

entitled to receive both payments subject to the phase-in period described in paragraph (c) of this section.

(2) *Chapter 61 disability retirees retiring with 20 or more years of service.* Disability retired pay payable under 10 U.S.C. Chapter 61 to a veteran with 20 or more years of creditable service may be paid concurrently with disability compensation to a qualifying veteran subject to the following:

(i) Any waiver required during the phase-in period under paragraph (c)(1)(ii) of this section; and

(ii) If the veteran's disability retired pay exceeds the amount of retired pay the veteran would have received had the veteran retired based on length of service, the veteran must waive that excess amount of disability retired pay in order to receive VA disability compensation.

(3) *Chapter 61 disability retirees retiring with less than 20 years of service.* Veterans who receive disability retired pay under 10 U.S.C. Chapter 61 with less than 20 years of creditable service are not eligible for concurrent receipt.

(4) *Improved Pension.* A veteran may receive improved pension and military retired pay at the same time without having to waive military retired pay. However, in determining entitlement to improved pension, VA will treat military retired pay in the same manner as countable income from other sources.

(c) *Waiver*—(1) *When a waiver is necessary.* (i) A waiver of military retired pay is necessary in order to receive disability compensation when a veteran is eligible for both military retired pay and disability compensation but is not eligible under paragraphs (b)(1) or (b)(2) of this section to receive both benefits at the same time.

(ii) All veterans who are eligible to receive both military retired pay and disability compensation at the same time under paragraphs (b)(1) or (b)(2) of this section, except those receiving compensation for a disability rated 100 percent, must file a waiver in order to receive the maximum allowable amount of disability compensation during the phase-in period. For veterans receiving disability compensation based on a VA determination of individual unemployability, the phase-in

period ends on December 30, 2009. For all other veterans, the phase-in period ends on December 31, 2013. After the phase-in period, veterans retired under 10 U.S.C. chapter 61 who are eligible for concurrent receipt must still file a waiver under the circumstances described in paragraph (b)(2)(ii) of this section.

(Authority: 10 U.S.C. 1414, 38 U.S.C. 5304, 5305)

(2) *How to file a waiver of military retired pay.* A veteran may request a waiver of military retired pay in any written, signed statement, including a VA form, which reflects a desire to waive all or some military retired pay. The statement must be submitted to VA or to the Federal agency that pays the veteran's military retired pay. VA will treat as a waiver an application for VA compensation filed by a veteran who is entitled to military retired pay.

(d) *Elections and the right to reelect either benefit.* (1) A veteran who has filed a waiver of military retired pay under this section has elected to receive disability compensation. A veteran may reelect between benefits covered by this section at any time by submitting a written, signed statement to VA or to the Federal agency that pays the veteran's military retired pay.

(2) An election filed within 1 year from the date of notification of Department of Veterans Affairs entitlement will be considered as "timely filed" for effective date purposes. See §3.401(e)(1). If the veteran is incompetent, the 1-year period will begin on the date that notification is sent to the next friend or fiduciary. In initial determinations, elections may be applied retroactively if the claimant was not advised of his or her right of election and its effect.

(Authority: 38 U.S.C. 5304(a), 5305)

[71 FR 67061, Nov. 20, 2006]

### §3.751 Statutory awards; retired service personnel.

Retired Regular and Reserve officers and enlisted personnel are not entitled to statutory awards of disability compensation from the Department of Veterans Affairs in addition to their retirement pay. However, under §3.750(c), eligible persons may waive an amount

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equal to the basic disability compensation and any statutory award otherwise payable by the Department of Veterans Affairs.

[41 FR 53797, Dec. 9, 1976]

### § 3.752 [Reserved]

#### § 3.753 Public Health Service.

Disability compensation may be paid concurrently with retirement pay to an officer of the commissioned corps of the Public Health Service, who was receiving disability compensation on December 31, 1956, as follows:

(a) An officer who incurred a disability before July 29, 1945, but retired for nondisability purposes prior to such date.

(b) An officer who incurred a disability before July 29, 1945, but retired for nondisability purposes between July 4, 1952, and December 31, 1956.

(c) An officer who incurred a disability between July 29, 1945, and July 3, 1952, but retired for nondisability purposes between July 4, 1952, and December 31, 1956.

[26 FR 1604, Feb. 24, 1961]

#### § 3.754 Emergency officers' retirement pay.

A retired emergency officer of World War I has basic eligibility to retirement pay by the Department of Veterans Affairs under Pub. L. 87-875 (sec. 11(b), Pub. L. 85-857) from date of filing application therefor after October 24, 1962, if the following requirements are met:

(a) Emergency officers' retirement pay would have been granted under Pub. L. 506, 70th Congress (Act of May 24, 1928) if application therefor had been filed before May 25, 1929.

(b) Such retirement pay would have continued to be payable under section 10 of Pub. L. 2, 73d Congress, or under section 1 of Pub. L. 743, 76th Congress.

(c) The monthly rate of retirement pay at any time between May 24, 1928 and May 24, 1929, inclusive, would have been lower than the monthly rate of disability compensation payable to the retired emergency officer.

CROSS REFERENCE: Emergency officers' retirement pay. See § 3.953(b).

[28 FR 72, Jan. 3, 1963]

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### SPECIAL BENEFITS

#### § 3.800 Disability or death due to hospitalization, etc.

This section applies to claims received by VA before October 1, 1997. For claims received by VA on or after October 1, 1997, see §§ 3.362 and 3.363.

(a) Where disease, injury, death or the aggravation of an existing disease or injury occurs as a result of having submitted to an examination, medical or surgical treatment, hospitalization or the pursuit of a course of vocational rehabilitation under any law administered by the Department of Veterans Affairs and not the result of his (or her) own willful misconduct, disability or death compensation, or dependency and indemnity compensation will be awarded for such disease, injury, aggravation, or death as if such condition were service connected. The commencing date of benefits is subject to the provisions of § 3.400(i).

(Authority: 38 U.S.C. 1151)

(1) Benefits under paragraph (a) of this section will be in lieu of any benefits the veteran may be entitled to receive under the Federal Employees' Compensation Act inasmuch as concurrent payments are prohibited. (See § 3.708.)

(2) Where any person is awarded a judgment on or after December 1, 1962, against the United States in a civil action brought pursuant to 28 U.S.C. 1346(b), or enters into a settlement or compromise on or after December 1, 1962, under 28 U.S.C. 2672 or 2677, by reason of a disability, aggravation or death within the purview of this section, no compensation or dependency and indemnity compensation shall be paid to such person for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the total amount of benefits which would be paid except for this provision equals the total amount included in such judgment, settlement, or compromise. The provisions of this paragraph do not apply, however, to any portion of such compensation or dependency and indemnity compensation payable for any period preceding the end of the month