

## **December 2008 Department News Bulletin**

**From all of us to all of you, "Happy Holidays" and all the best in the "New Year".**

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### **MEDICARE ENROLLMENT W/DISABILITY UPDATE 01:**

In NOV 08 over 75 health advocacy organizations launched the Coalition to End the Two-Year Wait for Medicare, sending a letter to health leaders in the House and Senate demanding that next year's health reform efforts make a priority of covering people with disabilities who are struggling to survive as they wait for Medicare coverage. Close to 1.5 million people are stuck in this waiting period annually. "Nearly 40% of these individuals are without health insurance coverage at some point during their wait for Medicare; 24% have no health insurance during this entire period. Many cannot afford to pay COBRA premiums to maintain coverage from their former employer, and private coverage on the individual market is unavailable or too expensive for this high-cost population. The economic downturn makes it difficult for states to extend Medicaid coverage beyond the most impoverished people with disabilities," the coalition letter reads. "No one with disabilities severe enough to qualify for SSDI should be without health insurance." The coalition includes organizations such as the American Cancer Society – Cancer Action Network, Amputee Coalition of America, Alzheimer's Association, Easter Seals and the Medicare Rights Center. In 1972, when Congress expanded Medicare to include people with disabilities, it created a "waiting period" that requires people to wait 24 months from when they begin receiving their Social Security Disability Insurance (SSDI) payments before they can receive health care through Medicare. Costs for the elimination of the waiting period are estimated to be around \$9 billion annually. These costs would be offset by about \$4 billion in Medicaid savings. In the 110th congress Senate bill S.2102 sponsored by Senator Jeff Bingaman (D-NM), with 23 sponsor (including President-elect Barack Obama) and House bill H.R. 154 sponsored by Representative Gene Green (D-TX) with 103 cosponsors. This legislation would eliminate the waiting period through a ten-year phase out. [Source: Medicare Watch 25 Nov 08 ++]

### **DOD DISABILITY EVALUATION SYSTEM UPDATE 12:**

Defense Secretary Robert Gates has issued a policy stating that the military will follow a new law requiring that service members being medically retired for post-traumatic stress disorder be rated at least 50% disabled, a provision of the 2008 Defense Authorization Act. But the Pentagon is ignoring another provision of the Act that requires a review board to be set up for medical evaluation cases, and has even added some pain to service members who feel they have been wronged: Decisions by the board, whenever it is formed, will not be retroactive. The Physical Disability Board of Review was mandated by Congress to check the fairness and accuracy of troops' disability cases. The Defense Department decided that the board will review only conditions found unfitting - which advocates for service members say leaves out any diagnosis that should have been included but

wasn't. They say it also excludes cases in which lower-rated conditions were found unfitting while higher-rated conditions were found fitting - allowing the military to spend less money on medical separation cases. Now a new memo states that decisions of the board, which was supposed to be set up in April, will not be retroactive. The memo, posted on the Military Health System Web site, states: "Any change to the rating is effective on the date of final decision by the service secretary." In other words, service members will not receive back pay for incorrect ratings.

Retired Army Lt. Col. Mike Parker, who has worked as an advocate for troops going through the medical retirement system, said the situation is maddening because the longer the Defense Department takes to set up the new board, the less back pay it will have to hand out. Parker said the new memo on PTSD ratings is better news. According to the 2008 Defense Authorization Act, all the services are required to follow the rules of the Veterans Affairs Schedule for Rating Disabilities. According to those rules, anyone being medically discharged with a diagnosis of PTSD must receive a disability rating of 50% and then be re-examined six months later. In the past, according to Army documents, many soldiers with PTSD have been found unfit for service, rated 10% disabled and immediately booted out. Not long ago, rumors were rampant that defense officials soon would issue guidance stating that this was, in fact, how those cases should be handled. But after the threat of a lawsuit and calls from veterans' groups for the Pentagon to obey the letter of the law, a 14 OCT policy was incorporated into Defense Department Instruction 1332.38, stating that the military will abide by the VASRD rules. The rules state: "When a mental disorder that develops on active duty as a result of a highly stressful event is severe enough to bring about release from active military service, the rating agency shall assign an evaluation of not less than 50% and schedule an examination within the six-month period following discharge to determine whether a change in rating and disposition is warranted. " The only exceptions will be those found to have a permanent and stable condition and a rating of 80% or higher, who will be permanently retired.

