

Office of the Secretary of Defense

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(3) Conduct an annual review of key positions and employees as noted herein.

(4) Petition to the respective Military Service any findings for adjudication of specific Ready Reserve members filling critical positions, as needed.

(5) When employers consider a Ready Reserve member as filling a key position within their organization, they should petition the applicable Reserve personnel center for discussion and adjudication. An employer may not take any employment action with regard to the position for which approval is sought based upon an employee or potential employee's military service until such time as the petition for approval has been approved by the relevant Service Secretary. Below is the list of Reserve personnel centers to which petitions shall be forwarded:

Army Reserve: U.S. Army Human Resources, Command 1800 Spearhead Division, Avenue ATTN: AHRC-ROR-PPA, Fort Knox, KY 40122-5100, <https://www.hrc.army.mil/>

Navy Reserve: Commander, Naval Military Personnel Command (Pers 91), 5720 Integrity Drive, Millington, TN 38055-9100, <https://www.public.navy.mil/bupers-npc/Pages/default.aspx>

Marine Corps Reserve: Director, Marine Corps Individual Reserve Support Activity (MCIRSA), 2000 Opelousas Ave., New Orleans, LA 70114, <https://www.marforres.marines.mil/Major-Subordinate-Commands/Force-Headquarters-Group/Marine-Corps-Individual-Reserve-Support-Activity/>

Air Force Reserve: Commander, Air Reserve Personnel Center/DPAM, 18420 E. Silver Creek Ave., Bldg. 390, MS 68, Buckley AFB, CO 80011, <https://www.arpc.afrc.af.mil/>

Coast Guard Reserve: Commander (PSC-RPM), U. S. Coast Guard Personnel Service Center, 2703 Martin Luther King Jr Ave. SE, Stop 7200, Washington, DC 20593-7200, <https://www.dcms.uscg.mil/Our-Organization/Assistant-Commandant-for-Human-Resources-CG-1/Personnel-Service-Center-PSC/Reserve-Personnel-Management-PSC-RPM/>

Army and Air National Guard: Submit petitions to the Adjutant General of the appropriate State, Territory, or the District of Columbia.

PART 45—MEDICAL MALPRACTICE CLAIMS BY MEMBERS OF THE UNIFORMED SERVICES

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AUTHORITY: 10 U.S.C. 2733a.

SOURCE: 86 FR 32208, June 17, 2021, unless otherwise noted.

§ 45.1 Purpose of this part.

(a) *In general.* The purpose of this part is to establish the rules and procedures for members of the uniformed services or their representatives to file claims for compensation for personal injury or death caused by the medical malpractice of a Department of Defense (DoD) health care provider. Claims under this part may be settled and paid by DoD under the Military Claims Act, Title 10, United States Code, Chapter 163, specifically section 2733a of Title 10 (hereinafter 10 U.S.C. 2733a, section 2733a, or the statute), as added to the Military Claims Act by section 731 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92; 133 Stat. 1457). Claims are adjudicated under an administrative process. This administrative process follows a set of rules and procedures set forth in this part. These rules and procedures are based primarily on a number of detailed provisions in the statute.

(b) *Relationship to military and veterans' compensation programs.* Federal law provides a comprehensive system of compensation for military members and their families in cases of death or disability incurred in military service. This system applies to all causes of death or disability incurred in service, whether due to combat injuries, training mishaps, motor vehicle accidents, naturally occurring illnesses, or household events, with limited exceptions (e.g., when the member is absent without leave or the injury is due to the

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member's intentional misconduct or willful negligence). This comprehensive compensation system applies to cases of personal injury or death caused by medical malpractice incurred in service as it does to all other causes. This part provides for the possibility of separate compensation in certain cases of medical malpractice but in no other type of case. A medical malpractice claim under this part will have no effect on any other compensation the member or the member's family is entitled to under the comprehensive compensation system applicable to all members. However, if the U.S. Government makes a payment for harm caused by malpractice, this payment reduces the potential damages under this part as provided in § 45.11.

(c) *Relationship to Healthcare Resolutions Program.* The medical malpractice claims process under this part is separate from the Military Health System Healthcare Resolutions Program. The Healthcare Resolutions Program, under Defense Health Agency Procedural Instruction 6025.17, is an independent, neutral, and confidential system that promotes full disclosure of factual information—including information involving adverse events and outcomes—and mediation of clinical conflicts. The program is part of the Military Health System's commitment to transparency, which also includes a patient's right to be heard as part of any quality assurance review of care provided. The Healthcare Resolutions Program is not involved in legal proceedings, compensation matters, or the adjudication of claims under this part. However, any member of the uniformed services may engage the Healthcare Resolutions Program to address non-monetary aspects of his or her belief that he or she has been harmed by medical malpractice by a DoD health care provider. Because it is not involved in claims or legal proceedings, the Healthcare Resolutions Program disengages when a claim is filed by a service member or his or her representative.

[86 FR 32208, June 17, 2021, as amended at 89 FR 40381, May 10, 2024]

§ 45.2 Claims payable and not payable in general.

(a) *In general.* This section sets forth a number of terms and conditions included in the statute (10 U.S.C. 2733a) that describe claims that are payable and not payable. Some of these terms and conditions are discussed in more detail in later sections of this part.

