

this part as well. A VASRD-based disability percentage represents the Government's estimate of the lost earning capacity attributable to an illness or injury incurred during military service. A Service member medically separated or retired through the Disability Evaluation System may receive distinct DoD and VA disability ratings. DoD will consider disability ratings, to the extent DoD deems pertinent, for other purposes relating to calculating damages, such as calculating loss of earning capacity and non-economic damages.

(b) *Disability rating procedures.* (1) If a claimant disagrees with the disability rating received in the DoD or VA disability evaluation or claims processes, the member must pursue the appeal opportunities available within the DoD and/or VA to change the member's disability rating.

(2) In any case in which a member has filed a claim under this part and also has a disability determination pending under DoD or VA disability evaluation or claims processes applicable to determinations or appeals, DoD may, in its discretion, hold in abeyance the claim under this part pending the outcome of the disability evaluation or claims process. DoD will notify the claimant that his or her claim is being held in abeyance.

(3) In any case in which a member has not yet received a DoD or VA disability evaluation because the member is retained on active duty, DoD will use the VASRD as the standard for assessing the degree of disability of the member relevant to the member's claim under this part.

§ 45.9 Calculation of damages: economic damages.

(a) *In general.* Economic damages are one component of a potential damages award. The claimant has the burden to prove the amount of economic damages by a preponderance of evidence. Estimates of future losses must be discounted to present value.

(b) *Elements of economic damages in personal injury cases.* Elements of economic damage are limited to the following:

(1) Past expenses, including medical, hospital, and related expenses actually

incurred. These expenses do not include health care services provided or paid for by DoD or VA.

(2) Future medical, hospital, and related expenses. These expenses do not include health care goods and services for which the member is entitled to receive from, or be reimbursed for by, DoD (including TRICARE) or VA. Goods and services provided or paid for by DoD or VA are deemed sufficient to meet the claimant's needs for that particular type of good or service.

(3) Past lost earnings unrelated to compensation as a member of the uniformed services. Appropriate documentation is required.

(4) Loss of earning capacity, after deducting for the claimant's personal consumption from the date of injury causing death until expiration of the claimant's work-life expectancy, as substantiated by appropriate documentation. In addition, loss of retirement benefits is compensable and similarly discounted after appropriate deductions. Estimates must be discounted to present value.

(5) Compensation when the claimant can no longer perform essential household services on his or her own behalf, including activities of daily living. This compensation does not include goods and services the member is entitled to receive from, or be reimbursed for by, DoD or VA. Goods and services provided or paid for by DoD or VA are deemed sufficient to meet the claimant's needs for that particular type of good or service.

(c) *Information DoD will consider in calculating economic damages.* In addition to the information submitted by the claimant, DoD may consider all relevant information in DoD records or information systems or otherwise available to DoD, including assessments from appropriate documentary sources and experts available to DoD.

§ 45.10 Calculation of damages: non-economic damages.

(a) *In general.* Non-economic damages are one component of a potential damages award. The claimant has the burden of proof on the amount of non-economic damages by a preponderance of evidence.

(b) *Elements of non-economic damages.* Elements of non-economic damage are limited to the following:

(1) *Past and future conscious pain and suffering by the claimant.* This element is physical discomfort as well as mental and emotional trauma or distress. Loss of enjoyment of life is compensable. The inability to perform daily activities that one performed prior to injury, such as recreational activities, is included in this element. DoD may request an interview of or statement from the member or other person with primary knowledge of the claimant.

(2) *Physical disfigurement.* This element is impairment resulting from an injury to a member that causes diminishment of beauty or symmetry of appearance rendering the member unsightly, misshapen, imperfect, or deformed. DoD may require a medical statement and photographs, documenting the claimant's condition.

(c) *Cap on non-economic damages.* In any claim under this part, total non-economic damages may not exceed a cap amount. The current cap amount is \$600,000. Updates to cap amounts in subsequent years will be published periodically, consistent with changes in prevailing amounts in the majority of the States with non-economic damages caps.

(d) *Information DoD will consider in calculating non-economic damages.* In addition to the information submitted by the claimant, DoD may consider all relevant information in DoD records or otherwise available to DoD, including assessments from appropriate documentary sources and experts available to DoD.

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§ 45.11 Calculation of damages: offsets for DoD and VA Government compensation.

(a) *In general.* Total potential damages calculated under this part, both economic and non-economic, are reduced by offsetting most of the compensation otherwise provided or expected to be provided by DoD or VA for the same harm that is the subject of the medical malpractice claim. The general rule is that prospective medical malpractice damage awards are

offset by DoD or VA payments and benefits that are primarily funded by Government appropriations. However, there is no offset for U.S. Government payments and benefits that are substantially funded by the military member. DoD is responsible for determining offsets, but claimants must provide information not available to DoD, but requested by DoD for the purpose of determining offsets.

(b) *Eligibility for payments and benefits.* In determining the offsets that are applied to a medical malpractice damages award under this part, DoD presumes that a claimant will receive all the payments and benefits for which the claimant is expected to be eligible, whether or not the claimant has taken steps to obtain the payment or benefit or ultimately receives such payment or benefit. A claimant may present evidence that he or she is not eligible for a payment or benefit to rebut the presumption.

(c) *Information considered.* In determining offsets under this section, DoD will consider all data available in DoD records or information systems, other U.S. Government records systems, and other information available to DoD. This data may include information on military pay and allowances, Disability Evaluation System outcomes, VA disability claims, marital status, number and ages of dependents, survivor benefits, and other information. Access to all such information will be in accordance with the Privacy Act, 5 U.S.C. 552a, and applicable implementing regulations.

(d) *Present value of future payments and benefits.* In determining offsets under this section, DoD will estimate the present value of future payments and benefits. Many such payments and benefits in cases of disability or death are lifetime benefits for members or survivors. With respect to any lifetime payments or benefits that may terminate upon the remarriage of a surviving spouse, DoD will not assume a remarriage. Estimates will be based on actuarial information provided by the Chief Actuary, DoD Office of the Actuary, taking into consideration methods and assumptions approved by the DoD Board of Actuaries and DoD Medicare-Eligible Retiree Health Care Board of