

Service Bulletin

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DEPARTMENT OF VETERANS AFFAIRS (VA)

<http://www.va.gov>

Presumption of Service Connection for Osteoporosis for Former Prisoners of War

The Department of Veterans Affairs (VA) is amending its adjudication regulations to establish a presumption of service connection for osteoporosis for former Prisoners of War (POWs) who were detained or interned for at least 30 days and whose osteoporosis is at least 10 percent disabling. The amendment implements a decision by the Secretary to establish such a presumption based on scientific studies. The effective date is September 28, 2009, and adds osteoporosis to the list of presumptive diseases in 38 C.F.R. § 3.309(c)(2)(ii).

VA is additionally amending its adjudication regulations to establish a presumption of service connection for osteoporosis for POWs who were detained or interned for any period of time, have a diagnosis of posttraumatic stress disorder (PTSD), and whose osteoporosis is at least 10 percent disabling. This amendment to 38 C.F.R. § 3.309(c) (1) reflects statutory provisions of the Veterans' Benefits Improvement Act of 2008, and adds, "On or after October 10, 2008, Osteoporosis, if the Secretary determines that the veteran has posttraumatic stress disorder (PTSD)."

Amendment of 38 C.F.R. § 17.96: Medications Prescribed by Non-VA Physicians

In a document published in the **Federal Register** on July 25, 2003 (68 FR 43927), VA issued an interim final rule that amended 38 C.F.R. § 17.96, allowing VA to fill certain prescriptions ordered by non-VA physicians. When the interim final rule was published, VA was experiencing increases in enrollment and demand for health care services. The increased demand was caused, at least in part, by veterans enrolling in the VA health care system to obtain pharmacy benefits at no cost or at a reasonable cost.

The interim final rule, in paragraphs (a) through (h), set forth rules that established a temporary program to fill prescriptions ordered by non-VA physicians prior to the veteran's initial primary care visit. The temporary program was limited to veterans who were enrolled in the VA health care system prior to July 25, 2003 and who requested an initial primary care appointment prior to July 25, 2003 with the next available appointment date more than 30 days from the date of the request. By 2004, VA had virtually eliminated the primary care wait list so there was no longer a

need for the temporary program. In addition, no veterans remain eligible for the temporary program. The final rule published August 24, 2009 removes paragraphs (a) through (h) of the interim final rule, thus returning the law to the state that it was in before the interim final rule was promulgated. The continuing provisions apply to the filling of prescriptions by non-VA physicians for veterans receiving increased pension or compensation at the housebound or aid and attendance levels, without regard to whether the veteran has had an initial primary care visit.

VA “Innovation Competition” Program

<http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=1763>

The Department of Veterans Affairs (VA) has launched one of the largest innovation competitions in the agency’s history. The on-line proposal period began on Tuesday, Sept, 8, and will conclude after Veterans Day. The competition is soliciting ideas from VA employees and co-located Veterans Service Organizations addressing such topics as claims processing times and better process transparency.

VA Regional Offices have been encouraged by the Secretary to submit entries via a secure online platform. At the close of the competition, VA administrators from each regional office will select the winning ideas, which will be reviewed by a team chaired by Patrick W. Dunne, the VA Under Secretary for Benefits. The final selections will receive full funding for project development and execution at the Regional Offices submitting the idea. The White House and VA will share the winning entries with the public after selection.

1,100 Colleges and Universities Partner with VA Yellow Ribbon Program

www.gibill.va.gov/GI_Bill_Info/CH33/YRP/YRP_List.htm

Over 1,100 colleges, universities and schools across the country have entered into “Yellow Ribbon” program agreements with the Department of Veterans Affairs (VA) to improve financial aid for Veterans participating in the Post-9/11 GI Bill. The Yellow Ribbon program funds tuition expenses that exceed the highest public in-state undergraduate tuition rate. Institutions can contribute up to 50 percent of those expenses, and VA will match this additional funding for eligible students.

The Yellow Ribbon program is reserved for veterans eligible for the Post-9/11 GI Bill at the 100 percent benefit level. This includes those who served at least 36 months on active duty or served at least 30 continuous days and were discharged due to a service-related injury.

HUD and VA announce \$75 million for HUD-VASH Program to provide rental housing and support for homeless veterans

The United States Interagency Council on Homelessness (USICH) was formed in June 2009 to coordinate the federal response to homelessness and to create a national partnership with every level of government and the private sector to address homelessness in the nation.