(b) *Claim not otherwise payable.* As required by the statute (section 2733a(b)(5)), a claim under this Part may only be paid if it is not allowed to be settled and paid under any other provision of law. This limitation provides that it cannot be a claim allowed under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346 and Chapter 171. Claims against the United States filed by members of the uniformed services or their representatives for personal injury or death incident to service are not allowed under the FTCA. These claims may be allowed under this Part if they meet the other applicable terms and conditions.

(c) *Time period for filing claims.* (1) The statute (section 2733a(b)(4)) requires that a claim must be received by DoD in writing within two years after the claim accrues. For mailed claims, timeliness of receipt will be determined by the postmark.

(2) There is a special rule for claims filed during calendar year 2020. Such claims must be presented to DoD in writing within three years after the claim accrues. The tolling provisions under the Servicemembers Civil Relief Act, 50 U.S.C. 3901-4043, are not applicable under this section.

(3) For purposes of applying the time limit for filing a claim, a claim accrues as of the latter of:

(i) The date of the act or omission by a DoD health care provider that is the basis of the malpractice claim; or

(ii) The date on which the claimant knew, or with the exercise of reasonable diligence should have known, of the injury and that malpractice was its possible cause.

(4) State statutes of limitation or repose are inapplicable.

(d) *No claim for attorney's fees or expenses in addition to statutorily allowed amount.* In calculating the amount that may be paid under this part, consistent

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with section 2733a(c)(2), there is no additional amount permitted for attorneys' fees or expenses associated with filing a claim or participating in any process relating to the adjudication of the claim. The adjudication of claims under this part is not an adversarial proceeding and there is no prevailing party to be awarded costs.

(e) *Claims adjudication based on national standards.* As required by the statute (section 2733a(f)(2)(B)), claims are adjudicated based on national standards consistent with generally accepted standards used in a majority of States in adjudicating claims under the FTCA. The determination of the applicable law is without regard to the place of occurrence of the alleged medical malpractice giving rise to the claim or the military or executive department or service of the member of the uniformed services. Foreign law has no role in the case of claims arising in foreign countries. The legal standards set forth in other sections of this part apply to determinations with respect to:

(1) Whether an act or omission by a DoD health care provider in the context of performing medical, dental, or related health care functions was negligent or wrongful, considering the specific facts and circumstances;

(2) Whether the personal injury or death of the member was proximately caused by a negligent or wrongful act or omission of a DoD health care provider in the context of performing medical, dental, or related health care functions, considering the specific facts and circumstances;

(3) Requirements relating to proof of duty, breach of duty, and causation resulting in compensable injury or loss, subject to such exclusions as may be established by this Part; and

(4) Calculation of damages that may be paid.

(f) *Certain other claims not payable.* The generally accepted legal standards under FTCA that are required to be reflected in the adjudication of claims under this Part include certain exclusions that are part of FTCA law.

(1) The due care and discretionary function exceptions apply to claims under this part.

(i) The due care and discretionary function exceptions, 28 U.S.C. 2680(a), bar any claim based upon an act or omission of a DoD health care provider, exercising due care, in the execution of a statute or regulation or based upon the exercise or performance of any discretionary function or duty on the part of DoD or a DoD health care provider.

(ii) The due care exception applies to any DoD health care provider's act, if carried out with due care, or omission, if omitted with due care, in the execution of a statute or regulation. The due care exception applies whether or not the statute or regulation is valid.

(iii) The discretionary function exception applies to the exercise or performance or the failure to exercise or perform any discretionary function. The discretionary function exception applies whether or not the discretion involved was abused. It applies to any DoD health care provider's act or omission that is a permissible exercise of discretion under the applicable statutes, regulations, or directive and, by its nature, is susceptible to policy analysis. The discretionary function exception applies to DoD policy decisions regarding clinical practice, patient triage, force health protection, medical readiness, health promotion, disease prevention, medical screening, health assessment, resource management, hiring and retaining employees, selection of contractors, military standards, fitness for duty, duty limitations, and health information management, among other matters affecting or involving the provision of health care services.

(2) The quarantine exception applies to claims under this part. This exception, consistent with 28 U.S.C. 2680(f), bars any claim for damages caused by the imposition or establishment of a quarantine by any agency of the U.S. Government.

(3) The combatant activities exception applies to claims under this part. This exception, consistent with 28 U.S.C. 2680(j), bars any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, in time of war.

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(4) The FTCA's exclusions under 28 U.S.C. 2674 of interest prior to judgment and punitive damages apply to any claim under this part.

(5) Claims based on intentional or negligent infliction of emotional distress, other intentional torts, wrongful death/life, strict liability, products liability, informed consent, negligent credentialing, or joint and severable liability theories are not payable under this part.

(6) Breach of medical confidentiality is not actionable under this part.

§ 45.3 Authorized claimants.

(a) *In general.* This section describes who may file a claim under this part. A claim may be filed only by a member of a uniformed service or an authorized representative on behalf of a member who is deceased or otherwise unable to file the claim due to incapacitation. A member of the uniformed services includes a cadet or midshipman from the military academies. It does not include an applicant to join a uniformed service or a delayed entry program recruit who has not been accessed into active duty.

