

§ 1.36 Systems exempt in whole or in part from provisions of 5 U.S.C. 552a and this part.
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Number	System name
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DO .120	Records Related to Office of Foreign Assets Control Economic Sanctions.
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Dated: July 16, 2010.
Melissa Hartman,
Acting Deputy Assistant Secretary for Privacy, Transparency, and Records.
[FR Doc. 2010-25134 Filed 10-6-10; 8:45 am]
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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3
RIN 2900-AN68

Compensation for Certain Disabilities Due to Undiagnosed Illnesses

AGENCY: Department of Veterans Affairs.
ACTION: Final rule; technical amendments.

SUMMARY: This document amends a Department of Veterans Affairs (VA) ratings and evaluations regulation to remove a provision reserving to the Secretary the authority for certain determinations and to make a non-substantive clarifying change.

DATES: *Effective Date:* October 7, 2010.
Applicability Date: The amendments to 38 CFR 3.317 apply to claims pending before VA on the effective date of this rule, as well as to claims filed with or remanded to VA after that date.

FOR FURTHER INFORMATION CONTACT: Thomas Kniffen, Chief, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9725. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: VA has determined that technical revisions to 38 CFR 3.317 are needed to remove a potential source of confusion and to more efficiently implement the intent of Congress as expressed in 38 U.S.C. 1117.

38 U.S.C. 1117 provides for the payment of disability compensation to Persian Gulf War veterans with a qualifying chronic disability that

became manifest during service in Southwest Asia during the Persian Gulf War, or became manifest to a degree of ten percent or more during the presumptive period established by the Secretary. Section 1117(a)(2) defines a “qualifying chronic disability” as a chronic disability resulting from any of the following (or any combination of the following): “(A) An undiagnosed illness, (B) A medically unexplained chronic multisymptom illness (such as chronic fatigue syndrome, fibromyalgia, and irritable bowel syndrome) that is defined by a cluster of signs or symptoms, [or] (C) Any diagnosed illness that the Secretary determines * * * warrants a presumption of service connection.”

It is evident from Congress’ use of the phrase “such as” in section 1117(a)(2)(B) that Congress intended “chronic fatigue syndrome, fibromyalgia, and irritable bowel syndrome” to be examples of medically unexplained chronic multisymptom illnesses, rather than an exclusive list.

VA has implemented this statute in a regulation at 38 CFR 3.317(a)(2), which provides a substantially similar definition of the term “qualifying chronic disability,” but also specifies the process for determining whether conditions other than chronic fatigue syndrome, fibromyalgia, and irritable bowel syndrome will be found to be “medically unexplained chronic multisymptom illnesses.” The regulation states, in 38 CFR 3.317(a)(2)(i)(B), that a qualifying chronic disability will include those three specified illnesses and “[a]ny other illness that the Secretary determines meets the criteria in paragraph (a)(2)(ii) of this section for a medically unexplained chronic multisymptom illness.” Paragraph (a)(2)(ii) of § 3.317 provides a detailed explanation regarding the types of illnesses that can be considered to be medically unexplained chronic multisymptom illnesses. The practical effect of the procedures established in the current regulation is to reserve to the Secretary the authority to determine whether illnesses other than chronic

fatigue syndrome, fibromyalgia, and irritable bowel syndrome will be found to be “medically unexplained chronic multisymptom illnesses” for purposes of applying 38 U.S.C. 1117. Accordingly, currently VA adjudicators or other officials cannot make that determination in individual cases without a specific determination by the Secretary.

VA is revising this procedure for two reasons. First, we believe it is unnecessary to reserve this authority to the Secretary, because the regulation sets forth clear and detailed standards to guide the determination as to what constitutes a medically unexplained chronic multisymptom illness. We believe the regulatory language provides sufficient guidance to enable medical professionals to render medical opinions on this issue and to enable VA adjudicators to decide this issue when it arises in individual cases. Second, we believe the current procedures may create confusion or may dissuade claimants from filing claims based on medically unexplained illnesses other than those currently listed in the regulation.

To make it clear that chronic fatigue syndrome, fibromyalgia, and irritable bowel syndrome are only examples of medically unexplained chronic multisymptom illnesses, we are revising the language of § 3.317(a)(2)(i)(B). Specifically, we are revising § 3.317(a)(2)(i)(B) by: Removing “The following” at the beginning of the sentence and replacing it with “A”; changing the plural word “illnesses” to the singular “illness” and the verb “are” to “is”; and adding “such as” at the end of the sentence. The revised section will read: “(B) A medically unexplained chronic multisymptom illness that is defined by a cluster of signs or symptoms, such as: (1) Chronic fatigue syndrome; (2) Fibromyalgia; (3) Irritable bowel syndrome.” This change eliminates language that could imply that the list is exhaustive.

