

DEPARTMENT OF VETERANS AFFAIRS**38 CFR Part 5****RIN 2900-AM04****Improved Pension****AGENCY:** Department of Veterans Affairs.**ACTION:** Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to reorganize and rewrite in plain language its Improved Pension regulations. These revisions are proposed as part of VA's rewrite and reorganization of all of its compensation and pension rules in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist claimants, beneficiaries, and VA personnel in locating and understanding these Improved Pension regulations.

DATES: Comments must be received by VA on or before November 26, 2007.

ADDRESSES: Written comments may be submitted through <http://www.regulations.gov>; by mail or hand-delivery to: Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AM04—Improved Pension." Copies of 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. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

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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 that apply to VA's Improved Pension program. 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.

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Overview of New Part 5 Organization

We plan to organize the new part 5 regulations so that most provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. 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. This subpart was published as proposed on March 31, 2006. *See* 71 FR 16464.

"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 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 Notices of Proposed Rulemaking (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. The second, covering general evidence requirements, effective dates for awards, revision of decisions, and protection of VA ratings, was published as proposed on May 22, 2007. *See* 72 FR 28770.

"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. This subpart was published as proposed on September 20, 2006. *See* 71 FR 55052.

"Subpart E—Claims for Service Connection and Disability Compensation" would define service-connected disability compensation and service connection, including direct and secondary service connection. This subpart would inform readers how VA determines service connection and entitlement to disability compensation. 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: Old-Law Pension, Section 306 Pension, and Improved Pension. This subpart would also include those provisions that state how to establish eligibility and entitlement to Improved 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. The portion concerning eligibility and entitlement requirements, as well as effective dates for Improved Pension is the subject of this document.

"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 dependency and indemnity compensation (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 was published as two separate NPRMs due to its size. The portion concerning accrued benefits, death compensation, 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 was published on October 21, 2005. *See* 70 FR 61326.

"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. This subpart was published as proposed on March 9, 2007. *See* 72 FR 10860.

"Subpart I—Benefits for Certain Filipino Veterans and Survivors" would pertain to the various benefits available to Filipino veterans and their survivors. This subpart was published as proposed on June 30, 2006. *See* 71 FR 37790.

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

"Subpart K—Matters Affecting the Receipt of Benefits" would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits. This subpart was published as proposed on May 31, 2006. *See* 71 FR 31056.

"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 to Dependents and Payments to Fiduciaries and 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 for the Project, 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.

Because of its large size, proposed part 5 will be published in a number of NPRMs, such as this one. VA will not adopt any portion of part 5 as final until all of the NPRMs have been published for public comment.

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 rulemakings.

Overview of This Notice of Proposed Rulemaking

This NPRM pertains to the Improved Pension program. These regulations would be contained in proposed Subpart F of new 38 CFR part 5. 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 differences are proposed, as are some regulations that do not have counterparts in 38 CFR part 3.

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 (or “New”)
5.370	3.23(a), (d)(4) and (5); 3.24(a); 3.271(a), (h); 3.351(b), (f)
5.371(a)	New
5.371(b)	3.3(a)(3)
5.371(c)	3.3(b)(4)
5.371(d)	3.3(a)(3)(v), (b)(4)(iii)
5.372(a)	3.3(a)(3)
5.372(b)	3.3(a)(3)(i)–(iv), (b)(4)(i)
5.372(c)	3.3(b)(4)(ii)
5.373	3.208
5.380	3.3(a)(3)(vi)(A), (B)(1) and (2)
5.381	3.342
5.382	3.323(b)
5.383(a)	3.400(intro), (b)(1)(intro), (b)(1)(ii)(A)
5.383(b)	3.151(b); 3.400(b)(1)(ii)(B)
5.390(a)	3.351(b)
5.390(b)	3.351(c)
5.391(a)	3.351(d)

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph (or “New”)	Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph (or “New”)
5.391(b)	New	5.414(a)(4)	3.276(b)
5.391(c)	3.351(f)	5.414(b)	3.274(a), (c)
5.392	3.401(a)(1); 3.402(c)(1)	5.414(c)(1)	3.274(b), (d)
5.400(a)	3.23(a); 3.24(b)	5.414(c)(2)	3.274(e)
5.400(a)(1)	3.23(a)(1)	5.414(c)(3)	3.275(e)
5.400(a)(2)	3.23(a)(3)	5.414(d)	3.275(d)
5.400(a)(3)	3.23(a)(2)	5.414(e)(1)	3.275(h)
5.400(a)(4)	3.23(a)(4)	5.414(e)(2)–(5)	New
5.400(a)(5)	3.23(a)(5)	5.415	3.660(a)(2), (d)
5.400(a)(6)	3.23(a)(7)	5.416(a)	3.23(d)(1); 3.60
5.400(a)(7)	3.23(a)(6)	5.416(b)	3.23(d)(1)
5.400(a)(8)	3.24(b)	5.416(c)	3.23(d)(4), (5)
5.400(b)	3.23(c)	5.417(a)–(c)	3.57(d)(1)
5.400(c)	New; 3.23(a)(5)	5.417(d), (e)	3.57(d)(2)
5.401(a)	3.27(a)	5.417(f), (g)	3.57(d)(3)
5.401(b)	3.23(a), (c); 3.24(b); 3.27(e)	5.420	New
5.410(a)	3.271(a)	5.421	3.29(b); 3.273 intro, (a), (b)
5.410(b)(1)	3.23(d)(4)	5.422(a)(1)	New
5.410(b)(2)	3.23(d)(5)	5.422(a)(2)	3.660(a)(2)
5.410(b)(3)	New	5.422(b)	3.660(b), (c)
5.410(c)(intro)	3.271(a)	5.423(a)	3.271(f)(1)
5.410(c)(1)	3.271(a)(1), 3.273(d)	5.423(b)	3.271(f)(2)
5.410(c)(2)	3.271(a)(3), 3.273(c)	5.424(a)–(c)	3.660(b)
5.410(c)(3)	3.271(a)(2), 3.273(d)	5.424(d)	New
5.410(d)	3.276(a)	5.425	3.30 intro, (a)–(d), (f)
5.410(e)	3.271(b)	5.430(a)	3.54 intro, (a)(2)
5.410(f)(1), (2)	3.271(d)	5.430(a)(1)	3.54(a)(1)
5.410(f)(3)	New	5.430(a)(2)	3.54(a)(3)
5.411(a)(1)	3.23(d)(5), (6); 3.272(m)	5.430(b)	3.54(e)
5.411(a)(2)	3.23(d)(4), (5), 3.272(m)	5.431(a)	New
5.411(b)	3.23(d)(6) (second sentence)	5.431(b)	3.400(c)
5.411(c)	3.272(j)	5.432	3.52(d)
5.412(a)	3.272(a), (l)	5.433	3.657(a)
5.412(a)(1)	3.272(b)	5.434	3.503(a)(9); 3.657(b)
5.412(a)(2)	New	5.435	3.24; 3.57(d)(2)
5.412(a)(3)	3.272(l)		
5.412(b)(1)	3.272(c)		
5.412(b)(2), (3)	New		
5.412(c)	3.272(d)		
5.412(d)	3.272(e)		
5.412(e)	3.272(f)		
5.412(f)	3.272(n)		
5.412(g)	3.272(s)		
5.412(h)–(j)	New		
5.412(k)(1)	3.272(q)		
5.412(k)(2)–(8)	New		
5.413(a)	3.272 (intro)		
5.413(b)(intro)	3.272(g)(intro)		
5.413(b)(1)	3.272(g)(1)(iii), (2)(iii)		
5.413(b)(2)(i)	3.272(g)(1)(i)		
5.413(b)(2)(ii)	3.272(g)(2)(i)		
5.413(b)(2)(iii)	3.272(g)(3)		
5.413(c)(1)(i)	3.272(h)		
5.413(c)(1)(ii)	New		
5.413(c)(1)(iii)	3.272(h)(1)(ii)		
5.413(c)(2)(i)–(iii)	3.272(h)(1)(ii), (2)		
5.413(c)(2)(iv)	3.272(h)(1)(i)		
5.413(c)(3)	3.272(h)(1)(ii)		
5.413(d)	3.272(i)		
5.413(e)	New		
5.413(f)	3.271(g)		
5.413(g)(1)	3.271(c)(1)		
5.413(g)(2)	3.271(c)(2)		
5.413(g)(3)	3.271(c)(3)		
5.414(a)(1), (2)	3.275(b)		
5.414(a)(3)	3.275(c)		

Readers who use this table to compare existing regulatory provisions with the proposed provisions, and who observe a substantive difference between them, should consult the text that appears later in this document for an explanation of significant changes in each regulation. Not every paragraph of every current part 3 section 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.

Background Information

The term "Improved Pension" is derived from the "Veterans' and Survivors' Pension Improvement Act of 1978," Public Law 95-588, 92 Stat. 2508. Improved Pension is the current nonservice-connected disability or death pension program that VA offers to new VA pension applicants. The Improved Pension designation distinguishes this program from "Section 306" Pension and "Old-Law" Pension, the nonservice-connected disability or death pension programs VA offered to new VA pension applicants before January 1, 1979. Statutes that pertain to Improved Pension are primarily found in chapter 15 of title 38, United States Code.

The regulations in this NPRM apply only to Improved Pension. We recognize that in the past, some of the regulations on which these proposed regulations are based applied to Old-Law Pension and/or Section 306 Pension, as well as Improved Pension. However, claimants can no longer establish entitlement to Old-Law Pension or Section 306 Pension programs. Therefore, certain regulations that once applied to other pension programs now apply to Improved Pension only. Examples include regulations pertaining to establishing wartime service, marriage dates, and determinations of permanent and total disability. Those regulations form the basis for many of the regulations in this NPRM.

Content of Proposed Regulations

Improved Pension Requirements—Veterans, Surviving Spouses, and Surviving Children

Section 5.370 Definitions for Improved Pension

Proposed § 5.370 contains definitions of certain basic terms used throughout the regulations governing Improved Pension benefits. The proposed definitions will make these regulations easier to use and understand.

We propose to use the terms "adjusted annual income" and "maximum annual pension rate" throughout part 5. The definitions of both of these terms are based on sections 1503, 1521, 1541 and 1542 of title 38, United States Code. Section 1503 provides that "annual income" for Improved Pension purposes consists of all payments, subject to certain exceptions. 38 U.S.C. 1503(a). We propose, rather than refer to "annual income," to refer to "adjusted annual income." We propose to define "adjusted annual income" as "countable annual income minus deductions

described in § 5.413, rounded down to the nearest dollar." Readers already familiar with the Improved Pension program will recognize the definition of "adjusted annual income" as synonymous with what is commonly termed within VA as "Income for VA Purposes" or "IVAP." The proposed definition of "adjusted annual income" combines most of current § 3.271 with paragraphs (d)(4) and (d)(5) of § 3.23, and current § 3.276(a).

We also propose to standardize references to the actual amount of Improved Pension VA pays by using the term, "Annual Improved Pension amount." Using standardized terms will help reduce confusion in these regulations. We propose to define "annual Improved Pension amount" as "the amount of Improved Pension payable to a beneficiary, calculated as the maximum annual pension rate minus adjusted annual income." This definition is based on current § 3.23(b), which requires VA to calculate an award of pension by subtracting the amount of the countable annual income of the veteran or surviving spouse from the maximum annual pension rate.

We define "countable annual income" as "payments of any kind from any source" unless specifically excluded. This definition is also consistent with current VA regulations.

We propose to define the term "maximum annual pension rate" as the pension rate payable to a beneficiary whose income is zero. The term "maximum annual pension rate," or "MAPR," is well-known and understood by persons familiar with the Improved Pension program, and the definition reflects the common understanding of the terms. More importantly, we believe this term is necessary to avoid confusion. The authorizing statute, 38 U.S.C. 1521, refers to pension paid at one of several "annual rate[s]," which are then reduced by the claimant's or beneficiary's annual income in order to determine the actual annual amount payable. In other words, a beneficiary may receive the statutory "annual rate of pension" (*i.e.*, the MAPR) only if his or her adjusted annual income is zero. We believe it is essential to emphasize that these statutory rates are maximum rates.

We propose to define "payments" as cash and cash equivalents (such as checks and other negotiable instruments), and the fair market value of personal services, goods or room and board received in lieu of other forms of payment. It is important that readers know that not only is currency considered income, but checks and

money orders as well, to include the market value of goods or services received in lieu of cash.

Although "Special Monthly Pension" is not defined in the current regulations, we propose to offer a definition to clarify for readers that Special Monthly Pension is a higher maximum annual pension rate applicable to a veteran or surviving spouse by reason of a disability or disabilities ratable at 60 percent or more, their housebound status or their need for the aid and attendance of another person in performing their daily living habits. The statutory authority for pension at this rate is contained in 38 U.S.C. 1521(d) and (e), and 1541(d) and (e).

Proposed § 5.370 defines a surviving child for Improved Pension purposes as one who is eligible for Improved Death Pension and who is not in the custody of a surviving spouse eligible for Improved Death Pension. This definition is critical to understanding the Improved Pension program because a child who is in the custody of a surviving spouse who has basic eligibility to receive Improved Pension has no separate eligibility. A child in this circumstance is a dependent of the surviving spouse and would be included in the surviving spouse's award.

Section 5.371 Eligibility and Entitlement Requirements for Improved Pension

Proposed § 5.371 is based on current §§ 3.3(a)(3), 3.3(b)(4), and 3.24(a). In this regulation concerning Improved Pension, we provide an overview of the Improved Pension program and the specific criteria that must be met to receive payments under this program.

Proposed § 5.371(a) is an introductory statement intended to give readers a general overview of the Improved Pension program. This section explains that Improved Pension claimants must be both eligible and entitled before benefits can be paid. We propose to use the term "eligibility" to refer to the age and service requirements applicable to Improved Pension awards, while the income and net worth requirements applicable to Improved Pension will be referred to as "entitlement" requirements.

We recognize that in common usage there is little, if any, difference between the words "eligible" and "entitled." Both terms generally mean "qualified," but defining these terms will make the Improved Pension regulations easier to understand. A veteran is "eligible" for Improved Disability Pension if he or she meets the basic requirements found in 38 U.S.C. 1521(a) or 1513 concerning

wartime service and disability or age 65. A surviving spouse is "eligible" for Improved Death Pension if the veteran met the basic requirements found in section 1541(a) concerning wartime service and disability. A surviving child is "eligible" for Improved Death Pension if the veteran met the basic requirements of section 1542 concerning wartime service and disability and if the child is not in the custody of an eligible surviving spouse. Veterans, surviving spouses, or surviving children are "entitled" to Improved Pension benefit payments only so long as their income is within statutory limits and their net worth does not bar payment. It is important to maintain a distinction between "eligibility" and "entitlement" in the regulations governing Improved Pension.

We propose to refer to the pension program for veterans as "Improved Disability Pension" and the program for survivors as "Improved Death Pension." Proposed § 5.371(b) is based on current § 3.3(a)(3), and describes the eligibility criteria for Improved Disability Pension for veterans. We recognize that the "disability" designation is a misnomer because veterans are no longer required to be disabled to receive Improved Disability Pension if they have attained age 65. A veteran having reached age 65 who meets the service requirements of 38 U.S.C. 1521 may be paid Improved Disability Pension without a documented total and permanent disability as long as the entitlement criteria have been met. See 38 U.S.C. 1513. However, we propose to retain the long-standing and statutory "disability pension" designations to distinguish it from other pension benefits.

Proposed § 5.371(c) describes the eligibility criteria for Improved Death Pension for a deceased veteran's surviving spouse or surviving child. Under 38 U.S.C. 1541 and 1542, it is not required that the veteran's death be nonservice-connected in order for the survivor to be eligible for Improved Death Pension. Therefore, instead of using the term, "nonservice-connected death," which is used in current § 3.3(b)(4), we propose to state in § 5.371(c)(3) that a survivor may be eligible for Improved Death Pension regardless of whether the veteran's death is service-connected. This will clarify that even if the veteran's death is service-connected (and the survivor is eligible for dependency and indemnity compensation (DIC)), the survivor may instead elect to receive Improved Death Pension.

Proposed § 5.371(d) is based on current §§ 3.3(a)(3)(v) and (b)(4)(iii), and expands on these provisions in order to

clarify that a claimant or beneficiary is entitled to Improved Pension benefits only when the claimant's or beneficiary's adjusted annual income is lower than the applicable maximum annual pension rate and when the claimant's or beneficiary's net worth does not bar benefit payments.

Section 5.372 Wartime Service Requirements for Improved Pension

Proposed § 5.372 pertains to veterans, surviving spouses, and surviving children. The definition of a surviving spouse is contained in proposed § 5.200, which was published in the **Federal Register** on September 20, 2006, in RIN 2900-AL94. See 71 FR 55052. Proposed § 5.200 defines surviving spouse as a person who met all of the requirements for being a spouse in proposed § 5.190 at the time the veteran died, who has not remarried, and who lived continuously with the veteran from the date of marriage to the date of the veteran's death. A surviving child for Improved Pension purposes is defined in proposed § 5.370 as a child who is eligible for Improved Death Pension as the surviving child of a deceased wartime veteran and who is not in the custody of a surviving spouse eligible to receive Improved Death Pension.

Proposed § 5.372 is based on paragraphs (a)(3)(i) through (iv) as well as paragraphs (b)(4)(i) and (ii) of current § 3.3. These paragraphs currently provide the wartime service periods for Improved Pension. Proposed § 5.372(a) includes a cross-reference to the proposed wartime service regulation in § 5.20 (69 FR 4832), so that persons who require more specific provisions concerning wartime periods may easily find them. Consistent with our proposal in a prior NPRM (69 FR 4822), we would shorten the term, "active military, naval, or air service," to "active military service."

Proposed § 5.372(b)(1) is based on current § 3.3(a)(3)(iii) and requires that at least one day during a period of qualifying service of at least 90 consecutive days be served during a wartime period.

Proposed § 5.372(b)(2) is based on current § 3.3(a)(3)(i) and states VA's long-standing interpretation that separate periods of service within the same wartime period may be added together. We believe that this is a reasonable interpretation of 38 U.S.C. 1521(j), upon which current § 3.3(a)(3)(i) is based.

Section 5.373 Evidence of Age in Improved Pension Claims

Proposed § 5.373 is based on current § 208. No substantive changes are intended.

Improved Disability Pension—Disability Determinations and Effective Dates

Section 5.380 Disability Requirements and Presumptions for Improved Disability Pension

Proposed § 5.380 is based on paragraphs (a)(3)(vi)(A) and (B)(1) and (2) of current § 3.3. We propose no substantive changes. We propose not to include paragraphs (a)(3)(vi)(B)(3) and (4) in part 5 because these current paragraphs are redundant of current §§ 3.340 and 3.342, and those criteria would be made expressly applicable to part 5 Improved Pension claims by proposed § 5.381.