(1) As provided in section 2733a(b)(1), the claim must be filed by the member of the uniformed services who is the subject of the medical malpractice claim or by an authorized representative on behalf of such member who is deceased or otherwise unable to file the claim due to incapacitation.

(2) In some circumstances, a claim otherwise payable under this part may be filed by or on behalf of a reserve component member. As provided in section 2733a(i)(3), those circumstances are that the claim is in connection with personal injury or death that occurred while the member was in a Federal duty status. This circumstance includes personal injury, death, or negligent diagnosis resulting from a negligent or wrongful act or omission that occurred while the member was in a Federal duty status. In the case of a member of the National Guard of the United States, a period of Federal duty status may be under Title 10, U.S. Code, or, based on 10 U.S.C. 12602, duty under title 32, U.S. Code. Other duty under State control is not covered.

(b) *Third party claims not allowed.* The statute only authorizes claims by members of the uniformed services. Thus, the regulation does not permit derivative claims or other claims from third parties alleging a separate injury as a result of harm to a member of the uniformed services. This prohibition includes claims by family members or survivors arising out of the circumstances of personal injury or death of a member.

(c) *Incident to service requirement.* Under section 2733a(a), the member's personal injury or death must be incident to service. An injury or death is incident to service if the medical care provided is based on the member's status under this section.

§ 45.4 Filing a claim.

(a) *In general.* A member of a uniformed service or, when applicable, an authorized representative may file a claim in writing. Any written claim will suffice as long as it is meets the requirements below and is signed by the claimant or authorized representative.

(b) *Contents of the claim.* The filed claim must include the following:

(1) The factual basis for the claim, including identification of the conduct allegedly constituting malpractice (e.g., the theory of liability and/or breach of the applicable standard of care);

(2) A demand for a specified dollar amount;

(3) If the claim is filed by an attorney, an affidavit from the claimant affirming the attorney's authority to file the claim on behalf of the claimant;

(4) If the claim is filed by an authorized representative, an affidavit from the representative affirming his/her authority to file on behalf of the claimant;

(5) If the claimant is not represented by an attorney, unless the alleged medical malpractice is within the general knowledge and experience of ordinary laypersons, an affidavit from the claimant affirming that the claimant consulted with a health care professional who opined that a DoD health care provider breached the standard of

care that caused the alleged harm. Alternatively, if the claimant is represented by an attorney, unless the alleged medical malpractice is within the general knowledge and experience of ordinary laypersons, the claim must include an affidavit from the attorney affirming that the attorney consulted with a health care professional who opined that a DoD health care provider breached the standard of care that caused the alleged harm.

(c) *Additional information to file in support of claim.* In the investigation and adjudication of a claim, DoD will access pertinent DoD records and information systems regarding the member in order to consider fully all facts that have a bearing on the claim. This collection may include information in personnel and medical records, the Defense Eligibility and Enrollment System (DEERS), reports of investigation, medical quality assurance records, and other information. Upon DoD's request, a claimant must identify any pertinent health care providers outside of DoD, and provide a copy of his or her medical records from each of the identified health care providers, including a statement that the records are complete. A claimant must provide medical release(s) upon DoD's request, enabling DoD to obtain medical records from these health care providers. Claimants may submit any other relevant information they believe supports their claim, such as information regarding the medical care involved, the acts or omissions the claimant believes constitute malpractice, medical opinions from non-DoD providers, and evidence of pain and suffering or other harm.

(d) *Substantiating the claim.* Under section 2733a(b)(6), DoD is allowed to pay a claim only if it is substantiated. The claimant has the burden to substantiate the claim by a preponderance of the evidence. Upon receipt of a claim, DoD may require that the claimant provide additional information DoD believes is necessary for adjudication of the claim, including the submission of an expert opinion at the claimant's expense. DoD may determine an expert opinion is not necessary when negligence is within the general knowledge and experience of ordinary laypersons, such as when a

foreign object is unintentionally left in the body or an operation occurred on the wrong body part. DoD may take other steps necessary to adjudicate the claim accurately, including conducting interviews of health care providers.

(e) *No discovery.* There is no discovery process for adjudication of claims under this part. However, claimants may obtain copies of records in DoD's possession that are part of their personnel and medical records in accordance with the Privacy Act of 1974, 5 U.S.C. 552a; DoD's Privacy Act regulation at 32 CFR part 310; and DoD Manual 6025.18, "Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule in DoD Health Care Programs." Claimants are not entitled to attorney work product, attorney-client privileged communications, material that is part of a DoD Quality Assurance Program protected under 10 U.S.C. 1102, pre-decisional material, or other privileged information.

[86 FR 32208, June 17, 2021, as amended at 87 FR 52462, Aug. 26, 2022]

§ 45.5 Elements of payable claim: facilities and providers.

(a) *In general.* This section describes some of the necessary elements of a payable claim. The health care involved must occur in a covered military medical treatment facility (MTF) and be provided by a DoD health care provider acting within the scope of employment.

(b) *Covered MTF.* (1) As provided in section 2733a(b)(3) and (i)(1), the alleged act or omission constituting medical malpractice must have occurred in a covered MTF. For the purposes of this regulation, an MTF is a medical center, inpatient hospital, or ambulatory care center, as those facilities are described in 10 U.S.C. 1073d. Fixed dental clinics are also included.

