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List of Subjects in 38 CFR Part 3

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

Dated: January 7, 2015.
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Acting Director, Office of Regulation Policy & Management, Office of the General Counsel, U.S. Department of Veterans Affairs.

For reasons set out in the preamble, VA proposes to amend 38 CFR part 3 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. Amend the table in § 3.261(a) as follows:
 ■ a. Remove entries (35) through (37) and (39) through (42).
 ■ b. Redesignate entry (38) as entry (35).
 ■ c. Revise newly designated entry (35).
 ■ d. Add entry (36).
 The revision and addition read as follows:
§ 3.261 Character of income; exclusions and estates.
 * * * * *
 (a) *Income.*

| Income | Dependency (parents) | Dependency and indemnity compensation (parents) | Pension; old-law (veterans, surviving spouses and children) | Pension; section 306 (veterans, surviving spouses and children) | See— |
|--|----------------------|---|---|---|-------------|
| (35) Income received under Section 6 of the Radiation Exposure Compensation Act (Pub. L. 101-426). | Excluded | Excluded | Included | Included | § 3.262(t). |
| (36) Other payments excluded from income listed in § 3.279. | Excluded | Excluded | Excluded | Excluded | § 3.262(u). |

* * * * *
 ■ 3. Amend § 3.262 as follows:
 ■ a. Add a sentence to the end of paragraph (l) introductory text.
 ■ b. Remove paragraphs (s), (u), (v), (x), (y), (z), and (aa).
 ■ c. Redesignate paragraphs (t) and (w) as paragraphs (s) and (t), respectively.
 ■ d. Revise newly designated paragraph (t).
 ■ e. Add a new paragraph (u).
 The additions and revision read as follows:

§ 3.262 Evaluation of income.

(l) * * * For the definition of what constitutes a medical expense, see

§ 3.278 Deductible medical expenses.

(t) *Radiation Exposure Compensation Act.* For the purposes of parents' dependency and indemnity compensation and dependency of parents under § 3.250, there shall be excluded from income computation payments under Section 6 of the Radiation Exposure Compensation Act of 1990.

(u) *Other payments.* Other payments excluded from income listed in § 3.279.

§ 3.263 [Amended]

■ 4. Amend § 3.263 by removing paragraphs (e), (f), (g), (h), and (i).

§ 3.270 [Amended]

■ 5. Amend § 3.270 as follows:

■ a. Revise the heading in paragraph (a) by removing "*Sections 3.250 to 3.270*" and adding in its place "*Sections 3.250 through 3.270 and sections 3.278 through 3.279*".
 ■ b. Revise the note to paragraph (a) by removing "§§ 3.250 to 3.270" and adding in its place "§§ 3.250 through 3.270 and §§ 3.278 through 3.279".
 ■ c. Revise the heading in paragraph (b) by removing "*Sections 3.271 to 3.300*" and adding in its place "*Sections 3.271 through 3.300*".
 ■ 6. Amend § 3.271 by adding paragraph (i) to read as follows:

§ 3.271 Computation of income.

(i) *Waiver of receipt of income.* Potential income that is not excludable under §§ 3.272 or 3.279 but is waived by an individual is included as countable income of the individual. However, if an individual withdraws a claim for Social Security benefits, after a finding of entitlement to those benefits, in order to maintain eligibility for unreduced Social Security benefits upon reaching a particular age, VA will not regard this potential income as having been waived and will therefore not count it.
 (Authority: 38 U.S.C. 1503(a))

■ 7. Amend § 3.272 as follows:

■ a. Add a sentence to the end of paragraph (g) introductory text.
 ■ b. Remove paragraphs (k), (o), (p), (r), (t), (u), (v), and (w).

■ c. Redesignate paragraphs (q), (s), and (x) as paragraphs (o), (p), and (q), respectively.
 ■ d. Add new paragraphs (k), (r), and (s).
 ■ e. Revise the authority citation in newly designated paragraph (q).
 The additions and revision read as follows:

§ 3.272 Exclusions from income.

(g) *Medical expenses.* * * * For the definition of what constitutes a medical expense, see § 3.278, Deductible medical expenses.

(k) *Income from certain annuity payments.* VA will exclude annuity payments and count, on an annual basis, only the interest components of payments if a claimant or beneficiary (or someone acting on his or her behalf) transfers an asset to an annuity principal and either of the following statements is true:

(1) VA has already considered the fair market value of the transferred asset as the claimant's or beneficiary's asset for VA purposes.

(2) The funds used to purchase the annuity were proceeds from the sale of the claimant's or beneficiary's primary residence that was previously excluded as an asset under § 3.275(b)(1), and such funds are not sufficient to cause net worth to exceed the net worth limit under § 3.274(a).

* * * * *

(q) * * *

(Authority: 38 U.S.C. 1503(a)(12))

(r) *Veterans' benefits from states and municipalities.* VA will exclude from income payments from a state or municipality to a veteran of a monetary benefit that is paid as a veterans' benefit due to injury or disease. VA will exclude up to \$5,000 of such benefit in any annualization period.

(Authority: 38 U.S.C. 1503(a)(11))

(s) *Other payments.* Other payments excluded from income listed in § 3.279.

■ 8. Revise § 3.274 to read as follows:

§ 3.274 Net worth and VA pension.

(a) *Net worth limit.* For purposes of entitlement to VA pension, the net worth limit effective [insert effective date of the final rule after publication in the **Federal Register**] is [insert the dollar amount of the maximum community spouse resource allowance for Medicaid purposes on the effective date of the final rule]. This limit will be increased by the same percentage as the Social Security increase whenever there is a cost-of-living increase in benefit amounts payable under section 215(i) of title II of the Social Security Act (42 U.S.C. 415(i)). VA will publish the current limit on its Web site at [location to be determined].

