



# Federal Register

---

**Wednesday,  
January 2, 2002**

---

**Part IV**

## **Department of Veterans Affairs**

---

**38 CFR Parts 3, 17, and 21  
Monetary Allowance Payments, Health  
Care, and Vocational Training for Certain  
Children of Vietnam Veterans; Proposed  
Rules**

**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 (O2D), 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](mailto: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](http://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](http://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](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)

[FR Doc. 01-31673 Filed 12-31-01; 8:45 am]

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 (O2D), 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](mailto: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

identification of covered birth defects are included in proposed § 3.815 set forth in the companion document concerning monetary allowances and identification of covered birth defects (RIN 2900-AK67) published in the Proposed Rules section of this issue of the **Federal Register**.)

Consistent with the authorizing legislation, a note to the proposed rule explains that the proposed provisions are not intended to be a comprehensive insurance plan and do not cover health care unrelated to spina bifida and covered birth defects.

The statutory provisions state that the Secretary may provide health care directly or by contract or other arrangement with any health care provider. VA proposes to contract or arrange for provision of covered health care only through approved health care providers. In this regard, it is proposed that such health care providers be only those currently approved, for the services provided, by the Center for Medicare and Medicaid Services (CMS), Department of Defense (DoD) TRICARE program, Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA), or Joint Commission on Accreditation of Healthcare Organizations (JCAHO), or currently approved under a license or certificate issued by a governmental entity with jurisdiction. This appears to provide reasonable assurance that individuals providing health care for these children under this authority are qualified to do so. These provisions already apply to the regulations concerning the provision of health care for Vietnam veterans' children with spina bifida, except that they reflect a title change in the Department of Defense program; clarify that approved health care providers include those issued a license or certificate by a governmental entity with jurisdiction; and clarify the definition of *respite care* by stating that the care must be furnished by an approved health care provider.

The proposal includes a note clarifying when VA is the exclusive payer for health care provided. The note states that VA would provide payment under the proposal only for health care relating to spina bifida or covered birth defects (under the definitions of *spina bifida* and *covered birth defects* in proposed § 17.900, this includes complications or medical conditions that according to the scientific literature are associated with spina bifida or with the covered birth defects). The note also states that VA is the exclusive payer for services authorized under this proposal regardless of any third-party insurer,

Medicare, Medicaid, health plan, or any other plan or program providing health care coverage. The note further states that any third-party insurer, Medicare, Medicaid, health plan, or any other plan or program providing health care coverage would be responsible according to its provisions for payment for health care not relating to spina bifida or covered birth defects.

It is proposed as a condition of payment that preauthorization from a benefits advisor of the VHA Health Administration Center be required, in accordance with prescribed procedures, for rental or purchase of durable medical equipment with a total rental or purchase price in excess of \$300, respectively; transplantation services; mental health services; training; substance abuse treatment; dental services; and travel (including any necessary costs for meals and lodging en route, and accompaniment by an attendant or attendants) other than mileage at the General Services Administration rate for privately owned automobiles. This will help VA provide necessary care under its statutory authority. Except for the following changes these preauthorization provisions already apply to children with spina bifida. The proposal would remove the requirement for preauthorization related to case management, home care, and respite care. The VHA Health Administration Center's experience has found that case management, home care, and respite care are approved in the vast majority of cases and review of these services prior to their provision has not resulted in a change to the overall outcome of care or expenses. Preauthorization would continue to be required for the rental or purchase of durable medical equipment, however, it is proposed that it not be required for the rental or purchase of equipment with a total rental or purchase price of \$300 or less, respectively. The VHA Health Administration Center's experience has shown that requiring preauthorization for durable medical equipment with a rental or purchase price of \$300 or less is not cost-effective for the government. The proposal also reflects a change in title of VHA Health Administration Center personnel.

Under the proposal, payment to approved health care providers would be made using the methodology already established for the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) (see 38 CFR 17.270 *et seq.*). We believe this methodology based on Medicare and DoD principles would result in fair payments and allow VA to utilize a

payment mechanism already in place. Use of the CHAMPVA payment methodology is currently a requirement under the regulations for spina bifida health care.

It is proposed that claims from approved health care providers be submitted to the VHA Health Administration Center for payment and that the claims contain specified information. The Center already provides claims processing services for eligible veterans' dependents under CHAMPVA and the spina bifida program. The specified information is necessary to make determinations concerning authorization for payment.

The proposal also includes time frames for submission of claims to ensure an orderly and efficient payment system. It is proposed that claims must be filed no later than one year after the date of service; or in the case of inpatient care, one year after the date of discharge; or in the case of retroactive approval for health care, 180 days following beneficiary notification of eligibility. Further, it is proposed that in response to a request for payment, VA will provide an explanation of benefits to ensure that VA determinations of payments would be understood by claimants. This already applies to spina bifida health care and is consistent with other VA health care programs for veterans' dependents.

The proposal sets forth a review and appeal process concerning determinations relating to the provision of health care or payment. A note states that the final decision of the VHA Health Administration Center Director, concerning provision of health care or payment, will inform the claimant of further appellate rights for an appeal to the Board of Veterans' Appeals. This already applies to spina bifida health care, except that the review and appeal process reflects a change in title of an organizational unit.

Consistent with the statutory scheme, we propose that payments made will constitute payment in full. Accordingly, providers will not be permitted to bill the patient for charges in excess of the VA-determined allowable amount. The proposed rule also includes a specific list of items that would be excluded from payment since we believe they were not intended to be subject to payment. This already applies to spina bifida health care.

The proposal includes provisions concerning medical records. It is proposed that copies of medical records generated outside VA that relate to activities for which VA is asked to provide payment or that VA determines are necessary to adjudicate claims under

§§ 17.900 through 17.905 must be provided to VA at no charge when requested by VA. This already applies to spina bifida health care.

#### **Paperwork Reduction Act of 1995**

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), this proposed rule contains information collections in proposed 38 CFR 17.902 through 17.904. These sections concern the provision of certain health care for Vietnam veterans' children with spina bifida or children born with certain other birth defects to women Vietnam veterans. VA is proposing to revise the information collection currently approved by the Office of Management and Budget (OMB) under control number 2900–0578 to substitute the information collections in proposed 38 CFR 17.902 through 17.904 for the information collections currently approved for those sections of the regulations. Accordingly, under section 3507(d) of the Act VA has submitted a copy of this rulemaking action to OMB for its review.

OMB assigns a control number for each collection of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Comments on the collections of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies sent by mail or hand delivery to the Director, Office of Regulations Management (02D), Department of Veterans Affairs, 810 Vermont Ave. NW, Room 1154, Washington, DC 20420; by fax to (202) 273–9289; or by e-mail to [OGCRegulations@mail.va.gov](mailto:OGCRegulations@mail.va.gov). Comments should indicate that they are submitted in response to “RIN 2900–AK88.” All written comments to VA 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).

#### **Preauthorization—Section 17.902**

*Title:* Preauthorization for Provision of Health Care for Certain Children of Vietnam Veterans.

*Summary of collection of information:* The provisions of proposed 38 CFR 17.902 would require individuals to submit to a benefits advisor of the VHA Health Administration Center a preauthorization request for health care

consisting of rental or purchase of durable medical equipment with a rental or purchase price in excess of \$300, respectively; mental health services; training; substance abuse treatment; dental services; transplantation services; or travel (other than mileage at the General Services Administration rate for privately owned automobiles). The preauthorization request would contain the child's name and Social Security number; the veteran's name and Social Security number; the type of service requested; the medical justification; the estimated cost; and the name, address, and telephone number of the provider.

*Type of review:* Revision of currently approved collection.

*Description of need for information and proposed use of information:* Such information would be necessary to make preauthorization determinations in accordance with proposed 38 CFR 17.902.

*Description of likely respondents:* Individuals seeking provision of health care to certain children of Vietnam veterans.

*Estimated number of respondents:* 400.

*Estimated frequency of responses:* Occasionally.

*Estimated total annual reporting and recordkeeping burden:* 200 hours.

*Estimated burden per respondent:* 30 minutes (2 × 15 minutes).

#### **Payment of Claims—Section 17.903**

*Title:* Payment of Claims for Provision of Health Care for Certain Children of Vietnam Veterans.

*Summary of collection of information:* The provisions of proposed 38 CFR 17.903 would require that, as a condition of payment, claims from “approved health care providers” for health care provided under 38 CFR 17.900 through 17.905 must include the following information, as appropriate: with respect to patient identification information: the patient's full name, Social Security number, address, and date of birth; with respect to provider identification information (inpatient and outpatient services): full name and address (such as hospital or physician), remittance address, address where services were rendered, individual provider's professional status (M.D., Ph.D., R.N., etc.), and provider tax identification number (TIN) or Social Security number; with respect to patient treatment information (longterm care or institutional services): dates of service (specific and inclusive); summary level itemization (by revenue code); dates of service for all absences from a hospital or other approved institution during a

period for which inpatient benefits are being claimed; principal diagnosis established, after study, to be chiefly responsible for causing the patient's hospitalization; all secondary diagnoses; all procedures performed; discharge status of the patient; and institution's Medicare provider number; with respect to patient treatment information for all other health care providers and ancillary outpatient services: diagnosis, procedure code for each procedure, service, or supply for each date of service, and individual billed charge for each procedure, service, or supply for each date of service; with respect to prescription drugs and medicines: name and address of pharmacy where drug was dispensed, name of drug, National Drug Code (NDC) for drug provided, strength, quantity, date dispensed, and pharmacy receipt for each drug dispensed.

*Type of review:* Revision of currently approved collection.

*Description of need for information and proposed use of information:* Such information would be necessary to make payment determinations in accordance with proposed 38 CFR 17.903.

*Description of likely respondents:*

Individuals seeking payment for provision of health care for certain children of Vietnam veterans.

*Estimated number of respondents:* 3,000.

*Estimated frequency of responses:* 10.

*Estimated total annual reporting and recordkeeping burden:* 3,000 hours.

*Estimated burden per respondent:* 60 minutes (10 × 6 minutes).

