

**§ 1404.18 Procedures for requesting expedited panels.**

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(b) Upon receipt of a joint Request for Arbitration Panel (Form R-43) indicating that both parties desire expedited services, the OAS will refer a panel of arbitrators.

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**§ 1404.20 [Removed]**

14. Section 1404.20 is removed.

**§ 1404.21 [Redesignated as § 1404.20]**

15. Section 1404.21 is redesignated as § 1404.20.

Dated: June 27, 2005.

**Maria A. Fried,**

*General Counsel and Federal Register Contact.*

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BILLING CODE 6732-01-M

**DEPARTMENT OF VETERANS AFFAIRS****38 CFR Part 3****RIN 2900-AM13****Phase-In of Full Concurrent Receipt of Military Retired Pay and Veterans Disability Compensation for Certain Military Retirees**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is proposing to amend its regulations concerning concurrent receipt of military retired pay and veterans' disability compensation. This proposed rule implements section 641 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136). This law permits certain veterans who are entitled to military retired pay and are receiving disability compensation for a service-connected disability or disabilities rated at 50 percent or higher to receive disability compensation as well as their military retired pay. The intended effect of the proposed regulation is to clearly state who is eligible for concurrent receipt of disability compensation and military retired pay, who must still waive military retired pay to receive disability compensation, and how to file such a waiver.

**DATES:** Comments must be received on or before September 6, 2005.

**ADDRESSES:** Written comments may be submitted by: mail or hand-delivery to Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Avenue, NW.,

Room 1068, Washington, DC 20420; fax to (202) 273-9026; e-mail to [VAregulations@mail.va.gov](mailto:VAregulations@mail.va.gov); or, through <http://www.Regulations.gov>. Comments should indicate that they are submitted in response to "RIN 2900-AM13." All 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) 273-9515 for an appointment.

**FOR FURTHER INFORMATION CONTACT:**

Adrienne Foster, Consultant, Compensation and Pension Service (211), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (202) 273-7051.

**SUPPLEMENTARY INFORMATION:**

Section 641 of the National Defense Authorization Act for Fiscal Year 2004 (the Act), Public Law 108-136, amended section 1414 of title 10, United States Code. Section 641 permits certain veterans who are eligible for military retired pay and for veterans' disability compensation for a single service-connected disability rated at 50 percent or higher, or a combination of service-connected disabilities rated 50 percent or higher, to receive concurrent payment of both military retired pay and disability compensation. Public Law 108-136 establishes a phase-in period from January 1, 2004, to December 31, 2013, during which the monthly amount of military retired pay payable to a qualified retiree will gradually increase. Section 642 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375, amended section 1414 of title 10, United States Code, by eliminating the phase-in period for retirees receiving compensation for a disability rated as 100 percent.

This amendment concerns entitlements administered by the Department of Defense (DoD) as well as VA. DoD must determine the phase-in amount for concurrent receipt. Regulations pertinent to this calculation or other matters specifically dealing with the receipt of military retired pay are the responsibility of DoD and are outside the scope of this proposed rulemaking. Section 1414(c) provides for the phase-in until December 31, 2013. (See 10 U.S.C. 1414(c).) This proposed rulemaking is solely related to the effect of this law on VA's compensation payments.

**Background**

Section 1414 of title 10, U.S.C., as amended by the Act, provides in

subsection (a) that certain veterans are permitted to receive concurrent payment of military retired pay and veterans' disability compensation, notwithstanding sections of the law that prohibit the duplication of benefits and require a waiver of military retired pay to receive disability compensation. (See 38 U.S.C. 5304, 5305.) Subject to the exception for retirees receiving compensation for a disability rated as 100 percent, from January 1, 2004, until December 31, 2013, payment to qualified retirees will be subject to a mathematical formula for the phase-in of full concurrent receipt. (See 10 U.S.C. 1414(c).)

Special provisions, administered by DoD, exist with respect to concurrent receipt for Chapter 61 Disability Retirees. (See 10 U.S.C. 1201-1221.) A veteran, retired under Chapter 61 with 20 or more years of service, must waive a portion of his or her disability retired pay to receive disability compensation. Veterans retired under Chapter 61 with less than 20 years of service are not entitled to this benefit.

**Regulations Affected by the Amended Section 1414**

The Act amends 10 U.S.C. 1414, which affects 38 CFR 3.750. The title of § 3.750 is "Retirement pay." We propose to change the title of § 3.750 to "Entitlement to concurrent receipt of military retired pay and disability compensation." This title more clearly conveys the content of the revised regulation.

Current § 3.750(a) prohibits concurrent receipt of military retired pay and disability compensation. Proposed paragraph (a) defines military retired pay.

Current paragraph (b) provides for election between military retired pay and disability compensation. We propose to move the information contained in current paragraph (b) to proposed paragraph (d). We propose in paragraph (b)(1), consistent with amended 10 U.S.C. 1414(a), to state that qualified veterans with a disability or disabilities rated at 50 percent or higher are entitled to concurrent receipt of both military retired pay and disability compensation benefits.

To comply with amended 10 U.S.C. 1414(b), we propose in paragraph (b)(2) to state that veterans who retire under 10 U.S.C. Chapter 61 with 20 or more years of creditable service must waive a portion of their disability retired pay to receive disability compensation, but only to the extent that disability retired pay exceeds the amount of retired pay they would have received had they retired based on length of service.

We propose in paragraph (b)(3) to state that Chapter 61 disability retirees who have less than 20 years of creditable service are not entitled to concurrent receipt.

Proposed paragraph (b)(4) is a restatement, in plain language, of the rule in current paragraph (d) that recipients of improved pension are entitled to receive military retired pay at the same time, but that in determining entitlement to improved pension, military retired pay will be treated as countable income.

Proposed paragraph (c) would amend the requirement that a veteran file a waiver of military retired pay in order to receive compensation benefits. All veterans eligible to receive military retired pay and disability compensation, but who are not qualified to receive them at the same time, must file a waiver of retired pay in order to receive compensation. Additionally, during the phase-in period, veterans must file a waiver even if they are eligible for concurrent receipt. By waiving military retired pay, eligible veterans will receive full disability compensation payments plus the appropriate phase-in amount of military retired pay from DoD. The phase-in period ends on December 31, 2013, and effective on January 1, 2014, a veteran eligible for concurrent receipt will no longer be required to file a waiver.

We propose in paragraph (c) to state that a veteran may file the waiver with VA rather than requiring the veteran to file it with the service department. This reflects current VA practice, and we believe it would be helpful to inform veterans of this practice. The proposed rule also describes what actions on the part of a claimant will be construed as a waiver of military retired pay. In paragraph (c)(1), we propose to describe how one files a waiver of military retired pay. Paragraph (c)(2) would restate, in plain language, the rule in current paragraph (c), that filing an application for VA benefits constitutes an election to receive disability compensation and a waiver of military retired pay.

Proposed paragraph (d)(1) would restate, in plain language, the rule in current paragraph (b), that the veteran may reelect between receipt of military retired pay and disability compensation and would make clear that this reelection may be made at any time. Proposed paragraph (d)(2) would restate the rule in current paragraph (b) concerning an election filed within 1 year of the date of notification of VA entitlement and that rule's application to incompetent veterans.

We have not included the provisions in § 3.750(d)(2) that state that recipients of old-law or section 306 pension must waive an equivalent amount of military retired pay. We propose to remove this section because no one may elect to receive old-law or section 306 pension, and the number of individuals that currently receive such pensions because they waived retired pay is very small. This deletion would not effect the entitlement of current beneficiaries. Should the occasion arise, VA will adjudicate any new claim relying on existing statutory authority.