(b) *When a claimant's or beneficiary's net worth exceeds the limit.* Except as provided in paragraph (h)(2) of this section, VA will deny or discontinue pension if a claimant's or beneficiary's net worth exceeds the net worth limit in paragraph (a) of this section.

(1) *Net worth* means the sum of a claimant's or beneficiary's assets and annual income.

(2) *Asset calculation.* VA will calculate a claimant's or beneficiary's assets under this section and § 3.275.

(3) *Annual income calculation.* VA will calculate a claimant's or beneficiary's annual income under § 3.271, and will include the annual income of dependents as required by law. See §§ 3.23(d)(4), 3.23(d)(5), and 3.24 for more information on annual income included when VA calculates a claimant's or beneficiary's pension entitlement rate. In calculating annual income for this purpose, VA will subtract all applicable deductible expenses, to include appropriate prospective medical expenses under § 3.272(g).

(4) *Example of net worth calculation.* A surviving spouse has claimed pension. The applicable maximum annual pension rate is \$8,485 and the net worth limit is \$117,240. The surviving spouse's annual income is

\$7,000 and her assets total \$116,000. Therefore, adding the spouse's annual income to her assets produces net worth of \$123,000. This amount exceeds the net worth limit.

(c) *Assets of other individuals included as claimant's or beneficiary's assets.* (1) *Claimant or beneficiary is a veteran.* A veteran's assets include the assets of the veteran as well as the assets of his or her spouse, if the veteran has a spouse.

(2) *Claimant or beneficiary is a surviving spouse.* A surviving spouse's assets include only the assets of the surviving spouse.

(3) *Claimant or beneficiary is a surviving child.* (i) If a surviving child has no custodian or is in the custody of an institution, the child's assets include only the assets of the child.

(ii) If a surviving child has a custodian other than an institution, the child's assets include the assets of the child as well as the assets of the custodian. If the child is in the joint custody of his or her natural or adoptive parent and a stepparent, the child's assets also include the assets of the stepparent. See § 3.57(d) for more information on child custody for pension purposes.

(d) *How a child's net worth affects a veteran's or surviving spouse's pension entitlement.* VA will not consider a child to be a veteran's or surviving spouse's dependent child for pension purposes if the child's net worth exceeds the net worth limit in paragraph (a) of this section.

(1) *Dependent child and potential dependent child.* For the purposes of this section—

(i) "Dependent child" refers to a child for whom a veteran or a surviving spouse is entitled to an increased maximum annual pension rate.

(ii) "Potential dependent child" refers to a child who is excluded from a veteran's or surviving spouse's pension award solely or partly because of this paragraph (d). References in this section to "dependent child" include a potential dependent child.

(2) *Dependent child net worth.* A dependent child's net worth is the sum of his or her annual income and the value of his or her assets.

(3) *Dependent child asset calculation.* VA will calculate the value of a dependent child's assets under this section and § 3.275. A dependent child's assets include the child's assets only.

(4) *Dependent child annual income calculation.* VA will calculate a dependent child's annual income under § 3.271, and will include the annual income of the child as well as the annual income of the veteran or

surviving spouse that would be included if VA were calculating a pension entitlement rate for the veteran or surviving spouse.

(e) *When VA calculates net worth.* Except as provided in paragraph (e)(3) of this section, VA calculates net worth only when:

(1) VA has received—
(i) an original pension claim;
(ii) a new pension claim after a period of non-entitlement;
(iii) a request to establish a new dependent; or

(iv) information that a veteran's, surviving spouse's, or child's net worth has increased or decreased; and

(2) The claimant or beneficiary meets the other factors necessary for pension entitlement as provided in § 3.3(a)(3) and (b)(4).

(3) *When VA may calculate net worth.* If the evidence shows that net worth exceeds the net worth limit, VA may decide the pension claim before determining if the claimant meets other entitlement factors. VA will notify the claimant of the entitlement factors that have not been established.

(f) *How net worth decreases.* Net worth may decrease in three ways: assets can decrease, annual income can decrease, or both assets and annual income can decrease.

(1) *How assets decrease.* A veteran, surviving spouse, or child, or someone acting on their behalf, may decrease assets by spending them on the types of expenses provided in paragraph (f)(1)(i) and (ii) of this section. The expenses must be those of the veteran, surviving spouse, or child, or a relative of the veteran, surviving spouse, or child. The relative must be a member or constructive member of the veteran's, surviving spouse's, or child's household.

(i) Basic living expenses such as food, clothing, shelter, or health care; or

(ii) Education or vocational rehabilitation.

(2) *How annual income decreases.* See §§ 3.271 through 3.273.

(3) *How VA treats payment amounts that can decrease either annual income or assets.* When expenses can be considered as either deductible expenses for purposes of calculating annual income under § 3.272 or basic living expenses for purposes of decreasing assets under paragraph (f)(1) of this section, VA will first apply the amounts paid to decrease annual income, using remaining amounts paid to decrease assets if necessary. VA will not deduct the same expenses from both annual income and assets.

(4) *Example 1.* The net worth limit is \$114,000 and the maximum annual

pension rate (MAPR) is \$12,000. A claimant has assets of \$113,000 and annual income of \$8,000. Adding annual income to assets produces a net worth of \$121,000, which exceeds the net worth limit. The claimant pays unreimbursed medical expenses of \$9,000. Unreimbursed medical expenses are deductible from annual income under § 3.272(g) to the extent that they exceed 5 percent of the applicable MAPR. They may also be deducted from assets under paragraph (h)(1) of this section because they are basic living expenses. VA applies the expenditures to annual income first, which decreases annual income to zero. The claimant's net worth is now \$113,000; therefore, it is not necessary to apply the expenses to assets.

