIC at the time of that basic DIC award, the effective date for special monthly DIC will be the later of the following dates:

(i) The effective date of the basic DIC award, or

(ii) The date entitlement to special monthly DIC arose. *See* [regulation that will be published in a future Notice of Proposed Rulemaking] (defining ''date entitlement arose'').

(3) *Surviving spouse or parent in receipt of hospital, institutional, or domiciliary care at VA expense*. If the surviving spouse or parent is provided hospital, institutional, or domiciliary care at VA expense, the effective date of any special monthly DIC award based on the need for aid and attendance under § 5.511(a) or (b) will be the date of departure from the medical facility.

(b) *Effective date of discontinuance*—(1) *Aid and attendance*. When a parent or surviving spouse is no longer in need of aid and attendance, VA will discontinue special monthly DIC based upon the need of aid and attendance effective the first day of the month that follows the month for which VA last paid that benefit.

(2) *Housebound*. When a surviving spouse is no longer housebound, VA will discontinue special monthly DIC based upon housebound status effective the first day of the month that follows the month for which VA last paid that benefit.

(Authority: 38 U.S.C. 501(a), 1311(c) and (d), 1315(g), 5110, 5112)

§§ 5.575–5.579 [Reserved]

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