Section 5.381 Permanent and Total Disability Ratings for Improved Disability Pension Purposes

We propose to repeat most of the content of § 3.342 in § 5.381 with minor technical changes, and cross reference to current § 3.340, "Total and permanent total ratings and unemployability," for other qualifying criteria. However, we propose not to repeat the provisions of § 3.342(c), which concern a temporary program of vocational training for certain new pension recipients. This program was based on 38 U.S.C. 1524 and allowed veterans who were awarded Improved Pension to receive vocational rehabilitation and employment services from VA. However, Congress included a provision allowing the Secretary of Veterans Affairs to set a reasonable time limit for veterans to participate in the program. Specifically, § 1524(b)(4) states that:

A veteran may not begin pursuit of a vocational training program under this subsection after the later of (A) December 31, 1995, or (B) the end of a reasonable period of time, as determined by the Secretary [of Veterans Affairs], following either the evaluation of the veteran under subsection (a) of this section or the award of pension to the veteran as described in subsection (a)(2) of this section. Any determination by the Secretary of such a reasonable period of time shall be made pursuant to regulations which the Secretary shall prescribe.

The Secretary of Veterans Affairs has not extended the period for beginning a vocational training program beyond December 31, 1995. Moreover, the Secretary has promulgated a regulation stating that no veteran may receive VA assistance under 38 U.S.C. 1524 after January 31, 1998. 38 CFR 21.6042(d).

Because this program has expired, we believe there is no reason to repeat the provisions of current § 3.342(c) in proposed § 5.381.

Section 5.382 Improved Disability Pension—Combining Disability Ratings

When VA grants service connection for a disability incurred or aggravated by military service, VA assigns a “disability rating” to the disability according to the “Schedule for Rating Disabilities” located in part 4 of title 38, Code of Federal Regulations. In cases where veterans have multiple disabilities, the disability ratings assigned to each of these disabilities may be combined in accordance with 38 CFR part 4.

Disabilities that are not service connected generally serve as a basis for a finding that a veteran is permanently and totally disabled for purposes of Improved Disability Pension. Section 1523(a) of title 38, United States Code, authorizes VA to combine ratings for nonservice-connected disabilities with ratings for service-connected disabilities to determine whether a veteran is totally disabled for Improved Disability Pension purposes.

VA has implemented § 1523(a) in 38 CFR 3.323(b). Current § 3.323(b)(1) provides that for pension purposes two or more nonservice-connected disabilities will be combined in the same manner that service-connected disabilities are combined, as described in § 3.323(a). Current § 3.323(b)(2) provides that for pension purposes VA may combine nonservice-connected and service-connected disabilities in the same manner that service-connected disabilities are combined.

Current § 3.323(b)(2) provides that VA “may” combine service-connected with nonservice-connected disability ratings. This permissive rule contrasts with the rules elsewhere in § 3.323 for combining nonservice-connected disabilities on the one hand, and the rules for combining service-connected disabilities on the other hand, which are mandatory rules and are expressed using the word “will.” Section 1523(a) of title 38, United States Code, provides that the “Secretary shall provide that,” for ascertaining whether an individual is totally disabled for pension purposes, service-connected and nonservice-connected disabilities “may” be combined. In fact, VA routinely combines service-connected and nonservice-connected disabilities for pension purposes, and we can think of no circumstance wherein VA would decline to combine a veteran’s disabilities for Improved Pension purposes. Proposed § 5.382(b) states that

VA “will” combine disabilities in such a manner because this is logical, consistent, and fair to veterans.

Current § 3.323(b)(2) provides for the combination of service-connected and nonservice-connected disability ratings without apparent restriction. The authorizing statute requires VA to combine such disability ratings to determine whether a veteran is permanently and totally disabled for pension purposes. See 38 U.S.C. 1523(a). We propose to include language to this effect in proposed § 5.382(b). Moreover, § 3.323(b)(2) is under the heading of “pension” and VA has always limited the applicability of the regulation to pension cases. Therefore, the proposed rule would apply only to Disability Pension claims.

We propose to not include the phrase in current § 3.323(b) that requires that disabilities considered in the determination of eligibility for Improved Disability Pension not be “the result of the veteran’s own willful misconduct.” This requirement is already expressed in § 5.381(a) and we see no reason to repeat that provision in § 5.382.

Section 5.383 Effective Dates for Awards of Improved Disability Pension

Proposed § 5.383 is based on current §§ 3.151(b), 3.400(intro) and 3.400(b)(1)(ii), which provide effective dates for awards of Improved Disability Pension. We propose not to include current § 3.400(b)(1)(i), which refers to claims received before October 1, 1984, because we know of no such pending Improved Pension claims.

The first sentence of proposed § 5.383(a) states that except as provided in paragraph (b) of this section, the effective date of an award of Improved Disability Pension will be the date of receipt of claim or the date the veteran became eligible (by attaining age 65 or by becoming permanently and totally disabled), whichever is later. This is based on the introduction of current § 3.400, which states that the effective date of an award of pension will be the date of receipt of the claim or the date entitlement arose, whichever is the later. The first sentence also incorporates the introductory paragraph of current § 3.400(b)(1), which states that an award of disability pension may not be effective prior to the date entitlement arose. Instead of using the phrase “the date entitlement arose,” which appears in current § 3.400, we have used the phrase “the date the veteran became eligible * * * and entitled”, and we have specified that the date the veteran became eligible is the date the veteran attained age 65 or the date the veteran became permanently

and totally disabled and that the veteran becomes entitled by meeting income and net worth requirements. The first sentence of proposed § 5.383(a) also incorporates current § 3.400(b)(1)(ii)(A), which states that the effective date of the award is the date of receipt of claim (except as provided in § 3.400(b)(1)(ii)(B), which is the subject of proposed 5.383(b), concerning retroactive awards).

The second sentence of proposed § 5.383(a) contains a cross-reference to proposed § 5.424, “Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income,” which is based upon current § 3.660(b). Current §§ 3.400(b)(1) and 3.660(b) are authorized by 38 U.S.C. 5110(b)(3) and 38 U.S.C. 5110(h), respectively. We provide a fuller discussion concerning 38 U.S.C. 5110(h) later in this NPRM. For this discussion, it is sufficient to say that § 5110(h) provides time limits to establish Improved Pension entitlement based on income beyond the time limits provided in § 5110(b)(3) to establish disability.

When it appears that a veteran’s anticipated income for the 12-month period following the date of receipt of claim will exceed the maximum annual pension rate, VA does not pay benefits. A decision that the claimant is not entitled to pension because the claimant’s income exceeds the maximum annual pension rate often occurs without VA first making the disability determination necessary for pension eligibility. In our view, this procedure is reasonable because it would be inefficient for VA to make a pension disability determination when it cannot otherwise grant entitlement to pension. At the same time, it would be unfair to the claimant if VA did not assign an effective date based on the date the pension claim was received in those cases where the veteran is able to establish qualifying income within the time limits provided under § 5110(h), even if VA had not ascertained that the veteran was permanently and totally disabled at that time. The cross-reference in proposed § 5.383(a) would make it plain that the “date of receipt of claim” is the date of receipt of the previous Improved Pension claim in these types of cases. We do not see this as a change, but as a clarification and a reconciliation of the two statutory provisions. This clarification is consistent with long standing VA practice and is fair to veterans.

Paragraph (b) of proposed § 5.383 clarifies current §§ 3.151(b) and 3.400(b)(1)(ii)(B). Current § 3.400(b)(1)(ii)(B) states that if an

incapacitating disability prevented a veteran from claiming benefits for at least the first 30 days after becoming permanently and totally disabled, that veteran could be awarded pension benefits effective the date he or she became permanently and totally disabled, if he or she files a claim within one year from the date on which the veteran became permanently and totally disabled. We propose to define the term "incapacitating disability." We propose to clarify that the disability that prevented a veteran from applying for benefits need not be the same disability that caused the veteran to become permanently and totally disabled. This would conform to the law and long-standing VA practice. The statute merely requires that "a" disability prevented the claimant from applying for Improved Disability Pension. See 38 U.S.C. 5110(b)(3)(B). We propose not to include the reference to the "presumptive provisions of § 3.342(a)," currently found in the last sentence of § 3.400(b)(1)(ii)(B), because current § 3.342(a) no longer contains presumptive provisions.

Proposed § 5.383(b) retains language from current § 3.400(b)(1)(ii)(B) which states that the disability pension award may be effective from the date of receipt of claim or the date on which the veteran became permanently and totally disabled, whichever is to the advantage of the veteran. The phrase "whichever is to the advantage of the veteran" is utilized both in the current statute (§ 5110(b)(3)(A)) and the current regulation (§ 3.400(b)(1)(ii)(B)). We have retained this phrase (slightly rewritten as "whichever is to the veteran's advantage") in the proposed regulation. It means that one cannot automatically assume that an earlier effective date would be more to the claimant's advantage than a later one. This is because the veteran's adjusted annual income, if considered from an earlier effective date, might preclude entitlement for a 12-month period, whereas a later effective date might not.

Special Monthly Pension Eligibility for Veterans and Surviving Spouses

Section 5.390 Special Monthly Pension for Veterans and Surviving Spouses at the Aid and Attendance Rate

Proposed § 5.390 is derived from current § 3.351(b) and (c). We propose no substantive changes. In proposed § 5.390(a), we have used the term "significantly disabled" to conform to the Veterans' Housing Opportunity and Benefits Improvement Act of 2006. That law amended certain sections of title 38 of the United States Code to eliminate

the use of the obsolete term "helpless" to describe significantly disabled veterans who seek aid and attendance benefits or their significantly disabled dependents and survivors who seek aid and attendance benefits. See Pub. L. No. 109-233, § 502, 120 Stat. 397, 415 (2006) (codified at 38 U.S.C. 1502(b) (2006)). No substantive change was intended by these amendments. See Explanatory Statement on Amendment to Senate Bill, S. 1235, as Amended, 152 Cong. Rec. H2976, H2978 (daily ed. May 22, 2006).

Proposed § 5.390(b)(4) cross-references § 3.352, which provides the criteria for determining need for aid and attendance or "bedridden."

Section 5.391 Special Monthly Pension for Veterans and Surviving Spouses at the Housebound Rate

Proposed § 5.391(a) and (c) are based on current § 3.351(d) and (f).

Proposed § 5.391(b) is a new provision. It reconciles the current regulations, which have not been altered since being promulgated in 1979, with *Hartness v. Nicholson*, 20 Vet. App. 216 (2006). In that case, the United States Court of Appeals for Veterans Claims (CAVC) stated that current § 3.315(d) does not consider the interpretive effects of 38 U.S.C. 1513(a), first enacted in 2001, on 38 U.S.C. 1521(e). See *Hartness*, 20 Vet. App. at 221. The CAVC held that, according to these statutes, a veteran who is otherwise eligible for Improved Pension based on being age 65 or older, and who is not in need of regular aid and attendance, is entitled to special monthly pension at the housebound rate if he or she has a disability ratable at 60 percent or more or is considered permanently housebound. See *Hartness*, 20 Vet. App. at 221-22. Such a veteran, unlike a veteran who is under 65 years old, need not have a disability that is permanent and total. See *id.* Proposed paragraph (b)(1) implements this aspect of *Hartness*.

Proposed paragraph (b)(2) reconciles 38 U.S.C. 1513(b) with the holding in *Hartness*. Under section 1513(b), "[i]f a veteran is eligible for pension under both [38 U.S.C. 1513 and 38 U.S.C. 1521], a pension shall be paid to the veteran only under section 1521." A veteran who is age 65 or older who has a permanent and total disability would be eligible for pension under both section 1513 and section 1521(a). Such a veteran would then be subject to 38 U.S.C. 1513(b) and could receive pension only under section 1521(a). In order for that veteran to receive special monthly pension under section 1521(e), he or she would need to have a

disability rated 60 percent or higher or be permanently housebound, in addition to being permanently and totally disabled. In contrast, a veteran who is 65 years or older and has a disability rated 60 percent or higher (but less than permanent and total) need not be permanently and totally disabled to receive special monthly pension. This is because such a veteran would not fall within the operation of section 1513(b) because that veteran's disability would not independently qualify him or her for pension under section 1521(a). Proposed paragraph (b)(2) clarifies the different rules for these two groups of veterans, which we are bound to apply pursuant to the CAVC's *Hartness* decision.

Finally, we propose to clarify in § 5.391(c) that the definition of "permanently housebound" is the same for veterans and surviving spouses.

Section 5.392 Effective Dates for Awards of Special Monthly Pension

Proposed § 5.392 is based on current § 3.401(a)(1) and § 3.402(c)(1). Paragraph (a) of proposed § 5.392 states the general effective date rule for special monthly pension. Paragraph (b) of proposed § 5.392 states an exception to the general effective date rule. The exception is when an award of Improved Pension is effective retroactively. In such cases, the special monthly pension award may be effective retroactively as well, if entitlement to special monthly pension is established for any part of the retroactive period.

Maximum Annual Pension Rates

Section 5.400 Maximum Annual Pension Rates for Veterans, Surviving Spouses, and Surviving Children

Proposed § 5.400 is based in part on paragraphs (a), (c), and (d)(3) of current § 3.23, and portions of § 3.24(b).

Proposed § 5.400(a) restates the statutory references in current § 3.23(a). Improved Pension rates are set by statute. Proposed § 5.400(a) provides the statutory references to 38 U.S.C. 1521, 1541, and 1542, which are the rate-setting statutes for Improved Pension.

Proposed § 5.400(b) restates current § 3.23(c) without reference to veterans of the Mexican border period. There are no more pension beneficiaries of veterans who served during this period of war.

Proposed § 5.400(c) informs readers that higher maximum annual pension rates apply to veterans and surviving spouses with dependents.

Section 5.401 Automatic Adjustment of Maximum Annual Pension Rates

Proposed § 5.401 is based on portions of current §§ 3.23, 3.24, and 3.27.

Current § 3.27 governs automatic adjustment of various types of benefit rates. Paragraph (a) of § 3.27 deals with Improved Pension and requires VA to increase the maximum annual pension rates whenever the Commissioner of Social Security increases Social Security benefits in accord with annual increases in the cost of living. Proposed § 5.401(b) is based on current § 3.27(e), as well as those portions of § 3.24(b) and paragraphs (a) and (c) of § 3.23 which require VA to publish increased maximum annual pension rates in the **Federal Register**. No substantive changes are proposed.

Improved Pension Income, Net Worth, and Dependency

Section 5.410 Countable Annual Income

Proposed § 5.410(a) clearly states that for Improved Pension purposes, VA does not count income received before the effective date of the beneficiary's Improved Pension award, nor does VA count income that an Improved Death Pension claimant received before the date the veteran died. This fact is one of the distinguishing characteristics of Improved Pension as opposed to VA's other need-based benefits. In the Improved Pension program, initial payments are made based on the adjusted annual income that the claimant expects to receive during the twelve-month period immediately following the effective date of the award of pension (generally the date VA receives a claim or the date of the veteran's death).

Proposed paragraphs (b)(1) and (2) of § 5.410 incorporate paragraphs (d)(4) and (5) of current § 3.23 in answering the question, "Whose income is countable?" In proposed paragraph (b)(1) concerning the income of a veteran, we have added a phrase concerning the income of a veteran's spouse. We state that a veteran's income includes that of his or her spouse "regardless of whether the spouse's income is available to the veteran." This addition is not a change. It can be inferred from the current regulations and is consistent with 38 U.S.C. 1521(c). We believe that this important provision should be made clearer to readers.

Paragraphs (b)(1) and (2) of proposed § 5.410 do not include certain portions of paragraphs (d)(4) and (5) of current § 3.23 concerning a child's income, in order to keep this lengthy regulation as simple as possible. Recognizing that many Improved Pension claimants do not have dependent children, we propose instead to incorporate the provisions concerning children within

proposed § 5.416, "Persons considered as dependents for Improved Pension." Having separate regulations will make these provisions easier to read and understand.

Proposed paragraphs (b)(1) through (b)(3) answer the question of whose income is included for the three types of claimants and beneficiaries: veterans, surviving spouses, and surviving children. We believe the complete answer concerning surviving children is too complex to be included in this regulation, so we propose to include a cross-reference to proposed § 5.435, "Calculating annual Improved Pension amounts for surviving children," which is the proposed comprehensive provision concerning annual Improved Pension amounts for surviving children.

Proposed § 5.410(c) restates current § 3.271(a). Current 3.271(a) states that a payment of any kind from any source shall be counted as income during the reporting period in which it was received unless it is specifically excluded under § 3.272.

Based on current part 3 regulations, including §§ 3.271, 3.272, 3.273, and 3.660, current VA practice is to use the term, "12-month annualization period" to describe the period for which a beneficiary reports income, adjustments to income, and net worth to VA. We propose to instead use the term "reporting period," which we believe is more explicit and more easily understood than "12-month annualization period". We propose to use "reporting period" in §§ 5.410, 5.413, 5.420, and 5.424 of this NPRM and throughout part 5 and to define that term in § 5.420(a).

Paragraphs (c)(1) through (c)(3) of proposed § 5.410 are derived from current § 3.271(a)(1) through (a)(3), as well as current § 3.273(c) and (d). Current § 3.271 describes the various income types and § 3.273 explains how to count them. We believe it makes sense for the two regulations to be merged. Paragraph (c)(3) includes information based on long-standing VA practice regarding counting of irregular income which we believe should be included in our regulations.

Proposed § 5.410(d) restates current § 3.276(a), concerning waived income, which should be listed in proposed § 5.410 with other items that VA counts as income. Current § 3.276(a) provides that VA will include for Improved Pension purposes any income that an individual has waived. Long-standing VA policy provides a caveat—that if an individual withdraws a Social Security claim after a finding of entitlement to Social Security benefits, so as to maintain eligibility for an unreduced

Social Security benefit on attainment of a certain age, this withdrawal is not presumed to be a waiver. We propose to include this clarification. We note that section 1503(a) of title 38, United States Code, requires VA to consider as income "all payments of any kind or from any source (including salary, retirement or annuity payments, or similar income, which has been waived * * *)." However, when a person applies for and is found entitled to Social Security, but then waives those benefits solely for the purpose of receiving more benefits at a later date, the action is more accurately considered a deferment of payments rather than a waiver. Therefore, proposed § 5.410(d) is fair and consistent with 38 U.S.C. 1503(a).

