

Dated: November 9, 2011.

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 3

RIN 2900-AN64

#### Clothing Allowance

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) amends its regulations regarding clothing allowances. The amendment provides for an annual clothing allowance for each qualifying prosthetic or orthopedic appliance worn or used by a veteran for a service-connected disability or disabilities that wears out or tears a single article of the veteran's clothing and for each physician-prescribed medication used by a veteran for a skin condition that is due to a service-connected disability that affects a single outergarment. The amendment also provides two annual clothing allowances if a veteran wears or uses more than one qualifying prosthetic or orthopedic appliance, physician-prescribed medication for more than one skin condition, or an appliance and a medication for a service-connected disability or disabilities and the appliance(s) or medication(s) together cause a single article of clothing to wear out faster than if affected by a single appliance or medication. This amendment also makes certain technical changes to the rule.

**DATES:** *Effective Date:* This final rule is effective December 16, 2011.

*Applicability Date:* This final rule applies to claims received by or pending before VA on or after December 16, 2011.

**FOR FURTHER INFORMATION CONTACT:** Tom Kniffen, Chief, Regulations Staff (211D), Compensation 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:** In a document published in the **Federal Register** on February 2, 2011 (76 FR 5733-5734), VA proposed to amend its regulations regarding clothing allowances in order to implement the

holding of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in *Sursely v. Peake*, 551 F.3d 1351, 1356 (Fed. Cir. 2009). In this final rule, VA will implement *Sursely* by amending 38 CFR 3.810(a)(2) to provide that a veteran is entitled to a clothing allowance for each qualifying prosthetic or orthopedic appliance worn or used by a veteran because of a service-connected disability which tends to wear or tear clothing or medication prescribed by a physician and used by a veteran for a skin condition caused by a service-connected disability which irreparably damages an outergarment if each appliance or medication affects a single article of clothing or outergarment.

VA also provides in § 3.810(a)(3) that a veteran is entitled to two annual clothing allowances if: (1) A veteran uses more than one qualifying prosthetic or orthopedic appliance, medication for more than one skin condition, or an appliance and a medication; and (2) the appliance(s) or medication(s) each satisfy the requirements of § 3.810(a)(1) and together tend to wear or tear a single article of clothing or irreparably damage an outergarment, requiring replacement at an increased rate than if the article of clothing, or outergarment, was affected by a single qualifying appliance or medication.

#### Comments in Response to Proposed Rule

A 60-day comment period ended April 4, 2011, and VA received comments from seven members of the general public and one organization. Three individual commenters expressed general support for the rule. A fourth commenter stated that VA should expand the service-connected disabilities for which a clothing allowance is provided to include "very limited knee movement when walking" which causes shoes to wear out faster. VA makes no change based on this comment because 38 U.S.C. 1162 authorizes payment of a clothing allowance only if a veteran "wears or uses a prosthetic or orthopedic appliance" that tends to wear out or tear the veteran's clothing or uses physician-prescribed medication for a skin condition due to a service-connected disability and the medication causes irreparable damage to the veteran's outergarments. No clothing allowance is payable if a veteran does not use a prosthetic or orthopedic appliance or medication for a skin condition.

Another commenter stated that use of an Ankle-Foot Orthotic (AFO) wears out shoes as well as slacks/trousers. VA makes no change based on this

comment because 38 U.S.C. 1162 does not authorize the payment of more than one clothing allowance based on a single qualifying appliance. Section 1162 authorizes VA to pay "a clothing allowance of \$716 per year" to each veteran who, because of service-connected disability "wears or uses a prosthetic appliance (including a wheelchair) which the Secretary determines tends to wear out or tear the clothing of the veteran." In *Sursely*, the Federal Circuit stated that "by linking receipt of the [clothing allowance] to a single qualifying appliance, Congress recognized that multiple appliances might allow the award of multiple benefits." That decision provides no basis for interpreting section 1162 to allow more than one clothing allowance for a single appliance.

A sixth commenter expressed that VA should establish "no limitation for the number of clothing allowances per year" because some veterans use a combination of prosthetic and/or orthopedic appliances for service-connected disabilities. VA appreciates this comment; however, VA makes no change in response to this comment because the rule as proposed already provides for multiple prosthetic and/or orthopedic appliances. As explained above, § 3.810(a)(2) provides that a veteran is entitled to an annual clothing allowance for each prosthetic or orthopedic appliance used by the veteran if each appliance affects a distinct article of clothing and § 3.810(a)(3) provides for two clothing allowances based on the cumulative effects of multiple appliances on a single article of clothing.

