

## Department of Veterans Affairs

## § 3.22

### § 3.22 DIC benefits for survivors of certain veterans rated totally disabled at time of death.

(a) Even though a veteran died of non-service-connected causes, VA will pay death benefits to the surviving spouse or children in the same manner as if the veteran's death were service-connected, if:

(1) The veteran's death was not the result of his or her own willful misconduct, and

(2) At the time of death, the veteran was receiving, or was entitled to receive, compensation for service-connected disability that was:

(i) Rated by VA as totally disabling for a continuous period of at least 10 years immediately preceding death;

(ii) Rated by VA as totally disabling continuously since the veteran's release from active duty and for at least 5 years immediately preceding death; or

(iii) Rated by VA as totally disabling for a continuous period of not less than one year immediately preceding death, if the veteran was a former prisoner of war who died after September 30, 1999.

(Authority: 38 U.S.C. 1318(b))

(b) For purposes of this section, "entitled to receive" means that at the time of death, the veteran had service-connected disability rated totally disabling by VA but was not receiving compensation because:

(1) VA was paying the compensation to the veteran's dependents;

(2) VA was withholding the compensation under authority of 38 U.S.C. 5314 to offset an indebtedness of the veteran;

(3) The veteran had applied for compensation but had not received total disability compensation due solely to clear and unmistakable error in a VA decision concerning the issue of service connection, disability evaluation, or effective date;

(4) The veteran had not waived retired or retirement pay in order to receive compensation;

(5) VA was withholding payments under the provisions of 10 U.S.C. 1174(h)(2);

(6) VA was withholding payments because the veteran's whereabouts was unknown, but the veteran was other-

wise entitled to continued payments based on a total service-connected disability rating; or

(7) VA was withholding payments under 38 U.S.C. 5308 but determines that benefits were payable under 38 U.S.C. 5309.

(c) For purposes of this section, "rated by VA as totally disabling" includes total disability ratings based on unemployability (§4.16 of this chapter).

(d) To be entitled to benefits under this section, a surviving spouse must have been married to the veteran—

(1) For at least 1 year immediately preceding the date of the veteran's death; or

(2) For any period of time if a child was born of the marriage, or was born to them before the marriage.

(Authority: 38 U.S.C. 1318)

(e) *Effect of judgment or settlement.* If a surviving spouse or child eligible for benefits under paragraph (a) of this section receives any money or property pursuant to a judicial proceeding based upon, or a settlement or compromise of, any cause of action or other right of recovery for damages for the death of the veteran, benefits payable under paragraph (a) of this section shall not be paid for any month following the month in which such money or property is received until the amount of benefits that would otherwise have been payable under paragraph (a) of this section equals the total of the amount of money received and the fair market value of the property received. The provisions of this paragraph do not apply, however, to any portion of such benefits payable for any period preceding the end of the month in which such money or property of value is received.

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

(f) *Social security and worker's compensation.* Benefits received under social security or worker's compensation are not subject to recoupment under paragraph (e) of this section even though such benefits may have been awarded pursuant to a judicial proceeding.

(g) *Beneficiary's duty to report.* Any person entitled to benefits under paragraph (a) of this section shall promptly

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report to the Department of Veterans Affairs the receipt of any money or property received pursuant to a judicial proceeding based upon, or a settlement or compromise of, any cause of action or other right of recovery for damages for the death of the veteran. The amount to be reported is the total of the amount of money received and the fair market value of property received. Expenses incident to recovery, such as attorney's fees, may not be deducted from the amount to be reported.

(h) *Relationship to survivor benefit plan.* For the purpose of 10 U.S.C. 1448(d) and 1450(c) eligibility for benefits under paragraph (a) of this section shall be deemed eligibility for dependency and indemnity compensation under 38 U.S.C. 1311(a).

(Authority: 38 U.S.C. 1318)

CROSS REFERENCES: Marriage dates. See § 3.54. Homicide. See § 3.11.

[44 FR 22718, Apr. 17, 1979, as amended at 48 FR 41161, Sept. 14, 1983; 53 FR 23235, June 21, 1988; 54 FR 31829, Aug. 2, 1989; 65 FR 3391, Jan. 21, 2000; 65 FR 43699, July 14, 2000]

#### § 3.23 Improved pension rates—Veterans and surviving spouses.

(a) *Maximum annual rates of improved pension.* The maximum annual rates of improved pension for the following categories of beneficiaries shall be the amounts specified in 38 U.S.C. 1521 and 1542, as increased from time to time under 38 U.S.C. 5312. Each time there is an increase under 38 U.S.C. 5312, the actual rates will be published in the "Notices" section of the FEDERAL REGISTER. (1) Veterans who are permanently and totally disabled.

(Authority: 38 U.S.C. 1521(b) or (c))

(2) Veterans in need of aid and attendance.

(Authority: 38 U.S.C. 1521(d))

(3) Veterans who are housebound.

(Authority: 38 U.S.C. 1521(e))

(4) Two veterans married to one another; combined rates.

(Authority: 38 U.S.C. 1521(f))

(5) Surviving spouse alone or with a child or children of the deceased veter-

eran in custody of the surviving spouse.

(Authority: 38 U.S.C. 1541(b) or (c))

(6) Surviving spouses in need of aid and attendance.

(Authority: 38 U.S.C. 1541(d))

(7) Surviving spouses who are housebound.

(Authority: 38 U.S.C. 1541(e))

(b) *Reduction for income.* The maximum rates of improved pension in paragraph (a) of this section shall be reduced by the amount of the countable annual income of the veteran or surviving spouse.

(Authority: 38 U.S.C. 1521, 1541)

(c) *Mexican border period and World War I veterans.* The applicable maximum annual rate payable to a Mexican border period or World War I veteran under this section shall be increased by the amount specified in 38 U.S.C. 1521(g), as increased from time to time under 38 U.S.C. 5312. Each time there is an increase under 38 U.S.C. 5312, the actual rate will be published in the "Notices" section of the FEDERAL REGISTER.

(Authority: 38 U.S.C. 1521(g))

(d) *Definitions of terms used in this section—(1) Dependent.* A veteran's spouse or child. A veteran's spouse who resides apart from the veteran and is estranged from the veteran may not be considered the veteran's dependent unless the spouse receives reasonable support contributions from the veteran. (Note that under § 3.60 a veteran and spouse who reside apart are considered to be living together unless they are estranged.) A child of a veteran not in custody of the veteran and to whose support the veteran is not reasonably contributing, may not be considered the veteran's dependent.

(Authority: 38 U.S.C. 1521(b))

(2) *In need of aid and attendance.* As defined in § 3.351(b).

(3) *Housebound.* As defined in § 3.351(d)(2), (f). This term also includes