Proposed § 5.410(f)(1) and (2) are based on current § 3.271(d), concerning income from income-producing property. In § 5.410(f)(2), we propose to clarify that if a beneficiary's income includes that of his or her spouse, and both the beneficiary and spouse are co-owners of a property which produces income, then income representing both co-owned shares is included as income to the beneficiary.

Proposed § 5.410(f)(3) is a new provision, based on long-standing VA practice, which states that if a person transfers ownership of income-producing property to another person or legal entity, but retains the right to that income, the income will be counted. We believe this is consistent with 38 U.S.C. 1503 and will help avoid confusion by pension beneficiaries by clarifying that such income will be counted by VA.

We propose not to include current § 3.271(e), which states: "Income shall be determined by the total amount received or anticipated during a 12-month annualization period." This sentence is unnecessary and redundant of other provisions, such as proposed § 5.423, which explains calculation procedures, as well as current § 3.272(e), which pertains to installment income from property sales.

Section 5.411 Counting a Child's Income for Improved Pension

Proposed § 5.411 is based on various provisions concerning when a child's income is countable for Improved Pension purposes. These provisions are presently found in paragraphs (d)(4) through (d)(6) of § 3.23, and paragraphs (j) and (m) of § 3.272. We believe it would simplify the provisions concerning counting a child's income to have them in one place.

Proposed § 5.411(a) concerns the availability of a dependent child's income to a veteran or surviving spouse. Rather than stating that VA counts a

child's income "to the extent it is" reasonably available (which is the language used in the current regulation § 3.23(d)(4) and (5)), we propose to say that VA counts "that portion of a child's income that is" reasonably available, which is more clear. Additionally, this change mirrors the statutory language of 38 U.S.C. 1521(h)(1) and 1541(g), which require VA to count as income to the beneficiary "that portion of the annual income of the child."

Proposed § 5.411(a)(1) restates the provisions of current paragraphs (d)(4), (d)(5), and (d)(6) of § 3.23 concerning the presumption of availability of a child's income.

Proposed § 5.411(a)(2) is derived from current § 3.23(d)(4) and (d)(5) relating to hardship. In addition to the current requirements, the proposed regulation states that a veteran or surviving spouse must specifically request that VA exclude all or part of a child's annual income because counting it would create a hardship on the veteran or surviving spouse. Currently, claimants are notified of this requirement in the VA Eligibility Verification Report form. Including the requirement in this regulation is consistent with VA's current practice, as reflected in the VA Eligibility Verification Report form.

Proposed § 5.411(a)(2) is also derived from current § 3.272(m) and describes the steps VA uses to calculate the amount of the hardship exclusion.

Proposed § 5.411(b) restates the second sentence of current § 3.23(d)(6), which is the definition of "expenses necessary for reasonable family maintenance." To the current list of examples (food, clothing, shelter) of basic necessities included in this definition, we propose to add healthcare, which is necessary to support a reasonable quality of life.

Proposed § 5.411(c) restates current § 3.272(j). We propose to refer to title 26, United States Code, rather than to the Internal Revenue Code of 1954. We believe more readers are familiar with these citations.

Section 5.412 Income Exclusions for Calculating Countable Annual Income

Proposed § 5.412 implements 38 U.S.C. 1503, which contains the basic statutory provisions for determining what counts as income for Improved Pension. Current § 3.272, "Exclusions from income," is the part 3 regulation that implements the statute. The current regulation mirrors the structure of the statute in mixing two separate analytical categories—income received that should be excluded from countable annual income and expense payments that should be deducted from countable

annual income. For example, § 3.272(g), (h) and (i) list various types of expenses incurred by claimants; these are properly in a separate category from income that claimants receive. Because of this distinction between payments that may be excluded from income and payments that may be deducted from income, we propose to divide the current regulation into two smaller regulations (proposed §§ 5.412 and 5.413) for the sake of clarity.

Proposed § 5.412 lists exclusions from annual income for Improved Pension purposes. In a future NPRM, we plan to propose a new regulation that would list all income sources and assets that are statutorily excluded in determining entitlement to all need-based programs that VA administers. The new regulation would be contained in proposed subpart L of proposed new part 5. Therefore, in proposed § 5.412, we do not cover such income sources that are found in current § 3.272. These sources include those currently listed in paragraphs (k), (o), (p), (r), (t), (u), and (v) of § 3.272. Proposed paragraphs (b)(3) and (k) cross-reference the new regulation.

Proposed § 5.412(a), based on § 3.272(a), also includes the content of current § 3.272(l). This consolidation is appropriate because current § 3.272(l), which authorizes the exclusion from income of payments received for participating in a program of therapy or rehabilitation under 38 U.S.C. 1718, characterizes this payment as a donation from public or private relief, welfare, or charitable organization under § 3.272(a). It is logical to place this type of payment in the paragraph dealing with such donations. Long-standing VA policy also regards benefits received under noncontributory programs (such as Supplementary Security Income) as an excluded donation. *See* current § 3.262(f). We propose to list this common exclusion in § 5.412(a)(2) for increased clarity.

Proposed § 5.412(b) is derived from § 3.272(c) and adds a provision (proposed § 5.412(b)(2)) that payments to a surviving spouse under § 3.20(c) do not count as income. Current § 3.20(c) pertains to the veteran's month-of-death rate for certain surviving spouses. *See* 38 U.S.C. 5310(b). In our view, proposed § 5.412(b)(2) is consistent with 38 U.S.C. 5310, in that such payments are considered part of a surviving spouse's entitlement and are not included as income for Improved Death Pension purposes.

Proposed § 5.412(c) through (g) restate current § 3.272(d)–(f), (n), and (s). We do not propose any substantive changes to these paragraphs.

Section 3803(c)(2)(C)(viii) of title 31, United States Code, defines "benefits," for purposes of that statute (which codifies the Program Fraud Civil Remedies Act of 1986), as including Improved Pension. Section 6(h) of Public Law 101–426, the Radiation Exposure Compensation Act (RECA), provides that payments under RECA are not considered income or resources for purposes of determining eligibility for benefits listed in 31 U.S.C. 3803(c)(2)(C)(viii). We have implemented that statutory exclusion in current § 3.272(s) (proposed § 5.412(g)). We propose to implement the following similar exclusions in proposed § 5.412(h)–(j), which include payments under section 103(c) of the Ricky Ray Hemophilia Relief Fund Act of 1998 (42 U.S.C. 300c–22 (note)), payments under the Energy Employees Occupational Illness Compensation Program (42 U.S.C. 7384 *et seq.*); and payments under 50 U.S.C. Appx. 1989b–4 and 1989c–5 to certain eligible Japanese-Americans and Aleuts. These statutes provide that such payments shall not be considered in determining entitlement to benefits listed in 31 U.S.C. 3803, which includes Improved Pension.

Because VA must count all payments unless specifically excluded, we believe it is important for readers to know what VA considers and does not consider a "payment." Proposed § 5.412(k) lists several items that VA does not consider payments, consistent with law, current regulations, and long-standing VA policy.

Section 5.413 Income Deductions for Calculating Adjusted Annual Income

We propose a new regulation, § 5.413, based on current §§ 3.271(c) and (g) and 3.272(g) through (i). These paragraphs pertain to expenses and losses that are deducted from countable annual income.

Proposed § 5.413(a) restates the last sentence of the introductory language of current § 3.272, which currently states, "Unless otherwise provided, expenses deductible under this section are deductible only during the 12-month annualization period in which they were paid." However, because proposed § 5.420 defines "reporting periods" for Improved Pension purposes, we refer to the "initial reporting period or annual reporting period" instead of the 12-month annualization period.

Proposed § 5.413(b) refers to a "medical expense report" instead of an eligibility verification report (EVR), which is referred to in current § 3.272(g), because certain categories of Improved Pension beneficiaries are not required to submit annual EVRs under

current § 3.277. Proposed § 5.413(b) includes a cross-reference to § 3.660(a), which explains that pension beneficiaries must inform VA if there is a change in income, and clarifies that a change in medical expenses is a change in income.

Current § 3.272(h) permits deductions of amounts paid for last illnesses, burials, and the veteran's just debts. We propose, consistent with long-standing VA usage, to designate these types of expenses as "final expenses." We believe that doing so improves clarity in proposed § 5.413(c).

Proposed § 5.413(c)(1)(ii) defines "last illness" as "the medical condition that was the primary or secondary cause of a person's death as indicated on the person's death certificate." We believe that this definition is simple, clear, and easy for VA personnel to apply correctly and consistently. Proposed § 5.413(c)(1)(iii), based upon current § 3.272(h)(1)(ii), defines "veteran's just debts." Consistent with long-standing VA policy, we propose to clarify to readers that a "veteran's just debts" includes debts that the veteran and spouse incurred jointly. We believe that it would be unfair and arbitrary to prohibit a surviving spouse or child from deducting debts that the veteran and surviving spouse incurred jointly, while allowing the deduction of debts incurred solely by the veteran.

Proposed § 5.413(c)(2)(i) through (c)(2)(iii) explain what final expenses VA will deduct for veteran awards, surviving child awards, and surviving spouse awards. These paragraphs restate and rearrange the provisions of current § 3.272(h)(1)(ii) and (h)(2) concerning these deductible final expenses in a way we believe is clearer.

Proposed § 5.413(c)(2)(iv) is based on current § 3.272(h)(1)(i), which provides a special exception to other final expense provisions. Proposed § 5.413(c)(2)(iv) incorporates the holding of VA's Office of General Counsel in VAOPGCPREC 1-2000, 65 FR 33421 (May 23, 2000), which held that Congress intended for last illness expenses that a surviving spouse paid for a veteran to be treated differently than other deductible final expenses because last illness expenses include expenses that the surviving spouse paid before the veteran's death when the surviving spouse was still the veteran's spouse. Under section 1503(a)(3)(B) of title 38, United States Code, VA will deduct amounts paid by a *spouse* of a veteran for the expenses of such veteran's last illness from a *surviving spouse's* annual income, as well as amounts paid by the surviving spouse for the expenses of such veteran's last

illness. This is an exception to the general rule that VA does not deduct expenses a claimant paid before the date of entitlement (or before the date of the veteran's death in death cases).

Proposed § 5.413(c)(2)(iv) provides this exception for the expenses of a veteran's last illness that a surviving spouse paid either before the veteran's death or after the veteran's death but before Improved Pension entitlement. It provides that payments made up to one year before the veteran's death may be deducted from a surviving spouse's countable annual income if the surviving spouse's Improved Death Pension claim is received within one year of the veteran's death. The amounts of these expenses would be deductible during the surviving spouse's initial reporting period. We believe this is a reasonable period in which to account for expenses associated with a veteran's last illness.

Proposed § 5.413(c) does not include the content of current § 3.272(h) concerning time periods for deducting final expenses because the periods for allowing deductible final expenses are the periods stated in proposed § 5.413(a), with the exception of "last illness" expenses under paragraph (c)(2)(iv). Therefore, we propose not to include the introduction to § 3.272(h). This clarifies and simplifies these types of adjustments, benefiting claimants and claims examiners alike.

Proposed paragraph (c)(3)(ii) clarifies that VA cannot allow the same expense as both a final expense and an unreimbursed medical expense.

Proposed paragraph § 5.413(d) restates current § 3.272(i), which provides for the deduction of certain educational expenses of a veteran or surviving spouse. We also propose to state that scholarships and grants are not deductible educational expenses when used for educational purposes.

Although VA counts all payments as income unless there is statutory authority or a policy basis to exclude or deduct them, VA permits certain deductions from particular income sources. In other words, the amount of income counted from certain sources is the difference between income and certain deductible expenses directly associated with that income. Proposed § 5.413(e), (f), and (g) list deductions permitted from particular income sources.

Proposed § 5.413(e) is new and states that gambling losses can be deducted from gross winnings to arrive at the net gambling income. This provision is based on long-standing VA policy and is consistent with how the Internal Revenue Service counts gambling

income. We believe it is important to include this information so that claimants or beneficiaries are fully informed about what VA considers a deduction from gambling winnings.

Proposed § 5.413(f)(1) is new and adds commercial insurance (disability, accident, life, or health) to the sources of an award or settlement listed in current § 3.271(g) from which deductions may be taken. It is consistent with the other items listed in § 5.413(f) including (6), "Legal damages collected for personal injury or death".

Section 5.414 Net Worth Determinations for Improved Pension

Proposed § 5.414 combines current § 3.274, § 3.275, and § 3.276(b) into one regulation. Current § 3.274 concerns the applicability of net worth concepts to Improved Pension entitlement, and current § 3.275 outlines the criteria for evaluating net worth. Current § 3.276(b) concerns asset transfers and whether such transfers can reduce net worth.

Currently the terms "net worth" and "corpus of estate" are used interchangeably. Consistent with our proposal in a prior NPRM (RIN 2900-AL83, 69 FR 77584), we propose to use the term "net worth" only and not include references to "corpus of estate" because we believe "net worth" is more commonly understood.

Proposed § 5.414(a) is derived from current § 3.275(b), the definition of net worth. We propose to add paragraphs (a)(1) through (3) to add detail consistent with long-standing VA policy. We also propose to provide two examples of the types of personal effects that are suitable to and consistent with the claimant's or beneficiary's reasonable mode of life.

Proposed § 5.414(a)(1) states that a mortgage on a home is not deducted from net worth. We believe this provision clarifies the principle, implied by the pension regulations in current 38 CFR, that a personal residence has no bearing on net worth for Improved Pension purposes.

Proposed § 5.414(a)(2) includes current and long-standing VA policy that VA will evaluate a "reasonable lot area" by considering the size of other residential lots in the vicinity. We believe this provision would improve the fairness of this regulation because lot sizes vary from locale to locale. It might be reasonable in some parts of the country to retain significant acreage. In other parts of the country, the same acreage would constitute a sizeable asset, and VA would require disposal of some or all of that asset for the claimant's or beneficiary's maintenance. We have also proposed to state VA's

long-standing policy that if the claimant or beneficiary lives on a farm, VA will exclude the value of a reasonable lot area, including the residence area, and consider the rest of the farm as part of net worth. We believe this will allow claimants and beneficiaries to continue to live on their family farm, while still accurately measuring net worth.

Proposed § 5.414(a)(4) restates current § 3.276(b), concerning asset transfers, which we propose to incorporate into the net worth regulation because it applies only to net worth. We propose no substantive changes to this provision.

Paragraphs (b) and (c) of proposed § 5.414 refer only to a veteran's or surviving spouse's adjusted annual income instead of listing all of the persons (veteran, dependent spouse, and dependent children for a veteran's adjusted annual income and surviving spouse and dependent children for a surviving spouse's adjusted annual income) whose income would be included in the adjusted annual income. It is sufficient to refer only to the veteran's or surviving spouse's adjusted annual income because the definition of adjusted annual income includes countable annual income, which includes the incomes of the dependent spouse and dependent children for a veteran's countable annual income and includes the incomes of the surviving spouse and dependent children for a surviving spouse's countable annual income. For the sake of clarity, paragraph (d) of proposed § 5.414 refers to the definition of "adjusted annual income" in proposed § 5.370.

Proposed § 5.414(b) combines paragraphs (a) and (c) of current § 3.274 into one paragraph dealing with veteran and surviving spouse Improved Pension awards. Because current paragraphs (a) and (c) of § 3.274 are substantively similar, this combination is appropriate.

Proposed § 5.414(c) combines paragraphs (b), (d), and (e) of § 3.274, and paragraph (e) of § 3.275(e), all pertaining to net worth of a child for Improved Pension purposes. We believe that combining rules pertaining only to children will make it easier for readers to find these rules.

Proposed § 5.414(c)(1) is based on current (b) and (d) of § 3.274 and states that an increased pension payable to a veteran or surviving spouse for a child will be discontinued or denied if the child's net worth is such that some part of that net worth reasonably should be consumed for the child's maintenance.

Paragraph (c)(2) of proposed § 5.414 is based on current § 3.274(e), which concerns net worth of a surviving child. However, we propose a change that

would assist readers and provide more clarity. We propose that paragraphs (c)(2)(i) and (ii) of proposed § 5.414 mirror paragraphs (a) and (b) of proposed § 5.435, which concerns annual income of a surviving child. Proposed § 5.414(c)(2)(i) provides that if a surviving child is not in the custody of another person, VA considers the net worth of the child only. Proposed § 5.414(c)(2)(ii) provides that if the child is in the custody of another person, the child's net worth includes that of the custodian. Additionally, we propose to mirror the provision of current § 3.57(d)(2) and proposed § 5.435, and state that when a child is in the joint custody of his or her parent and stepparent, the parent's net worth includes that of the stepparent. We believe this provision is consistent with 38 U.S.C. 1543.

Proposed § 5.414(c)(3) is derived from current § 3.275(e). The current regulation excludes actual or prospective educational or vocational expenses from a child's net worth, but not "beyond age 23." Proposed § 5.414(c)(3) states that VA will exclude those educational or vocational expenses until a child reaches age 23. Proposed § 5.414(c)(3) reflects long-standing VA interpretation and application of this rule. This does not represent a substantive change because in practice VA limits the exclusion when a child reaches age 23.

When 38 U.S.C. 1503 defines "annual income," it does so "under this chapter." Therefore, we must conclude that the references to income in the net worth statutes (38 U.S.C. 1522 and 1543) are references to the same definition of income because the statutes are in the same chapter. We believe that Congress intended the definition of income in section 1503 to apply to all determinations in which income might play a role, and we would clarify this point. At the same time, proposed § 5.414(d) states that, "in considering the claimant's or beneficiary's living expenses, VA cannot consider expenses it excluded or deducted in determining adjusted annual income." This statement is necessary because VA cannot consider living expenses that have already been used to calculate adjusted annual income. Because we propose this clarification concerning income and because the phrase "all of the claimant's or beneficiary's living expenses" sufficiently encompasses medical expenses, it is not necessary to specifically mention medical expenses in proposed § 5.414(d), although current § 3.275(d) does mention medical expenses.

In § 5.414(d)(1), we propose to restate a phrase currently found in § 3.275(d), "[w]hether the property can be readily converted into cash at no substantial sacrifice." Review of the legislative history of Public Law 86-211, which first required VA to use net worth in pension determinations, as well as Public Law 95-588, the Improved Pension law, shows Congress clearly intended that the greatest pension benefit should go to those with the greatest needs, and that benefits should be denied or discontinued if a claimant's or beneficiary's estate is large enough to provide for maintenance.

VA has historically interpreted the phrase "substantial sacrifice" as meaning that a claim should not be denied for excessive net worth if the claimant or beneficiary cannot readily convert real or personal property into liquid assets (assets that can be readily converted into cash). Therefore, proposed paragraph § 5.414(d)(1) provides for consideration of "[t]he value of liquid assets (assets that the claimant or beneficiary can readily convert into cash)." We believe this wording will be clearer to claimants and beneficiaries, as well as consistent with VA practice. We also note that proposed paragraph § 5.414(a), excluding the value of personal effects suitable to and consistent with a reasonable mode of life, would protect claimants and beneficiaries from having to sell non-liquid assets if this sale would be a substantial sacrifice.

