

**DEPARTMENT OF VETERANS
AFFAIRS**

38 CFR Part 3

RIN 2900-AN19

**Termination of Phase-In Period for Full
Concurrent Receipt of Military Retired
Pay and Veterans Disability
Compensation Based on a VA
Determination of Individual
Unemployability**

AGENCY: Department of Veterans Affairs.
ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its adjudication regulations regarding entitlement to full concurrent receipt of military retired pay and veterans disability compensation based on a VA determination of individual unemployability (IU). This rulemaking is intended to implement section 642 of the National Defense Authorization Act for Fiscal Year 2008, which provides that veterans who are entitled to receive veterans disability compensation based on a VA determination of individual unemployability are no longer subject to a phase-in period. This regulatory amendment is necessary to conform to statutory provisions.

DATES: *Effective Date:* March 19, 2009.

FOR FURTHER INFORMATION CONTACT: Nancy Copeland, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9685. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Beginning in 2004, 10 U.S.C. 1414(a) authorized concurrent receipt of retired pay and VA disability compensation for certain veterans. However, rather than immediately authorizing full concurrent receipt, Congress imposed a “phase-in” period permitting partial concurrent receipt for the period from January 1, 2004, to December 31, 2013.

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 qualified retirees receiving veterans’ disability compensation for a disability rated as 100-percent. Section 663 of the National Defense Authorization Act for Fiscal Year 2006, Public Law 109-163, further provided that veterans entitled to receive disability compensation based on a VA determination of IU were subject to the phase-in period only until September 30, 2009.

Section 642 of the National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, has further amended section 1414 of title 10, United States Code. Effective December 31, 2004, qualified retirees receiving veterans’ disability compensation at the rate payable for a 100-percent disability based on a VA determination of IU are no longer subject to a phase-in period. Any benefits due based on termination of the phase-in are payable from January 1, 2005.

Based on this statutory change, VA is amending 38 CFR 3.750 by removing language that provides that qualified retirees who receive disability compensation based on a VA determination of IU are subject to a phase-in period. This is no longer required based on the statutory change. To avoid confusion, we are clarifying that both veterans who are rated 100 percent disabled under the VA rating schedule and veterans who are entitled to receive 100 percent disability compensation based on a VA determination of IU need not file waivers of military retired pay.

Administrative Procedures Act

This final rule is an interpretive rule and the changes made by this rule merely reflect VA’s interpretation of statutory requirements. The primary purpose of the amendment is to implement VA’s statutory interpretation of 10 U.S.C. 1414 and to align § 3.750 to the statute. Section 553(b) of title 5, U.S. Code, does not apply to interpretive rules. Accordingly, there is a basis for dispensing with prior notice and opportunity to comment. Moreover, under section 553(d), interpretive rules do not require 30 days prior notice before they may become effective. Therefore, because the amendment to § 3.750 is an interpretive rule, the amendment may have an immediate effect. Accordingly, there is a basis for dispensing with the delayed effective date provisions of 5 U.S.C. 553(d).

Paperwork Reduction Act

This action 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 not to be a significant regulatory action 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 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 final rule will 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 number and title for this rule is Veterans Compensation for Service-Connected Disability; 64.116.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits,

Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Approved: February 24, 2009.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

■ For the reasons set out in the preamble, VA amends 38 CFR part 3 as follows:

PART 3—ADJUDICATION

■ 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. Amend § 3.750 by:

■ a. Revising paragraph (b)(1).

■ b. Revising paragraph (c)(1)(ii).

■ c. Redesignating paragraph (c)(2) as paragraph (c)(3).

■ d. Adding new paragraph (c)(2).

■ 3. The revisions and addition read as follows:

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

* * * * *

(b) * * *

(1) *Compensation.* Subject to paragraphs (b)(2) and (b)(3) of this section, a veteran 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 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.

* * * * *

(c) * * *

(1) * * *

(ii) Except as provided in paragraph (c)(2) of this section, 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 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 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.

(2) *When a waiver is not necessary.* Unless paragraph (b)(2)(ii) of this section applies, veterans who are entitled to receive disability compensation based on a VA determination of individual

unemployability as well as veterans rated 100-percent disabled under the VA schedule for rating disabilities need not file waivers of military retired pay. The phase-in period does not apply to this group of veterans.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MD202-3118; FRL-8775-2]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Update to Materials Incorporated by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of administrative change.

SUMMARY: EPA is updating the materials submitted by Maryland that are incorporated by reference (IBR) into the State implementation plan (SIP). The regulations affected by this update have been previously submitted by the Maryland Department of the Environment (MDE) and approved by EPA. This update affects the SIP materials that are available for public inspection at the National Archives and Records Administration (NARA), the Air and Radiation Docket and Information Center located at EPA Headquarters in Washington, DC, and the Regional Office.

DATES: *Effective Date:* This action is effective March 19, 2009.

ADDRESSES: SIP materials which are incorporated by reference into 40 CFR part 52 are available for inspection at the following locations: Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; the Air and Radiation Docket and Information Center, EPA Headquarters Library, Room Number 3334, EPA West Building, 1301 Constitution Ave., NW., Washington, DC 20460, and the National Archives and Records Administration. If you wish to obtain materials from a docket in the EPA Headquarters Library, please call the Office of Air and Radiation (OAR) Docket/Telephone number: (202) 566-1742; or the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: <http://www.archives.gov/>

federal_register/code_of_federal_regulations/ibr_locations.html.

FOR FURTHER INFORMATION CONTACT: Harold A. Frankford, (215) 814-2108 or by e-mail at frankford.harold@epa.gov.

SUPPLEMENTARY INFORMATION: The SIP is a living document which the State revises as necessary to address the unique air pollution problems in the State. Therefore, EPA from time to time must take action on SIP revisions containing new and/or revised regulations to make them part of the SIP. On May 22, 1997 (62 FR 27968), EPA revised the procedures for incorporating by reference federally-approved SIPs, as a result of consultations between EPA and the Office of the Federal Register (OFR). The description of the revised SIP document, IBR procedures and “Identification of plan” format are discussed in further detail in the May 22, 1997 **Federal Register** document. On November 29, 2004 (69 FR 69304), EPA published a document in the **Federal Register** beginning the new IBR procedure for Maryland. On February 2, 2006 (71 FR 5607) and May 18, 2007 (72 FR 27957), EPA published an update to the IBR material for Maryland. On March 11, 2008 (73 FR 12895), EPA published a correction update to the IBR material pertaining to source-specific requirements. In this document, EPA is doing the following:

1. Announcing the update to the IBR material as of December 1, 2008.
2. Making corrections to the following entries listed in the paragraph 52.1070(c) chart, as described below:
 - a. COMAR 26.11.01.01B(53)—moving the text from the “State effective date” and the “EPA approval date” columns to the “EPA approval date” and “Additional explanation/citation at 40 CFR 52.1100” columns respectively; and adding new text to the “State effective date column.”
 - b. COMAR 26.11.06.02—correcting the regulatory citation in the “Additional explanation/citation at 40 CFR 52.1100” column.
 - c. COMAR 26.11.13.08—correcting the page citation in the “EPA approval date” column.
 - d. COMAR 26.11.17.01 and .03—correcting the text in the “State effective date” and “EPA approval date” columns.
 - e. COMAR 26.11.24.05-1—adding explanatory text to the “Additional explanation/citation at 40 CFR § 52.1100” column.
 - f. COMAR 26.11.32.13—revising the explanatory text in the “Additional explanation/citation at 40 CFR 52.1100” column.