The seventh commenter stated that currently, only metal-hinged prosthetic devices qualify for the clothing allowance and that VA should cover wear and tear caused by plastic-hinged prosthetics as well. The commenter further stated that prescription skin cream for the "face, neck, hands, arms, or any area not covered by clothing may come into contact with clothing, causing discoloration or rapid deterioration." VA appreciates these comments; however, VA makes no change to the rule based on these comments for the following reasons. The term "prosthetic \* \* \* appliance" in § 3.810(a)(1)(i), (a)(1)(ii)(A), (a)(2) and (3) includes plastic-hinged prosthetics and is not limited to metal-hinged prosthetic devices. With regard to the comment about medication that comes in contact with clothing, § 3.810(a) does not limit entitlement to a clothing allowance to medications that are covered by clothing. Rather a veteran is entitled to a clothing allowance if any physician-

prescribed medication used for a skin condition caused by a service-connected disability irreparably damages the veteran's outergarment. As such, VA makes no change based on this comment.

VA received an eighth and final comment from the National Organization of Veterans' Advocates, Inc. (NOVA). NOVA suggested that VA revise § 3.810(a)(1)(i) to clarify that a veteran is entitled to one clothing allowance if a VA examination or hospital or examination report from a facility specified in 38 CFR 3.326(b) establishes that physician-prescribed medication for a skin condition due to a service-connected disability causes irreparable damage to the veteran's outergarments. VA makes no change based on this comment because it is beyond the scope of this rulemaking. Section 3.810(a)(1)(i) restates, without change, VA's long-standing policy of providing that claims for clothing allowance that are based on certain types of disabilities (*i.e.*, the loss or loss of use of a hand or foot compensable at the rate prescribed in 38 CFR 3.350(a), (b), (c), (d), or (f)) may be decided without the requirement for a certification from the VA Under Secretary for Health, or his or her designee, of medical facts establishing eligibility for the clothing allowance. Section 3.810(a)(1)(ii) correspondingly provides that, in all other clothing allowance claims, including claims based on use of prescribed medication and claims based on use of a prosthetic or orthopedic device for conditions other than those specified in § 3.810(a)(1)(i), certification from the Under Secretary for Health or his or her designee is necessary. VA's proposed rule did not propose to change this long-standing policy concerning the circumstances in which certification of medical facts is required. The purpose of this rule is to amend 38 CFR 3.810(a)(2) and (3) "to implement *Sursely*," which addressed a veteran's entitlement to two clothing allowances for independently qualifying orthopedic appliances affecting different articles of clothing. 76 FR 5733; *Sursely*, 551 F.3d at 1356.

VA will make the following non-substantive technical changes to the final rule to enhance clarity. The parenthetical "(including a wheelchair)" was included in proposed § 3.810(a)(1)(i) and (a)(1)(ii)(A), but was not included in proposed § 3.810(a)(2) and (3). VA will revise the parenthetical in § 3.810(a)(1)(i) and (a)(1)(ii)(A) to read "(including, but not limited to, a wheelchair)" and also add this parenthetical after the term "orthopedic

appliance" in paragraphs (a)(2) and (3) to clearly state that all qualifying prosthetic or orthopedic appliances, in addition to a wheelchair, are included.

VA will replace the term "distinct" in the title of § 3.810(a)(2) with the term "multiple types of" in order to clarify that more than one clothing allowance is payable when more than one type of garment is affected. Similarly, in § 3.810(a)(2)(ii), VA will replace the term "distinct" with "more than one type of" to clarify that more than one clothing allowance is payable when more than one type of article of clothing or outergarment is affected. We will also insert "type of" after "single" in the title of § 3.810(a)(3) and in § 3.810(a)(3)(ii) and will replace "an outergarment" with "a type of outergarment" in § 3.810(a)(3)(ii). This will clarify that the references to garments or clothing in this regulation are to types of garments, such as shirts, rather than to individual garments, such as a specific shirt.

In § 3.810(a)(3)(ii), VA will replace the phrase "at a faster rate than if affected by one qualifying appliance or medication" with "at an increased rate of damage to the clothing or outergarment due to a second appliance or medication." This language will clarify that a second clothing allowance may be paid when a second appliance and/or medication increases the rate of damage to the clothing or outergarment.

#### **Paperwork Reduction Act**

The collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521) referenced in the proposed rule has an existing OMB approval as a form. The form is VA Form 10–8678, Application for Annual Clothing Allowance (Under 38 U.S.C. 1162), OMB approval number 2900–0198. No changes are made in this final rule to the collection of information.

#### **Regulatory Flexibility Act**

The Secretary 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 final rule would not affect any small entities. Only VA beneficiaries could be directly affected. 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 Orders 12866 and 13563**

Executive Orders 12866 and 13563 direct agencies to assess the 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 effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a "significant regulatory action," which requires 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 this Executive Order."