(2) A claim may not be based on health care services provided by DoD health care providers in any other location, such as in the field, battalion aid stations, ships, planes, deployed settings, or in any other place that is not a covered MTF.

(c) *DoD health care provider.* As provided in section 2733a(i)(2), a DoD health care provider is a member of the

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uniformed services, DoD civilian employee, or personal services contractor of the Department (under 10 U.S.C. 1091) authorized by DoD to provide health care services. A non-personal services contractor or a volunteer working in an MTF is not a DoD health care provider for purposes of a payable claim under this part.

(d) *Scope of employment.* As provided in section 2733a(b)(2), for a claim to be payable under this part, the DoD health care provider whose negligent or wrongful act or omission is the basis of a claim must be acting within the scope of employment, meaning that the provider was acting in furtherance of his or her duties in the MTF. For personal services contractors, “scope of employment” means the contractor was acting within the scope of his or her duties.

§ 45.6 Element of payable claim: negligent or wrongful act or omission.

(a) *In general.* To establish the element of a negligent or wrongful act or omission, a member of a uniformed service (“claimant”) allegedly harmed incident to service by medical malpractice must prove by a preponderance of the evidence that one or more DoD health care providers in a covered MTF acting within the scope of employment had a professional duty to the patient involved and by act or omission breached that duty which proximately caused the injury or death.

(b) *Standard of care.* The professional duty referred to in paragraph (a) of this section is a duty to exercise the same degree of skill, care, and knowledge ordinarily expected of providers in the same field or specialty in a comparable clinical setting. The standard of care is determined based on generally recognized national standards, not on the standards of a particular region, State or locality. However, standard of care in the military context may be impacted by the particular setting and the availability of resources in that setting.

(c) *Breach of the standard of care.* A breach referred to in paragraph (a) occurs if the health care provider or providers by act or omission did not meet the standard of care.

(d) *Presenting evidence of the standard of care.* A claimant may present evidence to support what the claimant believes is the standard of care relevant to the care involved in the claim.

(e) *Presenting evidence of a failure to meet the standard of care.* (1) A claimant may present evidence to support what the claimant believes demonstrates the failure of one or more DoD health care providers to meet the standard of care. That evidence may be based on the medical records of the patient involved and other documentary evidence of the acts or omissions of health care providers involved, including expert reports.

(2) Evidence of an apology by a health care provider or any other DoD or Military Department personnel, such as hospital directors or commanders, to or regarding a patient will not be considered evidence of medical malpractice. Providers often apologize for unexpected or adverse outcomes independent of whether the provider's acts or omissions met the standard of care.

(f) *Information DoD will consider in assessing whether there was a negligent or wrongful act or omission.* (1) In addition to the information submitted by the claimant, DoD may consider all relevant information in DoD records and information systems or otherwise available to DoD, including information prepared by or on behalf of DoD in connection with adjudication of the claim.

(2) DoD will consider medical quality assurance records relevant to the health care provided to the patient. DoD's Clinical Quality Management Program features reviews of many circumstances of clinical care. Results of any such reviews of the care involved in the claim that occurred before or after the claim was filed may be considered by DoD in the adjudication of the claim. As required by 10 U.S.C. 1102, DoD medical quality assurance records are confidential. While such records may be used by DoD, any information contained in or derived from such records may not be disclosed to the claimant.

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(a) *In general.* (1) In a case otherwise payable under this part, a claimant must prove by a preponderance of evidence that a negligent or wrongful act or omission by one or more DoD health care providers was the proximate cause of the harm suffered by the member.

(2) Under section 2733a(c)(1), DoD is liable for only the portion of compensable injury, loss, or damages attributable to the medical malpractice of a DoD health care provider. To the extent other causes contributed to the personal injury or death of the member, whether pre-existing, concurrent, or subsequent, the potential amount of compensation under this regulation will be reduced by that proportion of the alternative cause(s).

(b) *Comparative negligence.* A rule of modified comparative negligence will apply to claims under this part. If a claimant was contributorily negligent in relation to the health care provided, damages will be reduced by the proportion of fault assigned to the Service member. If the claimant's own negligence constituted more than 50% of the fault, the claim is not payable.

(c) *Loss of chance or failure to diagnose.* A claimant may recover for loss of chance for a more favorable clinical outcome in the diagnosis and treatment of his or her illness or injury. The claimant must prove by a preponderance of the evidence that one or more DoD health care providers in a covered MTF acting within the scope of employment had a professional duty to the claimant and by act or omission breached that duty and proximately caused harm. In proving that the claimant suffered harm, the claimant must prove that the lost chance for a better outcome or the failure to diagnose a condition is attributable to the provider or providers. The claimant must prove a substantial loss as opposed to a theoretical or *de minimis* loss. The portion of harm attributable to the breach of duty will be the percentage of chance lost in proportion to the overall clinical outcome. Damages will be calculated based on this portion of harm.

(d) *Information DoD will consider in assessing proximate cause.* (1) In addition

to the information submitted by the claimant, DoD may consider all relevant information in DoD records or information systems or otherwise available to DoD, including information prepared by or on behalf of DoD in connection with adjudication of the claim.