(5) *Example 2.* The net worth limit is \$114,000 and the MAPR is \$12,000. A claimant has assets of \$113,000 and annual income of \$9,500. Adding annual income to assets produces a net worth of \$122,500, which exceeds the net worth limit. The claimant pays unreimbursed medical expenses of \$9,000. Unreimbursed medical expenses are deductible from annual income under § 3.272(g) to the extent that they exceed 5 percent of the applicable MAPR. In this case, medical expenses that exceed \$600 are deductible from income. Medical expenses may also be deducted from assets under paragraph (f)(1) of this section. VA applies the expenditures to annual income first, which decreases annual income to \$1,100. This decreases net worth to \$114,100, which is still over the limit. VA will then deduct the remaining \$600 in medical expenses from assets, bringing net worth to \$113,500.

(g) *Effective dates of pension entitlement or increased entitlement after a denial, reduction, or discontinuance based on excessive net worth.* (1) *Scope of paragraph.* This paragraph (g) applies when VA has:

(i) Discontinued pension or denied pension entitlement for a veteran, surviving spouse, or surviving child based on the veteran's, surviving spouse's, or surviving child's excessive net worth; or

(ii) Reduced pension or denied increased pension entitlement for a veteran or surviving spouse based on a dependent child's excessive net worth.

(2) *Effective date of entitlement or increased entitlement.* The effective date of entitlement or increased entitlement is the day net worth ceases to exceed the limit. For this effective date to apply, the claimant or beneficiary must submit a certified statement that net worth has decreased and VA must receive the certified statement before the pension

claim has become finally adjudicated under § 3.160. This means that VA must receive the certified statement within 1 year after its decision notice to the claimant concerning the denial, reduction, or discontinuance unless the claimant appeals VA's decision. Otherwise, the effective date is the date VA receives a new pension claim. In accordance with § 3.277(a), VA may require the claimant or beneficiary to submit additional evidence as the individual circumstances may require.

(h) *Reduction or discontinuance of beneficiary's pension entitlement based on excessive net worth.* (1) *Effective date of reduction or discontinuance.* When an increase in a beneficiary's or dependent child's net worth results in a pension reduction or discontinuance because net worth exceeds the limit, the effective date of reduction or discontinuance is the last day of the calendar year in which net worth exceeds the limit.

(2) *Net worth decreases before the effective date.* If net worth decreases to the limit or below the limit before the effective date provided in paragraph (h)(1) of this section, VA will not reduce or discontinue the pension award on the basis of excessive net worth.

(i) *Additional effective-date provisions for dependent children.* (1) *Establishing a dependent child on veteran's or surviving spouse's pension award results in increased pension entitlement.* When establishing a dependent child on a veteran's or surviving spouse's pension award results in increased pension entitlement for the veteran or surviving spouse, VA will apply the effective-date provisions in paragraphs (g) and (h) of this section.

(2) *Establishing a dependent child on veteran's or surviving spouse's pension award results in decreased pension entitlement.* (i) When a dependent child's non-excessive net worth results in decreased pension entitlement for the veteran or surviving spouse, the effective date of the decreased pension entitlement rate (i.e., VA action to add the child to the award) is the end of the year that the child's net worth decreases.

(ii) When a dependent child's excessive net worth results in increased pension entitlement for the veteran or surviving spouse, the effective date of the increased pension entitlement rate (i.e., VA action to remove the child from the award) is the date that VA receives a claim for an increased rate based on the child's net worth increase.

(Authority: 38 U.S.C. 1522, 1543, 5110, 5112)

■ 9. Revise § 3.275 to read as follows:

§ 3.275 How VA determines the asset amount for pension net worth determinations.

(a) *Definitions pertaining to assets.* (1) The term *assets* means the fair market value of all property that an individual owns, including all real and personal property, unless excluded under paragraph (b) of this section, less the amount of mortgages or other encumbrances specific to the mortgaged or encumbered property. VA will consider the terms of the recorded deed or other evidence of title to be proof of ownership of a particular asset. See also § 3.276(a)(4), which defines "fair market value."

(2) *Claimant.* (i) Except as provided in paragraph (a)(2)(ii) of this section, for the purposes of this section and § 3.276, *claimant* means a pension beneficiary, a dependent spouse, or a dependent or potential dependent child as described in § 3.274(d), as well as a veteran, surviving spouse, or surviving child pension applicant.

(ii) For the purpose of paragraph (b)(1) of this section, *claimant* means a pension beneficiary or applicant who is a veteran, a surviving spouse, or a surviving child.

(3) *Residential lot area.* For purposes of this section, *residential lot area* means the lot on which a residence sits that is similar in size to other residential lots in the vicinity of the residence, but not to exceed 2 acres (87,120 square feet), unless the additional acreage is not marketable.

(b) *Exclusions from assets.* Assets do not include the following:

(1) *The value of a claimant's primary residence (single-family unit),* including the residential lot area, in which the claimant has an ownership interest. VA recognizes one primary residence per claimant. If the residence is sold, any proceeds from the sale is an asset except to the extent the proceeds are used to purchase another residence within the same calendar year as the year in which the sale occurred.

(i) *Personal mortgage not deductible.* VA will not subtract from a claimant's assets the amount of any mortgages or encumbrances on a claimant's primary residence.