The memo, signed by David Chu, undersecretary of defense for personnel and readiness and effective immediately, also states that troops in the Disability Evaluation System may request an impartial physician or other health care professional not involved in his or her case to review the medical evidence for a Medical Evaluation Board. That was also mandated by Congress in the 2008 Defense Authorization Act. The memo states: "In most cases, this impartial health professional should be the service member's primary care manager," and adds that the adviser has five days to review the evidence. The new guidance also:

- Lays out time limits for how long each task should take to perform. For example, the entire process, from the date of the first medical summary for the Medical Evaluation Board to the final review board, excluding appeals review, "should not exceed" 70 days for active-duty members and 130 days for reserve-component members. Each appeal should take no longer than 30 days from the day the final Formal Physical Evaluation Board is completed.
  - Asks the services to create a new Medical Evaluation Board or Physical Evaluation Board to process cases if they encounter backlogs.
  - States that Physical Evaluation Board legal counselors will consult with the service members they counsel "at least one day in advance of the scheduled formal hearing. " Troops have complained that their counseling came just hours before their hearings, and often took place by phone.
- [Source: NavyTimes Kelly Kennedy article 22 Nov 08 ++]

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### ***DOD DISABILITY EVALUATION SYSTEM UPDATE 13:***

Marine Cpl. James Dixon was wounded twice in Iraq -- by a roadside bomb and a land mine. He suffered a traumatic brain injury, a concussion, a dislocated hip and hearing loss. He was

diagnosed with post-traumatic stress disorder. Army Sgt. Lori Meshell shattered a hip and crushed her back and knees while diving for cover during a mortar attack in Iraq. She has undergone a hip replacement and knee reconstruction and needs at least three more surgeries. In each case, the Pentagon ruled that their disabilities were not combat-related. In a little-noticed regulation change in MAR 08, the military's definition of combat-related disabilities was narrowed, costing some injured veterans thousands of dollars in lost benefits - and triggering outrage from veterans' advocacy groups. The Pentagon said the change was consistent with Congress' intent when it passed a "wounded warrior" law in January. Narrowing the combat-related definition was necessary to preserve the "special distinction for those who incur disabilities while participating in the risk of combat, in contrast with those injured otherwise," William J. Carr, deputy undersecretary of Defense, wrote in a letter to the 1.3-million-member Disabled American Veterans. The group, which has called the policy revision a "shocking level of disrespect for those who stood in harm's way," is lobbying to have the change rescinded.

Sen. Carl Levin (D-MI), chairman of the Armed Services Committee, said the Pentagon's "more conservative definition" limited benefits for some veterans. "That was not our intent," Levin said in a statement. He added: "When the disability is the same, the impact on the service member should be the same no matter whether the disability was incurred while training for combat at Ft. Hood or participating in actual combat in Iraq or Afghanistan. " Pentagon officials argue that benefits should be greater for veterans wounded in combat than for "members with disabilities incurred in other situations (e.g., simulation of war, instrumentality of war, or participation in hazardous duties, not related to combat)," Carr wrote. But veterans like Dixon and Meshell said their disabilities were a direct result of wounds suffered in combat. Dixon said he was denied at least \$16,000 in benefits before he fought the Pentagon and won a reversal of his noncombat-related designation. "I was blown up twice in Iraq, and my injuries weren't combat-related?" Dixon said. "It's the most imbecile thing I've ever seen. " Meshell, who is appealing her status, estimates she is losing at least \$1,200 a month in benefits. Despite being injured in a combat zone during an enemy mortar attack, she said, her wounds would be considered combat-related only if she had been struck by shrapnel. Meshell said the military had suggested that at least some of her disability was caused by preexisting joint deterioration. "Before I went over there, I was fine -- I was perfectly healthy," Meshell said. "This whole thing is causing me a lot of heartache."

Kerry Baker, associate legislative director of DAV, has accused the Pentagon of narrowing the definition of combat-related disabilities to save money. He said the change would reduce payments for tens of thousands of veterans - those already wounded and those injured in the future. "This is going to hurt a lot of people," Baker said. "It's one of those things that when you first look at it, you think: 'Wow. How can this be?'" In a letter to members of Congress, the Disabled American Veterans accused the Pentagon of "mutilating" the statutory definitions of combat-related disabilities as part of a "deliberate manipulation of the law. "The January legislation was aimed at allowing troops wounded in combat and combat-related operations to collect disability severance from the military and disability compensation from the Department of Veterans Affairs. Disability severance is based on past service. Disability compensation is based on future loss of earning potential. Previously, veterans with combat-related disabilities received reduced monthly VA compensation until their severance money was recouped. That is still the case for those whose injuries are not deemed combat-related. Years ago, Congress adopted a detailed definition of combat-related disabilities. It included such criteria as hazardous service, conditions simulating war and disability caused by an "instrumentality of war." Those criteria were not altered in the January legislation. The Pentagon, in establishing an internal policy based on the legislation, in March unlawfully stripped those criteria from the legislation, the Disabled American Veterans said. "We do not view this as an oversight," Baker testified before Congress in June. "We view this as an intentional effort to conserve monetary resources at the expense of disabled veterans."