(2) DoD may consider medical quality assurance records relevant to the health care provided to the patient. DoD's Clinical Quality Management Program features reviews of many circumstances of clinical care. Results of any such reviews of the care involved in the claim that occurred before or after the claim was filed may be considered by DoD in the adjudication of the claim. As required by 10 U.S.C. 1102, DoD medical quality assurance records are confidential. While such records may be used by DoD, any information contained in or derived from such records may not be disclosed to the claimant.

[86 FR 32208, June 17, 2021, as amended at 87 FR 52462, Aug. 26, 2022]

§ 45.8 Calculation of damages: disability rating.

(a) *In general.* For certain purposes relating to calculating damages for a member in a claim under this part, DoD will use the disability rating established in the DoD Disability Evaluation System under DoD Instruction 1332.18¹ or otherwise established by the Department of Veterans Affairs (VA) to assess the extent of the harm alleged to have been caused by medical malpractice. This rating is stated as a disability percentage under the VA Schedule for Rating Disabilities (VASRD) under 38 CFR part 4 or a successor provision. Under 10 U.S.C. 1216a, DoD is required to use the VASRD for assessing the degree of disability of a member under the Disability Evaluation System. DoD will use it for purposes of this part as well. A VASRD-based disability percentage represents the Government's estimate of the lost earning capacity attributable to an illness or

¹ Available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133218p.pdf?ver=2018-05-24-133105-050>.

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injury incurred during military service. A Service member medically separated or retired through the Disability Evaluation System may receive distinct DoD and VA disability ratings. DoD will consider disability ratings, to the extent DoD deems pertinent, for other purposes relating to calculating damages, such as calculating loss of earning capacity and non-economic damages.

(b) *Disability rating procedures.* (1) If a claimant disagrees with the disability rating received in the DoD or VA disability evaluation or claims processes, the member must pursue the appeal opportunities available within the DoD and/or VA to change the member's disability rating.

(2) In any case in which a member has filed a claim under this part and also has a disability determination pending under DoD or VA disability evaluation or claims processes applicable to determinations or appeals, DoD may, in its discretion, hold in abeyance the claim under this part pending the outcome of the disability evaluation or claims process. DoD will notify the claimant that his or her claim is being held in abeyance.

(3) In any case in which a member has not yet received a DoD or VA disability evaluation because the member is retained on active duty, DoD will use the VASRD as the standard for assessing the degree of disability of the member relevant to the member's claim under this part.

§ 45.9 Calculation of damages: economic damages.

(a) *In general.* Economic damages are one component of a potential damages award. The claimant has the burden to prove the amount of economic damages by a preponderance of evidence. Estimates of future losses must be discounted to present value.

(b) *Elements of economic damages in personal injury cases.* Elements of economic damage are limited to the following:

(1) Past expenses, including medical, hospital, and related expenses actually incurred. These expenses do not include health care services provided or paid for by DoD or VA.

(2) Future medical, hospital, and related expenses. These expenses do not include health care goods and services for which the member is entitled to receive from, or be reimbursed for by, DoD (including TRICARE) or VA. Goods and services provided or paid for by DoD or VA are deemed sufficient to meet the claimant's needs for that particular type of good or service.

(3) Past lost earnings unrelated to compensation as a member of the uniformed services. Appropriate documentation is required.

(4) For future lost earnings:

(i) Until DoD determines that the claimant is, or is expected to be, medically rehabilitated and able to resume employment;

(ii) In cases of permanent incapacitation, until expiration of the claimant's work-life expectancy; or

(iii) In cases of death, until the expiration of the claimant's work-life expectancy, after deducting for the claimant's personal consumption.

(iv) Future lost earnings must be substantiated by appropriate documentation and claimants have an obligation to mitigate damages.

(v) In addition, loss of retirement benefits is compensable and similarly discounted after appropriate deductions. Estimates for future lost earnings and retirement benefits must be discounted to present value.

(5) Compensation when the claimant can no longer perform essential household services on his or her own behalf, including activities of daily living. This compensation does not include goods and services the member is entitled to receive from, or be reimbursed for by, DoD or VA. Goods and services provided or paid for by DoD or VA are deemed sufficient to meet the claimant's needs for that particular type of good or service.

(c) *Information DoD will consider in calculating economic damages.* In addition to the information submitted by the claimant, DoD may consider all relevant information in DoD records or information systems or otherwise available to DoD, including assessments from appropriate documentary sources and experts available to DoD.

(d) *Disability discrimination.* An injury or condition does not result in lost

earnings for purposes of, and is not compensable under, this part if the lost earnings stem from disability discrimination, which may be settled and paid under other provisions of law.

[86 FR 32208, June 17, 2021, as amended at 89 FR 40381, May 10, 2024]

§ 45.10 Calculation of damages: non-economic damages.

(a) *In general.* Non-economic damages are one component of a potential damages award. The claimant has the burden of proof on the amount of non-economic damages by a preponderance of evidence. DoD may request an interview of or statement from the claimant or other person with primary knowledge of the claimant. DoD may also require medical statements documenting the claimant's condition and, in cases of disfigurement, photographs documenting the claimant's condition.