(ii) *Claimant not residing in primary residence.* Although rental income counts as annual income as provided in § 3.271(d), VA will not include a claimant's primary residence as an asset even if the claimant resides in any of the following as defined in § 3.278(b):

(A) A nursing home or medical foster home;

(B) An assisted living or similar residential facility that provides custodial care; or

(C) The home of a family member for custodial care.

(2) *Value of personal effects suitable to and consistent with a reasonable mode of life*, such as appliances and family transportation vehicles.

(3) *Radiation Exposure Compensation Act payments*. Payments made under section 6 of the Radiation Exposure Compensation Act of 1990.

(Authority: 42 U.S.C. 2210 (note))

(4) *Ricky Ray Hemophilia Relief Fund payments*. Payments made under section 103(c) and excluded under section 103(h)(2) of the Ricky Ray Hemophilia Relief Fund Act of 1998.

(Authority: 42 U.S.C. 300c-22 (note))

(5) *Energy Employees Occupational Illness Compensation Program payments*. Payments made under the Energy Employees Occupational Illness Compensation Program.

(Authority: 42 U.S.C. 7385e(2))

(6) *Payments to Aleuts*. Payments made to certain Aleuts under 50 U.S.C. App. 1989c-5.

(Authority: 50 U.S.C. App. 1989c-5(d)(2))

(7) *Other payments*. Other payments excluded from net worth listed in § 3.279, which lists statutory exclusions from income and net worth for all VA needs-based benefits.

(Authority: 38 U.S.C. 1522, 1543)

■ 10. Revise § 3.276 to read as follows:

§ 3.276 Asset transfers and penalty periods.

(a) *Asset transfer definitions*. For purposes of this section—

(1) *Claimant* has the same meaning as defined in § 3.275(a)(2)(i).

(2) *Covered asset* means an asset that—

(i) Was part of a claimant's net worth,

(ii) Was transferred for less than fair market value, and

(iii) If not transferred, would have caused or partially caused the claimant's net worth to exceed the net worth limit under § 3.274(a).

(3) *Covered asset amount* means the monetary amount by which a claimant's net worth would have exceeded the limit due to the covered asset alone if the uncompensated value of the covered asset had been included in net worth.

(i) *Example 1*. The net worth limit under § 3.274(a) is \$115,920. A claimant's assets total \$113,000 and his annual income is zero. However, the claimant transferred \$30,000 by giving it to a friend. If the claimant had not transferred the \$30,000, his net worth would have been \$143,000, which exceeds the net worth limit. The

claimant's covered asset amount is \$27,080, because this is the amount by which the claimant's net worth would have exceeded the limit due to the covered asset.

(ii) *Example 2*. The net worth limit under § 3.274(a) is \$115,920. A claimant's annual income is zero and her total assets are \$117,000, which exceeds the net worth limit. In addition, the claimant transferred \$30,000 by giving \$20,000 to her married son and giving \$10,000 to a friend. The claimant's covered asset amount is \$30,000 because this is the amount by which the claimant's net worth would have exceeded the limit due to the covered assets alone.

(4) *Fair market value* means the price at which an asset would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. VA will use the best available information to determine fair market value, such as inspections, appraisals, public records, and the market value of similar property if applicable.

(5) *Transfer for less than fair market value* means—

(i) Selling, conveying, gifting, or exchanging an asset for an amount less than the fair market value of the asset, or

(ii) An asset transfer to, or purchase of, any financial instrument or investment that reduces net worth and would not be in the claimant's financial interest but for the claimant's attempt to qualify for VA pension by transferring the asset to, or purchasing, the instrument or investment. Examples of such instruments or investments include—

(A) *Annuities*. *Annuity* means a financial instrument that provides income over a defined period of time for an initial payment of principal.

(B) *Trusts*. *Trust* means a legal arrangement by which an individual (the grantor) transfers property to an individual or an entity (the trustee), who manages the property according to the terms of the trust, whether for the grantor's own benefit or for the benefit of another individual.

(6) *Uncompensated value* means the difference between the fair market value of an asset and the amount of compensation an individual receives for it. In the case of a trust, annuity, or other financial instrument or investment described in paragraph (a)(5)(ii) of this section, *uncompensated value* means the amount of money or the monetary value of any other type of asset transferred to such a trust, annuity, or

other financial instrument or investment.

(7) *Look-back period* means the 36-month period immediately preceding the date on which VA receives either an original pension claim or a new pension claim after a period of non-entitlement.

(8) *Penalty period* means a period of non-entitlement, calculated under paragraph (e) of this section, due to transfer of a covered asset.

(b) *General statement of policy pertaining to pension and covered assets*. VA pension is a needs-based benefit and is not intended to preserve the estates of individuals who have the means to support themselves. Accordingly, a claimant may not create pension entitlement by transferring covered assets. VA will review the terms and conditions of asset transfers made during the 36-month look-back period to determine whether the transfer constituted transfer of a covered asset. In accordance with § 3.277(b), for any asset transfer, VA may require a claimant to provide evidence such as a Federal income tax return transcript, the terms of a gift, trust, or annuity, or the terms of a recorded deed or other evidence of title.

(c) *Presumption and exception pertaining to covered assets*. In the absence of clear and convincing evidence showing otherwise, VA presumes that an asset transfer made during the look-back period was for the purpose of decreasing net worth to establish pension entitlement and will consider such an asset to be a covered asset. However, VA will not consider such an asset to be a covered asset if the claimant establishes through clear and convincing evidence that he or she transferred the asset as the result of fraud, misrepresentation, or unfair business practice related to the sale or marketing of financial products or services for purposes of establishing entitlement to VA pension. Evidence substantiating the application of this exception may include a complaint contemporaneously filed with state, local, or Federal authorities reporting the incident.

(d) *Exception for transfers to certain trusts*. VA will not consider as a covered asset an asset that a veteran, a veteran's spouse, or a veteran's surviving spouse transfers to a trust established on behalf of a child of the veteran if:

(1) VA rates or has rated the child incapable of self-support under § 3.356; and

(2) There is no circumstance under which distributions from the trust can be used to benefit the veteran, the veteran's spouse, or the veteran's surviving spouse.

(e) *Penalty periods and calculations.* When a claimant transfers a covered asset during the look-back period, VA will assess a penalty period not to exceed 10 years. VA will calculate the length of the penalty period by dividing the total covered asset amount by the monthly penalty rate described in paragraph (e)(1) of this section and rounding the quotient down to the nearest whole number. The result is the number of months for which VA will not pay pension.

(1) *Monthly penalty rate.* The monthly penalty rate is the applicable maximum annual pension rate (MAPR) under 38 U.S.C. 1521(d), 1542(d), or 1543 described in this paragraph (e)(1) that is in effect as of the date of the pension claim, divided by 12, and rounded down to the nearest whole dollar. The MAPRs are located on VA's Web site at <http://www.benefits.va.gov/pension/>.

(i) If the claimant is a veteran or a surviving spouse, the annual rate is the MAPR at the aid and attendance level for a veteran or a surviving spouse with the applicable number of dependents.

(ii) If the claimant is a child, the annual rate is the child alone MAPR.

(2) *Beginning date of penalty period.* When a claimant transfers a covered asset or assets during the look-back period, the penalty period begins on the first day of the month that follows the date of the transfer. If there was more than one transfer, the penalty period will begin on the first day of the month that follows the date of the last transfer.

(3) *Entitlement upon ending of penalty period.* VA will consider that the claimant, if otherwise qualified, is entitled to benefits effective the last day of the last month of the penalty period, with a payment date as of the first day of the following month in accordance with § 3.31.

(4) *Example of penalty period calculation:* VA receives a pension claim in November 2014. The claimant's net worth is equal to the net worth limit. However, the claimant transferred covered assets totaling \$10,000 on August 20, 2014, and September 23, 2014. Therefore, the total covered asset amount is \$10,000, and the penalty period begins on October 1, 2014. The claimant is a surviving spouse with no dependents, so the applicable MAPR is \$13,563, and the monthly penalty rate is \$1,130. The penalty period is \$10,000/\$1,130 per month = 8 months. The eighth month of the penalty period is May 2015. The surviving spouse may be entitled to pension effective May 31, 2015, with a payment date of June 1, 2015, if other entitlement requirements are met.

(5) *Penalty period recalculations.* VA will not recalculate a penalty period under this section unless—

(i) The original calculation is shown to be erroneous; or

(ii) VA receives evidence showing that all covered assets were returned to the claimant before the date of claim or within 30 days after the date of claim. If all covered assets were returned to the claimant, VA will not assess a penalty period. For this exception to apply, VA must receive the evidence not later than 60 days after the date of VA's notice to the claimant of VA's decision concerning the penalty period. Once covered assets are returned, a claimant may reduce net worth under the provisions of § 3.274(f).

(Authority: 38 U.S.C. 1522, 1543, 1506(1))

(The Office of Management and Budget has approved the information collection requirement in this section under control numbers 2900-0001, 2900-0002, 2900-0004, and 2900-0002.)

§ 3.277 [Amended]

■ 11. Amend § 3.277(c)(2) by removing "shall" and adding in its place "may".

■ 12. Add § 3.278 to read as follows:

§ 3.278 Deductible medical expenses.

(a) *Scope.* This section identifies medical expenses that VA may deduct from countable income for purposes of three of its needs-based programs: Pension, section 306 pension, and parents' dependency and indemnity compensation (DIC). Payments for such medical expenses must be unreimbursed to be deductible from income.

(b) *Definitions.* For the purposes of this section—

(1) *Health care provider* means:

(i) An individual licensed by a state or country to provide health care in the state or country in which the individual provides the health care. The term includes, but is not limited to, a physician, physician assistant, psychologist, chiropractor, registered nurse, licensed vocational nurse, licensed practical nurse, and physical or occupational therapist; and

(ii) A nursing assistant or home health aide who is supervised by a licensed health care provider as defined in paragraph (b)(1)(i) of this section.

(2) *Activities of daily living (ADL)* mean basic self-care activities and consist of bathing or showering, dressing, eating, toileting, and transferring. *Transferring* means an individual's moving himself or herself from one position to another, such as getting in and out of bed.

(3) *Instrumental activities of daily living (IADL)* mean independent living

activities, such as shopping, food preparation, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation for non-medical purposes. Managing finances does not include services rendered by a VA-appointed fiduciary.

(4) *Custodial care* means regular:

(i) Assistance with two or more ADLs, or

(ii) Supervision because an individual with a mental disorder is unsafe if left alone due to the mental disorder.

(5) *Qualified relative* means a veteran's dependent spouse, a veteran's dependent or surviving child, and other relatives of the claimant who are members or constructive members of the claimant's household whose medical expenses are deductible under §§ 3.262(l) or 3.272(g). A "constructive member" of a household is an individual who would be a member of the household if the individual were not in a nursing home, away at school, or a similar situation. Qualified relatives do not include claimants who are veterans, surviving spouses, or parents.

(6) *Nursing home* means a facility defined in § 3.1(z)(1) or (2). If the facility is not located in a state, the facility must be licensed in the country in which it is located.