In addition, we are removing § 3.317(a)(2)(i)(B)(4) in order to omit the current regulatory language reserving to the Secretary the authority to determine

whether additional illnesses are “medically unexplained chronic multisymptom illnesses.” This change will have the effect of delegating to VA adjudicators the authority to determine on a case-by-case basis whether additional diseases meet the criteria of paragraph (a)(2)(ii) in the same manner as they make other determinations necessary in deciding claims. Under 38 CFR 3.100(a), VA adjudicators generally have delegated authority to make all findings and determinations necessary to a decision on a claim. This rulemaking will result in determinations of medically unexplained chronic multisymptom illness being made in accordance with that general delegation of authority.

If a veteran has an illness other than chronic fatigue syndrome, fibromyalgia, or irritable bowel syndrome, it is solely a medical determination whether that illness qualifies under revised § 3.317(a)(2)(i)(B) as a “medically unexplained chronic multisymptom illness.” In adjudicating claims under § 3.317(a)(2)(i)(B), VA will continue to apply the term “medically unexplained chronic multisymptom illness” as currently defined in § 3.317(a)(2)(ii): “A diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities.” This existing definition is based on the Congressional Joint Explanatory Statement that accompanied the introduction of medically unexplained chronic multisymptom illnesses into 38 U.S.C. 1117. See Explanatory Statement on House Amendment to Senate Amendments to H.R. 1291 [enacted as the Veterans Education and Benefits Expansion Act of 2001], 147 Cong. Rec. S13,235, S13,238 (Dec. 13, 2001)(Joint Explanatory Statement).

Finally, § 3.317(a)(2)(ii) exempts “[c]hronic multisymptom illnesses of partially understood etiology and pathophysiology” from being considered medically unexplained chronic multisymptom illnesses. To further clarify this exclusion, we have added the specific examples “diabetes” and “multiple sclerosis.” This clarification does not alter any existing rights under the current regulation, but merely provides examples to better illustrate the current regulation. The two listed examples, diabetes and multiple sclerosis, were cited by Congress in the legislative history of the authorizing legislation as examples of conditions that would not be within the scope of

the statutory term “medically unexplained chronic multisymptom illnesses.” See Joint Explanatory Statement, 147 Cong. Rec. at S13,238. When VA issued the rule currently in § 3.317(a)(2)(ii), we similarly explained that diabetes and multiple sclerosis were examples of conditions that would not meet the statutory and regulatory definition of “medically unexplained chronic multisymptom illnesses.” 68 FR 34539, 34540 (June 10, 2003). We believe that including this information in the text of the regulation will be helpful to readers.

Administrative Procedure Act

Because this amendment merely reflects a matter of agency procedure and makes other non-substantive changes, this rulemaking is exempt from the prior notice-and-comment and delayed-effective-date requirements of 5 U.S.C. 553.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The initial and final regulatory flexibility analysis requirements of sections 603 and 604 of the Regulatory Flexibility Act, 5 U.S.C. 601–612, are not applicable to this rule because a notice of proposed rulemaking is not required for this rule. Even so, the Secretary of Veterans Affairs hereby certifies that this final rule 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 rule will affect only individual VA beneficiaries and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB), as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy

of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

The economic, interagency, legal, and policy implications of this final rule have been examined and it has been determined not to be a significant regulatory action 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 issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program numbers and titles for this final rule are 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, approved this document on August 19, 2010 for publication.

List of Subjects in 38 CFR Part 3

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

Dated: September 30, 2010.

William F. Russo,

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

■ For the reasons set out in the preamble, VA amends 38 CFR part 3 as follows:

PART 3—ADJUDICATION

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

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

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

■ 2. Amend § 3.317 by:

- a. Revising the section heading.
- b. Revising paragraph (a)(2)(i)(B).
- c. In paragraph (a)(2)(ii), removing “and pathophysiology” and adding, in its place, “and pathophysiology, such as diabetes and multiple sclerosis.”.

The revisions read as follows:

§ 3.317 Compensation for certain disabilities due to undiagnosed illnesses.

- (a) * * *
- (2) * * *
- (i) * * *

(B) A medically unexplained chronic multisymptom illness that is defined by a cluster of signs or symptoms, such as:

- (1) Chronic fatigue syndrome;
- (2) Fibromyalgia;
- (3) Irritable bowel syndrome.

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