

Dated: January 27, 2011.

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Chief, Office of Regulations and  
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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 3

RIN 2900-AN64

#### Clothing Allowance

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its adjudication regulations regarding clothing allowances. The amendment would provide for annual clothing allowances for each qualifying prosthetic or orthopedic appliance worn or used by a veteran for a service-connected disability or disabilities that wears out or tears a distinct article of the veteran's clothing and for each physician-prescribed medication used by a veteran for a skin condition that is due to a service-connected disability that affects a distinct outergarment. The amendment would also provide two annual clothing allowances if a veteran wears or uses more than one qualifying prosthetic or orthopedic appliance, physician-prescribed medication for more than one skin condition, or an appliance and a medication for a service-connected disability or disabilities and the appliances(s) or medication(s) together cause a single article of clothing to wear out faster than if affected by a single appliance or medication.

**DATES:** VA must receive comments on or before April 4, 2011.

**ADDRESSES:** Written comments may be submitted through <http://www.Regulations.gov>; by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. (This is not a toll free number). Comments should indicate that they are submitted in response to "RIN 2900-AN64—Clothing Allowance." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment.

(This is not a toll free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Tom Kniffen, Chief, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9725. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:** Section 1162 of title 38, United States Code, authorizes VA to pay an annual clothing allowance to each veteran who, because of a service-connected disability, wears or uses a prosthetic or orthopedic appliance (including a wheelchair) which VA determines tends to wear out or tear the veteran's clothing or uses prescription medication for a skin condition that is due to a service-connected disability which VA determines causes irreparable damage to the veteran's outergarments. VA had interpreted "a clothing allowance \* \* \* because of a service-connected disability" in section 1162(1) and (2) and the word "or" between paragraphs (1) and (2) to mean that a veteran is entitled to only one annual clothing allowance, regardless of whether the veteran uses multiple qualifying appliances for more than one service-connected disability or uses a qualifying appliance for a service-connected disability and prescription medication for a skin condition resulting from a service-connected disability. In *Sursely v. Peake*, 551 F.3d 1351, 1356 (Fed. Cir. 2009), VA, based upon this statutory interpretation, rejected a claim for a second clothing allowance for "independently qualifying orthopedic appliances affecting different articles of clothing." The United States Court of Appeals for the Federal Circuit (Federal Circuit) disagreed with VA's interpretation and stated that, "by linking receipt of the benefit to a single qualifying appliance," Congress "require[s]" VA "to pay multiple clothing allowances to a veteran who \* \* \* uses multiple qualifying appliances." *Id.* and 1356 n.4. The Federal Circuit also rejected the United States Court of Appeals for Veterans Claims' conclusion that it would be "irrational" to permit multiple clothing allowances for use of multiple prosthetic appliances affecting a single article of clothing because under such circumstances the garment may wear out faster than if affected by a single appliance. *Id.* at 1357-58 and 1358 n.6

(quoting 22 Vet. App. 21, 25-26 (2007)). However, the Federal Circuit noted that VA could promulgate regulations prohibiting multiple clothing allowances if "damage to a single garment resulting from multiple prosthetic appliances is 'overlapping.'" *Id.* at 1358 (quoting *Esteban v. Brown*, 6 Vet. App. 259, 262 (1994)).

VA proposes to amend 38 CFR 3.810(a) to implement *Sursely*. VA would amend current § 3.810(a)(1) so that it provides the criteria for entitlement to one annual clothing allowance currently set forth in § 3.810(a)(1) and (2). We would also make a technical change in § 3.810(a)(1)(i) by changing the reference to § 3.326(c) to § 3.326(b) to reflect a longstanding regulatory amendment. VA also would revise § 3.810(a)(2) to provide the criteria for more than one annual clothing allowance where distinct garments are affected. New § 3.810(a)(2) would state that a veteran is entitled to a clothing allowance for each prosthetic or orthopedic appliance or medication used by the veteran that satisfies the requirements of paragraph (1) of this subsection if each appliance or medication affects a distinct article of clothing or outergarment. This regulation is consistent with the *Sursely* holding that the veteran was entitled to a second clothing allowance "for his independently qualifying orthopedic appliances affecting different articles of clothing." 551 F.3d at 1356.