(7) *Medical foster home* means a privately owned residence, recognized and approved by VA under 38 CFR 17.73(d), that offers a non-institutional alternative to nursing home care for veterans who are unable to live alone safely due to chronic or terminal illness.

(8) *Assisted living, adult day care, or similar facility* means a facility that provides individuals with custodial care. The facility may contract with a third-party provider for this purpose. A facility that is residential must be staffed 24 hours per day with custodial care providers. To be included in this definition, a facility must be licensed if such facilities are required to be licensed in the state or country in which the facility is located.

(c) *Medical expenses for VA purposes.* Generally, medical expenses for VA needs-based benefit purposes are payments for items or services that are medically necessary or that improve a disabled individual's functioning. Medical expenses may include, but are not limited to, the payments specified in paragraphs (c)(1) through (7) of this section.

(1) *Care by a health care provider.* Payments to a health care provider for services performed within the scope of the provider's professional capacity are medical expenses. Cosmetic procedures that a health care provider performs to

improve a congenital or accidental deformity or related to treatment for a diagnosed medical condition are medical expenses.

(2) *Medications, medical supplies, medical equipment, and medical food, vitamins, and supplements.* Payments for prescription and non-prescription medication procured lawfully under Federal law, as well as payments for medical supplies or medical equipment are medical expenses. Medically necessary food, vitamins, and supplements as prescribed or directed by a health care provider authorized to write prescriptions are medical expenses.

(3) *Adaptive equipment.* Payments for adaptive devices or service animals, including veterinary care, used to assist a person with an ongoing disability are medical expenses. Medical expenses do not include non-prescription food, boarding, grooming, or other routine expenses of owning an animal.

(4) *Transportation expenses.* Payments for transportation for medical purposes, such as the cost of transportation to and from a health care provider's office by taxi, bus, or other form of public transportation are medical expenses. The cost of transportation for medical purposes by privately owned vehicle (POV), including mileage, parking, and tolls, is a medical expense. For transportation in a POV, VA limits the deductible mileage rate to the current POV mileage reimbursement rate specified by the United States General Services Administration (GSA). The current amount can be obtained from www.gsa.gov or on VA's Web site at [location to be determined]. Amounts by which transportation expenses set forth in this paragraph (c)(4) exceed the amounts of other VA or non-VA reimbursements for the expense are medical expenses.

(i) *Example.* In February 2013, a veteran drives 60 miles round trip to a VA medical center and back. The veteran is reimbursed \$24.90 from the Veterans Health Administration. The POV mileage reimbursement rate specified by GSA is \$0.565 per mile, so the transportation expense is \$0.565/mile * 60 miles = \$33.90. For VA needs-based benefits purposes, the unreimbursed amount, here, the difference between \$33.90 and \$24.90 is a medical expense.

(ii) [Reserved]

(5) *Health insurance premiums.* Payments for health, medical, hospitalization, and long-term care insurance premiums are medical expenses. Premiums for Medicare Parts

B and D and for long-term care insurance are medical expenses.

(6) *Smoking cessation products.* Payments for items and services specifically related to smoking cessation are medical expenses.

(7) *Institutional forms of care and in-home care.* As provided in paragraph (d) of this section.

(d) *Institutional forms of care and in-home care.* (1) *Hospitals, nursing homes, medical foster homes, and inpatient treatment centers.* Payments to hospitals, nursing homes, medical foster homes, and inpatient treatment centers (including inpatient treatment centers for drug or alcohol addiction), including the cost of meals and lodging charged by such facilities are medical expenses.

(2) *In-home care.* Payments for services provided by an in-home attendant are medical expenses. Payments must be commensurate with the number of hours that the provider attends to the disabled person, and the attendant's hourly rate may not exceed the average hourly rate for home health aides published annually by the MetLife Mature Market Institute in its Market Survey of Long-Term Care Costs. VA will publish the in-home care hourly rate limit on its Web site at [location to be determined].

(i) Except as provided in paragraphs (d)(2)(ii) and (iii) of this section, the attendant must be a health care provider, and only payments for assistance with ADLs or health care services are medical expenses.

(ii) If a veteran or surviving spouse (or parent, for parents' DIC purposes) meets the criteria in § 3.351 for needing regular aid and attendance or being housebound, then—

(A) The attendant does not need to be a health care provider, and

(B) Payments for assistance with IADLs are medical expenses only if the primary responsibility of the attendant is to provide health care services or custodial care. Otherwise, only payments for assistance with health care or custodial care are medical expenses.

(iii) Paragraph (d)(2)(ii) of this section also applies to a qualified relative if a physician or physician assistant states in writing that, due to physical or mental disability, the qualified relative requires the health care services or custodial care that the in-home attendant provides.

(3) *Assisted living, adult day care, and similar facilities.* Certain payments to assisted living, adult day care, and similar facilities are medical expenses. Except as provided in paragraphs (d)(3)(i) and (ii) of this section, only payments for health care services or assistance with ADLs provided by a

health care provider are medical expenses.

(i) If a veteran or surviving spouse (or parent for parents' DIC purposes) meets the criteria in § 3.351 for needing regular aid and attendance or being housebound, then—

(A) The care does not need to be provided by a health care provider, and

(B) Medical expenses include all payments to the facility, to include meals and lodging, if the primary reason for the veteran or surviving spouse to be in the facility is to receive health care services or custodial care that the facility provides. Otherwise, only payments for assistance with health care or custodial care are medical expenses.

(ii) Paragraph (d)(3)(i) of this section also applies to a qualified relative if a physician or physician assistant states in writing that, due to mental or physical disability, the qualified relative requires the health care services or custodial care that the facility provides.