Paragraphs (d)(2) and (3) of proposed § 5.414 restate current § 3.275(d) without substantive change.

Finally, § 5.414(e) lists resources excluded by statute from net worth determinations. This list includes payments excluded by statutes that reference a list of benefits in 31 U.S.C. 3803(c)(2)(C). Specifically, these are payments under section 6 of the Radiation Exposure Compensation Act of 1990; payments under the Ricky Ray Hemophilia Relief Fund Act of 1998; payments under the Energy Employees Occupational Illness Compensation Program; and payments to certain eligible Japanese-Americans and Aleuts. Also, see the discussion concerning these payments in this NPRM under the discussion of proposed § 5.412.

We previously discussed a new regulation, to be addressed in a future NPRM, which would be contained in proposed subpart L of proposed new part 5. The new regulation would list all income sources and assets that are statutorily excluded in determining entitlement to all need-based programs that VA administers. Therefore, proposed § 5.414(e)(5) cross-references

the new proposed regulation, and proposed § 5.414 would not repeat the sources currently described in paragraphs (f), (g), and (i) through (j) of § 3.275 because these would be in the new regulation.

Section 5.415 Effective Dates for Improved Pension Awards Based on a Change in Net Worth

Proposed § 5.415 is based on current § 3.660(d), as well as the third sentence of current § 3.660(a)(2). Proposed § 5.415(a) governs the assignment of the effective date of a reduction or discontinuance of Improved Pension based on the beneficiary's net worth.

Proposed § 5.415(b), based on current § 3.660(d), concerns the effective date for payment or resumption when VA previously found net worth to bar Improved Pension. No substantive changes are proposed.

Section 5.416 Persons Considered as Dependents for Improved Pension

Proposed § 5.416 is based on current § 3.23(d)(1). It also encompasses current § 3.60, as well as portions of current paragraphs (d)(4) and (5) of § 3.23, and statutory provisions, all pertaining to dependency for Improved Pension purposes.

Section 1521(c) of title 38, United States Code, provides the statutory maximum annual pension rate for a veteran with a dependent spouse, stating that the higher rate applies “[i]f the veteran is married and *living with* or reasonably contributing to the support of such veteran's spouse” (emphasis added). Then, 38 U.S.C. 1521(h)(2) provides that “[a] veteran shall be considered as living with a spouse even though they reside apart unless they are estranged.” The provision of 38 U.S.C. 1521(h)(2) is expressed in current 38 CFR 3.60: “For the purposes of determining entitlement to pension under 38 U.S.C. 1521, a person shall be considered as living with his or her spouse even though they reside apart unless they are estranged.”

Proposed § 5.416(a) states that a spouse is considered a dependent spouse for Improved Pension if: (1) The veteran lives with the spouse; (2) the veteran and spouse live apart but are not estranged; or (3) the veteran reasonably contributes to the estranged spouse's support. This wording makes the regulation clear without changing the statutory meaning of 38 U.S.C. 1521(c) and (h)(2).

Proposed § 5.416(a)(3) restates current § 3.23(d)(1) as it pertains to spousal support and adds that determining whether support is “reasonable” is a factual matter that VA determines.

Proposed § 5.416(b) restates the last sentence of current § 3.23(d)(1) as it pertains to a dependent child of a veteran. It also states the implication of 38 U.S.C. 1541(c) and 1542 as interpreted by 38 CFR 3.23(d)(5), 3.24, and 3.57(d): VA considers a veteran's child to be a surviving spouse's dependent if the child is in the custody of the surviving spouse. See 38 U.S.C. 1506(1). The term “custody” for Improved Pension is defined in current § 3.57(d) (proposed counterpart § 5.417). In proposed § 5.416(b)(1), we propose to state that a child need not be living with the veteran or surviving spouse to be presumed in custody.

Proposed § 5.416(b)(2) restates the provision of current § 3.23(d)(1) that even if a veteran does not have custody of a child, the child is presumed to be the veteran's dependent child if the veteran provides reasonable support contributions.

Proposed § 5.416(c) indicates that a child is not considered a dependent child of the veteran or surviving spouse for Improved Pension purposes if the child's net worth is such that under proposed § 5.414(c)(1) (current paragraphs (b) and (d) of § 3.274) increased pension that would otherwise be payable to the veteran or surviving spouse on account of the child is denied or discontinued. We believe this is the correct interpretation of the statutes, 38 U.S.C. 1522(b) and 1543(a)(2), which provide that during the period that net worth bars increased pension, a child shall not be considered as the veteran's or surviving spouse's child for purposes of Improved Pension.

Section 5.417 Child Custody for Improved Pension

Proposed § 5.417 is based on current § 3.57(d), which defines “child custody” for Improved Pension purposes. Proposed § 5.417(a) through (c) are plain language restatements of current § 3.57(d)(1), and proposed § 5.417(f) and (g) are plain language restatements of current § 3.57(d)(3). Proposed paragraph (g) adds that if a child has no custodian, that child may be eligible for benefits in his or her own right.

Proposed § 5.417(d) and (e) are plain language restatements of the first three sentences of current § 3.57(d)(2). We propose to replace the word “remarried” with the more inclusive word “married”; this replacement does not change the intent or meaning of the current regulation. We excluded the last sentence of § 3.57(d)(2) from proposed § 5.417 and included it instead with the proposed regulation that explains how to calculate annual Improved Pension amounts for surviving children, § 5.435.

Improved Pension—Income Reporting Periods, Payments, Effective Dates, and Time Limits

Section 5.420 Reporting Periods for Improved Pension

Proposed § 5.420, is not directly based on any part 3 regulation. Rather it explains several key concepts regarding income reporting periods for Improved Pension, which are based on the part 3 Improved Pension regulations and long-standing VA practice. It defines a reporting period as the period for which VA counts income that is anticipated or received, when calculating adjusted annual income. It states that there are two types of reporting periods, the initial reporting period and the annual reporting period, and describes these periods in detail.

Section 5.421 How VA Calculates an Improved Pension Payment Amount

Proposed § 5.421 is based on paragraphs (a) and (b) of current § 3.273, VA's regulation pertaining to the calculation of the monthly amount payable to Improved Pension beneficiaries. Proposed regulations derived from current § 3.273(c) and (d), concerning categories of income, are covered in this NPRM in the discussion concerning proposed § 5.410. Proposed § 5.421 addresses “the basics” of how VA calculates an Improved Pension payment amount and what happens when changes occur. A general introduction to Improved Pension payment amount calculation is a useful tool for understanding more specific related regulations.

We propose to retain the long-standing VA term, “maximum annual pension rate,” to refer to the statutory “annual rate,” “annual rate of pension,” and “annual pension rate” referenced in 38 U.S.C. 1521, 1541, and 1542. We also see no reason to refer to the “applicable” maximum annual pension rate. It is unnecessary to state that VA uses whichever maximum annual pension rate applies. Therefore, we propose to not include the word “applicable.”

Proposed § 5.421(a) restates current § 3.273(a). However, we propose to exclude several words and phrases that are unnecessary. We propose not to include the phrase, “For the purpose of determining initial entitlement, or for resuming payments on an award which was previously discontinued,” because the basic procedure for calculating an Improved Pension payment amount is the same whether VA is calculating an initial award or a resumption of pension payments. For the same reason, we propose not to include the reference to

the “effective date of entitlement” in current § 3.273(a).

Current paragraphs (a) and (b) of § 3.273 contain three references to current § 3.29(b), which is the “rounding down” provision that became effective for pensions paid on or after June 1, 1983. We propose not to refer to the June 1, 1983, effective date because all VA pensions paid under part 5 will be effective after June 1, 1983. We otherwise propose to incorporate the provision of current § 3.29(b), pertaining to rounding, within proposed § 5.421(a).

Proposed § 5.421(b) and (c) provide answers to the simple questions, “What if the maximum annual pension rate changes?” and “What if adjusted annual income changes?” The simple answer is that VA recalculates the Improved Pension payment amount. Proposed paragraph (c) cross-references proposed § 5.422, “Effective dates for changes to Improved Pension payments due to a change in income,” which is a more complex regulation concerning annual income adjustments.

Section 5.422 Effective Dates for Changes to Improved Pension Payments Due to a Change in Income

Proposed § 5.422 contains effective dates for payment amount adjustments due to a change in income.

Current § 3.660 provides the effective dates for adjustments to VA’s need-based benefits. Specific effective-date provisions for increases are complex and are contained in a separate proposed regulation, § 5.424, “Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income.” Proposed § 5.422(a)(1) cross-references this regulation and provides the general rule that increases are effective the date entitlement arose, or in this specific instance, the date that income changed. Proposed § 5.422 also states that generally, VA makes such adjustments the first day of the month after the income change, according to current § 3.31, “Commencement of the period of payment.”

Proposed § 5.422(a)(2) restates the second sentence of current § 3.660(a)(2), using revised language for the effective date for payment of reduced or discontinued benefits. Although the current regulation states that the award will be reduced or discontinued effective the end of the month in which an increase in income occurred, in the proposed regulation we have stated that the award will be reduced or discontinued effective “the first day of the month following the income change.” VA has taken this approach throughout the Regulation Rewrite

Project. That is, rather than stating the effective date on which entitlement to the previous rate ends, the part 5 effective-date regulations would state the effective date as the day on which VA begins to discontinue benefits. For example, rather than stating that a particular discontinuance is effective “the last day of the month,” we would state that VA will discontinue benefits effective “the first day of the following month.” VA intends no substantive change by this rewording.

We also propose not to include the references to “running award[s]” found in current § 3.660(a)(2). The references to “running award[s]” are not found in the authorizing statute, 38 U.S.C. 5112(b). We believe the effective-date provisions of 38 U.S.C. 5112(b) apply, regardless of whether or not VA has actually processed the award or the award is in suspense.

Proposed § 5.422(b)(1) states a matter of long-standing policy which is not currently contained in any regulation. Although the provision is somewhat intuitive, we believe it should be explicitly stated in the regulations that VA stops counting a dependent’s income effective the same date that the dependent is removed. This is an exception to the general rule that VA must count all income for at least 12 months. Proposed § 5.422(b)(2) and (3) are derived from the first and second sentences of § 3.660(c).

Section 5.423 Improved Pension Determinations When Anticipated Annual Income is Uncertain

Proposed § 5.423(a) is based on current § 3.271(f), pertaining to VA action when anticipated annual income is uncertain. We propose to expand on the current provision to explicitly state that this provision also applies when there is evidence of record indicating the claimant’s anticipated annual income may be higher than the claimant reports. Because the current regulation does not bar consideration of evidence suggesting higher anticipated annual income, it is VA’s current practice to consider such evidence. We believe this provision is fair to claimants and easy to administer.

Proposed § 5.423(a)(1) also expands on § 3.271(f) to clarify that when anticipated annual income is expected to exceed the maximum annual pension rate, VA will not pay pension at that time. VA will then adjust benefits or pay pension upon the receipt of amended income information (for example, information about deductible expenses). We note that this provision is not new and can be derived from current

§ 3.271(f)(1); however, we believe it should be explicitly stated.

Proposed § 5.423(b) restates § 3.271(f)(2), concerning counting dependents’ income in situations when VA has not received evidence to establish dependents. There is no substantive change to this provision.

Section 5.424 Time Limits To Establish Entitlement to Improved Pension or To Increase the Annual Improved Pension Amount Based on Income

Proposed § 5.424 restates current § 3.660(b) as it pertains to Improved Pension. Current § 3.660(b)(1) provides that if payments are not made because anticipated income exceeds the maximum annual pension rate, pension may be awarded 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.” Proposed § 5.424(b)(1) is a plain language rewrite of § 3.660(b)(1).

Proposed § 5.424(b)(2) deals with benefits that are discontinued or paid at a lower amount. VA’s long-standing interpretation of § 3.660(b)(1) is that in claims for Improved Pension, the “12-month annualization period” refers to the initial or annual reporting period, as appropriate, and that the “same * * * calendar year” refers to the calendar year in which the reporting period ends. Proposed § 5.424(b)(1) and (b)(2) reflect this interpretation. Both (b)(1) and (b)(2) apply whether the income is actual or anticipated. Regarding the use of the term “facts found” in current § 3.660(b)(1), VA interprets “facts found” and another phrase used in several effective date rules, “date entitlement arose,” to have the same basic meaning. We propose to use only one of these terms, “date entitlement arose,” to improve consistency.

Proposed § 5.424(c) is based on current § 3.660(b)(2), which pertains to payment of Improved Pension benefits following nonentitlement for one reporting period.

Proposed § 5.424(d) is derived from current § 3.652(b) and is a matter of long-standing VA policy. Proposed § 5.424(d) states that there is no time limit to submit income evidence in order to reduce an overpayment; however, the income evidence submitted must pertain to the time period for which the overpayment was created. Although this provision is implied in current § 3.652(b), we believe that positively stating it within the Improved Pension time limits section makes the provision clearer to readers.

Section 5.425 Frequency of Payment of Improved Pension Benefits

Current § 3.30 governs the frequency of payment of Improved Pension and parents' dependency and indemnity compensation (DIC). (The provisions concerning parents' DIC are contained in a different NPRM (70 FR 61326).) Paragraphs (a) through (d), and paragraph (f) of current § 3.30 explain that the amount of Improved Pension payable determines how often the payment is made. The introduction to current § 3.30 includes a caveat that if a beneficiary is subject to losing other Federal benefit payments because pension payment is less often than monthly, the beneficiary may choose to receive monthly payment. Our proposal contains format and language changes only. There is no revision to the substance of the part 3 regulation.

Improved Death Pension Marriage Date Requirements and Effective Dates

Section 5.430 Marriage Date Requirements for Improved Death Pension.

Proposed § 5.430 is based on current § 3.54, the regulation that limits, in the case of post-service marriages, the class of surviving spouses eligible for pension to those whose marriages satisfy one of three conditions. We propose to separate these provisions into separate regulations because the Project is separating regulations according to benefit type. Proposed regulations based on other provisions contained in current § 3.54 will be or have been contained in separate NPRMs.

Proposed § 5.430 reorganizes the provisions of current § 3.54(a) in order to make it easier for the reader to locate pertinent marriage date requirements.

Proposed § 5.430(a)(1) contains a new sentence that explicitly states that multiple marriage periods may be added together to meet the one-year requirement. We believe this is a reasonable interpretation of 38 U.S.C. 1541(f)(2) because the statute does not provide that the period must be continuous. Proposed § 5.430(a)(2) limits the wartime periods described to the Mexican Border Period, World War I and later periods because this group of regulations pertains only to Improved Pension.

Proposed § 5.430(b) restates current § 3.54(e). We propose not to include the introductory clause in the first sentence of current § 3.54(e), which limits the scope of § 3.54(e) to "periods commencing after December 31, 1957." January 1, 1958, is the effective date of the Veterans' Benefits Act of 1957 (1957 Act), Public Law 85-56, 71 Stat. 83. The

1957 Act primarily served to consolidate laws concerning veterans' benefits into one statute. The text of one of the 1957 Act's provisions is similar to current 38 U.S.C. 103(b). *See* sec. 103, Public Law 85-56, 71 Stat. 90. However, the law in effect before the passage of the 1957 Act also permitted using the original date of marriage to determine if date of marriage requirements had been met where the surviving spouse and the veteran had been married more than once. *See* sec. 3, Public Law 78-483, 58 Stat. 804.

Section 5.431 Effective Dates for Improved Death Pension

Current § 3.400(c) pertains to effective dates for all VA death benefits.

Proposed § 5.431 is based on current § 3.400(c) only as it pertains to Improved Pension.

Proposed § 5.431(b) restates current § 3.400(c)(1) pertaining to death in service. We propose to not include current paragraph (c)(3)(i), which refers to claims received before October 1, 1984, because we know of no such pending Improved Death Pension claims. Should one be discovered, the prior version of the regulations would control the effective date. Likewise, we propose not to include current paragraph (c)(3)(ii) for claims received on or after October 1, 1984, but before December 10, 2004, for the same reasons.

Section 5.432 Deemed Valid Marriages and Contested Claims for Improved Death Pension

Proposed § 5.432 is a new regulation based on current § 3.52(d). In VAOPGCPREC 20-90, 55 FR 40985 (Oct. 5, 1990), VA's General Counsel held that the phrase "legal surviving spouse who has been found entitled to gratuitous death benefits" in § 3.52(d) does not apply to an individual who has been found to be the legal surviving spouse of the veteran but who does not meet the income requirements to qualify for Improved Death Pension. In other words, the mere fact of recognized status as a legal surviving spouse is not sufficient to prevent a surviving spouse of a deemed valid marriage from being entitled to gratuitous death benefits if the legal surviving spouse does not show that he or she meets all the legal criteria for the award of the benefit. We propose this new regulation to clarify that this deemed valid provision means that the legal surviving spouse must have been found entitled under all of the factual criteria for the award of the benefit in order to bar the recognition of the surviving spouse of the deemed

valid marriage as eligible for the same benefit.

Current § 3.52(d) indicates that a legal surviving spouse and a surviving spouse of a deemed valid marriage may compete at the same time for the same death benefits. In such cases, the wording of current § 3.52(d) suggests that a surviving spouse of a deemed valid marriage will be recognized so long as the legal surviving spouse fails to fulfill some factual criterion for the award of death benefits. A legal surviving spouse may not be entitled to Improved Death Pension, for example, due to excessive income. In this case, the other claimant may be eligible for Improved Death Pension as a surviving spouse of a deemed valid marriage.

When both a legal surviving spouse and a person claiming to be a surviving spouse of a deemed valid marriage apply for Improved Death Pension at the same time and the legal surviving spouse is not entitled to Improved Death Pension because his or her expected adjusted annual income appears to exceed the maximum annual pension rate, VA will not recognize a surviving spouse of a deemed valid marriage until the Improved Pension time limits under current § 3.660(b)(1) have expired. In this way, VA avoids the prospect of making a duplicate payment in violation of 38 U.S.C. 103(d).

Section 5.433 Effective Date of Discontinuance of Improved Death Pension Payments to a Beneficiary No Longer Recognized as the Veteran's Surviving Spouse

Proposed § 5.433 is based on current § 3.657(a). Current § 3.657 addresses two different effective date and payment adjustment scenarios when a surviving spouse is awarded Improved Death Pension, or when his or her Improved Death Pension benefits are discontinued. VA proposes to address each of these situations in separate sections in subpart F of part 5 as §§ 5.433 and 5.434.

