February 17, 2011

Director (00/21)  
All VA Regional Offices and Centers

In Reply Refer To:  211A  
Fast Letter 11-06

SUBJ:  Final Rule:  Specially Adapted Housing and Special Home Adaptation

Purpose

This fast letter provides information regarding the Department of Veterans Affairs (VA) publication of the final rule, RIN 2900-AN21, Specially Adapted Housing (SAH) and Special Home Adaptation (SHA), in the Federal Register on September 23, 2010. The final rule incorporates certain statutory provisions that affect how VA will evaluate applications for SAH and SHA.

Background

This final rule amends 38 C.F.R. § 3.809 that addresses eligibility for (SAH), and § 3.809a, that addresses eligibility for (SHA) grants and incorporates the authority to grant eligibility for both these benefits to members of the Armed Forces serving on active duty. These amendments incorporate provisions of the Veterans Benefits Act of 2003, Public Law 108-183; the Veterans Benefits Improvement Act of 2004, Public Law 108-454; the Veterans’ Housing Opportunity Act and Veterans Benefits Improvement Act of 2006, Public Law 109-233; and the Housing and Economic Recovery Act of 2008, Public Law 110-289.

The revisions to § 3.809(b) introductory text and § 3.809a(b) introductory text, pertaining to eligibility for SAH and SHA grants of persons disabled by VA treatment or vocational rehabilitation, apply to applications for SAH or SHA grants received by VA on or after December 10, 2004. The addition of § 3.809(b)(5), pertaining to loss or loss of use of both upper extremities as a disability qualifying for SAH grant eligibility, applies to all applications for SAH grants received by VA on or after December 10, 2004. The addition of § 3.809(b)(6) and § 3.809a (b)(2)(ii) through (b)(2)(iv), pertaining to severe burns as disabilities qualifying for SAH and SHA grant eligibility, apply to all applications for SAH or SHA grants received by VA on or after July 30, 2008.

This rule also amends 38 C.F.R. §§ 3.362 and 3.800 to update and reflect relevant statutory authority relating to award offsets that pertain to 38 U.S.C. Chapters 21 and 39 benefits.
Pertinent Regulatory Changes

Section 3.809 pertains to SAH and is amended as follows:

- Paragraph (a) of this section states that, on or after December 16, 2003, SAH is also available to “a member of the Armed Forces serving on active duty.”
- Paragraph (b) is reconstructed to state that “a member of the Armed Forces serving on active duty must have a disability rated as permanent and total that was incurred or aggravated in line of duty in active military, naval, or air service and that the veteran must be entitled to compensation under Chapter 11 of title 38, United States Code, for a disability rated as permanent and total.”
- Paragraph (b) of this section adds the two following provisions:
  - (b)(5) “The loss or loss of use of both upper extremities such as to preclude use of the arms at or above the elbow,” which applies to all applications for SAH grants received by VA on or after December 10, 2004, or
  - (b)(6) “Full thickness or subdermal burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk,” which applies to applications for SAH grants received by VA on or after July 30, 2008.

Section 3.809a pertains to SHA grants and is amended as follows:

- Paragraph (b) of this section includes the following new subparagraphs and applies to all applications for SHA grants received by VA on or after July 30, 2008:
  - (b)(2)(ii) provides that the permanent and total disability may be due to “deep partial thickness burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk,” or
  - (b)(2)(iii) provides that the permanent and total disability may be due to “Full thickness or subdermal burns that have resulted in contracture(s) with limitation of motion of one or more extremities or the trunk,” or
(b)(2)(iv) provides that the permanent total disability may be due to “Residuals of an inhalation injury (including but not limited to, pulmonary fibrosis, asthma, and chronic pulmonary disease).

- This section includes a cross-reference to §§ 36.440 through 36.4410 regarding assistance to certain disabled veterans in acquiring SAH.

On February 17, 2011, VA published Fast Letter 11-05, regarding amended procedures for handling Loan Guaranty (LGY) SAH/SHA claims. This letter addresses new electronic procedures, paper applications, processing of SAH/SHA claims, rating decisions, and rating decisions on claims with no corporate record.

Questions

Enclosed is a copy of the Federal Register publication, which contains the text of the regulatory amendment. For questions concerning this fast letter regarding rating decisions and entitlement dates, please email VAVBAWAS/CO/21Q&A. For questions concerning establishment and promulgation of SAH/SHA claims, please see FL 11-05 or email VAVBAWAS/CO/212A.

/S/
Thomas J. Murphy
Director
Compensation and Pension Service

Enclosure
SUMMARY: The Department of Veterans Affairs (VA) adopts as a final rule its proposal to amend its adjudication regulations regarding specially adapted housing and special home adaptation grants. This final rule incorporates certain provisions from the Veterans Benefits Act of 2003, the Veterans Benefits Improvement Act of 2004, the Veterans' Housing Opportunity and Benefits Improvement Act of 2006, and the Housing and Economic Recovery Act of 2008. These amendments are necessary to conform the regulations to the statutory provisions.

DATES: This final rule is effective October 25, 2010. Please refer to the SUPPLEMENTARY INFORMATION section for detailed information regarding the applicability dates of this final rule.

FOR FURTHER INFORMATION CONTACT: Thomas Kniffen, Chief, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9739. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: In a document published in the Federal Register on December 18, 2009, (74 FR 67145), VA proposed to amend its regulations pertaining to eligibility for specially adapted housing (SAH) grants and special home adaptation (SHA) grants. The public comment period ended on February 16, 2010, and VA received no comments. Therefore, VA is adopting the proposed rule as a final rule. However, we are making one change from the proposed rule. We are inserting `rated as permanent and total'' into the first sentence of 38 CFR 3.809(b) and 3.809a(b), so that the first sentence in each paragraph states: `A member of the Armed Forces serving on active duty must have a disability rated as permanent and total that was incurred or aggravated in line of duty...
in active military, naval, or air service.’’ Although we did not propose those provisions with the phrase ‘‘rated as permanent and total,’’ it is required by the statutory provisions on which they are based. Section 2101A(a) of title 38, United States Code, requires that housing assistance provided to certain members of the Armed Forces serving on active duty be provided ‘‘to the same extent as assistance is provided under [38 U.S.C. chapter 20] to veterans eligible under [chapter 20] and subject to the same requirements as veterans under [chapter 20].’’ To be entitled to a SAH or SHA grant, a veteran must be entitled to compensation ‘‘for a permanent and total service-connected disability.’’ 38 U.S.C. 2101(a)(2) and (b)(2). Therefore, for a member of the Armed Forces to be entitled to a SAH or SHA grant, the member’s disability that was incurred or aggravated in line of duty in active service (i.e., a service-connected disability) must be rated as permanent and total. Because the authorizing statutes require that SAH and SHA grants for Armed Forces members serving on active duty be conditioned on having a permanent and total service-connected disability, our implementing regulations must also impose that requirement.

Applicability Dates: The following applicability dates are provided for those amended regulations which do not contain an applicability date in the regulatory text. These dates are based upon the effective dates of the applicable provisions of the following Public Laws: Public Law 108-183, with applicable provisions effective December 16, 2003; Public Law 108-454, with applicable provisions effective December 10, 2004; Public Law 109-233, section 105 of which is effective December 10, 2004; and Public Law 110-289, with applicable provisions effective July 30, 2008. In accordance with the statutory provisions of these Public Laws, the following applicability dates pertain to this final rule:

(1) The revisions to Sec. 3.809(b) introductory text and Sec. 3.809a(b) introductory text, pertaining to eligibility for SAH and SHA grants of persons disabled by VA treatment or vocational rehabilitation, apply to applications for SAH or SHA grants received by VA on or after December 10, 2004.

(2) The addition of Sec. 3.809(b)(5), pertaining to loss or loss of use of both upper extremities as a disability qualifying for SAH grant eligibility, applies to all applications for SAH grants received by VA on or after December 10, 2004.

(3) The addition of paragraph (b)(6) to Sec. 3.809 and the addition of paragraphs (b)(2)(ii) through (b)(2)(iv) to 3.809a, pertaining to severe burns as disabilities qualifying for SAH and SHA grant eligibility, apply to all applications for SAH or SHA grants received by VA on or after July 30, 2008.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this final 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 final rule would not affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this final 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, 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 final rule have been examined, and it has been determined to be a significant regulatory action under the Executive Order because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in 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 one year. This final 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 the programs affected by this document are 64.106, Specially Adapted Housing for Disabled Veterans; 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, Department of Veterans Affairs, approved this document on September 9, 2010, for publication.
List of Subjects in 38 CFR Part 3


Dated: September 17, 2010.
Robert C. McFetridge,
Director, Regulation Policy and Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons set out in the preamble, VA amends 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 Sec. 3.362(e) to read as follows:

Sec. 3.362 Offsets under 38 U.S.C. 1151(b) of benefits awarded under 38 U.S.C. 1151(a).

* * * * *

(e) Offset of award of benefits under 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39. (1) If a judgment, settlement, or compromise covered in paragraphs (b) through (d) of this section becomes final on or after December 10, 2004, and includes an amount that is specifically designated for a purpose for which benefits are provided under 38 U.S.C. chapter 21 (38 CFR 3.809 and 3.809a) or 38 U.S.C. chapter 39 (38 CFR 3.808), and if VA awards 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39 benefits after the date on which the judgment, settlement, or compromise becomes final, the amount of the award will be reduced by the amount received under the judgment, settlement, or compromise for the same purpose.

(2) If the amount described in paragraph (e)(1) of this section is greater than the amount of an award under 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39, the excess amount received under the judgment, settlement, or compromise will be offset against benefits otherwise payable under 38 U.S.C. chapter 11.