The economic, interagency, budgetary, legal, and policy implications of this regulatory action 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 and Titles**

The Catalog of Federal Domestic Assistance program numbers and titles for this proposed rule are 64.013, Veterans Prosthetic Appliances; and 64.109, Veterans Compensation for Service-Connected Disability.

### 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, Department of Veterans Affairs, approved this document on November 2, 2011, 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: November 10, 2011.

#### Robert C. McFetridge,

Director of Regulation Policy and 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. Revise § 3.810, paragraph (a) to read as follows:

#### § 3.810 Clothing allowance.

(a) Except as provided in paragraph (d) of this section, a veteran who has a service-connected disability, or a disability compensable under 38 U.S.C. 1151 as if it were service connected, is entitled, upon application therefore, to an annual clothing allowance, which is payable in a lump sum, as specified in this paragraph.

(1) *One clothing allowance.* A veteran is entitled to one annual clothing allowance if—

(i) A VA examination or a hospital or examination report from a facility specified in § 3.326(b) establishes that the veteran, because of a service-connected disability or disabilities due to loss or loss of use of a hand or foot compensable at a rate specified in § 3.350(a), (b), (c), (d), or (f), wears or uses one qualifying prosthetic or orthopedic appliance (including, but not limited to, a wheelchair) which tends to wear or tear clothing; or

(ii) The Under Secretary for Health or a designee certifies that—

(A) A veteran, because of a service-connected disability or disabilities, wears or uses one qualifying prosthetic or orthopedic appliance (including, but not limited to, a wheelchair) which tends to wear or tear clothing; or

(B) A veteran uses medication prescribed by a physician for one skin condition, which is due to a service-connected disability, that causes irreparable damage to the veteran's outergarments.

(2) *More than one clothing allowance; multiple types of garments affected.* A veteran is entitled to an annual clothing allowance for each prosthetic or orthopedic appliance (including, but not limited to, a wheelchair) or medication used by the veteran if each appliance or medication—

(i) Satisfies the requirements of paragraph (a)(1) of this section; and

(ii) Affects more than one type of article of clothing or outergarment.

(3) *Two clothing allowances; single type of garment affected.* A veteran is entitled to two annual clothing allowances if a veteran uses more than one prosthetic or orthopedic appliance, (including, but not limited to, a wheelchair), medication for more than one skin condition, or an appliance and a medication, and the appliance(s) or medication(s)—

(i) Each satisfy the requirements of paragraph (a)(1) of this section; and

(ii) Together tend to wear or tear a single type of article of clothing or irreparably damage a type of outergarment at an increased rate of damage to the clothing or outergarment due to a second appliance or medication.

\* \* \* \* \*

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### DEPARTMENT OF VETERANS AFFAIRS

#### 38 CFR Part 59

RIN 2900-AN57

#### Updating Fire Safety Standards

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule; affirmation.

**SUMMARY:** This document affirms as final, without changes, a provision included in a final rule with request for comments that amended the Department of Veterans Affairs (VA) regulations concerning community residential care facilities, contract facilities for certain outpatient and residential services, and State home facilities. That provision established a five-year period within

which all covered buildings with nursing home facilities existing as of June 25, 2001, must conform to the automatic sprinkler requirement of the 2009 edition of the National Fire Protection Association (NFPA) 101. This rule helps ensure the safety of veterans in the affected facilities.

**DATES:** *Effective Date:* This final rule is effective November 16, 2011.

**FOR FURTHER INFORMATION CONTACT:** Brian McCarthy, Office of Patient Care Services, Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave. NW., Washington, DC 20420, (202) 461-6759. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** In a final rule with request for comments published in the **Federal Register** on February 24, 2011 (76 FR 10246), VA amended its regulations concerning the codes and standards applicable to community residential care facilities, contract facilities for outpatient and residential treatment services for veterans with alcohol or drug dependence or abuse disabilities, and State homes. We amended 38 CFR 17.63, 17.81(a)(1), 17.82(a)(1), and 59.130(d)(1) to require facilities to meet the requirements in the applicable provisions of current editions of publications produced by the NFPA. These publications are: NFPA 10, Standard for Portable Fire Extinguishers; NFPA 99, Standard for Health Care Facilities; NFPA 101, Life Safety Code; and NFPA 101A, Guide on Alternative Approaches to Life Safety.

We solicited comments regarding an interim final provision in the amendment to 38 CFR 59.130 that requires all buildings with nursing home facilities existing as of June 25, 2001, to have an automatic sprinkler system, as required in the 2009 edition of NFPA 101 by February 24, 2016. We provided a 60-day comment period on this interim final provision of the amendment to 38 CFR 59.130, and we received no comments.

Accordingly, we adopt this provision without change. This and all other provisions of the final rule with request for comments remain in effect as stated in the February 24, 2011, rule.

#### 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 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