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**DEPARTMENT OF VETERANS AFFAIRS**

**8320-01**

**38 CFR Part 71**

**RIN 2900-AR28**

**Extension of Program of Comprehensive Assistance for Family Caregivers**

**Eligibility for Legacy Participants and Legacy Applicants.**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Interim Final Rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is amending its regulations that govern VA's Program of Comprehensive Assistance for Family Caregivers (PCAFC) by extending eligibility for legacy participants, legacy applicants and their Family Caregivers, and the applicable benefits afforded to such Family Caregivers, to include the monthly stipend, by three years. VA is also making non-substantive technical amendments to the regulations.

**DATES:** Effective date: This interim final rule is effective [insert date of publication in the FEDERAL REGISTER].

Comment date: Comments must be received on or before [insert date 60 days after date of publication in the FEDERAL REGISTER].

**ADDRESSES:** Comments must be submitted through [www.Regulations.gov](http://www.Regulations.gov).

Comments received will be available at [regulations.gov](http://regulations.gov) for public viewing, inspection or copies.

**FOR FURTHER INFORMATION CONTACT:** Colleen Richardson, PsyD, Executive Director, Caregiver Support Program, Patient Care Services, Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420, (202) 461-7337. (This is not a toll-free telephone number.)

## **SUPPLEMENTARY INFORMATION:**

### I. Background

In 2010, section 1720G of title 38 of the United States Code (U.S.C.) was codified when it was enacted as part of the Caregivers and Veterans Omnibus Health Services Act of 2010. Public Law (Pub. L.) 111-163, 124 Stat. 1130 (2010). As originally enacted, section 1720G required VA, in part, to establish a Program of Comprehensive Assistance for Family Caregivers (PCAFC) for Family Caregivers of eligible veterans who have a serious injury incurred or aggravated in the line of duty in the active military, naval, or air service on or after September 11, 2001. VA implemented PCAFC through its regulations in part 71 of title 38, Code of Federal Regulations (CFR). PCAFC provides certain benefits such as training, respite care, counseling, technical support, beneficiary travel (to attend required caregiver training and for an eligible veteran's medical appointments), access to health care (if qualified) through the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA), and a monthly stipend. 38 U.S.C. 1720G; 38 CFR 71.25(d), 71.40.

In 2018, section 161 of the John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018 (VA MISSION Act of 2018), Pub. L. 115-182, 132 Stat. 1393 (2018), amended 38 U.S.C. 1720G by expanding PCAFC to Family Caregivers of eligible veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001, in a phased approach, establishing new benefits for designated Primary Family Caregivers of eligible veterans, and making other changes affecting program eligibility and VA's evaluation of PCAFC applications. To incorporate these and other necessary changes to improve and expand VA's PCAFC, VA amended 38 CFR part 71. 85 Federal Register (FR) 46226 (July 31, 2020). These changes took effect on October 1, 2020. *Id.* As part of that rulemaking, VA revised the eligibility criteria for PCAFC in § 71.20, identified a legacy cohort (i.e., legacy applicants, legacy participants, and their Family Caregivers, as those terms are defined in § 71.15) who were approved for PCAFC under the previous eligibility criteria, and created a one-year transition period whereby the legacy cohort would continue to remain eligible for PCAFC while VA reassessed whether the legacy cohort would continue to be eligible for PCAFC under the new eligibility criteria.

When VA established the initial one-year transition period for the legacy cohort, VA intended to establish a transition plan for legacy participants and legacy applicants who may or may not meet the new eligibility criteria and whose Primary Family Caregivers could have their stipend amount impacted by changes to the stipend payment calculation. 85 FR 13356 (March 6, 2020). The one-year period was intended to provide a reasonable amount of time for VA to conduct reassessments, minimize disruption to those individuals, including disruptions that would result from the changes to the stipend payment calculation, and provide a fair and reasonable time for transition.

85 FR at 46253. VA intended that all legacy applicants, legacy participants, and their Family Caregivers would have the same transition period, regardless of when the reassessment was completed during the one-year transition period. *Id.* This transition period was intended to ensure equitable treatment for all legacy applicants, legacy participants, and their Family Caregivers. *Id.*

On September 22, 2021, VA published an interim final rule (First PCAFC Extension for Legacy Cohort) which amended 38 CFR part 71, by extending the one-year transition period and timeline for VA to conduct all necessary reassessments of the legacy cohort for one additional year (that is, until September 30, 2022). 86 FR 52614 (September 22, 2021). A targeted discussion explaining why VA created the legacy cohort and the initial one-year transition period is more fully described in the First PCAFC Extension for Legacy Cohort, and that description is adopted by reference into this preamble. *See id.* at 52615.

On March 25, 2022, the U.S. Court of Appeals for the Federal Circuit issued a decision that set aside certain PCAFC criteria that VA established as part of the July 31, 2020 rulemaking. *Veteran Warriors, Inc. v. Sec’y of Veterans Affairs*, 29 F.4th 1320 (Fed. Cir. 2022). The court’s decision applies to cases and claims initiated on or after the date of the decision, as well as any PCAFC determination still open on direct review before VA as of that date. Matters still open on direct review include determinations concerning stipend decreases or discharges for the legacy cohort made in the course of reassessments completed before March 25, 2022. As a result, VA must repeat certain reassessments of the legacy cohort to account for the court’s interpretation, as explained in more detail below.