The first scenario occurs when VA is paying Improved Death Pension to one beneficiary who claims to be the surviving spouse of a veteran, but a second person later claims Improved Death Pension and successfully establishes that he or she is actually the veteran's lawful surviving spouse. Current § 3.657(a) governs the effective date for the discontinuance of the award to the beneficiary previously recognized as the veteran's surviving spouse. Proposed § 5.433 addresses this situation.

Proposed § 5.433(a) describes the situation to which the section applies. Proposed § 5.433(b) is substantively the

same as § 3.657(a) with two exceptions. First, 38 U.S.C. 5112(b)(6) precludes reduction or discontinuance of compensation, DIC, or pension “by reason of change in law or administrative issue” or a “change in interpretation of a law or administrative issue” until “the last day of the month following sixty days from the date of notice to the payee (at the payee’s last address of record) of the reduction or discontinuance.” We propose to add this exception as § 5.433(b)(3). Again, we propose to phrase the effective date that VA pays a reduced amount or discontinues benefits in terms of the date that the reduced amount begins or discontinuance occurs.

Second, current § 3.657(a)(1) and (2) refer to payments to the legal surviving spouse being effective either before or from “the date of filing claim.” Under the provisions of 38 U.S.C. 5110(a), the effective date of an award based on an original claim, a reopened claim, or claim for increase of compensation, pension, or DIC is fixed in accordance with the facts found, but shall not be earlier than the date of receipt of an application. The operative effective date is not the date of filing, but the date VA receives the claim. Therefore, § 5.433 refers to the date of receipt of claim.

Section 5.434 Award, or Discontinuance of Award, of Improved Death Pension to a Surviving Spouse Where Improved Death Pension Payments to a Child Are Involved

Proposed § 5.434 is based on current § 3.657(b), which concerns effective dates and payment adjustments to surviving spouses and children. This involves two different situations: (1) The surviving spouse is found eligible for death benefits and a separate award for a surviving child in that surviving spouse’s custody must therefore be discontinued, or (2) the surviving spouse continues to receive Improved Death Pension for a period of time after his or her eligibility discontinues (by remarriage, for example) and the veteran’s surviving child is eligible and entitled to receive Improved Death Pension because the surviving spouse is no longer eligible. In the second situation, we propose to refer to the surviving spouse, who is no longer eligible for benefits, as the “former” surviving spouse.

Proposed § 5.434(a) is based on current §§ 3.657(b)(1) and 3.503(a)(9), which provide that VA will discontinue benefits to a surviving child effective the date of last payment when a surviving spouse establishes eligibility.

Proposed § 5.434(b) is based on current § 3.657(b)(2), which provides

that VA will adjust the payment to the former surviving spouse, and surviving child depending on whether the child’s payment amount was lower, or equal to or greater than the former surviving spouse’s payment amount.

We propose a further wording change consistent with our proposal to clarify effective dates for reductions or discontinuances. Rather than saying VA will reduce or discontinue benefits “effective the date of last payment,” we propose to state that VA will reduce or discontinue benefits “effective the first of the month that follows the month for which VA last paid benefits.” Although it is longer, we believe the proposed phrase is clearer than the current rule. We propose this rewording because “date of last payment” could have varying meanings because VA pays one month in arrears. Therefore, proposed § 5.434 clarifies that VA will begin paying the new payee effective the same day it stops paying the previous payee in these cases. No substantive change is intended.

We have restructured the material of current § 3.657(b) to make it easier to follow and to clarify this rule’s application to Improved Pension claims. Current § 3.657(b) does not apply to Improved Pension in the same way that it applies to DIC.

Improved Pension is very different from DIC in its treatment of children and surviving spouses. Under current § 3.24 (proposed § 5.435), children may not establish separate entitlement to Improved Death Pension if they are in the custody of a surviving spouse who is eligible for Improved Pension. “Custody” for Improved Pension purposes is defined in current § 3.57(d) (proposed § 5.417). Custody for Improved Pension purposes exists unless legally divested and does not discontinue when the child reaches age 18. When such children are in the custody of a surviving spouse who is eligible for Improved Death Pension, VA considers them to be dependent children of the surviving spouse for Improved Pension purposes rather than surviving children.

Section 1542 of title 38, United States Code, provides, “The Secretary shall pay to each child [who meets basic eligibility requirements] and who is not in the custody of a surviving spouse eligible for [Improved Death Pension] pension [at statutory rates].” Therefore, if a surviving child is receiving Improved Death Pension, the fact that a surviving spouse also establishes entitlement to Improved Death Pension has no effect on the surviving child’s benefits if the surviving spouse is not a person legally responsible for the

surviving child’s support under current § 3.57(d)(2).

Alternatively, if a surviving child is receiving Improved Death Pension, and the child’s parent or legal custodian establishes eligibility for Improved Death Pension as the veteran’s surviving spouse, the child loses his or her separate entitlement. Therefore, we propose to amend the language of the existing provision and address its application to the Improved Pension program.

Current § 3.657(b) has been rewritten to clarify effective dates and payment adjustments that apply in the event the surviving spouse’s Improved Pension payment amount is equal to the child’s Improved Pension payment amount.

Section 5.435 Calculating Annual Improved Pension Amounts for Surviving Children

Proposed § 5.435 is derived from current § 3.24, except for several provisions from current § 3.24(a), which have been included elsewhere. The first two sentences of current § 3.24(a) have been incorporated in proposed § 5.370 as a definition of a surviving child. The third sentence of current § 3.24(a), concerning eligibility versus entitlement, has been included at the beginning of the Improved Pension subpart, in § 5.371. The last sentence of current § 3.24(a), which cross-references and restates part of current § 3.23(d)(5), that a surviving spouse’s income includes that of surviving children in the surviving spouse’s custody unless it would cause hardship, is included in the hardship provisions in proposed § 5.411.

Paragraphs (b)(1) and (b)(2) of proposed § 5.435 are based on current § 3.24(c) and are rewritten in plain language to improve readability. Proposed § 5.435(b)(3) includes the provision from the last sentence of current § 3.57(d)(2) that if a surviving child is in joint custody, the annual income of the natural or adoptive parent includes the income of the natural or adoptive parent’s spouse.

Non-Inclusion of Other Part 3 Provisions

Previously in this NPRM in the discussions concerning the new proposed part 5 regulations, we discussed regulations or portions of regulations that we propose not to include to part 5. We now discuss several other provisions that we propose not to include.

We propose not to include § 3.1(w), which briefly defines Improved Pension. Because of the regulation

reorganization of the Project, this definition would not be needed.

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

Although this document contains regulations which include collections of information under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501–3521), no new or proposed revised collections of information are associated with these proposed rules. The information collection requirements for these regulations are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control numbers 2900–0001 (Veteran's Application for Compensation and/or Pension), 2900–0004 (Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child), 2900–0095 (Pension Claim Questionnaire for Farm Income), 2900–0101 (Improved Pension Eligibility Verification Reports), and 2900–0104 (Report of Accidental Injury in Support of Claim for Compensation or Pension).

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

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) unless OMB waives such review, 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, budgetary, legal, and policy implications of this proposed rule have been examined and it has been determined to be a significant regulatory action under the Executive Order because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

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 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 rule would have no such effect on State, local, or 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 proposal are 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.115, Veterans Information and Assistance.

List of Subjects in 38 CFR Part 5

Administrative practice and procedure, Claims, Disability benefits, Pensions, Veterans.

Approved: June 15, 2007.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to further amend 38 CFR part 5, as proposed to be added at 69 FR 4832, January 30, 2004, and as further proposed to be amended

at 69 FR 77578, December 27, 2004, as follows:

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

Subpart F—Nonservice-Connected Disability and Death Pensions

1. The authority citation for part 5, subpart F, continues to read as follows:

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

2. Sections 5.370 through 5.459 and their undesignated center headings are added to subpart F to read as follows:

Improved Pension Requirements—Veterans, Surviving Spouses, and Surviving Children

Sec.

5.370 Definitions for Improved Pension.

5.371 Eligibility and entitlement requirements for Improved Pension.

5.372 Wartime service requirements for Improved Pension.

5.373 Evidence of age in Improved Pension claims.

5.374–5.379 [Reserved]

Improved Disability Pension—Disability Determinations and Effective Dates

5.380 Disability requirements and presumptions for Improved Disability Pension.

5.381 Permanent and total disability ratings for Improved Disability Pension purposes.

5.382 Improved Disability Pension—combining disability ratings.

5.383 Effective dates for awards of Improved Disability Pension.

5.384–5.389 [Reserved]

Special Monthly Pension Eligibility for Veterans and Surviving Spouses

5.390 Special Monthly Pension for Veterans and Surviving Spouses at the Aid and Attendance Rate.

5.391 Special Monthly Pension for Veterans and Surviving Spouses at the Housebound Rate.

5.392 Effective Dates for Awards of Special Monthly Pension.

5.393–5.399 [Reserved]

Maximum Annual Pension Rates

5.400 Maximum Annual Pension Rates for Veterans, Surviving Spouses, and Surviving Children.

5.401 Automatic Adjustment of Maximum Annual Pension Rates.

5.402–5.409 [Reserved]

Improved Pension Income, Net Worth, and Dependency

5.410 Countable Annual Income.

5.411 Counting a Child's Income for parents' Improved Pension.

5.412 Income exclusions for calculating countable annual income.

5.413 Income deductions for calculating adjusted annual income.

5.414 Net worth determinations for Improved Pension.

- 5.415 Effective dates for Improved Pension awards based on a change in net worth.
- 5.416 Persons considered as dependents for Improved Pension.
- 5.417 Child custody for purposes of determining dependency for Improved Pension purposes.
- 5.418–5.419 [Reserved]

Improved Pension—Income Reporting Periods, Payments, Effective Dates, and Time Limits

- 5.420 Reporting periods for Improved Pension.
- 5.421 How VA calculates an Improved Pension payment amount.
- 5.422 Effective dates for changes to Improved Pension payments due to a change in income.
- 5.423 Improved Pension determinations when anticipated annual income is uncertain.
- 5.424 Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income.
- 5.425 Frequency of payment of Improved Pension benefits.
- 5.426–5.429 [Reserved]

Improved Death Pension Marriage Date Requirements and Effective Dates

- 5.430 Marriage date requirements for Improved Death Pension.
- 5.431 Effective dates for Improved Death Pension.
- 5.432 Deemed valid marriages and contested claims for Improved Death Pension.
- 5.433 Effective date of discontinuance of Improved Death Pension payments to a beneficiary no longer recognized as the veteran's surviving spouse.
- 5.434 Award, or discontinuance of award, of Improved Death Pension to a surviving spouse where Improved Death Pension payments to a child are involved.
- 5.435 Calculating annual Improved Pension amounts for surviving children.
- 5.436–5.459 [Reserved]

Eligibility for Improved Pension—Veterans, Surviving Spouses, and Surviving Children

§ 5.370 Definitions for Improved Pension.

For the purposes of §§ 5.370 through 5.459:

Adjusted annual income means countable annual income minus deductions described in § 5.413, rounded down to the nearest dollar.

Annual Improved Pension amount means the amount of Improved Pension payable to a beneficiary, calculated as the maximum annual pension rate minus adjusted annual income.

Countable annual income means payments of any kind from any source that are not specifically excluded under §§ 5.410, 5.411, or 5.412.

Maximum annual pension rate means the amount of Improved Pension payable to a beneficiary whose adjusted

annual income is zero. The maximum annual pension rates are established by law. The various types of maximum annual pension rates are set forth at § 5.400.

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 received in lieu of other forms of payment.

Special Monthly Pension is a type of Improved Pension with higher maximum annual pension rates than the basic rates listed in § 5.400(a)(1) and (5). Special Monthly Pension is based on a veteran's or surviving spouse's disability or disabilities ratable at 60 percent or more, their housebound status, or their need of the aid and attendance of another person in performing their daily living habits.

A surviving child is a person who is eligible for Improved Death Pension as the surviving child of a deceased wartime veteran and who is not in the custody of a surviving spouse eligible to receive Improved Death Pension.

§ 5.371 Eligibility and entitlement requirements for Improved Pension.

(a) *General.* Improved Pension is a benefit payable to certain veterans or to a veteran's surviving spouse or surviving child. Improved Pension is paid monthly or as provided in § 5.425. In order for Improved Pension benefits to be paid, beneficiaries must be both eligible and entitled.

(b) *Eligibility requirements for Improved Disability Pension.* Veterans are eligible for Improved Disability Pension if they—

- (1) Have wartime service under § 5.372 and are either
- (2) Age 65 or older; or
- (3) Permanently and totally disabled under § 5.381.

(c) *Eligibility requirements for Improved Death Pension.* (1) A surviving spouse is eligible for Improved Death Pension if the deceased veteran had wartime service under § 5.372.

(2) A surviving child is eligible for Improved Death Pension if the deceased veteran had wartime service under § 5.372.

(3) A surviving spouse or surviving child may be eligible for Improved Death Pension regardless of whether the veteran's death is service-connected.

(d) *Entitlement requirements for Improved Disability or Death Pension.* In addition to the eligibility requirements of paragraphs (b) and (c) of this section, a claimant or beneficiary must meet income and net worth requirements to be entitled to or

continue to be entitled to Improved Pension.

(1) *Income.* VA determines a claimant's or beneficiary's annual Improved Pension amount by subtracting adjusted annual income from the maximum annual pension rate. A claimant is not entitled to benefits if his or her adjusted annual income is greater than the maximum annual pension rate. See § 5.400, "Maximum annual pension rates for veterans, surviving spouses and surviving children." See also § 5.370 for the definitions of "adjusted annual income," "annual Improved Pension amount," and "maximum annual pension rate."

(2) *Net worth.* A claimant's or beneficiary's net worth must not bar payment of Improved Pension, as provided in § 5.414.

(Authority: 38 U.S.C. 1513, 1521, 1522, 1541, 1542, 5303A)

§ 5.372 Wartime service requirements for Improved Pension.

(a) *Wartime periods for Improved Pension.* The periods of war for Improved Pension purposes are those specified in § 5.20.

(b) *Wartime service requirement for Improved Disability Pension.* A veteran has "wartime service" for Improved Disability Pension purposes if he or she served in the active military service for one or more of the following:

(1) A period of 90 consecutive days or more, at least 1 day of which was during a period of war.

(2) Ninety days or more during a period of war. Separate periods of service within the same period of war can be added together to meet the 90-day requirement.

(3) A total of 90 days or more in 2 or more separate periods of service during more than 1 period of war.

(4) Any period of time during a period of war if the veteran was:

(i) Discharged or released for a disability that was determined to be service-connected without presumptive provisions of law; or

(ii) Official service records show that the veteran had such a service-connected disability at the time of discharge that in medical judgment would have justified a discharge for disability.

(c) *Wartime service requirement for Improved Death Pension.* For Improved Death Pension claims, the veteran met the wartime service requirement if either of the following is true:

(1) The veteran had wartime service as specified in paragraph (b) of this section; or

(2) The veteran was, at the time of his or her death, receiving or entitled to receive disability compensation or military retired pay for a service-connected disability based on service during a period of war.

(Authority: 38 U.S.C. 1521(j), 1541(a), 1542)

§ 5.373 Evidence of age in Improved Pension claims.

Where the age of a veteran or surviving spouse is material to the decision of an Improved Pension claim, VA will accept as true the veteran's or surviving spouse's statement of age where it is consistent with all other statements of age in the record. If the record contains inconsistent statements of age, VA will use the youngest age of record unless the veteran or surviving spouse can submit documentation of an older age in one of the ways outlined in § 5.229 of this chapter.

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

§§ 5.374–5.379 [Reserved]

Improved Disability Pension—Disability Determinants and Effective Dates

§ 5.380 Disability requirements and presumptions for Improved Disability Pension.

(a) *Veteran must be permanently and totally disabled unless age 65 or older.* Unless a veteran has attained age 65, he or she must meet disability requirements in order to be eligible for Improved Disability Pension. The disability requirements are found in paragraph (b) of this section and in § 5.381, "Permanent and total disability ratings for Improved Disability Pension purposes."

(b) *Presumption of permanent and total disability for certain veterans.* A veteran is presumed permanently and totally disabled for Improved Disability Pension purposes if the veteran is:

- (1) A patient in a nursing home for long-term care because of disability; or
- (2) Disabled, as determined by the Commissioner of Social Security for purposes of any benefits administered by the Commissioner.

(Authority: 38 U.S.C. 1502(a), 1513)

§ 5.381 Permanent and total disability ratings for Improved Disability Pension purposes.

(a) *General.* Permanent total disability ratings for Improved Disability Pension purposes are authorized for a disability or a combination of disabilities that are not the result of the veteran's own willful misconduct whether or not they are service connected.

(Authority: 38 U.S.C. 1502(a), 1521(a))

(b) *Criteria.* In addition to the criteria for determining total disability and permanency of total disability contained in § 3.340 of this chapter, the following special considerations apply in Improved Disability Pension cases:

(1) Permanent total disability pension ratings will be authorized for congenital, developmental, hereditary or familial conditions, provided the other requirements for entitlement are met.

(2) The permanence of total disability will be established as of the earliest date consistent with the evidence in the case. Active pulmonary tuberculosis not otherwise established as permanently and totally disabling will be presumed so after 6 months' hospitalization without improvement. The same principle may be applied with other types of disabilities requiring hospitalization for indefinite periods. The need for hospitalization for periods shorter or longer than 6 months may be a proper basis for determining permanence. Where, in application of this principle, it is necessary to employ a waiting period to determine permanence of totality of disability and a report received at the end of such period shows the veteran's condition is unimproved, permanence may be established as of the date of entrance into the hospital. Similarly, when active pulmonary tuberculosis is improved after 6 months' hospitalization but still diagnosed as active after 12 months' hospitalization, permanence will also be established as of the date of entrance into the hospital. In other cases the rating will be effective the date the evidence establishes permanence.

(3) Special consideration must be given the question of permanence in the case of veterans under 40 years of age. For such veterans, permanence of total disability requires a finding that the end result of treatment and adjustment to residual handicaps (rehabilitation) will be permanent disability of the required degree precluding more than marginal employment. Severe diseases and injuries, including multiple fractures or the amputation of a single extremity, should not be taken to establish permanent and total disability until it is shown that the veteran, after treatment and convalescence, has been unable to secure or follow employment because of the disability and through no fault of the veteran.

(4) The following will not be presumed as evidence of employability:

- (i) Employment as a member-employer or similar employment obtained only in competition with disabled persons.
- (ii) Participation in, or the receipt of a distribution of funds as a result of

participation in, a therapeutic or rehabilitation activity under 38 U.S.C. 1718.