Housing and Urban Development (HUD) Secretary Shaun Donovan and VA Secretary Erik K. Shinseki announced the allocation of \$75 million to local public housing authorities across the 50 states, the District of Columbia, Puerto Rico and Guam to provide permanent supportive housing

and dedicated VA case managers for an estimated 10,000 homeless Veterans. This joint initiative is called the Veterans Affairs Supportive Housing Program (HUD-VASH). The funding will provide local public housing agencies with approximately 10,000 rental assistance vouchers specifically targeted to assist homeless veterans in their area. Public housing authorities, that administer HUD's Housing Choice Voucher Program, will work with VA medical centers to manage the program. In addition to the rental assistance, VA medical centers will provide supportive services and case management to eligible homeless veterans.

VA Launches 10-Year Health Study of 60,000 New Veterans

VA has initiated a large, long-term study to look at a broad array of health issues that may affect Operation Enduring Freedom/Operation Iraqi Freedom (OEF/OIF) veterans and their counterparts who served during the same time period. VA's "National Health Study for a New Generation of U.S. Veterans" will begin with 30,000 veterans deployed to OEF/OIF and 30,000 comparison veterans who were not deployed.

The study will include veterans who served in each branch of service, representing active duty, Reserve, and National Guard members. Women will be over-sampled to make sure they are represented and will comprise 20 percent of the study, or 12,000 women. A combination of mail surveys, online surveys, telephone interviews, and in-person physical evaluations will be used to collect data from the veterans.

The study will compare the deployed and non-deployed veterans in terms of chronic medical conditions, traumatic brain injury (TBI), post traumatic stress disorder (PTSD) and other psychological conditions, general health perceptions, reproductive health, pregnancy outcomes, functional status, use of health care, behavioral risk factors (smoking, drinking, seatbelt use, speeding, motorcycle helmet use, and sexual behavior), and VA disability compensation. VA has contracted with an independent veteran-owned research firm, HMS Technologies Inc., to collect the data.

VA Reopening Health Care Enrollment to Thousands of Veterans

www.va.gov/healtheligibility

VA will add nearly 266,000 more veterans into its medical centers and clinics across the country by expanding access to health care enrollment for certain veterans who had been excluded due to their income.

Under a new regulation effective June 15, 2009 VA will enroll veterans whose income exceeds current means-tested thresholds by up to 10 percent. These veterans were excluded from VA health care enrollment when income limits were imposed in 2003 on veterans with no service-connected disabilities or other special eligibility for care. There is no income limit for veterans with compensable service-connected disabilities or for veterans being seen for their service-connected disabilities.

Veterans who have applied for VA health care but were rejected due to income at any point in 2009 will have their applications reconsidered under the new income threshold formula. Those who applied before 2009, but were rejected due to income, must reapply. Information about enrollment and an income and assets calculator are available at the web site above. The

calculator provides a format in which veterans enter their household income, number of dependents, and zip codes to see if they may qualify for VA health care enrollment.

In addition to applying online, veterans may also contact VA's Health Benefits Service Center at 1-877-222 VETS (1-877-222-8387). Each VA medical center across the country has an enrollment coordinator available to provide veterans with enrollment and eligibility information.

Compensation and Pension Service Fast Letter 09-33:
Special Monthly Compensation at the Statutory Housebound Rate

38 U.S.C. § 1114(s) provides that SMC at the (s) rate will be granted if a veteran has a service-connected disability rated as total, and (1) has additional service-connected disability or disabilities independently ratable at 60 percent or more, or (2) is permanently housebound by reason of a service-connected disability or disabilities. VA's implementing regulation at 38 C.F.R. § 3.350(i) essentially mirrors the statutory language.

Prior to the CAVC's decision in *Bradley v. Peake*, VA excluded a rating of total disability based on individual unemployability (TDIU) as a basis for a grant of SMC at the (s) rate. VA relied upon language in citing VAOPGCPREC 6-99, dated June 7, 1999, in which the General Counsel stated that a TDIU rating takes into account all of a veteran's service-connected disabilities and that considering a TDIU rating and a schedular rating in determining eligibility for SMC would conflict with the requirement for "additional" disability of 60 percent or more by counting the same disability twice.

On November 26, 2008, the Court, in *Bradley v. Peake*, disagreed with VA's interpretation and held that the provisions of section 1114(s) do not limit a "service-connected disability rated as total" to only a schedular 100 percent rating. The Court found the opinion too expansive because it was possible that there would be no duplicate counting of disabilities if a veteran was awarded TDIU based on a single disability and thereafter received disability ratings for other conditions. The Court's holding allows a TDIU rating to serve as the "total" service-connected disability, if the TDIU entitlement was solely predicated upon a single disability for the purpose of considering entitlement to SMC at the (s) rate.