#### **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 proposed regulatory amendment would 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 amendment would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### **Executive Order 12866**

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

#### **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 developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any given year. This proposed rule would have no such effect on State, local, or tribal governments, or the private sector.

#### **Catalog of Federal Domestic Assistance Program Numbers**

The Catalog of Federal Domestic Assistance program numbers for this proposed rule are 64.104, 64.105, and 64.110.

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

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

Approved: March 24, 2005.

**R. James Nicholson,**  
*Secretary of Veterans Affairs.*

For the reasons set forth in the preamble, 38 CFR part 3 is proposed to be amended 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 § 3.750 to read as follows:

#### **§ 3.750 Entitlement to concurrent receipt of military retired pay and disability compensation.**

(a) *Definition of military retired pay.* For the purposes of this section, military retired pay is payment received by a veteran that is classified as military retired pay by the Service Department, including retainer pay, based on the recipient's service as a member of the Armed Forces or as a commissioned officer of the Public Health Service, the Coast and Geodetic Survey, the Environmental Science Services Administration, or the National Oceanic and Atmospheric Administration.

(b) *Payment of both military retired pay and disability compensation or improved pension—(1) Compensation.* Subject to paragraph (b)(2) of this section, a veteran with 20 or more creditable years of military service who is entitled to military retired pay and disability compensation for a service-connected disability rated 50 percent or more, or a combination of service-connected disabilities rated at 50 percent or more, under the schedule for rating disabilities (38 CFR part 4, subpart B), is 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. However, in addition to any waiver required during the phase-in period under paragraph (c)(1)(ii) of this section, the veteran must waive his or her disability retired pay to receive disability compensation to the extent that disability retired pay exceeds the amount of retired pay the veteran would have received had the veteran retired based on length of service.

(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 does not have a qualifying service-connected disability or disabilities rated at 50 percent or more.

(ii) All veterans who are eligible to receive both military retired pay and disability compensation, 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. The phase-in period ends on December 31, 2013. After December 31, 2013, 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) 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)

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 81

[Region II Docket No. R02-OAR-2005-NY-0001; FRL-7934-3]

### Air Quality Redesignation for the 8-Hour Ozone National Ambient Air Quality Standards; New York State

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** On April 15, 2004, we, the Environmental Protection Agency (EPA) announced nationwide designations under the 8-hour ozone National Ambient Air Quality Standard (NAAQS). That action designated several counties in the Syracuse area as unclassifiable. The counties in the Syracuse area included in the designation were Onondaga, Madison, Cayuga and Oswego in the State of New York. This action proposes to redesignate the above counties to attainment. We are soliciting comments on this proposed action.

**DATES:** Comments must be received on or before August 8, 2005.

**ADDRESSES:** Submit your comments, identified by Regional Material in EDocket (RME) ID Number R02-OAR-2005-NY-0001, by one of the following methods:

1. Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

2. Agency Web site: <http://docket.epa.gov/rmepub/>. RME, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Once in the system, select "quick search," then key in the appropriate RME Docket identification number. Follow the on-line instructions for submitting comments.

3. E-mail: [Werner.Raymond@epa.gov](mailto:Werner.Raymond@epa.gov).

4. Mail: Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency Region 2, 290

Broadway, New York, New York 10007-1866.

5. Hand Delivery or Courier. Deliver your comments to: EPA Region 2, Air Programs Branch, 290 Broadway, New York, New York 10007-1866.

**Instructions:** Direct your comments to RME ID Number R02-OAR-2005-NY-0001. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://docket.epa.gov/rmepub>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, [regulations.gov](http://regulations.gov), or e-mail. The EPA RME website and the Federal [regulations.gov](http://regulations.gov) website are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or [regulations.gov](http://regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

**Docket.** All documents in the electronic docket are listed in the RME index at <http://docket.epa.gov/rmepub/>. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy at the Environmental Protection Agency, Air Programs Branch, 290 Broadway, New York, New York. EPA requests that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The interested persons wanting to examine these documents should make an