(Authority: 38 U.S.C. 1718(g))

(5) The authority granted the Secretary under 38 U.S.C. 1502(a)(4) to classify as permanent and total those diseases and disorders, the nature and extent of which, in the Secretary's judgment, will justify such determination, will be exercised under § 3.321(b).

§ 5.382 Improved Disability Pension—combining disability ratings.

(a) *Nonservice-connected disabilities.* VA will combine the disability ratings assigned to multiple nonservice-connected disabilities in the manner prescribed by 38 CFR part 4.

(b) *Nonservice-connected and service-connected disabilities.* In order to determine whether a veteran is permanently and totally disabled for Improved Pension purposes, VA will combine the disability ratings assigned to one or more nonservice-connected disabilities in the manner prescribed by 38 CFR part 4, with the disability ratings assigned to one or more service-connected disabilities.

(Authority: 38 U.S.C. 1523(a))

§ 5.383 Effective dates for awards of Improved Disability Pension.

(a) *General Effective Date Provisions.* (1) Except as provided in paragraph (b) of this section, the effective date of an award of Improved Disability Pension will be the later of either:

- (i) The date of receipt of claim; or
- (ii) The date the veteran became eligible (by attaining age 65 or by becoming permanently and totally disabled) and entitled (by meeting the income and net worth requirements).

(2) If pension was previously claimed but was denied because the veteran's adjusted annual income was greater than the maximum annual pension rate, the claim is subject to § 5.424, "Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income."

(b) *Retroactive award.* If all of the following criteria apply, the effective date of an award of Improved Disability Pension will be the date the veteran became permanently and totally disabled or the date of receipt of the pension claim, whichever is to the veteran's advantage:

- (1) The veteran specifically requests a retroactive award;
- (2) VA receives the claim for a retroactive award not more than one year after the date the veteran became permanently and totally disabled; and

(3) The veteran was unable to submit a claim for at least the first 30 days after the date that the veteran became permanently and totally disabled because of incapacitating disability. An incapacitating disability is a physical or mental disability that prevents a veteran from filing a claim for pension. A disability resulting from the veteran's willful misconduct does not qualify as incapacitating. An incapacitating disability may be a disability other than that which made the veteran permanently and totally disabled. A disability need not require extensive hospitalization to qualify, but a disability that does require extensive hospitalization will be presumed to be incapacitating.

(Authority: 38 U.S.C. 5110(a) and (b)(3))

§§ 5.384–5.389 [Reserved]

Special Monthly Pension Eligibility for Veterans and Surviving Spouses

§ 5.390 Special monthly pension for veterans and surviving spouses at the aid and attendance rate.

(a) *Eligibility.* Special monthly pension based on the aid and attendance rate applies to a veteran or surviving spouse who is eligible for Improved Pension under §§ 5.371 and 5.372, and who is so significantly disabled as to need the regular aid and attendance of another person.

(b) *Eligibility criteria.* VA considers a claimant or beneficiary to be in need of aid and attendance if the claimant or beneficiary:

(1) Has 5/200 visual acuity or less in both eyes with corrective lenses; or
(2) Has concentric contraction of the visual field to 5 degrees or less in both eyes; or

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

(4) Establishes a factual need for aid and attendance as set forth in § 3.352, Criteria for determining need for aid and attendance and “permanently bedridden.”

(Authority: 38 U.S.C. 1502(b), 1521(d) and 1541(d))

§ 5.391 Special monthly pension for veterans and surviving spouses at the housebound rate.

A veteran or surviving spouse is eligible for special monthly pension based on the housebound rate if he or she is eligible for Improved Pension under §§ 5.371 and 5.372, does not need regular aid and attendance, and meets the criteria of paragraph (a), (b), or (c) of this section.

(a) *Eligibility criteria for veterans with permanent and total disability.* The

veteran has a single, permanent disability rated 100 percent disabling under the Schedule for Rating Disabilities in part 4 of this chapter (determinations of unemployability under § 4.17 of this chapter do not qualify), and either:

(1) Has an additional disability or disabilities independently ratable at 60 percent or more under VA's Schedule for Rating Disabilities. The additional disability or disabilities must be separate and distinct from the disability rated 100 percent disabling and must involve different anatomical segments or bodily systems than the disability rated 100 percent disabling; or

(2) Is “permanently housebound” by reason of disability or disabilities. “Permanently housebound” means that the veteran is substantially confined to his or her residence and its immediate premises. If the veteran is institutionalized, “permanently housebound” means he or she is substantially confined to the ward or clinical area of the institution. It must be reasonably certain that the veteran's disability or disabilities and resulting confinement will continue throughout the veteran's lifetime.

(b) *Eligibility criteria for veterans who are 65 years of age or older.* (1) *General.* The veteran is 65 years of age or older, and either:

(i) Has a disability or disabilities ratable at 60 percent or more under VA's Schedule for Rating Disabilities in part 4 of this Chapter; or

(ii) By reason of disability or disabilities, is “permanently housebound” as defined in paragraph (a)(2) of this section;

(2) *Special rule for veterans who are 65 years of age or older and have permanent and total disability.* If the veteran is 65 years of age or older and also has permanent and total disability, the veteran must meet the requirements of paragraph (a) of this section in order to receive special monthly pension.

(c) *Eligibility criteria for surviving spouses.* The surviving spouse is permanently housebound because of a disability or disabilities. The meaning of “permanently housebound” for surviving spouses is the same as its meaning for veterans in paragraph (a)(2) of this section.

(Authority: 38 U.S.C. 1502(c), 1521(e), 1541(e))

§ 5.392 Effective dates for awards of special monthly pension.

(a) *General.* The effective date for an award of special monthly pension will be either the date VA received the claim for special monthly pension or the date

entitlement arose, whichever date is later.

(b) *Exception—when an award of Improved Pension is effective retroactively.* Paragraph (b) of this section applies when an award of Improved Pension is effective retroactively, and entitlement to special monthly pension is established for all or part of the retroactive period. (Retroactively means that the award is effective prior to the date of receipt of the claim.) In such cases, the effective date of an award of special monthly pension will be the later of the effective date of the Improved Pension award or the date entitlement to special monthly pension arose.

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

§§ 5.393–5.399 [Reserved]

Maximum Annual Pension Rates

§ 5.400 Maximum annual pension rates for veterans, surviving spouses, and surviving children.

(a) *Maximum annual pension rates.* The maximum annual rates of Improved Pension for the following categories of beneficiaries shall be the amounts specified in 38 U.S.C. 1521, 1541, and 1542, as increased from time to time under 38 U.S.C. 5312. Each time there is an increase under 38 U.S.C. 5312, the actual rates will be published in the “Notices” section of the **Federal Register**.

(1) Veterans who are permanently and totally disabled or age 65 or older.

(Authority: 38 U.S.C. 1521(b) or (c))

(2) Veterans who are housebound.

(Authority: 38 U.S.C. 1521(e))

(3) Veterans who are in need of aid and attendance.

(Authority: 38 U.S.C. 1521(d))

(4) Two veterans who are married to one another; combined rates.

(Authority: 38 U.S.C. 1521(f))

(5) Surviving spouse who is alone or who is with a child or children of the deceased veteran in custody of the surviving spouse.

(Authority: 38 U.S.C. 1541(b) or (c))

(6) Surviving spouses who are housebound.

(Authority: 38 U.S.C. 1541(e))

(7) Surviving spouses who are in need of aid and attendance.

(Authority: 38 U.S.C. 1541(d))

(8) Surviving child or children of a deceased veteran, when the child or children have no personal custodian or are in the custody of an institution.

(Authority: 38 U.S.C. 1542)

(b) *World War I veterans.* The applicable maximum annual pension rate payable to a World War I veteran under this section shall be increased by the amount specified in 38 U.S.C. 1521(g), as increased from time to time under 38 U.S.C. 5312. Each time there is an increase under 38 U.S.C. 5312, the actual rate will be published in the "Notices" section of the **Federal Register**.

(c) *Dependents.* The maximum annual pension rates will increase if the veteran has a spouse or one or more dependent children. The maximum annual pension rates will increase if a surviving spouse has custody of the deceased veteran's surviving children. The applicable maximum annual pension rate payable under this section shall be increased by the amount specified in 38 U.S.C. 1521 and 1541, as increased from time to time under 38 U.S.C. 5312. Each time there is an increase under 38 U.S.C. 5312, the actual rates will be published in the "Notices" section of the **Federal Register**.

(Authority: 38 U.S.C. 1521, 1541, 1542)

§ 5.401 Automatic adjustment of maximum annual pension rates.

(a) *Pension rates increase when Social Security benefits increase.* VA will increase each maximum annual pension rate whenever there is a cost-of-living increase in Social Security benefit amounts under title II of the Social Security Act (42 U.S.C. 415(i)), which pertains to the Federal Old-Age, Survivors, and Disability Insurance Benefits program. VA will increase the maximum annual pension rates by the same percentage as the Social Security increase, and the increase will be effective on the same date as the Social Security increase.

(b) *New rates are published in the Federal Register.* Whenever the maximum annual pension rates increase, VA will publish the new rates in the "Notices" section of the **Federal Register**.

(Authority: 38 U.S.C. 5312(a))

§§ 5.402–5.409 [Reserved]

Improved Pension Income, Net Worth, and Dependency

§ 5.410 Countable annual income.

(a) *Time of receipt of income.* (1) For Improved Disability Pension claims, VA does not include income received before the effective date of the beneficiary's award.

(2) For Improved Death Pension claims, VA does not include income received before the date of the veteran's death or income received before the effective date of the award.

(b) *Whose income is countable?—(1) Improved Disability Pension for veterans.* The income of a veteran includes the veteran's income and that of the veteran's dependent spouse, regardless of whether the spouse's income is available to the veteran. It also includes the income of each dependent child (as defined in § 5.416(b)), subject to § 5.411, "Counting a child's income for Improved Pension."

(2) *Improved Death Pension for surviving spouses.* The income of a surviving spouse includes the surviving spouse's income and the income of each dependent child of the deceased veteran in the surviving spouse's custody, subject to § 5.411, "Counting a child's income for Improved Pension."

(3) *Improved Death Pension for surviving children.* The income of a surviving child includes the income of that child's custodial parent and the income of other surviving children as described in § 5.435, "Calculating annual Improved Pension amounts for surviving children."

(c) *Categories and counting of income.* If there is more than one way to categorize income, it will be categorized in the way that is most to the claimant's or beneficiary's advantage. Payments of any kind from any source will be counted as income during the reporting period in which it was received unless specifically excluded under this section, § 5.411, or § 5.412. See § 5.420, "Reporting periods for Improved Pension."

(1) *Recurring income.* Recurring income is income a claimant or beneficiary receives or expects to receive in equal amounts and at regular intervals (e.g., weekly, monthly, quarterly, etc.). There are two categories of recurring income as follows:

(i) *Long-term.* Long-term recurring income continues for an entire reporting period. VA will count such income during the reporting period in which it was received. If the initial payment was received after the beginning of the reporting period, VA will count such income for 12 months from the first of the month after the initial payment was received. Thereafter, VA will count such income during the reporting period in which it is received.

(ii) *Short-term.* Short-term recurring income stops before it has been received for at least one full reporting period. VA will count such income for 12 months from the first of the month after the initial payment was received.

(2) *Nonrecurring income.* Nonrecurring income is income that a claimant or beneficiary receives or expects to receive on a one-time basis (e.g., an inheritance). VA will count

such income for 12 months from the first of the month after it was received.

(3) *Irregular income.* Irregular income is income that a claimant or beneficiary receives or expects to receive in unequal amounts or at different intervals during a reporting period. VA will count the first installment of irregular income for 12 months from the first of the month after it was received. Thereafter, VA will count irregular income for 12 months from the beginning of the reporting period in which it is received.

(d) *Waived income.* If a person waives income that cannot be excluded under § 5.412, VA must count the waived income. However, if the person withdraws a claim for Social Security benefits in order to maintain eligibility for unreduced Social Security benefits upon reaching a particular age, VA will not regard this potential income as having been waived and will therefore not count it.

(e) *Salary.* Income from a salary is not determined by "take home" pay. VA counts as income the gross salary (earnings or wages) without any deductions. However, an employer's contributions to health and hospitalization plans are not included in gross salary.

(f) *Income-producing property.* Income from real or personal property counts as income of the property's owner. This includes property acquired through purchase, gift, or inheritance.

(1) *Proof of ownership.* VA will consider the terms of the recorded deed or other evidence of title as proof of ownership.

(2) *Income from jointly-owned property.* Where a person owns property jointly with others, including partnership property, VA will only count that portion of income produced by the property that represents the person's share of the ownership of the property.

Note: If a beneficiary's income includes that of his or her spouse, and both the beneficiary and spouse are co-owners of a property that produces income, then income representing both co-owned shares is included as income to the beneficiary.

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

(Authority: 38 U.S.C. 1503, 1521, 1541)

§ 5.411 Counting a child's income for parents' Improved Pension.

(a) *When to include a child's income in the veteran's or surviving spouse's countable annual income.* Subject to paragraphs (a)(1) and (a)(2) of this

section, for each child of the veteran who is in the veteran's or surviving spouse's custody, VA counts that portion of the child's annual income that is reasonably available to the veteran or surviving spouse. There is a rebuttable presumption that all of such a child's annual income is reasonably available to the veteran or surviving spouse.

(1) *Inclusion of a child's income when it is reasonably available to the veteran or surviving spouse.* VA considers a child's annual income reasonably available to the veteran or surviving spouse when it can readily be applied to meet the veteran's or surviving spouse's expenses necessary for reasonable family maintenance, as defined in paragraph (b) of this section.

(2) *Exclusion of a child's income when counting it would create a hardship.* If a veteran or surviving spouse specifically claims that counting a child's income would result in hardship, VA will exclude all or part of a child's available income if VA determines that counting it would create a hardship for the veteran or the surviving spouse. The effective date for the hardship exclusion is determined by § 5.424, "Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income." VA takes the following steps in calculating the amount of the hardship exclusion:

(i) *Adjusted annual income determined.* VA first determines the veteran's or surviving spouse's adjusted annual income without considering hardship.

(ii) *Annual Improved Pension amount determined.* VA then determines the veteran's or surviving spouse's annual Improved Pension amount without considering hardship.

(iii) *Annual expenses necessary for reasonable family maintenance calculated.* VA then calculates the claimant's annual expenses necessary for reasonable family maintenance, as defined in paragraph (b) of this section. However, VA cannot include expenses already deducted in determining adjusted annual income.

(iv) *Amount of hardship exclusion.* The expense amount greater than adjusted annual income plus the annual Improved Pension amount is the amount of the hardship exclusion. However, the amount of the hardship exclusion shall not exceed the available income of any child or children.

(b) *Expenses necessary for reasonable family maintenance.* For the purposes of this section, "expenses necessary for reasonable family maintenance" are expenses for basic necessities. Examples

include food, clothing, healthcare, and shelter. VA may include other expenses that are necessary to support a reasonable quality of life, as determined on a case-by-case basis.

(c) *Child's earned income.* This paragraph (c) applies whether the child is a dependent child or a surviving child. A child's earned income, which is current work income received during the year, is countable for VA purposes. VA will deduct from such earned income the amounts described in paragraphs (c)(1) and (c)(2) of this section.

(1) VA will deduct from a child's earned income the lowest amount of gross income for which an unmarried person must file a Federal Income Tax return if the person is not a surviving spouse or a head of household. For the law regarding this amount, see 26 U.S.C. 6012. For the definitions of the terms "unmarried person," "surviving spouse," and "head of household" for purposes of this paragraph (c), see 26 U.S.C. 2(a) and (b), 7703. See also <http://www.irs.gov>.

(2) VA will deduct from a child's earned income the amount the child pays for educational expenses if the child is pursuing post-secondary education or vocational rehabilitation. This includes tuition, fees, books, and materials.

(Authority: 38 U.S.C. 1503(a)(10), 1521, 1541)

§ 5.412 Income exclusions for calculating countable annual income.

VA will not count income from the following sources when calculating countable income for Improved Pension:

(a) *Donations received.* Donations received from public or private relief or welfare organizations. Examples include 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 care due to a person's impaired health or advanced age. However, if the maintenance is excluded as income under this provision, VA cannot deduct it as an unreimbursed medical expense under § 5.413.

(2) Benefits received under means-tested programs, for example, Supplementary Security Income payments.

(3) Payments from the VA Special Therapeutic and Rehabilitation Activities Fund for participating in VA-approved therapy or rehabilitation under 38 U.S.C. 1718, or in a program of rehabilitation which is conducted by a VA-approved State home and which conforms to the requirements of 38 U.S.C. 1718.

(Authority: 38 U.S.C. 1503(a)(1), 1718(f)(3))

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

(1) VA nonservice-connected disability or death pension payments, including accrued benefits.

(2) The veteran's month-of-death rate paid to a surviving spouse under § 3.20(c) of this chapter.

(3) VA benefits listed in [regulation that will be published in a future Notice of Proposed Rulemaking].

(Authority: 38 U.S.C. 1503(a)(2), 5310(b))

(c) *Casualty loss reimbursement.* Reimbursements of any kind for any casualty loss, 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.

(Authority: 38 U.S.C. 1503(a)(5))

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

(Authority: 38 U.S.C. 1503(a)(6))

(e) *Joint accounts.* Amounts in joint accounts in banks or similar institutions acquired because of the death of the other joint owner.

(Authority: 38 U.S.C. 1503(a)(7))

(f) *Survivor benefit annuity.* Payments made by the Department of Defense to qualified surviving spouses of veterans who died before November 1, 1953. (This does not include Survivor Benefit Plan (SBP) annuity payments or SBP Minimum Income Widow(er)'s Annuity Plan payments, which count as income.)

(Authority: 10 U.S.C. 1448 note; Section 653(d), Pub. L. 100-456, 102 Stat 1991)

(g) *Radiation Exposure Compensation Act payments.* Payments made under section 6 of the Radiation Exposure Compensation Act of 1990.

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

(h) *Ricky Ray Hemophilia Relief Fund payments.* Payments made under section 103(c) and excluded under 103(h)(2) of the Ricky Ray Hemophilia Relief Fund Act of 1998.

(Authority: 42 U.S.C. 300c-22 (note))

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

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

(j) *Payments to Aleuts.* Payments made to certain Japanese-Americans or Aleuts under 50 U.S.C. Appx. 1989b-4 or 1989c-5.

(Authority: 50 U.S.C. Appx. 1989b-4(f)(2), 1989c-5(d)(2))

(k) *Other amounts.* The following are excluded because VA does not consider them as "payments":

(1) Dividends on commercial insurance policies and cash surrender of life insurance to the extent that they represent return of premiums. However, interest earned is considered a payment.

