

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AK67

Monetary Allowances for Certain Children of Vietnam Veterans; Identification of Covered Birth Defects

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Department of Veterans Affairs (VA) adjudication regulations to provide for payment of a monetary allowance for an individual with disability from one or more covered birth defects who is a child of a woman Vietnam veteran and to provide for the identification of covered birth defects, to implement recent legislation. In addition, the proposed rule would amend the VA adjudication regulations affecting benefits for Vietnam veterans' children with spina bifida to reflect that legislation, to make conforming changes, and to remove unnecessary or obsolete provisions. Companion documents concerning the provision of health care (RIN 2900-AK88) and vocational training benefits (RIN 2900-AK90) for eligible children of Vietnam veterans are set forth in the Proposed Rules section of this issue of the **Federal Register**.

DATES: Comments must be received by VA on or before February 1, 2002.

ADDRESSES: Mail or hand-deliver written comments to: Director, Office of Regulations Management (02D), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1154, Washington, DC 20420; or fax comments to (202) 273-9289; or e-mail comments to OGCRegulations@mail.va.gov. Comments should indicate that they are submitted in response to "RIN 2900-AK67." All comments received will be available for public inspection in the Office of Regulations Management, Room 1158, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays).

FOR FURTHER INFORMATION CONTACT: Carol McBrine, M.D., Consultant, Regulations Staff (211A), Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 273-7210.

SUPPLEMENTARY INFORMATION: Section 401 of the Veterans Benefits and Health Care Improvement Act of 2000, Public Law 106-419, amends chapter 18 of title 38, United States Code, effective December 1, 2001, to authorize VA to

provide certain benefits, including a monthly monetary allowance, for children with covered birth defects who are the natural children of women veterans who served in the Republic of Vietnam during the Vietnam era. This document proposes to amend existing VA adjudication regulations and to add § 3.815 to title 38, Code of Federal Regulations, to implement this new authority.

Effective December 1, 2001, 38 U.S.C. 1823 provides that receipt of this allowance shall not affect the right of the child, or the right of any individual, based on the child's relationship to that individual, to receive any other benefit to which the child, or that individual, may be entitled under any law administered by VA, nor will the allowance be considered income or resources in determining eligibility for, or the amount of, benefits under any Federal or federally-assisted program. We propose to amend 38 CFR 3.261, 3.262, 3.263, 3.272, and 3.275 to reflect this statutory provision as it applies to VA's income-based benefit programs.

We also propose to amend 38 CFR 3.27, 3.29, 3.31, 3.105, 3.114, 3.158, 3.216, 3.403, 3.500, and 3.503 so that regulations applying to adjustment of benefit rates, rounding of dollar figures of the monthly payment, commencement of the period of payment, revision of decisions, mandatory disclosure of social security numbers, abandonment of claims, and effective date of the award and of reductions and discontinuances, apply to these benefits.

Further, we propose to make non-substantive changes to 38 CFR 3.814 concerning the monetary allowance for individuals with spina bifida to reflect section 401 of Public Law 106-419, to make conforming changes, and to remove unnecessary or obsolete provisions.

In addition, we propose to make changes for purposes of clarity in § 3.814 and in other provisions mentioned above.

Until December 1, 2001, 38 U.S.C. chapter 18 is titled "Benefits for Children of Vietnam Veterans Who Are Born with Spina Bifida." It provides benefits for the children of Vietnam veterans on the basis of a report by the Institute of Medicine (IOM) of the National Academy of Sciences called "Veterans and Agent Orange: Update 1996," in which the IOM noted what it considered "limited/suggestive evidence of an association" between herbicide exposure and spina bifida in the offspring of Vietnam veterans. Effective December 1, 2001, 38 U.S.C. chapter 18 is retitled "Benefits for

Children of Vietnam Veterans." Statutory provisions that have been in 38 U.S.C. chapter 18 concerning benefits for individuals with spina bifida who are children of Vietnam veterans are amended effective December 1, 2001, to be in subchapter I of chapter 18, renamed "Children of Vietnam Veterans Born with Spina Bifida." Subchapter II is added effective December 1, 2001, to chapter 18 and is titled "Children of Women Vietnam Veterans Born with Certain Birth Defects." Subchapter III is added effective December 1, 2001, to chapter 18 and is titled "General Provisions." That new subchapter contains provisions applicable to both categories of individuals.

The new statutory provisions, primarily 38 U.S.C. 1815, authorize VA to provide a monetary allowance for an individual with disability resulting from one or more covered birth defects who is a child of a woman Vietnam veteran. The statute is based on the results of a comprehensive health study by VA of 8,280 women Vietnam-era veterans (half of whom served in the Republic of Vietnam and half of whom served elsewhere) that was mandated by Public Law 99-272. The study, completed in October 1998, and titled "Women Vietnam Veterans Reproductive Outcomes Health Study" (VA study), was conducted by the Environmental Epidemiology Service of the Veterans Health Administration of the Department of Veterans Affairs. For purposes of satisfying the basic statistical requirement of independence of observations (i.e., in this study one pregnancy per woman), the VA study selected the first pregnancy after entrance date to Vietnam service, for women Vietnam veterans, as the "index pregnancy." For the non-Vietnam group, the index pregnancy was defined as the first pregnancy after July 4, 1965. The VA study defined "likely" birth defects as congenital anomalies and included structural, functional, metabolic, and hereditary defects. It excluded developmental disorders, perinatal complications, miscellaneous pediatric illnesses, and conditions that were not classifiable. A report of part of the VA study, "Pregnancy Outcomes Among U.S. Women Vietnam Veterans" (Pregnancy Outcomes report), was published in the American Journal of Industrial Medicine (38:447-454 (2000)).

As provided in 38 U.S.C. 1815(c), the amount of the monthly monetary allowance payable to an individual with disability resulting from covered birth defects will be: For the lowest level of disability (Level I), \$100; for the lower intermediate level of disability (Level

II), the greater of \$214 or the monthly amount payable under 38 U.S.C. 1805(b)(3) for the lowest level of disability prescribed for an individual with spina bifida who is the child of a Vietnam veteran; for the higher intermediate level of disability (Level III), the greater of \$743 or the monthly amount payable under 38 U.S.C. 1805(b)(3) for the intermediate level; for the highest level of disability (Level IV), the greater of \$1272 or the monthly amount payable under 38 U.S.C. 1805(b)(3) for the highest level of disability.

We propose to amend 38 CFR 3.27, "Automatic adjustment of benefit rates" to reflect the amendments to 38 U.S.C. chapter 18. Under the provisions of 38 U.S.C. 1805(b)(3) and 1815(d), these amounts are subject to adjustment under the provisions of 38 U.S.C. 5312, which provide for the adjustment of certain VA benefit rates whenever there is an increase in benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 *et seq.*).