The Court held that the requirement for a single "service-connected disability rated as total" cannot be satisfied by a combination of disabilities. Multiple service-connected disabilities that combine to 70 percent or more and establish entitlement to TDIU under 38 C.F.R. § 4.16(a) cannot be treated as a single "service-connected disability rated as total" for purposes of entitlement to SMC at the (s) rate.

Based on the Court's decision in *Bradley*, entitlement to SMC at the (s) rate will now be granted for TDIU recipients if the TDIU evaluation was, or can be, predicated upon a single disability and (1) there exists additional disability or disabilities independently ratable at 60 percent or more, or (2) the veteran is permanently housebound by reason of a service-connected disability or disabilities.

DEPARTMENT OF DEFENSE (DOD)

<http://www.defense.gov/>

DOD Transferability Options For “Post 9/11 GI Bill”

<https://www.dmdc.osd.mil/TEB/>

The Defense Department has implemented policy for transferring educational benefits to the spouses and children of service members under the “Post 9/11 GI Bill,” which takes effect Aug. 1, 2009. Career service members on active duty or in the selected reserve on Aug. 1, 2009, and who are eligible for the “Post 9/11 GI Bill,” may be entitled to transfer all or a portion of their education entitlement to one or more family members. To be eligible, service members must have served in the Armed Forces for at least six years, and agree to serve four additional years, from the date of election to transfer.

Service members with at least 10 years of service, who by DOD or service policy are prevented from committing to four additional years, may transfer their benefits provided they commit for the maximum amount of time allowed by such policy or statute.

Additionally, to maintain proper force structure and promotion opportunities, temporary rules have been developed for service members eligible to retire between Aug. 1, 2009 and Aug. 1, 2012. Depending on their retirement eligibility date, these service members will commit to one to three additional years, from the date of election to transfer.

U.S. COURT OF APPEALS FOR VETERANS CLAIMS **PRECEDENT DECISIONS**

<http://www.vetapp.gov/>

Percy V. Shinseki, 23 Vet.App. 37 (2009)

<http://www.vetapp.uscourts.gov/documents/Percy-2961.pdf>

In this case, VA did not act promptly to close out an appeal due to an untimely substantive appeal. Instead, it engaged in substantive and procedural development, scheduled hearings on the matter, and took testimony on the issue before determining that an issue existed concerning the jurisdiction of the Board of Veterans Appeals (BVA).

The Court noted that the statute affording a claimant a period of 60 days from the date of the mailing of the Statement of the Case to file a substantive appeal with the BVA is clear on its face that the 60-day period is not a jurisdictional bar to the Board’s adjudication of a matter. Because the 60-day filing period is not jurisdictional, VA may waive any issue of timeliness in the filing of a substantive appeal, either explicitly or implicitly. By treating a disability rating matter as if it were part of the veteran’s timely filed substantive appeal, the VA waived any objections it might have had to the timeliness of the appeal with respect to the matter. *Percy V. Shinseki, 23 Vet.App. 37 (2009)*. 38 USC § 7105(d)(3); 38 CFR § 20.302(b).

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

<http://www.cafc.uscourts.gov/>

Sharp v. U.S., No.2008-5105, slip op. (Fed. Cir. Aug. 24, 2009)

<http://www.cafc.uscourts.gov/opinions/08-5105.pdf>

The claimant's are surviving spouses of deceased veterans and military retirees of the United States Armed Forces, each of whom remarried after age 57. This case centered on statutory interpretation and involved two benefit programs: SBP, which is administered by the Department of Defense, and DIC, which is administered by the Department of Veterans Affairs. SBP is an insurance-style program allowing eligible servicemembers and military retirees to elect to have premiums deducted from their pay in order to provide their spouses with additional benefits after their deaths. 10 U.S.C. § 1448 (2006).

As the surviving spouse of a deceased military service member who chose to participate in SBP, the surviving spouses are the primary beneficiary of annuity payments that became effective the first day after their spouse's death. DIC is a separate benefit, which is automatically paid to surviving spouses of veterans who died while on active duty or while suffering from a service-connected disability. 38 U.S.C. § 1310(a) (2006) ("When any veteran dies . . . from a service-connected or compensable disability, the Secretary shall pay [DIC] to such veteran's surviving spouse . . ."). The widows' spouses died while on active duty or while suffering from a service-connected disability. Thus, each widow was eligible to receive both SBP and DIC benefits.

Prior to 2003, surviving spouses receiving DIC payments became ineligible to continue receiving the benefit when they remarried. Congress responded by passing the Veterans Benefits Act of 2003 ("the Veterans Benefits Act"), which restored DIC benefits to surviving spouses who chose to remarry after age 57. *Id.* § 103(d)(2)(B) ("The remarriage after age 57 of the surviving spouse of a veteran shall not bar the furnishing of benefits [relating to DIC] to such person as the surviving spouse of the veteran."). The Veterans Benefits Act also provided that, "notwithstanding any other provision of law," those remarried spouses who are simultaneously eligible for other benefits inuring to surviving spouses of veterans do not suffer a reduction in their benefits due to the DIC payments.

The statutory provisions at issue in the Federal Circuit's decision, 10 U.S.C. § 1450(c)(1) and 38 U.S.C. § 1311(e), were at odds: the SBP scheme calls for reducing SBP payments by the amount the recipient receives in DIC benefits, whereas the post-2003 DIC scheme prohibits such reductions for surviving spouses who remarry after age 57. The surviving spouses urged, and the trial court held, that by its plain language section 1311(e) modified or partially repealed section 1450(c)(1), so that surviving spouses who received reinstated DIC by virtue of remarrying after age 57 received their SBP payments unreduced by the amount of their DIC payments.

The Federal Circuit agreed with the surviving spouses and the appellate court. The Federal Circuit held that Congress' intention to supersede all other laws (except a provision not at issue in this case), and prevent a decrease in some other benefit payment as a result of section 1311(e)'s restoration of DIC payments to surviving spouses who remarry after age 57, was plain on the face of the statute. 38 U.S.C. § 1311(e) ("[N]otwithstanding any other provision of law (other than section 5304(b)(3) of this title), no reduction in benefits under such other provision of

law shall be made by reason of such individual's eligibility for benefits under this section.”). In other words, because the “notwithstanding” clause applies to “any other provision of law,” without relevant limitation, section 1311(e) cannot be given any effect unless its language is construed to modify or partially repeal the earlier-promulgated section 1450(c)(1) to the extent necessary to resolve the offset conflict. Therefore, those surviving spouses who receive reinstated DIC by virtue of remarrying after age 57 can also receive their SBP payments unreduced by the amount of their DIC payments.

Related information on the appellate court's decision can be found on page 20 in the November/December 2008 issue of the DAV magazine, which can be located at the following link: : http://magazine.dav.org/library/pdf/magazine_200806.pdf.

U.S. SMALL BUSINESS ADMINISTRATION

www.sba.gov

SBA's Patriot Express Loan Initiative Delivers \$315 Million to Veterans and Military Community

www.sba.gov/patriotexpress

In just two year's time, the U.S. Small Business Administration's Patriot Express Pilot Loan Initiative has supported more than \$315 million in loans to more than 3,750 veterans and their spouses who are using the SBA-guaranteed funds to establish and expand their small businesses. As a result of the American Recovery and Reinvestment Act, which raised loan guarantees to 90 percent, and eliminated fees temporarily, the number of Patriot Express loans increased to record levels in April and May of 2009.

Patriot Express, launched June 28, 2007, builds on the more than \$1 billion in loans SBA guarantees annually for veteran-owned businesses, and the counseling assistance and procurement support it provides each year to more than 200,000 veterans, service-disabled veterans and Reserve members. Patriot Express is a streamlined loan product based on the agency's SBA Express Program, but with an enhanced guaranty and interest rate. The Patriot Express loan is offered by SBA's nationwide network of participating lenders and features one of SBA's fastest turnaround times for loan approvals. Loans are available up to \$500,000 and qualify for SBA's maximum guaranty of up to 90 percent.

Patriot Express is available to military community members including veterans, service-disabled veterans, active-duty service members participating in the military's Transition Assistance Program, Reservists and National Guard members, current spouses of any of the above, and the widowed spouse of a service member or veteran who died during service, or of a service-connected disability. Patriot Express loans have been approved in all 50 states, the District of Columbia, the U.S. Virgin Islands, Puerto Rico and Guam and generally range from \$5,000 to \$375,000 in individual loan amounts. The average loan amount is almost \$85,000. Nearly 15 percent of those loans have gone to military spouses. After loan applications are approved by the bank, they are submitted to SBA for approval. Most applications are approved by SBA within 24 hours.

SBA Launches New Online Training Course:
'How to Win Federal Contracts'
www.sba.gov/fedcontractingtraining

The U.S. Small Business Administration has launched a new online training course to help strengthen access to contracting opportunities for small businesses, including those owned by veterans. The training course, "Recovery Act Opportunities: How to Win Federal Contracts," is part of a federal government-wide initiative being led by SBA and the Department of Commerce.

As part of the outreach to small businesses, the comprehensive online course uses both audio and script to provide information about the federal marketplace, contract rules, how to sell to the government, and where to find contract and Recovery Act opportunities. The course is indexed by subject matter to allow ease of use, and includes multiple direct links to additional contracting resources.



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