(2) Income Tax refunds.

(3) Interest on Individual Retirement Accounts that cannot be withdrawn without incurring a penalty.

(4) Interest on prepaid burial plans that is added to the value of the policy and is not available to the policy holder.

(5) Royalties received for extracting minerals.

(6) School scholarships and grants earmarked for specific educational purposes to the extent they are used for those purposes.

(7) Benefits payable but withheld, such as Social Security withheld to recoup an overpayment. This does not apply to VA benefits withheld to recoup an overpayment.

(8) Amounts listed in [regulation that will be published in a future Notice of Proposed Rulemaking].

(Authority: 38 U.S.C. 1503)

§ 5.413 Income deductions for calculating adjusted annual income.

(a) *General rule for allowing deductions.* Except as otherwise provided in paragraph (c)(2)(iv) of this section, VA will only allow deductible expenses for the initial reporting period or annual reporting period during which the expense was paid, regardless of when the expense was incurred. VA will only allow deductible losses for the initial reporting period or annual reporting period during which the loss was sustained. For the definitions of initial reporting period and annual reporting period, see § 5.420, "Reporting periods for Improved Pension."

(b) *Unreimbursed medical expenses.* Within the provisions of the following paragraphs, there will be deducted from the amount of an individual's countable annual income any unreimbursed amounts for medical expenses which

have been paid within the reporting period regardless of when the indebtedness was incurred. For the purpose of authorizing prospective payment of benefits, VA may accept a claimant's or beneficiary's estimate of future medical expenses based on a clear and reasonable expectation that they will continue, subject to necessary adjustment upon receipt of an amended estimate or upon receipt of a medical expense report. A change in medical expenses is a change in income. See § 3.660(a) of this chapter (concerning the beneficiary's responsibility to inform VA concerning income changes).

(1) *What amount of unreimbursed medical expenses will VA deduct? VA will deduct from countable annual income any unreimbursed (out of pocket) medical expenses (excluding "final expenses" as defined in paragraph (c) of this section) that exceed 5 percent of the beneficiary's maximum annual pension rate. The maximum annual pension rate that VA uses for this calculation includes the maximum annual pension rates for established dependents. It does not include the maximum annual pension rates based on aid and attendance or housebound eligibility. VA will use the maximum annual pension rate that is in effect for the period(s) during which VA deducts the expenses.*

(2) *Whose medical expenses will VA deduct?—(i) Improved Disability Pension—veteran or veteran's spouse.* Amounts paid by the veteran or the veteran's spouse for the unreimbursed medical expenses of the veteran, the veteran's spouse, and those members or constructive members of the veteran's or spouse's household, including children, parents, or other relatives, for whom there is a moral or legal obligation of support.

(ii) *Improved Death Pension—surviving spouse.* Amounts paid by the surviving spouse for the surviving spouse's own unreimbursed medical expenses and those of members or constructive members of the surviving spouse's household, including children, parents, or other relatives, for whom there is a moral or legal obligation of support.

(iii) *Improved Death Pension—surviving child.* Amounts paid by a surviving child for the surviving child's own unreimbursed medical expenses and those of parents, brothers, or sisters are deductible.

(Authority: 38 U.S.C. 1503(a)(8))

(c) *Final expenses—(1) Definitions.* (i) *Final expenses,* for the purposes of this section, are expenses paid by an Improved Pension beneficiary for a

veteran's, spouse's, or child's last illness and burial. In Improved Death Pension cases, final expenses also include a veteran's just debts.

(ii) *Last illness.* For purposes of this section, "last illness" means the medical condition that was the primary or secondary cause of a person's death as indicated on the person's death certificate.

(iii) *Veteran's just debts.* A veteran's just debts are those debts that the veteran incurred or those debts that the veteran and spouse incurred jointly during the veteran's life. The term just debts does not include any debt that is secured by real or personal property.

(2) *Final expenses that VA will deduct from countable annual income—(i) Veteran awards.* VA will deduct amounts paid by a veteran for the last illness and burial of the veteran's spouse or child, and amounts paid by a veteran's spouse for the last illness and burial of the veteran's child.

(ii) *Surviving child awards.* VA will deduct amounts paid by a surviving child for the veteran's final expenses and just debts.

(iii) *Surviving spouse awards.* VA will deduct amounts paid by a surviving spouse for the final expenses of the veteran or the veteran's child, and the just debts of the veteran.

(iv) *Surviving spouse's prior payments of veteran's last illness expenses.* VA will deduct during the surviving spouse's initial reporting period amounts paid by the surviving spouse before the veteran's death for the veteran's last illness when:

(A) The surviving spouse made the payments no more than one year before the veteran died; and

(B) VA received the surviving spouse's Improved Death Pension claim no later than one year after the veteran's death.

(3) *Final expenses that VA will not deduct from countable annual income.* VA will not deduct final expenses from a beneficiary's countable annual income if:

(i) The expenses are reimbursed 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 expenses of last illness or burial); or

(ii) The expenses are deducted as unreimbursed medical expenses under paragraph (b) of this section.

Authority: 38 U.S.C. 1503(a)(3), (4)

(d) *Educational expenses.* VA will deduct educational expenses from a veteran's or surviving spouse's countable annual income. For purposes

of this educational expense deduction, educational expenses include payments a veteran or surviving spouse makes for his or her own course of education, vocational rehabilitation, or training. It includes tuition, fees, books, and materials. If the veteran or surviving spouse is in need of aid and attendance, it also includes unreimbursed unusual transportation expenses associated with the pursuit of the course of education, vocational rehabilitation, or training. VA considers transportation expenses "unusual" if they are greater than the amount a person without a disability would reasonably spend on an appropriate means of transportation (public transportation, if reasonably available). Scholarships and grants are not considered income for VA purposes when used specifically for educational expenses, thus these two items are not deductible for educational expenses. See also § 5.411(c)(2) (deducting a child's educational expenses from his or her earned income).

(Authority: 38 U.S.C. 1503(a)(9))

(e) *Gambling income and losses.* VA will deduct from gambling gross winnings any gambling losses to arrive at net gambling income. Only net gambling income is countable.

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

(f) *Expenses and awards or settlements for death or disability.* VA will deduct from income received based on an award or settlement for death or disability any medical, legal, or other expenses that are incident to such death or disability or are incident to the collection or recovery of such an award or settlement. However, medical expenses cannot be deducted under this paragraph (f) if they are paid after the date that the award or settlement payment was received. Medical expenses paid after that date may be deducted under paragraph (b) of this section as unreimbursed medical expenses. VA will not deduct the same medical expenses under paragraph (b) of this section that it deducts under this paragraph (f). For purposes of this paragraph (f), the award or settlement may be from any of the following sources:

- (1) Commercial insurance (disability, accident, life, or health).
- (2) The Office of Workers' Compensation Programs of the U.S. Department of Labor.
- (3) The Social Security Administration.
- (4) The Railroad Retirement Board.
- (5) Any worker's compensation or employer's liability statute.
- (6) Legal damages collected for personal injury or death.

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

(g) *Business, farm, or profession—(1) Necessary operating expenses.* VA will deduct from income from a business, farm, or profession necessary operating expenses such as the cost of goods sold and payments for rent, taxes, upkeep, repairs and replacements. The value of an increase in stock inventory of a business is not income.

(2) *Depreciation.* Depreciation of a farm, business, or profession is not deductible from income produced by that farm, business, or profession.

(3) *Business and investment losses.* Losses sustained in operating a business, farm, profession, or from transactions involving investment property, may be deducted only from income derived from the source that sustained the loss.

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

§ 5.414 Net worth determinations for Improved Pension.

(a) *Definition of net worth.* For Improved Pension purposes, "net worth" means the market value of the claimant's or beneficiary's real and personal property, minus mortgages or other encumbrances. VA excludes the claimant's or beneficiary's residence (single-family unit), which also includes a reasonable lot area. VA also excludes the value of personal effects suitable to and consistent with the claimant's or beneficiary's reasonable mode of life, such as appliances and family transportation vehicles.

(1) *Personal residence.* Because the value of a residence is not considered, VA will not consider mortgages on that property as a deduction under paragraph (a) of this section.

(2) *Reasonable lot area.* VA will evaluate a "reasonable lot area" by considering the size of other residential lots in the vicinity. If the claimant or beneficiary lives on a farm, VA will exclude the value of a reasonable lot area, including the residence area, and consider the rest of the farm as part of net worth.

(3) *Proof of ownership.* VA will consider the terms of the recorded deed or other evidence of title to be proof of ownership.

(4) *Asset transfers.* (i) If a claimant or beneficiary gives property to a relative living in the same household, VA will include the value of the property as part of the claimant's or beneficiary's net worth. This also applies if the claimant or beneficiary sells the property to a relative in the same household at such a low price that it amounts to a gift.

(ii) If a claimant or beneficiary gives property to someone other than a

relative living in the same household, VA will include the value of the property as net worth unless it is clear that the one who gave the property has given up all rights of ownership, including the right to control the property.

(b) *How net worth affects veteran and surviving spouse Improved Pension awards.* (1) A veteran's net worth includes the net worth of the veteran and the net worth of the veteran's spouse. A surviving spouse's net worth includes that of the surviving spouse only.

(2) VA must deny or discontinue Improved Pension if VA determines it is reasonable to expect that some part of the net worth should be used for the claimant's or beneficiary's living expenses. VA must consider the veteran's or surviving spouse's adjusted annual income when determining whether net worth is a bar to Improved Pension under paragraph (d) of this section.

(c) *How a child's net worth affects Improved Pension awards—(1) Child in custody of veteran or surviving spouse.* Increased pension payable to a veteran or surviving spouse on account of a child will be denied or discontinued when the net worth of the child is such that under all circumstances including consideration of the veteran's or surviving spouse's adjusted annual income, it is reasonable that some part of the child's net worth be consumed for the child's maintenance.

(2) *Surviving child.* VA must deny or discontinue Improved Death Pension to a surviving child if VA determines that some part of the child's net worth should be used for the child's living expenses.

(i) *Surviving child not in custody or in custody of an institution.* If a surviving child has no personal custodian or is in the legal custody of an institution, VA will consider only the child's net worth and adjusted annual income when determining whether net worth is a bar to Improved Death Pension under paragraph (d) of this section.

(ii) *Surviving child in custody of a person legally responsible for the child's support.* If the child is living with a person who is legally responsible for the child's support, the child's net worth includes that person's net worth. If the child is in joint custody as provided in § 5.417(e), the child's net worth also includes the stepparent's net worth. VA must consider the adjusted annual income of the child as provided in § 5.435(b) when determining whether net worth is a bar to Improved Death Pension under paragraph (d) of this section.

(3) *Child educational exclusion.* When calculating the amount of a child's net worth, VA will exclude reasonable amounts for actual or estimated future educational or vocational expenses. VA will exclude only the amount needed to cover the child's education or vocational expenses until he or she reaches age 23.

(d) *Determining whether net worth is a bar to Improved Pension.* In determining whether net worth is a bar to Improved Pension, VA will consider the claimant's or beneficiary's adjusted annual income as defined in § 5.370, along with all of the claimant's or beneficiary's living expenses. However, in considering the claimant's or beneficiary's living expenses, VA cannot consider expenses it excluded or deducted in determining adjusted annual income. In addition to considering these income and expense factors, VA will also take the following factors into account:

(1) *Value of liquid assets.* The value of liquid assets (assets that the claimant or beneficiary can readily convert into cash).

(2) *Number of family members.* The number of family members (as defined in § 3.250) who depend on the claimant or beneficiary for support.

(3) *Life expectancy.* The claimant's or beneficiary's average life expectancy and the potential rate of depletion of the claimant's or beneficiary's net worth.

(e) *Statutory exclusions from net worth.* A claimant's or beneficiary's net worth does not include the following resources excluded by statute:

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

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

(2) *Ricky Ray Hemophilia Relief Fund payments.* Payments made under section 103(c) and excluded under 103(h)(2) of the Ricky Ray Hemophilia Relief Fund Act of 1998.

(Authority: 42 U.S.C. 300c-22(note))

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

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

(4) *Payments to Aleuts.* Payments made to certain Japanese-Americans or Aleuts under 50 U.S.C. Appx. 1989b-4 or 1989c-5.

(Authority: 50 U.S.C. Appx. 1989b-4(f)(2) or 1989c-5(d)(2))

(5) *Other payments.* Other payments excluded from net worth listed in

[regulation that will be published in a future Notice of Proposed Rulemaking]. (Authority: 38 U.S.C. 1522, 1543)

§ 5.415 Effective dates for Improved Pension awards based on a change in net worth.

(a) *Effective date for reduction or discontinuance of Improved Pension award when net worth increases.* If an increase in a beneficiary's net worth requires VA to discontinue Improved Pension, VA will discontinue the Improved Pension award effective the first day of the year following the year that net worth increased. If an increase in a child's net worth requires VA to reduce or discontinue Improved Pension under § 5.414(c), VA will reduce the payment amount or discontinue the Improved Pension award effective the first day of the year following the year that net worth increased.

(Authority: 38 U.S.C. 5112(b)(4)(B))

(b) *Claims previously denied or awards previously discontinued because of net worth.* When a claim for Improved Pension has been denied or an award of Improved Pension has been reduced or discontinued due to net worth, Improved Pension may be paid if there is a reduction in net worth. If the date net worth ceased to be a bar occurs before the previous denial or discontinuance has become final, the effective date of resumption of pension benefits will be the date that net worth ceased to be a bar. If the date net worth ceased to be a bar occurs after the previous denial or discontinuance has become final, the effective date of resumption of pension benefits will be assigned under § 5.383 (Improved Disability Pension) or § 5.431 (Improved Death Pension).

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

Cross reference: Finally adjudicated claims. See § 3.160(d).

§ 5.416 Persons considered as dependents for Improved Pension.

(a) *Criteria for a dependent spouse.* A veteran's spouse is a dependent spouse for Improved Disability Pension purposes if at least one of the following criteria apply:

(1) The veteran lives with the spouse.

(2) The veteran and the spouse live apart but are not estranged.

(3) The veteran and the spouse live apart and are estranged, but the veteran reasonably contributes to the spouse's support. Whether support contributions are reasonable is a factual matter that VA determines.

(b) *Criteria for a dependent child.* Unless paragraph (c) of this section

applies, a child is a dependent child for Improved Pension purposes if at least one of the following criteria apply:

(1) The child is in the veteran's or surviving spouse's custody. The term "custody" for Improved Pension purposes is defined in § 5.417. The child need not be living with the veteran or surviving spouse to be in custody; or

(2) The veteran reasonably contributes to the child's support. Whether support contributions are reasonable is a factual matter that VA determines.

(c) *When a child's net worth bars dependency status.* If a child's net worth is a bar under § 5.414(c)(1), that child is not a dependent child for Improved Pension purposes.

(Authority: 38 U.S.C. 1521, 1522(b), 1541, 1543(a)(2))

§ 5.417 Child custody for purposes of determining dependency for Improved Pension purposes.

This section applies to determinations of eligibility and entitlement to Improved Pension.

(a) *Definition of child custody.* If a veteran, surviving spouse, or person legally responsible for the support of a child has the legal right to exercise parental control and has responsibility for the welfare and care of the child, that person has custody of the child.

(b) *Child custody presumed.* A child of the veteran who is residing with the veteran, with the surviving spouse of the veteran who is the child's natural or adoptive parent, or with the person legally responsible for the child's support, shall be presumed to be in the custody of that individual.

(c) *What if the child does not live with the persons listed in paragraph (b)?* If the child does not live with a person listed in paragraph (b) of this section, VA still considers the child to be in the custody of that person unless there is a legal determination removing custody.

(d) *Definition of person legally responsible for the child's support.* A person who is legally responsible for a child's support is a person who is under a legal obligation, such as by law or court order, to provide for the child's support. Such person includes a natural or adoptive parent unless child custody has been legally removed from the natural or adoptive parent. Such person may also include the natural or adoptive parent's spouse as provided in paragraph (e) of this section.

(e) *Joint custody.* If a child's natural or adoptive parent is married, the child is presumed to be in the joint custody of the natural or adoptive parent and stepparent unless:

(1) The child's stepparent and natural or adoptive parent are estranged and living apart; or

(2) Legal custody has been removed from the natural or adoptive parent.

(f) *Custody retained after the age of majority.* A person who has custody of a child before the child's 18th birthday will be presumed to retain custody of the child on and after the child's 18th birthday, unless legal custody is removed. This applies without regard to when a child reaches the age of majority under applicable State law. This also applies without regard to whether the child was eligible for pension prior to age 18, or whether increased pension was payable to a veteran or surviving spouse on behalf of the child prior to the child's 18th birthday.

(g) *Successor custodian after the age of majority.* If a child's custodian dies after the child's 18th birthday, VA will consider the child to be in the custody of a successor custodian if the successor custodian has the legal right to exercise parental control and has responsibility for the welfare and care of the child. If there is no successor custodian, the child may be eligible for benefits in his or her own right.

(Authority: 38 U.S.C. 501, 1521, 1541)

§§ 5.418–5.419 [Reserved]

Improved Pension—Income Reporting Periods, Payments, Effective Dates, and Time Limits

§ 5.420 Reporting periods for Improved Pension.

When calculating adjusted annual income, VA counts income that is anticipated or received during a specific period, called a "reporting period." There are two types of reporting periods: the initial reporting period and the annual reporting period.

(a) *Initial reporting period*—(1) *General Rule.* Except as provided in paragraphs (a)(2) and (a)(3) of this section, the initial reporting period begins on the latest of the following:

(i) The date VA receives a pension claim; or

(ii) The date VA receives an election under § 5.460 or § 5.461; or

(iii) The date the claimant becomes eligible to receive Improved Pension.

(2) *Retroactive awards.* For Improved Pension claims where an effective date before the date of claim is assigned pursuant to § 5.383(b), the initial reporting period begins on the date the veteran became permanently and totally disabled if that would be to the veteran's advantage. If it would not be to the veteran's advantage, then the initial reporting period begins on the date of the pension claim.

(3) *Improved Death Pension claim received within one year after date of veteran's death.* When VA receives an Improved Death Pension claim within one year after the date of the veteran's death, the initial reporting period begins on the day that the veteran died. This is true even though the effective date under § 3.20 is the first day of the month of death. See § 5.431 for effective dates and rule applicability.

(4) *End of period.* The initial reporting period ends one year after the last day of the month in which the period began.

(b) *Annual reporting period.* For Improved Pension purposes, the annual reporting period is each calendar year. The first annual reporting period is the calendar year in which the initial reporting period ends.

(Authority: 38 U.S.C. 1506, 1521, 1541, 1542)

§ 5.421 How VA calculates an Improved Pension payment amount.

VA calculates payments of Improved Pension ("Improved Pension payment amounts") as provided in this section. See § 5.370 for the definitions of "adjusted annual income," "annual Improved Pension amount," and "maximum annual pension rate," which are used below.

(a) *How VA calculates a monthly Improved Pension payment amount.* To determine the monthly Improved Pension payment amount, VA divides the annual Improved Pension amount by 12 and rounds down to the nearest whole dollar.

(b) *What if the maximum annual pension rate changes?* When there is a change in a beneficiary's maximum annual pension rate (because of a cost-of-living adjustment or some other reason), VA recalculates the annual Improved Pension amount using the new maximum annual pension rate and the amount of adjusted annual income on the effective date that the maximum annual pension rate changes. VA then determines the new monthly payment amount as specified in paragraph (a) of this section.

(c) *What if adjusted annual income changes?* If a beneficiary's adjusted annual income increases or decreases, VA recalculates the annual Improved Pension amount using the new adjusted annual income amount. VA then determines the new monthly payment amount as specified in paragraph (a) of this section. See § 5.422, "Effective dates for changes to Improved Pension payments due to a change in income." (Authority: 38 U.S.C. 1521, 1541, 1542, and 5123)

§ 5.422 Effective dates for changes to Improved Pension payments due to a change in income.

(a) *Effective dates for changes to payments due to a change in income*—(1) *Income change requires an increased annual Improved Pension amount.* If an income change requires an increased annual Improved Pension amount, the effective date of the increased amount is the date that the income changes, subject to § 5.424, "Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income." VA generally cannot pay an increased amount of Improved Pension based on a change in income until the first day of the month following such an income change. See § 3.31 of this chapter (concerning dates for increased payments and exceptions).

(2) *Income change requires a reduced annual Improved Pension amount or discontinuance of Improved Pension.* If an income change requires a reduction of an annual Improved Pension amount or the discontinuance of Improved Pension, the effective date of the reduced amount or discontinuance is the first day of the month following the income change.

(b) *Income and dependents—exceptions to income-counting rules.* (1) VA will stop counting a dependent's income on the same date it removes the dependent from the Improved Pension award.

(2) If a beneficiary gains a dependent and this results in an increased annual Improved Pension amount, the effective date of the increase will be the date of the addition of the dependent if the required evidence is received within 1 year of the addition. If the required evidence is not received within 1 year, then the effective date will be the date such evidence is received.

(3) If a beneficiary loses a dependent and this results in an increased annual Improved Pension amount, the effective date of the increase will be the date VA receives notice of the loss of the dependent if the required evidence is received within 1 year of the loss. If the required evidence is not received within 1 year, then the effective date will be the date such evidence is received.

(Authority: 38 U.S.C. 501, 5110, 5112)

Cross reference: See also § 5.177(g) of this chapter (concerning reducing or discontinuing pension payments because of a change in disability or employability status).

§ 5.423 Improved Pension determinations when anticipated annual income is uncertain.

(a) *Uncertain anticipated annual income.* If a claimant or beneficiary is uncertain about the amount of his or her anticipated annual income or if there is evidence indicating more anticipated annual income than the amount the claimant or beneficiary reports, VA will do all of the following:

(1) Count the greatest amount of anticipated annual income the claimant or beneficiary estimates or that is indicated by the evidence. If that amount is greater than the maximum annual pension rate, Improved Pension will not be paid;

(2) Notify the claimant or beneficiary concerning the time limit provisions of § 5.424, “Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income;” and

(3) Adjust or pay benefits when complete income information is received, according to the provisions of § 5.424.

(b) *Uncertain dependent information.* If a dependent’s anticipated annual income is expected to be greater than the difference between the increased maximum annual pension rate based on the addition of the dependent and the maximum annual pension rate without the dependent, but the claimed dependent’s relationship has not yet been established by required evidence, VA will do the following:

(1) Determine the maximum annual pension rate without consideration of the claimed dependent;

(2) Count the claimed dependent’s income as income of the claimant or beneficiary for purposes of determining entitlement to Improved Pension and determining the annual Improved Pension amount; and

(3) Adjust the annual Improved Pension amount using the applicable maximum annual pension rate when evidence necessary to establish the dependent has been received. (For the evidence necessary to establish dependency, see Subpart D of this part.) (Authority: 38 U.S.C. 501, 1503)

§ 5.424 Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income.

(a) *Scope.* This section provides time limits for establishing entitlement to Improved Pension or for increasing the monthly Improved Pension payment amount based on adjusted annual income. If the claimant, beneficiary, or former beneficiary submits additional evidence within the time limits in this

section, VA may award or increase benefits for prior periods as set forth in this section.

(b) *Expected or actual income—(1) Pension not paid.* When VA does not pay a pension claim based on actual or expected adjusted annual income during the initial reporting period, the claimant may submit evidence that supports entitlement for all or part of that period. If the claimant submits additional evidence on or before December 31 of the calendar year that follows the calendar year in which the initial reporting period ends, VA may award benefits effective from the beginning of the initial reporting period, subject to the provisions of § 5.383, “Effective Dates for Awards of Improved Disability Pension” or § 5.431, “Effective Dates for Improved Death Pension.” If the claimant does not submit evidence of entitlement within this time limit, VA may only pay benefits effective from the date it receives a new claim.

(2) *Pension paid at a lower amount or discontinued.* When VA pays pension at a lower amount or discontinues pension benefits for all or part of a reporting period based on the claimant’s or beneficiary’s actual or expected adjusted annual income, the claimant, beneficiary, or former beneficiary may submit evidence that supports entitlement or increased entitlement for all or part of that period. If the claimant, beneficiary, or former beneficiary submits additional evidence on or before December 31 of the calendar year that follows the calendar year in which the reporting period ends, VA may award, resume, or increase benefits effective from the date entitlement arose but not earlier than the beginning of the reporting period. If the claimant, beneficiary, or former beneficiary does not submit evidence of entitlement within this time limit, VA may only pay or increase benefits effective from the date it receives a new claim, except as provided in paragraph (c) or (d) of this section.

(c) *Payment following nonentitlement for one reporting period.* This paragraph (c) applies if the claimant or beneficiary’s adjusted annual income does not permit payment for the initial reporting period or requires VA to discontinue payment for an entire reporting period. In such cases, VA may award Improved Pension effective from the date entitlement arose but not earlier than the beginning of the next reporting period (the new initial reporting period), if the claimant, beneficiary, or former beneficiary submits evidence before that reporting period ends. If the claimant, beneficiary, or former

beneficiary does not submit evidence of entitlement within this time limit, VA may only pay benefits effective from the date it receives a new claim, except as provided in paragraph (d) of this section.

(d) *No time limit to submit income evidence to reduce overpayment.* There is no time limit to submit income evidence, including deductible expenses, for the purpose of reducing an overpayment. However, the evidence submitted must relate to the initial or annual reporting period for which the overpayment was created.

(Authority: 38 U.S.C. 501, 5110(h))

§ 5.425 Frequency of payment of Improved Pension benefits.

VA issues payments of Improved Pension as provided in this section. Except as provided in paragraph (e) of this section, a beneficiary may choose to receive monthly payments if other Federal benefits would be denied because pension payments are issued less frequently than monthly.

(a) *Monthly if \$228 or more.* VA will make a payment every month if the annual Improved Pension amount is \$228 or more.

(b) *Every three months if \$144 but less than \$228.* VA will make a payment every three (3) months if the annual Improved Pension amount is at least \$144 but less than \$228. Payment dates will be on or about March 1, June 1, September 1, and December 1.

(c) *Every six months if \$72 but less than \$144.* VA will make a payment every six (6) months if the annual Improved Pension amount is at least \$72 but less than \$144. Payment dates will be on or about June 1 and December 1.

(d) *Once a year if less than \$72.* VA will make a payment once a year if the annual Improved Pension amount is less than \$72. The payment date will be on or about June 1.

(e) *Payments of less than one dollar are not made.* VA will not make a payment of less than one dollar.

(Authority: 38 U.S.C. 1508)

§§ 5.426–5.429 [Reserved]

Improved Death Pension Marriage Date Requirements and Effective Dates

§ 5.430 Marriage date requirements for Improved Death Pension.

(a) *General rule.* A surviving spouse may qualify for Improved Death Pension if the marriage to the veteran occurred before or during his or her service or, if married to him or her after his or her separation from service, the marriage meets one of the criteria in paragraphs (a)(1) through (3) of this section.

(1) The veteran and surviving spouse were married for 1 year or more (multiple marriage periods may be added together to meet the 1-year requirement);

(2) A veteran of one of the following wartime periods and the surviving spouse were married before one of the following delimiting dates:

(i) Mexican Border Period or World War I—December 14, 1944.

(ii) World War II—January 1, 1957.

(iii) Korean Conflict—February 1, 1965.

(iv) Vietnam Era—May 8, 1985.

(v) Persian Gulf War—January 1, 2001; or

(3) A child was born of the marriage or before the marriage.

(b) *More than one marriage to veteran.* If a surviving spouse has been legally married to the same veteran more than once, VA will use the date of the original marriage to decide whether the surviving spouse has met the marriage date requirements (delimiting date).

(Authority: 38 U.S.C. 103(b) and 1541(f))

§ 5.431 Effective dates for Improved Death Pension.

(a) *Nonservice-connected death after separation from service—*(1) *Claim received not later than 1 year after the date of death.* If VA awards Improved Death Pension based on a claim received no later than 1 year after the date of the veteran's death, the effective date of the award is the first day of the month in which the death occurred.

(2) *Claim received more than 1 year after the date of the veteran's death.* If VA awards Improved Death Pension based on a claim received more than 1 year after the date of the veteran's death, the effective date of the award is the date VA received the claim.

(b) *Death in service.* In certain instances, Improved Death Pension eligibility may be established if the veteran died in service.

(1) *Claim received within one year of death.* If VA receives a claim for Improved Death Pension not later than 1 year after the date of death fixed by the veteran's service branch report or finding of actual or presumed death, the effective date is the first day of the month that the Secretary concerned establishes as the date of death.

(2) *Claim not received within 1 year of death.* If VA does not receive the claim within 1 year of the date provided in paragraph (b)(1) of this section, the effective date is the date VA receives the claim.

(3) *Death benefits not to be paid concurrently with military benefits.* VA will not pay benefits to a claimant on a report of actual death for periods that

the claimant has received, or was entitled to receive, any of the following military benefits of the veteran:

- (i) An allowance;
- (ii) An allotment; or
- (iii) Service pay.

(Authority: 38 U.S.C. 5110(a), (d), (j))

§ 5.432 Deemed valid marriages and contested claims for Improved Death Pension.

(a) *Definition of contested claim.* For the purposes of this section, a claim is a "contested claim" when a claimant seeking recognition as a surviving spouse under the provisions for a deemed valid marriage in § 3.52 of this chapter and a legal surviving spouse eligible for Improved Death Pension both submit claims for Improved Death Pension.

(b) *VA adjudication of contested claims.* VA will take the following steps in adjudicating a contested claim:

(1) Develop the claims of both the legal surviving spouse and the claimant seeking recognition as the surviving spouse; then

(2) Afford each claimant the applicable time period provided in § 5.424(b) to show his or her adjusted annual income is less than the maximum annual pension rate; and then

(3) If the legal surviving spouse does not establish entitlement to Improved Death Pension before the applicable time limit of § 5.424(b) has expired, VA will recognize the claimant seeking recognition as a surviving spouse of a deemed valid marriage and award Improved Death Pension if that claimant meets eligibility and entitlement requirements. If the legal surviving spouse later claims Improved Death Pension and establishes entitlement, VA will then process the claim under § 5.433.

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

§ 5.433 Effective date of discontinuance of Improved Death Pension payments to a beneficiary no longer recognized as the veteran's surviving spouse.

(a) *Purpose.* This section applies when VA is paying Improved Death Pension to a surviving spouse (identified in this section as, "former surviving spouse") and another claimant (identified in this section as "new surviving spouse") establishes that he or she is the true legal surviving spouse eligible to receive Improved Death Pension.

(b) *Effective date for discontinuance of payments to former surviving spouse—*(1) *Discontinuance date of the award to the former surviving spouse where the award to the new surviving spouse is effective before the date VA*

received the new surviving spouse's claim. If benefits are payable to the new surviving spouse from a date before the date VA received the new surviving spouse's claim, VA will discontinue the award to the former surviving spouse effective the date of the award to the new surviving spouse.

(2) *Discontinuance date of the award to the former surviving spouse where award to the new surviving spouse is effective the date VA received the new surviving spouse's claim.* If benefits are payable to the new surviving spouse from the date VA received the new surviving spouse's claim, VA will discontinue the award to the former surviving spouse effective the later of the following:

(i) The date of receipt of the new surviving spouse's claim.

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

(3) *Exception where discontinuances are due to a change in, or change in interpretation of, the law or an administrative issue.* When VA must discontinue payments to a former surviving spouse because of a change in the law or an administrative issue or because of a change in the interpretation of law or an administrative issue, VA will discontinue the award to the former surviving spouse effective the first day of the month that follows the end of the 60-day notice period to the former surviving spouse concerning the discontinuance.

(Authority: 38 U.S.C. 5112(a) and (b)(6))

§ 5.434 Award, or discontinuance of award, of Improved Death Pension to a surviving spouse where Improved Death Pension payments to a child are involved.

(a) *Legal custodian of child establishes eligibility as surviving spouse.* When VA finds Improved Death Pension eligibility for the legal custodian of a child receiving Improved Death Pension, VA will award Improved Pension to the surviving spouse and discontinue the child's eligibility for Improved Death Pension as follows:

(1) *Annual Improved Pension amount for surviving spouse higher than amount for child.*

(i) If the surviving spouse is entitled to a higher Improved Pension payment amount than the child was receiving, the surviving spouse's pension award is effective the date provided by § 5.431, "Effective dates for Improved Death Pension."

(ii) The initial pension amount payable to the surviving spouse is the difference between the child's Improved Pension payment amount and the surviving spouse's Improved Pension

payment amount. VA will pay to the surviving spouse the full Improved Pension payment amount effective the first day of the month after the month for which VA last paid benefits to the child. VA will discontinue the child's pension award effective the same day.

(2) *Annual Improved Pension amount for surviving spouse equal to or less than amount for child.* When the child is receiving an Improved Death Pension payment amount equal to or higher than the Improved Pension payment amount that the surviving spouse is entitled to receive, VA will pay Improved Death Pension to the surviving spouse effective the first day of the month after the month for which VA last paid benefits to the child, and discontinue the child's pension award effective the same day. Section 3.31 of this chapter does not apply in such a situation.

(3) *Effective date of discontinuance of child's pension award when the surviving spouse is not entitled to payments.* When a surviving spouse establishes eligibility for Improved Death Pension but is not entitled because his or her adjusted annual income is greater than the maximum annual pension rate or because his or her net worth bars entitlement, VA will discontinue the child's pension award effective the first day of the month after the month for which VA last paid benefits to the surviving spouse.

(b) *Child establishes eligibility but surviving spouse has received Improved Death Pension payments after his or her own eligibility ended.* If a surviving spouse continued to receive Improved Pension payments after becoming ineligible for Improved Pension, and that surviving spouse has custody of a child who establishes eligibility for Improved Pension payments, VA will award Improved Pension to the child and discontinue the surviving spouse's eligibility as follows:

(1) *Improved Pension payment amount for the child is lower than the payment amount for the former surviving spouse.* When the former surviving spouse, who is the child's custodian, receives pension after eligibility ends and the child is entitled to a lower Improved Pension payment amount than the former surviving spouse is receiving, VA will amend the award to the former surviving spouse to

pay the child's Improved Pension payment amount. This amended award will be effective the date VA should have discontinued the former surviving spouse's pension award, thereby establishing a debt owed to VA by the former surviving spouse. VA will award pension to the child effective the first day of the month after the month for which it last paid benefits to the former surviving spouse and discontinue the former surviving spouse's pension award effective the same day. Section 3.31 of this chapter does not apply in such a situation.

(2) *The Improved Pension payment amount for the child is equal to or higher than the former surviving spouse's amount.* This paragraph (b)(2) applies when the former surviving spouse receives pension after eligibility ends and the child is entitled to an equal or higher Improved Pension payment amount than the payment amount the former surviving spouse is receiving.

(i) In such cases, the effective date of the child's pension award is the date VA should have discontinued the former surviving spouse's pension award.

(ii) The initial amount of pension payable to the child is the difference between the child's Improved Pension payment amount and the former surviving spouse's Improved Pension payment amount. VA will pay the full Improved Pension payment amount to the child effective the first day of the month after the month for which VA last paid benefits to the former surviving spouse and discontinue the surviving spouse's pension award effective the same day.

(Authority: 38 U.S.C. 501(a), 5110(a), 5112(a))

§ 5.435 Calculating annual Improved Pension amounts for surviving children.

(a) *Surviving child not in custody or in the custody of an institution.* If a surviving child has no personal custodian (a person legally responsible for the child's support), or a surviving child is in the custody of an institution, VA calculates the surviving child's annual Improved Pension amount by subtracting the surviving child's adjusted annual income from the surviving child's maximum annual pension rate.

(b) *Surviving child in the custody of a person legally responsible for the child's support—(1) One surviving child in the custody of a person legally responsible for the child's support.* If the surviving child has a custodian, the surviving child's annual Improved Pension amount is the lesser of:

(i) The maximum annual pension rate for a surviving spouse and one dependent surviving child, reduced by the adjusted annual income of the surviving child and that of the surviving child's custodian; or

(ii) The maximum annual pension rate for a surviving child alone, reduced by the surviving child's adjusted annual income.

(2) *More than one surviving child in the custody of a person legally responsible for the children's support.* If any surviving child has adjusted annual income equal to or greater than the maximum annual pension rate for one surviving child, that surviving child (and the surviving child's income) is not included in the calculation of the annual Improved Pension amount. The remaining surviving child(ren)'s annual Improved Pension amount is the lesser of:

(i) The maximum annual pension rate for a surviving spouse and the number of remaining surviving children, reduced by the total adjusted annual income of the remaining surviving children and that of the custodian; or

(ii) The maximum annual pension rate for a surviving child alone times the number of remaining surviving children, reduced by the total adjusted annual income of the remaining surviving children.

(3) *Income of natural or adoptive parent includes that of natural or adoptive parent's spouse.* If the custodian listed in paragraph (b)(1) or (2) of this section is a natural or adoptive parent of a surviving child who is in joint custody as provided in § 5.417(e), the income of that natural or adoptive parent includes the income of that natural or adoptive parent's spouse.

(Authority: 38 U.S.C. 1542)

§§ 5.436–5.459 [Reserved]

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