



DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

October 16, 2015

VBA Letter 20-15-16

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

SUBJ: Administration of Same-Sex Spousal Benefits

Purpose

As of the date of this notification, the Veterans Benefits Administration (VBA) is processing same-sex spousal benefit claims that were held or submitted following the June 26, 2015, Supreme Court decision in *Obergefell v. Hodges*. This letter rescinds VBA Letter 20-14-08 and provides instructions and procedures for processing compensation, pension, dependency and indemnity compensation (DIC), and vocational rehabilitation and employment (VR&E) claims involving same-sex marriage in light of the *Obergefell* decision.

Background

Section 3 of the Defense of Marriage Act (DOMA) defined “marriage” and “spouse” for purposes of federal law to preclude recognition of marriages of same-sex couples. On June 26, 2013, the Supreme Court held, in *United States v. Windsor*, that Section 3 of DOMA violates the Fifth Amendment of the U.S. Constitution by discriminating against same-sex couples who are lawfully married under state law.

VBA administers benefits and programs that depend on the definition of the terms “spouse” and “surviving spouse.” For purposes of VA benefits, 38 U.S.C. § 101(3) and § 101(31) define “surviving spouse” and “spouse” as persons “of the opposite sex.” These definitions (codified separately from DOMA) were not specifically addressed in the Supreme Court’s *Windsor* decision. On September 4, 2013, the United States Attorney General announced that the President had directed the Executive Branch to cease enforcement of 38 U.S.C. §§ 101(3) and 101(31), to the extent they preclude provision of Veterans’ benefits to same-sex married couples. Accordingly, VA ceased to enforce the above-mentioned statutory provisions and VBA’s implementing regulation (38 C.F.R. § 3.50), to the extent that they preclude provision of Veterans’ benefits to same-sex married couples. This announcement allowed VA to administer spousal and survivors’ benefits to same-sex married couples, provided their marriages met the requirements of 38 U.S.C. § 103(c). That provision states, “[i]n determining whether or not a person is or was the spouse of a Veteran, their marriage shall be proven as valid for the purposes of all laws administered by the Secretary according to the law of the place where the parties resided at

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the time of the marriage or the law of the place where the parties resided when the right to benefits accrued.” As such, prior to *Obergefell*, this provision precluded VA from recognizing a Veteran’s same-sex marriage where both the Veteran and the Veteran’s spouse resided in a state that did not recognize same-sex marriage at the time of the marriage, and at the time when the claimant’s right to benefits accrued, i.e., when the claimant became eligible for benefits or the date of claim, consistent with GC Precedent Opinion 4-2014.

On June 26, 2015, the Supreme Court held in *Obergefell v. Hodges* that the Fourteenth Amendment of the U.S. Constitution requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. Accordingly, VA may now recognize all same-sex marriages without regard to a Veteran’s state of residence.

Determining Whether VA Will Recognize A Marriage: Dependency Claims (Compensation and Pension), Survivors Pension, Dependency and Indemnity Compensation (DIC), Accrued Benefits, and Vocational Rehabilitation and Employment (VR&E)

NOTE: The following procedures apply to adjudication of compensation, pension, DIC, and VR&E claims. Education and insurance follow benefit-specific guidance, which is provided later in this letter. Loan guaranty guidance will be provided separately.

Important: Any claims related to same-sex marriage currently held at regional offices or centers must be processed expeditiously according to the guidance set forth in this notification.

Procedures

General

Under 38 U.S.C. § 5124(a), VA may accept the written statement of a claimant’s marriage to another individual as proof of the existence of the relationship. This statute is implemented under 38 C.F.R. § 3.204(a). To establish marriage under section 3.204(a), VBA requires only a statement by the claimant that includes the date and place of marriage and the name and social security number of the person the claimant has identified as his or her spouse.

Under 38 U.S.C. § 103(c), which is currently administered under 38 C.F.R. § 3.1(j), VBA will recognize a Veteran’s marriage for the purposes of paying benefits if the marriage was recognized under the law of the place where at least one of the parties resided when they were married, or at the time when the claimant became eligible for benefits. To apply the section 103(c) standard, consistent with 38 U.S.C. § 5124(a) and 38 C.F.R. § 3.204(a), VBA will generally accept a claimant’s statement that he or she is

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married. This same procedure applies no matter if the claimant is asserting that he/she is in an opposite-sex marriage or a same-sex marriage.