(b) *Elements of non-economic damages.* Non-economic damages include pain and suffering; physical discomfort; mental and emotional trauma or distress; loss of enjoyment of life; physical disfigurement; and the inability to perform daily activities that one performed prior to injury, such as recreational activities. Such damages are compensable as part of non-economic damages.

(c) *Cap on non-economic damages.* In any claim under this part, total non-economic damages may not exceed a cap amount published by DoD via a FEDERAL REGISTER notice. DoD will periodically publish updates to this cap amount via FEDERAL REGISTER notices, consistent with changes in prevailing amounts in the majority of the States with non-economic damages caps.

(d) *Information DoD will consider in calculating non-economic damages.* In addition to the information submitted by the claimant, DoD may consider all relevant information in DoD records or otherwise available to DoD, including assessments from appropriate documentary sources and experts available to DoD.

[86 FR 32208, June 17, 2021, as amended at 87 FR 52462, Aug. 26, 2022; 89 FR 40382, May 10, 2024]

§ 45.11 Calculation of damages: offsets for DoD and VA Government compensation.

(a) *In general.* Total potential economic damages calculated under this part are reduced by offsetting most of the compensation otherwise provided or expected to be provided by DoD or VA for the same harm that is the subject of the medical malpractice claim. DoD has the burden to establish the applicability and amount of any offsets.

(b) *Eligibility for payments and benefits.* In determining the offsets that are applied to a medical malpractice damages award under this part, DoD presumes that a claimant will receive all the payments and benefits for which the claimant is expected to be eligible, whether or not the claimant has taken steps to obtain the payment or benefit or ultimately receives such payment or benefit. A claimant may present evidence that he or she is not eligible for a payment or benefit to rebut the presumption.

(c) *Present value of future payments and benefits.* In determining offsets under this section from economic damages, DoD will use the present value of future payments and benefits. Many such payments and benefits in cases of disability or death are lifetime benefits for members or survivors. With respect to any lifetime payments or benefits that may terminate upon the remarriage of a surviving spouse, DoD will not assume a remarriage. Estimates will be based on actuarial information provided by the Chief Actuary, DoD Office of the Actuary, taking into consideration methods and assumptions approved by the DoD Board of Actuaries and DoD Medicare-Eligible Retiree Health Care Board of Actuaries, respectively, as of the recent actuarial valuation date.

(d) *Information considered.* In determining offsets under this section, DoD will consider all data available in DoD records or information systems, other U.S. Government records systems, and other information available to DoD. This data may include information on military pay and allowances, Disability Evaluation System outcomes, VA disability claims, marital status, number and ages of dependents, survivor benefits, and other information. Access to

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all such information will be in accordance with the Privacy Act, 5 U.S.C. 552a, and applicable implementing regulations. Claimants must provide information not available to DoD, but requested by DoD, for the purpose of determining offsets.

(e) *Benefits and payments that may be considered as potential offsets.* The general rule is that potential damages calculated under this part may be offset only by DoD or VA payments and benefits that are primarily funded by Government appropriations. Potential damages calculated under this part are not offset by U.S. Government payments and benefits that are substantially funded by the military member. The following examples are provided for illustrative purposes only, are not all-inclusive, and are subject to adjustment as appropriate.

(1) The following DoD and VA payments and benefits are primarily funded from Government appropriations and will be offset:

(i) Disability retired pay in the case of retirement due to the disability caused by the alleged medical malpractice;

(ii) Disability severance pay in the case of non-retirement disability separation caused by the alleged medical malpractice.

(iii) Incapacitation pay.

(iv) Involuntary and voluntary separation pays and incentives.

(v) Death gratuity.

(vi) Housing allowance continuation.

(vii) Survivor Benefit Plan.

(viii) VA disability compensation, to include Special Monthly Compensation, attributable to the disability resulting from the malpractice.

(ix) VA Dependency and Indemnity Compensation, attributable to the disability resulting from the malpractice.

(x) Special Survivor Indemnity Allowance.

(xi) Special Compensation for Assistance with Activities of Daily Living.

(xii) Program of Comprehensive Assistance for Family Caregivers.

(xiii) Fry Scholarship.

(xiv) TRICARE coverage, including TRICARE-for-Life, for a disability retiree, family, or survivors. Future TRICARE coverage is part of the Gov-

ernment's compensation package for a disability retiree or survivor.

(2) The following U.S. Government payments and benefits are substantially funded by the military members or are otherwise generally not eligible for consideration as potential offsets:

(i) Servicemembers Group Life Insurance.

(ii) Traumatic Servicemembers Group Life Insurance.

(iii) Social Security disability benefits.

(iv) Social Security survivor benefits.

(v) Prior Government contributions to a Thrift Savings Plan.

(vi) Commissary, exchange, and morale, welfare, and recreation facility access.

(vii) Value of legal assistance and other services provided by DoD.

(viii) Medical care provided while in active service or in an active status prior to death, retirement, or separation.

[86 FR 32208, June 17, 2021; 86 FR 33885, June 28, 2021, as amended at 87 FR 52462, Aug. 26, 2022; 89 FR 40382, May 10, 2024]

§45.12 Initial and Final Determinations.

(a) *Denial of claim—deficient filing.* If a claim does not contain the information required by §45.4(b), DoD will issue an Initial Determination stating that DoD will issue a Final Determination denying the claim unless the deficiency is cured.