For the reasons explained in the subsequent discussion below, VA is extending the transition period and timeline for VA to complete reassessments of the legacy cohort

by three additional years (that is, until September 30, 2025). Accordingly, VA is amending 38 CFR 71.20(b) and (c) regarding program eligibility; § 71.30(e) regarding reassessments; and §§ 71.40(c)(4)(i)(B) through (D), (c)(4)(ii)(C)(2)(i) and (ii), and the note to (c)(4)(ii)(C)(2) regarding the stipend methodology, to account for the additional three-year period through September 30, 2025.

Additionally, VA is making technical amendments to correct the citation in the definition of “General Caregiver” in § 71.15; and in §§ 71.20(a)(2)(ii) and (iii) and 71.25(a)(3)(ii)(A) and (B), VA is making technical amendments to reflect the date VA submitted to Congress a certification that VA fully implemented the information technology (IT) system required by section 162 of the VA MISSION Act of 2018 (i.e., October 1, 2020) and the date that is two years after the Secretary submitted such certification to Congress (i.e., October 1, 2022).

## II. Extension of Transition Period for Legacy Cohort

VA published the First PCAFC Extension for Legacy Cohort because VA was unable to conduct all reassessments of the legacy cohort within the one-year period provided in the July 31, 2020 rulemaking. 86 FR at 52616. Since the First PCAFC Extension for Legacy Cohort was published, VA has made significant progress in completing reassessments of the legacy cohort. As stated in the First PCAFC Extension for the Legacy Cohort, as of July 1, 2021, VA had only completed four percent of the estimated 19,800 reassessments needed for the legacy cohort. *Id.* As of August 3, 2022, VA has completed approximately 95 percent of the reassessments needed for the legacy cohort<sup>1</sup>; however, as discussed below, the outcome of the

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<sup>1</sup> Reassessment data provided in this rulemaking come from the Caregiver Record Management Application (CARMA) system. CARMA provides a snapshot in time, as of

*Veteran Warriors* decision has impacted VA's ability to rely on certain determinations made during many of the reassessments that were completed. Therefore, VA believes an additional three-year transition period is necessary while VA completes the remaining reassessments and repeats certain reassessments that were completed before the *Veteran Warriors* decision.

A. *Veteran Warriors, Inc. v. Sec'y of Veterans Affairs (Veteran Warriors)*

In the July 31, 2020 rulemaking, VA added a “need for supervision, protection, or instruction” as a basis upon which VA could determine that a veteran or servicemember is in need of personal care services under 38 CFR 71.20(a)(3). VA defined the term, “need for supervision, protection, or instruction,” to mean “an individual has a functional impairment that directly impacts the individual’s ability to maintain his or her personal safety on a daily basis.” 38 CFR 71.15. This term and its definition were intended to implement the two criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) (that is, “a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury” and “a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired”, respectively). The term “need for supervision, protection, or instruction” is also referenced in the definition of “unable to self-sustain in the community” in 38 CFR 71.15, which is applied for purposes of determining the applicable stipend level in § 71.40(c)(4)(i)(A).

In *Veteran Warriors*, several parts of the July 31, 2020 rulemaking were challenged, including VA's definition of need for supervision, protection, or instruction.

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the point when the report was run. This data is agile due to factors such as delayed data entry and data corrections, and therefore this data should be considered an estimate.

On March 25, 2022, the U.S. Court of Appeals for the Federal Circuit set aside VA's definition of "need for supervision, protection, or instruction" because it determined that the definition was inconsistent with the statutory language. *Veteran Warriors* at 1342-43. The court dismissed or denied the petition for review with respect to the other regulatory provisions challenged. Thus, none of the other PCAFC criteria or requirements in 38 CFR part 71 were impacted by the court's decision.

As a result of the court's decision, effective March 25, 2022, VA is required to apply clauses (ii) and (iii) of 38 U.S.C. 1720G(a)(2)(C) in place of the regulatory definition at 38 CFR 71.15 when making determinations under the PCAFC regulations that became effective on October 1, 2020. Further, in addition to cases and claims initiated on or after March 25, 2022, the judicial interpretation in *Veteran Warriors* also applies to any PCAFC determination (e.g., claim, case, appeal) "still open on direct review" before VA as of March 25, 2022, in any future decision that will be issued as part of that direct review. See *George v. McDonough*, 142 S. Ct. 1953, 1962 (2022) (citing the general rule from *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993) that the new interpretation of a statute can only retroactively affect decisions still open on direct review).

In general, new judicial interpretations apply to cases pending when the judicial interpretation is issued, but do not provide a basis to reopen final decisions. See generally *Jordan v. Nicholson*, 401 F.3d 1296, 1298-99 (Fed. Cir. 2005) (citing *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) as an example of the United States Supreme Court denying an attempt to reopen a final decision); *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 698 (Fed. Cir. 2000) (citing *Harper*, 509 U.S. at 97 (1993), in stating that "new interpretation of a statute can only retroactively effect decisions still open on direct review, not those decision[s] that are final"); *Rivers v.*

*Roadway Express*, 511 U.S. 298, 311-13 (1994) (discussing retroactive application of statutes). In general, cases are pending when no decision containing language “from which a claimant could deduce that the claim was adjudicated” has been issued.