The only time when VA will not accept a claimant's statement that he/she is married as being sufficient evidence to establish the claimant's marriage is when the claimant's statement on its face raises a question of validity, the claimant's statement conflicts with other evidence in the record, or there is a reasonable indication of fraud or misrepresentation. In these instances, VBA shall require more information, per 38 C.F.R. § 3.204(a)(2).

Important: For claims involving a biological child of the Veteran, the Veteran's written statement is sufficient to establish the relationship to the child, per 38 C.F.R. § 3.204(a). For claims involving an adopted child, the parent/child relationship should be recognized per 38 C.F.R. § 3.210(c). For claims involving a stepchild of a same-sex marriage, the parent/child relationship should be recognized per section 3.210(d). In instances when the relationship between the Veteran and child is neither biological nor adoptive, but there is indication that the relationship may be something more than a stepchild relationship, then refer the claim to regional counsel for a determination as to whether the child may be considered a legitimate child for the purpose of VA benefits under 38 C.F.R. § 3.210(a).

Survivors Claims

When determining whether VA will recognize a same-sex marriage in survivors claims, claims processors should accept the statement of the claimant that he/she was married, as they would do for claimants asserting a marital relationship by way of opposite-sex marriages.

Note: For survivors claims, VA may accept a written statement asserting the marital relationship, but should determine if the same-sex marriage satisfies the requirements of 38 C.F.R. §§ 3.50(b)(1)&(2) and 3.54 (marriage dates). When calculating years of marriage pursuant to section 3.54, use the date the marriage was performed, not the date the marriage could first be recognized for the purpose of VA benefits.

Important: In some cases, such as those involving domestic partnerships or civil unions, VA cannot recognize a marriage in a survivor's claim under section 103(c), but the case may raise the question of whether the marriage may be considered a "deemed valid" marriage under 38 U.S.C. § 103(a). Claims identified as possibly implicating section 103(a) will be processed with the assistance of regional counsel. Refer all such claims based on a same-sex marriage to regional counsel until further notice. The limited exception provided in section 103(a) and implementing regulation 38 C.F.R. § 3.52 permits VA, for the purpose of gratuitous death benefits, to recognize certain marriages as *deemed valid marriages* that are not recognized under state law. In order for this provision to be applied, the surviving spouse claiming benefits must have been, among other requirements, without knowledge of the legal impediment to the marriage when entering into the marriage, which must have occurred one year or more before the Veteran's death or for any period of time if a child was born of the marriage.

Effective Date

Although the effective dates of awards of compensation or pension based solely upon judicial precedents, i.e., the Supreme Court's decision in *Obergefell*, are governed by 38 U.S.C. § 5110(a), the Attorney General's September 4, 2013, announcement of the President's direction to cease enforcement of 38 U.S.C. § 101(3) and § 101(31) may be characterized as a liberalizing change in law based on an administrative issue and governed instead by 38 U.S.C. § 5110(g). Therefore, the effective date should be assigned as follows:

1. If the claim was pending or open upon direct review as of September 4, 2013, the effective date should be assigned under 38 U.S.C. § 5110 and 38 C.F.R. § 3.400, as if the laws barring VA's recognition of same-sex marriage had never been in effect.
2. If the claim was received after September 4, 2013, VA should apply U.S.C. § 5110(g) and 38 C.F.R. § 3.114, if applicable, to assign an effective date as early as September 4, 2013, if to do so would be to the claimant's benefit. However, the effective date may not be retroactive for more than one year from the date of receipt of the claim. To be entitled to benefits for up to one year prior to the date of the claim under 38 C.F.R. § 3.114, the claimant must have met all eligibility criteria on the date of the liberalizing change in law. For these purposes, the date of the liberalizing change in law is September 4, 2013, and a claimant may be considered to have met the marriage eligibility criteria on that date if they were actually married as of that date, even if their state of residence did not then recognize the marriage.
3. If the claimant is entitled to an effective date earlier than the date of receipt of the claim, based on some other provisions of 38 U.S.C. § 5110 and 38 C.F.R. § 3.400, then assign the effective date in accordance with those other provisions. For example, if VA receives a claim for DIC or survivors' pension within one year of the date the death occurred, then the effective date of the award may be the first day of the month in which the death occurred, pursuant to 38 U.S.C. § 5110(d) and 38 C.F.R. § 3.400(c)(2), regardless of whether that date is prior to September 4, 2013. However, if death occurred more than one year prior to receipt of the claim, and section 5110(d) and section 3.400(c)(2) are therefore inapplicable, then VA may nonetheless assign an effective date as early as September 4, 2013, or up to one year prior to the date of receipt of the claim, whichever is later, pursuant to 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114.