VA also recognizes, as the Federal Circuit did, that use of multiple qualifying appliances or medications may cause a single article of clothing to wear out faster, requiring replacement of the garment more frequently during the course of the year than if the garment were affected by only one appliance or medication. *Id.* at 1358 n.6. VA therefore also proposes to provide in § 3.810(a)(3) that a veteran is entitled to two annual clothing allowances if: (1) A veteran uses more than one qualifying prosthetic or orthopedic appliance, medication for more than one skin condition, or an appliance and a medication; and (2) the appliances(s) or medication(s) each satisfy the requirements of § 3.810(a)(1) and together tend to tear or wear a single article of clothing or irreparably damage an outergarment at a faster rate, requiring replacement sooner than if the article of clothing or outergarment was affected by a single qualifying appliance or medication. In such circumstances, VA would provide two annual clothing allowances, rather than an allowance for each appliance or medication, because we believe that the wear and tear or irreparable damage caused by three or

more appliances and/or medications will overlap the increased rate of damage caused by the second appliance and/or medication on the garment. *Id.* at 1358.

#### Paperwork Reduction Act

The collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521) referenced in this proposed rule has an existing OMB approval as a form. The form is VA Form 10–8678, Application for Annual Clothing Allowance (Under 38 U.S.C. 1162), OMB approval number 2900–0198. No changes are made in this proposed rule to the collection of information.

#### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed rule would not affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB), as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have

been examined and it has been determined to be a not significant regulatory action under the Executive Order.

#### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

#### Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this proposed rule are 64.013, Veterans Prosthetic Appliances; and 64.109, Veterans Compensation for Service-Connected Disability.

#### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, approved this document on January 19, 2011, for publication.

#### List of Subjects in 38 CFR Part 3

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

Approved: January 26, 2011.

#### Robert C. McFetridge,

Director, Regulations Policy and Management, Department of Veterans Affairs.

For the 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. Revise § 3.810(a) to read as follows:

#### § 3.810 Clothing allowance.

(a) Except as provided in paragraph (d) of this section, a veteran who has a service-connected disability, or a

disability compensable under 38 U.S.C. 1151 as if it were service connected, is entitled, upon application therefore, to an annual clothing allowance, which is payable in a lump sum, as specified in this paragraph.

(1) *One Clothing Allowance.* A veteran is entitled to one annual clothing allowance if—

(i) A VA examination or hospital or examination report from a facility specified in § 3.326(b) establishes that the veteran, because of a service-connected disability or disabilities due to loss or loss of use of a hand or foot compensable at a rate specified in § 3.350(a), (b), (c), (d), or (f), wears or uses one qualifying prosthetic or orthopedic appliance (including a wheelchair) which tends to wear or tear clothing; or

(ii) The Under Secretary for Health or a designee certifies that—

(A) A veteran, because of a service-connected disability or disabilities, wears or uses one qualifying prosthetic or orthopedic appliance (including a wheelchair) which tends to wear or tear clothing; or

(B) A veteran uses medication prescribed by a physician for one skin condition which is due to a service-connected disability and which causes irreparable damage to the veteran’s outer garments.

(2) *More Than One Clothing Allowance; Distinct Garments Affected.*

A veteran is entitled to an annual clothing allowance for each prosthetic or orthopedic appliance or medication used by the veteran if each appliance or medication—

(i) Satisfies the requirements of paragraph (a)(1) of this section; and

(ii) Affects a distinct article of clothing or outer garment.

(3) *Two Clothing Allowances; Single Garment Affected.* A veteran is entitled to two annual clothing allowances if a veteran uses more than one prosthetic or orthopedic appliance, medication for more than one skin condition, or an appliance and a medication, and the appliance(s) or medication(s)—

(i) Each satisfy the requirements of paragraph (a)(1) of this section; and

(ii) Together tend to wear or tear a single article of clothing or irreparably damage an outer garment at a faster rate than if affected by one qualifying appliance or medication.

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