(1) DoD will provide the claimant 90 calendar days following receipt of the Initial Determination to cure the deficiency, unless an extension of time is granted for good cause by the DoD Component which issued the Initial Determination. The date of receipt of the Initial Determination will be presumed to be seven calendar days after the date the Initial Determination was mailed or emailed, unless there is evidence to the contrary.

(2) If the claimant does not timely cure the deficiency, DoD will issue a Final Determination denying the claim for failure to cure the deficiency. A Final Determination issued under paragraph (a) of this section may not be appealed.

(b) *Denial of claim—failure to state a claim.* If a claim does not, based upon

the information provided, state a claim cognizable under 10 U.S.C. 2733a or this interim final rule, DoD will issue an Initial Determination denying the claim. Such an Initial Determination may be appealed under the procedures in § 45.13.

(c) *Denial of claim—absence of an expert report.* Where applicable, if the claimant initially does not submit an expert report in support of his or her claim and DoD intends to deny the claim, DoD will issue an Initial Determination stating that DoD will issue a Final Determination denying the claim in the absence of an expert report or manifest negligence. DoD will provide a meaningful explanation for the intent to deny the claim that includes the specific basis for the denial.

(1) DoD will provide the claimant 90 calendar days following receipt of the Initial Determination by the claimant or, if the claimant is represented, by the claimant's representative, to submit an expert report, unless an extension of time is granted for good cause. The date of receipt of the Initial Determination will be presumed to be seven calendar days after the date the Initial Determination was mailed or emailed, unless there is evidence to the contrary.

(2) If the claimant does not timely submit an expert report, DoD will issue a Final Determination denying the claim. A Final Determination issued under this paragraph (c) may not be appealed.

(d) *Initial Determination.* (1) Upon consideration of the information provided by the claimant and relevant information available to DoD, DoD will issue the claimant a written Initial Determination.

(2) The Initial Determination may be in the form of a certified letter and/or an email. The Initial Determination may take the form of a grant of a claim and an offer of settlement or a denial of the claim. Subject to applicable confidentiality requirements, such as 10 U.S.C. 1102, privileged information, and paragraph (a) of this section, DoD will provide a meaningful basis for an offer of settlement or will provide a meaningful explanation for the denial of a claim that includes the specific basis for the denial.

(3) The Initial Determination will include information on the claimant's right to appeal if the claimant does not agree with the Initial Determination.

(4) The claimant may request reconsideration of the damages calculation contained in an Initial Determination if, within the time otherwise allowed to file an administrative appeal, the claimant identifies an alleged clear error—a definite and firm conviction that a mistake has been committed—in the damages calculation. The DoD Component that issued the Initial Determination will review the alleged clear error and will issue an Initial Determination on Reconsideration either granting or denying reconsideration of the Initial Determination and adjusting the damages calculation, if appropriate. The Initial Determination on Reconsideration will include information on the claimant's right to appeal under the procedures in § 45.13.

[86 FR 32208, June 17, 2021, as amended at 87 FR 52463, Aug. 26, 2022]

§ 45.13 Appeals.

(a) *In general.* This section describes the appeals process applicable to Initial Determinations under this part, which include Initial Determinations on Reconsideration. With the exception of Initial Determinations issued under § 45.12(a), in any case in which the claimant disagrees with an Initial Determination, the claimant has a right to file an administrative appeal. The claimant should explain why he or she disagrees with the Initial Determination, but may not submit additional information in support of the claim unless requested to do so by DoD. An appeal must be received within 90 calendar days of the date of receipt of the Initial Determination by the claimant or, if the claimant is represented, the claimant's representative, unless an extension of time is granted for good cause by the DoD Component that issued the Initial Determination. The date of receipt of the Initial Determination will be presumed to be seven calendar days after the date the Initial Determination was mailed or emailed, unless there is evidence to the contrary. If no timely appeal is received, DoD will issue a Final Determination.

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(b) *Appeals Board.* Appeals will be decided by an Appeals Board administratively supported by the Office of the General Counsel, Defense Health Agency. Although there may be, in DoD's discretion, multiple offices that initially adjudicate claims under this part (such as offices in the Military Departments), there is a single DoD Appeals Board. The Appeals Board will consist of DoD attorneys designated by the Defense Health Agency from that agency and/or the Military Departments who are experienced in medical malpractice claims adjudication. Appeals Board members must not have had any previous role in the claims adjudication under appeal. The Appeals Board will consider cases in panels designated by the General Counsel of the Defense Health Agency of not fewer than three and no more than five Appeals Board members. Appeals are decided on a written record and decisions will be approved by a majority of the members. There is no adversarial proceeding and no hearing. There is no opposing party. The Appeals Board may obtain information or assessments from appropriate sources, including from the claimant, to assist in deciding the appeal. The Appeals Board is bound by the provisions of this part and will not consider challenges to them.

(c) *Burden of proof.* The claimant on appeal has the burden of proof by a preponderance of evidence that the claim is substantiated in the written record considered as a whole.

(d) *Appeals Board decisions.* (1) Every claimant will be provided a written Final Determination on the claimant's appeal. The Final Determination may adopt by reference the Initial Determination or revise the Initial Determination, as appropriate. If the Final Determination revises the Initial Determination, DoD will provide a meaningful explanation of the basis for the revisions.

(2) An Appeals Board decision is final and conclusive. 10 U.S.C. 2735.

(3) The Appeals Board may reverse the Initial Determination to grant or deny a claim and may adjust the settlement amount contained in the In-

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tial Determination either upwards or downwards as appropriate.

[86 FR 32208, June 17, 2021, as amended at 87 FR 52463, Aug. 26, 2022]

§45.14 Final and conclusive resolution.

(a) *Administrative adjudication final.* As provided in 10 U.S.C. 2735, the adjudication and settlement of a claim under this part is final and conclusive and not subject to review in any court. Unlike the FTCA, the Military Claims Act, 10 U.S.C. chapter 163, which provides the authority for this part, does not give Federal courts jurisdiction over claims. Further, no claim under this Part may be paid unless the amount tendered is accepted by the claimant in full satisfaction.

(b) *Additional terms of settlement agreement.* (1) Settlement agreements under this part will incorporate the requirement of section 2733a(g)(1) that no attorney may charge, demand, receive, or collect for services rendered, fees in excess of 20 percent of any claim payment amount under this part.

(2) Because settlement and payment of a claim under this part is under section 2733a(b)(5) conditional on the claim not being allowed to be settled and paid under any other provision of law, a settlement agreement under this part will include a provision that it bars any other claim against the United States or DoD health care providers arising from the same set of facts.

§45.15 Other claims procedures and administrative matters.

(a) *Payment of damages.* In the event damages are awarded, the claimant or the claimant's estate is entitled to payment of those damages.

(b) *Communication through counsel.* If the claimant is represented by counsel, all communications will be through the claimant's counsel.

(c) *Remedies for filing false claims or making false statements.* Remedies available to the United States for filing false claims with Federal agencies or making false statements to Federal agencies and officials are applicable to claims and statements made in connection with claims under this part. Applicable authorities include 31 U.S.C. 3729

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and 18 U.S.C. 1001. False claims and claims supported by false statements will be denied.

(d) *Reports to the Defense Health Agency.* As provided in section 2733a(e), not later than 30 calendar days after a Final Determination of medical malpractice or the payment of all or a portion of a claim under this part, a report documenting that determination is sent to the Director, Defense Health Agency to be used for all necessary and appropriate purposes, including those actions undertaken as part of DoD's Clinical Quality Management Program.

(e) *Monitoring claims adjudications under this part.* The General Counsel of the Defense Health Agency will monitor the performance of the claims adjudications structures and procedures under this part, including accounting for the number of claims processed under this part and the resolution of each claim and identifying means to enhance the effectiveness of the claims adjudication process.

(f) *Authority for actions under this part.* To ensure consistency and compliance with statutory requirements, supplementation of the procedures in this part is not permitted without approval in writing by the General Counsel of the Department of Defense. The General Counsel of the Department of Defense, under DoD Directive 5145.01, "General Counsel of the Department of Defense," may delegate in writing authority for making Initial and Final Determinations, and other actions by DoD officials under this part. As used in this part, and at DoD's discretion, "DoD" or "DoD Components" may include, but is not limited to, Military Departments.

[86 FR 32208, June 17, 2021, as amended at 87 FR 52463, Aug. 26, 2022]

PART 47—ACTIVE DUTY SERVICE FOR CIVILIAN OR CONTRACTUAL GROUPS

Sec.

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- 47.2 Applicability and scope.
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APPENDIX A TO PART 47—INSTRUCTIONS FOR SUBMITTING GROUP APPLICATIONS UNDER PUBLIC LAW 95-202

APPENDIX B TO PART 47—THE DOD CIVILIAN/MILITARY SERVICE REVIEW BOARD AND THE ADVISORY PANEL

AUTHORITY: 38 U.S.C. 106 note.

SOURCE: 54 FR 39993, Sept. 29, 1989, unless otherwise noted.

§47.1 Purpose.

This document:

(a) Revises 32 CFR part 47 and implements Public Law 95-202.

(b) Directs the Secretary of the Air Force to determine if an established group of civilian employees or contract workers provided service to the U.S. Armed Forces in a manner considered active military service for Department of Veterans Affairs (VA) benefits.

(c) Establishes the DoD Civilian/Military Service Review Board and the Advisory Panel.

(d) Establishes policy, assigns responsibilities, prescribes application procedures for groups and individuals, and clarifies the factors used to determine active duty (AD) service.

§47.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense (OSD), the Military Departments, and by agreement with the Department of Transportation (DoT), the U.S. Coast Guard.

(b) Applies to any group application considered under Public Law 95-202 after September 11, 1989 and to any individual who applies for discharge documents as a member of a group recognized by the Secretary of the Air Force.

§47.3 Definitions.

Armed conflict. A prolonged period of sustained combat involving members of the U.S. Armed Forces against a foreign belligerent. The term connotes more than a military engagement of limited duration or for limited objectives, and involves a significant use of military and civilian forces.

(a) Examples of armed conflict are World Wars I and II, and the Korean and Vietnam Conflicts.

(b) Examples of military actions that are not armed conflicts are as follows: