

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 5

RIN 2900-AL95

#### Payments to Beneficiaries Who Are Eligible for More Than One Benefit

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to reorganize and rewrite in plain language provisions applicable to payments to beneficiaries who are eligible for more than one benefit. 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 rules.

**DATES:** Comments must be received by VA on or before December 3, 2007.

**ADDRESSES:** Written comments may be submitted through [www.Regulations.gov](http://www.Regulations.gov); by mail or hand-delivery to Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026 (not a toll free number). Comments should indicate that they are submitted in response to "RIN 2900-AL95-Payments to Beneficiaries Who Are Eligible for More than One Benefit." 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 (not a toll free number) for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at [www.Regulations.gov](http://www.Regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** William F. Russo, Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-9515 (not a toll free number).

**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 the VA's claims adjudication process. Therefore, the Project began its efforts by reviewing, reorganizing, and redrafting the content of the regulations in 38 CFR part 3 governing the compensation and pension program of the Veterans Benefits Administration. These regulations are among the most difficult VA regulations for readers to understand and apply.

Once rewritten, the proposed regulations will be published in several portions for public review and comment. This is one such portion. It includes proposed rules regarding payment to beneficiaries who are eligible for more than one benefit. 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 part 5 regulations so that most of the provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. We believe this organization will enable 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, 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 types of claims and filing procedures, VA’s duties, rights and responsibilities of claimants and beneficiaries, general evidence requirements, and 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 as proposed 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 (AM01). *See* 72 FR 28770.

“Subpart D—Dependents and Survivors” would inform readers how VA determines whether an individual is a dependent or a survivor of a veteran. 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 compensation, including direct and secondary service connection. This subpart would inform readers how VA determines entitlement to service connection. The subpart would also contain those provisions governing presumptions related to service connection, rating principles, and effective dates, as well as several special ratings. This subpart will be published as three separate NPRMs due to its size. The first, concerning presumptions related to service connection, was published as proposed on July 27, 2004. *See* 69 FR 44614.

“Subpart F—Non-service-Connected Disability Pensions and Death Pensions” would include information regarding the three types of non-service-connected pension: Improved Pension, Old-Law Pension, and Section 306 Pension. This subpart would also include those provisions that state how to establish entitlement to Improved Pension, and the effective dates governing each pension. This subpart

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

“Subpart G—Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary,” would contain regulations governing claims for 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 as proposed 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, subpart L will be published in two separate NPRMs. The portion of subpart L that concerns payments to beneficiaries who are eligible for more than one benefit is the subject of this NPRM.

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 payments to claimants and beneficiaries who are eligible for more than one VA benefit or one VA benefit in addition to certain benefits from other Federal agencies. These regulations would be contained in proposed Subpart L 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")
5.740—Election .....	3.701(b).
5.740—Initial election .....	New.
5.740—Reelection .....	New.
5.740—Timely filed ...	3.750(b) [third sentence].
5.741(a) .....	3.155(a), 3.701(b), 13.55, 13.57, 13.58, 13.59, and New.
5.741(b) .....	3.155(b), 3.701(b).
5.742(a) .....	3.702(d)(1) [second sentence] and 3.711 [second sentence].
5.742(b) .....	New.
5.742(c) .....	3.702(d)(1) [last sentence] and New.
5.742(d) and (e) .....	New.
5.743(a) .....	3.400(j)(1).
5.743(b) .....	3.500(e) [first sentence], (i), and (x).
5.745 .....	3.401(e) and 3.750.
5.746(a) .....	3.654(a) [second sentence] and 3.700(a)(1)(ii).
5.746(b) .....	3.654(a) [first sentence] and 3.700(a)(1)(i).
5.746(c) .....	3.501(a) and 3.654(b)(1).
5.746(d)(1) .....	3.654(b)(2) [first sentence].
5.746(d)(2)(i) .....	New.
5.746(d)(2)(ii) .....	3.654(b)(2) [third and fourth sentences].
5.746(d)(3) .....	New.
5.746(d)(4) .....	3.654(b)(2) [second sentence].
5.746(d)(5) .....	3.654(b)(2) [last sentence].
5.746(e) .....	3.654(c) and 3.700(a)(1)(iii).
5.747(a)(1) .....	3.700(a)(2)(iii) [first sentence].
5.747(a)(2) .....	3.700(a)(2)(iv).
5.747(b) .....	3.700(a)(3).
5.747(c)(1) .....	3.700(a)(5)(i) [first sentence].
5.747(c)(2) .....	3.700(a)(5)(ii).
5.747(d) .....	3.700(a)(2)(iii), (a)(3), and (a)(5)(i).
5.748 .....	3.753.
5.750(a)(1) .....	3.708(a)(1) and (a)(4).
5.750(a)(2) .....	3.708(a)(2).
5.750(a)(3) .....	New.
5.750(b) .....	3.708(a)(3).
5.751(a)(1) .....	3.708(b)(1) [first sentence].

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph (or "New")
5.751(a)(2) .....	3.708(b)(1) [second sentence] and 3.958.
5.751(b) .....	3.708(b)(2).
5.751(c) .....	3.708(b)(1) [second and third sentences (excluding intervening cross reference)].
5.751(d) .....	New.
5.751(e) .....	3.708(a)(3) and 3.708(b)(1) [last sentence].
5.752 .....	New.
5.753 .....	3.710.
5.754(a) .....	New.
5.754(b) and (c) .....	3.715.
5.754(d) .....	3.500(x).
5.756 .....	3.700 [introduction].
5.757(a) .....	3.701(a) [sentences one and two].
5.757(b) .....	3.701(a) [sentences one and two].
5.757(c) .....	3.701(a) and New.
5.757(d) .....	3.701(a) [first and third sentences].
5.757(e)(1) .....	3.701(a) [first and fourth sentences].
5.757(e)(2) .....	New.
5.757(e)(3) .....	3.701(a) [fifth sentence].
5.758(a) .....	3.711 [first sentence].
5.758(b) .....	3.711 [last sentence].
5.758(c) .....	3.960(a).
5.758(d) .....	3.701(a) [fifth sentence].
5.759(a)(1)(i) .....	3.702(a).
5.759(a)(1)(ii) .....	3.702(d)(1).
5.759(a)(2) .....	3.702(a).
5.759(b) .....	3.702(c).
5.760 .....	3.702(d)(2) and New.
5.761 .....	3.700(b)(1).
5.762(a), (b) .....	3.700(b)(2).
5.762(c) .....	3.659, 3.703, and 3.503(a)(7).
5.763 .....	3.704(a).
5.764(a) .....	3.503(a)(8), 3.659(b), 3.703(c), 3.707(a), and 21.3023.
5.764(b), (c), and (d) .....	3.707 and 21.3023.

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 carried forward to part 5. Such provisions are discussed specifically under the appropriate part 5 heading in this preamble. Readers are invited to comment on the proposed part 5 provisions and also on our proposals to omit those part 3 provisions from part 5.

### Content of Proposed Regulations

#### *Payments to Beneficiaries Who Are Eligible for More Than One Benefit—General Provisions*

#### 5.740 Definitions Relating to Elections

Proposed § 5.740 defines four terms applicable to elections. The first definition is of the term "election." Current § 3.701(b) provides that VA may accept a statement meeting the requirements of an informal claim as an election. The requirements of an informal claim are contained in the first two sentences of current § 3.155(a). They are, essentially, any communication or action from a claimant or certain other listed persons that indicates an intent to apply for one or more VA benefits and that identifies the benefit(s) sought. Additionally, current § 3.1(p) requires that all claims be in writing.

We believe that it would be clearer to define an election directly, rather than through a reference to informal claims. We also note that there is an element inherent in the concept of an "election" that is not necessarily present in an informal claim, the element of choice, and that in practice VA requires that an election be signed by a person with authority to make the election. Considering all of these factors, we propose to define an election as "any writing, signed by a person authorized by § 5.741, 'Persons who may make an election,' expressing a choice between two or more VA benefits to which the person is entitled, or between VA and other Federal benefits to which the person is entitled." No substantive change is intended by this definition.

The next two terms that are defined are "initial election" and "reelection." An initial election is the first election that a person authorized by § 5.741 makes between two or more benefits. A reelection is a later, different election between benefits that were the subject of an initial election. We note that "initial election" and "reelection" are not defined in part 3. We think that adding these definitions in part 5 will prove

very helpful to the reader. The definitions are based on VA's current election regulations and no substantive change is intended.

The last term defined is "timely filed." We propose to state that, with respect to elections, "timely filed" means that a person authorized by § 5.741 filed an election within 1 year of VA's notice that such an election is required. This definition is consistent with the definition of a "timely filed" election in current § 3.750(b). While that definition is in the context of an election between VA benefits and military retirement pay, the definition in fact applies to all elections. See 38 U.S.C. 5103(b), which provides that when VA notifies a claimant that information or evidence is necessary to substantiate a claim, such information or evidence must be received by VA within 1 year of the date such notice is sent.

#### 5.741 Persons Who May Make an Election

Proposed § 5.741 describes persons who may make an election. Paragraph (a) lists persons who are authorized to sign an election. They include a claimant, a beneficiary, or a person authorized to act on behalf of a claimant or beneficiary. This list is based in part on current § 3.155(a) and § 3.701(b) and in part on long-standing VA practice. We have listed a beneficiary as a person authorized to sign an election, which is consistent with long-standing VA practice. We have also listed persons who are authorized to act on behalf of a claimant or beneficiary according to the requirements of certain VA regulations in part 13 of title 38 CFR, regarding fiduciaries. This is consistent with long-standing VA practice, and no substantive change is intended.

Paragraph (b) of proposed § 5.741 is also based on current § 3.155(a), which states that Members of Congress or a claimant or beneficiary's duly authorized representative are able to file an informal claim. They are, therefore, able to communicate a claimant's or beneficiary's intent to elect a particular benefit, as per § 3.701(b). However, consistent with long-standing VA practice, they are not able to sign an election. Further, as stated in § 3.155(b), a communication from certain representatives, namely a service organization, an attorney, or an agent, may not be accepted unless a power of attorney existed at the time the communication was written.

In keeping with long-standing VA practice, paragraph (b) of proposed § 5.741 states that VA will provide notice to the claimant or beneficiary of

the right to make an election when it receives a communication from a Member of Congress or from a claimant or beneficiary's duly authorized representative. If VA receives an election signed by a person authorized to do so under § 5.741(a) within 1 year of the notice, it will then consider the election to have been filed on the date it received the communication from the Member of Congress or the representative. These procedures are substantively consistent with rules in current § 3.701(b), which permit VA to accept a statement meeting the requirements of an informal claim as an election, and in current § 3.155, which permits VA to accept an informal claim from a Member of Congress or representative subject to confirmation through filing a benefit application within 1 year from the date VA sends the application. The end result would be the same under proposed § 5.741(b) as it would be under current part 3 rules; however, proposed § 5.471(b) does not use the "informal claim" language, which lacks clarity in the context of benefit elections.

#### 5.742 Finality of Elections; Cancellation of Certain Elections

Proposed § 5.742 states rules for determining when an election is "final." As explained in the introductory paragraph of proposed § 5.742, this section explains that a final election or reelection ordinarily may be changed only by cancellation under paragraph (d) or (e) of this section or by reelection, if authorized. The introductory paragraph also explains that other provisions of this part specify when reelection is authorized and when a final election or reelection is irrevocable.

Provisions similar to proposed § 5.742(a), (b), (d), and (e) were previously published as part of another part 5 NPRM, "Elections of Improved Pension; Old-Law Pension and Section 306 Pension," which was published as proposed on December 27, 2004, 69 FR 77578. These provisions were contained in proposed § 5.461(b). We now propose to remove that regulation (§ 5.461) and address these concepts in this NPRM in proposed §§ 5.742 and 5.758 instead. This will help achieve consolidation of benefit election rules in this NPRM.

Proposed § 5.742(a) states that an election is final when a beneficiary (or someone authorized to act for the beneficiary under § 5.741) has negotiated a check for the elected benefit. This is based on the last sentence of § 3.702(d)(1) (which is applicable to elections of dependency and indemnity compensation (DIC)) and

the second sentence of § 3.711 (which is applicable to elections of Improved Pension). Although § 3.702(d)(1) concerns DIC elections and § 3.711 concerns pension elections, it is long-standing VA practice to apply this rule to other elections of benefits. We note that § 3.711 refers to an exception to the rule that an election is final upon negotiation of a check. The exception is found in current § 3.714. We have not included this exception in proposed § 5.742 because § 3.714 is obsolete. VA proposed the removal of § 3.714 in a prior rewrite package ("Elections of Improved Pension; Old Law and Section 306 Pension," RIN 2900-AL83). See 69 FR 77578, 77587.

The vast majority of VA beneficiaries now receive benefits by direct deposit or electronic funds transfer rather than by check. In such cases the rule regarding negotiating a check in proposed § 5.742(a) could not apply. To cover benefits received by direct deposit or electronic funds transfer, we have proposed new § 5.742(b), which states that elections by beneficiaries who receive benefits by direct deposit or electronic funds transfer are final when the applicable financial institution receives the second payment of the elected benefit. This is consistent with long-standing VA practice. The reasoning is that a deposit in the beneficiary's account serves as notice that the elected benefits are being paid, just as receipt of a check is notice that the elected benefits are being paid.

Proposed § 5.742(c) provides a general rule that an election is final if the payee dies before negotiating a check or before receiving a second payment by direct deposit or electronic funds transfer. It is derived from the more specific provision contained in the last sentence of § 3.702(d)(1), which states that an election of DIC is final even if the payee dies before negotiating a check. This expansion of the rule from § 3.702(d)(1) is consistent with long-standing VA practice and allows for the orderly and consistent administration of payments to the estates of deceased beneficiaries. In proposed § 5.742(c), we have also added a provision addressing direct deposit and electronic funds transfer, which we have added to be consistent with proposed § 5.742(b).

Proposed § 5.742(d) states that if VA determines that a beneficiary was incompetent when he or she elected a benefit, the election can be canceled. This is consistent with long-standing VA practice and helps ensure that incompetent beneficiaries receive all the benefits to which they are entitled under the law.

Proposed § 5.742(e) states that a beneficiary can cancel an election if he or she made the election based on erroneous information that was provided by VA. However, VA must determine that the information was erroneous based on the same evidence of record used previously to provide the erroneous information. One example of this rule's application would be if VA mistakenly informed a claimant or beneficiary that he or she would be entitled to a higher rate if a particular benefit were elected and then later determines that this was not the case (based on the same evidence of record at the time that VA mistakenly informed the claimant or beneficiary of his or her entitlement to a higher rate). This is consistent with long-standing VA practice and helps ensure that beneficiaries are not unfairly deprived of VA benefits.

Note that when provisions similar to § 5.742(d) and (e) were previously proposed as § 5.461(b)(2) and (3), they provided that a request to cancel the election must be received within 1 year from the date that the election had become effective. Following internal reconsideration of this provision, we have determined that this limitation might be overly narrow in some cases. Therefore, proposed § 5.742(d) and (e) contain no such limitation.

#### 5.743 General Effective Dates for Awarding, Reducing, or Discontinuing VA Benefits Because of an Election

Proposed § 5.743(a) is based on current § 3.400(j)(1), which states the general effective date rule for elections. (Other part 5 provisions may contain specific additional effective date rules.) Under current § 3.400(j)(1), unless otherwise provided, the effective date of an award of elected VA benefits is "the date of receipt of election, subject to prior payments." The effective date is "subject to prior payments" in order to avoid impermissible concurrent payment of benefits which a beneficiary cannot lawfully receive for the same time period. This could potentially occur when a person receiving Benefit A elects to receive Benefit B instead, and the award of Benefit B is retroactive for some period of time. Because Benefit A and Benefit B cannot be received for the same time period, VA would offset the payments already issued for Benefit A against the amount payable for Benefit B. Proposed paragraph (a)(2) provides for this offset. The reader should note that no substantive change is intended in paragraph (a)(2). The offset is provided for in current § 3.400(j)(1), and proposed § 5.743(a)(2) merely explains it in more detail.

Section 3.400(j)(1) covers situations where a beneficiary elects a different benefit. It does not address situations where a claim is pending and an election is timely filed under § 5.740(d). In such cases, VA's long-standing practice has been to assign an effective date that is the same as the effective date VA would assign for the awarded benefit if no election were required. We have added such language to § 5.743(a) to address such situations.

Paragraph (b) provides the effective date for reduction or discontinuance when VA reduces or discontinues a benefit because another benefit is elected. It is based on current § 3.500(e) (first sentence), pertaining to Federal employees' compensation, § 3.500(i), pertaining to elections in general, and § 3.500(x), pertaining to the Radiation Exposure Compensation Act of 1990. We have consolidated these three effective date provisions in proposed § 5.743(b). We note that part 3 regulations provide effective dates for reductions and discontinuances of VA benefits in terms of the last date of entitlement to payment at the previous rate. We believe that it is clearer to state that the effective date for a reduction or discontinuance is the first day of payment of the new reduced rate or "no-pay date," rather than as the last day of the old rate. This approach is consistent throughout the rewrite project. We have taken that approach in proposed paragraph (b).

#### *Payments From Service Departments and the Effects of Those Payments on VA Benefits for Veterans*

##### 5.745 Entitlement to Concurrent Receipt of Military Retired Pay and VA Disability Compensation

Proposed § 5.745 pertains to the concurrent receipt of military retirement pay and VA disability compensation. It closely follows the language of current § 3.750, which was recently amended. No substantive changes are proposed.

Section 3.401(e) contains the effective date rules for elections between military retirement pay and VA disability compensation. We have incorporated these provisions into § 5.745(e). No substantive change is intended.

##### 5.746 Prohibition Against Receipt of Active Military Service Pay and VA Benefits for the Same Period

Proposed § 5.746(a) defines active military service pay. It is based on current § 3.654(a) and § 3.700(a)(1)(ii). We propose to state "active military service pay" rather than "active service pay" for clarity. No substantive change is intended.

Proposed § 5.746(b) states the general rule that VA will not pay disability compensation or pension for any period in which the veteran received active military service pay. It is based on § 3.700(a)(1)(i) and the first sentence of § 3.654(a). However, we have not included the reference to "retirement pay" found in current §§ 3.654(a) and 3.700(a)(1)(i), since VA does not administer any veteran's benefit titled "retirement pay." VA previously paid emergency officers' retirement pay (EOR), which is no longer a viable benefit. Therefore, references to EOR would not be carried forward to new part 5. Although military retirement pay may also be discontinued when a veteran returns to active duty, VA does not administer that benefit.

Proposed § 5.746(c) states the effective date of discontinuance of payments for VA benefits during active duty status. It is based on current §§ 3.501(a) and 3.654(b)(1). We propose to state that VA will discontinue payments "effective the day the veteran begins active duty service." This is consistent with our proposal throughout the Rewrite Project to state effective dates for discontinuances as the actual day payment stops, rather than the last day benefits are paid.

Title 10 U.S.C. 12316 gives veterans who return to active duty the right to continue to receive VA compensation or pension rather than active duty pay. This principle is not stated in current § 3.654 but we believe it is important for veterans to be aware of this right. Accordingly, we have included this information in proposed § 5.746(c).

Proposed § 5.746(d) concerns the resumption of payments for VA benefits after release from active duty. It is based on current § 3.654(b)(2). Current § 3.654(b)(2) provides that compensation will be authorized based on the degree of disability found to exist at the time the award is resumed, and that the disability will be evaluated on the basis of all facts, including records from the service department relating to the most recent period of active service. The practical consequence of this is that while the effective date for the resumption of payments can be as early as the day following release from active duty, the award that will generate those payments can be delayed while VA evaluates the degree of current disability.

In some cases, however, it might be clear from the record that the degree of impairment resulting from a service-connected disability had already become "static" when the veteran returned to active duty. A "static" disability is one that has stabilized and

is unlikely to either progress or improve. For example, the impairment resulting from an injury may remain permanently the same after the injury has fully healed. In the case of such static service-connected disabilities, the processing of resumed payments need not be delayed to reassess current impairment because impairment is not expected to change.

Accordingly, we propose to provide in proposed § 5.746(d)(2)(i) that VA will resume payments for service-connected disabilities at the same disability level that was in effect immediately prior to entering active duty if the evidence of record shows that the level of disability was static at the time of entry. This proposed provision is consistent with long-standing VA practice and prevents unnecessary delays in resuming VA disability compensation payments for veterans returning from military service where the degree of impairment for a service-connected disability is already known. This would not preclude the veteran from requesting an increase if he or she believed the disability had worsened. As provided in proposed § 5.746(d)(2)(ii), other disabilities (which may have gotten better or worse during the period of active duty) would continue to be evaluated before resumed payments are awarded.

Proposed new § 5.746(d)(3) clarifies how the provisions of current § 3.31, concerning delayed beginning dates for certain VA benefit payments, applies to payments resumed under § 5.746(d). With one exception, § 3.31 does not apply because its application is limited to "original, reopened, or increased awards" and does not apply to awards that "provide only for continuity of entitlement with no increase in rate of payment." See § 3.31(b). The exception is that § 3.31 does apply to the portion of the payment that represents the amount of the increase if the disability evaluation is increased.

Members of the Reserves and National Guard cannot receive both training pay and VA compensation or pension payments at the same time. However, they may waive their VA benefits in order to receive their training pay, which may be a greater amount. Proposed § 5.746(e) combines and updates the rules relating to waiver of VA benefits while on training duty that are located in current §§ 3.654(c) and 3.700(a)(1)(iii). We have omitted a now obsolete reference to "retirement pay" for the reasons noted above. We have clarified that the waivers apply to pay received by Reservists and National Guard members for active duty for training or inactive duty for training and included a cross reference to § 5.23,

which explains how VA classifies Reserve and National Guard duty. (The text of proposed § 5.23 may be found at 69 FR 4833.) We have also clarified that while VA does continue to accept prospective waivers, each waiver is good for not more than 1 year. In most cases, VA generates annual waiver forms to send to veterans based upon training duty data provided by the Department of Defense.

#### 5.747 Effect of Military Readjustment Pay, Disability Severance Pay, and Separation Pay on VA Benefits

Proposed § 5.747 is derived from current § 3.700(a)(2) through (5). We propose not to repeat current § 3.700(a)(2)(i) and (ii), concerning readjustment pay under former 10 U.S.C. 687 and 3814, because they are no longer necessary. These sections of title 10, United States Code, were repealed by §§ 109(a) and 214 of the Defense Officer Personnel Management Act (the Act) in 1980. Public Law 96–513, 94 Stat. 2835, 2870 and 2885. The repeal was effective September 15, 1981. Public Law 96–513, section 701(a), 94 Stat. 2955.

Although a savings provision was included in the Act, which allows persons who were on active duty on September 14, 1981, and were subsequently involuntarily separated from service, to elect payment under repealed 10 U.S.C. 687 and 3814, it is unlikely that there are still any eligible recipients. Therefore it is unlikely that the application of § 3.700(a)(2)(i) and (ii) would be required under proposed new part 5. Should that be necessary in a specific case, VA may always proceed under the applicable statutes.

Proposed § 5.747(a) pertains to lump-sum readjustment pay. Paragraph (a)(1) of proposed § 5.747 repeats nearly verbatim the first sentence of current § 3.700(a)(2)(iii). It describes the recoupment of lump-sum readjustment from VA compensation. Paragraph (a)(2) is derived from 3.700(a)(2)(iv), and describes the prohibition against recoupment of lump-sum readjustment pay from VA compensation awarded for a subsequent period of service.

Proposed § 5.747(b) is derived from current § 3.700(a)(3) and restates the conditions under which VA will recoup disability severance pay from a subsequent award of VA disability compensation. We have not included provisions regarding nondisability severance pay because it is highly unlikely that there will be any remaining eligible recipients. Nondisability severance pay was authorized under former 10 U.S.C. 8786, which was repealed by the Act in 1980.

Although the savings provision allows personnel who were on active duty on September 14, 1981, to be awarded nondisability severance pay, it is highly unlikely that it would still be awarded, since, due to the passage of time, such personnel would now be eligible for retirement benefits. The purpose of nondisability severance pay was to provide for service members who were involuntarily separated from the military prior to eligibility for retirement benefits. Now that these personnel would more than likely be eligible for retirement benefits, we believe a regulation pertaining to nondisability severance pay is no longer necessary.

We note that § 3.700(a)(3) indicates that VA will recoup the total amount of disability severance pay from an award of VA compensation when entitlement to VA compensation was established on or after September 15, 1981, even if the award for VA compensation is not for the same disability for which disability severance pay was granted. While this may be true for recoupment of nondisability severance pay, this proposed rule would explain that it is not true for disability severance pay. Under 10 U.S.C. 1212(c), VA must only recoup disability severance pay from VA compensation when the VA compensation is for the same disability for which disability severance pay was granted.

The current regulation reflects an ambiguity existing between two statutes. Section 1212(c) permits VA to recoup disability severance pay from VA compensation when the VA compensation is for the same disability for which disability severance pay was granted. However, 10 U.S.C. 1174(h)(2) states more broadly that if a veteran received separation pay, severance pay, or readjustment pay under any provision of law based on service in the armed forces, VA must deduct the "total amount" of such payment from VA disability compensation payments to the veteran. The current provision in section 3.700(a)(3) may suggest the view that the general rule stated in section 1174(h)(2) supersedes the more specific, but earlier-enacted rule in section 1212(c). However, the Supreme Court has stated that "it is a commonplace of statutory construction that the specific governs the general." *Morales v. TWA*, 504 U.S. 374, 384 (1992). Further, section 1161 of title 38, United States Code, which governs VA disability compensation awards, continues to refer to 10 U.S.C. 1212(c), rather than 10 U.S.C. 1174(h)(2), as the statute governing payment of disability compensation in cases involving

disability severance pay. Accordingly, the provision in this proposed rule that VA will recoup disability severance pay from VA disability compensation only where both awards involve the same disability more accurately reflects the requirements of the governing statutes. For the reasons stated above, provisions regarding nondisability severance pay are no longer necessary and are not included in proposed § 5.747.

Proposed § 5.747(c) pertains to recoupment of separation pay and special separation benefits. Paragraph (c)(1) of proposed § 5.747 repeats nearly verbatim the first sentence of current § 3.700(a)(5)(i). It describes the recoupment of separation pay from VA compensation. Paragraph (c)(2) of proposed § 5.747 is derived from current § 3.700(a)(5)(ii), and describes the prohibition against recoupment of separation pay from VA compensation awarded for a subsequent period of service.

Proposed § 5.747(d) states the amount VA must recoup from VA disability compensation for lump-sum readjustment pay, disability severance pay, separation pay, or special separation benefits paid to veterans upon their separation from service. It consolidates portions of current §§ 3.700(a)(2)(iii), (a)(3), and (a)(5)(i).

There is one change concerning the amount of special separation benefits awarded under 10 U.S.C. 1174a that VA must recoup. Current § 3.700(a)(5) provides, in part, that VA will recoup the full amount of special separation benefits paid on or before September 30, 1996, but will reduce the amount recouped by the amount of Federal income tax withheld from special separation benefits paid after September 30, 1996. That was accurate at the time that § 3.700(a)(5) was drafted. However, section 8208 of the Transportation Equity Act for the 21st Century, Public Law 105-178, 112 Stat. 107, 495 (1998), extended the provision allowing the deduction of Federal income tax withholding back to December 5, 1991, the date that section 1174a was added to title 10, United States Code. Public Law 102-190, section 661(a)(1), 105 Stat. 1290, 1394 (1991). Thus, the deduction of Federal income tax withheld from the amount VA must recoup applies to all 10 U.S.C. 1174a special separation benefits. Proposed § 5.747(d)(2) reflects this change.

#### 5.748 Concurrent Receipt of VA Disability Compensation and Retirement Pay by Certain Officers of the Public Health Service

Proposed § 5.748 is based on current § 3.753 with no substantive change. We have added authority citations.

#### *Payments From Federal Agencies and the Effects of Those Payments on VA Benefits for Veterans and Survivors*

#### 5.750 Election Between VA Benefits and Compensation Under the Federal Employees' Compensation Act for Death or Disability Due to Military Service

Proposed § 5.750 is based on current § 3.708(a), pertaining to benefits payable under the Federal Employees' Compensation Act (FECA), based on service in the U.S. Armed Forces before January 1, 1957. (FECA compensation is also payable based on Federal civilian employment, which is the subject of proposed § 5.751.) Paragraph (a)(1) of proposed § 5.750 is based on current § 3.708(a)(1) and (a)(4). Current § 3.708(a)(1) is entitled "initial election." We have changed this to "election required," because "initial election" might imply that a reelection is possible. Under 5 U.S.C. 8116(b), however, an election between VA benefits and FECA compensation generally is irrevocable and thus is not subject to a subsequent reelection (with an exception noted in proposed § 5.750(a)(2)). Thus, the title has been changed to "election required." In addition, we have added a provision indicating that an election between VA benefits and FECA compensation is irrevocable, aside from the exception provided for in proposed § 5.750(a)(2). We believe that providing this clarification will be helpful to the reader. No substantive change is intended.

Paragraph (a)(2) of proposed § 5.750 is based on current § 3.708(a)(2). We have changed the heading from "right of reelection" to "right to elect DIC in lieu of FECA compensation at any time." We believe the heading "right of reelection" is too broad, and may imply that any election involving FECA compensation is subject to reelection. As noted above, this is not the case. We believe the new, more specific heading, is more accurate and more helpful to the reader. No substantive change is intended. The basis for allowing a one-time election of DIC is the statutory provision under 38 U.S.C. 1316, which prohibits any return to FECA compensation once DIC has been granted.

Paragraph (a)(3) of proposed § 5.750 provides that if a veteran makes an election of FECA compensation instead

of VA disability compensation for a particular disability, and the veteran subsequently is awarded increased VA compensation based on a subsequent increased impairment of that disability, the veteran may elect to receive FECA compensation or VA compensation as to that additional disability. The basis for this policy is that the increase in payment is considered a new award that is subject to an initial election.

Paragraph (b) of proposed § 5.750 is based on current § 3.708(a)(3), and involves the effect of a surviving spouse's election of FECA compensation or VA benefits on the rights of children. We have divided the provisions of current § 3.708(a)(3) into proposed § 5.750(b)(1) and (b)(2). Proposed § 5.750(b)(1) addresses situations where the rights of the child are controlled by the surviving spouse. Proposed § 5.750(b)(2) addresses situations where the rights of the child are independent of the surviving spouse.

We have added an authority citation at the end of proposed § 5.750, which includes section 8116(b) of title 5, United States Code, which is the statute governing elections between VA benefits and FECA compensation, section 501(a) of title 38, United States Code, which is the statute authorizing the Secretary of VA to prescribe regulations that are necessary or appropriate to carry out the laws administered by VA, and section 1316(b) of title 38, United States Code, which is the statute pertaining to elections between DIC and FECA compensation.

#### 5.751 Election Between VA Benefits and Compensation Under the Federal Employees' Compensation Act for Death or Disability Due to Federal Civilian Employment

Proposed § 5.751 is based primarily on current §§ 3.708(b) and 3.958, regarding FECA compensation for death or disability due to Federal civilian employment. However, paragraph (d) of proposed § 5.751 is new.

Proposed § 5.751(a)(1) is based on current § 3.708(b)(1), and states the requirement that an individual must make an election between FECA compensation and VA disability compensation or dependency and indemnity compensation (DIC) if both FECA compensation and VA benefits are awarded based on the same disability or death.

Proposed § 5.751(a)(2) is based on current §§ 3.708(b)(1) and 3.958. It states that an individual may receive FECA compensation and VA benefits at the same time if there was an award prior to September 13, 1960, approving such



receipt. In such cases, an election between FECA compensation and VA benefits is not required.

Proposed § 5.751(b) is based on current § 3.708(b)(2) and states that there is no prohibition against concurrent payment of FECA compensation and VA compensation if entitlement to each benefit is based on a different disability or death. An election between FECA compensation and VA benefits is not required in such cases.

Proposed § 5.751(c) is based on current § 3.708(b)(1) and states that a Federal civilian employee's election between FECA compensation and VA benefits for the same disability is irrevocable, with the exception of the situation addressed in paragraph (d) of proposed § 5.751.

Paragraph (d) of proposed § 5.751, which is similar to paragraph (a)(3) of proposed § 5.750, provides for the situation where a veteran has elected FECA compensation, but later there is an increase in the disability which would warrant an increase in VA compensation. The veteran may elect between FECA compensation and VA compensation as to that additional disability. The basis for this policy is that the increase in payment is considered a new award that is subject to an initial election.

Paragraph (e)(2) of proposed § 5.751 is based on current § 3.708(b)(1) and states that a child who is eligible for DIC or other VA benefits independent of a surviving spouse may receive those benefits concurrently with the payment of FECA compensation to the surviving spouse. We have added paragraph (e)(1) to address a situation where the surviving spouse's election controls the rights of a child. This is the same provision as found in current § 3.708(a)(3) and proposed § 5.750(b)(1), which apply to elections involving FECA compensation based on disability or death due to military service. The provision equally applies to elections involving FECA compensation based on a disability or death due to civilian employment, so we have included it in proposed § 5.751(e)(1).

We have added an authority citation at the end of proposed § 5.751, which includes section 8116(b) of title 5, United States Code, which is the statute governing elections between VA benefits and FECA compensation, and section 501(a) of title 38, United States Code, which is the statute authorizing the Secretary of VA to prescribe regulations which are necessary or appropriate to carry out the laws administered by VA.

#### 5.752 Procedures for Elections Between VA Benefits and Compensation Under the Federal Employees' Compensation Act

This is a new regulation which sets out the special election procedures that apply to elections between VA benefits and compensation under the Federal Employees' Compensation Act (FECA). Unlike other elections involving VA benefits, an election between VA benefits and FECA compensation is made with the U.S. Department of Labor's Office of Workers' Compensation Programs (OWCP), not with VA. The procedures described in proposed § 5.752 are based on long-standing VA practice; no substantive change to these procedures is intended.

#### 5.753 Payment of VA Benefits and Civil Service Retirement Benefits for the Same Period

Proposed § 5.753 is a restatement of current § 3.710 without substantive change.

#### 5.754 Effect of Payment of Compensation Under the Radiation Exposure Compensation Act of 1990 on Payment of Certain VA Benefits

Proposed § 5.754 is based on current § 3.715, which was recently amended, pertaining to the concurrent receipt of Radiation Exposure Compensation Act of 1990 (RECA) compensation and VA benefits. In addition, we have added paragraph (d), which is based on current § 3.500(x), regarding the effective date of discontinuance or reduction of VA benefits due to receipt of RECA compensation. In keeping with the practice used throughout proposed part 5, we have reframed this discontinuance effective date rule in terms of the first day that benefits are not paid rather than in terms of the last day benefits are paid. In addition, we have changed the cite to current § 3.309(d), which appears in current § 3.715, to § 5.268, "Service connection for diseases presumed to be due to exposure to ionizing radiation," which was published as proposed on July 27, 2004. *See* 69 FR 44614.

#### *Rules Concerning the Receipt of Multiple VA Benefits*

#### 5.756 Prohibition Against Concurrent Receipt of Certain VA Benefits Based on the Service of the Same Veteran

Proposed § 5.756 is based on portions of the introduction to § 3.700 that relate to disability and death compensation, dependency and indemnity compensation (DIC), and pension benefits. The text has been simplified and restructured for clarity. No substantive changes are intended.

Paragraph (a) of proposed § 5.756 is based on the first sentence of current § 3.700. We note that this sentence refers to veterans, because it states that not more than one award will be paid to any person "based on his or her own service." Although the first sentence of current § 3.700 refers to "compensation," we have specified in proposed § 5.756 that this is "disability compensation."

Paragraph (b) of proposed § 5.756 is based on the second sentence of current § 3.700. Although § 3.700 refers to "dependents," proposed § 5.756(b) refers to "survivors," which is the term used throughout Part 5 to refer to persons who may receive benefits based on the death of a veteran. Dependents of a VA beneficiary are not entitled to compensation, pension, or DIC in their own right, and the prohibition on payment of multiple benefits therefore is not applicable to dependents. We note that dependents may receive apportionments of amounts otherwise payable to VA beneficiaries. In such cases, however, the prohibition on multiple benefits and the rights of election apply to the beneficiary, rather than the apportionee, except where a statute or regulation expressly provides otherwise (see proposed § 5.757(e)(3)). Additionally, although the second sentence of current § 3.700 refers to "compensation," we have specified that this is "death compensation." This is not a substantive change, because the current rule has no application to awards of disability compensation, a benefit awarded only to living veterans. The reader should see the discussion in the preamble regarding proposed § 5.757 for a further explanation of the effort to be more specific when referring to compensation.

Although the introduction to § 3.700 includes references to other benefits, including emergency officers', regular or reserve retirement pay, and naval pension, these references have not been repeated in proposed § 5.756, for the following reasons. Regarding emergency officers' retirement pay, we note that there are no longer any veterans receiving this benefit. Therefore, there are no regulations pertaining to this benefit that will be included in proposed part 5. Regarding military retirement pay, we plan to specifically address the concurrent receipt of military retirement pay and VA benefits in another regulation, § 5.745. Regarding naval pension, we note that the concurrent receipt of naval pension and VA benefits will be addressed in subpart H of proposed part 5 in a separate NPRM.



#### 5.757 Elections Between VA Disability or Death Compensation and Pension

Paragraphs (a) and (b) of proposed § 5.757(a) are based on portions of the first two sentences of current § 3.701(a). The first sentence of current § 3.701(a) states that, except as otherwise provided, a person entitled to receive pension or compensation under more than one law or section of a law administered by VA may elect to receive either benefit, regardless of whether it is the greater or lesser benefit, even though the election reduces the benefits payable to his or her dependents. The second sentence of current § 3.701(a) states that such person may at any time elect or reelect the other benefit. These two sentences of current § 3.701(a) have been slightly reworded and reorganized into paragraph (a) of proposed § 5.757, pertaining to elections between disability compensation and pension, and paragraph (b) of proposed § 5.757, pertaining to elections between death compensation and pension. We have not included the provisions regarding the effect of an election on dependents and survivors in these new paragraphs, however. Instead, we have included them in paragraphs (d) and (e)(1) of proposed § 5.757. These paragraphs, as discussed below, deal exclusively with the effect of an election on a dependent or survivor.

There are several matters that we seek to clarify in proposed § 5.757. First, we note that some current part 3 regulations are not specific about what is included when the term “compensation” is used. This could lead to misinterpretation. Therefore, we are attempting to be more specific in part 5. When current § 3.701 refers to “compensation,” it is referring to disability or death compensation and not dependency and indemnity compensation (DIC). In that regard, we adopt the analysis included in paragraph 8 of VA General Counsel Opinion VAOPGCPREC 4–92, which states that it is clear not only from the context of section 3.701, but from its history that the term “compensation” used in that section refers only to disability and death compensation, not DIC. The Opinion goes on to state that other provisions dealing with concurrent payments and elections use the term DIC when reference to that benefit is intended. *See* 38 CFR 3.700 and 3.703 through 3.709.

Further, the Opinion states that § 3.701 was primarily derived from former 38 CFR 4.52 (1956), which predated establishment of the DIC program. *See* Transmittal Sheet 200 (May 29, 1959). Section 3.702 (“Dependency and indemnity

compensation”), in contrast, incorporates terms of former 38 CFR 4.424, et seq. (1958), which implemented the DIC program. *See* Transmittal Sheet 200 (May 29, 1959). Also noted in the Opinion, § 3.701(a) permits reelection of the other benefit at any time, while § 3.702(d) states that an election to receive DIC is final and the claimant may not thereafter reelect death pension or compensation.

In addition to clarification of the term “compensation,” we have also clarified the term “pension,” which can refer to Improved Pension, Old-Law Pension, Section 306 Pension, or Improved Death Pension, depending on the context. In paragraphs (a) and (b) of proposed § 5.757, we specifically state that the option to freely elect or reelect between disability and death compensation and pension applies to elections and reelections involving Improved Pension or Improved Death Pension. We have set out the election rules pertaining to Old-Law Pension and Section 306 Pension in a separate paragraph, which is paragraph (c) of proposed § 5.757.

Paragraph (d) of proposed § 5.757 pertains to the effect of a veteran’s election on the rights of dependents. It is based on the third sentence of current § 3.701(a), which states that an election by a veteran controls the rights of all dependents in that case. We have also included the provision from the first sentence of current § 3.701(a), which states that an election may result in a reduction of the benefits payable to a dependent.

Paragraph (e)(1) of proposed § 5.757 pertains to the effect of a surviving spouse’s election on the rights of a child. It is based on the fourth sentence of current § 3.701(a), which states that an election by a surviving spouse controls the claims of all children including children over 18 and children not in the custody of the surviving spouse. We have also included a provision stating that the election may result in a reduction of the benefits payable to a child. This is based on the provision from the first sentence of current § 3.701(a), which states that a person’s election may result in a reduction of the benefits payable to a dependent.

Paragraph (e)(2) of proposed § 5.757 contains an exception to the general rule stated in paragraph (e)(1). This exception is not contained in current § 3.701. It is based on 38 U.S.C. 1542, which states that children who are not in the custody of a surviving spouse have independent eligibility for Improved Death Pension. For the text of proposed § 5.417 (corresponding to current § 3.57(d)), referenced in

proposed § 5.757(e)(2), *see* 70 FR #####, #####.

Paragraph (e)(3) of proposed § 5.757 contains another exception to the general rule stated in paragraph (e)(1). It is based on the fifth sentence of current § 3.701(a)(1), which states that the election of Improved Pension by a surviving spouse shall not prejudice the rights of any child receiving an apportionment on December 31, 1978. It has been slightly reworded for the sake of clarity, and we have added the terms Old-Law pension and Section 306 Pension to describe the apportionment. No substantive change is intended.

We note that we have not included the last two sentences of current § 3.701(a) in proposed § 5.757 because they are redundant of current § 3.960(d). They state that termination of the marriage of a surviving spouse who lost eligibility for Section 306 or Old-Law Pension because of that marriage does not restore eligibility for that pension. Regulations pertaining to the Section 306 Pension and Old-Law Pension programs are addressed in a separate NPRM. This includes a proposed regulation addressing the provisions of current § 3.960(d). *See* proposed § 5.470, “Reasons for Discontinuing or Reducing Section 306 or Old-Law Pension,” 69 FR 77578, 77589.

Paragraph (f) of proposed § 5.757 is a restatement of current § 3.701(c). In general, it states that when a person who is receiving VA pension or compensation is entitled to a higher rate under another law (that is, another VA compensation or pension program), VA will not pay that person under the other law unless that person makes an election.

#### 5.758 Electing Improved Pension Instead of Old-Law Pension or Section 306 Pension

A version of proposed § 5.758 was previously published as part of another part 5 NPRM, “Elections of Improved Pension; Old-Law Pension and Section 306 Pension,” which was published on December 27, 2004, at 69 FR 77578. The regulation was proposed § 5.461, “Electing Improved Pension Instead of Old-Law or Section 306 Pension.” We now propose to remove that regulation (§ 5.461) and place it in this NPRM as proposed § 5.758 instead. This will help achieve consolidation of benefit election rules in this NPRM.

Proposed § 5.758(a), (b), and (c) are the same as previously proposed § 5.461(a), (c), and (d), respectively, with minor editorial changes. Readers should refer to the remarks at 69 FR 77578, 77580–81 for comments concerning those paragraphs.

Previously proposed § 5.461(a) states the basic rule that, subject to certain exceptions, “a pension beneficiary who was entitled to receive Old-Law Pension or Section 306 Pension on December 31, 1978, may instead elect (choose) to receive Improved Pension.” It is restated in proposed § 5.758(a), and is based on current § 3.711.

Previously proposed § 5.461(c) states that if a veteran’s spouse is also a veteran eligible to elect Improved Pension, neither veteran may receive Improved Pension unless both elect to receive it. It is restated in proposed § 5.758(b), and is based on current § 3.711.

Previously proposed § 5.461(d) states that if a beneficiary does not elect Improved Pension, VA will continue to pay that beneficiary Old-Law Pension or Section 306 Pension at the monthly rate in effect on December 31, 1978, unless that rate must be reduced or discontinued under proposed § 5.470 or another regulation in this part. It is restated in proposed § 5.758(c), and is based on current § 3.960(a). For the text of § 5.470, cited in proposed § 5.758(c), see 69 FR 77578, 77589.

Previously proposed § 5.461(b) contains rules concerning the finality of elections. These provisions are now contained in proposed § 5.742.

The last provision of proposed § 5.758, paragraph (d), is based on the fifth sentence of current § 3.701(a). We note that this provision also appears in proposed § 5.757(e)(3). We believe it is helpful to the reader to place the provision in both places (§ 5.757(e)(3) and § 5.758(d)), as the subject matter is appropriate for both regulations.

#### 5.759 Election Between Death Compensation and Dependency and Indemnity Compensation

Proposed § 5.759 is a plain language restatement of paragraphs (a), (c), and (d)(1) of current § 3.702. It applies to elections between DIC and death compensation.

Paragraph (a) of proposed § 5.759 is based on current § 3.702(a). It states that a person entitled to receive both death compensation and DIC must choose one or the other benefit. It also states that a claim for service-connected death benefits will be considered a claim for DIC, subject to confirmation from the applicant. This is a plain language restatement of § 3.702(a). No substantive change is intended. Paragraph (a) also restates the rule contained in current § 3.702(d)(1) that an election to receive DIC instead of death compensation is final once the beneficiary receives payment for DIC.

Paragraph (b) of proposed § 5.759 is based on current § 3.702(c), which states that a claim for DIC may not be filed or withdrawn after the death of the surviving spouse, child, or parent.

We propose not to carry forward paragraphs (b), (e), and (f) of current § 3.702 because they are obsolete. Current paragraph (b) pertains only to surviving spouses receiving death compensation, the amount of which is based in part on the existence of a child who has attained the age of 18 years. Such a situation is highly unlikely, since death compensation is only awarded for deaths occurring before January 1, 1957. It is highly unlikely that a surviving spouse of a veteran who died before January 1, 1957, would have a dependent child.

Paragraph (e) of current § 3.702 provides for a surviving spouse to elect death compensation if he or she becomes eligible, even though DIC has been paid to a child or children of the veteran. This provision is no longer necessary, as it is highly unlikely that a surviving spouse would choose to receive death compensation instead of DIC, because the rate of DIC is higher than the rate of death compensation.

Paragraph (f) of current § 3.702 is also obsolete. It attempted to ensure that, under a complex and staggered rate-setting system for DIC benefits, the lowest possible DIC payment (for a service-connected death) was equal to or greater than the lowest possible payment made for a nonservice-connected death. However, in 1992, Congress reformed the DIC program by passing Public Law 102–568. Effective January 1, 1993, even the lowest possible DIC rate always exceeds the highest possible death pension rate.

#### 5.760 Electing Improved Death Pension Instead of Dependency and Indemnity Compensation

Proposed § 5.760 is based on current § 3.702(d)(2), which states that a surviving spouse who is receiving DIC may elect to receive Improved Death Pension instead. This is a simple restatement of the current provision, with no substantive change. However, we have not included the reference to November 2, 1994 because, under 1317(b), as enacted by Public Law 103–446, the right of election applies to anyone who is now or will become entitled to DIC, irrespective of when the award originally became effective.

#### 5.761 Concurrent Receipt of Disability Compensation, Pension, or Death Benefits by a Surviving Spouse Based on the Service of More Than One Veteran

Paragraphs (a), (b), and (c)(1) of proposed § 5.761, concerning the payment of multiple VA benefits to a surviving spouse, are based on the first sentence of current § 3.700(b)(1), which provides that a surviving spouse’s receipt of death pension, death compensation, or dependency and indemnity compensation (DIC) as the survivor of one veteran, or receipt of pension or disability compensation in his or her own right as a veteran, does not bar the payment of death pension, death compensation, DIC, or an apportionment of compensation or pension to that surviving spouse because of the death or disability of a different veteran.

Current § 3.700(b)(1) includes a reference to current § 3.700(a)(4). The proposed part 5 equivalent of § 3.700(a)(4) is § 5.464, “Multiple pension awards not payable.” Therefore we reference § 5.464 instead of § 3.700(a)(4) in proposed § 5.761. For the text of proposed § 5.464, see 69 FR 77578, 77589.

Proposed § 5.761(c)(2) is based on the second, third, and fourth sentences of § 3.700(b)(1). These sentences describe the election the surviving spouse is entitled to make for death benefits based on the death of more than one veteran to whom the surviving spouse was married. The current regulation states that when a surviving spouse elects death benefits based on the death of one veteran, then the death benefits to which the surviving spouse is entitled based on the death of another veteran are put in “suspense.” Rather than referring to this “suspension of benefits” in the proposed regulation, we propose merely to state that a surviving spouse may “elect” or “reelect” such benefits. The terms “elect” and “reelect” are more consistent with other regulations in this NPRM and are clearer to readers. No substantive change is intended.

#### 5.762 Payment of Multiple VA Benefits to a Surviving Child Based on the Service of More Than One Veteran

Paragraphs (a) and (b) of proposed § 5.762 are based on current § 3.700(b)(2), pertaining to concurrent receipt of VA benefits by a child. Paragraph (c) of proposed § 5.762 is primarily based on current §§ 3.659 and 3.703, both of which are entitled, “Two parents in same parental line.” It is also based on long-standing VA practice.

With few exceptions, VA is prohibited from paying a benefit to a child, based on the service of one parent, while paying a benefit to the same child, based on the service of a different parent in the same parental line. "Same parental line" is not defined in current VA regulations. It means that a child has more than one veteran father or more than one veteran mother for VA purposes. For example, if a child's biological father, who is a veteran, dies, and another male veteran subsequently adopts the child, VA considers the child to have two fathers in the same parental line. We have added a definition of "same parental line" in paragraph (c)(1) of proposed § 5.762.

The prohibition against a child's concurrent receipt of death benefits for more than one parent in the same parental line applies only to DIC or death compensation (but not death pension) between January 1, 1957, and June 8, 1960. In other words, a child could receive death pension for one parent at the same time as DIC or death compensation for another parent in the same parental line if both parents died before June 9, 1960. From June 9, 1960, and thereafter, the prohibition against concurrent receipt includes all three death benefits. The effective dates of these prohibitions are included in the introductory paragraph of current § 3.659 and paragraph (a) of current § 3.703. We have restated the effective dates of these prohibitions in plain language in paragraph (c)(3) of proposed § 5.762.

Paragraph (c)(4) of proposed § 5.762 is based on the last sentence of current § 3.703(b), which states that a child has the right to elect or reelect one or more times to receive benefits based on the death of either parent in the same parental line. It is rewritten in plain English; no substantive change is intended.

Paragraph (c)(5) of proposed § 5.762 is based on current § 3.659(a), which describes the offset VA applies when a child makes a reelection.

Paragraph (c)(6)(i) of proposed § 5.762 is based on current § 3.703(c). It addresses the effect of a child's election on other beneficiaries. It has been rewritten for improved clarity. No substantive changes are intended. The reference to "dependents' educational assistance" (DEA) in current § 3.703(c) has not been repeated because proposed § 5.762 involves death benefits only, and the effects of a child's election of DEA are included in proposed § 5.764, "Payment of Survivors' and Dependents' Educational Assistance and VA pension or dependency and

indemnity compensation for the same period."

Paragraph (c)(6)(ii) of proposed § 5.762 is based on current § 3.659(b), which describes the effective date of an award based on the child's election, and current § 3.503(a)(7), which states the effective date of discontinuance of pension, compensation, or DIC in two-parent cases. These provisions are rewritten in plain English; no substantive change is intended.

#### 5.763 Payment of Multiple VA Benefits to More Than One Child Based on the Service of the Same Veteran

Proposed § 5.763 is a plain language rewrite of current § 3.704(a). We have limited the application of § 5.763 to Improved Pension, dependency and indemnity compensation (DIC), and Survivors' and Dependents' Educational Assistance (DEA). We have not included a reference to death compensation, as it is highly unlikely that there will be any children receiving death compensation. We have not included references to Old-Law Pension or Section 306 Pension, as it has been indicated in other regulations that VA cannot pay increased rates for Old-Law or Section 306 Pension.

We note that current § 3.704(b) is addressed in a separate NPRM, subpart G, which is titled, "Dependency and Indemnity Compensation Benefits." The rule was published as proposed § 5.536(h) in that NPRM on October 21, 2005. *See* 70 FR 61326.

#### 5.764 Payment of Survivors' and Dependents' Educational Assistance and VA Death Pension or Dependency and Indemnity Compensation for the Same Period

Proposed § 5.764 is a plain language restatement of current paragraphs (a) and (b) of § 3.707, as well as §§ 3.503(a)(8), 3.659(b), and 3.703(c) concerning Survivors' and Dependents' Educational Assistance (DEA). We have removed the references to "compensation," which are referring to death compensation, because it is highly unlikely that a current recipient of DEA would be eligible for death compensation, since death compensation may only be awarded for deaths occurring before January 1, 1957. Proposed § 5.764 is also based on § 21.3023, which contains the specific substantive criteria for elections of DEA.

Proposed § 5.764(a)(1) states that a child over the age of 18 must elect between VA pension or DIC and DEA, because VA cannot pay DEA to such a child at the same time it pays the child pension or DIC. It is based on current § 3.707(a) and current § 21.3023(a).

Proposed § 5.764(a)(2) is based on current § 3.703(c) and states that when an election is made by a child with more than one parent in the same parental line, VA will determine the entitlement and the rate of benefits payable to other beneficiaries in the same case as if the child electing DEA did not exist. This is a plain language restatement of current § 3.703(c).

Proposed § 5.764(a)(3) states the applicable effective dates when a child elects DEA. It is a plain language restatement of current §§ 3.503(a)(8) and 3.659(b).

Proposed § 5.764(b) is based on current § 3.707(a) and current § 21.3023(b). It states that a child who is under the age of 18 or helpless may receive VA pension or DIC at the same time as DEA.

Proposed § 5.764(c) is based on current § 3.707(b) and current § 20.3023(d). It states that a surviving spouse may receive VA pension or DIC at the same time as DEA.

Proposed § 5.764(d) is based on § 3.707(a) and directs the reader to the provisions of current § 20.3023 for specific criteria regarding elections of DEA.

#### Non-Inclusion of Other Part 3 Provisions

As discussed earlier in this NPRM, there are certain regulations or portions of regulations that we propose not to carry forward to part 5.

We propose that paragraphs (j)(2) through (j)(6) of current § 3.400 not be repeated in new part 5. These are effective-date provisions for the election of pension payable under Public Law 86-211 ("Section 306 Pension"). New entitlement under this program is no longer possible. A separate NPRM pertains to continuing awards of Section 306 Pension. *See* 69 FR 77578.

We propose not to include the provisions of current § 3.751 in part 5 because it is redundant of the provisions of current § 3.750, which are included in § 5.740 and § 5.745. Furthermore, current § 3.751 provides that military retirees are not entitled to "statutory awards" of disability compensation in addition to military retired pay. "Statutory award" is a term that in VA vernacular means an award of special monthly compensation (SMC) under paragraphs (k) through (s) of 38 U.S.C. 1114. We believe that proposed part 5 would make it sufficiently clear that disability compensation includes SMC. In addition, some readers could be confused by the term "statutory award" in this context, particularly the second reference to it in § 3.751. Because all VA benefits are provided according to

statute, some readers might erroneously believe that a veteran must waive military retired pay in order to receive a clothing allowance or Medal of Honor Pension, for example, when this is not the case.

We propose that § 3.754 concerning emergency officers' retirement pay (EOR) not be included in proposed part 5 because there are no longer any veterans affected by this rule and this rule is obsolete.

#### **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**

This document contains provisions constituting a collection of information, at 38 CFR 5.764 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 this proposed rule. The information collection requirements for § 5.764 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control number 2900–0098.

#### **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, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any 1 year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

#### **Catalog of Federal Domestic Assistance Numbers and Titles**

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; and 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida.

#### **List of Subjects in 38 CFR Part 5**

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

Approved: June 22, 2007.

**Gordon H. Mansfield,**

*Deputy Secretary of Veterans Affairs.*

For the reasons set forth in the preamble, VA proposes to amend 38 CFR Part 5, as proposed to be added at 69 FR 4832, January 30, 2004, and as amended, by adding subpart L as follows:

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

#### **Subpart L—Payments and Adjustment to Payments**

##### **Payments to Beneficiaries Who Are Eligible for More Than One Benefit—General Provisions**

Sec.

- 5.740 Definitions relating to elections.
- 5.741 Persons who may make an election.
- 5.742 Finality of elections; cancellation of certain elections.
- 5.743 General effective dates for awarding, reducing, or discontinuing VA benefits because of an election.
- 5.744 [Reserved]

##### **Payments From Service Departments and the Effects of Those Payments on VA Benefits for Veterans**

- 5.745 Entitlement to concurrent receipt of military retired pay and VA disability compensation.
- 5.746 Prohibition against receipt of active military service pay and VA benefits for the same period.
- 5.747 Effect of military readjustment pay, disability severance pay, and separation pay on VA benefits.
- 5.748 Concurrent receipt of VA disability compensation and retirement pay by certain officers of the Public Health Service.
- 5.749 [Reserved]

##### **Payments From Federal Agencies and the Effects of Those Payments on VA Benefits for Veterans and Survivors**

- 5.750 Election between VA benefits and compensation under the Federal Employees' Compensation Act for death or disability due to military service.
- 5.751 Election between VA benefits and compensation under the Federal Employees' Compensation Act for death or disability due to Federal civilian employment.
- 5.752 Procedures for elections between VA benefits and compensation under the Federal Employees' Compensation Act.
- 5.753 Payment of VA benefits and civil service retirement benefits for the same period.
- 5.754 Effect of payment of compensation under the Radiation Exposure Compensation Act of 1990 on payment of certain VA benefits.
- 5.755 [Reserved]

##### **Rules Concerning the Receipt of Multiple VA Benefits**

- 5.756 Prohibition against concurrent receipt of certain VA benefits based on the service of the same veteran.

- 5.757 Elections between VA disability or death compensation and pension.
- 5.758 Electing Improved Pension instead of Old-Law Pension or Section 306 Pension.
- 5.759 Election between death compensation and dependency and indemnity compensation.
- 5.760 Electing Improved Death Pension instead of dependency and indemnity compensation.
- 5.761 Concurrent receipt of disability compensation, pension, or death benefits by a surviving spouse based on the service of more than one veteran.
- 5.762 Payment of multiple VA benefits to a surviving child based on the service of more than one veteran.
- 5.763 Payment of multiple VA benefits to more than one child based on the service of the same veteran.
- 5.764 Payment of Survivors' and Dependents' Educational Assistance and VA death pension or dependency and indemnity compensation for the same period.
- 5.765–5.769 [Reserved]

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

## Subpart L—Payments and Adjustments to Payments

### Payments to Beneficiaries Who Are Eligible for More Than One Benefit—General Provisions

#### § 5.740 Definitions relating to elections.

(a) *Election* means any writing, signed by a person authorized by § 5.741, “Persons who may make an election,” expressing a choice between two or more VA benefits to which the person is entitled, or between VA and other Federal benefits to which the person is entitled.

(b) *Initial election* means the first election a person, authorized by § 5.741, makes between two or more benefits.

(c) *Reelection* means an election a person, authorized by § 5.741, makes between benefits that were the subject of an initial election.

(d) *Timely filed* with respect to elections means that a person, authorized by § 5.741, files an election between two or more benefits within 1 year of VA's notice that such an election is required.

(Authority: 38 U.S.C. 501(a), 5103(b))

Cross reference: § 5.572 “Effective dates for reduction or discontinuance based on increased income-parents’ DIC.”

#### § 5.741 Persons who may make an election.

(a) *General.* VA will accept an election signed by a claimant or beneficiary, or if applicable, by any one of the following persons acting on behalf of a claimant or beneficiary:

(1) The spouse of a claimant or beneficiary if the claimant or beneficiary has been declared to be an incompetent veteran under § 13.57 of this chapter.

(2) The legal custodian of a claimant or beneficiary if the claimant or beneficiary is a minor under § 13.58 of this chapter.

(3) A fiduciary that VA designates, under § 13.55 of this chapter.

(4) A court-appointed fiduciary, under § 13.59 of this chapter.

(5) The chief officer of the institution in which the veteran is receiving care and treatment, and whom VA has designated as a payee, under §§ 13.55(b)(6) and 13.61 of this chapter.

(b) *Elections from a Member of Congress or duly authorized representative.* This paragraph (b) applies if VA receives a communication from a Member of Congress or from a claimant or beneficiary's duly authorized representative indicating that a claimant or beneficiary wishes to elect a VA benefit. (If the communication is from a service organization, attorney, or agent, there must be a power of attorney in effect at the time the communication was written.) If VA receives such a communication, VA will provide notice to the claimant or beneficiary that a person listed in paragraph (a) of this section must sign such an election. If a properly signed election is then timely filed under § 5.740(d), VA will consider the properly signed election to have been filed on the date it received the communication from the Member of Congress or the duly authorized representative.

(Authority: 38 U.S.C. 501(a), 5103(b)(1))

#### § 5.742 Finality of elections; cancellation of certain elections.

This section explains when an election or reelection becomes final. A final election or reelection ordinarily may be changed only by cancellation under paragraph (d) or (e) of this section or by reelection, if authorized. Other provisions of this part specify when reelection is authorized and when a final election or reelection is irrevocable.

(a) *Finality of an election when benefits are received by check.* Except as otherwise provided in this section, if the beneficiary receives payment of the elected benefit by check, the election is final when the beneficiary (or a person authorized to act on the beneficiary's behalf under § 5.741) negotiates the first check for the elected benefit.

(b) *Finality of an election when benefits are received by direct deposit or electronic funds transfer.* Except as otherwise provided in this section, if the

beneficiary receives payment of the elected benefit by direct deposit or electronic funds transfer, the election is final when the applicable financial institution receives the second payment of the elected benefit.

(c) *Finality of an election when a beneficiary dies after filing an election.* When a beneficiary dies after filing an election, but before the beneficiary had negotiated the check or before the applicable financial institution had received the second payment for the elected benefit, the election is final even though it would not be considered final under paragraph (a) or (b) of this section.

(d) *Cancellation of an election made by an incompetent person.* If VA finds that a beneficiary was mentally incompetent when he or she elected a benefit, the beneficiary, or another person listed in § 5.741(a) who is acting on behalf of the beneficiary, may cancel that election.

(e) *Cancellation of elections that were based on erroneous VA information.* A beneficiary who elected a benefit based on erroneous information that was provided by VA may cancel the election. For this right to cancellation to apply, VA must make a determination that it previously provided erroneous information. This determination must be based on the same evidence that VA used when it previously provided the erroneous information.

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

#### § 5.743 General effective dates for awarding, reducing, or discontinuing VA benefits because of an election.

(a) *General effective date for award; offset—(1) Effective date of award.* Unless otherwise provided in this part, when a claim is pending and an election is timely filed under § 5.740(d), the effective date for an award of an elected benefit shall be the same as the effective date VA would assign for the awarded benefit if no election were required. Unless otherwise provided in this part, when a beneficiary elects a different benefit, the effective date for an award of the elected VA benefit is the date VA receives the election.

(2) *Offset.* Payments of the elected benefit are subject to an offset. The payments will be offset by any payments the beneficiary received for another benefit for the same period. This offset will occur only if the two benefits cannot be received concurrently.

(b) *Effective date of reduction or discontinuance.* Unless otherwise provided in this part, when VA must reduce or discontinue payments because a beneficiary elected a different VA

benefit, or a non-VA benefit, the effective date of the reduction or discontinuance is the same date as the effective date of the award of the different VA benefit or the non-VA benefit.

(Authority: 38 U.S.C. 5110, 5112, 5304, 5305)

#### **§ 5.744 [Reserved]**

#### **Payments From Service Departments and the Effects of Those Payments on VA Benefits for Veterans**

#### **§ 5.745 Entitlement to concurrent receipt of military retired pay and VA disability compensation.**

(a) *Definition of military retired pay.* For the purposes of this part, military retired pay is payment received by a veteran that is classified as retired pay by the Service Department, including retainer pay, based on the recipient's service as a member of the Armed Forces or as a commissioned officer of the Public Health Service, the Coast and Geodetic Survey, the Environmental Science Services Administration, or the National Oceanic and Atmospheric Administration.

(b) *Payment of both military retired pay and disability compensation or Improved Pension—(1) Compensation.* Subject to paragraphs (b)(2) and (b)(3) of this section, a veteran who is entitled to military retired pay and disability compensation for a service-connected disability rated 50 percent or more, or a combination of service-connected disabilities rated at 50 percent or more, under the schedule for rating disabilities (38 CFR part 4, subpart B), or based on a determination of individual unemployability under 38 CFR 4.16, is entitled to receive both payments subject to the phase-in period described in paragraph (c) of this section.

(2) *Chapter 61 disability retirees retiring with 20 or more years of service.* Disability retired pay payable under 10 U.S.C. Chapter 61 to a veteran with 20 or more years of creditable service may be paid concurrently with disability compensation to a qualifying veteran subject to the following:

(i) Any waiver required during the phase-in period under paragraph (c)(1)(ii) of this section; and

(ii) If the veteran's disability retired pay exceeds the amount of retired pay the veteran would have received had the veteran retired based on length of service, the veteran must waive that excess amount of disability retired pay in order to receive VA disability compensation.

(3) *Chapter 61 disability retirees retiring with less than 20 years of service.* Veterans who receive disability retired pay under 10 U.S.C. Chapter 61

with less than 20 years of creditable service are not eligible for concurrent receipt.

(4) *Improved Pension.* A veteran may receive Improved Pension and military retired pay at the same time without having to waive military retired pay. However, in determining entitlement to Improved Pension, VA will treat military retired pay in the same manner as countable income from other sources.

(c) *Waiver—(1) When a waiver is necessary.* (i) A waiver of military retired pay is necessary in order to receive disability compensation when a veteran is eligible for both military retired pay and disability compensation but is not eligible under paragraphs (b)(1) or (b)(2) of this section to receive both benefits at the same time.

(ii) All veterans who are eligible to receive both military retired pay and disability compensation at the same time under paragraphs (b)(1) or (b)(2) of this section, except those receiving compensation for a disability rated 100 percent, must file a waiver in order to receive the maximum allowable amount of disability compensation during the phase-in period. For veterans receiving disability compensation based on a VA determination of individual unemployability, the phase-in period ends on December 30, 2009. For all other veterans, the phase-in period ends on December 31, 2013. After the phase-in period, veterans retired under 10 U.S.C. Chapter 61 who are eligible for concurrent receipt must still file a waiver under the circumstances described in paragraph (b)(2)(ii) of this section.

(Authority: 10 U.S.C. 1414, 38 U.S.C. 5304, 5305)

(2) *How to file a waiver of military retired pay.* A veteran may request a waiver of military retired pay in any written, signed statement, including a VA form, which reflects a desire to waive all or some military retired pay. The statement must be submitted to VA or to the Federal agency that pays the veteran's military retired pay. VA will treat a claim for VA disability compensation filed by a veteran who is entitled to military retired pay as a waiver.

(d) *Elections and the right to reelect either benefit.* (1) A veteran who has filed a waiver of military retired pay under this section has elected to receive disability compensation. A veteran may reelect between benefits covered by this section at any time by submitting a written, signed statement to VA or to the Federal agency that pays the veteran's military retired pay.

(2) An election filed within 1 year from the date of notification of VA entitlement will be considered as "timely filed" for effective date purposes. If the veteran is incompetent, the 1-year period will begin on the date that notification is sent to the next friend or fiduciary. In initial determinations, elections may be applied retroactively if the claimant was not advised of his or her right of election and its effect.

(e) *Effective date rules for elections.*

(1) If an election is timely filed under paragraph (d)(2) of this section, the effective date of the election will be the date of entitlement to the elected benefit.

(2) If a waiver is properly filed under paragraph (c), the effective date of the waiver will be the day following discontinuance or reduction of retirement pay.

(3) If a reelection is made under paragraph (d)(1) of this section, the effective date of the election will be the date that the reelection is received by VA.

(Authority: 38 U.S.C. 5304(a), 5305)

#### **§ 5.746 Prohibition against receipt of active military service pay and VA benefits for the same period.**

(a) *Definition of active military service pay.* For the purposes of this section, active military service pay means pay that a veteran receives for active duty, active duty for training, or inactive duty training. Active military service pay does not include pay for time spent by members of the Reserve Officer Training Corps in drills as part of their activities as members of the corps.

(b) *Prohibition against receipt of VA benefits at the same time as active military service pay.* VA will not pay disability compensation or pension to a veteran for any period for which the veteran receives active military service pay.

(c) *Effective date of discontinuance of payments for VA benefits during active duty status.* Unless the veteran elects to receive VA benefits instead of active military service pay, VA will discontinue payments effective the day the veteran begins active duty service. If VA does not know the exact date of the veteran's return to active duty, VA will discontinue payments effective the first day of the month that follows the month for which it last paid benefits. If the exact date of the veteran's return to active duty thereafter becomes known, VA will then discontinue payments effective as of that date.

(d) *Resumption of payments for VA benefits on release from active duty—*

(1) *Effective date.* If otherwise in order, VA will resume payments effective the day after the date of release from active duty if VA receives a claim to resume payments within 1 year after the date of release. Otherwise, the effective date is 1 year prior to the date VA receives the claim to resume payments.

(2) *Rate—(i) Static service-connected disabilities.* If the evidence of record shows that the level of disability had become static at the time of entry into active duty, VA will resume payments for a service-connected disability at the same disability level that was in effect immediately prior to entering active duty.

(ii) *Non-static service-connected disabilities.* Except as provided in paragraph (d)(2)(i) of this section, VA will resume payments based on the degree of disability found to exist when the award is resumed. VA will ascertain the degree of disability by considering all the facts, including facts provided in records from the service department relating to the most recent period of active military service.

(3) *Application of § 3.31.* Resumptions under paragraph (d) of this section are not subject to § 3.31 of this chapter, “Commencement of the period of payment,” except to the extent that the disability evaluation is increased.

(4) *Prior service-connection awards.* In determining whether disability compensation payments should be resumed under paragraph (d) of this section, VA will not disturb prior determinations of service connection except as provided in § 3.105 of this chapter.

(5) *New claims for service connection.* If the veteran incurs or aggravates a disability during the subsequent period of service, VA will not award service connection for the new disability unless it receives a claim for service connection for that disability.

(e) *Waiver of VA benefits during active duty for training or inactive duty for training—(1) Waiver of VA benefits.* Veterans who are Reservists and National Guard members may waive their VA pension or compensation for periods of active duty for training or inactive duty for training (see § 5.23, “How VA classifies Reserve and National Guard duty). Waivers may cover anticipated periods of training; however, each waiver is effective for not more than 1 year.

(2) *Readjustments.* VA may authorize retroactive payments of previously waived VA pension or compensation if readjustment is in order because the veteran did not receive service pay for a period of training duty as anticipated.

However, VA must receive a claim for readjustment within 1 year after the end of the fiscal year during which VA benefits were waived.

(Authority: 10 U.S.C. 12316; 38 U.S.C. 501(a), 5304(c))

**§ 5.747 Effect of military readjustment pay, disability severance pay, and separation pay on VA benefits.**

(a) *Lump-sum readjustment pay.* This paragraph (a) applies when entitlement to disability compensation was established on or after September 15, 1981.

(1) *Recoupment of lump-sum readjustment pay.* A veteran who has received a lump-sum readjustment payment may also receive disability compensation for disability incurred in or aggravated by service prior to the date of receipt of the lump-sum readjustment payment. However, the lump-sum readjustment payment will be recouped from the disability compensation.

(2) *Disability compensation for disability incurred or aggravated in subsequent service is not subject to recoupment.* The veteran must receive the full amount of the monthly compensation including additional amounts for dependents, payable for a service-connected disability that was incurred in or aggravated in a period of service that is subsequent to the period on which the readjustment pay was based.

(Authority: 10 U.S.C. 1174(h)(2); 38 U.S.C. 501(a))

(b) *Disability severance pay—(1) Recoupment of disability severance pay when VA compensation is awarded for a severance disability.* When VA disability compensation is awarded based on the same disability or disabilities for which the veteran received disability severance pay, VA will recoup from the disability compensation award the full amount of the disability severance pay.

(2) *Rate of recoupment of disability severance pay.* Generally, VA will recoup disability severance pay from VA disability compensation at the rate payable for the initial determination of the degree of the disability for which the veteran was awarded disability severance pay. However, the veteran must receive the full amount of the monthly compensation including additional amounts for dependents, payable for any additional nonseverance pay disabilities.

(i) *Definition of “initial determination of the degree of disability”.* The “initial determination of the degree of disability” means the first regular schedular compensable rating

determined under part 4 of this chapter. The “initial determination of the degree of disability” must be made without consideration in whole or in part of a need for hospitalization or a period of convalescence. It does not include a temporary 100 percent rating assigned under §§ 4.28, 4.29, or 4.30 of this chapter.

(ii) *Rate of recoupment prior to an initial determination of the degree of disability.* When a veteran is receiving a temporary evaluation assigned under §§ 4.28, 4.29, or 4.30 of this chapter and VA has not yet made an initial determination of the degree of disability, VA will recoup at the rate payable, based on that temporary evaluation, for the disability or disabilities for which the severance pay was granted.

(iii) *Rate of recoupment after an initial determination of the degree of disability.* After making an initial determination of the degree of disability, VA will recoup VA disability compensation at the monthly rate payable for the degree of disability assigned. VA will not thereafter change the rate of recoupment based on reevaluations of the veteran’s disability that lead to an increased rating.

(Authority: 10 U.S.C. 1174(h) and 1212(c); 38 U.S.C. 501, 1161)

(c) *Separation pay and special separation benefits.* This paragraph (c) applies when entitlement to disability compensation was established on or after September 15, 1981.

(1) *Recoupment of separation pay and special separation benefits.* A veteran who has received separation pay or special separation benefits may also receive disability compensation for a disability incurred in or aggravated by service prior to the date of receipt of separation pay or special separation benefits. However, the separation pay or special separation benefits will be recouped from the disability compensation.

(2) *Disability compensation for disability incurred or aggravated in subsequent service is not subject to recoupment.* The veteran must receive the full amount of the monthly compensation including additional amounts for dependents, payable for a service-connected disability that was incurred in or aggravated in a period of service that is subsequent to the period on which the separation pay or special separation benefits were based.

(Authority: 10 U.S.C. 1174, 1174a)

(d) *Amount recouped—(1) Lump-sum readjustment pay, disability severance pay, and separation pay—(i) Payments*



received before October 1, 1996. VA will recoup from VA disability compensation the total amount of lump-sum readjustment pay, disability severance pay, and separation pay a veteran received before October 1, 1996, regardless of the amount of Federal income tax withheld from such payments.

(ii) *Payments received after September 30, 1996.* VA will recoup from VA disability compensation the total amount of lump-sum readjustment pay, disability severance pay, and separation pay a veteran received after September 30, 1996, less the amount of Federal income tax withheld from such payments.

(2) *Special separation benefits.* VA will recoup from VA disability compensation the total amount of special separation benefits under 10 U.S.C. 1174a less the amount of Federal income tax withheld from such payments.

(Authority: 10 U.S.C. 1174, 1174a, 1174(h)(2), 1212(c))

**§ 5.748 Concurrent receipt of VA disability compensation and retirement pay by certain officers of the Public Health Service.**

Disability compensation may be paid concurrently with retirement pay to an officer of the commissioned corps of the Public Health Service, who was receiving disability compensation on December 31, 1956, as follows:

(a) An officer who incurred a disability before July 29, 1945, but retired unrelated to disability prior to such date.

(b) An officer who incurred a disability before July 29, 1945, but retired unrelated to disability between July 4, 1952, and December 31, 1956.

(c) An officer who incurred a disability between July 29, 1945, and July 3, 1952, but retired unrelated to disability between July 4, 1952, and December 31, 1956.

(Authority: Sec. 501(b), Pub. L. 84-881, 70 Stat. 881; E.O. 9575, 10 FR 7895; E.O. 10349, 17 FR 3769)

**§ 5.749 [Reserved]**

**Payments From Federal Agencies and the Effects of Those Payments on VA Benefits for Veterans and Survivors**

**§ 5.750 Election between VA benefits and compensation under the Federal Employees' Compensation Act for death or disability due to military service.**

(a) *General—* (1) *Election required.* An individual who is entitled to compensation from the U.S. Department of Labor's Office of Workers' Compensation Programs under the Federal Employees' Compensation Act

(FECA) for a disability or death incurred before January 1, 1957, due to service in the Armed Forces, and who is also entitled to VA pension, compensation, or dependency and indemnity compensation (DIC) based on the same disability or death (including compensation or DIC payable under 38 U.S.C. 1151, "Benefits for persons disabled by treatment or vocational rehabilitation") must elect whether to receive FECA compensation or the applicable VA benefit. An election under this paragraph (a)(1) is irrevocable once the election becomes final under § 5.742, with the exception of the situation addressed in paragraph (a)(2) of this section.

(2) *Right to reelect DIC in lieu of FECA compensation at any time.* An individual who is receiving benefits under FECA based on death in military service may elect at any time to receive DIC in lieu of FECA compensation. However, such an election of DIC is irrevocable once the election becomes final under § 5.742.

(3) *Future increases in impairment.* If a veteran makes an election of FECA compensation instead of VA disability compensation for a particular disability, and there is subsequent increased impairment based on that disability, the award of increased compensation based on the increased impairment will be considered a new benefit and the veteran may elect to receive FECA compensation or VA compensation as to that increased impairment. If the veteran elects VA compensation for the increase, VA will pay only the difference between the rate payable for the increased evaluation and the rate payable for the prior evaluation.

(b) *Effect of a surviving spouse's election of FECA compensation or VA benefits on the rights of children—* (1) *Cases in which a spouse's entitlement controls a child's entitlement.* If a child's entitlement to VA benefits is controlled by the surviving spouse's entitlement, the surviving spouse's election controls the rights of any of the veteran's children, even if the child is not in the custody of the surviving spouse and even if the child is not entitled to receive any benefits under FECA. If the surviving spouse elects to receive FECA compensation, the child's VA benefits will be discontinued on the same day that the surviving spouse's VA benefits are discontinued.

(2) *Cases in which a child has independent entitlement.* If a child is entitled to DIC or other VA benefits independent of the surviving spouse's entitlement, the child may receive such benefits at the same time that the

surviving spouse receives FECA compensation.

(Authority: 5 U.S.C. 8116(b); 38 U.S.C. 501(a), 1316(b), 1317(a))

**§ 5.751 Election between VA benefits and compensation under the Federal Employees' Compensation Act for death or disability due to Federal civilian employment.**

(a) *When both VA benefits and Federal Employees' Compensation Act (FECA) compensation are based upon the same disability or death—* (1) *Election required.* Except as otherwise provided in this section, an individual who is entitled to compensation from the U.S. Department of Labor's Office of Workers' Compensation Programs under FECA for a disability or death due to Federal civilian employment and who is also entitled to VA compensation or dependency and indemnity compensation (DIC) based on the same disability or death must elect whether to receive FECA compensation or the applicable VA benefit.

(2) *No election is required for VA awards approved prior to September 13, 1960.* Any award approved prior to September 13, 1960, authorizing VA benefits concurrently with an award of FECA compensation for a disability or death due to Federal civilian employment is not subject to the election requirement in paragraph (a)(1) of this section.

(b) *When VA benefits and FECA compensation are each based on a different disability or death.* There is no prohibition against concurrent payment of FECA compensation and VA compensation if entitlement to each benefit is based on a different disability or death. The election described in paragraph (a)(1) of this section is not required in such cases.

(c) *Election is irrevocable.* An election to receive FECA compensation or VA benefits under this section is irrevocable once the election becomes final under § 5.742. There is no right of reelection.

(d) *Future increases in disability.* If a veteran makes an election of FECA compensation instead of VA disability compensation for a particular disability, and there is subsequent increased impairment based on that disability, the award of increased compensation based on the increased disability will be considered a new benefit and the veteran may elect to receive FECA compensation or VA compensation as to that increased disability.

(e) *Effect of a surviving spouse's election of FECA compensation or VA benefits on the rights of children—* (1) *Cases in which a spouse's entitlement controls a child's entitlement.* If a

child's entitlement to VA benefits is controlled by the surviving spouse's entitlement, the surviving spouse's election controls the rights of any of the veteran's children, even if the child is not in the custody of the surviving spouse and even if the child is not entitled to receive any benefits under FECA. If the surviving spouse elects to receive FECA compensation, the child's VA benefits will be discontinued on the same day that the surviving spouse's VA benefits are discontinued.

(2) *Cases in which a child has independent entitlement.* If a child is entitled to DIC or other VA benefits independent of the surviving spouse's entitlement, the child may receive such benefits at the same time that the surviving spouse receives FECA compensation.

(Authority: 5 U.S.C. 8116(b); 38 U.S.C. 501(a))

**§ 5.752 Procedures for elections between VA benefits and compensation under the Federal Employees' Compensation Act.**

(a) *Procedures prior to VA receipt of an election between Federal Employees' Compensation Act (FECA) compensation and VA benefits.* When there is evidence showing that a claimant is receiving benefits from the U.S. Department of Labor's Office of Workers' Compensation Programs (OWCP) under FECA for the same disability or death for which VA benefits are claimed, VA will—

(1) Advise OWCP of the pertinent facts in the case, including the disabilities for which VA benefits are payable, and request that OWCP obtain the election; and

(2) Deny the VA claim, advise the claimant of the facts VA furnished to OWCP, and inform the claimant that OWCP will contact the claimant concerning rights of election.

(b) *Procedures when there is an election of VA benefits instead of FECA compensation.* If OWCP informs VA that the claimant has elected VA benefits, VA will pay benefits effective the date of receipt of the claim for VA benefits (or other effective date assigned under this chapter based on such claim). VA will offset FECA payments made during the period between the effective date of the VA award and the date of election.

**§ 5.753 Payment of VA benefits and civil service retirement benefits for the same period.**

VA will pay VA benefits to an eligible claimant or beneficiary at the same time that the claimant or beneficiary is receiving civil service retirement benefits. However, VA will consider

payments of civil service retirement benefits as income where income is a factor in entitlement to VA benefits except as otherwise provided in this part.

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

**§ 5.754 Effect of payment of compensation under the Radiation Exposure Compensation Act of 1990 on payment of certain VA benefits.**

(a) *Disability compensation.* (1) A radiation-exposed veteran, as defined in 38 CFR 3.309(d)(3), who receives a payment under the Radiation Exposure Compensation Act of 1990, as amended (42 U.S.C. 2210 note) (RECA), will not be denied disability compensation to which the veteran is entitled under 38 CFR 3.309(d) for months beginning after March 26, 2002.

(2) A veteran who is not a "radiation-exposed veteran," as defined in 38 CFR 3.309(d)(3), is not entitled to VA disability compensation for disability caused by a disease that is attributable to exposure to radiation for which the veteran has received a payment under RECA.

(b) *Dependency and indemnity compensation (DIC).* A person who receives a payment under RECA based upon a veteran's death will not be denied DIC to which the person is entitled under 38 CFR 3.5 and 3.22 for months beginning after March 26, 2002.

(c) *Offset of RECA payment against VA benefits.* Notwithstanding paragraphs (a)(1) or (b) of this section, the amount of a RECA payment will be deducted from the amount of disability compensation payable pursuant to § 3.309(d) or the amount of DIC payable.

(d) *Effective date of discontinuance of VA benefits.* This paragraph applies when VA must discontinue VA disability compensation to an individual because that individual received RECA compensation. In such a case, VA will discontinue its benefits effective the first day of the month that RECA benefits are issued.

(Authority: 38 U.S.C. 1112(c)(4), 1310(c); 42 U.S.C. 2210 note)

**§ 5.755 [Reserved]**

**Rules Concerning the Receipt of Multiple VA Benefits**

**§ 5.756 Prohibition against concurrent receipt of certain VA benefits based on the service of the same veteran.**

(a) *Veterans.* VA may not pay to a veteran an award of disability compensation and an award of disability pension at the same time based on the veteran's own service.

(b) *Survivors.* VA may not pay to a survivor more than one award of death

pension, death compensation, or dependency and indemnity compensation (DIC) based on the service of the same veteran.

(Authority: 38 U.S.C. 5304(a)(1))

**§ 5.757 Elections between VA disability or death compensation and pension.**

(a) *Elections between disability compensation and Improved Pension.* A person who is entitled to receive both disability compensation and Improved Pension may elect or reelect at any time to receive either benefit unless otherwise provided in this part, regardless of whether it is the greater or lesser benefit.

(b) *Elections between death compensation and death pension.* A person who is entitled to receive both death compensation and death pension may elect or reelect at any time to receive either benefit unless otherwise provided in this part, regardless of whether it is the greater or lesser benefit.

(c) *Elections between disability compensation and Old-Law Pension or Section 306 Pension.* A person who is entitled to receive both disability compensation and Old-Law Pension or Section 306 Pension may elect to receive either benefit. Such person may reelect at any time to receive the other benefit unless otherwise provided in this part, regardless of which is the greater or lesser benefit.

(d) *Effect of a veteran's election of disability compensation or pension on other beneficiaries.* A veteran's election of disability compensation or pension under this section controls the right of any dependent in that case, even though the election results in the reduction of the benefit payable to the dependent.

(e) *Effect of a surviving spouse's election on the rights of a child—(1) General—the election of the surviving spouse controls the claims of the child.* An election by a surviving spouse controls the claims of all children including children over 18 and children not in the custody of the surviving spouse, even though the election results in the reduction of the benefit payable to a child.

(2) *Exception—when a surviving spouse elects death compensation.* When a surviving spouse elects death compensation instead of Improved Death Pension, an otherwise eligible child is not precluded from receiving Improved Death Pension if the child is not in the custody of a surviving spouse. See § 5.417 Child custody for Improved Pension.

(3) *Exception—when a surviving spouse elects Improved Death Pension.* A surviving spouse's election of

Improved Death Pension does not affect the benefits of a surviving child who was receiving a separate apportioned award of Section 306 Pension or Old-Law Pension on December 31, 1978.

(f) *Change from one law to another.* Except as otherwise provided, where payments of pension or compensation are being made to a person under one law, the right to receive benefits under another law being in suspension, and a higher rate of pension or compensation becomes payable under the other law, benefits at the higher rate will not be paid for any date prior to the date of receipt of an election.

(Authority: 38 U.S.C. 501(a), 1542, 5304)

**§ 5.758 Electing Improved Pension instead of Old-Law Pension or Section 306 Pension.**

(a) *Right to elect Improved Pension.* Except as otherwise provided in this section, a pension beneficiary who was entitled on December 31, 1978 to receive Old-Law Pension or Section 306 Pension, may elect at any time to receive Improved Pension instead. An election to receive Improved Pension instead of Old-Law Pension or Section 306 Pension is irrevocable once the election becomes final under § 5.742. There is no right to reelection.

(b) *When a veteran's spouse is also a veteran who is eligible to elect Improved Pension.* If a veteran who is eligible to elect Improved Pension under this section has a spouse who is also a veteran who is eligible to elect Improved Pension under this section, neither veteran may receive Improved Pension unless both elect to receive it.

(c) *When a beneficiary chooses to receive Old-Law Pension or Section 306 Pension instead of Improved Pension.* If a pension beneficiary who is eligible to elect Improved Pension under this section does not do so, VA will continue to pay that beneficiary Old-Law Pension or Section 306 Pension at the monthly rate in effect on December 31, 1978, unless that rate must be reduced or discontinued under § 5.470, "Reasons for discontinuing or reducing Section 306 Pension or Old-Law Pension," or under another regulation in this part.

(d) *Effect of a surviving spouse's election of Improved Pension on the rights of a child.* A surviving spouse's election of Improved Pension does not affect the benefits of a surviving child who was receiving, on December 31, 1978, a separate apportioned award of Section 306 Pension or Old-Law Pension.

(Authority: 38 U.S.C. 501(a); Sec. 306(a) and (b), Pub. L. 95-588, 92 Stat. 2508)

**§ 5.759 Election between death compensation and dependency and indemnity compensation.**

(a) *Election between benefits is required.* A person who is eligible for both death compensation and dependency and indemnity compensation (DIC) must elect to receive one or the other benefit.

(1) *Persons currently receiving death benefits.* (i) A person who is currently receiving death compensation may elect to receive DIC.

(ii) An election to receive DIC instead of death compensation is irrevocable once the election becomes final under § 5.742. There is no right to reelection.

(2) *Persons claiming entitlement to service-connected death benefits.* VA will treat a claim for service-connected death benefits as a claim for DIC, subject to confirmation by the claimant, unless the claimant specifically requests death compensation.

(b) *Limitation of election.* An election of DIC may not be filed or withdrawn after the death of the surviving spouse, child, or parent. *See also* § 5.742(c) (concerning the finality of an election of DIC when the beneficiary dies before negotiating a DIC check).

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

*Cross-reference:* § 5.512, "Eligibility for death compensation or death pension instead of dependency and indemnity compensation."

**§ 5.760 Electing Improved Death Pension instead of dependency and indemnity compensation.**

A surviving spouse who is entitled to receive dependency and indemnity compensation (DIC) may elect to receive Improved Death Pension instead of DIC.

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

**§ 5.761 Concurrent receipt of disability compensation, pension, or death benefits by a surviving spouse based on the service of more than one veteran.**

(a) *Concurrent receipt of disability compensation or pension and death benefits.* Except as otherwise provided in § 5.464, "Multiple pension awards not payable," if a surviving spouse is receiving disability compensation or pension in his or her own right as a veteran, the surviving spouse is not barred from receiving:

(1) An apportionment of disability compensation or pension based on another veteran's disability, or

(2) Death pension, death compensation, or dependency and indemnity compensation (DIC) due to the death of another veteran.

(b) *Entitlement to death benefits based on the death of more than one veteran.* Except as otherwise provided

in this regulation or in § 5.464, "Multiple pension awards not payable," if a beneficiary is receiving death pension, death compensation, or DIC as the surviving spouse of one veteran, the beneficiary is not barred from receiving death pension, death compensation, or DIC due to the death of a different veteran.

(c) *Limitation—A surviving spouse is entitled to payment of only one award of death benefits at one time based on the death of more than one veteran to whom the surviving spouse was married—*(1) *Payment limitation.* VA may not pay more than one death pension, death compensation, or DIC award at a time to a surviving spouse based on the death of more than one veteran to whom the surviving spouse was married.

(2) *Election.* A surviving spouse who is eligible for death pension, death compensation, or DIC because of the deaths of more than one veteran to whom he or she was married may elect, or reelection, benefits based on the death of any one such deceased spouse. The election or reelection may be made at any time. Benefits payable in the elected case will be offset by any payments the surviving spouse received based on the death of the other spouse for the same period. The offset will occur only if the surviving spouse was entitled to benefits in the elected case prior to the date of receipt of the election under § 5.567, "Effective dates for DIC or death compensation awards," or § 5.431, "Effective dates for Improved Death Pension."

(Authority: 38 U.S.C. 5304(b)(1), (3))

**§ 5.762 Payment of multiple VA benefits to a surviving child based on the service of more than one veteran.**

(a) *A surviving child is entitled to concurrent receipt of disability compensation or pension and death benefits.* If a surviving child is receiving disability compensation or pension in his or her own right as a veteran, the surviving child is not barred from receiving:

(1) An apportionment of disability compensation or pension based on another veteran's disability, or

(2) Death pension, death compensation, or dependency and indemnity compensation (DIC) due to the death of another veteran.

(b) *A surviving child is entitled to more than one award of death benefits based on the death of more than one veteran.* Except as otherwise provided in paragraph (c) of this section or in § 5.464, "Multiple pension awards not payable," if a surviving child is receiving death pension, death

compensation, or DIC as the surviving child of one veteran, the surviving child is not barred from receiving death pension, death compensation, or DIC due to the death of a different veteran.

(c) *Exception—child with more than one parent in the same parental line—*  
(1) *Definition. Same parental line* means that the child has more than one veteran father or more than one veteran mother for VA purposes.

(2) *A surviving child is entitled to payment of no more than one death benefit due to the death of more than one parent in the same parental line.* Except for insurance and as provided in this paragraph (c), VA cannot pay more than one death benefit to, or based on the existence of, a surviving child because of the death of more than one parent in the same parental line.

(3) *Exception: More than one death benefit is payable when the death of both parents in the same parental line occurred prior to June 9, 1960.* If both fathers or both mothers died before June 9, 1960, a child who receives DIC for one parent may receive death pension for the other parent. Unless both fathers or both mothers died before January 1, 1957, such a child may not receive DIC or death compensation for the other parent. If both parents died before January 1, 1957, there is no prohibition on concurrent receipt of death benefits.

(4) *Surviving child's right to elect or reelect.* If a surviving child is entitled to benefits because of the death of more than one parent in the same parental line, the child has the right to elect or reelect one or more times to receive benefits because of the death of either such parent.

(5) *Benefits that are awarded as a result of a surviving child's reelection are subject to an offset.* VA will award benefits to the electing child according to the child's reelection. However, VA will offset the new award by subtracting the amount of any payments for the same period which VA previously made under the prior award to or based on the existence of that child.

(6) *Effect of a surviving child's election on the beneficiaries of the other parent in the same parental line.* (i) When a surviving child elects benefits because of the death of one veteran, and a surviving spouse and/or another surviving child are eligible for benefits because of the death of another veteran in the same parental line, VA will

determine the benefit rate to the surviving spouse and/or the other surviving child as if the surviving child making the election did not exist.

(ii) *Effective date.* If VA determines that benefits payable to the surviving spouse and/or the other surviving child should be increased, reduced, or discontinued as a result of the election or reelection, such increase, reduction, or discontinuance is effective the first day of the month following the month for which VA last paid benefits.

(Authority: 38 U.S.C. 5304)

**§ 5.763 Payment of multiple VA benefits to more than one child based on the service of the same veteran.**

(a) *Scope.* This section applies when two or more children are eligible to receive the same type of VA benefit based on the service of a veteran, and at least one of the children is also eligible to receive a different type of VA benefit based on the service of the same veteran. The types of VA benefits referred to in this section are as follows:

- (1) Improved Pension.
- (2) Dependency and indemnity compensation (DIC).
- (3) Survivors' and Dependents' Educational Assistance (DEA).

(b) *General rule.* This paragraph (b) applies when one of the children is eligible for more than one type of VA benefit as provided in paragraph (a) of this section and that child chooses to receive a benefit that is different than the type the remaining child receives. Except as provided in paragraph (c) of this section, VA cannot—

(1) Increase the rate of payment to the remaining child; or

(2) Pay a rate to each remaining child that is greater than the rate payable if all children were receiving the same type of VA benefit.

(c) *Exception to general rule.* The limitation in paragraph (b) of this section does not apply if the child elects DEA. Unless the child electing DEA is under the age of 18 or helpless, VA will pay benefits to the remaining child as if the child electing DEA did not exist. See 38 CFR 21.3023(b) (pertaining to restrictions on concurrent receipt of DEA and other VA benefits).

(Authority: 38 U.S.C. 3512, 3562)

**§ 5.764 Payment of Survivors' and Dependents' Educational Assistance and VA death pension or dependency and indemnity compensation for the same period.**

(a) *Child who has reached age 18—*(1) *Election is required.* (i) A child who has reached the age of 18 and is not helpless may not receive VA death pension at the same time as he or she receives Survivors' and Dependents' Educational Assistance (DEA) under 38 U.S.C. chapter 35, and must elect between VA death pension and DEA.

(ii) A child who has reached the age of 18 and is not helpless may not receive dependency and indemnity compensation (DIC) at the same time as he or she receives DEA benefits, and must elect between DIC and DEA.

(2) *Effect of election on other beneficiaries when there is more than one parent in the same parental line.* In cases where a child has more than one parent in the same parental line, if the child elects to receive benefits based on one parent, VA will consider the child's entitlement for purposes of determining the entitlement and rate of other survivors of that parent. For benefits based on the other parent's service, VA will determine the entitlement and rate of the survivors of that parent as if the child did not exist.

(3) *Effective date.* VA will discontinue the electing child's VA death pension or DIC effective the day preceding the beginning date of the DEA allowance. VA will increase payments, pay a reduced rate, or discontinue VA death pension or DIC to the remaining beneficiaries effective the beginning date of the DEA award to the child.

(b) *Child who is under age 18 or helpless.* Generally, a helpless child or a child who is younger than 18 may receive VA death pension or DIC at the same time as DEA under 38 U.S.C. chapter 35.

(c) *Surviving spouse.* A surviving spouse may receive VA death pension or DIC at the same time as DEA under 38 U.S.C. chapter 35.

(d) *Additional criteria.* Provisions concerning concurrent receipt of DEA and VA death pension or DIC are set forth in § 21.3023 of this chapter.

(Authority: 38 U.S.C. 3562)

**§§ 5.765–5.769 [Reserved]**

[FR Doc. E7–19280 Filed 10–1–07; 8:45 am]

BILLING CODE 8320–01–P