

to such shares. Such identification may be accomplished by assigning to the certificates of stock issued pursuant to the exercise of such options a special serial number or color.

(c) *Time for furnishing statements*—(1) *In general.* Each statement required by this section to be furnished to any person for a calendar year must be furnished to such person on or before January 31 of the year following the year for which the statement is required.

(2) *Extension of time.* For good cause shown upon written application of the corporation required to furnish statements under this section, the Director, Martinsburg Computing Center, may grant an extension of time not exceeding 30 days in which to furnish such statements. The application must contain a full recital of the reasons for requesting an extension to aid the Director in determining the period of the extension, if any, which will be granted and must be sent to the Martinsburg Computing Center (Attn: Extension of Time Coordinator). Such a request in the form of a letter to the Martinsburg Computing Center, 250 Murall Drive, Kearneysville, West Virginia 25430, signed by the applicant (or its agent) will suffice as an application. The application must be filed on or before the date prescribed in paragraph (c)(1) of this section for furnishing the statements required by this section, and must contain the employer identification number of the corporation required to furnish statements under this section.

(3) *Last day for furnishing statement.* For provisions relating to the time for performance of an act when the last day prescribed for performance falls on Saturday, Sunday, or a legal holiday, see § 301.7503-1 of this chapter (Regulations on Procedure and Administration).

(d) *Statements furnished by mail.* For purposes of this section, a statement is considered to be furnished to a person if it is mailed to such person's last known address.

(e) *Penalty.* For provisions relating to the penalty provided for failure to furnish a statement under this section, see section 6722.

(f) *Electronic furnishing of statements.* The statements required to be furnished pursuant to this section may be provided in an electronic format in lieu of a paper format, with the consent of the recipient. See § 31.6051-1(j) of the Regulations on Employment Taxes and Collection of Income Tax at the Source for further guidance regarding the manner in which such electronic statements must be furnished.

(g) *Effective date*—(1) *In general.* These regulations are effective on August 3, 2004.

(2) *Reliance and transition period.* For statutory options transferred on or before June 9, 2003, taxpayers may rely on the 1984 proposed regulations LR-279-81 (49 FR 4504), the 2003 proposed regulations REG-122917-02 (68 FR 34344), or this section until the earlier of January 1, 2006, or the first regularly scheduled stockholders meeting of the granting corporation occurring 6 months after August 3, 2004. For statutory options transferred after June 9, 2003, and before the earlier of January 1, 2006, or the first regularly scheduled stockholders meeting of the granting corporation occurring 6 months after August 3, 2004, taxpayers may rely on either the REG-122917-02 or this section. Taxpayers may not rely on LR-279-81 or REG-122917-02 after December 31, 2005. Reliance on LR-279-81, REG-122917-02, or this section must be in its entirety, and all statutory options granted during the reliance period must be treated consistently.

PART 14a—TEMPORARY INCOME TAX REGULATIONS RELATING TO INCENTIVE STOCK OPTIONS

PART 14A [REMOVED]

■ **Par. 16.** Part 14a is removed.

Mark E. Matthews,
Deputy Commissioner for Services and Enforcement.

Approved: July 20, 2004.

Gregory Jenner,
Acting Assistant Secretary of Treasury.
[FR Doc. 04-17448 Filed 8-2-04; 8:45 am]

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AK77

Additional Disability or Death Due to Hospital Care, Medical or Surgical Treatment, Examination, Training and Rehabilitation Services, or Compensated Work Therapy Program

AGENCY: Department of Veterans Affairs.
ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations concerning awards of compensation or dependency and indemnity compensation for additional disability or death caused by VA hospital care, medical or surgical

treatment, examination, training and rehabilitation services, or compensated work therapy (CWT) program. Under this amendment, benefits are payable for additional disability or death caused by VA hospital care, medical or surgical treatment, or examination only if VA fault or “an event not reasonably foreseeable” proximately caused the disability or death. Benefits also are payable for additional disability or death proximately caused by VA’s provision of training and rehabilitation services or CWT program. This amendment reflects amendments to 38 U.S.C. 1151, the statutory authority for such benefits.

DATES: *Effective Date:* September 2, 2004.

FOR FURTHER INFORMATION CONTACT: Beth McCoy, Consultant, Regulations Staff, Compensation and Pension Service (211A), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 273-7211.

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on December 12, 2002 (67 FR 76322), we proposed to amend the VA adjudication regulations concerning awards of compensation or dependency and indemnity compensation (DIC) for additional disability or death caused by VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy (CWT) program to comply with changes to the governing statute, section 1151 of Title 38, United States Code. Based on the rationale described in this document and in the notice of proposed rule making, VA adopts the proposed rules as revised in this document.

Effective for claims filed on or after October 1, 1997, section 422(a) of Public Law 104-204, 110 Stat. 2874, 2926 (1996), amended 38 U.S.C. 1151 to authorize an award of compensation or DIC for a veteran’s “qualifying additional disability” or “qualifying death.” Under 38 U.S.C. 1151, as amended, an additional disability or death qualifies for compensation or DIC if it (1) was not the result of the veteran’s willful misconduct; (2) was caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by VA, either by a VA employee or in a VA facility; and (3) was proximately caused by carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on VA’s part in furnishing the care, treatment, or examination, or by an

event not reasonably foreseeable. An additional disability or death also qualifies for benefits if it was not the result of the veteran's willful misconduct and was proximately caused by VA's provision of training and rehabilitation services as part of an approved rehabilitation program under 38 U.S.C. chapter 31.

Section 303 of Public Law 106-419, 114 Stat. 1853, effective November 1, 2000, amended 38 U.S.C. 1151(a)(2) to further expand the circumstances under which benefits are payable. For claims received on or after November 1, 2000, additional disability or death qualifies for entitlement to compensation and DIC if it was not the result of the veteran's willful misconduct and was proximately caused by participation in a CWT program under 38 U.S.C. 1718. We asked interested people to submit comments on or before February 10, 2003. We received two comments on our proposed rule: one from a veteran's service organization and one from another interested individual. We made several changes in the final rule based on these comments.

Section 3.154

We proposed to revise 38 CFR 3.154 to state that VA may accept as a claim any communication in writing indicating an intent to file a claim with the Veterans Benefits Administration for disability or death benefits under 38 CFR 3.358 or 3.361, whether such communication is contained in a formal claim for pension, compensation, DIC, or in any other document.