*Ingram v. Nicholson*, 21 Vet. App. 232, 243 (2007).

In the context of PCAFC, VA interprets “still open on direct review” to mean that, as of March 25, 2022, VA had not issued the last notice of decision that it intends to issue or provide the claimant on a PCAFC determination. This includes decisions pertaining to joint applications, reassessments, discharges, revocations, and stipend changes. Matters “still open on direct review” also encompass determinations for which VA had, as of March 25, 2022, issued advanced notice of its findings, but not “final notice” as that term is used in 38 CFR 71.40(c)(4)(ii)(C)(1)(ii), (2)(ii), and 71.45(b)(1)(ii)(A). Under those provisions, VA provides a 60-day advanced notice period before issuing a final notice in the case of a stipend decrease based on a reassessment or a discharge based on the eligible veteran not meeting the eligibility criteria in § 71.20(a)(1) through (4). As a result, for those determinations involving the “need for supervision, protection, or instruction” definition that were still pending issuance of a last notice of decision on March 25, 2022, VA must re-evaluate such determinations based on the *Veteran Warriors* decision, as such determinations are considered “still open on direct review.”

For the legacy cohort, the 60-day advanced notice period for stipend decreases under § 71.40(c)(4)(ii)(C)(2)(ii) and discharges under § 71.45(b)(1)(i)(A) (because the eligible veteran does not meet the requirements of § 71.20) cannot begin until October 1, 2022, by regulation, and thus, could not have been issued before March 25, 2022. Prior to March 25, 2022, when a reassessment of a member of the legacy cohort under § 71.30(e) resulted in a decision to decrease the stipend or discharge the individual, VA

provided such preliminary findings to the individual, with the intent of adopting those findings in its advanced notice of findings to be provided on October 1, 2022. However, because final notice of VA's decision regarding stipend decreases or discharges for the legacy cohort cannot be issued before 60 days after October 1, 2022, those cases or claims are "still open on direct review" by VA. Moreover, because VA's preliminary findings regarding stipend decreases and discharges made in the course of reassessments under § 71.30(e) for the legacy cohort were based, at least in part, on VA's definition for need for supervision, protection, or instruction that was invalidated by the decision in *Veteran Warriors*, VA can no longer rely on those preliminary findings.

In contrast, for any PCAFC decision in which VA had issued a final decision notice before March 25, 2022, VA is not required to proactively reopen the matter and adjudicate the decision again in accordance with *Veteran Warriors*. See *Jordan*, 401 F.3d at 1298-99; *Disabled Am. Veterans*, 234 F.3d at 698; *Rivers*, 511 U.S. at 311-13. Such decisions include those in which members of the legacy cohort received notice of a decision that was favorable before March 25, 2022 (i.e., a reassessment that resulted in a determination of continued eligibility for PCAFC under 38 CFR 71.20(a) with the same monthly stipend payment or an increased monthly stipend payment). Upon making such determinations, VA provides written notice of the decision. When a reassessment results in an increase in the monthly stipend payment for a Primary Family Caregiver of a legacy applicant or legacy participant, the increase takes effect as of the date of the reassessment. 38 CFR 71.40(c)(4)(ii)(C)(2)(i). Such determination is considered final and is not subject to the 60-day advanced notice period for stipend decreases under § 71.40(c)(4)(ii)(C)(2)(ii) and discharges under § 71.45(b)(1)(i)(A). Therefore, VA would not repeat reassessments for the legacy cohort that resulted in a favorable determination before March 25, 2022. However, this would not preclude a

claimant from requesting a review of or appealing a PCAFC decision issued before March 25, 2022, to the extent authorized by law.

Prior to the *Veteran Warriors* decision on March 25, 2022, VA had completed approximately 80 percent of the reassessments for the legacy cohort. As a result of those reassessments, VA determined that approximately 12,970 of the legacy participants and legacy applicants in the legacy cohort that were reassessed were no longer eligible for PCAFC, and approximately 360 legacy participants and legacy applicants that were reassessed would remain eligible but their Primary Family Caregiver's monthly stipend would be reduced based on the stipend level criteria in § 71.40(c)(4)(i)(A). Each of these approximately 13,330 individuals was provided preliminary findings from VA following their reassessments.

Since VA cannot rely on preliminary findings regarding stipend decreases and discharges for the legacy cohort that were based on VA's definition for need for supervision, protection, or instruction that was invalidated by the decision in *Veteran Warriors*, VA must repeat reassessments for such members of the legacy cohort who were reassessed using the definition of need for supervision, protection, or instruction (hereinafter referred to as "repeat reassessments"). In light of the short timeframe between the date *Veteran Warriors* was decided and September 30, 2022, VA will not be able to complete the remaining reassessments and repeat reassessments before the transition period for the legacy cohort is set to end under VA's current regulations. In order to maintain equity and parity within the legacy cohort, VA believes it is prudent to extend the eligibility for the entire legacy cohort until all members of the legacy cohort have been reassessed using the same eligibility criteria.<sup>2</sup>

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<sup>2</sup> Changes to 38 CFR part 71 that are required as a result of *Veteran Warriors* will be addressed in a separate rulemaking.