#### **Review and Appeal Process—Section 17.904**

*Title:* Review and Appeal Process Regarding Provision of Health Care or Payment Relating to Provision of Health Care for Certain Children of Vietnam Veterans.

*Summary of collection of information:* The provisions of proposed 38 CFR 17.904 would establish a review process regarding disagreements by a Vietnam veteran's child or representative with a determination concerning authorization of health care or a health care provider's disagreement with a determination regarding payment. The person or entity requesting reconsideration of such determination would be required to submit such request to the VHA Health Administration Center (Attention: Chief, Benefit and Provider Services), in writing within one year of the date of initial determination. The request must state why the decision is in error and include any new and relevant information not previously considered. After reviewing the matter, a benefits

advisor would issue a written determination to the person or entity seeking reconsideration. If such person or entity remains dissatisfied with the determination, the person or entity would be permitted to make a written request for review by the Director, VHA Health Administration Center.

*Type of review:* Revision of currently approved collection.

*Description of need for information and proposed use of information:* The information proposed to be collected under § 17.904 appears to be necessary to make review and appeal determinations.

*Description of likely respondents:* Beneficiaries and providers disagreeing with determinations regarding covered services and benefits.

*Estimated number of respondents:* 200.

*Estimated frequency of responses:* 3.

*Estimated total annual reporting and recordkeeping burden:* 200 hours.

*Estimated burden per respondent:* 60 minutes (3 × 20 minutes).

The Department considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;

- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;

- Enhancing the quality, usefulness, and clarity of the information to be collected; and

- Minimizing the burden of the collections of information on those who are to respond, including responses through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**.

Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed regulations.

#### Comment Period

We are providing, except for comments on the information collection provisions, 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 in order to avoid delay in the commencement of those benefits. We are providing for the information collections in this document a 60-day comment period pursuant to the Paperwork Reduction Act.

#### 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 the adoption of the rule would not have a significant impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. It is estimated that there are only a total of 1200 Vietnam veterans' children who suffer from spina bifida and women Vietnam veterans' children who suffer from covered birth defects. They are widely geographically diverse and the health care provided to them would not have a significant impact on any small businesses. Therefore, pursuant to 5 U.S.C. 605(b), this document is 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

There are no Catalog of Federal Domestic Assistance program numbers for the programs affected by this document.

#### List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting

and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Approved: October 26, 2001.

**Anthony J. Principi,**

*Secretary of Veterans Affairs.*

For the reasons set forth in the preamble, 38 CFR part 17 is proposed to be amended as follows:

#### PART 17—MEDICAL

1. The authority citation for part 17 continues to read as follows:

**Authority:** 38 U.S.C. 501(a), 1721, unless otherwise noted.

2. In part 17, the undesignated center heading immediately preceding § 17.900 and §§ 17.900 through 17.905 are revised to read as follows:

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

##### § 17.900 Definitions.

For purposes of §§ 17.900 through 17.905—

*Approved health care provider* means a health care provider currently approved by the Center for Medicare and Medicaid Services (CMS), Department of Defense TRICARE Program, Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA), Joint Commission on Accreditation of Health Care Organizations (JCAHO), or currently approved for providing health care under a license or certificate issued by a governmental entity with jurisdiction. An entity or individual will be deemed to be an approved health care provider only when acting within the scope of the approval, license, or certificate.

*Child* for purposes of spina bifida means the same as *individual* as defined at § 3.814(c)(2) or § 3.815(c)(2) of this title and for purposes of covered birth defects means the same as *individual* as defined at § 3.815(c)(2) of this title.

*Covered birth defects* means the same as defined at § 3.815(c)(3) of this title and also includes complications or medical conditions that are associated with the covered birth defects according to the scientific literature.

*Habilitative and rehabilitative care* means such professional, counseling, and guidance services and such treatment programs (other than vocational training under 38 U.S.C. 1804 or 1814) as are necessary to develop, maintain, or restore, to the maximum extent practicable, the functioning of a disabled person.

*Health care* means home care, hospital care, nursing home care, outpatient care, preventive care,

habilitative and rehabilitative care, case management, and respite care; and includes the training of appropriate members of a child's family or household in the care of the child; and the provision of such pharmaceuticals, supplies (including continence-related supplies such as catheters, pads, and diapers), equipment (including durable medical equipment), devices, appliances, assistive technology, direct transportation costs to and from approved health care providers (including any necessary costs for meals and lodging en route, and accompaniment by an attendant or attendants), and other materials as the Secretary determines necessary.

*Health care provider* means any entity or individual that furnishes health care, including specialized clinics, health care plans, insurers, organizations, and institutions.

*Home care* means medical care, habilitative and rehabilitative care, preventive health services, and health-related services furnished to a child in the child's home or other place of residence.

*Hospital care* means care and treatment furnished to a child who has been admitted to a hospital as a patient.

*Nursing home care* means care and treatment furnished to a child who has been admitted to a nursing home as a resident.

*Outpatient care* means care and treatment, including preventive health services, furnished to a child other than hospital care or nursing home care.

*Preventive care* means care and treatment furnished to prevent disability or illness, including periodic examinations, immunizations, patient health education, and such other services as the Secretary determines necessary to provide effective and economical preventive health care.

*Respite care* means care furnished by an approved health care provider on an intermittent basis for a limited period to an individual who resides primarily in a private residence when such care will help the individual continue residing in such private residence.

*Spina bifida* means all forms and manifestations of spina bifida except spina bifida occulta (this includes complications or medical conditions that are associated with spina bifida according to the scientific literature).

*Vietnam veteran* for purposes of spina bifida means the same as defined at § 3.814(c)(1) or § 3.815(c)(1) of this title and for purposes of covered birth defects means the same as defined at § 3.815(c)(1) of this title.

(Authority: 38 U.S.C. 101(2), 1802–1803, 1811–1813, 1821)

#### § 17.901 Provision of health care.

(a) *Spina bifida*. VA will provide a Vietnam veteran's child who has been determined under § 3.814 or § 3.815 of this title to suffer from spina bifida with such health care as the Secretary determines is needed by the child for spina bifida. VA may inform spina bifida patients, parents, or guardians that health care may be available at not-for-profit charitable entities.

(b) *Covered birth defects*. VA will provide a woman Vietnam veteran's child who has been determined under § 3.815 of this title to suffer from spina bifida or other covered birth defects with such health care as the Secretary determines is needed by the child for the covered birth defects. However, if VA has determined for a particular covered birth defect that § 3.815(a)(2) of this title applies (concerning affirmative evidence of cause other than the mother's service during the Vietnam era), no benefits or assistance will be provided under this section with respect to that particular birth defect.

(c) *Providers of care*. Health care provided under this section will be provided directly by VA, by contract with an approved health care provider, or by other arrangement with an approved health care provider.

(d) *Submission of information*. For purposes of §§ 17.900 through 17.905:

(1) The telephone number of the VHA Health Administration Center is (888) 820–1756;

(2) The facsimile number of the VHA Health Administration Center is (303) 331–7807;

(3) The hand-delivery address of the VHA Health Administration Center is 300 S. Jackson Street, Denver, CO 80209; and

(4) The mailing address of the VHA Health Administration Center—

(i) For spina bifida is P.O. Box 65025, Denver, CO 80206–9025; and

(ii) For covered birth defects is P.O. Box 469027, Denver, CO 80246–9027.

(Authority: 38 U.S.C. 101(2), 1802–1803, 1811–1813, 1821)

**Note to § 17.901:** This is not intended to be a comprehensive insurance plan and does not cover health care unrelated to spina bifida or unrelated to covered birth defects. VA is the exclusive payer for services paid under §§ 17.900 through 17.905 regardless of any third party insurer, Medicare, Medicaid, health plan, or any other plan or program providing health care coverage. Any third-party insurer, Medicare, Medicaid, health plan, or any other plan or program providing health care coverage would be responsible according to its provisions for payment for health care not relating to spina bifida or covered birth defects.

#### § 17.902 Preauthorization.

(a) Preauthorization from a benefits advisor of the VHA Health Administration Center is required for the following services or benefits under §§ 17.900 through 17.905: rental or purchase of durable medical equipment with a total rental or purchase price in excess of \$300, respectively; transplantation services; mental health services; training; substance abuse treatment; dental services; and travel (other than mileage at the General Services Administration rate for privately owned automobiles). Authorization will only be given in those cases where there is a demonstrated medical need related to the spina bifida or covered birth defects. Requests for provision of health care requiring preauthorization shall be made to the VHA Health Administration Center and may be made by telephone, facsimile, mail, or hand delivery. The application must contain the following:

- (1) Name of child,
- (2) Child's Social Security number,
- (3) Name of veteran,
- (4) Veteran's Social Security number,
- (5) Type of service requested,
- (6) Medical justification,
- (7) Estimated cost, and
- (8) Name, address, and telephone number of provider.

(b) Notwithstanding the provisions of paragraph (a) of this section, preauthorization is not required for a condition for which failure to receive immediate treatment poses a serious threat to life or health. Such emergency care should be reported by telephone to the VHA Health Administration Center within 72 hours of the emergency.

(Authority: 38 U.S.C. 101(2), 1802–1803, 1811–1813, 1821)

#### § 17.903 Payment.

(a)(1) Payment for services or benefits under §§ 17.900 through 17.905 will be determined utilizing the same payment methodologies as provided for under the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) (see § 17.270).

(2) As a condition of payment, the services must have occurred:

(i) For spina bifida, on or after October 1, 1997, and must have occurred on or after the date the child was determined eligible for benefits under § 3.814 of this title.

(ii) For covered birth defects, on or after December 1, 2001, and must have occurred on or after the date the child was determined eligible for benefits under § 3.815 of this title.

(3) Claims from approved health care providers must be filed with the VHA Health Administration Center in writing

(facsimile, mail, hand delivery, or electronically) no later than:

(i) One year after the date of service; or

(ii) In the case of inpatient care, one year after the date of discharge; or

(iii) In the case of retroactive approval for health care, 180 days following beneficiary notification of eligibility.