One commenter suggested deleting the reference to claims indicating an intent to request benefits under § 3.358 because all claims received on or after October 1, 1997, seeking benefits for injuries covered by these rules would necessarily be claims under § 3.361 rather than § 3.358. We agree. Section 3.358 applies only to claims that were received by VA prior to October 1, 1997. Any claims received in the future will be governed by § 3.361. We will therefore delete the reference to § 3.358 from this provision. In the event we receive a claim requesting benefits under § 3.358, we would construe it as indicating an intent to seek benefits under § 3.361.

One commenter asserted that the proposed rule should not require claimants to identify the specific regulation under which they seek benefits or to specify that they seek benefits from the Veterans Benefits Administration rather than simply from VA. We believe this commenter misunderstands the requirements of the proposed rule. The rule would not

require claimants to cite the governing regulation, but would require only that the claimant's communication indicate "an intent" to seek benefits provided by 38 CFR 3.361. In this respect, the rule is similar to the general rule in 38 CFR 3.155(a) governing informal claims, which provides that any communication indicating "an intent" to apply for VA benefits may be considered an informal claim. It is well established that this regulation does not require the claimant to cite the specific governing regulations. See *Servello v. Derwinski*, 3 Vet. App. 196, 199 (1992). A written communication indicating that the claimant seeks compensation or DIC for disability or death due to VA hospital care, medical or surgical treatment, or examination, VA-authorized training and rehabilitation services, or participation in a compensated work therapy program, would satisfy the requirements of the rule regardless of whether the communication specifically cited § 3.361.

The rule also would not require claimants to specifically state that they sought benefits from the Veterans Benefits Administration, but would require only that their communication indicate an intent to claim such benefits. The Veterans Benefits Administration is responsible for administering the compensation benefits provided by the statutes and regulations governing veterans' benefits, including the benefits provided by 38 U.S.C. 1151 and 38 CFR 3.361. See 38 U.S.C. 7703. A communication indicating an intent to seek compensation or DIC, under the statutes and regulations governing veterans' benefits, for disability or death due to VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program, would satisfy the requirements of the rule regardless of whether the communication specifically references the Veterans Benefits Administration by name.

We believe it is necessary to distinguish between claims that seek benefits from the Veterans Benefits Administration under the statutes and regulations governing veterans' benefits from claims seeking other types of payment for disability or death allegedly due to VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program. A person who believes he or she was injured by one of those causes has a choice of remedies. The claimant may seek compensation under the statutes and regulations governing veterans' benefits as provided in 38 U.S.C. 1151

and 38 CFR 3.361. Such claims are decided by the Veterans Benefits Administration and are governed by the non-adversarial procedures applicable to claims for veterans' benefits. Alternatively, a claimant may elect to file a claim against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* Such claims are decided by VA Regional Counsels or by Federal courts, and are not governed by the non-adversarial procedures applicable to claims for veterans' benefits. A claimant may elect to pursue one or the other of those remedies, or may pursue both, although any benefits awarded under section 1151 would be offset by the amount of any tort recovery. Because a claimant has the option of pursuing a tort claim without simultaneously pursuing a section 1151 claim, we do not believe that a claim submitted to VA seeking damages under the Federal Tort Claims Act should routinely be construed by VA as a claim for benefits under 38 U.S.C. 1151 and 38 CFR 3.361. Accordingly, we believe it is appropriate to provide that a claim will be construed as a claim for benefits under 38 U.S.C. 1151 and 38 CFR 3.361 only if the veteran intended to seek those benefits as distinguished from monetary damages under the Federal Tort Claims Act.

Although we disagree with the commenter's characterization of the proposed rule, we recognize that the language of the proposed rule may be confusing and that the standards governing claims for benefits under 38 U.S.C. 1151 and 38 CFR 3.361 may be stated more simply. Accordingly, we are revising 38 CFR 3.154 to state that VA may accept as a claim "any communication in writing indicating an intent to file a claim for disability compensation or DIC under the laws governing entitlement to veterans' benefits for a disability or death due to VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program." This language is consistent with the proposed rule, but more clearly indicates that a claimant need not cite the governing regulation or reference the Veterans Benefits Administration. The requirement that the communication indicate an intent to apply for benefits "under the laws governing entitlement to veterans' benefits" is intended to make clear that claims under the Federal Tort Claims Act are not routinely construed as claims under 38 U.S.C. 1151 or 38 CFR 3.361, because the Federal Tort Claims Act is not a law governing veterans' benefits.

The commenter also asserts that 38 CFR 3.154 should not require a claimant to indicate that he or she believes the claimed injury was caused by VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program. The commenter states that claimants should not be required to submit anything more than an application reflecting an intent to seek compensation or DIC. The commenter is correct that any communication indicating an intent to claim compensation or DIC may be accepted by VA as an informal claim for that benefit. This rule is expressly stated in 38 CFR 3.155(a). Our revision of § 3.154 would not alter that rule, nor would it preclude VA from accepting a claim for compensation or DIC meeting the requirements of § 3.155(a) and subsequently awarding benefits under 38 U.S.C. 1151 and 38 CFR 3.361 if development establishes that the claimant is entitled to benefits under those provisions. Section 3.154 would, however, make clear, as current § 3.154 does, that not all claims for compensation or DIC must be treated as claims for benefits under 38 U.S.C. 1151 and 38 CFR 3.361. As explained below, this distinction is both reasonable and necessary.

When VA receives a claim for benefits, it is required to inform the claimant of the information and evidence necessary to substantiate the claim, and to assist the claimant in obtaining such evidence. *See* 38 U.S.C. 5103, 5103A. Only a small percentage of claims received for compensation or DIC are claims for the benefits authorized by 38 U.S.C. 1151. The majority of claims received for compensation and DIC ordinarily require a determination concerning whether the claimed disability results from a disease or injury incurred in or aggravated by military service. *See* 38 U.S.C. 1110, 1310. Absent any indication to the contrary, VA will ordinarily inform the claimants of the need to submit information and evidence relevant to those factual issues and will focus its attention on those issues in developing and deciding the claim. Claims under section 1151 involve distinct factual determinations concerning whether the claimed disability was proximately caused by training and rehabilitation services or compensated work therapy or was proximately caused by VA fault in administering hospital care, medical or surgical treatment, or examination. If a claimant provides no indication that the claimed disability resulted from VA hospital care, medical or surgical

treatment, examination, training and rehabilitation services, or compensated work therapy program, VA would have no reason to infer that the claimant seeks the benefits provided by 38 U.S.C. 1151 and would have no reason to develop or decide that issue or to notify the claimant of the need to submit information or evidence relating to that issue. For these reasons, we believe it is reasonable to require claimants to indicate that they are seeking benefits for disability due to one of the factors covered by 38 U.S.C. 1151 and 38 CFR 3.361 before VA incurs the duty to develop and decide the issues relevant to such claims.