(e) *Non-medical expenses for VA purposes.* Payments for items and services listed in paragraphs (e)(1) through (5) of this section are not medical expenses for VA needs-based benefit purposes. The list is not all-inclusive.

(1) *Maintenance of general health.* Payments for items or services that benefit or maintain general health, such as vacations and dance classes, are not medical expenses.

(2) *Cosmetic procedures.* Except as provided in paragraph (c)(1) of this section, cosmetic procedures are not medical expenses.

(3) *Meals and lodging.* Except as provided in paragraph (d) of this section, payments for meals and lodging are not medical expenses. This category includes payments to facilities such as independent living facilities that do not provide health care services or custodial care.

(4) *Assistance with IADLs.* Except as provided in paragraph (d) of this section, payments for assistance with IADLs are not medical expenses.

(5) *VA fiduciary fees.* Fees for VA-appointed fiduciary services are not medical expenses.

CROSS REFERENCES: For the rules governing how medical expenses are deducted, see § 3.272(g) (regarding pension) and § 3.262(l) (regarding section 306 pension and parents' DIC).

(Authority: 38 U.S.C. 501(a), 1315(f)(3), 1503(a)(8), 1506(1))

(The Office of Management and Budget has approved the information collection requirement in this section under control numbers 2900-0001, 2900-0002, 2900-0004, 2900-0161, and 2900-0002.)

■ 13. Add § 3.279 to read as follows:

§ 3.279 Statutory exclusions from income or assets (net worth or corpus of the estate).

(a) *Scope of section.* This section sets forth payments that Federal statutes

exclude from income for the purpose of determining entitlement to any VA-administered benefit that is based on financial need. Some of the exclusions also apply to assets (pension), aka, net worth or the corpus of the estate (section 306 pension and parents as dependents for compensation).

| Program or payment | Income | Assets (corpus of the estate) | Authority |
|--|------------------------|-------------------------------|---------------------------------|
| (b) COMPENSATION OR RESTITUTION PAYMENTS | | | |
| (1) <i>Relocation payments.</i> Payments to individuals displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended. | Excluded | Included | 42 U.S.C. 4636. |
| (2) <i>Crime victim compensation.</i> Amounts received as compensation under the Victims of Crime Act of 1984 unless the total amount of assistance received from all federally funded programs is sufficient to fully compensate the claimant for losses suffered as a result of the crime. | Excluded | Excluded | 42 U.S.C. 10602(c). |
| (3) <i>Restitution to individuals of Japanese ancestry.</i> Payments made as restitution under Public Law 100-383 to an individual of Japanese ancestry who was interned, evacuated, or relocated during the period of December 7, 1941, through June 30, 1946, pursuant to any law, Executive Order, Presidential proclamation, directive, or other official action respecting these individuals. | Excluded | Excluded | 50 U.S.C. App. 1989b-4(f). |
| (4) <i>Victims of Nazi persecution.</i> Payments made to individuals because of their status as victims of Nazi persecution. | Excluded | Excluded | 42 U.S.C. 1437a note. |
| (5) <i>Agent Orange settlement payments.</i> Payments made from the Agent Orange Settlement Fund or any other fund established pursuant to the settlement in the In Re Agent Orange product liability litigation, M.D.L. No. 381 (E.D.N.Y.). | Excluded | Excluded | Sec. 1, Public Law 101-201. |
| (6) <i>Chapter 18 benefits.</i> Allowances paid under 38 U.S.C. chapter 18 to a veteran's child with a birth defect. | Excluded | Excluded | 38 U.S.C. 1833(c). |
| (7) <i>Flood mitigation activities.</i> Assistance provided under the National Flood Insurance Act of 1968, as amended. | Excluded | Excluded | 42 U.S.C. 4031. |
| (c) PAYMENTS TO NATIVE AMERICANS | | | |
| (1) <i>Indian Tribal Judgment Fund distributions.</i> All Indian Tribal Judgment Fund distributions excluded from income and net worth while such funds are held in trust. First \$2,000 per year of income received by individual Indians under the Indian Tribal Judgment Funds Use or Distribution Act in satisfaction of a judgment of the United States Court of Federal Claims excluded from income. | Excluded | Excluded | 25 U.S.C. 1407. |
| (2) <i>Interests of individual Indians in trust or restricted lands.</i> Interests of individual Indians in trust or restricted lands excluded from net worth. First \$2,000 per year of income received by individual Indians that is derived from interests in trust or restricted lands excluded from income. | Excluded | Excluded | 25 U.S.C. 1408. |
| (3) <i>Per Capita Distributions Act.</i> First \$2,000 per year of per capita distributions to members of a tribe from funds held in trust by the Secretary of the Interior for an Indian tribe. All funds excluded from income and net worth while funds are held in trust. | Excluded | Excluded | 25 U.S.C. 117b, 25 U.S.C. 1407. |
| (4) <i>Submarginal land.</i> Income derived from certain submarginal land of the United States that is held in trust for certain Indian tribes. | Excluded | Excluded | 25 U.S.C. 459e. |
| (5) <i>Old Age Assistance Claims Settlement Act.</i> Up to \$2,000 per year of per capita distributions under the Old Age Assistance Claims Settlement Act. | Excluded | Excluded | 25 U.S.C. 2307. |
| (6) <i>Alaska Native Claims Settlement Act.</i> Any of the following, if received from a Native Corporation, under the Alaska Native Claims Settlement Act: | Excluded | Excluded | 43 U.S.C. 1626(c). |
| (i) Cash, including cash dividends on stocks and bonds, up to a maximum of \$2,000 per year; | | | |
| (ii) Stock, including stock issued as a dividend or distribution; | | | |
| (iii) Bonds that are subject to the protection under 43 U.S.C. 1606(h) until voluntarily and expressly sold or pledged by the shareholder after the date of distribution; | | | |
| (iv) A partnership interest; | | | |
| (v) Land or an interest in land, including land received as a dividend or distribution on stock; | | | |
| (vi) An interest in a settlement trust. | | | |
| (7) <i>Maine Indian Claims Settlement Act.</i> Payments received under the Maine Indian Claims Settlement Act of 1980. | Excluded | Excluded | 25 U.S.C. 1728. |
| (8) <i>Cobell Settlement.</i> Payments received under <i>Cobell v. Salazar</i> , Civil Action No. 96-1285 (TFH) (D.D.C.). | Excluded for one year. | Excluded for one year. | Sec. 101, Public Law 111-291. |
| (d) WORK-RELATED PAYMENTS | | | |
| (1) <i>Workforce investment.</i> Allowances, earnings, and payments to individuals participating in programs under the Workforce Investment Act of 1998 (29 U.S.C. chapter 30). | Excluded | Included | 29 U.S.C. 2931(a)(2). |
| (2) <i>AmeriCorps participants.</i> Allowances, earnings, and payments to AmeriCorps participants under the National and Community Service Act of 1990. | Excluded | Included | 42 U.S.C. 12637(d). |