(Authority: 38 U.S.C. 1151)
3. Revise Sec. 3.800(a)(4) to read as follows:

Sec. 3.800 Disability or death due to hospitalization, etc.

* * * * *
(a) * * *
(4) Offset of award of benefits under 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39. (i) If a judgment, settlement, or compromise covered by paragraph (a)(2) of this section becomes final on or after December 10, 2004, and includes an amount that is specifically designated for a purpose for which benefits are provided under 38 U.S.C. chapter 21 (38 CFR 3.809 and 3.809a) or 38 U.S.C. chapter 39 (38 CFR 3.808), and if VA awards 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39 benefits after the date on which the judgment, settlement, or compromise becomes final, the amount of the award will be reduced by the amount received under the judgment, settlement, or compromise for the same purpose.
(ii) If the amount described in paragraph (a)(4)(i) of this section is greater than the amount of an award under 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39, the excess amount received under the judgment, settlement, or compromise will be offset against benefits otherwise payable under 38 U.S.C. chapter 11.

(Authority: 38 U.S.C. 1151(b)(2))

* * * * *

4. Amend Sec. 3.809 by:

a. In the introductory text, removing ``38 U.S.C. 2101(a)'' and adding in its place ``38 U.S.C. 2101(a) or 2101A(a)'' and by removing ``veteran'' and adding in its place ``veteran or a member of the Armed Forces serving on active duty'';

b. Revising paragraph (a);

c. Revising paragraph (b) introductory text;

d. In paragraph (b)(3), removing ``wheelchair.'' and adding, in its place, ``wheelchair, or'';

e. In paragraph (b)(4), removing ``with the loss of loss of use'' and adding in its place ``with the loss or loss of use'' and removing ``wheelchair.'' and adding, in its place, ``wheelchair, or'';

f. Adding paragraphs (b)(5) and (b)(6);

g. Removing paragraph (c);

h. Redesignating paragraph (d) as new paragraph (c); and

i. Revising the authority citation at the end of the section.

The revisions and additions read as follows:
Sec. 3.809  Specially adapted housing under 38 U.S.C. 2101(a).

* * * * *

(a) Eligibility. A veteran must have had active military, naval, or air service after April 20, 1898. Benefits are not restricted to veterans with wartime service. On or after December 16, 2003, the benefit under this section is also available to a member of the Armed Forces serving on active duty.

(b) Disability. A member of the Armed Forces serving on active duty must have a disability rated as permanent and total that was incurred or aggravated in line of duty in active military, naval, or air service. A veteran must be entitled to compensation under chapter 11 of title 38, United States Code, for a disability rated as permanent and total. In either case, the disability must be due to:

* * * * *

(5) The loss or loss of use of both upper extremities such as to preclude use of the arms at or above the elbow, or

(6) Full thickness or subdermal burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk.

* * * * *

(Authority: 38 U.S.C. 1151(c)(1), 2101, 2101A)

* * * * *

5. Amend Sec. 3.809a by:

a. In the introductory text, removing ``38 U.S.C. 2101(b)'' and adding in its place ``38 U.S.C. 2101(b) or 2101A(a)'' and by removing ``April 20, 1898,'' and adding in its place ``April 20, 1898, or to a member of the Armed Forces serving on active duty who is eligible for the benefit under this section on or after December 16, 2003,''.

b. Removing the authority citation after the introductory text.

c. In paragraph (a), removing ``veteran'' each place it appears and adding in each place ``member of the Armed Forces serving on active duty or veteran''; and by removing the last sentence.

d. Revising paragraph (b).

e. Removing paragraph (c).

f. Revising the authority citation at the end of the section.

g. Adding a cross-reference immediately after the authority citation at the end of the section.

The revisions and addition read as follows:
Sec. 3.809a Special home adaptation grants under 38 U.S.C. 2101(b).

* * * * *

(b) A member of the Armed Forces serving on active duty must have a disability rated as permanent and total that was incurred or aggravated in line of duty in active military, naval, or air service. A veteran must be entitled to compensation under chapter 11 of title 38, United States Code, for a disability rated as permanent and total. In either case, the disability must:

1. Include the anatomical loss or loss of use of both hands, or
2. Be due to:
   - Blindness in both eyes with 5/200 visual acuity or less, or
   - Deep partial thickness burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk, or
   - Full thickness or subdermal burns that have resulted in contracture(s) with limitation of motion of one or more extremities or the trunk, or
   - Residuals of an inhalation injury (including, but not limited to, pulmonary fibrosis, asthma, and chronic obstructive pulmonary disease).

(Authority: 38 U.S.C. 1151(c)(1), 2101, 2101A, 2104)

Cross-Reference: Assistance to certain disabled veterans in acquiring specially adapted housing. See Sec. Sec. 36.4400 through 36.4410 of this chapter.

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