As stated above, this rule does not preclude VA from accepting a non-specific claim for compensation or DIC under 38 CFR 3.155 or from later granting benefits on that claim under 38 U.S.C. 1151 and 3.361 if circumstances warrant. It merely clarifies that a claim will not routinely be construed as a claim under 38 U.S.C. 1151 or 38 CFR 3.361 unless it indicates an intent to apply for the benefits authorized by those provisions. To further clarify this narrow purpose, we will revise the introductory clause of § 3.154 as proposed from “VA may accept as a claim” to “VA may accept as a claim for benefits under 38 U.S.C. 1151 and § 3.361 of this part”. We believe this will make clearer that § 3.154 merely explains when a claim for compensation or DIC will be considered a claim under section 1151 and § 3.361 and does not limit VA’s authority under § 3.155 to accept non-specific claims for compensation or DIC.

We have made one further change to § 3.154 that was not raised by the commenters. As proposed, § 3.154 stated that VA would accept as a claim any written communication indicating an intent to seek benefits under section 1151, regardless of “whether such communication is contained in a formal claim for pension, compensation, dependency and indemnity compensation or in any other document.” We have added “or” between “compensation” and “dependency and indemnity compensation.” We believe this change merely improves the grammatical structure of the rule without altering its meaning.

Section 3.361(c)(2)

Section 1151 authorizes compensation for disability that was caused by VA hospital care, medical or surgical treatment, or examination. Proposed § 3.361(c)(2) states that “[h]ospital care, medical or surgical treatment, or examination cannot cause

the continuance or natural progress of a disease or injury for which the care, treatment, or examination was furnished unless VA’s failure to timely diagnose and properly treat the disease or injury proximately caused the continuance or natural progress.” One commenter suggested that the term “proximately caused” should be changed to “proximately worsened.” We disagree. Proposed § 3.361(c)(2) reflects principles stated in a precedent opinion of VA’s General Counsel, designated as VAOPGCPREC 5–2001, dated February 5, 2001. The General Counsel stated that VA medical care ordinarily could not be viewed as “causing” disability that results from the ordinary course and progression of a preexisting disease. However, the General Counsel also noted that under longstanding principles of causation in the context of tort law, medical treatment could be considered to have caused the natural progress of a preexisting disease in the limited circumstance where the physician negligently fails to properly diagnose and treat a disease. In such cases, the finding of causation is not based on a determination that the treatment made the disease worse than it would have been without treatment, but on the premise that the physician’s negligence “caused” the natural progress of the disease by failing to prevent it in circumstances where a physician exercising due skill and care would have prevented such natural progress from occurring. We believe the commenter’s suggestion would create the misleading impression that the physician’s actions must have made the progress of the disease worse than it would have been in the absence of any treatment. Accordingly, we make no change based on this comment. Circumstances where VA negligence worsens a preexisting disease are clearly covered by 38 U.S.C. 1151 and proposed 38 CFR 3.361(b), which provide for compensation where a veteran incurs “additional disability” as a result of such negligence. Proposed § 3.361(c)(2) is intended to address the narrower circumstance where a claimant seeks compensation under section 1151 for the natural progress of the preexisting disease.

Section 3.361(d)(1)

Section 1151 authorizes benefits for disability or death resulting from VA hospital care, medical or surgical treatment, or examination if the proximate cause of the disability or death was “carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault” on the part of VA, or “an event not reasonably

foreseeable.” Proposed § 3.361(d)(1) states that, to establish carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of VA, a claimant must show that “VA failed to exercise the degree of care that would be expected of a reasonable health care provider” or that “VA furnished the hospital care, medical or surgical treatment, or examination without the veteran’s or, in appropriate cases, the veteran’s representative’s informed consent.” In the notice of proposed rule making, we explained that VA interprets the reference in section 1151 to “carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault” as reflecting ordinary common-law principles of negligence and that the provisions of proposed § 3.361(d)(1) are intended merely to restate, more simply and clearly, the standards governing determinations of negligence.

One commenter disagreed with our interpretation of the statutory language “carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault” as reflecting general principles of common-law negligence. The commenter asserted that the statutory reference to “fault” simply implies a cause-and-effect relationship between VA action and the resulting disability or death. We disagree. The term “fault” is commonly understood to refer to negligence or other deviation from a legal duty. Black’s Law Dictionary, 608 (6th ed. 1990). As explained in the notice of proposed rule making, the language in section 1151 referring to “carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault” reflects terms and concepts commonly associated with common-law negligence, and thus supports the conclusion that the statutory reference to “similar instance of fault” is intended to refer to circumstances that would likewise support a finding of negligence. The history of section 1151 makes clear that the term “fault” is not intended merely to connote a cause-and-effect relationship. Section 1151 was enacted in response to the Supreme Court’s decision in *Brown v. Gardner*, 513 U.S. 115 (1994), which construed an earlier version of that statute to require only a cause-and-effect relationship between VA treatment and resulting disability or death, and rejected the Government’s claim that the statute required a showing of VA fault. In response to that decision, Congress revised section 1151 in 1996 to expressly require a showing of VA “carelessness, negligence, lack of

proper skill, error in judgment, or similar instance of fault.” Pub. L. 104–204, § 422(a), 110 Stat. 2874, 2926 (1996). To conclude that the term “fault” connotes only a cause-and-effect relationship would improperly deprive the 1996 amendment of any effect. The legislative history makes clear that the purpose of the amendment was to add a requirement for a showing of fault or negligence in addition to the causation requirement in the statute. See H.R. Rep. 812, 104th Cong., 2nd Sess. 84 (1996) (characterizing the statute as “requiring that there be an element of fault as a precondition for entitlement to compensation”); 142 Cong. Rec. H10182, 10183 (Sept. 11, 1996) (statement of Rep. Stokes) (indicating that the statute was intended to overturn the *Gardner* decision and allow payment only if there is evidence that VA was at fault); 142 Cong. Rec. S9875, 9879 (Sept. 5, 1996) (statement of Sen. Daschle) (stating that the statute “requires that veterans wishing to file liability claims against the VA show negligence, as is done in the private sector, to be entitled to benefits”).

The commenter also points to the fact that section 1151 authorizes compensation for the results of “an event not reasonably foreseeable” as evidence that Congress did not intend to impose a fault requirement. We believe the language of section 1151 makes clear that Congress intended to authorize compensation for disability proximately caused either by VA fault or by an event not reasonably foreseeable. The fact that the statutory provisions relating to events not reasonably foreseeable contain no fault requirement does not suggest that the distinct provisions expressly referencing VA fault may be construed to contain no fault requirement. Accordingly, we will make no change based on this comment.