(4) Claims for health care provided under the provisions of §§ 17.900 through 17.905 must contain, as appropriate, the information set forth in paragraphs (a)(4)(i) through (a)(4)(v) of this section.

(i) Patient identification information:

(A) Full name,

(B) Address,

(C) Date of birth, and

(D) Social Security number.

(ii) Provider identification information (inpatient and outpatient services):

(A) Full name and address (such as hospital or physician),

(B) Remittance address,

(C) Address where services were rendered,

(D) Individual provider's professional status (M.D., Ph.D., R.N., etc.), and

(E) Provider tax identification number (TIN) or Social Security number.

(iii) Patient treatment information (long-term care or institutional services):

(A) Dates of service (specific and inclusive),

(B) Summary level itemization (by revenue code),

(C) Dates of service for all absences from a hospital or other approved institution during a period for which inpatient benefits are being claimed,

(D) Principal diagnosis established, after study, to be chiefly responsible for causing the patient's hospitalization,

(E) All secondary diagnoses,

(F) All procedures performed,

(G) Discharge status of the patient, and

(H) Institution's Medicare provider number.

(iv) Patient treatment information for all other health care providers and ancillary outpatient services such as durable medical equipment, medical requisites, and independent laboratories:

(A) Diagnosis,

(B) Procedure code for each procedure, service, or supply for each date of service, and

(C) Individual billed charge for each procedure, service, or supply for each date of service.

(v) Prescription drugs and medicines and pharmacy supplies:

(A) Name and address of pharmacy where drug was dispensed,

(B) Name of drug,

(C) National Drug Code (NDC) for drug provided,

(D) Strength,

(E) Quantity,

(F) Date dispensed,

(G) Pharmacy receipt for each drug dispensed (including billed charge), and

(H) Diagnosis for which each drug is prescribed.

(b) Health care payment will be provided in accordance with the provisions of §§ 17.900 through 17.905. However, the following are specifically excluded from payment:

(1) Care as part of a grant study or research program,

(2) Care considered experimental or investigational,

(3) Drugs not approved by the U.S. Food and Drug Administration for commercial marketing,

(4) Services, procedures, or supplies for which the beneficiary has no legal obligation to pay, such as services obtained at a health fair,

(5) Services provided outside the scope of the provider's license or certification, and

(6) Services rendered by providers suspended or sanctioned by a Federal agency.

(c) Payments made in accordance with the provisions of §§ 17.900 through 17.905 shall constitute payment in full. Accordingly, the health care provider or agent for the health care provider may not impose any additional charge for any services for which payment is made by VA.

(d) Explanation of benefits (EOB). When a claim under the provisions of §§ 17.900 through 17.905 is adjudicated, an EOB will be sent to the beneficiary or guardian and the provider. The EOB provides, at a minimum, the following information:

(1) Name and address of recipient,

(2) Description of services and/or supplies provided,

(3) Dates of services or supplies provided,

(4) Amount billed,

(5) Determined allowable amount,

(6) To whom payment, if any, was made, and

(7) Reasons for denial (if applicable).

(Authority: 38 U.S.C. 101(2), 1802–1803, 1811–1813, 1821)

#### § 17.904 Review and appeal process.

For purposes of §§ 17.900 through 17.905, if a health care provider, child, or representative disagrees with a determination concerning provision of health care or with a determination concerning payment, the person or entity may request reconsideration. Such request must be submitted in writing (by facsimile, mail, or hand

delivery) within one year of the date of the initial determination to the VHA Health Administration Center (Attention: Chief, Benefit and Provider Services). The request must state why it is believed that the decision is in error and must include any new and relevant information not previously considered. Any request for reconsideration that does not identify the reason for dispute will be returned to the sender without further consideration. After reviewing the matter, including any relevant supporting documentation, a benefits advisor will issue a written determination (with a statement of findings and reasons) to the person or entity seeking reconsideration that affirms, reverses, or modifies the previous decision. If the person or entity seeking reconsideration is still dissatisfied, within 90 days of the date of the decision he or she may submit in writing (by facsimile, mail, or hand delivery) to the VHA Health Administration Center (Attention: Director) a request for review by the Director, VHA Health Administration Center. The Director will review the claim and any relevant supporting documentation and issue a decision in writing (with a statement of findings and reasons) that affirms, reverses, or modifies the previous decision. An appeal under this section would be considered as filed at the time it was delivered to the VA or at the time it was released for submission to the VA (for example, this could be evidenced by the postmark, if mailed).

**Note to § 17.904:** The final decision of the Director will inform the claimant of further appellate rights for an appeal to the Board of Veterans' Appeals.

(Authority: 38 U.S.C. 101(2), 1802–1803, 1811–1813, 1821)

#### § 17.905 Medical records.

Copies of medical records generated outside VA that relate to activities for which VA is asked to provide payment or that VA determines are necessary to adjudicate claims under §§ 17.900 through 17.905 must be provided to VA at no cost.

(Authority: 38 U.S.C. 101(2), 1802–1803, 1811–1813, 1821)

[FR Doc. 01–31674 Filed 12–31–01; 8:45 am]

BILLING CODE 8320–01–P

**DEPARTMENT OF VETERANS  
AFFAIRS**

**38 CFR Part 21**

**RIN 2900-AK90**

**Vocational Training 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 provision of vocational training and rehabilitation for women Vietnam veterans' children with covered birth defects. It would revise the current regulations regarding vocational training and rehabilitation for Vietnam veterans' children suffering from spina bifida to also encompass vocational training and rehabilitation for women Vietnam veterans' children with certain other birth defects. This is necessary to provide vocational training and rehabilitation for such children in accordance with recently enacted legislation. Companion documents entitled "Monetary Allowances for Certain Children of Vietnam Veterans; Identification of Covered Birth Defects" (RIN 2900-AK67) and "Health Care for Certain Children of Vietnam Veterans—Covered Birth Defects and Spina Bifida" (RIN 2900-AK88) 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](mailto:OGCRegulations@mail.va.gov). Comments should indicate that they are submitted in response to "RIN 2900-AK90." 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:** Charles A. Graffam, Consultant, Vocational Rehabilitation and

Employment Service (282), Department of Veterans Affairs, 810 Vermont Ave., NW, Washington, DC 20420; (202) 273-7410.

**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 "Vocational Rehabilitation and Education" regulations (38 CFR part 21) by revising the regulations in part 21, subpart M (§§ 21.8010 through 21.8410) concerning the provision of vocational training and rehabilitation. These regulations currently only concern the provision of vocational training and rehabilitation 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 correct the references to § 21.222 in § 21.8210 and to § 21.8020 in § 21.8082 and make other nonsubstantive changes for purposes of clarity. These would include amending § 21.8050(c) to clarify that VA does not provide for room and board for a vocational training program under part 21, subpart M, other than for a period of 30 days or less in a special rehabilitation facility for purposes of an extended evaluation or to improve and enhance vocational potential.

As a condition of eligibility for the provision of vocational training and rehabilitation under 38 U.S.C. 1814 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 identification of covered birth defects are included in proposed § 3.815 set

forth in the companion document concerning monetary allowances and identification of covered birth defects (RIN 2900-AK67) published in the Proposed Rules section of this issue of the **Federal Register**.)

This proposed rule includes a definition of *eligible child* that describes a child for whom the statute authorizes VA to provide vocational training under this subpart. In the revised § 21.8282, "Termination of a vocational training program," we propose to add provisions that would be applicable if VA makes a determination that a child no longer has a covered birth defect.

By statute, a child would only be eligible for one program of vocational training under 38 U.S.C. chapter 18 (even if, for example, a child has spina bifida and one or more other covered birth defects). It is proposed to reflect this in § 21.8016.

It is proposed that a woman Vietnam veteran's child with covered birth defects receive testing and evaluative services, as needed, similar to the testing and services that VA offers a veteran for the purposes of evaluation for eligibility and entitlement under a vocational rehabilitation program under 38 U.S.C. chapter 31. These testing and evaluative services are appropriate for determining whether it is reasonably feasible for the child to achieve a vocational goal and to guide the child, parent, or guardian in choosing a vocational training program for the child. This already applies to vocational training and rehabilitation for Vietnam veterans' children with spina bifida.

It is proposed that an eligible child would receive vocational training program services and assistance under provisions that, under the 38 U.S.C. chapter 31 program, already apply to vocational training program services and assistance for eligible veterans with service-connected disabilities. In this regard, it is proposed that the following provisions of 38 CFR part 21, subpart A, would apply as set forth in the text portion of this document:

- § 21.35 concerning certain definitions and explanations (see proposed § 21.8010).
- § 21.250(a) and (b)(2), concerning provision of employment services, including the definition of job development; § 21.252 concerning job development and placement services; § 21.254 concerning supportive services; § 21.256 concerning incentives for employers; and §§ 21.257 and 21.258 concerning rehabilitation through self-employment, including special assistance for persons engaged in self-employment programs (see proposed § 21.8020).

- §§ 21.50(b)(5) and 21.53(b) and (d) concerning the scope and nature of an evaluation of the reasonable feasibility of achieving a vocational goal (see proposed § 21.8032).

- §§ 21.80, 21.84, and 21.88 concerning the requirements for an individualized written plan of vocational rehabilitation and its purposes, to include employment assistance; and §§ 21.92, 21.94 (a) through (d), and 21.96 concerning preparation of, changes to, and review of an individualized written plan of vocational rehabilitation (see proposed §§ 21.8080 and 21.8082).

- §§ 21.100 and 21.380 concerning counseling (see proposed § 21.8100).

- § 21.120 concerning vocational training; §§ 21.122 through 21.132 concerning types of allowable vocational training; and § 21.146 concerning independent instructor courses (see proposed § 21.8120).

- §§ 21.290 through 21.298 concerning course approval and facility selection (except that the provisions pertaining to use of facilities offering independent living services to evaluate independent living potential (see § 21.294(b)(1)(i)) and to provide a program of independent living services to individuals for whom an Individualized Independent Living Plan (IILP) has been developed (see § 21.294(b)(1)(ii)) do not apply, and provisions concerning authorization of independent living services as an incidental part of a plan (see § 21.294(b)(1)(iii)) apply, in a comparable manner as for veterans under the 38 U.S.C. chapter 31 program, only to the extent allowable under proposed § 21.8050 for an individualized written plan of vocational rehabilitation (see proposed §§ 21.8120 and 21.8286).