## B. Duration of Extension

VA believes that a three-year extension is necessary to complete remaining reassessments and repeat reassessments, particularly as the second phase of PCAFC expansion begins on October 1, 2022, when VA anticipates an influx of an unknown quantity of applications. VA expects the surge in new applications associated with the second phase of PCAFC expansion will impact its ability to timely complete the remaining reassessments and repeat reassessments.

The VA MISSION Act of 2018 amended 38 U.S.C. 1720G by expanding eligibility for PCAFC to Family Caregivers of eligible veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001, in a two-phase approach. As described in the First PCAFC Extension for Legacy Cohort, VA received a dramatic increase in PCAFC applications at the onset of the first phase of expansion. VA anticipates the second phase of expansion, which takes effect October 1, 2022, will also result in a surge in new applications. VA believes it has adequately prepared for the influx of applications that will be received beginning on October 1, 2022 through staffing enhancements, streamlining processes, and continuing to provide Caregiver Support Program staff with focused trainings. VA increased the number of approved Caregiver Support Program positions by over 350 in FY 2022, bringing the total number of positions to 2,325. As of August 30, 2022, 89 percent of all positions have been filled. VA has streamlined its approach to the PCAFC assessment process by eliminating redundancies in assessments and evaluations, where possible. Targeted trainings have been provided to PCAFC staff focused on the process of conducting evaluations of PCAFC eligibility to build consistency and standardization in decision making, as well as delivery of PCAFC services. Trainings have reinforced a holistic approach in

evaluating not only eligibility for PCAFC but also identifying opportunities for referrals to supports and services beyond PCAFC that are available through VA and outside VA. Each of these initiatives has positioned VA to improve the experience of those already participating in PCAFC, those who are applying for PCAFC currently, and individuals who will apply as a result of second phase of expansion.

While VA has planned and prepared for a surge in new applications as a result of this long-awaited second phase of expansion, similar to the surge in applications VA received as a result of the first phase of expansion, VA did so based on the presumption that all necessary reassessments of the legacy cohort would have already been completed before October 1, 2022. VA does not know the exact quantity of applications VA will receive under the second phase of expansion, but VA anticipates that completing necessary reassessments of the legacy cohort while also adjudicating a surge in PCAFC applications received on and after October 1, 2022 will be challenging. Thus, to mitigate delay in new Family Caregivers obtaining PCAFC benefits, VA anticipates focusing our resources initially on evaluating these new applications received at the onset of the second phase of expansion, which will mean that additional time is needed to complete necessary reassessments and repeat reassessments of the legacy cohort.

This current scenario closely mirrors the scenario when the first phase of PCAFC expansion began in 2020. At that time, VA experienced a surge of new applications but also had to conduct reassessments of the legacy cohort. VA found that two years were needed (from October 1, 2020 to September 30, 2022) to complete most of the legacy cohort reassessments under 38 CFR 71.30(e), as explained in the First PCAFC Extension for Legacy Cohort. See 86 FR at 52615.

While VA has planned and prepared for a surge in new applications starting October 1, 2022, it needs to extend the transition period for three additional years to complete reassessments and repeat reassessments of the legacy cohort. While VA acknowledges that it determined two years were needed under the previous expansion, VA believes that three years will be needed during phase two of expansion to accommodate unforeseen circumstances or barriers that could interfere with VA's ability to complete reassessments and repeat reassessments.

For those reasons explained above, VA is now extending the transition period for three additional years (until September 30, 2025) for the legacy cohort while VA completes the remaining reassessments and repeat reassessments. This extension will ensure that all members of the legacy cohort have the same transition period and the same effective date for any termination or reduction in benefits, regardless of whether the reassessment was completed before or after the *Veteran Warriors* decision.

Without this extension, the current regulations would require VA to proceed in one of two ways starting October 1, 2022, both of which would be harmful to a portion of legacy applicants, legacy participants, and their Family Caregivers. First, VA could carry out the stipend decreases and discharges based on the determinations regarding the legacy cohort that were made before *Veteran Warriors* using the "need for supervision, protection, or instruction" regulatory definition. However, that would be unfair and inequitable to those legacy participants, legacy applicants, and their Family Caregivers because they would not have the benefit of being reassessed under the same criteria as those reassessed after *Veterans Warriors* (under the statutory criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii)), and the outcome of their determinations may be different if VA applied the statutory criteria in section 1720G(a)(2)(C)(ii) and (iii).

In the alternative, VA could set aside the stipend decreases and discharges based on the determinations that were made before *Veterans Warriors* using the “need for supervision, protection, or instruction” regulatory definition, but proceed in carrying out the stipend decreases and discharges that were determined after *Veteran Warriors*, as those determinations correctly used the statutory criteria in section 1720G(a)(2)(C)(ii) and (iii). However, this too would be unfair and inequitable to those legacy participants, legacy applicants, and their Family Caregivers with determinations made after *Veteran Warriors* because it would mean that they would have a shorter transition period than those for whom VA initiates repeat reassessments after October 1, 2022 because their determinations were made before *Veterans Warriors*. This is because the legacy applicants, legacy participants, and their Family Caregivers who are reassessed and found to be no longer eligible for PCAFC, or eligible but with a reduced stipend amount, would be impacted at different times. Some legacy participants, legacy applicants, and their Family Caregivers would experience negative impacts before others within this same cohort based on when they are reassessed. The varying impact would result from no reason other than that VA reassessed certain individuals prior to the *Veterans Warriors* decision and needed to conduct a repeat reassessment at a later date after October 1, 2022, than those individuals who were reassessed after *Veterans Warriors* under the statutory criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) before that date.

### C. Stipend Payment Provisions

#### *Special Rule for Primary Family Caregivers Subject to Decrease because of Monthly Stipend Rate*

The initial one-year transition period for the legacy cohort was intended to establish a transition plan for the legacy cohort who may or may not meet the new

eligibility criteria and whose Primary Family Caregivers could have their stipend amount impacted by changes to the stipend payment calculation. 85 FR 13356 (March 6, 2020). VA intended for the stipend amount for Primary Family Caregivers of legacy participants and legacy applicants to remain generally unchanged during the transition period, unless it is to their benefit, and so long as the eligible veteran did not relocate. 85 FR at 13387. To this end, 38 CFR 71.40(c)(4)(i)(D) permits the Primary Family Caregiver of an eligible veteran who meets the requirements of § 71.20(b) (i.e., legacy participants) to receive a monthly stipend that is not less than the amount the Primary Family Caregiver was eligible to receive as of the day before October 1, 2020 (based on the eligible veteran's address on record with PCAFC on such date) so long as the eligible veteran resides at the same address on record with PCAFC as of the day before October 1, 2020. VA believed that this special rule would provide legacy participants and their Primary Family Caregivers time to adjust to the proposed changes in PCAFC eligibility and the stipend payment methodology. *Id.* at 13385. When VA published the First PCAFC Extension for Legacy Cohort, VA continued for an additional year this special rule, and VA believes it is necessary to continue this special rule for an additional three years while VA completes reassessments and repeat reassessments for the legacy cohort.

VA believes this is necessary as the transition period for the legacy cohort is intertwined with the special rule in § 71.40(c)(4)(i)(D). VA never anticipated that the transition period associated with the special rule would be any different than the transition period authorized in other provisions of part 71 concerning the legacy cohort. VA's transition plan was intended to mitigate potentially negative impact on the legacy cohort based on changes VA made to the PCAFC eligibility criteria and stipend payment methodology. 85 FR at 46268, 46270, and 46275. It was never VA's intention to

remove the special rule in § 71.40(c)(4)(i)(D) before the conclusion of the transition period for the legacy cohort in other provisions of part 71 and doing so could cause hardship to the Primary Family Caregivers still receiving stipends under the special rule.

Moreover, CARMA, which is the workflow management tool used within the Caregiver Support Program and which automates the stipend payment calculation, intricately intertwines the transition period and the special rule. The workflow functionality within CARMA allows a Primary Family Caregiver to be transitioned off the special rule only if the legacy participant relocates to a new address or if the Primary Family Caregiver is eligible for a higher monthly stipend level as a result of a reassessment under § 71.30(e)(1) or as a result of Office of Personnel Management (OPM) updates to the General Schedule (GS). This functionality is by design, and bifurcating this functionality would require additional development, time, and resources. In the future, if VA determines that it is appropriate to uncouple the special rule from the transition period associated with the legacy cohort, VA will do so in a future rulemaking.

### *Adjustments to Stipend Payments*

When VA established the initial one-year transition period for the legacy cohort, § 71.40(c)(4)(ii) was revised to address adjustments to stipend payments. 85 FR at 46297. Section 71.40(c)(4)(ii)(C)(2) focuses on adjustments to monthly stipends pursuant to reassessments conducted by VA under § 71.30 for eligible veterans who meet the requirements of § 71.20(b) or (c) (i.e., legacy participants and legacy applicants) whose Primary Family Caregivers received monthly stipends pursuant to § 71.40(c)(4)(i)(B) or (D). Section 71.40(c)(4)(ii)(C)(2)(i) focuses on reassessments that result in an increase in the monthly stipend, sets forth the effective date of this increase, and authorizes retroactive payments because of this increase. Under

§ 71.40(c)(4)(ii)(C)(2)(i), VA provides retroactive payments back to October 1, 2020 in recognition that not all legacy participants and legacy applicants are reassessed at one time but rather are reassessed at different points during the transition period.

Retroactive payments ensure that the Primary Family Caregivers of all legacy participants and legacy applicants meeting the requirements of § 71.20(a) receive the benefit of any stipend increase as of October 1, 2020, regardless of when the reassessment is completed during the transition period.

Further, § 71.40(c)(4)(ii)(C)(2)(i) states that if more than one reassessment is completed during the two-year period beginning on October 1, 2020, the retroactive payment would only apply if the first reassessment during the two-year period beginning on October 1, 2020 results in an increase in the monthly stipend payment, and retroactive payments only apply as a result of the first reassessment. VA believed that any subsequent reassessment completed after the initial reassessment of a legacy participant or legacy applicant would likely be based on changes in the circumstances of the legacy participant or legacy applicant, such that retroactive payments back to a date before a previous reassessment would not be warranted. 85 FR at 13389.

However, as a result of *Veteran Warriors*, VA must initiate repeat reassessments for purposes unrelated to the specific circumstances of the legacy participant or legacy applicant. As discussed above, the repeat reassessments are needed because the definition of need for supervision, protection, or instruction that was relied upon by VA during reassessments completed before *Veteran Warriors*, was invalidated by the court's decision. VA cannot rely on preliminary findings regarding stipend decreases and discharges for the legacy cohort that were based on VA's definition of need for supervision, protection, or instruction that was invalidated by the decision in *Veteran*

*Warriors*. Since this decision, VA has applied 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) in place of this definition when making PCAFC eligibility and stipend level determinations.

To maintain equity among members of the legacy cohort, VA believes that those who will require a repeat reassessment as a result of *Veteran Warriors* should be eligible to receive a retroactive payment under 38 CFR 71.40(c)(4)(ii)(C)(2)(i) if the repeat reassessment results in a stipend increase. For example, a reassessment of a legacy participant and their Primary Family Caregiver could have been completed in February 2022 applying the definition of need for supervision, protection, or instruction, among other applicable criteria, which resulted in a determination of continued eligibility under § 71.20(a), but at a reduced monthly stipend amount. If a repeat reassessment is completed in November 2022 applying 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) in place of the definition of need for supervision, protection, or instruction, which results in a determination of continued eligibility, but at the higher monthly stipend level, which is more than the monthly stipend amount the Primary Family Caregiver was receiving before the repeat reassessment, VA believes the Primary Family Caregiver should be eligible for the retroactive increase back to October 1, 2020, which is presumably what would have been authorized had VA applied section 1720G(a)(2)(C)(ii) and (iii) in place of the definition of need for supervision, protection, or instruction during the first reassessment.

Therefore, VA adds a sentence to the end of 38 CFR 71.40(c)(4)(ii)(C)(2)(i) explaining that notwithstanding the previous sentence (i.e., the last sentence in the current paragraph), if the first reassessment during the five-year period beginning on October 1, 2020 was completed by VA before March 25, 2022, and such reassessment did not result in an increase in the monthly stipend payment, the retroactive payment described in this paragraph applies to the first reassessment initiated by VA on or after

March 25, 2022 that applies the criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) in place of the definition of need for supervision, protection, or instruction that was invalidated by *Veteran Warriors*, if such reassessment results in an increase in the monthly stipend payment, and only as a result of such reassessment.

### III. Changes to 38 CFR Part 71

For the reasons explained above, VA amends its regulations codified in 38 CFR 71.20 regarding program eligibility, § 71.30 regarding reassessments, and § 71.40 regarding caregiver benefits, to extend the transition period for legacy applicants, legacy participants, and their Family Caregivers from two years to five years (that is, until October 1, 2025) and to extend the time period for VA to conduct reassessments of such individuals from two years to five years (that is, until October 1, 2025).

VA amends § 71.20 by removing the words “two years” in §§ 71.20(b) and (c), and adding, in their place, the words “five years”.

VA amends § 71.30 by removing the words “two-year” in paragraphs (e)(1) and (2) and adding, in their place, the words “five-year”.

VA also amends § 71.40 by removing the words “two years” in paragraphs (c)(4)(i)(B) through (D) and adding, in their place, the words “five years”. VA similarly amends paragraph (c)(4)(ii)(C)(2)(i) by removing the words “two-year” and adding, in their place, the words “five-year”. Additionally, VA revises paragraph (c)(4)(ii)(C)(2)(i) by adding a sentence to the end of the paragraph explaining that notwithstanding the previous sentence (i.e., the last sentence in the current paragraph), if the first reassessment during the five-year period beginning on October 1, 2020 was completed by VA before March 25, 2022, and such reassessment did not result in an increase in the monthly stipend payment, the retroactive payment described in this paragraph

applies to the first reassessment initiated by VA on or after March 25, 2022 that applies the criteria in section 1720G(a)(2)(C)(ii) and (iii) in place of the definition of need for supervision, protection, or instruction that was invalidated by *Veteran Warriors*, if such reassessment results in an increase in the monthly stipend payment, and only as a result of such reassessment. Lastly, VA amends paragraph (c)(4)(ii)(C)(2)(ii) and the note to paragraph (c)(4)(ii)(C)(2) by removing the words “October 1, 2022”, and adding, in their place, the words “October 1, 2025”.