| Program or payment | Income | Assets (corpus of the estate) | Authority |
|---|----------------|-------------------------------|----------------------------|
| (3) <i>Volunteer work</i> . Compensation or reimbursement to volunteers involved in programs administered by the Corporation for National and Community Service, unless the payments are equal to or greater than the minimum wage. The minimum wage is either that under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) or that under the law of the state where the volunteers are serving, whichever is greater. | Excluded | Excluded | 42 U.S.C. 5044(f). |
| (e) MISCELLANEOUS PAYMENTS | | | |
| (1) <i>Food stamps</i> . Value of the allotment provided to an eligible household under the Food Stamp Program. | Excluded | Excluded | 7 U.S.C. 2017(b). |
| (2) <i>Food for children</i> . Value of free or reduced-price for food under the Child Nutrition Act of 1966. | Excluded | Excluded | 42 U.S.C. 1780(b). |
| (3) <i>Child care</i> . Value of any child care provided or arranged (or any amount received as payment for such care or reimbursement for costs incurred for such care) under the Child Care and Development Block Grant Act of 1990. | Excluded | Included | 42 U.S.C. 9858q. |
| (4) <i>Services for housing recipients</i> . Value of services, but not wages, provided to a resident of an eligible housing project under a congregate services program under the Cranston-Gonzalez National Affordable Housing Act. | Excluded | Included | 42 U.S.C. 8011(j)(2). |
| (5) <i>Home energy assistance</i> . The amount of any home energy assistance payments or allowances provided directly to, or indirectly for the benefit of, an eligible household under the Low-Income Home Energy Assistance Act of 1981. | Excluded | Excluded | 42 U.S.C. 8624(f). |
| (6) <i>Programs for older Americans</i> . Payments, other than wages or salaries, received from programs funded under the Older Americans Act of 1965, 42 U.S.C. 3001. | Excluded | Included | 42 U.S.C. 3020a(b). |
| (7) <i>Student financial aid</i> . Amounts of student financial assistance received under Title IV of the Higher Education Act of 1965, including Federal work-study programs, Bureau of Indian Affairs student assistance programs, or vocational training under the Carl D. Perkins Vocational and Technical Education Act of 1998. | Excluded | Excluded | 20 U.S.C. 1087uu, 2414(a). |
| (8) <i>Retired Serviceman's Family Protection Plan annuities</i> . Annuities received under subchapter 1 of the Retired Serviceman's Family Protection Plan. | Excluded | Included | 10 U.S.C. 1441. |

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

■ 14. Amend § 3.503 by adding paragraph (c) to read as follows:

§ 3.503 Children.

* * * * *

(c) *Medicaid-covered nursing home care (§ 3.551(i))*. (1) Last day of the calendar month in which Medicaid payments begin, last day of the month following 60 days after issuance of a prereduction notice required under § 3.103(b)(2), or the earliest date on which payment may be reduced without creating an overpayment, whichever date is later; or

(2) If the child or the child's custodian willfully conceals information necessary to make the reduction, the last day of

the month in which that willful concealment occurred.

(Authority: 38 U.S.C. 501, 1832, 5112(b), 5503(d))

■ 15. Amend § 3.551 by revising paragraph (i) to read as follows:

§ 3.551 Reduction because of hospitalization.

* * * * *

(i) *Certain beneficiaries receiving Medicaid-covered nursing home care*. This paragraph (i) applies to a veteran without a spouse or child, to a surviving spouse without a child, and to a surviving child. Effective November 5, 1990, and terminating on the date provided in 38 U.S.C. 5503(d)(7), if such a beneficiary is receiving Medicaid-covered nursing home care, no pension

or survivors pension in excess of \$90 per month will be paid to or for the beneficiary for any period after the month in which the Medicaid payments begin. A beneficiary is not liable for any pension paid in excess of the \$90 per month by reason of the Secretary's inability or failure to reduce payments, unless that inability or failure is the result of willful concealment by the beneficiary of information necessary to make that reduction.

* * * * *

§ 3.660 [Amended]

■ 16. Amend § 3.660(d) by removing “§§ 3.263 or 3.274” and adding in its place “§ 3.263”.

[FR Doc. 2015-00297 Filed 1-22-15; 8:45 am]

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