One commenter suggested that we add a provision explaining that compensation is payable for negligent errors in judgment but is not payable for “non-negligent” errors in judgment. The same commenter also suggested that we explain what constitutes a “non-negligent error in judgment.” This comment refers to our discussion of the proposed rules in the **Federal Register** of December 12, 2002 (67 FR 76323). We explained that we construed the statutory phrase “carelessness, negligence, lack of proper skill, error in judgment, or similar instances of fault on the part of the Department” to refer to the standards used to establish liability for negligence under the common law of torts. We noted that courts applying tort law have sometimes used the phrase “error in judgment” to

refer to non-negligent actions, such as a choice among diagnoses or treatment options that accorded with professional standards of care when made, but which in hindsight may have been less accurate or favorable than other reasonable alternatives. At other times, courts use that phrase to refer to decisions by health care providers regarding diagnosis or treatment that are negligent because they are not based on the exercise of due skill and care. We explained that we interpreted the phrase “error in judgment” as used in section 1151 to refer to decisions that are based on the lack of due skill and care and that, therefore, meet the common law definition of negligence.

We believe it is unnecessary to include a provision in the rules distinguishing negligent errors in judgment from non-negligent errors in judgment. As noted above, the operative distinction between those two types of actions depends upon whether the health care provider’s decision was based on the exercise of due skill and care. This principle is reflected in § 3.361(d)(1)(i) of the proposed rules, which refers to circumstances where “VA failed to exercise the degree of care that would be expected of a reasonable health care provider.” We believe this general standard provides a sufficient basis for VA adjudicators to determine whether the alleged error, whether an error of judgment or some other type of error, establishes a basis for compensation under section 1151. A specific discussion of the distinction between negligent and non-negligent errors or decisions relating to diagnosis and treatment would be merely duplicative of the general standard and would thus be unnecessary. Further, although the discussion of negligent and non-negligent errors of judgment in our notice of proposed rule making was necessary to explain the seemingly inconsistent judicial usage of the phrase “error in judgment,” we believe that inserting references to “negligent errors of judgment” and “non-negligent errors of judgment” into these rules would be unnecessarily confusing to readers and may detract attention from the operative standard in § 3.361(d)(1)(i).

A number of courts and legal commentators have noted that the judicial use of the phrase “error in judgment” to describe non-negligent choices among reasonable alternative diagnoses or treatment options is confusing and inaccurate. See Joseph H. King, Jr., *Reconciling the Exercise of Judgment and the Objective Standard of Care in Medical Malpractice*, 52 Okla. L. Rev. 49, 60–62 (1999); *Francouer v. Piper*, 776 A.2d 1270, 1274–75 (N.H.

2001); *Rogers v. Meridian Park Hospital*, 772 P.2d 929, 932–33 (Or. 1989). As an initial matter, a decision among diagnoses or treatment options that accords with established standards of care would not constitute an “error in judgment” within the ordinary meaning of that term, even if the choice may ultimately lead to an unfavorable result. The term “error” is commonly defined to mean “an act or condition of often ignorant or imprudent deviation from a code of behavior.” Webster’s Third New International Dictionary 772 (unabridged 1976). Accordingly, as some courts have noted, if a physician’s decision does not breach the accepted standards of care, “he or she by definition has committed no error of judgment.” *Rogers*, 772 P.2d at 933. Courts have also noted that the term “error in judgment” is confusing because decisions that were reasonable and therefore not erroneous when made may nevertheless appear erroneous in hindsight simply because they did not have the anticipated outcome. See *Hirahara v. Tanaka*, 959 P.2d 830, 834 (Haw. 1998). These ambiguities have led numerous courts in the past two decades to conclude that the phrase “error in judgment” should not be used in jury instructions in malpractice cases and that juries should be instructed that the determinative issue is whether the physician used due skill and care in making determinations and rendering treatment. See, e.g., *Hirahara*, 959 P.2d at 463 n.2 (citing cases from several courts); *Day v. Morrison*, 657 So.2d 808, 812 (Miss. 1995) (same).

In view of the ambiguity and potential for confusion inherent in the phrase “error of judgment,” we do not believe it would be helpful to reference or explain that term in these rules. We believe it is clearer to explain that the determinative issue is whether the health care provider exercised the degree of skill and care expected of a reasonable health care provider, and we believe this standard provides a sufficient basis for deciding claims under 38 U.S.C. 1151 in all cases, including those based on alleged errors in judgment. Accordingly, we will make no change based on this comment.

Section 3.361(d)(2)

Section 1151 authorizes compensation for disability or death due to VA hospital care, medical or surgical treatment, or examination in cases where the proximate cause of the injury is either VA fault or “an event not reasonably foreseeable.” Proposed 38 CFR 3.361(d)(2) would state that whether the proximate cause of a disability or death is “an event not

reasonably foreseeable” will be determined in each claim based upon what a reasonable health care provider would have foreseen.

One commenter suggested that VA clarify what constitutes an event not reasonably foreseeable. The commenter referenced a 1990 opinion by VA’s General Counsel discussing the term “accident,” as previously used in 38 U.S.C. 1151, and equating that term with an event that is not reasonably foreseeable. The commenter suggested that we incorporate principles stated in that opinion (designated as VAOPGCPREC 99–90) into this rule. Among other things, the opinion stated that almost no medical event is totally unforeseeable and suggested that VA determinations should not turn solely upon whether a risk is foreseeable in any measure, but on whether the result is one that is truly unexpected or not “reasonably” foreseeable in relation to the treatment provided, as distinguished from a clearly recognized risk of such procedure.

Terms such as “clearly recognized risk” and “truly unexpected results” are themselves ambiguous and subject to varying interpretations. It is not possible in our view, to state a comprehensive definition of “an event not reasonably foreseeable,” and we do not believe the clarity of this rule would be improved by introducing additional qualitative but ambiguous terms. We believe it may be helpful, however, to explain that the risk need not be completely unforeseeable or unimaginable. Accordingly, we are adding a sentence stating that the event need not be completely unforeseeable or unimaginable but must be one that a reasonable health care provider would not have considered an ordinary risk of the treatment provided.