We propose to amend the provisions of 38 CFR 3.29, "Rounding" to apply to increases in the monthly monetary amounts payable under 38 U.S.C. 1815. Whenever rates are increased under the provisions of 38 U.S.C. 5312, the Secretary may, under section 5312(c)(2), round those rates in such manner as the Secretary considers equitable and appropriate. The Secretary has determined that it is equitable and that, for ease of administration, it is appropriate to round up rate increases concerning the covered birth defects monetary benefit, as they are for the spina bifida monetary benefits. The proposed rule will amend § 3.29 accordingly.

We also propose to revise 38 CFR 3.31, "Commencement of the period of payment"; 38 CFR 3.114, "Change of law or Department of Veterans Affairs issue"; and 38 CFR 3.216, "Mandatory disclosure of social security numbers" to reflect that these provisions also apply to an individual with covered birth defects who is the child of a woman Vietnam veteran. All these provisions reflect statutory requirements.

Where a change in disability level warrants a reduction of the monetary allowance under 38 U.S.C. 1805 for individuals with spina bifida, the provisions of 38 CFR 3.105(g) direct VA to notify the beneficiary of the proposed reduction, allow the beneficiary 60 days to present evidence showing that the reduction should not occur, and provide that in the absence of such additional evidence the reduction will be effective the last day of the month following 60

days from the date of the notice. The proposed rule would expand the procedures to make them applicable to proposed reduction or discontinuance of any monetary allowance under 38 U.S.C. chapter 18. This reflects statutory requirements.

The provisions of 38 CFR 3.158 concern the circumstances under which VA will consider a claim abandoned. In view of the similarity between this benefit and other monetary benefits which VA administers, and in order to maintain consistency with respect to the administration of these benefits, we propose to apply these provisions to the monetary monthly allowance for individuals with covered birth defects, and we are proposing to amend 38 CFR 3.158 accordingly.

We propose to amend 38 CFR 3.403 by adding a new paragraph (c) to state that an award of the monetary allowance under 38 U.S.C. 1815 to or for an individual with covered birth defects who is a child of a woman Vietnam veteran will be the later of date of claim (or date of birth if a claim is received within one year of that date), the date entitlement arose, or December 1, 2001. This reflects statutory requirements.

VA is also proposing to amend 38 CFR 3.503 to specify that any monetary allowance under 38 U.S.C. chapter 18 will terminate the last day of the month before the month in which the death of a beneficiary occurs. This reflects statutory requirements.

VA is proposing to remove § 3.814(b), which sets forth an obsolete version of the "Application for Spina Bifida Benefits" form. The Office of Management and Budget has approved a revised version of the form.

We propose to add a new 38 CFR 3.815 to implement the provisions of 38 U.S.C. 1811, 1812, 1815, and 1821, as well as other provisions of 38 U.S.C. chapter 18, subchapters II and III. While § 3.815 primarily contains provisions concerning payment of monetary benefits, some of the proposed provisions of § 3.815 (for example, concerning whether an individual has a "covered birth defect") also would be used to determine eligibility for health care under 38 U.S.C. 1813 and vocational training under 38 U.S.C. 1814. Companion documents concerning the provision of health care (RIN 2900-AK88) and vocational training (RIN 2900-AK90) for certain children of Vietnam veterans with covered birth defects or spina bifida are set forth in the Proposed Rules section of this issue of the **Federal Register**.

In accordance with the statutory framework, paragraph (a)(1) of proposed § 3.815 provides that VA will pay a

monthly allowance, under subchapter II of 38 U.S.C. chapter 18, to or for an individual whose biological mother is or was a Vietnam veteran and who VA has determined to have disability resulting from one or more covered birth defects. Paragraph (a)(1) further provides that, except as provided in paragraph (a)(3) of that section, the amount of the monetary allowance will be based on the level of disability suffered by an individual as determined in accordance with the provisions of paragraph (e), which sets forth criteria for evaluating levels of disability suffered by individuals with covered birth defects. Paragraph (a)(2) provides that no monetary allowance will be provided under this section to an individual based on disability from a particular birth defect in any case where affirmative evidence establishes that the birth defect results from a cause other than the active military, naval, or air service of that veteran during the Vietnam era and that, in determining the level of disability, VA will not consider the particular defect in question. This will not prevent VA from paying a monetary allowance under subchapter II of 38 U.S.C. chapter 18 for any other birth defect for which affirmative evidence of another cause does not exist. We believe these provisions accord with the statutory intent of 38 U.S.C. 1812.

Paragraph (a)(3) of proposed § 3.815 provides that, in the case of an individual (as defined in § 3.815(c)(2)) whose only covered birth defect is spina bifida, a monetary allowance will be paid under § 3.814, and not under § 3.815, nor will the individual be evaluated for disability under § 3.815. Thus, the individual's disability would be evaluated under § 3.814 ("Monetary allowance under 38 U.S.C. chapter 18 for an individual suffering from spina bifida whose biological father or mother is or was a Vietnam veteran") and the monetary allowance would be paid under the terms of that section. In the case of an individual who has spina bifida and one or more additional covered birth defects, a monetary allowance will be paid under § 3.815 and the amount of the monetary allowance will be not less than the amount the individual would receive if his or her only covered birth defect were spina bifida. If, but for application of this paragraph, the monetary allowance payable to or for the individual would be based on an evaluation at Level I, II, or III, respectively, under § 3.814(d), the evaluation of the individual's level of disability under paragraph (e) of this section would be not less than Level II, III or, IV, respectively. These provisions

reflect statutory requirements under 38 U.S.C. 1824(a) and our interpretation that Congress intended that the provisions of 38 U.S.C. 1824(a) are solely to provide for nonduplication of benefits between subchapters I and II, and are not intended in any other way to reduce the amount of monetary allowance that would be payable under 38 U.S.C. chapter 18 for an individual with spina bifida.

Paragraph (b) of proposed § 3.815 states, in accord with the statute, that receipt of the monetary allowance under 38 U.S.C. chapter 18 will not affect the right of the individual with covered birth defects, or the right of any person based on the individual's relationship to that person, to receive any other benefit to which the individual, or that person, may be entitled under any law administered by VA.

Paragraph (c)(1) of proposed § 3.815 contains a definition of "Vietnam veteran" for purposes of that section. The term "Vietnam veteran" is defined to mean a person who performed active military, naval, or air service in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975, without regard to the characterization of the person's service. This reflects the statutory provisions in 38 U.S.C. 1821(2) and 1821(3)(B). We also propose to provide for purposes of § 3.815 that "service in the Republic of Vietnam" includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam. This is consistent with the definition of *service in the Republic of Vietnam* that appears at 38 CFR 3.307(a)(6)(iii).

Paragraph (c)(2) of proposed § 3.815 defines "individual" for purposes of that section to mean a person, regardless of age or marital status, whose biological mother is or was a Vietnam veteran and who was conceived after the date on which the veteran first entered the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975. Although 38 U.S.C. chapter 18 uses the terms "child" and "children," many of those entitled to this benefit are now adolescents or adults. This definition will make it clear that these regulations apply to eligible persons regardless of age. Paragraph (c)(2) also provides that to establish whether a person is the biological son or daughter of a Vietnam veteran, VA will require the types of evidence specified in 38 CFR 3.209 and 3.210.

A birth defect is defined by the March of Dimes organization as an abnormality of structure, function, or metabolism, whether genetically determined or a

result of environmental influence during embryonic or fetal life (<http://www.modimes.org>). Similar definitions are used by other State, national, and international organizations. The VA study of women Vietnam veterans did not define the term "birth defects" but stated that it included structural, functional, metabolic, and hereditary defects. It also stated that the causes of most congenital anomalies are unknown and that a combination of genetic and environmental factors may contribute to 20–25% of anomalies.

In the VA study, "likely" birth defects, reported by women Vietnam veterans in their children, were divided by pediatricians who reviewed the mothers' descriptions of the defects into the following seven categories: chromosomal abnormality; multiple anomalies (except chromosomal and heritable genetic); isolated anomaly; congenital neoplasms; heritable genetic disease; undescribed isolated heart abnormality; and other poorly described defect (non-cardiac). The VA study stated that there is a notable lack of difference between the children of women Vietnam veterans and the children of women non-Vietnam veterans for classes of known genetic/heritable conditions (including congenital malignancies). In the children resulting from index pregnancies, there was one congenital malignancy in a child of a Vietnam veteran and one in a child of a non-Vietnam veteran; there were four cases of heritable genetic disease in each group of veterans; and there were three chromosomal abnormalities in children of Vietnam veterans and four in the children of non-Vietnam veterans. Thus, the VA study provides no evidence of an association between service in Vietnam and three of the seven categories (chromosomal abnormalities, congenital malignancies, and heritable genetic diseases). Since under 38 U.S.C. 1812(a)(1) VA has authority to identify birth defects of children of women Vietnam veterans as covered birth defects only if the birth defects "are associated with the service of those veterans in the Republic of Vietnam during the Vietnam era," we believe it would not be appropriate to identify these three categories of birth defects as covered birth defects. Other conditions reported by the mother as birth defects that were something else included developmental disorders, such as autism, and miscellaneous pediatric conditions, such as asthma.

In addition, the statute specifically excludes familial disorders, birth-related injuries, and fetal or neonatal infirmities with well-established causes

from the category of covered birth defects.

Therefore, we propose in paragraph (c)(3) of § 3.815 to define the term "covered birth defect" for purposes of that section to mean:

[A]ny birth defect identified by VA as a birth defect that is associated with the service of women Vietnam veterans in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975, and that has resulted, or may result, in permanent physical or mental disability. However, the term *covered birth defect* does not include a condition due to a:

- (i) Familial disorder;
- (ii) Birth-related injury; or
- (iii) Fetal or neonatal infirmity with well-established causes.

We believe that this definition reflects the intent of Congress with respect to provision of benefits for individuals under 38 U.S.C. chapter 18, subchapters II and III.

In paragraph (d) of proposed § 3.815, VA lists some, but not all, specific conditions that VA would identify or would not identify as covered birth defects. Paragraph (d)(1) contains a list, based on the VA study, of some, but not all, conditions that VA would consider to be covered birth defects, unless a condition is familial in a particular case. Each of paragraphs (d)(2) through (d)(8) contains a non-exclusive list of certain conditions that, for different reasons, VA would not consider to be covered birth defects. Because of the vast number of possible birth defects, and the fact that many are sometimes familial and sometimes not (when they arise *de novo*, or anew, in a particular individual), it is not practical to develop an exclusive or definitive list in proposed § 3.815(d). For example, achondroplasia and Marfan syndrome are sometimes familial and sometimes not. We propose to include achondroplasia in the list of covered birth defects because 75% of cases are due to gene mutation (www.med.jhu.edu/Greenberg.Center/achon.htm) rather than being familial, but it will not be a covered birth defect in any case where it is determined to be familial. On the other hand, Marfan syndrome is familial in two-thirds to three-quarters of cases (www.marfan.org), so we propose to exclude it as a covered birth defect, unless there is no indication that it is familial in a particular family, in which case it would not be excluded as familial.

Proposed § 3.815(d)(1) states that covered birth defects include, but are not limited to, the following (but that if a birth defect is determined to be familial in a particular family, it would

not be a covered birth defect): achondroplasia, cleft lip and cleft palate, congenital heart disease, congenital talipes equinovarus (clubfoot), esophageal and intestinal atresia, Hallerman-Streiff syndrome, hip dysplasia, Hirschprung's disease (congenital megacolon), hydrocephalus due to aqueductal stenosis, hypospadias, imperforate anus, neural tube defects (including spina bifida, encephalocele, and anencephaly), Poland syndrome, pyloric stenosis, syndactyly (fused digits), tracheoesophageal fistula, undescended testicle, and Williams syndrome.

Familial, according to Dorland's Illustrated Medical Dictionary, 27th edition (1988), means occurring or affecting more members of a family than would be expected by chance. The category of familial disorders includes all heritable (that is, hereditary) genetic conditions, but not all genetic conditions, because a genetic mutation may arise for the first time during early development and not be hereditary. In that case, the parents would not have the genetic disorder, and the condition would not be familial.

Proposed § 3.815(d)(2) states generally that conditions that are familial disorders, including hereditary genetic conditions (as they are called in the VA study) are not covered birth defects. However, as proposed § 3.815(d)(2) also provides, if a birth defect is not familial in a particular family, VA would not consider it to be a familial disorder. (Thus, it would be a covered birth defect unless excluded under another provision of paragraph (d).) It states that familial disorders include, but are not limited to, the following, unless not familial in a particular family: albinism, alpha-antitrypsin deficiency, Crouzon syndrome, cystic fibrosis, Duchenne's muscular dystrophy, galactosemia, hemophilia, Huntington's disease, Hurler syndrome, Kartagener's syndrome (Primary Ciliary Dyskinesia), Marfan syndrome, neurofibromatosis, osteogenesis imperfecta, pectus excavatum, phenylketonuria, sickle cell disease, Tay-Sachs disease, thalassemia, and Wilson's disease (the VA study, The Merck Manual). These and other conditions, depending on the circumstances, may or may not be familial. For example, pectus excavatum is generally considered to be a familial birth defect but may also occur in the absence of a family history. Congenital blindness has some established causes, such as maternal rubella during pregnancy or metabolic disorders, but in other cases, it has no established cause and would be a covered birth defect. Similarly, congenital deafness may be

familial or may be due to an unknown cause. Some types of hydrocephalus are due to maternal infection and some have no known cause. Whether the disease is familial or not will be reported in most cases in medical records containing a family history.

Proposed § 3.815(d)(3) states that congenital malignant neoplasms (referred to in the VA study as congenital malignancies) are not covered birth defects. It states that these include, but are not limited to, the following: medulloblastoma, neuroblastoma, retinoblastoma, teratoma, and Wilm's tumor (The Merck Manual (17th edition, 1999 <http://www.neonatology.org/syllabus/teratoma.html>, http://cancer.med.upenn.edu/pdq_html/1/eng/100048.html, and <http://cancer.net.nci.nih.gov/clinpdq/pjf.html>).

Proposed § 3.815(d)(4) states that chromosomal abnormalities are not covered birth defects. It states that these include, but are not limited to, the following: Down syndrome and other Trisomies, Fragile X syndrome, Klinefelter's syndrome, Turner syndrome (the VA study, The Merck Manual).

Proposed § 3.815(d)(5) states that conditions that are due to birth-related injury are not covered birth defects. It states that these conditions include, but are not limited to, the following: brain damage due to anoxia during or around the time of birth; cases of cerebral palsy due to birth trauma; facial nerve palsy or other peripheral nerve injury; fractured clavicle; and Horner's syndrome due to forceful manipulation during birth.

Proposed § 3.815(d)(6) states that conditions that are due to a fetal or neonatal infirmity with well-established causes or that are miscellaneous pediatric conditions are not covered birth defects. VA considers that these include, but are not limited to, the effects of maternal infection during pregnancy, such as rubella, toxoplasmosis, or syphilis, and include fetal alcohol syndrome or fetal effects of maternal drug use (known to result from maternal use of alcohol or drugs during pregnancy). Miscellaneous pediatric conditions are conditions which the Pregnancy Outcomes report discusses as "unlikely birth defects." They were reported by the mother in telephone interviews as birth defects, but pediatricians determined them to be pediatric conditions rather than birth defects. Accordingly, proposed § 3.815(d)(6) states that the following are not covered birth defects: asthma and other allergies, hyaline membrane disease, maternal-infant blood

incompatibility, neonatal infections, neonatal jaundice, post-infancy deafness/hearing impairment (occurring after the age of one year), prematurity, and refractive disorders of the eye (for example, farsightedness and astigmatism).

Proposed § 3.815(d)(7) states that developmental disorders are not covered birth defects. VA considers that the following, which are listed in proposed § 3.815(d)(7), are developmental disorders rather than birth defects: attention deficit disorder; autism; epilepsy diagnosed after infancy (after the age of one year); learning disorders; and mental retardation (unless part of a syndrome that is a covered birth defect) (the VA study, <http://www.autism-society.org/whatisautism/autism.html#causes>, and <http://www.cdc.gov/nceh/cddh/ddhome.htm>).

Proposed § 3.815(d)(8) states that conditions that do not result in permanent physical or mental disability are not covered birth defects. VA believes that these include, but are not limited to, the following, which are listed in proposed § 3.815(d)(8): conditions rendered non-disabling through treatment; congenital heart problems surgically corrected or resolved without disabling residuals; heart murmurs unassociated with a diagnosed cardiac abnormality; hemangiomas that have resolved with or without treatment; and scars (other than of the head, face, or neck) as the only residual of corrective surgery for birth defects.

Paragraph (h) of proposed § 3.815 provides that if a regional office is unclear in any case as to whether a condition is a covered birth defect it may refer the issue to the Director of the Compensation and Pension Service to make the determination as to whether a condition is a covered birth defect.

Paragraph (e) of proposed § 3.815 provides, in accordance with 38 U.S.C. 1815(a) and (b), that VA will determine the level of disability currently resulting, in combination, from an individual's covered birth defects and associated disabilities. It further provides that no monetary allowance will be payable under subchapter II of 38 U.S.C. chapter 18 if VA determines under this paragraph that an individual has no current disability resulting from the covered birth defects, unless VA determines that the provisions of paragraph (a)(3) of this section are for application. Also, as required by 38 U.S.C. 1815(b), paragraph (e) sets forth a schedule for rating disabilities resulting from covered birth defects at four levels of disability, identified as

Level I, Level II, Level III, and Level IV, with Level I having the lowest, and Level IV the highest, level of disability. The schedule also includes Level 0 when VA determines that an individual has one or more covered birth defects, but has no current disability resulting therefrom. Disability determinations would be based on an assessment of the effect on day-to-day functioning or the extent of disfigurement of the head, face, or neck due to one or more covered birth defects or associated disabilities. These proposed criteria are necessarily broad because of the array of potential disabilities affecting any body system or multiple systems and are designed to be applicable to the widest possible variety of disabilities. We propose that the functions to be considered in assessing limitation of daily activities be mobility (ability to stand and walk, including balance and coordination), manual dexterity, stamina, speech, hearing, vision (other than correctable refraction errors), memory, ability to concentrate, appropriateness of behavior, and urinary and fecal continence. While disfigurement does not necessarily limit any of these functions, although it may limit communication, it may, in our judgment, and based on our experience with disability assessment in veterans, be significantly disabling in and of itself, and we are therefore proposing to include it in the criteria. These are similar to the types of functional impairments described in literature pertaining to disabilities, for example, in Americans with Disabilities Act (ADA) documents, such as the Glossary of Common Characteristics and Limitations of Disabilities in ADA Handbook, Appendix IV and ADA Title III Regulations, and in a 1997 Institute of Medicine document, "Enabling America: Assessing the Role of Rehabilitation Science and Engineering."

We propose that Level I be assigned if the individual has residual physical or mental effects that only occasionally or intermittently limit or prevent some daily activities, or the individual has disfigurement or scarring of the head, face, or neck without gross distortion or gross asymmetry of any facial feature (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips). We propose that Level II be assigned if the individual has residual physical or mental effects that frequently or constantly limit or prevent some daily activities, but the individual is able to work or attend school, carry out most household chores, travel, and provide age-appropriate self-care such as eating, dressing, grooming, and carrying out

personal hygiene, and communication, behavior, social interaction, and intellectual functioning are appropriate for age; or, the individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of one facial feature or one paired set of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips). We propose that Level III be assigned on one of four bases: if the individual has residual physical or mental effects that frequently or constantly limit or prevent most daily activities but the individual is able to provide age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene; the individual is unable to work or attend school, travel, or carry out household chores, or does so intermittently and with difficulty; the individual's communication, behavior, social interaction, and intellectual functioning are not entirely appropriate for age; or the individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of two facial features or two paired sets of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips). We propose that Level IV be assigned on one of three bases: if the individual has residual physical or mental effects that prevent age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene; communication, behavior, social interaction, and intellectual functioning are grossly inappropriate for age; or the individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of three facial features or three paired sets of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips). We believe these criteria will establish objective measures to identify discrete levels of disability, in accordance with the payment levels established by Congress that can be applied consistently.

Because VA medical facilities generally provide examination and care only to veterans, VA lacks pediatric examiners and pediatric specialists and some of the other specialists who might participate in the evaluation and care of individuals with covered birth defects. Therefore, paragraph (f) of proposed § 3.815 provides that VA may accept statements from private physicians, as well as examination reports from government or private institutions, for the purposes of determining whether an individual has a covered birth defect and rating claims from individuals with

covered birth defects. It also provides that if they are adequate for such purposes, VA may make the determination and rating without further examination.

Paragraph (g) of proposed § 3.815 provides that VA will reconsider its determination that an individual has a covered birth defect and/or the level of disability due to covered birth defects whenever it receives medical evidence indicating that a change is warranted. In general, we believe that the severity of these conditions will be stable but that this provision provides a reasonable procedure for evaluating those that are not.

Paragraph (i) of proposed § 3.815 contains effective date provisions for awards, and increases, of the monetary allowance under 38 U.S.C. chapter 18, subchapter II. Paragraph (j) of proposed § 3.815 contains provisions concerning reductions and discontinuances of that monetary allowance. These reflect statutory requirements.

Comment Period

We are providing a comment period of 30 days for this proposed rule due to the December 1, 2001, effective date of the new benefit programs enacted by section 401 of Public Law 106-419, the statutory requirement for a final rule prior to that date, and the need to have a final rule as soon as possible that would enable identification of, and evaluation of disability from, covered birth defects in order to avoid delay in the commencement of those benefits.

Paperwork Reduction Act of 1995

This proposed rule would remove the approved information collection provisions contained in 38 CFR 3.814 as unnecessary or obsolete. The version of the "Application for Spina Bifida Benefits" form that is published in § 3.814(b) is no longer being used. The Office of Management and Budget (OMB) has approved a revision of the form, under the same OMB control number, 2900-0572. VA intends to seek from OMB approval under the Paperwork Reduction Act for further modifications to that form. This proposed rule does not contain provisions constituting new collections of information under the Paperwork Reduction Act. Any provisions that might otherwise require approval as a modification to an information collection would not affect 10 or more persons in a twelve-month period.

Executive Order 12866

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

Regulatory Flexibility Act

The Secretary hereby certifies that these regulatory amendments would 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. The reason for this certification is that these amendments would not directly affect any small entities. Only individuals could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

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 would have no consequential effect on State, local, or tribal governments.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers for benefits affected by this rule are 64.104, 64.109, 64.127, and 64.128. There are no Catalog of Federal Domestic Assistance program numbers for other benefits affected by this rule.

List of Subjects in 38 CFR Part 3

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

Approved: October 26, 2001.

Anthony J. Principi,

Secretary of Veterans Affairs.

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

PART 3—ADJUDICATION

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

1. The authority citation for part 3, subpart A continues to read as follows:

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

2. In § 3.27, paragraphs (c) and (d) are revised to read as follows:

§ 3.27 Automatic adjustment of benefit rates.

* * * * *

(c) *Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans.*

Whenever there is a cost-of-living increase in benefit amounts payable under section 215(i) of Title II of the Social Security Act, VA shall, effective on the dates such increases become effective, increase by the same percentage the monthly allowance under 38 U.S.C. chapter 18.

(Authority: 38 U.S.C. 1805(b)(3), 1815(d), 5312)

(d) *Publishing requirements.* Increases in pension rates, parents' dependency and indemnity compensation rates and income limitation, and the monthly allowance under 38 U.S.C. chapter 18 made under this section shall be published in the **Federal Register**.

(Authority: 38 U.S.C. 1805(b)(3), 1815(d), 5312(c)(1))

3. In § 3.29, paragraph (c) is revised to read as follows:

§ 3.29 Rounding

* * * * *

(c) *Monthly rates under 38 U.S.C. chapter 18.* When increasing the monthly monetary allowance rates under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans, VA will round any resulting rate that is not an even dollar amount to the next higher dollar.

(Authority: 38 U.S.C. 1805(b)(3), 1815(d), 5312)

§ 3.31 [Amended]

4. Section 3.31 is amended by:

a. In the introductory text, removing “the monetary allowance under 38 U.S.C. 1805 for a child suffering from spina bifida” and adding, in its place, “a monetary allowance under 38 U.S.C. chapter 18 for an individual”.

b. In paragraph (c)(4)(ii), removing “the monetary allowance for children suffering from spina bifida” and adding, in its place, “a monetary allowance under 38 U.S.C. chapter 18”.

c. Revising the authority citation.

The revision reads as follows:

§ 3.31 Commencement of the period of payment.

* * * * *

(Authority: 38 U.S.C. 1822, 5111)

5. In § 3.105, paragraph (g) is revised to read as follows:

§ 3.105 Revision of decisions.

* * * * *

(g) *Reduction in evaluation—monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans.* Where a reduction or discontinuance of a monetary allowance currently being paid under 38 U.S.C. chapter 18 is

considered warranted, VA will notify the beneficiary at his or her latest address of record of the proposed reduction, furnish detailed reasons therefor, and allow the beneficiary 60 days to present additional evidence to show that the monetary allowance should be continued at the present level. Unless otherwise provided in paragraph (i) of this section, if VA does not receive additional evidence within that period, it will take final rating action and reduce the award effective the last day of the month following 60 days from the date of notice to the beneficiary of the proposed reduction. (Authority: 38 U.S.C. 1822, 5112(b)(6))

* * * * *

§ 3.114 [Amended]

6. Section 3.114 is amended by:

a. In the introductory text of paragraph (a), removing “the monetary allowance under 38 U.S.C. 1805 for a child suffering from spina bifida” each place it appears and adding, in its place, “a monetary allowance under 38 U.S.C. chapter 18 for an individual”.

b. Revising the authority citation at the end of paragraph (a).

The revision reads as follows:

§ 3.114 Change of law or Department of Veterans Affairs issue.

* * * * *

(Authority: 38 U.S.C. 1822, 5110(g))

* * * * *

§ 3.158 [Amended]

7. In § 3.158, paragraphs (a) and (c) are amended by removing “1805” and adding, in its place, “chapter 18”.

§ 3.216 [Amended]

8. Section 3.216 is amended by:

a. Removing “or the monetary allowance for a child suffering from spina bifida who is a child of a Vietnam veteran under § 3.814 of this part” and adding, in its place, “a monetary allowance under 38 U.S.C. chapter 18”.

b. Revising the authority citation.

The revision reads as follows:

§ 3.216 Mandatory disclosure of social security numbers.

* * * * *

(Authority: 38 U.S.C. 1822, 5101(c))

* * * * *

9. In § 3.261, paragraph (a)(40) is revised to read as follows:

§ 3.261 Character of income; exclusions and estates.

* * * * *

(a) * * *

Income	Dependency (parents)	Dependency and indemnity compensation (parents)	Pension; old-law (veterans, sur- viving spouses and children)	Pension; Sec- tion 306 (vet- erans, surviving spouses and children)	See—
(40) Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans (38 U.S.C. 1823(c)).	Excluded	Excluded	Excluded	Excluded	§ 3.262(y)

10. In § 3.262, paragraph (y) is revised to read as follows:

§ 3.262 Evaluation of income.

* * * * *

(y) *Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans.* There shall be excluded from income computation any allowance paid under the provisions of 38 U.S.C. 18 to or for an individual who is the child of a Vietnam veteran.

(Authority: 38 U.S.C. 1823(c))

11. In § 3.263, paragraph (g) is revised to read as follows:

§ 3.263 Corpus of estate; net worth.

* * * * *

(g) *Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans.* There shall be excluded from the corpus of estate or net worth of a claimant any allowance paid under the provisions of 38 U.S.C. chapter 18 to or for an individual who is a child of a Vietnam veteran.

(Authority: 38 U.S.C. 1823(c))

12. In § 3.272, paragraph (u) is revised to read as follows:

§ 3.272 Exclusions from income.

* * * * *

(u) *Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans.* Any allowance paid under the provisions of 38 U.S.C. chapter 18 to or for an individual who is a child of a Vietnam veteran.

(Authority: 38 U.S.C. 1823(c))

13. In § 3.275, paragraph (i) is revised to read as follows:

§ 3.275 Criteria for evaluating net worth.

* * * * *

(i) *Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans.* There shall be excluded from the corpus of estate or net worth of a claimant any allowance paid under the provisions of 38 U.S.C. chapter 18 to or for an

individual who is a child of a Vietnam veteran.

(Authority: 38 U.S.C. 1823(c))

14. In § 3.403, paragraph (b) is revised and paragraph (c) is added, to read as follows:

§ 3.403 Children.

* * * * *

(b) *Monetary allowance under 38 U.S.C. 1805 for an individual suffering from spina bifida who is a child of a Vietnam veteran.* An award of the monetary allowance under 38 U.S.C. 1805 to or for an individual suffering from spina bifida who is a child of a Vietnam veteran will be effective either date of birth if claim is received within one year of that date, or date of claim, but not earlier than October 1, 1997.

(Authority: 38 U.S.C. 1822, 5110; sec. 422(c), Pub. L. 104–204, 110 Stat. 2926)

(c) *Monetary allowance under 38 U.S.C. 1815 for an individual with covered birth defects who is a child of a woman Vietnam veteran.* Except as provided in § 3.114(a) or § 3.815(i), an award of the monetary allowance under 38 U.S.C. 1815 to or for an individual with one or more covered birth defects who is a child of a woman Vietnam veteran will be effective as of the date VA received the claim (or the date of birth if the claim is received within one year of that date), the date entitlement arose, or December 1, 2001, whichever is later.

(Authority: 38 U.S.C. 1815, 1822, 1824, 5110)

15. In § 3.503, paragraph (b) is revised to read as follows:

§ 3.503 Children.

* * * * *

(b) *Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans.* The effective date of discontinuance of the monthly allowance under 38 U.S.C. chapter 18 will be the last day of the month before the month in which the death of the individual occurred.

(Authority: 38 U.S.C. 1822, 5112(b))

16. Section 3.814 is amended by:
a. Revising the section heading.

b. Adding a heading to paragraph (a).

c. In paragraph (a), revising the first sentence and, in the second sentence, removing “other related individual” and adding, in its place, “related person”.

d. Removing and reserving paragraph (b).

e. In paragraph (c)(1), removing “an individual” and adding, in its place, “a person” and removing “individual’s” and adding, in its place, “person’s”.

f. In paragraph (c)(2), removing “§ 3.204(a)(1), VA shall” and adding, in its place, “§ 3.204(a)(1), VA will” and by removing “an individual’s biological father or mother is or was” and adding, in its place, “a person is the biological son or daughter of”.

g. Removing designation “(d)” from paragraph (d)(1) and by adding a heading for paragraph (d).

h. Removing the authority citation at the end of paragraph (d).

i. In paragraph (e), removing “children” and adding, in its place, “an individual”.

j. Revising the authority citation at the end of the section.

The revisions and additions read as follows:

§ 3.814 Monetary allowance under 38 U.S.C. chapter 18 for an individual suffering from spina bifida whose biological father or mother is or was a Vietnam veteran.

(a) *Monthly monetary allowance.* VA will pay a monthly monetary allowance under subchapter I of 38 U.S.C. chapter 18, based upon the level of disability determined under the provisions of paragraph (d) of this section, to or for a person who VA has determined is an individual suffering from spina bifida whose biological mother or father is or was a Vietnam veteran. * * *

* * * * *

(d) *Disability evaluations.* * * *

* * * * *

(Authority: 38 U.S.C. 501, 1805, 1811, 1812, 1821, 1822, 1823, 1824, 5101, 5110, 5111, 5112)

17. Section 3.815 is added to read as follows:

§ 3.815 Monetary allowance under 38 U.S.C. chapter 18 for an individual with disability from covered birth defects whose biological mother is or was a Vietnam veteran; identification of covered birth defects.

(a) *Monthly monetary allowance.* (1) *General.* VA will pay a monthly monetary allowance under subchapter II of 38 U.S.C. chapter 18 to or for an individual whose biological mother is or was a Vietnam veteran and who VA has determined to have disability resulting from one or more covered birth defects. Except as provided in paragraph (a)(3) of this section, the amount of the monetary allowance paid will be based upon the level of such disability suffered by the individual, as determined in accordance with the provisions of paragraph (e) of this section.

(2) *Affirmative evidence of cause other than mother's service during Vietnam era.* No monetary allowance will be provided under this section based on a particular birth defect of an individual in any case where affirmative evidence establishes that the birth defect results from a cause other than the active military, naval, or air service of the individual's mother during the Vietnam era and, in determining the level of disability for an individual with more than one birth defect, the particular defect resulting from other causes will be excluded from consideration. This will not prevent VA from paying a monetary allowance under this section for other birth defects.

(3) *Nonduplication; spina bifida.* In the case of an individual whose only covered birth defect is spina bifida, a monetary allowance will be paid under § 3.814, and not under this section, nor will the individual be evaluated for disability under this section. In the case of an individual who has spina bifida and one or more additional covered birth defects, a monetary allowance will be paid under this section and the amount of the monetary allowance will be not less than the amount the individual would receive if his or her only covered birth defect were spina bifida. If, but for the individual's one or more additional covered birth defects, the monetary allowance payable to or for the individual would be based on an evaluation at Level I, II, or III, respectively, under § 3.814(d), the evaluation of the individual's level of disability under paragraph (e) of this section will be not less than Level II, III or, IV, respectively.

(b) *No effect on other VA benefits.* Receipt of a monetary allowance under 38 U.S.C. chapter 18 will not affect the

right of the individual, or the right of any person based on the individual's relationship to that person, to receive any other benefit to which the individual, or that person, may be entitled under any law administered by VA.

(c) *Definitions.* (1) *Vietnam veteran.* For the purposes of this section, the term *Vietnam veteran* means a person who performed active military, naval, or air service in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975, without regard to the characterization of the person's service. Service in the Republic of Vietnam includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

(2) *Individual.* For the purposes of this section, the term *individual* means a person, regardless of age or marital status, whose biological mother is or was a Vietnam veteran and who was conceived after the date on which the veteran first entered the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975. Notwithstanding the provisions of § 3.204(a)(1), VA will require the types of evidence specified in §§ 3.209 and 3.210 sufficient to establish that a person is the biological son or daughter of a Vietnam veteran.

(3) *Covered birth defect.* For the purposes of this section the term *covered birth defect* means any birth defect identified by VA as a birth defect that is associated with the service of women Vietnam veterans in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975, and that has resulted, or may result, in permanent physical or mental disability. However, the term *covered birth defect* does not include a condition due to a:

- (i) Familial disorder;
- (ii) Birth-related injury; or
- (iii) Fetal or neonatal infirmity with well-established causes.

(d) *Identification of covered birth defects.* All birth defects that are not excluded under the provisions of this paragraph are covered birth defects.

(1) Covered birth defects include, but are not limited to, the following (however, if a birth defect is determined to be familial in a particular family, it will not be a covered birth defect):

- (i) Achondroplasia;
- (ii) Cleft lip and cleft palate;
- (iii) Congenital heart disease;
- (iv) Congenital talipes equinovarus (clubfoot);
- (v) Esophageal and intestinal atresia;

- (vi) Hallerman-Streiff syndrome;
- (vii) Hip dysplasia;
- (viii) Hirschsprung's disease (congenital megacolon);
- (ix) Hydrocephalus due to aqueductal stenosis;
- (x) Hypospadias;
- (xi) Imperforate anus;
- (xii) Neural tube defects (including spina bifida, encephalocele, and anencephaly);
- (xiii) Poland syndrome;
- (xiv) Pyloric stenosis;
- (xv) Syndactyly (fused digits);
- (xvi) Tracheoesophageal fistula;
- (xvii) Undescended testicle; and
- (xviii) Williams syndrome.

(2) Birth defects that are familial disorders, including hereditary genetic conditions, are not covered birth defects. Familial disorders include, but are not limited to, the following, unless the birth defect is not familial in a particular family:

- (i) Albinism;
- (ii) Alpha-antitrypsin deficiency;
- (iii) Crouzon syndrome;
- (iv) Cystic fibrosis;
- (v) Duchenne's muscular dystrophy;
- (vi) Galactosemia;
- (vii) Hemophilia;
- (viii) Huntington's disease;
- (ix) Hurler syndrome;
- (x) Kartagener's syndrome (Primary Ciliary Dyskinesia);
- (xi) Marfan syndrome;
- (xii) Neurofibromatosis;
- (xiii) Osteogenesis imperfecta;
- (xiv) Pectus excavatum;
- (xv) Phenylketonuria;
- (xvi) Sickle cell disease;
- (xvii) Tay-Sachs disease;
- (xviii) Thalassemia; and
- (xix) Wilson's disease.

(3) Conditions that are congenital malignant neoplasms are not covered birth defects. These include, but are not limited to, the following:

- (i) Medulloblastoma;
- (ii) Neuroblastoma;
- (iii) Retinoblastoma;
- (iv) Teratoma; and
- (v) Wilm's tumor.

(4) Conditions that are chromosomal disorders are not covered birth defects. These include, but are not limited to, the following:

- (i) Down syndrome and other Trisomies;
- (ii) Fragile X syndrome;
- (iii) Klinefelter's syndrome; and
- (iv) Turner's syndrome.

(5) Conditions that are due to birth-related injury are not covered birth defects. These include, but are not limited to, the following:

- (i) Brain damage due to anoxia during or around time of birth;

- (ii) Cerebral palsy due to birth trauma,
- (iii) Facial nerve palsy or other peripheral nerve injury;
- (iv) Fractured clavicle; and
- (v) Horner's syndrome due to forceful manipulation during birth.

(6) Conditions that are due to a fetal or neonatal infirmity with well-established causes or that are miscellaneous pediatric conditions are not covered birth defects. These include, but are not limited to, the following:

- (i) Asthma and other allergies;
- (ii) Effects of maternal infection during pregnancy, including but not limited to, maternal rubella, toxoplasmosis, or syphilis;
- (iii) Fetal alcohol syndrome or fetal effects of maternal drug use;
- (iv) Hyaline membrane disease;
- (v) Maternal-infant blood incompatibility;
- (vi) Neonatal infections;
- (vii) Neonatal jaundice;
- (viii) Post-infancy deafness/hearing impairment (onset after the age of one year);
- (ix) Prematurity; and
- (x) Refractive disorders of the eye.

(7) Conditions that are developmental disorders are not covered birth defects. These include, but are not limited to, the following:

- (i) Attention deficit disorder;
- (ii) Autism;
- (iii) Epilepsy diagnosed after infancy (after the age of one year);
- (iv) Learning disorders; and
- (v) Mental retardation (unless part of a syndrome that is a covered birth defect).

(8) Conditions that do not result in permanent physical or mental disability are not covered birth defects. These include, but are not limited to:

- (i) Conditions rendered non-disabling through treatment;
- (ii) Congenital heart problems surgically corrected or resolved without disabling residuals;
- (iii) Heart murmurs unassociated with a diagnosed cardiac abnormality;
- (iv) Hemangiomas that have resolved with or without treatment; and
- (v) Scars (other than of the head, face, or neck) as the only residual of corrective surgery for birth defects.

(e) *Disability evaluations.* Whenever VA determines, upon receipt of competent medical evidence, that an individual has one or more covered birth defects, VA will determine the level of disability currently resulting, in combination, from the covered birth defects and associated disabilities. No monetary allowance will be payable under this section if VA determines

under this paragraph that an individual has no current disability resulting from the covered birth defects, unless VA determines that the provisions of paragraph (a)(3) of this section are for application. Except as otherwise provided in paragraph (a)(3) of this section, VA will determine the level of disability as follows:

(1) *Levels of disability.*

(i) *Level 0.* The individual has no current disability resulting from covered birth defects.

(ii) *Level I.* The individual meets one or more of the following criteria:

- (A) The individual has residual physical or mental effects that only occasionally or intermittently limit or prevent some daily activities; or
- (B) The individual has disfigurement or scarring of the head, face, or neck without gross distortion or gross asymmetry of any facial feature (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(iii) *Level II.* The individual meets one or more of the following criteria:

- (A) The individual has residual physical or mental effects that frequently or constantly limit or prevent some daily activities, but the individual is able to work or attend school, carry out most household chores, travel, and provide age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene, and communication, behavior, social interaction, and intellectual functioning are appropriate for age; or
- (B) The individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of one facial feature or one paired set of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(iv) *Level III.* The individual meets one or more of the following criteria:

- (A) The individual has residual physical or mental effects that frequently or constantly limit or prevent most daily activities, but the individual is able to provide age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene;
- (B) The individual is unable to work or attend school, travel, or carry out household chores, or does so intermittently and with difficulty;

(C) The individual's communication, behavior, social interaction, and intellectual functioning are not entirely appropriate for age; or

(D) The individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of two facial features or two paired sets of facial features (nose, chin,

forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(v) *Level IV.* The individual meets one or more of the following criteria:

(A) The individual has residual physical or mental effects that prevent age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene;

(B) The individual's communication, behavior, social interaction, and intellectual functioning are grossly inappropriate for age; or

(C) The individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of three facial features or three paired sets of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(2) *Assessing limitation of daily activities.* Physical or mental effects on the following functions are to be considered in assessing limitation of daily activities:

- (i) Mobility (ability to stand and walk, including balance and coordination);
- (ii) Manual dexterity;
- (iii) Stamina;
- (iv) Speech;
- (v) Hearing;
- (vi) Vision (other than correctable refraction errors);
- (vii) Memory;
- (viii) Ability to concentrate;
- (ix) Appropriateness of behavior; and
- (x) Urinary and fecal continence.

(f) *Information for determining whether individuals have covered birth defects and rating disability levels.* (1) VA may accept statements from private physicians, or examination reports from government or private institutions, for the purposes of determining whether an individual has a covered birth defect and for rating claims for covered birth defects. If they are adequate for such purposes, VA may make the determination and rating without further examination. In the absence of adequate information, VA may schedule examinations for the purpose of determining whether an individual has a covered birth defect and/or assessing the level of disability.

(2) Except in accordance with paragraph (a)(3) of this section, VA will not pay a monthly monetary allowance unless or until VA is able to obtain medical evidence adequate to determine that an individual has a covered birth defect and adequate to assess the level of disability due to covered birth defects.

(g) *Redeterminations.* VA will reassess a determination under this section whenever it receives evidence indicating that a change is warranted.

(h) *Referrals.* If a regional office is unclear in any case as to whether a condition is a covered birth defect, it may refer the issue to the Director of the Compensation and Pension Service for determination.

(i) *Effective dates.* Except as provided in § 3.114(a) or paragraph (i)(1) or (2) of this section, VA will award the monetary allowance under subchapter II of 38 U.S.C. chapter 18, for an individual with disability resulting from one or more covered birth defects, based on an original claim, a claim reopened after final disallowance, or a claim for increase, as of the date VA received the claim (or the date of birth if the claim is received within one year of that date), the date entitlement arose, or December 1, 2001, whichever is later. Subject to the condition that no benefits may be paid for any period prior to December 1, 2001:

(1) VA will increase benefits as of the earliest date the evidence establishes that the level of severity increased, but only if the beneficiary applies for an increase within one year of that date.

(2) If a claimant reopens a previously disallowed claim based on corrected military records, VA will award the benefit from the latest of the following dates: the date the veteran or beneficiary applied for a correction of the military records; the date the disallowed claim was filed; or, the date one year before the date of receipt of the reopened claim.

(j) *Reductions and discontinuances.* VA will generally reduce or discontinue awards under subchapter II of 38 U.S.C. chapter 18 according to the facts found except as provided in §§ 3.105 and 3.114(b).

(1) If benefits were paid erroneously because of beneficiary error, VA will reduce or discontinue benefits as of the effective date of the erroneous award.

(2) If benefits were paid erroneously because of administrative error, VA will reduce or discontinue benefits as of the date of last payment.

(Authority: 38 U.S.C. 501, 1811, 1812, 1813, 1814, 1815, 1816, 1821, 1822, 1823, 1824, 5101, 5110, 5111, 5112)

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BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900-AK88

Health Care for Certain Children of Vietnam Veterans—Covered Birth Defects and Spina Bifida

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This document proposes to establish regulations regarding health care benefits for women Vietnam veterans' children with covered birth defects. It would revise the current regulations regarding health care for Vietnam veterans' children suffering from spina bifida to also encompass health care for women Vietnam veterans' children with certain other birth defects. This is necessary to provide health care for such children in accordance with recently enacted legislation. The revisions would also reduce the requirements for preauthorization, reflect changes in organizational and personnel titles, revise contact information for the VHA Health Administration Center, and make nonsubstantive changes for purposes of clarity. Companion documents entitled "Monetary Allowances for Certain Children of Vietnam Veterans; Identification of Covered Birth Defects" (RIN 2900-AK67) and "Vocational Training for Certain Children of Vietnam Veterans—Covered Birth Defects and Spina Bifida" (RIN 2900-AK90) are set forth in the Proposed Rules section of this issue of the **Federal Register**.

DATES: Comments must be received by VA on or before February 1, 2002, except that comments on the information collection provisions in this document must be received on or before March 4, 2002.

ADDRESSES: Mail or hand deliver written comments to: Director, Office of Regulations Management (02D), Room 1154, 810 Vermont Ave., NW, Washington, DC 20420; or fax comments to (202) 273-9289; or e-mail comments to OGCRegulations@mail.va.gov. Comments should indicate that they are submitted in response to "RIN 2900-AK88." All comments received will be available for public inspection in the Office of Regulations Management, Room 1158, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). In addition, see the Paperwork Reduction Act heading under the **SUPPLEMENTARY INFORMATION** section of this preamble regarding

submission of comments on the information collection provisions.

FOR FURTHER INFORMATION CONTACT:

Susan Schmetzer, Chief, Policy & Compliance Division, VHA Health Administration Center, Department of Veterans Affairs, P.O. Box 65020, Denver, CO 80206, telephone (303) 331-7552.

SUPPLEMENTARY INFORMATION: Prior to the enactment of Public Law 106-419 on November 1, 2000, the provisions of 38 U.S.C. chapter 18 only concerned benefits for children with spina bifida who were born to Vietnam veterans. Effective December 1, 2001, section 401 of Public Law 106-419 amends 38 U.S.C. chapter 18 to add benefits for women Vietnam veterans' children with certain birth defects (referred to below as "covered birth defects").

As amended, 38 U.S.C. chapter 18 provides for three separate types of benefits for women Vietnam veterans' children who suffer from covered birth defects as well as for Vietnam veterans' children who suffer from spina bifida: (1) Monthly monetary allowances for various disability levels; (2) provision of health care needed for the child's spina bifida or covered birth defects; and (3) provision of vocational training and rehabilitation.

This document proposes to amend VA's "Medical" regulations (38 CFR part 17) by revising the regulations in §§ 17.900 through 17.905 concerning the provision of health care. These regulations currently only concern the provision of health care for Vietnam veterans' children with spina bifida. This document proposes to revise the regulations by adding women Vietnam veterans' children with covered birth defects to the existing regulatory framework. The revisions would also reduce the requirements for preauthorization, reflect changes in organizational and personnel titles, revise contact information for the VHA Health Administration Center, and make nonsubstantive changes for purposes of clarity. As the proposed rule provides, the mailing address for the VHA Health Administration Center for spina bifida is P.O. Box 65025, Denver, CO 80206-9025 and for covered birth defects is P.O. Box 469027, Denver, CO 80246-9027.

As a condition of eligibility for the provision of health care for women Vietnam veterans' children with covered birth defects, it is proposed that the child must be an *individual* determined to have a *covered birth defect* under 38 CFR 3.815. (Definitions of the terms *individual* and *covered birth defect* and provisions concerning