#### IV. Technical Amendments

The VA MISSION Act of 2018 amended 38 U.S.C. 1720G by expanding eligibility for PCAFC to Family Caregivers of eligible veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001, in a two-phase approach. The first phase expanded PCAFC to eligible veterans who incurred or aggravated a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) in the line of duty on or before May 7, 1975, and began on the date the Secretary submitted a certification to Congress that VA fully implemented a required IT system required by section 162(a) of the VA MISSION Act of 2018. 38 U.S.C. 1720G(a)(2)(B)(ii). The second phase will begin two years after the date the Secretary submitted such certification to Congress. *Id.* at 1720G(a)(2)(B)(iii). As part of the July 31, 2020 rulemaking, VA referenced these dates of certification required by the VA MISSION Act of 2018 in 38 CFR 71.20(a)(2)(ii) and (iii) and 71.25(a)(3)(ii)(A) and (B) by using the phrases “date specified in a future Federal Register document” and “date published in a future Federal Register document”. 85 FR at 46295-96. Sections 71.20(a)(2)(ii) and (iii) refer to the time periods within which the individual’s serious injury must have been incurred or aggravated for purposes of the first and second

phases of expansion, respectively. Sections 71.20(a)(3)(ii)(A) and (B) refer to the dates VA will begin approving joint applications pursuant to §§ 71.20(a)(2)(ii) and (iii), respectively.

On October 7, 2020, VA published a Federal Register Notice (FRN) announcing that, in accordance with the requirements of the VA MISSION Act of 2018, the Secretary submitted to Congress on October 1, 2020, a certification that VA fully implemented the IT system required by the Act. 85 FR 63358 (October 7, 2020). This certification enabled VA to begin the first phase of the PCAFC expansion on October 1, 2020, and the second phase will begin on October 1, 2022. VA is amending §§ 71.20(a)(2)(ii) and (iii) and 71.25(a)(3)(ii)(A) and (B), to reflect these dates.

Thus, § 71.20(a)(2)(ii) is amended to replace “on the date specified in a future Federal Register document” with “October 1, 2020”. Section 71.20(a)(2)(iii) is amended to replace “two years after the date specified in a future Federal Register document as described in paragraph (a)(2)(ii) of this section” with “October 1, 2022”. Section 71.25(a)(3)(ii)(A) is amended to replace “the date published in a future Federal Register document that is specified in such section” and “the date published in a future Federal Register document that is specified in § 71.20(a)(2)(ii)” with “October 1, 2020”. Section 71.25(a)(3)(ii)(B) is amended to replace “the date that is two years after the date published in a future Federal Register document that is specified in § 71.20(a)(2)(ii)” each time it appears with “October 1, 2022”.

These are non-substantive technical amendments that will reflect the publication of the October 7, 2020 FRN and add clarity to the regulation but will have no impact on PCAFC eligibility criteria nor VA’s administration of PCAFC.

Additionally, in the July 31, 2020 rulemaking, VA redesignated § 71.30, which pertained to the Program of General Caregiver Support Services (PGCSS), as § 71.35.

85 FR at 46296. The definition for general caregiver under § 71.15 refers to an individual who meets the requirements of PGCSS; however, the cross-reference in the definition directs readers to § 71.30, which now pertains to reassessments of eligible veterans and Family Caregivers. Accordingly, the definition for general caregiver is amended to include the correct cross-reference to § 71.35.

### **Administrative Procedure Act**

The Secretary of Veterans Affairs finds that there is good cause under 5 U.S.C. 553(b)(B) to publish this rule without prior notice and opportunity for public comment, as notice and comment would be impracticable and contrary to public interest. Generally, VA would seek notice and comment in advance of issuing a final rule. However, in this circumstance, VA does not have sufficient time to provide the public with the opportunity for prior notice and comment and have the amendments effective by October 1, 2022. To provide such opportunity would cause harm to the eligible veterans and Family Caregivers who greatly benefit from and rely on PCAFC. As discussed earlier, due to the *Veteran Warriors* case, for those determinations involving the “need for supervision, protection, or instruction” definition in 38 CFR 71.15 that were still pending issuance of a last notice of decision on March 25, 2022, VA must re-evaluate such determinations based on the *Veteran Warriors* decision. VA cannot rely on preliminary findings regarding stipend decreases and discharges for the legacy cohort that were based on VA’s regulatory definition for need for supervision, protection, or instruction, and therefore these reassessments must be repeated. At the time of the court’s decision, VA had already completed approximately 80 percent of assessments for the legacy cohort. However, VA will not be able to repeat reassessments that were completed prior to the *Veteran Warriors* decision in addition to completing remaining

reassessments that have yet to be completed by October 1, 2022. The time period is much too short for VA to be able to repeat and complete all these reassessments.

Therefore, absent regulatory action, as mentioned earlier, the current regulations would require VA to proceed in one of two ways, both of which would be harmful to a portion of legacy applicants, legacy participants, and their Family Caregivers. First, VA could carry out the stipend decreases and discharges based on the determinations regarding the legacy cohort that were made before *Veteran Warriors* using the “need for supervision, protection, or instruction” regulatory definition. In the alternative, VA could set aside the stipend decreases and discharges based on the determinations that were made before *Veterans Warriors* using the “need for supervision, protection, or instruction” regulatory definition, but proceed in carrying out the stipend decreases and discharges that were determined after *Veteran Warriors*, as those determinations correctly used the statutory criteria in section 1720G(a)(2)(C)(ii) and (iii). However, as explained earlier, neither option would be fair and equitable to all members of the legacy cohort.

Therefore, extending the transition and reassessment period in advance of October 1, 2022 is necessary to provide time for VA to repeat reassessments that were completed prior to the *Veterans Warriors* decision (in addition to complete remaining reassessments) in order to maintain equity and parity among the legacy applicants, legacy participants, and their Family Caregivers. Otherwise, certain eligible veterans and Family Caregivers may be harmed, which would be contrary to public interest.

Notwithstanding the need to publish these amendments as an interim final rule, VA invites public comments on the amendments and will fully consider and address any comments received.

For the reasons stated above, the Secretary also finds good cause under 5 U.S.C. 553(d)(3) to make this interim final rule effective on the date of its publication in the Federal Register.

### **Executive Orders 12866 and 13563**

Executive Orders 12866 and 13563 direct agencies to assess the 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 effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at [www.regulations.gov](http://www.regulations.gov).

### **Regulatory Flexibility Act**

The Secretary hereby certifies that this interim 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 interim final rule extends the time for VA to conduct reassessments of legacy applicants, legacy participants, and their Family Caregivers and the transition period for such individuals. This rule will have no impact on small entities. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

### **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 interim final rule will have no such effect on State, local, and tribal governments, or on the private sector.

### **Paperwork Reduction Act**

This interim final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

### **Congressional Review Act**

Pursuant to Congressional Review Act) (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

### **List of Subjects in 38 CFR Part 71**

Administrative practice and procedure, Claims, Health care, Health facilities, Health professions, Mental health programs, Public assistance programs, Travel and transportation expenses, Veterans.

### **Signing Authority**

Denis McDonough, Secretary of Veterans Affairs, approved this document on August 19, 2022, 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.

***Consuela Benjamin,***

Regulations Development Coordinator,  
Office of Regulation Policy & Management,  
Office of General Counsel,  
Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 71 as follows:

PART 71 – CAREGIVERS BENEFITS AND CERTAIN MEDICAL BENEFITS OFFERED TO FAMILY MEMBERS OF VETERANS

1. The authority citation for part 71 continues to read as follows:

AUTHORITY: 38 U.S.C. 501, 1720G, unless otherwise noted.

Section 71.40 also issued under 38 U.S.C. 111(e), 1720B, 1782.

Section 71.47 also issued under 31 U.S.C. 3711; 38 U.S.C. 5302, 5314.

Section 71.50 also issued under 38 U.S.C. 1782.

§ 71.15 [Amended]

2. Amend § 71.15 by:

a. In the definition of “General Caregiver”, removing “§ 71.30” and adding in its place “§ 71.35”.

§ 71.20 [Amended]

3. Amend § 71.20 by:

a. In paragraph (a)(2)(ii), removing “on the date specified in a future Federal Register document” and adding in its place “October 1, 2020”.

b. In paragraph (a)(2)(iii), removing “two years after the date specified in a future Federal Register document as described in paragraph (a)(2)(ii) of this section” and adding in its place “October 1, 2022”.

c. In paragraphs (b) and (c), removing “two years” and adding in its place “five years”.

§ 71.25 [Amended]

4. Amend § 71.25 by:

a. In paragraph (a)(3)(ii)(A), removing “the date published in a future Federal Register document that is specified in such section” and adding in its place “October 1, 2020”.

b. In paragraph (a)(3)(ii)(A), removing “the date published in a future Federal Register document that is specified in § 71.20(a)(2)(ii)” and adding in its place “October 1, 2020”.

c. In paragraph (a)(3)(ii)(B), removing “the date that is two years after the date published in a future Federal Register document that is specified in § 71.20(a)(2)(ii)” each time it appears and adding in its place “October 1, 2022”.

§ 71.30 [Amended]

5. Amend § 71.30(e)(1) and (2) by removing “two-year” and adding in its place “five-year”.

§ 71.40 [Amended]

6. Amend § 71.40 by:

a. In the introductory text of paragraph (c)(4)(i)(B), removing “two years” and adding in its place “five years”.

b. In paragraphs (c)(4)(i)(C) and (D), removing “two years” and adding in its place “five years”.

c. In paragraph (c)(4)(ii)(C)(2)(i), removing “two-year” each time it appears and adding in its place “five-year”.

d. In paragraph (c)(4)(ii)(C)(2)(ii) and note to paragraph (c)(4)(ii)(C)(2), removing “October 1, 2022” each time it appears and adding in its place “October 1, 2025”.

e. Revising paragraph (c)(4)(ii)(C)(2)(i) by adding a sentence to the end of the paragraph.

The revision reads as follows:

§ 71.40 Caregiver benefits.

\* \* \* \* \*

(c) \* \* \*

(4) \* \* \*

(ii) \* \* \*

(C) \* \* \*

(2) \* \* \*

(i) \* \* \* Notwithstanding the previous sentence, if the first reassessment during the five-year period beginning on October 1, 2020 was completed by VA before March 25, 2022, and such reassessment did not result in an increase in the monthly stipend payment, the retroactive payment described in this paragraph applies to the first reassessment initiated by VA on or after March 25, 2022 that applies the criteria in section 1720G(a)(2)(C)(ii) and (iii) in place of the definition of need for supervision, protection, or instruction that was invalidated by *Veteran Warriors, Inc. v. Sec’y of Veterans Affairs*, 29 F.4th 1320, 1342-43 (Fed. Cir. 2022), if such reassessment results in an increase in the monthly stipend payment, and only as a result of such reassessment.

\* \* \* \* \*