- § 21.142(a) and (b); § 21.144; § 21.146; § 21.148(a) and (c); § 21.150, other than paragraph (b); § 21.152, other than paragraph (b); § 21.154, other than paragraph (b); and § 21.156 concerning special rehabilitative services of the following types: adult basic education, vocational course in a sheltered workshop or rehabilitation facility, independent instructor course, tutorial assistance, reader service, interpreter service for the hearing impaired, special transportation assistance, and other vocationally oriented incidental services (see proposed § 21.8140).

- §§ 21.212 through 21.224 concerning supplies (however, the following provisions do not apply to this subpart: § 21.216(a)(3) concerning special modifications, including automobile adaptive equipment; § 21.220(a)(1) concerning advancements

from the 38 U.S.C. chapter 31 program revolving loan fund; and § 21.222(b)(1)(x) concerning release or repayment for independent living services program supplies) (see proposed § 21.8210).

- § 21.262 concerning reimbursement for costs of training and rehabilitation facilities, supplies, and services (see proposed § 21.8260).

- §§ 21.60 and 21.62 concerning a medical consultant and the Vocational Rehabilitation Panel and § 21.310 concerning rate of pursuit measurement (see proposed § 21.8310).

- § 21.326 concerning the commencement and termination dates of a period of employment services (see proposed § 21.8320).

- §§ 21.362 and 21.364 concerning satisfactory conduct and cooperation (see proposed § 21.8360).

- § 21.154 concerning special transportation allowance; § 21.370 (however, the words “under § 21.282” in § 21.370(b)(2)(iii)(B) do not apply) and § 21.372 concerning intraregional and interregional travel at government expense; and § 21.376 concerning authorization of transportation services for evaluation or counseling (see proposed § 21.8370).

- § 21.380 concerning personnel qualification standards; §§ 21.412 and 21.414 (except § 21.414(c), (d), and (e)) concerning finality and revision of decisions; § 21.420 concerning notification that VA will provide as to findings, decisions, and appeal rights; and § 21.430 concerning accountability for authorization and payment of program costs for training and rehabilitation services (see proposed § 21.8380).

As set forth in the text portion of this document, these provisions appear to be appropriate to apply to the provision of vocational training and rehabilitation for women Vietnam veterans' children with covered birth defects. The same provisions apply to the provision of vocational training and rehabilitation for Vietnam veterans' children with spina bifida.

It is also proposed that VA officials will inform children who have covered birth defects about any vocational training and rehabilitation that may be available under other governmental and nongovernmental programs. This already applies to the provision of vocational training and rehabilitation for Vietnam veterans' children with spina bifida.

It is proposed that VA provide case management to assist the eligible child throughout a planned vocational training program. This would help to ensure that the child achieves the

maximum vocational benefit from the program. This already applies to the provision of vocational training and rehabilitation for Vietnam veterans' children with spina bifida.

#### Comment Period

We are providing, except for comments on the information collection provisions, 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 in order to avoid delay in the commencement of those benefits. We are providing for the information collections in this document a 60-day comment period pursuant to the Paperwork Reduction Act.

#### Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), collections of information are set forth in the provisions of proposed §§ 21.8014 and 21.8370. Proposed § 21.8014 would amend the provisions prescribing the information to be submitted for an application for a Vietnam veteran's child suffering from spina bifida to participate in a VA vocational training program. Proposed § 21.8370 would permit a request for reimbursement for certain transportation costs and would require submission of supporting documentation to receive reimbursement. Although provisions in the current § 21.8016 previously had been approved by the Office of Management and Budget (OMB) as an information collection under control number 2900-0581, VA is not seeking reinstatement and is requesting OMB to discontinue that approval because, as currently in effect and as proposed to be revised, § 21.8016 affects fewer than 10 respondents annually. As required under section 3507(d) of the Act, VA has submitted a copy of this rulemaking action to the OMB for its review of the collections of information in this proposed rule.

OMB assigns a control number for each collection of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Comments on the collections of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention Desk Officer for the Department of Veterans Affairs, Office of Information

and Regulatory Affairs, Washington, DC 20503, with copies sent by mail or hand delivery to the Director, Office of Regulations Management (O2D), Department of Veterans Affairs, 810 Vermont Ave. NW, Room 1154, Washington, DC 20420; by fax to (202) 273-9289; or by e-mail to [OGCRegulations@mail.va.gov](mailto:OGCRegulations@mail.va.gov).

Comments should indicate that they are submitted in response to "RIN 2900-AK90." All written comments to VA 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).

*Title:* Application for Vocational Training Benefits—Certain Children of Vietnam Veterans.

*Summary of collection of information:* The provisions of proposed 38 CFR 21.8014 would extend to women Vietnam veteran's children with covered birth defects the requirement that is applicable to Vietnam veterans' children with spina bifida for submitting an application for vocational training to be considered for this benefit.

*Type of review:* Reinstatement with change of a previously approved collection for which approval has expired (OMB control number 2900-0579).

*Description of need for information and proposed use of information:* VA needs to know sufficient identifying information about the applicant and the applicant's natural parent who was a Vietnam veteran to be able to relate the claim to other existing VA records. The information collected allows the Vocational Rehabilitation and Employment (VR&E) Division to review the existing records and to set up an appointment for an applicant to meet with a VR&E staff member to evaluate the claim.

*Description of likely respondents:* Adult children with spina bifida or other covered birth defects, parents or guardians of minor or incompetent children with spina bifida or other covered birth defects, authorized representatives, or Members of Congress.

*Estimated number of respondents:* 50.

*Estimated frequency of responses:* Once.

*Estimated total annual reporting and recordkeeping burden:* 12.5 reporting burden hours. The total annual reporting burden is based on each respondent taking 15 minutes to write to VA indicating a desire to take part in a vocational training program and providing the necessary identifying information. Although there is no set

format for this application, the applicant must provide certain information to perfect the claim. There are no recordkeeping requirements.

*Estimated average burden per respondent:* 15 minutes.

*Title:* Request for Transportation Expense Reimbursement.

*Summary of collection of information:* The provisions of proposed 38 CFR 21.8370 would extend to women Vietnam veteran's children with covered birth defects the current requirement applicable to Vietnam veterans' children with spina bifida that a child receiving vocational training to request VA payment for travel expenses. VA must determine that the child would be unable to pursue training or employment or employment without this assistance. To obtain payment, the child must submit documentation showing the expenses of transportation.

*Type of review:* Reinstatement with change of a previously approved collection for which approval has expired (OMB control number 2900-0580).

*Description of need for information and proposed use of information:* A child must specifically request VA assistance with transportation expenses. This allows VA to investigate the child's situation to establish that the child would be unable to pursue training or employment without VA travel assistance. To receive payment, the child must provide supportive documentation of actual expenses incurred for the travel. This prevents VA from making payment erroneously or for fraudulently claimed travel.

*Description of likely respondents:* Children with spina bifida or other covered birth defects.

*Estimated number of respondents:* 40. Approximately half of the children who plan and enter a program will need VA financial support for their transportation expenses while in a program.

*Estimated frequency of responses:* Once for the initial request; monthly to obtain the travel reimbursement.

*Estimated total annual reporting and recordkeeping burden:* 50 reporting burden hours. Each respondent will require 15 minutes to prepare and submit the initial request ( $40 \times \frac{1}{4}$  hour = 10 hours). Each respondent will then require 5 minutes to copy and submit receipts for transportation expenses to obtain reimbursement ( $40 \times 12 \times \frac{1}{12}$  hour = 40 hours).

*Estimated average burden per respondent:* 1 hour and 15 minutes.

The Department considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;

- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;

- Enhancing the quality, usefulness, and clarity of the information to be collected; and

- Minimizing the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collections of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed regulations.

#### **Executive Order 12866**

This proposed rule has been reviewed by OMB under Executive Order 12866.

#### **Regulatory Flexibility Act**

The Secretary of Veterans Affairs hereby certifies that the adoption of the proposed rule 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. It is estimated that there are only 1,200 Vietnam veterans' children who suffer from spina bifida and women Vietnam veteran's children who suffer from spina bifida or other covered birth defects. They are widely dispersed geographically, and the services provided to them would not have a significant impact on any small businesses. Moreover, the institutions capable of providing appropriate services and vocational training to Vietnam veteran's children with covered birth defects or spina bifida are generally large capitalization facilities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

#### **Catalog of Federal Domestic Assistance**

The Catalog of Federal Domestic Assistance program number for benefits

affected by this rule is 64.128. There is no Catalog of Federal Domestic Assistance program number for other benefits affected by this rule.

#### List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflicts of interest, Defense Department, Education, Employment, Government contracts, Grant programs-education, Grant programs-veterans, Health care, Loan programs-education, Loan programs-veterans, Manpower training programs, Personnel training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

Approved: October 26, 2001.

**Anthony J. Principi,**

*Secretary of Veterans Affairs.*

For the reasons set forth in the preamble, 38 CFR part 21 is proposed to be amended as set forth below:

#### PART 21—VOCATIONAL REHABILITATION AND EDUCATION

1. In part 21, the heading of subpart M is revised to read as follows:

##### Subpart M—Vocational Training and Rehabilitation for Certain Children of Vietnam Veterans—Spina Bifida and Covered Birth Defects

2. The authority citation for part 21, subpart M is revised to read as follows:

**Authority:** 38 U.S.C. 101, 501, 512, 1151 note, 1802, 1804–1805, 1811, 1811 note, 1812, 1814, 1816, 1821–1824, 5112, unless otherwise noted.

3. Sections 21.8010 through 21.8410 are revised to read as follows:

#### General

##### § 21.8010 Definitions and abbreviations.

(a) *Program-specific definitions and abbreviations.* For the purposes of this subpart:

*Covered birth defect* means the same as defined at § 3.815(c)(3) of this title.

*Eligible child* means, as appropriate, either an *individual* as defined at § 3.814(c)(2) of this title who suffers from spina bifida, or an *individual* as defined at § 3.815(c)(2) of this title who has a covered birth defect other than a birth defect described in § 3.815(a)(2).

*Employment assistance* means employment counseling, placement and post-placement services, and personal and work adjustment training.

*Institution of higher education* has the same meaning that § 21.4200 provides

for the term *institution of higher learning*.

*Program of employment services* means the services an eligible child may receive if the child's entire program consists only of employment assistance.

*Program participant* means an eligible child who, following an evaluation in which VA finds the child's achievement of a vocational goal is reasonably feasible, elects to participate in a vocational training program under this subpart.

*Spina bifida* means the same as defined at § 3.814(c)(3) of this title.

*Vietnam veteran* means, in the case of a child suffering from spina bifida, the same as defined at § 3.814(c)(1) or § 3.815(c)(1) of this title and, in the case of a child with a covered birth defect, the same as defined at § 3.815(c)(1) of this title.

*Vocational training program* means the vocationally oriented training services, and assistance, including placement and post-placement services, and personal and work-adjustment training that VA finds necessary to enable the child to prepare for and participate in vocational training or employment. A vocational training program may include a program of education offered by an institution of higher education only if the program is predominantly vocational in content.

*VR&E* refers to the Vocational Rehabilitation and Employment activity (usually a division) in a Veterans Benefits Administration regional office, the staff members of that activity in the regional office or in outbased locations, and the services that activity provides.

(Authority: 38 U.S.C. 101, 1802, 1804, 1811–1812, 1814, 1821)

(b) *Other terms and abbreviations.* The following terms and abbreviations have the same meaning or explanation that § 21.35 provides:

- (1) CP (Counseling psychologist);
- (2) Program of education;
- (3) Rehabilitation facility;
- (4) School, educational institution, or institution;
- (5) Training establishment;
- (6) Vocational goal;
- (7) VRC (Vocational rehabilitation counselor);
- (8) VRS (Vocational rehabilitation specialist); and
- (9) Workshop.

(Authority: 38 U.S.C. 1804, 1811, 1814, 1821)

##### § 21.8012 Vocational training program for certain children of Vietnam veterans—spina bifida and covered birth defects.

VA will provide an evaluation to an eligible child to determine the child's potential for achieving a vocational goal.

If this evaluation establishes that it is feasible for the child to achieve a vocational goal, VA will provide the child with the vocational training, employment assistance, and other related rehabilitation services authorized by this subpart that VA finds the child needs to achieve a vocational goal, including employment.

(Authority: 38 U.S.C. 1804, 1812, 1814)

##### § 21.8014 Application.

(a) *Filing an application.* To participate in a vocational training program, the child of a Vietnam veteran (or the child's parent or guardian, an authorized representative, or a Member of Congress acting on behalf of the child) must file an application. An application is a request for an evaluation of the feasibility of the child's achievement of a vocational goal and, if a CP or VRC determines that achievement of a vocational goal is feasible, for participation in a vocational training program. The application may be in any form, but it must:

(1) Be in writing over the signature of the applicant or the person applying on the child's behalf;

(2) Provide the child's full name, address, and VA claim number, if any, and the parent Vietnam veteran's full name and Social Security number or VA claim number, if any; and

(3) Clearly identify the benefit sought.

(Authority: 38 U.S.C. 1804(a), 1822, 5101)

(b) *Time for filing.* For a child claiming eligibility based on having spina bifida, an application under this subpart may be filed at any time after September 30, 1997. For a child claiming eligibility based on a covered birth defect, an application under this subpart may be filed at any time after November 30, 2001.

(Authority: 38 U.S.C. 1804, 1811, 1811 note, 1812, 1814, 1821)

##### § 21.8016 Nonduplication of benefits.

(a) *Election of benefits—chapter 35.* An eligible child may not receive benefits concurrently under 38 U.S.C. chapter 35 and under this subpart. If the child is eligible for both benefits, he or she must elect in writing which benefit to receive.

(Authority: 38 U.S.C. 1804(e)(1), 1814, 1824)

(b) *Reelections of benefits—chapter 35.* An eligible child receiving benefits under this subpart or under 38 U.S.C. chapter 35 may change his or her election at any time. A reelection between benefits under this subpart and under 38 U.S.C. chapter 35 must be prospective, however, and may not result in an eligible child receiving

benefits under both programs for the same period of training.

(Authority: 38 U.S.C. 1804(e)(1), 1814, 1824)

(c) *Length of benefits under multiple programs—chapter 35.* The aggregate period for which an eligible child may receive assistance under this subpart and under 38 U.S.C. chapter 35 together may not exceed 48 months of full-time training or the part-time equivalent.

(Authority: 38 U.S.C. 1804(e)(2), 1814)

(d) *Nonduplication of benefits under 38 U.S.C. 1804 and 1814.* An eligible child may only be provided one program of vocational training under this subpart.

(Authority: 38 U.S.C. 1804, 1814, 1824)

### Basic Entitlement Requirements

#### § 21.8020 Entitlement to vocational training and employment assistance.

(a) *Basic entitlement requirements.* Under this subpart, for an eligible child to receive vocational training, employment assistance, and related rehabilitation services and assistance to achieve a vocational goal (to include employment), the following requirements must be met:

(1) A CP or VRC must determine that achievement of a vocational goal by the child is reasonably feasible; and

(2) The child and VR&E staff members must work together to develop and then agree to an individualized written plan of vocational rehabilitation identifying the vocational goal and the means to achieve this goal.

(Authority: 38 U.S.C. 1804(b), 1814)

(b) *Services and assistance.* An eligible child may receive the services and assistance described in § 21.8050(a). The following sections in subpart A of this part apply to the provision of these services and assistance in a manner comparable to their application for a veteran under that subpart:

- (1) Section 21.250(a) and (b)(2);
- (2) Section 21.252;
- (3) Section 21.254;
- (4) Section 21.256 (not including paragraph (e)(2));
- (5) Section 21.257; and
- (6) Section 21.258.

(Authority: 38 U.S.C. 1804, 1814)

(c) *Requirements to receive employment services and assistance.* VA will provide employment services and assistance under paragraph (b) of this section only if the eligible child:

- (1) Has achieved a vocational objective;
- (2) Has voluntarily ceased vocational training under this subpart, but the case manager finds the child has attained sufficient skills to be employable; or

(3) VA determines during evaluation that the child already has the skills necessary for suitable employment and does not need additional training, but to secure suitable employment the child does need the employment assistance that paragraph (b) of this section describes.

(Authority: 38 U.S.C. 1804, 1814)

(d) *Additional employment services and assistance.* If an eligible child has received employment assistance and obtains a suitable job, but VA later finds the child needs additional employment services and assistance, VA may provide the child with these services and assistance if, and to the extent, the child has remaining program entitlement.

(Authority: 38 U.S.C. 1804, 1814)

(e) *Program entitlement usage.* (1) *Basic entitlement period.* An eligible child will be entitled to receive 24 months of full-time training, services, and assistance (including employment assistance) or the part-time equivalent, as part of a vocational training program.

(2) *Extension of basic entitlement period.* VA may extend the basic 24-month entitlement period, not to exceed another 24 months of full-time program participation, or the part-time equivalent, if VA determines that:

- (i) The extension is necessary for the child to achieve a vocational goal identified before the end of the basic 24-month entitlement period; and
- (ii) The child can achieve the vocational goal within the extended period.

(3) *Principles for charging entitlement.* VA will charge entitlement usage for training, services, or assistance (but not the initial evaluation, as described in § 21.8032) furnished to an eligible child under this subpart on the same basis as VA would charge for similar training, services, or assistance furnished a veteran in a vocational rehabilitation program under 38 U.S.C. chapter 31. VA may charge entitlement at a half-time, three-quarter-time, or full-time rate based upon the child's training time using the rate-of-pursuit criteria in § 21.8310. The provisions concerning reduced work tolerance under § 21.312, and those relating to less-than-half-time training under § 21.314, do not apply under this subpart.

(Authority: 38 U.S.C. 1804, 1814)

#### § 21.8022 Entry and reentry.

(a) *Date of program entry.* VA may not enter a child into a vocational training program or provide an evaluation or any training, services, or assistance under this subpart before the date VA first receives an application for a vocational

training program filed in accordance with § 21.8014.

(Authority: 38 U.S.C. 1151 note, 1804, 1811, 1811 note, 1812, 1814)

(b) *Reentry.* If an eligible child interrupts or ends pursuit of a vocational training program and VA subsequently allows the child to reenter the program, the date of reentrance will accord with the facts, but may not precede the date VA receives an application for the reentrance.

(Authority: 38 U.S.C. 1804, 1814, 1822)

### Evaluation

#### § 21.8030 Requirement for evaluation of child.

(a) *Children to be evaluated.* The VR&E Division will evaluate each child who:

- (1) Applies for a vocational training program; and
- (2) Has been determined to be an eligible child as defined in § 21.8010.

(Authority: 38 U.S.C. 1804(a), 1814)

(b) *Purpose of evaluation.* The evaluation has two purposes:

- (1) To ascertain whether achievement of a vocational goal by the child is reasonably feasible; and
- (2) If a vocational goal is reasonably feasible, to develop an individualized plan of integrated training, services, and assistance that the child needs to prepare for and participate in vocational training or employment.

(Authority: 38 U.S.C. 1804, 1814)

#### § 21.8032 Evaluations.

(a) *Scope and nature of evaluation.* The scope and nature of the evaluation under this program will be comparable to an evaluation of the reasonable feasibility of achieving a vocational goal for a veteran under 38 U.S.C. chapter 31 and §§ 21.50(b)(5) and 21.53(b) and (d).

(Authority: 38 U.S.C. 1804(a), 1814)

(b) *Specific services to determine the reasonable feasibility of achieving a vocational goal.* As a part of the evaluation of reasonable feasibility of achieving a vocational goal, VA may provide the following specific services, as appropriate:

- (1) Assessment of feasibility by a CP or VRC;
- (2) Review of feasibility assessment and of need for special services by the Vocational Rehabilitation Panel;
- (3) Provision of medical, testing, and other diagnostic services to ascertain the child's capacity for training and employment; and
- (4) Evaluation of employability by professional staff of an educational or

rehabilitation facility, for a period not to exceed 30 days.

(Authority: 38 U.S.C. 1804(a), 1814)

(c) *Responsibility for evaluation.* A CP or VRC will make all determinations as to the reasonable feasibility of achieving a vocational goal.

(Authority: 38 U.S.C. 1804(a), (b), 1814)

### Services and Assistance to Program Participants

#### § 21.8050 Scope of training, services, and assistance.

(a) *Allowable training, services, and assistance.* VA may provide to vocational training program participants:

(1) Vocationally oriented training, services, and assistance, to include:

(i) Training in an institution of higher education if the program is predominantly vocational; and

(ii) Tuition, fees, books, equipment, supplies, and handling charges.

(2) Employment assistance including:

(i) Vocational, psychological, employment, and personal adjustment counseling;

(ii) Services to place the individual in suitable employment and post-placement services necessary to ensure satisfactory adjustment in employment; and

(iii) Personal adjustment and work adjustment training.

(3) Vocationally oriented independent living services only to the extent that the services are indispensable to the achievement of the vocational goal and do not constitute a significant portion of the services to be provided.

(4) Other vocationally oriented services and assistance of the kind VA provides veterans under the 38 U.S.C. chapter 31 program, except as paragraph (c) of this section provides, that VA determines the program participant needs to prepare for and take part in vocational training or in employment.

(Authority: 38 U.S.C. 1804(c), 1814)

(b) *Vocational training program.* VA will provide either directly or by contract, agreement, or arrangement with another entity, and at no cost to the beneficiary, the vocationally oriented training, other services, and assistance that VA approves for the individual child's program under this subpart. Authorization and payment for approved services will be made in a comparable manner to that VA provides for veterans under the 38 U.S.C. chapter 31 program.

(Authority: 38 U.S.C. 1804(c), 1814)

(c) *Prohibited services and assistance.* VA may not provide to a vocational training program participant any:

(1) Loan;

(2) Subsistence allowance;

(3) Automobile adaptive equipment;

(4) Training at an institution of higher education in a program of education that is not predominantly vocational in content;

(5) Employment adjustment allowance;

(6) Room and board (other than for a period of 30 days or less in a special rehabilitation facility either for purposes of an extended evaluation or to improve and enhance vocational potential);

(7) Independent living services, except those that are incidental to the pursuit of the vocational training program.

(Authority: 38 U.S.C. 1804(c), 1814)

#### Duration of Vocational Training

##### § 21.8070 Basic duration of a vocational training program.

(a) *Basic duration of a vocational training program.* The duration of a vocational training program, as paragraphs (e)(1) and (e)(2) of § 21.8020 provide, may not exceed 24 months of full-time training, services, and assistance or the part-time equivalent, except as § 21.8072 allows.

(Authority: 38 U.S.C. 1804(d), 1814)

(b) *Responsibility for estimating the duration of a vocational training program.* While preparing the individualized written plan of vocational rehabilitation, the CP or VRC will estimate the time the child needs to complete a vocational training program.

(Authority: 38 U.S.C. 1804(c), 1814)

(c) *Duration and scope of training must meet general requirements for entry into the selected occupation.* The child will receive training, services, and assistance, as § 21.8120 describes, for a period that VA determines the child needs to reach the level employers generally recognize as necessary for entry into employment in a suitable occupational objective.

(Authority: 38 U.S.C. 1804(c), 1814)

(d) *Approval of training beyond the entry level.* To qualify for employment in a particular occupation, the child may need training that exceeds the amount a person generally needs for employment in that occupation. VA will provide the necessary additional training under one or more of the following conditions:

(1) Training requirements for employment in the child's vocational goal in the area where the child lives or

will seek employment exceed those job seekers generally need for that type of employment;

(2) The child is preparing for a type of employment in which he or she will be at a definite disadvantage in competing with nondisabled persons and the additional training will offset the competitive disadvantage;

(3) The choice of a feasible occupation is limited, and additional training will enhance the child's employability in one of the feasible occupations; or

(4) The number of employment opportunities within a feasible occupation is restricted.

(Authority: 38 U.S.C. 1804(c), 1814)

(e) *Estimating the duration of the training period.* In estimating the length of the training period the eligible child needs, the CP or VRC must determine that:

(1) The proposed vocational training would not normally require a person without a disability more than 24 months of full-time pursuit, or the part-time equivalent, for successful completion; and

(2) The program of training and other services the child needs, based upon VA's evaluation, will not exceed 24 months or the part-time equivalent. In calculating the proposed program's length, the CP or VRC will follow the procedures in § 21.8074(a).

(Authority: 38 U.S.C. 1804(d), 1814)

(f) *Required selection of an appropriate vocational goal.* If the total period the child would require for completion of an initial vocational training program in paragraph (e) of this section is more than 24 months, or the part-time equivalent, the CP or VRC must work with the child to select another suitable initial vocational goal.

(Authority: 38 U.S.C. 1804(d)(2), 1814)

##### § 21.8072 Authorizing training, services, and assistance beyond the initial individualized written plan of vocational rehabilitation.

(a) *Extension of the duration of a vocational training program.* VA may authorize an extension of a vocational training program when necessary to provide additional training, services, and assistance to enable the child to achieve the vocational or employment goal identified before the end of the child's basic entitlement period, as stated in the individualized written plan of vocational rehabilitation under § 21.8080. A change from one occupational objective to another in the same field or occupational family meets the criterion for prior identification in the individualized written plan of vocational rehabilitation.

(Authority: 38 U.S.C. 1804(d)(2), (e)(2), 1814)

(b) *Extensions for prior participants in the program.* (1) Except as paragraph (b)(2) of this section provides, VA may authorize additional training, limited to the use of remaining program entitlement including any allowable extension, for an eligible child who previously participated in vocational training under this subpart. The additional training must:

(i) Be designed to enable the child to complete the prior vocational goal or a different vocational goal; and

(ii) Meet the same provisions as apply to training for new participants.

(2) An eligible child who has previously achieved a vocational goal in a vocational training program under this subpart may not receive additional training under paragraph (b)(1) of this section unless a CP or VRC sets aside the child's achievement of that vocational goal under § 21.8284.

(Authority: 38 U.S.C. 1804(b) through (e), 1814)

(c) *Responsibility for authorizing a program extension.* A CP or VRC may approve extensions of the vocational training program the child is pursuing up to the maximum program limit of 48 months if the CP or VRC determines that the child needs the additional time to successfully complete training and obtain employment, and the following conditions are met:

(1) The child has completed more than half of the planned training; and

(2) The child is making satisfactory progress.

(Authority: 38 U.S.C. 1804(d)(2), 1814)

#### **§ 21.8074 Computing the period for vocational training program participation.**

(a) *Computing the participation period.* To compute the number of months and days of an eligible child's participation in a vocational training program:

(1) Count the number of actual months and days of the child's:

(i) Pursuit of vocational education or training;

(ii) Receipt of extended evaluation-type services and training, or services and training to enable the child to prepare for vocational training or employment, if a veteran in a 38 U.S.C. chapter 31 program would have received a subsistence allowance while receiving the same type of services and training; and

(iii) Receipt of employment and post-employment services (any period of employment or post-employment services is considered full-time program pursuit).

(2) Do not count:

(i) The initial evaluation period;

(ii) Any period before the child enters a vocational training program under this subpart;

(iii) Days of authorized leave; and

(iv) Other periods during which the child does not pursue training, such as periods between terms.

(3) Convert part-time training periods to full-time equivalents.

(4) Total the months and days under paragraphs (a)(1) and (a)(3) of this section. This sum is the period of the child's participation in the program.

(Authority: 38 U.S.C. 1804(d), 1814)

(b) *Consistency with principles for charging entitlement.* Computation of the program participation period under this section will be consistent with the principles for charging entitlement under § 21.8020.

(Authority: 38 U.S.C. 1804(d), 1814)

#### **Individualized Written Plan of Vocational Rehabilitation**

##### **§ 21.8080 Requirement for an individualized written plan of vocational rehabilitation.**

(a) *General.* A CP or VRC will work in consultation with each child for whom a vocational goal is feasible to develop an individualized written plan of vocational rehabilitation services and assistance to meet the child's vocational training needs. The CP or VRC will develop this individualized written plan of vocational rehabilitation in a manner comparable to the rules governing the development of an individualized written rehabilitation plan (IWRP) for a veteran for 38 U.S.C. chapter 31 purposes, as §§ 21.80, 21.84, 21.88, 21.90, 21.92, 21.94 (a) through (d), and 21.96 provide.

(Authority: 38 U.S.C. 1804(b), 1814)

(b) *Selecting the type of training to include in the individualized written plan of vocational rehabilitation.* If training is necessary, the CP or VRC will explore a range of possibilities, to include paid and unpaid on-job training, institutional training, and a combination of on-job and institutional training to accomplish the goals of the program. Generally, an eligible child's program should include on-job training, or a combination of on-job and institutional training, when this training:

(1) Is available;

(2) Is as suitable as using only institutional training for accomplishing the goals of the program; and

(3) Will meet the child's vocational training program needs.

(Authority: 38 U.S.C. 1804(b), (c), 1814)

##### **§ 21.8082 Inability of child to complete individualized written plan of vocational rehabilitation or achieve vocational goal.**

(a) *Inability to timely complete an individualized written plan of vocational rehabilitation or achieve identified goal.* After a vocational training program has begun, the VR&E case manager may determine that the eligible child cannot complete the vocational training program described in the child's individualized written plan of vocational rehabilitation within the time limits of the individualized written plan of vocational rehabilitation or cannot achieve the child's identified vocational goal. Subject to paragraph (b) of this section, VR&E may assist the child in revising or selecting a new individualized written plan of vocational rehabilitation or goal.

(b) *Allowable changes in the individualized written plan of vocational rehabilitation or goal.* Any change in the eligible child's individualized written plan of vocational rehabilitation or vocational goal is subject to the child's continuing eligibility under the vocational training program and the provisions governing duration of a vocational training program in §§ 21.8020(e) and 21.8070 through 21.8074.

(Authority: 38 U.S.C. 1804(d), 1804(e), 1814)

(c) *Change in the individualized written plan of vocational rehabilitation or vocational goal.* (1) The individualized written plan of vocational rehabilitation or vocational goal may be changed under the same conditions as provided for a veteran under § 21.94 (a) through (d), and subject to § 21.8070 (d) through (f), if:

(i) The CP or VRC determines that achievement of a vocational goal is still reasonably feasible and that the new individualized written plan of vocational rehabilitation or goal is necessary to enable the eligible child to prepare for and participate in vocational training or employment; and

(ii) Reentrance is authorized under § 21.8284 in a case when the child has completed a vocational training program under this subpart.

(2) A CP or VRC may approve a change of vocational goal from one field or occupational family to another field or occupational family if the child can achieve the new goal:

(i) Before the end of the basic 24-month entitlement period that

§ 21.8020(e)(1) describes; or

(ii) Before the end of any allowable extension under §§ 21.8020(e)(2) and 21.8072 if the new vocational goal in

another field or occupational family was identified during the basic 24-month entitlement period.

(3) A change from one occupational objective to another in the same field or occupational family does not change the planned vocational goal.

(4) The child must have sufficient remaining entitlement to pursue the new individualized written plan of vocational rehabilitation or goal, as § 21.8020 provides.

(Authority: 38 U.S.C. 1804(d), 1814)

(d) *Assistance if child terminates planned program before completion.* If the eligible child elects to terminate the planned vocational training program, he or she will receive the assistance that § 21.80(d) provides in identifying other resources through which to secure the desired training or employment.

(Authority: 38 U.S.C. 1804(c), 1814)

### Counseling

#### § 21.8100 Counseling.

An eligible child requesting or receiving services and assistance under this subpart will receive professional counseling by VR&E and other qualified VA staff members, and by contract counseling providers, as necessary, in a manner comparable to VA's provision of these services to veterans under the 38 U.S.C. chapter 31 program, as §§ 21.100 and 21.380 provide.

(Authority: 38 U.S.C. 1803(c)(8), 1804(c), 1814)

### Vocational Training, Services, and Assistance

#### § 21.8120 Vocational training, services, and assistance.

(a) *Purposes.* An eligible child may receive training, services, and assistance to enable the child to prepare for and participate in vocational training or employment.

(Authority: 38 U.S.C. 1804(b), (c), 1814)

(b) *Training permitted.* VA and the child will select vocationally oriented courses of study and training, completion of which usually results in a diploma, certificate, degree, qualification for licensure, or direct placement in employment. The educational and training services to be provided include:

(1) Remedial, deficiency, and refresher training; and

(2) Training that leads to an identifiable vocational goal. Under this program, VA may authorize all forms of programs that §§ 21.122 through 21.132 describe. This includes education and training programs in institutions of higher education. VA may authorize the

education and training at an undergraduate or graduate degree level, only if the degree program is predominantly vocational in nature. For an eligible child to participate in a graduate degree program, the graduate degree must be a requirement for entry into the child's vocational goal. For example, a master's degree is required to engage in social work. The program of training is predominantly vocational in content if the majority of the instruction provides the technical skills and knowledge employers generally regard as specific to, and required for, entry into the child's vocational goal.

(c) *Cost of education and training services.* The CP or VRC will consider the cost of training in selecting a facility when:

(1) There is more than one facility in the area in which the child resides that:

(i) Meets the requirements for approval under §§ 21.290 through 21.298 (except as provided by § 21.8286(b)),

(ii) Can provide the training, services and other supportive assistance the child's individualized written plan of vocational rehabilitation specifies, and

(iii) Is within reasonable commuting distance; or

(2) The child wishes to train at a suitable facility in another area, even though a suitable facility in the area where the child lives can provide the training. In considering the costs of providing training in this case, VA will use the provisions of § 21.120 (except 21.120(a)(3)), § 21.370 (however, the words "under § 21.282" in § 21.370(b)(2)(iii)(B) do not apply), and § 21.372 in a manner comparable to that for veterans under the 38 U.S.C. chapter 31 program.

(Authority: 38 U.S.C. 1804(b), (c), 1814)

(d) *Accessible courses not locally available.* If suitable vocational training courses are not available in the area in which the child lives, or if they are available but not accessible to the child, VA may make other arrangements. These arrangements may include, but are not limited to:

(1) Transportation of the child, but not the child's family, personal effects, or household belongings, to another area where necessary services are available; or

(2) Use of an individual instructor to provide necessary training in a manner comparable to that for veterans under the 38 U.S.C. chapter 31 program, as § 21.146 describes.

(Authority: 38 U.S.C. 1804(b), (c), 1814)

### Evaluation and Improvement of Vocational Potential

#### § 21.8140 Evaluation and improvement of vocational potential.

(a) *General.* A CP or VRC may use the services that paragraph (d) of this section describes to:

(1) Evaluate vocational training and employment potential;

(2) Provide a basis for planning:

(i) A program of services and assistance to improve the eligible child's preparation for vocational training and employment; or

(ii) A vocational training program;

(3) Reevaluate the vocational training feasibility of an eligible child participating in a vocational training program; and

(4) Remediate deficiencies in the child's basic capabilities, skills, or knowledge to give the child the ability to participate in vocational training or employment.

(Authority: 38 U.S.C. 1804(b), 1814)

(b) *Periods when evaluation and improvement services may be provided.* A CP or VRC may authorize the services described in paragraph (d) of this section, except those in paragraph (d)(4) of this section, for delivery during:

(1) An initial or extended evaluation; or

(2) Pursuit of a vocational training program.

(Authority: 38 U.S.C. 1804(c), 1814)

(c) *Duration of services.* The duration of services needed to improve vocational training and employment potential, furnished on a full-time basis either as a preliminary part or all of a vocational training program, may not exceed 9 months. If VA furnishes these services on a less than full-time basis, the duration will be for the period necessary, but may not exceed the equivalent of 9 months of full-time training.

(Authority: 38 U.S.C. 1804(c), 1814)

(d) *Scope of services.* Evaluation and improvement services include:

(1) Diagnostic services;

(2) Personal and work adjustment training;

(3) Referral for medical care and treatment for the spina bifida, covered birth defects, or related conditions;

(4) Vocationally oriented independent living services indispensable to pursuing a vocational training program;

(5) Language training, speech and voice correction, training in ambulation, and one-hand typewriting;

(6) Orientation, adjustment, mobility and related services; and

(7) Other appropriate services to assist the child in functioning in the proposed training or work environment.  
(Authority: 38 U.S.C. 1804(c), 1814)

(e) *Applicability of chapter 31 rules on special rehabilitation services.* The provisions of § 21.140 do not apply to this subpart. Subject to the provisions of this subpart, the following provisions apply to the vocational training program under this subpart in a manner comparable to that for veterans under the 38 U.S.C. chapter 31 program: § 21.142(a) and (b); § 21.144; § 21.146; § 21.148(a) and (c); § 21.150 other than paragraph (b); § 21.152 other than paragraph (b); § 21.154 other than paragraph (b); and § 21.156.

(Authority: 38 U.S.C. 1804(c), 1814)

### Supplies

#### § 21.8210 Supplies.

(a) *Purpose of furnishing supplies.* VA will provide the child with the supplies that the child needs to pursue training, to obtain and maintain employment, and otherwise to achieve the goal of his or her vocational training program.

(Authority: 38 U.S.C. 1804(c), 1814)

(b) *Types of supplies.* VA may provide books, tools, and other supplies and equipment that VA determines are necessary for the child's vocational training program and are required by similarly circumstanced veterans pursuing such training under 38 U.S.C. chapter 31.

(Authority: 38 U.S.C. 1804(c), 1814)

(c) *Periods during which VA may furnish supplies.* VA may provide supplies to an eligible child receiving:

- (1) An initial or extended evaluation;
- (2) Vocational training, services, and assistance to reach the point of employability; or
- (3) Employment services.

(Authority: 38 U.S.C. 1804(c), 1814)

(d) *Other rules.* The provisions of §§ 21.212 through 21.224 apply to children pursuing a vocational training program under this subpart in a comparable manner as VA provides supplies to veterans under 38 U.S.C. chapter 31, except the following portions:

- (1) Section 21.216(a)(3) pertaining to special modifications, including automobile adaptive equipment;
- (2) Section 21.220(a)(1) pertaining to advancements from the revolving fund loan;
- (3) Section 21.222(b)(1)(x) pertaining to discontinuance from an independent living services program.

(Authority: 38 U.S.C. 1804(c), 1814)

### Program Costs

#### § 21.8260 Training, services, and assistance costs.

The provisions of § 21.262 pertaining to reimbursement for training and other program costs apply, in a comparable manner as provided under the 38 U.S.C. chapter 31 program for veterans, to payments to facilities, vendors, and other providers for training, supplies, and other services they deliver under this subpart.

(Authority: 38 U.S.C. 1804(c), 1814)

#### Vocational Training Program Entrance, Termination, and Resources

#### § 21.8280 Effective date of induction into a vocational training program.

Subject to the limitations in § 21.8022, the date an eligible child is inducted into a vocational training program will be the date the child first begins to receive training, services, or assistance under an individualized written plan of vocational rehabilitation.

(Authority: 38 U.S.C. 1804(c), (d), 1814)

#### § 21.8282 Termination of a vocational training program.

A case manager may terminate a vocational training program under this subpart for cause, including lack of cooperation, failure to pursue the individualized written plan of vocational rehabilitation, fraud, administrative error, or finding that the child no longer has a covered birth defect. An eligible child for whom a vocational goal is reasonably feasible remains eligible for the program subject to the rules of this subpart unless the child's eligibility for or entitlement to a vocational training program under this subpart resulted from fraud or administrative error or unless VA finds the child no longer has a covered birth defect. The effective date of termination will be the earliest of the following applicable dates:

(a) *Fraud.* If an eligible child establishes eligibility for or entitlement to benefits under this subpart through fraud, VA will terminate the award of vocational training and rehabilitation as of the date VA first began to pay benefits.

(b) *Administrative error.* If an eligible child who is not entitled to benefits under this subpart receives those benefits through VA administrative error, VA will terminate the award of benefits as of the first day of the calendar month beginning at least 60 days after notifying the child of the proposed termination. This 60-day period may not result in the entrance of the child into a new quarter, semester,

or other term of training unless VA has already obligated payment for the training.

(c) *Change in status as an eligible child with a covered birth defect.* If VA finds that a child no longer has a covered birth defect, VA will terminate the award of benefits effective the last day of the month in which such determination becomes final.

(d) *Lack of cooperation or failure to pursue individualized written plan of vocational rehabilitation.* If reasonable VR&E efforts to motivate an eligible child do not resolve a lack of cooperation or failure to pursue an individualized written plan of vocational rehabilitation, VA will terminate the award of benefits as of the first day of the calendar month beginning at least 60 days after notifying the child of the proposed termination. This 60-day period may not result in the entrance of the child into a new quarter, semester, or other term of training. VA will deobligate payment for training in the new quarter, semester, or other term of training.

(Authority: 38 U.S.C. 1804, 1814)

#### § 21.8284 Additional vocational training.

VA may provide an additional period of training or services under a vocational training program to an eligible child who has completed training for a vocational goal and/or been suitably employed under this subpart, if the child is otherwise eligible and has remaining program entitlement as provided in § 21.8072(b), only under one of the following conditions:

(a) Current facts, including any relevant medical findings, establish that the child's disability has worsened to the extent that he or she can no longer perform the duties of the occupation which was the child's vocational goal under this subpart;

(b) The occupation that was the child's vocational goal under this subpart is now unsuitable;

(c) The vocational training program services and assistance the child originally received are now inadequate to make the child employable in the occupation which he or she sought to achieve;

(d) Experience has demonstrated that VA should not reasonably have expected employment in the objective or field for which the child received vocational training program services and assistance; or

(e) Technological change that occurred after the child achieved a vocational goal under this subpart now prevents the child from:

- (1) Performing the duties of the occupation for which VA provided

training, services, or assistance, or in a related occupation; or

(2) Securing employment in the occupation for which VA provided training, services, or assistance, or in a related occupation.

(Authority: 38 U.S.C. 1804(c), 1814)

**§ 21.8286 Training resources.**

(a) *Applicable 38 U.S.C. chapter 31 resource provisions.* The provisions of § 21.146 and §§ 21.290 through 21.298 apply to children pursuing a vocational training program under this subpart in a comparable manner as for veterans under the 38 U.S.C. chapter 31 program, except as paragraph (b) of this section specifies.

(Authority: 38 U.S.C. 1804(c), 1814)

(b) *Limitations.* The provisions of § 21.294(b)(1)(i) and (b)(1)(ii) pertaining to independent living services do not apply to this subpart. The provisions of § 21.294(b)(1)(iii) pertaining to authorization of independent living services as a part of an individualized written plan of vocational rehabilitation apply to children under this subpart in a comparable manner as for veterans under the 38 U.S.C. chapter 31 program only to the extent § 21.8050 allows.

(Authority: 38 U.S.C. 1804(c), 1814)

**Rate of Pursuit**

**§ 21.8310 Rate of pursuit.**

(a) *General requirements.* VA will approve an eligible child's pursuit of a vocational training program at a rate consistent with his or her ability to successfully pursue training, considering:

- (1) Effects of his or her disability;
- (2) Family responsibilities;
- (3) Travel;
- (4) Reasonable adjustment to training; and
- (5) Other circumstances affecting the child's ability to pursue training.

(Authority: 38 U.S.C. 1804(c), 1814)

(b) *Continuous pursuit.* An eligible child should pursue a program of vocational training with as little interruption as necessary, considering the factors in paragraph (a) of this section.

(Authority: 38 U.S.C. 1804(c), 1814)

(c) *Responsibility for determining the rate of pursuit.* VR&E staff members will consult with the child when determining the rate and continuity of pursuit of a vocational training program. These staff members will also confer with the medical consultant and the Vocational Rehabilitation Panel described in §§ 21.60 and 21.62, as

necessary. This rate and continuity of pursuit determination will occur during development of the individualized written plan of vocational rehabilitation, but may change later, as necessary to enable the child to complete training.

(Authority: 38 U.S.C. 1804(c), 1814)

(d) *Measurement of training time used.* VA will measure the rate of pursuit in a comparable manner to rate of pursuit measurement under § 21.310 for veterans under the 38 U.S.C. chapter 31 program.

(Authority: 38 U.S.C. 1804(c), 1814)

**Authorization of Services**

**§ 21.8320 Authorization of services.**

The provisions of § 21.326, pertaining to the commencement and termination dates of a period of employment services, apply to children under this subpart in a manner comparable to that provided for veterans under the 38 U.S.C. chapter 31 program. References in that section to an individualized employment assistance plan or IEAP are considered as referring to the child's individualized written plan of vocational rehabilitation under this subpart.

(Authority: 38 U.S.C. 1804(c), 1814)

**Leaves of Absence**

**§ 21.8340 Leaves of absence.**

(a) *Purpose of leave of absence.* The purpose of the leave system is to enable the child to maintain his or her status as an active program participant.

(Authority: 38 U.S.C. 1804(c), 1814)

(b) *Basis for leave of absence.* The VR&E case manager may grant the child leaves of absence for periods during which the child fails to pursue a vocational training program. For prolonged periods of absence, the VR&E case manager may approve leaves of absence only if the case manager determines the child is unable to pursue a vocational training program through no fault of the child.

(Authority: 38 U.S.C. 1804(c), 1814)

(c) *Effect on entitlement.* During a leave of absence, the running of the basic 24-month period of entitlement, plus any extensions thereto, shall be suspended until the child resumes the program.

(Authority: 38 U.S.C. 1804(c), 1814)

**Satisfactory Conduct and Cooperation**

**§ 21.8360 Satisfactory conduct and cooperation.**

The provisions for satisfactory conduct and cooperation in §§ 21.362 and 21.364, except as otherwise

provided in this section, apply to children under this subpart in a manner comparable to the way they apply to veterans under the 38 U.S.C. chapter 31 program. If an eligible child fails to meet these requirements for satisfactory conduct or cooperation, the VR&E case manager will terminate the child's vocational training program. VA will not grant an eligible child reentrance to a vocational training program unless the reasons for unsatisfactory conduct or cooperation have been removed.

(Authority: 38 U.S.C. 1804(c), 1814)

**Transportation Services**

**§ 21.8370 Authorization of transportation services.**

(a) *General.* VA will authorize transportation services necessary for an eligible child to pursue a vocational training program. The sections in subpart A of this part that are referred to in this paragraph apply to children under this subpart in a manner comparable to the way they apply to veterans under the 38 U.S.C. chapter 31 program. Transportation services include:

- (1) Transportation for evaluation or counseling under § 21.376;
- (2) Intraregional travel under § 21.370 (except that assurance that the child meets all basic requirements for induction into training will be determined without regard to the provisions of § 21.282) and interregional travel under § 21.372;
- (3) Special transportation allowance under § 21.154; and
- (4) Commuting to and from training and while seeking employment, subject to paragraphs (c) and (d) of this section.

(b) *Reimbursement.* For transportation services that VA authorizes, VA will normally pay in arrears and in the same manner as tuition, fees, and other services under this program.

(Authority: 38 U.S.C. 1804(c), 1814)

(c) *Payment for commuting expenses for training and seeking employment.* VA may pay for transportation during the period of vocational training and the first 3 months the child receives employment services. VA may reimburse the child's costs, not to exceed \$200 per month, of commuting to and from training and seeking employment if he or she requests this assistance and VA determines, after careful examination of the child's situation and subject to the limitations in paragraph (d) of this section, that the child would be unable to pursue training or employment without this assistance. VA may:

(1) Reimburse the facility at which the child is training if the facility provided transportation or related services; or

(2) Reimburse the child for his or her actual commuting expense if the child paid for the transportation.

(Authority: 38 U.S.C. 1804(c), 1814)

(d) *Limitations.* Payment of commuting expenses under paragraph (a)(4) of this section may not be made for any period when the child:

(1) Is gainfully employed;

(2) Is eligible for, and entitled to, payment of commuting costs through other VA and non-VA programs; or

(3) Can commute to school with family, friends, or fellow students.

(Authority: 38 U.S.C. 1804(c), 1814)

(e) *Documentation.* VA must receive supportive documentation with each

request for reimbursement. The individualized written plan of vocational rehabilitation will specify whether VA will pay monthly or at a longer interval.

(Authority: 38 U.S.C. 1804(c), 1814)

(f) *Nonduplication.* An eligible child eligible for reimbursement of transportation services both under this section and under § 21.154 will receive only the benefit under § 21.154.

(Authority: 38 U.S.C. 1804(c), 1814)

#### **Additional Applicable Regulations**

##### **§ 21.8380 Additional applicable regulations.**

The following regulations are applicable to children in this program in a manner comparable to that provided for veterans under the 38 U.S.C. chapter

31 program: §§ 21.380, 21.412, 21.414 (except paragraphs (c), (d), and (e)), 21.420, and 21.430.

(Authority: 38 U.S.C. 1804, 1814, 5112)

#### **Delegation of Authority**

##### **§ 21.8410 Delegation of authority.**

The Secretary delegates authority for making findings and decisions under 38 U.S.C. 1804 and 1814 and the applicable regulations, precedents, and instructions for the program under this subpart to the Under Secretary for Benefits and to VR&E supervisory or non-supervisory staff members.

(Authority: 38 U.S.C. 512(a), 1804, 1814)

[FR Doc. 01-31675 Filed 12-31-01; 8:45 am]

**BILLING CODE 8320-01-P**