Same-Sex Relationships and Common-Law Marriage

If the Veteran indicates that his or her same-sex marriage is a common-law marriage, claims processors must determine whether the same-sex relationship qualifies as a common-law marriage. See M21-1MR III.iii.5.C. Claims processors may seek guidance from regional counsel as needed.

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Insurance

For Servicemembers' Group Life Insurance (SGLI) and Family SGLI (FSGLI), where Veteran status is not a condition of participation, section 103(c) is inapplicable, and VA recognizes marriages for these programs based on the law of the place where the marriage occurred, which is the same standard as used by the Department of Defense (DoD). Section 103(c) also does not apply to the process of converting a spouse's FSGLI coverage to an individual policy, because that right of conversion depends upon status as a Servicemember's spouse, not as the spouse of a "Veteran." Similarly, when establishing a marriage for purposes of Veterans' Group Life Insurance (VGLI), section 103(c) is inapplicable, because VGLI proceeds are paid based on a relationship to a "former member" rather than a "Veteran."

For spousal determinations with respect to National Service Life Insurance (NSLI) or U.S. Government Life Insurance (USGLI), applicable regulations employ the place-of-residence analysis under section 103(c) to establish whether VA will recognize a marriage. Claims processors should follow the procedures set forth in this letter with regard to dependency claims for compensation and pension for determinations of marital status for NSLI and USGLI.

Education

Transfer of Post-9/11 GI Bill Benefits

Section 103(c) does not apply to transfers of Post 9/11 GI Bill Benefits, per 38 U.S.C. § 3319, because an individual's eligibility to transfer this education benefit is based on the individual being a member of the uniformed services with a specific amount of qualifying service. For the purpose of this benefit VA's recognizes all DoD-approved Section 3319 transfers to dependents.

Survivors' and Dependents' Educational Assistance (DEA/Chapter 35)

DEA/Chapter 35 claims eligibility may be established based on a relationship to either a Servicemember or a Veteran. For a dependent of a Servicemember, DEA eligibility may be established if either of the following exists:

1. A permanent and total disability, incurred or aggravated in the line of duty in the active military, naval, or air service, for which the Servicemember is hospitalized or receiving outpatient medical care, services, or treatment and is likely to be discharged or released from such service for such disability; OR
2. A Servicemember dies in the line-of-duty.

Section 103(c) is inapplicable when evaluating a Servicemember's dependents. DoD uses a different standard from VA in determining validity of marriage. For the purpose of determining whether VA will recognize a marriage to a Servicemember for this benefit, VA will recognize marriages that DoD recognizes. If eligibility is based on a relationship to a Veteran AND the relationship determination

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depends upon marital status (e.g. spouse/surviving spouse, child with no biological or adoptive relationship to the Veteran, or step-child), claims processors should accept the statement of the claimant that he or she is married for purposes of establishing eligibility of the child.

Questions

For questions, please contact the following:

Compensation: VAVBAWAS/CO/212A

Pension: VAVBAWAS/CO/PMC

Insurance: VAVBAPHI/IC/29/29A

Loan Guaranty: LGYLEGAL.VBAVACO@va.gov

Education: VABVAWAS/CO/225C

VR&E: Your area VR&E field liaison at the email address listed below, or by telephone at (202) 461-9600

District	Primary	Alternate	E-mail
North Atlantic	Ellen Braswell	Veronica Brown	VAVBAWAS/CO/VRE/NA
Southeast	Veronica Brown	Ellen Braswell	VAVBAWAS/CO/VRE/SE
Midwest	Sabrina McNeil	Anthony Estelle	VAVBAWAS/CO/VRE/MW
Continental	Lynn Horwatt	Veronica Brown	VAVBAWAS/CO/VRE/CONT
Pacific	Anthony Estelle	Sabrina McNeil	VAVBAWAS/CO/VRE/PA

/s/

Allison A. Hickey
Under Secretary for Benefits