We also believe it may be helpful to state that, in determining whether an event was reasonably foreseeable, VA will consider whether it was the type of risk that a reasonable health care provider would have disclosed in connection with the informed consent procedures of 38 CFR 17.32. Section 17.32 provides that, before rendering treatment, VA must disclose “reasonably foreseeable associated risks, complications, or side effects” of the treatment. Because the requirements of informed consent require VA health care providers to assess reasonably foreseeable risks, we believe reference to the informed consent requirements will provide a helpful framework for adjudicators in seeking medical opinions and considering the issue of what constitutes an event not reasonably foreseeable. Accordingly, we

will add a sentence to § 3.361(d)(2) stating that, in determining whether an event was reasonably foreseeable, VA will consider whether the risk of that event was the type of risk that a reasonable health care provider would have disclosed in connection with the informed consent procedures of 38 CFR 17.32.

One commenter suggested that we state that compensation is not payable for the results of “high-risk” medical treatment, but may be payable for adverse outcomes in “low-risk” procedures. The commenter further suggested that we establish a baseline risk threshold by stating, for example, that, if a medical procedure has a 5 percent or greater known risk of complications and such complications result, they will be deemed foreseeable. We do not believe such standards would be helpful. The risk of an event may be reasonably foreseeable by medical standards even if the event occurs in only a small percentage of cases. At the same time, an event that is not reasonably foreseeable may occur even in a high-risk procedure. We therefore make no change based on this comment.

The commenter also suggested that we add a statement, based on VAOPGCPREC 99–90, dated December 24, 1990, explaining that, if the only treatment that can possibly arrest a life-threatening condition involves a high risk of additional injury, such additional injury should be considered to result from the disease itself, rather than being classified as an event not reasonably foreseeable. We believe it is unnecessary to include this statement. We believe the statute and the proposed rule make it sufficiently clear that well-known risks of necessary treatment, if they materialize, would not constitute reasonably unforeseeable events. This rule is intended to state general rules governing a wide variety of possible factual scenarios, and we see no need to explain the application of the general rule to a specific and limited set of facts, such as those involving necessary treatment for life-threatening injuries. Insofar as the referenced statement from VAOPGCPREC 99–90 suggests that the results of well-known risks of necessary treatment should be considered results of the condition for which the treatment was sought, that suggestion is not directly relevant to these rules. An existing VA regulation at 38 CFR 3.310 provides for service connection of disability that is proximately due to a service-connected disease or injury. We therefore make no change based on this comment.

Section 3.361(f)

Section 1151 authorizes benefits for disability or death due to hospital care, medical or surgical treatment, or examination that, among other things, was administered “either by a Department employee or in a Department facility.” Proposed 38 CFR 3.361(e)(2) defines the term “Department facility” to mean a facility over which the Secretary of Veterans Affairs has direct jurisdiction. Proposed § 3.361(f) identifies activities that would not constitute services furnished by a Department employee or in a Department facility, including “[h]ospital care or medical services furnished under a contract made under 38 U.S.C. 1703,” and “[h]ospital care or medical services, including examination, provided under 38 U.S.C. 8153 in a facility over which the Secretary does not have direct jurisdiction.”

One commenter asserted that the proposed rules are ambiguous as to whether hospital care or medical services that are provided in a facility over which the Secretary has direct jurisdiction but are administered by non-VA personnel pursuant to a contract would be covered by section 1151. We do not agree that the regulations are ambiguous in this regard. Section 1151 itself provides that the disability or death must result from hospital care or medical services administered “either by a Department employee or in a Department facility” may be covered. The terms “either” and “or” unambiguously provide that hospital care or medical services provided in a Department facility may be covered regardless of whether they are also administered by a Department employee. Nothing in the proposed rules suggests otherwise. Proposed § 3.361(f)(1) provides that hospital care or medical services provided pursuant to a contract under 38 U.S.C. 1703 are not services furnished by a Department employee or in a Department facility. Section 1703 refers to “[c]ontracts for hospital care and medical services in non-Department facilities.” Because proposed § 3.361(f)(1) applies only to services in non-VA facilities, it cannot be construed to exclude services rendered in VA facilities by non-VA employees. Proposed § 3.361(f)(3) provides that hospital care or medical services provided pursuant to a contract under 38 U.S.C. 8153 “in a facility over which the Secretary does not have direct jurisdiction” are not services furnished by a Department employee or in a Department facility. Because proposed § 3.361(f)(3) excludes only

services provided in non-VA facilities, it cannot be construed to exclude services rendered in VA facilities by non-VA employees. Accordingly, we make no change based on this comment.

One commenter suggested that the rules clarify that an injury to a patient due to accidents or errors caused by non-health care workers, such as janitors, police, engineers, or administrators, is not compensable under 38 U.S.C. 1151. Proposed § 3.361(e)(1) defines a “Department employee” for purposes of section 1151 as a person who is, among other things “engaged in furnishing hospital care, medical or surgical treatment, or examinations under authority of law.” The terms “hospital care,” “medical or surgical treatment,” and “examinations,” refer to activities of a medical nature. Because non-health care workers generally would not be engaged in furnishing such medical services under authority of law, we believe the proposed rules sufficiently provide that injuries due to the actions of non-health care workers generally are not within the scope of the rules. We believe it is more consistent with the language of section 1151 to refer to the types of medical activities the VA employees were engaged in, rather than the employees’ occupational classifications. Accordingly, we will make no change based on this comment.

Additional Changes to Proposed Rules

In addition to the changes made in response to public comments, we have made certain other changes in these final rules for the reasons set forth below.

Section 3.361(a) and (d)(3)

We have revised § 3.361(a) and (d)(3) to clarify that the provisions of § 3.361 apply to claims alleging disability or death due to compensated work therapy if such claims were either pending before VA on November 1, 2000, or were received by VA after that date. This change reflects VA’s interpretation of existing statutory requirements and therefore does not require additional notice and comment procedures under 5 U.S.C. 553 prior to adoption. Moreover, this change is a relatively minor departure from the proposed rules and will be beneficial to claimants.

Proposed § 3.361(a) stated that § 3.361 would apply to claims received by VA on or after October 1, 1997. Our notice of proposed rule making, however, stated that the rule would apply to claims based on disability or death due to CWT only if such claims were received by VA on or after November 1, 2000. Further, in proposed § 3.361(d)(3),

we stated that benefits for injury or death due to training, rehabilitation services, or CWT could be paid only if the veteran had participated in such activity as part of a program authorized under 38 U.S.C. chapter 31 (pertaining to training and rehabilitation services), or “for claims received on or after November 1, 2000, as part of a CWT program under 38 U.S.C. 1718.”

The referenced dates of October 1, 1997, and November 1, 2000, correspond to two distinct statutes that amended 38 U.S.C. 1151. The first statute, Public Law 104–204, revised section 1151, effective October 1, 1997, to require a showing of VA fault in order to establish entitlement to benefits under that statute. Neither the preexisting statute, nor the amendments made by Public Law 104–204, applied to claims involving disability or death allegedly due to CWT. Section 303 of Public Law 106–419, however, revised section 1151, effective November 1, 2000, to authorize benefits for disability or death due to participation in a CWT program. The proposed rules reflect the view that the restrictive changes made by Public Law 104–204 apply to all claims filed on or after October 1, 1997, but that the liberalizing changes made by Public Law 106–419 apply only to claims filed on or after November 1, 2000. We believe the significance of those two dates should be stated more clearly, however, by referencing both dates in § 3.361(a), rather than in the separate provisions of § 3.361(a) and (d)(3).

We have also determined that the proposed rule was too restrictive insofar as it would have authorized benefits based on CWT only in claims filed on or after November 1, 2000. We have determined that the provisions of Public Law 106–419 authorizing benefits for disability or death due to CWT are applicable not only to claims that were filed on or after November 1, 2000, but also to claims that were filed prior to that date but had not yet been finally decided by VA as of that date. This determination is based on VA’s interpretation of Public Law 106–419 and the statutes and judicial rules governing the retroactive effect of new statutes.

Pursuant to 38 U.S.C. 5110(g) and 38 CFR 3.114(a), VA may not pay benefits for any period prior to the effective date of a new statute authorizing the benefit in question. Accordingly, the provisions of Public Law 106–419 authorizing VA to pay benefits for disability or death due to CWT must be construed to permit benefit payments only for periods beginning on or after the date of its enactment on November 1, 2000.

However, the prohibition on payment for periods prior to November 1, 2000, does not compel a prohibition on considering claims that were filed before that date. VA could consider claims filed before November 1, 2000, and award benefits to the claimant for periods after that date, if warranted.

Under established rules of statutory construction, new statutes are presumed not to operate retroactively unless their language requires that result. See *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). However, a statute does not operate retroactively merely because it is applied to a claim filed before the statute was enacted. *Id.* at 269. Rather, a statute would have a disfavored retroactive effect only if it impairs previously established rights, imposes new duties with respect to transactions already completed, or imposes some similar alteration with respect to past events. *Id.* at 280. A new provision that merely authorizes prospective benefits is not retroactive simply because it is applied to a claim filed before the statute was enacted. *Id.* at 273. Accordingly, because section 303 of Public Law 106-419 affects only entitlement to prospective benefits for periods after the date of its enactment, we conclude that it may be applied to claims that were filed before the date that statute was enacted and which remained pending before VA on that date.

For the foregoing reasons we are revising proposed § 3.361(a) to state that the provisions of that rule apply generally to claims that were received by VA on or after October 1, 1997, subject to the exception that, in claims based on disability or death allegedly caused by participation in a CWT program, the provisions of § 3.361 will apply only to claims that were pending before VA on November 1, 2000, or were received by VA after that date. We are also including a sentence noting that the effective date of any benefits awarded under that provision will be subject to 38 CFR 3.114(a) and 3.400(i), but may not be earlier than November 1, 2000. Further, we are removing the reference in proposed § 3.361(d)(3) to “claims received on or after November 1, 2000,” because that limitation, as modified, will now be stated in the paragraph (a) of § 3.361. Because this change merely reflects VA’s interpretation of the governing statutes and judicial rules, it is an interpretive rule and is not subject to the notice-and-comment requirements under 5 U.S.C. 553.

Section 3.361(d)(1)(ii)

The proposed rule stated that a patient’s informed consent may be

“expressed (*i.e.*, given orally or in writing) or implied.” We believe the language of the proposed rule makes clear that the term “expressed” was intended as an adjective referring to clearly-conveyed communications of consent, as distinguished from the implied communications of consent referenced later in the same sentence. However, the commonly-used adjectival form of that word is “express” rather than “expressed.” Accordingly, we have changed that word to “express” in the final rule in order to eliminate confusion. This grammatical change does not alter the meaning of the proposed rule.

Section 3.807

Section 3.807(c) discusses the types of “service-connected” disability that will establish entitlement to dependents’ educational assistance under chapter 35 of title 38, United States Code. The last sentence of current § 3.807(c) states that chapter 35 benefits are not payable in “[c]ases where eligibility for the service-connected benefits is established under § 3.800.” Section 3.800 is one of two VA regulations—the other being § 3.358—that implemented the provisions of section 1151 as it existed prior to October 1, 1997.

We proposed to revise the last sentence of § 3.807(c) to refer to “[c]ases where eligibility for the service-connected benefits is established under §§ 3.358, 3.361.” We are now revising that sentence to refer to “[c]ases where eligibility for the service-connected benefits is established under § 3.358, 3.361, or 3.800.” This would fix the obvious grammatical defect in the proposed rule and would also result in retaining the reference in the current regulation to § 3.800. Although reference to that provision may be unnecessary because § 3.800 merely authorizes the same benefit authorized by § 3.358, we believe it is preferable to refer to both of those provisions to eliminate any ambiguity. In view of the proximity of § 3.800 and § 3.807 in the Code of Federal Regulations, we believe it may be helpful to retain the reference to § 3.800. This change would not alter the meaning of the proposed rules because § 3.800 authorizes the same benefit as § 3.358. Because the retention of the reference to § 3.800 is consistent with the current regulation as well as the proposed regulation, there is no requirement for an additional notice and comment period with respect to this change.

Executive Order 12866

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any given year. This rule will have no such effect on State, local, or tribal governments, or the public sector.

Regulatory Flexibility Act

The Secretary hereby certifies that this 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 amendment will not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance numbers are 64.104 and 64.109.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Veterans.

Approved: May 20, 2004.

Anthony J. Principi,
Secretary of Veterans Affairs.

■ For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

PART 3—ADJUDICATION

■ 1. The authority citation for Part 3 continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

■ 2. Section 3.154 and the Cross References at the end of the section are revised to read as follows:

§ 3.154 Injury due to hospital treatment, etc.

VA may accept as a claim for benefits under 38 U.S.C. 1151 and § 3.361 any communication in writing indicating an intent to file a claim for disability compensation or dependency and indemnity compensation under the laws governing entitlement to veterans' benefits for disability or death due to VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program, whether such communication is contained in a formal claim for pension, compensation, or dependency and indemnity compensation or in any other document.

(Authority: 38 U.S.C. 1151)

Cross references: Effective dates. See § 3.400(i). Disability or death due to hospitalization, etc. See §§ 3.358, 3.361 and 3.800.

