



Office of the General Counsel

B-271810.8

June 6, 1996

The Honorable Alan K. Simpson
Chairman
The Honorable John D. Rockefeller IV
Ranking Minority Member
Committee on Veterans' Affairs
United States Senate

The Honorable Bob Stump
Chairman
The Honorable G.V. Montgomery
Ranking Minority Member
Committee on Veterans' Affairs
House of Representatives

Subject: Compensation for Disability Resulting from Hospitalization, Treatment,
Examination, or Vocational Rehabilitation

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Veterans Affairs (VA), entitled "Compensation for Disability Resulting from Hospitalization, Treatment, Examination, or Vocational Rehabilitation" (RIN: 2900-AH44). We received the rule on May 21, 1996. It was published in the Federal Register as a final rule on May 23, 1996. 61 Fed. Reg. 25787.

This rule adopts, with minor, nonsubstantive changes, an interim rule amending VA adjudication regulations concerning compensation for disability or death resulting from VA hospitalization, medical or surgical treatment, or examination. Before the interim rule, establishing entitlement to compensation for adverse results of medical or surgical treatment required that VA be at fault or that an accident occur. The interim rule, to conform the regulations to a recent United States Supreme Court decision (Brown v. Gardner, 115 S.Ct. 552 (1994)), deleted the fault-or-accident requirement and instead provided that compensation is payable for all but those injuries that are the certain, or very nearly certain, result of properly administered medical treatment to which a veteran consented. (For example, if a veteran had

consented to the amputation of a gangrenous leg, VA would not compensate him for the loss of a limb.)

Enclosed is our assessment of the VA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that VA complied with the applicable requirements.

If you have any questions about this report, please contact Kathleen E. Wannisky, Associate General Counsel for Operations, at (202) 512-8326. The official responsible for GAO evaluation work relating to the Department of Veterans Affairs is David P. Baine, Director, Health Care Delivery and Quality Issues. Mr. Baine can be reached at (202) 512-7101.

Robert P. Murphy
General Counsel

Enclosure

cc: Mr. Thomas O. Gessel
Director, Office of Regulations Management
Department of Veterans Affairs

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY
THE DEPARTMENT OF VETERANS AFFAIRS
ENTITLED
"COMPENSATION FOR DISABILITY RESULTING FROM HOSPITALIZATION,
TREATMENT, EXAMINATION, OR VOCATIONAL REHABILITATION"
(RIN: 2900-AH44)

(i) Cost-benefit analysis

As part of its implementation of Executive Order 12866, the Department of Veterans Affairs (VA) prepared a cost and budgetary analysis. The estimated cost to the government (and benefit to veterans disabled as a result of VA hospitalization, medical or surgical treatment) is \$166.5 million during fiscal year 1996, \$244.7 million during fiscal year 1997, \$327 million during fiscal year 1998, \$413.6 million during fiscal year 1999, and \$504.3 million during fiscal year 2000. The estimated 5-year benefit cost is \$1,656,100,000. A copy of that analysis was provided to the U.S. General Accounting Office when the final rule was submitted on May 21, 1996.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607 and 609

Pursuant to section 605(b) of the Act, VA certified in the preamble to the interim rule (60 Fed. Reg. 14222, 14223 (March 16, 1995)) that the rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act. Therefore, it was not required to prepare an initial or final regulatory flexibility analysis under sections 603 and 604 of the Act. For the same reason, sections 607 and 609 are inapplicable.

According to a VA official, VA's section 605(b) certification was not provided separately to the Small Business Administration (SBA) Chief Counsel for Advocacy. Rather, in accordance with VA's practice, publication of the certification in the Federal Register was treated as providing notice to SBA. An SBA official has confirmed that some agencies follow this practice without objection from SBA.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

According to VA, this rulemaking action does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995.

(iv) Other relevant information or requirements under Acts and Executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

Although the Act, 5 U.S.C. § 553(b)(A), does not require agencies to give general notice of a proposed rulemaking when issuing an interpretive rule¹ such as this, VA promulgated this rule through the general notice of proposed rulemaking procedures of the Act, 5 U.S.C. § 553. VA afforded interested parties the opportunity to comment on the interim rule. The preamble to the final rule evaluated and responded to the comments received.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

This rule contains no information collection requirements subject to the Act.

Statutory authorization for the rule

38 U.S.C. § 1151 provides for the payment of disability or dependency and indemnity compensation for additional disability or death resulting from an injury or aggravation of an injury suffered as the result of VA hospitalization, medical or surgical treatment, examination, or pursuit of a course of vocational rehabilitation under 38 U.S.C. ch. 31.

Executive Order No. 12866

Based on its economic impact, the rule was determined by the Office of Management and Budget to be a "significant regulatory action" within the meaning of Executive Order No. 12866. VA supplied to the Office of Information and Regulatory Affairs a planned regulatory action document that described the reason for the amendment to existing VA regulations and also assessed the costs and budgetary impact of the rule. According to VA, the Office of Information and Regulatory Affairs reviewed the rule at the final stage and suggested no changes.

Executive Order No. 12899

According to a VA official, relevant portions of Executive Order No. 12899, Civil Justice Reform, were considered in issuing this final rule. Our review of both the interim and final rules and accompanying documentation suggests that appropriate consideration was given to this Executive Order.

¹This rule amends VA's regulations regarding the award of compensation for disability resulting from hospitalization, treatment, examination, or vocational rehabilitation to reflect the Supreme Court's interpretation of 38 U.S.C. § 1151 as stated in Brown v. Gardner, 115 S.Ct. 552 (1994).

Section 3(b)(2)(B) requires agencies to make every reasonable effort to ensure that the regulation specifies in clear language the effect on existing Federal law or regulation. VA clearly indicated in both the interim rule and the final rule the amendments to the previous adjudication regulations necessitated by the Supreme Court decision in Brown, 115 S.Ct. 552 (1994).

Section 3(b)(2)(C) requires agencies to provide a clear legal standard rather than a general standard. VA adopted the standard for determining a veteran's right to compensation contained in Brown, 115 S.Ct. at 555, and incorporated it into the final rule in what appears to be a clear and unambiguous manner.

Section 3(b)(2)(D) requires agencies to specify in clear language the retroactive effect, if any, given to the regulation. In the preamble to the interim rule, VA clearly states that the effective date of the rule is November 25, 1991, the date of the Court of Veterans Appeals decision that invalidated the former regulations. In the preamble to the final rule, VA responded to comments submitted on the interim rule, including comments concerning the effective date. After discussing the comments, VA again stated that the effective date of the rule would be November 25, 1991.

Finally, section 3(b)(2)(F) requires agencies to define key terms in their regulations. The regulation includes a definition of the term "necessary consequences," a key element to be considered in determining a veteran's eligibility for compensation under this rule.

VA did not identify any other statute or executive order imposing procedural requirements relevant to the rule.