■ 3. In § 3.358, the authority citation at the end of paragraph (a) is removed, and paragraphs (a) and (b)(2) are revised to read as follows:

§ 3.358 Compensation for disability or death from hospitalization, medical or surgical treatment, examination or vocational rehabilitation training (§ 3.800).

(a) *General.* This section applies to claims received by VA before October 1, 1997. If it is determined that there is additional disability resulting from a disease or injury or aggravation of an existing disease or injury suffered as a result of hospitalization, medical or surgical treatment, examination, or vocational rehabilitation training, compensation will be payable for such additional disability. For claims received by VA on or after October 1, 1997, see § 3.361.

(b) * * *

(2) Compensation will not be payable under this section for the continuance or natural progress of a disease or injury for which the hospitalization, medical or surgical treatment, or examination was furnished, unless VA's failure to exercise reasonable skill and care in the diagnosis or treatment of the disease or injury caused additional disability or death that probably would have been prevented by proper diagnosis or treatment. Compensation will not be payable under this section for the continuance or natural progress of a disease or injury for which vocational rehabilitation training was provided.

* * * * *

■ 4. Section 3.361 is added to read as follows:

§ 3.361 Benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.

(a) *Claims subject to this section*—(1) *General.* Except as provided in paragraph (2), this section applies to claims received by VA on or after October 1, 1997. This includes original claims and claims to reopen or otherwise readjudicate a previous claim for benefits under 38 U.S.C. 1151 or its predecessors. The effective date of benefits is subject to the provisions of § 3.400(i). For claims received by VA before October 1, 1997, see § 3.358.

(2) *Compensated Work Therapy.* With respect to claims alleging disability or death due to compensated work therapy, this section applies to claims that were pending before VA on November 1, 2000, or that were received by VA after that date. The effective date of benefits is subject to the provisions of §§ 3.114(a) and 3.400(i), and shall not be earlier than November 1, 2000.

(b) *Determining whether a veteran has an additional disability.* To determine whether a veteran has an additional disability, VA compares the veteran's condition immediately before the beginning of the hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy (CWT) program upon which the claim is based to the veteran's condition after such care, treatment, examination, services, or program has stopped. VA considers each involved body part or system separately.

(c) *Establishing the cause of additional disability or death.* Claims based on additional disability or death due to hospital care, medical or surgical treatment, or examination must meet the causation requirements of this paragraph and paragraph (d)(1) or (d)(2) of this section. Claims based on additional disability or death due to training and rehabilitation services or compensated work therapy program must meet the causation requirements of paragraph (d)(3) of this section.

(1) *Actual causation required.* To establish causation, the evidence must show that the hospital care, medical or surgical treatment, or examination resulted in the veteran's additional disability or death. Merely showing that a veteran received care, treatment, or examination and that the veteran has an additional disability or died does not establish cause.

(2) *Continuance or natural progress of a disease or injury.* Hospital care, medical or surgical treatment, or

examination cannot cause the continuance or natural progress of a disease or injury for which the care, treatment, or examination was furnished unless VA's failure to timely diagnose and properly treat the disease or injury proximately caused the continuance or natural progress. The provision of training and rehabilitation services or CWT program cannot cause the continuance or natural progress of a disease or injury for which the services were provided.

(3) *Veteran's failure to follow medical instructions.* Additional disability or death caused by a veteran's failure to follow properly given medical instructions is not caused by hospital care, medical or surgical treatment, or examination.

(d) *Establishing the proximate cause of additional disability or death.* The proximate cause of disability or death is the action or event that directly caused the disability or death, as distinguished from a remote contributing cause.

(1) *Care, treatment, or examination.* To establish that carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on VA's part in furnishing hospital care, medical or surgical treatment, or examination proximately caused a veteran's additional disability or death, it must be shown that the hospital care, medical or surgical treatment, or examination caused the veteran's additional disability or death (as explained in paragraph (c) of this section); and

(i) VA failed to exercise the degree of care that would be expected of a reasonable health care provider; or

(ii) VA furnished the hospital care, medical or surgical treatment, or examination without the veteran's or, in appropriate cases, the veteran's representative's informed consent. To determine whether there was informed consent, VA will consider whether the health care providers substantially complied with the requirements of § 17.32 of this chapter. Minor deviations from the requirements of § 17.32 of this chapter that are immaterial under the circumstances of a case will not defeat a finding of informed consent. Consent may be express (*i.e.*, given orally or in writing) or implied under the circumstances specified in § 17.32(b) of this chapter, as in emergency situations.

(2) *Events not reasonably foreseeable.* Whether the proximate cause of a veteran's additional disability or death was an event not reasonably foreseeable is in each claim to be determined based on what a reasonable health care provider would have foreseen. The event need not be completely

unforeseeable or unimaginable but must be one that a reasonable health care provider would not have considered to be an ordinary risk of the treatment provided. In determining whether an event was reasonably foreseeable, VA will consider whether the risk of that event was the type of risk that a reasonable health care provider would have disclosed in connection with the informed consent procedures of § 17.32 of this chapter.

(3) *Training and rehabilitation services or compensated work therapy program.* To establish that the provision of training and rehabilitation services or a CWT program proximately caused a veteran's additional disability or death, it must be shown that the veteran's participation in an essential activity or function of the training, services, or CWT program provided or authorized by VA proximately caused the disability or death. The veteran must have been participating in such training, services, or CWT program provided or authorized by VA as part of an approved rehabilitation program under 38 U.S.C. chapter 31 or as part of a CWT program under 38 U.S.C. 1718. It need not be shown that VA approved that specific activity or function, as long as the activity or function is generally accepted as being a necessary component of the training, services, or CWT program that VA provided or authorized.

(e) *Department employees and facilities.* (1) *A Department employee is an individual—*

(i) Who is appointed by the Department in the civil service under title 38, United States Code, or title 5, United States Code, as an employee as defined in 5 U.S.C. 2105;

(ii) Who is engaged in furnishing hospital care, medical or surgical treatment, or examinations under authority of law; and

(iii) Whose day-to-day activities are subject to supervision by the Secretary of Veterans Affairs.

(2) *A Department facility* is a facility over which the Secretary of Veterans Affairs has direct jurisdiction.

(f) *Activities that are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility.* The following are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility within the meaning of 38 U.S.C. 1151(a):

(1) Hospital care or medical services furnished under a contract made under 38 U.S.C. 1703.

(2) Nursing home care furnished under 38 U.S.C. 1720.

(3) Hospital care or medical services, including examination, provided under 38 U.S.C. 8153 in a facility over which the Secretary does not have direct jurisdiction.

(g) *Benefits payable under 38 U.S.C. 1151 for a veteran's death.* (1) *Death before January 1, 1957.* The benefit payable under 38 U.S.C. 1151(a) to an eligible survivor for a veteran's death occurring before January 1, 1957, is death compensation. See §§ 3.5(b)(2) and 3.702 for the right to elect dependency and indemnity compensation.

(2) *Death after December 31, 1956.* The benefit payable under 38 U.S.C. 1151(a) to an eligible survivor for a veteran's death occurring after December 31, 1956, is dependency and indemnity compensation.

(Authority: 38 U.S.C. 1151)

■ 5. Section 3.362 is added to read as follows:

§ 3.362 Offsets under 38 U.S.C. 1151(b) of benefits awarded under 38 U.S.C. 1151(a).

(a) *Claims subject to this section.* This section applies to claims received by VA on or after October 1, 1997. This includes original claims and claims to reopen or otherwise readjudicate a previous claim for benefits under 38 U.S.C. 1151 or its predecessors.

(b) *Offset of veterans' awards of compensation.* If a veteran's disability is the basis of a judgment under 28 U.S.C. 1346(b) awarded, or a settlement or compromise under 28 U.S.C. 2672 or 2677 entered, on or after December 1, 1962, the amount to be offset under 38 U.S.C. 1151(b) from any compensation awarded under 38 U.S.C. 1151(a) is the entire amount of the veteran's share of the judgment, settlement, or compromise, including the veteran's proportional share of attorney fees.

(c) *Offset of survivors' awards of dependency and indemnity compensation.* If a veteran's death is the basis of a judgment under 28 U.S.C. 1346(b) awarded, or a settlement or compromise under 28 U.S.C. 2672 or 2677 entered, on or after December 1, 1962, the amount to be offset under 38 U.S.C. 1151(b) from any dependency and indemnity compensation awarded under 38 U.S.C. 1151(a) to a survivor is only the amount of the judgment, settlement, or compromise representing damages for the veteran's death the survivor receives in an individual capacity or as distribution from the decedent veteran's estate of sums included in the judgment, settlement, or compromise to compensate for harm suffered by the survivor, plus the

survivor's proportional share of attorney fees.

(d) *Offset of structured settlements.* This paragraph applies if a veteran's disability or death is the basis of a structured settlement or structured compromise under 28 U.S.C. 2672 or 2677 entered on or after December 1, 1962.

(1) *The amount to be offset.* The amount to be offset under 38 U.S.C. 1151(b) from benefits awarded under 38 U.S.C. 1151(a) is the veteran's or survivor's proportional share of the cost to the United States of the settlement or compromise, including the veteran's or survivor's proportional share of attorney fees.

(2) *When the offset begins.* The offset of benefits awarded under 38 U.S.C. 1151(a) begins the first month after the structured settlement or structured compromise has become final that such benefits would otherwise be paid.

(Authority: 38 U.S.C. 1151)

■ 6. Section 3.363 is added to read as follows:

§ 3.363 Bar to benefits under 38 U.S.C. 1151.

(a) *Claims subject to this section.* This section applies to claims received by VA on or after October 1, 1997. This includes original claims and claims to reopen or otherwise readjudicate a previous claim for benefits under 38 U.S.C. 1151 or its predecessors.

(b) *Administrative award, compromises, or settlements, or judgments that bar benefits under 38 U.S.C. 1151.* If a veteran's disability or death was the basis of an administrative award under 28 U.S.C. 1346(b) made, or a settlement or compromise under 28 U.S.C. 2672 or 2677 finalized, before December 1, 1962, VA may not award benefits under 38 U.S.C. 1151 for any period after such award, settlement, or compromise was made or became final. If a veteran's disability or death was the basis of a judgment that became final before December 1, 1962, VA may award benefits under 38 U.S.C. 1151 for the disability or death unless the terms of the judgment provide otherwise.

(Authority: 38 U.S.C. 1151)

■ 7. In § 3.400, the section heading of paragraph (i) is revised to read as follows:

§ 3.400 General.

* * * * *

(i) *Disability or death due to hospitalization, etc.* (38 U.S.C. 5110(c), (d); Public Law 87-825; §§ 3.358, 3.361, and 3.800.) * * *

* * * * *

§ 3.708 [Amended]

■ 8. In § 3.708, paragraph (a)(4) is amended by removing “or training.” and adding, in its place, “or hospital care, training, or compensated work therapy program. See §§ 3.358 and 3.361.”

■ 9. Section 3.800 is amended by adding introductory text to read as follows:

§ 3.800 Disability or death due to hospitalization, etc.

This section applies to claims received by VA before October 1, 1997. For claims received by VA on or after October 1, 1997, see §§ 3.362 and 3.363.

* * * * *

■ 10. In § 3.807, the last sentence of paragraph (c) is revised to read as follows:

§ 3.807 Dependents' educational assistance; certification.

* * * * *

(c) * * * Cases where eligibility for service-connected benefits is established under § 3.358, 3.361, or 3.800 are not included.

* * * * *

[FR Doc. 04-17597 Filed 8-2-04; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency****44 CFR Part 64**

[Docket No. FEMA-7839]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are suspended on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will be withdrawn by publication in the **Federal Register**.

EFFECTIVE DATES: The effective date of each community's suspension is the third date (“Susp.”) listed in the third column of the following tables.

ADDRESSES: If you wish to determine whether a particular community was suspended on the suspension date, contact the appropriate FEMA Regional Office or the NFIP servicing contractor.

FOR FURTHER INFORMATION CONTACT:

Mike Grimm, Mitigation Division, 500 C Street, SW.; Room 412, Washington, DC 20472, (202) 646-2878.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the National Flood Insurance Program, 42 U.S.C. 4001 *et seq.*; unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59 *et seq.* Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, the Federal Emergency Management Agency has identified the special flood hazard areas in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in the identified special flood hazard area of communities not participating in the NFIP and identified for more than a year, on the Federal Emergency Management Agency's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C.

4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives a 6-month, 90-day, and 30-day notification addressed to the Chief Executive Officer that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications have been made, this final rule may take effect within less than 30 days.

National Environmental Policy Act.

This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless they take remedial action.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

Executive Order 12612, Federalism. This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, October 26, 1987, 3 CFR, 1987 Comp.; p. 252.

Executive Order 12778, Civil Justice Reform. This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778, October 25, 1991, 56 FR 55195, 3 CFR, 1991 Comp.; p. 309.

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

■ Accordingly, 44 CFR part 64 is amended as follows: